IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver,	
Plaintiff,	
v.	
FBOP CORPORATION, *et al.*,	**Case No: 14-cv-04307**
Defendants	**Honorable James F. Holderman** **Magistrate Judge Mary M. Rowland**
PENSION BENEFIT GUARANTY CORPORATION,	
Plaintiff-Intervenor,	
v.	
FBOP CORPORATION, *et al.*,	
Defendants-Intervenor	

PENSION BENEFIT GUARANTY CORPORATION'S OPPOSITION TO FBOP CORPORATION AND TRUSTEE-ASSIGNEE'S RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

This is a dispute over the rights to a federal tax refund (the "Refund"). Thirty million of that Refund should have been paid to the Pension Benefit Guaranty Corporation ("PBGC") under a law permitting federal agencies, like PBGC, to offset a debtor's U.S. tax refund by amounts owed by the taxpayer to the agency. However, due entirely to an unforeseen problem with the Department of the Treasury's ("Treasury") computer system, the $30 million was mistakenly refunded to FBOP Corporation ("FBOP").

FBOP and the Federal Deposit Insurance Corporation ("FDIC") each claim ownership of the $252 million Refund. PBGC has intervened to assert its right to the $30 million (the "Offset Claim"). FBOP – joined by Patrick D. Cavanaugh of High Ridge Partners, Inc., in his capacity as Trustee-Assignee (the "Trustee-Assignee") – moves for judgment against PBGC on the pleadings (the "Motion," Dkt. Nos. 84, 85). FBOP argues that previous litigation and a settlement agreement between it and PBGC bar PBGC's claim under the doctrines of release and *res judicata*. But neither the previous litigation nor the settlement agreement pertained to the effect of a computer problem on PBGC's efforts to effectuate the $30 million tax offset. FBOP's other arguments are equally unavailing. The Motion should be denied.

I. STATUTORY BACKGROUND

PBGC is a federal government agency established to administer the pension insurance program created by Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").[1] When an underfunded pension plan terminates without sufficient assets to pay all promised benefits, PBGC typically becomes trustee of the plan and pays statutorily guaranteed pension benefits to plan participants and beneficiaries.[2]

Title IV of ERISA provides the exclusive means of terminating a pension plan.[3] Under 29 U.S.C. §1341, the plan sponsor may initiate termination of a pension plan in a "standard" termination if the plan has sufficient assets to pay all promised benefits, or in a "distress" termination if it does not. PBGC also may initiate plan termination under 29 U.S.C. § 1342 under certain circumstances, including when PBGC determines that its possible long-run loss

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[1] *See* 29 U.S.C. § 1302. Title IV of ERISA, 29 U.S.C. §§ 1301-1461, is the federal pension insurance program administered by PBGC.

[2] 29 U.S.C. §§ 1302(a)(2), 1321, 1322, 1344.

[3] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

"may reasonably be expected to increase unreasonably" if the plan is not terminated, or if the plan will not be able to pay benefits when due.

Once PBGC has made a determination to initiate termination of a plan under § 1342, the termination is typically accomplished by agreement with the plan administrator.[4] Absent such an agreement, ERISA authorizes PBGC to apply, under § 1342(c), to the appropriate federal district court for a decree adjudicating that the plan must be terminated.[5] If the plan has been terminated by agreement, the termination date is the date agreed to by PBGC and the plan administrator.[6] If no agreement is reached, the termination date is set by the court.[7]

Upon termination, the plan sponsor and members of its "controlled group" become liable for the unfunded benefit liabilities of the plan, among other things.[8] The unfunded benefit liabilities are the amount by which the plan's liabilities exceed its assets, as determined under regulations prescribed by PBGC. 29 U.S.C. § 1301(a)(18). The "controlled group" essentially includes any entity with common ownership of 80 percent. *See* 29 U.S.C. § 1301(a)(14); 26 C.F.R. §1.414(c).

When PBGC asks a court to terminate a pension plan, it generally seeks only termination of the plan, the establishment of a termination date, and appointment as statutory trustee under 29 U.S.C. §§ 1342 and 1348. Although the plan sponsor and members of its controlled group become liable to PBGC upon termination for the plan's unfunded benefit liabilities and other amounts, *see* 29 U.S.C. § 1362, PBGC does not assert claims for those liabilities in the action to terminate the plan, which involves different statutory provisions. Rather, after the plan is

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[4] *See* 29 U.S.C. § 1342(c).
[5] *Id.*
[6] 29 U.S.C. § 1348(a)(3).
[7] 29 U.S.C. § 1348(a)(4).
[8] 29 U.S.C. § 1362.

terminated, PBGC seeks payment from the liable parties. While PBGC typically estimates the amount of unfunded benefit liabilities to inform its termination decision, that estimate is not a determination of or demand for liability.

Federal law permits PBGC, as a federal agency, to offset its claims for past-due legally enforceable debt it holds against a taxpayer against any federal tax refund owed to that taxpayer. *See* 26 U.S.C. § 6402; 31 U.S.C. § 3720A. The procedures for asserting offset claims, referring them to Treasury, and recording them in that department's Treasury Offset Program ("TOP") are set out in 26 U.S.C. § 6402, 31 U.S.C. § 3720A, and the regulations thereunder. Once those procedures are satisfied, Treasury "shall" reduce a federal tax refund by the amount of the debt, pay that amount to the offsetting federal agency, and notify the taxpayer of the reduction. 26 U.S.C. § 6402(d); 31 U.S.C. § 3720A(c).

II. FACTUAL BACKGROUND

FBOP, a bank holding company that owned nine banks, was the contributing sponsor and plan administrator of the FBOP Corporation Pension Plan (the "Plan"), a defined benefit pension plan covered by PBGC's pension insurance program. Dkt. No. 51, PBGC Compl., ¶¶ 4, 8.[9]

In October 2009, FBOP's banks were taken over by FDIC, which entered into purchase and assumption agreements to assume all of the deposits and essentially all of the assets of each of the failed banks. *Id.*, ¶ 4. Simultaneously, FDIC was appointed as receiver for each of the banks. *Id.* FBOP subsequently initiated a wind down and a liquidation of all of its assets and those of its controlled group members. Dkt. 85-1 at 33-34, ¶¶ 8, 9, 19.[10]

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[9] The banks are Bank USA, N.A., California National Bank, San Diego National Bank, Pacific National Bank, Park National Bank, Community Bank of Lemont, North Houston Bank, Madisonville State Bank, and Citizens National Bank, Teague, Texas.

[10] PBGC's Termination Action amended Complaint is attached as Exhibit C to the memorandum

PBGC became aware of the FDIC receivership and sought further information pursuant to Title IV of ERISA. Through its efforts, PBGC learned that the company was winding down, had considerable secured debt, and had made no provisions for the pension plan, which was underfunded. PBGC also learned that FBOP was owed a large tax refund. PBGC initiated termination of the plan under 29 U.S.C. §1342(a)(2) and (a)(4) via its usual administrative process. Given that the plan sponsor would eventually cease to exist and that the plan had inadequate assets to pay its promised benefits, PBGC determined that the plan should be terminated under §1342(a)(2). Additionally, PBGC determined that its right to collect its liability via the offset process was in danger, as offset needed to occur prior to the payment of the tax refund. If the tax refund were paid prior to termination, PBGC would lose its only apparent avenue for recovery. Accordingly, PBGC also determined that the plan should be terminated under §1342(a)(4).

Because FBOP refused to terminate the Plan by agreement, PBGC moved to terminate the Plan by filing suit against FBOP in this Court on April 27, 2011, pursuant to 29 U.S.C. § 1342(c) (the "Termination Action"[11]). Dkt. No. 51, ¶ 11. PBGC asked the Court to terminate the Plan, appoint it as the Plan's statutory trustee, and set a Plan termination date. *See* Dkt. No. 85-1 at 34-39. While PBGC's Complaint described the underfunded nature of the Plan as a basis for termination, it did not assert an underfunding liability claim against FBOP. *Id.* Such a claim arises under 29 U.S.C. § 1362 only *upon* plan termination. FBOP filed a competing suit against PBGC, *FBOP Corp. v. PBGC*, No. 11 C 2782 (N.D. Ill.), seeking to avoid termination of the Plan and to prevent any resulting liability from arising or being collected via offset. That

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supporting the Motion, Dkt. No. 85-1 at 32-38. It is also attached as Exhibit C to FBOP's Answer and Affirmative Defenses to PBGC's Complaint, Dkt. No. 67-3.

[11] *PBGC v. FBOP Corp.*, No. 11 C 2788 (N.D. Ill.).

Complaint was dismissed by Judge Gettleman on PBGC's motion as described below.

On August 21, 2012, PBGC and FBOP entered into a settlement (the "Settlement Agreement") to resolve the Termination Action. Dkt. No. 51, ¶ 13.[12] Under the Settlement Agreement, FBOP agreed, *inter alia*, to (1) effectuate termination of the Plan and (2) not "formally or informally oppose or object in any way" to PBGC's referral to Treasury, or any other appropriate federal agency, of an offset limited to $30 million[13] of the liabilities that would arise as a result of the Plan's termination or to "any relief sought thereby by PBGC with respect to the Settlement Claim Amount." Dkt. No. 85-1 at 6; *see also* Dkt. No. 51, ¶ 14.[14] In return, PBGC agreed to release FBOP from its claims for termination liabilities. PBGC did not release its claim to the tax offset.

That same day, in compliance with the tax-offset rules, PBGC sent FBOP a notice of (1) the past-due, legally enforceable debt owed to PBGC in the amount of $30 million, and (2) PBGC's intention to refer the debt to what is now Treasury's Bureau of the Fiscal Service ("BFS") for tax-refund offset pursuant to 26 U.S.C. § 6402 and 31 U.S.C. § 3720A (the "Offset Claim").[15] Dkt. No. 51, ¶ 17. PBGC sent a similar notice to FDIC. *Id.*

On or about October 23, 2012, PBGC referred the Offset Claim to BFS and, on the same

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[12] The Settlement Agreement is attached as Exhibit A to the memorandum supporting the Motion, Dkt. 85-1 at 1-16. FBOP's secured lenders, JPMorgan Chase Bank, N.A. ("JPMorgan"), and BMO Harris Bank, N.A. ("BMO"), were also parties to the agreement. Dkt. No. 51, ¶ 13. On August 21, 2012, PBGC and FBOP entered into a separate agreement that terminated the Plan under 29 U.S.C. § 1342(c), established April 21, 2011 as the Plan's termination date, and appointed PBGC as statutory trustee of the Plan. *Id.*, ¶ 16.

[13] Before the Plan was terminated, PBGC estimated that its unfunded benefit liabilities, as defined in 29 U.S.C. §§ 1301(a)(18) and 1362(a) and (b), totaled approximately $40.5 million. *Id.*, ¶ 10.

[14] JPMorgan and BMO also agreed, *inter alia*, not to oppose or object to referral to TOP of the Offset Claim. *Id.*, ¶ 14.

[15] BFS is a new Treasury bureau that was formed from the consolidation of the Financial Management Service and the Bureau of the Public Debt. BFS administers TOP, the federal tax-refund offset program at issue here. *See* http://www.fiscal.treasury.gov/ (last accessed December 5, 2014).

day, recorded the Offset Claim in Treasury's TOP, thereby taking all of the actions necessary to enforce and record its claim against the Refund. *Id.*, ¶¶ 18, 19.

On December 18, 2012, and January 2, 2013, PBGC received payments of $8,780.00 and $175.00, respectively, through Treasury's TOP on account of the Offset Claim; these payments reduced the unpaid amount of the Offset Claim to $29,991,045. *Id.*, ¶¶ 21-22.

On or about December 31, 2013, Treasury paid FBOP the Refund in the amount of approximately $252 million through five separate paper checks called "Type A" checks. *Id.*, ¶¶ 23-24. Each of the five Type A checks was paired with a form entitled "Manual Refund Posting Voucher." *Id.*, ¶ 24. On each form, the box labeled "Yes (Allow TOP Offset, BPI-0)" was checked. *Id.*, ¶ 25. Despite this, Treasury did not deduct the Offset Claim from the Refund before paying FBOP (the "Offset Failure"). *Id.*, ¶ 26.

In March 2014, PBGC learned from FDIC's counsel that FBOP had received the Refund without deduction of the Offset Claim. *Id.*, ¶¶ 26-27. The sole reason for the Offset Failure was that Treasury's BFS computer-payment system could not accommodate large dollar amounts, and as a result, the Refund was not reduced for PBGC's offset. *Id.*, ¶ 28.

Before its investigation into the Offset Failure, PBGC had no actual or constructive knowledge of the Treasury computer issues or the Offset Failure. *Id.*, ¶ 29. Treasury's BFS acknowledges that the Offset Claim should have been deducted from the Refund and that the only reason it was not paid to PBGC was due to the computer problem described above. *Id.*, ¶ 30.

On September 2, 2014, the Court granted PBGC's Motion to Intervene in this action (Dkt. No. 50) and PBGC filed its Complaint the following day (Dkt. No. 51, the "Complaint").

III. LEGAL STANDARD

A Rule 12(c) motion for judgment on the pleadings is subject to the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014); *Ditto v. Am. Airlines, Inc.*, No. 94 C 1930, 1995 WL 153367, at *1 (N.D. Ill. Apr. 6, 1995). To survive a Rule 12(b)(6) motion, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts must take "all well-pleaded allegations in the plaintiffs' pleadings to be true, and []view the facts and inferences to be drawn from those allegations in the light most favorable to the plaintiffs." *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts may take judicial notice of public documents from prior litigation when considering Rule 12(c) motions. *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *see also Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994).

IV. ARGUMENT

A. PBGC's Claims Were Not Released.

FBOP argues that the Settlement Agreement bars Counts I, II, III, and V, but can point to no language that releases the claims in the instant suit.[16] "The primary object in construing a contract is to give effect to the intention of the parties involved." *Wells Fargo Funding v. Draper & Kramer Mortgage Corp.*, 608 F. Supp. 2d 981, 985 (N.D. Ill. 2009) (quoting *In re*

[16] PBGC stipulates that Illinois law governs the construction of and efforts to enforce the Settlement Agreement, as provided in Section 5.3 of the agreement. *See* Dkt. No. 85-1 at 11, § 5.3; *see also Cruz v. Globe Realty Mgmt. Co.*, No. 03 C 9298, 2005 WL 3455846, at *3 (N.D. Ill. Dec. 13, 2005) (quoting *Sims–Madison v. Inland Paperboard and Packaging, Inc.*, 379 F.3d 445, 448 (7th Cir. 2004)) ("As contracts, '[i]ssues regarding the formation, construction, and enforcement of settlement agreements are governed by state contract law.'").

Doyle, 581 N.E.2d 669, 676 (Ill. 1991) (internal quotations omitted)). Moreover, "the essential terms [of a settlement agreement] must be 'definite and certain' so that a court can ascertain the parties' agreement from the stated terms and provisions." *Wells Fargo Funding*, 608 F. Supp. 2d at 985 (quoting *Dillard v. Starcon Intern., Inc.*, 483 F.3d 502, 507 (7th Cir. 2007)).

The Settlement Agreement does not address a situation where, more than a year *after* the Settlement Agreement was executed, Treasury agreed that PBGC had a right to offset but mistakenly paid the full amount of the Refund to FBOP due to a problem with its computer systems.

Because Section 3.2 of the Agreement does not specifically mention the present factual scenario, FBOP is left with only the general release. However, under Illinois law, "a general release is inapplicable to unknown claims. A court of equity will not allow the releasee to take advantage of the general words of a release to defeat the collection of a demand not then in the minds of the parties." *Vill. of Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785, 795 (N.D. Ill. 1992).[17] When it negotiated and signed the Settlement Agreement in 2011, PBGC was not aware that its Offset Claim would be overlooked because of a computer error two years later. These events were unknown at the time of the execution of the Settlement Agreement and cannot fall into its general release.[18]

FBOP argues that the general release applies because the Settlement Agreement released all claims to unfunded benefit liabilities and that the instant suit seeks payment of unfunded benefit liabilities. That argument relies on a mischaracterization of this suit. PBGC does not

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[17] Citing *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991) and *Murphy v. S-M Delaware, Inc.*, 420 N.E.2d 456, 460 (Ill. 1981).

[18] Moreover, as explained below with respect to FBOP's *res judicata* argument, Judge Gettleman correctly determined that the question of PBGC's entitlement to setoff was not at issue in the Termination Litigation in any event, which is why such a release was not included in Section 3.2.

seek payment of unfunded benefit liabilities owed under 29 U.S.C. § 1362.[19] Instead, as this Court has previously held, PBGC's claim "relates to the tax refund at the center of this litigation," as PBGC "assert[s] that FBOP acquired PBGC's share of the refund because of BFS's computer error." Dkt. No. 50 at 6. The pleadings allege that FBOP received money that PBGC was entitled to receive purely due to error. PBGC brought this action solely to obtain money that rightfully belonged to it, which was mistakenly paid to FBOP.

PBGC did not release that claim in the Settlement Agreement; indeed, the Settlement Agreement expressly recognized PBGC's right to assert a claim to the offset. FBOP argues only that PBGC "took the risk that the Department of Treasury would not recognize the right of offset."[20] But Treasury **did** recognize PBGC's right to the offset when it sent payments of $8,780.00 and $175.00, respectively, to PBGC through the TOP in December 2012 and January 2013, and when it checked the box labeled "Yes (Allow TOP Offset, BPI-0)" on the forms that accompanied the "Type A" checks sent to FBOP in December 2013. Thus, this FBOP argument regarding the release also fails.

B. *Res Judicata* Does Not Bar PBGC's Claims.

The application of *res judicata* requires a showing of three elements: (1) a final judgment on the merits in the prior litigation; (2) an identity of parties between the two cases; and (3) an identity of the causes of action alleged in the two suits. *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 338 (7th Cir. 1995). As to the third element, "a claim has 'identity' with a previously litigated matter if it emerges from the same 'core of operative facts' as that earlier

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[19] If PBGC was seeking to recover the unfunded benefit liabilities, it would have sought the full amount of those liabilities, $40 million, in its Complaint. Instead, PBGC is seeking only the $30 million portion of the Tax Refund that it should have received.

[20] Mem. in Supp. of FBOP Mot., Dkt. 85 at 10.

action." *Id.* at 338-39; *see also Doe v. Allied–Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993) (claims share an "identity" when they arise out of the same transaction and share a "single core of operative facts giving rise to a remedy.") (internal quotations and citations omitted).

Res judicata does not apply here because PBGC's present claims do not share the same core of operative facts with the Termination Action. The Termination Action arose from the receivership, which caused FBOP to wind down its operations and liquidate its assets and the assets of its controlled group members. Dkt. No. 85-1 at 33-34, ¶¶ 8, 9, 19. PBGC determined that the Plan was underfunded and that a liquidating and over-leveraged FBOP would be unable to meet its Plan obligations and would cause the Plan to be a wasting trust. Dkt. No. 85-1 at 34-35, ¶¶ 19-28. Thus, PBGC asked the court to terminate the Plan under 29 U.S.C. § 1342, set the date of plan termination under 29 U.S.C. § 1348, and appoint PBGC as statutory trustee under 29 U.S.C. § 1342, as set forth in its "Request for Relief." Dkt. No. 85-1 at 34-39. No request for offset or for unfunded benefit liabilities under 29 U.S.C. § 1362 was made.

Judge Gettleman's October 5, 2011 order granting PBGC's amended motion to dismiss FBOP's amended Complaint and counterclaim in the Termination Action confirms that PBGC was not seeking offset or to recover liabilities under 29 U.S.C. § 1362. Case No. 1:11-cv-02788, Dkt. No. 51 (attached as Exhibit A hereto). Count II of FBOP's amended Complaint sought a declaration that PBGC was not owed any unfunded benefit liabilities and was not entitled to setoff, and injunctive relief barring PBGC from referring purported debt to Treasury for a tax-refund offset.[21] FBOP's counterclaim sought the same regarding the unfunded benefit liabilities and also sought a declaration that PBGC was not entitled to setoff.[22] The court dismissed both

[21] Ex. A at 4.

[22] S*ee* Dkt. 85-1 at 66-67.

for lack of jurisdiction, holding:

> PBGC has conceded that, at this time, it is not entitled to setoff, and **its current complaint does not seek setoff or a certain amount of the [unfunded benefit liabilities], the final determination of which has not yet occurred.** Thus, it is clear that no "action" has taken place that could allow the court to exercise jurisdiction under [29 U.S.C.] § 1303(f).

Id. at 8-9 (emphasis added).

In contrast, the operative facts alleged in the instant Complaint occurred after the Termination Action ended and the Settlement Agreement was executed in 2011. PBGC took all actions necessary to enforce and record its Offset Claim with TOP in 2012. Treasury's BFS acknowledged PBGC's Offset Claim, but mistakenly paid the Refund to FBOP without deduction of the Offset Claim because of a computer issue in December 2013. PBGC learned about the mistake in March 2014. When FDIC brought this suit over the entire Refund, PBGC intervened to assert its right to the $30 million offset. The Offset Claim was simply not in front of the Court in the Termination Action, and its core of operative facts is distinct from that of the Termination Action, as the Court has already recognized: "PBGC's claim relates to the tax refund at the center of this litigation" and PBGC "assert[s] that FBOP acquired PBGC's share of the refund because of BFS's computer error." Dkt. No. 50 at 6. FBOP's *res judicata* argument fails.[23]

C. Count I States a Claim for Declaratory Judgment.

FBOP argues that Count I of the Complaint fails to state a claim for declaratory judgment because no case or controversy between the parties exists, PBGC seeks an "advisory opinion,"

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[23] The Trustee-Assignee has waived his right to join in FBOP's *res judicata* arguments. Though the Trustee-Assignee "fully adopts and joins in" FBOP's arguments, Dkt. No. 87 at 2, the *res judicata* affirmative defense was not included in his Answer and Affirmative Defenses (*see* Dkt. No. 69 at 21-22). Under Federal Rule of Civil Procedure 8(c)(1), the affirmative defense of *res judicata* is one that, "in responding to a pleading, a party must affirmatively state[.]" *See also Yohannan v. Patla*, 971 F. Supp. 323, 326 (N.D. Ill. 1997).

and PBGC should be suing Treasury instead. However, this ignores the Court's recognition that "PBGC's claim relates to the tax refund at the center of this litigation" when it allowed PBGC to intervene in this case. Dkt. No. 50 at 6. FBOP is one of two main parties asserting ownership of that refund, including the portion subject to PBGC's Offset Claim.

Moreover, FBOP has repeatedly disputed the Offset Claim, and has signaled its intent to rebuff PBGC on the Offset Claim if it prevails over FDIC. There is nothing "advisory" about PBGC's request for $30 million that FBOP also wants. Thus, PBGC does not need to allege a breach of the Settlement Agreement (and has not, because the Settlement Agreement has nothing to do with the Offset Claim) to establish "an actual, substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Johnson v. Rohr-Ville Motors, Inc.*, 64 F. Supp. 2d 737, 739 (N.D. Ill. 1999) (internal citations and quotations omitted). A well-pled, $30 million controversy between the parties is "actual and substantial" and is the type of action that warrants declaratory judgment if it can "settle the particular controversy and clarify the legal relations in issue." *Id.* (quoting *NUCOR v. Aceros y Maquilas de Occidente*, 28 F.3d 572, 579 (7th Cir. 1994)).

D. PBGC's Unjust Enrichment Claims State a Cause of Action Under Illinois Law.

FBOP erroneously argues that an unjust enrichment claim requires "unlawful or improper conduct." On the contrary, under Illinois law, to state a cause of action for unjust enrichment, a plaintiff need allege only that a defendant unjustly retained a benefit to plaintiff's detriment and that defendant's retention of the benefit violates fundamental principles of justice, equity, and good conscience. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989). PBGC has sufficiently alleged both elements. Dkt. No. 51, ¶¶ 47-48, 51.

FBOP conflates the general rule with specific cases involving wrongdoing by a

defendant. In some instances, the retention of the benefit is unjust due to improper conduct by defendant, which forms the basis of another claim against defendant in tort, contract, or statute. *See Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) (applying Illinois law). In those instances, "the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim."[24] *Id.*, *citing Ass'n Benefit Servs. v. Caremark Rx, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007).

Such cases do not apply here. When a plaintiff's substantive claim is not grounded in tort, contract, or statute against a defendant, plaintiff can assert unjust enrichment as an independent cause of action. *See, e.g.*, *Machowicz v. Kaspersky Lab, Inc.*, No. 14 C 1394, 2014 WL 4683258, at *5 (N.D. Ill. Sept. 19, 2014) ("Unjust enrichment is generally an independent cause of action under Illinois law.").[25] In these instances, unjust enrichment does not require unlawful or improper conduct on the part of the defendant, but only that defendant's retention of the property is unjust. *See, e.g.*, *HPI Health Care*, 545 N.E.2d at 679 ("[T]he plaintiff is seeking recovery of a benefit that was transferred to the defendant by a third party. In such situations, courts have found that retention of the benefit would be unjust where . . . the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead[.]"). *Id.*[26] Here, because PBGC's unjust enrichment claim is not tied to other claims alleging

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[24] The cases cited by Movants fall into this category. In *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 923 (Ill. App. Ct. 2009), plaintiff asserted that defendant committed fraud, which was plaintiff's premise for claims of violation of the Illinois Consumer Fraud Act ("ICFA") and for unjust enrichment. Because the court found that the improper conduct was insufficient to support the ICFA claim, it was likewise insufficient to establish unjust enrichment. *Id.* at 928.

[25] *See also United States v. Fischer Excavating, Inc.*, No. 4:12-CV-4082-SLD-JAG, 2014 WL 4638600, at *7 (C.D. Ill. Sept. 17, 2014) ("Illinois law does not require that a separate, breached legal obligation support an unjust enrichment claim . . . .").

[26] *Citing Hamilton Glass Co. v. Shaffer*, 139 N.E.2d 799 (Ill. App. Ct. 1957).

wrongdoing by FBOP – but is tied to the Treasury computer issue and the Offset Failure – PBGC can assert unjust enrichment as a separate cause of action. *Id.*

E. Count V Sufficiently Alleges a Plausible Claim.

Count V of the Complaint seeks a declaratory judgment that the payment of the Refund to FBOP without deduction of the balance of the Offset Claim was a mistake or accident caused by the Treasury computer limitation, and a judgment ordering Wells Fargo to pay PBGC the balance of the Offset Claim. Dkt. No. 51 at 12, 14. FBOP latches onto the word "mistake" to allege that no cause of action exists under Illinois law for mistake by third-party BFS.[27]

However, all Federal Rule of Civil Procedure 8(a)(2) requires is a "short and plain statement" of PBGC's claim "showing that it is entitled to relief."[28] Count V addresses the mistaken or accidental payment of the Refund to FBOP without deduction of the balance of the Offset Claim, and requests a judgment that escrow agent Wells Fargo pay the balance of the Offset Claim to PBGC because it is unjust and inequitable for PBGC to be deprived of these funds. PBGC has met its notice pleading obligations under Rule 8 and Count V should proceed.

V. CONCLUSION

For the reasons set forth herein, PBGC asks the Court to deny FBOP and the Trustee-Assignee's Rule 12(c) Motion for Judgment on the Pleadings in its entirety.

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[27] The header for Count V actually says "Mistake or Accident." Dkt. No. 51 at 12.

[28] *See, e.g.*, *Superior Edge, Inc. v. Monsanto Co.*, No. CIV. 12-2672 JRT/FLN, 2014 WL 4414764, at *5 (D. Minn. Sept. 8, 2014) (refusing to "elevate form over substance in violation of Rule 8's liberal notice pleading requirements" when denying request to make a party replead counterclaims that met Rule 8's requirements).

Dated: December 5, 2014

Respectfully submitted,

/s/ Simon J. Torres

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