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

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| FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver,<br><br>Plaintiff,<br><br>v.<br><br>FBOP CORPORATION, *et. al.*,<br><br>Defendants. | Case No: 14-cv-04307<br><br>Honorable Thomas M. Durkin<br><br>Magistrate Judge Mary M. Rowland |
| PENSION BENEIFT GUARANTY CORPORATION,<br><br>Plaintiff-Intervenor,<br><br>v.<br><br>FBOP CORPORATION, *et al.*,<br><br>Defendants-Intervenors. | |

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

U.S. Code



Other Authorities

The Pension Benefit Guaranty Corporation ("PBGC") seeks $30 million that it was entitled to collect by offset (the "Offset Claim") against a $265 million federal tax refund (the "Refund"). PBGC is a federal agency that insures pension plans. When FBOP Corporation's ("FBOP") pension plan terminated in 2012, FBOP and its subsidiary banks became jointly and severally liable to PBGC for the shortfall in the plan. FBOP settled its liability by agreeing not to oppose PBGC's collection of $30 million by federal tax offset.

Federal law provides that after a federal agency has properly submitted a debt for collection by offset, the U.S. Department of the Treasury ("Treasury") "shall" collect that debt from the debtor's overpayment of taxes before paying any refund to the taxpayer. PBGC took the correct steps to have Treasury deduct $30 million from FBOP's and the banks' tax overpayment. Because of an unforeseen problem with Treasury's payment system, however, the Offset Claim was mistakenly paid to FBOP as part of the Refund.

FBOP and its Trustee Assignee ("Movants") have moved for judgment on the pleadings against PBGC. Movants primarily assert that PBGC's Offset Claim is barred by previous litigation and by PBGC's settlement agreement with FBOP. But *res judicata* only applies if a later litigation shares the same "core of operative facts" as the previous litigation. And the two litigations arise from entirely different facts. The prior litigation sought to terminate FBOP's pension plan, while the current litigation seeks to recover funds that were wrongfully paid to FBOP. Indeed, the defining fact of the current litigation did not even occur until more than a year after the prior litigation was concluded. Additionally, the settlement agreement simply did not address the effect of an unforeseeable mistake by Treasury on PBGC's efforts to collect its $30 million Offset Claim. For these reasons and the others set forth herein, the motion should be denied.

## STATUTORY BACKGROUND

PBGC is the U.S. government agency that administers the nation's pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").[1] Title IV provides the exclusive means for terminating a covered pension plan.[2] PBGC may initiate plan termination under 29 U.S.C. § 1342 in certain circumstances, including if PBGC's possible long-run loss "may reasonably be expected to increase unreasonably" unless the plan is terminated, or if the plan will be unable to pay benefits when due.[3]

Once PBGC has made a determination to initiate plan termination, the termination is typically accomplished by agreement with the plan administrator.[4] Absent such agreement, PBGC may apply under § 1342(c) to the appropriate federal district court for a decree adjudicating that the plan must be terminated.[5] If the plan is terminated by agreement, the plan's 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 each member of its "controlled group" become jointly and severally liable to PBGC for the plan's unfunded benefit liabilities.[8] The unfunded

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[1] 29 U.S.C. §§ 1301-1461.

[2] *See, e.g., Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 446 (1999).

[3] 29 U.S.C. §§ 1342(a)(2), (4).

[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.

benefit liabilities are the amount by which the plan's liabilities exceed its assets, as determined under regulations prescribed by PBGC.[9] The "controlled group" generally includes any entity with common ownership of 80%.[10]

When PBGC asks a court to terminate a pension plan, it generally seeks only termination of the plan, establishment of a termination date, and appointment as statutory trustee under 29 U.S.C. §§ 1342 and 1348. Although the plan sponsor and each member of its controlled group become liable to PBGC upon termination for the plan's unfunded benefit liabilities and other amounts,[11] PBGC does not assert claims for those liabilities in the termination action. Rather, after the plan is terminated, PBGC seeks payment from the liable parties. And while PBGC typically estimates the amount of unfunded benefit liabilities to inform its termination decision, that estimate is not a determination of or a demand for liability.

Under federal law, PBGC can seek offset of a past-due, legally enforceable debt owed to PBGC by a taxpayer against any federal tax overpayment made by that taxpayer. The law provides for payment of the offset before the net amount, or refund, is paid.[12] The procedures for asserting offset claims, referring them to Treasury, and recording them in the 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 have been satisfied, Treasury "shall" reduce a federal tax overpayment by the amount of the debt and pay that amount to the offsetting federal agency.[13]

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[9] 29 U.S.C. § 1301(a)(18).

[10] *See* 29 U.S.C. § 1301(a)(14); 26 C.F.R. § 1.414(c).

[11] *See generally* 29 U.S.C. § 1362.

[12] *See, e.g.*, 26 U.S.C. §§ 6402(a), (d).

[13] 26 U.S.C. § 6402(d); 31 U.S.C. § 3720A(c).

PBGC's regulations allow it to refer debts to Treasury for collection, including through TOP.[14]

## FACTUAL BACKGROUND

FBOP is a former bank holding company that owned nine banks (the "Banks"). FBOP sponsored the FBOP Corporation Pension Plan (the "Plan"), a pension plan covered by Title IV of ERISA.[15] In October 2009, the Banks were closed and placed into FDIC receivership.[16] Thereafter, PBGC learned that FBOP was liquidating its remaining operations, had considerable secured debt, and had made no provision to address the underfunded Plan. PBGC also learned that FBOP was expecting a large federal tax refund. Based on these facts, PBGC moved to terminate the Plan.

FBOP refused to terminate the Plan by agreement, and on April 27, 2011, PBGC sued FBOP in the Northern District of Illinois (the "Termination Action").[17] PBGC sought an order terminating the Plan, appointing PBGC as the Plan's statutory trustee, and setting April 21, 2011, as the Plan's termination date. Although PBGC's complaint described the Plan's underfunding as a basis for seeking termination, it did not assert any claim against FBOP for that underfunding. Instead, that claim arose *upon* plan termination.[18] FBOP filed a competing lawsuit against PBGC, seeking to avoid Plan termination and to prevent any resulting liability from arising or being collected by offset.[19] On October 5, 2011, the district court dismissed

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[14] *See generally* 29 C.F.R. part 4903 (§§ 4903.1-4903.22).

[15] PBGC's Intervention Complaint, Dkt. 51 ¶¶ 4, 8 ("PBGC Compl.").

[16] *Id.*, ¶ 4.

[17] *Id.*, ¶ 11; *see* 29 U.S.C. § 1342(c).

[18] *See* 29 U.S.C. § 1362.

[19] *FBOP Corp. v. PBGC*, Case No. 11-cv-02782 (N.D. Ill.).

FBOP's lawsuit.[20]

On August 21, 2012, PBGC and FBOP entered into a settlement agreement to resolve the Termination Action (the "Settlement Agreement").[21] Under the Settlement Agreement, FBOP agreed to terminate the Plan.[22] Moreover, FBOP and its secured creditors, JPMorgan Chase Bank, N.A. and BMO Harris Bank N.A., agreed to, *inter alia*, not "formally or informally oppose or object in any way" to PBGC's referral to Treasury for offset a debt of $30 million for the liabilities resulting from the Plan's termination.[23] In exchange, PBGC released FBOP from the termination liabilities for the Plan.[24] But PBGC did not release its right to recover the $30 million through tax offset, which became the basis of the Offset Claim.[25]

That same day, PBGC sent FBOP a notice of (1) the past-due, legally enforceable debt of $30 million owed to PBGC, and (2) PBGC's intention to refer that debt to what is now Treasury's Bureau of the Fiscal Service ("BFS")[26] for offset pursuant to 26 U.S.C. § 6402 and 31 U.S.C. § 3720A.[27] PBGC sent a similar notice to FDIC as receiver for the Banks.[28]

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[20] Mem. Opinion & Order Granting Dismissal (11-cv-02788), Oct. 5, 2011, Dkt. 51 (the "Dismissal Order"). The Dismissal Order is attached as Exhibit A.

[21] PBGC Compl., ¶ 13; *see generally* Dkt 168-1 at 2-15, Settlement Agreement.

[22] Dkt 168-1, Settlement Agreement, ¶ 2.1(a).

[23] *Id.*, ¶¶ 2.1(b)-(d); *see also id.*, ¶¶ 2.3, 2.6. PBGC estimated that the Plan's unfunded benefit liabilities totaled $40.5 million. PBGC Compl., ¶ 10.

[24] Dkt. 168-1, Settlement Agreement, ¶¶ 3.1, 3.2.

[25] *Id.*, ¶¶ 2.6, 3.2, 3.4; *see also* PBGC Compl., ¶ 15.

[26] BFS is a bureau of the Treasury Department that administers debt collection, including TOP.

[27] PBGC Compl., ¶ 17; *see also* 29 C.F.R. §§ 4903.5, 4903.10(b), 4903.12(b).

[28] PBGC Compl., ¶ 17.

On or about October 23, 2012, PBGC referred the Offset Claim to BFS's Cross-Servicing Program for collection through TOP. Shortly thereafter, the Cross-Servicing Program referred the Offset Claim to TOP. At this point, PBGC had taken all necessary action to record and enforce its Offset Claim.[29] On December 18, 2012, and January 2, 2013, PBGC received payments of $8,780 and $175, respectively, through TOP on account of the Offset Claim.[30]

On or about December 31, 2013, BFS disbursed the Refund to FBOP in five paper checks.[31] BFS issued the checks based upon "Manual Refund Posting Vouchers" prepared by IRS.[32] On each voucher, the box labeled "Yes (Allow TOP Offset, BPI-0)" was checked.[33] Nonetheless, BFS did not submit the overpayment through TOP for deduction of the Offset Claim before disbursing the Refund (the "Offset Failure").[34] The sole reason for the Offset Failure was that BFS's computer-payment system could not accommodate large dollar amounts, and as a result, the Refund was not reduced for PBGC's offset.[35] After the Offset Failure, BFS updated its computer system to ensure that large payments will be processed through TOP.[36]

In March 2014, PBGC learned that the Refund was paid to FBOP without deduction of

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[29] *Id.*, ¶¶ 18, 19.

[30] *Id.*, ¶ 21. PBGC received other de minimis payments in 2014, as well.

[31] *Id.*, ¶ 23.

[32] *Id.*, ¶ 24.

[33] *Id.*, ¶ 25.

[34] *Id.*, ¶ 26.

[35] *Id.*, ¶ 28.

[36] *Id.* (discussing PAM Release 7.0).

the Offset Claim.[37] Before BFS issued the Refund, PBGC had no actual or constructive knowledge of the Treasury computer issues or the Offset Failure.[38] 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 the computer problem described above.[39]

FBOP deposited the Refund into an escrow account. On June 10, 2014, the Federal Deposit Insurance Corporation (the "FDIC") sued FBOP seeking a determination that the Refund is property of the Banks. PBGC moved to intervene, claiming that but for the computer processing glitch, PBGC would have received payment of the Offset Claim.[40] PBGC claimed that the FDIC and/or FBOP was unjustly enriched by the mistaken inclusion of the $30 million in the Refund.[41] In permitting PBGC's intervention, the district court rejected the FDIC's argument "that the 'genesis' of PBGC's claim relates to the unfunded pension liabilities of the Banks." The district court found that PBGC's claim is "for a portion of the tax refund which, under federal law, neither the Banks nor FBOP should ever have received."[42]

On May 5, 2015, PBGC and the FDIC settled PBGC's action against the FDIC as receiver for the Banks. That settlement provides that if the FDIC receives all or part of the Refund, it will pay $12.5 million to PBGC.[43] The settlement also resolved certain claims that

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[37] *Id.*, ¶¶ 26-27.

[38] *Id.*, ¶ 29.

[39] *Id.*, ¶ 30.

[40] *See id.*, ¶ 28.

[41] *Id.*, ¶¶ 44-70.

[42] Intervention Order, Dkt. 50 at 6.

[43] Dkt. 168-1 at 3, Exhibit F, Settlement Agreement between PBGC and the FDIC, dated May 5,

PBGC filed in the FDIC's receivership proceedings for the Banks. The settlement did not resolve PBGC's action against FBOP and the Trustee-Assignee, which remains pending.[44]

## LEGAL STANDARD

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is subject to the same standard as a motion under Rule 12(b)(6) to dismiss for failure to state a claim.[45] To survive a Rule 12(b)(6) motion, a complaint need only "state a claim to relief that is plausible on its face."[46] 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."[47] Courts may take judicial notice of public documents from prior litigation when considering Rule 12(c) motions.[48]

## ARGUMENT

### I. PBGC's claims are neither barred nor released by the Settlement Agreement.

#### A. PBGC did not release its Offset Claim in the Settlement Agreement.

Movants argue that the Settlement Agreement bars Counts I, II, III, and V of PBGC's Intervention Complaint. It does not. The Settlement Agreement contains no language releasing

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2015, ¶ 1.A.

[44] *Id.* at ¶¶ 2, 3, Dkt. 169-1 at 85.

[45] *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).

[46] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[47] *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[48] *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).

PBGC's current claims, and the events giving rise to PBGC's intervention were unforeseeable at the time that the Termination Action was dismissed pursuant to the settlement. Although FBOP and the Trustee-Assignee assert that "a deal's a deal," they seek to benefit from a "bargain" the parties never made.[49] Indeed it is Movants, not PBGC, that are trying to rewrite the Settlement Agreement.

Illinois law governs the construction of and efforts to enforce the Settlement Agreement.[50] "[T]he primary object in construing a contract is to give effect to the intention of the parties involved."[51] Moreover, "[t]he 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."[52]

Section 3.2 of the Settlement Agreement contains PBGC's releases. PBGC did not release its Offset Claim in the Settlement Agreement. In fact, the Settlement Agreement expressly recognized PBGC's right to assert a claim for offset. And neither Section 3.2 nor any other provision of the Settlement Agreement addresses or contemplates the present factual scenario where, more than a year *after* the Settlement Agreement was executed, Treasury agreed that PBGC had a right to offset but mistakenly refunded the full overpayment to FBOP due to a problem with its computer system.

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[49] The Trustee-Assignee is not a signatory of the Settlement Agreement, but PBGC's releases extend to FBOP's assigns. *See* Dkt. 168-1 at 5-6, Settlement Agreement, at § 3.2.

[50] *See* Dkt. 168-1, Settlement Agreement, at 9, § 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).

[51] *Wells Fargo Funding v. Draper & Kramer Mortg. Corp.*, 608 F. Supp. 2d 981, 985 (N.D. Ill. 2009) (internal quotations omitted).

[52] *Id.* (quoting *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 507 (7th Cir. 2007)).

Thus Movants are left with the general release. But 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."[53] When they negotiated and signed the Settlement Agreement in 2012, neither PBGC nor FBOP was aware that the Offset Claim would be overlooked because of a computer error two years later. These events were unknown when the parties executed the Settlement Agreement, and they cannot fall into the general release.[54]

Movants attempt to sidestep this fact by asserting that when PBGC signed the Settlement Agreement, "it clearly took the risk that the Department of Treasury would not recognize the right of offset."[55] And PBGC did assume the risk that Treasury would reject its claim to a statutory right of offset.[56] But Treasury did not reject PBGC's claim. Instead Treasury *recognized* PBGC's right to the offset by sending payments of $8,780 and $175, respectively, to PBGC through the TOP in December 2012 and January 2013, and by checking the box labeled "Yes (Allow TOP Offset, BPI-0)" on the payment vouchers that authorized the Refund in December 2013.

PBGC was not paid the Offset Claim because of a mistake, which is the basis of PBGC's

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[53] *Vill. of Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785, 795 (N.D. Ill. 1992) (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)).

[54] As explained in response to FBOP's *res judicata* argument below, Judge Gettleman correctly determined that PBGC's entitlement to offset was not at issue in the Termination Action.

[55] Dkt. 168 at 19.

[56] Dkt. 168-1, Settlement Agreement, at 2 ("WHEREAS, PBGC asserts that it has a right of offset pursuant to 26 U.S.C. §6402 and the regulations thereunder, 31 U.S.C. [§] 3720A and the regulations thereunder, and other applicable federal law and regulations[.]").

present claims. While the Settlement Agreement refers to FBOP disputing PBGC's statutory right to offset, it does not contemplate any party's awareness of, consideration of, or complicity with Treasury's *recognition* of PBGC's offset right but subsequent mistake in failing to apply the Offset Claim before issuing the Refund to FBOP.[57] Indeed, nothing in the Settlement Agreement contemplates any mistake by Treasury or otherwise supports Movants' overreaching interpretation that the Settlement Agreement is "certainly broad enough to encompass any and all claims" for the $30 million not paid to PBGC because of Treasury's mistake.[58]

Movants also argue that the general release applies because the Settlement Agreement released all claims to unfunded benefit liabilities (which Movants argue were sought by PBGC in the Termination Action) and the instant suit seeks payment of such liabilities.[59] This mischaracterizes PBGC's present claim.[60] Here, the Court has already recognized that "PBGC's claim relates to the tax refund at the center of this litigation," as PBGC "assert[s] that FBOP

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[57] *Id.* ("WHEREAS, FBOP has answered PBGC's amended complaint in the Lawsuit, denying the material allegations of the amended complaint and asserting certain affirmative defenses to PBGC's claims therein[.]"). Movants continue to oppose PBGC's offset right in this case. *See, e.g.*, FBOP Answer to PBGC Compl., Dkt. 67 at 4, ¶ 12, and at 8, ¶ 34.

[58] Dkt. 168 at 17. Movants cite several alleged facts as evidence that PBGC faced uncertainty in receiving the Offset Claim: the IRS had not approved the Refund at the time of the Settlement Agreement's execution; FBOP contested PBGC's right to offset; the escrow agreement between FBOP and FDIC; FDIC's claim to the entire refund; and JPMorgan Chase Bank and BMO Harris Bank's priority security interest claims to the Refund. Dkt. 168 at 20. None of these facts explain why PBGC could or should have contemplated Treasury's mistake.

[59] Dkt. 168 at 15-16.

[60] Movants argue that "the Settled Lawsuit sought 'unfunded benefit liabilities' from FBOP of 'approximately $40.5 million' . . . ." This contention lacks basis. And if PBGC was seeking to recover the Plan's unfunded benefit liabilities in this action, it would have sought the full amount of those liabilities – $40.5 million.

acquired PBGC's share of the refund because of BFS's computer error."[61] PBGC alleges that, purely due to error, FBOP received money to which PBGC was entitled. PBGC brought this action solely to recover that money. Movants' release argument is without merit.

### B. PBGC's Offset Claim was not litigated in the Termination Action, and *res judicata* does not apply.

Movants next argue that PBGC's claims are barred by the doctrine of *res judicata* because the claims were resolved in the Termination Action. The Trustee-Assignee waived this argument by failing to include *res judicata* as an affirmative defense in his Answer.[62] In any event, the argument lacks merit. *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.[63] As to the third element, "a claim has 'identity' with a previously litigated matter if it emerges from the same 'core of

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[61] Intervention Order, Dkt. 50 at 6.

[62] Trustee-Assignee's Answer and Affirmative Defenses (Dkt. No. 69 at 21-22). *See* Fed. R. Civ. P. 8(c)(1) (listing *res judicata* as an affirmative defense that must be affirmatively stated in "responding to a pleading"); *see also Yohannan v. Patla*, 971 F. Supp. 323, 326 (N.D. Ill. 1997). Movants assert that FBOP's arguments are "equally applicable" to the Trustee-Assignee because he is FBOP's assignee, but the cases cited by Movants are inapposite. Dkt. 168 at 15 n.9. *Hernandez ex rel. Gonzalez v. Tapia*, No. 10-CV-4124, 2010 WL 5232942 (N.D. Ill. Dec. 15, 2010), and *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169 (5th Cir. 1992), do not address a situation like this, where one party (the Trustee-Assignee) fails to comply with Rule 8(c) in its answer and attempts to join a compliant party's (FBOP) affirmative defense. Moreover, in *Russell*, the Fifth Circuit stated that "[u]nder Federal Rule of Civil Procedure 8(c), the doctrine [of *res judicata*] must be affirmatively pled. Failure to so plead usually precludes the district court and appellate courts from considering the doctrine." 962 F.2d at 1172. However, the court recognized unique circumstances before it and stated that "we may raise the issue of res judicata *sua sponte* 'as a means to affirm the district court decision below.'" *Id.* Neither *Russell's* facts nor its procedural posture are present here. Similarly, *Henderson v. Marker*, No. 13 CV 2621, 2014 WL 886833 (N.D. Ill. Mar. 5, 2014), involved a decision on Rule 12(b)(6) motions to dismiss by defendants where no answers had been filed. 2014 WL 886833, at *7.

[63] *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 338 (7th Cir. 1995).

operative facts' as that earlier action."[64]

*Res judicata* does not apply because PBGC's present claims do not share the same core of operative facts with the Termination Action. The Termination Action arose from the Banks' receivership, which caused FBOP to wind down its remaining operations and to liquidate its remaining assets.[65] PBGC determined that the Plan was underfunded and that a liquidating and over-leveraged FBOP would be unable to meet its Plan obligations, causing the Plan to become a wasting trust.[66] Thus, PBGC asked the district court to terminate the Plan under 29 U.S.C. § 1342, set the Plan's termination date 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."[67] PBGC made no request for offset or for unfunded benefit liabilities under 29 U.S.C. § 1362.

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.[68] 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.[69] FBOP's counterclaim sought the same

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[64] *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).

[65] PBGC's Amended Compl. (Termination Action), Dkt. No. 168-1 at 30-31, ¶¶ 8, 9, 19.

[66] *Id.* at 31-32, ¶¶ 19-28.

[67] *Id.* at 31-36.

[68] The Dismissal Order (11-cv-02788 Dkt. 51), attached as Exhibit A.

[69] *Id.* at 4.

regarding the unfunded benefit liabilities and also sought a declaration that PBGC was not entitled to setoff.[70] The district court dismissed both 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).[71]

In contrast, the PBGC Intervention Complaint alleges operative facts that occurred after the Termination Action ended and the Settlement Agreement was executed in 2012. PBGC took all actions necessary to enforce and record its Offset Claim with TOP in 2012. BFS acknowledged PBGC's Offset Claim, but mistakenly paid the Refund to FBOP without deducting the Offset Claim because of a computer issue in December 2013. PBGC learned about the mistake in March 2014. When the FDIC brought this suit over the entire Refund, PBGC intervened to assert its right to the $30 million offset. 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."[72] The Offset Claim was simply not before the district court in the Termination Action.

Movants argue that "[t]he only new 'fact' that PBGC points to is the Treasury's 'mistake.'"[73] However, that fact is *the* operative fact for PBGC's present claims. This new fact differentiates the present litigation from the Termination Action. Movants attempt to distract

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[70] *See* FBOP's Answer, Affirmative Defenses, & Counterclaim (Termination Action), filed in this action at Dkt. 168-1, at 62-64.

[71] Mem. Opinion & Order Granting Dismissal (11-cv-02788 Dkt. 51) at 8-9 (emphasis added).

[72] Intervention Order, Dkt. 50 at 6.

[73] Dkt. 168 at 21.

from the obvious: Treasury's mistake was two years away from occurring at the time of the Termination Action. And as explained above, the Settlement Agreement simply does not address or contemplate a situation where PBGC's right to offset is recognized and then mistakenly ignored by Treasury. Finally, the Termination Action did not deal with a claim for unfunded benefit liabilities or PBGC's offset rights; it dealt with plan termination, as Judge Gettleman explicitly stated. *Res judicata* does not apply.

## II. PBGC has sufficiently alleged an actual controversy with Movants in PBGC's request for a declaratory judgment.

Movants next argue that Count I of PBGC's Intervention Complaint fails to state a claim for declaratory judgment because there is no case or controversy between the parties, PBGC seeks an "advisory opinion," and PBGC should be suing Treasury instead. This argument ignores the Court's recognition that "PBGC's claim relates to the tax refund at the center of this litigation."[74] FBOP (and by extension, the Trustee-Assignee) is one of two parties asserting ownership of the entire Refund, including the portion subject to PBGC's Offset Claim.

Movants' position that "no dispute exists between PBGC and FBOP" is puzzling and self-serving.[75] FBOP has repeatedly disputed the Offset Claim.[76] There is nothing "advisory" about PBGC's request for $30 million that Movants also want. Thus, PBGC does not need to allege a breach of the Settlement Agreement (and has not, because the Settlement Agreement has

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[74] Dkt. No. 50 at 6.

[75] Dkt. 168 at 16.

[76] *See* FBOP's Answer and Affirmative Defenses in this Action, Dkt. 67 at 4 (answer to ¶ 12; "FBOP . . . denies that PBGC is entitled to offset its claims . . . "), 8 (answer to ¶ 34), 10 (answer to ¶ 42); *see also* FBOP's Answer, Affirmative Defenses, & Counterclaim in the Termination Action, filed in this action at Dkt. 168-1, at 48 (answer to ¶ 33), 64 (seeking to enjoin PBGC from exercising setoff).

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."[77] A well-pleaded, $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."[78] Accordingly, Movants are not entitled to judgment on the pleadings on Count I.

**III. PBGC has adequately stated a claim against Movants for unjust enrichment.**

Movants first argue that PBGC cannot asset a claim for unjust enrichment because that claim is governed by an express contract – the Settlement Agreement. However, this argument is predicated upon Movants' flawed assertion that Counts II and III were released by the Settlement Agreement. As shown above, they were not.

Movants further argue that PBGC has failed to state a claim for unjust enrichment. To establish a claim for unjust enrichment under Illinois law, a plaintiff must only allege that a defendant has 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.[79] And where a benefit was transferred to defendant by a third party, these allegations are met if the benefit should have been given to plaintiff, but a third party mistakenly gave it to defendant instead.[80]

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[77] *Johnson v. Rohr-Ville Motors, Inc.*, 64 F. Supp. 2d 737, 739 (N.D. Ill. 1999) (internal citations and quotations omitted).

[78] *Id.* (quoting *NUCOR v. Aceros y Maquilas de Occidente*, 28 F.3d 572, 579 (7th Cir. 1994)).

[79] *HPI Health Care Servs., Inc. v. Mount Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989).

[80] *Chi. Title Ins. Co. v. Sinikovic*, No. 11 C 2504, 2015 WL 5116829, at *6 (N.D. Ill. Aug. 28, 2015) (citations omitted).

No showing of wrongdoing or illegality is required for this type of unjust enrichment claim.[81]

Here, PBGC has sufficiently alleged the required elements. The Offset Claim should have been paid to PBGC before the Refund was issued. Instead, a third party (Treasury) mistakenly paid it to FBOP. This mistake results in manifest injustice by depriving PBGC of its $30 million through no fault of its own.

The doctrine of unjust enrichment is broad: it underlies a number of legal and equitable actions and remedies.[82] Movants attempt to cherry-pick holdings premised on different types of unjust enrichment claims—such as those involving wrongdoing by a defendant—and apply them to mistaken third-party payments. In *Martis v. Grinnell Mutual Reinsurance Co.*, for example, a plaintiff sued an insurance company for improperly applying preferred provider discounts.[83] Though plaintiff asserted separate claims for statutory fraud and unjust enrichment, both claims were based on the same "wrongdoing" and, therefore, tied together.[84] And when the statutory fraud claim was dismissed, the unjust enrichment claim also fell.[85] Thus, "*Martis* is not an accurate statement of the law on the equitable claim for unjust enrichment" and should not be generalized to other types of unjust enrichment claims.[86] Moreover, the Illinois Supreme Court

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[81] *Id.*

[82] *HPI Health Care Servs.*, 545 N.E.2d at 678.

[83] 905 N.E.2d 920 (Ill. App. Ct. 2009).

[84] *Id.* at 923.

[85] *Id.* at 928.

[86] *Nat'l Union Fire Ins. Co. of Pittsburgh v. DiMucci*, 34 N.E.3d 1023, 1043 (Ill. App. Ct. 2015), *reh'g denied* (explaining that *Martis* and *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 877 (Ill. App. Ct. 2003), misinterpreted an Illinois Supreme Court case to reach the conclusion that unjust enrichment claims require defendant to owe a duty to plaintiff); *see also Cleary v. Philip Morris Inc.*, 656 F.3d 511, 518 (7th Cir. 2011) ("*Martis*'s articulation of unjust enrichment law might be viewed as language limited to its particular facts and not a true variance from how the

has recognized unjust enrichment as an independent cause of action.[87] And "Illinois law [does not] require an underlying claim for breach of contract or tort" to support an unjust enrichment claim.[88] PBGC has adequately stated such a claim.

## IV. PBGC has adequately stated a claim against Movants for mistake.

Count V of the Complaint seeks a declaratory judgment that the payment of the Refund to FBOP without deduction of the Offset Claim was a mistake or accident caused by Treasury's computer limitation, and a judgment ordering Wells Fargo to pay PBGC the balance of the Offset Claim.[89] FBOP argues that the only cause of action for mistake is for mutual mistake in the execution of a contract.[90] But a claim for mistake does not require a contractual issue.[91]

Moreover, Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement" of PBGC's claim "showing that it is entitled to relief."[92] Count V addresses the mistaken or accidental payment of the Refund to FBOP without deduction of the balance of the

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Illinois Supreme Court considers unjust enrichment claims . . . .").

[87] *HPI Health Care*, 545 N.E.2d at 679.

[88] *Stevens v. Interactive Fin. Advisors, Inc.*, No. 11 C 2223, 2015 WL 791384, at *16 (N.D. Ill. Feb. 24, 2015) (noting that to the extent there is a conflict between the Illinois Supreme Court and the appellate court, "[t]he Illinois Supreme Court's pronouncements, of course, trump those of lower Illinois courts").

[89] Dkt. No. 51 at 12, 14.

[90] The header for PBGC's Count V actually says "Mistake or Accident." Dkt. No. 51 at 12.

[91] *See, e.g.*, *United States v. LaSalle Bank*, N.A., No. 07 C 6196, 2008 WL 4874169, at *2 (N.D. Ill. July 29, 2008) (holding that payment by mistake or error was a valid legal theory by which the government could prove its case); *Klaczak v. Consol. Med. Transp., Inc.*, No. 96 C 6502, 2002 WL 31010850, at *5 (N.D. Ill. Sept. 9, 2002) (same).

[92] *See, e.g.*, *Superior Edge, Inc. v. Monsanto Co.*, 44 F. Supp. 3d 890, 899 (D. Minn. 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).

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 and Count V should proceed.

## CONCLUSION

PBGC filed the Intervention Complaint to recover its $30 million Offset Claim. The sole reason PBGC did not receive that $30 million before the Refund was issued is due to a mistake by Treasury. That mistake occurred after the Termination Action was settled, was not contemplated by the parties in settling that action, and was not a claim that PBGC released as part of that settlement. Movants' other challenges to PBGC's claims are similarly unavailing. PBGC has alleged valid claims against Movants, which the Court may resolve. The motion should be denied.

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Respectfully submitted,

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