

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

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In re:	)	
	)	In Proceedings Under Chapter 11
BILL JOHNSON’S RESTAURANTS, INC.,	)	Case No.: 2:11-bk-22441-SSC
	)	
Debtor.	)	Adv. Proc. No. 2:13-ap-00526 (SSC)
	)	
BILL JOHNSON’S RESTAURANTS, INC.,	)	
an Arizona corporation,	)	
	)	<b>REPLY TO MOTION TO</b>
	)	<b>INTERVENE TO FILE OF</b>
	)	<b>MOTION TO DISMISS</b>
Plaintiff,	)	
	)	
vs.	)	
	)	
PLATTNER, SCHNEIDMAN, SCHNEIDER,	)	
JEFFRIES & PLATTNER, P.C.,	)	
an Arizona professional corporation, <i>et. al.</i>	)	
	)	
Defendants.	)	

**PENSION BENEFIT GUARANTY CORPORATION’S REPLY TO MOTION TO  
INTERVENE TO FILE MOTION TO DISMISS**

Plaintiff Bill Johnson’s Restaurants, Inc. (“BJR”) filed a First Amended Complaint on August 19, 2013 (docket number 21). Contemporaneously therewith, BJR filed its response to the Pension Benefit Guaranty Corporation’s (“PBGC”) motion to intervene to file a motion to dismiss (the “Motion”, docket number 23), arguing that, in light of the First Amended Complaint, PBGC’s Motion is moot. PBGC disagrees. For the reasons set forth in the Memorandum in Support of the Motion, and for the reasons below, PBGC respectfully requests that this Court grant the Motion.

1 **ARGUMENT**

2 Although BJR’s First Amended Complaint removes all references to ERISA in the claims  
3 for relief, the First Amended Complaint retains most of the factual allegations relating to the Bill  
4 Johnson’s Restaurant Inc. Pension Plan (the “Pension Plan”), a defined benefit pension plan  
5 covered by Title IV of ERISA, which was terminated by PBGC as of April 4, 2013.<sup>1</sup> However,  
6 given the purported removal of ERISA causes of action, it is not clear how any factual  
7 allegations relating to the Pension Plan are relevant to the claims being asserted in the First  
8 Amended Complaint. And because the claims for relief are so vaguely asserted, PBGC believes  
9 that BJR is likely still seeking either ERISA claims, or state law claims that are preempted by  
10 ERISA. As discussed in the Memorandum in Support of the Motion (“Memorandum”), BJR  
11 does not have standing to bring claims under ERISA. Moreover, BJR cannot bring state law  
12 claims that relate to the Pension Plan, because such claims are preempted by ERISA. Because  
13 PBGC has a significant protectable right in the causes of action that are derived from the factual  
14 allegations relating to the Pension Plan, and for the reasons discussed in the Memorandum, this  
15 Court should grant PBGC’s Motion to Intervene to File Motion to Dismiss (“Motion”).  
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19 **I. ERISA preempts state law claims that relate to the Pension Plan.**

20 ERISA section 514(a) states that “the provisions of this title and Title IV shall supersede  
21 any and all State laws insofar as they may now or hereafter relate to any employee benefit  
22 plan....” The United States Supreme Court stated that a state law “relates to” an employee  
23 benefit plan “if it has a connection with or reference to such a plan.”<sup>2</sup> A sufficient “reference”  
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26 <sup>1</sup> PBGC now serves as the statutory trustee of the Pension Plan pursuant to ERISA section 4042(c).

27 <sup>2</sup> *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990); *Providence Health Plan v. McDowell*, 385 F.3d  
28 1168, 1172 (9th Cir. 2004). Preemption under ERISA section 514(a) is known as “conflict preemption.” ERISA section 502(a) contains another preemption provision known as “complete preemption,” which is not applicable here. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004); *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 944-45 (9th Cir. 2009).

1 exists where a claim is premised on—and, indeed, relies on—the existence of an ERISA plan.<sup>3</sup>  
2 ERISA’s preemption provisions are expansive, and the preemption clause in section 514(a) “is  
3 not limited to state laws specifically designed to affect employee benefit plans.”<sup>4</sup>  
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5 In the First Amended Complaint, BJR alleges several facts relating to the Pension Plan.  
6 For instance, paragraphs 50-53 of the First Amended Complaint discuss the funded status of the  
7 Pension Plan in 2000-2003, and then allege that the Professional Defendants and  
8 Directors/Shareholders were aware of the Pension Plan underfunding. Paragraphs 71 and 72  
9 describe the distributions to the Directors/Shareholders from the Pension Plan from 2004-2009,<sup>5</sup>  
10 while paragraph 73 alleges the Directors/Shareholders knew at the time of these distributions that  
11 the Pension Plan was underfunded. And paragraph 88 alleges that as of April 4, 2013, the  
12 Pension Plan was underfunded by approximately \$6.7 million.  
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14 Then, in nearly every cause of action, BJR alleges wrongdoing by the Professional  
15 Defendants and/or Directors/Shareholders relating to the distribution of BJR assets or other cash  
16 distributions.<sup>6</sup> Although the assets of a pension plan are not assets of a plan sponsor or the plan  
17 sponsor’s bankruptcy estate,<sup>7</sup> these vague allegations almost certainly reference the distributions  
18 from, or liability of BJR to, the Pension Plan, simply because these facts would not be otherwise  
19 relevant or necessary in the First Amended Complaint. For instance, it appears from paragraphs  
20 71-73, along with paragraph 92, that the Directors/Shareholders improperly accepted  
21 distributions from the Pension Plan when they knew that the Pension Plan was underfunded, and  
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24 <sup>3</sup> *Ingersoll-Rand*, 498 U.S. at 140.

25 <sup>4</sup> *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-48 (1987) (internal citations omitted). See also *United*  
26 *Steelworkers of Am. v. United Engineering, Inc.*, 52 F.3d 1386, 1393 (6th Cir. 1995) (“[T]he question is whether  
27 the legislative scheme speaks directly to a question, not whether Congress has affirmatively proscribed  
28 the use of federal common law.”) (internal quotations omitted).

<sup>5</sup> PBGC’s actuary believes that these distributions were proper benefit payments under the Pension Plan.

<sup>6</sup> Paragraphs 97, 101, 105, 109, 114, 118, 123.

<sup>7</sup> See *PBGC v. Pritchard*, 33 F.3d 509, 511 (5th Cir. 1994) (finding a Chapter 7 trustee is responsible for  
terminating a pension plan even when the plan assets “are separate and apart from the bankruptcy  
estate”); *In re Springfield Furniture, Inc.*, 145 B.R. 520, 528-29 (Bankr. E.D. Va. 1992) (collecting cases).

1 those action constituted breaches of those defendants' fiduciary duties to BJR and contributed to  
2 BJR's insolvency and eventual bankruptcy.

3 Any cause of action brought in the First Amended Complaint that refers to the Pension  
4 Plan—or, in other words, is premised or relies on the existence of the Pension Plan—is  
5 preempted by ERISA and therefore should be dismissed.<sup>8</sup> And, as discussed in the  
6 Memorandum, BJR does not have standing to bring any claims under ERISA because BJR is not  
7 one of the parties empowered to bring a civil action under ERISA section 502.<sup>9</sup>

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9 Moreover, BJR has no standing to seek damages for the underfunding of the Pension  
10 Plan.<sup>10</sup> ERISA section 1362(b)(1)(A) states that employers are liable to PBGC for the total  
11 amount of unfunded benefit liabilities as of the termination date. Congress intended PBGC to be  
12 the sole source of recovery for pension benefits, and provided for payment of guaranteed and  
13 non-guaranteed benefits based on the recovery from the parties liable to PBGC for the plan  
14 underfunding.<sup>11</sup> Therefore, *all* recoveries on account the unfunded benefit liabilities are payable  
15 to PBGC, and ERISA occupies the field of issues relating to pension plan underfunding.<sup>12</sup> To  
16 the extent that a claim for relief in the First Amended Complaint seeks damages relating to the  
17 Pension Plan's underfunding (here, approximately \$6.7 million), that claim is preempted<sup>13</sup> and  
18 should be dismissed.<sup>14</sup>

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25 <sup>8</sup> ERISA section 514(a); *Ingersoll-Rand*, 498 U.S. at 139-140; *McDowell*, 385 F.3d at 1172.

26 <sup>9</sup> See ERISA sections 502(a), 4062(a). See also Memorandum, pgs. 6-7.

27 <sup>10</sup> See ERISA section 4062 (liability for pension plan underfunding is owed to PBGC).

28 <sup>11</sup> ERISA sections 4022(c) and 4044; see also *United Engineering*, 52 F.3d at 1390-91.

<sup>12</sup> *United Engineering*, 52 F.3d at 1393.

<sup>13</sup> See *id.* 1394 (holding that employee claims under section 301 of the Labor Management Relations Act against an employer for unfunded nonguaranteed benefits is preempted by ERISA).

<sup>14</sup> ERISA section 514(a); *Ingersoll-Rand*, 498 U.S. at 139-140; *McDowell*, 385 F.3d at 1172.



1 **CONCLUSION**

2 For the reasons discussed herein and in the Memorandum, this Court should grant the  
3 Motion to permit PBGC to either file a motion to dismiss or to monitor the proceeding until it  
4 files a motion to dismiss or determines that such a motion is not necessary.  
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7 Respectfully submitted,

8 Dated: September 3, 2013  
9 Washington, D.C.

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