

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

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver,	)	
	)	
Plaintiff,	)	Case No: 14-cv-04307
	)	
v.	)	Honorable James F. Holderman
	)	
FBOP CORPORATION, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**REPLY IN SUPPORT OF THE PENSION BENEFIT GUARANTY CORPORATION’S MOTION TO INTERVENE**

The Pension Benefit Guaranty Corporation (“PBGC”) seeks to intervene in this lawsuit because it concerns the proper ownership of a federal tax refund that was issued to FBOP Corporation (“FBOP”). PBGC claims entitlement to about \$30 million of that refund, which should have been offset before the refund was issued. The Federal Deposit Insurance Corporation, as receiver for FBOP’s former banks (“FDIC-R”),<sup>1</sup> opposes intervention by PBGC. FDIC-R asserts that PBGC cannot intervene because the Court does not have jurisdiction over any claims that PBGC submitted in FDIC-R’s receivership proceeding.<sup>2</sup> PBGC is not, however, seeking intervention here to enforce its claims in the FDIC-R receivership; PBGC is seeking

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<sup>1</sup> The failed 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.

<sup>2</sup> FDIC-R does not oppose PBGC’s intervention with respect to any claims against FBOP or the other non-FDIC-R defendants. *See* FDIC-Receiver’s Opposition to the PBGC’s Motion to Intervene (hereinafter “FDIC-R Response”) at 3.

resolution of its offset claim against the refund that is the subject of *this* action. Because the Court has jurisdiction to decide PBGC's offset claim, the motion to intervene should be granted.

## **ARGUMENT**

### **I. Intervention is Appropriate Because the Court Has Jurisdiction over PBGC's Offset Claim.**

To intervene in this action, PBGC must establish that the Court has jurisdiction to determine PBGC's offset claim against the tax refund.<sup>3</sup> As a federal agency and wholly owned United States government corporation, the Court has jurisdiction over PBGC's claim pursuant to 28 U.S.C. §§ 1331, 1345, and 1367(a). These statutes notwithstanding, FDIC-R responds that PBGC cannot establish jurisdiction because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") strips the Court of any jurisdiction to consider PBGC's claims in the FDIC-R receivership.<sup>4</sup> This response misses the point. PBGC is not seeking to intervene to adjudicate the claims it filed in FDIC-R's receivership, nor is PBGC attempting to recover assets that belong to the receivership estate. PBGC seeks to enforce its independent right to recover about \$30 million that should have been deducted before the tax refund was ever issued. Thus, the assets belong to PBGC. Accordingly, the FIRREA restrictions do not apply, and the Court has jurisdiction over PBGC's proposed complaint.

#### **A. PBGC's intervention concerns its right to obtain offset against the tax refund issued to FBOP.**

PBGC was established to administer the pension insurance program under Title IV of the

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<sup>3</sup> See *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 775 (7th Cir. 2007) (noting that independent jurisdiction is necessary for permissive intervention).

<sup>4</sup> FDIC-R Response at 3-7; see also 12 U.S.C. § 1821(d)(13)(D).

Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”).<sup>5</sup> When an underfunded pension plan terminates, PBGC typically becomes the plan’s trustee and pays benefits subject to statutory limits.<sup>6</sup> Upon termination, the plan sponsor and each member of its controlled group become jointly and severally liable to PBGC for, *inter alia*, the plan’s “unfunded benefit liabilities.”<sup>7</sup>

FBOP sponsored the FBOP Corporation Pension Plan (the “Pension Plan”), a defined-benefit pension plan insured by PBGC under Title IV of ERISA. On April 21, 2012, PBGC filed a lawsuit against FBOP seeking termination of the Pension Plan.<sup>8</sup> PBGC alleged that the Pension Plan was significantly underfunded, and that it should be terminated to allow PBGC to offset the underfunding liabilities against a large federal tax refund anticipated by FBOP. As a government corporation and federal agency, PBGC is entitled to seek offset of debts owed to PBGC against overpayments a taxpayer has made to the federal government.<sup>9</sup>

In August 2013, PBGC settled its termination lawsuit against FBOP in exchange for FBOP agreeing to (1) effectuate termination of the Pension Plan, and (2) not oppose or object to PBGC’s referral to the Treasury Offset Program (“TOP”), or any other appropriate federal agency, of an offset of \$30 million against FBOP’s anticipated tax refund, on account of

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<sup>5</sup> 29 U.S.C. § 1301-1461 (2012).

<sup>6</sup> 29 U.S.C. §§ 1302(a)(2), 1321, 1322.

<sup>7</sup> *See* 29 U.S.C. § 1362(a), (b)(1)(A). A plan’s “unfunded benefit liabilities” are determined by subtracting the value of the plan assets from the plan’s benefit liabilities as of its termination date. 29 U.S.C. § 1301(a)(18).

<sup>8</sup> PBGC filed this lawsuit against FBOP pursuant to 29 U.S.C. § 1342(c).

<sup>9</sup> *See generally* 26 U.S.C. § 6402(a), (d), (h); *see also* 31 U.S.C. § 3720A.

liabilities due to PBGC as a result of the Pension Plan's termination (the "Offset Claim").<sup>10</sup>

After providing FBOP with the requisite statutory notice, PBGC referred the Offset Claim to the Treasury Department's Financial Management Service (now known as the Bureau of the Fiscal Service ("BFS")). That same day, PBGC recorded the Offset Claim in the TOP. Although PBGC received a couple of small payments on account of the Offset Claim, the \$30 million balance of the Offset Claim was not deducted before BFS issued a federal tax refund of approximately \$265 million to FBOP (the "Refund"). The sole reason for BFS's failure to deduct the Offset Claim before issuing the Refund was a computer error that affected BFS's payment system.<sup>11</sup>

PBGC seeks to intervene in this action to obtain a judicial determination that it is entitled to about \$30 million of the Refund (the "Offset Funds"),<sup>12</sup> which PBGC would have received before the Refund was paid to FBOP, if not for BFS's computer error. And PBGC has taken no actions that would waive its right to the Offset Claim.<sup>13</sup> Therefore, because PBGC properly asserted and did not waive its offset against the tax overpayment, PBGC retains its right to recover the Offset Claim from the Refund.

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<sup>10</sup> The Settlement Agreement dated August 21, 2012, was signed by PBGC, FBOP, JPMorgan Chase Bank, N.A., and BMO Harris Bank, N.A.

<sup>11</sup> Ex. A to Memorandum in Support of PBGC's Motion to Intervene (hereinafter "PBGC Complaint") at 8, ¶ 28.

<sup>12</sup> See 26 U.S.C. § 6402(a), (d) (providing that the Secretary of the Treasury shall refund overpayment of tax liability subject to offset of any past-due legally enforceable debt owed to a federal agency).

<sup>13</sup> PBGC Complaint at 9-10.

**B. FDIC-R's jurisdictional arguments are contrary to the factual allegations in PBGC's proposed complaint, which the Court must accept as true.**

FDIC-R insists that PBGC is attempting to use the intervention to circumvent the restrictions in FIRREA. To that end, FDIC-R explains that FIRREA restricts the Court's jurisdiction over "any claim or action for payment from, or any action seeking a determination of rights *with respect to, the assets* of any depository institution for which the Corporation has been appointed receiver."<sup>14</sup> But, as FDIC-R concedes, the FIRREA jurisdictional bar is limited to claims against assets of the failed banks. Here, PBGC is not asking the Court for any determination on its claims against, or recovery from, the assets of the failed banks.

Instead, as explained above, PBGC seeks intervention to establish that its Offset Claim gives it a right to the Offset Funds. In its proposed complaint, PBGC alleges that *PBGC*, not the failed banks, is the rightful owner of the Offset Funds, due to PBGC's right under federal law to be paid from tax overpayments prior to any refunds being issued to the taxpayer.<sup>15</sup> PBGC is entitled to receive the Offset Funds from the Refund under 26 U.S.C. § 6402 and 31 U.S.C. § 3720A. PBGC's proposed complaint accordingly alleges that FDIC-R's potential receipt of the Refund will constitute an unjust enrichment to the extent that it includes the Offset Funds, which should have been deducted before the Refund was issued to FBOP.<sup>16</sup> FDIC-R's objection assumes that the failed banks are the owners of the Refund, but the Court "must accept as true the non-conclusory allegations of the motion,"<sup>17</sup> which here includes PBGC's allegation that it,

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<sup>14</sup> FDIC-R Response at 5 (quoting 12 U.S.C. § 1821(d)(13)(D)(i)) (emphasis added).

<sup>15</sup> PBGC Complaint at ¶ 43; *see also* 26 U.S.C. 6402.

<sup>16</sup> PBGC Complaint at 12-13. The Complaint includes a similar count against FBOP and the Trustee-Assignee for FBOP.

<sup>17</sup> *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (citation omitted).

not the failed banks, rightfully owns the portion of the Refund necessary to satisfy PBGC's Offset Claim.

PBGC has filed separate claims with FDIC-R in the receiverships of FBOP's former banks, but those claims are not at issue in this case.<sup>18</sup> Pursuant to Title IV of ERISA, and as members of FBOP's controlled group, the former banks are jointly and severally liable to PBGC for the Pension Plan's unfunded benefit liabilities.<sup>19</sup> However, the fact that PBGC has also submitted claims in the FDIC-R receivership does not alter PBGC's independent right to seek payment of its Offset Claim against the Refund, which is the reason for PBGC's intervention motion. The Court has jurisdiction to determine this issue.

## **II. Denying PBGC's Motion to Intervene Will Impair PBGC.**

FDIC-R's only remaining challenge to PBGC's intervention is that PBGC has not established that its interests will be impaired as a result of this litigation.<sup>20</sup> FDIC-R characterizes the issue as whether "disposition of this action threatens to impair [PBGC's] ability to protect its

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<sup>18</sup> PBGC's recovery on its Offset Claim through intervention in this action will affect the amount of PBGC's claims filed in the FDIC-R receivership. For example, if PBGC recovers \$30 million in this action, that recovery will reduce the amount of PBGC's claims in the receivership.

<sup>19</sup> See 29 U.S.C. § 1362(a), (b)(1)(A) (providing that a plan's contributing sponsor and any members of its controlled group are jointly and severally liable for the plan's unfunded benefit liabilities). FDIC-R's response fails to acknowledge that PBGC has claims for joint and several liability against all members of FBOP's controlled group. See, e.g., FDIC-R Response at 3, 5 (generally discussing PBGC's claim for "alleged underfunded pension liabilities").

<sup>20</sup> FDIC-R does not challenge PBGC's establishment of the other necessary elements for intervention as a matter of right. Those elements are that (1) PBGC timely moved to intervene, (2) PBGC possesses an interest related to the subject matter of the lawsuit, and (3) the current parties do not adequately represent PBGC's interest. Fed. R. Civ. P. 24(a); *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) (discussing requirements for intervention as of right). See generally Memorandum in Support of PBGC's Motion to Intervene at 6-10.

claims against the FDIC-Receiver.”<sup>21</sup> And because PBGC can presumably address those claims through the FIRREA process, FDIC-R concludes that PBGC’s interests will not be impaired.<sup>22</sup>

This argument suffers from the same defects as FDIC-R’s argument about jurisdiction.

To determine whether the disposition of this action will threaten to impair PBGC’s interests, the Court must analyze whether resolving a legal question “in this action would as a practical matter foreclose rights of [PBGC] in a subsequent proceeding.”<sup>23</sup> FDIC-R claims that PBGC’s interests will not be impaired because PBGC can enforce its rights in the FDIC-R receivership. In support of its argument, FDIC-R cites cases where the proposed intervenors had adequate alternative forums for protecting their interests.<sup>24</sup> PBGC’s claim against the Refund has a different legal basis than its claim against the FDIC-R. Accordingly, the FDIC-R process does not afford PBGC an alternative forum for the Offset Claim. Even if it did, that forum is not adequate: “where a proposed intervenor’s interest will be prejudiced if it does not participate in the main action, the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene.”<sup>25</sup>

Here, PBGC’s interests will be prejudiced if it is not permitted to intervene. PBGC seeks to intervene in this action to enforce its entitlement to the Offset Claim, not the claims it

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<sup>21</sup> FDIC-R Response at 8.

<sup>22</sup> *Id.*

<sup>23</sup> *Zurich Capital Mkts., Inc. v. Coglianesi*, 236 F.R.D. 379, 386 (N.D. Ill. 2006) (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982)).

<sup>24</sup> FDIC-R Response at 8 (citing *SEC v. Homa*, 17 Fed. App’x 441 (7th Cir. 2001); *CFTC v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384 (7th Cir. 1984)).

<sup>25</sup> *Heritage Capital Advisory Servs., Ltd.*, 736 F.2d at 387 (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Old Sec. Life Ins. Co.*, 600 F.2d 671, 681 (7th Cir. 1979)).

separately submitted to FDIC-R. PBGC filed claims with FDIC-R as a protective measure, for the joint and several liability of the failed banks. Those claims are limited to about \$28 million, pursuant to a Memorandum of Understanding between PBGC and the FDIC. Accordingly, at most, PBGC would recover \$28 million from the FDIC-R claims procedure, and possibly less, while it stands to recover more if it prevails in this suit.

There is no legitimate dispute that resolution of this action without PBGC's involvement would severely prejudice, if not outright end, PBGC's efforts to preserve its offset right. PBGC argues that the Court should allow PBGC to be paid its Offset Claim against the Refund before it is paid and distributed to the creditors of FBOP and/or FDIC. As a result, PBGC will lose its opportunity to enforce its offset right.<sup>26</sup> Because PBGC's interests will be impaired if it is denied intervention in this lawsuit, the motion to intervene should be granted.

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<sup>26</sup> See *Zurich Capital Mkts.*, 236 F.R.D. at 386 (noting that impairment may be established where a decision might reduce or completely deplete assets against which the proposed intervenors had a claim) (citing *Mountain Top Condo Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995)).

**CONCLUSION**

The Court has jurisdiction over PBGC's claims in this matter. Moreover, PBGC has established the necessary criteria to support its intervention as a matter of right under Fed. R. Civ. P. 24(a), and for permissive intervention under Fed. R. Civ. P. 24(b). Accordingly, the Court should grant PBGC's motion to intervene.

Dated: August 5, 2014  
Washington, D.C.

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## CERTIFICATE OF SERVICE

I certify that a copy of the attached **Reply in Support of the Pension Benefit Guaranty Corporation's Motion to Intervene** was filed electronically on August 5, 2014. Notice of this filing will be sent to all parties registered on this Court's ECF system by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Colin B. Albaugh  
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