

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

**FEDERAL DEPOSIT INSURANCE
CORPORATION, as a separate and distinct
Receiver of Bank USA, N.A., California
National Bank, Citizens National Bank of
Teague, Madisonville State Bank, North
Houston Bank, Pacific National Bank, Park
National Bank, and San Diego National Bank**

Plaintiff,

v.

**FBOP CORPORATION and PATRICK D.
CAVANAUGH of High Ridge Partners,
Inc., not individually, but solely as Trustee-
Assignee under FBOP Corporation’s Trust
Agreement and Assignment for the Benefit
of Creditors; JPMORGAN CHASE BANK,
N.A., AS AGENT; BMO HARRIS BANK
N.A., as successor in interest to M&I
MARSHALL & ILSLEY BANK; ORE
HILL HUB FUND LTD.; CANYON
BALANCED MASTER FUND, L.P.;
MARINER-TRICADA CREDIT
STRATEGIES MASTER FUND, LTD.;
PMT CREDIT OPPORTUNITIES FUND
LTD.; PROSPECT MOUNTAIN FUND
LIMITED; STRUCTURED CREDIT
OPPORTUNITIES FUND II, LP; and
GORDON C. WATSON,**

Defendants.

Case No: 14-cv-04307

Honorable James F. Holderman

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

The Pension Benefit Guaranty Corporation (“PBGC”), files this Motion to Intervene under Rule 24(a), or alternatively under Rule 24(b), of the Federal Rules of Civil Procedure

(“Motion”). PBGC moves to intervene because it is entitled to a portion of the tax refund that is the subject of this action. In support of the Motion, PBGC states as follows:

BACKGROUND

1. PBGC is a wholly owned United States government corporation established under Title IV of Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”).¹ When an underfunded pension plan terminates, PBGC typically becomes the plan’s trustee and, subject to statutory limits, pays benefits to plan participants.²

2. Defendant FBOP Corporation (“FBOP”) is an Illinois Corporation and a former bank holding company, which owned 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 (together, the “Banks”).

3. On October 30, 2009, the Banks were taken over by Plaintiff Federal Deposit Insurance Corporation (“FDIC”), which entered into purchase and assumption agreements with U.S. Bank, N.A. to assume all of the deposits and essentially all of the assets of each of the failed Banks. At the same time, the FDIC was appointed receiver of the failed Banks (“FDIC-R”).

4. On information and belief, on or about October 5, 2012, FBOP entered into an agreement with Defendant Patrick D. Cavanaugh of High Ridge Partners, Inc. to make an assignment for the benefit of creditors of FBOP.

The Pension Plan and PBGC Settlement Agreement

5. FBOP was the contributing sponsor and plan administrator of the FBOP

¹ 29 U.S.C. § 1302(a).

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

Corporation Pension Plan (the “Pension Plan”), a defined benefit pension plan that is covered by PBGC’s termination insurance program under Title IV of ERISA.³ The Pension Plan provided pension benefits to certain former employees of FBOP, and their beneficiaries.

6. Before the Pension Plan was terminated under Title IV of ERISA, PBGC estimated that the Pension Plan’s assets were not sufficient to cover all of its promised benefits. Specifically, PBGC estimated that the Pension Plan “unfunded benefit liabilities,” as defined in 29 U.S.C. §§ 1301(a)(18) and 1362(a) and (b), totaled approximately \$40.5 million.

7. After the FDIC put the Banks into receivership, PBGC commenced proceedings against FBOP in this Court on April 27, 2011, seeking a decree terminating the Pension Plan pursuant to 29 U.S.C. § 1342(c) (the “Termination Action”).

8. In the Termination Action, PBGC alleged that it could offset its claims with respect to the Pension Plan against any federal tax refund owed to FBOP or any of its controlled-group members under 26 U.S.C. § 6402 and 31 U.S.C. § 3720A.

9. On August 21, 2013, PBGC, FBOP, JPMorgan Chase Bank, N.A. (“JPMorgan”), and BMO Harris Bank, N.A. (“BMO”) entered into an agreement to settle the Termination Action (“PBGC Settlement Agreement”). Under the PBGC Settlement Agreement, FBOP agreed, *inter alia*, 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 on account of liabilities due to PBGC as a result of the Pension Plan’s termination (the offset claim of \$30 million, the “Offset Claim”). Likewise, JPMorgan and BMO agreed, *inter alia*, not to oppose or object to referral to TOP of the PBGC Offset Claim.

³ 29 U.S.C. §§ 1002(16), 1301(a)(1) and (13), 1321(a).

10. On August 21, 2012, PBGC and FBOP entered into an agreement terminating the Pension Plan under 29 U.S.C. § 1342(c), establishing April 21, 2011, as the Pension Plan's termination date, and appointing PBGC as statutory trustee of the Pension Plan.

11. On August 21, 2012, as required by 26 U.S.C. § 6402, 29 U.S.C. § 3720A, and the regulations thereunder, PBGC sent FBOP a notice of, *inter alia*, (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 the Financial Management Service for tax refund offset pursuant to 26 U.S.C. § 6402 and 31 U.S.C. § 3720A. PBGC sent a similar notice to FDIC-R.

12. On or about October 23, 2012, PBGC referred its Offset Claim against FBOP to the Financial Management Service (now known as the Bureau of the Fiscal Service or "BFS"). That same day, PBGC recorded the Offset Claim in the TOP.

13. On December 18, 2012, and January 2, 2013, PBGC received payments of \$8,780 and \$175, respectively, through the TOP on account of its Offset Claim.

14. With those offsets, PBGC's unpaid Offset Claim was reduced to \$29,991,045.

Federal Income Tax Refund to FBOP

15. On or about December 31, 2013, the Department of Treasury paid FBOP a federal tax refund in the amount of approximately \$265 million (the "Refund"). On information and belief, the Refund was issued to FBOP through five separate paper checks called "Type A" checks.

16. Each of the five Type A checks was paired with a form entitled "Manual Refund Posting Voucher."

17. On each form, the box labeled "Yes (Allow TOP Offset, BPI-0)" was checked.

18. Before paying FBOP, BFS did not deduct PBGC's Offset Claim from the Refund

(the “Offset Failure”). PBGC did not learn of the Offset Failure until PBGC’s counsel was informed by FDIC’s counsel in March, 2014.

19. On information and belief, the sole reason for the Offset Failure was a computer glitch that affected BFS’s payment system through which Type A checks for large dollar amounts are processed, and as a result, the Refund was not processed through TOP (the “Error”). BFS admits that this was a mistake, and on information and belief, there is a fix for the Error, called “PAM Release 7.0,” which BFS scheduled for release in May 2014.

20. BFS acknowledges that the Offset Claim should have been deducted from the Refund, and that the reason the Offset Claim was not deducted from the Refund was a mistake caused by the Error.

21. On information and belief, FBOP deposited the Refund into the Escrow Account held by the Escrow Agent pursuant to the Escrow Agreement between the FDIC-R and FBOP dated September 30, 2011 (as amended, the “Escrow Agreement”).

22. On information and belief, the Refund is currently in the Escrow Account, and will remain in the Escrow Account until the dispute between the FDIC and FBOP (among others) regarding ownership of the Refund is finally resolved.

ARGUMENT

I. INTERVENTION AS A MATTER OF RIGHT

23. Federal Rule 24(a) states, in relevant part, that “[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

24. A person seeking to intervene as a matter of right must establish that: (1) the motion is timely, (2) it possesses an interest related to the subject matter of the action, (3) the disposition of the action threatens to impair that interest, and (4) the current parties to the action fail to adequately represent that interest.⁴

25. In evaluating a motion to intervene, the Court must accept as true the non-conclusory allegations of the motion and pleading.⁵ Moreover, the Court should not deny a motion to intervene “unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint.”⁶

26. For the following reasons, PBGC is entitled to intervene in this action as a matter of right. Accordingly, the Court must grant PBGC’s Motion.

A. *PBGC’s Motion is timely.*

27. The Seventh Circuit requires that potential intervenors be diligent in learning about actions that might affect their rights, and act promptly once they learn of any such actions.⁷ Moreover, if the delay caused by the intervention will prejudice existing parties, then the motion may be denied.⁸

28. In deciding whether a motion to intervene is timely, the Court may consider

⁴ *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003); *Vollmer v. Publishers Clearing House*, 348 F.3d 698, 705 (7th Cir. 2001); *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994).

⁵ *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir.1983); *Zurich Capital Markets, Inc. v. Coglianesi*, 236 F.R.D. 379, 383 (N.D. Ill. 2006); *Sec. and Exch. Comm’n v. Falor*, 270 F.R.D. 372, 373 (N.D. Ill. 2010)

⁶ *Id.*

⁷ *Nissei*, 31 F.3d at 438-39.

⁸ *Id.*

factors such as: (1) the length of time the movant knew or should have known of its interest in the action, (2) the prejudice to existing parties caused by the delay, (3) the prejudice to the movant if the motion is denied, and (4) other unusual circumstances.⁹

29. Here, FDIC filed this action on June 10, 2014, and PBGC learned of the action on June 13, 2013. To date, there has been no material activity in the case. Indeed, as the defendants have not yet filed answers, any brief delay caused by PBGC's intervention will not prejudice the existing parties. Moreover, if PBGC is not allowed to intervene, then PBGC will be prejudiced because all rights to the Refund, which is the subject matter of this action, will be decided without consideration of PBGC's claim.¹⁰

30. For these reasons, PBGC's intervention motion is timely.

B. PBGC has an interest related to the subject matter of the action.

31. Intervention under Rule 24(a) requires a "direct, significant, and legally protectable interest in the subject matter of the lawsuit," and such interest must be unique to the proposed intervenor.¹¹ Whether the proposed intervenor has an interest sufficient to warrant intervention is a highly fact-specific determination; therefore, the application of other cases is limited.¹²

⁹ *Reid L.*, 289 F.3d at 1018 (holding the District Court did not abuse its discretion in finding a motion untimely when it was filed a decade after the litigation commenced).

¹⁰ *See Zurich Capital Markets, Inc. v. Coglianese*, 263 F.R.D 379, 384 (N.D. Ill. 2006) (the movant would be prejudiced if not allowed to intervene where the action involved assets to which the movant had a claim to).

¹¹ *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

¹² *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir.1995).

32. Here, PBGC has a significant interest in the Refund, which is the subject of this action. Specifically, PBGC is entitled to receive the balance of the Offset Claim from the Refund through offset under 26 U.S.C. § 6401 and 31 U.S.C. §3720A, a right that no other party to this action possesses. In fact, but for the mistake of another agency of the federal government, PBGC would have received the balance of the Offset Claim prior to the Refund being paid to FBOP.¹³

33. Therefore, PBGC has a direct, significant, and legally protected interest in the Refund, which is the subject of the litigation.

C. Disposition of the action threatens to impair PBGC's interest.

34. Whether disposition of the action threatens to impair the interest of the proposed intervenor depends on whether a decision in the action “would as a practical matter foreclose rights of the proposed intervenor[] in a subsequent proceeding.”¹⁴ For example, if disposition of the action could deplete funds or assets so as to make it unlikely or more difficult for the proposed intervenor to recover on those funds or assets, there would be sufficient impairment to meet the Fed. R. Civ. P. 24(a)(2) standard.¹⁵

35. Moreover, courts have found that the possibility that the proposed intervenor might have a chance to litigate its claims in a future action was not an automatic bar to intervention.¹⁶

¹³ See Complaint attached as Exhibit A.

¹⁴ *Zurich*, 263 F.R.D at 386.

¹⁵ See *id.* (where the proposed intervenor had a claim to funds that were the subject of the action, the court found sufficient impairment) (citing *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 569-70 (D. Del. 1981)).

¹⁶ *City of Chicago v. FEMA*, 660 F.3d 980, 985-86 (7th Cir. 2011); *Natural Resources Def.*

36. Finally, the “benefits derived from consolidation of disputes into one proceeding” favors intervention.¹⁷

37. Here, FDIC-R sued the defendants to determine ownership of the Refund, which is in escrow pending resolution of this action. If this action is resolved without determining PBGC’s claims to the Refund, the Refund will be paid to either FDIC-R or FBOP (or both) and be distributed to that party’s creditors. As a result, there will be no funds remaining from which PBGC could seek the recovery to which it is entitled.

38. As such, disposition of this action without consideration of PBGC’s claims irreparably impairs PBGC’s interest in the Refund.

D. Existing parties inadequately represent PBGC’s interest.

39. In determining whether a proposed intervenor’s interest is adequately represented by existing parties to the action, the Supreme Court has stated that the burden of making this showing is minimal—the movant need only show that its interest *may* not be adequately protected.¹⁸

40. Here, there is no question that the current parties to this action do not adequately represent PBGC’s interest. Both parties believe they are entitled to ownership of the entire Refund. In fact, on June 13, 2014, FDIC-R sent a letter to the Escrow Agent, stating that FDIC-R does not consent to release of any escrowed funds to PBGC. Moreover, none of the existing parties have the offset right to the Refund that PBGC possesses, and therefore cannot represent

Council v. Costle, 561 F.2d 904, 906 (7th Cir. 1977).

¹⁷ *City of Chicago*, 660 F.3d at 986.

¹⁸ *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Wisc. Educ. Ass’n Council*, 705 F.3d at 659; *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256 (7th Cir. 1983).

PBGC's interests.

41. For these reasons, PBGC's interest is not adequately represented by the existing parties in this action.

II. PERMISSIVE INTERVENTION

42. Alternatively, if the Court finds that PBGC is not entitled to intervene in this action as a matter of right under Rule 24(a), the Court should grant PBGC permissive intervention under Rule 24(b).

43. Where the proposed intervenor's claim and the main cause of action share common issues of law or fact, as long as the court has independent jurisdiction, the Court has discretion to grant the motion to intervene under Fed. R. Civ. P. 24(b).¹⁹ Relevant factors include whether the request is timely and whether intervention would delay or prejudice the existing parties.²⁰

44. Permissive intervention is appropriate here because, as discussed above, PBGC's Complaint, attached as Exhibit A, shares common issues regarding the payment and ownership of the Refund. Moreover, the Motion is timely and will not delay or prejudice the existing parties to this action.

45. Therefore, if the Court finds that PBGC is not entitled to intervene in this action as a matter of right under Rule 24(a), the Court should exercise its discretion and grant PBGC permissive intervention under Rule 24(b).

¹⁹ *Ligas ex. rel Foster v. Maram*, 478 F.3d 771, 775 (7th Cir. 2007); *Schipporeit*, 69 F.3d at 1381.

²⁰ *Vollmer*, 348 F.3d at 706-707; *Southmark Corp. v. Cagan*, 950 F.2d 416, 419 (7th Cir. 1991).

RULE 24(c)—PLEADING REQUIREMENT

46. As required by Rule 24(c) of the Federal Rules of Civil Procedure, PBGC attaches its Complaint as Exhibit A.

REQUEST FOR RELIEF

WHEREFORE, PBGC respectfully requests that the Court grant PBGC's Motion to intervene as a matter of right under Fed. R. Civ. P. 24(a), or alternatively, allow permissive intervention by PBGC under Fed. R. Civ. P. 24(b), and grant such other relief as the Court deems just and proper.

Dated: July 8, 2014
Washington, D.C.

/s/ Katherine B. Kohn
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
STEPHANIE THOMAS
Assistant Chief Counsel
KATHERINE B. KOHN
COLIN B. ALBAUGH
Attorneys
PENSION BENEFIT GUARANTY
CORPORATION
Office of the Chief Counsel
1200 K Street, NW, Suite 340
Washington, D.C. 20005-4026
202-326-4020, ext. 4779
202-326-4112 (facsimile)
efile@pbgc.gov

Attorneys for Pension Benefit Guaranty Corporation