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

FBOP CORPORATION,	)	
Plaintiff,	)	**Case No: 11-CV-02782**
v.	)	**Honorable Robert W. Gettleman**
PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO DISMISS

Defendant Pension Benefit Guaranty Corporation ("PBGC") moves to dismiss Plaintiff FBOP Corporation's Amended Complaint. Count I of FBOP's Amended Complaint is duplicative of PBGC's Amended Complaint pending with this Court, and Count II lacks subject matter jurisdiction and is not ripe for review.[1]

I. BACKGROUND

FBOP is the contributing sponsor and plan administrator of the FBOP Corporation Pension Plan (the "Plan") within the meaning of 29 U.S.C. §§ 1301(a)(1) and (13), 1002(16)(A). The Plan is a defined benefit pension plan covered by Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA").[2] The Plan provides pension benefits to

[1] Fed. R. Civ. P. 12(b)(1) and (6). FBOP seeks an award of attorneys' fees against PBGC. While PBGC does not address that request in this motion, PBGC reserves its rights to object to the request for attorneys fees if and when it becomes necessary.

[2] *See* 29 U.S.C. § 1321(a).

approximately 2,589 current and former employees of FBOP and their beneficiaries.[3] The FDIC, on October 30, 2009, took over all of FBOP's banks,[4] and FBOP is in the process of conducting an orderly out-of-court liquidation of its remaining assets.

PBGC is a United States government agency established under 29 U.S.C. § 1302(a) to administer the pension insurance program created by Title IV of ERISA.[5] 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 their beneficiaries.[6]

Title IV of ERISA provides the exclusive means of terminating a pension plan.[7] Under 29 U.S.C. § 1341, the plan sponsor can voluntarily 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 termination of a pension plan under 29 U.S.C. § 1342 under certain circumstances, including when PBGC determines that its possible long-run loss with respect to the plan "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.

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[3] The large majority of Plan participants were employees of the banks owned by FBOP.

[4] The banks owned by FBOP and taken over by the FDIC on October 30, 2009 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.

[5] *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.

[6] 29 U.S.C. §§ 1302(a)(2), 1321, 1322, 1344.

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

Once PBGC has made a determination to terminate a plan under § 1342, the termination is typically accomplished by agreement with the plan administrator.[8] If PBGC and the plan administrator cannot agree, ERISA authorizes PBGC to apply under § 1342(c) to the appropriate United States district court for a decree adjudicating that the plan must be terminated.[9] A plan termination date is set pursuant to 29 U.S.C. § 1348. If the plan has been terminated by agreement, the termination date is the date agreed to by PBGC and the plan administrator.[10] If no agreement is reached, the termination date is set by the court.[11]

When PBGC goes to court to terminate a pension plan, it 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.[12] At the time of the court filing, PBGC had an estimate of the Plan's underfunding. After termination, PBGC makes a final determination of liability.[13] Liability arises under 29 U.S.C. § 1362, not § 1342. PBGC's determination of liability is generally subject to appeal to the agency's Appeal Board.[14] Where PBGC believes that its

[8] *See* 29 U.S.C. § 1342(c).

[9] *Id.*

[10] 29 U.S.C. § 1348(a)(3).

[11] 29 U.S.C. § 1348(a)(4). In setting the termination date, the court first determines when the plan participants had actual or constructive notice of plan termination such that their expectation of plan continuation is cut off. *PBGC v. United Airlines, Inc.*, 436 F.Supp.2d 909, 919 (N.D. Ill. 2006) (citing *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 665 (6th Cir. 2004). Then, the court selects whatever later date serves the best interests of PBGC. *Id.* (citing *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993). In selecting the date, the court assumes that "the date selected by PBGC adequately protects PBGC's interests." *Mize*, 987 F.2d at 1063.

[12] PBGC also typically requests that the court order the plan sponsor to turn over documents necessary to trustee the plan.

[13] 29 C.F.R. § 4003.1(b)(9), 4068.3.

[14] 29 C.F.R. § 4003.1(a).

"ability to assert or obtain payment of liability is in jeopardy," it may issue a demand immediately upon making its determination regarding liability, without providing for appeal rights.[15] While PBGC typically *estimates* the amount of unfunded benefit liabilities to inform its termination decision, that estimate is not a determination of liability, and is subject to refinement prior to PBGC's determination of unfunded benefit liabilities.

PBGC, as a federal agency, also has a right to offset debts owed to it by plan sponsors or controlled group members[16] against moneys owed to the plan sponsor or controlled group member by any other federal agency, including the Internal Revenue Service.[17] PBGC's setoff rights are exercised pursuant to regulations, which provide a mandatory period to allow the plan sponsor or controlled group member time to contest the offset.[18]

On April 21, 2011, PBGC issued a Notice of Determination ("Notice") that the Plan should be terminated under 29 U.S.C. § 1342(a) and (c).[19] That same day, PBGC sent FBOP the Notice along with a letter demanding payment of the Plan's unfunded benefit liabilities ("UBL"),[20] estimated at $56,650,211, by April 26, 2011 (the "Demand Letter"). Furthermore, by letter dated April 26, 2011, PBGC sent notice to FBOP of the agency's intention to set off the amount of the UBL against FBOP's anticipated $200 million income tax refund for tax year

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[15] 29 C.F.R. § 4068.3(c).

[16] Controlled group members, generally any entities related through 80% ownership, 29 U.S.C. § 1301(a)(14), 26 C.F.R. § 1.414(b) and (c), are jointly and severally liable for unfunded benefit liabilities and other liabilities related to the Plan, *see* 29 U.S.C. §§ 1307, 1362.

[17] 31 U.S.C. § 3717, 29 C.F.R. § 4903.

[18] 29 C.F.R. § 4903.

[19] Specifically, PBGC determined that the Plan would be unable to pay benefits when due and that PBGC's long run loss with respect to the Plan could reasonably be expected to increase unreasonably unless the Plan was terminated.

[20] 29 U.S.C. § 1362(b).

2009 by June 25, 2011 (the "Setoff Notice"). PBGC issued both the Demand Letter and the Setoff Notice before plan termination in this case because FBOP indicated that it expected to receive the refund in June 2011, and PBGC therefore believed time was of the essence.[21] FBOP's counsel later informed PBGC that the tax return was being audited and receipt of the refund was not expected for a year or more. As there is now adequate time for resolution of PBGC's termination action, PBGC issued a letter to FBOP withdrawing both the Setoff Notice and the demand for liability contained in the Demand Letter, without prejudice.[22]

In a telephone conversation on April 25, 2011, FBOP indicated an unwillingness to sign an agreement terminating the Plan. Accordingly, PBGC informed FBOP that it intended to seek a district court decree terminating the Plan under 29 U.S.C. § 1342(c) if the agreement was not signed by the deadline indicated in the Demand Letter.[23] On April 26, 2011, the day after PBGC informed FBOP of its intention to file a complaint seeking Plan termination, FBOP filed this action seeking a declaratory judgment against PBGC.[24]

The next morning, before learning of FBOP's complaint, PBGC filed an action pursuant to 29 U.S.C. §§ 1342(c) and 1348(a) seeking an order (a) terminating the Plan, (b) appointing PBGC statutory trustee of the Plan, and (c) establishing April 21, 2011 as the termination date for the Plan. PBGC later filed an Amended Complaint on May 20, 2011. PBGC's Complaint

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[21] Agreed Motion to Stay Pending Resolution of Defendant FBOP Corporation's Agreed Motion to Reassign Related Case Pursuant to Local Rule 40.4 at ¶ 5, case number 11-02788; Letter from Robert Bacon, Acting Director of PBGC Department of Insurance Supervision and Compliance to Michael Kelly, Chairman of FBOP Corporation, June 2, 2011, attached as Exhibit 1.

[22] Letter from Robert Bacon, Acting Director of PBGC Department of Insurance Supervision and Compliance to Michael Kelly, Chairman of FBOP Corporation, June 2, 2011, attached as Exhibit 1.

[23] See Shelton Declaration, attached as Exhibit 2.

[24] FBOP's complaint was initially assigned to Judge Castillo, but was reassigned to Judge Gettleman on May 11, 2011.

and Amended Complaint do not seek a judgment regarding the amount of liability or PBGC's right to offset under federal law.

On May 18, FBOP filed its Amended Complaint (the "FBOP Complaint") in this case, which differed radically from its original Complaint.[25]

II. MOTION TO DISMISS STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(1), the Court must accept all allegations as true and draw all reasonable inferences in favor of the plaintiff.[26] But the Court need not accept the complaint's jurisdictional allegations, and the Court may look beyond the complaint's allegations to evidence that has been submitted on the issue to determine whether the Court has subject matter jurisdiction.[27]

In addition to lack of subject matter jurisdiction, a complaint may also be dismissed for failing to state a claim upon which relief may be granted.[28] When considering a motion to dismiss under Rule 12(b)(6), the Court construes the complaint in the light most favorable to the plaintiff, accepting all allegations as true and drawing any inferences in the plaintiff's favor.[29] In order to survive dismissal, "the plaintiff 'must plead some facts that suggest a right to relief that

[25] FBOP cites 29 U.S.C. §§ 1303(f) and 1303(e)(3) as the basis for this Court's jurisdiction. Section 1303(e)(3), however, only applies to actions brought by PBGC.

[26] *Allice-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003).

[27] *Id.* The court's consideration of evidence outside the complaint will not convert a motion to dismiss to a motion for summary judgment. *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

[28] Fed. R. Civ. P. 12(b)(6).

[29] *Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011).

is beyond the 'speculative level.'"[30] Dismissal is proper if the complaint fails to set forth sufficient facts to state a claim for relief that is plausible on its face.[31] However, the Court is not required to admit conclusions of law or unwarranted deductions of fact.[32]

FBOP brought its Amended Complaint under the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, which allows courts to consider cases seeking a declaratory judgment. A case filed under the DJA is subject to the usual requirements of subject matter jurisdiction,[33] including ripeness.[34] In addition, the court has complete discretion whether to hear cases brought under the DJA, and can dismiss such cases for prudential reasons.[35]

Ripeness requires "a court to 'evaluate' both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[36] Fitness for judicial

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[30] *Atkins v. City of Chi.*, 631 F.3d 823, 832 (7th Cir. 2011) (internal citations omitted). *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

[31] *Twombly*, 550 U.S. at 570; *Heyde v. Pittenger*, 633 F.3d 512, 517-17 (7th Cir. 2011).

[32] *R.J.R. Servs., Inc. v. Aetna Cas. and Sur. Co.*, 895 F.2d 279, 281 (7th Cir.1988).

[33] *Illinois v. City of Chi.*, 137 F.3d 474, 477-78 (7th Cir. 1998).

[34] *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); *Biddison v. City of Chi.*, 921 F.2d 724, 726 (7th Cir. 1991).

[35] *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction."); *Public Affairs Ass'n v. Rickover*, 369 U.S. 111, 112 (1962); *Int'l Harvester Co.*, 623 F.3d at 1217-18; *Alcan Aluminum Ltd. v. Dep't of Revenue*, 724 F.2d 1294, 1298 (7th Cir. 1984). Even where ripeness does not rise to the level of a jurisdictional issue, it is a prudential issue to be considered in dismissing a case under the DJA. *Int'l Harvester Co.*, 623 F.3d at 1218 (even where the plaintiff carried its burden of establishing an actual controversy, relief under the DJA was not appropriate because the status of another pending suit raised the distinct possibility that the suit under the DJA would not serve a useful purpose).

[36] *Peick v. PBGC*, 724 F.2d 1247, 1261 (7th Cir. 1983) (citations omitted).

decision requires a plaintiff to present an issue that is ready for adjudication.[37] An action is not fit for judicial decision, for example, when further factual development would significantly assist the court in resolving the legal issues.[38] Hardship supports a finding of ripeness where, for example, a party bears immediate costs for complying with a regulation or statute that may be invalid.[39]

III. ARGUMENT

A. Count I of the FBOP Complaint should be dismissed because it is duplicative and serves no useful purpose.

FBOP seeks a declaration under the Declaratory Judgment Act[40] that the Plan should not be terminated.[41] The DJA states, in relevant part, that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[42]

The DJA allows for final judgment in an actual case or controversy only where adjudication serves a useful purpose, such as where the party entitled to the remedy has not

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[37] *See Nevada v. Dep't of Energy*, 457 F.3d 78, 84 (D.C. Cir. 2006) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

[38] *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

[39] *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, (1985) (finding the challenge to a statute's arbitration scheme as ripe because "requir[ing] the industry to proceed without knowing whether the [arbitration scheme] is valid would impose palpable and considerable hardship." (citation and internal quotations omitted)).

[40] 28 U.S.C. § 2201.

[41] Complaint at pg. 9.

[42] 28 U.S.C. § 2201.

sought it, thereby giving rise to uncertainty.[43] But the DJA is not a device to win the "race to the courthouse" by filing an action before the natural plaintiff files its action.[44] In considering whether to exercise its discretion to hear a case under the DJA, a court must consider whether the litigant's need for relief outweighs the public interest in judicial expediency and avoiding unnecessary federal litigation.[45] Where any uncertainty facing the plaintiff is resolved by another suit, the court may properly dismiss the declaratory judgment action.[46] Thus, the Supreme Court opined that courts are well within their discretion to abstain from exercising jurisdiction in DJA proceedings where there are parallel state court proceedings.[47]

The Seventh Circuit has also emphasized the propriety of dismissing needless declaratory actions. In *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*, the Seventh Circuit affirmed the district court's dismissal of a declaratory judgment action where Tempco filed suit the same day that it learned of Omega's intention to file a trademark infringement suit.[48] Tempco filed suit in the Northern District of Illinois to obtain its preferred forum.[49] Four days

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[43] Wright, Miller, and Kane, *Federal Practice & Procedure*, Civil 3d. § 2751 (2004); *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1218 (7th Cir. 1980); *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir.1987); *Allstate Ins. Co. v. Employers Liab. Assurance Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971).

[44] *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002).

[45] *Int'l Harvester*, 623 F.3d at 1218.

[46] *See Int'l Harvester*, 623 F.3d at 1218.

[47] *Wilton*, 515 U.S. at 282-83; *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *Med. Assurance*, 610 F.3d at 379 (stating that the court should consider factors such as whether the parties to both actions are identical, whether going forward in the declaratory judgment action will serve a useful purpose or whether it will amount to duplicative litigation, and whether the relief the declaratory judgment plaintiff seeks is available in another forum or at another time).

[48] 819 F.2d 746 (7th Cir. 1987).

[49] *Id.* at 749.

later, Omega filed an infringement action in the District of Connecticut and moved to dismiss Tempco's action, which the district court granted.[50]

The Seventh Circuit affirmed, finding that Tempco's declaratory judgment action served no useful purpose, as Omega's infringement action would resolve all the legal issues presented in Tempco's declaratory judgment action.[51] Since Tempco's declaratory judgment action served no useful purpose, it was properly dismissed.[52]

Similarly, here, FBOP filed its DJA action one day after PBGC informed FBOP that it planned to file an action to terminate the Plan. Count I involves the very same issues presented in PBGC's Amended Complaint, namely, whether the Plan should be terminated. And in a plan termination action under 29 U.S.C. § 1342, PBGC is the natural plaintiff.[53] Moreover, FBOP cannot suffer from any uncertainty regarding the Plan because PBGC *has* sought an affirmative remedy – termination of the Plan under ERISA § 4042(c).

As in *Tempco*, the FBOP Complaint serves no useful purpose and will result in "piecemeal and duplicative litigation,"[54] wasting judicial time and resources. District courts—including this Court—should decline to hear actions filed "in an attempt to manipulate the

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[50] *Id*. at 747.

[51] *Id.* at 749.

[52] *Id*.

[53] *See* 29 U.S.C. § 1342(c); *see also Hyatt,* 302 F.3d at 711.

[54] *Med. Assurance*, 610 F.3d at 379.

judicial process" by racing to the court house.[55] Therefore, this Court should grant PBGC's motion to dismiss Count I.[56]

B. <u>Because There Has Been No Agency Action and No Injury, Count II Should Be Dismissed For Lack of Jurisdiction, Ripeness, and Failure to State A Claim</u>

Count II.A of the FBOP Complaint seeks a declaration that "PBGC is not owed a UBL payment because the Setoff Notice is erroneous, unfounded, and based on knowingly inaccurate and false information."[57] FBOP also seeks to enjoin PBGC from referring the UBL debt to the Financial Management Service for tax refund offset. The Court should dismiss this count for lack of subject matter jurisdiction and for FBOP's failure to state a claim upon which relief may be granted.

1. Count II should be dismissed because the Court lacks jurisdiction.

As stated above, PBGC makes separate determinations under ERISA to terminate a plan and to assess liability for a terminated plan. PBGC's decision to seek termination is grounded in § 1342(a), while PBGC's determination of liability is made pursuant to §§ 1362 and 1368. PBGC's regulations also make clear that liability is an independent agency determination.[58]

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[55] *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 647 (7th Cir. 1998).

[56] Count I also alleges that PBGC made false statements regarding the Plan in a press release and requests that the Court direct PBGC "to publish a written retraction of [PBGC's] prior false statements regarding FBOP and the Pension Plan," and enjoin PBGC "from making further false statements regarding FBOP and the Pension Plan." FBOP Complaint at pg. 9. However, FBOP states no legal basis for the Court to grant such relief. FBOP seeks jurisdiction over its claims under 29 U.S.C. § 1303(f), which provides for suits against PBGC by parties "adversely affected by any action of the corporation with respect to a plan in which such person has an interest . . .." Any press release by PBGC is not an action "with respect to a plan" under § 1303(f). Moreover, FBOP as not alleged any "adverse affect" resulting from these allegedly false statements. That lack of injury likewise robs this Court of jurisdiction. *See Illinois v. Chicago*, 137 F.3d at 477 (injury is an indispensible element of a case or controversy).

[57] FBOP Complaint at pg. 11.

[58] 29 C.F.R. § 4003.1(b)(9).

PBGC has made no determination of liability in this case. It revoked its original assessment of liability, and the demand for payment, pending resolution of the audit of FBOP's tax returns, a process which FBOP alleges could take a year or more.[59]

FBOP alleges jurisdiction under § 1303(f), which allows certain persons "adversely affected by any action of the corporation [PBGC]" to bring suit. Because there is no agency action,[60] this court lacks jurisdiction to consider the case under § 1303(f).

2. In the alternative, Count II should be dismissed because FBOP's claims are not ripe.

Additionally, FBOP's claims are not ripe. As stated above, ripeness requires "a court to 'evaluate' both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[61] To establish fitness for judicial decision, a plaintiff must present an issue that is ready for adjudication.[62] PBGC withdrew its demand for liability from FBOP on June 2, 2011 and thereafter has not calculated the Plan's UBL or issued any demand to FBOP. Moreover, the issue would be mooted should this Court find that the Plan should not be terminated. Thus, the amount of the Plan's UBL, if any, that may be due to PBGC in the future is not fit for judicial decision at this time.

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[59] *See* Agreed Motion to Stay Pending Resolution of Defendant FBOP Corporation's Agreed Motion to Reassign Related Case Pursuant to Local Rule 40.4, at ¶¶ 6-7.

[60] The Administrative Procedure Act ("APA") applies to this case by virtue of 5 U.S.C. § 704 (applies to agency action made reviewable by statute). Sections 701(b)(2) and 551 of the APA define action to include "assessment of damages, reimbursement, restitution, compensation" and the like. There is no assessment of liability in this case.

[61] *Peick v. PBGC*, 724 F.2d 1247, 1261 (7th Cir. 1983) (citations omitted).

[62] *See Nevada v. Dep't of Energy*, 457 F.3d 78, 84 (D.C. Cir. 2006) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

Moreover, the Setoff Notice has also been revoked. In the event that PBGC issues another notice of setoff, FBOP will have an administrative process available to raise any dispute it may have with PBGC's future determination of setoff.[63] FBOP must exhaust its remedies through that process prior to bringing suit.[64] Specifically, under 29 C.F.R. § 4903.11(c), the debtor may present evidence that the debt is not past due or legally enforceable, as well as evidence regarding the amount of the debt and terms of repayment. Under PBGC's regulations, PBGC will review the administrative record, and may provide opportunity for oral hearing.[65] By regulation, PBGC may not refer any debt to the Financial Management Service without first certifying that it has given FBOP at least 60 days to present evidence that the debt is not past due or legally enforceable and that *it has considered such evidence*.[66] Since PBGC has not issued another setoff notice, and FBOP has not exhausted the administrative review process available to dispute any such future setoff notice, a request for injunction regarding the Setoff Notice is not fit for judicial decision.

FBOP also cannot demonstrate hardship to itself if the Court withholds consideration of the claim.[67] PBGC has withdrawn both the Setoff Notice and demand for payment of liability contained in the Demand Letter. Furthermore, FBOP will not be prejudiced by waiting for the PBGC's Amended Complaint to be resolved: if this Court declines to issue a decree that the Plan is terminated, then FBOP will not owe any UBL unless and until the Plan is later terminated. If

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[63] 29 C.F.R. § 4903.11(c); 29 C.F.R. § 4903(c); *see also* 26 C.F.R. § 301.6402-6(c)(5).

[64] *See Glisson v. U.S. Forest Serv.*, 55 F.3d 1325 (7th 1995).

[65] 29 C.F.R. § 4903.11(c).

[66] 26 C.F.R. § 301.6402-4(c)(5).

[67] *Peick*, 724 F.2d at 1261.

PBGC does issue a setoff notice at a later date, then FBOP will have the administrative review process available, and, once that process is exhausted, can request relief from this Court. Neither of these remedies will be affected by the Court declining to adjudicate FBOP's claims now.

The claims in Count II are not fit for judicial decision because PBGC has not calculated the Plan's UBL, has withdrawn its demand for liability, and has withdrawn its notice to FBOP of its intent to set off any debt against FBOP's overpayment to the IRS. Furthermore, FBOP can show no hardship if this Court withholds consideration of the claims. Therefore, the claims are not ripe for this Court's adjudication and should be dismissed.

3. FBOP fails to state a claim upon which relief may be granted.

FBOP seeks a declaration that "PBGC is not owed any termination [UBL] because the Setoff Notice is erroneous and unfounded."[68] UBL is determined under 29 U.S.C. §§ 1362(a), 1301(a)(18) and the regulations under 29 C.F.R. § 4044; setoff is a collection remedy available to PBGC and has no bearing on the calculation or amount of the UBL. Moreover, FBOP does not allege that calculations in accordance with those sections would yield a zero UBL. Therefore, FBOP has failed to state a claim upon which relief can be granted.

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[68] FBOP Complaint at pg 11 (emphasis added).

CONCLUSION

For the foregoing reasons, PBGC respectfully requests:

1. The Motion to Dismiss be granted: and
2. Other relief as the Court deems just and proper.

Dated: June 9, 2011
Washington, D.C.

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