

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MUKTA PATEL, ASHOK PAREKAH,
JITU PATEL, and ANDREA and PHIL
BOSWELL, on Behalf of Themselves
And All Others Similarly Situated,

Plaintiffs,

v.

MUKESH C. PATEL, R.C. PATEL,
EDWARD J. BRISCOE, SCOTT DIX,
BRIJ M. KAPOOR, MUKUND R.
PATEL, NARENDA D. PATES,
DHIRU G. PATEL, and BALVANT
PATEL,

Defendants.

CIVIL ACTION FILE

NO. 1:09-CV-3684-CAP

**FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF
HAVEN TRUST BANK’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO INTERVENE, STAY PROCEEDINGS, AND EXTEND TIME
FOR FILING PLEADING IN INTERVENTION**

The Federal Deposit Insurance Corporation (“FDIC”) in its capacity as receiver of Haven Trust Bank (“FDIC-R”), submits this Memorandum in Support of its Motion to Intervene pursuant to Fed.R.Civ.P. 24(a)(2) or, alternatively, Fed.R.Civ.P. 24(b)(1)(B), to stay proceedings, and to extend the time for filing a pleading in intervention.

INTRODUCTION

The Plaintiffs' claims arise from allegations of mismanagement of an FDIC-insured banking institution, of which the FDIC-R is now receiver, and seek to recover losses in stock value that flow directly from that mismanagement. The Plaintiffs' claims are derivative in nature under Georgia law, and are now owned exclusively by the FDIC-R by operation of federal law. The FDIC-R seeks to intervene in this action to protect its interest in the derivative claims asserted by the Plaintiffs. Further, the FDIC-R is evaluating the failure of the institution at issue, but has not yet determined whether it will pursue any potential claims in litigation. Accordingly, the FDIC-R requests that the Court continue the stay of proceedings in this matter until such time as the FDIC-R determines how it intends to proceed with respect to any claims of mismanagement of the institution.

FACTS

During all relevant times, Haven Trust Bank (the "Bank"), headquartered in Duluth, Georgia, was a banking institution chartered under the laws of the State of Georgia, and its deposits were insured by the FDIC. All stock in the Bank was owned by a bank holding company known as Haven Trust Bancorp, Inc. (the "Holding Company").

In December of 2008, the Bank failed and was closed by the Georgia Department of Banking and Finance.¹ The FDIC was appointed as receiver for the Bank. Thereafter, the FDIC-R began taking steps to comply with its statutory obligations to oversee the affairs of the Bank and commenced an investigation into the Bank's failure. As part of this investigation, the FDIC-R continues to evaluate, among other things, the sufficiency of the Bank's internal policies and procedures, as well as the acts and/or omissions of the Bank's former officers and directors in connection with their management of the Bank's affairs. After completing its investigation, the FDIC-R will determine, among other things, whether claims should be brought against any individual or entity for injury or harm they may have caused to the Bank. Several of the Defendants in this case, as former officers and/or directors of the Bank, are potential targets of such claims.

On December 31, 2009, Plaintiffs Mukta Patel, Ashok Parekh, Jitu Patel, Andrea Boswell, and Phil Boswell, as shareholders of the Holding Company, filed the instant action for the benefit of themselves and a class of investors in the Holding Company. In essence, Plaintiffs allege that the Defendants, as officers and directors of the Bank, mismanaged the Bank's affairs in such a way as to

¹ As a result of the Bank's failure, the Holding Company filed for relief under Chapter 7 of the Bankruptcy Code. That case is pending before the United States Bankruptcy Court for the Northern District of Georgia as case number 09-64497.

render the Bank financially unsound, and then induced the Plaintiffs to purchase stock in the Holding Company through misrepresentations and omissions pertaining to true financial condition of the Bank.

Although dressed as a case of securities fraud and misrepresentation under federal and Georgia state law, the gravamen of the Plaintiffs' Amended Complaint alleges nothing more than losses flowing directly from injuries to the Bank itself as a result of negligent, reckless, or intentional mismanagement by the Bank's former officers and directors. Indeed, vast portions of the Amended Complaint focus upon the upstart, operation, and ultimate demise of the Bank. In particular, beginning on page 12 and continuing until page 26 of the Amended Complaint, Plaintiffs set forth allegations of reckless lending practices, lax internal controls and operating procedures, and repeated failures to address regulatory concerns. For instance, Plaintiffs list a number of loan transactions they contend failed to comply with internal policies and/or regulatory requirements. (Am. Complaint, ¶ 39). Similarly, Plaintiffs identify a number of allegedly improper loans made to various insiders and their related interests. (*Id.* ¶¶ 40-42). Plaintiffs further fault Defendants for utilizing so-called "brokered deposits" as a source of funding for the Bank during the alleged class period. (*Id.* ¶¶ 43-44). Moreover, Plaintiffs identify an expansive list of alleged regulatory violations and failures to follow regulatory recommendations arising from various aspects of the Bank's business

activities, including but not limited to its policies regarding loan-to-value ratios, its asset quality control and risk management practices, its appraisal practices, its treatment of financial obligations owed by directors, its directors' compensation practices, and its dividend payment and debt servicing practices with respect to the Holding Company. (*Id.* ¶¶ 45-50). As support for these contentions of mismanagement, Plaintiffs rely extensively, if not exclusively, upon a Material Loss Review Audit Report prepared by the FDIC's Office of Inspector General in August 2009. (*Id.*, Ex. 2).

Plaintiffs also contend that mismanagement by Defendants, as the officers and/or directors of the Bank, was the ultimate cause of the Bank's failure and the diminution of the value of Plaintiffs' stock in the Holding Company. For instance, early in the Amended Complaint, Plaintiffs assert that "[t]he Bank's excessively risky lending practices, together with its excessively high cost of funds obtained through brokered deposits, ultimately led to [the Holding Company's] failure." (*Id.* ¶ 3). Later, citing the results of the FDIC's Material Loss Review, Plaintiffs allege that "the Bank's failure was a direct consequence of Defendants' actions, in their capacity as officers and directors, and was not caused by the slowdown of the regional real estate economy." (*Id.* ¶ 38). Indeed, Plaintiffs further expounded on those allegations under a subsection of the Amended Complaint titled "The

Defendants' Responsibility for the Bank's and Haven Trust's Failure" by quoting a length from the FDIC's report. (*Id.* ¶ 58).

In sum, although Plaintiffs have attempted to frame their allegations of wrongdoing and damages in terms of securities fraud and misrepresentation, and have asserted in conclusory fashion throughout the Amended Complaint that the Holding Company's stock was artificially inflated, Plaintiffs' alleged losses clearly emanate from the fact that the Bank, as the sole asset of the Holding Company, became worthless upon the appointment of the FDIC as receiver for the Bank. (*Id.* ¶¶ 33, 37, 89). For the reasons discussed below, the claims asserted by Plaintiffs are derivative claims belonging to the Bank, or so-called "double derivative" claims asserted on behalf of the Holding Company. Either way, the claims asserted by the Plaintiff are now the property of the FDIC-R by operation of federal law. Thus, the FDIC-R should be permitted to intervene in this case to protect its interests and, if necessary, contest the Plaintiffs' standing to assert the claims at issue.

LAW AND ARGUMENT

A. The FDIC has the right to intervene under Fed.R.Civ.P. 24(a).

Under Fed.R.Civ.P. 24(a), which provides for intervention as a matter of right, a court must allow intervention if the party seeking to intervene establishes that: "(1) [its] application to intervene is timely; (2) [it] has an interest relating to

the property or transaction which is the subject of the action; (3) [it] is so situated that disposition of the action, as a practical matter, may impede or impair [its] ability to protect that interest; and (4) [its] interest is represented inadequately by the existing parties to the suit.” *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1999). Any doubt concerning the propriety of intervention should be resolved in favor of the moving party. *Federal Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

(i) The FDIC’s application for intervention is timely.

To determine whether a request for intervention is timely, courts must look at the following factors: (1) the moving party’s knowledge of its interest in the litigation and the length of time preceding its request for intervention; (2) if there is delay in seeking intervention, the prejudice to the existing parties because of the delay; (3) the potential prejudice to the moving party if intervention is denied; and (4) the existence of any unusual circumstances weighing either in favor of or against a finding of timeliness. *Id.*; *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365 (11th Cir. 1984). Significantly, there is no bright-line measurement of timeliness under Fed.R.Civ.P. 24. *See Walker*, 747 F.2d at 1366. Instead, as the Eleventh Circuit has explained, “[t]he requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.” *Chiles*,

865 F.2d at 1213 (finding a motion to be timely where filed seven months after initial complaint, three months after a motion to dismiss, and prior to commencement of any discovery).

This case is in its very early stages. The initial Complaint was filed on December 31, 2009. (Doc. 1). On March 18, 2010, the Court entered an Order instructing Plaintiffs to file a Consolidated Amended Complaint within 60 days, allowing Defendants 60 days to respond to that Amended Complaint, and allowing Plaintiffs 60 days to respond to any potential motion to dismiss the Amended Complaint. (Doc. 22). In addition, the Court stayed all pretrial procedures, including discovery, pending a ruling on any potential motion to dismiss. (*Id.*) Plaintiffs filed an Amended Complaint on May 17, 2010. (Doc. 23). Thereafter, on July 16, 2010, Defendants filed a motion to dismiss. (Doc. 27). Plaintiffs' response to that motion was filed September 14, 2010. (Doc. 32). The motion has not been ruled upon, and pretrial procedures are still subject to the Court's stay.

The FDIC-R timely seeks to intervene in this case. The FDIC-R did not learn of the case until on or about June 21, 2010, when its counsel, Robert E. Craddock, Jr., listened to a webinar CLE in which members of defense counsel's

firm participated as presenters and discussed this case as an example.² Upon learning of the lawsuit, the FDIC-R began evaluating intervention and this Motion timely followed. Furthermore, in light of the present posture of proceedings, there is no concern that intervention will prejudice any of the existing parties. However, if intervention is not allowed, the prejudice to the FDIC-R resulting from its inability to pursue its rights will be profound. Finally, there are no unusual circumstances militating against a finding of timeliness.

Accordingly, under Eleventh Circuit precedent, the FDIC-R's request for intervention is timely.

(ii) The FDIC has an interest in the property or transaction at issue in this case.

In order to have a recognizable interest in the subject of proceedings, a moving party “must be at least [a] real part[y] in interest in the transaction which is the subject of the proceeding.” *Chiles*, 865 F.2d at 1214 (citation omitted).

“The [moving party's] interest need not, however, be of a nature identical to that of the claims asserted in the main action.” *Id.* (citation omitted). Instead, the trial

² The FDIC-R, as a nonparty to this case, was not served with process in this case or otherwise notified of its existence by the Plaintiffs. Nor did any notification come from Defendants, despite the fact that the FDIC-R was actively investigating Defendants' conduct in connection with the Bank's failure and, through its counsel, was frequently in contact with Defendants' counsel.

court's focus “‘is a flexible one, which focuses on the particular facts and circumstances surrounding each [motion for intervention].’” *Id.* (citations omitted, brackets in original).

As an entity charged by federal law with the task of managing the affairs of failed banking institutions, the FDIC-R has a substantial and legally recognizable interest in discharging its statutory duties. *CEP Emery Tech Investors, LLC v. JPMorgan Chase Bank, N.A.*, 2010 WL 1460263, *4 (N.D. Cal. Apr. 12, 2010) (finding intervention appropriate where subject matter at issue concerned the effect of the FDIC's treatment of a lease agreement). As receiver for the Bank, one of the FDIC-R's duties is to marshal the Bank's assets for the benefit of the Bank's creditors. To that end, federal law provides that the FDIC-R, by operation of law, succeeds to “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution....” 12 U.S.C. § 1821(d)(2)(A)(i).

Among the assets transferred to the FDIC-R by operation of § 1821(d)(2)(A)(i) are any derivative claims belonging to the Bank. *Lubin v. Skow*, 2010 WL 2354141, *2 (11th Cir. Jun. 14, 2010); *see also, In re Sunrise Securities Litigation*, 916 F.2d 874, 889 (3rd Cir. 1990). “Under Georgia law, a direct claim is distinguishable from a derivative claim if the shareholder is ‘injured in a way

which is different from the other shareholders or independently of the corporation.” *Lubin*, 2010 WL 2354141 at *3. The question of whether a claim is derivative or direct is a legal determination not controlled by conclusory assertions in a complaint. *Lubin v. Skow*, 2009 WL 4641761 *5 (N.D. Ga. Nov. 30, 2009) (Story, J.), *affirmed*, *Lubin*, 2010 WL 2354141 at *3 (citing *Phoenix Airline Servs., Inc. v. Metro Airlines, Inc.*, 397 S.E.2d 699, 701, for the position that “[i]t is the nature of the wrong alleged and not the pleader’s designation or stated intention that controls the court’s decision.”); *In re Sunrise Securities Litigation*, 916 F.2d at 882 (“Whether a claim is individual or derivative is determined from the body of the complaint rather than from the label employed by the parties.”).

Despite the labels of fraud and misrepresentation stated in their Amended Complaint, Plaintiffs’ claims are derivative in nature and belong to the FDIC-R. In particular, Plaintiffs seek to recover for losses in value of their stock in the Holding Company, which they contend owned only one asset: the Bank. (Am. Comp. ¶ 33). As discussed above, losses of the Holding Company’s stock value flow directly from injury to Bank as a result of mismanagement by the Defendants. Under Georgia law, claims of mismanagement resulting in losses of stock value are derivative in nature. *Lubin*, 2010 WL 2354141 at *2. It makes no difference that Plaintiffs have dressed their allegations as fraud and misrepresentation.

Where claims are premised upon conduct that injured the insured institution, and where the alleged losses are incidental to and flow from that injury, the claim is properly considered derivative in nature. *In re Sunrise Securities Litigation*, 916 F.2d at 883-888 (concluding that depositor's RICO claim premised upon fraud in the inducement of deposits was derivative); *Crocker v. FDIC*, 826 F.2d 347, 353 (5th Cir. 1987) (concluding that RICO claims premised upon fraud and misrepresentation resulting in loss of stock value should have been dismissed because claims were derivative in nature). It likewise makes no difference that Plaintiffs assert their claims as shareholders of the Holding Company instead of the Bank. Any harm to the Holding Company's stock value stems directly from the alleged mismanagement of the Bank, and is inseparable from the harm suffered by the Bank. *See Lubin*, 2010 WL 2354141 at *4; *In re Southeastern Banking Corp.*, 827 F.Supp. 742, 746 (S.D. Fla. 1993) ("There is no meaningful distinction between injury suffered by the holding company and the derivative claims of mismanagement, especially where [the holding company's] solvency and success were 'crucially dependent' on the Bank, as alleged in the Complaint...."), *rev'd in part on other grounds*, 69 F.3d 1539 (11th Cir. 1995).

Because the claims asserted herein emanate from harm to the Bank, those claims are derivative in nature and belong exclusively to the FDIC-R. As the

owner of the claims asserted, the FDIC-R undoubtedly has a legally cognizable interest in the subject matter of this litigation.

(iii) Unless the FDIC-R is permitted to intervene, disposition of this case may as a practical matter impair or impede the FDIC's interests.

“The nature of the [moving party's] interest and the effect that the disposition of the lawsuit will have on [its] ability to protect that interest are closely related issues. ‘The second cannot be answered without reference to the first.’” *Chiles*, 865 F.2d at 1214 (citation omitted). Here, the FDIC-R claims ownership of the claims at issue in this case. Further, the FDIC-R is presently evaluating whether to assert claims against the Defendants based upon the same mismanagement forming the basis of the Plaintiffs' claims. Unless the FDIC-R is allowed to intervene in this case and oversee the direction of the litigation, the FDIC-R's ability to prosecute claims based upon the same or related facts in subsequent litigation may be jeopardized by the effect of any preclusive ruling in favor of the Defendants in this case. *See Chiles*, 865 F.2d at 1214 (“Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right.”).

Additionally, there is a limited source of assets from which a judgment against any of the Defendants may be satisfied. One potential source is an officers

and directors liability insurance policy underwritten by Travelers Insurance Company. Under that policy, the amount of coverage available to satisfy any liability is diminished by the costs associated with defending claims against the Defendants insured under the policy. As the owner of the claims asserted against the Defendants, the FDIC-R has an interest in preserving sources of potential recoveries on any claims it may assert. Unless the FDIC-R is allowed to intervene, Plaintiffs' litigation will diminish the amount of coverage under the insurance policy mentioned above and may also diminish other personal assets of the Defendants. As the pendency of this litigation threatens to interfere with the FDIC-R's interests, this factor weighs in favor of the FDIC-R's right to intervene.

(iv) The FDIC-R's interests are not adequately represented by the existing parties.

The burden of establishing inadequate representation “should be treated as minimal” and is satisfied if the moving party demonstrates that “representation of [its] interest ‘may be’ inadequate.” *Chiles*, 865 F.2d at 1214 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972)). Stated differently, a moving party should be allowed to intervene “unless it is clear that [the existing parties] will provide adequate representation.” *Id.* (quoting 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909, at 319 (2d ed. 1986)).

It is far from “clear” that the FDIC-R’s interests will be protected by the existing parties. The Defendants’ interests in this case include, among other things, defeating claims that they mismanaged the affairs of the Bank. However, Defendants are also subjects of an FDIC-R investigation involving mismanagement of the Bank and potential adverse parties in litigation that may be pursued by the FDIC-R. Accordingly, it cannot be said that Defendants will protect the FDIC-R’s interests. Nor will the Plaintiffs. The Plaintiffs seek to obtain monetary damages for their own benefit, and to do so to the detriment of the Bank’s other creditors. The FDIC-R seeks to establish that the claims asserted by Plaintiffs belong to the FDIC-R and to preserve possible sources of recovery for the benefit of the Bank’s creditors. Thus, the interests of the Plaintiffs and the FDIC-R are adverse. These facts are sufficient to meet the FDIC-R’s “minimal” burden of establishing that representation “may” be inadequate.

C. **In the alternative, permissive intervention is appropriate because the FDIC-R’s exclusive ownership of the Bank’s derivative claims depends upon questions of law and fact in common with the claims asserted by the Plaintiffs.**

Under Fed.R.Civ.P. 24(b), a trial court may, as a matter of discretion, allow intervention where a party establishes that: “(1) [its] application to intervene is timely; and (2) [its] claim or defense and the main action have a question of law or fact in common.” *Chiles*, 865 F.2d at 1213. Again, any doubt concerning the

propriety of intervention should be resolved in favor of the party seeking to intervene. *Falls Chase Special Taxing Dist.*, 983 F.2d at 216.

(i) The FDIC-R's application for intervention is timely.

For the reasons discussed in Section A(i) at pages 7-9 above, the FDIC's request for intervention is timely.

(ii) There are common questions of law and fact.

As discussed above, the allegations of Plaintiffs' Amended Complaint center upon allegations of mismanagement of the Bank's affairs. The FDIC-R contends that, by operation of law, it owns all claims arising from mismanagement of the Bank, and that Plaintiffs have no standing to pursue those claims.

Resolution of these issues will turn on the factual allegations of mismanagement and the legal theories alleged in Plaintiffs' Amended Complaint. Further, the FDIC-R is presently investigating whether it should pursue claims related to the very same conduct forming the basis of the Plaintiffs' claims. In the event such claims are asserted, they will involve common facts and legal theories.

Moreover, as discussed above, there is no danger that allowing intervention at this time will unduly delay proceedings or in any way prejudice the rights of the existing parties. No discovery or other pretrial proceedings have occurred in this case, except for the filing of a motion to dismiss. Further, this case is stayed pending further orders of the Court.

D. The Court should temporarily stay proceedings to allow the FDIC-R to complete its investigation of the Bank's failure and its evaluation of potential claims arising from that failure.

The FDIC-R is presently evaluating whether to pursue legal claims arising from the failure of the Bank and anticipates that a decision will be made in the near future. After ruling on the Defendants' pending Motion to Dismiss, and until such time as the FDIC-R's litigation decision is made, the FDIC-R requests that the Court continue its stay of these proceedings and extend the time period for the FDIC-R to file its pleading in intervention as required by Fed.R.Civ.P. 24(c).

It is beyond question that courts have broad discretion to control the progression of cases pending before them. For instance, under Fed.R.Civ. 6(b), a court may extend particular times in which acts must be done under the Federal Rules of Civil Procedure. Furthermore, a court's discretion extends to the determination of whether a case as a whole should be stayed. *Fitzer v. American Inst. of Baking, Inc.*, 2010 WL 1955974, *1 (S.D. Ga. May 13, 2010) (citing *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982)). In evaluating a request for a stay, courts should consider the advantages of the stay as well as the prejudice to each party if the stay is granted or denied. *Id.*

The advantages of a continuation of the present stay are apparent. If the FDIC-R determines to pursue litigation on behalf of the Bank, it likely will contest

the Plaintiffs' standing to assert the claims at issue in this case. Continuing the stay will ensure that no party will be forced to bear litigation expenses that may later prove to be unnecessary. Further, there will be no prejudice to any party if the requested stay is granted. There is no trial date set for this matter or any other deadlines that may be affected. On the contrary, not continuing the stay will result in prejudice to the FDIC-R by continuing to diminish potential sources of recovery. Accordingly, the interests of justice support a continuation of the stay in this case.

Moreover, extending the time for the FDIC-R to file a pleading in intervention as required by Fed.R.Civ.P. 24(c) is warranted. Until such time as the FDIC-R completes its investigation and evaluation of potential litigation, it is unprepared to further advance its position in this case.

CONCLUSION

In light of the foregoing, the FDIC-R requests that the Court enter an order (1) allowing the FDIC-R to intervene as a matter of right, or pursuant to the Court's discretion; and (2) continuing the present stay of proceedings in this matter and extending the FDIC-R's time for filing a pleading in intervention until such time as the FDIC-R completes its investigation of the Bank's failure and determines whether to pursue litigation of any derivative claims on behalf of the Bank.

CERTIFICATION PURSUANT TO L.R. 7.1D

Pursuant to LR 7.1D, this certifies that this document was prepared using the New Times Roman font in 14 point. These font and point selections are approved by LR5.1C.

Respectfully submitted,

THOMAS KENNEDY SAMPSON & TOMPKINS LLP

/s/ Jeffrey E. Tompkins

THOMAS G. SAMPSON

Georgia Bar No. 623600

JEFFREY E. TOMPKINS

Georgia Bar No. 714608

SHUKURA L. INGRAM

Georgia Bar No. 383498

3355 Main Street

Atlanta, GA 30337

Tel: (404) 688-4503

Fax: (404) 761-3406

and

Robert E. Craddock, Jr.

Tennessee Bar No. 5826

WYATT TARRANT & COMBS, LLP

1715 Aaron Brenner Drive, Suite 800

Memphis, TN 38120

(901) 537-1000

(901) 537-1010

Attorneys for the Federal Deposit Insurance Corporation,
as Receiver for Haven Trust Bank

