IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, v. SAINT-GOBAIN CORPORATION BENEFITS COMMITTEE, as Plan Administrator for the Saint-Gobain Containers, Inc. Retirement Income Plan, Defendant.	Civil Action No. 13-02069

OBJECTION OF THE
PENSION BENEFIT GUARANTY CORPORATION
TO THE MOTION TO INTERVENE
AS PARTY DEFENDANT
BY ARDAGH GROUP S.A.

Preliminary Statement

Plaintiff, Pension Benefit Guaranty Corporation ("PBGC"), opposes the Motion to Intervene as Party Defendant (the "Motion") by Ardagh Group S.A. ("Ardagh"). Ardagh is a prospective purchaser of Saint-Gobain Containers, Inc. ("Containers"). Containers sponsors the Saint-Gobain Containers Inc. Retirement Income Plan ("Pension Plan"). PBGC filed this action against the Pension Plan's administrator, the Saint-Gobain Containers Benefits Committee ("Benefits Committee"), to terminate Containers' Pension Plan under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). Given that this case is focused on the Pension Plan, Ardagh's status as a prospective purchaser of Containers gives Ardagh no cognizable legal interest that would entitle it to intervene in this action. In fact, even Ardagh's purchase of Containers is in doubt since the recent filing by the Federal Trade Commission ("FTC") of a complaint against Ardagh under the FTC Act, alleging that its agreement to purchase Containers violates section 5 of the FTC Act and that a consummated transaction would

violate section 7 of the Clayton Act.[1] Moreover, Ardagh and the Benefits Committee share a common interest – "neither wants the Pension Plan to be terminated," and the Benefits Committee can adequately represent that common interest.[2] Thus, Ardagh should not be allowed to intervene as of right under Rule 24(a)(2). Similarly, Ardagh has no claim, equitable or otherwise under 29 U.S.C. § 1303(f) and, therefore, no claim with a question of law or fact in common with this action, such that intervention is permissible under Rule 24(b). The Court should deny Ardagh's motion to intervene.

Statutory Background

PBGC is a wholly owned United States government corporation established under 29 U.S.C. §1302(a) to administer the pension plan termination insurance program created under Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (2006 and Supp. V 2011). When an underfunded pension plan terminates, PBGC ensures the timely and uninterrupted payment of statutorily guaranteed pension benefits to plan participants and their beneficiaries.[3] As part of its administration of Title IV, PBGC routinely monitors corporate transactions and other events that may pose a risk to pension plans and the termination insurance program.

Title IV of ERISA contains specific rules governing the termination of covered pension plans. PBGC is authorized by 29 U.S.C. § 1342 to commence proceedings to terminate a plan whenever PBGC determines, *inter alia*, that the possible long-run loss of PBGC with respect to

[1] The FTC filed its Complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(b), alleging that the Share Purchase Agreement violates Section 5 of the FTC Act, 15 U.S.C. § 45 and that, if consummated, the sale would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. *See* Complaint, *In the Matter of Ardagh Group S.A.*, Docket No. 9356 (F.T.C. June 28, 2013).

[2] Memorandum of Law of Ardagh Group S.A. in Support of its Motion to Intervene as a Party Defendant ("Moving Br.") at 8-9, Document 14.

[3] 29 U.S.C. §§ 1302(a)(2), 1321, 1322.

the plan may reasonably be expected to increase unreasonably if the plan is not terminated.[4] Under Title IV, PBGC is authorized "upon notice to the plan administrator, [to] apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to . . . avoid any unreasonable deterioration of the financial condition of the plan."[5] When PBGC and the plan administrator have not agreed on a date of termination, the district court establishes the date of termination.[6]

PBGC does not have statutory authority to prevent corporate transactions that it determines will put the termination insurance program at unreasonably increased risk. In the case of a transaction like the sale of Containers, involving the transfer of a pension plan to a group of commonly controlled trades or businesses that poses an unacceptable risk to the termination insurance program, PBGC engages the plan sponsor in negotiations to increase the funding of the pension plan or to provide guarantees or other security to protect the pension plan and the termination insurance program. But if these negotiations do not result in protections for a pension plan that address PBGC's concerns about increased risk, the agency's only statutory tool is to initiate termination of the pension plan being transferred.

PBGC's determination is a final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 551-706.[7] Thus, the determination is subject to judicial review based on the administrative record under the "arbitrary and capricious" standard. 5 U.S.C. §§ 704, 706. *See also City of Arlington, TX v. Federal Communications Commission*, 133 S.Ct.

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[4] 29 U.S.C. § 1342(a)(4).

[5] 29 U.S.C. § 1342(c).

[6] 29 U.S.C. § 1348(a)(4).

[7] *See* 5 U.S.C. §§ 551(a)(13), 701(b)(2), 704.

1863, 1874 (2013) (upholding *Chevron* deference for a federal agency's interpretation of statutory ambiguity that concerns the scope of the agency's statutory authority).

Factual and Procedural Background

On April 17, 2013, based on the prospective sale of Containers to Ardagh, PBGC determined under 29 U.S.C. § 1342(a)(4) that the possible long-run loss to PBGC is reasonably expected to increase unreasonably unless the Pension Plan is terminated. (Complaint ("Compl.") ¶¶ 8-10 & Exhibit 1, Document 1.) As a result of Ardagh's highly leveraged acquisition, the underfunded Pension Plan will be transferred from the investment-grade "controlled group" of Compagnie de Saint-Gobain, Containers' ultimate parent, to the controlled group of Ardagh Group S.A., a speculative grade Luxembourg-based glass and metal packaging company.[8] (Compl. ¶8.) Under PBGC's regulations, the Pension Plan is underfunded, on a termination basis, by about $525 million. (Compl. ¶ 7.)

On April 18, 2013, PBGC initiated this action by filing a complaint against the Benefits Committee, as administrator[9] of the Pension Plan. PBGC is asking the Court to enter a decree terminating the Pension Plan under 29 U.S.C. § 1342, to establish the Plan's termination date under 29 U.S.C. §1348(a)(4), and to appoint PBGC as statutory trustee under 29 U.S.C.

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[8] A "controlled group" within the meaning of ERISA is the plan sponsor and all trades or businesses under common control, as determined under the Treasury Regulations. 29 U.S.C. § 1301(a)(14).

[9] The term "administrator" means –

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;
(ii) if an administrator is not so designated, the plan sponsor; or
(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(a)(16).

§1342(c). (Compl. at 5.) On June 12, 2013, the Benefits Committee filed its Answer to Complaint for Pension Plan Termination ("Answer," Document 7). Ardagh now seeks to intervene as party defendant pursuant to Rule 24(a)(2) or, alternatively, Rule 24(b)(1)(B). (Moving Br. at 1.)

ARGUMENT

I. Ardagh should not be permitted to intervene as of right because it does not have a legally cognizable interest in this matter and, if it did, that interest is adequately represented by the Benefits Committee.

Fed. R. Civ. P. 24(a)(2) provides:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:
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> * * * *
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> (2) 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.

In this Circuit, a party may intervene as of right only if its application meets all four of the following criteria:

> (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; *and* (4) the interest is not adequately represented by an existing party in the litigation.

Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987) (emphasis added) (citations omitted). "Although these requirements are intertwined, each must be met to intervene as of right." *Id.* (citations omitted). Thus, Ardagh bears the burden of proof in establishing each requirement.[10] *Id.* PBGC does not dispute that Ardagh's application is timely. But Ardagh does not have a

[10] *United States v. Alcan Aluminum*, 25 F.3d 1174, 1181 n.9 (3d Cir. 1994).

legally cognizable interest in this matter. Even assuming *arguendo* that it did, the Benefits Committee adequately represents their shared interest.

A. Ardagh does not have a legally cognizable interest in PBGC's action against the Benefits Committee.

To justify intervention as of right, an applicant's interest must be "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1970). The Third Circuit has further specified that "to have an interest sufficient to intervene as of right, 'the interest must be "a legal interest as distinguished from the interests of a general and indefinite character."' *Harris*, 820 F.2d at 601 (*quoting United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (internal citations omitted)). "To intervene as of right as a party to the litigation … the applicant must do more than show that his or her interests may be affected in some incidental manner. Rather the applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." *Harris*, 820 F.2d at 601 (*citing United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir.1978)).[11]

In an action to terminate a pension plan under Title IV of ERISA, Congress provided that only PBGC and the pension plan's administrator were proper parties.[12] ERISA is a "comprehensive and reticulated statute," and it is unlikely that Congress meant to "authorize other remedies that it simply forgot to incorporate expressly." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252-54 (1993) (quoting *Nachman Corp. v. PBGC,* 446 U.S. 359, 361 (1980) and

[11] A private right of action may be necessary to establish a legally cognizable claim. *See Pennsylvania State Univ. v. U.S. Dep't of Health & Human Servs.*, 142 F.R.D. 274 (M.D. Pa. 1992) (HMO's potential economic interest in outcome of litigation was not a legally protectable interest because there was no private right of action under the Public Health Service Act); *Brody v. Spang*, 957 F.2d 1108, 1116, 1124 (3d Cir. 1992) (cognizable legal interest must be sufficient to justify intervention; remanding for determination).

[12] 29 U.S.C. § 1342(c).

Massachusetts Mut. Life ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)). Only PBGC may institute plan termination proceedings, when it determines that a pension plan should be terminated under 29 U.S.C. § 1342(a). And, under 29 U.S.C. § 1342(c), only PBGC has the right to seek a decree for plan termination. ERISA requires that PBGC notify the plan administrator of its administrative determinations, and, in the absence of an agreement to terminate the plan, notice of its application to a district court for an order effectuating the termination. *See* 29 U.S.C. § 1342(c).

Thus, while the Benefits Committee has a legally cognizable interest in this matter as the Pension Plan's administrator, Ardagh, as a prospective purchaser of Containers, does not. Unlike the party seeking to intervene in *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.* and the other cases Ardagah cites, Ardagh has no common interest in sharing the proceeds from an insurance fund with other insureds or protecting a stake in property.[13] And contrary to Ardagh's assumption that the Pension Plan is an asset of Containers to be acquired by purchasing Containers' stock (Moving Br. at 7), it is beyond dispute under ERISA that the Pension Plan's assets may "never inure to the benefit of any employer," and must be held in trust for the exclusive purpose of "providing benefits to participants . . . and defraying reasonable expenses of administering the plan."[14] A plan sponsor who treated a pension plan's assets as its own would be in gross violation of ERISA's anti-inurement and exclusive benefit provisions.[15]

Moreover, Ardagh has not demonstrated that PBGC's action to terminate the Pension

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[13] 72 F.3d 361, 369 (3d Cir. 1995); *Cf. Gregory v. Correction Connection, Inc.*, Civ. A. No. 88-7990, 1990 WL 178207 (E.D. Pa. Nov. 13, 1990) (intervenor's interest in deposited funds); *In re David M. Hunt Constr. Co.*, 3 B.R. 256 (Bankr. E.D. 1980) (interest in funds due under a construction contract).

[14] 29 U.S.C. § 1103(c)(1).

[15] *Id.*; *see also* 29 U.S.C. § 1104(a)(1)(A).

Plan necessarily affects Ardagh's rights under its Share Purchase Agreement ("SPA"). Despite its claims, Ardagh has not established that PBGC's termination of the Pension Plan results in default under the SPA or that Pension Plan termination would "eviscerate Ardagh's contractual right under the SPA to fully assume the Pension Plan." (Moving Br. at 7-8.) Accordingly, Ardagh has not shown that its interests under the SPA are affected in more than an "incidental manner" or that "there is a tangible threat to a legally cognizable interest."[16] Thus, Ardagh has not met its burden of proof in establishing a sufficient interest or that its interest may be impaired by PBGC's action.

B. Assuming a*rguendo* that Ardagh has a legally cognizable interest in this litigation, the Benefits Committee adequately represents any such interest; thus, Ardagh is not entitled to intervene as a matter of right.

> Representation will be considered inadequate on any of the following three grounds:
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> (1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit.

Brody v. Spang, 957 F.2d at 1123 (citing *Hoots v. Com. of Pa.*, 672 F.2d 1133, 1135 (3d Cir. 1982)). The party seeking intervention as of right has the burden of proving that one of those three grounds exists. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). The burden while "minimal" is satisfied only "if the applicant shows that representation of his interest 'may be' inadequate." *Id.* It has been noted that "a compelling showing should be required" where a party's interest is identical to that of one of the present parties. *Mountain Top Condo. Ass'n.*, 72 F.3d at 368-69 (citations omitted).

Where parties have similar interests, courts in this Circuit have found that their interests have not sufficiently diverged unless, and until, their ultimate goals in litigation were different.

[16] *Harris*, 820 F.2d at 601.

For example, in *Hoots v. Com. of Pa.*, the Third Circuit found that taxpayers and two school districts had the same interest where they all were seeking to effectuate a tax refund.[17] Similarly, in *Olden v. Hagerstown Cash Register*, the Third Circuit found that a personal injury plaintiff and an insurance company had the same interest in a trial because they both were seeking the largest recovery possible.[18] But the Third Circuit noted that their interests could diverge after a verdict, when damages could be allocated among different parties, and the insurance company could seek to intervene at that later date.[19]

Ardagh fails to meet its burden of proving that its interest diverges sufficiently from that of Benefits Committee. Assuming *arguendo* that Ardagh has a legally cognizable interest in this case, it shares the same interest with Benefits Committee -- "neither wants the Pension Plan to be terminated." (Moving Br. at 8-9.) Ardagh contends that its interest diverges from Benefits Committee's interests, because "Benefits Committee's single focus is on administering the Pension Plan," while Ardagh allegedly will suffer a financial loss if the SPA is terminated. (*Id*.) But, as noted above, Ardagh has not shown that termination of the Pension Plan results in termination of the SPA. Moreover, Ardagh fails to demonstrate any meaningful distinction between its goals and those of the Benefits Committee in this litigation.[20] Nor does Ardagh contend that there is collusion between Benefits Committee and PBGC or that Benefits Committee – and its experienced counsel – is not diligently defending the suit. (*Id.*) Thus, the Court should conclude that Benefits Committee adequately represents any interest Ardagh may

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[17] 672 F.2d 1133, 1135 (3d Cir. 1982).

[18] 619 F.2d 271, 275 (3d Cir. 1980).

[19] *Id.*

[20] *See, e.g.*, Benefits Committee's Answer (Document 7).

have in this litigation. In the event that their interests diverge in the future, the Court could permit intervention at that time.

Accordingly, because Ardagh has failed to carry its burden of proof on three of the four requirements, this Court should deny Ardagh's motion for mandatory intervention.

II. Because Ardagh cannot assert a claim under 29 U.S.C. § 1303(f), permissive intervention is inappropriate.

"The requirements for permissive intervention are: (1) an independent basis of subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 338-9 (E.D. Pa. 2004). Ardagh can neither establish an independent basis of subject matter jurisdiction under 29 U.S.C. § 1303(f) nor justify an exception.

The statute on which Ardagh relies as an independent basis of subject matter jurisdiction authorizes suit by "a fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary . . . *or an employee organization representing such a participant or beneficiary*." 29 U.S.C. § 1303(f) (emphasis added). But Ardagh is not any of those persons. Consequently, Ardagh's reliance on *Pension Benefit Guaranty Corp. v. Slater Steels Corp.*, involving a union's intervention, is inapposite.[21]

Ardagh argues that this Court does not need an independent basis of subject matter jurisdiction because courts have recognized a limited exception to the subject matter jurisdiction requirement when a party seeks intervention for the limited purpose of modifying a protective order. (Moving Br. at 10.) But the limited exception exists "because such intervenors do not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to

[21] 220 F.R.D. 339 (N.D. Ind. 2004).

exercise a power that it already has, namely the power to modify a previously entered confidentiality order." *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d at 338-39 (citations omitted). Ardagh supplies no such basis for the Court's exercise of power in this case. Without citing any supporting precedent, Ardagh also argues that the limited exception is much broader and applies whenever an applicant is not asking the Court to exercise jurisdiction over an additional claim. (Moving Br. at 10.) Courts have not, however, expanded the limited exception in the manner Ardagh asserts. Accordingly, Ardagh has not satisfied the requirements for permissive intervention under Rule 24(b).[22]

Conclusion

Ardagh has not met its burden of proof on three required elements of mandatory intervention under Rule 24(a)(2). It has not demonstrated that is has a legally cognizable interest in PBGC's action under 29 U.S.C. § 1342(c) or that the Benefits Committee, as the Pension Plan's administrator, cannot fully represent Ardagh's interest in opposing Pension Plan termination. Thus, intervention as of right is not appropriate. Similarly, Ardagh has no identifiable claim giving rise to a common question of law or fact, and permissive intervention is

[22] The Court is well within its discretion to decide that Ardagh's participation would be superfluous and burdensome to the existing litigants, and to deny Ardagh's application for permissive intervention. *See Hoots v. Com. of Pa.*, 672 F.2d at 1136 (noting where "the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous"). As discussed above, Ardagh and the Benefits Committee share the same interest in opposing the termination of the Pension Plan. The Court should find that Ardagh is not entitled to intervene under Rule 24(b).

not appropriate. Accordingly, the Motion should be denied.

Dated: Washington, D.C.
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Respectfully submitted,

s/ Erika E. Barnes

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