

# In the United States Court of Federal Claims

No. 95-524C  
(Filed May 12, 2005)

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HOMER J. HOLLAND, )  
HOWARD R. ROSS, )  
FIRST BANKS, INC., AND )  
FIRST BANK MO, )  
 )  
Plaintiffs, )  
v. )  
 )  
THE UNITED STATES, )  
 )  
Defendant. )  

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## **OPINION AND ORDER**

GEORGE W. MILLER, Judge.

This matter is before the Court on the Joint Motion of Plaintiffs Holland, Ross and First Banks, Inc. and Third Party First Bank MO to Join First Bank MO as a Plaintiff and For Leave to File The Third Amended Complaint. Defendant filed an Opposition to the Joint Motion. The movants filed a Reply, and by leave of Court, defendant filed a Surreply. Oral argument was deemed unnecessary. For the reasons set forth below, the Joint Motion of Plaintiffs Holland, Ross and First Banks, Inc. and Third Party First Bank MO to Join First Bank MO as a Plaintiff and For Leave to File The Third Amended Complaint is GRANTED.

## ***BACKGROUND***

On October 5, 2004, the Court issued an Opinion and Order in which First Banks, Inc. (“First Banks”) was granted leave to join this action as a plaintiff and plaintiffs Holland, Ross, and First Banks were granted leave to file the second amended complaint. *Holland v. United States*, 62 Fed. Cl. 395 (2004). After First Banks filed a motion for summary judgment on liability, defendant filed a motion for continuance pursuant to United States Court of Federal Claims Rule (“RCFC”) 56(f), asserting that it needed discovery in order to oppose the motion of First Banks because defendant had recently obtained information that First Bank MO, a

subsidiary of First Banks, appeared to be the successor-in-interest to River Valley<sup>1</sup>, and thus the real party in interest to the contract claims of the thrift originally asserted by Messrs. Holland and Ross. After some investigation, plaintiffs established that First Bank MO is in fact the direct successor to River Valley and the real party in interest with respect to the claims in issue. On April 8, 2005, plaintiffs and First Bank MO filed a joint motion to join First Bank MO as a plaintiff and for leave to file the third amended complaint. A copy of the third amended complaint was attached to the joint motion as Exhibit 1.<sup>2</sup>

## ***DISCUSSION***

### **I. First Bank MO May be Joined as a Plaintiff Pursuant to RCFC 17(a)**

As the Federal Circuit has explained, RCFC 17(a) “sets forth the broad and general principle that actions should be brought in the name of the real party in interest and that courts should be lenient in permitting ratification, joinder, or substitution of that party.” *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999). “[T]he purpose of RCFC 17(a) is to enable a defendant to present defenses he has against the real party in interest, to protect defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect.” *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973); *see also* Fed. R. Civ. P. 17 Advisory Committee Notes (Rule 17 serves primarily “to protect the Defendant against a subsequent action by the party actually entitled to recover.”).

The court has articulated three factors to consider when determining whether to allow joinder of a real party in interest: 1) whether the defendant will be prejudiced, 2) whether the factual allegations of the complaint will change, and 3) whether the defendant is aware of the relevant parties. *DePonte Invs., Inc. v. United States*, 60 Fed. Cl. 9 (2004); *First Annapolis Bancorp*, 54 Fed. Cl. at 542 (citing *Scheufler v. Gen. Host Corp.*, 126 F.3d 1261, 1270 (10th Cir. 1997)). The Court will address each of these factors.

Defendant asserts that it will be prejudiced by the joinder of First Bank MO because it has not received discovery to which it is entitled, and which it needs in order to respond to River Valley’s damages claims that would be advanced by First Bank MO. The Court does not believe that the degree to which the parties have responded to proper discovery requests is a matter that

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<sup>1</sup> The court’s July 30, 2003 opinion describes two River Valley entities: River Valley Savings Bank, F.S.B. of Peoria, Illinois, and River Valley Savings Bank, a state-chartered savings bank of Rock Falls, Illinois. *See Holland*, 57 Fed. Cl. 540. These two entities merged in 1991 to create a third River Valley entity. The parties, however, have used the term “River Valley” to refer collectively to all three River Valley entities. Accordingly, the Court will do likewise.

<sup>2</sup> The third amended complaint appears to substitute First Bank MO for First Banks.

should be decided in the context of the present motion to join. To the extent defendant contends that plaintiffs have not sufficiently complied with defendant's discovery requests, defendant should attempt to resolve that matter with plaintiffs and if it is unable to do so, defendant may file an appropriate motion.

Defendant next asserts prejudice as a result of plaintiffs' revised damages claims. The revision of plaintiffs' damages claims was authorized by the Court in its Order of January 14, 2005 as a result of the Court's having held previously that the claims for damages sought to be advanced by Messrs. Holland and Ross were in fact claims belonging to River Valley. The movants have represented that joining First Bank MO will not result in any further revision to plaintiffs' damages claims. The Court will hold the movants to that representation. In sum, the prejudice that defendant asserts is unrelated to the joint motion to join First Bank MO as a plaintiff. While the issues raised by defendant may have to be addressed, they do not form a proper basis for denying the motion to join First Bank MO.

The next factor to be considered is whether the factual allegations of the complaint will change. Certainly, both parties have recognized that there will be no change regarding liability, because the alleged breach involved River Valley, regardless of the identity of the successor-in-interest. As for damages, plaintiffs and First Bank MO have represented that the material factual allegations will not change with the joinder of First Bank MO. As stated above, the Court expects that plaintiffs and First Bank MO will honor that representation.

Additionally, defendant was aware of the existence of First Bank MO. While it was unknown that this second-tier subsidiary of First Banks was the direct successor-in-interest to River Valley, the identity of First Banks and its corporate structure has been known throughout this litigation.

Lastly, RCFC 17(a) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Defendant contends that the movants have not met the "reasonable time" standard because the Government first asserted that the successor-in-interest to River Valley was the real party in interest in this case in December 2003. Thus, argues defendant, the joint motion to join First Bank MO in April 2005, comes too late. The Court is not persuaded by this argument. When defendant sought to dismiss Messrs. Holland and Ross in December 2003, *both* parties believed that First Banks was the real party in interest to the claims of River Valley. Unfortunately, the parties did not discover their mistake until January 2005. It was at that time that defendant first objected to First Banks as a plaintiff on real-party-in-interest grounds and suggested that First Bank MO was the proper plaintiff. Plaintiffs moved to join First Bank MO within a "reasonable time" after that objection.

Plaintiffs and third party First Bank MO have met the requirements for joinder of a real party in interest pursuant to RCFC 17(a). Furthermore, the joinder of First Bank MO relates back

to the date of the original complaint. RCFC 17(a) (“such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”); *see also Castle v. United States*, 48 Fed. Cl. 187, 194 (2000), *aff’d in part, rev’d in part* by 301 F.3d 1328 (Fed. Cir. 2002) (“where [a] suit is commenced by one who arguably has an interest in the enforcement of a claim and the real party in interest is later brought into the litigation, the joinder or substitution of the real party in interest relates back for limitations purposes to the date of the original pleading.”).

## **II. First Bank MO Can Properly Be Joined as a Plaintiff Pursuant to RCFC 15, and First Bank MO’s Claims Relate Back for the Purposes of the Statute of Limitations**

### **A. Plaintiffs May Amend Their Complaint Pursuant to RCFC 15(a)**

RCFC 15(a) provides, in pertinent part: “A party may amend the party’s pleadings . . . by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” The decision as to whether to grant leave to amend a complaint under Rule 15 falls within the sound discretion of the trial court. *Olech v. Vill. of Willowbrook*, 138 F. Supp. 2d 1036 (N.D. Ill. 2000) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)). This liberal policy of granting amendments is based in part on the belief that decisions on the merits should be made whenever possible, absent countervailing considerations. *Id.* (citing *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986)). The Supreme Court has identified the kinds of circumstances that can warrant denial of leave to amend: “undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, futility of amendment, etc.” *Forman v. Davis*, 371 U.S. at 182. Because courts should permit amendments when “justice so requires,” RCFC 15(a), and the circumstances in this case do not warrant denial of leave to amend, *see id.* at 182, plaintiffs’ motion for leave to amend to join First Bank MO pursuant to RCFC 15(a) is granted.

### **B. Plaintiffs and First Bank MO Meet the RCFC 15(c)(2) Test for Relation Back**

It is undisputed that a claim by First Bank MO would run afoul of the six-year statute of limitations. *See* 28 U.S.C. § 2501 (“Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues”). Thus, it is not sufficient for First Bank MO and plaintiffs to simply amend their complaint; First Bank MO’s claims must be determined to “relate back” to Holland and Ross’ original complaint. RCFC 15(c) governs “relation back.” An amendment of a pleading relates back to the date of the original pleading when:

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

- (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

RCFC 15(c).

Plaintiffs are seeking in this motion to add a plaintiff. Thus, the Court will apply RCFC 15(c)(2), rather than RCFC 15(c)(3), which governs amendments to add defendants. *See Baron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1369 (2004) (in deciding whether amendment adding a plaintiff could relate back, used “conduct, transaction, or occurrence” test found in RCFC 15(c)(2)); *Creppel v. United States*, 33 Fed. Cl. 590 (1995); *Baldwin Park Cmty. Hosp. v. United States*, 231 Ct. Cl. 1011 (1982) (relying on then Rule 39(c), relation back based on same “conduct, transaction, or occurrence”). Because addition of new plaintiffs is analyzed under RCFC 15(c)(2), the mistake requirement of RCFC 15(c)(3) does not apply. When determining whether an amendment should relate back, the “fundamental question is not why the plaintiff failed to act sooner, but rather whether the late addition to the case comes without fair notice to the defendant and would cause undue prejudice.” *Olech*, 138 F. Supp. 2d at 1047. Additionally, “[t]he reasons for the delay in adding the plaintiff are immaterial to that inquiry.” *Id.* at 1044.

The test for relation back has been developed to include four factors: 1) whether the new plaintiff’s claim arose out of the “same conduct, transaction, or occurrence” as the original complaint; 2) whether the new plaintiff shares an “identity of interest” with the original plaintiff; 3) whether the defendant had “fair notice” of the new plaintiff’s claim; and 4) whether the addition of the new plaintiff causes the defendant prejudice. *Baldwin Park*, 231 Ct. Cl. 1011 (1982); *Snoqualmie Tribe of Indians v. United States*, 178 Ct. Cl. 570, 586-87, 372 F.2d 951, 960 (1967); *Olech*, 138 F. Supp. 2d at 1041. These four factors closely parallel the three-prong test for joinder of the real party in interest pursuant to RCFC 17(a), *see supra* at Part I, and thus, several of these factors have been discussed above.

1. The New Plaintiff’s Claims Arose Out of the “Same Conduct, Transaction, or Occurrence” Set Forth in the Original Complaint

First Bank MO’s claims, as set forth in the proposed third amended complaint, clearly arose out of the same conduct, transaction, or occurrence set forth by Messrs. Holland and Ross in their original complaint, and First Banks in the second amended complaint. The core dispute is the same. Like Messrs. Holland and Ross and First Banks, First Bank MO’s claim is based on the Government’s breach, because of FIRREA, of contracts between the Government and River Valley regarding the Republic Savings and Galva, Home, and Mutual transactions. *See* Pls. Mot. at Ex. 1.

2. The New Plaintiff Shares an “Identity of Interest” With the Original Plaintiff

Under this prong of the test, the salient question is whether “the new plaintiff is sufficiently related so that the new plaintiff was in effect ‘involved in the proceedings unofficially from an early stage.’” *Staren v. Am. Nat’l Bank & Trust Co.*, 529 F.2d 1257 (7th Cir. 1976); *Creppel v. United States*, 33 Fed. Cl. 590 (1995); *Nielsen v. Prof’l Fin. Mgmt.*, 682 F. Supp 429 (D. Minn. 1987). First Bank MO is sufficiently related to the original plaintiffs. Messrs. Holland and Ross essentially created, controlled, and owned River Valley. *See generally Holland*, 57 Fed. Cl. 540; *see also* Joint Stipulation of Facts (Dec. 31, 2003) ¶¶ 167, 329. First Banks purchased River Valley from them, and then, as a result of a number of intermediate transactions, the claims of River Valley were transferred to First Banks’ subsidiary, First Bank MO. Additionally, First Banks has been involved in the proceedings from an early stage.

3. The Government Had “Fair Notice” of the New Plaintiff’s Claims

This element requires only that defendant had “fair notice that a legal claim existed.” *Creppel*, 33 Fed. Cl. at 597. The Government has known for years that legal claims existed with respect to River Valley. The Republic Savings and Galva, Home, and Mutual contracts, to which the court found that Messrs. Holland and Ross were in privity, *see Holland*, 57 Fed. Cl. 540, were contracts between the Government and River Valley. Messrs. Holland and Ross alleged, and the court held, that the Government breached those contracts. *Id.* Clearly then, the Government knew that the successor-in-interest to River Valley had breach of contract claims against it.

4. The Addition of First Bank MO Does Not Cause Prejudice to the Government

Prejudice exists if “relevant evidence has been lost or compromised due to the passage of time, or where the proposed amendment does not afford defendant adequate time for discovery.” *Olech*, 138 F. Supp. 2d at 1046. As discussed *supra* at Part I, the prejudice asserted by the Government is independent of the motion to file the third amended complaint and can be dealt with separately.

Plaintiffs and First Bank MO have met the requirements for amending the complaint pursuant to RCFC 15(a) to add a new plaintiff. Additionally, First Bank MO’s claims will relate back to the date of Holland and Ross’ original complaint because the proposed amendments fulfill the requirements of RCFC 15(c).

***CONCLUSION***

The Joint Motion of Plaintiffs Holland, Ross and First Banks, Inc. and Third Party First Bank MO to Join First Bank MO as a Plaintiff and For Leave to File a Third Amended Complaint is GRANTED. Plaintiffs and First Bank MO shall file and serve the third amended complaint by Friday, May 20, 2005.

IT IS SO ORDERED.

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GEORGE W. MILLER  
Judge