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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The United States of America, Plaintiff, vs. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her official capacity, Defendants.	No. 2:10-cv-01413-PHX-SRB **COCHISE COUNTY SHERIFF LARRY A. DEVER'S MOTION TO INTERVENE** (Assigned to the Honorable Susan R. Bolton)

Larry A. Dever, Cochise County Sheriff, in his official capacity ("Sheriff Dever"), by and through counsel undersigned, hereby respectfully requests that this Court enter an order permitting him to intervene in this case. Permissive intervention is appropriate as Sheriff Dever and his deputies must administer the legislative act that is the subject matter of this action. This Motion is made and based upon Rule 24(b)(2)(A) of the Federal Rules of Civil Procedure the Memorandum of Points and Authorities that follows, any oral argument offered at any hearing conducted on this issue and this Court's entire file maintained on this issue, judicial notice of which is requested pursuant to Rule 201 of the

Federal Rules of Evidence.

RESPECTFULLY SUBMITTED this 28th day of July, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

Introduction and Background

At issue in this matter is whether SB 1070, as amended by HB 2162 (the "Act") is constitutional and should be enjoined. The United States has alleged that the Act violates the Supremacy and Commerce Clauses of the United States Constitution.

Sheriff Dever is the Sheriff of Cochise County, a southern Arizona border county. Sheriff Dever is the Chairman of the National Sheriff's Association Border Issues Subcommittee, a member of the Arizona Border Sheriff's Alliance and the Border States Sheriff's Association. He is serving his fourth elected term as Sheriff of Cochise County and has taken a vocal leadership role in resolving border issues both locally and state-wide.

Cochise County's entire southern border (nearly 84 miles) is shared with Mexico and the County has two active ports of entry in Douglas and Naco. Since 1996, when elected as Sheriff to his first term, Sheriff Dever has battled illegal immigration and related issues, including human and drug smuggling, as the County is an extremely popular smuggling corridor for travel to Tucson and Phoenix.

1 It is the Sherriff's job to protect the people of Cochise County, notwithstanding
2 whether they are legally present. No party is as familiar with (1) the problems associated
3 with illegal immigration; (2) existing law enforcement procedures related to illegal
4 immigration; and (3) law enforcement procedures that will be followed if the Act is
5 implemented and enforced, as Sheriff Dever.
6
7 Sheriff Dever is a Defendant in a related matter (*Friendly House et al. v. Whiting et*
8 *al.,* No. 2:2010-cv-01061) and possesses the statutory duty to enforce and administer the
9 Act when it becomes effective. *See* A.R.S. § 11-441(A)(2). He desires to intervene in this
10 case to advocate in favor the Act's constitutionality and value and to ensure its lawful and
11 proper administration.
12
13 Intervention is proper in this case because the Sheriff is uniquely qualified to
14 represent the interests of one, who as County Sherriff, must administer and enforce the very
15 Act that is the focus of this litigation.
16 **<u>Law and Argument</u>**
17
18 **I. PERMISSIVE INTERVENTION IS WARRANTED UNDER RULE**
19 **24(b)(2)(A) AS SHERIFF DEVER MUST ADMINISTER THE ACT, WHICH IS THE SUBJECT MATTER OF PLAINTIFF'S CLAIMS.**
20 Sheriff Dever should be permitted to intervene in this case as a Defendant under
21 Rule 24(b)(2)(A). This rule authorizes permissive intervention of a government officer or
22 agency when a party's claim or defense is based on "a statute or executive order
23 administered by the officer or agency." Fed. R. Civ. P. 24(b)(2)(A).
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In exercising their discretion under Rule 24, district courts should apply this rule liberally "in allowing a government agency to intervene in cases involving a statute it is required to enforce; indeed, a hospitable attitude is appropriate." *Meyer v. MacMillan Publishing Co., Inc.*, 85 F.R.D. 149, 150 (S.D.N.Y. 1980) (citing *Blowers v. Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2nd Cir. 1975)).

Moreover, this specific subsection of Rule 24 was added in 1946 to assure government access free from overly-limited interpretations of the intervention provision. *See* Fed. R. Civ. P. 24 advisory committee's notes; *see also* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 Ariz. St. L. J. 853, 968-69 (1989).

Although public officials or agencies "may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation." *In re First Databank Antitrust Litigation,* 205 F.R.D. 408, 414 (D.D.C. 2002) (citing *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967)). One advantage of government intervention is heightened protection of the public interest in litigation. *See New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 690 F.2d 1203, 1210 (5th Cir. 1982).

Here, Sheriff Dever possesses a statutory duty to enforce all laws of the State of Arizona. *See* A.R.S. § 11-441(A)(2) (the county sheriff shall "arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offense"). Accordingly, Sheriff Dever is charged with the crucial and considerable duty of enforcing the Act and ensuring that it is applied justly and within constitutional directives. The enforcement and administration of the Act is not purely a 'private

1 controversy' but one with which Sheriff Dever is 'officially concerned.' *In re First*
2 *Databank*, 205 F.R.D. at 414.
3 Furthermore, Sheriff Dever has a unique and specific perspective to present to this
4 Court as a border sheriff, with nearly 84 miles of shared border and two active ports of
5 entry. During his 14-year tenure as Sheriff, Sheriff Dever has had significant experience in
6 border control and has been called upon to testify before Congress regarding the specific
7 issues his county faces in the battle against illegal immigration. Sheriff Dever can provide
8 knowledge and information to this Court that would otherwise be unavailable to it to
9 demonstrate the necessity of the Act as critical tool for securing the border and the health,
10 safety, and welfare of all persons present in his county and our State.
11
12 **II. SHERIFF DEVER'S MOTION IS TIMELY.**
13 Sheriff Dever's Motion is timely. When considering the timeliness of a motion to
14 intervene, courts consider the following three factors: (1) the stage of the proceeding at
15 which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason
16 for and the length of the delay. *U.S. ex rel. McGough v. Covington Technologies Co.*, 967
17 F.2d 1391, 1394 (9th Cir. 1992) (citing *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)).
18
19 A. Sheriff Dever is seeking permission to intervene at a very early stage
20 in the proceedings.
21 The first factor weighs heavily in favor of this Court authorizing Sheriff Dever's
22 intervention as he is intervening at a very early stage of this matter. The United States'
23 Complaint was filed only three weeks ago, on July 6, 2010 and Defendants have not
24 answered. This Court has not yet made any substantive rulings in this matter, including a
25

1 decision on Plaintiff's motion for a preliminary injunction. *See Northwest Forest Res.*
2 *Council v. Glickman,* 82 F.3d 825, 837 (9th Cir. 1996). Sheriff Dever's intervention at this
3 time will also permit him to file a timely answer.

4 B. No party will be prejudiced by Sheriff Dever's intervention.

5 Sheriff Dever's intervention will not prejudice any of the existing parties. No
6 prejudice results from intervention when the Court has neither made any substantive rulings
7 nor will need to re-open or re-litigate any of the issues. *Id.; see also CEP Emery Tech*
8 *Investors, LLC v. JPMorgan Chase Bank, N.A.*, No. 09-04409-SBA, slip op. at 3 (N.D. Cal.
9 Apr. 12, 2010) (attached). Sheriff's Dever's intervention will not prejudice any of the
10 parties as this Court will not need to re-open or re-litigate any of the issues as he is seeking
11 to participate in the underlying substantive merits.

12 C. The instant motion is not delayed.

13 Finally, the third factor also justifies Sheriff Dever's intervention as he has not
14 unnecessarily delayed in filing his request to intervene. Sheriff Dever will defend against
15 the DOJ's claims and file a timely answer.

16 **III. CONCLUSION.**

17 Consequently Sheriff Dever respectfully requests that this Court grant him leave to
18 intervene under Rule 24(b)(2)(A). His motion is timely and his intervention will not
19 prejudice any parties herein.

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DATED this 28th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The United States of America, Plaintiff, vs. The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her official capacity, Defendants.	No. 2:10-cv-01413-PHX-SRB **EXHIBIT INDEX IN SUPPORT OF COCHISE COUNTY SHERIFF LARRY A. DEVER'S MOTION TO INTERVENE** (Assigned to the Honorable Susan R. Bolton)

EXHIBIT A - *CEP Emery Tech Investors, LLC v. JPMorgan Chase Bank, N.A.*, No. 09-04409-SBA, slip op. at 3 (N.D. Cal. Apr. 12, 2010)

EXHIBIT A

Westlaw.

Slip Copy, 2010 WL 1460263 (N.D.Cal.)
(Cite as: 2010 WL 1460263 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
CEP EMERY TECH INVESTORS, LLC, Plaintiff,
v.
JPMORGAN CHASE BANK, N.A., Defendants.
Jpmorgan Chase Bank, N.A., Cross-Complainant,
v.
Federal Deposit Insurance Corporation as Receiver for Washington Mutual Bank Cross-Defendant.
No. 09-04409 SBA.

April 12, 2010.

West KeySummary
Federal Civil Procedure 170A ⚷320

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak320 k. Time for Intervention. Most Cited Cases

Federal Civil Procedure 170A ⚷343

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak343 k. Receivers. Most Cited Cases

Federal Deposit Insurance Corporation (FDIC), as receiver for insolvent bank, was entitled to intervention in commercial lessee's breach of contract and warranty action against assuming bank. The FDIC's motion was timely because the case was at an early stage and had not had any significant activity. The FDIC also had a protectable interest in the subject matter of the litigation and a substantial interest in discharging its statutory duty under Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). Moreover, the relief sought by lessee would adversely affect the FDIC's interests. Finally, the FDIC's interests would not be adequately represented by assuming bank, because assuming bank's interests might have been more narrow. Federal Deposit Insurance Act, § 2[11](e)(4), 12 U.S.C.A. § 1821(e)(4); Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

Renée Welze Livingston, Jason G. Gong, Livingston Law Firm, A Professional Corporation, Walnut Creek, CA, for Cross-Defendant Federal Deposit Insurance Corporation as Receiver for Washington Mutual Bank.

[PROPOSED] ORDER GRANTING FEDERAL DEPOSIT INSURANCE CORPORATION'S (AS RECEIVER FOR WASHINGTON MUTUAL BANK) MOTION TO INTERVENE

SAUNDRA BROWN ARMSTRONG, District Judge.

*1 This matter is before the Court on Cross-Defendant Federal Deposit Insurance Corporation's (as Receiver for Washington Mutual Bank) (hereinafter "FDIC" or "Applicant") Motion to Intervene (as a Defendant) Pursuant to Fed.R.Civ.P. Rule 24(a)(2) or in the Alternative, Fed.R.Civ.P. Rule 24(b)(2), Plaintiff's CEP Emery Tech Investors LLC's ("Emerytech") Opposition, Applicant's Reply, and JPMorgan Chase Bank, N.A.'s ("Chase") Statement of Non-Opposition. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS FDIC's Motion to Intervene. The Court, in its discretion, finds this matter suitable for resolution without oral argument. *See* Fed.R.Civ.P. 78(b).

I. BACKGROUND

The present dispute between Emerytech and Chase

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arises from a commercial lease originating between Emerytech and Washington Mutual Bank ("WaMu"). Emerytech seeks damages against Chase exceeding $4,100,000, including unspecified late charges and interest due under the WaMu lease and attorney's fees and costs on the theory that Chase assumed the lease when it purchased certain bank assets pursuant to a Purchase and Assumption Agreement (P & A Agreement) with the FDIC.

On or about August 26, 2002, Emerytech (the landlord) and WaMu (the tenant) entered into a five-year written lease agreement involving approximately 35,000 square feet of office space of the EmeryTech Building in Emeryville, California. The lease between Emerytech and WaMu commenced on October 1, 2002 and was to run through July 20, 2007. On or about February 26, 2007, Emerytech and WaMu executed an amendment to the original lease that extended the lease for an additional five years through July 20, 2012.

On September 25, 2008, the Office of Thrift Supervision, an office within the United States Department of the Treasury, declared that WaMu was insolvent, placed the failed institution into receivership, and appointed the FDIC as Receiver for WaMu. Upon accepting the appointment, the FDIC assumed the assets and liabilities of WaMu, which included the subject lease between WaMu and Emerytech. On the same day, the FDIC entered into a P & A Agreement with Chase that provided for the sale, transfer, and control of certain WaMu assets and liabilities to Chase as the "Assuming Bank." Emerytech was not a party to this agreement between the FDIC and Chase. It is the FDIC and Chase's position that pursuant to the P & A Agreement, Chase had a 90-day option to assume the WaMu lease, but declined to exercise this option leaving liability for the lease with the FDIC as the successor for WaMu.

On April 5, 2009, the FDIC notified Emerytech that it was disaffirming the lease pursuant to 12 U.S.C. Section 1821(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). If valid, disaffirmance of the subject lease would render it unenforceable against the FDIC. Pursuant to Section 1821(e)(4) of FIRREA, the disaffirmance would also limit the scope of potential damages against the FDIC to accrued rent up until either the later of (1) the date the notice of disaffirmance was mailed, or (2) the effective repudiation date. *See id.*

*2 On February 26, 2009, Emerytech filed an action against Chase in the Alameda County Superior Court asserting claims for breach of contract and warranty. On March 25, 2009, Emerytech filed a First Amended Complaint ("FAC") against Chase asserting breach of the underlying lease and seeking back rent and damages. (Docket 1, Ex. 3.) Among other things, the FAC asserts that Chase assumed the WaMu lease as part of a general assumption of WaMu's assets and liabilities pursuant to the P & A Agreement between the FDIC and Chase.

On August 19, 2009, Chase filed a third-party cross-complaint against the FDIC seeking declaratory relief and indemnification. (Docket 1, Ex. 5.) On September 18, 2009, the FDIC removed the state court action to this Court. (Notice of Removal, Docket 1.) On December 4, 2009, the FDIC filed the instant motion to intervene. The FDIC seeks to intervene as of right pursuant to FRCP 24(a)(2) or, alternatively, pursuant to FRCP 24(b)(2) in the main action as a defendant. (Docket 14.) On Feburary 8, 2010, Emerytech filed an opposition (Docket 29), and defendant Chase filed a statement of non-opposition (Docket 30). The FDIC filed its reply on Feburary 16, 2010. (Docket 31.)

II. LEGAL STANDARD

A. Intervention as of Right

Rule 24(a) (2) of the Federal Rules of Civil Procedure requires a district court to grant intervention if "(1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3)

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the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties." *Portland Audubon Society v. Hodel,* 866 F.2d 302, 308 (9th Cir.1989); *see also United States v. Oregon,* 913 F.2d 576, 587 (9th Cir.1990); *SEC v. Navin,* 166 F.R.D. 435, 439 (N.D.Cal.1995).

The Ninth Circuit has held that district courts are to interpret the requirements of Rule 24(a)(2) broadly in favor of intervention. *See Prete v. Bradbury,* 438 F.3d 949, 954 (9th Cir.2006); *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir.1998). To determine whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, *see Donnelly,* 159 F.3d at 409, and are required to accept as true the non-conclusory allegations made in support of intervention, *see Southwest Center for Biological Diversity v. Berg,* 268 F.3d 810, 819 (9th Cir.2001).

B. Permissive Intervention

Rule 24(b)(1) allows "anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." *See* Fed.R.Civ.P. 24(b)(1)(A) and (B). An applicant seeking to intervene under Rule 24(b)(1)(B) must also demonstrate that the motion is timely, that the applicant's claim or defense and the main action have questions of law or fact in common, and that the trial court has an independent basis for jurisdiction over the applicant's claims or defenses. *See Donnelly,* 159 F.3d at 412; *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 839 (9th Cir.1996). Because a district court has broad discretion to grant relief under Rule 24(b)(1)(B), a court may properly deny intervention even after an applicant satisfies the threshold requirements under the statute. *See Donnelly,* 159 F.3d at 412. In exercising its discretion, a district court must consider whether intervention "will unduly delay the main action or will unfairly prejudice the existing parties." *See id.; see also* Fed.R.Civ.P. 24(b)(3).

III. DISCUSSION

A. Intervention as of Right

*3 The Court finds that the FDIC is entitled to intervene as of right in this action because it has established that it satisfies the requirements of Rule 24(a)(2). *See Prete,* 438 F.3d at 954 (stating that applicant bears burden to establish elements under Rule 24).

1. The FDIC's Motion is Timely

To determine whether a motion to intervene is timely, courts consider the following three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *See United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1391, 1394-1396 (9th Cir.1992); *see also United States v. Oregon,* 745 F.2d 550, 552 (9th Cir.1984) (stating that courts are to be lenient when determining whether a motion to intervene as a matter of right is timely).

Although significant delay can weigh against intervention, courts have held that a "mere lapse of time alone is not determinative." *See Oregon,* 745 F.2d at 552. Thus, to be timely, an applicant need not seek to intervene immediately. *See Navin,* 166 F.R.D. at 439 (citing *NAACP v. New York,* 413 U.S. 345, 367, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973)). Instead, courts consider whether there have been actual proceedings of substance on the merits in the underlying action. *See Northwest Forest Resources Council v. Glickman,* 82 F.3d 825, 837 (9th Cir.1996) (concluding that motion was timely where it had been filed "before the district court had made any substantive rulings").

Here, the Court finds that the FDIC has demon-

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strated that its motion is timely. First, this case is at an early stage in the proceedings and has not had any significant activity consisting of procedural, substantive, or discovery-related motions regarding the substantive issues presented in this action. Thus, the Court has yet to consider the underlying merits of this case. *See Glickman,* 82 F.3d at 837. Second, the FDIC's intervention at this early stage of the proceedings will not prejudice the existing parties because there will be no need to reopen and to re-litigate any prior proceedings between the parties. *Cf. League of United Latin American Citizens v. Wilson,* 131 F.3d 1297, 1304 (9th Cir.1997) (concluding that parties would be prejudiced where intervenor waited 27 months before seeking to intervene when litigation was beginning to wind down). Third, the FDIC has not significantly delayed its attempt to intervene in this action, particularly where there have been no proceedings regarding the merits of the issues presented in Emerytech's amended complaint. *See Glickman,* 82 F.3d at 837 (stating that courts consider whether any substantive proceedings have occurred when determining the timeliness of a motion to intervene).

2. Protectable Interest in the Subject Matter of the Litigation

An applicant filing a timely motion to intervene must also demonstrate that it has a significantly protectable interest in the subject matter of the underlying litigation. *See Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527 (9th Cir.1983); *see also Glickman,* 82 F.3d at 837. "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly,* 159 F.3d at 409.

*4 The "interest" test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrus,* 622 F.2d 436, 438 (9th Cir.1980). An applicant satisfies the "relationship" requirement if resolution of plaintiff's claims will actually affect the applicant. *See Donnelly,* 159 F.3d at 410.

Here, the Court finds that the FDIC has a significant protectable interest in the subject matter of the action and that it has a substantial interest in discharging its statutory duty under Section 1821(d) of FIRREA. *See Sahni v. American Diversified Partners,* 83 F.3d 1054, 1058 (9th Cir.1996) (discussing broad scope of FDIC's authority under FIRREA to dispose of receivership assets and to deal with distressed institutions). In addition, resolution of Emerytech's claims will affect the FDIC because Emerytech's claims, if successful, will effectively unwind the FDIC-Receiver's contract with Chase and abrogate the FDIC's statutorily conferred authority to disaffirm the WaMu lease. Accordingly, the Court concludes that the FDIC has met its burden to establish a protectable interest in the action.

3. Disposition of this Action May Adversely Impair the FDIC's Interests

To meet the impairment element under Rule 24(a)(2), an applicant need only demonstrate that disposition of the lawsuit may adversely affect the applicant's interest if intervention is not granted. *See United States v. Washington,* 86 F.3d 1499, 1503 (9th Cir.1996). In addition, the Advisory Committee Notes of Rule 24 provide that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *See Berg,* 268 F.3d at 822 (quoting Advisory Committee Notes for Rule 24).

Here, the Court finds the relief sought by Emerytech may adversely affect the FDIC's interests, because if Emerytech's action to enforce the subject lease against Chase prevails, it could effectively (1) abrogate the FDIC's disaffirmance of the subject lease; and (2) unwind the P & A Agreement between the FDIC and Chase. In addition, disposi-

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tion of this action may impair the FDIC's ability to dispose of receivership assets in an expeditious and efficient manner as required by FIRREA. *See Sahni,* 83 F.3d at 1057-58. Accordingly, the Court finds that the FDIC has met its burden to demonstrate that disposition of the main action may adversely impair its interests.

4. The FDIC's Interests May Not Adequately be Represented by Chase

Whether an applicant's interests will be adequately represented by an existing party depends on whether (1) the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) the present party is capable and willing to make such arguments; and (3) the party seeking to intervene would offer any necessary elements to the proceedings that other parties would neglect. *See Berg,* 268 F.3d at 822.

***5** Although the applicant bears the burden of demonstrating that the existing parties may not adequately represent its interests, *see Sagebrush Rebellion, Inc.,* 713 F.2d at 528, the burden of showing inadequacy is minimal, meaning that the applicant need only show that representation of its interests by existing parties *may be* inadequate. *See Berg,* 268 F.3d at 822-23 (citing *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)).

Here, the Court finds that the FDIC's interests may not be adequately represented by Chase, because Chase's interests in this action might be more narrow than the FDIC's interests. Specifically, Chase seeks a determination that it did not assume the subject lease to negate Emerytech's breach of contract claim. In contrast, the FDIC has a broader interest in discharging its statutory duty under FIRREA by disposing of receivership assets in a timely and efficient manner and ensuring that P & A Agreements with successor banks are enforceable. These interests might not be represented by Chase in the main action. Accordingly, the Court concludes that the FDIC has met its minimal burden of establishing that Chase may inadequately represent its interests in defending against Emerytech's claims.

For the reasons discussed above, the Court concludes the FDIC has met its burden to intervene as of right in the main action. Accordingly, the Court hereby GRANTS the FDIC's motion to intervene pursuant to Rule 24(a)(2).

B. Permissive Intervention

In addition to seeking to intervene as of right, the FDIC in the alternative seeks to intervene pursuant to Rule 24(b)(1)(B). An applicant seeking permissive intervention has the burden of establishing that (1) the motion is timely; (2) the trial court has an independent basis for jurisdiction; and (3) the applicant's claims or defenses and the main action have a question of law or fact in common. *See Donnelly,* 159 F.3d at 412; *Glickman,* 82 F.3d at 839. The Court finds the FDIC has met its burden for permissive intervention.

First, as discussed above, the FDIC's motion to intervene is timely and demonstrates that it shares common issues of law and fact with the main action relating to matters such as, *inter alia,* (1) the scope and meaning of the P & A Agreement between the FDIC and Chase, (2) whether Chase assumed the WaMu lease, and (3) whether the FDIC properly disaffirmed the lease. Second, the Court has an independent basis for jurisdiction under FIRREA to adjudicate the FDIC's claims and/or defenses. *See* 12 U.S.C. Section 1819(b) (2)(A) (providing that any civil suit in which the FDIC, in any capacity, is a party is "deemed to arise under the laws of the United States"). Third, the Court finds that allowing the FDIC to intervene will not cause undue delay or prejudice to the existing parties, but will promote the interest of judicial economy. *See Venegas v. Skaggs,* 867 F.2d 527, 531 (9th Cir.1989). Moreover, the Court further finds that intervention will significantly contribute to the full development

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of factual issues and to the fair adjudication of the legal issues presented in this action, *see Spangler v. Pasadena Board of Education,* 552 F.2d 1326, 1329 (9th Cir.1977), and will promote the interest of judicial economy, *see Venegas,* 867 F.2d at 531.

*6 For the foregoing reasons, the Court concludes the FDIC has established the elements for permissive intervention pursuant to Rule 24(b)(1)(B). Accordingly, the Court notes that if the FDIC had not brought a motion to intervene as of right, the Court would grant the FDIC's motion to intervene pursuant to Rule 24(b)(1)(B).

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED THAT:

(1) The FDIC's motion to intervene pursuant to FRCP 24(a)(2) is GRANTED;

(2) The FDIC's motion to intervene pursuant to FRCP 24(b)(2) is DENIED AS MOOT;

(3) The FDIC shall file its Answer within (5) days of the date of this order;

(4) The Case Management Conference currently scheduled for April 13, 2010, shall be CONTINUED to **May 26, 2010, at 3:15 p.m.** The parties shall ***meet and confer*** prior to the conference and shall prepare a joint Case Management Conference Statement which shall be filed no later than ten (10) days prior to the Case Management Conference that complies with the Standing Order For All Judges Of The Northern District Of California and the Standing Order of this Court. Plaintiff shall be responsible for filing the statement as well as for arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at the above indicated date and time.

IT IS SO ORDERED.

N.D.Cal.,2010.

CEP Emery Tech Investors LLC v. JPMorgan Chase Bank, N.A.
Slip Copy, 2010 WL 1460263 (N.D.Cal.)

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