

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS**

**IN RE RICHARD P. LOTFY AND  
SHARI D. LOTFY,**

**Debtors.**

**BANKRUPTCY NO. 08-40106**

**RICHARD P. LOTFY & SHARI D.  
LOTFY**

**Plaintiff,**

**ADV. PRO. NO. 08-04071**

**v.**

**INDYMAC BANK, FSB, MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS**

**Defendants.**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. The FDIC's Dual Appointment as Receiver and Conservator

The FDIC was appointed as Receiver for IndyMac Bank, F.S.B. and as Conservator for the IndyMac Federal Bank, FSB on July 11, 2008, pursuant to 12 U.S.C. § 1821(d)(2). The FDIC-Receiver was appointed for the purpose of liquidating the liabilities of the failed institution pursuant to 12 U.S.C. § 1821 (c)(6)(B). The FDIC-Receiver is the successor-in-interest to the failed institution and assumed all rights, titles,

powers, privileges, and operations of the failed institution. The FDIC-Conservator was appointed to operate the new institution. 12 U.S.C. § 1821(d)(2).

Where, as here, a lawsuit implicates the FDIC's dual capacity as Receiver for a failed institution and as Conservator for a new institution, the FDIC may be substituted into that action in each capacity. See *FDIC v. Rahn*, 116 F.3d 1142, 1145-1146 (6<sup>th</sup> Cir. 1997) (FDIC, as receiver, that the plaintiff could have, but failed to implead). The "separateness" of these dual identities of the FDIC has been "well respected by the federal courts." *Texas Am. Bancshares, Inc. v. Clarke*, 954 F.2d 329, 335 (5<sup>th</sup> Cir. 1992).

II. The Allegations of the Complaint Implicate the FDIC's Dual Role as Receiver and Conservator

The FDIC has a substantial legal interest in the subject matter of this action because the FDIC-Receiver assumed all rights, titles, powers, privileges, operations and liabilities of the failed institution and the FDIC-Conservator operates the new institution. See 12 U.S.C. § 1821 (d)(2). As such, the FDIC essentially stands in the shoes of the Bank and operates as its successor. See 12 U.S.C. 1821(d)(2)(B). Accordingly, claims against the Bank are claims against the FDIC in its capacity as either Receiver, Conservator, or in this case, both.

The allegations of the Plaintiffs' Complaint implicates the FDIC via its dual role as Receiver and Conservator. For example the Complaint seeks to void a foreclosure sale of a loan which is an asset of the FDIC-Conservator. Because the Plaintiffs' complaint implicates the dual roles of the FDIC, the FDIC requests that the Court find it is an indispensable party pursuant to Fed.R.Civ.P. 16

III. Dismissal Pursuant to Fed.R.Civ.P. 12 (b)(7) for failure to Join Necessary Party Pursuant to Fed.R.Civ.P. 19

Pursuant to Fed.R.Civ.P. 12(b)(7) a party may file a motion for judgment on the pleadings. In this case the Defendant is moving for judgment on the pleadings for failure to join a necessary party. The FDIC maintains that it is an indispensable party pursuant to Fed.R.Civ.P. 19.

Fed.R.Civ.P. 19 states, *inter alia*, “A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction **must** be joined as a party if: (A) in that person’s absence, the court cannot accord complete relief amongst existing parties;” (emphasis added) Fed.R.Civ.P. 19(a)(1)(A). In order to determine whether Fed.R.Civ.P. 19 has been complied with the Court must first decide if the party is necessary. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7<sup>th</sup> Cir. 2001). In order to do this the Court must conclude that: (1) it is impossible for complete relief to be granted to existing parties without the absent party; and (2) if failure to join the absent party will either (a) impair that party’s interest, or (b) expose the existing parties to the risk of multiple and potentially inconsistent adjudications. *North Shore Gas Co., Inc. v. Salomon, Inc.*, 152 F. 3d 642, 647 -48 (7<sup>th</sup> Cir. 1998).

It is clear from the law as applied to this particular case that the FDIC is a person who must be joined as a party in order for the court to provide complete relief. Relief cannot be granted in this case without joining the FDIC since the FDIC is the Receiver for IndyMac Bank, F.S.B. and Conservator for IndyMac Federal Bank, FSB. In addition, failure to join the FDIC will impair IndyMac Bank, F.S.B.’s interest since it is not the party that is responsible for the loan.

IV. Conclusion

The FDIC is clearly an indispensable party as the Conservator for IndyMac Federal Bank, FSB and the Receiver for IndyMac Bank, F.S.B. As such a dismissal pursuant to Fed.R.Civ.P. 12(b)(7) is warranted and required.

Respectfully submitted,  
IndyMac Bank, FSB

By its attorney,

/s/ John T. Precobb

John T. Precobb  
BBO# 561931  
Orlans/Moran PLLC  
45 School St.  
Boston, MA 02108  
(617) 502-4116

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