

APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-2389

[Filed August 17, 2018]

PEGGY BERG,)
)
<i>Plaintiff-Appellant,</i>)
)
<i>v.</i>)
)
SOCIAL SECURITY ADMINISTRATION,)
)
<i>Defendant-Appellee.</i>)
)

Appeal from the United States Bankruptcy Court for the
Western District of Wisconsin.
Nos. 3:14-BK-13435 & 3-16-00089-cjf —
Catherine J. Furay, Bankruptcy Judge.

ARGUED FEBRUARY 7, 2018 —
DECIDED AUGUST 17, 2018

Before BAUER, ROVNER, and SYKES, *Circuit Judges.*

ROVNER, *Circuit Judge.* Shortly before Peggy Berg filed a petition for bankruptcy, the Social Security Administration (“SSA” or “Agency”) reduced the

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payment of a back-award that it owed to her by the amount of an earlier overpayment that Berg owed to the Agency. Berg contested this setoff because it was taken during the ninety-day period before the filing of her bankruptcy petition. The bankruptcy court concluded that SSA permissibly recovered \$17,385 of its overpayment but impermissibly improved its position by \$2,015, and ordered the Agency to return that amount to Berg. This court granted a petition to file a direct appeal from the bankruptcy court. We now affirm the judgment of the bankruptcy court.

I.

The facts are undisputed. Berg began receiving Social Security disability benefits in June 1994. In 2002, she returned to work. Although she notified the Agency that she was working again, SSA continued to pay her benefits until December 2003. The Agency subsequently determined that it overpaid Berg in the amount of \$25,690. An administrative law judge determined that Berg was without fault in incurring this overpayment, but that SSA could nevertheless recover the overpayment under the terms of the Social Security Act. Based on Berg's income and ability to pay, the administrative law judge ordered her to repay \$24,000 to the Agency at a rate of \$300 per month. Berg did not appeal that decision and began making payments.

Berg stopped working again on November 17, 2012 but continued to make regular, smaller payments towards her SSA debt. In March 2014, Berg filed a new application for disability benefits. Because of Berg's age and condition, SSA gave priority consideration to her case and granted her application on July 15, 2014. The

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Agency determined that Berg met the criteria for disability benefits as of November 17, 2012, the date that she stopped working. Under the Social Security Act and the applicable regulations, Berg's benefits began to accrue in May 2013, after a five month waiting period, and became payable at the end of that month.

By July 2014, Berg had reduced the debt that she owed to the Agency to \$19,400. In a Notice of Award letter ("Notice") dated July 30, 2014, the SSA informed Berg that she was entitled to disability benefits beginning in May 2013, and that she would receive her first check in August 2014. According to the Notice, Berg had accrued benefits at a rate of \$1,440 per month from May to November 2013, and at an increased rate of \$1,461 from December 2013 through July 2014, due to a cost-of-living adjustment. Her accumulated benefits from May 2013 through July 2014 totaled \$20,307. The Notice explained that the SSA would deduct from that total the \$19,400 that Berg still owed from the Agency's earlier overpayment. In early August 2014, Berg received a check for \$907. The SSA subsequently denied a request from Berg to reconsider the Agency's decision to recover its earlier overpayment from her back-award.

On August 7, 2014, Berg filed a petition for bankruptcy. She listed the \$19,400 that the SSA recovered from her as a setoff in her Statement of Financial Affairs, and also included that same amount as a possible asset subject to recovery in her schedules. 11 U.S.C. § 553. She then commenced an adversary proceeding against the SSA under 11 U.S.C. §§ 553(b) and 522(h), seeking recovery of the amount of back-

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benefits set off by the SSA. The bankruptcy court found that the elements for setoff under the bankruptcy code were present. Specifically, the SSA had a pre-petition claim against Berg for return of its earlier overpayment; SSA owed a pre-petition debt to Berg because of the award of back-benefits; the obligations were mutual; and both the claim and the debt were valid and enforceable. 11 U.S.C. § 553(a); *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 955 (7th Cir. 2003) (setoffs are allowed when debts are mutual and “the general rule is that mutuality is satisfied when the offsetting obligations are held by the same parties in the same capacity (that is, as obligor and obligee) and are valid and enforceable, and (if the issue arises in bankruptcy) both offsetting obligations arise either pre-petition or post-petition, even if they arose at different times out of different transactions.”).

The bankruptcy court noted that a trustee, or as was the case here, a debtor acting under 11 U.S.C. § 522(h), may recover a setoff under 11 U.S.C. § 553(b)(1), to the extent that a creditor improved its position within the ninety days preceding the debtor’s filing of the bankruptcy petition. This ninety-day preference test allows the trustee or debtor to recover from the creditor the amount offset to the extent that the insufficiency on the setoff date is less than the insufficiency on the later of (a) ninety days before the petition filing date, and (b) the first date on which there was an insufficiency during the ninety days immediately preceding the petition date. “Insufficiency,” the court explained, is the amount by which a creditor’s claim exceeds the amount of its debt. See 11 U.S.C. § 553(b)(2) (“insufficiency’ means amount, if any, by which a claim against the debtor

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exceeds a mutual debt owing to the debtor by the holder of such claim.”). The date ninety days prior to Berg’s August 7, 2014 filing was May 9, 2014. The court calculated that Berg’s total accrued disability benefit as of May 9, 2014 was \$17,385. That same day, Berg owed the Agency \$19,400. That meant that on May 9, 2014, the insufficiency was \$2,015. The court then compared that amount with the insufficiency on the date that the SSA took the setoff, July 30, 2014. By then, Berg still owed the Agency \$19,400, but the SSA owed her \$20,307. That meant that there was no insufficiency on July 30, 2014 (because the SSA’s debt to Berg was now larger than the amount that she owed the SSA), and the SSA had improved its position in the amount of \$2,015 during the ninety-day preference period. The court therefore concluded that the SSA was entitled to keep \$17,385 and ordered the Agency to return \$2,015 to Berg. Berg appealed.

II.

Although Berg moved under Federal Rule of Civil Procedure 12(c) for judgment on the pleadings, the parties submitted a pre-trial statement of stipulated facts and the court relied on that statement in reaching its judgment. This is akin to judgment under Federal Rule of Civil Procedure 52(a). *Marantz v. Permanente Medical Group, Inc. Long Term Disability Plan*, 687 F.3d 320, 327 (7th Cir. 2012) (when parties agree to judgment based on stipulated facts, in effect, the court is asked to decide the case as if there had been a bench trial in which the evidence was the material gathered in discovery, and the standard of review is governed by Federal Rule of Civil Procedure 52(a)); *Arlington LF, LLC v. Arlington Hospitality, Inc.*, 637 F.3d 706, 717

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(7th Cir. 2011) (Federal Rule of Bankruptcy Procedure 7052 makes Federal Rule of Civil Procedure 52 applicable to adversarial bankruptcy proceedings). We review the district court’s legal conclusions *de novo* and any factual inferences that the court drew from the stipulated facts as well as its application of the facts to the law for clear error. *Marantz*, 687 F.3d at 327. *See also Lardas v. Grcic*, 847 F.3d 561, 569 (7th Cir. 2017) (after a bench trial on an adversary proceeding, we review the bankruptcy court’s legal determinations *de novo* and its findings of fact for clear error).

On appeal, Berg contends that there were no benefits from which the SSA could take an offset until the Agency issued the Notice of Award letter on July 30, 2014. According to Berg, before that Notice was issued, she had no right to a back-award and the benefits awarded therefore accrued on the day that the Notice was issued and the setoff was taken. The bankruptcy court erred, she contends, by treating the back-benefits as accruing over time, month by month, rather than as a lump sum on the date that the Agency made the award, July 30, 2014. Berg also argues that the case law supports her position, and that public policy also favors treating the date of the Notice as the date that her benefits accrued. If the benefits accrued on July 30, 2014, Berg maintains, then the Agency improved its position by the entire amount of the offset during the ninety-day preference period and she would be entitled to recoup \$19,400. We conclude that Berg’s interpretation of the law is incorrect.

The Social Security Act provides that a person who has worked long enough, has paid taxes into the system, and is “under a disability,” “shall be entitled to

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a disability insurance benefit (i) *for each month* beginning with the first month after his waiting period ... in which he becomes so entitled to such insurance benefits[.]” 42 U.S.C. § 423(a)(1) (emphasis added). Section 423(c)(2) specifies a five-month waiting period after the onset of disability before an eligible individual may receive her first disability payment. Even then, that individual does not become entitled to payment of benefits for a particular month until she survives through the last day of that month. 42 U.S.C. § 402(a). The benefit for a particular month is paid on the third day of the month after the benefits accrue. The parties agree that Berg, who was disabled as of November 17, 2012, became entitled to receive disability payments as of May 2013, a payment that would have been made in the ordinary course on June 3, 2013.

The Social Security Act also provides that, when a benefits recipient has been overpaid, “recovery shall be made” by decreasing the benefit payments to which that person may be entitled. 42 U.S.C. § 404(a). But recovery from (or adjustments of payments to) a person who is without fault in incurring the overpayment may not occur if the “adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” 42 U.S.C. § 404(b)(1). *See also* 20 C.F.R. §§ 404.507–509. At a time when Berg had returned to work, an administrative law judge determined both that recovery of the overpayment would not defeat the purpose of the Social Security Act and that recovery was not against equity and good

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conscience. The Agency thus was obligated to recover the overpayment, and Berg did not appeal that ruling.¹

The bankruptcy court correctly concluded that the transaction at issue here met the elements of a setoff under section 553 of the Bankruptcy Code. Under section 553(a), the overpayment to Berg meant that the Agency had a pre-petition claim against Berg; the SSA's award of back-benefits resulted in the Agency owing a pre-petition debt to Berg; the obligations were mutual; and both the claim and the debt were enforceable. 11 U.S.C. § 553(a); *Doctors Hospital*, 337 F.3d at 955. "Although no federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995). The right of setoff, the Court explained, allows entities to apply their mutual debts against each other to avoid the pointless exercise of "making A pay B when B owes A." *Citizens Bank*, 516 U.S. at 18 (citing *Studley v. Boylston Nat'l Bank of Boston*, 229 U.S. 523, 528 (1913)).

Section 553(b) sets the limits for a creditor's right of setoff during the ninety-day period prior to the filing of a bankruptcy petition:

- (1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a

¹ That decision is no longer subject to judicial review. 42 U.S.C. § 405(g).

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creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

- (A) 90 days before the date of the filing of the petition; and
- (B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(2) In this subsection, “insufficiency” means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

11 U.S.C. § 553(b). In plain English—a commodity rarely found in the Bankruptcy Code—this means that a debtor like Berg² may recover from a creditor like the SSA an amount set off by the creditor in the ninety days preceding the filing of the bankruptcy petition but only to the extent that the creditor improved its position during that ninety-day period. That, in turn, depends on determining the difference between any

² Section 522(h) of the Bankruptcy Code allows the debtor to recover a setoff that is recoverable by the trustee under section 553 if the trustee does not herself attempt to recover it. 11 U.S.C. § 522(h). *See also Lee v. Schweiker*, 739 F.2d 870, 873 n.3 (3d Cir. 1984) (when the trustee does not pursue exempt assets, the assets are of no benefit to the creditors, and the debtor is empowered to intervene in the proceeding and pursue those assets).

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insufficiency in the Agency's position ninety days before the bankruptcy filing and its position on the date of the setoff. Insufficiency, as the bankruptcy court noted, is the "amount, if any, by which a claim against the debtor [Berg] exceeds a mutual debt owing to the debtor by the holder of such claim [the SSA]." 11 U.S.C. § 553(b)(2).

The parties seem to agree in principle on the mathematical process that courts apply when calculating the insufficiency. *See, e.g., Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1040 (5th Cir. 1987). The dispute comes instead in determining when SSA began to owe benefits to Berg. Although Berg characterizes the issue as when the setoff occurred, the real question is when Berg's benefits began to accrue after she filed her second application for disability benefits. Berg asserts that she had no right to benefits at all until the Agency determined in July 2014 that she was entitled to benefits and was owed back-benefits. The back-benefits, Berg contends, accrued on July 30, 2014 when the SSA issued the Notice awarding the benefits. In her view, then, the SSA improved its position by the entire \$19,400 that it took in setoff during the ninety-day preference period. The SSA, on the other hand, contends that, although it did not issue its Notice until July 2014, Berg was disabled as of May 2013 and thus began to accrue benefits on a monthly basis at that earlier date. Under that scenario, the SSA improved its position by only \$2,015 during

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the preference period, and that is the amount that should be returned to Berg.³

In support of her argument that she had no benefits from which to take an offset until the date of the Notice awarding those benefits, Berg relies largely on an unpublished decision from a bankruptcy court in North Carolina. *See In re Goodman*, 2012 WL 529574 (Bankr. E.D.N.C. Feb. 17, 2012). That court assumed without analysis that the date of the award of back-benefits governed the calculation of the insufficiency, treating the date of the Agency's decision to award back-benefits as the date of accrual for the entire amount. The bankruptcy court here rejected that case in favor of the reasoning of the Third Circuit in *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984).

In *Lee*, the debtor was receiving monthly retirement benefits from the Agency. One year, she engaged in work that should have reduced her entitlement to benefits but the Agency was unaware that she had earned this income and continued to pay her retirement benefits at the higher rate, resulting in an overpayment of approximately \$750. Lee reached an agreement with SSA to repay the overpayment by having the Agency reduce her monthly benefits by

³ In a footnote in its brief, the SSA states that, for the purposes of this appeal, the Agency does not dispute the bankruptcy court's determination that Berg is entitled to recover \$2,015 of the \$19,400 in back-benefits that the SSA took in offset. In the bankruptcy court, the Agency took the position that it was entitled to recover the entire \$19,400 because there was nothing the SSA could do in the ninety days pre-petition to improve its position. The Agency apparently wishes to preserve that argument for future cases but concedes the \$2,015 calculation here.

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approximately \$100 per month until the overpayment was recovered. Lee then filed for bankruptcy but SSA was not aware of the filing and continued to deduct \$100 per month from Lee's benefit check. When the trustee did not seek to recover the amounts deducted, Lee filed an adversary proceeding to recover them herself.

The court first concluded that, once a bankruptcy petition is filed, "the income provided by Social Security benefits should be protected by the automatic stay," and that the "right of SSA to recover pre-petition debts should be subject to the limitations on setoff." 739 F.2d at 876. The court was then faced with calculating the insufficiency on the relevant dates, and that, in turn, depended on when SSA owed the debtor her benefits. The debtor asserted that, under the Social Security Act, a recipient does not become entitled to benefits for a particular month until she survives through the last day of that month, and so the Agency would owe her nothing on August 15 for the month of August. 42 U.S.C. § 402(a). The court held that section 402(a) of the Social Security Act applied in the bankruptcy context as well. 739 F.2d at 877. The court then applied that provision to the debtor's claim:

In order to accrue benefits, all the beneficiary must do is survive; if the debtor survives, SSA must pay. Under these circumstances, we believe that all of the monthly benefits that came due before the filing of the petition should be considered obligations of SSA to the beneficiary ninety days before the petition is filed for the purposes of applying the

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“improvement in position” test, even though they are not yet payable.

Lee, 739 F.2d at 877. In other words, the court found that the “SSA would be obligated to Lee for three months benefits … ninety days before the filing.” 739 F.2d at 877 n.13. Under the facts in *Lee*, that meant that there was no insufficiency ninety days before the filing but an “‘excess’ of debts to the debtor over claims against the debtor.” *Id.* Because there had not been an improvement in the SSA’s position in the ninety days prior to the filing of the petition, the SSA was not required to return the amounts recouped before the petition was filed.

That understanding of Social Security benefits as accruing as soon as the recipient survives the month and is lawfully entitled to them is consistent with the Bankruptcy Code’s concepts of “debt” and “claim” as they are used in section 553(b)(2). We have noted that, although the Bankruptcy Code does not specify when a debtor incurs a debt, the Code’s definitions of “debt” and “claim” aid our understanding. *In re Energy Co-op, Inc.*, 832 F.2d 997, 1001 (7th Cir. 1087). “The term ‘debt’ means liability on a claim.” 11 U.S.C. § 101(12). The term “claim” is defined in relevant part as:

right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]

11 U.S.C. § 101(5)(A). Under the Social Security Act, as the Third Circuit pointed out in *Lee*, a beneficiary has a right to payment of benefits as soon as the

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beneficiary survives to the end of the month that the beneficiary is eligible for benefits.⁴ Under the Bankruptcy Code, it does not matter if that right to payment is “reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” The claim, and therefore the debt, accrue as soon as there is a right to benefits, a date determined in this instance by the Social Security Act itself.

When Berg filed an application for disability benefits in March 2014, she created an unliquidated, contingent claim against the SSA that related back to the (then undetermined) date that she became entitled to benefits. That date was later determined to be May 2013, and neither party disputes that the SSA accurately calculated the amount of the back-award (starting on that date) in its Notice. The bankruptcy court thus correctly calculated the accrual of Berg’s benefits as occurring on the dates that she had a right to benefits, or the last day of each month that she was eligible for benefits and survived to the end of the month. On May 9, 2014, the date that was ninety days prior to the filing of the petition, that amount was \$17,385. Because Berg then owed the Agency \$19,400, the insufficiency on May 9, 2014 was \$2,015. On July 30, 2014, the date the SSA took the setoff, Berg still owed the Agency \$19,400, but the SSA owed her

⁴ Lee was receiving retirement benefits under 42 U.S.C. § 401 *et seq.*, and Berg was receiving disability benefits under 42 U.S.C. § 423(a), but in either case the recipient must survive to the end of an eligible month to be entitled to payment of benefits for that month. 42 U.S.C. § 402.

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\$20,307. That meant that there was no insufficiency on July 30, 2014, and the SSA had improved its position in the amount of \$2,015 during the ninety-day preference period. That is the amount that Berg may now recover.

There is no basis in policy to conclude otherwise. First, section 553 does not bar setoffs entirely but simply prevents a creditor from improving its position during the ninety-day pre-petition period. This limit on setoffs was imposed in order to allow the trustee to recover setoffs that improved the position of one creditor at the expense of all the others during the ninety-day period prior to bankruptcy. *Matter of Prescott*, 805 F.2d 719, 730 (7th Cir. 1986). As the Third Circuit explained in *Lee*, Congress was concerned that creditors, primarily banks that had mutual accounts with debtors, would anticipate the filing of a bankruptcy petition and attempt to secure an advantage for themselves by decreasing an insufficiency to the detriment of other creditors. *Lee*, 739 F.3d at 877. That same concern does not apply to the Agency's recovery of overpayments because neither the debtor nor the SSA can do anything to increase the amount of benefits that will accrue during the ninety-day pre-petition period. Essentially, neither party can manipulate the process to the detriment of other creditors. Recognizing the creation of SSA's contingent debt to Berg on the date when Berg became entitled to disability benefits (and accruing it monthly thereafter) rather than using the arbitrary date that the Agency issued its administrative decision is consistent with both the Social Security Act and the Bankruptcy Code.

AFFIRMED.

APPENDIX B

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

[Filed June 15, 2017]

Case Number: 14-13435-7

In re:)
)
 GERALD W. BERG and)
 PEGGY A. BERG,)
)
 Debtors.)
)

Adversary Number: 16-89

PEGGY A. BERG,)
)
 Plaintiff,)
)
 v.)
)
 SOCIAL SECURITY)
 ADMINISTRATION,)
)
 Defendant.)
)

MEMORANDUM DECISION

This matter is before the Court on the motion of Plaintiff Peggy A. Berg (“Berg”) for judgment on the

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pleadings pursuant to Fed. R. Civ. P. 12(c), made applicable to bankruptcy proceedings through Fed. R. Bankr. P. 7012(b). To decide this motion, the following facts alleged or presented by agreement of the parties are recited. For the reasons set forth below, the Court concludes the Social Security Administration's insufficiency position decreased during the 90 days prior to Berg's bankruptcy filing in the amount of \$2,015.00. Accordingly, Berg is entitled to that amount.

FACTS

Peggy A. Berg filed a voluntary Chapter 13 petition under title 11 of the Bankruptcy Code on August 7, 2014. She moved to convert her case to a Chapter 7 on September 8, 2014. The Court entered a final decree on January 21, 2015. On August 4, 2016, Berg filed a motion to reopen her bankruptcy case. On November 15, 2016, she filed the present adversary complaint seeking to unwind the Social Security Administration's prepetition setoff of her social security disability benefits.

Berg received disability insurance benefits from the Social Security Administration (the "SSA") from June 1994 through December 2003. She became re-employed in 2002. Despite having notified the SSA of her return to employment, it continued to pay and Berg retained benefits until the benefits were terminated in December 2003. This resulted in an overpayment of \$25,690.00.

The SSA determined Berg was without fault in causing or accepting the overpayment (20 C.F.R. 404.507(c)). Nonetheless, it also determined that recovery of the overpayment would not be inequitable.

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She did not appeal the determination. A payment plan was established for payment at the rate of \$300.00 per month. Berg made payments for a period and reduced the overpayment to \$19,400.00 as of July 2014.

Berg stopped working on November 17, 2012. In March 2014, she filed another application for disability benefits with a protective filing date of January 2014. On July 15, 2014, the SSA granted the application. It determined that she met the criteria for disability as of November 17, 2012. Under the regulations, she was entitled to receive benefits beginning in May 2013. The SSA's Notice of Award letter dated July 30, 2014, explained the benefits, their accrual rate, and adjustments for cost of living. The Award letter also told Berg that the SSA determined it would use \$19,400.00 of the accrued benefits to pay off the remaining overpayment. The SSA kept and applied \$19,400.00 of back benefits and sent a payment of \$907.00 to Berg for July 2014.¹ Full benefit payments commenced in August 2014.

Berg filed bankruptcy on August 7, 2014. She identified the \$19,400.00 as a possible asset subject to recovery in her schedules. She also disclosed it as a setoff in her Statement of Financial Affairs. Berg commenced this adversary proceeding seeking recovery of the amount of back benefits set off by the SSA. The basis for her claims are 11 U.S.C. §§ 553(b) and 522(h). The parties have stipulated the relevant facts are undisputed. The Court has jurisdiction pursuant to 28

¹ This amount represented the monthly benefit remaining for July 2014 after deduction of the prior overpayment from the accrued benefits.

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U.S.C. §§ 1334(a) and 157(a). This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (I), and (O).

ARGUMENTS

The parties agree the transaction at issue is a setoff governed by 11 U.S.C. § 553(b). They disagree on the extent to which section 553(b) unwinds that transaction.

The SSA argues the offset of benefits was not inequitable. It points out the SSA cannot waive recovery of overpayments except in narrow circumstances that are inapplicable in this case. It argues the statutory preservation of setoff supports the application of accrued benefits against the overpayment. It contends it did not improve its position or, alternatively, the only possible improvement was \$1,163.00 representing a change in position between May 9, 2014,² and July 30, 2014.

Berg argues the offset of accrued benefits against the overpayment occurred within 90 days of the petition date and would have been recoverable by a trustee under section 553. Further, she asserts there was no “mutual debt” within the 90 days and that the SSA improved its position. In her response, it is clear what Berg does *not* argue:

- (1) the SSA did not overpay her;
- (2) the amount of overpayment was incorrectly calculated;

² May 9 is the 90th day.

- (3) the amount of accrued benefits that were set off were incorrectly calculated;
- (4) that, in the absence of a bankruptcy, there would have been a right of setoff.

The parties frame the issues as (1) whether the SSA's actions qualify as a setoff under section 553, and (2) whether, notwithstanding the provisions of section 553, the rights are constrained by section 522 and thus recoverable.

STANDARD

A motion for judgment on the pleadings is subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Federal Sign v. Fultz (In re Fultz)*, 232 B.R. 709, 716 (Bankr. N.D. Ill. 1999). The Court "may not look beyond the pleadings, and all uncontested allegations to which the parties had an opportunity to respond are taken as true." *Alexander v. City of Chicago*, 994 F.2d 333, 335 (7th Cir. 1993). Therefore, we must determine whether the complaint states "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). All well-pleaded factual allegations in Berg's complaint are taken as true, and all reasonable inferences from the facts are drawn in favor of the non-movant. *Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 612 (7th Cir.

2014); *see also Golden v. Gibrick*, 561 B.R. 470, 473 (Bankr. N.D. Ill. 2016). There are no contested facts.

APPLICABLE STATUTES

To resolve this case, the meaning of various statutes must be considered.

Section 553(a) recognizes a creditor's right to offset a mutual debt and provides:

(a) Except as otherwise provided . . . title [11] does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that--

(1) the claim of such creditor against the debtor is disallowed;

. . .

(3) the debt owed to the debtor by such creditor was incurred by such creditor--

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

. . .

Section 553(b) restricts a creditor's right to offset a mutual debt and reads:

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(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(b)(2) In this subsection, “insufficiency” means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

Section 522(h) provides:

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—

(1) such transfer is . . . recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

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The Court must also consider the statute that requires the SSA to reduce, by offset, an individual's disability benefits when the individual has been overpaid. The authority of the SSA to address overpayments is in 42 U.S.C. §§ 404 and 1383. It permits the SSA to adjust future payments when there has been a past overpayment or underpayment. *See* 42 U.S.C. § 1383(b).

DISCUSSION

Generally, a creditor has a right to setoff under the Bankruptcy Code where four conditions are present: “(1) the creditor holds a ‘claim’ against the debtor that arose before the commencement of the case; (2) the creditor owes a ‘debt’ to the debtor that also arose before the commencement of the case; (3) the claim and debt are ‘mutual’; and (4) the claim and debt are each valid and enforceable.” *St. Francis Physician Network v. Rush Prudential HMO (In re St. Francis Physician Network)*, 213 B.R. 710, 715 (Bankr. N.D. Ill. 1997) (quoting 5 *Collier on Bankruptcy* ¶ 553.01 (15th ed. Revised)). Each element is present in this case.

Turning to the first element, the SSA must hold a prepetition claim against Berg. A claim is a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C. § 101(5). The SSA held a prepetition claim against Berg based on its overpayment of disability benefits. That claim was determined in December 2003. Thus, the SSA held a prepetition claim against Berg.

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Next, the SSA must owe a prepetition debt to Berg. A debt is liability on a claim. 11 U.S.C. § 101(12). The SSA owed a prepetition debt to Berg under her 2014 disability application. While the amount of the debt was not liquidated until the determination in July 2014, there was nonetheless a debt because there was a right to payment on an unliquidated, contingent claim when she filed the application in March 2014.

Berg filed her disability application approximately 159 days before the petition date. While the SSA's amount of the debt was determined a mere 23 days before the petition date, the entitlement to payments dated back to November 17, 2012 – 263 days before the petition date. There was, indisputably, a debt owed prepetition by the SSA to Berg.

The Court now turns to whether the obligations owed by the parties are mutual. Mutuality is established “when the offsetting obligations are held by the same parties in the same capacity (that is, as obligor and obligee) and are valid and enforceable” *Meyer Med. Physicians Grp., Ltd. v. Health Care Serv. Corp.*, 385 F.3d 1039, 1041 (7th Cir. 2004) (citations omitted). These offsetting obligations may arise either prepetition or postpetition and may arise out of separate transactions. *Id.* Simply put, “[m]utuality requires that the debt in question be owed in the same right and between the same parties standing in the same capacity” regardless of the debt’s character. *Id.* (citations omitted).

The SSA and Berg held mutual obligations in the same capacity as obligor and obligee. As described, in December 2003, the SSA determined it overpaid Berg disability benefits of \$25,690.00, and in 2009 an

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administrative law judge adjusted that amount to \$24,000.00, which Berg reduced to \$19,400.00. On July 15, 2014, the SSA granted Berg's application and determined she was disabled as that term is defined under the Social Security Act since November 17, 2012, and entitled to receive \$20,307.00 in disability insurance benefits. Thus, the parties and their respective capacities have not changed.

Finally, there is no dispute over whether the claim and debt are each valid and enforceable. Thus, the Court finds the elements for setoff are present. However, that does not end the Court's inquiry.

Section 553(b) of the Bankruptcy Code restricts a creditor's ability to exercise its right of setoff within the 90-day period prior to a debtor's bankruptcy filing. Section 553(b) reads:

(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

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(2) In this subsection, “insufficiency” means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

To begin, a trustee, or as is the case here, a debtor acting under 11 U.S.C. § 522(h), may recover a setoff under 11 U.S.C. § 553(b)(1) to the extent the creditor improved its position within the 90-day period preceding the debtor’s bankruptcy filing. As provided under section 553(b)(1), a trustee may recover the amount offset to the extent that any insufficiency on the setoff date is less than the insufficiency on the later of (A) 90 days before the petition date, and (B) the first date during the 90 days immediately preceding the petition date on which there is an insufficiency.

Section 553(b)(1) directs the Court to look at two separate dates to determine whether the SSA improved its position relative to other creditors during the 90-day period prior to Berg’s bankruptcy. This calculation proceeds in four steps, and is “strictly mathematical.” *See 5 Collier on Bankruptcy* ¶ 553.09[2][a] (16th ed.); *Braniff Airways v. Exxon Co.*, 814 F.2d 1030, 1040 (5th Cir. 1987).

First, section 553(b)(1) requires the Court to determine the SSA’s setoff position 90 days prior to Berg’s filing. To calculate the SSA’s position, the Court must compare the SSA’s claim with its debt, and calculate the extent to which its claim exceeds the amount of the debt, i.e., its “insufficiency.” “Insufficiency” is defined under section 553(b)(2) as the amount by which a creditor’s claim exceeds the amount of its debt. 11 U.S.C. § 553(b)(2).

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As described, Berg filed a Chapter 7 petition on August 7, 2014. Ninety days prior to that date is May 9, 2014. In its Notice of Award letter dated July 30, 2014, the SSA informed Berg she was eligible to receive disability benefits relating back to November 17, 2012. The Award letter stated Berg's benefits were subject to a five-month waiting period prior to receipt and explained benefits accrued since May 2013. Under 42 U.S.C. § 402(a) and 20 C.F.R. § 404.302(b)(4), disability insurance benefits are not paid until the recipient survives through the last day of the month. By illustration, benefits that accrue for the month of November are not paid until December, and so forth.

Relevant here, according to Berg's Award letter, the SSA calculated her award of back benefits as follows: Between May 2013 and November 2013, her benefits accrued at \$1,440.30 per month for a subtotal of \$10,080.00. In December 2013, there was a cost of living adjustment to \$1,461.90. Accordingly, between December 2013 and July 2014, the back benefits were \$1,461.90 per month for a subtotal during that time of \$10,227.00. Together, the SSA determined Berg had accrued benefits of \$20,307.00 between May 2013 and July 2014. Because section 553(b) instructs the Court to determine the insufficiency on May 9, 2014, I must determine Berg's accrued benefits for that particular date keeping in mind the May 2014 benefits were not accrued and payable until the first week of June 2014. Berg's accrued benefits from May 2013 through April 2014 total \$17,385.00. This is the total accrued as of May 9, 2014. On that same day, Berg owed the SSA

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\$19,400.00.³ Netting \$19,400.00 against \$17,385.00, on May 9 there existed an insufficiency of \$2,015.00

Step two applies only when there is no insufficiency on the ninetieth day prior to filing, which is not the case here. Step three directs the Court to determine the later to occur between (1) any insufficiency existing on the ninetieth day and (b) any insufficiency existing on the first day during the 90 days preceding the petition date, which includes the ninetieth day. 11 U.S.C. §§ 553(b)(1)(A) and (B); *see also Collier, supra*, ¶ 553.09[2][a]. Here, there existed an insufficiency of \$2,015.00 on the ninetieth day prior to Berg's bankruptcy petition. Thus, the Court will use that day as its initial reference point to compare whether on the setoff date the SSA decreased its insufficiency.

Under step four, the Court compares the SSA's insufficiency on the ninetieth day with its insufficiency on the date of setoff. On the setoff date of July 30, 2014, no insufficiency existed. Berg owed the SSA \$19,400.00 and the SSA owed Berg an accrued amount of \$20,307.00. Using the accrual date instead of the date of payment more accurately reflects how the SSA calculates an individual's benefits. Thus, on July 30, 2014, the SSA's insufficiency was zero, resulting in a change of position of \$2,015.00.

In applying section 553(b)'s improvement-in-position test, it is critical to remember that section 553(b) instructs the Court to look only at two dates: (1) the date of the first insufficiency during the 90 days

³ While the SSA states in its Brief that Berg owed it \$19,425.00 on May 9, the stipulated facts do not mention that amount.

prior to the petition date, and (2) the date of the actual prepetition setoff. Susan V. Kelley, *Ginsburg & Martin on Bankruptcy*, § 8.06[E] (5th Ed. Supp. 2016). “What happens between those two dates, or before or after them, is irrelevant.” *Id.*

Section 553(b) applies even if no insufficiency exists on the actual setoff date. *See Braniff Airways*, 814 F.2d at 1040 n.12. In that case, the Fifth Circuit reasoned that a creditor could certainly argue that section 553(b) does not apply when no insufficiency exists on the actual setoff date because the statute’s plain language refers only to a comparison of the insufficiencies on both dates. However, the court declined to adopt this argument. *Id.* And since neither the SSA nor Berg has made a similar argument, this Court will not address that argument here.

In essence, this case is similar to a setoff illustration provided by *Collier*:

Suppose a bank had a claim against a debtor for \$15,000. At 90 days before the commencement of debtor’s bankruptcy case, the debtor had \$10,000 on deposit with the bank. The “insufficiency” at 90 days was thus \$5,000. On the 89th day, the debtor deposited \$5,000, resulting in a balance of \$15,000 and an insufficiency of zero. At 30 days before the commencement of the debtor’s bankruptcy case, the bank offset the entire deposit against its claim. In calculating any recoverable improvement, section 553(b) requires use of the *later* of the insufficiency at 90 days before the petition date and the *first* date on which there was *any* insufficiency during the 90 day period, in this case the insufficiency on

the [ninetieth] day was \$5,000. Because the insufficiency at the time of setoff (zero) was less than the insufficiency at 90 days prior to filing (\$5,000), the bank improved its position by (\$5,000), but the bank may keep \$10,000 from its setoff (\$15,000 less the \$5,000 recovered by the trustee).

5 *Collier, supra*, ¶ 553.09[2][b] (emphasis same).

Upon receipt of the SSA's Award letter, on the ninetieth day prior to Berg's filing, the SSA owed Berg \$17,385.00 and Berg owed the SSA \$19,400.00, creating an insufficiency of \$2,015.00. On the actual day of setoff, the SSA's debt to Berg exceeded its claim against her reducing the insufficiency to zero, which is less than the insufficiency 90 days prior to her filing. Thus, the SSA improved its position by \$2,015.00.

Nonetheless, the SSA contends that under no circumstances could it inequitably improve its position in the 90 days before Berg's bankruptcy filing. The SSA argues under *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984), that Congress's concern that banks would foresee a debtor's bankruptcy was imminent and "scramble to secure a better position for themselves by decreasing the 'insufficiency,' to the detriment of other creditors" does not apply because neither the SSA nor Berg can do anything to increase the amount of benefits that will accrue in the 90 days before the petition date. *See id.* at 877. As such, the SSA contends that it properly recovered the \$19,400.00 in overpaid benefits.

This position overlooks the "purely mathematical" application of section 553(b) noted by the SSA and a

variety of courts applying section 553. *See Braniff Airways, Inc.*, 814 F.2d at 1040; *Damas v. United States (In re Damas)*, 504 B.R. 290, 294-95 (Bankr. D. Mass. 2014) (concluding debtor could not recover offset of social security payments because there was no decrease in the SSA's insufficiency position); *In re Bass Mechanical Contractors, Inc.*, 88 B.R. 201, 203 n.2 (Bankr. W.D. Ark. 1988). Accordingly, considerations of a creditor's intent or equity do not factor into the analysis.

Berg cites *In re Goodman*, Case No. 11-02760-8-JRL, 2012 Bankr. LEXIS 546 (Bankr. E.D.N.C. Feb. 17, 2012), for the proposition that an insufficiency did not exist on the ninetieth day because the SSA did not determine Berg was eligible to receive benefits until the actual date of setoff of July 30, 2014. As a result, section 553(b) instructs the Court to look to the first date upon which an insufficiency occurred, which was simultaneously the setoff date. Thus, according to Berg, the SSA's position improved between the date the insufficiency arose and the date of setoff, entitling her to recover the full setoff amount. However, this Court finds the Third Circuit's reasoning in *Lee* instructive. The court in *Lee* looked to when the benefits accrued as opposed to when the SSA's obligation to pay arose. *See Lee*, 739 F.2d at 877. Here, on the ninetieth day before filing her petition, Berg had accrued disability benefits in the amount of \$17,385.00, which created an insufficiency of \$2,015.00. Berg continued to accrue benefits up to and through the actual setoff date of July 30, 2014. On that date, no insufficiency existed. When comparing the two dates, the SSA improved its position by \$2,015.00 between May 9, 2014, and July 30, 2014.

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In summary, on July 30, 2014, Berg owed the SSA \$19,400.00. On that same day, the SSA owed Berg \$20,307.00, and set off Berg's debt of \$19,400.00 against her back benefits of \$20,307.00, issuing her a check for \$907.00. Using the accrual method, on the ninetieth day (May 9, 2014) prior to filing her bankruptcy, Berg had accrued back benefits of \$17,385.00, but owed the SSA \$19,400.00. Netting \$19,400.00 against \$17,385.00, on May 9 there existed an insufficiency of \$2,015.00. Between these two dates, the SSA improved its position in the amount of \$2,015.00. Accordingly, Berg is entitled to recover \$2,015.00. The SSA is entitled to retain \$17,385.00.

CONCLUSION

For the foregoing reasons, judgment on the pleadings is granted in favor of Plaintiff Peggy A. Berg in the amount of \$2,015.00. The Defendant, Social Security Administration, is entitled to retain \$17,385.00 of the amount offset.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

A separate order consistent with this decision will be entered.

Dated: June 15, 2017

BY THE COURT:

/s/Catherine J. Furay
Hon. Catherine J. Furay
U.S. Bankruptcy Judge

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THIS ORDER IS SIGNED AND ENTERED.

Dated: June 15, 2017

/s/Catherine J. Furay

Hon. Catherine J. Furay

United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

[Filed June 15, 2017]

Case Number: 14-13435-7

In re:)
)
GERALD W. BERG and)
PEGGY A. BERG,)
)
Debtors.)
)

Adversary Number: 16-89

PEGGY A. BERG,)
)
Plaintiff,)
)
v.)
)
SOCIAL SECURITY)

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ADMINISTRATION,)
)
)
Defendant.)
)

ORDER

The Court has today entered its Memorandum Decision in this adversary proceeding. Accordingly,

IT IS ORDERED that the Plaintiff's motion for judgment on the pleadings is granted, and judgment consistent with the decision shall be entered.

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THIS ORDER IS SIGNED AND ENTERED.

Dated: June 15, 2017

/s/Catherine J. Furay

Hon. Catherine J. Furay

United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

[Filed June 15, 2017]

Case Number: 14-13435-7

In re:)
)
GERALD W. BERG and)
PEGGY A. BERG,)
)
Debtors.)
)

Adversary Number: 16-89

PEGGY A. BERG,)
)
Plaintiff,)
)
v.)
)
SOCIAL SECURITY)

ADMINISTRATION,)
)
)
Defendant.)
)

JUDGMENT

This proceeding having come before the Court on a motion by Plaintiff for judgment on the pleadings, and the Court having issued its decision this date, it is hereby ORDERED:

1. Judgment is entered in favor of Plaintiff Peggy A. Berg in the amount of \$2,015.00.
2. Each party shall bear its own fees and costs.

APPENDIX C

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

**Bankr. Case No. 3:14-bk-13435
Chapter 7
Adversary Case No. 3-16-00089-cjf**

[Filed February 7, 2017]

In re Gerald W. Berg and Peggy A. Berg)
)
Peggy A. Berg,)
)
Plaintiff,)
)
v.)
)
Social Security Administration,)
)
Defendant.)
)

PRETRIAL STATEMENT

The parties by their respective undersigned attorneys submit this joint document pursuant to the Court's Preliminary Pretrial Order (Dkt. #9). The parties' attorneys conferred via telephone around 10:00 AM on February 2, 2017, and via email and a voicemail that day. Berg's attorney, Kyle Hanson, submits this order after having received approval from attorneys for

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the Social Security Administration (SSA), Julie Bentz and Richard Humphrey.

The facts in this case are undisputed. The only dispute is the legal effect of those facts, and so all that is needed is legal argument for the Court to make its determination.

SSA paid Berg benefits from June 1994 through December 2003, although Berg notified SSA of her re-employment in mid 2002. That resulted in an overpayment of \$25,690.60 as of December 2003; pursuant to a payment plan, Berg paid that debt down to \$19,400 as of July 2014. Berg petitioned for bankruptcy relief on August 7, 2014. Berg made a separate claim for benefits in the first half of 2014, and SSA awarded Berg forward benefits (that are not at issue) plus \$20,307 in back-paid benefits – but SSA did not pay that full amount, but rather subtracted the prior debt of \$19,400, paying the difference of \$907.

The question present is whether or not SSA owes Berg that \$19,400. Was the debt discharged pursuant to the Court's Chapter 7 discharge order entered January 9, 2015? Do Sections 553(b) and 522(h) apply to allow Berg to recover that insufficiency setoff, or do those provisions not apply in this situation? Berg asserts that she is entitled to recover that \$19,400. SSA asserts that it was entitled to take that setoff.

The parties stipulate to the following briefing schedule: (1) Berg submits a motion for judgment on the pleadings by February 22, 2017; (2) SSA responds by March 15, 2017; and (3) Berg submits any Reply by March 29, 2017. The parties do not think oral argument is necessary at this time.

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Respectfully Submitted:

/s/ Kyle Hanson

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