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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :
 :
 : Plaintiff, :
 :
 : - against - :
 :
 : GEN RE CORPORATION, :
 :
 : Defendant, :
 :
 : - and - :
 :
 : LIBERTY MUTUAL INSURANCE COMPANY, :
 :
 : Intervenor. :
-----X

No: 10-cv-458-LAP

**ORAL ARGUMENT
REQUESTED**

**MEMORANDUM OF LAW IN SUPPORT OF LIBERTY
MUTUAL INSURANCE COMPANY'S MOTION TO
INTERVENE AND TO ALTER OR AMEND THE JUDGMENT**

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Preliminary Statement

Liberty Mutual Insurance Company (“Liberty Mutual”) is the victim of the fraud scheme alleged in the Complaint. It seeks to intervene and to amend the judgment in this action because the Plaintiff Securities and Exchange Commission (“SEC”) refused to address Liberty Mutual’s legitimate claim to the \$12 million at issue and because Defendant General Re Corporation (“Gen Re”) contends “disgorgement of [that money] to the SEC precludes Liberty from recovering the \$12.1 million to which it seeks to lay claim, as Gen Re cannot be ordered to pay the same sum twice.”

The Judgment entered on consent of the original parties (the “Consent Judgment”) is both procedurally and substantively unfair to Liberty Mutual. Simply put, the SEC and Gen Re agreed that, as part of Gen Re’s settlement of securities law violations, Gen Re would disgorge \$12.2 million and the government would keep that money for itself.* Gen Re paid that money to the SEC on February 8, 2010.** Liberty Mutual claims that the money Gen Re disgorged belongs to Liberty Mutual and should be paid to it, and so told the SEC before it entered the settlement with Gen Re. Gen Re also asked the SEC to allow the money that it disgorged to be put in escrow pending an adjudication of Liberty Mutual’s claim to it. The SEC said no and demanded forfeiture as a condition of the settlement.

To maintain its settlement with the SEC, Gen Re concedes in this action that it disgorged its fees derived from the unlawful transactions alleged in the SEC’s Complaint and interest on

* The disgorgement amount is \$12,221,398. The amount that Gen Re owes Liberty Mutual is \$12,100,000. For ease of reference, each of these two amounts will be referred to as \$12 million.

** By order dated February 8, 2010, the Court directed the SEC to hold the disgorged funds in a separate interest-bearing account pending the resolution of the dispute Liberty Mutual has put before the Court.

those fees. Gen Re also has said that it will defend any subsequent litigation seeking payment of the money that Liberty Mutual says Gen Re owes it, by contending that anything owed Liberty Mutual and the disgorgement money are one in the same; and, once that money was paid to the government, any liability that Gen Re had to Liberty Mutual was extinguished. As such, the wrongdoer seeks to use its settlement with the SEC to kill two birds with one stone: (a) to resolve Gen Re's exposure to the SEC for the securities law violations; and (b) to evade paying a lawful debt Gen Re owes Liberty Mutual.

Thus, this is a classic case for allowing intervention to sort out the competing claims to the \$12 million that Gen Re disgorged. If the Court does not allow Liberty Mutual to intervene, then there is a real risk that, in subsequent litigation, a court or panel of arbitrators may decide that Gen Re owes Liberty Mutual this money, but that Gen Re has no obligation to pay Liberty Mutual anything because it disgorged to the government the very money it owed Liberty Mutual. The Court should not allow this.

Rather, the Court should determine, as between Liberty Mutual and the SEC, to whom the money at issue should be paid in equity and fairness and amend the judgment accordingly. Liberty Mutual contends that money should be paid to it because either (a) the disgorged funds are derived from the money that Gen Re owes Liberty Mutual or (b) upon the balancing of the equities, the money should be paid to the victim of Gen Re's securities law violations even if the disgorged funds are Gen Re's fees plus interest. Alternatively, to protect the integrity of the judicial process, Liberty Mutual seeks a declaration that is binding on Gen Re in any subsequent litigation or arbitration that the source of the disgorged money is not derived from any debt Gen Re owes Liberty Mutual.

Given these facts, intervention is proper because: (1) Liberty Mutual has an interest in the \$12 million that Gen Re has disgorged, and its claim in its proposed Complaint in Intervention arises from the same transactions that are the basis for the SEC's action against Gen Re and the Consent Judgement; (2) Liberty Mutual's interests are not adequately represented either by Gen Re or the SEC; (3) Liberty Mutual promptly sought to intervene; and (4) intervention will not prejudice the rights of Gen Re or the SEC, as Liberty Mutual does not seek to relitigate any core issue decided by the Consent Judgment, whereas denying intervention may greatly prejudice Liberty Mutual's rights.

The Facts

The accompanying affidavits of James P. McKenney, Sean B. McSweeney and Kevin J. Fee dated February 10, 2010 report the relevant facts. They are recited in the proposed Complaint in Intervention and summarized here.

According to the SEC, Gen Re and Prudential Financial, Inc. (together with its subsidiaries and affiliates, "Prudential") through Prudential subsidiaries, collectively called "PRUPAC," entered into a series of sham transactions that purported to be reinsurance contracts. The true purpose of these transactions was to allow Gen Re to hold cash for Prudential, which Prudential then drew down at strategic times to increase its earnings. Pursuant to an oral side agreement, Gen Re was paid a 4 to 4.5% fee for facilitating these "round trips of cash." That money was taken from the "premiums" PRUPAC paid Gen Re and the interest earned on those "premiums." At the end of 2002, Gen Re owed Prudential more than \$41 million purportedly for reinsurance recoveries, and, according to the SEC, Prudential included that money in its year end income. However, that money was simply cash PRUPAC had paid Gen Re which Gen Re

promised to return with interest less its fees. See SEC Complaint at 10-15. The \$41.3 million that Gen Re owed PRUPAC, however, was not paid to Prudential. At the end of 2002, it remained on PRUPAC's books as a receivable due from Gen Re for reinsurance recoveries (the "\$41 million receivable").

The SEC further alleged that Prudential made false entries in its books and records regarding the sham transactions with Gen Re, including mis-characterizing the \$41 million receivable as reinsurance proceeds, and that this violated the Exchange Act's requirement that public companies keep accurate books and records. See Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A) and 78m(b)(2)(B). The SEC charged Gen Re with aiding and abetting Prudential's books and records violations. In the Consent Judgment entered in this action, Gen Re agreed not to contest the truthfulness of the allegations made against it in any action, such as this one, in which the SEC is a party. Prudential has entered into a similar Consent Judgment based on a SEC Complaint that alleged the same sham transactions between Prudential and Gen Re. See Securities and Exchange Commission v. Prudential Financial, Inc., 08 Civ 3916 (D.N.J.)(PGS).

Liberty Mutual was unaware of Prudential and Gen Re's fraud scheme when it purchased PRUPAC in 2003. That purchase included the \$41 million receivable that PRUPAC still carried on its books and represented to Liberty Mutual was money owed as reinsurance recoveries. Liberty Mutual, thus, became a holder in due course of that receivable.* Gen Re later told Liberty

* It is ironic that the SEC seeks to deny Liberty Mutual money that belongs to it by arguing that it is disqualified from receiving disgorged funds because it is the successor in interest to Prudential's fraud scheme. In purchasing PRUPAC, Liberty Mutual relied upon Prudential's books and records to provide accurate information regarding PRUPAC's assets and liabilities, including the legitimacy of the \$41 million receivable at issue. The SEC resolved its investigation of

Mutual that the actual amount that it owed for claims made under the reinsurance contracts was \$29.2 million, and not the \$41.3 million that PRUPAC carried on its books. Gen Re paid Liberty Mutual the lesser amount, leaving a balance of \$12.1 million owed on the \$41 million receivable. The SEC's Complaint and the Consent Judgment make clear that what Gen Re told Liberty Mutual was false. The \$41 million receivable on PRUPAC's books, in fact, was PRUPAC's own cash that Gen Re was holding. Liberty Mutual bought that cash when it bought PRUPAC.

After the SEC and Prudential announced their settlement in 2008, Liberty Mutual told the SEC that it was the victim of the fraud scheme, it was owed the \$41 million receivable, and Gen Re would be unjustly enriched if it was allowed to keep that money.

Shortly before the SEC settled with Gen Re, Liberty Mutual repeated this to the SEC concerning the \$12 million that remained unpaid. During its negotiations with the SEC, Gen Re asked that the \$12 million it disgorged be held in escrow and that Liberty Mutual and Prudential be allowed to contest to whom that money should be paid. The SEC refused. As a condition of any settlement of the claims involving Prudential's fraudulent books and records, the SEC required Gen Re to disgorge \$12 million and pay the money to the government. The Complaint and Consent Judgment in this action were filed on January 20 and 26, 2010, respectively.

The SEC also contends that Prudential paid Gen Re \$8.1 million for its role in the sham reinsurance transactions that really were nothing but round trips of cash, and that Gen Re has

Prudential and Gen Re by filing complaints alleging books and records violations involving the sham reinsurance transaction pursuant to Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act. Now the SEC seeks to disentitle Liberty Mutual's claim to the money in dispute notwithstanding that Liberty Mutual relied on the very books and records that the SEC says are false and fraudulent in its enforcement action. The laws prohibiting publicly traded companies from cooking their books are designed to protect everyone in the marketplace, including Liberty Mutual.

disgorged that money plus interest. In its February 2, 2010 letter to the Court, the SEC claims that this will have no effect on any claim that Liberty Mutual has for its unpaid receivable. Gen Re, however, contends that what it is forfeiting and what it may owe Liberty Mutual are one in the same. In its February 3, 2010 letter to the Court, Gen Re said: “We recognize Gen Re's obligation in this proceeding not to deny the SEC's characterization of [the disgorgement] amount in its Complaint as a fee.” Gen Re also said that its “disgorgement of the approximately \$12.1 million to the SEC precludes Liberty from recovering the \$12.1 million to which it seeks to lay claim, as Gen Re cannot be ordered to pay the same sum twice.” See Gen Re letter to the Court dated February 3, 2010.

Thus, the dispute before the Court is a classic case of multiple parties asserting differing interests and competing claims to the same funds.

Argument

LIBERTY MUTUAL SATISFIES THE REQUIREMENTS FOR MANDATORY OR PERMISSIVE INTERVENTION UNDER RULE 24

Liberty Mutual has a claim to the \$12 million that the Court ordered Gen Re to disgorge to the government. The purpose of Liberty Mutual's intervention is to be heard regarding the fair and equitable disposition of that money as between Liberty Mutual and the SEC, and, alternatively, to preclude Gen Re in any subsequent litigation involving the unpaid portion of the \$41 million receivable from taking a position contrary to its concession in this action that any money that it disgorges is its “fees” from the fraud scheme plus interest.

Liberty Mutual's claim arises from the same facts that warranted the SEC's action against Gen Re and the conduct that warranted Gen Re disgorging \$12 million. Neither Gen Re nor the

SEC adequately represented Liberty Mutual's interests. Liberty Mutual's application is prompt and will not prejudice any party. These circumstances support both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b).

A. **Liberty Mutual Satisfies the Requirements for Intervention as of Right**

Rule 24(a)(2) provides:

On timely motion, the Court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Intervention should be granted where, as here, the intervenor: "(1) files a timely motion; (2) asserts an interest relating to the property or transaction that is the subject of the action; (3) is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) has an interest not adequately represented by the other parties.'" Berkeley Acquisitions, LLC v. Mallow, Konstam & Hager, P.C., 262 F.R.D. 269, 272 (S.D.N.Y. 2009) (quoting U.S. v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994)).

1. **The Application Is Timely**

Liberty Mutual was not a party to the SEC proceedings, and had no prior opportunity to petition the Court as to the equitable distribution of the money owed it that Gen Re disgorged. It has acted promptly after learning that Gen Re had agreed to disgorge \$12 million arising from the conduct described SEC's Complaint. This action was commenced by the SEC on January 20, 2010. The Consent Judgment was entered on January 26, 2010. It directed Gen Re to disgorge

its ill-gotten gains to the SEC on or before February 9, 2010, and directed the SEC to pay over those funds to the Federal Treasury. Through its January 29, 2010 pre-motion conference letter to the Court, Liberty Mutual sought to intervene in this action, well within the time which Gen Re was required to pay the disgorged funds.

The federal courts recognize that intervention is timely even after entry of judgment. The Supreme Court has held that, in assessing the timeliness of a post-judgment motion for intervention, “[t]he critical inquiry. . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment.” United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-96 (1977). Accord Dow Jones & Co., Inc. v. U.S. Dep’t. of Justice, 161 F.R.D. 247 (S.D.N.Y. 1995) (citing United Airlines).

Applying that rule, United Airlines held that an intervention motion filed within the 30-day period after entry of judgment was timely. Dow Jones held that an intervention motion filed within 18 days after entry of summary judgment was timely.

Liberty Mutual does not seek to relitigate the underlying issues. It only seeks to modify the judgment to declare that the funds Gen Re disgorged be paid to Liberty Mutual. In the alternative, Liberty Mutual seeks a declaration that is binding on Gen Re in any subsequent proceeding that any money that it disgorged and paid to the government is not derived from any debt that Gen Re may owe Liberty Mutual.

In similar circumstances, courts have found the intervenor’s post-judgment motion for intervention to be timely. See, e.g., McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970) (granting insurance company’s motion to intervene as of right after judgment, and before distribution of funds, to protect its asserted interest in those funds); S.E.C. v. Navin, 166 F.R.D.

435 (N.D. Cal. 1995) (granting post-judgment intervention as of right after entry of consent decree, but before liquidation and distribution of corporate assets, where intervenor asserted interest in those assets).

McDonald is directly on point. There, the court held that, where the intervenor insurance company “was not attempting to reopen or relitigate any issue which had previously been determined,” but only to “protect its . . . interest in a fund which had not yet been distributed,” its motion for intervention promptly after entry of judgment was timely and proper. 430 F.2d at 1071. In so holding, McDonald cited with approval the following language from two prior cases:

“When the money was paid into court, all the purposes of the decree, so far as the parties to the suit were concerned, were accomplished. The insurance companies had not been parties to the suit, and it was entirely competent for them, at any time before the final distribution of the fund was made, to intervene for the purpose of presenting their claim to an interest in the fund, and for its establishment by the decree of the court.”

430 F.2d at 1072 (quoting Mason v. Marine Ins. Co., 110 F. 452, 455 (6th Cir. 1901), and citing Mitchell v. The Etna, 138 F.2d 37 (3d Cir. 1943)).

The procedural posture of this case is identical. Liberty Mutual seeks “to intervene for the purpose of presenting [its] claim in the fund[s], and for its establishment by the decree of the court.” McDonald, *supra*, 430 F.2d at 1072.

2. Liberty Mutual’s Interest in the Action

If the disgorged funds are derived from the unpaid receivable balance, then Gen Re has paid the government Liberty Mutual’s money. Gen Re concedes the allegation in the SEC Complaint that the money it disgorged is its “fees” for participating in the fraud scheme plus interest. However, Gen Re also says that it intends to argue in other litigation that the disgorged

funds are derived from the receivable to bar any claim that Liberty Mutual has to the unpaid receivable balance. Thus, Liberty Mutual has an interest to protect in this action because, as it now stands, the execution of the Consent Judgment may compromise Liberty Mutual's rights.

3. Disgorgement to the Treasury Impairs Liberty Mutual's Interests

Gen Re has told the Court and Liberty Mutual that, once it disgorges and pays \$12 million to the SEC, that will immunize it from any further liability to Liberty Mutual arising from the \$41 million receivable. Gen Re premises its argument that it need only pay once on Litton Indus. Inc. v. Lehman Bros. Kuhn Loeb Inc., 734 F. Supp. 1071, 1076 (S.D.N.Y. 1990), cited with approval in Commercial Union Assur. Co., plc v. Milken, 17 F.3d 608, 615 (2d Cir. 1994). Those cases hold that the satisfaction of one equitable obligation to disgorge ill-gotten gains satisfies a subsequent equitable claim to disgorge the same money. Liberty Mutual does not endorse Gen Re's position; in fact, it rejects it.

Liberty Mutual has both legal claims (contract, bailment, etc.) and equitable claims (unjust enrichment) to the \$12 million that Gen Re owes it. Legal claims for the same money survive disgorgement. See In re Spear & Jackson Sec. Litig., 399 F. Supp. 2d 1350, 1360 (S.D. Fla. 2005). Thus, Liberty Mutual believes that its money damages claims will survive any disgorgement, even if a court or arbitrator determines that the equitable claim does not. However, at this point, neither the nature of Liberty Mutual's claims against Gen Re nor the viability of any defense has been adjudicated.

If it is later determined that Liberty Mutual only has an equitable claim to the unpaid balance, and that the money that Gen Re disgorged was derived from those funds, then Liberty Mutual may be barred from any recovery from Gen Re, and, at the same time, have no recourse

against the government. At that juncture, the only loser would be the actual victim of Gen Re's fraud.

In precisely these circumstances, courts regularly grant leave to intervene as of right to third parties whose rights may be impaired by the relief sought in a SEC enforcement action. See, e.g., SEC v. Flight Transp. Corp., 699 F.2d 943, 948 (8th Cir. 1983) (granting mandatory intervention where creditor "has a sufficiently direct interest" in funds that otherwise might be disgorged); S.E.C. v. Heartland Group, Inc., No. 01 C 1984, 2003 WL 1089366, at *5 (N.D. Ill. Mar. 11, 2003) (granting creditor's intervention motion as of right where if the relief sought by the SEC were granted, the creditor "would lose indemnification funds that it would otherwise have an interest in"); S.E.C. v. Navin, 166 F.R.D. 435 (N.D. Cal. 1995) (allowing post-judgment intervention as of right where corporate defendant's only assets otherwise would be liquidated via consent decree).

4. Liberty Mutual's Interests Are Not Adequately Represented

The requirement that an intervenor's interests not be adequately represented by existing parties "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972).

Liberty Mutual has more than made that "minimal" showing. Both Gen Re and the SEC have acted in their own self-interest and adversely to the interests of Liberty Mutual. Without intervention, Liberty Mutual's interests will never be protected.

As demonstrated above, Gen Re is not seeking to protect Liberty Mutual's interests. Gen Re is attempting to exploit the settlement of its dispute with the SEC to impair Liberty Mutual's

rights. The same can be said for the SEC. The SEC knew that Liberty Mutual claimed an interest in the \$12 million at issue because Liberty Mutual told it so twice. The SEC could have filed a motion regarding the disposition of the disgorgement money. This would have permitted all interested parties to be heard, and allowed the Court, after considering the equities, to make a thoughtful judgment concerning the proper disbursement of the disgorged money. The SEC, however, made no such motion. It obtained the Consent Judgment without telling the Court of Liberty Mutual's claim to the money at issue, and then presented Liberty Mutual with a *fait accompli* in the form of the Consent Judgment.

Further, in utter disregard of the victim's interest, the SEC has been silent on Gen Re's explicit intent to concede here that it is disgorging its "fees" but, outside the confines of this action, to seek to evade a lawful debt by arguing that any money that it owed Liberty Mutual was disgorged to the government and that the disgorgement extinguished any debt owed Liberty Mutual.

5. What Liberty Mutual Seeks to Litigate Upon Intervention

Liberty Mutual seeks to intervene to ask the Court to resolve two interrelated disputes and amend the judgment accordingly. A plenary action is not necessary to resolve either dispute, and Liberty Mutual does not seek one. First, the Court should determine, in equity and fairness, as between Liberty Mutual and the Treasury who should be paid the disgorged money. Liberty contends that it should be paid the money (a) if the disgorged funds are derived from any debt that Gen Re owes Liberty Mutual or (b) as the victim of Gen Re's securities law violations even if the disgorged funds are Gen Re's fees plus interest. Alternatively, Liberty Mutual asks the Court to make a finding that is binding on Gen Re in any other litigation or arbitration involving

the \$41 million receivable that the source of the disgorged money is not derived from any debt Gen Re owes Liberty Mutual. The latter relief is necessary to protect the integrity of the judicial process by preventing Gen Re from taking contradictory positions, as it intends to do, regarding the source of the disgorged money. The judgment should then be amended to reflect the Court's rulings.

The Complaint in Intervention relies on the same facts that serve as the basis of the SEC's action and the Consent Judgment, to wit: The \$41 million receivable was cash Gen Re owed PRUPAC, and not a reinsurance recovery. Gen Re has disgorged the money as ordered by the Court. It has no standing to contest who, as between the SEC and Liberty Mutual, is the proper recipient of those funds. To the extent that it does have standing, Gen Re must concede that the \$41 million was only cash it was holding for PRUPAC because Gen Re has agreed not to contest the facts alleged in the SEC Complaint. Liberty Mutual's proof that Gen Re owes it \$12 million includes three additional facts which Liberty Mutual will put before the Court, none of which the SEC or Gen Re can or should dispute: (1) Liberty Mutual bought PRUPAC in 2003; (2) the \$41 million receivable was on PRUPAC's books at the time of that purchase; and (3) Gen Re has only paid Liberty Mutual \$29.2 million of that receivable, leaving \$12.1 million balance unpaid.

To establish that in fairness and equity, the disgorged funds should be paid to it, Liberty Mutual will demonstrate that it would be unjust and inequitable to allow the government to keep disgorged money owed to Liberty Mutual and, at the same time, to allow Gen Re to seek to avoid paying Liberty Mutual on the ground that its disgorgement extinguished any further liability for the money owed Liberty Mutual. If intervention is not allowed, Liberty Mutual may not be able to obtain from Gen Re what it owes Liberty Mutual.

The alternative relief that Liberty Mutual seeks is an amendment to the judgment declaring that the money that Gen Re disgorged is not derived from any debt that Gen Re owes Liberty Mutual and that Gen Re's payment to the SEC does not preclude Liberty Mutual from recovering the \$12.1 million to which it seeks to lay claim. In the circumstances of this case, simple fairness requires such a ruling if the disgorged funds are not awarded to Liberty Mutual.

Moreover, judicial estoppel should bar Gen Re's effort to evade its lawful debt. As the Second Circuit has held:

Judicial estoppel "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [that party] in a prior legal proceeding." The purposes of the doctrine are to "preserve the sanctity of the oath," and to "protect judicial integrity by avoiding the risk of inconsistent results in two proceedings."

Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999) (citations omitted).

To protect the integrity of the judicial system, this Court should allow intervention to preclude Gen Re from doing the very thing that judicial estoppel condemns. Ostensibly, Gen Re will point to a provision in the Consent Judgment that allows it to dispute facts conceded in this action in any action in which the SEC is not a party. However, that provision cannot be read as permitting it to take contradictory positions to the detriment of a third party in both actions.

Pursuant to Rule 59, Fed. R. Civ. Pro., the judgment should be modified for the given reasons, by directing that \$12.1 million of the disgorged funds be paid to Liberty Mutual, or, in the alternative, declaring that the disgorged money is not derived from any debt Gen Re owes Liberty Mutual, and that this finding is binding on Gen Re in any subsequent litigation involving the \$41 receivable.

B. Liberty Mutual Satisfies the Requirements for Permissive Intervention

Liberty Mutual separately satisfies the requirements for permissive joinder under Rule 24(b)(1)(B), which provides: “On timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact.”

In deciding a Rule 24(b) motion, the “principal consideration set forth in the Rule is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Sackman v. Liggett Group, Inc., 167 F.R.D. 6, 23 (E.D.N.Y. 1996) (citations omitted); see also Rule 24(b)(3) (“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”). Other relevant factors include “the nature and extent of the intervenors’ interest, whether their interests are adequately represented and whether the applicants for intervention will contribute to a full development of the issues presented for adjudication.” Sackman, 167 F.R.D. at 23.

Liberty Mutual satisfies these requirements. As set forth above, Liberty Mutual has a direct interest in the disgorged funds and, in its current form, the Consent Judgment is affirmatively adverse to Liberty Mutual’s interest. Liberty Mutual’s intervention will not prejudice any party; nor will Liberty Mutual seek to re-litigate or undo the core factual issues decided. Indeed, its claim arises out of the exact same set of facts described in the Complaint and Consent Judgment which the SEC propounds and Gen Re cannot contest. Further, no one can dispute, at least in good faith, that Liberty Mutual purchased PRUPAC, the \$41 million receivable due from Gen Re was on PRUPAC’s books at the time of the purchase and \$12 million of that receivable remains unpaid.

The factual issues which the Court must resolve relate to the source of the disgorgement

money, and to whom, in equity and fairness, the Court should distribute it. These disputes are before the Court because the SEC refused to address Liberty Mutual's legitimate claim to the \$12 million at issue and because Gen Re takes contradictory positions on the source of these funds to benefit itself financially, all to Liberty Mutual's detriment. Far from causing prejudice to any party, Liberty Mutual's intervention will promote judicial economy, conserve the parties' resources and, most important, protect the integrity of the judicial process.

In such circumstances, courts grant leave to intervene as the most efficient way to deal with competing claims. See, e.g., S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 457, 469 (S.D.N.Y. 2000) ("Given the broad discretion to this Court under Rule 24(b) to determine the fairest and most efficient method of handling a case with multiple parties and claims, intervention is appropriate."); SEC v. Kings Real Estate Inv. Trust, 222 F.R.D. 660, 667-68 (D. Kan. 2004) (allowing intervention to determine priority of competing claims to assets whose distribution is sought by the SEC).

Conclusion

The parties' procurement of the Consent Judgment without affording Liberty Mutual any opportunity to protect its interests was both procedurally unfair and substantively unjust. Liberty Mutual is the victim of the very books and records violation in the SEC's complaints, misconduct which both Gen Re and Prudential concede. Liberty Mutual claims the \$12 million that Gen Re paid to the government. This Court should determine who is the proper and just recipient of that money and amend the judgment to direct payment of the \$12.1 million to Liberty Mutual. A failure to decide these issues at this time will allow for conflicting resolutions of the source of the disgorged funds. This, in turn, has the potential of allowing Gen Re to fulfill is

