UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	PROMESA Title III
as representative of	:	Case No. 17-BK-3283 (LTS)
THE COMMONWEALTH OF PUERTO RICO, *et al.*,	:	(Jointly Administered)
Debtors.[1]	:	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE COMMONWEALTH OF PUERTO RICO,	:	
as agent of	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	
as representative of	:	Adv. Proc. No. 17-257 (LTS)
THE COMMONWEALTH OF PUERTO RICO,	:	
Plaintiff,	:	
v.	:	
BETTINA WHYTE,	:	
as agent of	:	

[1] The Debtors in these title III cases, along with each Debtor's respective title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283 (LTS)) (Last Four Digits of Federal Tax ID: 3481), (ii) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566(LTS)) (Last Four Digits of Federal Tax ID: 9686), (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567 (LTS)) (Last Four Digits of Federal Tax ID: 3808), (iv) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284 (LTS)) (Last Four Digits of Federal Tax ID: 8474), and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747).

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:
as representative of	:
THE PUERTO RICO SALES TAX FINANCING CORPORATION,	:
Defendant.	:

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COMMONWEALTH AGENT'S LIMITED OBJECTION TO URGENT MOTION OF BANK OF NEW YORK MELLON, AS TRUSTEE, FOR LEAVE TO INTERVENE IN COMMONWEALTH-COFINA DISPUTE FOR A LIMITED PURPOSE

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To the Honorable United States District Court Judge Laura T. Swain:

The Commonwealth Agent respectfully submits this limited objection (the "Limited Objection") to the *Urgent Motion of the Bank of New York Mellon, as Trustee, for Leave to Intervene in the Commonwealth-COFINA Dispute for a Limited Purpose* [Case No. 17-00257-LTS, Docket No. 503], dated June 20, 2018 (the "BONY Intervention Motion").[2] In support of its Limited Objection, the Commonwealth Agent states as follows:

PRELIMINARY STATEMENT

1. A motion to intervene must be denied if the motion is untimely **or** if the putative intervenor has not satisfied its burden of demonstrating that its interests are not adequately represented by any of the existing parties. The BONY Intervention Motion fails both of these requirements and (other than with respect to certain limited issues applicable solely to BONY (in contrast to arguments made by BONY on behalf an amorphous group of "Beneficial Holders")) must be denied.

2. Throughout this adversary proceeding, the Commonwealth Agent has asserted that the Commonwealth owns **all** SUT revenues, including SUT revenues already collected and deposited with BONY (the "BONY Cash"). **In other words, from the moment the complaint was filed in this adversary proceeding, there was a "measurable risk"[3] to any party that asserts rights and/or interests in any SUT revenues (including the BONY Cash) that these**

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the *Omnibus Reply of Commonwealth Agent in Support of Urgent Motion, Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rule 9019, for Order Establishing Procedures Governing 5.5% SUT Revenues Collected On or After July 1, 2018*, [Case No. 17-00257-LTS, Docket No. 517] (the "Reply"), filed contemporaneously herewith.

[3] As explained below, the presence of a "measurable risk" is a key consideration in an intervention motion, as the First Circuit has explained, "the law contemplates that a party must move to protect its interest no later than when it gains some actual knowledge that a measurable risk exists." *Banco Popular v. Greenblatt*, 964 F.2d 1227 (1st Cir.1992).

asserted rights and/or interests would be imperiled by the Commonwealth-COFINA Dispute, whether by settlement or by court ruling.

3. Notwithstanding this measurable risk, BONY chose not to move to intervene in the Commonwealth-COFINA Dispute when the complaint was filed over nine months ago. It chose not to move to intervene as the deadlines approached for expert discovery and for summary judgment, and it chose not to move to intervene until two months after oral arguments on the summary judgment motions. While BONY chose not to intervene, it (and the Beneficial Holders) consciously accepted the measurable risk that the court could issue a ruling, or the parties could negotiate a settlement, that extinguished any, or at least some, alleged rights or interests in the SUT revenues already deposited with BONY.

4. BONY now takes issue with the Urgent Motion filed by the Commonwealth Agent, and **supported (or at least not objected to) by all existing parties in this adversary proceeding**.[4] Specifically, BONY points to the fact that, under the Urgent Motion, if the settlement ultimately fails and the court (after the Abeyance Period) issues a "split ruling," then such a ruling would be retroactive to July 1, 2018 as to future SUT. BONY takes issues with this because (as the BONY Intervention Motion and the Proposed BONY Objection make clear) BONY believes that (i) the mere act of holding SUT revenues is in and of itself legally significant, and (ii) that the amount of SUT revenues affected by this alleged legal significance should continue to grow. Accordingly, BONY filed its intervention motion, arguing that the Urgent Motion imperils the Beneficial Holders (and BONY's) alleged interests in the Post-July 1, 2018 Funds.

[4] The AAFAF Response, while it requests certain changes to the language of any order granting the Urgent Motion, is not couched as an objection, and indeed states that provided AAFAF's rights are reserved, it "does not object to the relief sought in the" Urgent Motion. AAFAF Resp. pg. 2.

5. It is a fundamental matter of logic that if the Post-July 1, 2018 Funds were to be deposited with BONY, they would become BONY Cash. Equally obvious is that the Commonwealth Agent's claim that the Commonwealth owns **all** SUT revenues, including the BONY Cash, would therefore apply to Post-July 1 SUT Funds. Therefore, it is incontrovertible that the "measurable risk" to BONY's alleged interest in the Post-July 1, 2018 Funds is exactly the same "measurable risk" to its alleged interest in the BONY Cash that existed from the moment the complaint was filed in September, 2017. Accordingly, the timeliness requirement that is a threshold requirement for all intervention motions (and which courts have strictly enforced) prohibits BONY – who was content to ignore this risk from the inception of the adversary proceeding until now – from moving to intervene at this late stage.

6. Separately, even if BONY's motion were timely (it is not), the interests of the amorphous group of Beneficial Holders BONY asserts are more than adequately represented by the sophisticated and active existing COFINA parties who (at least for purposes of the Commonwealth-COFINA Dispute) share the same ultimate objective. Indeed, the existing COFINA parties already include Permitted Intervenors (as defined in the Stipulation) that collectively hold and/or insure both junior and senior COFINA bonds with a face amount of approximately $9 billion. As such, there is no Beneficial Holder whose interests are not aligned with an existing party, and there is no basis to rebut the presumption established by the First Circuit that the presence of an existing party with the same ultimate objective establishes adequate representation of a putative intervenor.

LIMITED OBJECTION

I. BONY Intervention on Behalf of Beneficial Holders Is Untimely and Unnecessary

7. Rule 24 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Bankruptcy Rule 7024, sets out the standard for mandatory intervention (Rule

24(a)) and permissive intervention (Rule 24(b)). To succeed on a motion to intervene, the putative intervenor must establish that its motion is timely; a motion asserting a mandatory right to intervene also requires that the putative intervenor establish (among other things) the lack of adequate representation of its position by any existing party.[5] Fed. R. Civ. P. 24(a)(2); *see also R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). The failure to satisfy any one of the preconditions to intervention "dooms intervention." *Id*. (internal references omitted). As explained herein, the BONY Intervention Motion is not timely, and its asserted interest is more than adequately represented; accordingly, the BONY Intervention Motion must be denied.

A. BONY Intervention Motion is Untimely

8. The First Circuit has explained that the "timeliness inquiry" is a threshold determination whenever intervention is requested and opposed." *Candelario-Del Moral v. UBS Fin. Servs. Inc. of Puerto Rico*, 290 F.R.D. 336, 340 (D.P.R. 2013), *as corrected* (May 8, 2013), *aff'd sub nom. In re Efron*, 746 F.3d 30 (1st Cir. 2014) (citing *R &G Mortg.*, 584 F.3d at 7); *see also Banco Popular v. Greenblatt*, 964 F.2d 1227 (1st Cir.1992) ("We have made it pellucidly clear that Rule 24's timeliness requirement is of great importance."); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 290 F.R.D. 11, 14 (D. Mass. 2013) ("For intervention, timeliness is of first importance.") (internal references omitted).

9. In this circuit, courts consider four factors as part of the timeliness inquiry: (i) the length of time that the putative intervenor knew or reasonably should have known that its interests were at risk before moving to intervene; (ii) the prejudice to existing parties of allowing intervention; (iii) the prejudice to the moving party of denying intervention; and (iv) the presence

[5] BONY has not asserted a unconditional statutory right intervention under Rule 24(a)(1).

of any special circumstances militating for or against intervention. *R & G Mortg.*, 584 F.3d at 7. BONY "neither mentions nor applies the timeliness factors," *Candelario*, 290 F.R.D. at 341, which is unsurprising, as each relevant factor militates against allowing BONY to intervene.

i. BONY Knew of Risk to Alleged Interest to Beneficial Holders Months Before Moving to Intervene

10. "The first factor focuses on actual or constructive knowledge of possible jeopardy." *Greenblatt*, 964 F.2d at 1231. Stated otherwise, "the law contemplates that a party must move to protect its interest no later than when it gains some actual knowledge that a measurable risk exists." *Id.; see also Sec. & Exch. Comm'n v. Callahan*, 193 F. Supp. 3d 177, 203 (E.D.N.Y. 2016) ("Rule 24 does not require that an applicant's interest be crystallized or that an applicant wait until there is 'no doubt' that his or her interests will be impacted. Instead, Rule 24 encourages applicants to move when it becomes apparent that their interests **might** not be protected.") (as modified) (emphasis added). "Once a potential intervenor has acquired such knowledge [*i.e.*, knowledge of a measurable risk], the tempo of the count accelerates." *Greenblatt*, 964 F.2d at 1231. The "timeliness inquiry," therefore, "centers on how diligently the putative intervenor has acted once he has received actual or constructive notice of the impending threat." *R & G Mortg.*, 584 F.3d at 8.

11. The BONY Intervention Motion makes clear that the (alleged) interests BONY seeks to protect through intervention are the "rights and interests attendant to [BONY]'s legal title to and possession of the Post-July 1, 2018 Funds." BONY goes on to explain that the Commonwealth Agent is asking the court to "treat the Post-July 1, 2018 Funds as if they were not deposited with [BONY]." BONY expands on this argument in its proposed objection, stating the effect of the Urgent Motion is that "funds that otherwise would be deposited with BNYM after July 1, 2018, and held by BNYM in trust for the benefit of Bondowners (and Beneficial

Holders) under the terms of the Resolution would be recharacterized automatically as 'future' Pledged Sales Tax as if those funds were not held by BNYM and possession of the funds in trust had no legal significance."[6]

12. In other words, BONY believes that (i) it holds legal title to all SUT revenues deposited in BONY accounts, and (ii) notwithstanding the Interpleader Order (as defined in the BONY Intervention Motion), the mere fact that BONY holds such funds is itself of legal significance. The BONY Intervention Motion is designed entirely to safeguard these alleged interests against the "retroactive concern" identified by BONY – *i.e.*, that the courts' ruling may take away these alleged rights of BONY and the Beneficial Holders in SUT revenues deposited with BONY, including the Post-July 1, 2018 Funds.

13. This concern, however, existed from the moment the complaint was filed. As BONY itself notes in its proposed objection, the Commonwealth Agent has always asserted that **all SUT revenues, wherever held and whenever deposited, are Commonwealth property**.[7] It is beyond cavil, therefore, that any ruling the court may issue—and indeed, could have already issued—could include a finding that all SUT revenues are property of the Commonwealth. **Therefore, from the moment the complaint was filed BONY was aware of a "measurable risk" to the alleged rights of the Beneficial Holders in SUT revenues already deposited with BONY**.

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[6] Proposed BONY Obj. ¶ 28.

[7] *See* Proposed BONY Obj. ¶ 29. For the avoidance of doubt, the Commonwealth Agent, which asserts that the Commonwealth is the owner of all SUT revenues, regardless of whether they have been deposited with BONY, strongly disputes BONY's allegation that the mere fact that it holds SUT revenues is of any legal significance, and reserves all rights accordingly. Moreover, and contrary to BONY's repeated assertions that it holds legal title to the SUT revenues, *see* BONY Intervention Mot. ¶¶ 22, 23, even if the Commonwealth is incorrect in its assertion that it owns the SUT revenues, it would be COFINA, not BONY, that would be the owner of such funds. *See Response of the Puerto Rico Sales Tax Financing Corporation to Motions for Summary Judgment* [Case No. 17-133-LTS, Docket No. 469], ¶¶ 33-37. This Objection merely points out that regardless of the merits of BONY's assertions, from the moment the complaint was filed in this adversary proceeding BONY was aware that its assertions about legal title and the legal significance of holding the SUT revenues were being attacked and were subject to, in the words of the First Circuit, a "measurable risk."

14. Notwithstanding this knowledge, BONY chose not to intervene when the complaint was filed, it chose not to intervene before or after the summary judgment briefs were filed, and it chose not to intervene after the court heard oral arguments. "This delay is simply too long in the context of this litigation." *Glass Dimensions*, 290 F.R.D. at 15 (motion was untimely where movant waited seven months after learning of interest in litigation); *see also Photographic Illustrators Corp. v. Orgill, Inc.*, 316 F.R.D. 45, 49 (D. Mass. 2016) (noting that the First Circuit has "emphasized" that "parties having knowledge of the pendency of litigation which may affect their interests sit idle at their peril"). This alone is grounds to conclude that the BONY Intervention Motion is untimely, and, therefore, to deny the motion. *See, e.g.*, *R & G Mortg.*, 584 F.3d at 8-9 (delay of two and a half months after movant was aware of the "incipient problem" rendered motion untimely); *Greenblatt*, 964 F.2d at 1231-32 (failure to act for over three months rendered motion untimely).

ii. Prejudice to Existing Parties Requires Denial of BONY Intervention Motion

15. The second and third elements of a timeliness inquiry require a court to balance the harms of either granting or denying intervention. *R & G Mortg.*, 584 F.3d at 9.

16. Here, Beneficial Holders are not prejudiced in any way by denial of the BONY Intervention Motion. *First*, as discussed below, their (alleged) interests are adequately represented by the large and varied group of COFINA bondholders that have intervened, and are active, in this adversary proceeding. *Second*, as discussed in the Commonwealth Agent's reply in support of the Urgent Motion, filed contemporaneously herewith, the Urgent Motion simply preserves the *status quo* in this adversary proceeding during the Abeyance Period to allow the Agents the time and opportunity to finalize the Agreement in Principle. Critically, because the Agents have agreed that the court's ruling on the ownership of SUT not yet collected by the Commonwealth (as of June 30, 2018) shall govern the ownership, as between the

Commonwealth and COFINA, of the Post-July 1, 2018 Funds, the Urgent Motion does not prejudice the relative rights of any party, including BONY and the Beneficial Holders, either as they currently exist or as they may be determined by the court in any future ruling.

17. On the other hand, the existing parties would be unfairly prejudiced if the BONY Intervention Motion were granted. Courts have explained that intervention that would disrupt a settlement causes significant harm to the existing parties. *See, e.g.*, *R & G Mortg.*, 584 F.3d at 9 (holding, where "original parties had forged a settlement" by the time of movant sought to intervene, that "harm that intervention would have worked to the original parties was manifest").

18. The Urgent Motion is a critical part of, and on its own merits is, a significant development in the Commonwealth-COFINA Dispute. As explained in the Reply, it preserves the *status quo* as it existed prior to execution of the Agreement in Principle and entry of the Abeyance Order, thereby allowing the Agents to focus on documenting and executing, and obtaining court approval of, the settlement agreement, rather than litigating over the issues being settled. Moreover, because the parties understand that the Urgent Motion is a critical part of the Agreement in Principle, no party to the adversary proceeding, **including parties that are holders of COFINA bonds**, has objected to the Urgent Motion.

19. Allowing BONY to intervene would force the existing parties to spend time and money litigating the issues addressed by the Urgent Motion. Moreover, because the Urgent Motion is itself one of the conditions precedent to the effectiveness of the Agreement in Principle, it threatens the entire settlement, which is manifestly prejudicial to all the existing parties, all of whom support the Urgent Motion. This should not be allowed, especially in light of the importance of this issue. *See United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 576 (W.D. Wis. 1990) (denying intervention where delay "would render the negotiations

between the original parties a waste of time and stall the implementation of the remedy designed to benefit the public health"). Indeed, that BONY "seeks to intervene at this particular juncture—at a time when the parties have been having meaningful settlement talks or, alternatively, bring this case to trial promptly—supports the reasonable inference that the motion is a tactical attempt to thwart a potential settlement rather than participate in the litigation" simply because BONY believes it should be able to pick and choose what parts of the settlement should be implemented. *Candelario*, 290 F.R.D. at 342.

B. Interests of Beneficial Holders are Adequately Protected

20. Even if the BONY Intervention Motion were timely (it is not), it should be denied because BONY has not shown, and cannot show, that the Beneficial Holders' (alleged) interests in the Post-July 1, 2018 Funds are not adequately protected by the existing parties to the adversary proceeding.

21. As contemplated by the Stipulation, numerous parties have already intervened in the Commonwealth-COFINA Dispute as Permitted Intervenors (as defined in the Stipulation). Importantly, these Permitted Intervenors include parties that hold and/or insure both the senior and junior COFINA bonds. Together, these Permitted Intervenors hold or insure approximately $9 billion of all outstanding COFINA bonds across all types of COFINA bonds. As such, there is no Beneficial Holder whose interests are not aligned with an existing party, and BONY has not offered any explanation why a Beneficial Holder of any specific type of COFINA bonds would not be adequately represented for the purposes of the Commonwealth-COFINA Dispute by the existing parties that hold that same type of COFINA bond. *See B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006) (there is a presumption of adequate representation "in cases where the intervenor's ultimate objective matches that of the named party"); *see also SBRMCOA, LLC v. Bayside Resort, Inc.*, No. CV 2006-42, 2013 WL 3958749,

at *10 (D.V.I. July 30, 2013) ("speculation about future divergence of interests" was "simply insufficient to overcome the presumption" of adequate representation).

II. Court Should Not Grant Permissive Intervention on Behalf of Beneficial Holders

22. The First Circuit has held that "when a putative intervenor seeks both intervention as of right and permissive intervention, a finding of untimeliness with respect to the former normally applies to the latter (and, therefore, dooms the movant's quest for permissive intervention)." *R & G Mortg. Corp.*, 584 F.3d at 11. Indeed, the timeliness inquiry applies more strictly, and district courts have broader discretion, with respect to a motion for permissive intervention. *Id.* at 8.

23. As discussed above, the BONY Intervention Motion is untimely, and therefore its request for permissive intervention must be denied as well. Moreover, BONY makes no arguments as to why it should be granted permissive intervention separate from its flawed arguments in support of intervention by right, and it should be denied for the same reasons – namely, the untimely nature of the motion, the manifest prejudice to the existing parties, and the fact that the alleged interests BONY seeks to protect are already protected by active and sophisticated parties with the same ultimate objective in the Commonwealth-COFINA Dispute.

III. Commonwealth Agent Does Not Object to Limited BONY Intervention as to Issues that Affect BONY Only

24. Notwithstanding its focus on BONY's asserted need to protect the (alleged) interests of an amorphous group of "Beneficial Holders" (which need, as described above, is illusory), the BONY Intervention Motion (and the Proposed BONY Objection) also identifies a few procedural matters that are applicable solely to BONY:

- BONY asserts an interest in ensuring that any order granting the Urgent Motion clarifies that BONY will not be liable for complying with such order;

- BONY asserts a right to be heard with regard to the specific procedures to be put in place by an order granting the Urgent Motion, to ensure that such procedures are not unduly burdensome to BONY; and

- BONY asserts a right to payment from SUT revenues it holds for its fees and expenses and indemnification that has priority over all payments to COFINA bondholders.

The Commonwealth Agent acknowledges that BONY's interests with respect to these limited issues are not adequately represented by the existing parties, and has no objection to BONY being heard on these limited issues.[8] However, the Commonwealth Agent believes that the modifications reflected in the Revised Proposed Order should fully address BONY's concerns.[9]

[Remainder of page left intentionally blank.]

[8] The Commonwealth Agent believes, however, that any payment BONY is entitled to should be paid first from the Pre-July 1, 2018 Funds.

[9] *See* Revised Proposed Order ¶ 3.

WHEREFORE, the Commonwealth Agent respectfully requests that court deny the BONY Intervention Motion (other than as to the limited issues identified in paragraph 24 herein) and grant the Commonwealth Agent further relief as is necessary and appropriate.

Dated: June 22, 2018

/s/ G. Alexander Bongartz Esq.

PAUL HASTINGS LLP
Luc. A. Despins, Esq. *(Pro Hac Vice)*
James R. Bliss, Esq. *(Pro Hac Vice)*
James B. Worthington, Esq. *(Pro Hac Vice)*
G. Alexander Bongartz, Esq. *(Pro Hac Vice)*
200 Park Avenue
New York, New York 10166
Telephone: (212) 318-6000
lucdespins@paulhastings.com
jamesbliss@paulhastings.com
jamesworthington@paulhastings.com
alexbongartz@paulhastings.com

Counsel to the Official Committee of Unsecured Creditors

- and –

/s/ Juan J. Casillas Ayala

CASILLAS, SANTIAGO & TORRES LLC
Juan J. Casillas Ayala, Esq., USDC - PR 218312
Diana M. Batlle-Barasorda, Esq., USDC - PR 213103
Alberto J. E. Añeses Negrón, Esq., USDC - PR 302710
Ericka C. Montull-Novoa, Esq., USDC - PR 230601
El Caribe Office Building
53 Palmeras Street, Ste. 1601
San Juan, Puerto Rico 00901-2419
Telephone: (787) 523-3434
jcasillas@cstlawpr.com
dbatlle@cstlawpr.com
aaneses@cstlawpr.com
emontull@cstlawpr.com
Local Counsel to the Official Committee of Unsecured Creditors