

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO, et al.

Debtors.¹

THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF THE COMMONWEALTH OF
PUERTO RICO,

as agent of

THE COMMONWEALTH OF PUERTO RICO,

Plaintiff,

v.

BETTINA WHYTE,

as agent of

THE PUERTO RICO SALES TAX FINANCING
CORPORATION,

Defendant.

PROMESA

Title III

Case No. 17-BK-3283-LTS

Adversary Proceeding

Case No. 17-00257(LTS)

¹ The Debtors in these Title III Cases, along with each Debtor's respective Title III case number 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) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) 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); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

ORDER

This matter is before the Court on 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* (Dkt. No. 503) (the “Motion to Intervene”). Therein, the Bank of New York Mellon (“BNYM”) requests leave to intervene for the limited purpose of objecting to the *Commonwealth Agent’s 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* (Dkt. No. 495) (the “Procedures Motion”). The Commonwealth Agent has filed a limited objection (Dkt. No. 518) and BNYM has filed a reply (Dkt. No. 521). After careful consideration of the briefing, and for the reasons stated herein, this Court **ALLOWS** the Motion to Intervene. BNYM’s objection to the Procedures Motion, in its entirety, is deemed by the Court to have been filed as of the date of the Motion to Intervene. The Commonwealth Agent has already responded to the arguments in BNYM’s objection in its Omnibus Reply in support of the Procedures Motion (Dkt. No. 517).

I. Introduction

Federal Rule of Civil Procedure 24(a)(2) governs intervention as a matter of right and dictates that “[o]n 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."^{2 3}

BNYM moves to intervene in order to object to the Procedures Motion in its own right and as trustee on behalf of all holders of beneficial interests in bonds of the Puerto Rico Sales Tax Financing Corporation ("COFINA") (the "Beneficial Holders"). The Commonwealth Agent objects only insofar as BNYM seeks to intervene on behalf of Beneficial Holders. See Objection, Dkt. No. 518 ¶ 24. The Commonwealth Agent does not dispute that BNYM, on behalf of the Beneficial Holders, claims an interest relating to the property at issue here. Rather, in its objection, the Commonwealth Agent argues first that the Motion to Intervene is untimely and second that the interests of the Beneficial Holders are adequately represented. This Court disagrees with both arguments.

II. Discussion

1. Timing

The Motion to Intervene is timely. "The timeliness inquiry is inherently fact-sensitive and depends on the totality of the circumstances." R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 8 (1st Cir. 2009). The First Circuit has looked to four factors when evaluating the timeliness prong: "(i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii)

² PROMESA § 310 provides that "[t]he Federal Rules of Bankruptcy Procedure shall apply to a case under this title and to all civil proceedings arising in or related to cases under this title." In turn, Federal Rule of Bankruptcy Procedure 7024 dictates that "Rule 24 F.R.Civ.P. applies in adversary proceedings."

³ As the Court determines that BNYM has the right to intervene under Fed. R. Civ. P. 24(a), the Court need not address BNYM's argument for permissive intervention under Fed. R. Civ. P. 24(b).

the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention.” Id. at 7. The four factors show that the Motion to Intervene was timely.

BNYM filed its Motion to Intervene at a reasonable time after the bank was made aware of the potential risks presented by the Procedures Motion. “[A] motion to intervene is timely if it is filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his rights.” Id. at 8. The Commonwealth Agent asserts that BNYM has known of the allegations made in this adversary proceeding since its inception and that BNYM’s request for intervention is simply too delayed. See Objection ¶ 14. However, BNYM is not requesting to intervene in the entire adversary proceeding. BNYM has moved solely for the purpose of responding to the Procedures Motion. BNYM filed its Motion to Intervene six days after the Commonwealth Agent filed the Procedures Motion and secured an expedited briefing schedule so that the Motion to Intervene could be decided promptly. See Order, Dkt. No. 507. While BNYM has been on notice of the entire proceeding since its inception, it has only known about the specific implications of the Procedures Motion since that motion was filed. BNYM’s response time was reasonable.

The other timeliness factors weigh in BNYM’s favor. The existing parties are not prejudiced by BNYM’s intervention. Courts are rightly hesitant to allow a “disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence.” R&G Mortg. Corp., 584 F.3d at 9. That, however, is not the case here. BNYM filed its Motion to Intervene in time for this Court to consider the merits of all of the parties’ arguments in

connection with the Procedures Motion. While BNYM's arguments may be adverse to the other litigating parties, the timing of its intervention is not prejudicial. BNYM, on the other hand, would be prejudiced by not being able to intervene in motion practice that it believes could impact its rights and the rights of Beneficial Holders. Finally, the unique procedural posture of the Procedures Motion is a special circumstance weighing in favor of BNYM's right to participate. For all of the reasons above, the Motion to Intervene is timely.

2. Adequate Representation

BNYM moves to intervene on behalf of Beneficial Holders, claiming that it is "authorized to exercise remedies or resolve disputes on behalf of *all* Bondowners (subject to direction and indemnification from Bondowners in accordance with the Resolution)." Motion to Intervene ¶ 28. (emphasis in original). The Commonwealth Agent does not dispute BNYM's authority as trustee to represent the Beneficial Holders' interests. Instead, the Commonwealth Agent argues that "the interests of the amorphous group of Beneficial Holders [that BNYM] asserts are more than adequately represented by the sophisticated and active existing COFINA parties . . ." Objection ¶ 6. This Court disagrees.

"Typically, an intervenor need only make a 'minimal' showing that the representation afforded by a named party would prove inadequate." B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 545 (1st Cir. 2006). "[W]here the intervenor's ultimate objective matches that of the named party, a rebuttable presumption of adequate representation applies." Id. at 546. "To overcome that presumption, the intervenor need only offer 'an adequate explanation why' it is not sufficiently represented by the named party. One way for the intervenor to show inadequate representation is to demonstrate that its interests are

sufficiently different in kind or degree from those of the named party.” Id. (internal citation omitted). Here, although the existing parties to this adversary proceeding may include the holders and insurers of “approximately \$9 billion of all outstanding COFINA bonds across all types of COFINA bonds,” Objection ¶ 21, the arguments advanced by BNYM on behalf of the Beneficial Holders are different from those advanced in other responses to the Procedures Motion. For example, BNYM maintains that there are due process concerns with the relief sought in the Procedures Motion in that all bondholders have not been provided proper notice. Reply ¶¶ 7, 15. However, the Commonwealth Agent relies on the fact, in support of the Procedures Motion, that no existing COFINA party has objected. Dkt. No. 495, ¶ 1 (“[i]t is noteworthy that no holder of COFINA bonds has objected to the Urgent Motion.”). Thus, the issue whether proper notice has been given to all appropriate parties is relevant. This Court makes no ruling on the merits of BNYM’s arguments, but notes that no other COFINA party has raised this objection. Therefore, the position of BNYM, on behalf of the Beneficial Holders, is not adequately represented without BNYM’s intervention.

III. Conclusion

As the Motion to Intervene was timely and BNYM is not otherwise adequately represented, this Court finds that BNYM has a limited right to intervene under Fed. R. Civ. P. 24(a)(2). The Motion to Intervene is ALLOWED and BNYM’s objection, in its entirety, is deemed to have been filed as of the date of the Motion to Intervene.

This resolved Dkt. No. 503.

SO ORDERED.

/s/ Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

DATED: June 27, 2018