

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

In re: THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO, as
a representative of THE COMMONWEALTH
OF PUERTO RICO, et al. Debtors.¹

PROMESA Title III No. 3:17-BK-3283-LTS
(Jointly Administered)

HON. THOMAS RIVERA-SCHATZ (in his official
capacity and on behalf of the Senate of
Puerto Rico), and HON. CARLOS J. MÉNDEZ-
NÚÑEZ (in his official capacity and on behalf
of the House of Representatives of Puerto
Rico),

Adv. Proc. No. 18-00081-LTS

Plaintiffs,

vs.

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,
JOSÉ B. CARRIÓN III, ANDREW G. BIGGS,
CARLOS M. GARCÍA, ARTHUR J. GONZÁLEZ,
JOSÉ R. GONZÁLEZ, ANA J. MATOSANTOS,
DAVID A. SKEEL, JR. and NATALIE A. JARESKO
(in their official capacities),

Defendants.

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

I. Introduction

This matter is before the Court on the *Motion to Request Leave to Intervene* (Dkt. No. 20) (the “Motion to Intervene”) filed by members of the Puerto Rico House of Representatives who ran on the ticket of the Popular Democratic Party (“Moving Intervenors”). Plaintiff Carlos J. Mendez-Nuñez, in his official capacity as Speaker of the House of Representatives of Puerto Rico and on behalf of the House of Representatives, filed an opposition to the Motion to Intervene (Dkt. No. 30), Plaintiff the Hon. Thomas Rivera-Schatz, in his official capacity and on behalf of the Senate of Puerto Rico, filed an opposition (Dkt. No. 32), and Defendants filed a partial opposition (Dkt. No. 31). The Moving Intervenors filed a motion for leave to reply to the oppositions on July 19, 2018 (Dkt. No. 35). This Court finds good cause to allow the Moving Intervenors’ motion to file a reply and has considered the arguments therein. For the reasons set forth herein, the Motion to Intervene is DENIED.

II. Background

On July 9, 2018, Plaintiffs filed the complaint in this adversary proceeding. Therein, they seek (i) a declaratory judgment that the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”) overreached its powers by demanding that the Legislative Assembly approve a bill repealing certain Commonwealth of Puerto Rico (the “Commonwealth”) legislation, Law 80, retroactively as a condition for the approval of the Commonwealth’s budget and (ii) an injunction prohibiting Defendants from implementing the Oversight Board’s 2018-2019 budget and directing the Oversight Board to certify as compliant the budget approved by the Legislative Assembly. The Court has set an expedited schedule for

this adversary proceeding (Dkt. No. 10). Defendants filed a motion to dismiss on July 18, 2018 (Dkt. No. 27), any opposition thereto is due on July 21, 2018 and any reply is due July 23, 2018. The Court will hear argument on the motion to dismiss at the omnibus hearing set for July 25, 2018.

Plaintiffs in this adversary proceeding are the President of the Senate of Puerto Rico and the Speaker of the House of Representatives of Puerto Rico. The Moving Intervenors are minority members of the House of Representatives and request to be heard here because they “are compelled to exercise their constitutional prerogatives on behalf of their constituents and to appear in court to defend those prerogatives when they are being threatened.” Motion to Intervene at 2-3. The Moving Intervenors tendered an intervention complaint along with the Motion to Intervene (Dkt. No. 20-1). Therein, the Moving Intervenors argue that the Oversight Board has not only acted in excess of its powers, but is itself unconstitutional.

III. Discussion

The Moving Intervenors claim the ability to intervene under Fed. R. Civ. P. 24(a)(2), or alternatively Fed. R. Civ. P. 24(b).² Intervention is not warranted under either statute.

First, the Moving Intervenors seek relief under Fed. R. Civ. P. 24(a)(2), which allows for intervention as of right. Specifically, the rule provides 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 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.”

As detailed herein, to the extent that the Moving Intervenors claim any interest relating to this adversary proceeding, they are adequately represented and are not permitted to intervene under Fed. R. Civ. P. 24(a)(2).

The Moving Intervenors cannot intervene under Rule 24(a)(2) to advance challenges to the Oversight Board's actions that are not already at issue in this proceeding. The Moving Intervenors' proposed intervention complaint reiterates Plaintiffs' argument that the Oversight Board has overreached in making policy decisions with regard to Law 80 and the current fiscal plan and budget, but it also goes further, alleging constitutional challenges to the Oversight Board's structure and actions. While the former overlapping interests are very much at issue in this adversary proceeding, the Moving Intervenors' new constitutional claims are not. "It is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." Southwestern Penn. Growth Alliance v. Browner, 121 F.3d 106, 121 (3d Cir. 1997). While the Moving Intervenors may be able to file those additional claims against the Oversight Board in an independent adversary proceeding in this Title III case, they do not constitute interests at issue in the instant proceeding that warrant intervention.³ For purposes of assessing intervention under Fed. R. Civ. P. 24, only those claims that overlap with existing subjects of this adversary proceeding are proper.

³ The Court recognizes Plaintiff Carlos J. Mendez-Nuñez's attack on the Moving Intervenors' standing, through which he argues that "individual legislators lack a sufficient interest to intervene to defend a law's constitutionality." Dkt. No. 30 at 8. See also Dkt. No. 32 (the Hon. Thomas Rivera-Schatz's response) at 9-11. The Court also acknowledges the Moving Intervenors' response that such a rule "merely restates the logical conclusion that legislators cannot appear in a court proceeding addressing the constitutionality of a law that **they** approved." Dkt. No. 35-1 at 4-5 (emphasis in original). As the Court rules that the Moving Intervenors' constitutional issues are not appropriately added to this proceeding, and that the Moving Intervenors are adequately represented on their remaining claims, the Court need not reach the merits of the standing argument.

To the extent that the Moving Intervenors are requesting to participate in this proceeding in order to advance overlapping interests in declaratory and injunctive relief concerning the Oversight Board's alleged "abrogation of powers that were not vested upon it by Congress or the overextension of those that were[,]" the Moving Intervenors are adequately represented. Motion to Intervene at 5. "[W]here the intervenor's ultimate objective matches that of the named party, a rebuttable presumption of adequate representation applies." B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006). "[T]o overcome the presumption, the intervenor need only offer an adequate explanation as to why it is not sufficiently represented by the named party." Id. (internal citation and quotation omitted). The Moving Intervenors have not done so here.

The Moving Intervenors are members of the House of Representatives, an entity already represented by Plaintiff Carlos J. Mendez-Nuñez in this case. The Moving Intervenors have not shown any reason why the Hon. Mendez-Nuñez, in his official capacity as Speaker of the House of Representatives of Puerto Rico and on behalf of the House of Representatives, will not be able to adequately represent their interest in asserting that the Oversight Board has overstepped its bounds. In fact, the only argument the Moving Intervenors raise in support of their contention that representation by the existing Plaintiff is not sufficient is that their "contentions go much further than those of the legislative majority leadership and assert additional arguments that would not be heard by the Court if intervention is disallowed." Motion to Intervene at 5-6. As explained *supra*, however, it is not appropriate to raise new claims by way of intervention. When these additional claims are removed, it is clear to the Court that the Moving Intervenors are adequately represented. As the Moving Intervenors

accept in their Reply, “[t]he fact that Mr. Mendez-Núñez holds a leadership position in the House of Representatives does not make his interest in the instant case any different from that of the minority legislators” Dkt. No. 35-1 at 4. Any interest the Moving Intervenors have in the cabined arguments at issue in this adversary proceeding are adequately represented.

Next, the Moving Intervenors seek to intervene under Fed. R. Civ. P. 24(b) which allows for permissive intervention. That rule provides that 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.” The rule further provides that “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). This Court hereby uses its discretion to deny permissive intervention. This adversary proceeding involves complex and novel questions which the Court has been asked to resolve on an expedited basis. Where the Moving Intervenors are adequately represented and have not forfeited their chance to litigate their claims through a separate adversary proceeding, the Court does not find value in adding them as an additional party days before arguments on dispositive motions in this proceeding.

IV. Conclusion

For each of the reasons stated above, the motion requesting leave to file a reply (Dkt. No. 35) is ALLOWED. The Motion to Intervene (Dkt. No. 20) is DENIED.

Additionally, the Moving Intervenors have filed a motion in this adversary proceeding under Fed. R. Civ. P. 5.1 certifying constitutional questions raised by the proposed intervention complaint to the United States Attorney General (Dkt. No. 24) (the “Certification Motion”). In light of this order, the proposed intervention complaint cannot be filed in this adversary

proceeding and the certification requested by the Moving Intervenors is not required. The Certification Motion is DENIED.

This resolves Dkt. Nos. 20, 24, and 35.

SO ORDERED.

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

DATED: July 20, 2018