UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, Applicant.	PROMESA Title VI Case No. 18-01561 **Re: ECF Nos. 59, 112, and 131.**

GDB AND AAFAF'S REPLY TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OMNIBUS RESPONSE TO GDB/AAFAF'S AND OVERSIGHT BOARD'S STANDING OBJECTIONS

GDB and AAFAF respectfully submit this reply (the "**Reply**") to the *Omnibus Response of Official Committee of Unsecured Creditors to GDB/AAFAF's and Oversight Board's Standing Objections* [ECF No. 131] (the "**Response**"), and in further support of *GDB and AAFAF's Objection to the Official Committee of Unsecured Creditors' Standing to Object to the Approval Application* [ECF No. 112] (the "**Standing Objection**").[1]

PRELIMINARY STATEMENT

1. The UCC's attempt to establish its standing to object to the Approval Application rests on the demonstrably false premise that Title VI provides a forum for it to air its grievances concerning the GDB Restructuring Act, and advance its gripes about GDB, which provided billions of dollars to the Title III Debtors at the Government of Puerto Rico's direction.

2. The UCC claims that it is a "fallacy" that the Qualifying Modification "can be considered for approval apart from the GDB Restructuring as a whole." (Response ¶ 40.) Not so—AAFAF and GDB's position represents a plain reading of PROMESA section 601(m)(1)(D). As the statute makes clear, after the Issuer and its Bond holders reach agreement on a proposed modification, the Oversight Board certifies that the modification is a "Qualifying Modification," and the Bond holders vote in favor of the Qualifying Modification—all of which has already happened here—the Court is called upon to make a determination that the Issuer has complied with all of the requirements laid out in section 601 and, if so, approve the Qualifying Modification. Nothing in Title VI provides, or even suggests, that any party (let alone a non-Bond holder like the UCC) can use the Approval Application process to challenge the Qualifying Modification's terms, much less challenge a separate statute like the GDB Restructuring Act. Whatever claims

[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Standing Objection.

the UCC thinks it may have concerning the GDB Restructuring Act already have been made in another proceeding (in which the UCC lacks standing).[2] The UCC cannot assert such claims here.

3. In any event, the UCC's arguments in favor of standing fail:

- PROMESA section 601(m)(2) is a provision that limits the ability of parties to attack the Qualifying Modification once consummated; it does not create statutory standing for the UCC;
- The UCC lacks any statutory authority to be heard in the Title VI Action;
- The UCC has not suffered a cognizable injury itself such that it has standing to be heard here; and
- The unsecured creditors it purports to represent are, at most, creditors of creditors of GDB that have not suffered a cognizable injury and thus do not have standing to be heard.

4. Accordingly, as described more fully below, the UCC's responses to the Standing Objection are unavailing.

ARGUMENT

I. The UCC is Not a Proper Party to Object to the Approval Application and Cannot Rely on Any Statutory Provisions of PROMESA or the GDB Restructuring Act to Justify Standing.

A. Section 601(m)(2) Does Not Provide an Independent Right to Challenge the Qualifying Modification.

5. The Standing Objection demonstrated that (i) Title VI's terms and structure make clear that parties that are not Bond holders have no role to play in a Title VI action, and (ii) the UCC cannot establish standing to appear in this Title VI Action. (Standing Objection ¶¶ 20-24, 31-35.) The UCC responds by lumping these arguments together and focusing on section 601(m)(2), claiming that "[i]f the unsecured creditors of the Title III Debtors will be bound

[2] As demonstrated in the *Memorandum of Law in Support of GDB and AAFAF's Motion to Dismiss Complaint for Lack of Standing* [Case No. 18-00101, ECF No. 9] (the "**Motion to Dismiss**"), the UCC lacks standing to assert those claims in the adversary proceeding it has commenced.

pursuant to section 601(m)(2), they indisputably have standing to be heard in the Title VI case." (Response at ¶ 39.) This argument is a red herring. Regardless of whether section 601(m)(2) operates to "bind" creditors of the Commonwealth and its instrumentalities to the Qualifying Modification, this provision is simply an anti-mischief provision that prevents entities or persons lacking standing in the Title VI proceeding from interfering with the Qualifying Modification's implementation by commencing a separate proceeding attacking it. It does not affirmatively or independently create standing for the UCC (or the creditors it represents in the Title III cases) to appear in the Title VI Action because section 601(m)(2) does not deprive the UCC or any unsecured creditor it represents of any right it otherwise had. The UCC cannot bootstrap a prohibition against interfering with an approved Qualifying Modification in a separate proceeding into a right to object to the Approval Application in this action. Not surprisingly, the UCC cites no authority for its novel theory that a provision depriving non-parties of the right to challenge a court order in one forum creates a right for that non-party to interfere with the underlying action in the first instance.[3]

6. Moreover, nothing under section 601(m)(2) provides the UCC standing to complain of the releases effected under the GDB Restructuring Act, which are granted with the consent of the actual parties-in-interest (namely, the Government Entities providing them) and which do not release any claim or right held by the UCC or any of the creditors it represents. The UCC does

[3] Notably, section 601(m)(2) also provides that, unless otherwise provided for, "no claims or right that may be asserted by any party in a capacity other than holder of a Bond affected by the Qualifying Modification shall be satisfied, released, discharged or enjoined by this provision." This protects non-Bond holders' independent rights against GDB. (Standing Objection ¶24.) The UCC's contention that the release provisions of the GDB Restructuring Act undermine section 601(m)(2) is misplaced: GDB and AAFAF are not asking for the court to approve the GDB Restructuring Act releases, nor do they affect any creditor claims against GDB other than those of the Title III Debtors, who have consented to such release. As such, neither the UCC nor the creditors of the Title III Debtors have suffered any injury sufficient to confer standing upon them. (Response ¶ 40.)

not have standing to appear in this action to try to torpedo the Qualifying Modification's approval simply because that approval triggers the release provisions in the GDB Restructuring Act, which are not affected by or subject to PROMESA section 601(m)(2). As noted before, the issue here is whether GDB has complied with section 601's requirements—nothing in the GDB Restructuring Act gives the UCC standing to address its complaints of the releases under that Act in this Title VI Action.

B. ***Neither Article 702 of the GDB Restructuring Act Nor Section 926 of the Bankruptcy Code, As Incorporated by PROMESA, Grant the UCC Standing Here.***

7. The UCC also relies on the release provisions in the GDB Restructuring Act article 702 to argue it has standing here to directly challenge the releases because such releases affect the Title III Debtors' unsecured creditors' rights, including their rights under Bankruptcy Code section 926, as incorporated by PROMESA. This argument is unsustainable. As set forth above, the releases under the GDB Restructuring Act are not part of this matter.

8. Moreover, as explained in the *Informative Motion Regarding Releases Under Article 702 of the GDB Restructuring Act* [Case No. 18-01561, ECF No. 151], the GDB Restructuring Act releases are only releases *given by the Title III Debtors* (and other Government Entities). No unsecured creditor of any Title III Debtor is granting a release in its capacity as such, and therefore those creditors (which the UCC purports to represent) are not directly or uniquely injured by the releases and lack standing to challenge them.

9. The UCC's argument that the interaction between the release provisions in the GDB Restructuring Act and Bankruptcy Code section 926 creates standing for it to appear here is similarly misplaced. The UCC's purported desire to protect individual creditors' ability to bring avoidance claims from the effects of the GDB Restructuring Act does not give it standing to challenge the Qualifying Modification's approval, because the release of any avoidance claims the

Title III Debtors could theoretically have is being effectuated by the GDB Restructuring Act. Moreover, as demonstrated in GDB/AAFAF's Motion to Dismiss, the UCC does not have standing to challenge—in any forum—the GDB Restructuring Act's alleged impact on section 926 because (i) the harm it complains of cannot be redressed by invalidating the GDB Restructuring Act, (ii) its claim is not ripe, and (iii) it is not a creditor of the Title III Debtors and, thus, has no rights under section 926. (Motion to Dismiss at 13-17.)

II. The UCC Lacks Prudential Standing and Cannot Represent the Title III Debtors' Unsecured Creditors in the Title VI Action.

10. The UCC's assertions that it has prudential standing and can act on behalf of the Title III Debtors' creditors in the Title VI Action (Response at ¶¶ 42-46) are closely related and equally baseless.

11. The UCC first argues that the basic prudential standing rule that a party generally cannot assert the rights of third parties is "wholly inapplicable" to the UCC because "[a]sserting the rights of others is precisely the Committee's purpose." (Response ¶ 42.) This simply begs the question as to which "rights of others" the UCC is trying to assert. Even an entity whose "purpose" is asserting the rights of others must demonstrate either that it has standing in its own right or that it is empowered to assert the rights of third parties, and that those third parties themselves have standing.[4] *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env. Svs.*, 528 U.S. 167, 181 (2000)

[4] The UCC's argument that prudential standing requires only that a party not attempt to exercise "the rights or legal interest of others in order to obtain relief from injury to themselves" is simply incorrect. Binding First Circuit authority and the very case the UCC cites hold that a party seeking to exercise a third party's rights lacks prudential standing even if the party asserts it is attempting to obtain relief for the third party. *See United States v. Union Bank for Savings and Inv. (Jordan)*, 487 F.3d 8, 22 (1st Cir. 2007) (a bank did not have prudential standing to argue on behalf of its depositors that forfeiture of funds under the USA PATRIOT Act was an "excessive fine" under the Eighth Amendment); *see also Rajamin v. Deutsche Bank Nat'l Tr. Co*., 757 F.3d 79, 86-91 (2d Cir. 2014) (finding that plaintiff lacked prudential standing where it sought to assert rights under contracts to which it was not a party); *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (finding lack of prudential standing where plaintiff asserted constitutional rights of third parties); Response ¶ 42 (citing *Rajamin* and *Warth*).

(holding that an association suing on behalf of its members must demonstrate that its members "have standing to sue in their own right"). The UCC's arguments fail because it concedes it is not asserting its own rights and the creditors it represents would also lack prudential standing had they sought to participate in this Title VI Action.

12. Whatever rights the UCC purports to be asserting, they cannot be greater than those enjoyed by the unsecured creditors they represent. *Laidlaw*, 528 U.S. at 181; *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108 (1st Cir. 2006) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (requiring that for an association to assert rights on behalf of its members in a representational capacity, its members must have standing to sue in their own right); *In re SI Restructuring, Inc.*, 714 F.3d 860, 864 (5th Cir. 2013) (requiring that for a creditor to have derivative standing to bring a claim on behalf of a debtor, the debtor must have the right to bring the claim). Put differently, for the UCC to establish standing, it must establish that creditors of Title III Debtors would have prudential standing to appear in this matter. As the Court recently recognized, to establish prudential standing "a party must 'show that his claim is premised on his own legal rights (as opposed to those of a third party) . . .'" Memorandum Order [Case No. 17-03283-LTS, ECF No. 3941], at 3 (*quoting Katz v. Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012) (quoting *Pagán v. Calderón*, 448 F.3d 16, 27 (1st Cir. 2006))). And, "[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim," and therefore a creditor lacks prudential standing to individually pursue such a claim. *St. Paul Fire & Marine Ins. Co. v. PepsiCo.,* 884 F.2d 688, 701 (2d Cir. 1989); *see also St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 545 (5th Cir. 2009) (to have prudential standing, a creditor must assert a claim for his own direct injury and not a claim that belongs to the debtor's estate). Here, if

unsecured creditors of the Title III Debtors suffer any injury, it results entirely from the consensual treatment of the Title III Debtors' claims against GDB, not because of the abridgment of their own rights; the Title III Debtors' unsecured creditors themselves have no legal rights of their own being abridged and have suffered no "particularized injury." Indeed, the very premise of the UCC's argument is that the claims it wants to assert "could be brought by any creditor" of a Title III Debtor, and therefore belong to the Title III Debtors. *See PepsiCo.,* 884 F.2d at 701.

13. This dooms the UCC. No party it represents can demonstrate it has claims based on its own legal rights (as opposed to the Title III Debtors' rights). A creditor of a Title III Debtor appearing in this matter would simply be arguing as a creditor of a potential GDB creditor (which is the classic example of impermissibly trying to assert the rights of a third party), and such creditors of creditors do not have prudential standing. As this Court has recognized, a creditor of a creditor does not have prudential standing to intervene where it had no direct relationship to the funds at issue between the creditor and debtor. *See BNYM v. COFINA (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 301 F. Supp. 3d 306, 312 (D.P.R. 2017).

14. Moreover, the UCC itself does not have prudential standing to assert claims in the Title VI Action in its representative capacity as a creditors' committee. Its assertion to the contrary ignores the obvious: a creditors' committee acts on behalf of creditors in a case under Title III of PROMESA or chapter 9 or 11 of the Bankruptcy Code pursuant to specific statutory authority that has no analog under Title VI of PROMESA. Whatever authority the UCC may have to act on behalf of creditors under Title III does not carry over to this Title VI Action. Moreover, the UCC does not dispute that its sole source of authority is Bankruptcy Code section 1109 and that this

statute is applicable to Title III, not Title VI, actions. (Standing Objection ¶ 26.)[5] Nothing in the UCC's papers shows it has a statutory right to represent the Title III Debtors' creditors outside of the Title III proceedings, or that it can appear here without specific authorization from the Title III court (which should not be forthcoming, for the reasons set forth in GDB and AAFAF's objection to the UCC's derivative standing motion).[6]

15. Finally, unable to cobble together even a semblance of legal authority supporting its right to appear in this Title VI Action, the UCC urges the Court to "take a practical approach" to standing. (Response ¶¶ 45-46.) But the UCC offers no meaningful justification for this Court to adopt an ad hoc approach that ignores the demands of constitutional and prudential standing and Congress's legislative judgments under PROMESA, much less any reason why the UCC should be permitted to interfere in this matter. No such justification exists.

CONCLUSION

For the foregoing reasons, the Court should sustain the Standing Objection in its entirety.

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[5] The UCC effectively concedes that it does not have the right to act on behalf of the Title III Debtors themselves, and instead argues only that it has the power to act on behalf of the Title III Debtors' unsecured creditors. (Response ¶ 44.)

[6] *See Objection of the Government Development Bank for Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Official Committee of Unsecured Creditors Derivative Standing Motion* [Case No. 17-3283, ECF No. 3961].

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Respectfully submitted,

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