Hearing Date: October 3, 2018 at 2:00 p.m. (prevailing Eastern Time)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO, Applicant.	PROMESA Title VI Case No. 18-1561 (LTS)
Official Committee of Unsecured Creditors for the Title III Debtors,[1] Putative Objectant, v. The Financial Oversight and Management Board for Puerto Rico, Title VI Administrative Supervisor and Respondent.	**Re: ECF Nos. 59 and 131.**

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S REPLY TO OMNIBUS RESPONSE OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO GDB/AAFAF'S AND OVERSIGHT BOARD'S STANDING OBJECTIONS

[1] On May 3, 2017 a voluntary petition for relief under section 304(a) of PROMESA was filed in the United States District Court for the District of Puerto Rico (the "Court") for the Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS). Thereafter, Title III cases were commenced in this Court for the (i) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS), (ii) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS), (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS), and (iv) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (PROMESA Title III case numbers are listed as Bankruptcy Case numbers due to software limitations). The Office of the United States Trustee for the District of Puerto Rico has appointed the UCC (as defined herein) in the Title III cases of the Commonwealth, ERS, HTA, and PREPA (collectively, the "Title III Debtors"). *See* Case No. 17-3282-LTS, ECF Nos 338, 1171.

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To the Honorable United States District Court Judge Laura Taylor Swain:

The Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), in its capacity as the Administrative Supervisor in the Title VI case regarding the Government Development Bank for Puerto Rico ("GDB") pursuant to section 601(a)(1) of the *Puerto Rico Oversight, Management, and Economic Stability Act* ("PROMESA")[2] and in its capacity as representative of the Commonwealth of Puerto Rico (the "Commonwealth") in its Title III case pursuant to PROMESA section 315(b), respectfully submits this reply (the "Reply") to the *Omnibus Response of Official Committee of Unsecured Creditors to GDB/AAFAF's and Oversight Board's Standing Objections* [Case No. 18-1561, ECF No. 111] (the "Response").[3] In support of this Reply, the Oversight Board respectfully represents:

PRELIMINARY STATEMENT

1. The gravamen of the UCC's Response is that the UCC should have standing because its constituency is bound by the GDB Restructuring in two ways. First, the UCC erroneously asserts (see below) PROMESA § 601(m)(2) provides the Qualifying Modification is "binding" on creditors of the Title III Debtors "and should not be subject to any collateral attack or other challenge by any such entities in any court or other forum." Response at ¶ 15. Second, the GDB Restructuring Act releases certain nondebtors, which the UCC contends violates § 601(m)(2). *Id.* The UCC's argument is completely wrong legally and factually.

2. Even if § 601(m)(2) referred to creditors of Title III debtors, as opposed to creditors of GDB and its instrumentalities, Congress's codification of preexisting law barring collateral

[2] PROMESA has been codified in 48 U.S.C. §§ 2101-2241.

[3] Capitalized terms used but not defined herein shall have the meaning given them in the *Objection of Financial Oversight and Management Board for Puerto Rico as the Administrative Supervisor of the Government Development Board* [sic] *for Puerto Rico to the Official Committee of Unsecured Creditors' Notice of Intention to Object to Qualifying Modification for Government Development Bank* [Case No. 18-1561, ECF No. 111] (the "Standing Objection").

attacks on orders of courts presiding over debt modifications does not grant standing to entities that lacking standing to object to such orders to begin with. Just as it is black letter law that creditors and shareholders of a corporation lack standing to participate in the corporation's litigation with third parties, the creditors of the creditors of the corporation similarly lack standing. Even if § 601(m)(2) codified that creditors of creditors cannot collaterally attack what they had no standing to litigate in the first place, that would not grant them standing they never had in the underlying litigation.

3. The UCC's second rationale is based on nonexistent facts. The GDB Restructuring Act applies only to claims of government entities. GDB/AAFAF's informative motion,[4] makes clear the releases in the GDB Restructuring Act only apply to current officers and directors in their capacities as such. Moreover, the Court is only asked under PROMESA § 601(m)(1)(D) to approve the Qualifying Modification, not the GDB Restructuring Act. That releases under the GDB Restructuring Act are not triggered unless and until the Qualifying Modification is approved, does not mean the Court is opining on the GDB Restructuring Act.

4. In sum, the UCC has no basis whatsoever for standing to oppose the Qualifying Modification. Moreover, the UCC nowhere explains how it can oppose the Qualifying Modification without relying on the rights of the Title III Debtors, while the Oversight Board is simultaneously representing those rights in a manner totally opposite to the UCC's positions. What the UCC really wants is derivative standing to take control of those rights and have the Oversight Board out of the way. Derivative standing is separately briefed in connection with the UCC's separate motion [Case No. 17 -3283, ECF No. 3881] (the "Derivative Standing Motion").

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[4] *See Informative Motion Regarding Releases under Article 702 of the GDB Restructuring Act* [ECF No. 151] (the "GDB Informative Motion").

5. The UCC's Response also pushes two novel theories: (1) the prudential standing doctrine does not apply to the UCC even when it asserts the rights of non-creditors, and (2) the UCC can appear outside a Title III case so long as doing so is in its constituents' interests. If the UCC's theories were to stand, the UCC could assert any parties' legal rights in any forum so long as the UCC showed such action is in its constituents' interests. But, while the UCC may desire limitless authority to sue everyone, everywhere, and for any reason purportedly helping its constituency (as it certainly has attempted to do through its deluge of repetitive litigation assaulting the GDB Restructuring), it is not immune from or above standing requirements.

6. Apart from its novel legal theories, the UCC's Response fails to answer the numerous fatal standing issues raised in the Standing Objection because it cannot. The statutory language of PROMESA and the text of the proposed Qualifying Modification approval order make clear that claims of creditors of the Title III Debtors are not satisfied, released, discharged, or enjoined by the Qualifying Modification, other than as explained above in paragraph 2. No matter how the UCC may try to employ legal gymnastics to bend, contort, or ignore various statutory provisions and legal doctrines, the UCC simply has no standing to appear in and object to the Title VI Qualifying Modification because its constituents' sole interest in the Qualifying Modification is derivative of the Title III Debtors. The UCC is not a creditor of GDB, it does not have any claims, and it cannot assert the claims of its constituents (themselves not creditors of GDB) directly. Even if it could, the UCC has no authority to operate outside the Title III Cases. Despite its protests, it does not cite a single decision where a statutory committee has litigated outside a bankruptcy case *without* first obtaining derivative standing to do so.

7. Lacking a direct injury, the UCC is reduced to complaining about imagined injuries to the Title III Debtors. *See* Response at ¶¶ 11-12, 16-20, 40-47. Putting aside the Title III Debtors

do not even have net positive claims against GDB in the first place,[5] fatal to the UCC's standing to raise these issues is one simple fact: *they do not represent the Title III Debtors or their interests.*[6] The Oversight Board is the only representative of the Debtors. *See* PROMESA § 315(b). The prudential standing doctrine bars the UCC's attempt to usurp the Oversight Board's role as sole representative of the Title III Debtors by asserting the Title III Debtors' rights in this Court.[7]

8. The UCC attempts to punch its way out of this corner by asserting the prudential standing doctrine does not apply to statutory committees. But the UCC can only represent the rights of its constituents in a bankruptcy "case," it does not have blanket authority to represent the rights of whomsoever it pleases, including the Title III Debtors—that authority is exclusive to the Oversight Board. Accordingly, the UCC's attempt to supplant the Oversight Board as representative of the Title III Debtors to assert their rights in the Title VI Case is barred.

<u>REPLY</u>

I. The UCC Lacks Standing and Has No Authority to Object to the Qualifying Modification

9. Nowhere in the UCC's many pleadings filed with this Court or the Title III Court does the UCC cite to any authority that allows it to object to the Qualifying Modification. To the contrary, the UCC Derivative Standing Motion filed in the Title III case shows that even the UCC does not believe it has standing in the Title VI Case. The UCC makes no effort to respond to the

[5] *See* Standing Objection at 2 n.4.

[6] Because the UCC cannot assert the interests of the Title III Debtors in the Title VI Case, it is seeking a Court order in the Title III Cases granting it derivative standing to object to the Qualifying Modification. *See Official Committee of Unsecured Creditors' Motion for Order Granting Derivative Standing* [Case No. 17 -3283, ECF No. 3881] (the "<u>UCC Derivative Standing Motion</u>").

[7] This doctrine requires a claimant to demonstrate that its claims are premised on its own legal rights (as opposed to those of a third party). *See Latin Am. Music Co. v. Archdiocese of San Juan of the Roman Catholic & Apostolic Church*, 499 F.3d 32, 46 (1st Cir. 2007) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)).

arguments raised by the Oversight Board in the Standing Objection that the UCC lacks direct standing because it is not a creditor of GDB, does not represent the creditors of GDB, and, even if it did, it could not assert the claims of its constituents directly against GDB.

II. Parties Lacking Standing Do Not Acquire Standing By Virtue of Their Inability to Appeal Collateral Attacks Are Automatically Barred

10. In *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992), a creditor desiring to foreclose its mortgage against property the debtor leased and to extinguish a subordinate lease argued the debtor's lease had been automatically rejected pursuant to Bankruptcy Code § 365. The Seventh Circuit ruled the mortgagee lacked standing to do so because it could not assert the rights of the landlord to enforce an automatic rejection. The discussion ended with standing and did not cover stay termination. Similarly, creditors of the Title III Debtors, or their committee, cannot assert the rights of the debtors against the Qualifying Modification even though the creditors may be indirectly affected. Even if PROMESA § 601(m)(2) provided the Qualifying Modification is binding on creditors of creditors, it would do nothing more than codify preexisting law.

11. That the Title III Court's order cannot be attacked in another forum also simply states preexisting law. The Supreme Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1994) ruled district courts outside the district where the debtor's case is pending should not make rulings contradicting the bankruptcy court's rulings: "this they cannot be permitted to do without seriously undercutting the orderly process of the law." There, the Supreme Court imposed the rule against collateral attacks, even though no statute barred remote district courts from issuing such orders. In sum, nothing in § 601(m)(2) gives the UCC standing creditors of creditors lack in the first place.

III. Prudential Standing Bars the UCC from Asserting Title III Debtors' Rights

12. The Standing Objection demonstrated the UCC's proposed objection is barred by the prudential standing doctrine because its claims are premised on the rights of third parties—*i.e.*

the Title III Debtors, whose sole representative is the Oversight Board—and not on its own rights. Standing Objection at ¶¶ 32-33. The UCC responds to this with a sleight of hand. It argues "the prudential standing rule that a litigant generally cannot assert the rights of third parties has no application to a creditors' committee, the very nature of which is to act in a representative capacity." Response at ¶ 1. That would have some relevance if the UCC were representing the Title III debtors' creditors' interests in the Title VI case.[8] But the UCC is attempting to assert the rights of the Title III debtors. The UCC is *not* statutorily authorized to represent the Title III Debtors' interests—only the Oversight Board, as sole representative and trustee of each Title III Debtor, is permitted to do so. Moreover, because Bankruptcy Code section 363 does not apply in Title III, it is not even pertinent that the UCC differs with the Oversight Board as to how the Title III debtors' rights should be used. PROMESA, like Bankruptcy Code chapter 9, leaves the use of the debtor's property up to the debtor, as this Court recently observed. *Memorandum Order Denying Motion of Official Committee of Unsecured Creditors for Entry of an Order Enforcing the Automatic Stay*, [Case No. 17-3283, ECF No. 3941] (the "Stay Enforcement Order") at 6.

13. Indeed, if the UCC were correct that the prudential standing doctrine does not apply to it, a statutory committee would never need to seek derivative standing. It could shove aside the trustee and represent the debtor's interest at will. But this absurd result is not reality because the UCC's representation is confined to its constituents' interests and not those of any other party.

14. Because the UCC cannot represent or assert the rights of the Title III Debtors, this Court's decision in *BNYM v. COFINA (In re Fin. Oversight & Mgmt. Bd. for P.R.)* is directly authoritative on the issue of prudential standing. There, this Court ruled that a party which "had

[8] While it is correct that a statutory committee, by definition, represents the interests of its constituents, it is specifically authorized to do so by the Bankruptcy Code by dint of its appointment by the U.S. Trustee. *See* 11U.S.C. §§ 1103 and 1109(b).

no basis or authority on which to assert rights of the Commonwealth" was precluded by the prudential standing doctrine from asserting claims predicated on such rights. 301 F. Supp. 3d 306, 312 (D.P.R. 2017). The UCC argues that the case is distinguishable because "[u]nlike the GO Group, which had no basis or authority on which to assert rights of the Commonwealth, the Committee is the statutory representative of the Title III Debtors' unsecured creditors and has a fiduciary duty to protect their interests." Response ¶ 43. While a fiduciary duty to unsecured claimholders may permit the UCC to represent unsecured claimholders' rights, it does not permit the UCC to assert the Title III Debtors' rights. Nor does it give the UCC blanket authority to represent any third parties' rights. Just as the GO Group attempted to assert the rights of the Commonwealth, the UCC is attempting to assert the rights of the Commonwealth and other Title III Debtors. That the UCC is a statutory committee affords it no greater rights than any other party attempting to supplant the Oversight Board as representative of the Debtors—none whatsoever.

IV. The UCC Lacks Standing because it is Not Bound by the Qualifying Modification

15. Failing to show it has any statutory or any other authority, the UCC stakes its argument that it has direct standing to interfere in the Title VI Case on one gambit: "[i]f its constituents will be bound, the Committee has a right to be heard on the Qualifying Modification." Response at ¶ 1. The UCC's constituents, however, have no claims subject to the Qualifying Modification, and the UCC's argument to the contrary relies on a tortured construction of PROMESA section 601(m)(2) readily refuted factually in addition to the legal refutation above.

16. Simply put, to the extent creditors of the Title III debtors have "Bond" claims against GDB, they are entitled to assert them and they individually have standing in the Title VI Case. This does not grant the UCC standing to represent them in the Title VI case because their standing does not emanate from their claims against the Title III debtors.

17. The UCC asserts that PROMESA section 601(m)(2) will result in the Qualifying Modification binding all creditors of all the territorial instrumentalities of Puerto Rico (including the unsecured claimholders of the Title III Debtors). Response at ¶¶ 36-39. This section provides, in relevant part, that the Qualifying Modification, when approved, "will be full, final, complete, binding, and conclusive as to the *territorial government Issuer*, other territorial instrumentalities of the *territorial government Issuer*, and *any creditors of such entities*." PROMESA section 601(m)(2) (emphasis added). The UCC deliberately misreads this provision to argue the "Issuer" is both the Commonwealth and GDB, and, as a result, the Commonwealth's creditors are also bound by the Qualifying Modification of GDB's debt. Response at ¶¶ 38-39. This is wrong.

18. A Qualifying Modification adjusts the bond debt of an "Issuer." "Issuer" is defined, in PROMESA section 601(a)(8) to mean "*as applicable*, the Territory Government Issuer *or* an Authorized Territorial Instrumentality." PROMESA section 601(a)(8) (emphasis added). As the Oversight Board explained in its Standing Objection (*see* Standing Objection at ¶¶ 7, 36-37), it is GDB, and not the Commonwealth, that is seeking a Title VI modification of its bond claims. The reality of the transaction, the structure of PROMESA, and commonsense all dictate that "Issuer" in this context refers to GDB. To remove any doubt, the Title VI Application (*see* ECF No. 1) makes clear the GDB is the Issuer[9] and has been authorized as such by the Oversight Board.[10] All Bond claims subject to the Qualifying Modification are claims of GDB creditors.[11] That the

9 *Id.* at ¶ 50 ("PROMESA section 601(d) directs the Oversight Board, as the Administrative Supervisor, to establish, in consultation with the Issuer (here, GDB), separate Pools of Bonds distinguished by specific provisions governing priority or security arrangements.")

10 *Id.* at ¶ 19-20 ("GDB is both an Issuer and Authorized Territorial Instrumentality…On July 12, 2017, the Oversight Board issued a resolution authorizing GDB to use the Title VI modification procedure.").

11 *Id.* at ¶ 18 ("Here, GDB seeks to use Title VI to modify approximately $4.5 billion in Bond Claims. The Bond Claims subject to the Qualifying Modification (*i.e.*, the Participating Bond Claims) include claims based on (i) GDB's outstanding public bonds; (ii) certain deposits held at GDB by municipalities and non-public entities; and (iii) certain other private creditors.").

Commonwealth has guaranteed at least one outstanding Bond affected by the Qualifying Modification does not render it an "Issuer" of such Bonds and would not entitle it to seek a Title VI Modification of those Bonds unilaterally. The UCC intentionally attempts to confuse when the term "Issuer" means "GDB," the "Commonwealth," or both, solely for the purpose of concocting a direct injury to its constituents. Accordingly, the definition of "Issuer" applicable in this instance is Authorized Territorial Instrumentality, *i.e.* GDB, and not the Commonwealth.[12]

19. The UCC's resort to the language in the RSA and the Proposed Approval Order[13] provide no firmer ground for its argument the Title III Debtors' unsecured claimholders are bound by the Qualifying Modification. Response at ¶ 39. The UCC is not a party to the RSA and is not directly affected by its terms, making it irrelevant to the UCC's standing. Neither the UCC nor its constituency is a party to or third party beneficiary of the RSA and cannot benefit or be adversely impacted by it. It is hornbook law that an agreement between two parties does not change the rights of a third.[14] Significantly, the revised Proposed Approval Order filed by AAFAF and GDB on September 20, 2018 [Case No. 18-1561, ECF No. 158-1] (the "Revised Proposed Order")

[12] Moreover, if the term "Issuer" in section 601(m)(2) were meant to be inclusive of the Commonwealth, then "territorial government Issuer" would be capitalized to refer to the defined term "Territory Government Issuer." That the term "territorial government" is lowercase demonstrates that it is meant as an adjective to the defined term "Issuer," which, as applicable here, means GDB. As an adjective, it clarifies that the Issuer is a governmental entity, and may include any covered instrumentalities of that entity. Therefore, the Qualifying Modification only affects GDB's creditors, it does not cause any direct, legally cognizable harm to the UCC's constituents, and the UCC is unable to rely on this provision to demonstrate standing.

[13] *Notice of Filing of Proposed Order Approving The Qualifying Modification for GDB* [ECF No. 125] Ex. A, at 11.

[14] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Reaseguradora v. Banco Progreso Internacional De P.R.*, 1999 U.S. Dist. LEXIS 7197 at *16 ("Contracts can only bind the parties thereto, and accordingly only the parties to a contract can demand performance from each other. Third parties cannot be bound by a contract because it can only regulate the relationships between its contracting parties."); *City of Revere v. Boston/Logan Airport Assocs.*, 416 F. Supp. 2d 200, 208 (D. Mass. 2005) ("As a general matter, contracts do not bind nonparties."); *Union De Empleados De Muelles De P.R., Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 884 F.3d 48 (holding that "the [defendant] was not a party to the agreement and therefore was not bound by its provisions."); *Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007) (deciding case based on "the fundamental principle of contract law prohibiting the parties to a contract from binding nonparties.")

clarified and removed the language the UCC complains about in its Response (at ¶ 39). In doing so, the Revised Proposed Order made clear that the Qualifying Modification is only binding to the extent of the statutory language of PROMESA. *Id.* ("The Qualifying Modification, including the Exchange Terms, is approved and binding in its entirety pursuant to PROMESA sections 601(m)(1)(D), 601(n), and 602."). And, as shown above, the statutory language of PROMESA only binds the creditors of the Issuer affected by the Qualifying Modification—in other words, GDB's creditors. Therefore, contrary to the UCC's assertions, nothing in PROMESA, the Revised Proposed Order, or the RSA directly binds the UCC's constituents and grants them standing to object to the Qualifying Modification. Regrettably, despite the Revised Proposed Order clarifications, the UCC has not withdrawn its preliminary objection to the Qualifying Modification.[15]

20. This conclusion is solidified by the proviso at the end of PROMESA § 601(m)(2), which states "**no claim 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**." PROMESA § 610(m)(2). It makes clear only holders of Bonds affected by the Qualifying Modification are bound by it. The UCC's only response to this proviso is to complain about the GDB Restructuring Act's third-party releases, the effectiveness of which are tied to the approval of the Qualifying Modification. *See* Response at ¶ 40. But this argument is beside the point because only "Government Entities," such as the Title III Debtors, are affected by the releases contained in the GDB Restructuring Act.[16] And, as has

[15] *See Preliminary Objection of Official Committee of Unsecured Creditors of all Puerto Rico Title III Debtors (Other Than COFINA) to Proposed PROMESA Title VI Modification of Government Development Bank for Puerto Rico* [ECF No. 136].

[16] *See* GDB Restructuring Act § 702 ("no *Government Entity* shall have any further rights or claims against GDB, the Recovery Authority and the Public Entity Trust, and any officers, directors, employees, agents and other representatives thereof . . . Each *Government Entity* is hereby deemed to forever waive, release and discharge

been made clear, the UCC does not represent the interests of the Title III Debtors or other affected Government Entities, and cannot assert their rights to object to the Qualifying Modification.

V. The UCC has No Legally Cognizable Injury through Bankruptcy Code Section 926

21. Desperate to manufacture some direct injury, the UCC argues that the release of the Title III Debtors' (unspecified) avoidance claims deprives unsecured claimholders of the "right" to seek appointment of a trustee under Bankruptcy Code section 926. Response at ¶ 41. The UCC's argument falls flat because, if true, it would turn PROMESA on its head by giving creditors veto rights over the Debtors' ability to enter into settlements. In other words, anytime a Title III Debtor settles a cause of action that it owns (*i.e.* its "property"), a creditor could attempt to stop the transaction by claiming it has been deprived of its "right" to seek a trustee under section 926. It would thus invite court scrutiny of each transaction—an intrusion on the debtors' authority over its property that Congress prevented by excluding Bankruptcy Code § 363 from PROMESA.

22. Indeed, as this Court ruled less than two weeks ago, the incorporation of PROMESA §§ 303 and 305, along with the exclusion of Bankruptcy Code § 363, preserves a Title III debtor's substantial independence and decision-making, including its authority to "enter[] into negotiated resolutions of disputes over property rights or otherwise taking actions to dispose of its property" without Court approval. Stay Enforcement Order at 6; *see also In re City of Stockton*, 486 B.R. at 199 (holding debtor could freely enter into settlements without court approval for the same reasons); 6 COLLIER ON BANKRUPTCY ¶ 904.01[2] ("The chapter 9 debtor is free to enter into (or not enter into) a settlement as it sees fit, without the necessity of court approval"). The Court recognized the GDB Restructuring is one such negotiated resolution of the debtors' property rights

GDB, the Recovery Authority and the Public Entity Trust, and any officers, directors, employees, agents and other representatives thereof from any and all such claims.").

that is protected from review by the Court. *Id*. The UCC cannot invert PROMESA's clear deference to a Title III Debtor's decision-making by inserting a creditor veto through § 926 that would invite court review of otherwise unreviewable transactions. Notably, no creditor has even filed a motion with the Title III Court to appoint a trustee pursuant to Bankruptcy Code § 926.

23. Moreover, the decision whether or not to appoint a trustee to pursue certain causes of action is left entirely to the discretion of the court. Because of this, creditors have no "right to a trustee."[17] Any supposed injury is far too attenuated and speculative to be legally cognizable, as the UCC could not establish that, but for the settlement, the court would appoint a trustee to pursue some (unspecified) avoidance claim.

24. By pointing to section 926, the UCC is trying to transform a supposed injury of a "right" in the Title III Case into standing in the Title VI Case. However, any action pursuant to section 926 of the Bankruptcy Code would be brought in the Title III Court and not in the Title VI Case. Thus, even if UCC had standing to bring such action pursuant to section 926 of the Bankruptcy Code or could somehow show an injury (and it cannot), it would only provide the UCC standing in the Title III Case and not in the Title VI Case. In other words, the UCC cannot create standing in the Title VI case because of an alleged injury in the Title III case.

25. Finally, even if § 926 could be used to conjure a legally cognizable injury, the UCC cannot rely on it for standing. Section 926 of the Bankruptcy Code only permits a "creditor" and

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[17] *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (holding that plaintiff had no standing where injury entirely contingent on exercise of third party's discretion, as "federal courts may not assume a particular exercise of . . . discretion in establishing standing"); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (denying standing where injury depended on "speculative inferences" on what third parties might do); *Allen v. Wright*, 468 U.S. 737, 759 (1984) (finding no standing where plaintiff's injury depended on the discretionary actions of numerous third parties).

not a party-in-interest, to seek a trustee.[18] There is no right belonging to the UCC that is implicated by section 926 and therefore, no injury the UCC can assert to establish standing in the Title VI.

VI. The UCC Cannot Act in the Title VI Case Absent Derivative Standing

26. As set forth in the Standing Objection, the UCC, as purely a creature of the Title III Cases, has no statutory authority to act in the Title VI Case because such proceeding, which concerns the assets and liabilities of a non-Title III entity (*i.e.* GDB), is independent and outside the Title III Cases for which the UCC has been appointed. This limitation stems from Bankruptcy Code section 1103(c), which defines the entire universe of actions that a statutory creditors' committee may engage in during the course of a bankruptcy case. Significantly, four of the five provisions specifically limit the UCC to activities that necessarily occur within the bankruptcy case which spawned the committee (e.g. consulting with a trustee or debtor in possession concerning administration of the case).[19] While the remaining subsection, § 1103(c)(5), permits a committee to "perform such other services as are in the interest of those represented," it has been interpreted as limited to actions within the bankruptcy case.[20]

27. In its Response, the UCC makes no effort to demonstrate how any provision in section 1103 or elsewhere in the Bankruptcy Code grants it the power to act independently and outside the Title III Cases. It rails against the cases cited by the Oversight Board, contending that these cases take an "overly restrictive" interpretation of section 1103. Response at ¶ 44-45. But

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[18] This limitation was intentional and is animated by sovereignty concerns. *See In re New York City Off-Track Betting Corp.*, No. 09-17121 MG, 2011 WL 309594, at *4 (Bankr. S.D.N.Y. Jan. 25, 2011) ("the narrow application of section 926 is evidenced by the fact that *only* a creditor, and not any party in interest (or the court *sua sponte*), can seek the appointment of a trustee.") (emphasis added).

[19] As observed by the court in *In re Dow Corning Corp.*, "[e]ach of these powers relates to actions which intimately involve the core of the reorganization process; and without the existence of a chapter 11 case, these powers would be meaningless." 199 B.R. 896, 902 (Bankr. E.D. Mich. 1996).

[20] *In re Dow Corning Corp.*, 199 B.R. at 902. Notably, the UCC fails to rebut the analysis of *In re Dow Corning* contained in the Standing Objection (at ¶ 28).

the UCC mischaracterizes these cases. While the court in *In re Johns–Manville Corp.*, 52 B.R. 879, 884 (Bankr. S.D.N.Y. 1985) held that section 1103 "does not grant a committee *blanket* authority to represent its constituency in matters outside and independent of the bankruptcy case," the use of the term "blanket" does not imply that a committee has some authority to act outside of the bankruptcy case. Instead, as the court in *In re Dow Corning* explained, "there is a clear line of separation between the ability of a creditors' committee to act within the bankruptcy case and the ability to act independent of and outside the case. And this line of separation is reasonable." 199 B.R. 896, 902 (Bankr. E.D. Mich. 1996). The Sixth Circuit would go on to affirm the bankruptcy court's holding as the "rational conclusion." *Official Comm. of Tort Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 142 F.3d 433 (6th Cir. 1998).

28. While the UCC protests the clear holdings in the cases cited by the Oversight Board, it fails to provide a single case casting doubt on this jurisprudence or holding that a statutory committee may engage in litigation outside the bankruptcy case. Instead, the UCC cites a host cases where a creditors' committee appeared in state court and other non-bankruptcy courts, **but did so pursuant to orders of derivative standing**. *See* Response at ¶ 46, n.72. These cases prove the rule: if the UCC wants to act outside the Title III Cases for which it is appointed, it may only do so through a grant of derivative standing. But as demonstrated at length in the Oversight Board's derivative standing objection,[21] PROMESA forecloses the UCC from seeking to stand in the Oversight Board's shoes and represent the Title III Debtors' interests.

VII. Neither the Oversight Board Nor its Counsel are Conflicted

29. Absent any legal basis to establish standing, the UCC argues that alleged "conflicts of interest pervading the GDB Restructuring" result in a "compelling" need for the UCC to appear

[21] *See* Case No. 17-3283, ECF No. [3958]

in the Title VI Case. Response at ¶ 1. But a "compelling need" does not create standing. Moreover, the UCC's outrageous claims of conflict are without a shred of merit.

30. The UCC asserts, in bold and underlined letters, that "[i] f the purported Qualifying Modification is approved, the very people who orchestrated the GDB Restructuring will have succeeded in releasing themselves, GDB, and others of any liability to the Title III Debtors relating to GDB's role in Puerto Rico's financial crisis…" Response at ¶ 28. As it pertains to the Oversight Board, the UCC bases this contention on two of the Oversight Board's members having formerly served as GDB president. Response at ¶ 26. But, as made clear by the GDB Informative Motion, former directors and officers of the GDB are not receiving any releases through the Qualifying Modification or the GDB Restructuring Act. The allegation of conflict also fails because the Oversight Board's seven members unanimously certified the Qualifying Modification—thus providing a majority of independent board members even if two votes were set aside.

31. Finally, the Oversight Board's counsel, Proskauer Rose LLP ("Proskauer") is not conflicted. Proskauer's representation of the GDB for the purposes of drafting the Puerto Rico Corporation Debt Enforcement and Recovery Act (the "Act") and defending the Act in appellate litigation are a matter of public record.[22] Proskauer's representation of the GDB terminated over a year before the Oversight Board was established or made the determination to retain Proskauer—a representation which was also immediately made public.[23] And, contrary to the insinuations of conflict made by the UCC, Proskauer was never retained for any debt issuances.

[22] *See, e.g.*, Agreement For Professional Services Between The Government Development Bank For Puerto Rico And Proskauer Rose LLP, dated February 3, 2014 (2014-BGF090), at p. 2 (emphasis added).

[23] Robert Slavin, Puerto Rico's Oversight Board Hires the GDB's Law Firm Bond Buyer (2016), https://www.bondbuyer.com/news/puerto-ricos-oversight-board-hires-the-gdbs-law-firm (last visited Sep 25, 2018).

WHEREFORE the Oversight Board respectfully requests that the Court enter an order determining the UCC lacks standing to participate in this Title VI Case, and to object to the Qualifying Modification and the GDB Restructuring Act, and grant the Oversight Board such other and further relief as is just and proper.

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Respectfully submitted,

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