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

AUTONOMOUS MUNICIPALITY OF SAN JUAN, Plaintiff, v. THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, and PUERTO RICO FISCAL AGENCY & FINANCIAL ADVISORY AUTHORITY, Defendants.	Case No. 3:17-cv-02009

ORDER

I. Procedural Background

a. Initial Motions

On July 26, 2017, Plaintiff Autonomous Municipality of San Juan ("San Juan") filed a *Complaint For Declaratory Judgment and Injunctive Relief* (Dkt. No. 1) (the "Complaint"). Subsequently, seven other municipalities of Puerto Rico moved to intervene, including Juana Díaz, Cabo Rojo, Hormigueros, San Germán, Luquillo, San Lorenzo and Mayaguez (Dkt. Nos. 15, 17, 19, 20, 21) (collectively the "Motions"). On September 11, 2017, Defendants Government Development Bank for Puerto Rico ("GDB") and Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") filed their motion to dismiss as well as an opposition to the Motions (Dkt. No. 62). On the same day, Defendant the Financial Oversight and Management Board (the "FOMB") filed its motion to dismiss, including arguments opposing the Motions (Dkt.

No. 61). On September 14, 2017, Plaintiff San Juan filed a response in support of the Motions (Dkt. No. 68). On October 11, 2017, Municipalities Juana Díaz and Cabo Rojo filed an amended intervention complaint to respond to certain arguments the Defendants had raised in their briefing (Dkt. No. 80). This Court takes notice of that amended pleading as well as the arguments raised across the aforementioned motion practice.

b. Motions Regarding Timing of Adjudication

On September 13, 2017, proposed intervenors municipalities of Juana Díaz and Cabo Rojo filed their *Motion To Request That The Pending Motions To Intervene Be Adjudicated Prior To The Pending Dispositive Motions* (Dkt. No. 66) ("Motion for Adjudication"). Defendants the FOMB, GDB and AAFAF filed an opposition thereto (Dkt. No. 79).

II. Underlying Lawsuit

This proceeding, commenced by San Juan, challenges the certification of a "Restructuring Support Agreement ("RSA") to restructure the debts of the Government Development Bank of Puerto Rico ("GDB") under Title VI of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101-2241 ("PROMESA")." Compl. ¶ 1. The initial Complaint alleges that "the RSA provides that property tax revenues held in a trust pursuant to a trust agreement at GDB for the benefit of San Juan and other municipalities will be appropriated and used to pay all of GDB's creditors, including public bondholders." Id. ¶ 2. San Juan alleges that in the approved process for voting on the RSA, the "Oversight Board, GDB and AAFAF are violating PROMESA by improperly classifying San Juan and thereby depriving San Juan and other municipal depositors of their statutory right to vote as a group on the RSA in accordance with the nature and priority of their claims against the GDB." Id. ¶ 6. San Juan

argues that their rights are secured, id. ¶ 7, that "a substantial amount of deposits belonging to San Juan have been trapped at the GDB for well over a year," and that "[t]o date, the GDB has refused to return to San Juan the bulk of the monies that belong to it or reduce San Juan's loan payments by a corresponding amount in the form of a statutorily guaranteed offset." Id. ¶¶ 25-26. San Juan alleges that "[w]hile the RSA Parties purportedly recognize that San Juan – and all similarly situated municipalities – possess setoff rights, the RSA impermissibly seeks to curtail these rights through the RSA." Id. ¶ 61. Plaintiff seeks a declaratory judgment that the RSA violates PROMESA and that PROMESA preempts Puerto Rican laws and executive orders that purport to stop withdrawals of municipal deposits from the GDB. Id. ¶ 9.

San Juan also sought a preliminary injunction, which the Honorable Judge Swain denied on September 27, 2017. Dkt. No. 72. In denying the injunction, Judge Swain found, inter alia, that San Juan had "not carried its burden of demonstrating that injunctive relief is necessary to prevent such harm," based in part on the fact that "the record contains no evidence as to the voting intentions of any municipalities other than the few that have already signed on as supporters of the RSA." Id. at 16, 18.

III. The Timing of the Court's Decision

Defendants ask that the Court wait to rule on the Motions until after this Court has decided the pending motions to dismiss in the case, as "[t]he Court will not know [whether the claims are futile] until it decides Defendants' motions to dismiss, which challenge Plaintiff's (and other municipalities') standing and authority to bring this action, as well as the ripeness of

Plaintiff's claims."[1] Dkt. 79 at 2. This Court recognizes that "courts have held that futility is a proper basis for denying a motion to intervene." In re Merrill Lynch & Co. Research Reports Sec. Litig., 2008 U.S. Dist. LEXIS 53923, at *13-14 (S.D.N.Y. June 26, 2008) (collecting cases). The futility analysis is based on "whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to prevail on the merits." Williams & Humbert, Ltd., v. W. & H. Trade Marks (Jersey) Ltd., 840 F.2d 72, 75 (D.C. Cir. 1988).

In the instant case, however, there is no reason to pre-judge the merits of the motions to dismiss, since they clearly raise significant issues of concern to all the municipalities. Intervention is designed to "further[ ] the goals of efficiency and uniformity." Wilder v. Bernstein, 965 F.2d 1196, 1202 (2nd Cir. 1992). Where each moving municipality has asserted identical claims to San Juan, it serves judicial economy to decide on intervention now such that all intervenors can argue and be bound by dispositive motions.

Additionally, a timely decision is proper as this case is currently in its early stages and any prejudice to the parties caused by the granting of the Motions will be minimal. Photographic Illustrators Corp. v. Trade Serv. Co., No. 15-cv-13157-ADB, 2016 WL 107938, at *2 (D. Mass. Jan. 8, 2016); Penobscot Nation v. Mills, No. 1:12-cv-254-GZS, 2013 WL 3098042, at *3 (D. Me. June 18, 2013) ("[intervention] will not unduly delay the adjudication of this case because this case is still in its early stages, with discovery not set to be completed for several months"). Consequently, the Motion for Adjudication is allowed and the Court will address the merits of the Motions prior to the pending motions to dismiss.

[1] The Court recognizes that the arguments set forth in the pending motions to dismiss could change after the filing of the anticipated amended complaint.

IV. Standard for Intervention

The putative intervenors raise arguments under both Federal Rule of Civil Procedure 24(a), intervention as of right, and Federal Rule of Civil Procedure 24(b), permissive intervention.

Federal Rule of Civil Procedure 24(a) dictates that a 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." (Emphasis added). "[U]nder certain circumstances the adverse impact of stare decisis standing alone may be sufficient to satisfy the practical impairment requirement." Int'l Paper Co v. Inhabitants of the Town of Jay, 887 F.2d 338, 344 (1st Cir. 1989) (internal quotation omitted). Furthermore, "[a]n intervenor need only show that representation may be inadequate, not that it is inadequate." Conservation Law Found. of N.E., Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992). However, "[w]here the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation" to deny intervention as of right. Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979).

Federal Rule of Civil Procedure 24(b)(1) dictates 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." (Emphasis added). "The First Circuit has noted that the threshold for permissive intervention is low, and that once the threshold requirements are satisfied, the district court may 'consider almost any factor rationally relevant.'" Penobscot Nation, 2013 WL 3098042, at

*2 (quoting Dagget v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999)). Federal Rule of Civil Procedure 24(b) "is satisfied where a single common question of law or fact is involved, despite factual differences between the parties." McNeill v. NYC Housing Auth., 719 F. Supp. 233, 250 (S.D.N.Y. 1989). In granting or denying permissive intervention, the Court must also abide by Federal Rule of Civil Procedure 24(b)(3), which requires that the Court "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Where intervention as of right is not warranted because adequate representation exists, but where parties share common questions of law or fact, the Court can grant permissive intervention. See New York v. Abraham, 204 F.R.D. 62, 66 (S.D.N.Y. 2001).

V. Evaluating the Claims Under Permissive Intervention

Each of the appearing municipalities asserts the same causes of action as Plaintiff San Juan. See, e.g., Dkt. No. 15-1 at 4 ("[Municipalities of Juana Díaz and Cabo Rojo] assert the same causes of action asserted by the Municipality of San Juan at paragraphs 79-112 of their complaint and hereby seek the same relief sought by said party."). The parties disagree as to whether San Juan's representation is sufficient so that intervention by the municipalities should not be permitted as of right under Federal Rule of Civil Procedure 24(a). This Court does not need to resolve this issue, as permissive intervention is clearly appropriate.

There is no doubt that the seven municipalities moving to intervene share a common question of law or fact with San Juan. In fact, San Juan's complaint repeatedly refers to the similarities between its alleged harm and that of other Puerto Rican municipalities. See, e.g., Compl. ¶ 2 ("trust agreement at GDB for the benefit of San Juan and other municipalities"),

¶ 6 ("Oversight Board, GDB and AAFAF are violating PROMESA by improperly classifying San Juan and thereby depriving San Juan and other municipal depositors of their statutory right to vote as a group"). The statutory scheme challenged by San Juan affects all Puerto Rican municipalities with certain monies held at the GDB. Since the requirements of Federal Rule of Civil Procedure 24(b) are clearly met, and where intervention would allow each municipality to voice their arguments before a final ruling on the motions to dismiss in this case, this Court allows the Motions.

VI. Scope of Intervention

"[C]ourts are not faced with an all-or-nothing choice between grant or denial: Rule 24 also provides for limited-in-scope intervention." United States v. City of Detroit, 712 F.3d 925, 931 (6th Cir. 2013). Intervention "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24, advisory committee's notes, 1966 amendment. As the First Circuit recently explained, "[t]hese competing concerns are particularly poignant in the present case, which [is affiliated with] the largest proceeding to restructure debt in the history of the American municipal bond market." Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for PR, 872 F.3d 57, 64 (1st Cir. 2017) (internal quotation omitted).

"It is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." Sw Pa. Growth Alliance v. Browner, 121 F.3d 106, 121 (3rd Cir. 1997). As such, the intervening parties shall not argue beyond the scope of the allegations made in the amended complaint. The parties shall also not duplicate arguments

made by San Juan and must consult with San Juan before the filing of any document, and prior to any argument before the Court.

VII. Conclusion

For the foregoing reasons, this Court ORDERS as follows:

1. The *Motion to Request that the Pending Motions to Intervene be Adjudicated Prior to the Pending Dispositive Motions* (Dkt. No. 66) is GRANTED.

2. The Motions (Dkt. Nos. 15, 17, 19, 20, 21) are GRANTED with the limitations explained herein.

3. If appropriate, the Court may issue further procedural orders relating, inter alia, to the timing and length of written pleadings and any oral argument.

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

DATED: October 27, 2017