

**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.<sup>1</sup>

PROMESA  
Title III

No. 17 BK 3283-LTS  
(Jointly Administered)

In re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT  
BOARD FOR PUERTO RICO,

as representative of

PUERTO RICO ELECTRIC POWER AUTHORITY,

Debtor.

No. 17 BK 4780-LTS

**MOTION OF ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL  
CORP. GOLDENTREE ASSET MANAGEMENT LP, SYNCORA GUARANTEE, INC.,  
AND U.S. BANK NATIONAL ASSOCIATION AS THE PREPA BOND  
TRUSTEE TO STRIKE THE TESTIMONY OF OJAS SHAH**

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<sup>1</sup> The Debtors in these Title III cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico ("Commonwealth") (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); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (iv) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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

Assured Guaranty Corp., Assured Guaranty Municipal Corp., GoldenTree Asset Management LP, Syncora Guarantee Inc., and U.S. Bank National Association as the PREPA Bond Trustee, (collectively, “Movants”), hereby move under Federal Rules of Evidence 401, 402 and 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to strike the trial testimony of Ojas Shah. Such testimony lacked competence, relevance and any proper basis for expert opinion.

**PRELIMINARY STATEMENT**

1. The Financial Oversight & Management Board for Puerto Rico (the “FOMB” or the “Oversight Board”) offered Ojas Shah of McKinsey as a witness on whether the best interest test (“BIT”) under PROMESA was satisfied. In other words, he was proffered to establish whether creditor recoveries outside of Title III were higher than recoveries contemplated under the *Corrected Fourth Amended Title III Plan of Adjustment of the Puerto Rico Electric Power Authority* (ECF No. 4345,<sup>2</sup> the “POA” or the “Plan of Adjustment”). Throughout his cross examination, Shah admitted repeatedly that he relied on numerous assumptions and data provided by the FOMB’s advisors, including its counsel at Proskauer Rose LLP (“Proskauer”) rather than any personal knowledge. He further testified that he performed no independent evaluation of these assumptions, all of which are essential to the BIT analysis. Shah lacks the personal knowledge to offer competent and relevant factual testimony on whether the best interest test was met. Moreover, and alternatively, by merely “parroting” the opinions of counsel, without any separate analysis or inquiry, Shah’s so-called expert opinion is also inadmissible, incompetent and of no relevance to whether PROMESA’s best interest test was actually satisfied.

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<sup>2</sup> All references herein are to Case No. 17-BK-4780-LTS.

2. In addition, and at minimum, with respect to certain percentage recovery scenarios identified in Mr. Shah's purported analysis—the diesel generator scenarios (as defined below)—Mr. Shah's testimony makes clear that such scenarios were not based on Mr. Shah's own knowledge or experience, but rather solely on oral conversations that he had with two former members of McKinsey's energy group. Neither of these individuals were presented by the Board prior to the close of its case in chief. Shah testified that he never received any written work product or analysis (nor was he aware of the information such individuals relied on) that would support the inclusion of these scenarios. Thus, Mr. Shah had no factual basis to personally testify about these scenarios or their impact on creditor recoveries outside of Title III. Alternatively, Shah's testimony lacks the reliability necessary to render admissible expert evidence.

3. For the foregoing reasons, Shah's testimony regarding the BIT (including with respect to the diesel generator scenarios) should be stricken.

### **FACTUAL BACKGROUND**

4. Shah is a Partner at McKinsey & Company, an advisor to FOMB. In its Preliminary List of Fact Witnesses filed on September 29, 2023, the Board identified Shah as a fact witness and represented his testimony topics would include "showing the Plan is in the best interest of the creditors of the Debtor under PROMESA section 314(b)(6)." ECF No. 3963 at 4. The witness list also noted that he "may offer opinion testimony pursuant to Fed. R. Civ. P. 26(a)(2)(C)." *Id.* at 5. In the *Debtor's Opening Rule 26(a)(2)(c) Disclosures* (the "Debtor's Rule 26 Disclosures"), the FOMB thus identified Shah as an expert on the BIT and indicated:

Mr. Shah is expected to base this testimony on, among other things, (a) his review and understanding of the classification and treatment of claims under the Plan, (b) his review and understanding of the assumptions made in connection with the Debtor's best interests test analysis, which was prepared by McKinsey, including (i) the resource envelope available for all creditors of the Debtor, (ii) the

amount of unsecured claims, and (iii) and the resolution of certain key legal issues which may require litigation outside of Title III, including the rates to be charged by PREPA, and (c) Mr. Shah's extensive experience serving as an advisor to the FOMB over the past several years and other experience in providing financial advisory services.

ECF No. 4271 at 9-10.

5. Shah's direct testimony in this case included a BITR Report ("BITR"), prepared by Shah in December of 2023. ECF No. 4253. That report purports to calculate percentage creditor recoveries under different rate, electricity load and claim amount scenarios outside of Title III. It did not address creditor recoveries under the Plan. Indeed, Shah never even read the Plan or the Disclosure Statement concerning the Plan before submitting his BITR. March 8 2024 Tr., ECF No. 5050, at 786:10-18.

6. Not only did Shah's BITR fail to address creditor recoveries under the Plan, there are numerous flawed assumptions adopted wholesale by Mr. Shah in his purported BITR related to percentage creditor recoveries outside of Title III. In particular, Shah's recitation of possible creditor recoveries outside of Title III are almost exclusively based upon numerous factual and legal assumptions provided by Proskauer and other Board advisors concerning events, facts, data, and dictated methodology. *See* ECF No. 4253 at Appendix I. Proskauer also provided a "Debt Stack" concerning creditor claim amounts and priorities. ECF No. 4253 at 30; March 8 2024 Tr., ECF No. 5050, 788:14-17. The BITR admits that with respect to the numerous assumptions and dictated methodologies, McKinsey engaged in no independent analysis, review or verification of them. ECF No. 4253 at 5-6. At his cross examination on March 8, 2024, Shah confirmed that neither he nor McKinsey had reviewed any of the underlying documents supporting the assumptions therein. ECF No. 5050 at 788:21-23. Rather, McKinsey simply accepted the assumptions provided as "true, accurate and reliable." *Id.* at 788:18-20. The same was true for

other assumptions and data provided by PREPA, LUMA, the Commonwealth of Puerto Rico and other Board advisors, such as Ernst & Young and Citi. *Id.* at 789:6-16. Proskauer also provided Shah with its estimates of creditor recoveries under the Plan since Shah had not even attempted to do so in his BITR. ECF No. 4253. And even though Shah alleged that his BITR purports to assess the revenues available to creditors of PREPA based on available remedies under non-bankruptcy laws, including the “Constitution of the Commonwealth of Puerto Rico”, McKinsey did not perform any analysis of non-bankruptcy laws or the Puerto Rico Constitution. *Id.* at 790:20-791:19.

7. As the Court no doubt observed at trial, Shah’s BITR was nothing more than a mathematical exercise with pre-determined inputs dictated by Proskauer and others, the obvious ultimate goal of which was to produce a pre-ordained BIT result for the Board. Essentially, Mr. Shah served as a puppet with Proskauer, on behalf of the Board, serving as puppeteer.

8. The absence of personal knowledge and competence is particularly acute as to tow rate recovery scenarios included in McKinsey’s BITR labelled the “capped revenue envelope implied rate” scenarios. These assume that upon appointment of a receiver outside of Title III, a receiver would be unable to raise rates beyond the “cost of running small scale diesel generators” (collectively, the “diesel generator” scenarios). ECF No. 4253 at 14. However, consistent with Shah’s lack of knowledge concerning the validity of the numerous factual and legal assumptions upon which the BITR was based, Shah confirmed his utter lack of foundational knowledge about these scenarios. During cross-examination, he testified that he included the diesel generator scenarios based solely on a conversation with certain former McKinsey employees in its Energy Group and that he did not receive any work product or written analysis from these individuals to explain or support the recommendation to include such scenarios. ECF No. 5050 at 813:4-7, 21-24; 814:19-21. Further, he “[did not] know all the variables” that were used to calculate the



threshold rate information for the diesel generator scenario. *Id.* at 815:4-7. He did not know whether the assumptions underlying these scenarios were feasible for certain of PREPA's customers. *Id.* at 815:8-11 ("I don't know the percentage of PREPA customers that have access" to substitute diesel generation"). He was therefore unable to explain the calculations underlying these scenarios, for which he admitted he was "not an energy expert." *Id.* 5050 at 813:9; 814:12-17.

9. Movants now bring this motion to strike Mr. Shah's factual testimony as incompetent and irrelevant testimony concerning whether the BIT has been satisfied. Alternatively, while Movants recognize the Court's prior decision denying their motion to *Daubert* Shah, they respectfully assert that given his trial testimony such relief is now more appropriate than ever. Shah's testimony should be stricken.

### **JURISDICTION**

10. The Court has subject-matter jurisdiction to consider this matter and the relief requested herein pursuant to PROMESA § 306(a).

11. Venue is appropriate in this District pursuant to PROMESA §§ 106(a) and 307(a) and 28 U.S.C. § 1391.

### **ARGUMENT**

1. Testimony is only admissible if the witness is "shown to have sufficient personal knowledge of the matter at issue." *Barrett v. United States*, 965 F.2d 1184, 1195 (1st Cir. 1992) (citing Fed. R. Evid. 602). Testimony based on hearsay, rather than personal knowledge, is not competent evidence. *Smith v. New Venture Gear, Inc.*, No. 99-CV-2086, 2007 WL 2948945, at \*5 (N.D.N.Y. Sept. 30, 2007), *aff'd*, 319 Fed. Appx. 52 (2d Cir. 2009). The competency of evidence in the end depends upon whether it is likely to advance the search for the truth, and that

does not inevitably follow from the fact that it is rationally relevant. *United States v. Krulewitch*, 145 F.2d 76, 80 (2d Cir. 1944). Additionally, to be admissible, evidence must be relevant. *Blasco Figueroa v. Puerto Rico Aqueducts & Sewer Auth.*, No. 14-1395 (SCC), 2016 WL 6135445, at \*3 (D.P.R. Oct. 21, 2016) (quoting Fed. R. Evid. 401).

2. Separate and apart from foundational competence and relevancy, trial courts must perform a “gatekeeping function” in order to ensure that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. *Smith v. Jenkins*, 732 F.3d 51, 64 (1st Cir. 2013) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Federal Rule of Evidence 702 requires that testimony be (1) based on sufficient facts or data, (2) the product of reliable principles and methods, and (3) reflective of a reliable application of the principles and methods to the facts of the case. *Id.* (citing Fed. R. Evid. 702.)

**I. SHAH DID NOT PERFORM INDEPENDENT ANALYSIS AND THEREFORE HIS FACTUAL TESTIMONY SHOULD BE STRICKEN**

3. Evidence—expert or not—is relevant only when it has any tendency to make a material fact more or less probable. *Blasco Figueroa*, 2016 WL 6135445 at \*3. Evidence is relevant if (1) “it has any tendency to make a fact more or less probable than it would be without the evidence”, and (2) “the fact is of consequence in determining the action”. *United States v. Aiyer*, 33 F.4th 97, 123 (2d Cir. 2022) (quoting Fed. R. Evid. 401). “Irrelevant evidence is *not* admissible.” *Id.* (quoting Fed. R. Evid. 402). Competent evidence must advance the search for truth. *United States v. Krulewitch*, 145 F.2d 76, 80 (2d Cir. 1944); *see also Smith v. New Venture Gear, Inc.*, 2007 WL 2948945, at \*5 (finding evidence incompetent where based on hearsay rather than personal knowledge). Testimony must be stricken if it is unclear whether the witness had personal knowledge of the events or processes the witness described. *Fed. Trade Comm’n v. Vyera*

*Pharm., LLC*, No. 20CV00706 (DLC), 2021 WL 5300019, at \*2 (S.D.N.Y. Nov. 15, 2021). Because Shah did not independently verify any of the numerous and controlling assumptions in the BITR, and did no personal work to determine whether the best interests test has been met, he lacks the personal knowledge to render relevant or competent evidence on that issue. *See Blasco Figueroa*, 2016 WL 6135445 at \*3; *Barrett v. United States*, 965 F.2d at 1195.

4. First, on its face, the BITR recognizes it does not reflect an independent analysis based on McKinsey's work. The BITR expressly contains the disclaimer that "McKinsey & Company has accepted as true, accurate and appropriate, all of the legal and financial assumptions provided by Proskauer Rose LLP, O'Neill & Borges, LLC, other FOMB advisors and the Government of Puerto Rico, PREPA, LUMA and their respective advisors." ECF No. 4253 at 6. The BITR continues: "McKinsey & Company has not independently verified any of the information from [same entities]" nor does it take "any independent position with respect to this information in these assumptions." *Id.* To be clear, the BITR relies upon (and sets forth in Appendix I) the numerous Board and Proskauer-created assumptions of events, data, analyses, dictated methodology and legal standards, and that McKinsey did no independent analysis to review or verify the accuracy of such assumptions. *Id.* Shah confirmed these disclaimers during cross examination and the absence of independent work with respect to the assumptions provided by Proskauer. *See* ECF No. 5050 at 787:2-7; 788:21-789:2 ("Q. Now, in the [December 2023 BITR] you relied on certain assumptions in preparing the report that were provided by Proskauer, correct? A. That's correct. . . . And McKinsey has not independently verified any of the information in Proskauer's assumptions, correct? A. That's correct. Q. And McKinsey doesn't take any independent position with respect to the information contained in the Proskauer assumptions? A. That's correct."). In sum, Shah admitted that he relied on Proskauer in preparing the BIT. *Id.* at 789:3-5. The same was true for other assumptions and data provided by PREPA, LUMA, the

Commonwealth of Puerto Rico and other Board advisors, such as EY and Citi. ECF *Id.* at 789:6-16.

5. The assumptions provided by the Board, Proskauer and others, and adopted wholesale by Shah, are not merely legal assumptions. Instead, they have a material impact on the calculation of potential recoveries outside of Title III. *See* ECF No. 4253 at Appendix I. The Bondholders highlight the following non-exhaustive examples of assumptions taken as true by Shah when he attempted to calculate percentage creditor recoveries that would have occurred outside of Title III in June of 2024:

- Shah testified that “Proskauer, in its assumptions, determined that McKinsey should use rates supplied by the revenue envelope as a reasonable estimate of rates PREPA could charge while accounting for considerations set forth in the estimation order” and confirmed that he has not even reviewed the Estimation Order, an Order he admitted was based on conditions that existed in 2017. ECF No. 5050 at 792:18-793:4. Nor did he know whether using an Estimation Order based on 2017 conditions was reasonable. *Id.* at 793:9-20.
- McKinsey accepted Proskauer’s assumptions as to the existence of “numerous legal and practical factors [that] would limit the ability of either PREPA or a receiver to raise rates beyond those identified,” without even knowing what “factor[s]” Proskauer was referring to. *Id.* at 794:5-16.
- Shah admitted that earlier drafts of the BTR had substantially increased potential recoveries but such predicted recoveries were reduced in part due to updated assumptions provided by Proskauer. *Id.* at 795:13-796:18.
- Shah admitted that McKinsey accepted from Proskauer a 7% discount rate to discount the future cash flows back to the effective date of the analysis. This was accepted without doing any independent research or analysis on the 7% discount rate. *Id.* at 797:3-17. Such assumption was accepted even though Shah had previously used a 6% discount rate in his January and March 2023 BTRs. March 8 2024 Tr., ECF No. 5050, 797:18-798:9.
- McKinsey adopted the assumption that “[d]ismissal of the Title III case as of the effective date of the analysis will present no less risk and uncertainty than was present in July 2017” without performing any independent analysis to confirm the accuracy of the statement. *Id.* at 799:4-14.
- McKinsey also adopted the assumption concerning which of PREPA’s accounts were restricted or otherwise unavailable for distribution to creditors without performing any independent work or verification. *Id.* at 799:15-24. Shah confirmed that an updated

assumption on this issue could affect projected creditor recoveries outside of Title III. *Id.* at 799:25-800:6.

- Regarding load forecast assumptions, Shah confirmed that he relied on the assumptions that Proskauer provided McKinsey, which were based on the fiscal plan. *Id.* at 800:22-24.
- The BTR accepts Proskauer's assumption that LUMA and Genera will terminate their contracts outside of Title III due to the appointment of a receiver (notwithstanding the substantial earnings those operators would otherwise stand to receive under such contracts) triggering substantial termination-related payments and substantial loan paybacks to the Commonwealth. ECF No. 4253 at 21-23. Shah conceded that he was "not aware" of any evidence supporting this assumption, nor did he review the underlying PREPA or Genera contracts, or speak with LUMA or Genera concerning their contracts. ECF No. 5050 at 801:5-802:21.
- Shah admitted that he did not check estimates of pension cost projections received by PREPA's other consultant, Ernst & Young, or to independently confirm the assumptions of estimates of outstanding bond debt provided by Citi. *Id.* at 803:20-804:5; 816:4-21. Instead, Shah testified that "[w]e relied on the projects we received." *Id.* at 804:1.
- McKinsey accepted assumptions from Proskauer related to payment priorities without performing any independent analysis as to whether those payment priorities were correct or incorrect. *Id.* at 804:6-14. Instead, Shah testified that "[w]e relied on their guidance." *Id.* at 804:14.
- McKinsey relied on the assumptions provided by Proskauer on the minimum cash balance to be retained by PREPA – in other words, cash reserves, without reviewing the relevant portions of the Trust Agreement or speaking to anyone at PREPA regarding their reserve intentions. *Id.* at 786:19-21, 804:15-805:14. Essentially, the evidence shows that while PREPA had the ability to hold reserves at a particular level, it was not required to under the Trust Agreement. ECF No. 4706-53 at 74-75. Shah confirmed that McKinsey did not even review PREPA's history of reserve retention. March 8 2024 Tr., ECF No. 5050, at 805:9-11.
- McKinsey did no independent work to verify the various claim amounts by creditors. *Id.* at 805:19-807:3.
- McKinsey failed to conduct any independent evaluation of the possibility of government reimbursement of the substantially disputed COBRA claim and did not account in any way for the possibility of federal reimbursements even though McKinsey knew of the disputed nature of the claim. *Id.* at 808:22-809:20.
- McKinsey accepted Proskauer's assumption that the Fuel Line Lenders claims should be paid before the bondholders but did no independent analysis of whether such claims were Current Expenses entitling them to priority and did not review the nature of the relationship between PREPA and the FLLs. *Id.* at 809:21-810:6.

- McKinsey did no independent analysis of whether “if PREPA, or its receiver, does not pay valid claims, including claims held by the retirement systems and the Fuel Line Lenders, such creditors may procure judgments and be able to attach revenues in the general fund before they become encumbered by the Trustee’s security interest.” *Id.* at 810:9-21. Indeed, McKinsey failed to review or consider the relevant portions of the Trust Agreement prohibiting attachment of PREPA revenues by creditors. *Id.* at 811:3-14.
- Shah also testified that he did not run any models that yielded higher revenue envelopes other than the Board’s prescribed revenue envelope. *Id.* at 811:25-812:5. Shah also did not do any independent verification or analysis of the revenue envelope, using instead what was provided to him by Proskauer. *Id.* at 811:25-812:5.

6. In sum, Shah did not challenge the assumptions and facts provided or perform independent work to confirm their accuracy. Proskauer and other FOMB advisors made determinations as to the specific figures and methodologies that it wanted Shah to employ in undertaking the BITR. Shah essentially did what Proskauer and the Board wanted and paid millions of dollars for it. ECF No. 5050 785:11-25. Shah’s wholesale reliance on the opinions of others without independent analysis or verification makes his trial testimony lacking in personal knowledge, irrelevant, and failing to advance the search for truth.

## **II. SHAH’S FACTUAL TESTIMONY REGARDING THE DIESEL GENERATOR SCENARIOS SHOULD BE STRICKEN**

7. Of particular concern is Shah’s testimony regarding the diesel generator scenarios and such testimony should be stricken as irrelevant and incompetent. *See Blasco Figueroa*, 2016 WL 6135445 at \*3; *Barrett v. United States*, 965 F.2d at 1195. During cross examination, Shah testified that the idea to use the capped revenue implied rate relating to the diesel issue came from former members the McKinsey Energy Group – a group that he and his Energy Team working on the BITR were not a part of. ECF No. 5050 at 813:4-7. Shah confirmed at his cross examination that (1) he does not know anyone currently at McKinsey with any knowledge concerning the diesel generator recommendations (*id.* at 813:25-814:3), (2) he has not been provided with any information or written analysis as to any analysis the McKinsey Energy Group performed to

compare alternative scenarios (*id.* at 813:21-24; 814:19-21), (3) he does not know what variables went into calculating the threshold rate for the diesel information (*id.* at 815:4-7), and (4) he does not know what percentage of PREPA customers even have the ability to substitute to diesel generation (*id.* at 815:8-11).

8. Shah's testimony with respect to the diesel generator scenarios relied solely on the oral opinions of others, without any personal knowledge of the information they even considered. The testimony on the diesel generator scenarios should be stricken as irrelevant, incompetent and failing to advance the search for truth.

### **III. ALTERNATIVELY, SHAH'S EXPERT TESTIMONY SHOULD BE STRICKEN UNDER DAUBERT**

Alternatively, as previously advanced in the Motion to Exclude Certain Expert Testimony of Ojas Shah (ECF No. 4553), Shah's proffered expert testimony should be stricken under *Daubert*, 509 U.S. at 592-94. "As courts have repeatedly held, and can be implied from rule 702, an expert cannot merely base his opinions upon the opinions of others without having an independent basis for his opinion." *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Assoc.*, No. 2:08-CV-1448 JCM (RJJ), 2011 WL 743748, at \*3 (D. Nev. Feb. 23, 2011); *Beck's Off. Furniture & Supplies, Inc. v. Haworth, Inc.*, 94 F.3d 655, 1996 WL 466673, at \*7 (10th Cir. Aug. 16, 1996) (experts "may not merely parrot the opinions of other experts whose conclusions are not themselves in the record"). A debtor's expert's inability to set forth an independent opinion, and merely accepting opinions of others, creates a "one-sided narrative of the evidence . . . which embodies the perspective of [Debtor's] attorneys." *Noel v. City of New York*, No. 15 CV 5236-LTS, 2023 WL 3170430, at \*4 (S.D.N.Y. Apr. 28, 2023); *Rivera-Cruz v. Latimer, Biaggi, Rachid & Godreau, LLP*, No. 04-2377 (ADC), 2008 WL 2446331, at \*5 (D.P.R. June 16, 2008) ("It is not

the job of an expert to parrot the opinions of counsel, but to ‘bring to the [trier of fact] more than the lawyers can offer in argument.’”).

Movants recognize that the Court has previously denied their *Daubert* motion made pre-hearing. However, at trial, it has now been confirmed that the BTR is not the product of Shah’s independent work, and based upon a multitude of factual and legal assumptions, pre-packaged by Proskauer to obtain a pre-ordained BIT result. Moreover, by his own admission, Shah has no expertise on the subject of diesel generators and relied solely on the oral suggestion of others, without knowledge of the information supporting this suggestion. Thus, alternatively, Shah’s testimony should be stricken as inappropriate expert testimony. *See generally* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592-94.

### **CONCLUSION**

WHEREFORE Movants respectfully request the Court strike the trial testimony of Mr. Ojas Shah which he bases solely on assumptions from Proskauer and the Board’s other consultants, and grant such other relief as is just and proper.



Dated: New York, New York  
March 13, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed this document electronically with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all parties of record in the captioned case.

At New York, New York, the 13<sup>th</sup> day of March, 2024.

By: /s/ Howard R. Hawkins, Jr.  
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