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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 THE BANK OF SAIPAN, INC.,

9 Petitioner/Plaintiff,

10 v.

11 FERMIN M. ATALIG in his official and
12 personal capacities,

13 Respondent/Defendant.
14

Civil Case No. 02-0376 E

**ORDER DENYING
MOTION TO INTERVENE**

15 **I.**

16 **INTRODUCTION**

17 This matter came before the Court at 1:30 p.m. on September 26, 2002 by Paul M. Calvo,
18 Edward M. Calvo and Thomas J.M. Calvo (or the Calvos) for their Motion to Intervene. The Calvos were
19 represented by Michael Dotts. Fermin M. Atalig, Acting Secretary of Commerce (or the Secretary) was
20 represented by Benjamin Sachs, Assistant Attorney General.
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22 **II.**

23 **FACTUAL BACKGROUND**

24 The Bank of Saipan (or BOS) filed a Petition for Judicial Review seeking review of the Acting
25 Secretary of Commerce's letter issued May 28, 2002. Pursuant to Rule 24 of the Commonwealth Rules
26 of Civil Procedure, the Calvos, who claim to be 28% shareholders of BOS and are directors of BOS, seek
27 intervention as parties to the BOS's action for judicial review.
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1 **III.**

2 **DISCUSSION**

3 For the following reasons, the Court denies the Calvos' motion to intervene: the motion was filed
4 after the expiration of the limitations period and the motion does not relate back to the date of the BOS's
5 original action for judicial review.

6 A. Rule 24 Intervention

7 Parties may intervene in civil actions under Rule 24 of the Commonwealth Rules of Civil Procedure.
8 The rule provides for two types of intervention: intervention of right and permissive intervention.

9 (a) INTERVENTION OF RIGHT. Upon timely application
10 anyone shall be permitted to intervene in an action: (1) when a statute of
11 the Commonwealth confers an unconditional right to intervene; or (2)
12 when the applicant claims an interest relating to the property or transaction
13 which is the subject of the action and the applicant is so situated that the
14 disposition of the action may as a practical matter impair or impede the
15 applicant's ability to protect that interest, unless the applicant's interest is
16 adequately represented by existing parties.

17 (b) PERMISSIVE INTERVENTION. Upon timely application
18 anyone may be permitted to intervene in an action: (1) when a statute of
19 the Commonwealth confers a conditional right to intervene; or (2) when
20 an applicant's claim or defense and the main action have a question of law
21 or fact in common. [...] In exercising its discretion the court shall consider
22 whether the intervention will unduly delay or prejudice the adjudication of
23 the rights of the original parties.

24 Com. R. Civ. P. 24(a) & (b).

25 The Commonwealth Rule is patterned after Rule 24 of the Federal Rules of Civil Procedure and
26 interpretations of the counterpart federal rules are helpful in interpreting the Commonwealth Rules. See
27 *Ada v. K. Sadhwani's, Inc.*, 3 N.M.I. 303, 311 n.3 (1992).

28 1. Intervention of right

A court applies a four-part test under Rule 24(a)(2) to determine whether an applicant may
intervene as a matter of right. The four-part test provides that:

(1) the motion must be timely; (2) the applicant must claim a 'significantly
protectable' interest relating to the property or transaction which is the subject
of the action; (3) the applicant must be so situated that the disposition of the
action may as a practical matter impair or impede its ability to protect that
interest; and (4) the applicant's interest must be inadequately represented by

1 the parties to the action.

2 *Sierra Club v. United States E.P.A.*, 995 F.2d 1478, 1481 (9th Cir. 1993).

3 a. Timeliness

4 A motion to intervene must be timely. The court considers three factors in determining whether a
5 motion for intervention is timely: “(1) the stage of the proceeding at which an applicant seeks to intervene;
6 (2) the prejudice to the other parties; and (3) the reason for and length of the delay.” *League of United*
7 *Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

8 However, these timeliness factors should be considered only if the motion to intervene is properly
9 before the Court. The Calvos’ motion raises a threshold issue of jurisdiction. The Court must first
10 determine whether the Calvos’ motion to intervene, filed outside the limitations period, relates back to the
11 date of the original, timely filed action.

12 The Secretary alleges the motion to intervene is untimely and jurisdictionally defective because the
13 Calvos missed the 30 day limitations period to review agency action. The Calvos, on the other hand, argue
14 that the intervention motion relates back to the original complaint and that the limitation period does not
15 apply.

16 i. Relation back and Rule 24

17 Both parties agree that the Calvos’ motion to intervene is outside of the limitations period for
18 judicial review of the Secretary’s decision issued May 28, 2002. The standard of review to determine
19 whether the Secretary’s actions were lawful has not yet been determined. However, the standard of review
20 need not be determined for purposes of this motion because, under either the Administrative Procedure
21 Act, 9 CMC §§ 9101-9115, or under the Commonwealth Banking Code, 4 CMC §§ 6101-6116, the
22 limitation period for seeking judicial review of the Secretary’s decision is 30 days. *See* 1 CMC § 9112(b);
23 4 CMC § 6113(a). The Calvos’ motion to intervene was filed on August 16, 2002 – some 50 days after
24 the expiration of the limitations period.

25 The Calvos argue that limitation periods do not apply for motions to intervene because the motion
26 automatically relates back to the time of the original complaint. However, the Court does not share the
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1 Calvos' confidence that a movant may automatically intervene in an action under Rule 24 after the
2 expiration of the statute of limitations by relating back to the original filing. Rather, this Court finds that a
3 motion in intervention under Rule 24 of the Commonwealth Rules of Civil Procedure, submitted after the
4 expiration of the statute of limitations, is untimely unless the proposed intervener can establish that it is a real
5 party in interest so that the intervening pleading will relate back to the date of the commencement of the
6 action.

7 ii. Relation back under Rule 24 is not automatic

8 A would-be-intervener may not automatically rely on Rule 24 to save an untimely motion to
9 intervene. Even though Rule 24 is silent on the issue of relation back, some courts have allowed a time
10 barred intervention motion to relate back to the original complaint. However, most cases do not allow
11 relation back automatically. Instead, courts have held that the intervening party must establish that they are
12 the real party in interest under Rule 17(a) to avail themselves of relation back.

13 The authority relied on by the Calvos' supports this conclusion. The court in *In re Maxxam,*
14 *Inc./Federated Dev. Shareholders Litigation v. Maxxam, Inc.*, 698 A.2d 949 (Del. Ch. 1996), allowed
15 a motion to intervene under Rule 24 to relate back to the original action after the limitations period expired.
16 However, the court allowed the motion to relate back because the would-be intervener was the real party
17 in interest. *Id.* at 955-58.

18 The other case relied upon by the Calvos does not dissuade this Court from its present ruling. In
19 *Bay Park Towers Condo. Ass'n, Inc.*, a Florida appellate court determined that the right to intervene
20 exists in favor of a person who claimed to be the owner of, or has some interest in, the property or right
21 which was the subject of litigation, even though the action would be time barred. *See Bay Park Towers*
22 *Condo. Ass'n, Inc. v. H. J. Ross & Assocs.*, 503 So. 2d 1333 (Fla. Dist. Ct. App. 1987). The court's
23 holding in *Bay Park Condo. Ass'n* does not support the Calvos' position. First, there is no mention of
24 Rule 24 (or its equivalent) anywhere in the decision. The holding may be an interpretation of a local rule,
25 one which this court cannot identify in the language of the opinion, but does not invoke Rule 24.
26 Furthermore, the authority cited by the *Bay Park Condo. Ass'n, Inc.* court to support its ruling is
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1 consistent with this Court’s ruling. The cases relied upon supporting relation back are cases where there
2 was a *change* in a party plaintiff. *Id.* at 1335 (citing 35 FLA.JUR.2D LIMITATION OF ACTIONS § 77
3 (1982) (“amendment for a mere change in a party plaintiff is not affected by the expiration of the period
4 allowed by the statute of limitations”); *Rubenstein v. Burleigh House, Inc.*, 305 So. 2d 311 (Fla. Dist. Ct.
5 App. 1975) (“where the association lacked standing to represent the interests of individual unit owners,
6 defendant would not be heard to complain that the statute of limitations barred amendment of the complaint
7 to add the individual unit owners as plaintiffs”)).

8 Authority in the Ninth Circuit supports this Court’s conclusion. In *Cummings v. United States*,
9 the Ninth Circuit held that a district court abused its discretion in denying a motion to intervene as untimely.
10 704 F.2d 437 (9th Cir. 1983). Holding that the expiration of the statute of limitations did not prevent the
11 motion to intervene, the court of appeals noted that “[t]he insurer subrogee’s complaint in intervention . .
12 . has the same effect as *pro tanto* substitution of the real party in interest under FED. R. CIV. P. 17(a).
13 Such a substitution relates back to the filing of the original complaint.” *Id.* at 439-40. As such, the court
14 did not consider relation back under the rule of intervention. Its discussion of relation-back occurred in
15 the context of Rule 17(a) which explicitly allows relation back.

16 The principle that relation back under Rule 24 is not automatic is supported by decisions of the
17 United States Supreme Court. The Supreme Court has considered that a claim may not be time barred
18 where a putative class member seeks to appeal the denial of class certification. *See Am. Pipe & Constr.*
19 *Co. v. Utah*, 414 U.S. 538, 560-61, 94 S. Ct. 756, 769-70, 38 L. Ed. 2d 713, 730-31 (1974); *United*
20 *Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977). These cases deal
21 with the tolling of limitations periods, not relation back. However, the Supreme Court’s very consideration
22 of the tolling of limitations periods in these cases indicate that relation-back does not automatically apply
23 to motions to intervene. If relation-back were a permissible option, the Court would have discussed it.

24 iii. The Calvos are not the real party in interest

25 In light of this Court’s ruling, the Court now considers whether the Calvos are the real party in
26 interest who can avail their untimely Rule 24 motion to relate back to the original complaint. The Calvos
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1 make no mention of Rule 17 in their pleadings; however, this Court concludes that the Calvos are not the
2 real party in interest.

3 Rule 17 seeks to protect the parties in litigation by ensuring that the named plaintiffs are the proper
4 persons whose interest will be materially affected by the outcome. The principle behind Rule 17 is to
5 identify the party who possesses the right sought to be enforced. Typically, the real party in interest steps
6 in the shoes of the plaintiff of record to cure a defect in standing so that the proper party, who may actually
7 litigate the interest, is named.

8 The Calvos are not the real party in interest for the purposes of judicial review of the May 28
9 determination by the Secretary. The Calvos have a right to pursue judicial review; however, the BOS
10 equally has a right to pursue judicial review. The BOS was adversely affected or aggrieved by the
11 determination of the Secretary. The BOS possesses the right to be enforced by the original petition for
12 judicial review. Accordingly, the BOS is the proper party to the suit in their own right. The Calvos, as
13 alleged shareholders are also adversely affected or aggrieved by the determination of the Secretary. This
14 creates an independent ability to sue in their own right. However, the Calvos' ability expired with the 30
15 day limitations period.

16 This Court does not agree that a party is the real party in interest in a motion to intervene simply
17 because they have an interest in the litigation or are a co-owner of the subject of the litigation. Compare
18 *Cincinnati Ins. Co. v. Twedell*, 717 N.E.2d 1195 (Cleveland Mun. Ct. 1998); *Bay Park Towers*
19 *Condo. Ass'n, Inc.*, 503 So. 2d 1333 (Fla. Dist. Ct. App. 1987). "Real party in interest" is a term of art.
20 Real party in interest identifies a legal status related to the party's ability to enforce rights in relation to other
21 parties. A party is not the real party in interest simply because they have an interest in the subject of the
22 litigation. Rule 17 does not speak to what parties must be joined in an action; it merely ensures the present
23 parties are the proper parties. *See* Com. R. Civ. P. 17. Nor does Rule 17 give priority to one party over
24 the other if they are equally entitled to pursue the claim. *Id.*

25 If this Court allows the Calvos to intervene after the limitations period simply because they have
26 an interest in the claim, it would allow a time barred suit to circumvent the limitations period. There is
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1 nothing in the purpose of Rule 24 which would countenance a situation in which claims, otherwise time
2 barred, could be resuscitated simply by virtue of the existence of another timely filed lawsuit with common
3 questions of law or fact. Such a result would serve only to frustrate the purpose of the limitations period
4 to put stale claims to rest.¹

5 2. Permissive Intervention

6 A court has substantial discretion in granting permissive intervention under Rule 24(b).
7 *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S. Ct. 1177, 94 L. Ed. 2d 389
8 (1987). There are three prerequisites for allowing permissive intervention under Rule 24(b)(2). Permissive
9 intervention should be granted only where there are “(1) independent grounds for jurisdiction; (2) the
10 motion is timely; and (3) the applicant’s claim or defense, and the main action, have a question of law or
11 a question or fact in common.” *Northwest Forest Resource Council*, 82 F.3d at 839. The court must
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13 ¹Regardless of the Court’s conclusion on timeliness, this Court would deny the Calvos’ motion under Rule
14 24(a) because their interests are adequately represented by the BOS. In determining whether a would-be intervenor’s
15 interests will be adequately represented by an existing party, courts consider:

- 16 (1) whether the interest of a present party is such that it will undoubtedly make all
17 the intervenor’s arguments; (2) whether the present party is capable and willing to
18 make such arguments; and (3) whether the would-be intervenor would offer any
19 necessary elements to the proceedings that other parties would neglect.

20 *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)(citing *California v. Tahoe Reg’l*
21 *Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). The prospective intervenor bears the burden of demonstrating that
22 the existing parties may not adequately represent its interest. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th
23 Cir. 1983). The burden of showing inadequacy is “minimal,” and the applicant only needs to show that representation
24 of its interests by existing parties “may be” inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10,
25 92 S. Ct. 630, 636 n.10, 30 L. Ed.2d 686, 694 n.10 (1972). In assessing the adequacy of representation, the focus is on the
26 “subject of the action,” not just the particular issues before the court at the time of the motion. *Sagebrush*, 713 F.2d at
27 528.

28 A presumption arises, however, where the applicant for intervention and the existing party have the same
ultimate objective. Where “an applicant for intervention and existing party have the same ultimate objective, a
presumption of adequacy of representation arises.” *Northwest Forest Resource Council*, 82 F.3d at 838 (internal
quotations omitted).

The Calvos and the BOS have the same ultimate objective in the action for judicial review. And the Calvos only
assertion regarding the BOS’s representation is that they will be greatly affected if the BOS does not zealously preserve
this judicial review. The Court is not persuaded that this indicates a lack of adequate representation. Compare *Tahoe*
Reg’l Planning Agency, 792 F.2d at 775 (intervenor’s assertion that, in hindsight, it would have argued its interests more
vigorously than existing parties does not amount to a showing of inadequate representation of its interests).

1 also consider whether the intervention would unduly prejudice or delay pending litigation. Com. R. Civ. P.
2 24(b)(2).

3 In this case, permissive intervention is denied. The first and second parts of this test have been
4 addressed in the foregoing analysis. The Calvos' motion is untimely and does not relate back to the original
5 complaint. Since the motion is time barred, the Calvos do not have independent grounds for jurisdiction.

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7 **IV.**

8 **CONCLUSION**

9 For these reasons, the Calvos' Motion for Intervention under Rule 24 is denied.

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11 **SO ORDERED** this 25th day of October 2002.

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14 /s/David A. Wiseman
15 David A. Wiseman, Associate Judge
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