

UNITED STATES DISTRICT COURT
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.¹

PROMESA
Title III

No. 17 BK 3283-LTS
(Jointly Administered)

THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF THE
COMMONWEALTH OF PUERTO RICO,

as agent of

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

THE COMMONWEALTH OF PUERTO
RICO,

Plaintiff,

Adv. Proc. No. 17-00257-LTS

**REPLY IN FURTHER SUPPORT OF
URGENT MOTION OF THE BANK OF
NEW YORK MELLON, AS TRUSTEE,
FOR LEAVE TO INTERVENE IN THE
COMMONWEALTH-COFINA DISPUTE
FOR A LIMITED PURPOSE**

¹ 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 (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (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 (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747).

v.

BETTINA WHYTE,

as agent of

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

THE PUERTO RICO SALES TAX
FINANCING CORPORATION,

Defendant.

The Bank of New York Mellon (“BNYM”), as trustee under the Amended and Restated Sales Tax Revenue Bond Resolution (as amended and supplemented, the “Resolution”), adopted on July 13, 2007, by the Puerto Rico Sales Tax Financing Corporation (“COFINA”), through its undersigned counsel, files this reply in further support of the *Urgent Motion of The Bank of New York Mellon, as Trustee, for Leave to Intervene in the Commonwealth-COFINA Dispute for a Limited Purpose* [Doc. No. 503] (the “Motion”) and in response to the limited objection [Doc. No. 518] (the “Limited Objection”) to the Motion filed by The Official Committee of Unsecured Creditors of the Commonwealth of Puerto Rico (the “Commonwealth Agent”), as agent for The Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico, and in support hereof, respectfully represents as follows:²

REPLY

1. BNYM seeks to intervene as a defendant in this Adversary Proceeding for the limited purpose of objecting to the Procedures Motion. The principal purposes of the proposed objection are to (i) protect Beneficial Holders’ fundamental right to due process and (ii) preserve BNYM’s and the Beneficial Holders’ existing legal rights and interests in and to the Post-July 1, 2018 Funds.

2. Of all of the parties to this Adversary Proceeding, only the Commonwealth Agent opposes BNYM’s intervention and, even then, only to the extent that BNYM is advocating for the benefit of the Beneficial Holders. *See Limited Objection* ¶ 1.

² Capitalized terms used but not defined in this Motion have the meanings given in the Resolution or the Motion, as the context requires. References to Bondowners generally as a matter of convenience do not change the defined terms set forth in the Resolution, as addressed more fully in the *Motion of The Bank of New York Mellon, as Trustee, for Partial Summary Judgment Pursuant to Fed. R. Civ. 56*, No. 17-0133-LTS (D.P.R. Nov. 6, 2017), Doc. No. 435, and BNYM reserves all rights and claims addressed therein.

Importantly, the Commonwealth Agent does not oppose the Motion to the extent BNYM seeks to intervene to protect its own interests. *See id.* ¶ 24.

3. Insofar as BNYM seeks to protect non-party Beneficial Holders' due process rights, the Commonwealth Agent does not contest several prerequisites for intervention. Specifically, the Commonwealth Agent does not dispute that (i) BNYM has an interest in the Post-July 1, 2018 Funds, (ii) there is a realistic threat that the disposition of the Procedures Motion will impede BNYM's ability to protect that interest, and (iii) BNYM has a defense that shares common questions of law or fact with the Procedures Motion. Rather, the Commonwealth Agent challenges only (a) the timeliness of the Motion and (b) BNYM's assertion that no other party to this Adversary Proceeding adequately represents its interests. *See Limited Objection* ¶ 7. Neither challenge should defeat BNYM's right to intervene or, at least, the Court's discretion to grant BNYM leave to intervene.³

I. THE MOTION WAS TIMELY.

4. Given that BNYM seeks to intervene solely in response to the Procedures Motion, the Commonwealth Agent cannot reasonably dispute that BNYM filed a timely motion. The Motion was filed four business days after the Procedures Motion and within the expedited timeframe set by the Court (as extended by agreement of the Commonwealth Agent).

³ To demonstrate a right to intervene under Federal Rule 24(a)(2), BNYM must establish: "(i) the timeliness of its motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede its ability to protect that interest; and (iv) the lack of adequate representation of its position by any existing party." *P.R. Tel. Co. v. Sistema de Retiro de los Empleados del Gobierno y la Judicatura*, 637 F.3d 10, 14 (1st Cir. 2011). The Court may permit BNYM to intervene if BNYM: (i) files a "timely motion;" (ii) "has a claim or defense that shares with the main action a common question of law or fact;" and (iii) will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B) & (c); *see Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999).

5. Instead of focusing on the timeliness of the Motion in relation to the Procedures Motion—the motion to which BNYM seeks to object—the Commonwealth Agent focuses on the timeliness of the Motion in relation to commencement of the Adversary Proceeding. *See* Limited Objection ¶¶ 13-14. The Commonwealth Agent’s focus is misplaced. The Motion is timely because (i) the due process interests that BNYM seeks to protect were not put at measurable risk until the Procedures Motion was filed, (ii) there is no prejudice to the existing parties of allowing intervention, and (iii) the lack of due process to Beneficial Holders that are not party to this Adversary Proceeding is highly prejudicial.

6. *First*, the threat to Beneficial Holders’ due process rights did not exist until the Procedures Motion was filed. BNYM does *not* seek to intervene for the purpose of arguing the merits of the Commonwealth-COFINA Dispute. BNYM seeks to intervene for the limited purpose of objecting to the Procedures Motion—a motion that never should have been filed in this Adversary Proceeding. Pursuant to the Commonwealth-COFINA Stipulation, no agreement between the Agents can be effective until it is approved as part of a confirmed plan of adjustment in COFINA’s title III proceeding. *See* Commonwealth-COFINA Stipulation ¶ 4.i.⁴

⁴ Paragraph 4.i. of the Commonwealth-COFINA Stipulation provides in relevant part:

Any settlement negotiated pursuant to the protocol approved herein . . . shall only be effective upon . . . with respect to COFINA, confirmation of a title III plan of adjustment in the COFINA title III case incorporating such settlement pursuant to a Final Order, and which plan has become effective

Commonwealth-COFINA Stipulation ¶ 4.i. Similarly, paragraph 4.1 of the Commonwealth-COFINA Stipulation states:

[N]o hearing to consider approval of any settlement of the Commonwealth-COFINA Dispute with respect to COFINA shall occur, and objections to such settlement by COFINA’s creditors and other parties in interest shall not be due, until a reasonable time after the Oversight Board files a title III plan of adjustment for COFINA

Had the Commonwealth Agent followed the Court-approved procedure, BNYM would have no reason to seek intervention now.

7. By stepping beyond the bounds of the Court-approved settlement protocol, the Commonwealth Agent seeks to deprive Beneficial Holders that are not party to this Adversary Proceeding of procedural due process—notice of and an opportunity to be heard—with regard to an agreement that seeks to impair their substantive rights and interests. Although BNYM is not taking a position at this time on the agreement-in-principle, BNYM seeks to intervene now to protect Beneficial Holders’ fundamental right to due process and preserve BNYM’s and Beneficial Holders’ existing substantive rights and interests in relation to the relief requested in the Procedures Motion. These procedural and substantive interests were put at “measurable risk” only when the Commonwealth Agent broke protocol and sought approval of a portion of the Agents’ agreement in this Adversary Proceeding rather than as part of a plan of adjustment in COFINA’s title III case. Upon learning of this measurable risk to its and the Beneficial Holders’ interests, BNYM promptly sought to intervene for the limited purpose of objecting to the Procedures Motion.

8. *Second*, the Commonwealth Agent’s action in seeking relief beyond the scope of the Commonwealth-COFINA Stipulation does not render BNYM’s intervention prejudicial to existing parties. The Commonwealth Agent has no “right” to alter BNYM’s or the Beneficial Holders’ substantive rights, let alone to do so without notice and an opportunity to be heard.

9. The Commonwealth Agent’s complaint that intervention at this late stage would be prejudicial, *see* Limited Objection ¶ 19, mischaracterizes the nature and purpose of the relief requested by BNYM. Far from seeking to “thwart” the agreement-in-principle, BNYM

Commonwealth-COFINA Stipulation ¶ 4.1.

seeks only to ensure that procedures used to implement the agreement do not deprive Beneficial Holders of due process and that parties' existing legal rights in the Pledged Sales Tax, whatever they may be, are not altered in the event that the settlement is never finalized and approved. The Commonwealth Agent's claim of prejudice rings hollow where the Commonwealth Agent knows that the Commonwealth-COFINA Stipulation requires any agreement to be approved as part of a plan of adjustment in COFINA's title III case after notice and an opportunity to be heard has been given to all Beneficial Holders. See Commonwealth-COFINA Stipulation ¶¶ 4.i. and 4.l.

10. *Third*, the prejudice to BNYM and non-party Beneficial Holders of denying intervention is significant. The Commonwealth Agent seeks to dictate the definition of "future funds" (*i.e.*, all Pledged Sales tax collected after July 1, 2018) in the event that the full agreement-in-principle is never finalized and approved and the Commonwealth prevails in part in a hypothetical decision on the merits. See Procedures Motion ¶¶ 4(c), 5. The Commonwealth Agent effectively admits that, far from preserving the status quo, the Disposition Procedure may alter fundamentally the legal rights of BNYM and Beneficial Holders that are not parties to the agreement between the Agents.⁵ Compromising *others'* rights outside of the settlement protocol established by the Commonwealth-COFINA Stipulation without giving all Beneficial Holders notice and an opportunity to be heard is unfairly prejudicial.

11. The suggestion that the Disposition Procedure does not prejudice BNYM and Beneficial Holders because the Commonwealth-COFINA Dispute "always included[] the possibility that [Beneficial Holders] will have no rights to any SUT revenues, including the Post-July 1, 2018 Funds," Omnibus Reply at ¶ 10, ignores the distinction between an agreement

⁵ See *Omnibus Reply of Commonwealth Agent in Support of Urgent Motion, Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rule 9019, for Order Establishing Procedures Governing 5.5% SUT Revenues Collected On or After July 1, 2018* [Doc. No. 517] (the "Omnibus Reply") ¶ 8 ("The fact that this results in the alteration of rights that may have otherwise accrued to COFINA post-July 1, 2018 is the nature of any settlement under Bankruptcy Rule 9019.").

between the Agents and a decision on the merits by the Court. Prior to the Procedures Motion, there was no known risk, and non-party Beneficial Holders were not notified of the possibility, that the Agents would seek approval of a substantive allocation of the Pledged Sales Tax outside of the scope of a Court order on the merits or approval of a comprehensive settlement as part of a confirmed plan of adjustment in COFINA's title III case. The concept of piecemeal approval of a portion of the Agents' agreement prior to confirmation of a plan is not contemplated in the Commonwealth-COFINA Stipulation. It is prejudicial to change the rules at this late stage in order to avoid the short delay associated with providing due process to all Beneficial Holders.

12. In sum, the Commonwealth Agent cannot defeat mandatory or permissive intervention on timelines grounds because BNYM sought to intervene immediately after the interests that it seeks to protect were put at risk by the Procedures Motion and because the balance of potential prejudice to the existing parties and the non-party Beneficial Holders weighs heavily in favor of permitting intervention.

II. BNYM'S POSITION IS NOT REPRESENTED ADEQUATELY IN THE ADVERSARY PROCEEDING.

13. BNYM's position is not represented adequately for purposes of the Procedures Motion for two reasons.

14. *First*, the Commonwealth Agent's notion of adequate representation is based on the false premise that the Procedures Motion properly was filed in the Adversary Proceeding. The Commonwealth Agent should have complied with the Commonwealth-COFINA Stipulation by seeking approval of any agreement between the Agents affecting the substantive rights of others as part of a plan of adjustment in COFINA's title III proceeding. Were that procedure followed, each Beneficial Holder would have an option to vote for or against the plan and the right to object (or not) to the plan.

15. *Second*, although the Beneficial Holders' legal positions on the merits of the Commonwealth-COFINA Dispute may be represented adequately by others, the Commonwealth-COFINA Stipulation contemplates that individual Beneficial Holders have the right to vote on any proposed settlement as part of a plan. Beneficial Holders make individual decisions on whether to vote for a plan, and their decisions may depend on a range of variables, including the difference in interests between, for example, a retiree in Puerto Rico who purchased the Bonds at par and who has limited other retirement investments and an institutional investor who purchased the Bonds at a discount shortly prior to commencement of COFINA's title III proceeding. This divergence of interests presumably is one of the reasons why the parties to the Commonwealth-COFINA Stipulation determined that no agreement may be effective unless approved as part of a plan of adjustment confirmed in COFINA's title III case. That process—unlike that now proposed by the Commonwealth Agent—ensures due process and the right of each Beneficial Holder to vote for or against a plan that incorporates the settlement.

16. For these reasons, the Commonwealth Agent cannot defeat mandatory or permissive intervention on the basis that BNYM's and all Beneficial Holders' interests are represented adequately in the Adversary Proceeding.

WHEREFORE, BNYM respectfully requests that the Motion be granted, that BNYM be granted leave to intervene in this Adversary Proceeding as a defendant for the limited purpose of filing the objection attached to the Motion as Exhibit B, and that such objection be deemed to have been filed with the Court as of the date of the Motion.

Dated: June 27, 2018
San Juan, Puerto Rico

Respectfully submitted,

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