

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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In re: :

THE FINANCIAL OVERSIGHT AND : PROMESA

MANAGEMENT BOARD FOR PUERTO RICO, : Title III

as representative of : Case No. 17-BK-3283 (LTS)

THE COMMONWEALTH OF PUERTO RICO, *et al.*, : (Jointly Administered)

Debtors.¹ :

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THE OFFICIAL COMMITTEE OF UNSECURED : Adv. Proc. No. 17-00257-LTS

CREDITORS OF THE COMMONWEALTH OF PUERTO : RICO,

as agent of :

THE COMMONWEALTH OF PUERTO RICO, :

Plaintiff, :

v. :

BETTINA WHYTE, :

as agent of :

THE PUERTO RICO SALES TAX FINANCING : CORPORATION,

Defendant. :

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¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number 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 (“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); and (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

MEMORANDUM ORDER

Before the Court is the Commonwealth Agent’s urgent motion for an order establishing procedures governing the 5.5% portion of the sales and use tax revenues (the “Pledged SUT”) collected on or after July 1, 2018. (Docket entry no. 495, the “Motion.”²) The Court has received and carefully considered all of the parties’ submissions and arguments in connection with the Motion, including responses to the Motion filed by the Ad Hoc Group of General Obligation Bondholders (“GO Group”) (docket entry no. 500), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”) (docket entry no. 501), the COFINA Senior Bondholders’ Coalition (the “COFINA Seniors”) and Ambac Assurance Corporation (“Ambac”) (docket entry no. 510), the National Public Finance Guarantee Corporation (“National”) (docket entry no. 512), and the COFINA Agent (docket entry no. 516), as well as the reply and sur-reply filed by the Commonwealth Agent (docket entry no. 517), and AAFAF (docket entry no. 515), respectively. The Court has also reviewed the Objection to the Motion filed by the Bank of New York Mellon (“BNYM”) (docket entry no. 503-2, the “Objection”), and BNYM’s reply submission in connection therewith (docket entry no. 521). For the reasons that follow, BNYM’s Objection is sustained in part and overruled in part, and the Motion is granted in part and denied in part, as set forth below.

The Motion filed by the Commonwealth Agent seeks primarily to establish procedures by which Pledged SUT collected after July 1, 2018, are accounted for separately before, during, and after the 60-day “abeyance period” provided for in the Court’s June 11, 2018, Order Holding Decisions on Motions for Summary Judgment (docket entry no. 492). The GO Group, the COFINA Seniors, Ambac, National, and the COFINA Agent have consented to the

² All docket entry references are to filings in Adversary Proceeding No. 17-00257-LTS in Title III Case No. 17-BK-3283, unless otherwise indicated.

relief sought by the Commonwealth Agent, as reflected in the Commonwealth Agent's revised proposed order establishing these procedures (docket entry no. 517-1).³ BNYM objects principally to the aspect of the proposed procedure that would govern the disposition of Pledged SUT deposited after July 1, 2018, in the event that a Commonwealth-COFINA Dispute settlement is not finalized and approved by the Court (the "Disposition Procedure"). Under the proposed Disposition Procedure, which is set forth in paragraph 2(c) of the Commonwealth Agent's revised proposed order, in the event that either (1) a settlement is not executed by August 4, 2018, or (2) the effective date of COFINA's Title III plan of adjustment approving and incorporating the settlement does not occur within 200 days after a settlement is executed, the Court's ruling on the ownership of the Pledged SUT "not yet collected by the Commonwealth (as of June 30, 2018) shall govern the ownership, as between the Commonwealth and COFINA, of the Abeyance Period Funds." (*Id.* at ¶ 2(c)). BNYM argues that, in the event that the Court later determines that the Commonwealth owns all of the Pledged SUT that has not yet been deposited with BNYM and, by virtue of the Disposition Procedure, the Commonwealth's entitlement is effective as of July 1, 2018, rather than as of the date of the Court's later decision, various COFINA bond beneficial interest holders who have not been given direct notice of the Commonwealth Agent's Motion will have been deprived of their property under the Disposition Procedure without adequate notice and an opportunity to be heard. (See Objection at 2.)

³ AAFAF's response to the Motion does not assert a formal objection to the relief sought by the Commonwealth Agent, but rather seeks to insert various "clarifications" into the proposed order. To the extent that AAFAF requests declarations regarding certain parties' rights under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") or the COFINA Amended and Restated Sales Tax Revenue Bond Resolution, the Court declines to address them, as they are outside the scope of the relief sought by the Commonwealth Agent. The Court has considered the other requested clarifications in formulating this Memorandum Order.

BNYM's Objection is sustained to the extent that the Disposition Procedure seeks retroactive treatment of funds collected after July 1, 2018, which could affect the substantive rights of beneficial interest holders in the event that the Court's ruling on the ownership of the Pledged SUT is premised on different treatment of funds that have been deposited with BNYM, and funds that have not yet been so deposited. Approval of an agreement with such a potential impact on substantive rights in the context of this motion practice appears to be precluded by the Commonwealth-COFINA Dispute Stipulation (case no. 17-BK-3283, docket entry no. 996, the "Stipulation"), which provides for a detailed settlement approval process, including a notice and hearing procedure for any parties in interest, and ties such approval to confirmation of a COFINA plan of adjustment. (See Stipulation ¶¶ 4.i, 4.l.) The Commonwealth Agent's Motion is, accordingly, denied without prejudice to the extent that it seeks to impose the proposed Disposition Procedure. In light of the Court's determination that the Disposition Procedure cannot be approved at this time, the Court does not consider BNYM's other due process arguments related to that procedure.

BNYM's objection regarding potential claims and liabilities arising out of BNYM's compliance with this Court's order has been mooted by a revision to the Commonwealth Agent's proposed order, which is adopted in this Memorandum Order. To the extent that BNYM continues to object to the Motion because it does not mandate specific procedures regarding the calculation and apportionment of investment gains, its Objection is sustained and the parties are hereby directed to confer and jointly propose an order detailing such procedures by July 6, 2018. BNYM's remaining objections are overruled.

Accordingly, IT IS HEREBY ORDERED THAT:

1. The Objection filed by BNYM is sustained in part and overruled in part, and the Commonwealth Agent's Motion is granted in part and denied in part, as set forth herein.

2. Because the relief granted herein does not affect the substantive rights of any beneficial interest holder, the Court finds that the Commonwealth Agent has provided adequate and appropriate notice of the Motion under the circumstances and that no other or further notice is required.

3. The following procedures shall govern the 5.5% SUT revenues on deposit and to be deposited with BNYM:⁴

(a) BNYM shall separately account for (i) all 5.5% SUT revenues currently in BNYM accounts or received on or before June 30, 2018 (the “Pre-July 1 2018 Funds”), (ii) all 5.5% SUT revenues received by BNYM on or after July 1, 2018 and prior to the earlier of (x) the end of the 60-day abeyance period provided for in the Abeyance Order (as such period may be extended or subsequently renewed by further order of the Court) plus 30 calendar days or (y) the date of a ruling by this court on the pending motions for summary judgment in this Adversary Proceeding (such period, the “Abeyance Period” and the funds received during such period, the “Abeyance Period Funds”), and (iii) all 5.5% SUT Revenues received by BNYM following the conclusion of such Abeyance Period (the “Post-Abeyance Period Funds”), so as to ensure that the three pools of funds (and proceeds from investment of such funds) are clearly identifiable; and

(b) Upon the effective date of the settlement, the Abeyance Period Funds and Post-Abeyance Period Funds shall be allocated and released to the Commonwealth and COFINA in

⁴ Capitalized terms not otherwise defined in this Order have the meanings set forth in the Motion and the revised proposed order attached to the Commonwealth Agent’s reply in support of its Motion.

accordance with the percentage shares of the PSTBA set forth in the settlement agreement (i.e., 53.65% for COFINA, which would be the first dollars of the 5.5% SUT, and 46.35% for the Commonwealth) (as it may be modified by a settlement agreement or order of this Court, including an order confirming a plan of adjustment for COFINA or an order authorizing such settlement agreement pursuant to Rule 9019 in the Commonwealth's Title III case).

4. For the avoidance of doubt, all SUT funds on deposit or to be deposited into the BNYM accounts, including the Pre-July 1, 2018 Funds, the Abeyance Period Funds, and the Post-Abeyance Period Funds, shall continue to remain subject to the Order Granting Interpleader, Staying Pending and Future Litigation Against Bank of New York Mellon, as Trustee, Pursuant to 28 U.S.C § 2361, and Granting Related Relief [Docket No. 110 in Adv. Proc. 17-00133 (LTS)] (the "Interpleader Order"), and nothing in this Order shall affect any party's rights under the Interpleader Order. Further, BNYM is hereby released and discharged from any and all claims and liability relating to and arising from BNYM's compliance with this Order.
5. Nothing in this Order affects the collection, transfer, or deposit of SUT revenues that are not deposited with BNYM.
6. To the extent there is any conflict between the terms of the Agreement in Principle and the terms of this Order, this Order shall govern.
7. The Commonwealth, COFINA, BNYM, Banco Popular, the GDB, the Commonwealth Agent, and the COFINA Agent are authorized and directed to take all actions necessary to effectuate the relief granted pursuant to this Order.

8. This Order shall not be stayed and shall be valid and fully effective immediately upon entry.
9. The rights (if any) of parties in interest to oppose the settlement described in the Agreement in Principle or otherwise to object to entry of any order implementing the settlement, including an eventual order confirming COFINA's Title III plan of adjustment or an order approving the settlement under Bankruptcy Rule 9019 in the Commonwealth's Title III case, are expressly preserved. Nothing in this Order shall limit or otherwise affect the rights of any party under the Stipulation.
10. This Court shall retain exclusive jurisdiction over all matters pertaining to the implementation, interpretation, and enforcement of this Order.
11. The parties shall meet and confer concerning the specifics of separate accounting procedures for the funds that are the subject of this Order and shall jointly propose an order detailing such procedures by **July 6, 2018**.
12. This Memorandum Order resolves docket entry nos. 495 and 503-2.

SO ORDERED.

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

DATED: June 29, 2018