

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

**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) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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.

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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, hereby moves (this “Motion”) this Court for the entry of an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure (the “Federal Rules”), made applicable to this proceeding by Rule 7024 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and section 310 of the Puerto Rico Oversight, Management and Economic Stability Act, 48 U.S.C. § 2101 *et seq.* (“PROMESA”), granting BNYM leave to intervene in the above-captioned adversary proceeding (this “Adversary Proceeding”) for the limited purpose of objecting to the urgent motion [Doc. No. 495] (the “Procedures 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 (the “Oversight Board”), as representative of the Commonwealth of Puerto Rico (the “Commonwealth”), to establish procedures governing proceeds of the Pledged Sales Tax (as defined herein) collected on or after July 1, 2018, and in support hereof, respectfully states as follows:²

PRELIMINARY STATEMENT

1. BNYM seeks to intervene as a defendant in this Adversary Proceeding for the limited purpose of objecting to the Procedures Motion. The purposes of BNYM’s objection are threefold: (i) to ensure that all holders of beneficial interests in the Bonds (the “Beneficial

² Capitalized terms used but not defined in this Motion have the meanings given in the Resolution or the Procedures Motion, as the context may require. 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.

Holders”) whose rights may be affected by the proposed procedures receive adequate notice of the relief requested by the Commonwealth Agent and an opportunity to be heard; (ii) to protect the validity, priority, and extent of any of BNYM’s rights, claims, liens, and security interests under the Resolution and the Court’s interpleader order; and (iii) to avoid the imposition of new duties on BNYM outside of the Resolution and the Court’s interpleader order absent clearly defined parameters.

2. To be clear, BNYM takes no position on the full agreement-in-principle at this time and in no way seeks to upset the settlement process. Further, of the three procedures proposed by the Commonwealth Agent in the Procedures Motion, BNYM does **not** object to: (i) accounting separately for the Pledged Sales Tax deposited after July 1, 2018, provided that (a) parties-in-interest develop and the Court’s orders clearly define specific procedures as to how any investment gains should be calculated and apportioned between Pre- and Post-July 1, 2018 Funds, and (b) BNYM is protected from liability for acting in compliance with such Court order; and (ii) allocating the Pledged Sales Tax deposited after July 1, 2018, to the Commonwealth and COFINA pursuant to a settlement agreement that is approved by the Court as part of a confirmed plan of adjustment.

3. If granted leave to intervene, the focus of BNYM’s proposed objection is the Commonwealth Agent’s proposed procedure governing the disposition of the Pledged Sales Tax deposited after July 1, 2018, in the event that the settlement is not finalized and approved by the Court and the Court later determines that the Commonwealth owns all of the Pledged Sales Tax not yet collected and deposited with BNYM. *See* Procedures Motion ¶¶ 4(c), 5. The Commonwealth Agent would like the Court to approve an agreement between the Agents now that, in such circumstances, the Court’s hypothetical future ruling would be retroactive to July 1,

2018. In effect, the deposit of Pledged Sales Tax with BNYM after July 1, 2018, could cease to be governed by the Resolution and applicable law. *See id.* This last procedure is referred to herein as the “Disposition Procedure.”

4. Intervention is warranted for two reasons. *First*, BNYM is entitled to intervene under Federal Rule 24(a)(2) because: (i) the Motion is timely; (ii) BNYM holds legal title to the funds that may be affected if the Procedures Motion were granted; (iii) an order granting the Procedures Motion could affect BNYM’s substantive rights in those funds; and (iv) no other party in this Adversary Proceeding adequately represents BNYM’s interests. Indeed, BNYM is a necessary party to any request for relief that affects BNYM’s substantive rights. *Second*, BNYM should be permitted to intervene under Federal Rule 24(b)(1)(B) because its proposed objection responds directly to questions of law raised by the Procedures Motion and BNYM’s intervention would not unduly delay or prejudice the adjudication of the rights of other parties.

JURISDICTION AND VENUE

5. The United States District Court for the District of Puerto Rico (the “Court”) has subject matter jurisdiction pursuant to section 306(a) of PROMESA.

6. Venue is proper pursuant to section 307(a) of PROMESA.

7. The relief requested herein is warranted under Bankruptcy Rule 7024.

BACKGROUND

8. The Commonwealth created COFINA as an independent governmental instrumentality for the purpose of financing the payment, retirement, or defeasance of Commonwealth debt obligations through the issuance of bonds secured by an assignment of a portion of the revenues generated by a tax on the sale or use of a broad range of goods and services. *See* 13 L.P.R.A. §§ 11a(b), 12. A portion of the tax (the “Pledged Sales Tax”) in each

fiscal year is required to be deposited in a special fund owned by COFINA and maintained separate and apart from the Commonwealth's general fund. *See* 13 L.P.R.A. § 12. COFINA's enabling statute states that the Pledged Sales Tax was "transferred to, and shall be the property of COFINA." *Id.*

9. COFINA issued multiple series of senior and subordinate sales tax revenue bonds (the "Bonds") under the Resolution. *See generally* Resolution. Payments of principal and interest and other amounts due under the Resolution are secured by, among other things, an assignment of the Pledged Sales Tax. *See id.* § 501. Upon receipt, COFINA is required to deposit the Pledged Sales Tax with BNYM. *Id.* § 505.1. Amounts held by BNYM under the Resolution, including the Pledged Sales Tax, are "held in trust" and "applied only in accordance with the provisions of the Resolution" *Id.* § 502.3.

10. On May 16, 2017, BNYM commenced an adversary proceeding (the "Interpleader Proceeding") seeking interpleader and declaratory relief because certain holders of beneficial interests in the Bonds, insurers of the Bonds, and COFINA asserted competing claims to the Pledged Sales Tax held by BNYM in trust under the Resolution. *See Complaint*, Adv. Pro. No. 17-0133-LTS (D.P.R. May 16, 2017), Doc. No. 1. BNYM filed the Interpleader Proceeding to preserve the funds held in trust while the Court resolved the parties' disputes. In Stage One of the Interpleader Proceeding, the Court recognized the parties' competing claims, granted BNYM's request to interplead the funds, and ordered BNYM to hold the funds (net of BNYM's fees and expenses) "on behalf of the party or parties ultimately determined by the Court to be entitled" to them. *See Order Granting Interpleader, Staying Pending and Future Litigation Against The Bank of New York Mellon, as Trustee, Pursuant to 28 U.S.C. § 2361, and Granting*

Related Relief (the “Interpleader Order”), Adv. Pro. No. 17-0133-LTS (D.P.R. May 30, 2017), Doc. No. 110.

11. On August 10, 2017, the Court entered the *Stipulation and Order Approving Procedure to Resolve Commonwealth-COFINA Dispute* (the “Commonwealth-COFINA Stipulation”), establishing procedures whereby the Agents could litigate and/or settle the narrow legal question of “[w]hether after considering all procedural and substantive defenses and counterclaims, including constitutional issues, the sales and use taxes purportedly pledged by COFINA to secure debt are property of the Commonwealth or COFINA under applicable law” (the “Commonwealth-COFINA Dispute”). See No. 17 BK 3283-LTS (D.P.R. Aug. 10, 2017), Doc. No. 996.

12. On September 8, 2017, the Commonwealth Agent commenced this Adversary Proceeding to litigate the Commonwealth-COFINA Dispute. See *Complaint*, Adv. Pro. No. 17-0257-LTS (D.P.R. Sept. 8, 2017), Doc. No. 1.

13. On June 7, 2018, the Agents announced an agreement-in-principle that may resolve the Commonwealth-COFINA Dispute *if* all conditions precedent are satisfied, the Agents reach a final settlement agreement, and that agreement is approved by the Court as part of a confirmed plan of adjustment submitted by COFINA. See *Joint Informative Motion of Commonwealth Agent and COFINA Agent Disclosing Agreement in Principle*, Adv. Pro. No. 17-0257-LTS (D.P.R. June 7, 2018), Doc. No. 486.

14. At the Agents’ request, the Court entered an order holding any rulings on the pending summary judgment motions in this Adversary Proceeding in abeyance for a period of sixty days to allow the Agents to finalize a settlement agreement. See *Order Holding*

Decisions on Motions for Summary Judgment in Abeyance for 60-Day Period, Adv. Pro. No. 17-0257-LTS (D.P.R. June 11, 2018), Doc. No. 492.

15. The Commonwealth Agent filed the Procedures Motion to “establish[] procedures” governing the Pledged Sales Tax collected on or after July 1, 2018, “pending implementation of the Commonwealth-COFINA settlement.” See Procedures Motion ¶ 1. If granted, the Procedures Motion would subject the deposit of any Pledged Sales Tax collected on or after July 1, 2018, with BNYM to the following conditions:

- (a) BONY would separately account for (i) all 5.5% SUT revenues currently in BONY accounts or received on or before June 30, 2018 (the “Pre-July 1 2018 Funds”) and (ii) all 5.5% SUT revenues received by BONY on or after July 1, 2018 (the “Post-July 1, 2018 Funds”), so as to ensure that the two pools of funds (and proceeds from investment of such funds) are clearly identifiable;
- (b) Upon the effective date of the settlement, the Post-July 1, 2018 Funds shall be allocated to the Commonwealth and COFINA in accordance with the PSTBA shares 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); and
- (c) In the event that either (x) the Agents do not execute a settlement agreement by August 4, 2018 **or** (y) the effective date of COFINA’s Title III plan of adjustment approving and incorporating the settlement does not occur within 200 days after execution of the settlement agreement (as such deadlines may be extended pursuant to the terms of the Agreement in Principle), then the court’s eventual ruling on the ownership of the 5.5% SUT not yet collected by the Commonwealth (as of June 30, 2018) shall govern the disposition of the Post-July 1, 2018 Funds (it being understood that neither Agent is waiving any appellate rights with respect to such determination).

Procedures Motion ¶ 4.

16. As noted above, BNYM does not object to the first procedure, providing a separate accounting for the Post-July 1, 2018 Funds, as long as the parties are not asking the

Court to impose any new duties, such as an undertaking to perform a complicated calculation and accounting for investment gains attributable to Pre- and Post-July 1, 2018 Funds, without clearly defined instructions. The current proposal should be revised to address allocation of investment gains between the two pools of funds. BNYM also does not object to the second procedure, allocating the Post-July 1, 2018 Funds pursuant to the settlement agreement if such agreement is approved by the Court as part of a confirmed plan of adjustment. BNYM's objection focuses solely on the third proposed procedure—the Disposition Procedure.

RELIEF REQUESTED

17. Through this Motion, BNYM requests that the Court enter an order, pursuant to Federal Rule 24(a)(2) or (b)(1)(B), granting BNYM leave to intervene in this Adversary Proceeding for the limited purpose of objecting to the Procedures Motion. In accordance with Federal Rule 24(c), a copy of BNYM's proposed objection to the Procedures Motion is attached hereto as **Exhibit B**.³

BASIS FOR RELIEF REQUESTED

18. The right to participate in litigation that impacts one's interests is an important right that courts seek to protect. *See, e.g., Elliot v. GM LLC (In re Motors Liquidation LLC)*, 829 F.3d 135, 163-65 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1813 (2017). If the Disposition Procedure is approved in its current form, BNYM and the Beneficial Holders may be deprived of substantive rights in funds held in trust by agreement of the Agents without giving all Beneficial Holders adequate notice and an opportunity to be heard. Even if the settlement agreement is never finalized or approved, the Disposition Procedure has the potential to determine the right to receive hundreds of millions of dollars of Pledged Sales Tax that are

³ *See Peaje Investments LLC v. García-Padilla*, 845 F.3d 505 (1st Cir. 2017) (filing an opposition to a pending motion setting forth the putative intervenor's position on the issue for which intervention is sought is sufficient under Federal Rule 24(c)).

required to be deposited with and held in trust by BNYM for application solely in accordance with the Resolution. For the reasons discussed below, BNYM is entitled to intervene under Federal Rule 24(a)(2) and permitted to intervene under Federal Rule 24(b) for the limited purpose of protecting BNYM's and all Beneficial Holders' interests in the Post-July 1, 2018 Funds from the potential negative effects of an order granting the Procedures Motion.

I. BNYM IS ENTITLED TO INTERVENE UNDER FEDERAL RULE 24(a)(2).

19. BNYM satisfies each of the requirements for intervention under Federal Rule 24(a)(2). This rule provides that, “[o]n timely motion, the 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.” To demonstrate a right to intervene, a putative intervenor 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).

A. BNYM’s Motion Is Timely.

20. BNYM is seeking to intervene for the limited purpose of objecting to the Procedures Motion. BNYM is filing this Motion only four business days after the Procedures Motion was filed and within the expedited timeframe permitted by the Court for parties to the Adversary Proceeding to respond to the Procedures Motion (as extended by agreement of the Commonwealth Agent). Contemporaneously with the filing of this Motion, BNYM is filing an urgent motion to expedite the deadline for responsive briefing so that the Motion may be decided

and BNYM's proposed objection to the Procedures Motion may be considered contemporaneously with any other objections prior to July 1, 2018. Accordingly, granting BNYM leave to intervene for the limited purpose of objecting to the Procedures Motion should not disrupt the parties' progress in this Adversary Proceeding generally or delay a ruling on the Procedures Motion.

B. BNYM Has An Interest In The Property That Forms The Basis Of The Procedures Motion.

21. The Commonwealth Agent filed the Procedures Motion for the purpose of establishing procedures governing the Post-July 1, 2018 Funds. Under applicable law and the Resolution, BNYM has *substantive* rights and interests in and to the Post-July 1, 2018 Funds.

22. Applicable law requires that the Pledged Sales Tax be deposited into the Dedicated Sales Tax Fund held and owned by COFINA separate and apart from the Commonwealth's general fund. *See* 13 L.P.R.A. § 12. All Pledged Sales Tax received by COFINA is pledged to BNYM as security for payment of the Bonds. Resolution § 501. Upon receipt, COFINA is required to deposit the Pledged Sales Tax with BNYM for application in accordance with the Resolution. *Id.* § 505.1. Amounts deposited with BNYM are "held in trust" and "shall be applied only in accordance with the provisions of the Resolution" *Id.* § 502.3. Further, pursuant to the Interpleader Order, BNYM is required to hold the entirety of the Pledged Sales Tax deposited with BNYM in the existing accounts into which they have been deposited on behalf of the party or parties ultimately determined by the Court to be entitled to such funds. *See* Interpleader Order ¶ 2.

23. BNYM holds legal title to trust funds, including the Post-July 1, 2018 Funds once they are deposited with BNYM, pursuant to applicable law and the Resolution. *See* Resolution § 502.3 (amount deposited with BNYM are "held in trust"); *In re Doman*, 68 A.D.3d

862, 863 (N.Y. App. Div. 2009) (“A valid express trust requires . . . a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee, and . . . actual delivery of the fund or property, with the intention of vesting legal title in the trustee.”); *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 691 (7th Cir. 2010) (“In American law, a trustee is the legal owner of the trust’s assets.”); *see also Wells Fargo Bank Minnesota, N.A. v. Levin Professional Servs., Inc.*, 348 F. Supp. 2d 638, 640 n. 1 (E.D. Va. 2004) (“An indenture trustee is ‘[a] trustee named in a trust indenture and charged with holding legal title to the trust property’”) (quoting Black’s Law Dictionary (7th ed. 1999)), *aff’d*, 189 Fed. Appx. 239 (4th Cir. 2006). The “backbone of trust law is the concept of separate ownership of equitable and legal interests.” *Taliaferro v. Taliaferro*, 921 P.2d 803, 809 (Kan. 1996). “[B]eneficiaries hold the beneficial interests (or ‘equitable title’) in trust property, while the trustee (ordinarily) holds ‘bare’ legal title to the property.” *Restatement (Third) of Trusts* § 42, cmts. a and c (2003); *accord Assured Guaranty Corp. v. Commonwealth of Puerto Rico*, No. 17-00155-LTS, Doc. No. 125, slip op. at 26 (D.P.R. Jan. 30, 2018) (“a trust divides ownership of property, placing legal title with trustee while the beneficiary enjoys an equitable interest.”).

24. Importantly, BNYM’s right to payment of its claims—whether for fees and expenses or indemnification—has priority of payment ahead of all payments to Bondowners. *See* Resolution § 804. BNYM also has a lien on and security interest in “all monies and securities . . . from time to time held by [BNYM] under the terms of the Resolution.” *See* Resolution §§ 101, “Pledged Property” and 501.1.

25. The fact that BNYM is a necessary (if not indispensable) party to any claim for relief that might extinguish BNYM’s substantive rights also supports BNYM’s right to intervention. *See* Federal Rule of Civil Procedure 24 advisory committee note (1996)

(“Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(I) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.”).

26. For these reasons, BNYM has a protectable interest in the Post-July 1, 2018 Funds—the subject of the Procedures Motion—that is sufficient for purposes of intervention under Federal Rule 24(a)(2).

C. The Disposition Of The Procedures Motion Could Impede BNYM’s Ability To Protect Interests In The Post-July 1, 2018 Funds.

27. Through the Procedures Motion, the Commonwealth Agent implicitly seeks a pre-determination of certain rights and interests of BNYM (and the Beneficial Holders) as part of the Commonwealth-COFINA Dispute. Specifically, the Commonwealth Agent wants the Court to decide now that, *if* the agreement-in-principle is not finalized and approved, and the Court later determines that the Commonwealth owns all of the Pledged Sales Tax not yet collected and deposited with BNYM, such hypothetical future ruling would be retroactive to July 1, 2018. *See* Procedures Motion ¶ 4(c). Establishing the Disposition Procedure may deprive BNYM (and the Beneficial Holders) immediately of the rights and interests attendant to BNYM’s legal title to and possession of the Post-July 1, 2018 Funds merely by agreement of the Agents, without adequate notice to all Beneficial Holders or any hearing and in advance of any ruling on the merits. Stated differently, the Commonwealth Agent wants the Court to treat the Post-July 1, 2018 Funds as if they were not deposited with BNYM, which arguably has the same effect as cutting off the flow of Pledged Sales Tax entirely. Accordingly, there is a realistic

threat that an order approving the Disposition Procedure would impede BNYM's ability to protect its interests in the Post-July 1, 2018 Funds.

D. No Party To The Commonwealth-COFINA Dispute Adequately Represents BNYM's Unique Interests In Connection With The Procedures Motion.

28. BNYM occupies a unique position in COFINA's title III proceeding.

First, BNYM it is the only party authorized to exercise remedies or resolve disputes on behalf of *all* Bondowners (subject to direction and indemnification from Bondowners in accordance with the Resolution).⁴ *Second*, BNYM is the only party with an interest in protecting BNYM's own substantive rights. As indenture trustee, BNYM has an interest in preserving the integrity of the Resolution and ensuring that, except as otherwise expressly permitted by the Resolution, the covenants and agreements in the Resolution are enforced "for the equal benefit, protection and security" of all Bondowners" Resolution § 103. Among those agreements is that the Pledged Sales Tax held by BNYM in trust must be applied solely in accordance with the Resolution. *Id.* § 502.3.

29. No party in this Adversary Proceeding has the same interest. The Commonwealth Agent seeks to limit BNYM's rights and interests in the Post-July 1, 2018 Funds. *See generally* Procedures Motion. The COFINA Agent's mandate is to achieve a result that is best for COFINA, rather than BNYM or other creditors of COFINA. *See* Stipulation ¶ 4.f. Although the interests of COFINA-related intervenors (e.g., coalitions of senior and subordinate

⁴ *See* Resolution § 1102; *see also In re Delta Air Lines, Inc.*, 370 B.R. 537, 548-49 (Bankr. S.D.N.Y.), *aff'd*, 374 B.R. 516 (S.D.N.Y. 2007), *aff'd*, 309 Fed. Appx. 455 (2d Cir. 2009), *cert. denied*, 558 U.S. 1007 (2009) ("Implicit in the authority to commence proceedings to remedy defaults is the power to negotiate and agree upon settlements, subject to the power to direct in writing by a majority in amount of the Bondholders In default situations where contractual rights are already impaired by exogenous events, non-impairment clauses are moot and the Trustee's power to sue and settle subject to direction by a majority in amount or a specified minimum percentage will be sustained over the objection of a minority or individual."); *Chemical Bank v. Seattle*, 955 F.2d 1268 (9th Cir. 1991) (trustee settlement binds bondholders as long as the trustee has acted in good faith and without neglecting its duty to assert claims and liens); *In re Nortel Networks, Inc.*, 522 B.R. 491 (Bankr. D. Del. 2014) (pre-plan settlement agreements proper subject of Rule 9019 motion).

holders of beneficial interests in the Bonds and monoline insurers of the Bonds) may be consistent with certain interests of BNYM, each of these parties looks to maximize its own recovery. A large percentage of Beneficial Holders also are not individually represented in this Adversary Proceeding or COFINA's title III proceeding. BNYM's individual interests are not represented at all. BNYM, as the indenture trustee for all Bondowners, has a unique interest that is not adequately represented by any other party.

30. Because (i) the Motion was timely, (ii) BNYM has an interest in the Post-July 1, 2018 Funds, (iii) that may be diminished as a result of the relief requested, and (iv) no other party in the Adversary Proceeding adequately represents BNYM's unique interests, BNYM satisfies all of the requirements for intervention as a matter of right under Federal Rule 24(a)(2).

II. BNYM SHOULD BE PERMITTED TO INTERVENE UNDER FEDERAL RULE 24(b)(1)(B).

31. Even if this Court determines that BNYM is not entitled to intervene in this Adversary Proceeding under Federal Rule 24(a)(2), BNYM should be permitted to intervene under Federal Rule 24(b)(1)(B). Courts "enjoy[] very broad discretion" to grant permissive intervention under Federal Rule 24(b) where the putative intervenor: (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).

32. As set forth above, the Motion is timely and intervention will not unduly delay or prejudice the original parties' rights because BNYM seeks leave to intervene as a defendant for the limited purpose of objecting to the Procedures Motion. Additionally, BNYM's proposed objection shares with the Procedures Motion common questions of law and fact.

Specifically, BNYM seeks to challenge the Procedures Motion on the bases that due process has not been provided to all Beneficial Holders and that the Disposition Procedure is unnecessary to preserve the status quo. *See* Ex. B. By responding directly to the relief requested in the Procedures Motion, BNYM does not seek to inject any new or different issues into the Adversary Proceeding. For these reasons, BNYM satisfies all of the requirements for permissive intervention under Federal Rule 24(b).

NO PRIOR REQUEST

33. No previous request for the relief sought herein has been made by BNYM to this or any other court.

WHEREFORE, BNYM respectfully requests that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting BNYM leave to intervene in this Adversary Proceeding as a defendant for the limited purpose of filing the objection attached hereto as **Exhibit B** and granting such other and further relief as may be just and proper.

[The remainder of this page was intentionally left blank.]

Dated: June 20, 2018
San Juan, Puerto Rico

Respectfully submitted,

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*Counsel to The Bank of New York Mellon,
as indenture trustee*

EXHIBIT A

Proposed Order

(Attached)

**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

**ORDER GRANTING 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) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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.

Upon consideration 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* (the “Motion”) and upon the Court’s consideration of the responses and oppositions thereto,²

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED as set forth herein.
2. BNYM is granted leave to intervene in this Adversary Proceeding as a defendant for the limited purpose of filing the objection to the Procedures Motion that was attached to the Motion as Exhibit B (the “Objection”).
3. The Objection is deemed to have been filed with the Court as of the date of the Motion.

Dated: _____

HONORABLE LAURA TAYLOR SWAIN
UNITED STATES DISTRICT JUDGE

² Capitalized terms used but not defined in this Order have the meanings given in the Motion.

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

**OBJECTION OF THE BANK OF NEW
YORK MELLON, AS TRUSTEE, TO
COMMONWEALTH AGENT'S 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**

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) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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.

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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, hereby objects (this “Objection”) to the urgent motion [Doc. No. 495] (the “Procedures 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 (the “Oversight Board”), as representative of the Commonwealth of Puerto Rico (the “Commonwealth”), to establish procedures governing proceeds of the Pledged Sales Tax (as defined herein) collected on or after July 1, 2018, and in support hereof, respectfully states as follows:¹

PRELIMINARY STATEMENT

1. Through this Objection, BNYM seeks: (i) to ensure that all holders of beneficial interests in the Bonds (the “Beneficial Holders”) whose rights may be affected by the proposed procedures receive adequate notice of the relief requested by the Commonwealth Agent and an opportunity to be heard; (ii) to protect the validity, priority, and extent of any of BNYM’s rights, claims, liens, and security interests under the Resolution and the Court’s interpleader order; and (iii) to avoid the imposition of new duties on BNYM outside of the Resolution and the Court’s interpleader order absent clearly defined parameters.

2. To be clear, BNYM takes no position on the full agreement-in-principle at this time and in no way seeks to upset the settlement process. Further, of the three procedures

¹ Capitalized terms used but not defined in this opposition have the meanings given in the Resolution or the Procedures 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.

proposed by the Commonwealth Agent in the Procedures Motion, BNYM does **not** object to:

(i) accounting separately for the Pledged Sales Tax deposited after July 1, 2018, provided that (a) parties-in-interest develop, and the Court's orders clearly define, specific procedures as to how any investment gains should be calculated and apportioned between Pre- and Post-July 1, 2018 Funds, and (b) BNYM is protected from liability for acting in compliance with such Court order; and (ii) allocating the Pledged Sales Tax deposited after July 1, 2018, to the Commonwealth and COFINA pursuant to a settlement agreement that is approved by the Court as part of a confirmed plan of adjustment.

3. The focus of this Objection is the Commonwealth Agent's proposed procedure governing the disposition of the Pledged Sales Tax deposited after July 1, 2018, in the event that the settlement is not finalized and approved by the Court and the Court later determines that the Commonwealth owns all of the Pledged Sales Tax not yet collected and deposited with BNYM. *See* Procedures Motion ¶¶ 4(c), 5. The Commonwealth Agent would like the Court to approve an agreement between the Agents now that, in such circumstances, the Court's hypothetical future ruling would be retroactive to July 1, 2018. In effect, the deposit of Pledged Sales Tax with BNYM after July 1, 2018, could cease to be governed by the Resolution and applicable law. *See id.* This last procedure is referred to herein as the "Disposition Procedure."

4. The Procedures Motion suffers from two fundamental flaws as it relates to the Disposition Procedure. *First*, the Disposition Procedure may deprive BNYM and the Beneficial Holders of substantive property and contractual rights without giving adequate notice and an opportunity to be heard to all Beneficial Holders, in contravention of Beneficial Holders' due process rights. *Second*, the Commonwealth Agent's protestations notwithstanding, the

Disposition Procedure is not necessary to preserve the status quo. Funds have been interpleaded and are subject to disbursement only by Court order. Nothing more should be required by the Commonwealth Agent.

5. These flaws easily may be remedied. As to the application of due process, the Court may enter an order *conditionally* approving the Procedures Motion subject to the following notice procedures:

- a. Within five (5) days of the entry of the order conditionally approving the Procedures Motion, BNYM shall provide written notice of the Procedures Motion to all Bondowners, advising them of the Court's conditional approval of the Procedures Motion, the objection deadline established solely for Beneficial Holders that are not party to this Adversary Proceeding, and any other information that BNYM deems appropriate.
- b. Holders of beneficial interests in the Bonds that are not party to this Adversary Proceeding shall have thirty-five (35) days after entry of an order conditionally approving the Procedures Motion to file an objection or other responsive pleading in the Adversary Proceeding. Such holders are permitted to intervene in the Adversary Proceeding for that limited purpose without the need to file a motion seeking leave to intervene.
- c. If no objections are timely filed, the order conditionally approving the Procedures Motion will become effective as of the first day following the objection deadline without any further action required by the Court or the parties. If one or more objections are filed within the time allotted, the Court will consider them prior to entering a final order granting or denying the Procedures Motion.

Further, if the Court determines that the Disposition Procedure is necessary to preserve the status quo and to protect the Commonwealth Agent's existing rights, the Court should confirm that the status quo is, indeed, being preserved by incorporating the following language in the order:

“Notwithstanding anything to the contrary contained in the order, nothing in the order shall alter or impair the validity, priority, or extent of any of BNYM's rights, claims, liens, or security interests under the Resolution or the Interpleader Order.”

6. Separately, as a condition to ordering BNYM to perform accounting functions beyond the scope of BNYM's duties under the Resolution and the Interpleader Order,

the Court should (i) mandate clearly defined and specific procedures, to be developed by the parties-in-interest, governing the calculation and apportionment of investment gains as between Pre- and Post-July 1, 2018 Funds, and (ii) protect BNYM from liability for acting in compliance with such Court order.

7. In the absence of these changes to the proposed order, the Procedures Motion should be denied.

BACKGROUND

8. The Commonwealth created COFINA as an independent governmental instrumentality for the purpose of financing the payment, retirement, or defeasance of Commonwealth debt obligations through the issuance of bonds secured by an assignment of a portion of the revenues generated by a tax on the sale or use of a broad range of goods and services. *See* 13 L.P.R.A. §§ 11a(b), 12. A portion of the tax (the “Pledged Sales Tax”) in each fiscal year is required to be deposited in a special fund owned by COFINA and maintained separate and apart from the Commonwealth’s general fund. *See* 13 L.P.R.A. § 12. COFINA’s enabling statute states that the Pledged Sales Tax was “transferred to, and shall be the property of COFINA.” *Id.*

9. COFINA issued multiple series of senior and subordinate sales tax revenue bonds (the “Bonds”) under the Resolution. *See generally* Resolution. Payments of principal and interest and other amounts due under the Resolution are secured by, among other things, an assignment of the Pledged Sales Tax. *See id.* § 501. Upon receipt, COFINA is required to deposit the Pledged Sales Tax with BNYM. *Id.* § 505.1. Amounts held by the Trustee under the Resolution, including the Pledged Sales Tax, are “held in trust” and “applied only in accordance with the provisions of the Resolution” *Id.* § 502.3.

10. On May 16, 2017, BNYM commenced an adversary proceeding (the “Interpleader Proceeding”) seeking interpleader and declaratory relief because certain holders of beneficial interests in the Bonds, insurers of the Bonds, and COFINA asserted competing claims to the Pledged Sales Tax held by BNYM in trust under the Resolution. *See Complaint*, Adv. Pro. No. 17-0133-LTS (D.P.R. May 16, 2017), Doc. No. 1. BNYM filed the Interpleader Proceeding to preserve the fund while the Court resolved the parties’ disputes. In Stage One of the Interpleader Proceeding, the Court recognized the parties’ competing claims, granted BNYM’s request to interplead the funds, and ordered BNYM to hold the funds (net of the BNYM’s fees and expenses) “on behalf of the party or parties ultimately determined by the Court to be entitled” to them. *See Order Granting Interpleader, Staying Pending and Future Litigation Against The Bank of New York Mellon, as Trustee, Pursuant to 28 U.S.C. § 2361, and Granting Related Relief* (the “Interpleader Order”), Adv. Pro. No. 17-0133-LTS (D.P.R. May 30, 2017), Doc. No. 110.

11. On August 10, 2017, the Court entered the *Stipulation and Order Approving Procedure to Resolve Commonwealth-COFINA Dispute* (the “Commonwealth-COFINA Stipulation”), establishing procedures whereby the Agents could litigate and/or settle the narrow legal question of “[w]hether after considering all procedural and substantive defenses and counterclaims, including constitutional issues, the sales and use taxes purportedly pledged by COFINA to secure debt are property of the Commonwealth or COFINA under applicable law” (the “Commonwealth-COFINA Dispute”). *See* No. 17 BK 3283-LTS (D.P.R. Aug. 10, 2017), Doc. No. 996.

12. On September 8, 2017, the Commonwealth Agent commenced this Adversary Proceeding to litigate the Commonwealth-COFINA Dispute. *See Complaint*, Adv. Pro. No. 17-0257-LTS (D.P.R. Sept. 8, 2017), Doc. No. 1.

13. On June 7, 2018, the Agents announced an agreement-in-principle that may resolve the Commonwealth-COFINA Dispute *if* all conditions precedent are satisfied, the Agents reach a final settlement agreement, and that agreement is approved by the Court as part of a confirmed plan of adjustment submitted by COFINA. *See Joint Informative Motion of Commonwealth Agent and COFINA Agent Disclosing Agreement in Principle*, Adv. Pro. No. 17-0257-LTS (D.P.R. June 7, 2018), Doc. No. 486.

14. At the Agents' request, the Court entered an order holding any rulings on the pending summary judgment motions in this Adversary Proceeding in abeyance for a period of sixty days to allow the Agents to finalize a settlement agreement. *See Order Holding Decisions on Motions for Summary Judgment in Abeyance for 60-Day Period*, Adv. Pro. No. 17-0257-LTS (D.P.R. June 11, 2018), Doc. No. 492.

15. The Commonwealth Agent filed the Procedures Motion to “establish[] procedures” governing the Pledged Sales Tax collected on or after July 1, 2018, “pending implementation of the Commonwealth-COFINA settlement.” *See Procedures Motion* ¶ 1. If granted, the Procedures Motion would subject the deposit of any Pledged Sales Tax collected on or after July 1, 2018, with BNYM to the following conditions:

- (a) BONY would separately account for (i) all 5.5% SUT revenues currently in BONY accounts or received on or before June 30, 2018 (the “Pre-July 1 2018 Funds”) and (ii) all 5.5% SUT revenues received by BONY on or after July 1, 2018 (the “Post-July 1, 2018 Funds”), so as to ensure that the two pools of funds (and proceeds from investment of such funds) are clearly identifiable;

- (b) Upon the effective date of the settlement, the Post-July 1, 2018 Funds shall be allocated to the Commonwealth and COFINA in accordance with the PSTBA shares 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); and
- (c) In the event that either (x) the Agents do not execute a settlement agreement by August 4, 2018 **or** (y) the effective date of COFINA's Title III plan of adjustment approving and incorporating the settlement does not occur within 200 days after execution of the settlement agreement (as such deadlines may be extended pursuant to the terms of the Agreement in Principle), then the court's eventual ruling on the ownership of the 5.5% SUT not yet collected by the Commonwealth (as of June 30, 2018) shall govern the disposition of the Post-July 1, 2018 Funds (it being understood that neither Agent is waiving any appellate rights with respect to such determination).

Procedures Motion ¶ 4.

16. As noted above, BNYM does not object to the first procedure, providing a separate accounting for the Post-July 1, 2018 Funds, as long as the parties are not asking the Court to impose any new duties, such as an undertaking to perform a complicated calculation and accounting for investment gains attributable to Pre- and Post-July 1, 2018 Funds, without clearly defined instructions. The current proposal should be revised to address allocation of investment gains between the two pools of funds. BNYM also does not object to the second procedure, allocating the Post-July 1, 2018 Funds pursuant to a settlement agreement if approved by the Court as part of a confirmed plan of adjustment. BNYM's objection focuses solely on the third proposed procedure—the Disposition Procedure.

ARGUMENT

I. AT A MINIMUM, DUE PROCESS REQUIRES THAT ALL BENEFICIAL HOLDERS ARE PROVIDED ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD WITH RESPECT TO THE PROCEDURES MOTION.

17. The Commonwealth Agent wants the Court to enter an order now that, *if* the agreement-in-principle is not finalized and approved, and the Court later determines that the Commonwealth owns all of the Pledged Sales Tax not yet collected and deposited with BNYM, such hypothetical future ruling would be retroactive to July 1, 2018, notwithstanding that BNYM already would be holding Post-July 1, 2018 Funds in trust pursuant to the terms of the Resolution. *See* Procedures Motion ¶ 4(c). The Commonwealth Agent’s proposed order, if entered, would function as an implicit pre-determination of one discrete issue within the larger Commonwealth-COFINA Dispute, alter the status quo, and may directly affect BNYM’s and the Beneficial Holders’ interests in those funds.² At a minimum, such relief should not be granted without due process—adequate notice and an opportunity to be heard—being given to all Beneficial Holders whose rights and interests may be affected.

18. Due process requires that adequate notice and an opportunity to be heard be given to any entity whose pecuniary interests might be directly and adversely impacted by a proposed action. *See Gonzalez-Gonzalez v. U.S.*, 257 F. 3d 31 (1st Cir. 2001); *see also W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F. 3d 714, 720 (1st Cir. 1994) (recognizing that parties-in-interest “encompasses not only entities holding ‘claims’ against the debtor, but any entity whose pecuniary interests might be directly and adversely affected by the proposed action.”).

² In that sense, the requested relief is akin to an advisory opinion—relief requested that amounts to an abstract declaration of the parties’ respective relationships to the Post-July 1, 2018 Funds without application of the relief to resolve any current concrete dispute. *See Opinion and Order Granting Motion to Dismiss*, Adv. Pro. No. 17-0189-LTS (D.P.R. Jan. 30, 2018), Doc. No. 124.

19. Possession of the Pledged Sales Tax has legal significance under the Resolution. As examples: (i) funds on deposit with BNYM shall be applied only in accordance with the Resolution and applicable law, *see* Resolution § 502.3; (ii) the amounts held by BNYM for payment due on any date with respect to particular Bonds “shall, on and after such date and pending such payment, be set aside on its books and held in trust by it for the Owners of such Bonds,” *id.* § 1203; (iii) BNYM has payment priority rights with respect to its fees, expenses, and indemnification claims, *see id.* § 1103.1; and (iv) BNYM has a lien prior to that of the Bondowners on any and all funds at any time held by it under the Resolution, *see id.* § 804. If the Disposition Procedure is imposed, but the settlement ultimately is not consummated, BNYM and the Beneficial Holders may be deprived of these and all other legal rights that attend possession of the Post-July 1, 2018 Funds. In these circumstances, due process rights must be afforded to all Beneficial Holders whose interests might be affected by the relief requested.

20. The need for due process is highlighted by the procedures governing the effectiveness of settlements in the Commonwealth-COFINA Stipulation. If the Agents reach an agreement, the Commonwealth-COFINA Stipulation provides that “[s]uch settlement 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. The Commonwealth-COFINA Stipulation conditions the effectiveness of agreements between the Agents on confirmation of a plan of adjustment, *inter alia*, to prevent the Agents from modifying creditors’ legal and contractual rights and interests in property unilaterally without proper notice and an opportunity to be heard.

21. Despite this recognition of Beneficial Holders' due process rights, the Commonwealth Agent seeks to implement "one critical and time-sensitive component of the agreement in principle" outside the Court-approved protocol through a motion filed in this Adversary Proceeding. *See* Procedures Motion ¶ 1. Although the Commonwealth Agent characterizes this component of the agreement as merely procedural in nature, the requested relief may fundamentally alter the characterization of Post-July 1, 2018 Funds to the detriment of BNYM and the Beneficial Holders. The Commonwealth Agent wants the Court to treat the Post-July 1, 2018 Funds as if they were not deposited with BNYM, which arguably has the same effect as cutting off the flow of Pledged Sales Tax entirely.

22. A large percentage of Beneficial Holders is not a party to this Adversary Proceeding and/or not represented at all in connection with this title III proceeding. Non-party Beneficial Holders have not received adequate notice of the proposed settlement among the Agents. Before the Agents negotiate away others' interests in property, the Commonwealth-COFINA Stipulation and due process demand that such Beneficial Holders have adequate notice and an opportunity to be heard. *See W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d at 720 (explaining that "the debtor in possession or trustee must ensure 'parties in interest' adequate notice and opportunity to be heard *before* their interests may be adversely affected" because "[n]otice is the cornerstone underpinning Bankruptcy Code procedure."). The Court should not create an exception to its settlement protocol or permit the Commonwealth Agent to ignore the Beneficial Holders' due process rights as a matter of convenience.

23. To remedy the due process defects of the Procedures Motion, BNYM requests that the Court deny the Procedures Motion unless the following (or substantially

similar) notice procedures are incorporated as part of an order *conditionally* approving the Procedures Motion.

- a. Within five (5) days of the entry of the order conditionally approving the Procedures Motion, BNYM shall provide written notice of the Procedures Motion to all Bondowners, advising them of the Court's conditional approval of the Procedures Motion, the objection deadline established solely for Beneficial Holders that are not party to this Adversary Proceeding, and any other information that BNYM deems appropriate.
- b. Holders of beneficial interests in the Bonds that are not party to this Adversary Proceeding shall have thirty-five (35) days after entry of an order conditionally approving the Procedures Motion to file an objection or other responsive pleading in the Adversary Proceeding. Such holders are permitted to intervene in the Adversary Proceeding for that limited purpose without the need to file a motion seeking leave to intervene.
- c. If no objections are timely filed, the order conditionally approving the Procedures Motion will become effective as of the first day following the objection deadline without any further action required by the Court or the parties. If one or more objections are filed within the time allotted, the Court will consider them prior to entering a final order granting or denying the Procedures Motion.

II. BNYM'S RIGHTS, CLAIMS, LIENS, AND SECURITY INTERESTS UNDER THE RESOLUTION AND THE INTERPLEADER ORDER SHOULD NOT BE ALTERED.

24. The Commonwealth Agent ostensibly filed the Procedures Motion in order to "preserv[e] the status quo of the Commonwealth's and COFINA's respective rights to" the Pledged Sales Tax. *See* Procedures Motion ¶ 1. The Ad Hoc Group of General Obligation Bondholders observed that "the relief requested in the Motion is unnecessary because the goal of preserving the status quo already has been achieved through the Court's prior holdings with respect to the interpleaded funds held by [BNYM]." *See* Doc. No. 500. BNYM agrees.

25. BNYM commenced the Interpleader Proceeding to resolve conflicting claims to the Pledged Sales Tax in its possession by certain holders of beneficial interests in the Bonds, insurers of the Bonds, and COFINA. Recognizing the existence of such competing claims, the Court ordered BNYM to interplead deposits of the Pledged Sales Tax "until entry of

a final order of this Court directing the timing and manner of the disbursement of such funds.”

Interpleader Order ¶ 3. Pursuant to the Interpleader Order, BNYM must “hold the entirety of the [interpleaded funds] in the existing accounts into which they have been deposited, on behalf of the party or parties ultimately determined by the Court to be entitled” to such funds. *Id.*

26. The Disposition Procedure is not necessary to protect whatever interest the Commonwealth Agent may have in the Post-July 1, 2018 Funds because those funds have been interpleaded and are subject to disbursement only by Court order. No additional procedures are necessary. If the Court determines that the Procedures Motion should be granted, it should confirm that the status quo is, indeed, being preserved by providing expressly that nothing in the order alters the validity, priority, or extent of any of BNYM’s rights, claims, liens, or security interests under the Resolution or the Interpleader Order.

27. In support of the Procedures Motion, the Commonwealth Agent cites section 105(a) of the Bankruptcy Code, providing that “[t]he court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). On the facts of this case, however, the Disposition Procedure is not “necessary” (or appropriate) to carry out the provisions of title III or to avoid any potential unfair advantage for COFINA if the settlement fails. *See Official Unsecured Creditors’ Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1311 (1st Cir. 1993) (“Nor does section 105(a) authorize courts to create substantive rights that are otherwise unavailable under the Code, or to expand the contractual obligations of parties”); *see also Noonan v. Sec’y of Health & Human Servs. (In re Ludlow Hosp. Society, Inc.)*, 124 F.3d 22, 28 (1st Cir. 1997) (“But since section 105 itself is not a source of new substantive rights, the bankruptcy court may invoke section 105(a) only if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code.”).

28. Far from being necessary to preserve the status quo, the Disposition Procedure appears to fundamentally alter the status quo. If the Agents' proposal were accepted, it would be the Commonwealth Agent's legal position that could be enhanced and to whom the unfair advantage would run. If the agreement-in-principle is not finalized and approved by the Court, funds that otherwise would be deposited with BNYM after July 1, 2018, and held by BNYM in trust for the benefit of Bondowners (and Beneficial Holders) under the terms of the Resolution would be recharacterized automatically as "future" Pledged Sales Tax as if those funds were not held by BNYM and possession of the funds in trust had no legal significance. By contrast, maintaining the status quo under the Interpleader Order would not "improve" COFINA's position or result in an "unfair advantage" for COFINA; it would preserve (not enhance or diminish) BNYM's and the Bondowners' existing legal and contractual rights.

29. The Disposition Procedure is not necessary to preserve whatever interest the Commonwealth currently may have in the Post-July 1, 2018 Funds. The Commonwealth Agent has taken the position that the Commonwealth owns the Pledged Sales Tax, regardless of whether the proceeds of such tax have been deposited with BNYM under the Resolution. *See Commonwealth Agent's Motion for Summary Judgment and Incorporated Memorandum of Law*, Adv. Pro. No. 17-0257-LTS (D.P.R. Feb. 21, 2018) Doc. No. 322 (arguing that the Pledged Sales Tax, "including all SUT revenues currently on deposit at BONY and any future SUT revenues," are the Commonwealth's property).

30. If the Commonwealth Agent is correct, the Interpleader Order is sufficient to protect the Commonwealth in the event that the agreement-in-principle is not finalized and approved because it prevents BNYM from distributing the Pledged Sales Tax in the absence of a Court order. *See Interpleader Order* ¶ 2. If the Commonwealth Agent is incorrect, the

Commonwealth Agent would not be harmed or prejudiced by maintaining the equilibrium established by the Interpleader Order. In these circumstances, the Commonwealth currently has no interest in funds once they are deposited with BNYM and would continue to have no interest in funds deposited with BNYM. The Commonwealth Agent should not be able to expand its rights and diminish non-parties' rights in property solely because it has reached a preliminary agreement-in-principle with the COFINA Agent—an agreement that is subject to numerous conditions precedent and may never be finalized or approved.

31. Because the procedures are not “necessary or appropriate” within the context of section 105(a) of the Bankruptcy Code, BNYM requests that the Court deny the Procedures Motion unless the following (or substantially similar) language is incorporated into the order, thereby confirming that the status quo actually is being preserved and that nothing in the order affects BNYM’s rights: “Notwithstanding anything to the contrary contained in the order, nothing in the order shall alter or impair the validity, priority, or extent of any of BNYM’s rights, claims, liens, or security interests under the Resolution or the Interpleader Order.”³

III. THE COURT SHOULD NOT IMPOSE ANY NEW DUTIES ON BNYM WITHOUT ITS CONSENT.

32. Under the Interpleader Order, BNYM has a duty to hold the Pledged Sales Tax deposited with BNYM “in the existing accounts into which they have been deposited” and to invest such funds and “apply the investment gains in accordance with the terms of the Resolution.” Interpleader Order ¶ 3. As part of this process, BNYM has issued monthly notices to Bondowners since the commencement of the Interpleader Proceeding regarding the updated market value of each debt service account into which the Pledged Sales Tax is deposited as of the first day of each month. BNYM also internally tracks the amount of Pledged Sales Tax

³ AAFAF is seeking a similar reservation of rights in the proposed order. *See* Doc. No. 501.

deposited with BNYM on a daily basis in the ordinary course of business. Accordingly, it is not burdensome or objectionable for BNYM to provide a separate accounting of the Pledged Sales Tax deposited with BNYM after July 1, 2018.

33. Separately accounting for investment gains on Post-July 1, 2018 Funds, however, is burdensome and complicated and could subject BNYM to second-guessing and unnecessary liability in the event that any party disagrees with BNYM's calculations. As a condition to ordering BNYM to perform accounting functions beyond the scope of BNYM's duties under the Resolution and the Interpleader Order, the Court should (i) mandate clearly defined and specific procedures, to be developed by the parties-in-interest, governing the calculation and apportionment of investment gains as between Pre- and Post-July 1, 2018 Funds, and (ii) protect BNYM from liability for acting in compliance with such Court order.

WHEREFORE, BNYM respectfully requests that the Court enter an order sustaining this Objection, denying the Procedures Motion, and granting such other and further relief in favor of BNYM as may be just and proper.

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Dated: June 20, 2018
San Juan, Puerto Rico

Respectfully submitted,

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