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UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

In Re:)	Docket No. 3:17-BK-3283 (LTS)
)	
)	PROMESA Title III
The Financial Oversight and)	
Management Board for)	
Puerto Rico,)	(Jointly Administered)
)	
<i>as representative of</i>)	
)	
The Commonwealth of)	
Puerto Rico, <i>et al.</i>)	July 29, 2020
)	
Debtors,)	

In Re:)	Docket No. 3:17-BK-4780 (LTS)
)	
)	PROMESA Title III
The Financial Oversight and)	
Management Board for)	
Puerto Rico,)	(Jointly Administered)
)	
<i>as representative of</i>)	
)	
Puerto Rico Power)	
Authority,)	
)	
Debtor,)	

1

2 National Public Finance) Docket No. 3:19-AP-00422 (LTS)
 3 Guarantee Corporation,)
 4 et al.,)
 5) *in 3:17-BK-4780 (LTS)*
 6 Plaintiffs,)
 7)
 8 v.)
 9)
 10 UBS Financial Services,)
 11 Inc., et al.,)
 12)
 13 Defendants.)

9

10 Ambac Assurance) Docket No. 3:20-AP-00047 (LTS)
 11 Corporation,)
 12) *in 3:17-BK-3283 (LTS)*
 13 Plaintiff,)
 14)
 15 v.)
 16)
 17 Merrill Lynch, Pierce,)
 18 Fenner & Smith,)
 19 Incorporated, et al.,)
 20)
 21 Defendants.)

17 OMNIBUS HEARING

18 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

19 UNITED STATES DISTRICT COURT JUDGE

20 AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

21 UNITED STATES DISTRICT COURT JUDGE

22

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1 APPEARANCES:

2 ALL PARTIES APPEARING TELEPHONICALLY

3 For The Commonwealth
4 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
5 Mr. Brian S. Rosen, PHV
6 Ms. Laura Stafford, PHV

7 For National Public
8 Finance Guarantee
9 Corporation and MBIA
10 Insurance Corporation: Mr. Philippe Z. Selendy, PHV
11 Mr. Federico Hernandez Denton, Esq.

12 For Underwriters: Mr. Peter G. Neiman, PHV

13 For Ambac Assurance
14 Corporation: Mr. Jonathan E. Pickhardt, PHV

15 For Puerto Rico Fiscal
16 Agency and Financial
17 Advisory Authority: Mr. John J. Rapisardi, PHV
18 Mr. Luis C. Marini Biaggi, Esq.

19 For the Special Claims
20 Committee: Mr. Tristan G. Axelrod, PHV

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I N D E X

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WITNESSES:

PAGE

None.

EXHIBITS:

None.

1 San Juan, Puerto Rico

2 July 29, 2020

3 At or about 9:42 AM

4 * * *

5 THE COURT: Good morning. This is Judge Laura Taylor
6 Swain.

7 MS. NG: Hi, Judge. It's me, Lisa.

8 THE COURT: Good morning, Ms. Ng.

9 Ms. Tacoronte, would you announce the case, please?

10 COURTROOM DEPUTY: Absolutely, Your Honor.

11 The United States District Court for the District of
12 Puerto Rico is now in session. The Honorable Laura Taylor
13 Swain presiding. Also present, the Honorable Judith Dein.
14 God save the United States of America and this Honorable
15 Court.

16 *In Re: The Financial Oversight and Management Board*
17 *for Puerto Rico, as representative of the Commonwealth of*
18 *Puerto Rico, et al.*, PROMESA Title III, case number 17-3283,
19 for Omnibus Hearing.

20 THE COURT: Buenos dias. Good morning and welcome
21 counsel, parties in interest, and members of the public and
22 press. We are once again convening telephonically for today's
23 Omnibus Hearing against a backdrop of circumstances that
24 present numerous challenges for all participants and
25 stakeholders in these Title III proceedings.

1 Our thoughts remain with all of those on the island
2 and on the mainland who have been affected directly and
3 indirectly by the coronavirus pandemic, as well as the people
4 on the island coping with the damage and unease brought about
5 by the most recent series of earthquakes that hit the southern
6 region of the island and the uncertainties of the storm
7 season.

8 To ensure the orderly operation of today's telephonic
9 hearing, all parties on the line must mute their phones when
10 they are not speaking. If you are accessing these proceedings
11 on a computer, please be sure to select "mute" on both the
12 Court Solutions dashboard and your phone.

13 I remind everyone that, consistent with court and
14 judicial conference policies, and the Orders that have been
15 issued, no recording or retransmission of this hearing is
16 permitted by any person, including, but not limited to, the
17 parties, members of the public or the press. Violations of
18 this rule may be punished with sanctions.

19 I will be calling on each speaker during these
20 proceedings. When I do, please unmute yourself and identify
21 yourself by name for clarity of the record. After the
22 speakers listed on the Agenda for each of today's matters have
23 spoken, I may provide an opportunity for other parties in
24 interest to address briefly any issues raised during the
25 course of the presentations that require further remarks. If

1 | you wish to be heard under these circumstances, please unmute
2 | yourself and state your name clearly at the appropriate time.
3 | I will call on the speakers if more than one person wishes to
4 | be heard.

5 | Please don't interrupt each other or me during this
6 | hearing. If we interrupt each other, it is difficult to
7 | create an accurate transcript. But having said that, I
8 | apologize in advance for breaking this rule, as I may
9 | interrupt if I have questions or if you go beyond your
10 | allotted time.

11 | If anyone has difficulty hearing me or another
12 | participant, please say something immediately. The time
13 | allotments for each matter and the time allocations for each
14 | speaker are set forth in the Agenda that was filed by the
15 | Oversight Board on Monday, July 27. The Agenda, which was
16 | filed as docket entry No. 13847 in case 17-3283, is available
17 | to the public at no cost on Prime Clerk for those interested.

18 | I encourage each speaker to keep track of his or her
19 | own time. And the Court will also be keeping track of the
20 | time and will alert each speaker when there are two minutes
21 | remaining with one buzz, and when time is up, with two buzzes.

22 | Here is an example of the buzz sound.

23 | (Sound played.)

24 | THE COURT: If your allocation is two minutes or
25 | less, you will just hear the final buzzes.

1 If we need to take a break, I will direct everyone to
2 disconnect and dial back in at a specified time. This
3 morning's session will end by noon, and I don't expect to need
4 an afternoon session.

5 The first Agenda item is, as usual, status reports
6 from the Oversight Board and AAFAF. As I requested in the
7 Procedures Order, these reports have been made in writing in
8 advance of this telephonic hearing and are available on the
9 public docket at docket entry Nos. 13874 and 13870 in case
10 17-3283. I've reviewed the reports carefully, and I thank the
11 Oversight Board and AAFAF for the care and detail reflected in
12 the reports, which I find quite comprehensive.

13 I have some questions regarding ADR for the Oversight
14 Board, but first I will invite the Oversight Board to make any
15 additional or general remarks its representatives wish to make
16 on the record this morning.

17 MR. BIENENSTOCK: Your Honor, this is Martin
18 Bienenstock of Proskauer Rose for the Oversight Board. Good
19 morning.

20 THE COURT: Good morning, Mr. Bienenstock.

21 MR. BIENENSTOCK: Good health to everyone.

22 We didn't have additional remarks. I think my
23 partner, Brian Rosen, is also on, and he would address the ADR
24 questions.

25 THE COURT: Thank you, Mr. Bienenstock.

1 Mr. Rosen, are you on? Mr. Rosen, would you unmute
2 and say something if you're on?

3 (No response.)

4 MR. BIENENSTOCK: Your Honor, if --

5 THE COURT: It sounds like something or someone
6 dropped.

7 Ms. Ng, can you tell whether Mr. Rosen is on the
8 dashboard?

9 MS. NG: He's on the dashboard. I'll unmute him.

10 Mr. Rosen, are you there?

11 MR. ROSEN: I am on the phone, Your Honor.

12 THE COURT: Okay. Very good. Good morning,
13 Mr. Rosen.

14 MR. ROSEN: Good morning, Your Honor.

15 THE COURT: And so this is Brian Rosen of Proskauer
16 speaking, yes?

17 MR. ROSEN: Yes, Your Honor.

18 THE COURT: Okay. Very good.

19 I had some questions regarding ADR, and it's
20 basically to assist the Court with staffing and structural
21 decisions in connection with the evaluative mediation aspect
22 of ADR. And so my general question is to ask you to discuss
23 your overall projected timeline for the ADR process.

24 I'm particularly interested in your view of the
25 earliest point at which you expect to have completed the offer

1 exchange phase with respect to any claims; and at what point
2 you would expect to begin increasing the number of claims per
3 notice; and what your target number of claims per notice and
4 frequency of notices might be; and then I'll have a couple of
5 other questions. But the timetable and volume are the ones to
6 start with.

7 MR. ROSEN: Yes, Your Honor. And also, Your Honor,
8 Ms. Stafford, who you know, is also on the line, and she may
9 assist me at any point in time.

10 Your Honor, as we reflected in the status report, we
11 transferred a minimum amount of claims the first time, only
12 21, and we anticipate that we'll provide an update on
13 September 8th. We are working with the Department of Justice,
14 the Puerto Rico Department of Justice with respect to bringing
15 in more claims into the ADR process, but we anticipate at this
16 time probably moving only in the same period -- excuse me, the
17 same amount of claims in, on a going-forward basis for the
18 first few times. So we're talking about, Your Honor,
19 approximately 20 to 30 to 40 claims. Each will include claims
20 not only against the Commonwealth and HTA, but also we've
21 included some that were against PREPA.

22 We are working with the providers, as we included in
23 there, and we're discussing with the Unsecured Creditors
24 Committee some issues associated with those providers. We --

25 THE COURT: This would be the arbitration providers?

1 MR. ROSEN: Yes, Your Honor.

2 And specifically, we've been talking with JAMS and
3 AAA. Those were the two providers that gave us proposals that
4 we found acceptable and that we wanted to continue a dialogue
5 with them. And it is likely, Your Honor, that we would
6 probably utilize both of those just based upon the number.
7 And with some claims being mainland-based, and some being on
8 island, and one provider being able to accommodate us more
9 with on-island and more Spanish speaking arbitrators, so we
10 decided to bifurcate the roles to have it be a little bit
11 smoother running for not only the Oversight Board, but also
12 for the Puerto Rico Department of Justice.

13 We are working with the Department of Justice now
14 with respect to settlement bandwidth so that we can move this
15 forward quickly. We don't anticipate -- or excuse me. We do
16 anticipate being able to provide those offers in the time
17 frame that is required under the Order, which is the 60-day
18 time frame.

19 And so, with respect to the first 21 claims that were
20 placed into the ADR, we will provide those responses in the
21 beginning of September, or those settlement proposals. We
22 don't anticipate needing the services, however, of the court
23 processes probably for another 30 to 60 days after that time
24 period, and it will be small claims. We're hopeful that the
25 settlement offers that we make will be satisfactory obviously,

1 and there will be very few people that will be necessary from
2 the Court's perspective.

3 As these ramp up, Your Honor, we don't anticipate
4 getting more than probably 1,000 claims at the end of the day,
5 but that could change based upon the settlement processes and
6 the acceptances by the respective claimants.

7 THE COURT: And so the 1,000, is that a net number
8 that you would expect might go to evaluative mediation, or is
9 the 1,000 the number of claims you would notice up for the ADR
10 process in total?

11 MR. ROSEN: I think, Your Honor, it's probably in
12 total, but as we dig down a little bit more, as the bar date
13 on PBA comes about now and more claims are being filed there,
14 we may have to change that estimate, in which case we'll
15 obviously inform the Court. But that is our guesstimate at
16 this time.

17 THE COURT: Okay. And again, just for clarity, for
18 me and for others, I think the last time we had spoken at an
19 Omni about numbers, there had been a guesstimate of ten to
20 fifteen thousand claims coming through ADR, if I'm not
21 mistaken. And so --

22 MR. ROSEN: Those were the total amount possible,
23 Your Honor, but as we continue to analyze and cull the
24 information, that number continues to be reduced.

25 THE COURT: All right. I very much appreciate that

1 clarification. And it sounds to me as though with 20 to 40
2 claims per notice for, as you say, the next few times, would
3 it be fair to say that we shouldn't expect more than a couple
4 hundred at most to be noticed up and taken into the process
5 before the end of the year?

6 MR. ROSEN: I think that's a fair number, Your Honor,
7 yes.

8 THE COURT: And do you expect to be grouping these
9 claims substantively or conceptually in any way?

10 MR. ROSEN: Well, Your Honor, as we indicated in the
11 status report, we're focused at this time on some litigation
12 phase and some accounts payable. We'll probably continue to
13 do that with -- as the Puerto Rico DOJ gets more up to speed
14 on some of these and we can process more of the information,
15 probably veering a little bit more towards the
16 litigation-based claims rather than the accounts payable.

17 THE COURT: And that's for the foreseeable near and
18 mid term?

19 MR. ROSEN: Yes, Your Honor.

20 THE COURT: And that actually covers all of my
21 questions. And so you expect to be doing a notice per month
22 of the 20 to 40 claims?

23 MR. ROSEN: Your Honor, I think under the Order, it's
24 anywhere from -- I think it's up to 60 days. So it's probably
25 in that two-month time frame that we'll do the notices.

1 THE COURT: Thank you.

2 MR. ROSEN: I think the next batch, Your Honor, would
3 be in October. I just want to make sure. The status would be
4 due in September with -- excuse me. I apologize. The second
5 tranche will be August 24th. We'll send more into the ADR
6 process.

7 THE COURT: Okay. And then after that, it would be
8 October?

9 MR. ROSEN: Probably, Your Honor. That would be our
10 goal.

11 THE COURT: Thank you very much. This is very
12 helpful.

13 MR. ROSEN: My pleasure.

14 THE COURT: And so I have no further questions for
15 the Oversight Board. And I again thank AAFAF for its report.
16 I have no questions for AAFAF at this point, but did
17 Mr. Rapisardi or Mr. Marini wish to make any additional or
18 general comments?

19 MR. MARINI BIAGGI: Good morning, Your Honor. Luis
20 Marini for AAFAF. I don't have any further comments other
21 than what we put in our status report.

22 THE COURT: Thank you, Mr. Marini.

23 Are there any other counsel who have questions or
24 comments that they wish to make in connection with the status
25 report? If you do, unmute yourself, and state your name

1 clearly, then wait for me to call on you to speak.

2 I know that the unmuting can be complicated, so I'll
3 wait 15 seconds before I go on.

4 All right. That was 20 seconds, and so I am assuming
5 that there are no further comments. Thank you all.

6 And so at this point, I will turn to the argument of
7 the Motions to Remand. National's Motion to Remand is docket
8 entry No. 31 in adversary proceeding 19-422, and Ambac's
9 Motion to Remand is docket entry No. 22 in adversary
10 proceeding 20-047. We have 60 minutes allocated for the oral
11 argument in total, and the first scheduled speaker is
12 Mr. Selendy for MBIA and National, who has been allocated 11
13 minutes.

14 Mr. Selendy.

15 MR. SELENDY: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. SELENDY: May it please the Court. Philippe
18 Selendy for plaintiffs, National and MBIA, which I'll refer to
19 together as National. I am on the line with my co-counsel,
20 Federico Hernandez Denton. And today, National and Ambac will
21 share plaintiffs' time.

22 I'll address common issues for both insurers: Why
23 these non-core claims against nondebtors will not affect the
24 estate; why this Court should remand; and why there's no
25 federal question. Federico Hernandez Denton will then address

1 the nature of the claims and the Commonwealth's interest. And
2 John Pickhardt will speak to points specific to Ambac.

3 As a threshold matter, defendants bear the burden of
4 establishing removal jurisdiction and disputed questions of
5 fact; and controlling substantive law must be construed in
6 favor of remand. Importantly, the Claims Committee itself is
7 not advocating to keep the cases in this court.

8 The insurers here are asserting claims solely against
9 the underwriters of Puerto Rico municipal bonds. They are
10 equitable claims under *actos propios* and unilateral
11 declaration of will, are based on Article VII of the Civil
12 Code.

13 As the Puerto Rico Supreme Court has held, the
14 doctrines are unique in the American system, with no ready
15 analog at common law. *Actos propios* protects legitimate
16 expectations under a standard of exceptional good faith, while
17 unilateral declaration of will is like unilateral contract,
18 enforcing commitments made with the intent of affecting the
19 conduct of others.

20 What the insurers must show is that the banks made
21 false assurances of due diligence in a way contrary to
22 accepted norms in Puerto Rico. If the banks violated their
23 assurances, leading National and Ambac to insure deals that
24 failed, the banks are responsible for the losses.
25 Significantly, the claims don't require any proof of debtor

1 misconduct.

2 Now, according to the banks, there are two main
3 conceivable effects: A reduction in the insurers' claims
4 against the estate, or an increase in the banks'
5 indemnification or contribution claims against the estate.
6 But as I'll explain, that's wrong. There will be no effective
7 change in the insurers' claims, and the banks' claims are too
8 contingent and remote. These non-core cases will not impact
9 the rights or liabilities of the estate or the administration
10 of these proceedings.

11 First, defendants admit the insurers filed proofs of
12 claim against the debtors for the exact same amounts claimed
13 against the banks. But if National and Ambac prevail, the
14 banks will be subrogated automatically, dollar for dollar, to
15 the insurers' claims under Section 3248 of Puerto Rico Civil
16 Code. 3248(1) applies because the banks, as unsecured
17 creditors, will be satisfying the debtors' obligations to
18 preferential creditors. And 3248(3) applies because the banks
19 have an interest in the same debt that is the subject of the
20 insurers' proofs of claim.

21 As the Supreme Court held in *Eastern Sands*, this
22 statute applies automatically, not presumptively. There are
23 no exceptions or equitable defenses. The result then is just
24 a substitution of creditors, with no change in the
25 classification of the insurers' filed claims against the

1 debtors. That is an insufficient nexus to confer "relating
2 to" jurisdiction, as the cases of *Santa Clara* and *In re C&A*
3 confirm.

4 The banks --

5 THE COURT: Mr. Selendy.

6 MR. SELENDY: Yes. Yes, Your Honor.

7 THE COURT: Sorry to interrupt, but I warned you that
8 I might do that.

9 MR. SELENDY: Of course.

10 THE COURT: Given the magnitude of these claims and
11 the role that the insurers have played and are playing, as a
12 practical matter in the dynamics of the administration of the
13 estate and litigation issues, isn't it a little unrealistic to
14 say nothing changes when the claim holder changes, even if
15 that's automatic?

16 MR. SELENDY: Well, the effect of a change in the
17 substitution of the creditor is not a change in the
18 classification of the claim. And that switch, under
19 controlling First Circuit law, reflected in both these cases,
20 *Santa Clara* and *In re C&A*, doesn't constitute the type of
21 conceivable effect that is recognized in *Pacor*, which of
22 course the First Circuit is following.

23 In terms of the dollar amount of the claims, that's
24 not the relevant issue. The question is will there be an
25 impact in some way to the rights or liabilities of the estate

1 or the administration. And here, because it does operate
2 automatically, there is no effective change. Indeed, as I
3 will cover later, if the Court were to decline to remand and
4 instead retain jurisdiction, there would be real burdens on
5 these proceedings because we're dealing with non-core Spanish
6 Civil Law claims that cannot be tried with streamlined
7 bankruptcy procedures. And there are further complications
8 introduced by the fact that these are local law issues that
9 require consideration of local usage, custom and public
10 interest.

11 So if I may, Your Honor, I'll turn to the banks' own
12 claims for indemnification and contribution, which are too
13 remote. As I mentioned, the First Circuit follows *Pacor* and
14 its progeny, which holds a -- claims are too contingent to
15 support "related to" jurisdiction if further litigation is
16 required on the claims.

17 No bank even filed a proof of claim for
18 indemnification or contribution, other than Santander. The
19 bar date passed two years ago, and the remote chance that late
20 filed claims might be allowed cannot support jurisdiction.

21 Here, of course, the Special Committee issued their
22 report showing bank failures of due diligence back in mid
23 2018, and the FOMB, National and Ambac all filed complaints
24 long ago. There's no excuse, as Rule 9006(b)(1) requires, for
25 the banks' neglect.

1 Santander's Proofs of Claim fair no better. They are
2 contingent under the rule of *W.R. Grace*, because the debtors
3 are likely to object, as they did in *COFINA*, where Santander's
4 claims were disallowed, thus requiring further litigation.

5 There's also a second independent reason why the
6 banks' claims are all inadequate, and that is that they are
7 all conditional. In the First Circuit, indemnification of
8 contribution claims only matter for "relating to" jurisdiction
9 if they're virtually automatic and unconditional. The case of
10 *In re Montreal Maine* is a good example.

11 And here, even for the subset of deals where the
12 banks do have indemnification rights, the contracts impose
13 limits and conditions. One important condition is in Section
14 13(a), which carves out debtor liability for any untrue
15 statement or omission by the banks. Exactly what's alleged
16 here. In addition, the law also implied exceptions for bad
17 faith and gross negligence, both of which again are implicated
18 here.

19 Finally, Your Honor, there's no precedent for the
20 banks' speculation that they might claim non-contractual
21 contribution for liability based on their own equitable
22 misconduct.

23 So in summary, no bank can identify any timely,
24 virtually automatic indemnification of contribution claims as
25 the First Circuit requires for there to be any impact

1 sufficing for "relating to" jurisdiction. Even if this Court
2 were to conclude that there's some attenuated basis for
3 "relating to" jurisdiction, the cases still should be
4 remanded.

5 Comity dictates federal courts should be hesitant to
6 exercise jurisdiction when state issues substantially
7 predominate, and of course Commonwealth issues substantially
8 predominate here over bankruptcy issues. The claims do not
9 challenge the legality, operation, intent or conduct of the
10 debtors; do not require interpretation of PROMESA; and do not
11 relate to the restructuring.

12 On the other hand, the claims do raise important
13 issues as to the interpretation and application of --

14 (Sound played.)

15 MR. SELENDY: -- law. *Actos propios*, and unilateral
16 declaration of will are claims that originate in Spanish Civil
17 Law or adopted by the Puerto Rico Supreme Court. The contours
18 of the claims are still being developed. And where issues of
19 local law are unsettled, their predominance is always
20 significant as the bankruptcy court held in *In re Acevedo*.
21 That favors remand.

22 I'll note the banks engaged in misdirection when they
23 compared Commonwealth courts to federal -- Commonwealth issues
24 to federal law generally, rather than the bankruptcy issues;
25 but even on that wrong standard, the banks fall short. The

1 | insurers don't bring federal securities claims and they
2 | cannot -- there are no federal defenses to their equitable
3 | claims.

4 | Moreover, any impact or lack of impact on the estate
5 | will be the same whether the cases are litigated here or in
6 | the Commonwealth, just as in *Cambridge Place* where Judge Dein
7 | recommended equitable remand, despite automatic debtor
8 | liability for indemnification. And notably, to give complete
9 | assurance that there's no effect on the estate, National will
10 | stay execution and enforcement of any judgment until after
11 | Plan confirmation. That makes this an easier case than *Vitol*
12 | or *ASP*, both of which this Court remanded because claims were
13 | expected to be resolved post confirmation, and in both of
14 | which cases, debtors were involved.

15 | Last, Your Honor, there's no federal question
16 | jurisdiction. Under the well-pleaded complaint rule, the
17 | question raised by the insurers is simply whether Puerto Rico
18 | equitable doctrines require the banks to live up to assurances
19 | made in Puerto Rico years ago. That's a fact bound, situation
20 | specific question of local law. There's no federal actor
21 | here, no challenge to the validity of any federal law or
22 | regulation, no risk of any precedent of systemic federal
23 | import. In fact, there's no question of federal law at all.

24 | The banks admit they haven't performed --

25 | (Sound played.)

1 MR. SELENDY: Your Honor, may I have 30 seconds and
2 I'll finish?

3 THE COURT: Yes. You may finish your thought. Thank
4 you.

5 MR. SELENDY: Thank you.

6 The banks admit they had to perform reasonable due
7 diligence. They said so in all the offer materials. And that
8 context sets the basis for legitimate expectations in the
9 Commonwealth's bond market.

10 It doesn't matter whether the obligations imposed by
11 the equitable doctrines overlap with those imposed by federal
12 law, as the United States Supreme Court made very clear in
13 *Merrill Lynch v. Manning* when it remanded state law claims
14 that referred repeatedly to violations of federal securities
15 regulations. And the First Circuit case of *Municipality of*
16 *Mayaguez*, is the same effect.

17 Finally --

18 THE COURT: Thank you.

19 MR. SELENDY: Finally, if the Court were to weigh the
20 congressionally approved federal-state balance, Commonwealth
21 interests dominate. Congress does approve of parallel state
22 regulation that touches upon securities matters, particularly
23 on municipal issuances, and Puerto Rico hasn't --

24 THE COURT: Thank you, Mr. Selendy.

25 MR. SELENDY: Thank you.

1 My counsel, the former Chief Justice of Puerto Rico
2 Supreme Court, Federico Hernandez Denton, will now address
3 Puerto Rico's overwhelming interest in defining its scope of
4 the equitable doctrines. Thank you, Your Honor.

5 THE COURT: Thank you.

6 Mr. Hernandez Denton. Mr. Hernandez Denton, can you
7 unmute yourself?

8 Ms. Ng, would you see if there's anything you can
9 unmute?

10 (Discussion off the record.)

11 THE COURT: Okay. All right. So we will wait.

12 Mr. Hernandez Denton, if you can just make sure that
13 you have pressed "unmute" on your phone, and if you have the
14 computer screen up, also on the computer screen. And we will
15 wait for the courtroom deputy to see if she can do this from
16 the master screen. I apologize for the delay.

17 Maddie, are you still there?

18 All right. Thank you, everyone, for your patience.
19 We will just continue to wait.

20 MS. NG: Judge?

21 THE COURT: Yes, Ms Ng.

22 MS. NG: I'm sorry.

23 (Discussion off the record.)

24 THE COURT: Thank you both.

25 Good morning, Mr. Hernandez Denton.

1 MR. HERNANDEZ DENTON: Yes. Good morning, Your
2 Honor. Thank you very much for your patience. May it please
3 the Court, I'm Federico Hernandez Denton on behalf of
4 National.

5 First, I would like to thank Your Honor for your work
6 on this very important matter.

7 I am going to address the Commonwealth courts'
8 overriding interest in adjudicating those disputes, which
9 involve doctrines unique to the Civil Codes and its
10 institutions. I am referring to *la doctrina de los actos*
11 *proprios* and *la doctrina de la declaracion unilateral de*
12 *voluntad* as sources of obligations. Both claims emanate from
13 Article VII of the Puerto Rico Civil Code, which expressly
14 enables the court to decide cases in accordance with equity.

15 These claims are rooted in our civil law tradition of
16 several centuries. Applying *la doctrina de los actos propios*,
17 the Puerto Rico Supreme Court said, in *International General*
18 *Electric*, that "the rule that nobody is allowed to go against
19 his own acts is grounded and rooted in the general principles
20 of law. And one should act in good faith in the juridical
21 life. Contradictory behavior should be prevented." And
22 that's the end of the quote.

23 Diaz Picasso, a very distinguished civil law lawyer,
24 a scholar, essentially analyzed the doctrine in a very often
25 quoted writing, and explained that the concept of *doctrina de*

1 | *los actos propios* includes, and I'm quoting, "loyalty in the
2 | dealing, as well as honest and faithful conduct, a criterion
3 | of conduct according to which obligations should be
4 | performed." And that's my own translation, Your Honor.

5 | As to *la declaracion unilateral de voluntad*, in
6 | *Ortiz*, the Supreme Court of Puerto Rico expressly recognized
7 | it as a source of obligations which enforces a claim on a
8 | promise made with the intent to influence the conduct of
9 | others.

10 | In our civil law tradition, judges have significant
11 | discretion to shape the contours of its claims, and to do so
12 | must weigh the public interest, the customs and usage of the
13 | community. The Commonwealth courts are also free to recognize
14 | new applications of old doctrines, and have done so on
15 | multiple occasions to specific conducts of parties in
16 | different types of conducts, in all aspects of human
17 | interactions.

18 | Considering its experience with those doctrines, the
19 | Commonwealth courts are best suited to interpret -- to
20 | interpret the Puerto Rico Civil Code and the institutions that
21 | are derived from both doctrines, according to our customs --

22 | (Sound played.)

23 | MR. HERNANDEZ DENTON: -- and usage. They are also
24 | in a better position to examine the developments of those
25 | doctrines in countries with similar civil law traditions, from

1 Spain to Argentina.

2 We must bear in mind that in interpreting and
3 applying these doctrines to specific facts, a court
4 knowledgeable in civil law always takes into consideration the
5 extensive jurisprudence of the Supreme Court of Spain and of
6 other countries, as well as the civil law treatises. These
7 experiences, as well as the application of the doctrines of
8 different conducts in several other countries carry great
9 weight in Puerto Rico jurisprudence.

10 In addition, the Commonwealth courts, steeped in
11 civil law tradition, are best suited to interpret these
12 Spanish language treatises, law review articles, and
13 jurisprudence in their original language. The common law, on
14 the other hand, has no bearing on the interpretation or
15 application of *doctrina de los actos propios* or *la declaracion*
16 *unilateral de voluntad*.

17 With that in mind, former Associate Justice of the
18 Supreme Court, Jaime Fuster, and a well-known comparative law
19 scholar, explained in *Corraliza* that, as expressly stated in
20 his Opinion, that the federal court's attempts to use the
21 common law to interpret equitable claims has, in fact, caused
22 great confusion. For example, the use of a secondary
23 statement to interpret *la doctrina de los actos propios*, while
24 comparing it to the Commonwealth concept of promissory
25 estoppel.

1 And another very well-known author, a Spanish author,
2 Jaramillo, in his treatise on *la doctrina de los actos*
3 *proprios*, also addressed --

4 (Sound played.)

5 MR. HERNANDEZ DENTON: -- and reminded us that *la*
6 *doctrina de los actos propios* is different than common law.
7 Let's not forget that the common law does not recognize *la*
8 *doctrina de la declaracion unilateral de voluntad* as a source
9 of obligations.

10 The Commonwealth courts should apply the civil law
11 doctrines to the facts that originate in the Complaint filed
12 by National in the Superior Court. They are not touched --
13 they are not security claims, and have no real analog in
14 common law. They are based on doctrines of good faith
15 principles.

16 Our courts are specifically powered by the Civil Code
17 to provide the equitable relief that we are requesting. And
18 if I may have a few more seconds, finally, Your Honor, the
19 significance --

20 THE COURT: Very briefly, please.

21 MR. HERNANDEZ DENTON: Finally, Your Honor, the
22 significance and importance of both doctrines is so entrenched
23 in Puerto Rico that the recently adopted Civil Code reiterated
24 the importance of good faith and of *la doctrina de los actos*
25 *proprios* in all of its acts, and has expressly codified *la*

1 | *declaracion unilateral de voluntad.* That often occurs after
2 | civil law countries decide to revamp their legal systems and
3 | actualize their civil codes, and incorporate judge-made
4 | doctrines into the codes.

5 | For the reasons previously stated, and in
6 | consideration of comity, we respectfully request that this
7 | Court remand this action to the Judicial Branch of Puerto
8 | Rico.

9 | Thank you, Your Honor, for the opportunity to address
10 | this Court. It has been a privilege and an honor for me to do
11 | so today.

12 | I will now turn the argument over to counsel for
13 | Ambac, unless Your Honor has any questions that I might assist
14 | you to be able to respond.

15 | THE COURT: No. Thank you. I have no questions.
16 | And thank you very much for your argument. The honor is
17 | mine.

18 | I'll turn now to Mr. Pickhardt.

19 | Ms. Ng, can you make sure that you don't have any
20 | muting on on your end?

21 | MS. NG: I'm here and I'm watching everything.

22 | MR. PICKHARDT: Good morning, Your Honor. John
23 | Pickhardt on behalf of Ambac. Are you able to hear me okay,
24 | Your Honor?

25 | THE COURT: Yes, I can. Thank you so much. Good

1 morning, Mr. Pickhardt.

2 MR. PICKHARDT: Good morning.

3 Your Honor, I will be brief, because Ambac's Motion
4 to Remand should be granted for all of the same reasons that
5 Mr. Selendy and Judge Hernandez Denton described, including
6 that it is not related to this Title III proceeding; it does
7 not arise under federal law; and it involves unique equitable
8 doctrines that Puerto Rico has an overriding interest in
9 having its own courts adjudicate.

10 However, Ambac's Complaint also has an important
11 distinction which makes any argument that it belongs in this
12 Court even more attenuated, since the two bond issuances that
13 are the subject of Ambac's Complaint were not issued by any
14 Title III debtor. Rather, Ambac's case involves bond
15 issuances by the Puerto Rico Infrastructure Financing
16 Authority, PRIFA, and by the Puerto Rico Convention Center
17 District Authority, PRCCDA, which, as Your Honor knows,
18 neither of which are Title III debtors that have appeared in
19 this proceeding.

20 The fact that the issuers are not Title III debtors
21 in Ambac's case is important for two reasons. First, it means
22 that Ambac's case is distinct, because the official statements
23 that are at issue in Ambac's case were not issued by any Title
24 III debtor. And while the conduct at issue in Ambac's case,
25 like National's case, is the underwriters' statements

1 regarding their due diligence efforts, the defendants have
2 nonetheless contended in opposing the remand that the conduct
3 of Title III debtors is nonetheless implicated.

4 That argument is especially attenuated in the case of
5 Ambac's Complaint, where the instrumentalities that issued the
6 official statements are not before this Court in this Title
7 III proceeding. It is similarly much more difficult for
8 defendants to contend that a Title III debtor would somehow be
9 a defendant in Ambac's case but for the existence of this
10 Title III proceeding. The Commonwealth is not a signatory on
11 the official statements, only the non-debtor instrumentalities
12 are.

13 It also means that the defendants' arguments
14 regarding involvement of Title III debtors as third-party
15 witnesses in Ambac's case is even more attenuated. And to the
16 extent that third parties -- and this is all relevant, and, in
17 any event, will be associated with PRIFA and PRCCDA, not the
18 Commonwealth or any other Title III defendant.

19 Secondly, this distinction means that Ambac's case is
20 unique because no Title III debtor has any contract, any
21 agreements with the underwriter defendant with regard to the
22 bond issuance at issue in Ambac's case. This is perhaps the
23 most important distinction, that the defendants rely very
24 heavily on the existence of underwriting agreements with Title
25 III debtors in arguing that National's case is related to

1 those proceedings.

2 Specifically, defendants argue that any recovery
3 against them would result in an indemnification claim against
4 the Title III debtor under their underwriting agreement, which
5 would impact those proceedings. Mr. Selendy described all of
6 the substantial and insurmountable impediments for such a
7 claim in the case of National, but in addition to those, no
8 such indemnification claims could even possibly exist in
9 regard to Ambac's case because the underwriting agreements are
10 with PRIFA and PRCCDA, which are not Title III debtors.

11 The defendant also argued in the case of National
12 that their underwriting agreements would provide the basis for
13 contribution claims against Title III debtors. Again, such
14 contractual contribution claims against a Title III debtor are
15 not even possible in the case of Ambac's actions.

16 And while defendants had, therefore, pivoted to
17 arguing that they have Commonwealth contribution claims
18 against the Commonwealth, in the case of Ambac, even that
19 argument is more attenuated given no Title III debtor signed
20 or issued the official statements on that issue, and
21 subsequently, would ultimately be precluded for all of the
22 reasons described by Mr. Selendy, including that such a claim
23 would be, you know, redundant of the automatic subrogation to
24 Ambac's claim. There is no basis in identifying any improper
25 conduct by a Title III debtor.

1 And I would also just note in closing, Your Honor,
2 that in the arguments that were presented here, with respect
3 to --

4 (Sound played.)

5 MR. PICKHARDT: -- there being no implication on the
6 Title III proceeding, it is further supported by the
7 Informative Motion that was filed by the Oversight Board in
8 which it indicated that Ambac's proceeding, "does not concern
9 or implicate any obligation of a debtor in the Title III
10 proceeding." And similarly the Oversight Board said again,
11 "it does not appear to have any disputed issues of fact in
12 common with litigation brought by the Oversight Board."

13 And I understand that the Oversight Board will
14 address Your Honor later with respect to their informative
15 motion and their position in this case, which I understand
16 does not distinguish between, you know, Ambac and MBIA's case,
17 is what they -- you know, with respect to both actions, but
18 certainly the informative motion that they filed in respect of
19 Ambac's case, you know, and also a further persuasive reason
20 why this case should be remanded.

21 Unless Your Honor has any questions, I will conclude
22 there.

23 THE COURT: Thank you, Mr. Pickhardt. I have no
24 further questions for you.

25 MR. PICKHARDT: Thank you, Your Honor.

1 THE COURT: And so we will now turn to the argument
2 for the defendants opposing the motion. I have Mr. Neiman
3 down for 28 minutes.

4 And, Ms. Ng, can you make sure that we don't have
5 anything blocked on our end?

6 MS. NG: Will do, Judge.

7 THE COURT: Thank you.

8 MR. NEIMAN: Thank you, Your Honor. Can you hear me
9 okay?

10 THE COURT: Yes, I can. Good morning.

11 MR. NEIMAN: Hi, Your Honor. This is Peter Neiman
12 from Wilmer Hale. I represent the Underwriter defendants.

13 Your Honor, I was feeling a little old this morning
14 when I realized it was actually 18 years ago that I was before
15 you for three months. I represented the government in a
16 criminal case.

17 THE COURT: It was a long time ago, but we're still
18 young, right?

19 MR. NEIMAN: Thank you, Your Honor. I appreciate
20 that.

21 I wanted to start the conversation today by
22 addressing a couple of things that were said by my colleagues
23 on the other side that I think are not quite accurate. And
24 the first is the suggestion from Mr. Selendy, and I think this
25 was also echoed by Mr. Pickhardt, that somehow the debtor

1 misconduct was not implicated in these adversary proceedings.
2 And I don't think you have to look any further than the
3 complaint in the adversary proceedings to know that that's not
4 correct.

5 Those complaints are just littered with allegations
6 that the offering statements contained material
7 misrepresentations about the financial condition of the
8 debtor. Those are the debtor's statements. And that would be
9 debtor misconduct if they said false things in the offering
10 documents.

11 The reason that both Mr. Pickhardt and Mr. Selendy
12 tried to claim the debtor misconduct is not at issue here is,
13 because we've cited two cases that are closely analogous on
14 the facts, the *Worldcom, Inc. Sec. Litig.* from this Court, and
15 the *SPV* decision from the Second Circuit that say, where
16 debtor misconduct is central, that by itself could establish
17 "related to" jurisdiction. It clearly is central here,
18 because it's -- and it's all over their Complaint.

19 The second thing that I wanted to pick up on, and
20 this is related to a question that Your Honor asked, and the
21 response, I think, was a little inaccurate from Mr. Selendy.
22 Your Honor asked, wouldn't a substitution of parties itself be
23 an important impact. We obviously don't concede at all that
24 -- their rights at subrogation, so on that -- that's one of
25 the issues here is substitution of parties, and I'll get to

1 | that in a minute. But they are suggesting to you, not
2 | withstanding your practical question -- you know, to say the
3 | least, the bond insurers have been important players in this
4 | bankruptcy. I think they've filed between them more than 490
5 | filings in the Title III cases. And they've been quite
6 | aggressive litigants, that you might expect from firms that at
7 | this point have no business other than litigation. And as a
8 | practical matter, it's certainly reasonable to think that
9 | having their claims litigated or reduced would be quite
10 | significant.

11 | And Mr. Selendy, said, you know, you find First
12 | Circuit authority in *Santa Clara*. And *Santa Clara*, Mr.
13 | Selendy repeatedly refers to in his brief as a First Circuit
14 | decision. It is not a First Circuit decision. It's not
15 | binding authority. It's a decision of the Bankruptcy
16 | Appellate Panel, which is not binding on a United States
17 | District Court, period.

18 | There are cases that go both ways on the question of
19 | whether substitution of parties is itself sufficient "related
20 | to" jurisdiction. And I think on the facts here, as Your
21 | Honor noted, given the significance of the bond issuers in
22 | this case, there is jurisdiction, although we have plenty of
23 | other arguments as well.

24 | I also wanted to say, the suggestion that subrogation
25 | is so clearly automatic here, that there's no possible

1 financial impact on the debtors. I'll just note that they
2 make that claim, the plaintiffs, but they haven't cited a
3 single case that says that equitable defenses are unavailable
4 to subrogation in this context. They haven't cited a single
5 case that says that subrogation is even available in this
6 context.

7 This is not a case in which an insurer or a guarantor
8 stated they had, in a hypothetical world in which it seems --
9 where they've progressed in a lawsuit, and they've paid, and
10 we go to seek subrogation, we would be in the position of
11 someone who had been found liable and had been found to have
12 engaged in misconduct, and traditionally, subrogation is
13 subject to equitable defenses in that kind of circumstance.
14 They've cited no case to suggest it isn't.

15 I'm just asking you to do a little thought
16 experiment, Your Honor, to -- when you're thinking about the
17 question of whether subrogation -- it's so automatic that you
18 should just review it here, assuming there's no possibility of
19 a financial impact. Just imagine, Your Honor, that they
20 prevail in these cases, we pay the debt, and then we go to the
21 debtor and say, look, you should just pay us the same hundreds
22 of millions of dollars in cash and bonds that you were going
23 to pay the bond insurers. So subrogation is automatic. You
24 just have to pay us.

25 And ask yourself the question, in that circumstance,

1 would the debtors really say, the very smart and intelligent
2 lawyers who represent the debtors, would they really say, oh,
3 you know, you're right? We have no possible defenses here.
4 We're just going to write you a check or issue bonds for
5 hundreds of millions of dollars, even though there's been no
6 cases cited that say that you're even entitled to subrogation,
7 and there's certainly no case that says that ordinary self --
8 equitable defenses don't apply. We'll just send you a check.
9 We won't even litigate. It's so clear that we won't even
10 litigate. Or instead, would one expect and assume that in
11 that circumstance, the reaction of the debtor before writing a
12 big check would say, well, actually, there might be. There's
13 some pretty obvious defenses here we'd like to assert, and
14 we'll test whether they apply or not.

15 There is no way that subrogation here is automatic as
16 the plaintiffs suggest, and it's certainly concludable that
17 the debtors would assert defenses and that they would prevail,
18 in which case there would be an enormous financial impact on
19 the estate.

20 I also wanted to address very quickly the suggestion
21 from Ambac that their case was materially different from the
22 National case in ways that their view favored remand. And I
23 think the first thing that they suggested was, well, you know,
24 their case doesn't really involve any Title III debtor. And
25 it's true that the bonds that they are suing about were not

1 issued by a Title III debtor, but their claim -- they've made
2 a claim against the Commonwealth related to those very bonds,
3 as you know, asserting that the Commonwealth did an improper
4 clawback and that was the reason why they didn't get paid --
5 that those bonds didn't get paid. And they've made the exact
6 same claim in their case against us.

7 And so the conduct of the Title III debtor for that
8 reason is very much at issue, both in their claims against the
9 debtor and their claims against us. And indeed, the
10 Commonwealth is the source of many of the statements in the
11 offering documents that are also central to their case against
12 us.

13 The official statements repeat over and over again
14 that the Commonwealth is one of the sources of the information
15 that they are alleging is false in their case against us. So
16 their suggestion that this case is somehow very different from
17 the National case because the bonds were not issued by the
18 Commonwealth, but by an instrumentality that's not a Title III
19 debtor, I think really doesn't wash because, in fact, they've
20 put the conduct of the Commonwealth itself very much at issue,
21 both in their adversary proceeding against us and in the
22 claims they've made in the Title III proceeding.

23 So with those basic points, without -- I'd like to
24 just kind of walk through for the Court, in the time that I
25 have available, the reasons why we think this is clearly

1 "related to" jurisdiction here, and why we think that actually
2 remand would not be appropriate.

3 I also want to spend a few minutes talking about why
4 actually you don't even need to get to either of those issues,
5 because the adversary proceeding Complaints, which on their
6 face invoke the federal securities laws by name 57 times, and
7 also invoke the duties of underwriters under those federal
8 securities laws another 90 times, and identify exactly one
9 misrepresentation that they claim was made by the
10 underwriters, and that misrepresentation is -- claims to be
11 the representation that due diligence was conducted in
12 conformity with the federal securities laws. And so it
13 shouldn't be surprising, given a complaint that reads like
14 that, that that provides for "arising under" jurisdiction
15 here.

16 Let me start with "related to" jurisdiction, and as I
17 think everybody agrees, you know, the standard here is whether
18 it's conceivable that the adversary proceeding could have an
19 impact on the bankruptcy. That's a low bar by any measure,
20 and here it's more than conceivable for multiple reasons,
21 whether the bond insurers win these adversary proceedings or
22 whether we win these adversary proceedings, it's going to be
23 likely that it's going to have an impact. And that's true
24 likely whether these adversary proceedings are resolved before
25 or after any plan is confirmed.

1 We've already talked about one type of impact, and
2 that is, you know, in a world in which the bond insurers win
3 and collect from us, that would mean, since they can't collect
4 the same dollars as they collect from us, they can't collect
5 from the estate, that would reduce their claims against the
6 estate. And because subrogation is not -- is potentially
7 subject to things like equitable defenses, that could have a
8 huge financial impact on the estate, hundreds of millions of
9 dollars at least. So that's one example.

10 A second example is, let's assume it's in a world in
11 which we prevail. Could that have an impact on the estate?
12 And the answer is absolutely yes. And let me just give you an
13 example of that.

14 It's quite conceivable that if we win the Ambac case,
15 for example, that that would actually eliminate Ambac's proofs
16 of claim against the Commonwealth on the bonds that are issued
17 in the adversary proceeding.

18 Ambac's proof of claim asserts, as I mentioned
19 before, that the Commonwealth lawfully diverted funds that
20 should have paid their bonds, and Ambac's Complaint in the
21 adversary proceeding makes the identical claim, that the
22 debtor of the Commonwealth lawfully diverted funds.

23 And, you know, we might well dispute that there's
24 anything wrongful about what they call a diversion, and they
25 might argue that it was Ambac's mistaken analysis that --

1 | whether such diversions were allowed or when they were
2 | permitted, and not any due diligence created by us that led to
3 | their losses. And if we won that argument, we would establish
4 | the lawfulness of what Ambac provisionally calls the diversion
5 | of funds. That conclusion would be binding on Ambac, and that
6 | would eliminate Ambac's claims against the debtors. And
7 | again, that's just another instance that's conceivable, which
8 | is all that's required, and that's more than enough to show
9 | "related to" jurisdiction.

10 | I wanted to, for a moment -- you know, there's been
11 | some suggestion in the papers and the proceedings that, you
12 | know, the time involved it would that (indiscernible) somehow,
13 | because of all the --

14 | THE COURT: Mr. Neiman, there was some interference a
15 | couple of seconds ago, so if you can just backtrack 20
16 | seconds?

17 | MR. NEIMAN: Oh, I'm sorry, Your Honor. Is it better
18 | now?

19 | THE COURT: Yes, it is.

20 | MR. NEIMAN: Thank you. I had just started to talk
21 | about kind of the timing issue. Is that where I dropped out
22 | at?

23 | THE COURT: Yes.

24 | MR. NEIMAN: Okay. And so they suggested that that
25 | timing, that is, what they call, at least in their papers and

1 in the adversary proceedings, you know, the likelihood that a
2 plan would be confirmed before these adversary proceedings
3 would be resolved, somehow weighing against "related to"
4 jurisdiction. I just want to point out, we think that's wrong
5 for a number of different reasons.

6 It's wrong because "related to" jurisdiction is
7 determined at the time of removal. It's not suggested by
8 subsequent events. It's wrong because the First Circuit case
9 that we cited, *In re Boston Regional Hospital*, you know,
10 squarely says that "related to" jurisdiction can exist even in
11 an adversary proceeding filed after plan confirmation. But
12 may affect distribution, but of course things that could
13 reduce or eliminate claims could certainly affect
14 distribution, particular creditors where the debtor agreed to
15 provisions that would allow for reductions in claims post
16 confirmation, where the creditor got paid from some other
17 source, which is at least conceivable here.

18 And frankly, of course, you know, in the very
19 uncertain world that we're all living in, you know, it's hard
20 for anybody to predict what's going to happen, when. And I am
21 particularly curious for Ambac to be taking this position
22 about timing, given that they've, you know, sat and opposed
23 things like the Plan Support Agreement, that the Plan is
24 unconfirmable.

25 So our first admission of "related to" jurisdiction

1 is just related to financial impacts on the estate, potential
2 elimination of hundreds of millions of dollars in claims.
3 Whether we win or lose, and whether the adversary proceedings
4 are resolved before or after a plan is confirmed, that, by
5 itself, is more than sufficient for "related to" jurisdiction.

6 There's also the restitution of the parties, as I
7 spoke about before. There's also the closely analogous cases
8 that we pointed to that say that where debtor is -- comity is
9 central, which it plainly is here, there's "related to"
10 jurisdiction. And then there's also the whole issue of
11 indemnification and contribution.

12 So it's curious to me that the plaintiffs are so
13 confident that subrogation, which normally if it was equitable
14 defenses, and for which there's no contractual right, is
15 totally automatic, and no one would ever question it. But the
16 indemnification claims Santander has, the common process
17 displayed, it's hopelessly contingent and could never be a
18 decision for "related to" jurisdiction, we don't think that's
19 right at all.

20 And we also have special contribution claims, and
21 we've cited the *SPV* case for the point that the absence of
22 timely filed proof of claim, which of course we couldn't have
23 filed, because they sued us after, after the bar dates had
24 run, and these are somehow deemed novel theories that I'm not
25 sure why we would have anticipated, and we think we fit well

1 within *SPV*.

2 So we think there's very, very substantial arguments
3 for "related to" jurisdiction here, and I think the Court
4 clearly has the power to hear this case.

5 Let me turn now to the arguments that the Court
6 should exercise its discretion to remand, notwithstanding
7 that it has jurisdiction here. And just a footnote, for a
8 moment, and I'll come back to this, and I mentioned it before
9 already, but obviously discretionary remand is only an issue
10 if the Court rejects our federal subject matter "arising
11 under" jurisdiction argument.

12 In other words, if we're right that this Complaint in
13 which almost every other word is a reference to the federal
14 securities laws, if we're right that this Complaint arises
15 under federal law, then discretionary remand is just off the
16 table. And I'll come back to that at the end, but let me turn
17 now to the discretionary remand question, assuming it's
18 available in this case.

19 It's the plaintiffs' burden here. We have the burden
20 to show "related to" jurisdiction, and I think we've more than
21 met that burden. But it's the plaintiffs' burden to show that
22 remand is appropriate. And the Supreme Court has made clear
23 that the ordinary obligation of a federal court to exercise
24 its jurisdiction when it's possibly been invoked is virtually
25 unflagging, and plaintiffs have not met that burden here.

1 This is a very substantial dispute between parties
2 who are absolutely central to the bankruptcy, the
3 underwriters, and the bonds that are at issue, and the
4 insurers of many of those bonds. This is not some
5 long-running -- a case that's been in the Puerto Rico courts
6 for years, like a couple of cases that Your Honor has had
7 remanded. We moved at the very outset.

8 And as I said, this case, you know, essentially turns
9 on questions of federal law. This is a Complaint with, you
10 know, 57 direct -- two Complaints of 57 direct references to
11 federal securities laws, 90 references to the duties created
12 by those laws, and the only misrepresentation that they
13 identify is the representation that we conducted the due
14 diligence in accordance with the federal securities laws.

15 So they tell you, oh, this is really basically a
16 dispute under Puerto Rico law, and I just don't think that's
17 consistent with the Complaint that they filed.

18 THE COURT: But there is no private right of action
19 under the cited rule, correct?

20 MR. NEIMAN: That's absolutely right, Your Honor.
21 But in order to prevail in this case -- make no mistake about
22 it, in order to prevail in this case, they have to show that
23 the representation they've identified in their Complaint is
24 false.

25 None of these doctrines allow them to complain

1 | because we said something that was true. These documents
2 | require them to show that we said something that was false.
3 | And the only thing that they identified in the Complaint that
4 | we said that was false is representation that we complied with
5 | the obligations of due diligence under the federal securities
6 | laws, which means they have to prove that we violated the
7 | federal securities laws.

8 | THE COURT: But in --

9 | MR. NEIMAN: Then the --

10 | THE COURT: They have to prove liability under the
11 | civil law doctrine has taken place that they invoked.

12 | MR. NEIMAN: Oh, that's right. It's not sufficient
13 | for them to prove that misrepresentation, but it's absolutely
14 | essential. And my point is just, Your Honor, that when
15 | thinking about the discretionary issue, and when thinking
16 | about whether state law issues predominate or federal law
17 | issues predominate, the central thing that they need to show
18 | in order to have any chance of prevailing is that we violated
19 | the federal securities laws. And I think that weighs heavily
20 | against discretionary remand.

21 | On the question -- let me just sort of walk Your
22 | Honor through kind of the traditional factors one by one that
23 | weigh in on discretionary remand, and articulate a view why we
24 | think they all favor Your Honor keeping this case.

25 | The first factor is the effect of the action on the

1 administration of the bankruptcy estate. We've already
2 detailed why this could have a profound effect, potentially
3 eliminating up to a billion dollars in claims, potentially
4 sidelining or reducing the role for the most litigious
5 claimants, potentially resulting in Ambac being precluded from
6 asserting its improper clawback, in a sense. All of that
7 weighs very heavily against remand.

8 National then -- in fact, Ambac offered what they
9 considered to be a solution to this. They said, oh, we'll
10 just wait, and we agree, we won't try to collect any -- we'll
11 stay any judgment that we might obtain until after a plan is
12 confirmed.

13 I just want Your Honor to pause for a second and
14 think about what they're suggesting, because that is a
15 suggestion that is probably not in the interest of the
16 creditors, and this Court should not agree to it. If National
17 can collect against us and reduce the amount the debtor has to
18 pay to them, that's a good thing for other creditors, and it
19 could potentially free up as much as 720 million dollars. But
20 instead of having to go to pay National, it could go to pay
21 other creditors.

22 I don't know why in the world they think this Court
23 would want to make that money unavailable to other creditors
24 by agreeing to some kind of collusive arrangement in which
25 National doesn't try to collect on the debt that they would

1 | try to establish until after a plan is confirmed. That makes
2 | no sense at all.

3 | This case is going to have a big effect on the
4 | administration of the bankruptcy estate. That weighs
5 | substantially against remand. That which -- and I believe
6 | they talked about this a bit. I do just want to remind the
7 | Court that it's their burden to establish discretionary remand
8 | when appropriate, which means it's their burden, when they
9 | say, oh, this is all about Puerto Rico law, to show that
10 | Puerto Rico law even applies to this controversy. Let me give
11 | you an analogy that suggests that it's a pretty good reason to
12 | think it doesn't given who the parties are.

13 | There's a non-Puerto Rico plaintiff suing non-Puerto
14 | Rico defendants. All the parties are located outside of
15 | Puerto Rico here. And the analogy that I thought of, the
16 | basic claim is that we made some misrepresentation to them
17 | that induced them to do something. And, you know, we see
18 | claims like that all the time in the securities world where
19 | somebody claims, look, you lied to me about the quality of
20 | some stock and I bought it. That's analogous to the claim
21 | that they're making here.

22 | And that's the claim -- we don't stop and say, wait,
23 | what's the -- that the stock that was at issue in this
24 | misrepresentation case, you know, where are they located? So
25 | if I misrepresented to Mr. Selendy the quality of Microsoft

1 and he wanted to sue me, he wouldn't say, well, Microsoft is
2 in Seattle; we have to proceed to Washington. You'd think
3 where was I when you made the representation? Where was
4 Mr. Selendy when he heard it? Where was the loss suffered?
5 None of this has to do with happenstance of where the issue
6 is. And the same is true here.

7 THE COURT: That's an argument that you'll have to
8 make in relation to Puerto Rico choice of law principles,
9 since whether it's in the Commonwealth court or in the Title
10 III court, this litigation is being brought in Puerto Rico,
11 correct?

12 MR. NEIMAN: That's correct, Your Honor. But Puerto
13 Rico follows sort of the balance of interests test, and in a
14 case in which the plaintiffs are not from Puerto Rico and
15 defendants are all headquartered outside of Puerto Rico, where
16 the representations that were made in Puerto Rico with
17 regard -- I mean were made outside of Puerto Rico, where the
18 bonds were sold almost entirely outside of Puerto Rico, we
19 think, under Puerto Rico choice of law rules, Puerto Rico law
20 does not apply here.

21 The next factor -- and again, Your Honor, I think the
22 central point here is they're the ones that are trying to
23 convince you that state law predominates, and more
24 specifically, that Puerto Rico law predominates, because if
25 New York law controls here, that does not support a remand to

1 a Puerto Rico court.

2 It's their burden to convince you that Puerto Rico
3 law predominates, and there are very serious reasons to think
4 that Puerto Rico law doesn't apply here. Assuming for a
5 second, for the purposes of the next point, the physical
6 reasons for asserting state law -- assuming for the moment
7 that Puerto Rico law does apply and they have this claim that
8 is so difficult, we've cited a large number of cases where
9 federal courts have applied the Puerto Rico law. In none of
10 them did the courts say it was too difficult for them to
11 understand.

12 The case they cited from the Puerto Rico Supreme
13 Court about confusion in the doctrine was criticizing lower
14 Puerto Rico courts for their confusion. It wasn't
15 predominantly a case about confusion by federal courts.

16 And thankfully, the central issue is that if we ever
17 get to Puerto Rico law, Puerto Rico law will only come into
18 play if they can establish a misrepresentation. That is, that
19 we didn't comply with federal law when we said that we did.
20 But there are some very obvious defenses under Puerto Rico law
21 that are not going to expire in several enumerations of this
22 doctrine.

23 The Puerto Rico Supreme Court has said that, for
24 example, the "unilateral declaration of will" doctrine
25 requires showing an unmistakable intention to be bound. And

1 | it couldn't be more unmistakable that there was no such
2 | intention, because the offering documents themselves say we
3 | don't guarantee the accuracy of these statements. So I think
4 | the prospect that this is going to turn on niceties of Puerto
5 | Rico law is quite remote.

6 | Secondly, I don't think there's any comity interest
7 | here, which is the next factor highly related to the fact that
8 | the actions are, as we just said --

9 | (Sound played.)

10 | MR. NEIMAN: There's no right to a jury trial here,
11 | so that factor weighs against remand.

12 | And the next factor -- this case is sort of like
13 | *Vitol*, where Your Honor thought remand was appropriate because
14 | a lot of things were alleged, involving removal over a forum
15 | selection clause, and court documents that were pending for
16 | years prior to the removal to the Title III court, and state
17 | law, unlike the claims here, did not turn on the question of
18 | whether defendants' conduct complied with federal law. So all
19 | the traditional elements, we think, weigh against
20 | discretionary remand.

21 | Just a couple of other factual points that I want to
22 | note, and then I'll get quickly to "arising under"
23 | jurisdiction --

24 | THE COURT: You are under two minutes now, so make
25 | your choices.

1 MR. NEIMAN: I'm sorry, Your Honor. How much time do
2 I have left?

3 THE COURT: Less than two minutes. You had one
4 beep.

5 MR. NEIMAN: Oh, Your Honor, I'm sorry. I thought I
6 heard that earlier.

7 Okay. Very quick here. I think, as a practical
8 matter, it makes much more sense for Your Honor to be managing
9 this case. The discovery is going to be largely directed
10 against the debtor, because they did allege there were false
11 statements in the offer documents, statements alleged to come
12 from the debtor.

13 It makes much more sense for Your Honor to be in a
14 position to sequence the legal issues in this case so that it
15 can be resolved on a schedule that makes sense with the
16 bankruptcy. We are committed to working with the Court to do
17 that as quickly as possible. And I think you also want to
18 avoid the prospect of inconsistent judgments if this case is
19 remanded.

20 And if we prevail in state court on the claim that
21 clawback was lawful, that would be binding on Ambac. It might
22 be different than the conclusion Your Honor would reach. Or,
23 vice versa, we might lose. You might find clawback is lawful
24 and state court might find it's unlawful. It doesn't make any
25 sense to create a possibility of inconsistent judgments.

1 Then we turn, finally, Your Honor, to "arising under"
2 jurisdiction. I think everybody agrees that the *Gunn* and
3 *Grable* tests apply here. I don't think there is any
4 reasonable dispute that there are federal issues in this case,
5 given how the Complaint is written, and the only
6 misrepresentation that they've identified --

7 (Sound played.)

8 THE COURT: You can complete this thought.

9 MR. NEIMAN: Yeah. Thank you, Your Honor.

10 And I would just say that we think that not only are
11 they present and necessary, but they're quite substantial
12 decisions about whether, as the plaintiffs have alleged, due
13 diligence somehow requires looking back at all prior offering
14 documents and confirming their accuracy each time you
15 underwrite an offering, or whether we have to follow up and
16 monitor whether the issue was identified differently than in
17 the offering documents.

18 Those are claims and duties under the federal
19 securities laws that we think don't exist here. They're
20 actually presented in this case, and would be quite
21 disruptive, even more to the market of municipal bonds, if the
22 state court were then to determine that there were such
23 obligations.

24 And so, overall, we think there is "arising under"
25 jurisdiction here, there is "related to" jurisdiction here,

1 and discretionary remand would not be appropriate under the
2 settled law governing discretionary remand.

3 Thank you so much for your attention, Your Honor.
4 It's so good to be in front of you again.

5 THE COURT: Thank you, Mr. Neiman.

6 And now we have Ms. Beville for the Special Claims
7 Committee and the Oversight Board for four minutes.

8 Ms. Ng, would you make sure that Ms. Beville is
9 unmuted on your end?

10 MS. NG: Yes, I will, Judge.

11 THE COURT: Thank you.

12 Ms. Beville?

13 Ms. Ng, is Ms. Beville on the dashboard?

14 MS. NG: Judge, I don't see her on.

15 THE COURT: If there is anyone else who is intending
16 to make this argument for the Special Claims Committee, would
17 you do the little hand wave thing on the dashboard?

18 And Ms. Ng, would you tell me if you see anyone
19 waving their hand on the dashboard?

20 MS. NG: Will do.

21 Nobody's waving their hand.

22 THE COURT: All right. Then we will go on to the
23 rebuttal arguments. And I have Mr. Selendy first for three
24 minutes.

25 Would you unmute, Mr. Selendy?

1 MR. SELENDY: Yes. Thank you. Can you hear me, Your
2 Honor?

3 THE COURT: Yes, I can. Thank you.

4 MR. SELENDY: Okay. Thank you.

5 Let me begin by saying that the idea that a stay of
6 execution is collusion is ridiculous. This Court approved
7 exactly that in *Vitol* and in *ASP*. And as to magnitude, the
8 *Vitol* case involved 3.9 billion dollars at issue for the
9 debtor.

10 I'll note that the banks remain still uncertain about
11 the applicable law, including the choice of law. That favors
12 remand, as this Court held in *Sealink*.

13 In addition, Mr. Neiman said there is no case that
14 addresses the question of equitable defenses as to Puerto
15 Rico's statutory subrogation statute. That's incorrect. It's
16 -- *Eastern Sands* from the Supreme Court of Puerto Rico, which
17 said unequivocally that subrogation is automatic. And this
18 is, frankly, part of the bank's pattern of disregard for
19 Puerto Rico law.

20 As to the substitution of creditors, we cited both
21 *Santa Clara* and the DPR case of *In re C&A*. Mr. Neiman in
22 response did not raise any First Circuit case and instead
23 invoked out of the circuit law, *SPV* and *Worldcom*.

24 Your Honor asked the question about the absence of a
25 private right of action. That unequivocally favors remand as

1 held in the case of *Mays v. Flint*. There is no question that
2 the insurers here cannot assert claims under the federal
3 securities laws, and there is no private right of action under
4 15c2-12.

5 As to context, the Complaint does allege problems in
6 the deals and the background rules in the federal securities
7 laws, but that sets the basis for our review of underwriter
8 due diligence. The question on the Complaints is simply
9 whether the banks violated their assurances of due diligence
10 as gate keepers to the market under the Puerto Rico equitable
11 doctrines. For example, the National Complaint, paragraphs
12 248, 7 to 19, 93 to 94.

13 I'll note that Mr. Neiman failed to address the First
14 Circuit case of *Municipality of Mayaguez*, which is directly on
15 point on this issue, as well as the Supreme Court case of
16 *Merrill Lynch v. Manning*.

17 It doesn't matter if defendant's conduct violates
18 federal law as well as Puerto Rico law. The question is not
19 about commonality of fact, as *Pacor* and *In re VideOcart* may
20 claim, but whether there is a conceivable impact. And as we
21 demonstrated earlier, both through automatic subrogation and
22 because of the contingency and conditionality of the bank's
23 indemnification and contribution claims, there is no such
24 impact.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. SELENDY: If you have any further questions, I'll
3 be glad to address them.

4 THE COURT: Thank you. I do not.

5 MR. SELENDY: Thank you.

6 THE COURT: And now Mr. Pickhardt, who has reserved
7 two minutes.

8 MR. PICKHARDT: Your Honor, John Pickhardt on behalf
9 of Ambac. Are you able to hear me?

10 THE COURT: Yes, I can. Thank you.

11 MR. PICKHARDT: Your Honor, I will also be very
12 brief.

13 The Underwriters' briefs in support of remand of
14 National's case and its impact to Puerto Rico focus almost
15 entirely on the fact that the debtors were issuers. In my
16 arguments pointing out that, for Ambac's case, the issuers are
17 not debtors, Mr. Neiman was focused primarily on suggesting
18 that, nonetheless, debtor's conduct is at issue, because the
19 Commonwealth clawback of funds would somehow be prevented from
20 adjudication in these proceedings. That is
21 simply inaccurate.

22 The claims that are being asserted by Ambac, like
23 National's, concern statements that were made by the
24 underwriter at the time of the bond issuances and concerning
25 the due diligence that they conducted; and it will be those

1 | statements and the basis for those statements that will be
2 | adjudicated, not for propriety of the clawback that occurred a
3 | decade or more later.

4 | And so while Ambac has taken issue with the propriety
5 | of the clawback, that is not something that is present for
6 | adjudication in this case. And we think, Your Honor, that
7 | that is, frankly, one of the reasons that the Oversight Board
8 | has agreed with Ambac that this is not a case that concerns or
9 | implicates any conduct or obligations of the debtors. And
10 | Mr. Neiman's arguments do not, you know, convincingly suggest
11 | otherwise.

12 | I have nothing further, Your Honor, unless you have
13 | any questions.

14 | THE COURT: No, I don't. Thank you.

15 | I have just received a message that Tristan Axelrod
16 | from the SCC is raising his hand. And I believe he's
17 | Ms. Beville's colleague.

18 | And so, Ms. Ng, can you unmute Mr. Axelrod?

19 | And, Mr. Axelrod, I apologize for having skipped you
20 | over.

21 | MS. NG: Judge, I --

22 | MR. AXELROD: Thank you, Judge Swain. Are you able
23 | to hear me now?

24 | THE COURT: Yes, I am. Sorry about that.

25 | MR. AXELROD: Thank you. I was disconnected earlier

1 the moment I was called, and I apologize for the delay.

2 May it please the Court. These are motions to remand
3 litigation concerning bond issuances and the conduct of
4 financial professionals and government officials in connection
5 with those issuances. Specifically, the Ambac litigation
6 concerns PRIFA bonds issued in 2005 and PRCCDA bonds issued in
7 2006. The National litigation concerns PREPA, HTA and COFINA
8 bonds issued between 2001 and 2007.

9 The Special Claims Committee, the SCC, has a mandate
10 to preserve and prosecute litigation claims belonging to the
11 Title III debtors. Pursuant to that mandate, we have
12 initiated a variety of litigation, including litigation
13 alleging misconduct by financial professionals in connection
14 with bond issuances. And specifically, that can be found at
15 Adversary Proceeding 19-280, among others.

16 Due to the possibility of confusion between
17 litigation brought by the SCC and Ambac and the facts inherent
18 to that litigation, the SCC filed an informative motion
19 regarding the Ambac remand motion. To repeat the substance of
20 that informative motion, the SCC has not commenced any
21 litigation relating to PRIFA and PRCCDA bonds that are the
22 subject of Ambac's litigation. The SCC is unaware of any
23 facts at issue in Ambac's litigation that would be common to
24 any litigation brought by the SCC.

25 Certain parties have since inquired to the SCC

1 regarding the National litigation. Although the SCC filed no
2 formal statement regarding the National remand motion, the
3 same is true regarding that litigation. The SCC has not
4 commenced litigation relating to the PREPA, HTA and COFINA
5 bonds subject to National's litigation and is unaware of any
6 facts at issue therein that would be common to any litigation
7 brought by the SCC.

8 To be very clear, the SCC has not commenced
9 litigation relating to the bonds at issue in either the Ambac
10 or National Complaints, or any bond issuance or other
11 transaction from the same time period. Certain parties have
12 approached the Oversight Board regarding the potential effects
13 of the Ambac and National litigation on the Title III
14 proceedings, and the Court has heard a fair amount on that
15 subject today. And the SCC has reviewed those arguments and
16 the underlying facts.

17 The Oversight Board takes no position regarding the
18 propriety of an exercise of "related to" jurisdiction in this
19 instance, and likewise has no legal position as to the
20 applicability of "arising under" jurisdiction. More
21 specifically, from the perspective of the Oversight Board, the
22 outcome of the Ambac and National litigation is not material
23 to any amounts paid by the debtors through and after the Title
24 III proceedings as treatment of allowed claims. It is
25 certainly possible that the Ambac and National litigation

1 | could impact the reconciliation and distribution on claims in
2 | the Title III cases, but those claims are not ripe for
3 | presentation and reconciliation at this time. And the
4 | Oversight Board declines at this time to devote resources to
5 | projecting the outcome of this litigation and its attendant
6 | effect on Title III proceedings and distributions.

7 | Again, we acknowledge it is possible that the outcome
8 | of this litigation could impact claims reconciliation and
9 | payments, and we take no position as to whether such impact
10 | justifies an exercise of this Court's jurisdiction.

11 | If Your Honor has no further questions, I'll
12 | conclude.

13 | THE COURT: Thank you. I have no further questions.
14 | Thank you, Mr. Axelrod.

15 | MR. AXELROD: Thank you.

16 | THE COURT: And since Mr. Axelrod did end up speaking
17 | out of turn because of the technological issues, does
18 | Mr. Selendy or Mr. Pickhardt wish to say anything further by
19 | way of rebuttal?

20 | First, Mr. Selendy?

21 | Ms. Ng, make sure he's unmuted, please.

22 | MR. SELENDY: I am here, Your Honor. Nothing
23 | further. Thank you.

24 | THE COURT: Thank you.

25 | Mr. Pickhardt?

1 MR. PICKHARDT: Your Honor, nothing further from me
2 either. Thank you.

3 THE COURT: Thank you so much.

4 I have reviewed carefully the submissions and
5 listened carefully to everything that has been said here this
6 morning. I will now make an oral ruling in respect of these
7 motions.

8 Before the Court are *Plaintiffs' Motion for Remand*
9 *and Memorandum in Support Thereof*, Docket Entry No. 31, in
10 Adversary Proceeding No. 19-422 -- I'll refer to that as the
11 "National Motion" -- and *Plaintiff's Motion for Remand and*
12 *Memorandum in Support*, which is at Docket Entry No. 22 in
13 Adversary Proceeding No. 20-47, which I'll refer to as the
14 "Ambac Motion". And I will refer to the two motions together
15 as the "Motions".

16 The Motions were filed by the Plaintiffs in the
17 adversary proceedings, whom I will refer to as National and
18 Ambac, respectively. Each of the Motions requests entry of an
19 order remanding the Adversary Proceeding to the Commonwealth
20 Court of First Instance. The Motions are opposed by the
21 Defendants in the adversary proceedings, each of which is an
22 underwriter that was involved in certain issuances of bonds by
23 the Commonwealth of Puerto Rico and certain Commonwealth
24 instrumentalities.

25 The Court has considered carefully the parties'

1 | submissions and the arguments made on the record today. The
2 | Court now makes its oral ruling as to the motions, and
3 | reserves the right to make non-substantive corrections in the
4 | transcript of this ruling. The Motions are granted for the
5 | following reasons.

6 | The Court will begin by addressing whether it has
7 | subject matter jurisdiction of the adversary proceedings.

8 | As a threshold matter, the Motions contend that the
9 | Court lacks federal question jurisdiction of the adversary
10 | proceedings. The Court agrees.

11 | Federal district courts are authorized by statute to
12 | exercise jurisdiction over "all civil actions arising under
13 | the Constitution, laws, or treaties of the United States." 28
14 | U.S.C. Section 1331. There are two means by which a case can
15 | "arise under" federal law. See *Gunn v. Minton*, 568 U.S. 251,
16 | 257, (2013) decision.

17 | First, most directly and most commonly, federal
18 | question jurisdiction can be 'invoked by plaintiffs pleading a
19 | cause of action created by federal law.' ... *Municipality of*
20 | *Mayaguez v. Corporacion Para el Desarrollo del Oeste, Inc.*,
21 | 726 F.3d 8, 13 (1st Cir. 2013) (quoting *Grable & Sons Metal*
22 | *Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312
23 | (2005)).

24 | Second, federal question jurisdiction can arise in a
25 | "'special and small category' of cases" in which a plaintiff

1 pleads a state law cause of action that "involves important
2 federal issues." I again cite *Mayaguez*, 726 F.3d at 13, at
3 this point quoting *Empire Healthchoice Assurance, Inc., v.*
4 *McVeigh*, 547 U.S. 677, 699 (2006).

5 In the latter situation, however, "the mere presence
6 of a federal issue in a state cause of action does not
7 automatically confer federal-question jurisdiction." *Nashoba*
8 *Commc'ns Ltd. P'ship No. 7 v. Town of Danvers*, 893 F.2d 435,
9 438 (1st Cir. 1990) (quoting *Merrell Dow Pharm. Inc. v.*
10 *Thompson*, 478 U.S. 804, 813 (1986)). Rather, to assess
11 whether subject matter jurisdiction exists with respect to a
12 state law claim that raises a federal issue, courts assess
13 whether the state-law claim "necessarily raise[s] a stated
14 federal issue, actually disputed and substantial, which a
15 federal forum may entertain without disturbing any
16 congressionally approved balance of federal and state judicial
17 responsibilities." *Grable*, 545 U.S. at 314.

18 The Complaints do not plead federal causes of action.
19 Further, the Court concludes that the *Grable* "substantial
20 federal question" basis for jurisdiction is not present
21 because any federal issues that may be litigated in connection
22 with the adversary proceedings are neither necessarily raised
23 by the Complaint such that the Court would be required to
24 address them in order to resolve the issues that are raised in
25 the Complaints, nor substantial such that they are of

1 importance to the federal system as a whole.

2 At their core, the Complaints allege that the
3 insurance applications submitted to Plaintiffs contained
4 misleading information, misrepresentations, and omissions.
5 Plaintiffs allege that they were thereby induced by Defendants
6 to provide insurance for certain bond issuances. While the
7 Complaints reference due diligence obligations arising under
8 federal law, the alleged breaches for which Plaintiffs seek
9 damages are not breaches of federal law-imposed obligations.
10 Rather, the Complaints seek damages pursuant to Commonwealth
11 law on account of Plaintiffs' alleged detrimental reliance on
12 the bundle of information submitted in connection with the
13 insurance applications.

14 The potential presence of federal law affirmative
15 defenses such as the statute of repose under the
16 Sarbanes-Oxley Act is not a proper basis for exercising
17 federal jurisdiction. *See Greenwich Fin. Servs. Distressed*
18 *Mortg. v. Countrywide Fin. Corp.*, 654 F. Supp. 2d, 192, 203
19 (S.D.N.Y. 2009).

20 It is certainly likely that the parties will look to
21 the requirements of federal law, including SEC Rule 15c2-12
22 (including case law or other persuasive interpretations of
23 those requirements) to support their arguments that
24 Defendants' conduct was or was not within the range of
25 diligence that might reasonably have been expected in light of

1 | any representations that they made to Plaintiffs. But those
2 | arguments are not "necessarily raised" by the Complaint, which
3 | grounds its request for relief in substantive doctrines of
4 | Commonwealth law.

5 | While the obligations purportedly imposed by those
6 | doctrines may overlap with those imposed by federal law, the
7 | mere overlap of issues between state law causes of action and
8 | federal causes of action is not sufficient to support federal
9 | jurisdiction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v.*
10 | *Manning*, 136 S. Ct. 1562, 1574 (2016) in which the Court noted
11 | that, notwithstanding the federal courts' exclusive
12 | jurisdiction over all suits "brought to enforce any liability
13 | or duty created by" the Securities Exchange Act, "Congress
14 | specifically affirmed the capacity of [state] courts to hear
15 | state-law securities actions, which predictably raise issues
16 | coinciding, overlapping, or intersecting with those under the
17 | [Exchange] Act itself."

18 | Nor do the Complaints present substantial federal
19 | issues. The substantiality inquiry "demands that a federal
20 | question must be not only important to the parties, but
21 | important to the federal system." *Municipality of Mayaguez*,
22 | 726 F.3d at 14. The First Circuit has described two
23 | situations that can meet the substantiality requirement:

24 | First, an issue may be substantial where the
25 | outcome of the claim could turn on a new

1 interpretation of a federal statute or regulation
2 which will govern a large number of cases. In other
3 words, a case is more likely to be important to the
4 federal system as a whole if it presents "a nearly
5 'pure issue of law ... that could be settled once
6 and for all'" rather than an issue that is
7 "fact-bound and situation-specific" and whose
8 holding will more likely be limited to the facts of
9 the case.

10 ...

11 Second, a federal issue may also be substantial
12 where the resolution of the issue has "broader
13 significance ... for the Federal Government."

14 *Id.* (citations omitted) As explained earlier, the Complaints
15 do not seek to enforce Rule 15c2-12, and the parties are in
16 agreement that the Plaintiffs lack a private right of action
17 through which they could enforce Rule 15c2-12, so the
18 Complaints do not raise an issue of whether private Plaintiffs
19 may enforce that rule. Moreover, even if Defendants are
20 correct that the Complaints effectively challenge their
21 conduct as being inconsistent with federal law, the question
22 of whether Defendants operated in a manner consistent with
23 their due diligence obligations with respect to certain
24 issuances of bonds is fact intensive and lacks broader
25 significance for the federal government, and thus lacks

1 substantiality.

2 The Court now turns to whether the adversary
3 proceedings are "related to" the Title III cases.

4 Section 306(a)(2) of PROMESA confers on district
5 courts "original but not exclusive jurisdiction of all civil
6 proceedings arising under [PROMESA], or arising in or related
7 to cases under [PROMESA]." 48 U.S.C. Section 2166(a)(2). The
8 jurisdictional language of Section 306(a)(2) is analogous to
9 that of the bankruptcy jurisdiction statute, 28 U.S.C. Section
10 1334(b).

11 The First Circuit has recognized the well-established
12 *Pacor* standard for determining whether a proceeding is
13 "related to" a bankruptcy case. *In re Santa Clara County*
14 *Child Care Consortium*, 223 B.R. 40, 45 (B.A.P. 1st Cir. 1998)
15 (citations omitted).

16 That standard holds that "related to" jurisdiction
17 exists when "the outcome of [the] proceeding could conceivably
18 have any effect on the estate being administered in
19 bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d
20 Cir. 1984) (internal citations omitted).

21 Although the proceeding "need not necessarily be
22 against the debtor or against the debtor's property," its
23 "outcome" must be one that "could alter the debtor's rights,
24 liabilities, options or freedom of action (either positively
25 or negatively)" and in some way "impact[] ... the handling and

1 administration of the bankruptcy estate." *Id.*

2 Although the parties to the adversary proceedings are
3 not Title III Debtors, the outcome of the adversary
4 proceedings could conceivably affect the Title III cases.
5 Plaintiffs have asserted claims against the Title III Debtors,
6 and any recovery in the adversary proceedings will reduce the
7 amount of the claims that Plaintiffs may assert against the
8 Title III Debtors. While Plaintiffs argue that Defendants
9 would be subrogated to their claims by operation of
10 Commonwealth law, resulting in a mere substitution of
11 creditors rather than a net change in the Debtors'
12 liabilities, Defendants have noted potential counterarguments
13 and defenses that the Title III Debtors would likely raise in
14 that scenario. Thus, it is conceivable that the adversary
15 proceedings would change not only the identity of the
16 creditors, but would affect the Title III debtors' "rights,
17 liabilities [or] options" by providing them with new defenses
18 to claims prosecuted by Defendants and with potential net
19 reductions in the total amount of claims.

20 Accordingly, the adversary proceedings are
21 distinguishable from the situation before the Court in *Santa*
22 *Clara*, where there was no apparent question that the
23 declaratory judgment action would, if successful, simply swap
24 one creditor for another, with no change in overall
25 liabilities. Thus, the Court concludes that it has "related

1 to" jurisdiction of the adversary proceedings pursuant to 48
2 U.S.C. Section 2166(a). Such jurisdiction is not, however,
3 exclusive. Accordingly, the Court turns to the Movants'
4 requests for equitable remand.

5 Although the Court has the authority to exercise
6 jurisdiction of the adversary proceedings, it will, in the
7 exercise of its discretion, grant Plaintiffs' request to
8 equitably remand the adversary proceedings.

9 Section 306(d) of PROMESA permits the Court to remand
10 adversary proceedings "on any equitable ground." 48 U.S.C.
11 Section 2166(d) (2). Under the similar statutory provision
12 that applies to bankruptcy cases, courts in the First Circuit
13 look to the following non-exclusive list of factors in
14 determining whether equitable remand of a bankruptcy-related
15 claim or cause of action is appropriate:

16 (1) the effect of the action on the
17 administration of the bankruptcy estate; (2) the
18 extent to which issues of state law predominate;
19 (3) the difficulty of applicable state law; (4)
20 comity; (5) the relatedness or remoteness of the
21 action to the bankruptcy case; (6) the existence of
22 the right to a jury trial; and (7) prejudice to
23 the involuntarily removed party.

24 *Santa Clara*, 223 B.R. at 46. The most relevant factors here
25 strongly support remand of the adversary proceedings.

1 Factors one and five support remand. The adversary
2 proceedings are disputes among non-debtors. Although the
3 outcome of the adversary proceedings may change the mix of
4 creditors and may affect the amount of the Title III Debtors'
5 liabilities, those considerations would, at most, only affect
6 creditors' recoveries to some degree. There is no indication
7 that the outcomes of the adversary proceedings will materially
8 help, hinder, or otherwise affect the actual administration of
9 the Title III cases and the restructuring process. At the
10 same time, there is a significant breadth, depth, and urgency
11 of adversary proceedings and contested matters already pending
12 in connection with these Title III cases, and retention of the
13 instant adversary proceedings would entail further burdening
14 of this Court's limited resources and the risk of trade offs
15 with the efficient resolution of core Title III matters.

16 With respect to the second, third, and fourth
17 factors, state law issues are significant and may require
18 reference to bodies of law that are unique to the
19 Commonwealth. Merely determining the applicable substantive
20 law will require reference to Commonwealth choice of law
21 principles. And, to the extent that Commonwealth substantive
22 law applies, the underlying claims are not common law causes
23 of action that exist in most states. The Court believes that
24 the expertise of the Commonwealth Courts in applying
25 Commonwealth law will aid in the efficient and just resolution

1 of the adversary proceedings. Thus, these factors support
2 remand.

3 Accordingly, the Court will enter an order granting
4 the Motions for the reasons stated on the record today.

5 That concludes the formal portion of the Agenda. I
6 am a bit concerned that, because of our technical set up, I
7 may have missed anyone who wanted to make some comments on the
8 reports of AAFAF and the Oversight Board.

9 Ms. Ng, is it possible for you to unmute the people
10 with speaking lines or, very carefully, for hands' raised, or
11 both, so I can make sure that I didn't skip over anyone?

12 MS. NG: Okay. I don't see any hands raised so far.
13 And people are able to unmute and mute themselves, so I guess
14 if anybody wants to talk, they can unmute themselves.

15 THE COURT: Okay. So you don't have any muting on
16 them that would block them from unmuting themselves?

17 MS. NG: No. No.

18 THE COURT: All right. I will wait 20 seconds, and
19 if I hear a voice, I will call on that person.

20 All right. That was 20 seconds. Thank you all for
21 helping me make sure that I hadn't denied anyone the
22 opportunity to speak who was looking to speak.

23 There are a number of matters that are adjourned to
24 future Omnis. Those are all listed on the Agenda filed at
25 13847 in the 17-3282 case.

1 And so this concludes the hearing Agenda for the July
2 Omnibus Hearing. The next scheduled hearing date is the
3 September Omnibus Hearing scheduled for September 16th to
4 17th, 2020. I expect that hearing to occur telephonically as
5 well. And the Court will issue a procedures order providing
6 appropriate logistical details closer to the date of that
7 hearing.

8 Additionally, I would like to remind everyone that
9 the operative Case Management Order (Docket Entry No. 13512-2)
10 does not require the parties to serve paper courtesy copies of
11 the pleadings on the Court. (See also Docket Entry No. 3730,
12 ¶3). So please refrain from sending paper courtesy copies
13 until further notice in light of the limited physical presence
14 of staff at the courthouses currently. And thank you for
15 cooperating with that request and being mindful of the
16 provisions of the Orders.

17 As always, I would like to thank the court staff in
18 Puerto Rico, Boston, and New York for their work in preparing
19 for and conducting today's hearing, and their superb ongoing
20 support of these very complex cases under very challenging
21 circumstances.

22 Stay safe and keep well, everyone. And we
23 particularly wish all who are on the island safety in the
24 coming tropical storm. Take care. We are adjourned.
25 Good-bye.

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(At 11:30 AM, proceedings concluded.)

* * *

1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 76 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 July 29, 2020.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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