Objection Deadline: November 8, 2019 at 4:00 PM (AST)
Hearing Date: January 29, 2020 at 9:30 AM (AST)
Oral Argument Requested

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	PROMESA Title III
as representative of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO,	
Debtor.[1]	

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747); (v) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19 BK 1928-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION and MBIA INSURANCE CORPORATION, Plaintiffs, -v- UBS FINANCIAL SERVICES INC.; UBS SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; GOLDMAN SACHS & CO. LLC; J.P. MORGAN SECURITIES LLC; MORGAN STANLEY & CO. LLC; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; RBC CAPITAL MARKETS LLC; and SANTANDER SECURITIES LLC, Defendants.	Adv. Proc. No. 19-422-LTS

PLAINTIFFS' MOTION FOR REMAND AND MEMORANDUM IN SUPPORT THEREOF

October 9, 2019

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PRELIMINARY STATEMENT

Plaintiffs (collectively, "National") assert claims against non-debtor underwriters ("Defendants") based on equitable doctrines—doctrina de actos propios and unilateral declaration of will—uniquely grounded in Section 7 of the Puerto Rico Civil Code. These claims, which have no ready analogue at common law, seek to hold Defendants accountable for false assurances concerning their due diligence and related gatekeeper responsibilities in the municipal bond market. They belong in Puerto Rico court and should be remanded. There is no "related to" jurisdiction here: National asserts no claim of misconduct by the Commonwealth or any debtor in the Title III proceedings; any recovery by National will not reduce the debtors' liabilities due to subrogation; and Defendants' purported indemnification and contribution claims against the debtors are untimely, speculative, conditional, and remote. Even if this Court did have jurisdiction, the overwhelming authority supports equitable remand or permissive abstention in favor of adjudication in the Commonwealth court. Finally, National's claims do not fall within the "special and small" category of state law claims deemed to "arise under" federal law for jurisdictional purposes.

Though the underwriters want to defeat National's choice of forum and avoid the scrutiny of a Commonwealth court, Defendants had no difficulty promoting the issuance of tens of billions of dollars of bonds under express assurances—made in Puerto Rico and governed by Puerto Rico law, custom, and usage—that they would investigate the bonds' Official Statements and form a reasonable basis to believe the Official Statements were true and complete. In fact, as a recent investigation revealed, the underwriters wholly failed to do so, and much of the information in the offerings turned out to be untrue or incomplete. National relied on Defendants' false assurances to issue over $11.5 billion in irrevocable insurance, which protected innocent bondholders but subjected National to severe losses once the bonds defaulted.

Defendants' removal of National's claims to this Court is without merit.

First, National's claims are not "related to" the Title III proceedings. Governing precedent requires a state or local claim to impact administration of a bankruptcy estate for "related to" jurisdiction. Even in the unlikely event this case were to proceed quickly enough for National to recover on its local claims before approval of the confirmation plan, Defendants would then be subrogated to National's Title III claims against the debtors, and such substitution of parties cannot create "related to" jurisdiction. *See* Point I.A. While Defendants assert they might bring indemnification and contribution claims, that is not sufficient to establish "related to" jurisdiction either. In this Circuit, bankruptcy courts lack "related to" jurisdiction over claims between non-debtors based on the potential future assertion of contingent indemnification or contribution claims; only one Defendant timely filed a relevant proof of claim; and no Defendant can show an unconditional indemnification or contribution claim. Point I.B. Defendants' contention that National's local claims are necessarily intertwined with its Title III claims rests on unfounded speculation that National would sue the issuers but for the automatic bankruptcy stay. The Complaint—not Defendants' bid to reframe National's allegations—governs the jurisdictional inquiry, and the Complaint on its face asserts claims of inequitable conduct solely against the non-debtors. Point I.C.

Second, even if National's claims were tangentially "related to" the Title III proceedings, this Court should equitably remand or permissively abstain. This is not a close call:

- National's equitable claims arise under evolving doctrines only recently recognized by the Puerto Rico Supreme Court. Commonwealth courts have a strong interest in resolving the scope of these equitable claims, which turn in part on considerations of public good. Further,

the civil law origins of the doctrines; the fact that the code, caselaw, treatises, and other relevant materials will be in Spanish; and Plaintiffs' choice of forum all point to remand. Point II.A.

- National's non-core claims under Puerto Rico equitable doctrines have virtually no connection to the Title III proceedings: They do not require interpretations of PROMESA, do not involve the debtors, and do not impact administration of the debtors' estates. Consistent with prior orders of this Court, National will ensure the absence of any impact by consenting to a stay of final judgment on its local claims until the Title III proceedings end. Point II.B.
- No factor weighs in favor of this Court retaining the case—Defendants are plainly forum-shopping. Retaining this complex case will delay the bankruptcy proceedings, strain this Court's already-limited resources, and prejudice National. Point II.C.

Finally, this case does not "arise under" federal law. National brings claims based on Puerto Rico law, not federal law. Defendants seek to invoke the very narrow exception for non-federal cases where federal issues are necessarily raised, actually disputed, substantial, and capable of resolution in federal court without upsetting the federal-local balance. That exception does not apply here. National's local claims do not require a showing that Defendants violated federal law; rather, National can establish that the underwriters breached Commonwealth principles of good faith and proper conduct under settled industry custom and usage. Point III.A. Even if there were a disputed federal issue, it would not be "substantial" for purposes of federal jurisdiction, as National does not challenge the validity of a federal rule or statute, and no federal actor is involved. Rather, National brings highly fact-based claims limited to the specific parties and bonds at issue. Point III.B. Last, exercising jurisdiction over National's claims would upset the federal-local

balance. While Puerto Rico has a strong interest in adjudicating claims under its equitable doctrines, federal securities law gives National no private right of action, and Congress has not preempted Puerto Rico law here. Out of concern for comity between federal and local governments, Congress created a scheme that lightly regulates municipal issuances, allowing Puerto Rico to develop equitable doctrines that supplement that regulation. Remand is warranted.

BACKGROUND

A. Defendants' Inequitable Inducement of Insurance

Financial guaranty insurers like National guarantee payment of interest or principal on bonds in the event of default, for a premium. By "wrapping" bonds with its own credit rating and ability to pay, an insurer increases the bonds' creditworthiness and marketability. Compl. ¶¶ 8, 95.[2] Here, from 2001 to 2007, National insured nearly $11.5 billion in payments on 16 bonds underwritten by Defendants and issued by Puerto Rico and its agencies, including PREPA, HTA, and COFINA. Compl. ¶¶ 20, 102, 114.

National did so at Defendants' behest. Defendants solicited National to provide insurance by submitting applications that included the bonds' Official Statements. Compl. ¶¶ 16, 20, 97, 114. Defendants assured National they had reasonably investigated the Official Statements and, upon issuance of the bonds, would have a reasonable basis to believe them to be true and complete. Each Official Statement represented: "The Underwriters have reviewed the information in this

[2] Citations to "Ex." refer to exhibits to the Declaration of Philippe Z. Selendy in support of this motion; to "Not." to the Notice of Removal filed by Defendants; to "Dkt." to the Docket in this adversary proceeding; and to "Compl." to the certified translation of the Complaint attached as Ex. 1.

Official Statement in accordance with, and as part of their respective responsibilities to investors under the federal securities laws as applied to the facts and circumstances of the transaction, but the Underwriters do not guarantee the accuracy or completeness of such information." Compl. ¶ 115; *see also, e.g.*, PREPA, *Official Statement* ("*Offic. Stmt.*"), *Series NN*, 4, Dkt. 2-3. The market, including National, understood that representation to be consistent with Defendants' obligation, as municipal bond underwriters, to obtain and review the Official Statements pursuant to Rule 15c2-12 of the Securities Exchange Act of 1934, and to perform a "reasonable investigation" to develop "a reasonable basis for belief in the truthfulness and completeness of the key representations made in [the Official Statements] used in the offerings." *Municipal Securities Disclosure*, SEC Release No. 26100 ("Disclosure No. 26100"), 53 Fed. Reg. 37778, 1988 WL 999989, at *20 (Sept. 22, 1988).

Custom and norms in the municipal bond industry independently compelled Defendants to investigate the Official Statements and form a reasonable basis regarding their truth and completeness. Issuances of municipal bonds are "exempt from federal securities registration and reporting requirements that apply to other securities."[3] While underwriters have extraordinary access to municipal issuers and are responsible for vetting issuer information, insurers and other market players are not in the same position; publicly available information regarding issuers is limited and sometimes unreliable, and insurers cannot reasonably verify this information on their own. Compl. ¶¶ 99, 118. Because of this asymmetry of information, the bond insurance industry

[3] *Investor Bulletin: The Municipal Securities Market*, U.S. Sec. and Exch. Comm'n, (Feb. 1, 2018), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_munibondsmarket.

depends on underwriters' good faith in furnishing vetted, accurate information about issuers and their creditworthiness; the same is true for bond buyers, who are largely retail and individual investors, and depend heavily on the underwriters' due diligence. Compl. ¶¶ 17, 36, 93, 99, 124.

Relying in good faith on Defendants' applications and assurances of reasonable investigation, National insured the bonds. This insurance was irrevocable—once issued, National had to cover losses on the insured bonds, even if it turned out the insurance was issued based on false information. *See, e.g.*, Compl. ¶ 119. Had National known that Defendants would not investigate the statements as represented, it never would have issued the policies. Compl. ¶¶ 250, 265.

B. National's Claims Against Defendants Under Puerto Rico Equitable Law

After the Puerto Rico issuers began defaulting on their bonds, the Financial Oversight and Management Board for Puerto Rico ("FOMB"), through a Special Investigation Committee, uncovered that the underwriter Defendants had failed to conduct a reasonable investigation into the truth of key representations in the Official Statements, which were untrue and incomplete. Informed by the Committee's findings, National filed this lawsuit on August 9, 2019, in the Commonwealth Court of First Instance, San Juan Part, Superior Section, bringing equitable claims against Defendants to recover claims payments made on the bonds. As of July 1, 2019, National has already paid more than $720 million. Compl. ¶ 12.

National's first equitable claim is that the underwriters violated Puerto Rico's doctrina de actos propios by making assurances of their reasonable due diligence but in fact failing to investigate whether the information they provided National was true and complete. Rooted in Spanish jurisprudence, this doctrine emanates from Puerto Rico Civil Code § 7:

> When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration.

Doctrina de actos propios protects "legitimate expectations" and "good faith," and prohibits "behavior that would result in an unreasonable interference with a legitimately created trust relationship, that allowed the other party to reasonably rely on the original conduct." Thiago Luis Sombra, *The Duty of Good Faith Taken to a New Level: An Analysis of Disloyal Behavior*, 9 J. CIV. L. STUD. 28, 31 (2016). It "aim[s] to raise good faith to the condition of a general principle that is autonomous, abstract, and subject to being invoked for a variety of legal relations, but with consideration of the peculiar aspects of each case." *Id*. at 34. Thus, doctrina de actos propios—which can exist independent of a contract—extends beyond the mainland common law doctrine of good faith. "Through … [doctrina de actos propios], essential interests are safeguarded to achieve an effective interaction at all levels of daily life. It is expected that the relations between the members of the society are characterized by the qualities of honesty and sincerity, so that at all times we can rest upon the truthfulness of the representations or acts of others." Ex. 2, *O.C.S. v. Universal*, 2012 TSPR 165, 172 (P.R. 2012).

The Puerto Rico Supreme Court has interpreted this unique equitable doctrine broadly. *Int'l Gen. Elec. P.R., Inc. v. Concrete Builders of P.R., Inc.*, 4 P.R. Offic. Trans. 1221 (P.R. 1976). The elements of the doctrine focus on these considerations: "(a) A certain behavior of a subject, (b) that he has given life to a situation contrary to reality, that is, apparent and, through such appearances, may influence the behavior of others, and (c) that it be the basis of the trust of another

party which has acted in good faith and that, for that reason, has acted in a manner which would cause him prejudice if his trust was defrauded." *Id.* at 1231.

The doctrine has been readily applied in commercial disputes, including where—as here—a bank undermines a plaintiff's legitimate expectations of good-faith conduct. *See MMB Dev. Grp., Ltd. v. Westernbank Puerto Rico*, 762 F. Supp. 2d 356, 370 (D.P.R. 2010). It has been applied to offensive claims. *See Int'l Gen. Elec.*, 4 P.R. Offic. Trans. at 1231. And plaintiffs have been awarded reliance damages, even outside any contractual relationship. *Id.*

National's second equitable claim is that Defendants' conduct violated the unilateral declaration of will doctrine. Also based on Civil Code § 7, the Puerto Rico Supreme Court recognized this doctrine in 2004: "[G]rowth and commercial traffic justified the possibility of giving full force and effect to acts in which only one person intended to bind himself or herself—as in a unilateral declaration of intention." *Ortiz v. P.R. Tel.*, 2004 TSPR 133, 162 D.P.R. 715, 724, 2004 WL 1824113 (P.R. 2004). It applies where a party violates a promise made with the intention that others would rely, and demands that "[o]nce the obligation is constituted, the declaring party is subject to compensate for the damages of its non-compliance" until the obligation is withdrawn. Ex. 3, *Nationstar Mortg., LLC v. de Jesús Roldan*, No. K CD2012-2549 (908), 2014 WL 1692581 (TCA), at *6 (P.R. Cir. Mar. 31, 2014). Its elements are: "(1) the sole will of the person who intends to be bound; (2) sufficient standing; (3) a clear intention to be bound; (4) an object of the obligation; (5) certainty as to the form and content of the declaration; (6) a suitable juridical act; and (7) the content of the obligation may not be contrary to law, to morals or to public policy." *Ortiz*, 162 D.P.R. 715, 725–26.

Both claims raise major issues of public importance, which support application of these equitable doctrines here. *See* P.R. LAWS ANN. tit. 31, § 7 (2016). A fundamental anomaly of the financial crisis in Puerto Rico is that Defendants—who abandoned their responsibilities as gate-keepers in pursuit of hundreds of millions in fees and profits—emerged unscathed while Puerto Rico, its investors, and its insurers all had to pay the price. The municipal bond markets depend upon the integrity and transparency of the underwriting process, and in particular upon the ability of investors and insurers to rely on the assurances and good faith of underwriters. Reinforcing industry norms by holding Defendants accountable for their inequitable conduct will help restore the Commonwealth's access to capital markets. As an insurer, National has no contractual or statutory remedies against the underwriters. *See* Compl. ¶¶ 38, 251, 264. Puerto Rico's equitable doctrines are thus uniquely tailored to address Defendants' inequitable conduct.

C. Defendants' Removal

On September 9, 2019, Defendants removed National's claims to the District of Puerto Rico, purportedly based on PROMESA and federal question jurisdiction. Defendants also sought transfer to this Court for consolidation into the Title III proceedings.

The bar date for filing claims in the Title III proceedings passed over a year ago, on June 29, 2018. In the Title III proceedings, National is subrogated to the bondholders' rights and filed proofs of claim, including for the bonds at issue, seeking recovery from the debtors on the claim amounts it has paid and will pay. *See* Dkts. 3-1 to 3-9 (National's Proofs of Claim). Only one Defendant—Santander—filed any potentially relevant proofs of claim for indemnification, on three of the sixteen bond issuances in dispute. *See* Dkts. 3-11 and 3-14 (Santander Proofs of

Claim).[4] While other Defendants and their affiliates filed certain other proofs of claim before the bar date, none relates to the bonds at issue here.[5] Defendants suggest that the Official Statements could give rise to indemnification (Not. ¶¶ 11, 31), but the Official Statements for seven of the bonds do not describe *any* indemnification obligation.[6] As to the nine remaining bonds, six Official Statements state, without elaboration, that the relevant issuer "has agreed to indemnify, to the extent permitted by law, the Underwriters against *certain* liabilities, including liabilities under federal securities laws or to contribute to payments that the Underwriters may be required to make in respect thereof," *e.g.*, PREPA, *Offic. Stmt., Series NN*, 57, Dkt. 2-3 (emphasis added); the last three Official Statements are even more limited and refer only to indemnification, not to contribution, *e.g.*, PREPA, *Offic. Stmt.*, *Series MM*, 15, Dkt. 2-4; HTA, *Offic. Stmt., Series N*, 62, Dkt. 2-16. Defendants have not submitted the underlying agreements, which presumably would spell out covered and uncovered liabilities and various applicable conditions and exceptions. No Defendant has filed a proof of claim for contribution under civil or common law. Should Defendants seek to assert any of these conditional indemnification or contribution claims, they would need to do so in a separate action against the debtors. *See infra* at 15.

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[4] Santander also filed a proof of claim for indemnification relating to GO Bond 2007A, Santander Proof of Claim, Dkt. 3-13, but the Official Statement for that issuance does not state that the Commonwealth will indemnify the underwriters.

[5] *See, e.g.,* Claim Nos. 74824, 91725, and 94366 (claims by Goldman Sachs entities); Claim Nos. 45147, 47184, and 169589 (claims by UBS); Claim Nos. 4081, 4410, and 4518 (claims by Merrill Lynch); Claim Nos. 9238 and 10743 (claims by Morgan Stanley); Claim Nos. 26655, 34464, and 36217 (claims by UBS Financial Services of Puerto Rico).

[6] *See* Dkts. 2-9 to 2-13, 2-15 (Official Statements for bonds at issue). Defendants state that HTA, *Offic. Stmt., Series L* was attached as Ex. O to their Declaration, but nothing was included. *See* Dkt. 2-14. That official statement in any event does not include indemnification language.

ARGUMENT

Defendants bear the burden of establishing jurisdiction. *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico* ("*Rivera*"), No. 17 BK 3283, 2018 WL 8130850, at *2 (D.P.R. Oct. 12, 2018) (Swain, J.). "Removal statutes are strictly construed against removal jurisdiction," *id.* at *2 (quotations omitted), "both because the federal courts are courts of limited jurisdiction and because removal of a case implicates significant federalism concerns," *Sealink Funding Ltd. v. Bear Stearns & Co. Inc.*, No. 12 Civ. 1397, 2012 WL 4794450, at *2 (S.D.N.Y. Oct. 9, 2012) (Swain, J.) (citation omitted). "On a motion for remand, the court 'must construe all disputed questions of fact and controlling substantive law in favor of the plaintiff.'" *Id.* at *2 (citation omitted).

I. THIS CASE IS NOT "RELATED TO" THE TITLE III PROCEEDINGS

Section 306(a)(2) of PROMESA gives district courts "jurisdiction of all civil proceedings … related to cases under [PROMESA]." 48 U.S.C. § 2166(a)(2). Interpretation of this provision is informed by the standards of "related to" jurisdiction under 28 U.S.C. § 1334(b). *Rivera*, 2018 WL 8130850, at *3. The First Circuit follows *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) and its progeny, *see In re Santa Clara Cty. Child Care Consortium*, 223 B.R. 40, 45 (B.A.P. 1st Cir. 1998), which holds that "related to" jurisdiction lies "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate," *Pacor*, 743 F.2d at 994. Defendants cannot meet this standard.

A. This Case Will Not Affect The Debtors' Title III Liabilities

Where "[t]he outcome of the state court proceeding will not have a substantial and direct financial impact upon the reorganization proceeding," *Santa Clara*, 223 B.R. at 49, the court lacks "related to" jurisdiction. Even if National's claims were resolved with great expedition prior to confirmation of the bankruptcy plan—an extraordinarily unlikely event—a recovery by National would not reduce or otherwise affect the estate's liabilities because Defendants would be subrogated dollar-for-dollar to National's Title III claims by operation of Puerto Rico law.

Santa Clara is on point. The First Circuit affirmed remand of a creditor's state-law claim that would "merely determine the validity and enforceability of a guaranty between two creditors of the debtor," holding that bankruptcy courts lack "related to" jurisdiction over state-law claims "involving non-debtor parties[] which may result in contribution/substitution of creditors without a change in the classification of a claim as it relates to the debtor." *Santa Clara*, 223 B.R. at 49; *see also In re C&A, S.E.*, No. 05–05297, 2006 WL 3909927, at *4 (Bankr. D.P.R. Aug. 18, 2006) (applying *Santa Clara* to hold no "related to" jurisdiction where an action's outcome "will not have any effect on the estate being administered in bankruptcy, it will only result in a substitution of creditors without a change in the classification of the claim as it relates to the debtor").

The same is true here: Under Puerto Rico law, when a third party pays on a debt owed by a debtor to a creditor, even absent a contractual relationship, statutory subrogation can be "automatically" available when any of the enumerated subsections of Puerto Rico Civil Code Section 3248 is met. Ex. 4, *Eastern Sands, Inc. v. Roig Commercial Bank*, 140 P.R. Dec. 703, 714 (1996); Ex. 5 RODRIGO BERCOVITZ RODRIGUEZ-CANO, COMENTARIOS AL CÓDIGO CIVIL 1477–79

(Thomson Aranzadi, 2da ed. 2006).[7] One subsection makes subrogation automatically available "when a creditor pays another preferential creditor." P.R. LAWS ANN. tit. 31, § 3248(1) (2016). Even accounting for Defendants' contingent and untimely purported indemnification and contribution claims, they would be at best unsecured creditors; National—which stands in the bondholders' shoes with priority claims over the debtors' revenues—is a preferential creditor. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017). Another subsection makes subrogation automatically available "[w]hen the person who is interested in the fulfilment of the obligation pays." P.R. LAWS ANN. tit. 31, § 3248(3) (2016). Such interest is defined broadly, *see Eastern Sands,* 140 P.R. Dec. at 716; BERCOVITZ RODRIGUEZ-CANO, 1479; Ex. 6, ALFONSO HERNÁNDEZ MORENO, EL PAGO DEL TERCERO 160–62 (Bosch 1983), and includes Defendants' interest in National recovering on its Title III claims. Once National recovers from Defendants on its equitable claims, Defendants will be automatically subrogated to National's Title III claims by operation of statute to the full extent of its recovery, such that there will be no reduction in the debtors' total liabilities and thus no impact on the estate.

Defendants' cases addressing subrogation confirm the absence of jurisdiction. *In re Canion* acknowledged that, where a plaintiff sues a non-debtor that is subrogated to a plaintiff's rights against the estate, the estate "will still owe the same sum, the only possible difference being to whom the sum is owed," but found no subrogation based on a defense not interposed here. 196 F.3d 579, 585–86 (5th Cir. 1999). *TD Bank, N.A. v. Sewall* turned on defendants' waiver of any

[7] In interpreting Section 3248, Puerto Rico looks to interpretations of Article 1210 of the Civil Code of Spain, from which Section 3248 is derived. *Eastern Sands*, 140 P.R. Dec. at 714.

"right to subrogation or indemnification," which otherwise would have eliminated effects on the estate. 419 B.R. 103, 109 (D. Me. 2009). Defendants did not waive such rights prior to removal. Defendants' remaining cases (Not. ¶¶ 25–26) do not consider subrogation.

Finally, resolution of National's claims will not impact the rights of the debtors or of any other third party. Not. ¶ 28. National's action will have no effect on the estate, and non-parties cannot "be bound by res judicata or collateral estoppel." *Pacor*, 743 F.2d at 995.

B. Defendants Cannot Show "Related To" Jurisdiction Based Upon Contingent And Uncertain Indemnification And Contribution Claims

The Supreme Court cautions that "'related to' jurisdiction cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). While a contingent outcome might satisfy *Pacor*'s "conceivable effects" test, "contingencies cannot be too far removed; too many links in the chain of causation before the bankruptcy estate is affected may preclude 'related to' jurisdiction." *Sealink Funding*, 2012 WL 4794450, at *2. Defendants' theoretical indemnification and contribution claims are contingent and highly uncertain and cannot defeat remand.

1. No "Related To" Jurisdiction Based Upon Indemnification Claims

Following *Pacor* and its progeny, courts in the First Circuit confirm that "when the non-debtor defendant's right to indemnification from the debtor is uncertain or conditional, the cases giving rise to the indemnification claims are not related to the debtor's bankruptcy." *In re Montreal Maine & Atl. Ry., Ltd.*, No. 1:13-MC-00184, 2014 WL 1155419, at *7 (D. Me. Mar. 21, 2014) (citing Third Circuit precedent); *see also Bibeault v. CVS Pharmacy, Inc.*, No. CV 19-10758, 2019 WL 3546889, at *3 (D. Mass. June 21, 2019) (R&R) (no "related to" jurisdiction where

indemnification does "not operate automatically"); *Marotta Gund Budd & Dzera LLC v. Costa*, 340 B.R. 661, 671 (D.N.H. 2006) (no "related to" jurisdiction where indemnification claim disputed); *Cent. Maine Rest. Supply v. Omni Hotels Mgmt. Corp.*, 73 B.R. 1018, 1023–24 (D. Me. 1987) (no "related to" jurisdiction where indemnification conditional); *Sewall*, 419 B.R. at 107 (no "related to" jurisdiction unless the "company/debtor is under an unconditional duty to indemnify"); *cf. Philippe v. Shape, Inc.*, 103 B.R. 355, 358 (D. Me. 1989) (unconditional indemnification supports "related to" jurisdiction). "[G]iven the First Circuit's continued allegiance to *Pacor*, this court is not free to apply a different rule." *Marotta*, 340 B.R. at 671.

Under this precedent, Defendants' uncertain indemnification claims cannot create "related to" jurisdiction. *First*, Defendants admit they would need to assert and litigate their contingent claims to enforce their purported rights (Not. ¶ 31), which independently defeats "related to" jurisdiction. *Pacor* "dictates that a bankruptcy court lacks subject matter jurisdiction over a third-party action if the only way in which that third-party action could have an impact on the debtor's estate is through the intervention of yet another lawsuit[.]" *In re W.R. Grace & Co.*, 591 F.3d 164, 173 (3d Cir. 2009) (following *Pacor* to hold no "related to" jurisdiction over claims among non-debtors where defendant would have to "bring an indemnification or contribution claim against [the debtor] in the Bankruptcy Court").

Second, if the underwriters actually placed weight on indemnification claims, they would have filed proofs of claim. Yet no Defendant except Santander filed a proof of claim for indemnification as to any bond at issue before the June 29, 2018, bar date. Santander's filing is limited to one HTA and two PREPA bonds. Creditors must file proofs of claim before the bar date unless

"the failure to act was the result of excusable neglect." *Sealink Funding*, 2012 WL 4794450, at *3. Defendants cannot make this showing. "[A]n indemnification right arises at the time the indemnification agreement is executed, and it constitutes a claim under the Bankruptcy Code even if the act giving rise to indemnification has not yet occurred." *Id.* (quotations omitted); *accord Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, No. 11 Civ. 2232, 2011 WL 4965150, at *5 (S.D.N.Y. Oct. 19, 2011). The agreements relied upon by Defendants were executed *over a decade ago*, the Special Committee report was issued *over a year ago*, and yet no Defendant but one has filed an indemnification claim. This leaves Santander's proofs of claim for indemnification, which not only require new litigation but, as detailed below, are also contingent and unsecured; by any reasonable measure, they lack the "substantial and direct financial impact upon the reorganization proceeding" necessary for "related to" jurisdiction. *Santa Clara*, 223 B.R. at 49.

Third, Defendants fail to establish any "unconditional indemnification rights," which again independently defeats "related to" jurisdiction. *Montreal Maine*, 2014 WL 1155419, at *8 (indemnity provision excluded losses arising out of intentional acts or gross negligence); *Marotta*, 340 B.R. at 671 (debtors disputed scope of indemnity clause); *Central Maine*, 73 B.R. at 1023–24 (indemnification conditioned on notice). Defendants, who bear the burden of showing "related to" jurisdiction, fail to provide the Court with *any* indemnification agreements. The Official Statements for seven of the 16 bonds contain no reference to indemnity. *See* Dkts. 2-9 to 2-15. The Official Statements for the remaining nine bonds, issued by PREPA and HTA, indemnify Defendants (including Santander) only for "certain liabilities"—a limitation inconsistent with "an unconditional right to indemnify." *See* Dkts. 2-2 to 2-8, 2-16. Finally, no Defendant shows the absence

of common law or statutory exceptions as to any of the bonds, which further renders indemnification conditional. *See, e.g.*, *In re Joan & David Halpern Inc.*, 248 B.R. 43, 46–47 (Bankr. S.D.N.Y. 2000).

Defendants' cases do not support "related to" jurisdiction. *Pacor* controls and requires near-certain and automatic indemnification liability. *Marotta*, 340 B.R. at 670–71. Defendants are driven (Not. ¶ 30) to rely upon out-of-circuit cases—*In re Extended Stay Inc.*, 435 B.R. 139, 152 (S.D.N.Y. 2010), and *SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333, 340 (2d Cir. 2018)—applying a more permissive standard that "conflicts with *Pacor*, which remains the law in [the First Circuit]." *Marotta*, 340 B.R. at 670–71 & n.16. In any event, under any standard, courts routinely deny "related to" jurisdiction where defendants have failed to file timely proofs of claim. *Sealink*, 2012 WL 4794450, at *3; *accord Allstate Ins.*, 2011 WL 4965150, at *5.

Defendants' only cases from within the First Circuit involve inevitable or automatic indemnification and are thus inapposite. *Cambridge Place Investment Management, Inc. v. Morgan Stanley & Co.* concerned "an unconditional duty to indemnify at least some of the claims" such that jurisdiction could lie—but even there, the court abstained from exercising jurisdiction (*see infra* at 25). No. 10-11376, 2010 WL 6580503, at *5, 6–9 (D. Mass. Dec. 28, 2010). There is no evidence of unconditional indemnification rights here. In *Voya Institutional Trust Co. v. University of Puerto Rico*, the court found "related to" jurisdiction over a suit against the Governor of Puerto Rico in his official capacity because the claim "necessarily implicate[d]" the Commonwealth and its assets in bankruptcy. 266 F. Supp. 3d 590, 599 (D.P.R. 2017). National's action does not name or "necessarily implicate" any government official or the assets of any debtor.

In re New England Compounding Pharmacy, Inc. Products Liability Litigation, 496 B.R. 256, 267–69 (D. Mass. 2013)—which in turn relies on *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996) (cited at Not. ¶ 22)—found "related to" jurisdiction over product liability claims against non-debtor steroid distributors because of the distributors' common law indemnity claims against the debtor-manufacturer, which had primary liability for the steroids; the resulting indemnity claims would inevitably affect the debtor-manufacturer's bankruptcy. By contrast to those mass product liability actions, Defendants' liability "is not necessarily derivative of any primary liability of the debtor." *Montreal Maine*, 2014 WL 1155419, at *7 (indemnification conditional where negligence claims against managers of debtor-railway did "not necessarily implicate" the railway). Defendants are liable to National for false assurances of reasonable due diligence regardless of whether the debtors are liable for their disclosures to the underwriters.

2. No "Related To" Jurisdiction Based Upon Contribution Claims

National's only claims in this action—doctrina de actos propios and unilateral declaration of will—are equitable claims. Defendants cite no authority allowing contribution under local law for liability stemming from equitable claims, let alone in these circumstances, and courts in other jurisdictions have rejected such attempts. *E.g.*, *Daigle Commercial Grp., Inc. v. St. Laurent*, 734 A.2d 667, 676 (Me. 1999). Defendants' case of *Zurich American Insurance. v. Lord Electric Company of Puerto Rico*, 828 F. Supp. 2d 462, 469 (D.P.R. 2011), involved joint and several liability for a tort and is inapposite.

Even if Defendants could show rights of contribution under Commonwealth law, any resulting claims would be conditional and inadequate to support "related to" jurisdiction in the First

Circuit. *Montreal Maine*, 2014 WL 1155419, at *8 ("evidence of unconditional rights of contribution" required). And those conditional contribution claims would be untimely. Even if some courts accept late contribution claims, as Defendants contend (Not. ¶ 32), they do so only if "[a] party may not know of a potential contribution claim until sued." *SPV OSUS*, 882 F.3d at 340. At the latest, Defendants knew of potential contribution claims against debtors as of the release of the Special Committee report in August 2018 and, separately, over six months ago with the filing of the FOMB complaint against many Defendants for aiding and abetting the GDB's alleged breaches of fiduciary duty. They lack any valid basis for filing a late proof of contribution claim now. *See In re Nat'l Steel Corp.*, 316 B.R. 510, 518–19 (Bankr. N.D. Ill. 2004) (no excusable neglect for untimely proof of claim for contribution).

C. Asserted Common Issues Are Insufficient For "Related To" Jurisdiction

Defendants' asserted overlap of "many" factual issues and unidentified "key" legal issues (Not. ¶¶ 37–38) does not create "related to" jurisdiction.[8] "The mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of ['related to' jurisdiction]." *Pacor*, 743 F.2d at 994; *see also In re VideOcart*, 165 B.R. 740, 743 (Bankr. D. Mass. 1994) ("[N]either common issues,

[8] The FOMB action referenced by Defendants touches on only one "subset" of one of the 16 bond issuances addressed by National's claims (Not. ¶ 37)—and that subset was not insured by National. The FOMB asserts wrongdoing by the GDB as well as core bankruptcy claims in connection with a different time period and different issuers. By contrast, National, a non-debtor, asserts non-core claims of inequitable conduct solely by other non-debtors that will not affect the estate.

related parties, parallel claims nor bankruptcy law applications make a case related to a bankruptcy for the purpose of removal jurisdiction.").

In an effort to drum up some connection between this suit and the Title III proceedings, Defendants baselessly hypothesize that, but for the automatic stay, National would have filed equitable claims against the issuers. Not. ¶ 34. But the Complaint focuses squarely on *Defendants'* misconduct in soliciting insurance and their false assurances of reasonable investigation. *See, e.g.*, Compl. ¶¶ 8–9, 16–17, 96–97, 114–16, 248–50, 256–63. The context is plainly different from the cases relied upon by Defendants, in which the plaintiffs had alleged specific *debtor* misconduct. *See SPV OSUS*, 882 F.3d at 342 (claims of aiding and abetting fraud required proof that the debtor itself was liable for fraud); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 321 (S.D.N.Y. 2003) (fraud claims against underwriters expressly alleged debtor was not named "because [it] filed for protection under the bankruptcy laws").

II. EVEN IF THIS COURT HAD "RELATED TO" JURISDICTION, THE COURT SHOULD EQUITABLY REMAND OR PERMISSIVELY ABSTAIN

Even if this Court concluded it could exercise "related to" jurisdiction, it should decline to do so. This Court may remand the action "on any equitable ground," 48 U.S.C. § 2166(d)(2), or abstain "in the interests of justice," 48 U.S.C. § 2169. Equitable remand and permissive abstention are governed by "conceptually aligned" factors that focus on the predominance of state law issues and related concerns of comity, the action's effect on the bankruptcy proceedings, and prejudice

to the removed party.[9] *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico* ("*Asociación de Salud Primaria*"), 330 F. Supp. 3d 667, 682–83 (D.P.R. 2018). These factors overwhelmingly favor abstention and remand here.

A. National's Claims Raise Unique And Disputed Issues Of Puerto Rico Equitable Law That Should Be Decided By Puerto Rico Courts

National's claims arise under evolving equitable doctrines of Puerto Rico law and raise no "bankruptcy issues." *In re LM Waste Serv. Corp.*, 562 B.R. 845, 851–52 (Bankr. D.P.R. 2016) (abstaining where "Puerto Rico law predominates over bankruptcy law in contractual and tortious interference actions"). The doctrines of "actos propios" and "unilateral declaration of will" are grounded in the Puerto Rico Civil Code, which is Spanish in origin. The vast majority of relevant decisions and treatises, and many relevant documents concerning Defendants' conduct in Puerto Rico, are in Spanish. "[T]he courts in Puerto Rico are best suited for interpreting the laws of Puerto Rico and relevant documents without issues relating to proper translations, not just of the laws but of case law interpreting those laws." *In re Acevedo*, 546 B.R. 496, 506 (Bankr. D. Mass. 2016)

[9] For equitable remand, courts consider: (1) effect on administration of the estate; (2) extent to which state law issues predominate; (3) difficulty of applicable state law; (4) comity; (5) relatedness/remoteness to bankruptcy case; (6) right to a jury trial; and (7) prejudice to the involuntarily removed party. *See Santa Clara*, 223 B.R. at 46. For permissive abstention, courts consider: (1) effect on efficient administration of estate; (2) extent to which state law issues predominate over bankruptcy issues; (3) unsettled nature of applicable law; (4) related state court proceedings; (5) any jurisdictional basis other than 28 U.S.C. § 1334; (6) relatedness/remoteness to the bankruptcy case; (7) substance, not form, of an asserted core proceeding; (8) feasibility of severing state law claims from core bankruptcy matters so judgments entered in state court can be enforced in bankruptcy court; (9) burden on bankruptcy docket; (10) likelihood that bankruptcy proceeding involves forum shopping; (11) right to jury trial; and (12) presence of non-debtor parties. *See In re LM Waste Serv. Corp.*, 562 B.R. 845, 851 (Bankr. D.P.R. 2016).

(permissively abstaining where case involved Puerto Rico property law claims); *see also V. Suarez & Co. v. Dow Brands, Inc.*, 337 F.3d 1, 8 (1st Cir. 2003) (citing J.H. Merryman, The Civil Law Tradition 56–57 (2d ed. 1985) (recognizing importance of treatises in Commonwealth law and noting that the "civil law is a law of the professors")); Ex. 7, Order at 12, *Vitol*, No. 17-00221-LTS, Dkt. 31 (D.P.R. Feb. 12, 2019) (remanding in "deference to the [Commonwealth] courts" where case requires the "construction and application of the Commonwealth statute").

Remand or abstention is essential here given the presence of "unsettled issues of state law." *Acevedo*, 546 B.R. at 505 (quoting *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993)); *In re Jimenez Marrero*, No. 16-08164, 2018 WL 5795840, at *5 (Bankr. D.P.R. Nov. 2, 2018) (permissively abstaining where case involved claims concerning Puerto Rico's doctrine of reverse accession, which is "entirely a state law issue ... scarcely addressed by the state courts, and with very specific requirements"); *Vitol* at 12 (remanding claims because they were "based entirely on unsettled issues of Commonwealth law"). While Puerto Rico's courts have provided guidance on the contours of these equitable doctrines, there are relatively few cases or treatises on the subject. Moreover, the doctrines are unique, and extend the duties of good faith and proper conduct far beyond superficially analogous common-law doctrines.

Adjudication of National's local law claims here would impinge on Puerto Rico's substantial sovereign interests. "[W]hen state issues substantially predominate," as here, "[i]t is well-settled that comity considerations dictate that federal courts should be hesitant to exercise jurisdiction." *Sealink Funding*, 2012 WL 4794450, at *4 (citation omitted). That is because "[t]he Commonwealth Court retains a vested interest in seeing that its laws are enforced as intended." *In re*

Caribbean Petroleum Corp., 443 B.R. 560, 569 (Bankr. D.P.R. 2010). That interest is especially pronounced because both doctrines require consideration of the public interest, an inquiry best undertaken by a local court. *See* Ex. 8, *Alonso Pinero v. UNDARE, Inc.*, 2017 TSPR 171, 199 D.P.R. 32, 54 (P.R. 2017).

Remand is also warranted out of "respect for Plaintiff's choice of forum." *Gen. Elec. Capital Corp. v. Por-Fac Coop., Inc.*, No. 01 CIV. 10215, 2002 WL 1300054, at *3 (S.D.N.Y. June 11, 2002) (Swain, J.); *see also Buechner v. Avery*, No. 05 CIV 2074, 2005 WL 3789110, at *6 (S.D.N.Y. July 8, 2005) (remanding state law claims to avoid denying plaintiff its choice of forum). National's choice is entitled to special weight because the evolving equitable doctrines, set forth in Spanish and governed by Puerto Rico law, are best resolved by Puerto Rico courts.

Defendants wrongly paint this case as turning on federal securities laws. Not. ¶¶ 40–53. This argument mischaracterizes National's claims. The Complaint simply acknowledges the undisputed fact that Defendants, as underwriters, were obligated by federal law to conduct due diligence on the issuers' Official Statements. National could not sue Defendants for violating the Exchange Act, and Defendants' failure to conduct the requisite investigation of the bonds can be proven with reference to industry norms and practices in the municipal bond markets. Even if the case presented questions of federal securities law—which it does not—issues of Puerto Rico equitable law "clearly dominate." *See, e.g.*, *Vitol* at 11–13 (remanding where state law predominated over federal law); *In re MJS Las Croabas Props., Inc.*, BAP No. PR 17-048, 2018 WL 5226082, at *7 (B.A.P. 1st Cir. Oct. 18, 2018) (affirming permissive abstention of state tax dispute between non-debtors as "the issue here is clearly dominated by Puerto Rico law"); *In re CH Props., Inc.*,

381 B.R. 20, 30 (D.P.R. 2007) (abstaining where Commonwealth contract law issues predominated); *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 495 B.R. 332, 353–54 (W.D. Ky. 2013) (abstaining where state law issues predominated over bankruptcy and federal law).

B. National's Claims Have Minimal Connection To The Title III Proceedings And Will Not Impact Administration Of The Bankruptcy Estate

This Court should remand or abstain on the additional basis that National's claims are extraneous to the Title III proceedings and will not impact administration of the estate. "Where issues are far removed or peripheral, and do not involve issues central to the restructuring, abstention is warranted in bankruptcy cases." *Asociación de Salud Primaria*, 330 F. Supp. 3d at 683. For example, this Court has abstained on the basis that the "Removed Claims relat[ing] to the plaintiffs' rights to Medicaid payments from the Commonwealth … are not central to the restructuring at issue in this Title III case," "do not involve issues requiring interpretation of PROMESA," and are not "directly related to the restructuring process." *Id.* The case for remand or abstention is even stronger here. National's equitable claims arise out of the banks' misconduct that took place at least a decade before debtors filed for bankruptcy, do not require interpretation of PROMESA, and are unrelated to the restructuring process.

Even if Defendants had timely, non-hypothetical, non-contingent, and non-conditional indemnification or contribution claims—which they do not—the connection to the Title III proceedings would be weak. As a general matter, such contingent claims provide no reason to refuse remand of underlying state law claims, and "jurisdiction should not be retained." *Schumacher v. White*, 429 B.R. 400, 408 (E.D.N.Y. 2010) (citation and quotation omitted) (collecting cases). And

here, indemnification claims would apply (at most) to only one Defendant and three bonds. That is plainly insufficient to warrant retaining jurisdiction. *See Cambridge Place*, 2010 WL 6580503, at *7 (Dein, J.) (abstaining where "indemnification agreements do not involve all of the defendants" and only "some of those agreements involve current indemnification obligations" while "others involve only potential indemnification obligations that are quite remote"); *In re Residential Capital, LLC*, 488 B.R. 565, 577 (Bankr. S.D.N.Y. 2013) (equitably remanding despite timely proofs of claim where most of the claims did not involve the debtor "or the administration of the bankruptcy cases"). Further, even if the claims did have some impact on the magnitude or composition of the estate, "that impact is not affected by the choice of forum," and "the efficient administration of the bankruptcy-related estates will not be affected if this court abstains and remands the matter to state court." *Cambridge Place*, 2010 WL 6580503, at *7.

National does not challenge the legality or operation of the debtors. There is no reason to infer any impact on the restructuring, by contrast to cases more closely intertwined with bankruptcy proceedings. *Cf. Rivera*, 2018 WL 8130850, at *1 (retaining jurisdiction over claims challenging PREPA's ownership of property and disputing Governor's ability to appoint PREPA's directors); Ex. 9, Order at 1–2, *Gaudier*, No. 18-00053-LTS, Dkt. 18 (D.P.R. Oct. 12, 2018) (retaining jurisdiction over claims challenging Governor's removal of PREPA director); Ex. 10, Order at 1–2, *Albelo*, No. 19-00003-LTS, Dkt. 57 (D.P.R. July 31, 2019) (retaining jurisdiction over claims challenging legality of legislation related to COFINA that could drain billions from COFINA's estate).

It is highly improbable that National's claims in this action will be resolved before a bankruptcy plan is confirmed and the Title III proceedings end. Regardless, in that unlikely event, Defendants would be subrogated automatically to National's claims and National's recoveries could not affect the liabilities of the estate, as discussed above. If this Court has any concerns about possible impact to the estate, National would consent to a stay of a final judgment of its claims in Commonwealth court against the *non-debtor* Defendants until the debtors' plans are confirmed. That solution should be more than sufficient in light of this Court's order in *Asociación de Salud Primaria*, which remanded claims against the *debtor* Commonwealth to the local court, on condition the claims proceed to judgment but await enforcement until resolution of the Title III proceedings. 330 F. Supp. 3d at 683, 685; *see also Maroten v. Safapour (In re Herula)*, No. 02-14346, 2004 WL 2609245, at *1 (Bankr. D.R.I. Oct. 4, 2004) (abstaining and ordering that any follow-on indemnification litigation be tried in bankruptcy court). "[T]he efficiency gained by retaining only those cases integral to this Title III process weighs heavily in favor of remanding the Removed Claims to the State Court." *Asociación de Salud Primaria*, 330 F. Supp. 3d at 683.

By contrast, litigating this action here would adversely impact administration of the estate. National's claims against the non-debtor underwriters cannot be tried using streamlined bankruptcy procedures, and remand or abstention is warranted to avoid the resulting delays. *See Residential Capital*, 488 B.R. at 577. Litigating the claims in this forum would burden this Court with issues that are "far removed [and] peripheral, and do not involve issues central to the restructuring," *Asociación de Salud Primaria*, 330 F. Supp. 3d at 683, including myriad factual questions regarding Defendants' solicitation of bond insurance and industry norms concerning underwriter

due diligence, as well as unsettled issues of equitable doctrines in the Spanish-language Puerto Rico Civil Code. There can be no question that efficient administration of the estate "is fostered by keeping this … issue in [local] court where it belongs." *LM Waste*, 562 B.R. at 851.

C. The Remaining Factors Support Remand Or Abstention

All other relevant factors support remand. There is no other source of federal jurisdiction. The case is a non-core proceeding that involves only Commonwealth law issues. *See Caribbean Petroleum*, 443 B.R. at 566 ("The First Circuit defines non-core proceedings as claims concerned only with state law issues that did not arise in the core bankruptcy function of adjudicating debtor-creditor rights[.]") (citation omitted). National's claims concern non-debtor parties only and can proceed independently from the Title III proceedings—to which they are unrelated (or, at best, only tenuously so). The claims are complex, based on evolving doctrine, and rooted in the Puerto Rico Civil Code, and would burden this Court's "relatively limited resources[.]" *Asociación de Salud Primaria*, 330 F. Supp. 3d at 675. "[G]iven the lack of ties to a bankruptcy proceeding or other compelling reason, the conclusion is inescapable that the removal of this case to district court was simply forum shopping." *Cambridge Place*, 2010 WL 6580503, at *9.

This Court has abstained or remanded in far less compelling circumstances. In *Vitol*, for example, this Court remanded claims filed by PREPA—a *debtor*—relating to PREPA's "largest" debts and assets and involving the interpretation of "federal constitutional defenses," because defendants failed to demonstrate that adjudication in state court would "necessarily have a material effect on the administration" of the estate, especially given the expectations of plan confirmation prior to resolution of the state case; the "claims [were] based entirely on unsettled issues of

Commonwealth law," such that "comity counsel[ed] deference to the courts of the Commonwealth"; and interpretation of the federal constitution was "within the jurisdictional competence of the Commonwealth Court." *Vitol* at 11–13. In *Asociación de Salud Primaria*, this Court likewise abstained even though "federal issues predominate[d]" and the case involved funds owed by the Commonwealth with the prospect of "a judgment against the Commonwealth [that] could impact the estate," primarily because the state court proceeding would "not hinder the Title III restructuring process." 330 F. Supp. 3d at 683.

Courts also have abstained in cases cited by Defendants. In *Cambridge Place* (cited at Not. ¶ 30), Judge Dein found "related to" jurisdiction based on potential indemnification claims, but exercised permissive abstention because the connection to the bankruptcy was attenuated and the indemnification claims were uncertain and did not cover all defendants. 2010 WL 6580503, at *7. While defendants might have pursued $1.2 billion in indemnification damages from the debtor, the impact of the claims was "not affected by the choice of forum": "Whether the case proceed[ed]" in bankruptcy court or in state court, "the outcome" of the trial would "have the same impact on the bankruptcy proceedings." *Id.*

Likewise, in *Johnson v. Fifth Third Bank, Inc.*, the court mandatorily abstained because, among other reasons, there were only state law claims, the proceeding was non-core, and there was no jurisdiction independent of "related to" jurisdiction. 476 B.R. 493, 501–02 (W.D. Ky. 2012) (cited at Not. ¶ 26). In a companion case—*CPC Livestock*—the court found permissive abstention appropriate, despite allegations of liability based on misrepresentations of "compliance" with a "comprehensive [federal] regulatory scheme," because state law issues predominated

and were unsettled; while there could be a "net impact on the estate" resulting from litigating a suit in a state forum due to a possible increase in indemnity claims against the estate, that "would not disrupt the administration of the estate." 495 B.R. at 347, 354.

National's choice of forum—and the interests of Puerto Rico and its citizens in adjudicating these Commonwealth law equitable claims—should be honored. This Court should remand or abstain.

III. THIS CASE DOES NOT "ARISE UNDER" FEDERAL LAW

While Defendants acknowledge National does not bring federal claims (Not. ¶ 41), they nonetheless assert that National's equitable Commonwealth law claims fit in the "'special and small category' of cases in which arising under jurisdiction still lies." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)). "Federal jurisdiction will lie over a state law cause of action if the face of the complaint 'reveals a federal issue [that] is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in a federal court without disrupting the federal-state balance of power.'" *Mun. of Mayagüez v. Corp. Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8, 13 (1st Cir. 2013) (quoting *Gunn*, 568 U.S. at 258). Cases fall within "the contours of this slim category" only "[w]here all four of these requirements are met." *Gunn*, 568 U.S. at 258. Defendants do not meet a single one.

A. No Federal Issue Is Necessarily Raised Or Actually Disputed

Federal courts may exercise jurisdiction over state or local claims only if a federal issue is "necessarily raised" and "actually disputed." *Gunn*, 568 U.S. at 258. Defendants point to the

Complaint's nominal references to SEC Rule 15c2-12 (Not. ¶¶ 44–48, 50–51), but this is nowhere near enough to establish jurisdiction.

The First Circuit has explained that "the mere fact that a claim or defense requires an explanation of a federal statutory scheme as background does not mean that a complaint 'necessarily raise[s] a stated federal issue.'" *Narragansett Indian Tribe v. Rhode Island Dep't of Transp.*, 903 F.3d 26, 32 (1st Cir. 2018) (citation omitted); *see also Anghel v. Ruskin Moscou Faltischek, P.C.*, 598 F. App'x 805, 807 (2d Cir. 2015) ("'Where a federal issue is present as only one of multiple theories that could support a particular claim' … 'this is insufficient to create federal jurisdiction.'") (quoting *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005)). Thus, in *Flinn v. Santander Bank, N.A.*, when a plaintiff brought state-law claims against a bank, the bank removed, invoking "arising under" jurisdiction because the plaintiff's consumer protection claims rested on allegations that the bank had violated federal laws. 359 F. Supp. 3d 128, 134 (D. Mass. 2019). The court properly remanded, holding that no federal issue was necessarily raised because plaintiff did not have to prove a violation of federal law to prevail on its state law claim. *Id*. at 134–35. Similarly, in *In re Standard & Poor's Rating Agency Litigation*, when plaintiffs brought state-law claims against a ratings agency, it removed, claiming "arising under" jurisdiction because the court would "necessarily have to consult" a federal statute to determine if the rating statements were independent and objective. 23 F. Supp. 3d 378, 395–96 (S.D.N.Y. 2014). The court remanded, holding no federal issue was necessarily raised: While defendant's code of conduct was required by federal law, plaintiffs did not have to prove a violation of federal law to prevail on their state law claims—only that defendant's statements were deceptive. *Id*. at 399–400.

Under this standard, National's claims do not "necessarily raise" a federal law issue. As in *Flinn* and *Standard & Poor's*, National can prevail on its local claims without proving violations of federal law. National's claims of doctrina de actos propios and the unilateral declaration of will are both based on Puerto Rico Civil Code § 7, which specifically empowers courts to consider "accepted and established usages and customs," and the Puerto Rico Supreme Court has explained that a plaintiff can prevail on a doctrina de actos propios claim by proving the defendant's violation of industry customs and norms. *Int'l Gen. Elec.*, 4 P.R. Offic. Trans. at 1226 (holding violation of bond requirement could support actos propios claim; the requirement was both under law and expected as "basic knowledge for all the persons involved in the building industry as contractors, materialmen, and bondsmen"). Here, National pleads exactly that, alleging Defendants violated established customs and norms by which bond underwriters should vet the applications they provided to bond insurers. Compl. ¶¶ 96–99, 248, 258. National can prove its claims by proving Defendants violated these customs, regardless of whether Defendants' conduct also violated federal law. *Int'l Gen. Elec.*, 4 P.R. Offic. Trans. at 1231.

Nor do National's claims involve a federal issue that is actually disputed. Plainly, National has not sued Defendants for violating Rule 15c2-12. Nor could it: Unlike other securities laws, that Rule provides no private right of action. (In fact, no securities law provides a private right of action in this context to monoline insurers like National.) Even if National could bring such an action and had done so, there would be no federal issue in actual dispute. Defendants do not dispute that Rule 15c2-12 applies to them and requires them to conduct a "reasonable investigation" and develop "a reasonable basis for belief" in the "truthfulness and completeness" of

information contained in the Official Statements. Disclosure No. 26100, 1988 WL 999989, at *20. While the law is unsettled as to the required nature of the "dispute," the better-reasoned cases hold that, where—as here—the parties "do not dispute that the federal regulations" apply to the conduct at issue and defendants fail to adduce specific disputes of interpretation or enforceability, then no federal issue is "actually disputed." *Medici v. Lifespan Corp.*, 384 F. Supp. 3d 218, 223 (D.R.I. 2019); *accord MHA LLC v. HealthFirst, Inc.*, 629 F. App'x 409, 414 (3d Cir. 2015); *McLaughlin v. Bayer Essure, Inc.*, No. 14-7315, 2018 WL 3535142, at *4 (E.D. Pa. July 23, 2018).[10]

B. No Issue Of Importance To The Federal System As A Whole Is Presented

Even if National's local claims "necessarily raised" and "actually disputed" a federal question, the Supreme Court cautions that "it takes more than a federal element 'to open the "arising under" door.'" *Empire*, 547 U.S. at 701. "[I]t is not enough that the federal issue be significant to the particular parties in the immediate suit; that will *always* be true when the state claim 'necessarily raise[s]' a disputed federal issue.… The substantiality inquiry … looks instead to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. The paradigmatic "substantial" case "present[s] a nearly 'pure issue of law' … that could be settled once and for all" rather than an issue that is "fact-bound and situation-specific[]" and whose holding will more likely be limited to the facts of the case. *Empire*, 547 U.S. at 700–01 (citation omitted).

[10] These cases are in accord with the *Gunn-Grable* test because a dispute over interpretation or enforceability is more likely to be legal in nature and significant to the federal system as a whole, in contrast to a factual disagreement as to whether a violation exists. *Cf. Callahan v. Sw. Airlines Co.*, No. CV 18-10563-MGM, 2018 WL 5849476, at *5 (D. Mass. Sept. 26, 2018), *report and recommendation adopted*, No. CV 18-10563-MGM, 2018 WL 5846819 (D. Mass. Nov. 7, 2018).

This bar is high. A case may be substantial "where the outcome of the claim could turn on a new interpretation of a federal statute or regulation which will govern a large number of cases," or "where the resolution of the issue has broader significance … for the Federal Government" because it "directly challenges the propriety of an action taken by a federal department, agency, or service"; on the other hand, a case presenting a factual dispute of whether a defendant complied with federal regulations is not substantial. *Mayagüez*, 726 F.3d at 14 (citation and quotations omitted); *see also MHA LLC*, 629 F. App'x at 413 n.6 ("The prototypical case of *Grable* jurisdiction is one in which the federal government itself seeks access to a federal forum, an action of the federal government must be adjudicated, or where the validity of a federal statute is in question.").

The First Circuit's decision in *Mayagüez* is controlling and shows why this standard precludes "arising under" jurisdiction here. In *Mayagüez*, the plaintiff alleged that the defendant breached contractual representations that it had "compl[ied] with "the [federal] Housing and Community Development Act" and "applicable state and federal laws, rules, and regulations." 726 F.3d at 9–10. In light of *Gunn* and *Empire*, the First Circuit explained, "compliance with an 'intricate and detailed set of federal regulatory requirements'" was not enough to warrant federal jurisdiction: "[T]o be substantial, the dispute must involve a true risk to the interests of a federal agency, program, or statutory scheme." *Id*. at 17. While the claims at issue involved "interpretation of federal regulations," the key disputes were "factual" such that "the resolution of this case will have no impact on the ability of HUD or any other federal agency to carry out its business." *Id.* at 14–15. Thus, there was no arising under jurisdiction. *Id.* at 17.

So too, here. National does not challenge the validity of a federal rule or statute, nor is a federal actor involved. The disputes are highly factual: In soliciting insurance from National, did Defendants assure National that they had vetted the insurance applications, did Defendants actually do so, and did National rely on Defendants' assurances? Even if National were to prove its local claims by showing that Defendants also violated Rule 15c2-12—which it need not do—that would not make the case "substantial"; after all, in *Mayagüez*, the nub of the case was whether the defendant "failed to comply with federal regulations, and thereby breached its contract." *Mayagüez*, 726 F.3d at 14. Just as in *Mayagüez*, the disputes would be factual and no new interpretation of Rule 15c2-12 would be necessary.

Even if Defendants could concoct some open legal question, they are simply wrong in asserting (Not. ¶ 51) that it would disrupt federal regulations for the Puerto Rico courts to address those issues. "*Gunn* answers that argument: the [local] court's rulings will not bind the federal courts in future cases and will have no preclusive effect beyond the parties to the [local] litigation, and the possibility that the parties might be subjected to a [local] court's incorrect interpretation of federal law does not suffice to create 'arising under' jurisdiction." *Haith ex rel. Accretive Health, Inc. v. Bronfman*, 928 F. Supp. 2d 964, 970 (N.D. Ill. 2013) (citing *Gunn*, 568 U.S. at 261–63); *see also Doe v. Bos. Univ.*, No. 17-cv-10520, 2017 WL 2255752, at *2 (D. Mass. May 23, 2017) ("Even assuming this case could turn on a new interpretation of Title IX, that interpretation would not 'govern a large number of cases' so as to affect the federal system as a whole[.]") (citation omitted); *Urata v. Canare Elec. Co. Ltd.*, No. 12-5704, 2013 WL 2395049, at *13 (D.N.J. May 29, 2013) ("[A]ny state court decision that improperly resolves an issue of first impression

either will be limited to these facts, or will be resolved in time by federal courts properly exercising their jurisdiction."); *Solera Nat'l Bancorp, Inc. v. Quagliano*, No. 14-cv-00967, 2014 WL 2058120, at *1–2 (D. Colo. May 19, 2014) ("[A]ny decision by a state court would not be controlling in future cases as to what [the SEC rule] means or requires.").

The few cases that Defendants cite do not help them. *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180 (1921) (Not. ¶ 42) challenged a federal law's constitutionality. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'r & Mfg.*, 545 U.S. 308, 312–13 (2005) ("[T]he Court recognized federal-question jurisdiction [in *Smith*] because the principal issue in the case was the federal constitutionality of the bond issue."). No such dispute exists here.

The Second Circuit cases of *D'Alessio Securities v. New York Stock Exchange*, 258 F.3d 93 (2d Cir. 2001) and *NASDAQ OMX Group v. UBS Securities*, 770 F.3d 1010 (2d Cir. 2014) (Not. ¶ 42) involved national securities exchanges, with quasi-governmental powers, sued for breaching federal law duties, on issues that applied broadly to all exchange members. *D'Alessio*, 258 F.3d at 101–02 (overseeing member compliance with Exchange Act rules); *NASDAQ*, 770 F.3d at 1021 (ensuring "fair and orderly markets" for high-stakes IPOs). The claims here fall squarely on the other side of the "substantial" line: There is no central exchange for municipal securities;[11] municipal underwriters do not exercise quasi-governmental authority; and municipal issuances are not subject to reporting or registration requirements. Such minimal federal intervention reflects

[11] MSRB Education Center, *The Secondary Market Process,* https://www.msrb.org/EducationCenter/Municipal-Market/Lifecycle/Primary/Secondary-Market-Process.aspx (last visited Oct. 5, 2019).

the "balance" Congress struck "between the need to protect investors and concerns about inter-governmental comity." Disclosure No. 26100, 1988 WL 999989, at *18.

Finally, *Reserve Management Co. v. Willkie Farr & Gallagher LLP*, No. 11 Civ. 7045, 2012 WL 4378058, at *6–7 (S.D.N.Y. Sept. 25, 2012) (Not. ¶ 52) has been abrogated by the Supreme Court and the First Circuit. *Reserve Management* held that state law claims implicating the Exchange Act generally are subject to federal jurisdiction, pointing to cases directing that state law claims involving patent law should be adjudicated in federal courts. *Id.* at *7. The Supreme Court rejected this line of cases in *Gunn*, observing "the possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger the federal courts' exclusive patent jurisdiction, even if the potential error finds its root in a misunderstanding of patent law." *Gunn*, 568 U.S. at 263.[12] The First Circuit confirmed this point in *Mayagüez*, 726 F.3d at 17, holding that the pervasiveness of a federal statutory scheme is insufficient for jurisdiction. Following *Gunn*, numerous courts have held that state claims implicating the Exchange Act or other similarly "comprehensive" schemes do not confer "arising under" jurisdiction.[13]

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[12] *See also Barone v. Bausch & Lomb, Inc.*, 372 F. Supp. 3d 141, 152 (W.D.N.Y. 2019) (collecting cases holding that "[t]he desire for uniform interpretation of federal law is related to the argument about expertise (as it presupposes state courts will not properly interpret federal law) and … has been found insufficient") (citation omitted).

[13] *See Liana Carrier Ltd. v. Pure Biofuels Corp.*, 672 F. App'x 85, 91–92 (2d Cir. 2016) (contractual representations that "SEC Reports complied in all material respects with the requirements of the Securities Act and the Exchange Act" did not present a substantial question); *BlackRock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-09367, 2018 WL 5619957, at *6 (S.D.N.Y. Aug. 7, 2018) (state law claim alleging failure to comply with federal statute's "prudent person" requirement presented "highly fact-specific question" and did not create *Grable* jurisdiction); *see also, e.g.*, *MSO of Puerto Rico, LLC v. Med Scan, PSC*, No.

C. Depriving The Commonwealth Court Of Jurisdiction Would Disturb The Federal-State Balance Approved By Congress

There is no question that Puerto Rico's interest in adjudicating its own equitable doctrines is exceedingly strong. *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute."). Nor is there any reason to doubt that the Commonwealth court will adhere to applicable precedents in assessing whether Defendants respected industry customs and norms. *See Gunn*, 568 U.S. at 262 ("[S]tate courts can be expected to hew closely to the pertinent federal precedents."); *MSO of Puerto Rico*, 2019 WL 2869173, at *9 (finding no arising under jurisdiction while acknowledging that "Puerto Rican courts might have to interpret" federal law).

Defendants do not point to anything of weight on the other side of the scale. The Supreme Court instructs that "an important clue to Congress's conception of the scope of jurisdiction" is whether federal law provides a private right of action or preempts state remedies." *Grable*, 545 U.S. at 318. Both factors cut against jurisdiction here. While Congress created private rights of action to enforce other provisions of the Exchange Act, it provided none to enforce Rule 15c2-12. Congress has neither preempted state laws that prohibit the same conduct as the Exchange Act, nor prevented state courts from adjudicating claims based on such state laws. To the contrary,

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3:18-01683, 2019 WL 2869173, at *9 (D.P.R. July 2, 2019) (allegations of Medicare violations not substantial); *Administracion de Seguros de Salud de Puerto Rico v. Triple-S Salud, Inc.*, 212 F. Supp. 3d 283, 285–88 (D.P.R. 2015) (HIPAA violations); *Massachusetts v. DMB Fin., LLC*, No. 18-cv-11120, 2018 WL 6199566, at *4–5 (D. Mass. Nov. 28, 2018) (FTC rules); *Barone*, 372 F. Supp. 3d at 1501–52 (FDA regulations).

state courts regularly entertain suits under state law involving municipal securities, even though the proof may constitute actionable securities fraud under federal law.[14] Defendants would remove a wide swath of cases involving not only municipal securities, but also other securities—such as residential mortgage-backed securities and variable annuity contracts—from the ambit of the state courts. That is not what Congress intended.

State law actions often "provide an important remedy not available under federal law" and a "supplement" to "existing federal or state statutes." *Roland v. Green*, 675 F.3d 503, 518 (5th Cir. 2012) (citation omitted), *aff'd sub nom. Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). Through the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. 105-353, 112 Stat. 3227, Congress confirmed its goal of removing from state courts only a subset of state law securities claims—principally class actions involving securities traded on regulated national exchanges. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 87 (2006). Congress expressly recognized that "State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets," and it did not seek to "chang[e] the current treatment of individual lawsuits" under state law. Pub. L. No. 105-353 § 2. As the Supreme Court has observed, the limitations to SLUSA "evince[] congressional sensitivity to state prerogatives." *Merrill Lynch*, 547 U.S. at 87.

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[14] *E.g.*, *First Ark. Bank & Tr., v. Gill Elrod Ragon Owen & Sherman, P.A.*, 427 S.W.3d 47, 50 (Ark. 2013) (adjudicating state securities fraud and other state law claims related to municipal bonds); *Vest v. Duncan-Williams, Inc.*, No. M2003-02690-COA-R3-CV, 2004 WL 1056741, at *1 (Tenn. Ct. App. May 4, 2004) (same); *Herrmann v. Boehm*, No. D040608, 2003 WL 21040588, at *1 (Cal. Ct. App. May 9, 2003) (same); *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1097 (Colo. 1995) (same).

Remand is necessary so that state and local courts can develop their own laws, as Congress envisioned. *See Liana Carrier*, 672 F. App'x at 92 (affirming remand of state law breach of contract claim that would "necessarily turn on the requirements of federal securities law" out of "[r]espect for the state-federal balance"); *Haith ex rel. Accretive Health, Inc.*, 928 F. Supp. 2d at 972 ("There is no reason to suppose … that in passing those laws to regulate … the issuance and trading of securities, Congress also intended to bring derivative claims based on violations of those laws into the federal courts."). This is particularly true for "evolving" claims that have not been oft-interpreted, like doctrina de actos propios and the unilateral declaration of will. *GGNSC Admin. Servs., LLC v. Schrader*, 917 F.3d 20, 25 (1st Cir. 2019) (certifying case that "presents an unresolved question of [state] law whose answer is unclear" and "may implicate policy judgments best left to" state courts); *Quilez-Velar v. Ox Bodies, Inc.*, 823 F.3d 712, 723 (1st Cir. 2016) (certifying case to Puerto Rico Supreme Court where "precedents available are not clear").

The need to honor comity and preserve local prerogatives is especially acute in the municipal bond context, given Congress's choice to eschew comprehensive federal regulation of municipal issuances in favor of "intergovernmental comity." Disclosure No. 26100, 1988 WL 999989 at *18. Issuances by municipalities—themselves instrumentalities of states or territories—are subject to extensive state and local regulatory and even constitutional restrictions, as illustrated by Puerto Rico's own constitutional restrictions on debt issuances. *See* P.R. CONST. art. VI. State and local remedies thus are paramount in this sphere.

Defendants point (Not. ¶ 51) to the Exchange Act's jurisdictional provision, which grants federal courts jurisdiction over suits "brought to enforce any liability or duty created by [the

Exchange Act] or the rules or regulations thereunder." 15 U.S.C. § 78aa(a). Defendants' argument is foreclosed by *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, which held that the Exchange Act's "jurisdictional test matches the [*Gunn-Grable*] one we have formulated for § 1331 …. If (but only if) such a case meets the 'arising under' standard, [the Exchange Act] commands that it go to federal court." 136 S. Ct. 1562, 1568-70 (2016) ("incidental assertions" of Exchange Act requirements insufficient because plaintiff "can get all the relief he seeks just by showing the breach of [state law], without proving any violation of federal securities law"); *see also Liana Carrier*, 672 F. App'x at 92 (concluding that the "concern for state court prerogatives [does not] disappear … in the face of a statute granting exclusive federal jurisdiction") (citation omitted). Defendants also point to PROMESA's lack of a mandatory abstention provision (Not. ¶ 53), but provide no authority suggesting that this absence creates "arising under" jurisdiction.

Finally, Defendants assert (Not. ¶ 51) that PROMESA creates a federal interest that warrants removal of National's claims. They are wrong. Congress decided the parameters of PROMESA jurisdiction in enacting Section 2166; Defendants cannot bootstrap the specifically-defined federal interest underlying PROMESA into a broader federal interest that independently qualifies for "arising under" jurisdiction. Moreover, nothing in PROMESA (and Defendants cite nothing) delegates to the federal courts the role of enforcing fair play in the market for municipal bond insurance.

RELIEF REQUESTED & CONCLUSION

National respectfully requests the Court remand its claims to the Court of First Instance.

Dated: October 9, 2019
San Juan, Puerto Rico

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 9, 2019, I filed this **DECLARATION OF PHILIPPE Z. SELENDY IN SUPPORT OF PLAINTIFFS' MOTION FOR REMAND AND MEMORANDUM IN SUPPORT THEREOF** electronically with the Clerk of Court using the CM/ECF System, which will send notification of such filing to all parties of record in the above-captioned case. I further certify that on October 9, 2019, I served this document by certified mail and email on the "Standard Parties," as required by the *Tenth Amended Case Management Procedures Order*, Case No.17-03283-LTS, Dkt. 8027-1.

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