# Appendix A

# United States Court of Appeals
## For the First Circuit

Nos. 23-2036, 23-2049, 23-2050, 23-2052, 23-2053, 23-2054, 23-2057

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors,

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THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of the Puerto Rico Electric Power Authority; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs, Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, as Administrative Agent; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LCC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs, Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; ASSURED GUARANTY

CORP.; ASSURED GUARANTY MUNICIPAL CORP.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCEBERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, a series of Macquarie Investment Management Business Trust; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY; SIG STRUCTURED PRODUCTS, LCC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants, Appellants/Cross-Appellees,

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LCC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants, Appellees.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Hon. Laura Taylor Swain,* U.S. District Judge

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Before

Kayatta, Howard, and Rikelman,
Circuit Judges.

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Martin J. Bienenstock, with whom Mark D. Harris, Margaret A. Dale, Dietrich L. Snell, Ehud Barak, Shiloh Rainwater, Henrique N. Carneiro, Timothy W. Mungovan, John E. Roberts, Elliot R. Stevens, Lucas Kowalczyk, and Proskauer Rose LLP were on brief, for appellee/cross-appellant the Financial Oversight and Management Board for Puerto Rico, as representative of the Puerto Rico Electric Power Authority.

Peter Friedman, with whom Maria J. DiConza, Elizabeth L. McKeen, Ashley M. Pavel, Jason Zarrow, O'Melveny & Myers LLP, Luis C. Marini-Biaggi, Carolina Velaz-Rivero, and Marini Pietrantoni

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* Of the Southern District of New York, sitting by designation.

Muñiz LLC were on brief, for appellee/cross-appellant the Puerto Rico Fiscal Agency and Financial Advisory Authority.

Pedro A. Jimenez, with whom Luc A. Despins, Eric D. Stolze, Stephen B. Kinnaird, Stephen Sepinuck, Paul Hastings LLP, Juan J. Casillas Ayala, Israel Fernández Rodríguez, Juan C. Nieves González, and Casillas, Santiago & Torres LLC were on brief, for appellee/cross-appellant The Official Committee of Unsecured Creditors of All Title III Debtors.

Richard G. Mason, Amy R. Wolf, Emil A. Kleinhaus, Angela K. Herring, Michael H. Cassel, Wachtell, Lipton, Rosen & Katz, Nayuan Zouairabani, Victoria Rivera Llorens, and McConnell Valdés LLC on brief for appellee Cortland Capital Market Services LLC.

Sarah E. Phillips, Simpson Thacher & Bartlett LLP, Jose L. Ramirez-Coll, and Antonetti Montalvo & Ramirez Coll on brief for appellees SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master LTD, and Ultra NB LLC.

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Glenn M. Kurtz, with whom Claudine Columbres, Isaac Glassman, Thomas E. MacWright, Thomas E. Lauria, John K. Cunningham, Keith Wofford, Michael C. Shepherd, Jesse L. Green, White & Case LLP, and Lydia M. Ramos Cruz were on brief, for appellant/cross-appellee GoldenTree Asset Management LP.

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June 12, 2024

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**KAYATTA, Circuit Judge.** In this opinion, we consider the rights of parties holding certain revenue bonds, which were issued by the Puerto Rico Electric Power Authority ("PREPA" or "the Authority") before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. §§ 2161–78. We hold that these bondholders have a non-recourse claim on PREPA's estate for the principal amount of the bonds, plus matured interest. We also hold that this claim is secured by PREPA's Net Revenues -- as that term is defined by the underlying bond agreement -- and by liens on certain funds created by that bond agreement. We do not decide what effect, if any, confirmation of a plan of reorganization will have on the bondholders' security interest, nor do we attempt to estimate the economic value of that security interest. Our reasoning follows.

## I.

### A.

Puerto Rico passed the Puerto Rico Electric Power Authority Act ("Authority Act") in 1941. See P.R. Laws Ann. tit. 22, § 191. The Authority Act created PREPA, a public electric utility. Id. § 193(a). More than eighty years later, PREPA remains the "sole electric utility in Puerto Rico." Puerto Rico Electric Power Authority (PREPA), P.R. Fiscal Agency & Fin. Advisory Auth., https://perma.cc/F7HA-QNVH. It owns electrical

generation, transmission, and distribution assets in the Commonwealth, and serves around 1.5 million customers. Id.

The Authority Act permits PREPA to raise money by issuing revenue bonds secured by its "entire gross or net revenues and present or future income." P.R. Laws Ann. tit. 22, § 206(e)(1); see also id. § 196(o). In this manner, PREPA can raise money without granting a lien on its physical assets, such as power plants or transmission lines. Pursuant to the Authority Act, PREPA in 1974 executed the Trust Agreement with First National City Bank, which was then acting as trustee.[1] Under the Trust Agreement, PREPA raised money to finance its system by issuing revenue bonds (the "Revenue Bonds"). PREPA promised to repay the bondholders over time,[2] in accordance with the Trust Agreement. Several articles of the Trust Agreement frame the issue before us.

First, the Trust Agreement opens with a Preamble,[3] the text and meaning of which we discuss in detail in Part II.A.1 of this opinion.

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[1] The current trustee is U.S. Bank National Association (to which we refer as the "Trustee").

[2] The lower-case phrase "the bondholders" refers generally to the creditors that loaned PREPA money under the Trust Agreement. When specifically discussing the bondholders and insurers that are parties in this action, we use the capitalized term "Bondholders."

[3] The Bondholders propose different labels for this provision, such as the "Now, Therefore paragraph," or the "Granting Clause." While we opt for the simpler "Preamble," our choice of

Second, Article I of the Trust Agreement defines key terms, including "Revenues" and "Net Revenues." PREPA's "Revenues" are (1) "all moneys received by [PREPA] in connection with or as a result of its ownership or operation" of its electricity generation and distribution system, (2) "any proceeds of use and occupancy insurance on the System or any part thereof, and (3) "income from investments made under" either the Trust Agreement or a 1947 predecessor agreement.[4] PREPA's "Net Revenues" are any Revenues remaining after deducting reasonable and necessary operating expenses. Article I also defines the phrase "Opinion of Counsel," which means any opinion filed by PREPA's counsel to "authenticate bonds under [the Trust] Agreement."

Third, Article V of the Trust Agreement establishes a "waterfall" structure for distributing PREPA's Revenues (as the term is defined in Article I) into certain funds. The Revenues first flow into the General Fund.[5] PREPA pays its reasonable operating expenses ("Current Expenses") out of the General Fund. The remaining dollars -- the Net Revenues -- then flow into the

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label does not bear on whether the provision is operative or prefatory.

[4] The Trust Agreement carved out several forms of investment income from this definition. Those exceptions are not relevant to this case, so we do not detail them here.

[5] This excludes investment income, certain types of which qualify as "Revenue" but nevertheless do not flow into the General Fund.

Revenue Fund, minus a reserve to cover future operating expenses. From there, Net Revenues flow first into the Sinking Fund, and then into a series of Subordinate Funds. The Net Revenues deposited into the Sinking Fund cover debt service. The Net Revenues deposited into the Subordinate Funds cover internal PREPA operations, such as extraordinary repairs or capital improvements.

There are four Subordinate Funds: the Construction Fund,[6] the Self-Insurance Fund, the Capital Improvement Fund, and the Reserve Maintenance Fund. If there is not enough money in the Sinking Fund to cover PREPA's debt service obligations, Article V (specifically, sections 512 through 512B) broadly requires PREPA to draw on the Subordinate Funds -- other than the Construction Fund -- to pay bondholders.

Fourth, and relatedly, Articles IV and V grant security interests in certain funds both within and outside of the waterfall structure described in Article V. Section 401 of the Trust Agreement creates a "lien and charge in favor of the [bondholders]" in moneys residing in the Construction Fund. Similarly, under section 507 of the Trust Agreement, the moneys in the Sinking Fund and remaining Subordinate Funds -- that is, the Subordinate Funds

[6] The Construction Fund is not technically part of the waterfall structure established in Article V. Instead, the Construction Fund is replenished by bond proceeds and certain Net Revenues preemptively siphoned off from the Revenue Fund. For the sake of simplicity, however, we include it in the broader category of Subordinate Funds.

within the Article V waterfall -- are "subject to a lien and charge in favor of the [bondholders]."[7] Section 513 confirms that the Sinking Fund moneys are "pledged to and charged with" debt service payments to the bondholders.

Fifth, Article VI of the Trust Agreement specifies how PREPA should hold and invest the moneys it receives. Specifically, section 601 of the Trust Agreement states that:

> All moneys received by the Authority under the provisions of this Agreement shall be deposited with a Depositary or Depositaries, shall be held in trust, shall be applied only in accordance with the provisions of this Agreement and shall not be subject to lien or attachment by any creditor of the Authority.

Sixth, Article VII of the Trust Agreement outlines specific contractual covenants between the bondholders and PREPA. In section 701, PREPA covenants that it will "promptly pay the principal of and the interest on" the Revenue Bonds. PREPA also covenants that the Revenue Bonds are "payable solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified." In sections 705 and 712, PREPA also agrees not to create -- "or suffer to be created" -- any lien or charge on "the Revenues ranking equally with or prior to the [Revenue Bonds]."

[7] Sections 401 and 507 both grant a lien to the Trustee, not the bondholders. But those sections confirm that this lien is for the benefit of the bondholders.

Finally, Article VIII of the Trust Agreement outlines the bondholders' remedies. Section 804 permits the bondholders to file a suit "in equity or at law . . . for the appointment of a receiver as authorized by the Authority Act[,] or for the specific performance of any covenant or agreement contained herein." The same provision entitles the bondholders to "recover and enforce any judgment or decree against the Authority, but solely as provided herein and in such bonds, for any portion of such amounts remaining unpaid . . . and to collect (but solely from moneys in the Sinking Fund and any other moneys available for such purpose) in any manner provided by law, the moneys adjudged or decreed to be payable."

**B.**

In 2017, PREPA defaulted on its fundamental obligations under the Trust Agreement, including its obligation to pay the bondholders. But for the passage of PROMESA, the Trustee and/or the bondholders could have pursued various remedies authorized by the Authority Act and the Trust Agreement. Those remedies include suits at law and/or equity to enforce contractual covenants, to obtain an accounting, and to place PREPA in receivership. P.R. Laws Ann. tit. 22, §§ 207(a)-(b), 208(a)(1)-(3).

Congress, however, changed all this by enacting PROMESA. Among other things, PROMESA created the Financial Oversight and Management Board ("FOMB" or "Board"). 48 U.S.C. § 2121(b)(1).

PROMESA empowered the Board to place Commonwealth entities into bankruptcy-type restructuring proceedings (often called "Title III proceedings"), which resemble municipal bankruptcy proceedings under Chapter 9 of the Bankruptcy Code. In re Fin. Oversight & Mgmt. Bd. for P.R., 919 F.3d 121, 124-25 (1st Cir. 2019); see generally 48 U.S.C. § 2161(a) (incorporating broad swaths of the Bankruptcy Code into PROMESA). In July 2017, the Board commenced a Title III proceeding in district court (also called the "Title III court") to restructure PREPA. See In re Fin. Oversight & Mgmt. Bd. for P.R., 899 F.3d 13, 18 (1st Cir. 2018). As a result, the bondholders' ability to pursue any remedies against PREPA under Commonwealth law was automatically stayed. See 48 U.S.C. § 2161(a) (incorporating section 362 of the Bankruptcy Code into PROMESA); 11 U.S.C. § 362(a) (stating that a bankruptcy petition automatically stays actions against the debtor's estate).

After two years of on-and-off negotiations and skirmishes, the Board filed an adversary proceeding within the Title III restructuring proceeding. The purpose of the adversary proceeding was to define the rights and remedies that bondholders had against PREPA. After the parties negotiated a restructuring agreement for PREPA in 2019, the Board agreed not to prosecute the adversary proceeding. See In re Fin. Oversight & Mgmt. Bd. for P.R., 91 F.4th 501, 506 n.3 (1st Cir. 2024). The Commonwealth's government unilaterally terminated the restructuring agreement in

March 2022, so the Board moved to revive its original complaint. Id. at 506. The Board filed its amended complaint in October of that year, and this remains the operative complaint for purposes of this appeal. The amended complaint included three allegations that are relevant here.

First, the Board alleged that bondholders only had security interests in moneys deposited in the Sinking or Subordinate Funds. According to the Board, bondholders did not have a security interest in PREPA's current or future Revenues/Net Revenues, unless those Revenues/Net Revenues resided in the Sinking or Subordinate Funds. Second, the Board alleged that bondholders only had perfected security interests in the Sinking Fund and one of the Subordinate Funds (i.e., the Self-Insurance Fund), meaning the Board could avoid the remaining unperfected interests pursuant to 11 U.S.C. § 544(a). Finally, the complaint alleged that the Revenue Bonds were non-recourse, meaning bondholders could only recover owed moneys from the liened Funds, rather than any other part of PREPA's estate.

The bondholders that are parties to this case (again, "the Bondholders") filed an answer denying the Board's allegations. The Bondholders also filed a counterclaim. Among other things, the counterclaim alleged that PREPA had misappropriated moneys "for uses other than Current Expenses instead of paying [the] [B]ondholders," and had therefore breached

its obligations to hold "all moneys received under the provisions of the Trust Agreement in trust for the benefit of the [B]ondholders." The Bondholders asked for a declaratory judgment that PREPA was in breach of trust, and an "order requiring an accounting of PREPA's revenues" pursuant to P.R. Laws Ann. tit. 22, § 208(a)(2). According to the Bondholders, this "accounting" would require equitable disgorgement of any moneys that PREPA wrongly diverted from the Sinking and/or Subordinate Funds.

**C.**

On March 22, 2023, the Title III court issued a partial summary judgment order in the adversary proceeding. First, the court agreed with the Board that the Trust Agreement only granted the Bondholders security interests in "moneys actually deposited to the Sinking Fund and the [Subordinate Funds]." The Trust Agreement did not grant a broader security interest in PREPA's current or future Revenues (or Net Revenues). Second, the court concluded that the Board could avoid any unperfected security interests under 11 U.S.C. § 544(a).[8] Third, the Title III court rejected the Board's argument that the Revenue Bonds were

[8] The parties have since stipulated that the Bondholders' security interests in the Reserve Maintenance Fund, the Capital Improvement Fund, and the Construction Fund are unperfected. There is one notable exception to this stipulation: The Bondholders may still argue that they have a perfected security interest in PREPA's Revenues, and that this perfection extends to the moneys in these Subordinate Funds.

non-recourse, holding instead that the Bondholders could sue PREPA to recover moneys outside the Sinking and Subordinate Funds.

With respect to the non-recourse holding, the Title III court emphasized that even though the Bondholders lacked a security interest in PREPA's Revenues or Net Revenues, section 804 of the Trust Agreement still permitted them to seek a court order forcing PREPA to divert moneys into the Sinking Fund. Recall that section 804 authorized any bondholder to sue in law or equity for the "specific performance of any covenant or agreement contained" in the Trust Agreement. In the court's view, the existence of this equitable specific performance remedy gave bondholders an unsecured deficiency claim on PREPA's Net Revenues. The precise amount of this claim would "aris[e] from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance." A court may -- for purposes of claim allowance -- estimate a claim in bankruptcy "arising from a right to an equitable remedy for breach of performance." 11 U.S.C. § 502(c)(2). The Title III court applied that provision, estimating the specific performance remedy (and therefore the unsecured claim on Net Revenues) at around $2.4 billion.

The court's partial summary judgment order did not reach the Bondholders' trust-related arguments. But its final summary judgment order, which it issued on November 28, 2023, did. There, the Title III court concluded that the Bondholders had failed to

state a claim for breach of trust. It also rejected their related demand that PREPA equitably disgorge, via an "accounting," any misappropriated moneys pursuant to P.R. Laws Ann. tit. 22, § 208(a)(2). The court found that PREPA was not a trustee under the plain language of the Trust Agreement, and that an "accounting" under the Authority Act did not require the sweeping restitution remedy the Bondholders requested.

**D.**

Upon issuance of the Title III court's final summary judgment order, the Bondholders filed separate notices of appeal. The Bondholders challenged the Title III court's findings that they lacked a security interest in PREPA's current or future Revenues or Net Revenues; that any such interest was potentially avoidable under 11 U.S.C. § 544(a); that they had failed to state a claim for breach of trust; and that they were not entitled to an "accounting" of misappropriated PREPA moneys. The Bondholders also challenged the Title III court's estimation order, arguing that the court erred by allowing an unsecured claim of $2.4 billion, rather than almost $9 billion (i.e., the face value of the Revenue Bonds). Alternatively, the Bondholders challenged the estimation order's methodology.

The Board and associated plaintiff-appellees -- specifically the Official Committee of Unsecured Creditors ("Committee") and the Puerto Rico Fiscal Agency and Financial

Advisory Authority ("AAFAF") -- cross-appealed. In addition to rejecting the Bondholders' arguments, the Board and its allies argued that the Title III court erred in allowing any unsecured claim at all on PREPA's Net Revenues. In the Board's view, the Revenue Bonds were non-recourse, so the Bondholders could only recover from their collateral, i.e., the moneys in the Sinking and Subordinate Funds. In the alternative, the Board and its allies argued that the Title III court's $2.4 billion estimation should be affirmed. Finally, the Board contended that if there were a lien on Net Revenues, it would be avoidable as unperfected.

We consolidated these appeals and ordered expedited briefing and oral argument.[9]

**II.**

We begin by asking whether the Trust Agreement grants the Bondholders a lien on any of PREPA's revenues other than those that make it into the Sinking or Subordinate Funds. We hold that

[9] In our analysis, we frequently refer to arguments made by the Bondholders. In their briefing, several Bondholders -- specifically, Assured Guaranty Municipal Corp., GoldenTree Asset Management LP, Syncora Guarantee, and U.S. Bank National Association -- incorporate by reference arguments made by other Bondholders, pursuant to Federal Rule of Appellate Procedure 28(i). The PREPA Ad Hoc Group does not do so. But neither the Board nor its allies suggests that the Bondholders' invocation of Rule 28(i) was improper, or that the PREPA Ad Hoc Group's failure to invoke Rule 28(i) constitutes waiver of arguments raised exclusively by other Bondholders. So, where a Bondholder sufficiently develops a given argument, we attribute that argument to all "the Bondholders."

the Trust Agreement grants the Bondholders a lien on PREPA's Net Revenues, even if they are not placed in one of the Funds. Our reasoning follows.

**A.**

**1.**

The dispute about the scope of the Bondholders' lien begins with the Trust Agreement's Preamble. In pertinent part, the Preamble provides: "Now, Therefore, This Agreement Witnesseth, that . . . in order to secure the payment of [the Revenue Bonds] . . . [PREPA] does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the [Revenue Bonds] . . . and it is mutually agreed and covenanted . . . as follows . . . ."[10]

[10] The full text of the Preamble reads:

> Now, Therefore, This Agreement Witnesseth, that in consideration of the premises, of the acceptance by the Trustee of the trusts hereby created, and of the purchase and acceptance of the bonds by the holders thereof, and also for and in consideration of the sum of One Dollar to the Authority in hand paid by the Trustee at or before the execution and delivery of this Agreement, the receipt of which is hereby acknowledged, and for the purpose of fixing and declaring the terms and conditions upon which the bonds are to be issued, executed, authenticated, delivered, secured and accepted by all persons who shall from time to time be or become holders thereof, and in order to secure the payment of all the bonds at any time issued and outstanding hereunder and the interest and the redemption premium, if any, thereon according to their tenor, purport and effect, and in order to secure the performance and observance of all

According to the Bondholders, the Preamble grants a lien on all of PREPA's "Revenues," which is defined as PREPA's gross revenues with several exceptions not relevant here. In sharp contrast, the Title III court found that the Preamble did not create any lien at all, let alone a lien on PREPA's gross revenues. The court gave two reasons for this conclusion.

First, the court concluded that the Preamble was a non-binding "prefatory clause" -- much like a "whereas clause" -- rather than a "self-effectuating granting clause." The Board does not defend this reading of the Preamble, calling it "beside the point." In its brief, AAFAF actually concedes that the Preamble's language is "operative." Only the Committee and a group of intervenors defend the contention that the Preamble is not

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> the covenants, agreements and conditions therein and herein contained, the Authority has executed and delivered this Agreement and has pledged and does hereby pledge to the Trustee the revenues of the System, subject to the pledge of such revenues to the payment of the principal of and the interest on the 1947 Indenture Bonds (hereinafter mentioned), and other moneys to the extent provided in this Agreement as security for the payment of the bonds and the interest and the redemption premium, if any, thereon and as security for the satisfaction of any other obligation assumed by it in connection with such bonds, and it is mutually agreed and covenanted by and between the parties hereto, for the equal and proportionate benefit and security of all and singular the present and future holders of the bonds issued and to be issued under this Agreement, without preference, priority or distinction as to lien or otherwise, except as otherwise hereinafter provided, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof or otherwise, as follows:

operative. The former labels the clause "not an operative term at all," but rather a "lead-in" or "recital." And the latter calls the clause "prefatory."

We agree with the Bondholders that the Preamble is a granting clause, rather than a prefatory clause. To be sure, language that only expresses the aspirations of the parties (such as a classic "whereas" clause) can be a mere table-setter, often without legal force. See Minturn v. Monrad, 64 F.4th 9, 15 (1st Cir. 2023). And the Trust Agreement does begin with table-setting "whereas" clauses. But the relevant Preamble language does not appear in such a clause. Instead, it debuts in a subsequent "Now Therefore . . ." clause, which states that the Authority "does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the bonds." (Emphasis added.) This language reflects a promise, not merely an aspiration or a description of background facts.

Puerto Rico case law supports the conclusion that the Preamble is not merely prefatory.[11] In a case interpreting an unrelated bond agreement, the Puerto Rico Supreme Court found that a provision beginning with "Now, Therefore" was one of the "main clauses" in the contract. D'All Concrete Mix, Inc. v. Raúl

[11] Under section 1301 of the Trust Agreement, Puerto Rico law governs the contract's construction.

Fortuño, Inc., 14 P.R. Offic. Trans. 954, 956 (1983) (per curiam). We see no reason to read the Preamble differently, especially given that no party identifies any contrary Puerto Rico authority.

Our conclusion that the text of the Preamble is not merely prefatory brings us to the Title III court's alternative finding that the Preamble did not create any kind of security interest because it did not use the words "lien" or "charge." Again, the Board and its allies do not defend the court's reasoning. The Board even concedes that the Preamble's "pledge" is enough to create a security interest.

The Board is correct. There is no "magic words" requirement for creating a security interest under Puerto Rico law. Instead, a security agreement need only "indicate an [objective] intent to create a security interest." In re Esteves Ortiz, 295 B.R. 158, 162 (B.A.P. 1st Cir. 2003) (applying Puerto Rico law). The Preamble clearly evinces such an intent. It states that "in order to secure the payment" of the Revenue Bonds, PREPA "pledge[s] . . . the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the bonds." This language closely resembles language that we have previously found sufficient to create a security interest. See, e.g., In re Navigation Tech. Corp., 880 F.2d 1491, 1493 (1st Cir. 1989) (finding that an assignment of contractual

rights "[t]o secure the payment of [a] debt" was enough to create a security interest).

Revealingly, the Authority Act -- which, as the Title III court found, authorizes PREPA to grant liens in its revenues -- uses the same phrasing as the Preamble. Section 206 of the Authority Act states that PREPA may "pledg[e]" its current or future revenues to "secure payment of [revenue bonds]." See P.R. Laws Ann. tit. 22, § 206(e)(1). In other words, the Authority Act expressly contemplates that a "pledge" to "secure payment" of a bond can create a security interest. It would therefore be paradoxical to hold that the identical language in the Preamble does not create such an interest.

**2.**

Having established that the Preamble creates a security interest, we next determine the scope of that security interest. The Trust Agreement specifies that PREPA pledges as security for the Revenue Bonds "the revenues of the System . . . and other moneys to the extent provided in this Agreement . . . as follows." This text poses two questions. First, what are the "revenues of the System," given that the Trust Agreement never expressly defines the phrase? And second, does the phrase "to the extent provided in [the Trust Agreement]" apply to both the pledge of the "revenues of the System" and the pledge of "other moneys," or just to one of those pledges? We address each question in turn.

**i.**

We begin with the Bondholders' ambitious claim that the "revenues of the System" means PREPA's Revenues (i.e., gross revenues). The Trust Agreement does not define "revenues of the System." It does, however, define "Revenues" to mean "all moneys received by the Authority in connection with or as a result of its ownership or operation of the System [minus a variety of investments and transactions]." It also defines "Net Revenues" to mean "the excess of the Revenues . . . over the Current Expenses." By eschewing the defined terms "Revenues" and "Net Revenues" in favor of the undefined term "revenues of the System," the Preamble's text leaves unclear precisely what is being pledged.

To resolve this ambiguity, we turn to the more fundamental rule that a court should read a contract "as a whole." See 11 Williston on Contracts § 32:5 (4th ed.); see also Entact Serv., LLC v. Rimco, Inc., 526 F. Supp. 2d 213, 221 (D.P.R. 2007) (citing P.R. Laws Ann. tit. 31, § 3475) ("[W]hen interpreting contracts, [a court applying Puerto Rico law] must read contract provisions in relation to one another, giving unclear provisions the meaning which arises from considering all provisions together."). And that rule brings clarity.

When negotiating a contract governing billions of dollars in bonds, the parties understandably agreed to accompany any bond issuance with an opinion of counsel that would confirm

the creditors' rights and responsibilities. This opinion of counsel would need to describe the security that PREPA purported to provide its creditors. The parties supplied that description in section 101 of the Trust Agreement. Under section 101, an opinion of counsel must state that the Trust Agreement "creates a legally valid and effective pledge of the Net Revenues . . . and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement . . . ." (Emphasis added.) We refer to this language -- which the parties drafted to direct future counsel on how to describe the collateral securing the Revenue Bonds in connection with the issuance and delivery of any such bonds -- as the "Opinion of Counsel Clause." And given this agreed-upon description, we construe the phrase "revenues of the System" in the Preamble to mean "Net Revenues" (i.e., gross revenues minus Current Expenses) rather than "Revenues" (i.e., gross revenues).

The Bondholders retort that other Trust Agreement provisions -- namely, sections 516(c), 705, and 712 -- suggest that the lien is on Revenues, not Net Revenues.[12] These provisions generally forbid PREPA from granting a lien equal or superior to

[12] The Bondholders also reference section 701's statement that the "Revenues are hereby pledged to the payment of [the Revenue Bonds]." Our analysis applies to that language as well.

the lien "secured hereby upon the Revenues."[13] (Emphasis added.) These sections are about lien priority, not lien scope. And none of these sections says that the Bondholders' lien is secured by all the Revenues. That is, even if a bondholder were to have a lien on part of the Revenues (for example, the Net Revenues), one could still describe that lien as "upon the Revenues." Moreover, even if the Bondholders' preferred reading were plausible, drive-by references to "Revenues" must take a back seat to the drafters' focused description of the collateral in the Opinion of Counsel Clause. See Restatement (Second) of Contracts § 203, cmt. e (1981) ("Attention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.").

Finally, and most practically, even if the Bondholders' reading of the Trust Agreement were correct, they would likely end up in the same place. As all parties agree, PREPA's Revenues and Net Revenues are "special revenues" under the Bankruptcy Code (a term that we define more precisely later). See infra note 15. And under the Code, any lien on special revenues is subordinate to

[13] Sections 516(c) and 705 use this language, while section 712 describes a lien on the "Revenues of the bonds issued under and secured by this Agreement."

a utility's reasonable and necessary post-petition operating expenses. See 11 U.S.C. § 928(b); 48 U.S.C. § 2161(a) (incorporating section 928 into PROMESA). Accordingly, as the Bondholders conceded at oral argument, "even a gross revenue pledge becomes a net pledge in [a Title III proceeding]." 5 Norton Bankruptcy Law & Practice § 90:13 (3d ed. 2024).

**ii.**

The Board and its allies agree that the Bondholders do not have a lien on PREPA's gross Revenues. But they insist that this is only half the story. They argue that the Bondholders' security interest does not even attach to all Net Revenues. Instead, they claim that it attaches only to those Net Revenues that have flowed into the Sinking Fund and/or the Subordinate Funds. This argument trains on the text of the Preamble, which states in relevant part that PREPA "does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement . . . as follows." (Emphasis added.)

The Board's reasoning is thus: (1) The Preamble's revenue pledge is only "to the extent provided in [the Trust Agreement] . . . as follows"; (2) section 701 of the Trust Agreement states, in turn, that PREPA's "Revenues are hereby pledged . . . in the manner and to the extent hereinabove particularly specified"; (3) therefore, the Preamble and

section 701 are "bookends" that limit the Bondholders' security interest to the more specific grants that appear between those two contractual provisions; (4) those more specific grants -- in sections 401, 507, and 513 -- only expressly provide for liens in the Sinking and Subordinate Funds; (5) so, the Trust Agreement narrows the Preamble's revenue pledge to those Net Revenues that are actually deposited into the Sinking and Subordinate Funds.

The first step in this argument poses a classic antecedent puzzle. Recall that in the Preamble, the modifying phrase "to the extent provided in [the Trust Agreement]" immediately follows the pledge of "other moneys." But the Board's argument assumes that this modifying phrase applies to both of its antecedent phrases: "revenues of the System" and "other moneys." Put differently, in the Board's view, the Preamble pledges (1) the "revenues of the System . . . to the extent provided in [the Trust Agreement]," and (2) "other moneys to the extent provided in [the Trust Agreement]." Unsurprisingly, the Bondholders counter that the phrase "to the extent provided in [the Trust Agreement]" modifies only its immediate antecedent: "other moneys."

The parties' respective readings rely on arguably opposing interpretative canons. On the one hand, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."

Paroline v. United States, 572 U.S. 434, 447 (2014) (quoting Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920)). In a prior PROMESA case, we cited Paroline to interpret a similar bond agreement between creditors and Puerto Rico's government employee pension system. See In re Fin. Oversight & Mgmt. Bd. for P.R., 948 F.3d 457, 467 (1st Cir. 2020) ("Andalusian"). There, the bond agreement defined "Employers' Contributions" as "the contributions . . . made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to [certain statutory sections]." Id. at 464. We rejected the argument that the modifying phrase beginning with "which are payable to the System" only applied to its immediate antecedent: "any assets in lieu thereof or derived thereunder." Id. at 467. Instead, we found that the modifying phrase also naturally referred to "the contributions . . . made by the Employers." Id. The Board urges us to reach a similar conclusion here: that the "to the extent" phrase applies to both of its antecedents.

On the other hand, there is the canon of the last antecedent. This canon of statutory interpretation broadly prescribes that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." Barnhart v. Thomas, 540 U.S. 20, 26 (2003). If we apply this canon, then the "to the extent" phrase underlined

above only modifies its immediate antecedent: "other moneys." Thus, the Preamble would pledge (1) "the revenues of the System," and (2) "other moneys to the extent provided in [the Trust Agreement]."

Faced with the opposing indications of two interpretative guides, we opt for the interpretation that the drafters sanctioned in the Opinion of Counsel Clause. Notably, that clause both "follows" the Preamble and comes before section 701's command to construe the Trust Agreement's revenue pledge "in the manner and to the extent hereinabove particularly specified." And in describing the security granted by the Trust Agreement to protect bondholders, the clause states in pertinent part that the Trust Agreement establishes a "legally valid and effective pledge of the Net Revenues . . . and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds." (Emphasis added.) This language -- with its two "and[s]" -- draws a clear grammatical distinction between the pledge of the "Net Revenues" and the pledge of the "moneys, securities, and funds held or set aside under this Agreement." That distinction runs directly counter to the Board's contention that the Trust Agreement only pledges Net Revenues to the extent they reside in the Sinking or Subordinate Funds.

In agreeing on how to describe the Revenue Bonds' collateral to potential investors in the Opinion of Counsel Clause,

the parties presumably used words that accurately conveyed their mutual intent. We are loath to read ambiguous language in the Trust Agreement in a manner suggesting that the Agreement calls for investors to be misled, as would be the case if we were to hold that the Bondholders' collateral was limited to moneys in the Sinking and Subordinate Funds. See Asociacion de Condominos v. Centro I, Inc., 6 P.R. Offic. Trans. 257, 268 (1977) (contract interpretation should consider practical consequences of a proffered reading). We also find it very unlikely that an objectively reasonable party to the transaction giving rise to the Revenue Bonds would have expected the source of repayment not to be subject to a lien while in the debtor's hands.

To defend its preferred reading, the Board embraces the Title III court's view that the Trust Agreement cannot create overlapping liens in the Net Revenues and the moneys in the Sinking and Subordinate Funds. The basic argument here is that if the Bondholders have a lien on all Net Revenues, then the Fund-specific liens outlined in sections 401, 507, and 513 would be superfluous, because the Sinking and Subordinate Funds also contain Net Revenues. But at least one Subordinate Fund -- the Construction Fund -- also includes bond proceeds, which the parties agree are

not Net Revenues.[14] So, at least one Fund-specific pledge covers moneys not captured by the pledge of the Net Revenues.

To be sure, that still leaves us construing the text as granting an arguably superfluous lien in (at least) the Sinking Fund. But such superfluity is hardly unheard of in revenue bond agreements. See In re Las Vegas Monorail Co., 429 B.R. 317, 325, 333 (Bankr. D. Nev. 2010) (interpreting a contract that granted a lien against net revenues, even though the creditor also held liens in the funds that received those net revenues); cf. Unisys P.R., Inc. v. Ramallo Bros. Printing, 1991 WL 735351 (P.R. Offic. Trans.) (court interpreting contract may consider intent of parties in light of industry practice). Indeed, in this case, such a belt-and-suspenders approach likely offered valuable assurance to the bondholders. For example, section 507 of the Trust Agreement states that the Sinking Fund is held by the Trustee, not by PREPA. By expressly noting that the Sinking Fund is "subject to a lien and charge" in favor of the bondholders, the Trust Agreement eliminates any risk that the transfer of moneys from the PREPA-held Revenue Fund to the Trustee-held Sinking Fund would impair the lien initially placed on those moneys as Net Revenues. Given this context, the mere fact that our interpretation of the Trust

[14] The parties disagree on whether other categories of moneys -- such as letters of credit and federal subsidies -- also qualify as Net Revenues. We need not resolve that issue here.

Agreement creates superfluity is not enough to invalidate it. See Restatement (Second) of Contracts § 203, cmt. b (1981) ("Even agreements tailored to particular transactions sometimes include overlapping or redundant or meaningless provisions.").

The Board also points to section 601 of the Trust Agreement, which states in pertinent part: "All moneys received by [PREPA] under the provisions of this Agreement . . . shall not be subject to lien or attachment by any creditor of [PREPA]." According to the Board, this provision means that no lien can attach to Net Revenues in their liminal, pre-Sinking Fund (or pre-Subordinate Fund) state. This argument proves too much. The Sinking and Subordinate Funds contain only "moneys received" by PREPA. If "moneys received" are not subject to a lien, then section 601 would cast doubt on every lien created by the Trust Agreement. And it would undo the work done by both the Preamble and the Opinion of Counsel Clause.

The more sensible reading of section 601 is that no non-bondholder creditor may -- absent the bondholders' consent -- secure a lien on moneys received by PREPA. This reading aligns with the Authority Act, which states that "[n]o lien whatsoever may be placed on the assets of [PREPA] insofar as the Trust Agreement with the bondholders or agreements with the creditors of [PREPA] do not allow." P.R. Laws Ann. tit. 22, § 196(o). Thus, the Authority Act distinguishes between agreements with

"bondholders" and agreements with PREPA's other "creditors." Id. And if we apply this distinction to section 601, then that provision's prohibition on "lien or attachment by any creditor of [PREPA]" clearly refers to creditors that are not bondholders. (Emphasis added.) By contrast, section 601 does not bar bondholders from obtaining a lien on "moneys received" by PREPA. On the contrary, it guarantees that any such lien is presumptively superior to a lien held by a non-bondholder creditor.

In sum, we find that as security for the Revenue Bonds, PREPA pledged the Net Revenues and not just those moneys that made it into the Sinking and Subordinate Funds.

**B.**

We have established that the Bondholders have a lien on PREPA's Net Revenues. But that is not the end of the matter. The parties disagree on a more fundamental question: Does the lien on Net Revenues also apply to future Net Revenues, i.e., Net Revenues that PREPA has not yet acquired? We conclude that the answer is yes. Our reasoning follows.

**1.**

Commonwealth law determines whether -- and to what extent -- a trustee or bondholder may have a security interest in the assets of a bankrupt borrower. See Butner v. United States, 440 U.S. 48, 54 & n.9 (1979). Here, the Authority Act expressly permits PREPA to pledge the "entire gross or net revenues and

present or future income of [PREPA], including the pledging of all or any part thereof to secure payment" of the Revenue Bonds. P.R. Laws Ann. tit. 22, § 206(e)(1). Puerto Rico has also adopted the Uniform Commercial Code ("UCC"), which sanctions security interests in "after-acquired collateral," i.e., liens extending to property that the debtor does not possess at the time of the underlying security agreement (also known as "floating liens"). P.R. Laws Ann. tit. 19, § 2234(a); see also U.C.C. § 9-204, cmt. 2 ("[A] security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given."). And the UCC recognizes that a debtor may convey an "account" as security for a debt. As relevant here, Puerto Rico's version of the UCC defines "account" as a "right to payment of a monetary obligation, whether or not earned by performance . . . for energy provided or to be provided." P.R. Laws Ann. tit. 19, § 2212(a)(2) (emphasis added). In sum, several provisions in Commonwealth law establish that the Bondholders may hold a security interest in yet-to-be-acquired Net Revenues.

Congress has also recognized that a revenue bond can be secured by future income. Under section 552(a) of the Bankruptcy Code, a lien on after-acquired property does not attach to property acquired after the debtor files for bankruptcy. See 11 U.S.C. § 552(a). But section 928 of the Bankruptcy Code makes clear that

a lien on "special revenues" -- like the one at issue here -- continues to attach to revenues acquired post-petition, notwithstanding the general bar in section 552(a).[15] See 11 U.S.C. § 928(a). As the legislative history shows, Congress passed section 928 to alleviate the concern that municipalities would use section 552(a) to avoid "long-term pledges of [project-specific] revenues." See S. Rep. No. 100-506, at 25 (1988) (appended letter providing views of Department of Justice). Thus, the Bankruptcy Code not only recognizes that a debtor may grant a lien on future revenues -- it also expressly states that such liens continue to attach to revenues acquired after the filing of a bankruptcy petition.

Several courts have also considered the scope of a municipal revenue lien like the one before us. And all of them have concluded (or at least implied) that a revenue lien can extend to revenues to be acquired at a later date. See, e.g., In re Jefferson Cnty., 474 B.R. 228, 266 (Bankr. N.D. Ala. 2012) (holding that under Alabama law, a revenue lien is a lien on a "source of revenues," rather than a "possessory lien" on revenues already acquired); In re City of Chester, 655 B.R. 555, 567 (Bankr. E.D.

[15] "Special revenues" include "receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used . . . to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems." 11 U.S.C. § 902(2)(A). The parties agree that PREPA's Net Revenues are "special revenues."

Pa. 2023) (recognizing a lien on revenues "payable or to be received" by the city (emphasis added)); In re Fin. Oversight & Mgmt. Bd. for P.R., 931 F.3d 111, 116 (1st Cir. 2019) (noting in passing dicta that applying section 552(a) to special revenue bonds risks the "termination of creditors' security interests in future special revenues"). We have not discovered -- nor has the Board identified -- any contrary authority.

Thus, Puerto Rico law, the Bankruptcy Code, and prior case law all indicate that the Net Revenues that PREPA acquires in the future will be subject to the pledge of Net Revenues made by PREPA in the Trust Agreement.

**2.**

The Board nevertheless lodges several objections to the conclusion that the Bondholders' lien extends to PREPA's future Net Revenues.

**i.**

The Board argues that under our opinion in Andalusian, a revenue lien cannot extend to future-acquired revenues. But Andalusian is inapposite. That case involved bonds issued by Puerto Rico's Employees Retirement System ("ERS"), which were secured by employer contributions to the ERS's multi-employer pension plan. See 948 F.3d at 462–64.

For two main reasons, this court held that the ERS bondholders' lien on employer contributions did not attach to

post-petition contributions. First, the court reasoned that the future employer contributions were not "proceeds" within the meaning of Bankruptcy Code section 552(b)(1) because their receipt depended on intervening appropriation by the Puerto Rico legislature.[16] Id. at 467–70. So, ERS had a "mere expectancy" of receiving future employer contributions, not a conveyable right of receipt that could support a section 552(b)(1) claim on the post-petition proceeds of that pre-petition collateral. Id. at 468 & n.8. Second, the court found that employer contributions to ERS were not special revenues within the meaning of section 928(a). Id. at 463, 473. Therefore, the ERS bondholders could not rely on that section to avoid section 552(a)'s general rule that pre-petition floating liens are ineffective as to collateral acquired post-petition.

Here, though, there is no claim that PREPA's Net Revenues are proceeds of the Bondholders' pre-petition collateral. And the Bondholders do not seek the protection of section 552(b)(1) for such proceeds. Additionally, the parties agree that PREPA's Net Revenues -- unlike the contributions at issue in Andalusian -- are

[16] Broadly, under section 552(b)(1), a creditor maintains a post-petition lien on the "proceeds" of collateral acquired pre-petition. 11 U.S.C. § 552(b)(1). The bondholders in Andalusian argued that post-petition employer contributions were "proceeds" of collateral they had acquired pre-petition (i.e., ERS's right to receive employer contributions). See 948 F.3d at 466.

special revenues within the meaning of section 928(a). So, the Board is effectively arguing that if PREPA's future Net Revenues are too uncertain to qualify as protected "proceeds" under section 552(b)(1), then they are also too uncertain to qualify as protected "special revenues" under section 928. But Andalusian never linked sections 552(b) and 928 in this way.[17] Indeed, if it had, then there would have been no need to subsequently find that the post-petition ERS contributions were not protected special revenues under section 928. See id. at 473–75. The finding that the contributions were too uncertain to fall within section 552(b) would have sufficed. We will not read Andalusian in a manner that renders the entire second half of the opinion superfluous dicta.

**ii.**

The Board next argues that recognizing any interest in future PREPA Net Revenues is contrary the Commonwealth's adoption of Article 9 of the UCC. The Board contends that a security interest cannot attach to property under the UCC until (1) the property exists; and (2) the debtor has a transferable right in that property. As a general proposition, this is true. See P.R.

[17] As a side note, the Board's implicit assumption that future rate payments to PREPA are as uncertain as the future ERS contributions in Andalusian is somewhat dubious. Unlike the contributions in Andalusian, PREPA's right to collect rate payments does not depend on intervening legislative appropriation. See P.R. Laws tit. 22, § 196(l). Importantly, though, we do not rely on this fact in concluding that Andalusian does not control here.

Laws Ann. tit. 19, § 2233(a) (a security interest attaches when it becomes enforceable); id. § 2233(b) (a security interest is enforceable when, among other things, "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party").

However, the Board's argument proves only that a creditor cannot enforce a floating lien with respect to specific units of yet-to-be-acquired collateral. See U.C.C. § 9-204, cmt. 2 (validating a "floating lien" in a debtor's "existing and (upon acquisition) future assets" (emphasis added)). For example, the floating lien does not permit Bondholders to demand now Net Revenues that the debtor will receive in five years. But this does not mean that PREPA cannot convey an initial overarching interest in any Net Revenues that come through the door in five years. In other words, the Board's objection goes to when a revenue lien attaches to (and is perfected with respect to) future Net Revenues. It does not undermine our initial conclusion that, under Commonwealth law, a debtor may convey a lien on future Net Revenues. See P.R. Laws Ann. tit. 19, § 2234(a); P.R. Laws Ann. tit. 22, § 206(e)(1).

**3.**

We also address an argument raised by the Title III court, rather than the Board. In its opinion below, the court agreed with us that PREPA could grant a lien that would attach to

its future-acquired revenues, but it found "no evidence" that PREPA had actually done so. However, as we discuss in more depth below, see infra Part III.A, the Bondholders' lien in the Net Revenues is best understood as a security interest in an "account" under Article 9 of the UCC. And it is "commercially reasonable to anticipate that security interests in inventory or accounts would include after-acquired property." Am. Empls. Ins. Co. v. Am. Sec. Bank., N.A., 747 F.2d 1493, 1501 (D.C. Cir. 1984) (quoting In re Middle Atl. Stud Welding Co., 503 F.2d 1133, 1137 (3d Cir. 1974) (Seitz, C.J., dissenting)). So, the fact that PREPA granted a lien in an account (i.e., the right to receive Net Revenues), and did so without reservation, is enough to conclude that the lien extended to after-acquired Net Revenues. Indeed, it strains plausibility to suggest that the parties agreed otherwise, i.e., that bondholders paid billions in return for a pledge of Net Revenues that applied only to Net Revenues received or due on the day the Trust Agreement was executed. See Asociacion de Condominos, 6 P.R. Offic. Trans. at 268 (considering practical consequences of proposed contractual interpretation).

**III.**

As an alternative basis for affirming, the Board argues that even if the Bondholders have a lien on PREPA's current and future Net Revenues, that lien is avoidable under 11 U.S.C. § 544(a). Section 544(a) grants the bankruptcy trustee (or, in a

PROMESA case, the Board) the powers of a hypothetical creditor who "extends credit . . . at the [beginning] of the case," and thereby obtains "a [judgment] lien on all property on which a creditor on a simple contract could have obtained such a [judgment] lien." See 11 U.S.C. § 544(a); 48 U.S.C. § 2161(c)(7).

In Puerto Rico, a judgment lien is superior to any unperfected security interest. See P.R. Laws Ann. tit. 19, § 2267. So, if the Net Revenue lien is unperfected, then the Board may avoid it. The Title III court did not address whether the Net Revenue lien was perfected because it concluded that no such lien existed. Having established that the Net Revenue lien exists, and with the benefit of full argument and briefing, we conclude that it is perfected with respect to Net Revenues that PREPA has acquired. We also conclude that the lien's application to future Net Revenues will be perfected, at the very latest, immediately upon PREPA's acquisition of those Net Revenues. This means no hypothetical judgment creditor can outrank the Bondholders with respect to those future-acquired Net Revenues. So, the Board's avoidance argument fails.

**A.**

We first find that the Bondholders have perfected their lien with respect to Net Revenues already acquired by PREPA. Under Article 9 of the UCC (as adopted in Puerto Rico), the mechanism for perfecting a lien depends on the underlying collateral. See

id. §§ 2251–64. Thus, the first step in the perfection analysis is to categorize the Bondholders' collateral. The Bondholders mainly argue that their security interest is in an "account," as that term is defined in the UCC. The Board retorts that the Bondholders' interest is in either "money" or "deposit accounts," as those terms are defined in the UCC. The Bondholders have it right.

As discussed above, Puerto Rico defines an "account" as a "right to payment of a monetary obligation . . . for energy provided or to be provided." Id. § 2212(a)(2)(v). This squarely describes the Net Revenue lien.[18] The Bondholders loaned PREPA money, and they are secured by the Net Revenues that PREPA obtains (or will obtain) by providing electricity. By contrast, neither of the categories proposed by the Board appear to fit. A deposit account is a "demand, time, savings, passbook, or similar account maintained with a bank." Id. at § 2212(a)(29). This may describe the Sinking and Subordinate Funds, but it does not describe the underlying Net Revenues that feed those Funds.

Commonwealth law defines the term "money" generally, but not as a category of collateral. See id. § 451(24) (defining money

[18] We are not alone in describing a lien on revenues as an "account" under the UCC. See, e.g., In re Northview Corp., 130 B.R. 543, 544–45, 547 (B.A.P. 9th Cir. 1991) (pledge of "all . . . revenues . . . now or hereafter acquired" by a hotel was an account under the UCC); In re Ocean Place Dev., LLC, 447 B.R. 726, 732 (Bankr. D.N.J. 2011) (same).

as a "medium of exchange authorized or adopted" by a government). However, the latest version of Article 9 of the UCC defines "money" as hard currency. See U.C.C. § 9-102(a)(54A) (noting that "money" does not include electronic currency not subject to physical control). No party alleges that PREPA is holding its Net Revenues as currency. So, the "money" category also seems inappropriate.

In Puerto Rico, an interest in an "account" is perfected by filing a financing statement. P.R. Laws Ann. tit. 19, § 2260(a). A financing statement is valid for at least five years. See id. § 2335(a); see also id. § 2335(f) (financing statement lasts indefinitely where debtor is a "transmitting utility and a filed financing statement so indicates"). Here, the Bondholders filed an updated financing statement in August 2013, which described the underlying collateral as the "Revenues of the System (as each such term is defined in the Agreement) and other moneys to the extent provided in the Agreement."[19] The Board filed its restructuring petition for PREPA in July 2017, so the August 2013

[19] The language of the financing statement seems to imply that the Bondholders' lien is in Revenues, rather than Net Revenues. But under Commonwealth law, the financing statement cannot create an interest beyond that created by the Trust Agreement. See Xynergy Healthcare Cap. II LLC v. Municipality of San Juan, 516 F. Supp. 3d 137, 155-56 (D.P.R. 2021) (quoting In re Levitz Ins. Agency, 152 B.R. 693, 698 (Bankr. D. Mass. 1992)) ("Where a security agreement covers only certain assets, the financing statement's inclusion of additional assets is ineffective to create a security interest in the additional assets omitted from the security agreement.").

financing statement was timely. Moreover, the Board does not argue that the August 2013 financing statement insufficiently described the Bondholders' collateral, or suffered from any other flaw that would render the Net Revenue lien unperfected.

Accordingly, the Bondholders have clearly perfected their lien with respect to Net Revenues that PREPA has already acquired. See P.R. Laws Ann. tit. 19, § 2233(b) (security interest attaches once "debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party"); id. § 2258 (perfection requires attachment).

**B.**

The next question is whether and how the Bondholders have perfected their lien on Net Revenues that PREPA has not yet acquired. Here, some background on the law and commentary on this issue is instructive.

Under 11 U.S.C. § 547(b), a bankruptcy trustee may avoid a debtor's pre-petition transfer of property to a creditor, if such transfer: (1) was made for an antecedent debt; (2) was made while the debtor was insolvent; (3) was made within a certain time period (usually ninety days); and (4) gives the creditor more than it would receive in a liquidation scenario that did not include the transfer. See also 5 Collier on Bankruptcy ¶ 547.01 (16th ed. 2023) (providing an overview of section 547). Before 1978, a body of case law emerged to reconcile section 547's language on

pre-petition transfers with the UCC's recognition of liens on after-acquired property. See, e.g., 4 White, Summers & Hillman, Uniform Commercial Code § 32:24 nn. 2–5 (6th ed. 2023) (collecting authorities). To understand the problem, consider a simplified example of a creditor with a lien on a merchant's revolving inventory (i.e., a lien on after-acquired property). If we conceive of the creditor as holding a distinct lien on each unit of inventory, which arises only as the inventory is acquired, then -- all else being equal -- any liens on inventory acquired in the ninety-day pre-petition period would arguably be avoidable as preferences under section 547. The upshot is that the creditor would have no bulletproof lien on inventory acquired even months before the bankruptcy petition date.

To avoid this outcome, several courts proposed the "entity" or "stream" conception of liens on after-acquired property. See, e.g., Grain Merchs. of Ind., Inc. v. Union Bank & Sav. Co., 408 F.2d 209, 215–17 (7th Cir. 1969); DuBay v. Williams, 417 F.2d 1277, 1287 n.8 (9th Cir. 1969) (describing the idea in dicta without adopting it); Manchester Nat'l Bank v. Roche, 186 F.2d 827, 831 (1st Cir. 1951) (same). On this view, the creditor's security interest was not in each individual piece of inventory. Instead, the interest was in the "entity of [inventory] as a whole, and not in the individual components, so that the [relevant] transfer of property occurred" when the "interest in the

[inventory] as an entity was created and the financing statements were duly filed," rather than when the debtor acquired rights in a particular piece of inventory. Grain Merchs., 408 F.2d at 216. One commentator put it in more philosophical terms, suggesting that "[t]he secured creditor's interest is in the stream of accounts flowing through the debtor's business, not in any specific accounts. As with the Heraclitean river, although the accounts in the stream constantly change, we can say it is the same stream." William E. Hogan, Games Lawyers Play with the Bankruptcy Preference Challenge to Accounts and Inventory Financing, 53 Cornell L. Rev. 553, 560 (1968).

Congress amended the Bankruptcy Code in 1978 to overrule Grain Merchants, noting that for preference purposes, the relevant transfer only occurred when "the debtor has acquired rights in the property transferred." 11 U.S.C. § 547(e)(3); see also S. Rep. No. 95-989, at 89 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5875 (expressing intent to overrule Grain Merchants). In its briefing, the Board implies that by adopting what would become section 547(e)(3), Congress expressly "disapprov[ed] of the 'stream' [conception]" of after-acquired property that the pre-1978 cases espoused, and which the Bondholders seem to endorse.

Just a decade later, though, Congress executed a u-turn by adding section 926(b) to the Bankruptcy Code. Under that provision, a transfer of property "for the benefit of any holder

of a bond or note" is not avoidable under section 547. 11 U.S.C. § 926(b). So, at least with respect to revenue bond payments, Congress appeared to resurrect the pre-1978 "stream" or "entity" theory of after-acquired property. And the legislative history suggests as much. To quote the accompanying Senate committee report: "[I]n the municipal finance context, if the lien on future revenues is voided as a preference, the result is at odds with public policy and state enabling legislation which almost invariably provides that pledges of such revenues are effective when made and good against other creditors." S. Rep. No. 100-506, at 7 (1988) (emphasis added).

The "stream" or "entity" theory discussed in Grain Merchants -- and reiterated in the legislative history of section 926(b) -- resembles the theory that the Bondholders advance now. In essence, the Bondholders argue that their lien covers the "stream" of Net Revenues as a whole, not the individual batches of Net Revenues as they come in the door. Thus, the Bondholders argue that by virtue of their perfected lien in the "stream" of Net Revenues, they currently hold perfected interests in both already-acquired and future-acquired Net Revenues.

Puerto Rico has not expressly adopted a "stream" theory of after-acquired collateral. Nor is there any Commonwealth case that applies the reasoning from Grain Merchants (or Congress's adoption of section 926(b)) to revenue bonds. We therefore

hesitate to endorse the Bondholders' sweeping assertion that -- under Commonwealth law -- their perfected lien on the Net Revenue "stream" means they hold an already-perfected interest in future-acquired Net Revenues.

Moreover, even if we were to assume that Commonwealth law recognizes the "stream" theory in some form, it does not follow that the Bondholders currently have a perfected lien on all not-yet-acquired Net Revenues. Indeed, some commentators read Grain Merchants as holding that lien attachment (and therefore the potential for perfection) still only arises when the debtor acquires the collateral. On this view, when a creditor holds a lien in a collateral "stream," the creditor does not automatically hold a perfected interest in each piece of collateral within that "stream." Instead, the creditor's interest in a piece of collateral attaches upon acquisition and is treated as if perfected at the time of the initial financing statement. See, e.g., Rafael I. Pardo, On Proof of Preferential Effect, 55 Ala. L. Rev. 281, 305 (2004) ("[T]he [Grain Merchants] lien creditor test related the timing of the transfer of a security interest acquired under a floating lien back to the filing of a financing statement by the secured party."); Richard F. Duncan, Preferential Transfers, the Floating Lien, and Section 547(c)(5) of the Bankruptcy Reform Act of 1978, 36 Ark. L. Rev. 1, 7 n.29 (1982) (noting that a security interest in after-acquired collateral would be perfected "under

the earlier filing"). This slightly modified approach to the "stream" theory finds some footing in Commonwealth law. As noted above, under Commonwealth law, a lien attaches to property upon acquisition. P.R. Laws Ann. tit. 19, § 2233(b); see also U.C.C. § 9-204, cmt. 2. It therefore seems to follow that the Bondholders cannot currently hold a perfected lien in property that PREPA has not yet acquired.

Ultimately, we need not identify the precise contours of the Commonwealth law governing attachment and perfection. Under any plausible conception of Commonwealth law, the Bondholders' lien on future-acquired Net Revenues is not avoidable. If the Commonwealth adopts the Bondholders' sweeping view -- i.e., that their perfection of the lien in the Net Revenue "stream" means they already hold a perfected interest in future-acquired Net Revenues -- then the lien is clearly unavoidable. If the Commonwealth adopts the modified conception of "stream" theory discussed above, then the Bondholders' lien will attach to future Net Revenues when PREPA acquires them, at which point the lien will be treated as if it was perfected at the time of the initial financing statement. And if the Commonwealth adopts no "stream" theory at all, then perfection would occur as soon as PREPA acquires any future Net Revenues. See P.R. Laws Ann. tit. 18, § 2258 ("A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest

attaches."). In that case, there would be no intervening period during which a judgment creditor could obtain a superior lien. Cf. Arthur J. Harrington, Insecurity for Secured Creditors: The Floating Lien and Section 547 of the Bankruptcy Act, 63 Marq. L. Rev. 447, 467 n.75 (1980) ("Since attachment is immediate, there is simply no intervening time between the debtor's acquisition of the collateral and perfection of the secured party's rights . . . during which the [judgment] creditor's right can attach to the debtor's inventory and accounts receivable."). Thus, section 544(a) would not apply.

Accordingly, we hold that the Bondholders' lien is not avoidable under section 544(a).[20]

**IV.**

We have held that the lien granted by the Trust Agreement covers PREPA's present and future Net Revenues, and that the Bondholders' lien is not avoidable. This leaves unanswered the following question: How should the Title III court account for that lien in PREPA's restructuring? Some of the Bondholders ask us to the answer that question now. We decline to do so.

[20] As noted earlier, see supra note 8, the Bondholders have reserved the right to argue that perfection of the lien on Net Revenues also perfects the liens on moneys deposited into certain Funds. Because the district court had no opportunity to rule on this issue, and because we have not received focused briefing on it, we offer no opinion on whether -- or to what extent -- perfection of the Net Revenue lien influences perfection of the liens in the Sinking and/or Subordinate Funds.

Without focused briefing from the parties or insight from the Title III court, it is difficult to determine precisely what must be decided. The Title III court never discussed how to account for a Net Revenue lien during PREPA's restructuring. It had no occasion to do so, because it held that no lien in the Net Revenues existed. Instead, the court answered the materially different question of how to account for a lien that covered only moneys in the Sinking and Subordinate Funds.

In their briefing, some Bondholders point to the Title III court's suggestion that a plan of adjustment will "cut[] off accretions of the [Bondholders'] security interest." They argue that this language amounts (incorrectly, they say) to a holding that a plan of adjustment can unilaterally "cut off" the Bondholders' security interest, no matter what form that interest takes. But the court's language only applied to a lien on the Sinking and Subordinate Funds. Basically, the court held that a plan of adjustment would discharge PREPA's contractual obligation to replenish the Sinking and Subordinate Funds. Therefore, any "accretions" to those Funds would stop on the confirmation date, meaning the Bondholders' security interests in those Funds would not grow in value after the confirmation date. That holding says nothing about the extent to which a lien on Net Revenues received post-confirmation is dischargeable in a plan of adjustment.

We therefore decline to tell the Title III court -- in the first instance and without adequate briefing -- how it should deal with the Bondholders' Net Revenue lien during plan confirmation. In working through the difficult, novel, and important questions posed by the Title III proceedings in this case and others, we have found the considered opinions and insights of the Title III court to be extremely helpful. This has been true even in the handful of cases (like this one) where we have, with the benefit of time and further briefing, arrived at a different outcome.

**V.**

Next, the parties ask us to consider two disputes regarding related questions that the Title III court did address: (1) What is the size of the claim that the Net Revenue lien secures?; and (2) If the Bondholders' collateral only satisfies part of that claim, may the Bondholders file a deficiency claim for the remainder?

**A.**

We start with the first question: What is the amount of the Bondholders' claim on PREPA's estate? We conclude that the proper amount of the Bondholders' claim is the face value (i.e., principal plus matured interest) of the Revenue Bonds.

**1.**

We begin by summarizing the Title III court's holding on this question. In the proceedings below, the court concluded that the Bondholders only had a secured claim on moneys deposited into the Sinking and Subordinate Funds. As our preceding discussion makes clear, we do not share this view. But the Title III court also found that the Bondholders had an unsecured claim on PREPA's Net Revenues, even if they were not yet deposited in the Sinking and Subordinate Funds.

To understand the Title III court's finding, we must look to section 101(5) of the Bankruptcy Code. Under that section, a creditor can have two types of claim on a bankrupt debtor's estate. First, a creditor's claim can stem from a "right to payment." 11 U.S.C. § 101(5)(A). Second, a creditor's claim can stem from a "right to an equitable remedy for breach of performance[,] if such breach gives rise to a right to payment." Id. § 101(5)(B).

The Title III court found that the Bondholders' unsecured claim on Net Revenues derived from a "right to an equitable remedy for breach of performance." Id. Recall the remedies outlined in the Trust Agreement. If PREPA breached its contractual covenant to transfer Net Revenues into the Sinking and Subordinate Funds, then the Bondholders could force PREPA to change course by placing PREPA into receivership, or by seeking specific

performance. Those are equitable remedies. And those remedies would, by definition, reach Net Revenues not yet deposited into the Sinking and Subordinate Funds. Therefore, the court found, the Bondholders had a claim on the Net Revenues that derived from their "equitable remed[ies] for breach of performance." Id. And the amount of that claim was limited to "[what] could be achieved through the application of the equitable remedies to fulfill the . . . covenant to pay the [Revenue] Bonds from the Net Revenues of the System."

That brings us to section 502(c)(2) of the Bankruptcy Code. Under that section, a court may estimate (i.e., assign a dollar amount to) a "right to payment arising from a right to an equitable remedy for breach of performance." See id. § 502(c)(2). Applying section 502(c), the district court estimated the Bondholders' unsecured claim on the Net Revenues at $2.4 billion. Broadly speaking, the Title III court reached that number by estimating how much Net Revenue a receiver would be able to direct into the Sinking and Subordinate Funds (while complying with the rest of the Trust Agreement) over the next 100 years, and then discounting that figure to present value.

**2.**

We disagree with the foundational assumption of the Title III court's valuation analysis: that the Bondholders' claim on the Net Revenues was a "right to payment arising from a right

to an equitable remedy for breach of performance" subject to estimation under section 502(c)(2). Instead, we find that the Bondholders had a legal "right to payment" rooted in the covenants outlined in the Trust Agreement. Because the Revenue Bonds specify the amount that PREPA legally owes the Bondholders, there was no need to estimate the Bondholders' "right to payment" under section 502(c).

A creditor holds a "right to payment" when the debtor is legally obligated to pay "under the relevant non-bankruptcy law." In re Chateaugay Corp., 53 F.3d 478, 497 (2d Cir. 1995) (quoting In re Nat'l Gypsum Co., 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992)). Here, that non-bankruptcy law is the law of contracts (and the Authority Act) as applied to the Trust Agreement. And the Trust Agreement clearly requires PREPA to pay the bonds in full. In section 701 of the Trust Agreement, PREPA promises to "promptly pay the principal of and interest on each and every bond issued" under the Trust Agreement. This covenant creates a legal right to payment. To be sure, but for the automatic stay on actions against PREPA's estate, the Bondholders could deploy various equitable remedies -- such as receivership -- to enforce their right to payment if PREPA breaches the covenant. See P.R. Laws Ann. tit. 22, § 208. But the underlying right remains a legal one. Indeed, the Trust Agreement expressly permits the Bondholders to

proceed at law to challenge any breach of the Trust Agreement's covenants.

When a legal right to payment arises from a debt instrument, the "proper amount of claim in a bankruptcy case" is the "full face amount of [the instrument]." In re Oakwood Homes Corp., 449 F.3d 588, 596–97 (3d Cir. 2006) (emphasis omitted) (quoting 4 Collier on Bankruptcy ¶ 502.03 (5th rev. ed. 2005)); see also In re Trendsetter HR L.L.C., 949 F.3d 905, 910 n.22 (5th Cir. 2020) (citing the same Collier section).

This makes sense. As an analogy, consider how courts have applied section 502(c)(1), another estimation provision that applies to "contingent or unliquidated claim[s]." 11 U.S.C. § 502(c)(1). The purpose of that provision is to assign a dollar amount to "undetermined claims of an unsettled amount." In re Trendsetter, 949 F.3d at 910 n.22. By contrast, section 502(c)(1) does not apply to "liquidated claims" -- that is, claims with an amount determinable "by reference to an agreement or by a simple computation." In re Nicholes, 184 B.R. 82, 89 (B.A.P. 9th Cir. 1995). When dealing with "liquidated claims," the court can often look to an underlying agreement to determine the claim amount. Id. ("[D]ebts arising from a contract are generally liquidated."); see also In re Flaherty, 10 B.R. 118, 120 (Bankr. N.D. Ill. 1981) (the amount of a liquidated claim "may be ascertained by computation or reference to the contract out of which the claim

arises"); 2 Norton Bankruptcy Law & Practice § 48:13 (3d ed. 2024) ("Liquidated claims . . . should be calculated directly from the underlying obligation under applicable law.").

The case law around section 502(c)(1) informs our analysis of section 502(c)(2). A claim "arising from a right to an equitable remedy for breach of performance" resembles a "contingent or unliquidated claim." In both cases, the amount of the claim is not easy to discern, so estimation is appropriate. 11 U.S.C. § 502(c)(1)-(2). But here, the Bondholders' claim resembles a "liquidated claim." We can easily determine its amount by looking to the contract from which it arises: the Trust Agreement. In re Flaherty, 10 B.R. at 120. According to that contract, the face value of the Revenue Bonds (i.e., the principal plus matured interest) is just under $8.5 billion.[21] So, that is the amount of the Bondholder's claim on the Net Revenues.

Only one party -- AAFAF -- attempts to defend the Title III court's estimation analysis. The agency argues that the Bondholders do not have a contractual right to payment in full, because section 804 of the Trust Agreement permits paying the Bondholders "solely from the Sinking Fund and other moneys available for such purpose." So, AAFAF argues, the Bondholders

[21] For our purposes, the face value of a debt instrument is the principal plus any matured interest. The bankruptcy court must disallow any portion of a claim attributable to unmatured interest. See 11 U.S.C. § 502(b)(2).

only have a right to payment from non-deposited Net Revenues if they deploy their equitable remedies to force those Net Revenues into the Sinking Fund. The upshot of this argument is that any right to payment from the Net Revenues is equitable, not legal.

There are two problems with this argument. First, AAFAF conflates the mechanism by which the Bondholders are paid with the Bondholders' underlying legal right to payment. The fact that payments come from the Sinking Fund says nothing about the Bondholders' underlying entitlement to those payments in the first place. That legal right stems from the payment covenant in section 701, which never states that the Bondholders are only entitled to payment from the Sinking Fund. Second, the text of section 804 undercuts AAFAF's position. That provision permits payment of the Bondholders from the "Sinking Fund and any other moneys available for such purpose." (Emphasis added.) Net Revenues are "available" for debt service. The only pre-debt service payments required by the Trust Agreement are the deduction of Current Expenses from incoming Revenues, which is required under section 505. After that, Net Revenues are eligible for debt payments, as evidenced by the text of section 804 referring to "other moneys" available for debt service, not "other funds" available for debt service.

Accordingly, the proper amount of the claim is the principal plus matured interest of the bonds, or roughly

$8.5 billion (the district court can determine the precise amount). Importantly, this is not to say that the Bondholders must be paid $8.5 billion. Rather, it is to say that the Bondholders' allowed claim on PREPA's estate is on the order of $8.5 billion. And that allowed claim is only secured "to the extent of the value of [the Bondholders'] interest" in the Net Revenues and the Sinking and Subordinate Funds. 11 U.S.C. § 506(a)(1). If the value of those liens is less than the allowed claim amount, then the Bondholders are undersecured. In that event, what (if anything) can the Bondholders do to recover the difference between the allowed claim amount and the value of their collateral? We turn to that question next.

**B.**

In the proceedings below, the parties took opposing positions on whether the Bondholders had any recourse against PREPA beyond their rights to the collateral securing the Revenue Bonds. Given our holding that the Bondholders' collateral does include PREPA's Net Revenues, the significance of this issue has likely shrunk, but not disappeared.

Under section 1111(b) of the Bankruptcy Code, a secured creditor -- subject to limited exceptions -- has "recourse against the debtor on account of [its secured] claim," even if the creditor is otherwise nonrecourse under applicable non-bankruptcy law. Id. § 1111(b)(1)(A). However, under section 927 of the Bankruptcy

Code, this presumption of recourse does not apply to a "holder of a claim payable solely from special revenues of the debtor." Id. § 927.

The Bondholders contend that section 927 does not apply, because their secured claim is not payable "solely" from special revenues. Instead, they claim, the Revenue Bonds are also payable from non-special revenue sources like investment earnings, federal subsidies, or insurance proceeds. This argument overreads the word "solely" in section 927. The purpose of section 927 is to deny special revenue bondholders any recourse to the general funds of a municipality, which are often subject to "statutory or constitutional limits on debt issuance." 6 Collier on Bankruptcy ¶ 927.02 (16th ed. 2024). Thus, a claim is payable "solely from special revenues" under section 927 when the claimant lacks "any right to claim from the general treasury of the municipality." Id. Here, the Trust Agreement expressly states that the Revenue Bonds are not "general obligations of [the] Commonwealth of Puerto Rico." So, section 927 applies, and the Bondholders' recourse is limited to their collateral unless the Trust Agreement says otherwise.

Nothing in the Trust Agreement makes the Bondholders recourse creditors. The only contractual provisions cited by the Bondholders are sections 804 and 805. Section 804 permits the Bondholders' Trustee to sue PREPA for unpaid moneys, and to demand

payment from the "Sinking Fund and any other moneys available for [debt service]." As noted above, only the Net Revenues (and the non-Net Revenue moneys in the liened Funds) are available for debt service. Section 505 of the Trust Agreement requires payment of Current Expenses (i.e., conversion of Revenues to Net Revenues) before any payments may flow to the Bondholders. So, section 804 simply states that the Bondholders may reach the Net Revenues and the liened Funds to recover unmade payments. It does not grant any further recourse. The same logic applies to section 805, which states that if moneys in the Sinking Fund are insufficient to make debt service payments, the Bondholders may reach the moneys in the Sinking Fund and "any moneys then available or thereafter becoming available for [debt service]." Again, only Net Revenues and the liened Funds are available for debt service. So again, section 805 does not broaden the Bondholders' recourse beyond their collateral.

Thus, the Bondholders are nonrecourse creditors. A nonrecourse creditor may "look only to its collateral for satisfaction of its debt and does not have any right to seek payment of any deficiency from a debtor's other assets." In re 680 Fifth Ave. Assocs., 156 B.R. 726, 732–33 (Bankr. S.D.N.Y. 1993). The Bondholders may not file an unsecured deficiency claim against PREPA, because that claim would naturally reach assets other than the Bondholders' collateral. This conclusion is hardly

novel. In fact, it aligns with the standard market practice for special revenue bonds. See 4 Norton Bankruptcy Law & Practice § 90:13 (3d ed. 2024) ("[S]pecial revenue bonds usually are non-recourse debt . . . . [I]n the event of default the bondholders have no claim against the municipality's general fund or other non-pledged revenues or assets . . . . [B]ondholders assume the risk that the revenues will not be enough to pay the bonds.").

**VI.**

Finally, the Bondholders appeal two related holdings by the Title III court pertaining to PREPA's trust obligations (or lack thereof). First, some of the Bondholders challenge the court's dismissal of their breach of trust claim. Second, they challenge the court's dismissal of their "accounting" claim, which is rooted in the Authority Act's command that PREPA "account as if [it] were the trustee of an express trust" in favor of the Bondholders. P.R. Laws Ann. tit. 22, § 208(a)(2).

We affirm the dismissal of the breach of trust claim, but we reverse the dismissal of the accounting claim.

**A.**

Some of the Bondholders claim that when PREPA received Revenues, it held them in trust for the benefit of the Bondholders. But the Trust Agreement clearly identifies First National City Bank and its successors -- not PREPA -- as Trustee. In response,

the Bondholders point to language in section 601 stating, in pertinent part, that all moneys received by PREPA "shall be deposited with a Depositary or Depositaries [and] shall be held in trust." But nothing in section 601 states that PREPA receives and holds its moneys in trust in the first instance. On the contrary, section 601 -- which is captioned "Deposits constitute trust funds" -- states that "[a]ll moneys deposited with each Depositary, including the Trustee, shall be credited to the particular fund or account to which such moneys belong." (Emphasis added.) This language shows that the "Trustee" must be a "Depositary," i.e., a financial institution designated to hold deposits under the Trust Agreement. PREPA is not a Depositary. So, we read section 601 as requiring PREPA to deposit moneys with Depositories, who then hold the moneys in trust and apply them in accordance with the Trust Agreement. Section 601 does not make PREPA itself a trustee.

The text of the Authority Act elsewhere reinforces our conclusion. The Authority Act requires PREPA to "account as if [it] were the trustee of an express trust." P.R. Laws Ann. tit. 22, § 208(a)(2) (emphasis added). As the Title III court properly noted, this language would be unnecessary if PREPA were already a trustee with respect to all moneys received.

**B.**

The Bondholders also appeal the Title III court's dismissal of their accounting claim. Here, the Bondholders are on

firmer footing. We agree that the accounting claim should be reinstated.

The Authority Act permits the Bondholders, subject to the terms of the Trust Agreement, to bring an equitable action requiring PREPA to "account as if [it] were the trustee of an express trust." P.R. Laws Ann. tit. 22, § 208(a)(2). And the Trust Agreement does not limit this authority. Section 804 permits the Trustee to sue (on the Bondholders' behalf) for "the enforcement of any proper legal or equitable remedy."

The concept of an "accounting" is not defined in the Trust Agreement, the Authority Act, or Puerto Rico law. Historically, though, an "accounting" has been an equitable remedy much like restitution or disgorgement. See Liu v. SEC, 591 U.S. 71, 79 (2020) (noting that an equitable cause of action to "depriv[e] wrongdoers of their net profits from unlawful activity" has been variously called accounting, restitution, or disgorgement).

Taken together, the Trust Agreement and Authority Act appear to permit the Bondholders to bring an equitable action for Net Revenues wrongly diverted from debt service. Indeed, in their brief, the Bondholders suggest that PREPA has spent Net Revenues on unreasonable Current Expenses, thereby starving the Sinking and Subordinate Funds of cash and slowing debt payments to the

Bondholders. So, the Bondholders appear to have an accounting claim, unless any relevant authorities suggest otherwise.

In dismissing the accounting claim, the Title III court concluded that a creditor requesting an "accounting" under Puerto Rico law is entitled only to information about the debtor's unpaid obligations. It relied on two authorities for this proposition, but we do not find either one apposite.

First, the court relied on P.R. Laws Ann. tit. 19, § 2240, which defines a "request for an accounting" as a "record authenticated by the debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral." P.R. Laws Ann. tit. 19, § 2240(a)(2). As the text makes clear, this provision concerns a debtor's request for an accounting, not a creditor's request for an accounting. Moreover, the definition of "request for an accounting" that appears in section 2240 is expressly limited to that section. Id. § 2240(a).

Second, the court relied on our holding in Citibank Global Markets, Inc. v. Rodríguez Santana, 573 F.3d 17 (1st Cir. 2009). There, an account holder sued a broker-dealer, broadly alleging overcharging of commissions. Id. at 21–22. The account holder alleged the broker-dealer had fraudulently induced him to sign a settlement agreement concerning those overcharges. Id. at 29. He argued that the settlement would only have been valid if the broker-dealer (acting as his agent) had "provide[d] an

accounting of its . . . overcharges." Id. at 30. The broker-dealer had, in fact, provided a "detailed forty-plus page analysis of the overcharges." Id. at 30. The Citibank court did not pass on whether such an accounting was, in fact, required. It simply held that, if an accounting were required, nothing in Puerto Rico law suggested that the broker-dealer's analysis was insufficient. Id. Thus, Citibank did not define the remedy of "accounting" under Puerto Rico law. And even if it did define that remedy, it did so in the context of agency law, not secured transactions. Id. Citibank therefore provides little guidance here.

To conclude, the Bondholders have properly pled a claim for an equitable accounting. That said, we emphasize, as the Board correctly does, that any equitable accounting will not expand the Bondholders' recourse beyond the Net Revenues. Under the Authority Act, a claim for an equitable accounting is subject to the terms of the Trust Agreement. P.R. Laws Ann. tit. 22, § 208(a). And as discussed above, sections 804 and 805 of the Trust Agreement state that in any legal or equitable action to enforce payment of the Revenue Bonds, the Bondholders may only reach moneys available for debt service. Thus, while the Bondholders stated a claim for an accounting under the Authority Act, that claim will not entitle them to reach any moneys or funds in which they do not already hold a security interest.

## VII.

For the foregoing reasons, the judgment of the Title III court is affirmed in part and reversed in part. All parties shall bear their own costs.

# Appendix B

# United States Court of Appeals
## For the First Circuit

Nos. 23-2036, 23-2049, 23-2050, 23-2052, 23-2053, 23-2054, 23-2057

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors,

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THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO ELECTRIC POWER AUTHORITY; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs-Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, AS ADMINISTRATIVE AGENT; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LLC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs-Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE; ASSURED GUARANTY CORP.; ASSURED GUARANTY MUNICIPAL CORP.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCE BERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, A SERIES OF MACQUARIE INVESTMENT MANAGEMENT BUSINESS TRUST TO THE FORM 2019; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY, ON BEHALF OF RUSSELL INVESTMENT COMPANY TAX-EXEMPT HIGH YIELD BOND FUND; SIG STRUCTURED PRODUCTS, LLC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants-Appellants/Cross-Appellees,

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LLC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants-Appellees.

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Before
Kayatta, Howard, and Rikelman,
Circuit Judges.

**ORDER ON PETITIONS FOR PANEL REHEARING**
**Entered: November 13, 2024**

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The petitions of FOMB and the Official Committee of Unsecured Creditors are granted in part. The opinion of this Court issued on June 12, 2024 is withdrawn and replaced with the revised opinion of this date. The judgment of even date is vacated. The petitions are otherwise denied.

By the court:

Anastasia Dubrovsky, Clerk

cc: Hon. Laura Taylor Swain, Ada Garcia-Rivera, Clerk, United States District Court for the District of Puerto Rico, Heriberto J. Burgos-Perez, Matthew D. McGill, Ricardo F. Casellas-Sanchez, Diana Perez-Seda, Howard Robert Hawkins Jr., Mark C. Ellenberg, Casey J. Servais, Jeremy Max Christiansen, Lochlan Francis Shelfer, Thomas J. Curtin, William J. Natbony, Hermann D. Bauer-Alvarez, Timothy W. Mungovan, Michael T. Mervis, Luis Francisco Del-Valle-Emmanuelli, Margaret Antinori Dale, John E. Roberts, Mark David Harris, Martin J.

Bienenstock, Ehud Barak, Paul V. Possinger, Jeffrey W. Levitan, Lucas Kowalczyk, Shiloh Rainwater, Daniel Steven Desatnik, Elliot Rainer Stevens, Dietrich L. Snell, Henrique N. Carneiro, Israel Fernandez-Rodriguez, Juan J. Casillas-Ayala, Ricardo Burgos-Vargas, Luc A. Despins, Juan Carlos Nieves-Gonzalez, Georg Alexander Bongartz, Eric D. Stolze, Stephen Blake Kinnaird, Pedro A. Jimenez, Luis C. Marini-Biaggi, Elizabeth Lemond McKeen, Gabriel Luis Olivera Dubon, Peter M. Friedman, Ashley M. Pavel, John J. Rapisardi, Carolina Velaz-Rivero, Nancy A. Mitchell, Maria Jennifer DiConza, Jason Zarrow, Amy R. Wolf, Nayuan Zouairabani-Trinidad, Richard G. Mason, Emil A. Kleinhaus, Angela K. Herring, Nicholas Baker, Sarah E. Phillips, Michael H. Cassel, Victoria M. Rivera-Llorens, Jose Luis Ramirez-Coll, Carolina V. Cabrera-Bou, Sylvia M. Arizmendi-Lopez de Victoria, Rafael Escalera-Rodriguez, Daniel A. Salinas-Serrano, Eric Mark Kay, Carlos R. Rivera-Ortiz, Susheel Kirpalani, Nayda I. Perez-Roman, Iris Jannette Cabrera-Gomez, Eric A. Tulla, Clark T. Whitmore, William Z. Pentelovitch, John T. Duffey, Jason M. Reed, Michael Charles McCarthy, Glenn Kurtz, Lydia Margarita Ramos-Cruz, John K. Cunningham, Thomas Lauria, Eric Perez-Ochoa, Luis A. Oliver-Fraticelli, Jonathan D. Polkes, Robert Berezin, Dora L. Monserrate, Rolando Emmanuelli-Jimenez, Jessica Esther Mendez-Colberg, Zoe Negron Comas, Rafael A. Ortiz-Mendoza, Manuel Fernandez-Bared, Linette Figueroa-Torres, Andrew N. Rosenberg, Karen R. Zeituni, G. Eric Brunstad Jr., Fernando J. Gierbolini-Gonzalez, Richard James Schell-Gonzalez, Stephen D. Zide, David A. Herman, Kevin Michael Gallagher, Laura Appleby, Kyle Hosmer, Andrew N. Ferguson

# Appendix C

# United States Court of Appeals
## For the First Circuit

Nos. 23-2036, 23-2049, 23-2050, 23-2052, 23-2053, 23-2054, 23-2057

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors,

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THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO ELECTRIC POWER AUTHORITY; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs-Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, AS ADMINISTRATIVE AGENT; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LLC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs-Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE; ASSURED GUARANTY

CORP.; ASSURED GUARANTY MUNICIPAL CORP.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCE BERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, A SERIES OF MACQUARIE INVESTMENT MANAGEMENT BUSINESS TRUST TO THE FORM 2019; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY, ON BEHALF OF RUSSELL INVESTMENT COMPANY TAX-EXEMPT HIGH YIELD BOND FUND; SIG STRUCTURED PRODUCTS, LLC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants-Appellants/Cross-Appellees,

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LLC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants-Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Laura Taylor Swain,* U.S. District Judge]

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Before

Kayatta, Howard, and Rikelman,
Circuit Judges.

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Martin J. Bienenstock, with whom Mark D. Harris, Margaret A. Dale, Dietrich L. Snell, Ehud Barak, Shiloh Rainwater, Henrique N. Carneiro, Timothy W. Mungovan, John E. Roberts, Elliot R. Stevens, Lucas Kowalczyk, and Proskauer Rose LLP were on brief, for appellee/cross-appellant the Financial Oversight and Management Board for Puerto Rico, as representative of the Puerto Rico Electric Power Authority.

Peter Friedman, with whom Maria J. DiConza, Elizabeth L.

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* Of the Southern District of New York, sitting by designation.

McKeen, Ashley M. Pavel, Jason Zarrow, O'Melveny & Myers LLP, Luis C. Marini-Biaggi, Carolina Velaz-Rivero, and Marini Pietrantoni Muñiz LLC were on brief, for appellee/cross-appellant the Puerto Rico Fiscal Agency and Financial Advisory Authority.

Pedro A. Jimenez, with whom Luc A. Despins, Eric D. Stolze, Stephen B. Kinnaird, Stephen Sepinuck, Paul Hastings LLP, Juan J. Casillas Ayala, Israel Fernández Rodríguez, Juan C. Nieves González, and Casillas, Santiago & Torres LLC were on brief, for appellee/cross-appellant The Official Committee of Unsecured Creditors of All Title III Debtors.

Richard G. Mason, Amy R. Wolf, Emil A. Kleinhaus, Angela K. Herring, Michael H. Cassel, Wachtell, Lipton, Rosen & Katz, Nayuan Zouairabani, Victoria Rivera Llorens, and McConnell Valdés LLC on brief for appellee Cortland Capital Market Services LLC.

Sarah E. Phillips, Simpson Thacher & Bartlett LLP, Jose L. Ramirez-Coll, and Antonetti Montalvo & Ramirez Coll on brief for appellees SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master LTD, and Ultra NB LLC.

Michael C. McCarthy, Clark T. Whitmore, John T. Duffey, and Maslon LLP on brief for appellant/cross-appellee U.S. Bank National Association.

Matthew D. McGill, with whom Jeremy M. Christiansen, Lochlan F. Shelfer, Gibson, Dunn & Crutcher LLP, Howard R. Hawkins, Jr., Mark C. Ellenberg, Casey J. Servais, William J. Natbony, Thomas J. Curtin, Cadwalader, Wickersham & Taft LLP, Heriberto Burgos Perez, Ricardo F. Casellas-Sánchez, Diana Pérez-Seda, and Casellas Alcover & Burgos P.S.C. were on brief, for appellants/cross-appellees Assured Guaranty Corp. and Assured Guaranty Municipal Corp.

Glenn M. Kurtz, with whom Claudine Columbres, Isaac Glassman, Thomas E. MacWright, Thomas E. Lauria, John K. Cunningham, Keith Wofford, Michael C. Shepherd, Jesse L. Green, White & Case LLP, Lydia M. Ramos Cruz, and Ramos Cruz Legal were on brief, for appellant/cross-appellee GoldenTree Asset Management LP.

Susheel Kirpalani, Eric Kay, Quinn Emanuel Urquhart & Sullivan, LLP, Rafael Escalera, Carlos R. Rivera-Ortiz, and Reichard & Escalera on brief for appellant/cross-appellee Syncora Guarantee, Inc.

G. Eric Brunstad, Jr., with whom Stephen D. Zide, David A. Herman, Dechert LLP, Dora L. Monserrate-Peñagarícano, Fernando J. Gierbolini-González, Richard J. Schell, and Monserrate Simonet & Gierbolini, LLC were on brief, for appellants/cross-appellees PREPA Ad Hoc Group.

Kevin Carroll, Laura E. Appleby, Kyle R. Hosmer, and Faegre Drinker Biddle & Reath LLP on brief for Securities Industry and Financial Markets Association, amicus curiae.

Jason S. Miyares, Attorney General of Virginia, Andrew N.

Ferguson, Solicitor General of Virginia, Kevin M. Gallagher, Deputy Solicitor General of Virginia, Brendan T. Chestnut, Special Assistant to the Solicitor General of Virginia, Steve Marshall, Attorney General of Alabama, Christopher M. Carr, Attorney General of Georgia, Kris Kobach, Attorney General of Kansas, Michael T. Hilgers, Attorney General of Nebraska, Gentner F. Drummond, Attorney General of Oklahoma, Ken Paxton, Attorney General of Texas, Patrick Morrisey, Attorney General of West Virginia, Ashley Moody, Attorney General of Florida, Brenna Bird, Attorney General of Iowa, Austin Knudsen, Attorney General of Montana, Dave Yost, Attorney General of Ohio, Alan Wilson, Attorney General of South Carolina, Sean D. Reyes, Attorney General of Utah, on brief for the Commonwealth of Virginia and 13 Other States, amici curiae.

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November 13, 2024

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**KAYATTA, Circuit Judge.** In this opinion, we consider the rights of parties holding certain revenue bonds issued by the Puerto Rico Electric Power Authority ("PREPA" or "the Authority") before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. §§ 2161–78. We hold that these bondholders have a non-recourse claim on PREPA's estate for the principal amount of the bonds, plus matured interest. We also hold that this claim is secured by PREPA's Net Revenues -- as that term is defined by the underlying bond agreement -- and by liens on certain funds created by that bond agreement. We do not decide what effect, if any, confirmation of a plan of reorganization will have on the bondholders' security interest, nor do we attempt to estimate the economic value of that security interest. Our reasoning follows.

## I.

### A.

Puerto Rico passed the Puerto Rico Electric Power Authority Act ("Authority Act") in 1941. See P.R. Laws Ann. tit. 22, § 191. The Authority Act created PREPA, a public electric utility. Id. § 193(a). More than eighty years later, PREPA remains the "sole electric utility in Puerto Rico." Puerto Rico Electric Power Authority (PREPA), P.R. Fiscal Agency & Fin. Advisory Auth., https://perma.cc/F7HA-QNVH. It owns electrical

generation, transmission, and distribution assets in the Commonwealth, and serves around 1.5 million customers. Id.

The Authority Act permits PREPA to raise money by issuing revenue bonds secured by its "entire gross or net revenues and present or future income." P.R. Laws Ann. tit. 22, § 206(e)(1); see also id. § 196(o). In this manner, PREPA can raise money without granting a lien on its physical assets, such as power plants or transmission lines. Pursuant to the Authority Act, PREPA in 1974 executed the Trust Agreement with First National City Bank, which was then acting as trustee.[1] Under the Trust Agreement, PREPA raised money to finance its system by issuing revenue bonds (the "Revenue Bonds"). PREPA promised to repay the bondholders over time,[2] in accordance with the Trust Agreement. Several articles of the Trust Agreement frame the issue before us.

First, the Trust Agreement opens with a Preamble,[3] the text and meaning of which we discuss in detail in Part II.A.1 of this opinion.

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[1] The current trustee is U.S. Bank National Association (to which we refer as the "Trustee").

[2] The lower-case phrase "the bondholders" refers generally to the creditors that loaned PREPA money under the Trust Agreement. When specifically discussing the bondholders and insurers that are parties in this action, we use the capitalized term "Bondholders."

[3] The Bondholders propose different labels for this provision, such as the "Now, Therefore paragraph," or the "Granting Clause." While we opt for the simpler "Preamble," our choice of

Second, Article I of the Trust Agreement defines key terms, including "Revenues" and "Net Revenues." PREPA's "Revenues" are (1) "all moneys received by [PREPA] in connection with or as a result of its ownership or operation" of its electricity generation and distribution system, (2) "any proceeds of use and occupancy insurance on the System or any part thereof, and (3) "income from investments made under" either the Trust Agreement or a 1947 predecessor agreement.[4] PREPA's "Net Revenues" are any Revenues remaining after deducting reasonable and necessary operating expenses. Article I also defines the phrase "Opinion of Counsel," which means any opinion filed by PREPA's counsel to "authenticate bonds under [the Trust] Agreement."

Third, Article V of the Trust Agreement establishes a "waterfall" structure for distributing PREPA's Revenues (as the term is defined in Article I) into certain funds. The Revenues first flow into the General Fund.[5] PREPA pays its reasonable operating expenses ("Current Expenses") out of the General Fund. The remaining dollars -- the Net Revenues -- then flow into the

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label does not bear on whether the provision is operative or prefatory.

[4] The Trust Agreement carved out several forms of investment income from this definition. Those exceptions are not relevant to this case, so we do not detail them here.

[5] This excludes investment income, certain types of which qualify as "Revenue" but nevertheless do not flow into the General Fund.

Revenue Fund, minus a reserve to cover future operating expenses. From there, Net Revenues flow first into the Sinking Fund, and then into a series of Subordinate Funds. The Net Revenues deposited into the Sinking Fund cover debt service. The Net Revenues deposited into the Subordinate Funds cover internal PREPA operations, such as extraordinary repairs or capital improvements.

There are four Subordinate Funds: the Construction Fund,[6] the Self-Insurance Fund, the Capital Improvement Fund, and the Reserve Maintenance Fund. If there is not enough money in the Sinking Fund to cover PREPA's debt service obligations, Article V (specifically, sections 512 through 512B) broadly requires PREPA to draw on the Subordinate Funds -- other than the Construction Fund -- to pay bondholders.

Fourth, and relatedly, Articles IV and V grant security interests in certain funds both within and outside of the waterfall structure described in Article V. Section 401 of the Trust Agreement creates a "lien and charge in favor of the [bondholders]" in moneys residing in the Construction Fund. Similarly, under section 507 of the Trust Agreement, the moneys in the Sinking Fund and remaining Subordinate Funds -- that is, the Subordinate Funds

[6] The Construction Fund is not technically part of the waterfall structure established in Article V. Instead, the Construction Fund is replenished by bond proceeds and certain Net Revenues preemptively siphoned off from the Revenue Fund. For the sake of simplicity, however, we include it in the broader category of Subordinate Funds.

within the Article V waterfall -- are "subject to a lien and charge in favor of the [bondholders]."[7] Section 513 confirms that the Sinking Fund moneys are "pledged to and charged with" debt service payments to the bondholders.

Fifth, Article VI of the Trust Agreement specifies how PREPA should hold and invest the moneys it receives. Specifically, section 601 of the Trust Agreement states that:

> All moneys received by the Authority under the provisions of this Agreement shall be deposited with a Depositary or Depositaries, shall be held in trust, shall be applied only in accordance with the provisions of this Agreement and shall not be subject to lien or attachment by any creditor of the Authority.

Sixth, Article VII of the Trust Agreement outlines specific contractual covenants between the bondholders and PREPA. In section 701, PREPA covenants that it will "promptly pay the principal of and the interest on" the Revenue Bonds. PREPA also covenants that the Revenue Bonds are "payable solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified." In sections 705 and 712, PREPA also agrees not to create -- "or suffer to be created" -- any lien or charge on "the Revenues ranking equally with or prior to the [Revenue Bonds]."

[7] Sections 401 and 507 both grant a lien to the Trustee, not the bondholders. But those sections confirm that this lien is for the benefit of the bondholders.

Finally, Article VIII of the Trust Agreement outlines the bondholders' remedies. Section 804 permits the bondholders to file a suit "in equity or at law . . . for the appointment of a receiver as authorized by the Authority Act[,] or for the specific performance of any covenant or agreement contained herein." The same provision entitles the bondholders to "recover and enforce any judgment or decree against the Authority, but solely as provided herein and in such bonds, for any portion of such amounts remaining unpaid . . . and to collect (but solely from moneys in the Sinking Fund and any other moneys available for such purpose) in any manner provided by law, the moneys adjudged or decreed to be payable."

**B.**

In 2017, PREPA defaulted on its fundamental obligations under the Trust Agreement, including its obligation to pay the bondholders. But for the passage of PROMESA, the Trustee and/or the bondholders could have pursued various remedies authorized by the Authority Act and the Trust Agreement. Those remedies include suits at law and/or equity to enforce contractual covenants, to obtain an accounting, and to place PREPA in receivership. P.R. Laws Ann. tit. 22, §§ 207(a)-(b), 208(a)(1)-(3).

Congress, however, changed all this by enacting PROMESA. Among other things, PROMESA created the Financial Oversight and Management Board ("FOMB" or "Board"). 48 U.S.C. § 2121(b)(1).

PROMESA empowered the Board to place Commonwealth entities into bankruptcy-type restructuring proceedings (often called "Title III proceedings"), which resemble municipal bankruptcy proceedings under Chapter 9 of the Bankruptcy Code. In re Fin. Oversight & Mgmt. Bd. for P.R., 919 F.3d 121, 124-25 (1st Cir. 2019); see generally 48 U.S.C. § 2161(a) (incorporating broad swaths of the Bankruptcy Code into PROMESA). In July 2017, the Board commenced a Title III proceeding in district court (also called the "Title III court") to restructure PREPA. See In re Fin. Oversight & Mgmt. Bd. for P.R., 899 F.3d 13, 18 (1st Cir. 2018). As a result, the bondholders' ability to pursue any remedies against PREPA under Commonwealth law was automatically stayed. See 48 U.S.C. § 2161(a) (incorporating section 362 of the Bankruptcy Code into PROMESA); 11 U.S.C. § 362(a) (stating that a bankruptcy petition automatically stays actions against the debtor's estate).

After two years of on-and-off negotiations and skirmishes, the Board filed an adversary proceeding within the Title III restructuring proceeding. The purpose of the adversary proceeding was to define the rights and remedies that bondholders had against PREPA. After the parties negotiated a restructuring agreement for PREPA in 2019, the Board agreed not to prosecute the adversary proceeding. See In re Fin. Oversight & Mgmt. Bd. for P.R., 91 F.4th 501, 506 n.3 (1st Cir. 2024). The Commonwealth's government unilaterally terminated the restructuring agreement in

March 2022, so the Board moved to revive its original complaint. Id. at 506. The Board filed its amended complaint in October of that year, and this remains the operative complaint for purposes of this appeal. The amended complaint included three allegations that are relevant here.

First, the Board alleged that bondholders only had security interests in moneys deposited in the Sinking or Subordinate Funds. According to the Board, bondholders did not have a security interest in PREPA's current or future Revenues/Net Revenues, unless those Revenues/Net Revenues resided in the Sinking or Subordinate Funds. Second, the Board alleged that bondholders only had perfected security interests in the Sinking Fund and one of the Subordinate Funds (i.e., the Self-Insurance Fund), meaning the Board could avoid the remaining unperfected interests pursuant to 11 U.S.C. § 544(a). Finally, the complaint alleged that the Revenue Bonds were non-recourse, meaning bondholders could only recover owed moneys from the liened Funds, rather than any other part of PREPA's estate.

The bondholders that are parties to this case (again, "the Bondholders") filed an answer denying the Board's allegations. The Bondholders also filed a counterclaim. Among other things, the counterclaim alleged that PREPA had misappropriated moneys "for uses other than Current Expenses instead of paying [the] [B]ondholders," and had therefore breached

its obligations to hold "all moneys received under the provisions of the Trust Agreement in trust for the benefit of the [B]ondholders." The Bondholders asked for a declaratory judgment that PREPA was in breach of trust, and an "order requiring an accounting of PREPA's revenues" pursuant to P.R. Laws Ann. tit. 22, § 208(a)(2). According to the Bondholders, this "accounting" would require equitable disgorgement of any moneys that PREPA wrongly diverted from the Sinking and/or Subordinate Funds.

**C.**

On March 22, 2023, the Title III court issued a partial summary judgment order in the adversary proceeding. First, the court agreed with the Board that the Trust Agreement only granted the Bondholders security interests in "moneys actually deposited to the Sinking Fund and the [Subordinate Funds]." The Trust Agreement did not grant a broader security interest in PREPA's current or future Revenues (or Net Revenues). Second, the court concluded that the Board could avoid any unperfected security interests under 11 U.S.C. § 544(a).[8] Third, the Title III court

[8] The parties have since stipulated that the Bondholders' security interests in the Reserve Maintenance Fund, the Capital Improvement Fund, and the Construction Fund are unperfected. Joint Stipulation & Proposed Agreed Order of the Financial Oversight and Management Board for Puerto Rico, U.S. Bank National Ass'n as PREPA Bond Trustee, the Ad Hoc Group of PREPA Bondholders, Assured Guaranty Corp., Assured Guaranty Municipal Corp., National Public Finance Guarantee Corp., and Syncora Guarantee, Inc. Resolving Perfection-Related Issues at 5-7, In re Fin. Oversight & Mgmt. Bd. for P.R., 703 F. Supp. 3d 318 (D.P.R. 2023) (Adv. Proc. No. 19-

rejected the Board's argument that the Revenue Bonds were non-recourse, holding instead that the Bondholders could sue PREPA to recover moneys outside the Sinking and Subordinate Funds.

With respect to the non-recourse holding, the Title III court emphasized that even though the Bondholders lacked a security interest in PREPA's Revenues or Net Revenues, section 804 of the Trust Agreement still permitted them to seek a court order forcing PREPA to divert moneys into the Sinking Fund. Recall that section 804 authorized any bondholder to sue in law or equity for the "specific performance of any covenant or agreement contained" in the Trust Agreement. In the court's view, the existence of this equitable specific performance remedy gave bondholders an unsecured deficiency claim on PREPA's Net Revenues. The precise amount of this claim would "aris[e] from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance." A court may -- for purposes of claim allowance -- estimate a claim in bankruptcy "arising from a right to an equitable remedy for breach of performance." 11 U.S.C. § 502(c)(2). The Title III court applied that provision, estimating the specific performance remedy (and therefore the unsecured claim on Net Revenues) at around $2.4 billion.

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00391). There is one notable exception to this stipulation: The Bondholders may still argue that they have a perfected security interest in PREPA's Revenues, and that this perfection extends to the moneys in these Subordinate Funds. Id.

The court's partial summary judgment order did not reach the Bondholders' trust-related arguments. But its final summary judgment order, which it issued on November 28, 2023, did. There, the Title III court concluded that the Bondholders had failed to state a claim for breach of trust. It also rejected their related demand that PREPA equitably disgorge, via an "accounting," any misappropriated moneys pursuant to P.R. Laws Ann. tit. 22, § 208(a)(2). The court found that PREPA was not a trustee under the plain language of the Trust Agreement, and that an "accounting" under the Authority Act did not require the sweeping restitution remedy the Bondholders requested.

**D.**

Upon issuance of the Title III court's final summary judgment order, the Bondholders filed separate notices of appeal. The Bondholders challenged the Title III court's holdings that they lacked a security interest in PREPA's current or future Revenues or Net Revenues; that any such interest was potentially avoidable under 11 U.S.C. § 544(a); that they had failed to state a claim for breach of trust; and that they were not entitled to an "accounting" of misappropriated PREPA moneys. The Bondholders also challenged the Title III court's estimation order, arguing that the court erred by allowing an unsecured claim of $2.4 billion, rather than almost $9 billion (i.e., the face value

of the Revenue Bonds). Alternatively, the Bondholders challenged the estimation order's methodology.

The Board and associated plaintiff-appellees -- specifically the Official Committee of Unsecured Creditors ("Committee") and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") -- cross-appealed. In addition to rejecting the Bondholders' arguments, the Board and its allies argued that the Title III court erred in allowing any unsecured claim at all on PREPA's Net Revenues. In the Board's view, the Revenue Bonds were non-recourse, so the Bondholders could only recover from their collateral, i.e., the moneys in the Sinking and Subordinate Funds. In the alternative, the Board and its allies argued that the Title III court's $2.4 billion estimation should be affirmed. Finally, the Board contended that if there were a lien on Net Revenues, it would be avoidable as unperfected.

We consolidated these appeals and ordered expedited briefing and oral argument.[9]

[9] In our analysis, we frequently refer to arguments made by the Bondholders. In their briefing, several Bondholders -- specifically, GoldenTree Asset Management LP, Syncora Guarantee, and U.S. Bank National Association -- incorporate by reference arguments made by other Bondholders, pursuant to Federal Rule of Appellate Procedure 28(i). The PREPA Ad Hoc Group does not do so. But neither the Board nor its allies suggests that the Bondholders' invocation of Rule 28(i) was improper, or that the PREPA Ad Hoc Group's failure to invoke Rule 28(i) constitutes waiver of arguments raised exclusively by other Bondholders. So, where a

## II.

We begin by asking whether the Trust Agreement grants the Bondholders a lien on any of PREPA's revenues other than those that make it into the Sinking or Subordinate Funds. We hold that the Trust Agreement grants the Bondholders a lien on PREPA's Net Revenues, even if they are not placed in one of the Funds. Our reasoning follows.

### A.

#### 1.

The dispute about the scope of the Bondholders' lien begins with the Trust Agreement's Preamble. In pertinent part, the Preamble provides: "Now, Therefore, This Agreement Witnesseth, that . . . in order to secure the payment of [the Revenue Bonds,] . . . [PREPA] does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the [Revenue Bonds] . . . , and it is mutually agreed and covenanted . . . as follows . . . ."[10]

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Bondholder sufficiently develops a given argument, we attribute that argument to all "the Bondholders."

[10] The full text of the Preamble reads:

> Now, Therefore, This Agreement Witnesseth, that in consideration of the premises, of the acceptance by the Trustee of the trusts hereby created, and of the purchase and acceptance of the bonds by the holders thereof, and also for and in consideration of the sum of One Dollar to the Authority in hand paid by the Trustee at or before

According to the Bondholders, the Preamble grants a lien on all of PREPA's "Revenues," which are defined as PREPA's gross revenues with several exceptions not relevant here. In sharp contrast, the Title III court found that the Preamble did not create any lien at all, let alone a lien on PREPA's gross revenues. The court gave two reasons for this conclusion.

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> the execution and delivery of this Agreement, the receipt of which is hereby acknowledged, and for the purpose of fixing and declaring the terms and conditions upon which the bonds are to be issued, executed, authenticated, delivered, secured and accepted by all persons who shall from time to time be or become holders thereof, and in order to secure the payment of all the bonds at any time issued and outstanding hereunder and the interest and the redemption premium, if any, thereon according to their tenor, purport and effect, and in order to secure the performance and observance of all the covenants, agreements and conditions therein and herein contained, the Authority has executed and delivered this Agreement and has pledged and does hereby pledge to the Trustee the revenues of the System, subject to the pledge of such revenues to the payment of the principal of and the interest on the 1947 Indenture Bonds (hereinafter mentioned), and other moneys to the extent provided in this Agreement as security for the payment of the bonds and the interest and the redemption premium, if any, thereon and as security for the satisfaction of any other obligation assumed by it in connection with such bonds, and it is mutually agreed and covenanted by and between the parties hereto, for the equal and proportionate benefit and security of all and singular the present and future holders of the bonds issued and to be issued under this Agreement, without preference, priority or distinction as to lien or otherwise, except as otherwise hereinafter provided, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof or otherwise, as follows:

First, the court concluded that the Preamble was a non-binding "prefatory clause" -- much like a "whereas clause" -- rather than a "self-effectuating granting clause." The Board does not defend this reading of the Preamble, calling it "beside the point." In its brief, AAFAF actually concedes that the Preamble's language is "operative." Only the Committee and a group of intervenors defend the contention that the Preamble is not operative. The former labels the clause "not an operative term at all," but rather a "lead-in" or "recital." And the latter calls the clause "prefatory."

We agree with the Bondholders that the Preamble is a granting clause, rather than a prefatory clause. To be sure, language that only expresses the aspirations of the parties (such as a classic "whereas" clause) can be a mere table-setter, often without legal force. See Minturn v. Monrad, 64 F.4th 9, 15 (1st Cir. 2023). And the Trust Agreement does begin with table-setting "whereas" clauses. But the relevant Preamble language does not appear in such a clause. Instead, it debuts in a subsequent "Now Therefore . . ." clause, which states that the Authority "does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the bonds." (Emphasis added.) This language reflects a grant, not merely an aspiration or a description of background facts.

Puerto Rico case law supports the conclusion that the Preamble is not merely prefatory.[11] In a case interpreting an unrelated bond agreement, the Puerto Rico Supreme Court found that a provision beginning with "Now, Therefore" was one of the "main clauses" in the contract. D'All Concrete Mix, Inc. v. Raúl Fortuño, Inc., 14 P.R. Offic. Trans. 954, 956 (1983) (per curiam). We see no reason to read the Preamble differently, especially given that no party identifies any contrary Puerto Rico authority.

Our conclusion that the text of the Preamble is not merely prefatory brings us to the Title III court's alternative finding that the Preamble did not create any kind of security interest because it did not use the words "lien" or "charge." Again, the Board and its allies do not defend the court's reasoning. The Board even concedes that the Preamble's "pledge" is enough to create a security interest.

The Board is correct. There is no "magic words" requirement for creating a security interest under Puerto Rico law. Instead, a security agreement need only "indicate an [objective] intent to create a security interest." In re Esteves Ortiz, 295 B.R. 158, 162 (B.A.P. 1st Cir. 2003) (applying Puerto Rico law). The Preamble clearly evinces such an intent. It states that "in order to secure the payment" of the Revenue Bonds, PREPA

[11] Under section 1301 of the Trust Agreement, Puerto Rico law governs the contract's construction.

"pledge[s] . . . the revenues of the System . . . and other moneys to the extent provided in this Agreement as security for the payment of the bonds." This language closely resembles language that we have previously found sufficient to create a security interest. See, e.g., In re Navigation Tech. Corp., 880 F.2d 1491, 1493 (1st Cir. 1989) (finding that an assignment of contractual rights "[t]o secure the payment of [a] debt" was enough to create a security interest).

Revealingly, the Authority Act -- which, as the Title III court found, authorizes PREPA to grant liens in its revenues -- uses the same phrasing as the Preamble. Section 206 of the Authority Act states that PREPA may "pledg[e]" its current or future revenues to "secure payment of [revenue bonds]." See P.R. Laws Ann. tit. 22, § 206(e)(1). In other words, the Authority Act expressly contemplates that a "pledge" to "secure payment" of a bond can create a security interest. It would therefore be paradoxical to hold that the identical language in the Preamble does not create such an interest.

**2.**

Having established that the Preamble creates a security interest, we next determine the scope of that security interest. The Trust Agreement specifies that PREPA pledges as security for the Revenue Bonds "the revenues of the System . . . and other moneys to the extent provided in this Agreement . . . as follows."

This text poses two questions. First, what are the "revenues of the System," given that the Trust Agreement never expressly defines the phrase? And second, does the phrase "to the extent provided in [the Trust Agreement]" apply to both the pledge of the "revenues of the System" and the pledge of "other moneys," or just to one of those pledges? We address each question in turn.

**i.**

We begin with the Bondholders' ambitious claim that the "revenues of the System" means PREPA's Revenues (i.e., gross revenues). The Trust Agreement does not define "revenues of the System." It does, however, define "Revenues" to mean "all moneys received by the Authority in connection with or as a result of its ownership or operation of the System [minus a variety of investments and transactions]." It also defines "Net Revenues" to mean "the excess of the Revenues . . . over the Current Expenses." By eschewing the defined terms "Revenues" and "Net Revenues" in favor of the undefined term "revenues of the System," the Preamble's text leaves unclear precisely what is being pledged.

To resolve this ambiguity, we turn to the more fundamental rule that a court should read a contract "as a whole." See 11 Williston on Contracts § 32:5 (4th ed.); see also Entact Serv., LLC v. Rimco, Inc., 526 F. Supp. 2d 213, 221 (D.P.R. 2007) (citing P.R. Laws Ann. tit. 31, § 3475) ("[W]hen interpreting contracts, [a court applying Puerto Rico law] must read contract

provisions in relation to one another, giving unclear provisions the meaning which arises from considering all provisions together."). And that rule brings clarity.

When negotiating a contract governing billions of dollars in bonds, the parties understandably agreed to accompany any bond issuance with an opinion of counsel that would confirm the creditors' rights and responsibilities. This opinion of counsel would need to describe the security that PREPA purported to provide its creditors. The parties supplied that description in section 101 of the Trust Agreement. Under section 101, an opinion of counsel must state that the Trust Agreement "creates a legally valid and effective pledge of the Net Revenues . . . and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement . . . ." (Emphasis added.) We refer to this language -- which the parties drafted to direct future counsel on how to describe the collateral securing the Revenue Bonds in connection with the issuance and delivery of any such bonds -- as the "Opinion of Counsel Clause." And given this agreed-upon description, we construe the phrase "revenues of the System" in the Preamble to mean "Net Revenues" (i.e., gross revenues minus Current Expenses) rather than "Revenues" (i.e., gross revenues).

The Bondholders retort that other Trust Agreement provisions -- namely, sections 516(c), 705, and 712 -- suggest that the lien is on Revenues, not Net Revenues.[12] These provisions generally forbid PREPA from granting a lien equal or superior to the lien "secured hereby upon the Revenues."[13] (Emphasis added.) These sections are about lien priority, not lien scope. And none of these sections says that the Bondholders' lien is secured by all the Revenues. That is, even if a bondholder were to have a lien on part of the Revenues (for example, the Net Revenues), one could still describe that lien as "upon the Revenues." Moreover, even if the Bondholders' preferred reading were plausible, drive-by references to "Revenues" must take a back seat to the drafters' focused description of the collateral in the Opinion of Counsel Clause. See Restatement (Second) of Contracts § 203, cmt. e (Am. L. Inst. 1981) ("Attention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.").

[12] The Bondholders also reference section 701's statement that the "Revenues are hereby pledged to the payment of [the Revenue Bonds]." Our analysis applies to that language as well.

[13] Sections 516(c) and 705 use this language, while section 712 describes a lien on the "Revenues of the bonds issued under and secured by this Agreement."

Finally, and most practically, even if the Bondholders' reading of the Trust Agreement were correct, they would likely end up in the same place. As all parties agree, PREPA's Revenues and Net Revenues are "special revenues" under the Bankruptcy Code (a term that we define more precisely later). See infra note 15. And under the Code, any lien on special revenues is subordinate to a utility's reasonable and necessary post-petition operating expenses. See 11 U.S.C. § 928(b); 48 U.S.C. § 2161(a) (incorporating section 928 into PROMESA). Accordingly, as the Bondholders conceded at oral argument, "even a gross revenue pledge becomes a net pledge in [a Title III proceeding]." 5 Norton Bankruptcy Law & Practice § 90:13 (3d ed. 2024).

**ii.**

The Board and its allies agree that the Bondholders do not have a lien on PREPA's gross Revenues. But they insist that this is only half the story. They argue that the Bondholders' security interest does not even attach to all Net Revenues. Instead, they claim that it attaches only to those Net Revenues that have flowed into the Sinking Fund and/or the Subordinate Funds. This argument trains on the text of the Preamble, which states in relevant part that PREPA "does hereby pledge to the Trustee the revenues of the System . . . and other moneys to the extent provided in this Agreement . . . as follows." (Emphasis added.)

The Board's reasoning is thus: (1) The Preamble's revenue pledge is only "to the extent provided in [the Trust Agreement] . . . as follows"; (2) section 701 of the Trust Agreement states, in turn, that PREPA's "Revenues are hereby pledged . . . in the manner and to the extent hereinabove particularly specified"; (3) therefore, the Preamble and section 701 are "bookends" that limit the Bondholders' security interest to the more specific grants that appear between those two contractual provisions; (4) those more specific grants -- in sections 401, 507, and 513 -- only expressly provide for liens in the Sinking and Subordinate Funds; (5) so, the Trust Agreement narrows the Preamble's revenue pledge to those Net Revenues that are actually deposited into the Sinking and Subordinate Funds.

The first step in this argument poses a classic antecedent puzzle. Recall that in the Preamble, the modifying phrase "to the extent provided in [the Trust Agreement]" immediately follows the pledge of "other moneys." But the Board's argument assumes that this modifying phrase applies to both of its antecedent phrases: "revenues of the System" and "other moneys." Put differently, in the Board's view, the Preamble pledges (1) the "revenues of the System . . . to the extent provided in [the Trust Agreement]," and (2) "other moneys to the extent provided in [the Trust Agreement]." Unsurprisingly, the Bondholders counter that

the phrase "to the extent provided in [the Trust Agreement]" modifies only its immediate antecedent: "other moneys."

The parties' respective readings rely on arguably opposing interpretative canons. On the one hand, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Paroline v. United States, 572 U.S. 434, 447 (2014) (quoting Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920)). In a prior PROMESA case, we cited Paroline to interpret a similar bond agreement between creditors and Puerto Rico's government employee pension system. See In re Fin. Oversight & Mgmt. Bd. for P.R., 948 F.3d 457, 467 (1st Cir. 2020) ("Andalusian"). There, the bond agreement defined "Employers' Contributions" as "the contributions . . . made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to [certain statutory sections]." Id. at 464. We rejected the argument that the modifying phrase beginning with "which are payable to the System" only applied to its immediate antecedent: "any assets in lieu thereof or derived thereunder." Id. at 467. Instead, we found that the modifying phrase also naturally referred to "the contributions . . . made by the Employers." Id. The Board urges us to reach a similar conclusion

here: that the "to the extent" phrase applies to both of its antecedents.

On the other hand, there is the canon of the last antecedent. This canon of statutory interpretation broadly prescribes that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." Barnhart v. Thomas, 540 U.S. 20, 26 (2003). If we apply this canon, then the "to the extent" phrase underlined above only modifies its immediate antecedent: "other moneys." Thus, the Preamble would pledge (1) "the revenues of the System," and (2) "other moneys to the extent provided in [the Trust Agreement]."

Faced with the opposing indications of two interpretative guides, we opt for the interpretation that the drafters sanctioned in the Opinion of Counsel Clause. Notably, that clause both "follows" the Preamble and comes before section 701's command to construe the Trust Agreement's revenue pledge "in the manner and to the extent hereinabove particularly specified." And in describing the security granted by the Trust Agreement to protect bondholders, the clause states in pertinent part that the Trust Agreement establishes a "legally valid and effective pledge of the Net Revenues . . . and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds." (Emphases added.) This language -- with

its two "and[s]" -- draws a clear grammatical distinction between the pledge of the "Net Revenues" and the pledge of the "moneys, securities and funds held or set aside under this Agreement." That distinction runs directly counter to the Board's contention that the Trust Agreement only pledges Net Revenues to the extent they reside in the Sinking or Subordinate Funds.

In agreeing on how to describe the Revenue Bonds' collateral to potential investors in the Opinion of Counsel Clause, the parties presumably used words that accurately conveyed their mutual intent. We are loath to read ambiguous language in the Trust Agreement in a manner suggesting that the Agreement calls for investors to be misled, as would be the case if we were to hold that the Bondholders' collateral was limited to moneys in the Sinking and Subordinate Funds. See Asociacion de Condominos v. Centro I, Inc., 6 P.R. Offic. Trans. 257, 268 (1977) (explaining that contract interpretation should consider practical consequences of a proffered reading). We also find it very unlikely that an objectively reasonable party to the transaction giving rise to the Revenue Bonds would have expected the source of repayment not to be subject to a lien while in the debtor's hands.

To defend its preferred reading, the Board embraces the Title III court's view that the Trust Agreement cannot create overlapping liens in the Net Revenues and the moneys in the Sinking and Subordinate Funds. The basic argument here is that if the

Bondholders have a lien on all Net Revenues, then the Fund-specific liens outlined in sections 401, 507, and 513 would be superfluous, because the Sinking and Subordinate Funds also contain Net Revenues. But at least one Subordinate Fund -- the Construction Fund -- also includes bond proceeds, which the parties agree are not Net Revenues.[14] So, at least one Fund-specific pledge covers moneys not captured by the pledge of the Net Revenues.

To be sure, that still leaves us construing the text as granting an arguably superfluous lien in (at least) the Sinking Fund. But such superfluity is hardly unheard of in revenue bond agreements. See In re Las Vegas Monorail Co., 429 B.R. 317, 325, 333 (Bankr. D. Nev. 2010) (interpreting a contract that granted a lien against net revenues, even though the creditor also held liens in the funds that received those net revenues); cf. Unisys P.R., Inc. v. Ramallo Bros. Printing, No. CE-89-754, 1991 WL 735351, at *11 (P.R. Offic. Trans.) (noting that when interpreting a contract, a court may consider the parties' intent in light of prevailing industry practices). Indeed, in this case, such a belt-and-suspenders approach likely offered valuable assurance to the bondholders. For example, section 507 of the Trust Agreement states that the Sinking Fund is held by the Trustee, not by PREPA.

[14] The parties disagree on whether other categories of moneys -- such as letters of credit and federal subsidies -- also qualify as Net Revenues. We need not resolve that issue here.

By expressly noting that the Sinking Fund is "subject to a lien and charge" in favor of the bondholders, the Trust Agreement eliminates any risk that the transfer of moneys from the PREPA-held Revenue Fund to the Trustee-held Sinking Fund would impair the lien initially placed on those moneys as Net Revenues. Given this context, the mere fact that our interpretation of the Trust Agreement creates superfluity is not enough to invalidate it. See Restatement (Second) of Contracts § 203, cmt. b (1981) ("Even agreements tailored to particular transactions sometimes include overlapping or redundant or meaningless provisions.").

The Board also points to section 601 of the Trust Agreement, which states in pertinent part: "All moneys received by [PREPA] under the provisions of this Agreement . . . shall not be subject to lien or attachment by any creditor of [PREPA]." According to the Board, this provision means that no lien can attach to Net Revenues in their liminal, pre-Sinking Fund (or pre-Subordinate Fund) state. This argument proves too much. The Sinking and Subordinate Funds contain only "moneys received" by PREPA. If "moneys received" are not subject to a lien, then section 601 would cast doubt on every lien created by the Trust Agreement. And it would undo the work done by both the Preamble and the Opinion of Counsel Clause.

The more sensible reading of section 601 is that no non-bondholder creditor may -- absent the bondholders'

consent -- secure a lien on moneys received by PREPA. This reading aligns with the Authority Act, which states that "[n]o lien whatsoever may be placed on the assets of [PREPA] insofar as the Trust Agreement with the bondholders or other agreements with the creditors of [PREPA] do not allow." P.R. Laws Ann. tit. 22, § 196(o). Thus, the Authority Act distinguishes between agreements with "bondholders" and agreements with PREPA's other "creditors." Id. And if we apply this distinction to section 601, then that provision's prohibition on "lien or attachment by any creditor of [PREPA]" clearly refers to creditors that are not bondholders. (Emphasis added.) By contrast, section 601 does not bar bondholders from obtaining a lien on "moneys received" by PREPA. On the contrary, it guarantees that any such lien is presumptively superior to a lien held by a non-bondholder creditor.

In sum, we find that as security for the Revenue Bonds, PREPA pledged the Net Revenues and not just those moneys that made it into the Sinking and Subordinate Funds.

**B.**

We have established that the Bondholders have a lien on PREPA's Net Revenues. But that is not the end of the matter. The parties disagree on a more fundamental question: Does the lien on Net Revenues also apply to future Net Revenues, i.e., Net Revenues that PREPA has not yet acquired? We conclude that the answer is yes. Our reasoning follows.

**1.**

Commonwealth law determines whether -- and to what extent -- a trustee or bondholder may have a security interest in the assets of a bankrupt borrower. See Butner v. United States, 440 U.S. 48, 54 & n.9 (1979). Here, the Authority Act expressly permits PREPA to pledge the "entire gross or net revenues and present or future income of [PREPA], including the pledging of all or any part thereof to secure payment" of the Revenue Bonds. P.R. Laws Ann. tit. 22, § 206(e)(1). Puerto Rico has also adopted the Uniform Commercial Code ("UCC"), which sanctions security interests in "after-acquired collateral," i.e., liens extending to property that the debtor does not possess at the time of the underlying security agreement (also known as "floating liens"). P.R. Laws Ann. tit. 19, § 2234(a); see also U.C.C. § 9-204, cmt. 2 (Unif. L. Comm'n 2024) ("[A] security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given."). In sum, several provisions in Commonwealth law establish that the Bondholders may hold a security interest in yet-to-be-acquired Net Revenues.

Congress has also recognized that a revenue bond can be secured by future income. Under section 552(a) of the Bankruptcy Code, a lien on after-acquired property does not attach to property acquired after the debtor files for bankruptcy. See 11 U.S.C.

§ 552(a). But section 928 of the Bankruptcy Code makes clear that a lien on "special revenues" -- like the one at issue here -- continues to attach to revenues acquired post-petition, notwithstanding the general bar in section 552(a).[15] See 11 U.S.C. § 928(a). As the legislative history shows, Congress passed section 928 to alleviate the concern that municipalities would use section 552(a) to avoid "long-term pledges of [project-specific] revenues." See S. Rep. No. 100-506, at 25 (1988) (appended letter providing views of Department of Justice). Thus, the Bankruptcy Code not only recognizes that a debtor may grant a lien on future revenues -- it also expressly states that such liens continue to attach to revenues acquired after the filing of a bankruptcy petition.

Several courts have also considered the scope of a municipal revenue lien like the one before us. And all of them have concluded (or at least implied) that a revenue lien can extend to revenues to be acquired at a later date. See, e.g., In re Jefferson County, 474 B.R. 228, 266 (Bankr. N.D. Ala. 2012) (holding that under Alabama law, a revenue lien is a lien on a "source of revenues," rather than a "possessory lien" on revenues

[15] "Special revenues" include "receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used . . . to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems." 11 U.S.C. § 902(2)(A). The parties agree that PREPA's Net Revenues are "special revenues."

already acquired); In re City of Chester, 655 B.R. 555, 567 (Bankr. E.D. Pa. 2023) (recognizing a lien on revenues "payable or to be received" by the city (emphasis added)); In re Fin. Oversight & Mgmt. Bd. for P.R., 931 F.3d 111, 116 (1st Cir. 2019) (noting in passing dictum that applying section 552(a) to special revenue bonds risks the "termination of creditors' security interests in future special revenues"). We have not discovered -- nor has the Board identified -- any contrary authority.

Thus, Puerto Rico law, the Bankruptcy Code, and prior case law all indicate that the Net Revenues that PREPA acquires in the future will be subject to the pledge of Net Revenues made by PREPA in the Trust Agreement.

**2.**

The Board nevertheless lodges several objections to the conclusion that the Bondholders' lien extends to PREPA's future Net Revenues.

**i.**

The Board argues that under our opinion in Andalusian, a revenue lien cannot extend to future-acquired revenues. But Andalusian is inapposite. That case involved bonds issued by Puerto Rico's Employees Retirement System ("ERS"), which were secured by employer contributions to the ERS's multi-employer pension plan. See 948 F.3d at 462–64.

For two main reasons, this court held that the ERS bondholders' lien on employer contributions did not attach to post-petition contributions. First, the court reasoned that the future employer contributions were not "proceeds" within the meaning of Bankruptcy Code section 552(b)(1) because their receipt depended on intervening appropriation by the Puerto Rico legislature.[16] Id. at 467–70. So, ERS had a "mere expectancy" of receiving future employer contributions, not a conveyable right of receipt that could support a section 552(b)(1) claim on the post-petition proceeds of that pre-petition collateral. Id. at 468 & n.8. Second, the court found that employer contributions to ERS were not special revenues within the meaning of section 928(a). Id. at 463, 473. Therefore, the ERS bondholders could not rely on that section to avoid section 552(a)'s general rule that pre-petition floating liens are ineffective as to collateral acquired post-petition.

Here, though, the parties agree that PREPA's Net Revenues -- unlike the contributions at issue in Andalusian -- are special revenues within the meaning of section 928(a). That status

[16] Broadly, under section 552(b)(1), a creditor maintains a post-petition lien on the "proceeds" of collateral acquired pre-petition. 11 U.S.C. § 552(b)(1). The bondholders in Andalusian argued that post-petition employer contributions were "proceeds" of collateral they had acquired pre-petition (i.e., ERS's right to receive employer contributions). See 948 F.3d at 466.

by itself distinguishes this case from Andalusian unless we were to treat its discussion of special revenues as superfluous, which we will not.

**ii.**

The Board next argues that recognizing any interest in future PREPA Net Revenues is contrary to the Commonwealth's adoption of Article 9 of the UCC. The Board contends that a security interest cannot attach to property under the UCC until (1) the property exists; and (2) the debtor has a transferable right in that property. As a general proposition, this is true. See P.R. Laws Ann. tit. 19, § 2233(a) (explaining that a security interest attaches when it becomes enforceable); id. § 2233(b) (providing that a security interest is enforceable when, among other things, "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party").

However, the Board's argument proves only that a creditor cannot enforce a floating lien with respect to specific units of yet-to-be-acquired collateral. See U.C.C. § 9-204, cmt. 2 (validating a "floating lien" in a debtor's "existing and (upon acquisition) future assets" (emphasis added)). For example, the floating lien does not permit Bondholders to demand now Net Revenues that the debtor will receive in five years. But this does not mean that PREPA cannot convey an initial overarching interest in any Net Revenues that come through the door in five

years. In other words, the Board's objection goes to when a revenue lien attaches to (and is perfected with respect to) future Net Revenues. It does not undermine our initial conclusion that, under Commonwealth law, a debtor may convey a lien on future Net Revenues. See P.R. Laws Ann. tit. 19, § 2234(a); P.R. Laws Ann. tit. 22, § 206(e)(1).

**3.**

We also address an argument raised by the Title III court, but not by the Board. In its opinion below, the court agreed with us that PREPA could grant a lien that would attach to its future-acquired revenues, but it found "no evidence" that PREPA had actually done so. However, both the Board and the Bondholders construe the pledged collateral as encompassing moneys received after the signing of the Trust Agreement. To construe it otherwise would suggest that the bondholders paid billions in return for a pledge of Net Revenues that applied only to the small amount of Net Revenues already received and retained the day the Trust Agreement was executed. See Asociacion de Condominos, 6 P.R. Offic. Trans. at 268 (considering the practical consequences of a proposed contractual interpretation).

**III.**

As an alternative basis for affirming, the Board argues that even if the Bondholders have a lien on PREPA's current and future Net Revenues, that lien is avoidable under 11 U.S.C.

§ 544(a). Section 544(a) grants the bankruptcy trustee (or, in a PROMESA case, the Board) the powers of a hypothetical creditor who "extends credit . . . at the [beginning] of the case," and thereby obtains "a [judgment] lien on all property on which a creditor on a simple contract could have obtained such a [judgment] lien." See 11 U.S.C. § 544(a); 48 U.S.C. § 2161(c)(7).

In Puerto Rico, a judgment lien is superior to any unperfected security interest. See P.R. Laws Ann. tit. 19, § 2267. So, if the Net Revenue lien is unperfected, then the Board may avoid it. The Title III court did not address whether the Net Revenue lien was perfected because it concluded that no such lien existed. Having established that the Net Revenue lien exists, and with the benefit of full argument and briefing, we conclude that it is perfected, or will be perfected, at the very latest, immediately upon PREPA's acquisition of those Net Revenues. This means no hypothetical judgment creditor can outrank the Bondholders with respect to those Net Revenues.

**A.**

In arguing to the contrary, the Board and its allies contend that there is a mismatch between the nature of the collateral and the form of perfection attempted by the Bondholders. The Board argues that because the Net Revenues pledged as collateral consist "of the excess of the Revenues . . . over the Current Expenses," and "revenues" consist of "all moneys received

by" PREPA, Trust Agreement § 101, the Net Revenues should be classified as either "money" or "deposit accounts." And given that a security interest in collateral classified as such is not perfected by the means employed by the Bondholders (i.e., filing a financing statement), FOMB argues that the Bondholders lack a perfected interest in the Net Revenues. The Bondholders do not dispute that a security interest in collateral classified as "money" or "deposit accounts" is not perfected by the filing of a financing statement. Instead, they argue that PREPA's Net Revenues as pledged in the Trust Agreement are more properly classified as either "accounts" or "general intangibles" -- security interests that all parties agree are perfected by the filing of a financing statement.

We consider first the Board's superficially attractive claim that PREPA's "moneys" as collateral should be classified as "money." As the Board acknowledges, though, the term "money" as used to classify collateral for purposes of perfection "[m]eans a medium of exchange authorized or adopted by a . . . government," P.R. Laws Ann. tit. 19, § 451(24); i.e., currency. And no party points to any indication in the record that any substantial portion of the collateral subject to dispute was received in the form of currency.

So, that leaves the Board with its other candidate for classifying Net Revenues as a form of collateral -- a "deposit

account." A deposit account is a "demand, time, savings, passbook, or similar account maintained with a bank." Id. § 2212(a)(29). The Board argues that when the Net Revenues flow into any one of the many funds recognized by the Trust Agreement, the "security interest in those revenues becomes a security interest in a 'deposit account.'" See In re O.P.M. Leasing Servs., Inc., 46 B.R. 661, 670 n.5 (Bankr. S.D.N.Y 1985) (explaining that, where "the parties clearly intended to create a security interest in the money" in their agreement, that security interest continued to attach to the deposit account into which the money was deposited). Here, though, Article I of the Trust Agreement effected a conditional pledge of both "the Net Revenues . . . and of the . . . funds held or set aside . . . as security for the bonds." (Emphases added.) Further bolstering the conclusion that the parties intended to treat the Net Revenues and the funds as distinct entities is the fact that some but not all of the funds are held or set aside as collateral themselves. Trust Agreement § 507. This favors the view that the Bondholders have a security interest in the Net Revenues that PREPA receives from its ownership and operation of its energy system, whether or not they are held at any moment in any particular bank account. We therefore remain unconvinced that the special revenues defined as PREPA's current and future Net Revenues are best themselves categorized as only a deposit account under this particular agreement.

Treating the collateral as the moneys that are not currency rather than just the deposit accounts into which those moneys move and out of which they exit at any moment also aligns with the manner in which the Trust Agreement allows the debtor to directly control the several funds that separate operating and other costs from the revenues net of those costs.

That leaves "accounts" and "general intangibles" as the remaining options. Which one we choose has no effect on the outcome of this appeal because the parties agree that perfection in either case requires the filing of a financing statement -- which all agree the Bondholders have done.

In our initial, now withdrawn opinion, we settled on "account" as the better option. The Board, though, makes a reasonable argument that an "account" might describe PREPA's receivables, but it provides a poor fit for PREPA's present or future receipts. Puerto Rico defines an "account" as, inter alia, "a right to payment of a monetary obligation . . . for energy provided or to be provided." P.R. Laws Ann. tit. 19, § 2212(a)(2)(v). While the Bondholders have a right to repayment by PREPA, and PREPA acquires rights to repayment by its customers, nothing in the Trust Agreement seems to convey any pledge of either such right. Rather, PREPA pledged its receipts, net of expenses. And the Bondholders point to no authority treating a pledge of receipts as necessarily encompassing the receivables that give

rise to these receipts. So, without necessarily deciding the issue, we assume the Board is correct and turn our focus to the category of "general intangibles," which is after all something of a catch-all for interests that do not fit other categories.

The Commonwealth defines "general intangibles" as a form of collateral that is "personal property," but is not "accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, life insurance policies, money, and oil, gas, or other minerals before extraction." Id. § 2212(a)(42) (emphases added). No party argues that Net Revenues are not personal property or that we should consider as options any of the listed types of personal property other than accounts, deposit accounts, or money. So, given our findings and assumption concerning those options, we are left to conclude that the Net Revenues under the Trust Agreement are best categorized as a form of general intangibles.

The Board cites two cases in opposition to this conclusion. In re O.P.M. Leasing Services held that an escrow account was not a general intangible because it was "for all intents and purposes, money"; but the court failed to consider whether the money in question was actually hard currency, even as it relied only on a case in which the money was clearly hard currency. See 46 B.R. at 670 n.5 (citing In re Midas Coin Co.,

Inc., 264 F. Supp. 193 (E.D. Mo. 1967), aff'd sub nom Zuke v. St. Johns Cmty. Bank, 387 F.2d 118 (8th Cir. 1968)). The Board also cites In re Barr, which also held that certain property (utility deposits) was not a general intangible because it was money. 180 B.R. 156, 160 (Bankr. N.D. Tex. 1995). Yet, again, that court did not consider at all the definition of money applicable here -- instead, it focused its discussion on a "utility deposit . . . used to secure performance of contractual rights." Id. More closely on point, the court also held that profits of a cooperative credited to a patron, but not yet paid to the patron, constituted a general intangible. See id. at 159; see also In re Beck, 96 B.R. 161, 163 (Bankr. C.D. Ill. 1988) (accepting party's uncontested assertion that retained earnings account was a general intangible). Meanwhile, two of the Bondholders cite a case even more closely apposite: In re Ocean Place Development, LLC, 447 B.R. 726 (Bankr. D.N.J. 2011). There, the court found that the pledged revenues of money received from the debtor's operations should be characterized as "'accounts' or 'payment intangibles,' as defined under Article 9." 447 B.R. at 737.[17] In short, while scant, the case law favors the view that PREPA's Net Revenues as such should be classified as a general intangible for purposes of determining whether a lien in those revenues has been perfected.

[17] The applicable provision defined "payment intangibles" as a form of "general intangible." Ocean Dev., 447 B.R. at 732 n.4.

This is not to say that all special revenues should be classified as we classify them. Different agreements may warrant different treatments. We simply hold that under this Trust Agreement, the security interest in PREPA's Net Revenues received now or in the future that are not held in the form of currency are best classified as general intangibles. And that conclusion leaves us as before -- the Bondholders have perfected their lien with respect to PREPA's Net Revenues.

In Puerto Rico, an interest in a general intangible is perfected by filing a financing statement. P.R. Laws Ann. tit. 19, § 2260(a). A financing statement is valid for at least five years. Id. § 2335(a); see also id. § 2335(f) (providing that a financing statement lasts indefinitely where "debtor is a transmitting utility and a filed financing statement so indicates"). Here, the Bondholders filed an updated financing statement in August 2013, which described the underlying collateral as the "Revenues of the System (as each such term is defined in the Agreement) and other moneys to the extent provided in the Agreement."[18] The Board filed

[18] The language of the financing statement seems to imply that the Bondholders' lien is in Revenues, rather than Net Revenues. But under Commonwealth law, the financing statement cannot create an interest beyond that created by the Trust Agreement. See Xynergy Healthcare Cap. II LLC v. Municipality of San Juan, 516 F. Supp. 3d 137, 155-56 (D.P.R. 2021) ("Where a security agreement covers only certain assets, the financing statement's inclusion of additional assets is ineffective to create a security interest in the additional assets omitted from

its restructuring petition for PREPA in July 2017, so the August 2013 financing statement was timely. Moreover, the Board does not argue that the August 2013 financing statement insufficiently described the Bondholders' collateral or suffered from any other flaw that would render the Net Revenue lien unperfected.

Accordingly, the Bondholders have perfected their lien with respect to Net Revenues that PREPA acquires. See P.R. Laws Ann. tit. 19, § 2233(b) (providing that a security interest attaches once a "debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party"); id. § 2258 (instructing that perfection requires attachment).

**B.**

The Board also argues that because future Net Revenues do not yet exist, it can avoid any lien in those future Net Revenues. To see why this is not so requires some background on the applicable law.

Under 11 U.S.C. § 547(b), a bankruptcy trustee may avoid a debtor's pre-petition transfer of property to a creditor, if such transfer: (1) was made for an antecedent debt; (2) was made while the debtor was insolvent; (3) was made within a certain time period (usually ninety days); and (4) gives the creditor more than it would receive in a liquidation scenario that did not include

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the security agreement." (quoting In re Levitz Ins. Agency, 152 B.R. 693, 698 (Bankr. D. Mass. 1992))).

the transfer. See also 5 Collier on Bankruptcy ¶ 547.01 (16th ed. 2023) (providing an overview of section 547). Before 1978, a body of case law emerged to reconcile section 547's language on pre-petition transfers with the UCC's recognition of liens on after-acquired property. See, e.g., 4 White & Summers' Uniform Commercial Code § 32:24 nn. 2–5 (6th ed. 2023) (collecting authorities). To understand the problem, consider a simplified example of a creditor with a lien on a merchant's revolving inventory (i.e., a lien on after-acquired property). If we conceive of the creditor as holding a distinct lien on each unit of inventory, which arises only as the inventory is acquired, then -- all else being equal -- any liens on inventory acquired in the ninety-day pre-petition period would arguably be avoidable as preferences under section 547. The upshot is that the creditor would have no bulletproof lien on inventory acquired even months before the bankruptcy petition date.

To avoid this outcome, several courts proposed the "entity" or "stream" conception of liens on after-acquired property. See, e.g., Grain Merchs. of Ind., Inc. v. Union Bank & Sav. Co., 408 F.2d 209, 215–17 (7th Cir. 1969); DuBay v. Williams, 417 F.2d 1277, 1287 n.8 (9th Cir. 1969) (describing the idea in dicta without adopting it); Manchester Nat'l Bank v. Roche, 186 F.2d 827, 831 (1st Cir. 1951) (same). On this view, the creditor's security interest was not in each individual piece of inventory.

Instead, the interest was in the "entity of [inventory] as a whole, and not in the individual components, so that the [relevant] transfer of property occurred [] when the interest in the [inventory] as an entity was created and the financing statements were duly filed," rather than when the debtor acquired rights in a particular piece of inventory. Grain Merchs., 408 F.2d at 216. One commentator put it in more philosophical terms, suggesting that "[t]he secured creditor's interest is in the stream of accounts flowing through the debtor's business, not in any specific accounts. As with the Heraclitean river, although the accounts in the stream constantly change, we can say it is the same stream." William E. Hogan, Games Lawyers Play with the Bankruptcy Preference Challenge to Accounts and Inventory Financing, 53 Cornell L. Rev. 553, 560 (1968).

Congress amended the Bankruptcy Code in 1978 to overrule Grain Merchants, noting that for preference purposes, the relevant transfer only occurred when "the debtor has acquired rights in the property transferred." 11 U.S.C. § 547(e)(3); see also S. Rep. No. 95-989, at 89 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5875 (expressing intent to overrule Grain Merchants). In its briefing, the Board implies that by adopting what would become section 547(e)(3), Congress expressly "disapprov[ed] of the 'stream' [conception]" of after-acquired property that the pre-1978 cases espoused, and which the Bondholders seem to endorse.

Just a decade later, though, Congress executed a u-turn by adding section 926(b) to the Bankruptcy Code. Under that provision, a transfer of property "for the benefit of any holder of a bond or note" is not avoidable under section 547. 11 U.S.C. § 926(b). So, at least with respect to revenue bond payments, Congress appeared to resurrect the pre-1978 "stream" or "entity" theory of after-acquired property. And the legislative history suggests as much. To quote the accompanying Senate committee report: "[I]n the municipal finance context, if the lien on future revenues is voided as a preference, the result is at odds with public policy and state enabling legislation which almost invariably provides that pledges of such revenues are effective when made and good against other creditors." S. Rep. No. 100-506, at 7 (1988) (emphases added).

The "stream" or "entity" theory discussed in Grain Merchants -- and reiterated in the legislative history of section 926(b) -- resembles the theory that the Bondholders advance now. In essence, the Bondholders argue that their lien covers the "stream" of Net Revenues as a whole, not the individual batches of Net Revenues as they come in the door. Thus, the Bondholders argue that by virtue of their perfected lien in the "stream" of Net Revenues, they currently hold perfected interests in both already-acquired and future-acquired Net Revenues.

Puerto Rico has not expressly adopted a "stream" theory of after-acquired collateral. Nor is there any Commonwealth case that applies the reasoning from Grain Merchants (or Congress's adoption of section 926(b)) to revenue bonds. We therefore hesitate to endorse the Bondholders' sweeping assertion that -- under Commonwealth law -- their perfected lien on the Net Revenue "stream" means they hold an already-perfected interest in future-acquired Net Revenues.

Moreover, even if we were to assume that Commonwealth law recognizes the "stream" theory in some form, it does not follow that the Bondholders currently have a perfected lien on all not-yet-acquired Net Revenues. Indeed, some commentators read Grain Merchants as holding that lien attachment (and therefore the potential for perfection) still only arises when the debtor acquires the collateral. On this view, when a creditor holds a lien in a collateral "stream," the creditor does not automatically hold a perfected interest in each piece of collateral within that "stream." Instead, the creditor's interest in a piece of collateral attaches upon acquisition and is treated as if perfected at the time of the initial financing statement. See, e.g., Rafael I. Pardo, On Proof of Preferential Effect, 55 Ala. L. Rev. 281, 305 (2004) ("[T]he [Grain Merchants] lien creditor test related the timing of the transfer of a security interest acquired under a floating lien back to the filing of a financing statement by the

secured party."); Richard F. Duncan, Preferential Transfers, the Floating Lien, and Section 547(c)(5) of the Bankruptcy Reform Act of 1978, 36 Ark. L. Rev. 1, 7 n.29 (1982) (noting that a security interest in after-acquired collateral would be perfected "under the earlier filing"). This slightly modified approach to the "stream" theory finds some footing in Commonwealth law. As noted above, under Commonwealth law, a lien attaches to property upon acquisition. P.R. Laws Ann. tit. 19, § 2233(b); see also U.C.C. § 9-204, cmt. 2. It therefore seems to follow that the Bondholders cannot currently hold a perfected lien in property that PREPA has not yet acquired.

Ultimately, we need not identify the precise contours of the Commonwealth law governing attachment and perfection. Under any plausible conception of Commonwealth law, the Bondholders' lien on future-acquired Net Revenues is not avoidable. If the Commonwealth adopts the Bondholders' sweeping view -- i.e., that their perfection of the lien in the Net Revenue "stream" means they already hold a perfected interest in future-acquired Net Revenues -- then the lien is clearly unavoidable. If the Commonwealth adopts the modified conception of "stream" theory discussed above, then the Bondholders' lien will attach to future Net Revenues when PREPA acquires them, at which point the lien will be treated as if it was perfected at the time of the initial financing statement. And if the Commonwealth adopts no "stream"

theory at all, then perfection would also occur as soon as PREPA acquires any future Net Revenues. See P.R. Laws Ann. tit. 19, § 2258 ("A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches."). In that case, there would be no intervening period during which a judgment creditor could obtain a superior lien. Cf. Arthur J. Harrington, Insecurity for Secured Creditors: The Floating Lien and Section 547 of the Bankruptcy Act, 63 Marq. L. Rev. 447, 467 n.75 (1980) ("Since attachment is immediate, there is simply no intervening time between the debtor's acquisition of the collateral and perfection of the secured party's rights . . . during which the [judgment] creditor's right can attach to the debtor's inventory and accounts receivable."). Thus, section 544(a) would not apply.

Accordingly, we hold that the Bondholders' lien is not avoidable under section 544(a).[19]

**IV.**

We have held that the lien granted by the Trust Agreement covers PREPA's present and future Net Revenues and that the

[19] As noted earlier, see supra note 8, the Bondholders have reserved the right to argue that perfection of the lien on Net Revenues also perfects the liens on moneys deposited into certain Funds. Because the district court had no opportunity to rule on this issue, and because we have not received focused briefing on it, we offer no opinion on whether -- or to what extent -- perfection of the Net Revenue lien influences perfection of the liens in the Sinking and/or Subordinate Funds.

Bondholders' lien is not avoidable. This leaves unanswered the following question: How should the Title III court account for that lien in PREPA's restructuring? Some of the Bondholders ask us to the answer that question now. We decline to do so.

Without focused briefing from the parties or insight from the Title III court, it is difficult to determine precisely what must be decided. The Title III court never discussed how to account for a Net Revenue lien during PREPA's restructuring. It had no occasion to do so, because it held that no lien in the Net Revenues existed. Instead, the court answered the materially different question of how to account for a lien that covered only moneys in the Sinking and Subordinate Funds.

In their briefing, some Bondholders point to the Title III court's suggestion that a plan of adjustment will "cut[] off accretions of the [Bondholders'] security interest." They argue that this language amounts (incorrectly, they say) to a holding that a plan of adjustment can unilaterally "cut off" the Bondholders' security interest, no matter what form that interest takes. But the court's language only applied to a lien on the Sinking and Subordinate Funds. Basically, the court held that a plan of adjustment would discharge PREPA's contractual obligation to replenish the Sinking and Subordinate Funds. Therefore, any "accretions" to those Funds would stop on the confirmation date, meaning the Bondholders' security interests in those Funds would

not grow in value after the confirmation date. That holding says nothing about the extent to which a lien on Net Revenues received post-confirmation is dischargeable in a plan of adjustment.

We therefore decline to tell the Title III court -- in the first instance and without adequate briefing -- how it should deal with the Bondholders' Net Revenue lien during plan confirmation. In working through the difficult, novel, and important questions posed by the Title III proceedings in this case and others, we have found the considered opinions and insights of the Title III court to be extremely helpful. This has been true even in the handful of cases (like this one) where we have, with the benefit of time and further briefing, arrived at a different outcome.

**V.**

Next, the parties ask us to consider two disputes regarding related questions that the Title III court did address: (1) What is the size of the claim that the Net Revenue lien secures?; and (2) If the Bondholders' collateral only satisfies part of that claim, may the Bondholders file a deficiency claim for the remainder?

**A.**

We start with the first question: What is the amount of the Bondholders' claim on PREPA's estate? We conclude that the

proper amount of the Bondholders' claim is the face value (i.e., principal plus matured interest) of the Revenue Bonds.

**1.**

We begin by summarizing the Title III court's holding on this question. In the proceedings below, the court concluded that the Bondholders only had a secured claim on moneys deposited into the Sinking and Subordinate Funds. As our preceding discussion makes clear, we do not share this view. But the Title III court also found that the Bondholders had an unsecured claim on PREPA's Net Revenues, even if they were not yet deposited in the Sinking and Subordinate Funds.

To understand the Title III court's finding, we must look to section 101(5) of the Bankruptcy Code. Under that section, a creditor can have two types of claim on a bankrupt debtor's estate. First, a creditor's claim can stem from a "right to payment." 11 U.S.C. § 101(5)(A). Second, a creditor's claim can stem from a "right to an equitable remedy for breach of performance[,] if such breach gives rise to a right to payment." Id. § 101(5)(B).

The Title III court found that the Bondholders' unsecured claim on Net Revenues derived from a "right to an equitable remedy for breach of performance." Id. Recall the remedies outlined in the Trust Agreement. If PREPA breached its contractual covenant to transfer Net Revenues into the Sinking and

Subordinate Funds, then the Bondholders could force PREPA to change course by placing PREPA into receivership, or by seeking specific performance. Those are equitable remedies. And those remedies would, by definition, reach Net Revenues not yet deposited into the Sinking and Subordinate Funds. Therefore, the court found, the Bondholders had a claim on the Net Revenues that derived from their "equitable remed[ies] for breach of performance." Id. And the amount of that claim was limited to "[what] could be achieved through the application of the equitable remedies to fulfill the . . . covenant to pay the [Revenue] Bonds from the Net Revenues of the System."

That brings us to section 502(c)(2) of the Bankruptcy Code. Under that section, a court may estimate (i.e., assign a dollar amount to) a "right to payment arising from a right to an equitable remedy for breach of performance." See id. § 502(c)(2). Applying section 502(c), the district court estimated the Bondholders' unsecured claim on the Net Revenues at $2.4 billion. Broadly speaking, the Title III court reached that number by estimating how much Net Revenue a receiver would be able to direct into the Sinking and Subordinate Funds (while complying with the rest of the Trust Agreement) over the next 100 years and then discounting that figure to present value.

**2.**

We disagree with the foundational assumption of the Title III court's valuation analysis: that the Bondholders' claim on the Net Revenues was a "right to payment arising from a right to an equitable remedy for breach of performance" subject to estimation under section 502(c)(2). Instead, we find that the Bondholders had a legal "right to payment" rooted in the covenants outlined in the Trust Agreement. Because the Revenue Bonds specify the amount that PREPA legally owes the Bondholders, there was no need to estimate the Bondholders' "right to payment" under section 502(c).

A creditor holds a "right to payment" when the debtor is legally obligated to pay "under the relevant non-bankruptcy law." In re Chateaugay Corp., 53 F.3d 478, 497 (2d Cir. 1995) (quoting In re Nat'l Gypsum Co., 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992)). Here, that non-bankruptcy law is the law of contracts (and the Authority Act) as applied to the Trust Agreement. And the Trust Agreement clearly requires PREPA to pay the bonds in full. In section 701 of the Trust Agreement, PREPA promises to "promptly pay the principal of and interest on each and every bond issued" under the Trust Agreement. This covenant creates a legal right to payment. To be sure, but for the automatic stay on actions against PREPA's estate, the Bondholders could deploy various equitable remedies -- such as receivership -- to enforce their right to

payment if PREPA breaches the covenant. See P.R. Laws Ann. tit. 22, § 208. But the underlying right remains a legal one. Indeed, the Trust Agreement expressly permits the Bondholders to proceed at law to challenge any breach of the Trust Agreement's covenants.

When a legal right to payment arises from a debt instrument, the "proper amount of claim in a bankruptcy case" is the "full face amount of [the instrument]." In re Oakwood Homes Corp., 449 F.3d 588, 596–97 (3d Cir. 2006) (emphasis omitted) (quoting 4 Collier on Bankruptcy ¶ 502.03 (5th rev. ed. 2005)); see also In re Trendsetter HR L.L.C., 949 F.3d 905, 910 n.22 (5th Cir. 2020) (citing the same Collier section).

This makes sense. As an analogy, consider how courts have applied section 502(c)(1), another estimation provision that applies to "contingent or unliquidated claim[s]." 11 U.S.C. § 502(c)(1). The purpose of that provision is to assign a dollar amount to "undetermined claims of an unsettled amount." In re Trendsetter, 949 F.3d at 910 n.22. By contrast, section 502(c)(1) does not apply to "liquidated claims" -- that is, claims with an amount determinable "by reference to an agreement or by a simple computation." In re Nicholes, 184 B.R. 82, 89 (B.A.P. 9th Cir. 1995). When dealing with "liquidated claims," the court can often look to an underlying agreement to determine the claim amount. Id. ("[D]ebts arising from a contract are generally liquidated.");

see also In re Flaherty, 10 B.R. 118, 120 (Bankr. N.D. Ill. 1981) (the amount of a liquidated claim "may be ascertained by computation or reference to the contract out of which the claim arises") (quoting Zimek v. Ill. Nat'l Cas. Co., 370 Ill. 572, 572 (1939)); 2 Norton Bankruptcy Law & Practice § 48:13 (3d ed. 2024) ("Liquidated claims . . . should be calculated directly from the underlying obligation under applicable law.").

The case law around section 502(c)(1) informs our analysis of section 502(c)(2). A claim "arising from a right to an equitable remedy for breach of performance" resembles a "contingent or unliquidated claim." In both cases, the amount of the claim is not easy to discern, so estimation is appropriate. 11 U.S.C. § 502(c)(1)-(2). But here, the Bondholders' claim resembles a "liquidated claim." We can easily determine its amount by looking to the contract from which it arises: the Trust Agreement. In re Flaherty, 10 B.R. at 120. According to that contract, the face value of the Revenue Bonds (i.e., the principal plus matured interest) is just under $8.5 billion.[20] So, that is the amount of the Bondholder's claim on the Net Revenues.

Only one party -- AAFAF -- attempts to defend the Title III court's estimation analysis. The agency argues that the

[20] For our purposes, the face value of a debt instrument is the principal plus any matured interest. The bankruptcy court must disallow any portion of a claim attributable to unmatured interest. See 11 U.S.C. § 502(b)(2).

Bondholders do not have a contractual right to payment in full, because section 804 of the Trust Agreement permits paying the Bondholders "solely from the Sinking Fund and other moneys available for such purpose." So, AAFAF argues, the Bondholders only have a right to payment from non-deposited Net Revenues if they deploy their equitable remedies to force those Net Revenues into the Sinking Fund. The upshot of this argument is that any right to payment from the Net Revenues is equitable, not legal.

There are two problems with this argument. First, AAFAF conflates the mechanism by which the Bondholders are paid with the Bondholders' underlying legal right to payment. The fact that payments come from the Sinking Fund says nothing about the Bondholders' underlying entitlement to those payments in the first place. That legal right stems from the payment covenant in section 701, which never states that the Bondholders are only entitled to payment from the Sinking Fund. Second, the text of section 804 undercuts AAFAF's position. That provision permits payment of the Bondholders from the "Sinking Fund and any other moneys available for such purpose." (Emphasis added.) Net Revenues are "available" for debt service. The only pre-debt service payments required by the Trust Agreement are the deduction of Current Expenses from incoming Revenues, which is required under section 505. After that, Net Revenues are eligible for debt payments, as evidenced by the text of section 804 referring to

"other moneys" available for debt service, not "other funds" available for debt service.

Accordingly, the proper amount of the claim is the principal plus matured interest of the bonds, or roughly $8.5 billion (the district court can determine the precise amount). Importantly, this is not to say that the Bondholders must be paid $8.5 billion. Rather, it is to say that the Bondholders' allowed claim on PREPA's estate is on the order of $8.5 billion. And that allowed claim is only secured "to the extent of the value of [the Bondholders'] interest" in the Net Revenues and the Sinking and Subordinate Funds. 11 U.S.C. § 506(a)(1). If the value of those liens is less than the allowed claim amount, then the Bondholders are undersecured. In that event, what (if anything) can the Bondholders do to recover the difference between the allowed claim amount and the value of their collateral? We turn to that question next.

**B.**

In the proceedings below, the parties took opposing positions on whether the Bondholders had any recourse against PREPA beyond their rights to the collateral securing the Revenue Bonds. Given our holding that the Bondholders' collateral does include PREPA's Net Revenues, the significance of this issue has likely shrunk, but not disappeared.

Under section 1111(b) of the Bankruptcy Code, a secured creditor -- subject to limited exceptions -- has "recourse against the debtor on account of [its secured] claim," even if the creditor is otherwise nonrecourse under applicable non-bankruptcy law. Id. § 1111(b)(1)(A). However, under section 927 of the Bankruptcy Code, this presumption of recourse does not apply to a "holder of a claim payable solely from special revenues of the debtor." Id. § 927.

The Bondholders contend that section 927 does not apply, because their secured claim is not payable "solely" from special revenues. Instead, they claim, the Revenue Bonds are also payable from non-special revenue sources like investment earnings, federal subsidies, or insurance proceeds. This argument overreads the word "solely" in section 927. The purpose of section 927 is to deny special revenue bondholders any recourse to the general funds of a municipality, which are often subject to "statutory or constitutional limits on debt issuance." 6 Collier on Bankruptcy ¶ 927.02 (16th ed. 2024). Thus, a claim is payable "solely from special revenues" under section 927 when the claimant lacks "any right to claim from the general treasury of the municipality." Id. Here, the Trust Agreement expressly states that the Revenue Bonds are not "general obligations of [the] Commonwealth of Puerto Rico." So, section 927 applies, and the Bondholders' recourse is

limited to their collateral unless the Trust Agreement says otherwise.

Nothing in the Trust Agreement makes the Bondholders recourse creditors. The only contractual provisions cited by the Bondholders are sections 804 and 805. Section 804 permits the Bondholders' Trustee to sue PREPA for unpaid moneys and to demand payment from the "Sinking Fund and any other moneys available for [debt service]." As noted above, only the Net Revenues (and the non-Net Revenue moneys in the liened Funds) are available for debt service. Section 505 of the Trust Agreement requires payment of Current Expenses (i.e., conversion of Revenues to Net Revenues) before any payments may flow to the Bondholders. So, section 804 simply states that the Bondholders may reach the Net Revenues and the liened Funds to recover unmade payments. It does not grant any further recourse. The same logic applies to section 805, which states that if moneys in the Sinking Fund are insufficient to make debt service payments, the Bondholders may reach the moneys in the Sinking Fund and "any moneys then available or thereafter becoming available for [debt service]." Again, only Net Revenues and the liened Funds are available for debt service. So again, section 805 does not broaden the Bondholders' recourse beyond their collateral.

Thus, the Bondholders are nonrecourse creditors. A nonrecourse creditor may "look only to its collateral for

satisfaction of its debt and does not have any right to seek payment of any deficiency from a debtor's other assets." In re 680 Fifth Ave. Assocs., 156 B.R. 726, 732–33 (Bankr. S.D.N.Y. 1993). The Bondholders may not file an unsecured deficiency claim against PREPA, because that claim would naturally reach assets other than the Bondholders' collateral. This conclusion is hardly novel. In fact, it aligns with the standard market practice for special revenue bonds. See 4 Norton Bankruptcy Law & Practice § 90:13 (3d ed. 2024) ("[S]pecial revenue bonds usually are non-recourse debt . . . . [I]n the event of default the bondholders have no claim against the municipality's general fund or other non-pledged revenues or assets . . . . [B]ondholders assume the risk that the revenues will not be enough to pay the bonds.").

**VI.**

Finally, the Bondholders appeal two related holdings by the Title III court pertaining to PREPA's trust obligations (or lack thereof). First, some of the Bondholders challenge the court's dismissal of their breach of trust claim. Second, they challenge the court's dismissal of their "accounting" claim, which is rooted in the Authority Act's command that PREPA "account as if [it] were the trustee of an express trust" in favor of the Bondholders. P.R. Laws Ann. tit. 22, § 208(a)(2).

We affirm the dismissal of the breach of trust claim, but we reverse the dismissal of the accounting claim.

**A.**

Some of the Bondholders claim that when PREPA received Revenues, it held them in trust for the benefit of the Bondholders. But the Trust Agreement clearly identifies First National City Bank and its successors -- not PREPA -- as Trustee. In response, the Bondholders point to language in section 601 stating, in pertinent part, that all moneys received by PREPA "shall be deposited with a Depositary or Depositaries [and] shall be held in trust." But nothing in section 601 states that PREPA receives and holds its moneys in trust in the first instance. On the contrary, section 601 -- which is captioned "Deposits constitute trust funds" -- states that "[a]ll moneys deposited with each Depositary, including the Trustee, shall be credited to the particular fund or account to which such moneys belong." (Emphasis added.) This language shows that the "Trustee" must be a "Depositary," i.e., a financial institution designated to hold deposits under the Trust Agreement. PREPA is not a Depositary. So, we read section 601 as requiring PREPA to deposit moneys with Depositories, who then hold the moneys in trust and apply them in accordance with the Trust Agreement. Section 601 does not make PREPA itself a trustee.

The text of the Authority Act elsewhere reinforces our conclusion. The Authority Act requires PREPA to "account as if

[it] were the trustee of an express trust." P.R. Laws Ann. tit. 22, § 208(a)(2) (emphasis added). As the Title III court properly noted, this language would be unnecessary if PREPA were already a trustee with respect to all moneys received.

**B.**

The Bondholders also appeal the Title III court's dismissal of their accounting claim. Here, the Bondholders are on firmer footing. We agree that the accounting claim should be reinstated.

The Authority Act permits the Bondholders, subject to the terms of the Trust Agreement, to bring an equitable action requiring PREPA to "account as if [it] were the trustee of an express trust." P.R. Laws Ann. tit. 22, § 208(a)(2). And the Trust Agreement does not limit this authority. Section 804 permits the Trustee to sue (on the Bondholders' behalf) for "the enforcement of any proper legal or equitable remedy."

The concept of an "accounting" is not defined in the Trust Agreement, the Authority Act, or Puerto Rico law. Historically, though, an "accounting" has been an equitable remedy much like restitution or disgorgement. See Liu v. SEC, 591 U.S. 71, 79 (2020) (noting that an equitable cause of action to "deprive[] wrongdoers of their net profits from unlawful activity" has been variously called accounting, restitution, or disgorgement).

Taken together, the Trust Agreement and Authority Act appear to permit the Bondholders to bring an equitable action for Net Revenues wrongly diverted from debt service. Indeed, in their brief, the Bondholders suggest that PREPA has spent Net Revenues on unreasonable Current Expenses, thereby starving the Sinking and Subordinate Funds of cash and slowing debt payments to the Bondholders. So, the Bondholders appear to have an accounting claim, unless any relevant authorities suggest otherwise.

In dismissing the accounting claim, the Title III court concluded that a creditor requesting an "accounting" under Puerto Rico law is entitled only to information about the debtor's unpaid obligations. It relied on two authorities for this proposition, but we do not find either one apposite.

First, the court relied on P.R. Laws Ann. tit. 19, § 2240, which defines a "request for an accounting" as a "record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral." P.R. Laws Ann. tit. 19, § 2240(a)(2). As the text makes clear, this provision concerns a debtor's request for an accounting, not a creditor's request for an accounting. Moreover, the definition of "request for an accounting" that appears in section 2240 is expressly limited to that section. Id. § 2240(a).

Second, the court relied on our holding in Citibank Global Mkts., Inc. v. Rodríguez Santana, 573 F.3d 17 (1st Cir.

2009). There, an account holder sued a broker-dealer, broadly alleging overcharging of commissions. Id. at 21–22. The account holder alleged the broker-dealer had fraudulently induced him to sign a settlement agreement concerning those overcharges. Id. at 29. He argued that the settlement would only have been valid if the broker-dealer (acting as his agent) had "provide[d] an accounting of its . . . overcharges." Id. at 30. The broker-dealer had, in fact, provided a "detailed forty-plus page analysis of the overcharges." Id. at 30. The Citibank court did not pass on whether such an accounting was, in fact, required. It simply held that, if an accounting were required, nothing in Puerto Rico law suggested that the broker-dealer's analysis was insufficient. Id. Thus, Citibank did not define the remedy of "accounting" under Puerto Rico law. And even if it did define that remedy, it did so in the context of agency law, not secured transactions. Id. Citibank therefore provides little guidance here.

To conclude, the Bondholders have properly pled a claim for an equitable accounting. That said, we emphasize, as the Board correctly does, that any equitable accounting will not expand the Bondholders' recourse beyond the Net Revenues. Under the Authority Act, a claim for an equitable accounting is subject to the terms of the Trust Agreement. P.R. Laws Ann. tit. 22, § 208(a). And as discussed above, sections 804 and 805 of the Trust Agreement state

that in any legal or equitable action to enforce payment of the Revenue Bonds, the Bondholders may only reach moneys available for debt service. Thus, while the Bondholders stated a claim for an accounting under the Authority Act, that claim will not entitle them to reach any moneys or funds in which they do not already hold a security interest.

**VII.**

For the foregoing reasons, the judgment of the Title III court is affirmed in part and reversed in part. All parties shall bear their own costs.

# Appendix D-1

# United States Court of Appeals
## For the First Circuit

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Nos. 23-2036
23-2049
23-2050
23-2052
23-2053
23-2054
23-2057

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors,

---

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of the Puerto Rico Electric Power Authority; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs-Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, as Administrative Agent; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LLC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs-Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; ASSURED GUARANTY INC.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCE BERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, a series of Macquarie Investment Management Business Trust to the Form 2019; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY, on behalf of Russell Investment Company Tax-Exempt High Yield Bond Fund; SIG STRUCTURED PRODUCTS, LLC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants-Appellants/Cross-Appellees,

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LLC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants-Appellees.

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Before

Rikelman, Howard, and Kayatta, Circuit Judges.

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**ORDER OF COURT**

Entered: December 31, 2024

Appellee/Cross-Appellant Official Committee of Unsecured Creditors' petition for rehearing is denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Heriberto J. Burgos-Perez, Matthew D. McGill, Ricardo F. Casellas-Sanchez, Diana Perez-Seda, Howard Robert Hawkins Jr., Mark C. Ellenberg, Casey J. Servais, Jeremy Max Christiansen, Lochlan Francis Shelfer, Thomas J. Curtin, William J. Natbony, Hermann D. Bauer-Alvarez, Timothy W. Mungovan, Michael T. Mervis, Luis Francisco Del-Valle-Emmanuelli, Margaret Antinori Dale, John E. Roberts, Mark David Harris, Martin J. Bienenstock, Ehud Barak, Paul V. Possinger, Jeffrey W. Levitan, Lucas Kowalczyk, Shiloh Rainwater, Daniel Steven Desatnik, Elliot Rainer Stevens, Dietrich L. Snell, Henrique N. Carneiro, Israel Fernandez-Rodriguez, Juan J. Casillas-Ayala, Ricardo Burgos-Vargas, Luc A. Despins, Juan Carlos Nieves-Gonzalez, Georg Alexander Bongartz, Eric D. Stolze, Stephen Blake Kinnaird, Pedro A. Jimenez, Luis C. Marini-Biaggi, Elizabeth Lemond McKeen, Gabriel Luis Olivera Dubon, Peter M. Friedman, Ashley M. Pavel, John J. Rapisardi, Carolina Velaz-Rivero, Nancy A. Mitchell, Maria Jennifer DiConza, Jason Zarrow, Amy R. Wolf, Nayuan Zouairabani-Trinidad, Richard G. Mason, Emil A. Kleinhaus, Angela K. Herring, Nicholas Baker, Sarah E. Phillips, Michael H. Cassel, Victoria M. Rivera-Llorens, Jose Luis Ramirez-Coll, Carolina V. Cabrera-Bou, Sylvia M. Arizmendi-Lopez de Victoria, Rafael Escalera-Rodriguez, Daniel A. Salinas-Serrano, Eric Mark Kay, Carlos R. Rivera-Ortiz, Susheel Kirpalani, Nayda I. Perez-Roman, Iris Jannette Cabrera-Gomez, Eric A. Tulla, Clark T. Whitmore, William Z. Pentelovitch, John T. Duffey, Jason M. Reed, Michael Charles McCarthy, Glenn Kurtz, Lydia Margarita Ramos-Cruz, John K. Cunningham, Thomas Lauria, Eric Perez-Ochoa, Luis A. Oliver-Fraticelli, Jonathan D. Polkes, Robert Berezin, Dora Luisa Monserrate-Peagarcano, Rolando Emmanuelli-Jimenez, Jessica Esther Mendez-Colberg, Zoe Negron Comas, Rafael A. Ortiz-Mendoza, Manuel Fernandez-Bared, Linette Figueroa-Torres, Andrew N. Rosenberg, Karen R. Zeituni, G. Eric Brunstad Jr., Fernando J. Gierbolini-Gonzalez, Richard James Schell-Gonzalez, Stephen D. Zide, David A. Herman, Kevin Michael Gallagher, Laura Appleby, Kyle Hosmer, Andrew N. Ferguson

# Appendix D-2

# United States Court of Appeals
## For the First Circuit

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Nos. 23-2036
23-2049
23-2050
23-2052
23-2053
23-2054
23-2057

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors,

---

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of the Puerto Rico Electric Power Authority; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs-Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, as Administrative Agent; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LLC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs-Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; ASSURED GUARANTY INC.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCE BERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, a series of Macquarie Investment Management Business Trust to the Form 2019; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY, on behalf of Russell Investment Company Tax-Exempt High Yield Bond Fund; SIG STRUCTURED PRODUCTS, LLC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants-Appellants/Cross-Appellees,

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LLC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants-Appellees.

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Before

Rikelman, Howard, and Kayatta, Circuit Judges.

---

**ORDER OF COURT**

Entered: December 31, 2024

Appellee/Cross-Appellant Financial Oversight and Management Board for Puerto Rico's petition for rehearing is denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Heriberto J. Burgos-Perez, Matthew D. McGill, Ricardo F. Casellas-Sanchez, Diana Perez-Seda, Howard Robert Hawkins Jr., Mark C. Ellenberg, Casey J. Servais, Jeremy Max Christiansen, Lochlan Francis Shelfer, Thomas J. Curtin, William J. Natbony, Hermann D. Bauer-Alvarez, Timothy W. Mungovan, Michael T. Mervis, Luis Francisco Del-Valle-Emmanuelli, Margaret Antinori Dale, John E. Roberts, Mark David Harris, Martin J. Bienenstock, Ehud Barak, Paul V. Possinger, Jeffrey W. Levitan, Lucas Kowalczyk, Shiloh Rainwater, Daniel Steven Desatnik, Elliot Rainer Stevens, Dietrich L. Snell, Henrique N. Carneiro, Israel Fernandez-Rodriguez, Juan J. Casillas-Ayala, Ricardo Burgos-Vargas, Luc A. Despins, Juan Carlos Nieves-Gonzalez, Georg Alexander Bongartz, Eric D. Stolze, Stephen Blake Kinnaird, Pedro A. Jimenez, Luis C. Marini-Biaggi, Elizabeth Lemond McKeen, Gabriel Luis Olivera Dubon, Peter M. Friedman, Ashley M. Pavel, John J. Rapisardi, Carolina Velaz-Rivero, Nancy A. Mitchell, Maria Jennifer DiConza, Jason Zarrow, Amy R. Wolf, Nayuan Zouairabani-Trinidad, Richard G. Mason, Emil A. Kleinhaus, Angela K. Herring, Nicholas Baker, Sarah E. Phillips, Michael H. Cassel, Victoria M. Rivera-Llorens, Jose Luis Ramirez-Coll, Carolina V. Cabrera-Bou, Sylvia M. Arizmendi-Lopez de Victoria, Rafael Escalera-Rodriguez, Daniel A. Salinas-Serrano, Eric Mark Kay, Carlos R. Rivera-Ortiz, Susheel Kirpalani, Nayda I. Perez-Roman, Iris Jannette Cabrera-Gomez, Eric A. Tulla, Clark T. Whitmore, William Z. Pentelovitch, John T. Duffey, Jason M. Reed, Michael Charles McCarthy, Glenn Kurtz, Lydia Margarita Ramos-Cruz, John K. Cunningham, Thomas Lauria, Eric Perez-Ochoa, Luis A. Oliver-Fraticelli, Jonathan D. Polkes, Robert Berezin, Dora Luisa Monserrate-Peagarcano, Rolando Emmanuelli-Jimenez, Jessica Esther Mendez-Colberg, Zoe Negron Comas, Rafael A. Ortiz-Mendoza, Manuel Fernandez-Bared, Linette Figueroa-Torres, Andrew N. Rosenberg, Karen R. Zeituni, G. Eric Brunstad Jr., Fernando J. Gierbolini-Gonzalez, Richard James Schell-Gonzalez, Stephen D. Zide, David A. Herman, Kevin Michael Gallagher, Laura Appleby, Kyle Hosmer, Andrew N. Ferguson

# Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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|---|---|
| In re:<br>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>THE COMMONWEALTH OF PUERTO RICO et al.,<br>Debtors.[1] | PROMESA<br>Title III<br><br>No. 17 BK 3283-LTS<br>(Jointly Administered) |
| In re:<br>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>PUERTO RICO ELECTRIC POWER AUTHORITY,<br>Debtor. | No. 17 BK 4780-LTS |
| In re:<br>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>PUERTO RICO POWER ELECTRIC AUTHORITY,<br>Plaintiff/Counterclaim-Defendant, | Adv. Proc. No. 19-00391-LTS |

[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 (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS, CORTLAND CAPITAL MARKET SERVICES, SOLA LTD., SOLUS OPPORTUNITIES FUND 5 LP, ULTRA MASTER LTD, ULTRA NB LLC, UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC., AND SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA,

Intervenor-Plaintiffs,

-v-

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Defendant/Counterclaim-Plaintiff,

THE AD HOC GROUP OF PREPA BONDHOLDERS, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, AND SYNCORA GUARANTEE, INC.,

Intervenor-Defendants/Counterclaim-Plaintiffs.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S MOTION FOR SUMMARY JUDGMENT AND THE DEFENDANT'S AND INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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*Co-counsel to SREAEE*

LAURA TAYLOR SWAIN, United States District Judge

Before the Court are cross-motions for summary judgment under Federal Rule of Bankruptcy Procedure 7056.[2] The *Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 62 in Adv. Proc. No. 19-00391),[3] with its accompanying memorandum of law (the "FOMB Motion"), *Memorandum of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 63) (the "FOMB Memorandum"), was filed by the Puerto Rico Electric Power Authority ("PREPA") by and through the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"). The *Memorandum in Support of Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment Against Plaintiffs/Counterclaim-Defendants* (Docket Entry No. 67) (the "Defendants' Memorandum"),[4] was filed by U.S. Bank National Association as Trustee (the

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[2] The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") are made applicable in these Title III cases by section 310 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. § 2170. PROMESA is codified at 48 U.S.C. section 2101 et seq. References herein to "PROMESA" section numbers are to the uncodified version of the legislation. References herein to the provisions of Title 11 of the United States Code (the "Bankruptcy Code") are to sections made applicable in these cases by section 301 of PROMESA. 48 U.S.C. § 2161.

[3] Unless otherwise noted, all references herein to Docket Entry Nos. are references to Adversary Proceeding No. 19-00391.

[4] The pleading comprises the functional motion for summary judgment in addition to the memorandum of law in support thereof. (Defs. Mem. at 1 (the "Defendants' Motion").) The Defendants' Answer and Counterclaim Complaint was filed along with the *Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary*

"Trustee"), the Ad Hoc Group of PREPA Bondholders (the "Ad Hoc Group" or the "AHG"), Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured"), National Public Finance Guarantee Corporation ("National"), and Syncora Guarantee Inc. ("Syncora," and together with the Trustee, Ad Hoc Group, Assured, and National, the "Bondholders" or the "Defendants").[5] In their respective cross-motions, the Oversight Board and the Defendants seek summary judgment with respect to Counts I-VII of the Oversight Board's *First Amended Complaint Objecting to Defendant's Claims and Seeking Related Relief* (Docket Entry No. 26) (the "FAC"), and Counts I & II of the counterclaim complaint included in the *Defendant's and Intervenor-Defendants' Answer, Affirmative Defenses, and Counterclaims* (Docket Entry No. 47) (the "Defendants' Answer and Counterclaim Complaint").

The Court heard oral argument with respect to the cross-motions at the February 1, 2023 omnibus hearing. *Feb. 1, 2023 Omnibus Hr'g Tr.* (Docket Entry No. 140) (the "Omni Hearing Transcript"). The Court has considered carefully all the parties' submissions, and the arguments made in connection with the cross-motions.[6] The Court has subject matter

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*Judgment* (Docket Entry No. 67-1 (the "Defendants' SUMF")), and the *Declaration of Matthew M. Madden* (Docket Entry No. 67-2 (the "Madden Declaration")).

[5] Assured, Syncora, and National are all monoline insurers of insured Bonds.

[6] The Court has also received and reviewed, inter alia, the following pleadings: *The Financial Oversight and Management Board for Puerto Rico's, as Title III Representative of the Puerto Rico Electric Power Authority, Statement of Undisputed Material Facts in Support of Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 64) (the "FOMB SUMF"); *Declaration of Margaret A. Dale in Respect of the Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056 of the Financial Oversight and Management Board of Puerto Rico as Title III Representative of the Puerto Rico Electric Power Authority* (Docket Entry No. 65) (the "Dale Declaration"); *Declaration of Nelson Morales in Respect of the Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056 of the Financial Oversight and Management Board of Puerto Rico as Title III Representative of the Puerto Rico Electric Power Authority* (Docket Entry No. 66) (the "Morales Declaration"); *SREAEE's Memorandum in Support of the Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico*

*Electric Power Authority, for Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 74) (the "SREAEE Memorandum"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Oversight Board's Motion for Summary Judgment (*Docket Entry No. 76) (the "UCC Memorandum"), filed by the Official Committee of Unsecured Creditors (the "UCC" or the "Committee"); *UTIER's Joinder to SREAEE's Memorandum in Support of the Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 77) (the "UTIER Joinder"); *Response of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Summary Judgment Motion of Defendant-Counterclaim Plaintiff* (Docket Entry No. 89) (the "FOMB Response"); *Response of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment* (Docket Entry No. 90) (the "FOMB SUMF Response"); *Memorandum in Response to the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment and Intervenor-Plaintiffs' Supplemental Briefs* (Docket Entry No. 91) (the "Defendants' Response"); *Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Response to Plaintiff/Counterclaim-Defendant's Statement of Undisputed Material Facts* (Docket Entry No. 91-1) (the "Defendants' SUMF Response"); *Declaration of William J. Natbony Pursuant To Fed. R. Civ. P. 56(d) in Support of Defendants/Counterclaim-Plaintiffs' Opposition to the Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 90-2) (the "Natbony Declaration"); *Joinder of the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Financial Oversight and Management Board for Puerto Rico's Responses to (I) Summary Judgment Motion of Defendant-Counterclaim Plaintiff, and to (II) Defendant/Counterclaim-Plaintiffs' and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment* (Docket Entry No. 92) (the "AAFAF Joinder"); *Response and Opposition of Fuel Line Lenders to Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 93) (the "FLL Response"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Response of Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Summary Judgment Motion of Defendant-Counterclaim Plaintiff [Adv. Proc. Docket No. 67]* (Docket Entry No. 94) (the "UCC Response"); *Objection of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendants' Fed. R. Civ. P. 56(d) Application* (Docket Entry No. 97) (the "FOMB Rule 56(d) Objection"); *Defendants' Response to Objection of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendants' Fed. R. Civ. P. 56(d) Application*

jurisdiction of this action pursuant to section 306(a) of PROMESA. 48 U.S.C. § 2166(a).

In brief, The Oversight Board and the Defendants have cross-moved for summary judgment with respect to the allowance or disallowance of Proof of Claim No. 18449, which was filed by the Trustee as a fully secured claim in the amount of $8,477,156,729.56, consisting of principal in the aggregate amount of $8,258,614,158.00, and accrued and unpaid interest in the

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(Docket Entry No. 101) (the "Defendants' Rule 56(d) Response"); *Reply of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, in Support of Summary Judgment Motion [ECF No. 63]* (Docket Entry No. 104) (the "FOMB Reply"); *Reply in Support of Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment Against Plaintiffs/Counterclaim-Defendants* (Docket Entry No. 105) (the "Defendants' Reply"); *Notice of Motion and Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 106) (the "FOMB Rule 702 Motion"); *Memorandum of Law in Support of Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 107) (the "FOMB Rule 702 Memorandum"); *Joinder of the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Reply of the Financial Oversight and Management Board for Puerto Rico in Support of Summary Judgment Motion [ECF No. 63]* (Docket Entry No. 110) (the "AAFAF Reply Joinder"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Reply of Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, in Support of Summary Judgment [ECF No. 63]* (Docket Entry No. 111) (the "UCC Reply"); *Objection by the Ad Hoc Group of PREPA Bondholders, Assured Guaranty Corp., Assured Guaranty Municipal Corp., Syncora Guarantee, and U.S. Bank National Association, as Trustee to the Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 114) (the "Defendants' Rule 702 Objection"); and the *Reply of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of Puerto Rico Electric Power Authority, in Support of Motion to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 117) (the "FOMB Rule 702 Reply"); *Supplemental Brief of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, with Respect to Defendants' New Arguments Raised at Oral Argument* (Docket Entry No. 137 Ex. B) (the "FOMB Supplemental Brief"); *The Trustee's and PREPA Bondholders' Brief in Response to the Post-Argument Supplemental Brief of the Financial Oversight and Management Board of Puerto Rico* (Docket Entry No. 141) (the "Defendants' Supplemental Response").

aggregate amount of $218,542,581.56 (plus additional amounts accruing postpetition) (the "Master PREPA Bond Claim"),[7] asserting a secured claim on behalf of all PREPA bondholders for amounts due pursuant to that certain trust agreement between PREPA and the Trustee (as successor trustee), dated as of January 1, 1974, as amended and supplemented (the "Trust Agreement" or "TA").[8] The Oversight Board has requested disallowance of the Master PREPA Bond Claim to the extent it purports to be secured by any PREPA property aside from certain moneys currently deposited to the "Sinking Fund," which is a fund created by the Trust Agreement and subjected to a lien and charge for payment on the Bonds, and a limited number of certain other funds explicitly made subject to liens by the terms of the Trust Agreement, subject

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[7] The Bondholders also state that their claim is secured by: "(ii) certain intangibles provided for in the Trust Agreement and Resolutions or provided for in the Authority Act, including, without limitation, certain covenants, obligations and undertakings; and (iii) moneys and investments to the extent provided in the Trust Agreement, the Resolutions and the Authority Act, including all monies and investments held in trust or required to be held in trust by the Authority at Depositories or otherwise in special accounts or funds under the Trust Agreement including, without limitation, in the General Fund, the Construction Fund, the Reserve Maintenance Fund, and the Capital Improvement Fund, all of which are subject to the rights of the Trustee and the Bondholders to the extent provided in the Trust Agreement, Resolutions, and the Authority Act." (Master PREPA Bond Claim Ex. A ¶ 6.)

[8] The original 1974 Trust Agreement is attached as Exhibit A to the Morales Declaration. (Morales Decl. Ex. A (the "Original Trust Agreement" or "Original TA").) The nineteen supplemental agreements amending the Original Trust Agreement are attached thereafter. (Morales Decl. Exs. B-U.) The Defendants attached a "Conformed Trust Agreement" purporting to incorporate all amendments to the Trust Agreement as Exhibit 1 to the Madden Declaration. (Madden Decl. Ex. 1.) In the FLL Response, the Fuel Line Lenders (as defined therein) identified reasonable concerns with the accuracy of the document. (FLL Resp. ¶ 12 n.6.) In response to the Court's *Order Concerning PREPA Trust Agreement* (Docket Entry No. 115), the Oversight Board and the Defendants filed an agreed-upon conformed trust agreement as Exhibit A to their *Joint Informative Motion Submitting Conformed Trust Agreement in Response to January 5, 2023 Order Concerning PREPA Trust Agreement [ECF No. 115]* (Docket Entry No. 118 Ex. A) (the "Joint Conformed Trust Agreement"). For ease of reference, unless noted as "Original Trust Agreement" or "Original TA," references to the "Trust Agreement" or "TA" herein are to the Joint Conformed Trust Agreement.

to perfection of those liens (the "Specified Funds," as defined below). (See, e.g., FOMB Reply ¶ 112.) The Oversight Board also argues that the Sinking Fund and the Specified Funds are the only sources to which Bondholders can ever look for payment in respect of the Bonds and that the Bondholders' allowable claim is thus limited to their collateral, which the Oversight Board contends is in turn limited to the moneys currently in the Sinking Fund and the Specified Funds, and that the Bondholders therefore cannot have an unsecured claim for any amounts owed to them beyond the moneys currently on deposit in the liened Funds. (See, e.g., FOMB Mem. ¶ 139.) The Bondholders, in turn, contend that they have a claim for the face amount of the bonds that is secured by all of PREPA's current and future revenues, to which they can look for payment in perpetuity. (See, e.g., Defs. Resp. ¶ 17.)

For the following reasons, the Court holds that (a) the Trust Agreement granted the Bondholders security interests only in moneys actually deposited to the Sinking Fund, Self-insurance Fund, Capital Improvement Fund, Reserve Maintenance Fund, and Construction Fund (as defined in the Trust Agreement); (b) the Bondholders have perfected their liens in the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund, over which the Trustee has established control (as discussed below);[9] (c) the Bondholders have no security interest in the covenants and remedies provided for by the Trust Agreement; but (d) based on PREPA's payment and equitable relief covenants in the Trust Agreement, the Bondholders have an unsecured claim (within the meaning of 11 U.S.C. § 101(5)(B)) to be liquidated by reference to the value of future Net Revenues (as defined in the Trust Agreement) that would, under the

[9] The Court declines to address at this juncture the Bondholders' possible perfection of their liens on the Capital Improvement Fund and Construction Fund, because the record before the Court provides no evidence from either party as to the form of the assets comprising those Funds and their custodial status, and means of perfection may vary with the form of the asset in question.

waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds (the "Unsecured Net Revenue Claim").

## I.

## BACKGROUND

### A. PREPA

PREPA is a public corporation created under the Puerto Rico Electric Power Authority Act, Act No. 83-1941, codified at 22 L.P.R.A. §§ 191-240 (as amended, the "Authority Act"),[10] to supply substantially all of the electricity consumed in the Commonwealth. (FOMB SUMF ¶ 2.)[11] The Authority Act authorizes PREPA to issue bonds. 22 L.P.R.A. § 206. Between the years 1974 and 2016, PREPA made several bond issuances pursuant to the Trust Agreement, totaling approximately $8.3 billion of bonds (the "Bonds"). (FOMB SUMF ¶ 6.)

### B. The PROMESA Title III Proceeding and Procedural Posture[12]

On July 2, 2017 (the "Petition Date"), the Oversight Board filed a petition

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10 Until 1979, PREPA's name was the Puerto Rico Water Resources Authority.

11 Facts presented or recited as undisputed in this Opinion and Order are identified as such in the Oversight Board's or Bondholders' statements pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Oversight Board's Local Civil Rule 56(b) statement ("FOMB SUMF") or to the Bondholders' Local Civil Rule 56(b) statement ("Defs. SUMF") incorporate by reference citations to the respective underlying evidentiary submissions.

12 Additional detail can be found in, inter alia, the Disclosure Statement, as well as the Urgent Motion (as defined below), the Court's order denying the Urgent Motion, and the RSA Termination Notice (as defined below).

pursuant to Title III of PROMESA, commencing a debt adjustment proceeding for PREPA under that statute. (Docket Entry No. 1 in Case No. 17-4780.)

On May 3, 2019, the Oversight Board, the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), PREPA (together the "Government Parties"), along with the Ad Hoc Group and Assured (followed soon thereafter by Syncora and National), entered into a restructuring support agreement intended to resolve claims related to the Bonds by granting certain treatment in exchange for support of a corresponding plan of adjustment (the "2019 RSA"). The 2019 RSA contemplated, and according to the Oversight Board was dependent upon, passage by the Commonwealth of legislation authorizing its several transactions. Such legislation was never passed.

This adversary proceeding was commenced on July 1, 2019. (Docket Entry No. 1.)

In April 2020, after numerous adjournments of hearings on a motion to approve the settlements embodied in the 2019 RSA, as well as numerous extensions of time due to earthquakes and the COVID-19 pandemic, the Court stayed the deadlines applicable to the settlement motion. (Docket Entry No. 1954 in Case No. 17-4780.) The Government Parties filed periodic status updates. (See, e.g., Docket Entry Nos. 1992, 2691 in Case No. 17-4780.)

On January 18, 2022, the Court confirmed the *Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al.* (Docket Entry No. 19784 in Case No. Case No. 17-3283 (the "Commonwealth Plan"). (Docket Entry No. 19813 in Case No. 17-3283.)

On February 18, 2022, the Ad Hoc Group filed an urgent motion (the "Urgent Motion") asking the Court to appoint a mediator and set PREPA plan submission and

confirmation deadlines. (Docket Entry No. 2718 in Case No. 17-4780.)

On March 8, 2022, citing concerns regarding lack of implementing legislation and a comprehensive settlement of PREPA's legacy obligations, along with concerns regarding the affordability of the cost of electricity and the sustainability of the electric system as a result of rising inflation and significant surges in the price of crude oil, AAFAF exercised its unilateral right to terminate the 2019 RSA. (See Docket Entry No. 2747 Ex. B in Case No. 17-4780 (the "RSA Termination Notice").)

On March 8, 2022, the Court denied the Urgent Motion's specific requests, but entered an order requiring the Oversight Board, by a certain deadline (the "Path Forward Deadline"), to file one of the following:

> i. A proposed plan of adjustment, disclosure statement, and proposed deadlines in connection with consideration of the disclosure statement, plan-related discovery, solicitation and tabulation of votes, objection period in connection with the confirmation hearing, and proposed confirmation hearing schedule for the PREPA Title III case; **or**
>
> ii. A detailed term sheet for a plan of adjustment, with a proposed timetable for the filing of the plan, consideration and approval of a disclosure statement, voting and confirmation of the plan; **or**
>
> iii. A proposed schedule for the litigation of significant disputed issues in PREPA's Title III case, including, without limitation, the motion for stay relief to seek appointment of a receiver, the UCC's claim objection (including, if appropriate, litigation of antecedent questions of standing), and the issues raised in Adv. Proc. Nos. 19-396 and 19-405; **or**
>
> iv. A declaration and memorandum of law showing cause as to why the court should not consider dismissal of PREPA's Title III case for failure to demonstrate that a confirmable plan of adjustment can be formulated and filed within a time period consistent with the best interests of PREPA, the parties-in-interest and the people of Puerto Rico.

(See Docket Entry No. 2748 in Case No. 17-4780 ¶ 3(b) (emphasis in original).)

On April 8, 2022, this Court entered orders appointing the Mediation Team (as defined therein) and establishing terms and conditions to govern mediation, including an initial mediation termination date (the "Termination Date"). (Docket Entry No. 2772 in Case No. 17-4780 (the "Appointment Order"); Docket Entry No. 2773 in Case No. 17-4780 (the "Terms and Condition Order").)

The Path Forward Deadline and Termination Date were extended several times. (See, e.g., Docket Entry No. 2949 in Case No. 17-4780.) In mid-September, the Mediation Team declined to extend the deadlines any further, at which time the Bondholders (without the Trustee) filed a motion to dismiss PREPA's Title III Case or for relief from the automatic stay in order to enforce their contractual right to a receiver. (See Docket Entry No. 2973 in Case No. 17-4780.)[13]

On September 29, 2022, this Court entered an order staying the motion to dismiss the case or for relief from the automatic stay, establishing a deadline to file a plan of adjustment, and establishing a litigation schedule for this adversary proceeding. (See Docket Entry No. 3013 in Case No. 17-4780 (the "Litigation Scheduling Order").) In the Litigation Scheduling Order, the Court declined to set a briefing schedule with respect to Cortland Capital Markets Services LLC v. Fin. Oversight and Mgmt. Bd. of P.R. (In re Fin. Oversight and Mgmt. Bd. of P.R.), Adv. Proc. No. 19-396-LTS (the "Current Expense Litigation"), a concurrent adversary proceeding

[13] On July 7, 2017, certain PREPA bondholders and monoline insurers filed a motion seeking to lift the automatic stay under PROMESA to pursue the appointment of a receiver in a non-Title III court. (Docket Entry No. 74 in Case No. 17-4780.) Following the denial of the motion by this Court, a partial reversal by the Court of Appeals for the First Circuit, and a renewed motion, the briefing schedule for the motion was extended several times and was not ultimately resolved before the parties' entry into the 2019 RSA. (See Docket Entry Nos. 299, 1176, 1204.) See Fin. Oversight & Mgmt. Bd. for P.R. v. Ad Hoc Grp. of PREPA Bondholders (In re Fin. Oversight & Mgmt. Bd. for P.R.), 899 F.3d 13 (1st Cir. 2018).

regarding what comprise "Current Expenses" under the Trust Agreement, intending to limit the scope of the current litigation to the scope of liens and extent of recourse granted by the Trust Agreement. (Litigation Scheduling Order ¶ 3.) However, as will be addressed below, this Opinion and Order includes certain rulings pertaining to the Current Expense motion, which were unavoidable in the course of interpreting the Trust Agreement, and in light of certain statements made by the parties at oral argument.

On October 3, 2022, the Oversight Board filed the FAC. (Docket Entry No. 26.) The Court granted numerous other parties the right to intervene and file responsive and supplemental pleadings, including: the Committee; Cortland Capital Market Services LLC, as Administrative Agent and SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master TLD and Ultra NB LLC (together, the "Fuel Line Lenders" or "FLLs"); Sistema de Retiro de los Empleados de la Autoridad de Energia Eléctrica ("SREAEE"); and the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"). (See, e.g., Docket Entry Nos. 34-36.) After the Court granted various motions to intervene, the monoline insurers and AHG joined the Trustee and filed the Defendants' Answer and Counterclaim Complaint on October 17, 2022. (Docket Entry No. 47.)

The Oversight Board's Motion and the Defendants' Motion were both filed on October 24, 2022. (Docket Entry Nos. 62, 67.)

C. The PREPA Plan and Disclosure Statement

On March 1, 2023, the Oversight Board, on behalf of PREPA, filed the *Modified Second Amended Title III Plan of Adjustment of the Puerto Rico Electrical Power Authority* (Docket Entry No. 3296 in Case No. 17-4780) (along with any subsequent amendments or modifications, the "PREPA Plan").

On March 3, 2023, the Court approved the *Disclosure Statement for Modified Second Amended Title III Plan of Adjustment of the Puerto Rico Electrical Power Authority* (Docket Entry No. 3297 in Case No. 17-4780) (the "Disclosure Statement"). (Docket Entry No. 3304 in Case No. 17-4780 (the "DS Order").)[14]

D. Counts of the First Amended Complaint and the Defendants' Answer and Counterclaim Complaint

The Oversight Board has moved for summary judgment with respect to the following counts of the FAC, and the Defendants have cross-moved for summary judgment in their favor with respect to these same counts:

> **Count I -** Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Revenues Beyond Those Deposited to the Credit of the Sinking Fund and Self-Insurance Fund (11 U.S.C. § 502)
>
> **Count II -** Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Moneys Received by PREPA in Connection with or as a Result of its Ownership or Operation of the System Other than the Revenues Deposited to the Credit of the Sinking Fund and Self-Insurance Fund and Avoiding and Preserving for the Benefit of PREPA Any Such Security Interests Pursuant to Bankruptcy Code Sections 544 and 551 (19 L.P.R.A. §§ 2212(a)(52), 2267(a)(2); 11 U.S.C. §§ 502, 544(a),

[14] On February 2, 2023, the Oversight Board, on behalf of itself and as the sole Title III representative of PREPA, and National entered into the PREPA Plan Support Agreement (the "PREPA PSA") regarding the treatment of the Bonds in the PREPA Plan. As a result of the PREPA PSA, on March 20, 2023, the Oversight Board and National filed the *Urgent Joint Motion to Stay Certain Contested Matters and Adversary Proceedings related to Bonds Issued by the Puerto Rico Electric Power Authority ("PREPA") with respect to National Public Finance Guarantee Corporation* (Docket Entry No. 144) (the "Urgent National Motion"). The Urgent National Motion requests a stay of, inter alia, this adversary proceeding, solely with respect to National, "subject to a further order of the Court, and without prejudice to all rights, arguments, claims, and defenses of the parties as they currently exist in such matters[.]" (Urgent National Motion ¶ 4.) Pending decision on the Urgent National Motion, for the sake of convenience, the Court will continue to refer to the Defendants as the "Bondholders," which term will be deemed to except National to the extent of any such further order.

551; 48 U.S.C. § 2161)

**Count III -** Judgment Disallowing the Master PREPA Bond Claim to the Extent it Asserts Priority, Perfected Security Interests Against Moneys Received by PREPA in Connection with or as a Result of its Ownership or Operation of the System Other than the Revenues Deposited to the Credit of the Sinking Fund and Self-Insurance Fund and Subordinating the Trustee's Security Interest to PREPA's Interest in Such Property (48 U.S.C. § 2161; 19 L.P.R.A. §§ 2260, 2267, 2322)

**Count IV -** Judgment Disallowing the Master PREPA Bond Claim Asserting Security Interests in the Covenants and Remedies, which are Not PREPA's Property thus Not Collateral Capable of Being Pledged by PREPA (11 U.S.C. §§ 502, 506; 19 L.P.R.A. § 2233(b)(2); 22 L.P.R.A. § 196(o))

**Count V -** Judgment Disallowing Master PREPA Bond Claim Asserting Security Interests Against the Covenants and Remedies and Avoiding and Preserving for the Benefit of PREPA Any Such Security Interests Pursuant to Bankruptcy Code Sections 544 and 551 (19 L.P.R.A. §§ 2212(a)(52), 2267(a)(2); 11 U.S.C. §§ 502, 544(a), 551; 48 U.S.C. § 2161)

**Count VI -** Judgment Disallowing the Master PREPA Bond Claim to the Extent it Asserts Priority, Perfected Security Interests Against the Covenants and Remedies and Subordinating the Trustee's Security Interest to PREPA's Interest in Such Property (48 U.S.C. § 2161; 19 L.P.R.A. §§ 2260, 2267, 2322)

**Count VII -** Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund (11 U.S.C. §§ 502, 506, 927)

The Bondholders have moved for summary judgment with respect to the following counts of the Defendants' Answer and Counterclaim Complaint, and the Oversight Board has cross-moved for summary judgment in its favor with respect to the same counts:

**Counterclaim Count I -** Declaratory Judgment that Under the Trust Agreement the Trustee Has Recourse to the Sinking Fund and the Right to Obtain Specific Performance of Covenants to Fund the Sinking Fund, and in the Event of Default Has Recourse to All PREPA Revenues and Other Moneys (28 U.S.C. § 2201; 11 U.S.C. §§ 502, 506, 927; Fed. R. Bankr. P. 7001(2), (9))

> **Counterclaim Count II -** Declaratory Judgment that the Trustee Possesses Valid, Perfected, and Priority Security Interests in All PREPA Revenues and that Those Security Interests are Not Subject to Avoidance or Subordination (28 U.S.C. § 2201; 11 U.S.C. §§ 502, 506, 544; 19 L.P.R.A. § 2267; Fed. R. Bankr. P. 7002(2), (9))[15]

## II.

## DISCUSSION

### A. Ripeness

The Bondholders contend that this dispute is not ripe for decision, and that, therefore, this Court lacks subject matter jurisdiction to decide the summary judgment motions. (Defs. Mem. ¶ 136.) Ripeness "has roots in both the Article III case or controversy requirements and in prudential considerations." Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks and citations omitted). The doctrine "seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (quoting Texas v. United States, 523 U.S. 296, 300 (1998) (additional citations omitted).) The Bondholders argue that future potential events may eliminate the need for the Court to resolve the pending summary judgment motions. Because the Court can only adjudicate cases of which it has jurisdiction, the Court will consider this issue before reaching the merits of the summary judgment claims. See Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149-50 (1st Cir. 2002) ("After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest."). As explained below, the Bondholders' arguments are not persuasive.

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[15] The Defendants' Answer and Counterclaim Complaint also asserts numerous affirmative defenses.

In this adversary proceeding, the Oversight Board has requested the disallowance of the Master PREPA Bond Claim "to the extent that it purports to be secured by any PREPA property aside from Revenues deposited to the Sinking Fund and Self-[i]nsurance fund."[16] (FAC ¶ 5; see also FOMB Mem. ¶ 108.) In contrast, the Bondholders argue, as detailed below, that their claim is secured by all past, present and future revenues of PREPA. (See, e.g., Defs. Resp. ¶ 17.) Both the Oversight Board and the Bondholders have moved for summary judgment, arguing that the extent, if any, of the secured status of the Bondholders' Claim can be determined by the Court's interpretation of the clear and unambiguous language of, inter alia, the Trust Agreement, although they each advocate for different interpretations. The resolution of this issue is of utmost importance to PREPA's prospects of emerging from Title III and to Puerto Rico's financial stability.

Under Bankruptcy Rule 7001(2), "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" is a proper subject of an adversary proceeding. (See, e.g., FOMB Reply ¶ 112.) A court may, before the plan confirmation process begins, determine the validity, priority or extent of a lien or other interest in property by way of a motion for summary judgment in an adversary proceeding. See Ferry Rd. Props., LLC v. RL BB ACO II-TN, LLC, (In re Ferry Rd. Props., LLC), Adv. Proc. No. 12-5022, 2012 WL 3888201, at *8 (Bank. E.D. Tenn. Sept. 7, 2012). Similarly, an objection to a claim in bankruptcy may be lodged at any time during the pendency of a case. See, e.g., In re Presque Isle Apartments, L.P., 118 B.R. 331, 332 (W.D. Pa. 1990). Section 502 of the Bankruptcy Code mandates that a court

[16] The Sinking Fund and Self-insurance Fund are, respectively, the principal fund charged with payment on the Bonds and another fund subject to a lien in favor of the Bondholders. Both of these funds are held by the Trustee, as explained below.

resolve objections to a claim and determine the amount of the claim after notice and a hearing.[17] 11 U.S.C.A. § 502 (Westlaw through P.L. 117-262). Thus, the present posture of the case—cross-motions for summary judgment in an adversary proceeding—is an appropriate way for the Court to address and resolve the issues raised by the summary judgment motions, including whether the Master PREPA Bond Claim is secured by any PREPA property aside from Revenues currently deposited to the Sinking Fund and the Self-Insurance Fund.

The Bondholders argue that the instant proceeding is not ripe for adjudication, however, because the Court may never have to resolve the issue of the scope of their secured status. (Defs. Mem. ¶ 136.) Outside of a Title III proceeding, or if the Court were to lift the automatic stay, the argument goes, the Trustee could obligate PREPA to raise rates and collect revenues in the Sinking Fund sufficient to pay the Bondholders in full, allegedly in accordance with its covenants in the Trust Agreement. (Defs. Mem. ¶ 137 ("If the stay were lifted, the Trustee may be able to access future revenues credited to the Sinking Fund to repay bondholders in full, in which case there would be no need to adjudicate whether the Trustee or bondholders have recourse to or a lien on any moneys beyond those in the Sinking Fund.").) However, the outcome of any lift stay motion, and the Trustee's authority to compel PREPA to increase rates to a level to pay the Bondholders in full, is not clear. Those questions raise issues as complex as those presently before the Court. The Court has before it a concrete, fully-briefed dispute, the

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[17] In addition to the Oversight Board's objection to the Bondholders' claim the Master PREPA Bond Claim was also the subject of an unresolved claim objection filed by the Committee of Unsecured Creditors on October 30, 2019. (See *Objection of Committee to Proof of Claim No. 1849 Filed by U.S. Bank National Association, in its Capacity as Trustee for Non-recourse PREPA Bonds* (Docket Entry No. 1691 in Case No. 17-4780) (the "UCC Claim Objection").) The Court terminated the Committee's claim objection without prejudice and without resolution at that time. (Docket Entry No. 1855 in Case No. 17-4780.)

outcome of which is of significant importance to this Title III proceedings. The potential outcome of hypothetical litigation outside of these proceedings designed to obligate PREPA to perform under, and consistent with, the Bondholders' interpretation of the Trust Agreement does not render the summary judgment issues (which require the Court to interpret the Trust Agreement, among other things) unripe for adjudication.

Texas v. United States, on which the Bondholders rely, fully supports this conclusion. 523 U.S. 296 (1998). In that case, the Supreme Court held that the question of whether a statute would apply to a hypothetical set of facts was not ripe for adjudication. Id. at 300. As the Court held, "determination of the scope of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Id. (internal punctuation and citation omitted). In contrast, in the instant case, the Court has before it a concrete dispute with specific, potential, consequences. There is no reason to await the speculative outcome of other potential litigation.

The Bondholders also argue that the present motions are not ripe because it is only at confirmation that the Court can decide if PREPA can permanently repudiate its alleged obligation to fund the Sinking Fund with sufficient revenues to pay the Bondholders in full. (Defs. Mem. ¶¶ 142-43.) According to the Bondholders, the issue whether PREPA was obligated to fund the Sinking Fund beyond the extent to which it did will arise at the confirmation hearing in the context of determining whether the plan of adjustment violates PROMESA section 314(b)'s bar against having a plan that either violates Puerto Rico law or sees Bondholders receive less than they would receive from enforcement of their available remedies outside of bankruptcy. (Defs. Mem. ¶ 142.)

Even assuming, without deciding, that the issue of PREPA's obligation to put

revenues in the Sinking Fund will be decided at confirmation, that prospect does not deprive the Court of authority to resolve the existing cross-motions for summary judgment. At this point in time, a plan of adjustment has been filed, the disclosure statement has been approved, and hearings for plan confirmation have been scheduled. If the Bondholders are right in that they have a security interest in all PREPA revenues, past, present and future, the Court may not need to address whether the Sinking Fund was adequately funded at confirmation. Again, the potential outcome of complex issues at confirmation do not render the instant motions for summary judgment unripe for resolution.

Finally, the Bondholders argue that, if the Court does not adopt their interpretation of the Trust Agreement, they require discovery before the Court can resolve the motions for summary judgment. (Defs. Mem. ¶ 41 n.11; Natbony Decl. ¶ 3.) The need for discovery, if any, will be addressed by the Court in connection with its ruling on the merits of the summary judgment motions. It is not grounds for the Court to avoid addressing the issues raised in the motions for summary judgment.

In sum, the Bondholders have not established that the motions for summary judgment are not ripe for adjudication. Therefore, the Court has subject matter jurisdiction and will reach the merits of the cross-motions for summary judgment.

B. Standard of Review Under Fed. R. Civ. P. 56

Under Federal Rule of Civil Procedure 56(a),[18] summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that

[18] Federal Rule of Civil Procedure 56 is made applicable in this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7056. See 48 U.S.C. § 2170.

"possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and . . . must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841-42 (1st Cir. 1993). The Court declines to address assertions proffered by the parties that are immaterial and conclusory statements of law which the parties proffer as facts.

Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to summary judgment, "the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). A party seeking denial or deferral of a motion for summary judgment under Rule 56(d) must "(i) 'show good cause for the failure to have discovered the facts sooner'; (ii) 'set forth a plausible basis for believing that specific facts . . . probably exist'; and (iii) 'indicate how the emergent facts . . . will influence the outcome of the pending summary judgment motion.'" In re PHC Inc. S'holder Litig., 762 F.3d 138, 143 (1st Cir. 2014) (quoting Resolution Tr. Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994)). Stated

differently, a nonmovant seeking discovery under Rule 56(d) must meet the requirements of "authoritativeness, timeliness, good cause, utility, and materiality." Id. at 144 (quoting Resolution Tr. Corp., 22 F.3d at 1203).

C. Relevant Sections of the Trust Agreement

The Bondholders' principal contention is that the Trust Agreement, despite containing specific limited grants of liens in sections 401, 507, and 513, gives them currently enforceable liens on all present and future revenues of PREPA, including revenues not yet collected for electricity not yet generated. (See, e.g., Defs. Resp. ¶ 17.) The basis for their argument is a passage in the Trust Agreement's opening recitals (to which the Bondholders refer to as the "Granting Clause" and the Oversight Board refers to as the "Words of Agreement Clause," and which the Court will refer to as the "Preamble") that the Bondholders contend controls absolutely the scope of the security interest granted by the Trust Agreement, to the exclusion of any more specific operative terms within the remainder of the document. For reasons explained at length below, the Court finds the Bondholders' expansive view of their lien rights inconsistent with the clear and unambiguous terms of the Trust Agreement. The Court next reviews the provisions and terms of the Trust Agreement that are most relevant to the determination of the scope of any liens granted thereunder.

1. Preamble

The passage in question reads as follows, in relevant part:

> Now, THEREFORE, THIS AGREEMENT WITNESSETH, that . . . in order to secure the performance and observance of all the covenants, agreements and conditions . . . herein contained, **the Authority has executed and delivered this Agreement and has pledged and does hereby pledge to the Trustee the revenues of the System**, subject to the pledge of such revenues to the payment of the principal of and the interest on the 1947 Indenture Bonds (hereinafter mentioned), **and other moneys to the extent provided**

> **in this Agreement** as security for the payment of the bonds and the interest and the redemption premium, if any, thereon and as security for the satisfaction of any other obligation assumed by it in connection with such bonds, and **it is mutually agreed and covenanted by and between the parties hereto**, for the equal and proportionate benefit and security of all and singular the present and future holders of the bonds issued and to be issued under this Agreement, without preference, priority or distinction as to lien or otherwise, except as otherwise hereinafter provided, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof or otherwise, **as follows:**

(TA at 13 (emphasis added).)[19] The sequentially-numbered Articles and Sections of the Trust Agreement are set forth immediately after the Preamble. The left-hand margins of the Original Trust Agreement include brief notations describing generally the contents of each section, which have been retained in the Joint Conformed Trust Agreement; the Trust Agreement provides that the notations are not intended to affect the "meaning, construction or effect" of any texts or articles of the document. (TA § 1301.) The Preamble is described informally in the margin as the "Pledge of revenues of the System[.]" (TA at 13.)

2. Section 701

The language of the Preamble, both the pledge and the subsequent reference to a covenant, parallel the language of section 701 of the Trust Agreement, which provides in pertinent part:

> **The Authority covenants that it will promptly pay the principal of and the interest on each and every bond issued under the provisions of this Agreement at the places, on the dates and in the manner specified herein** and in said bonds and in the coupons, if any, appertaining thereto, and any premium required for the retirement of said bonds by purchase or redemption, according to the true intent and meaning thereof. Until the 1947 Indenture Bonds

[19] The "1947 Indenture" and bonds related thereto are not at issue, and the passages in the Trust Agreement that make reference to payment of those bonds are only relevant insofar as they affect the interpretation of the contract with respect to the subsequently issued Bonds.

> have been paid or provision has been made for their payment and the release of the 1947 Indenture, such principal, interest and premium are payable solely from moneys in the Renewal and Replacement Fund and said moneys are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified. After the 1947 Indenture Bonds have been paid or provision has been made for their payment and the release of the 1947 Indenture, **such principal, interest and premium will be payable solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified**.

(TA § 701 (emphasis added).) The margin beside section 701 informally describes the second part of this passage as "Pledge of revenues."

3. Section 101 - Definitions

a. Revenues

"Revenues" are defined in section 101 of the Trust Agreement as, in relevant part:

> **[A]ll moneys received by the Authority** in connection with or as a result of its ownership or operation of the System, including the income derived by the Authority from the sale of electricity generated or distributed by the System, any proceeds of use and occupancy insurance on the System or any part thereof and income from investments made under the provisions of the 1947 Indenture and this Agreement . . . .

(TA § 101 (emphasis added).)

b. System

"System" is defined in section 101 of the Trust Agreement as:

> [A]ll the properties presently owned and operated by the Authority as a single integrated system, together with all works and properties which may be hereafter acquired or constructed by the Authority in connection with the production, distribution or sale of electric energy and the acquisition or construction of which shall be financed in whole or in part from the proceeds of bonds issued under the provisions of the 1947 Indenture or this Agreement or from moneys deposited to the credit of the 1947 Construction Fund, the Construction Fund, the Capital Improvement Fund or the Renewal and Replacement Fund or from Subordinate Obligations to the extent such works and properties have been included by the

> Authority as part of the System . . . .

(TA § 101.)

c. Opinion of Counsel

"Opinion of Counsel" is defined in section 101 of the Trust Agreement as, in relevant part:

> [A] written opinion of counsel who may (except as otherwise expressly provided in this Agreement) be counsel for the Authority. Every opinion of counsel required to be filed with the Trustee in connection with an application to the Trustee to authenticate bonds under this Agreement shall contain the following statements: . . . **(ii) this Agreement creates a legally valid and effective pledge of the Net Revenues**, subject only to the lien of the 1947 Indenture, **and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement** . . . .

(TA § 101 (emphasis added).)

d. Net Revenues

Section 101 of the Trust Agreement defines "Net Revenues" as: "the amount of the excess of the Revenues for such period over the Current Expenses for such period."

e. Current Expenses

Section 101 of the Trust Agreement defines "Current Expenses" as, in relevant part: "the Authority's reasonable and necessary current expenses of maintaining, repairing and operating the System . . . ."

4. Section 401

Section 401 of the Trust Agreement provides, in relevant part:

> A special fund is hereby created and designated "Puerto Rico Electric Power Authority Power System Construction Fund" (herein sometimes called the "Construction Fund"), to the credit of which such deposits shall be made as are required by the provisions of Section 208 of this Agreement. There shall also be deposited to the

> credit of the Construction Fund any moneys received from any other source for paying any portion of the cost of any Improvements. One or more separate accounts may be created in the Construction Fund for use for specified projects.
>
> **The moneys in the Construction Fund** shall be held by the Authority in trust, separate and apart from all other funds of the Authority, and **shall be applied to the payment of the cost of any Improvements and**, except for any moneys in separate accounts in the Construction Fund received from the United States Government or any agency thereof or from the Commonwealth of Puerto Rico or any agency thereof, **pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Agreement and for the further security of such holders until paid out or transferred as herein provided.**

(TA § 401 (emphasis added).)

5. Section 503

Section 503 of the Trust Agreement provides, in relevant part:

> A special fund is hereby created and designated the "Puerto Rico Electric Power Authority General Fund" (herein sometimes called the "General Fund"). **The Authority covenants that . . . all Revenues**, other than income from investments made under the provisions of this Agreement, **will be deposited as received in the name of the Authority with a qualified depositary or depositaries to the credit of the General Fund and applied in accordance with the provisions of this Article**.

(TA § 503 (emphasis added).)

6. Section 505

Section 505 of the Trust Agreement provides, in relevant part, that: "The Authority covenants that **moneys in the General Fund will be used first for the payment of the Current Expenses of the System** . . . ." (TA § 505 (emphasis added).)

7. Section 506

Under section 506 of the Trust Agreement, Revenues after payment of Current Expenses, or "Net Revenues," are to be transferred from the General Fund to a Revenue Fund,

providing, in relevant part:

> A special fund is hereby created and designated the "Puerto Rico Electric Power Authority Power Revenue Fund" (herein sometimes called the "Revenue Fund"). . . . [**T]he Treasurer shall transfer**, on or before the 15th day of each month, **from the General Fund to the credit of the Revenue Fund** an amount equal to the amount of **all moneys held for the credit of the General Fund on the last day of the preceding month less such amount to be held as a reserve for Current Expenses** . . . . **The Authority covenants that all moneys to the credit of the Revenue Fund will be applied to the purposes and in the order set forth in this Article.**

(TA § 506 (emphasis added).)

8. Section 507

a. Section 507

The first paragraph of section 507 of the Trust Agreement provides, in relevant part:

> **A special fund is hereby created and designated the "Puerto Rico Electric Power Authority Power Revenue Bonds Interest and Sinking Fund" (herein sometimes called the "Sinking Fund"). There are hereby created three separate accounts in the Sinking Fund** designated "**Bond Service Account**", "**Reserve Account**" and "**Redemption Account**", respectively. **Another special fund is hereby created and designated** "Puerto Rico Electric Power Authority Reserve Maintenance Fund" (herein sometimes called the "**Reserve Maintenance Fund**"). **Two other special funds are hereby created and designated** "Puerto Rico Electric Power Authority Self-insurance Fund" (herein some times called the "**Self-insurance Fund**") and "Puerto Rico Electric Power Authority Capital Improvement Fund" (herein sometimes called the "**Capital Improvement Fund**"). . . . .

(TA § 507 (emphasis added).)

b. Section 507(a)

Section 507(a) provides that moneys on deposit in the Revenue Fund (i.e., Revenues after the payment of Current Expenses, or "Net Revenues") are generally to be

transferred first:

> (a) to the credit of the Bond Service Account, such amount thereof (or the entire sum so withdrawn if less than the required amount) as may be required to make the total amount then to the credit of the Bond Service Account equal to the sum of
>
> > (i) the Interest Accrual on all the outstanding bonds to and including the first day of the next calendar month, and
> >
> > (ii) the Principal Accrual on the outstanding serial bonds to and including the first day of the next calendar month;

(TA § 507(a).)

c. Section 507(b)-(h)

Subsections (b)-(h) of section 507 of the Trust Agreement provide that, after deposit into the Bond Service Account in the Sinking Fund, deposits of Net Revenues are to be made—if moneys are sufficient—into the Redemption Account and Reserve Account of the Sinking Fund, and then into the Reserve Maintenance Fund, Self-insurance Fund, and Capital Improvements Fund. (TA § 507(b)-(h).)

d. Section 507(h)

Section 507(h) of the Trust Agreement additionally subjects the Net Revenues in the Sinking Fund and the Specified Funds to a lien and charge in favor of the Bondholders, providing, in relevant part:

> (h) . . . . **The moneys in the Sinking Fund shall be held by the Trustee in trust, and the moneys in the Reserve Maintenance Fund, the Self-insurance Fund and the Capital Improvement Fund shall be held by the Authority in trust, separate and apart from all other funds of the Authority, and shall be applied as hereinafter provided with respect to such Funds and, pending such application, shall be subject to a lien and a charge in favor of the holders of the bonds issued and outstanding under this Agreement and for the further security of such holders until paid out or transferred as herein provided**.

(TA § 507(h) (emphasis added).)

9. Section 513

Section 513 of the Trust Agreement charges the Sinking Fund with payment of the Bonds, providing, in relevant part:

> **Subject to the terms and conditions set forth in this Agreement, moneys held for the credit of the Bond Service Account, the Reserve Account and the Redemption Account shall be held in trust** and disbursed by the Trustee for (a) the payment of interest on the bonds issued hereunder as such interest becomes due and payable, or (b) the payment of the principal of such bonds at their respective maturities, or (c) the payment of the purchase or redemption price of such bonds before their respective maturities, **and such moneys are hereby pledged to and charged with the payments mentioned in this Section**.
>
> Whenever the total of the moneys held for the credit of the Bond Service Account, the Reserve Account and the Redemption Account shall be sufficient for paying the principal of and the redemption premium, if any, and the interest accrued on all bonds then outstanding under the provisions of this Agreement, such moneys shall be applied by the Trustee to the payment, purchase or redemption of such bonds.

(TA § 513 (emphasis added).)

D. FAC Count I - The Trust Agreement Grants the Bondholders Security Interests Only in Moneys Actually Received and Deposited into the Sinking Fund and the Specified Funds

In Count I of the FAC, the Oversight Board seeks disallowance, pursuant to 11 U.S.C. section 502, of the Master PREPA Bond Claim to the extent it asserts a claim secured by security interests in revenues beyond those deposited to the credit of the Sinking Fund and Self-insurance Fund. Section 502 of the Bankruptcy Code provides, in relevant part, that:

> (b) . . . if . . . objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> > (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable

> law for a reason other than because such claim is contingent or unmatured . . . .

11 U.S.C.A. § 502 (Westlaw through P.L. 117-262).

Section 506 of the Bankruptcy Code governs the determination of the value of the secured portion of a claim. It provides in relevant part:

> (a)(1) **An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the [debtor's] interest in such property,** or to the extent of the amount subject to setoff, as the case may be, **and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.** Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C.A. § 506 (Westlaw through P.L. 117-262).

Under general rules of contract interpretation, as well as the laws of Puerto Rico (TA § 1301), a contract must be read as a unified whole. 31 L.P.R.A. § 3475 ("The stipulations of a contract should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together."). A court must also interpret a contract so as to give effect to each provision of the contract and avoid a reading that would render other provisions of the contract superfluous. See, e.g., N. New England Tel. Ops. LLC v. Local 2327, Int'l Brotherhood of Elec. Workers, AFL-CIO, 735 F.3d 15, 22 (1st Cir. 2013).

As noted above, the Bondholders contend that they have security interests, a term defined by the Bankruptcy Code as "lien[s] created by an agreement,"[20] in all present and future

[20] 11 U.S.C.A. § 101(50) (Westlaw through P.L. 117-262).

revenues of the Authority. The Bondholders also contend that the Preamble creates and defines the scope of the security interests granted by the Trust Agreement, notwithstanding the existence of more specific operative terms within the remainder of the document. (See, e.g., Defs. Mem. ¶ 36.) The Trust Agreement supports neither proposition.

Here, reading the Trust Agreement as a whole, it unambiguously embodies a pledge (i.e., a promise) to pay the amounts owing on the Bonds from Net Revenues, that is partially secured by a lien on the moneys received by PREPA attaching at the time they are ultimately deposited into the Sinking Fund, as well as liens on moneys the provisions of the Trust Agreement make "available" for transfer to supplement the Sinking Fund in the event of a shortfall that attach at the time they are deposited into the "Specified Funds" (the Reserve Maintenance Fund, Self-insurance Fund, Capital Improvement Fund, and Construction Fund).[21]

While the term "pledge" is used in the Preamble of the Trust Agreement with respect to "revenues" and "other moneys[,]" the Preamble contains no reference to any grant of a lien or charge, but instead states that the pledge is "**mutually agreed and covenanted by and between the parties hereto**[.]" (TA at 13 (emphasis added).) As the Court held when interpreting very similar agreements regarding the Puerto Rico Highways and Transportation Authority, a pledge that lacks "references to a lien or charge or other language indicating" that it is meant to expand the scope of specific lien grants results in a mere "unsecured promise[] to deposit Revenues in the manner required by the" agreement. In re Fin. Oversight & Mgmt. Bd. of P.R., 618 B.R. 619, 639 n.19 (D.P.R. 2020) ("HTA"). The Preamble does not grant the Bondholders any security interests.

Sections 401, 507, and 513 of the Trust Agreement are the only provisions that

[21] The Oversight Board uses the term "Subordinate Funds" to refer to the Specified Funds.

confer specific grants of liens, and only do so with respect to "moneys" deposited into the Sinking Fund and the Specified Funds. Section 401 creates the Construction Fund and grants a "lien and charge" in favor of the Bondholders on Revenues deposited therein as well as bond proceeds and moneys received from any other source for "Improvements" (as defined in the TA) that have been deposited into the Fund (other than moneys received from the United States or Commonwealth governments or their agencies) pending and subject to application to the costs of System Improvements. (TA § 401.) Section 507 creates the Sinking Fund and the Specified Funds and subjects moneys received and deposited into those funds to a "charge" in favor of the Bondholders. (TA § 507.) Cf. 11 U.S.C.A. § 101(37) (Westlaw through P.L. 117-262) ("The term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation."). Sections 512, 512A, and 512B specify how moneys are to be transferred to the Sinking Fund from the Specified Funds in the event of a shortfall. (TA §§ 512, 512A, 512B.) Moneys in the Specified Funds are not uniformly automatically available for transfer to the Sinking Fund in the event of a shortfall; for example, section 512A requires that certain Consulting Engineers approve any transfer from the Self-insurance Fund into the Sinking Fund in writing after the Authority has made the determination that the moneys are not needed for their ordinary purpose. (TA § 512A.) Section 513, by contrast, specifies that the moneys in the Sinking Fund are specifically "pledged to and charged with" payment in full of principal and interest on and redemption of the Bonds. (TA § 513.) If a security interest had been granted in all current and future income of the authority by the language in the Preamble, the Preamble would render the later specific limited lien grants in sections 401, 507, and 513 superfluous. Such a reading would not only be illogical, it would contravene the basic principle that contracts are to be read in a manner that gives each provision meaning and renders none superfluous.

The Preamble is not a self-effectuating granting clause that confers interests without regard to the scope of all other covenant and lien provisions of the Trust Agreement. That the Preamble is merely a prefatory clause indicating that the scope of the pledge is mapped by more specific terms to come in subsequent sections is clear because the Preamble ends with the phrase "**as follows:**"—indicating that the pledge is defined by further provisions in the body of the agreement. (TA at 13 (emphasis added).) To the extent the Preamble points to the specific pledges contained later in the Trust Agreement, it has the same effect as a "whereas" clause: "Although a statement in a 'whereas' clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document." Abraham Zion Corp. v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985) (internal quotation omitted); Restatement (Second) of Contracts § 203(c) ("specific terms and exact terms are given greater weight than general language").

The Trust Agreement section that speaks most directly to the contours of the pledge of "revenues of the System" is section 701, which embodies a covenant to pay interest and principal "**solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified**[.]" (TA § 701 (emphasis added).) In HTA, this Court interpreted a phrase substantially identical to that found in section 701, regarding bonds "payable solely from Revenues . . . which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified[.]" 618 B.R. at 639. There, the Court held the clause "logically imports the scope of the pledge, mechanics, and detailed limitations contained elsewhere in the" agreement. Id. Nothing in the PREPA Trust Agreement supports a different interpretation. Here, the two phrases are bookends, "as follows:" in the Preamble, and "in the manner and to the

extent hereinabove particularly specified" in section 701, which, like the Preamble, nowhere mentions liens.

Section 701 of the Trust Agreement narrows the scope of the pledge, which is not denominated by section 701 or the Preamble as associated with any lien or charge, from all "revenues," to the defined term "Revenues" (defined to mean only "moneys received" from System operations or financing) pledged "in the manner and to the extent hereinabove specified"—that is, subject to the payment terms contained in the preceding sections of the body of the Trust Agreement.

The provisions that fall between the Preamble and section 701 provide for a payment waterfall beginning with a General Fund created by section 503 of the Trust Agreement, where "all Revenues, other than income from investments" are first deposited. (TA § 503.) The Revenues in the General Fund are "used first for the payment of the Current Expenses of the System[.]" (TA § 505.) The question of what constitutes a "Current Expense[] of the System" is a subject of the Current Expense Litigation.[22] After payment of Current Expenses, but holding back a reserve for Current Expenses as they come due, the moneys are transferred to the "Revenue Fund" created by section 506. (TA § 506.) Under the Trust Agreement, excess Revenues remaining after payment of Current Expenses are "Net Revenues." (See TA § 101.) These are the moneys—all of which consist of Revenues—that are required to be transferred to the Revenue Fund and then finally rendered collateral upon transfer to the

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[22] The Bondholders have described the Current Expense Litigation as involving the claim of "certain fuel line lenders to PREPA . . . that the Trust Agreement requires PREPA to pay all Current Expenses before the bonds[.]" (Defs. Mem. ¶ 33 n.7).)

At oral argument on these cross-motions for summary judgment, the AHG conceded that the Bondholders stand in line behind Current Expenses whether the Bondholders have a gross revenue pledge or only a Net Revenue pledge. (Omni Hr'g Tr. 136:18-137:12.)

liened Sinking Fund and Specified Funds. (TA §§ 506, 507; see also Defs. Mem. ¶ 56.)

The scope of the general pledge of the Trust Agreement is best summarized in the section 101 definition of "Opinion of Counsel," which prescribes the following description to be provided to prospective bondholders: "this Agreement creates a legally valid and effective pledge of the Net Revenues, subject only to the lien of the 1947 Indenture, and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement[.]"

Accordingly, and without regard to the question of lien perfection,[23] the Bondholders have been pledged payment on the Bonds from the Net Revenues of the System, but their claim is only partially secured by a lien and charge on moneys actually received and deposited into the Sinking Fund and other Specified Funds (plus certain other bond revenues and "any moneys received from any other source for paying any portion of the cost of any Improvements" deposited into the Construction Fund). (TA § 401.)[24]

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[23] Count I of the FAC and Count II of the Defendants' Answer and Counterclaim Complaint can only be resolved after examining lien perfection.

[24] To briefly address another Bondholder contention: the Bondholders argue that the clause in sections 401 and 507 stating that the Sinking Fund and the Specified Funds are subject to a lien and charge "for the further security of such holders" grants liens directly to Bondholders in addition to liens granted to the Trustee in all of the "revenues of the System." (See, e.g., Defs. Mem. ¶¶ 30-33, 40, 43-44.) However, if a creditor has been granted blanket security, it does not require "further security." The Oversight Board is correct that the phrases simply point to one another: the lien in section 401 is in further security of the liens in section 507, and vice versa. The lien grants are also "further security," in the informal sense of the word, for the Trust Agreement's unsecured covenants. (See FOMB Mem. ¶ 41 n.17; FOMB Reply ¶ 28.)

More importantly, a distinction the Bondholders seek to draw between security interests granted to the Trustee and those granted to the Bondholders is unavailing. The Trustee holds its security interests only for the benefit of the Bondholders, and, as the Oversight Board noted at oral argument, any distinction would be one without a difference because the Trustee and the Bondholders are together limited to the same remedies under

E. FAC Count I - The Bondholders Do Not Have a Security Interest in Future Revenues Not Yet Received for Energy Not Yet Generated

1. The Trust Agreement

The Bondholders contend that the Trust Agreement grants them an enforceable security interest in future income, derived from the sale of energy that PREPA has not yet generated, which PREPA has not yet received. (See generally, e.g., Defs. Suppl. Resp.) The Bondholders note, accurately, that the Authority Act gives PREPA the ability "to secure payment of its bonds and of any and all other obligations by pledging or placing a lien on all or any of its contracts, revenues, and income" (22 L.P.R.A. § 196(o)) and provides that "[a]ny resolution . . . authorizing any bonds **may** contain provisions, which shall be part of the contract with the holders of the bonds . . . (1) as to the disposition of the entire gross or net revenues and present or **future income** of the Authority, including the pledging of all or any part thereof to secure payment of the bonds" (22 L.P.R.A. § 206(e)(1) (emphasis added)). The Bondholders argue that, if they have a security interest in all of the revenues (small "r" denoting a broader definition) it necessarily includes a presently enforceable security interest on revenues not yet acquired. (Defs. Suppl. Resp. ¶ 14 n.9.) U.C.C. § 9-204; 19 L.P.R.A. § 2234.

There is no evidence, however, that PREPA used the authority to grant a security interest in future revenues when it issued the bonds on which the Bondholders base their claim. As explained above, the only assets subjected to a lien and charge by the terms of the Trust

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section 808 of the Trust Agreement, informally referred to as the "No Action Clause." (Defs. Mem. ¶ 107; TA § 808; Omni Hr'g Tr. 117:18-118:4.)

Further, the Bondholders fail throughout the briefing to distinguish PREPA's circumstances meaningfully from those considered by the Court in HTA, a decision that addressed agreements very similar to, and at points identical to, the Trust Agreement; in particular, the Court finds it to be of no significance that the bond resolutions in HTA involved a "Fiscal Agent" rather than a "Trustee." (Defs. Mem. ¶ 111.) See 618 B.R. at 626.

Agreement are moneys already received and deposited in the Sinking Fund and the Specified Funds. (TA §§ 401, 507, 513.)

The "future revenues" in which the Bondholders claim a security interest are a "mere expectancy" until they are rendered collateral, i.e., received and deposited into the liened Funds. Puerto Rico's law does not recognize such an expectancy as property in which an entity is capable of granting a creditor a security interest. See Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Designated Activity Co. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 948 F.3d 457, 468 n.8 (1st Cir. 2020) ("Andalusian") (the First Circuit, applying a general tenet of Puerto Rican law, held that "Puerto Rico law recognizes that the mere expectancy of property is not itself a property interest."). (See, e.g., FOMB Reply ¶ 16.)[25]

Accordingly, the Bondholders have no currently enforceable security interest (indeed, they have no interest at all) in future revenues the Authority has not yet received and deposited into the Sinking Fund or other Funds in which the Trust Agreement specifically grants them interests.

2. Bankruptcy Code Section 928

The Bondholders argue: "the Oversight Board's disallowance claims should be denied *even if it were right* that the Trustee and bondholders have a perfected lien only on moneys that are first credited to the Sinking Fund. That indisputably valid and perfected lien continues post-petition, under Bankruptcy Code Section 928(a), and covers all *future* special revenues credited to the Sinking Fund." (Defs. Mem. ¶ 79 (emphasis in original).)

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[25] For this, among other reasons, the Bondholders' asserted theories under the Takings Clause of the Fifth Amendment of the Constitution of the United States fail. (See, e.g., Defs. Mem. ¶ 88.) U.S. Const. amend. V. Under Puerto Rico law, as stated in Andalusian, the Bondholders have no present property right in the mere expectancy of future revenues.

> Section 928 of the Bankruptcy Code provides, in pertinent part:
>
> (a) . . . subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C.A. § 928 (Westlaw through P.L. 117-262.)

"Special Revenues" are defined by section 902(2)(A) of the Bankruptcy Code, in relevant part, as: "receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems[.]" 11 U.S.C.A. § 902(2)(A) (Westlaw through P.L. 117-262).

As stated above, by the plain language of the Trust Agreement, the only moneys that become subject to a lien and charge under the terms of the Trust Agreement are moneys that have already been deposited in the Sinking Fund and the Specified Funds. (TA §§ 401, 507, 513.) The language of section 928 of the Bankruptcy Code similarly refers only to "revenues acquired"— in the past-tense—and does not support the Bondholders' interpretation of that statute to the extent the Bondholders claim that it currently captures revenues not yet received by PREPA and deposited into the Funds. The Oversight Board and the Committee do not contest that the Bondholders' liens persist post-petition in that they attach to any moneys that are or have been deposited to the Sinking Fund and the Specified Funds after the commencement of the case. (See, e.g., UCC Resp. ¶ 9; FOMB Resp. ¶ 32.) The Oversight Board merely argues that section 928 does not apply to revenues that PREPA has not acquired yet, and that any claim

increasing due to the accretion of liened moneys in the liened Funds can be satisfied through confirmation and discharge via a plan of adjustment, as with any non-executory contract. (See, e.g., Omni Hr'g Tr. 103:16-104:24; FOMB Resp. ¶ 32.)

The Bondholders cite section 1201 of the Trust Agreement for the proposition that the Trust Agreement, and the liens granted thereunder, must persist until the Bonds are paid in full. (TA § 1201.) The Bondholders' arguments do not provide support for their contention that their continuing liens will persist beyond the satisfaction of their claim during the course of the Title III Case, assuming the confirmation of a plan of adjustment. See, e.g., In re Hawker Beechcraft, Inc., 486 B.R. 264, 277 (Bankr. S.D.N.Y. 2013) (if "the contract is not executory and the debtor chooses not to perform, the non-debtor party gets [a] pre-petition claim for breach of contract.").

Accordingly, the Bondholders' liens persist on special revenues, if any, deposited into the Funds after the commencement of PREPA's Title III case. However, their security interests do not, by virtue of section 928 of the Bankruptcy Code, extend to future revenues prior to receipt. Nor does section 928 make the obligations from which such future liens, arising from a Trust Agreement that is a non-executory contract, nondischargeable. The Bondholders' security interest is limited to the amounts on deposit in the liened Funds, to the extent such liens are perfected. Section 928 of the Bankruptcy Code will continue to operate to render any special revenues in the Funds subject to the Bondholders' liens until such time as a plan of adjustment is confirmed that cuts off accretions of the security interest.

F. FAC Counts IV-VI - The Bondholders Do Not Have a Security Interest in the Covenants of the Trust Agreement

The Oversight Board seeks summary judgment with respect to Counts IV-VI of the FAC, disallowing the Master PREPA Bond Claim to the extent it asserts security interests in

the covenants and remedies provisions of the Trust Agreement. Counts IV-VI parallel Counts I-III but only address any purported security interests granted by the Trust Agreement in the covenants and remedies therein. (See Master PREPA Bond Claim Ex. A ¶ 6 (asserting security interests in, inter alia, the "covenants, obligations and undertakings" of the Trust Agreement).) The Oversight Board argues that the covenants and remedies were never the property of PREPA and therefore PREPA could not have granted security interests in them. (See, e.g., FOMB Reply ¶ 43.)

The Bankruptcy Code defines a "security interest" as a "lien created by an agreement." 11 U.S.C.A. § 101(50) (Westlaw through P.L. 117-262). For a claim secured by a security interest to be allowed under the Bankruptcy Code, the creditor must have a "lien on property in which the debtor has an interest." 11 U.S.C.A. § 506(a) (Westlaw through P.L. 117-262). The Bondholders' argument that the Trust Agreement grants them a lien on the covenants, or that the remedies in the Trust Agreement create liens or are liens, is entirely without merit. The covenants and remedies in the Trust Agreement, being merely promises and means of seeking the fulfillment of promises, are not property in which PREPA has and can grant an interest.

Indeed, in their response to the Oversight Board's motion, the Bondholders have abandoned their claim to have liens on the covenants of the Trust Agreement. (Defs. Resp. ¶ 72.)[26] Accordingly, the Oversight Board is entitled as a matter of law to summary judgment

[26] When a party fails to oppose arguments set forth in a motion for summary judgment, courts may treat such arguments as conceded. See Tutor Perini Corp. v. Banc of Am. Sec. LLC, 120 F. Supp. 3d 22, 32 (D. Mass. 2015); Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175, 227 (D.D.C. 2014) (acknowledging that where a defendant does not address a plaintiff's argument in its reply brief to a motion for summary judgment, a party can be held to have conceded).

with respect to Counts IV-VI and the Master PREPA Bond Claim is disallowed to the extent it asserts a secured claim based on the covenants and remedies provisions of the Trust Agreement. The Bondholders' cross-motion for summary judgment as to Counts IV-VI is denied in its entirety.

G. FAC Count II - The Bondholders Have Perfected Liens in the Sinking Fund and the Specified Funds to the Extent that the Deposit Accounts Comprising the Funds are in the Control of the Trustee

The Court next turns to the question of the extent to which the Bondholders' security interests have been perfected.

1. Perfection By Control

Sections 401, 507, and 513 of the Trust Agreement grant the Bondholders liens only in "moneys" actually received and deposited into the accounts comprising the Sinking Fund and the Specified Funds, and section 513 provides that the Bonds are payable solely from the Sinking Fund. (TA §§ 401, 507, 513.)

The Commonwealth has adopted revised Article 9 of the Uniform Commercial Code (the "U.C.C."), which governs the creation, perfection and priority of security interests. See 19 L.P.R.A. §§ 2211-2409 (hereinafter, revised Article 9 is referred to as "Article 9"). Article 9 thus governs the existence, validity and perfection of security interests in PREPA's property. See 19 L.P.R.A. § 2251; U.C.C. § 9-301. The Oversight Board proffers in its brief, but does not proffer evidence, that the Sinking Fund and all of the Specified Funds comprise "deposit accounts" as that term is defined under the U.C.C. (FOMB Mem. ¶ 61.) 19 L.P.R.A. § 2212(a)(29); U.C.C. § 9-102(a)(29).

Under Article 9, the only relevant way to perfect a security interest in a deposit account is by "control" of the deposit account; a UCC-1 financing statement is not sufficient. 19 L.P.R.A. § 2262(b)(1); U.C.C. § 9-312(b)(1)) ("a security interest in a deposit account may be

perfected only by control . . . ."); see also 19 L.P.R.A. § 2264(a) ("A security interest in . . . deposit accounts . . . may be perfected by control of the collateral under § 2214 . . . ."); U.C.C. § 9-314(a).[27] Under Article 9, a secured party has "control" of a deposit account only if: (a) the secured party is the bank with which the deposit account is maintained; (b) the secured party is the customer of the bank where the deposit account is maintained (and the holder of the deposit account); or (c) the debtor, the secured party and the bank have executed a "deposit account control agreement" or "DACA" that gives the secured party requisite "control" of the deposit account (by providing that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor). See 19 L.P.R.A. § 2214(a)(1)-(3); U.C.C. § 9-104(a)(1)-(3). No DACA exists between the Trustee and the holders of any of PREPA's other depositary banks. (FOMB SUMF ¶ 83.)[28]

The Trust Agreement explicitly commits the Sinking Fund to the custody of the Trustee. (TA § 507(h).) The Oversight Board has proffered a declaration that the Self-insurance Fund is also held by the Trustee. (See, e.g., Morales Decl. ¶¶ 32-33; FOMB Mem. ¶ 59.) At oral argument, the Oversight Board's counsel stated that the Trustee holds the Reserve Maintenance

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[27] The Bondholders argue that, "Under the UCC, 'a security interest attaches to any identifiable proceeds of collateral,' and '[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected[,]" and that therefore, because they have a lien on future revenues before they are acquired, they also have a lien on any proceeds of those revenues, i.e., the moneys deposited into the General Fund. (Defs. Mem. ¶ 127 (quoting 19 L.P.R.A. §§ 2265(a)(2), (c); U.C.C. § 9-315(a)(2), (c)).) The Bondholders' position is without merit and is in any event irrelevant because, as explained above, the Bondholders' liens do not extend to future revenues or to any assets beyond the content of the Sinking Fund and the Specified Funds.

[28] The Oversight Board included this allegation in the FAC. (FAC ¶ 64.) In their response to the Oversight Board's Statement of Undisputed Material Facts, the Defendants admitted to the facts of this statement. (Defs. SUMF Resp. ¶ 83.)

Fund as well, but that the Trustee does not hold the Construction Fund.[29] (Omni Hr'g Tr. 34:6-8.) The Oversight Board's counsel did not address the Capital Improvement Fund; accordingly, its status is unknown. From these statements, the Court concludes that the Oversight Board does not dispute the existence of perfected security interests in the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund.

Accordingly, the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund are under the control of the Trustee, and the Bondholders therefore have perfected security interests in them. The only remaining question with respect to lien perfection is whether the Oversight Board can avoid the Bondholders' liens on the moneys in the Construction Account and the Capital Improvement Account.

2. Under Section 544 of the Bankruptcy Code, the Oversight Board Can Avoid any Unperfected Security Interests of the Bondholders

The Oversight Board moves for summary judgment on Count II of the FAC, seeking, pursuant to Bankruptcy Code sections 544, 550, and 551, to avoid and preserve for the benefit of PREPA any security interests in moneys received by PREPA in connection with or as a result of its ownership or operation of the system other than the revenues deposited to the credit of the Sinking Fund and Self-insurance Fund. Because, as noted above, the Oversight Board has proffered that the Reserve Maintenance Fund is also under the control of the Trustee and the Bondholders' security interest in that Fund is therefore perfected, the Court must deny the motion with respect to Count II insofar as it relates to the Bondholders' interest in the Reserve Maintenance Fund. In light of the Court's earlier conclusion that the Bondholders' security interest does not extend beyond the Sinking Fund and the Specified Funds, the Court construes

[29] Counsel's statement that the Trustee holds the Subordinate Obligations Fund is not relevant to the Bondholders' claim. (Omni Hr'g Tr. 34:6-8.)

the relevant aspect of Count II as seeking to avoid security interests in the Capital Improvement Fund and the Construction Fund.

> Section 544(a) provides:
>
> > (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
> >
> > > (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .

11 U.S.C.A. § 544(a) (Westlaw through P.L. 117-262). Under section 301(c)(7) of PROMESA, the term "trustee" in applicable Bankruptcy Code provisions means the Oversight Board. 48 U.S.C.A. § 2161(c)(7) (Westlaw through P.L. 117-262) ("The term 'trustee', when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means the Oversight Board, except as provided in section 926 of title 11, United States Code."). Under sections 550 and 551 of the Bankruptcy Code (and section 301(c)(5) of PROMESA, which provides that the term "property of the estate" in this instance means "property of the debtor") any transfer of property of the debtor avoided under section 544 may be recovered by the trustee (Oversight Board) and must be preserved for the benefit of the debtor. 11 U.S.C. §§ 550, 551; 48 U.S.C. § 2161(c)(5).

Under section 544 of the Bankruptcy Code, the Oversight Board may avoid unperfected security interests by standing in the shoes of a hypothetical lien creditor and a creditor with an unsatisfied execution, whether or not such a creditor exists. 11 U.S.C. § 544. Under section 9-317(a)(2) of the U.C.C., a lien creditor has priority over unperfected security interests. 19 L.P.R.A. § 2267(a)(2). As explained above, according to the parties, the only

liened Funds over which the Trustee does not have established control, and therefore a perfected security interest, are the Capital Improvement Fund and the Construction Fund.

The Bondholders argue that no PREPA creditor could have obtained a judicial lien against PREPA as of the commencement of this Title III Case. (Defs. Mem. ¶ 132.) In the First Circuit, the burden of establishing the rights of a hypothetical lien creditor under applicable non-bankruptcy law is placed on the bankruptcy trustee, and the Oversight Board therefore bears that burden in these Title III Cases. See, e.g., Ford v. Fed. Home Loan Mortg. Corp. (In re Bishop), Adv. Proc. No. 09-1034-MWV, 2009 WL 2231197, at *2 (Bankr. D.N.H. July 24, 2009) (stating that, "[t]o assert a cause of action pursuant to § 544(a)(1) or § 544(a)(3), the [trustee] must provide adequate grounds for an inference that a transfer of property of the debtor is avoidable by a hypothetical lien creditor or bona fide purchaser."); see also 48 U.S.C. § 2161(c)(7). Here, the Oversight Board points to section 705 of the Trust Agreement, which specifically recognizes that, "if PREPA's debts go unpaid, unpaid creditors may obtain a lien (presumably a judicial lien) 'upon the System or any part thereof or the Revenues.'" (FOMB Resp. ¶ 103 (quoting TA § 705).)[30] Because, as the AHG acknowledged at oral argument, Current Expenses are paid before the Bondholders' claim on the pledged Net Revenues,[31] judicial liens on Current Expenses would be superior to the Bondholders' interests. The Oversight Board also notes that the Trust Agreement permits junior subordinate liens on the Bonds. (FOMB Resp. ¶ 103.) Based on these clear provisions of the Trust Agreement, the Court concurs in the conclusion that PREPA's assets can be subjected to judicial liens under applicable

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30 Section 705 of the Trust Agreement requires PREPA to "satisfy and discharge . . . all lawful claims and demands for labor, materials, supplies or other objects" within sixty days of accrual if they might otherwise become a lien on the System or any part of the Revenues[.]" (TA § 705.)

31 See supra note 22.

non-bankruptcy law.

Furthermore, jurisprudence from Puerto Rico confirms that the assets of a Puerto Rico governmental entity may be subject to attachment and seizure where the legislature has conferred sufficient operational powers upon the governmental entity to render it subject to "judicial process as any private enterprise would be under like circumstances . . . ."[32] Arraiza v. Reyes; León, Interventor, 70 D.P.R. 614, 616 (P.R. 1949), quoted in Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 942 (1st Cir. 1993). The Puerto Rico Supreme Court has identified various powers and attributes that should be considered in determining whether a governmental entity was intended to be amenable to judicial process in a manner similar to a private business. See generally Arraiza, 70 D.P.R. at 617. Upon consideration of the factors enumerated in Arraiza—which include the abilities to be sued as a corporation, enter into contracts, borrow money, and issue bonds that will not be a liability of the Commonwealth—the Court concludes that PREPA is an entity that is sufficiently structured like a private business that its assets may be subject to provisional remedies, including liens.[33]

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[32] A court may bar direct attachment of funds of such a public entity only where the attachment would interfere with the entity's "performance of its [governmental] functions." Librotex, Inc. v. Autoridad de Acueductos y Alcantarillados de P.R., 138 D.P.R. 938, 941-42 (P.R. 1995) (citing Arraiza, 70 D.P.R. at 618), available in English translation at Docket Entry No. 123-1 in Adv. Proc. No. 17-00155-LTS ("the Legislature granted the [Puerto Rico Aqueduct and Sewer] Authority sufficient operational powers to consider it 'as subject to legal proceedings as any private entity would be in similar circumstances, so long as it does not interfere with the performance of its [governmental] functions'").

[33] The Authority Act for PREPA provides that the "corporation" may, inter alia, "govern the manner in which its general business may be conducted"; "have full control over and intervene in any venture undertaken or acquired"; "enter into contracts and execute any instruments as are necessary or convenient in the exercise of any of its powers"; "sue and be sued in all courts of justice"; collect fees for electrical power services; and "borrow money, make and issue bonds[.]" 22 L.P.R.A. § 196. Further, bonds of the Authority "shall not be a debt of the Commonwealth[.]" 22 L.P.R.A. § 210; cf. Arraiza, 70 D.P.R. at 617. Moreover, the Authority Act established a Governing Board for PREPA,

Moreover, the Puerto Rico Court of Appeals recently held that PREPA "is a corporation and public division that acts and does business as a private company." Villanueva v. Autoridad de Energía Eléctrica [PREPA], No. KLCE202100646, 2021 WL 3701742 (TCA), at *9 (P.R. Cir. July 14, 2021) available in English translation at Docket Entry No. 215-3 in Adv. Proc. No. 19-00388-LTS.

Further, Puerto Rico's Rules of Civil Procedure generally empower courts to order the attachment of a lien to secure a judgment creditor's claim. See 32A L.P.R.A. app. V, Rule 56.1. Accordingly, a court would have been empowered to issue any provisional order it deemed necessary and appropriate to secure satisfaction of the judgment pursuant to Puerto Rico Rule of Civil Procedure 56.1. Specifically, and as relevant here, a court could have ordered the attachment of a lien against property of PREPA as of the commencement of this Title III Case; thus, the Oversight Board has hypothetical lien creditor power as of the commencement of the case.

Thus, to the extent the moneys subject to the Bondholders' liens (in the Sinking Fund and the Specified Funds) are held in deposit accounts that are within the control of the Trustee, the Bondholders have valid and perfected liens in those moneys. By the same reasoning, to the extent the liened moneys are in deposit accounts not within the control of the Trustee, the Oversight Board has the right to avoid the Bondholders' liens and recover and/or preserve the collateral for the benefit of PREPA pursuant to Bankruptcy Code sections 544, 550,

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consisting of members of differing mandated backgrounds, similar to the governing structure of a private entity. See 22 L.P.R.A. § 194.

Accordingly, PREPA is inherently capable of functioning for financial and litigation purposes as a private business or enterprise, exhibiting characteristics similar to those of the Puerto Rico Aqueduct and Sewer Authority, against which an order of attachment was upheld in Arraiza.

and/or 551.[34] However, if the moneys could be held in a securities account or a special account, it is possible that the Bondholders could have perfected their liens by a means other than control, including by way of a UCC-1 financing statement. 19 L.P.R.A. § 2262(b)(1); U.C.C. § 9-312(b)(1) ("A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing."). Because neither party has proffered evidence sufficient to establish that they have perfected liens on the Construction Fund or Capital Improvement Fund, a material issue of fact exists and summary judgment cannot be granted in favor of either party with respect to those Funds.

H. FAC Counts I through VI and Counterclaim Count II - Conclusions with Respect to the Secured Portion of the Master PREPA Bond Claim

Therefore, the Oversight Board's motion for summary judgment as to Count I of the FAC, seeking a "Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Revenues Beyond Those Deposited to the Credit of the Sinking Fund and Self-Insurance Fund," is granted in part, the Defendants' cross-motion on Count I is denied in part, and the Master PREPA Bond Claim is disallowed to the extent it asserts any security interest, perfected or otherwise, in moneys beyond those actually deposited into the Sinking Fund and the Specified Funds as of the time of discharge, if and when the PREPA Plan of Adjustment is confirmed.

The Oversight Board's motion for summary judgment as to Count I of the FAC is further denied with respect to the moneys in the Reserve Maintenance Fund because the Trustee has established control of the Fund and perfected its liens thereon, accordingly the Defendants'

[34] The Court's decision regarding section 544 of the Bankruptcy Code renders any decision with respect to Count III of the FAC unnecessary at this juncture. Accordingly, summary judgment with respect to Count III is denied.

cross-motion thereon is granted to the same extent. Finally, the Oversight Board's motion for summary judgment as to Count I of the FAC is denied at this juncture as to the Construction Fund and Capital Improvement Fund because the Oversight Board has not proffered any competent evidence to establish that the Defendants have not perfected their liens on those Funds, and that, therefore, the liens are subject to avoidance under sections 544, 550, and/or 551 of the Bankruptcy Code. Accordingly, the Court will not disallow the Master PREPA Bond Claim's assertion of perfected security interests in those Funds at this time, and the Defendants' cross-motion thereon is also denied because the Defendants have not established that they have perfected their liens on those Funds and that, therefore, the liens are not subject to avoidance under sections 544, 550, and/or 551 of the Bankruptcy Code.

The Oversight Board's motion for summary judgment as to Count II of the FAC, asserted to permit the Oversight Board to avoid security interests in moneys other than those deposited to the Sinking Funds and Self-insurance Fund, is denied at this juncture. In light of the conclusions set forth above in connection with Count I of the FAC, the parties' motions with respect to Count II of the FAC are denied as moot with respect to any security interests asserted by the Defendants beyond those in moneys actually deposited into the Sinking Fund and the Specified Funds. Having established as a matter of law that the Oversight Board can avoid the Defendants' security interests in the Capital Improvement Fund and Construction Fund if the Defendants have not perfected their liens therein, the Court declines to address the Defendants' possible perfection of their liens on those Funds, because the record before the Court provides no evidence as to the form of the assets comprising the Funds or their custodial status. Accordingly, the Oversight Board's motion for summary judgment as to Count II of the FAC is denied with respect to the Capital Improvement Fund and Construction Fund pending further proceedings,

and the Defendants' cross-motion thereon is denied for substantially the same reasons. Finally, the Oversight Board's motion for summary judgment as to Count II of the FAC is denied with respect to moneys in the Reserve Maintenance Fund because the Trustee has control over the Fund and so has perfected its lien thereon, and the Defendants' cross-motion for summary judgment thereon is granted with respect to the Reserve Maintenance Fund for substantially the same reasons.

The Defendants' motion for summary judgment as to Count II of the Defendants' Answer and Counterclaim Complaint is, accordingly, granted with respect to the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund in which the Defendants have valid and perfected liens, and the Oversight Board's cross-motion is denied to the extent it seeks to avoid the Bondholders' security interest in the Reserve Maintenance Fund. The Oversight Board did not seek to avoid the Bondholders' security interests in the Sinking Fund and Self-insurance Fund. The Defendants' motion for summary judgment as to Count II of the Defendants' Answer and Counterclaim is denied with respect the Capital Improvement Fund and Construction Fund for the same reasons stated above with respect to Count II of the FAC—because the Defendants have not proffered evidence sufficient to establish that they have perfected liens on those Funds, and the Oversight Board's cross-motion is denied as to those Funds for substantially the same reasons. Finally, as with Count II of the FAC, in light of the conclusions set forth above in connection with Count I of the FAC, the parties' motions with respect to Count II of the Defendants' Answer and Counterclaim Complaint are denied as moot with respect to any security interests asserted by the Defendants beyond those in moneys actually deposited into the Sinking Fund and the Specified Funds.

The Oversight Board's motion for summary judgment is denied, and the

Defendants' cross-motion is denied, as to Count III of the FAC for the reasons stated above.[35]

Finally, the Oversight Board's motion for summary judgment is granted, and the Defendants' cross-motion is denied, as to Counts IV-VI of the FAC for the reasons stated above.[36]

I. Counterclaim Count I and FAC Count VII - The Bondholders Have an Unsecured Net Revenue Claim Arising from the Covenants of the Trust Agreement

In Count I of the Defendants' Answer and Counterclaim Complaint, the Bondholders seek a declaratory judgment that, under the Trust Agreement, the Trustee has recourse to the Sinking Fund and the right to obtain specific performance of covenants to fund the Sinking Fund, and in the event of default has recourse to all PREPA revenues and other moneys. (E.g., Defs. Mem. ¶¶ 49-52.)

In Count VII of the FAC, the Oversight Board seeks judgment disallowing the Master PREPA Bond Claim to the extent it claims any right to payment beyond moneys credited to the deposit of the Sinking Fund and Self-Insurance Fund, arguing that section 927 of the Bankruptcy Code precludes any Bondholder entitlement to an unsecured "deficiency" claim. (See, e.g., FOMB Reply ¶ 52 & n.36.)

As the Court explains below, the Bondholders have an Unsecured Net Revenue Claim in the form of a general unsecured claim against PREPA based on PREPA's promise, set forth in the Trust Agreement, to pay Bond principal and interest from pledged Net Revenues of the System—which is partially secured by the moneys in the Sinking Fund and the Specified Funds, and is otherwise unsecured—and the remedies provisions of the Trust Agreement provide the Bondholders with the ability to obtain relief against PREPA.

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35 See supra note 34.

36 See supra section II.F.

1. The Equitable Remedies in the Trust Agreement Provide the Bondholders with Recourse and, Reduced to Claims, Give Rise to a General Unsecured Claim

The Bondholders' argument that they have recourse to all revenues of PREPA and other moneys—and therefore can have a general unsecured claim—is based upon the remedies provided in sections 804 and 805 of the Trust Agreement, which provide, in relevant part, that the Trustee may (or, in some instances, shall):

> [P]rotect and enforce its rights and the rights of the bondholders under applicable laws or under this Agreement by such suits, actions or special proceedings . . . either for **the appointment of a receiver as authorized by the Authority Act or for the specific performance of any covenant or agreement contained herein** or in aid or execution of any power herein granted or for the enforcement of any proper, legal or equitable remedy . . . .
>
> In the enforcement of any remedy under this Agreement **the Trustee shall be entitled to sue for, enforce payment of and receive any and all amounts then or during any default becoming, and at any time remaining, due from the Authority for principal, interest or otherwise under any of the provisions of this Agreement or of the bonds** and unpaid, with interest on overdue payments of principal at the rate or rates of interest specified in such bonds, together with any and all costs and expenses of collection and of all proceedings hereunder and under such bonds, **without prejudice to any other right or remedy of the Trustee or of the bondholders**, **and to recover and enforce any judgment or decree against the Authority, but solely as provided herein** and in such bonds, for any portion of such amounts remaining unpaid and interest, costs and expenses as above provided, **and to collect (but solely from moneys in the Sinking Fund and any other moneys available for such purpose) in any manner provided by law, the moneys adjudged or decreed to be payable**.

(TA § 804 (emphasis added).)

> Section 805 of the Trust Agreement provides, in relevant part, that:
>
> **Anything in this Agreement to the contrary notwithstanding, if at any time the moneys in the Sinking Fund shall not be sufficient** to pay the interest on or the principal of the bonds as the same shall become due and payable (either by their terms or by acceleration of maturities under the provisions of Section 803 of this

> Article), **such moneys, together with any moneys then available or thereafter becoming available for such purpose, whether through the exercise of the remedies provided for in this Article or otherwise**, shall be applied: [pro rata to pay the Bondholders after payment of the Trustee's fees and expenses] . . . .

(TA § 805 (emphasis added).)

The Bondholders' argument of entitlement to recourse to all of PREPA's revenues and "other moneys" is based, in addition to the Preamble, primarily upon the clause "and to collect (but solely from moneys in the Sinking Fund and **any other moneys available for such purpose**) in any manner provided by law, the moneys adjudged or decreed to be payable." (TA § 804 (emphasis added).) Additionally, the Bondholders argue that section 805 contemplates additional moneys "becoming available" from outside the Sinking Fund and the Specified Funds as a result of the exercise of their equitable remedies. (Defs. Mem. ¶ 66.)

In summary, the Bondholders' argument is that, when read together in conjunction with the Trust Agreement as a whole, the remedies in sections 804 and 805[37] provide them with recourse against PREPA outside of the Sinking Fund because the Bondholders may obtain either judgments requiring PREPA to apply Net Revenue-derived assets from outside of the Sinking Fund to payments through the Fund, or—through specific performance of the right to appoint a receiver—to effectively increase Net Revenues through efforts to raise rates pursuant to the Authority Act and the covenants of the Trust Agreement. (See, e.g., Defs. Mem. ¶¶ 44, 46-47, 49, 51-52.)

Finally, the Bondholders argue that their equitable remedies determine the amount of their claim, because under section 101(5)(b) of the Bankruptcy Code, "a 'right to an equitable

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[37] In conjunction with remedies provided by the Authority Act. See 22 L.P.R.A. §§ 207-208.

remedy for breach of performance' is a 'claim,' under the Bankruptcy Code, if 'such breach gives rise to a right to payment.'" (Defs. Mem. ¶ 63 (citing In re Fin. Oversight & Mgmt. Bd. for P.R., 485 F. Supp. 3d 351, 361 (D.P.R. 2020) ("Equitable causes of action are thus 'claims' under the Bankruptcy Code—and therefore are subject to resolution through the Title III claims resolution process—if payment could be substituted for the equitable remedy.").) See also generally Ohio v. Kovacs, 469 U.S. 274 (1985) (receivership obligation reduced to a claim).

The Bondholders' argument is correct, except in one particular: the Bondholders argue that the "rights and remedies resulting from PREPA's many breaches of its Trust Agreement covenants can be resolved by this Title III process if—*but only if*—they give rise to a right to the payment of damages in the full amount of the [Master PREPA Bond Claim]." (Defs. Mem. ¶ 63.) By operation of the remedies of the Trust Agreement, providing the means to potentially generate moneys from outside of the liened Funds by a judgment for specific performance, and by virtue of section 101(5)(b) of the Bankruptcy Code, the Bondholders are entitled to a general unsecured claim.[38] However, the Court cannot simply value the Unsecured

[38] The Oversight Board argues that section 701 of the Trust Agreement prevents the personal liability of PREPA, providing that, "neither the Commonwealth of Puerto Rico nor any such municipalities or other political subdivisions shall be liable for the payment of the principal of or the interest on the bonds." (FOMB Mem. ¶ 140 (citing TA § 701; 22 L.P.R.A. § 193(a)); FOMB Reply ¶ 52.) The Oversight Board's argument fails because there is no explicit exception for PREPA and it has not established that PREPA is a "political subdivision" of the Commonwealth. Nor does the Authority Act provide any explicit liability exception for PREPA, and indeed it contemplates that bonds will be payable out of PREPA's funds: "The bonds and other obligations issued by the Authority shall not be a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth of Puerto Rico nor any such municipalities or other political subdivisions shall be liable thereon, **nor shall such bonds or other obligations be payable out of any funds other than those of the Authority**." 22 L.P.R.A. § 210 (emphasis added).

Net Revenue Claim at the full amount of the Master PREPA Bond Claim.[39]

In the event that the Bondholders obtained specific performance and a receiver raised rates to satisfy payment of the Bonds, the Revenues received would not be paid ahead of Current Expenses,[40] and the receiver would not have the freedom to charge rates that are not "reasonable"[41] or be completely untethered from the Trust Agreement—any such remedies and Revenues would still be subject to the payment restrictions and priorities of the Trust Agreement. (E.g., TA §§ 503, 506-507.) Any equitable claim reduced to payment arising from the Trust Agreement must have no greater value than the value that could be achieved through the application of the equitable remedies to fulfill the Trust Agreement's unsecured covenant to pay the Bonds from the Net Revenues of the System.

Here, the Trust Agreement pledges the Net Revenues of PREPA via section 701 and the preceding payment provisions. (TA § 701.) The pledge extends beyond the lien grants of sections 401, 507, and 513—embodying a partially secured obligation to pay the Bonds in full from Net Revenues: "The Authority covenants that it will promptly pay the principal of and the interest on each and every bond issued under the provisions of this Agreement at the places, on

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39 The Court's analysis of the Unsecured Net Revenue Claim and the provisions of sections 804 and 805 do not affect the scope of the liens granted by the Trust Agreement. Under the terms of the Trust Agreement, and as explained in the Court's discussion of entitlement to future revenues above, a mere pledge, covenant, or remedy cannot be utilized to expand the scope of the Bondholders' security interest to encompass moneys beyond the amounts described above that are on deposit in the Sinking Fund and the Specified Funds, or acquired during the course of the case and deposited to the Sinking Fund or other Specified Fund in which the Trustee has perfected its liens, notwithstanding section 928 of the Bankruptcy Code (as discussed above). See supra Section II.E.

40 As noted above, there is currently pending litigation regarding what constitute "Current Expenses."

41 (TA § 502.) 22 L.P.R.A. § 196(l).

the dates and in the manner specified herein[.]" (TA § 701.)

Under the terms of the Trust Agreement, as corroborated by the definition of "Opinion of Counsel" in section 101, PREPA did not pledge payment out of gross revenues or an unlimited "all revenues," but instead covenanted to pay the Bonds out of the "Net Revenues" of PREPA "in the manner and to the extent hereinabove particularly specified"—in other words, subject to all of the payment provisions and limitations of liability contained within the previous sections of the Trust Agreement. (TA §§ 101, 701.) As discussed above, in HTA this Court held that precisely the same phrase "logically imports the scope of the pledge, mechanics, and detailed limitations contained elsewhere in the" agreement. 618 B.R. at 639.

The value of the Unsecured Net Revenue Claim must be determined with reference to the value of Net Revenues that would, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds. Valuing the Unsecured Net Revenue Claim may also require accounting for the likelihood of payment of the Bondholders' claim in relation to claims higher up the Trust Agreement's payment waterfall. Cf. In re Hemingway Transp., Inc., 993 F.2d 915, 923 (1st Cir. 1993) (to value a contingent claim, the court discounts the claim's value to "reflect the uncertainty of the contingency").[42] In its reply, the Committee articulated a potential measure of the Bondholders' Unsecured Net Revenue Claim as "a right to payment in an amount equal to the present value of the future ***net*** revenues that PREPA may generate" or "what someone would pay now for the

[42] For this reason, among others, the Bondholders do not prevail on their arguments that, if the full amount of the Master PREPA Bond Claim is not satisfied, their equitable remedies cannot be reduced to claims and are therefore nondischargeable. (See, e.g., Defs. Mem. ¶ 64.).

right to potentially receive net revenue payments from PREPA in the future, taking into account the enormous difficulties and legion of uncertainties affecting, and limiting, PREPA's ability to generate any such net revenues." (UCC Reply ¶ 24 (emphasis in original).) That said, the Court will not predetermine the method of valuation or the appropriate time at which valuation should be gauged before all parties can be heard from on the matter.

Accordingly, the unsecured portion of the Master PREPA Bond Claim is a general unsecured claim, the value of which must be determined hereafter, either consensually or through proceedings under section 502 of the Bankruptcy Code.

2. Section 927 of the Bankruptcy Code is Inapplicable to the Master PREPA Bond Claim

Count VII of the FAC seeks a "Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund."

Section 1111(b)(1)(A) of the Bankruptcy Code, provides: "A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse . . . ." 11 U.S.C.A. § 1111(b)(1)(A) (Westlaw through P.L. 117-262).

Section 927 of the Bankruptcy Code provides: "The holder of a claim payable solely from special revenues of the debtor under applicable nonbankruptcy law shall not be treated as having recourse against the debtor on account of such claim pursuant to section 1111(b) of this title." 11 U.S.C.A. § 927 (Westlaw through P.L. 117-262) (emphasis added).) "Special Revenues" are defined by section 902(2)(A) of the Bankruptcy Code, in relevant part, as: "receipts derived from the ownership, operation, or disposition of projects or

systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems[.]" 11 U.S.C.A. § 902(2)(A) (Westlaw through P.L. 117-262).

Section 927 of the Bankruptcy Code provides a special exception for undersecured non-recourse loans, i.e., loans payable only from designated assets of the debtor ("collateral") in which the creditors have security interest, where (i) the security is not sufficient to satisfy the outstanding liability—the creditor is "undersecured," and (ii) the governing instruments prohibit recourse to assets other than the collateral. Ordinarily, under section 1111(b) of the Bankruptcy Code, creditors in that situation are presented with the choice whether to (i) receive an unsecured recourse ("deficiency") claim—permitting the creditor to vote their claim and receive payment pro rata with general unsecured claims, or (ii) to elect to have the undersecured claim treated and satisfied under a plan as a fully secured claim—and potentially benefit from any appreciation in the value of the collateral. See generally Collier on Bankruptcy ¶ 1111.03 (16th ed. 2023).[43]

In a Title III Case under PROMESA, section 927 of the Bankruptcy Code confines the creditor's recovery to its collateral if (i) the agreement is non-recourse, and (ii) the claim is payable solely from "special revenues" which include receipts derived from the operation of a utility system. See 11 U.S.C. § 902(2)(A). The Oversight Board argues that section 927 applies here and precludes the Bondholders from seeking payment of outstanding

[43] For example, for a creditor with an otherwise allowable secured claim for $1,000,000, secured only by a house worth only $600,000, section 1111(b) would grant the undersecured creditor the option to receive a $400,000 unsecured "deficiency" claim, treated as a general unsecured claim for voting and distribution purposes. If the creditor takes the general unsecured claim, they can vote its value and perhaps deny confirmation of a plan it opposes. If the creditor takes the $1,000,000 secured claim, they can benefit if the house increases in value.

amounts from any assets other than those currently in the Sinking Fund and the Specified Funds. Were the Oversight Board correct, the Bondholders' claim would be restricted to their collateral, consisting of the moneys that happen to be in the liened Funds in which the Trustee has perfected its interest as of the time of discharge, if and when the PREPA Plan is confirmed.

The Oversight Board's position is contradicted by the unambiguous terms of the Trust Agreement, which channel Revenues through a payment waterfall until they reach the Sinking Fund and the Specified Funds on which the Bondholders have been granted liens, but also include equitable remedy provisions that permit the Bondholders either to obtain judgments requiring PREPA to apply Net Revenue-derived assets from outside of the Sinking Fund to payments through the Fund, or—through specific performance of the right to appoint a receiver—to effectively increase Net Revenues through efforts to raise rates pursuant to the covenants of the Trust Agreement and the Authority Act.

Accordingly, the particular combination of provisions embodied in the Trust Agreement renders the Bonds recourse instruments, and section 927 of the Bankruptcy Code is inapplicable.

J. Counterclaim Count I and FAC Count VII - Conclusions with Respect to the Unsecured Portion of the Master PREPA Bond Claim

In conclusion, the portion of the claim constituting the Defendants' general unsecured claim—the Unsecured Net Revenue Claim—is not precluded by the Trust Agreement, or by section 927 of the Bankruptcy Code, which is inapplicable here. The value of the Unsecured Net Revenue Claim must be determined with reference to the value of Net Revenues that would likely, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral in the future upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds.

As discussed above, because of certain contingencies, the Unsecured Net Revenue Claim cannot be valued on this record, and the Court will not predetermine the method of valuation or the appropriate time as of which valuation should be gauged before all parties can be heard from on the matter. Accordingly, the value of the Unsecured Net Revenue Claim must be determined consensually or through proceedings under section 502 of the Bankruptcy Code. The parties are directed to meet and confer to discuss the necessity and nature of further proceedings to resolve this point.

Therefore, the Oversight Board's motion for summary judgment with respect to Count VII of the FAC, seeking a "Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund[,]" is denied because section 927 of the Bankruptcy Code is inapplicable when, as here, the relevant agreement unambiguously provides for recourse. Accordingly, the Defendants' unsecured portion of their claim is a general unsecured claim—subject to valuation—and summary judgment with respect to Count VII is denied. The Defendants' cross-motion for summary judgment as to Count VII of the FAC is granted for the same reasons.

Summary judgment with respect to Count I of the Defendants' Answer and Counterclaim Complaint, seeking a "Declaratory Judgment that Under the Trust Agreement the Trustee Has Recourse to the Sinking Fund and the Right to Obtain Specific Performance of Covenants to Fund the Sinking Fund, and in the Event of Default Has Recourse to All PREPA Revenues and Other Moneys[,]" is granted to the extent that the Court hereby declares that (i) the Defendants have recourse to the Sinking Fund, in which the Trustee has a valid, perfected lien, and (ii) the Defendants have recourse as to any deficiency in the form of a general unsecured

claim under section 101(5)(b) of the Bankruptcy Code arising from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance, and is denied in all other respects, without prejudice to proceedings to determine the amount of the unsecured claim. The Oversight Board's cross-motion for summary judgment as to Count I of the Defendants' Answer and Counterclaim Complaint is denied, without prejudice to the Oversight Board's position regarding the valuation of the Net Unsecured Claim.

K. The Oversight Board's Rule 702 Motion

In the Oversight Board's Rule 702 Motion, the Oversight Board seeks exclusion of the declaration of Robert A. Lamb (Docket Entry No. 91-4) (the "Lamb Declaration"), which is proffered by the Bondholders as expert testimony, arguing that the testimony must be excluded as inadmissible extrinsic evidence because it relates to the interpretation of the Trust Agreement, the relevant portions of which the Oversight Board argues are unambiguous. The Oversight Board further argues that the Lamb Declaration fails to meet the criteria established by Rule 702 of the Federal Rules of Evidence for the admission of expert testimony. (FOMB Rule 702 Mot. ¶¶ 2, 4.)

"Rule 702 of the Federal Rules of Evidence governs the admission of expert testimony." Bradley v. Sugarbaker, 809 F.3d 8, 16 (1st Cir. 2015) (citing Fed. R. Evid. 702). "Rule 702 requires that the 'testimony be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) that the witness apply "the principles and methods reliably to the facts of the case."'" Id. (quoting Pagés-Ramírez v. Ramírez-Gonzalez, 605 F.3d 109, 113 (1st Cir. 2010)). "When faced with a proffer of expert testimony, the district court must determine whether the expert witness is qualified and has specialized knowledge that will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" Bogosian

v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 476 (1st Cir. 1997) (quoting Fed. R. Evid. 702); see also United States v. Sepulveda, 15 F.3d 1161, 1183 (1st Cir. 1993) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993)). In this regard, the trial court is given wide discretion to admit or exclude expert testimony. See United States ex rel. Jones v. Brigham & Women's Hosp., 678 F.3d 72, 83 (1st Cir. 2012) (quoting Alt. Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 31-32 (1st Cir. 2004) ("Evidentiary rulings have the potential to shape and winnow the scope of the summary judgment inquiry, and a trial court should have as much leeway in dealing with those matters at the summary judgment stage as at trial.")).

Here, the Oversight Board challenges the admissibility of Robert A. Lamb's testimony on the grounds that (i) his testimony will not assist the Court in interpreting contractual terms and drawing legal conclusions as to the meaning of the Trust Agreement, and (ii) he is not qualified to opine on market conditions before 1984. (FOMB Rule 702 Mot. ¶¶ 2, 4.) In response, the Bondholders argue that Mr. Lamb's testimony is admissible insofar as Mr. Lamb "explains that the Oversight Board's proposed reading of the Trust Agreement is directly at odds with longstanding custom and practice in the municipal bond market." (Defs. Rule 702 Obj. ¶ 4.) The Bondholders insist that the terms of the Trust Agreement are ambiguous and that testimony related to the recourse and lien issues must focus on using industry custom and practices to elucidate the meaning of certain Trust Agreement terms, including "explanations of how, in Lamb's experience, participants in the municipal bond market (which included the drafters of the Trust Agreement and its amendments) would understand the liens and recourse in revenue bonds to work." (Defs. Rule 702 Obj. ¶¶ 6, 8 (citing Temple v. McCall, 720 F.3d 301, 305 (5th Cir. 2013) ("The use of expert testimony is appropriate where, for example, a phrase in

a contract is ambiguous and a court seeks to determine whether there is a received usage in the trade which would shed light on its meaning.")).)

"The question of whether a contract is ambiguous—presents a question of law for the judge. If the court finds no ambiguity, it should proceed to interpret the contract—and it may do so at the summary judgment stage." Torres Vargas v. Santiago Cummings, 149 F.3d 29, 33 (1st Cir. 1998) (citing United States Liab. Ins. Co. v. Selman, 70 F.3d 684, 687 (1st Cir. 1995); In re Newport Plaza Assocs., 985 F.2d 640, 644 (1st Cir. 1993)).

As explained above, the material terms of the Trust Agreement are, when read as a whole, unambiguous. Resorting to extrinsic evidence is only appropriate in circumstances where a court determines that a relevant contractual ambiguity exists. See Torres Vargas, 149 F.3d at 33. Here, the Court concludes there is no ambiguity in the Trust Agreement warranting consideration of the extrinsic evidence proffered in the Lamb Declaration. Consequently, exclusion of the Lamb Declaration is appropriate, and the Court need not address Mr. Lamb's qualifications to proffer the expert testimony. Accordingly, the Oversight Board's Rule 702 Motion is granted.[44]

L. The Bondholders' Rule 56(d) Motion

The Bondholders have requested that the Court defer ruling on the Oversight Board's motion for summary judgment pending further discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. (See generally Natbony Decl.) The Bondholders argue that, "while the Court should grant Defendants' motion and deny the Board's motion as a matter of

[44] This Court rejected similar efforts in HTA: "[T]he Court rejects the HTA Movants' arguments that are founded in accounting terminology and principles rather than in law; such arguments are insufficient to demonstrate that the Bondholders have been granted a lien or other property right in Revenues beyond those provided by the plain terms of the Bond Resolutions." 618 B.R. at 637.

law, if it does not do so, then it should afford Defendants an opportunity to take discovery concerning the material disputed facts raised by the [Oversight] Board." (Natbony Decl. ¶ 3.) The Bondholders seek discovery on eight categories of issues related to Counts I-VII of the FAC. (See Natbony Decl. ¶¶ 17-39.)

The Bondholders have not demonstrated a lack of access to evidence concerning any genuinely disputed material fact that is necessary to oppose the Oversight Board's motion for summary judgment, such that deferral of a ruling on the pending motions to allow the parties to conduct discovery would be appropriate. See In re PHC, 762 F.3d at 143. Accordingly, the Rule 56(d) Motion is denied.

## III.

## CONCLUSION

In conclusion, and for the foregoing reasons, the Oversight Board's motion for summary judgment is (i) granted in part and denied in part with respect to Count I of the FAC and therefore granted in part and denied in part as to the Defendants' cross-motion thereon (see supra pages 53-54), (ii) denied with respect to Count II of the FAC but granted in part and denied in part as to the Defendants' cross-motion thereon (see supra pages 54-55); (iii) denied with respect to Count III of the FAC and also as to the Defendants' cross-motion thereon (see supra page 53 n.34), (iv) granted with respect to Counts IV, V, and VI, and denied as to the Defendants' cross-motion thereon (see supra pages 45-46), and (v) denied with respect to Count VII of the FAC, and therefore granted as to the Defendants' cross-motion thereon (see supra page 65).

The Defendants' motion for summary judgment is granted in part and denied in part with respect to Counts I and II of the Defendants' Answer and Counterclaim Complaint;

and, accordingly, the Oversight Board's cross-motions as to Counts I and II of the Defendants' Answer and Counterclaim Complaint are similarly granted in part and denied in part (see supra pages 65-66 (Counterclaim Count I) and 55 (Counterclaim Count II).[45]

The parties are directed to meet and confer and file a joint report no later than seven (7) days from the date of entry of this Opinion and Order stating their positions on the nature, scope, and scheduling of further proceedings that they may believe are necessary in connection with the further resolution of this adversary proceeding. The joint report shall identify what discovery issues, if any, remain to be resolved in light of this Opinion and Order. They are further directed to commence working with the Mediation Team immediately in good faith efforts to resolve consensually the outstanding disputes concerning the proposed Plan of Adjustment.

This Opinion and Order resolves Docket Entry Nos. 62, 67, 97, and 106 in Adv. Proc. No. 19-00391.

SO ORDERED.

Dated: March 22, 2023

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

[45] For substantially the reasons stated by the Oversight Board in its reply, the Defendants' affirmative defenses do not preclude the grant of partial judgment. (FOMB Reply ¶¶ 64-66.) The Court has addressed certain of the Defendants' affirmative defenses as briefed and as necessary to resolve the relevant issues herein.

# Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

| | |
|---|---|
| In re:<br>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>THE COMMONWEALTH OF PUERTO RICO et al.,<br>Debtors.[1] | PROMESA<br>Title III<br><br>No. 17 BK 3283-LTS<br>(Jointly Administered) |
| In re:<br>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>PUERTO RICO ELECTRIC POWER AUTHORITY,<br>Debtor. | No. 17 BK 4780-LTS |
| THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,<br>as representative of<br>PUERTO RICO POWER ELECTRIC AUTHORITY,<br>Plaintiff/Counterclaim-Defendant, | Adv. Proc. No. 19-00391-LTS |

[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 (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS, CORTLAND CAPITAL MARKET SERVICES, SOLA LTD., SOLUS OPPORTUNITIES FUND 5 LP, ULTRA MASTER LTD, ULTRA NB LLC, UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC., AND SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA,

Intervenor-Plaintiffs,

-v-

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Defendant/Counterclaim-Plaintiff,

THE AD HOC GROUP OF PREPA BONDHOLDERS, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, AND SYNCORA GUARANTEE, INC.,

Intervenor-Defendants/Counterclaim-Plaintiffs.

ORDER CONCERNING BONDHOLDERS' UNSECURED NET REVENUE CLAIM ESTIMATION

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LAURA TAYLOR SWAIN, United States District Judge

On March 22, 2023, the Court issued its *Opinion and Order Granting in Part and Denying in Part the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment and the Defendant's and Intervenor-Defendants' Cross-Motion for Summary Judgment* (Docket Entry No. 147)[2] (the "Summary Judgment Order").[3] In the Summary Judgment Order, addressing cross-motions for summary judgment on Counts I-VII of the Oversight Board's *First Amended Complaint Objecting to Defendant's Claims and Seeking Related Relief* (Docket Entry No. 26) (the "FAC"), and Counts I & II of the counterclaim complaint included in the Bondholder Defendants'[4] *Defendant's and Intervenor-Defendants' Answer, Affirmative Defenses, and Counterclaims* (Docket Entry No. 47) (the "Defendants' Answer and Counterclaim Complaint"), the Court held, inter alia, that:

> (a) the Trust Agreement granted the Bondholders security interests only in moneys actually deposited to the Sinking Fund, Self-insurance Fund, Capital Improvement Fund, Reserve Maintenance Fund, and Construction Fund (as defined in the Trust Agreement); (b) the Bondholders have perfected their liens in the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund, over which the Trustee has established control (as discussed below);[5] (c) the

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2 Unless otherwise noted, all references herein to Docket Entry Nos. are references to Adversary Proceeding No. 19-00391.

3 All capitalized words used but not defined herein shall have the meanings ascribed to them in the Summary Judgment Order or in any specific document the Court is citing.

4 U.S. Bank National Association as Trustee (the "Trustee"), the Ad Hoc Group of PREPA Bondholders (the "Ad Hoc Group" or the "AHG"), Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured"), National Public Finance Guarantee Corporation ("National"), and Syncora Guarantee Inc. ("Syncora," and together with the Trustee, Ad Hoc Group, and Assured, the "Bondholders" or the "Defendants").

5 The Court declined to address the Bondholders' possible perfection of their liens on the Capital Improvement Fund and Construction Fund, because the record before the Court provided no evidence from either party as to the form of the assets comprising those Funds and their custodial status, and means of perfection may vary with the form of the asset in question. Subsequent to the ruling, the parties have attempted to work through those lien perfection issues, including with respect to the Reserve Maintenance Fund,

> Bondholders have no security interest in the covenants and remedies provided for by the Trust Agreement; but (d) based on PREPA's payment and equitable relief covenants in the Trust Agreement, the Bondholders have an unsecured claim (within the meaning of 11 U.S.C. § 101(5)(B)) to be liquidated by reference to the value of future Net Revenues (as defined in the Trust Agreement) that would, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds (the "Unsecured Net Revenue Claim").

(Summary Judgment Order at 13-14 (emphasis added).) The Court held that the value of the Unsecured Net Revenue Claim must be determined "either consensually or through proceedings under section 502 of the Bankruptcy Code."[6] (Summary Judgment Order at 62, 70.) The parties have not reached consensus, and the Court now proceeds, after briefing and an evidentiary hearing, to estimate the value of the Unsecured Net Revenue Claim.

The Court has subject matter jurisdiction of this matter pursuant to section 306(a) of PROMESA. 48 U.S.C. § 2166(a). The Court has considered carefully all the parties' submissions,[7] and for the following reasons the Court's estimation of the value of the Unsecured

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which Fund's inclusion as within the control of the Trustee was due to a misstatement by the Oversight Board's counsel.

[6] References herein to the provisions of Title 11 of the United States Code (the "Bankruptcy Code") are to sections made applicable in these cases by section 301 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. § 2161. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") are made applicable in these Title III cases by section 310 of PROMESA. 48 U.S.C. § 2170. PROMESA is codified at 48 U.S.C. section 2101 et seq. References herein to PROMESA section numbers are to the uncodified version of the legislation.

[7] The Court has also received and reviewed, inter alia, the following pleadings: *SREAEE's Substantive Opening Brief in Support of Estimation of the Unsecured Net Revenue Claim* (Docket Entry No. 187) (the "SREAEE 502 Brief"); *UTIER's Substantive Opening Brief for Estimation of the Unsecured Net Revenue Claim and Joinder to SRAEE's Substantive Opening Brief* (Docket Entry No.188) (the "UTIER 502 Brief"); *Memorandum of the Financial Oversight and Management Board for Puerto Rico in Support of Estimation of Unsecured Net Revenue Claim* (Docket Entry No. 192) (the "FOMB 502 Brief"); *Joinder of the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Legal*

Net Revenue Claim as of July 3, 2017 (the "Estimation Date"),[8] is **$2,388,000,000.00**.

I.

PROCEDURAL BACKGROUND AND PRE-HEARING GUIDANCE ON CLAIM ESTIMATION

The factual background underlying this adversary proceeding is set forth in the Summary Judgment Order; the Court assumes readers' familiarity with that Order. (See Summary Judgment Order at 14-19.) In addition to the summarized holding above, the Court made the following statements in the Summary Judgment Order with respect to valuing the

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*Arguments in the Memorandum of the Financial Oversight and Management Board for Puerto Rico in Support of Estimation of Unsecured Net Revenue Claim* (Docket Entry No. 195) (the "AAFAF 502 Joinder"); *Limited Joinder and Reservation of Rights of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Memorandum of Financial Oversight and Management Board for Puerto Rico in Support of Estimation of Unsecured Net Revenue Claim* (Docket Entry No. 196) (the "UCC 502 Joinder"); *The PREPA Bond Trustee's and PREPA Bondholders' Opening Brief in Support of their Proposed Estimation of their Unsecured Net Revenue Claim* (Docket Entry No. 197) (the "Defendants' 502 Brief"); *Motion to Inform and Reservation of Rights of the Ad Hoc Committee of National Claim Assignees* (the "AHC RoR") (Docket Entry No. 199 in Adv. Proc. No. 19-00391 and Docket Entry No. 3488 in Case No. 17-4780); *Limited Response of Fuel Line Lenders Concerning Estimation of Unsecured Net Revenue Claim* (Docket Entry No. 220) (the "FLL Response"); *SREAEE's Response Brief in Support of Estimation of the Unsecured Net Revenue Claim* (Docket Entry No. 221) (the "SREAEE Response"); *UTIER's Response Brief in Support of Estimation of the Unsecured Net Revenue Claim* (Docket Entry No. 223) (the "UTIER Response"); *Response to the Plaintiff's and Plaintiff-Intervenors' Opening Briefs in Support of their Proposed Estimation of the Unsecured Net Revenue Claim* (Docket Entry No. 225) (the "Defendants' Response"); *Response of the Financial Oversight and Management Board for Puerto Rico in Support of Estimation of Unsecured Net Revenue Claim [ECF No. 192]* (Docket Entry No. 226) (the "FOMB Response"); *Intervenor-Plaintiff Official Committee of Unsecured Creditors' Response Brief in Connection with Estimation of Unsecured Net Revenue Claim* (Docket Entry No. 230) (the "UCC Response"). Additionally, in response to the Court's *Order Concerning PREPA Trust Agreement* (Docket Entry No. 115), the Oversight Board and the Defendants filed an agreed-upon conformed trust agreement as Exhibit A to their *Joint Informative Motion Submitting Conformed Trust Agreement in Response to January 5, 2023 Order Concerning PREPA Trust Agreement [ECF No. 115]* (Docket Entry No. 118 Ex. A) (the "Trust Agreement").

[8] The parties' experts have agreed that July 3, 2017, the date on which PREPA filed its Title III petition, is the appropriate reference date for claim estimation. (See infra section II.D; see also 11 U.S.C. § 502(b).)

Unsecured Net Revenue Claim:

- By operation of the remedies of the Trust Agreement, providing the means to potentially generate moneys from outside of the liened Funds by a judgment for specific performance, and by virtue of section 101(5)(b) of the Bankruptcy Code, the Bondholders are entitled to a general unsecured claim. (Summary Judgment Order at 59.)

- In the event that the Bondholders obtained specific performance and a receiver raised rates to satisfy payment of the Bonds, the Revenues received would not be paid ahead of Current Expenses, **and the receiver would not have the freedom to charge rates that are not "reasonable"** ((TA § 502) 22 L.P.R.A. § 196(l)) or be completely untethered from the Trust Agreement—any such remedies and Revenues would still be subject to the payment restrictions and priorities of the Trust Agreement. (E.g., TA §§ 503, 506-507.) **Any equitable claim reduced to payment arising from the Trust Agreement must have no greater value than the value that could be achieved through the application of the equitable remedies to fulfill the Trust Agreement's unsecured covenant to pay the Bonds from the Net Revenues of the System.** (Summary Judgment Order at 60 (emphasis added).)

- **The value of the Unsecured Net Revenue Claim must be determined with reference to the value of Net Revenues that would, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds**. Valuing the Unsecured Net Revenue Claim may also require accounting for the likelihood of payment of the Bondholders' claim in relation to claims higher up the Trust Agreement's payment waterfall. Cf. In re Hemingway Transp., Inc., 993 F.2d 915, 923 (1st Cir. 1993) (to value a contingent claim, the court discounts the claim's value to "reflect the uncertainty of the contingency"). In its reply, the Committee articulated a potential measure of the Bondholders' Unsecured Net Revenue Claim as "a right to payment in an amount equal to the present value of the future net revenues that PREPA may generate" or "what someone would pay now for the right to potentially receive net revenue payments from PREPA in the future, taking into account the enormous difficulties and legion of uncertainties affecting, and limiting, PREPA's ability to generate any such net revenues." (UCC Reply ¶ 24 (emphasis in original).) That said, the Court will not predetermine the method of valuation or the appropriate time at which valuation should be gauged before all parties can be heard from on the matter.

> Accordingly, the unsecured portion of the Master PREPA Bond Claim is a general unsecured claim, the value of which must be determined hereafter, either consensually or through proceedings under section 502 of the Bankruptcy Code. (Summary Judgment Order at 61-62 (emphasis added).)

- Summary judgment with respect to Count I of the Defendants' Answer and Counterclaim Complaint, seeking a "Declaratory Judgment that Under the Trust Agreement the Trustee Has Recourse to the Sinking Fund and the Right to Obtain Specific Performance of Covenants to Fund the Sinking Fund, and in the Event of Default Has Recourse to All PREPA Revenues and Other Moneys[,]" is granted to the extent that the Court hereby declares that (i) the Defendants have recourse to the Sinking Fund, in which the Trustee has a valid, perfected lien, and (ii) the Defendants have recourse as to any deficiency **in the form of a general unsecured claim under section 101(5)(b) of the Bankruptcy Code arising from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance**, and is denied in all other respects, without prejudice to proceedings to determine the amount of the unsecured claim. (Summary Judgment Order at 65-66 (emphasis added).)

The Court ordered the parties to return to mediation, and directed the parties to meet and confer and file a joint report addressing "the nature, scope, and scheduling of further proceedings that they may believe are necessary in connection with the further resolution of this adversary proceeding" and "what discovery issues, if any, remain to be resolved in light" of the Summary Judgment Order. (Summary Judgment Order at 70.)

After the Court issued the Summary Judgment Order, the Defendants filed the *Trustee's and PREPA Bondholders' Urgent Motion for Limited Clarification* (the "Reconsideration Motion") (Docket Entry No. 150), as well as a Court-ordered joint report, the *Amended Joint Informative Motion in Response to Summary Judgment Order* (the "Informative Motion") (Docket Entry No. 153). In the Reconsideration Motion, the Defendants sought "clarification" with respect to the phrase "over the remainder of the term of the Bonds," requesting that the Court either replace the phrase with "at any time" or omit the phrase

altogether. (Clarification Mot. ¶ 1.) On March 31, 2023, the Court issued its *Order (I) Denying the Trustee's and PREPA Bondholders' Urgent Motion for Limited Clarification and the Urgent Motion for Expedited Consideration Thereof, and (II) Setting Deadlines and Providing Relief Concerning the Amended Joint Informative Motion in Response to Summary Judgment Order* (Docket Entry No. 154) (the "Denial Order"). In the Denial Order, the Court denied the Bondholders' request and directed the parties to file their "respective proposed procedures for estimation along with their respective proposed timelines to accomplish estimation[.]" (Denial Order at 5.) With respect to the Unsecured Net Revenue Claim, the Court stated:

> - [T]he Court expects the parties to address the impact of the Trust Agreement, economic projections, relevant contingencies, and **any relevant bankruptcy and nonbankruptcy law** on the estimation of the claim. The Court will look to the parties to provide legal, factual, and methodological support for their valuation positions in any section 502 proceedings . . . .

(Denial Order at 4-5 (emphasis added).) On April 13, 2023, the Court issued its *Order Regarding Claim Estimation and Briefing* (Docket Entry No.168) (the "502 Hearing Order"), setting a timeline and procedures for discovery and briefing with respect to a claim estimation hearing. (502 Hr'g Order ¶¶ 1-3.) With respect to the Unsecured Net Revenue Claim, the Court stated:

> - **First, the Court rejects** Defendants' contention that estimation of the Unsecured Net Revenue Claim under section 502(c)(2) [of the Bankruptcy Code] is unnecessary, as well as **Defendants' contention that the proper measure of the Unsecured Net Revenue Claim is the face value of the Bonds**. (See Defs. Proposal ¶¶ 13, 19.) Defendants' disagreement with the holdings of the Summary Judgment Order is noted, and they may argue any such matter at the appropriate time on appeal. As stated in the Summary Judgment Order, the Court will take into account for purposes of the section 502 determination the "payment restrictions and priorities of the Trust Agreement." (Summary Judgment Order at 60 (emphasis in original).) Defendants' proposed estimate(s) must address those matters. Second, in the [Informative Motion], the parties expressed

> disagreement as to the meaning of the phrase "the term of the Bonds" as used in the Summary Judgment Order. (See Summary Judgment Order at 61.) Such disagreement led the Defendants to file the [Reconsideration Motion], which the Court thereafter denied. (Denial Order at 4-5.) Because further briefing of the parties' extreme and irreconcilable proffered definitions of the phrase "the term of the Bonds" would not be helpful to the Court, the Court provides the following guidance: the Court did not use the term simply to refer to the stated maturity date of each Bond. **Nor did the Court conclude that the Bonds have effectively no expiration because the ability to collect on the Bonds purportedly has no expiration**. Non-bankruptcy law imposes functional time constraints on the ability to collect on debts. When formulating their positions as to the remainder of the term of the Bonds, the Court advises the parties to consider the period of time during which the Bondholders would be in a position to realize legal or equitable relief in aid of recovery, taking into consideration any limitations imposed by the terms of the Trust Agreement as well as applicable non-bankruptcy law, such as relevant statutes of limitations and limitations on the collectability of judgments.

(502 Hr'g Order at 4-5 (emphasis added).) The Court further directed the parties once more to return to mediation. (502 Hr'g Order ¶ 4.)

The Bondholders also filed a motion requesting immediate certification of the Summary Judgment Order to the Court of Appeals for the First Circuit (the "First Circuit"), seeking review of, inter alia, the ruling that the Master PREPA Bond Claim is not a secured claim with respect to all present and future revenues of PREPA. (See generally *Urgent Motion Requesting Certification of This Court's March 22, 2023 Summary Judgment Order for Immediate Appeal Pursuant to PROMESA § 306(e)(3)-(4)* (the "Defendants' Certification Motion") (Docket Entry No. 155).) The Defendants' Certification Motion was joined in part by the Official Committee of Unsecured Creditors (the "Committee"), which sought review based on its position that the Unsecured Net Revenue Claim is payable solely from special revenues and therefore the Bondholders are barred from recourse by section 927 of the Bankruptcy Code. (See generally *Intervenor-Plaintiff Official Committee of Unsecured Creditors' (A) Partial*

*Joinder in PREPA Bond Trustee's and PREPA Bondholders' Urgent Motion Requesting Certification of this Court's March 22, 2023 Summary Judgment Order for Immediate Appeal Pursuant to PROMESA § 306(e)(3)-(4) and (B) Request for Certification of Such Order Pursuant to PROMESA § 306(e)(3)-(4)* (the "UCC Certification Motion") (Docket Entry No. 167).) In the certification motions, both the Bondholders and the Committee also argued that the Court should stay the estimation proceeding. (UCC Cert. Mot. ¶ 7; Defs. Cert. Mot. ¶ 8.)

On May 3, 2023, the Court issued its *Order Denying Certification of the Court's March 22, 2023 Summary Judgment Order for Interlocutory Appeal* (Docket Entry No. 182) (the "Certification Denial Order").

On May 18, 2023, the Court issued its *Notice Concerning Section 502 Hearing and Omnibus Hearing* (Docket Entry No. 215), setting the dates for the claim estimation hearing.

On May 24, 2023, the Court issued its *Further Order Concerning Section 502 Hearing* (Docket Entry No. 234) (the "Further Order") directing the parties' expert witnesses to proffer their direct testimony for the hearing in the form of declarations. (Further Order at 1.)

On May 30, 2023, the Court issued its *Order Regarding Procedures for the June 6-8, 2023 Claim Estimation Hearing* (Docket Entry No. 238) (the "502 Hearing Procedures Order"), defining the structure of the claim estimation hearing and topics to be addressed in the hearing. In the order, the Court designated time for oral argument of specified issues and directed the parties to address certain issues in cross-examination of certain witnesses. (502 Hr'g Procs. Order ¶¶ 5, 6(c).)

The following parties filed briefs and/or reservation of rights in connection with the 502 Hearing: Plaintiffs, Defendants, the Committee, the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), Cortland Capital Market Services LLC, as

Administrative Agent and SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master LTD, and Ultra NB LLC (together, the "Fuel Line Lenders"), Sistema de Retiro de los Empleados de la Autoridad de Energia Eléctrica ("SREAEE"); the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"); and BlackRock.[9]

From June 6-8, 2023, the Court held a hearing on claim (the "502 Hearing") comprising: a day of opening statements and oral argument (June 6, 2023 502 Hearing Transcript, the "June 6 Tr."), a day of cross-examination and redirect of certain witnesses whose declarations were received in evidence (June 7, 2023 502 Hearing Transcript, the "June 7 Tr."), and a day of closing argument (June 8, 2023 Hearing Transcript, the "June 8 Tr."). The following witnesses testified at the 502 Hearing: Mr. David Plastino on behalf of the Plaintiffs, Dr. Maureen Chakraborty on behalf of the Defendants, Dr. Susan Tierney on behalf of the Defendants, Mr. John Young on behalf of the Defendants, Ms. Julia Frayer on behalf of the Committee, and Mr. Scott Martinez on behalf of the Committee.[10]

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[9] BlackRock Advisors, LLC and BlackRock Financial Management, Inc. (together "BlackRock") filed a reservation of rights with respect to the current proposed PREPA Plan. (Docket Entry No. 3700 in Case No. 17-4780.) BlackRock purports to reserve its right to argue that, if the claim is estimated at less than full face value plus interest, certain 2016 Bonds it holds should, by virtue of PREPA's financial distress at the time they were issued, be analogized to postpetition Debtor-in-Possession financing and, through application of the Court's equitable powers, be granted priority and paid in full, even if the other outstanding PREPA Bonds are not. The Court makes no limitation on its claim estimation ruling to accommodate this purported reservation of rights and notes that, in submissions raising this argument for consideration at the 502 Hearing that were later withdrawn, BlackRock had identified no legal authority or contractual basis for the treatment it sought. (See Docket Entry No. 204.)

[10] The Plaintiffs filed the *Declaration of David Plastino* (Docket Entry No. 282-1) (the "Plastino Declaration"). The Defendants filed the following declarations: *Direct Testimony Expert Declaration of Maureen M. Chakraborty, Ph.D.* (Docket Entry No. 245-1) (the "Chakraborty Declaration); and Direct Testimony Expert Declaration of Susan Tierney, Ph.D. (Docket Entry No. 245-2) (the "Tierney Declaration"). The Committee filed the following declarations *Declaration of Julia Frayer Pursuant to Order Regarding Procedures for the June 6-8, 2023 Claim Estimation Hearing* (Docket

## II.

## DISCUSSION

Section 502(a) of the Bankruptcy Code provides that: "A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C.A. § 502(a) (Westlaw through P.L. 118-6).

Section 502(b) of the Bankruptcy Code provides that, subject to certain exceptions, if an objection to the claim is lodged: "the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount . . . ." Id. § 502(b).

Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section—
>
> > (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
> >
> > (2) any right to payment arising from a right to an equitable remedy for breach of performance.

Id. § 502(c).

### A. Applicable Law

#### 1. Procedures for Conducting a Claim Estimation Hearing Under Section 502(c) of the Bankruptcy Code

The Court's estimation methodology follows from the conclusions reached in the Summary Judgment Order and the Court's subsequent guidance, reproduced in relevant part above. In brief, the system revenues from which PREPA has pledged to repay the Bonds are

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Entry No. 243-1) (the "Frayer Declaration") and *Declaration of Scott R. Martinez Pursuant to Order Regarding Procedures for the June 6-8, 2023 Claim Estimation Hearing* (Docket Entry No. 243-2) (the "Martinez Declaration).

collectable only through certain subaccounts (a "Sinking Fund" and certain other funds) in which PREPA has given a security interest, those accounts are funded only after the payment of certain other obligations and expenses, and the Bondholders would have to use the equitable remedies of specific performance and appointment of a receiver in accordance with the Trust Agreement and statutory provisions (significantly, the Puerto Rico Electric Power Authority Act, Act No. 83-1941, codified at 22 L.P.R.A. §§ 191-240) to enforce PREPA's unsecured covenants to pay the Bondholders the net revenues in accordance with the payment provisions of the Trust Agreement. To estimate these rights to payment under Section 502(c) of the Bankruptcy Code, the Court considered evidence as to types and projections of future revenues and of other calls on the waterfall that would reduce the amounts payable to the accounts from which the Bondholders have a right to be paid, in order to arrive at an estimation of the Estimation Date value of the amounts likely to be available for Bondholder payment through these mechanisms.

Courts have recognized that "neither the Code nor the Federal Rules of Bankruptcy Procedure provides any procedures or guidelines for estimation, and a bankruptcy court has wide discretion in accomplishing it." In re Chemtura Corp., 448 B.R. 635, 648 (Bankr. S.D.N.Y. 2011) (internal citations omitted). "In estimating a claim, the bankruptcy court should use whatever method is best suited to the circumstances." Addison v. Langston (In re Brints Cotton Mktg., Inc.), 737 F.2d 1338, 1341 (5th Cir. 1984) (internal cites and quotation omitted). Courts may employ a variety of means, including a "summary trial, a full-blown evidentiary hearing, or the review of pleadings and briefs followed by oral argument of counsel," In re AMR Corp., Case No. 11-15463 (SHL), 2021 WL 2954824, at *4 (Bankr. S.D.N.Y. 2021) (collecting cases), and have specifically recognized that it is often "inappropriate to hold time-consuming proceedings which would defeat the very purpose of 11 U.S.C. § 502(c)(1) to avoid undue

delay." In re Adelphia Bus. Sols., Inc., 341 B.R. 415, 432 (Bankr. S.D.N.Y. 2003) (citation omitted). See also In re Lionel L.L.C., 2007 WL 2261539, at *5 (Bankr. S.D.N.Y. Aug. 3, 2007). "Thus, a truncated process under Section 502(c) 'has been found to be consistent with the dictates of due process of law.'" In re AMR Corp., 2021 WL 2954824, at *4 (internal citations omitted).

Here, the Court solicited input from the parties (see, e.g., Docket Entry Nos. 162, 163) and adopted a process similar to the parties' proposals with briefing, discovery, and a three-day hearing including oral argument and cross-examination, with few restraints on what the parties could argue or present. (See, e.g., Docket Entry No. 168.) The Court considered carefully each of the submissions and observed the demeanor and evaluated the credibility of the testifying witnesses.

2. The Burden of Proof in a Claim Estimation Hearing Under Section 502(c) of the Bankruptcy Code

Because the estimation of a claim is situated within the claim objection process, some courts have looked to the burden of proof that governs the claim objection process when addressing parties' burden of proof in estimation.[11] See, e.g., In re Loucheschi LLC, 471 B.R. 777, 779 (Bankr. D. Mass. 2012); In re FRG Ltd. P'ship, 121 B.R. 451, 456 (Bankr. E.D. Pa. 1990) (in holding that the allocation of the burden of proof in estimating a Rule 3018(a) claim allowance is the same as in deciding objections to proofs of claim, the court stated that "[w]e cannot imagine any reason for allocating the burdens of proof differently in a proceeding to estimate claims than in a proceeding to finally determine the merits of a proof of claim. The

[11] The Court notes that burden of proof has not been addressed specifically in most estimation cases, and it is not clear that the Court has to address evidentiary burden at all in the context of an estimation hearing where the prediction of hypothetical outcomes is committed to the Court's discretion.

estimation process is merely a microcosm of the ordinary claims-determination process."); In re Benanti, No. 15-71018, 2018 WL 1801194, at *6 (Bankr. C.D. Ill. Apr. 13, 2018) (holding that "the allocation of the burdens of proof in a proceeding to estimate a contingent claim [under section 502(c)] is the same as a proceeding to determine the allowability of a claim."). The First Circuit has held that, in order to successfully challenge the prima facie validity of a proof of claim, the objecting party must proffer "substantial evidence." In re Hemingway Transp., Inc., 993 F.2d 915, 925 (1st Cir. 1993); see also In re Nelson, 621 B.R. 542, 553 (B.A.P. 1st Cir. 2020). Thus, for purposes of this estimation, the Plaintiffs were required, in the first instance, to present substantial evidence "to overcome the presumption of validity" of the Bondholders' claim that they are entitled to the full outstanding amount of the Bonds plus prepetition interest in order to shift the burden to the Bondholders to "prove [their] claim." In re Loucheschi LLC, 471 B.R. at 779.

Here, the Plaintiffs, in their evidentiary submissions and presentation in connection with the hearing, presented substantial evidence sufficient to meet their burden of rebutting through expert testimony the prima facie validity of Bondholders' claim that they are entitled to allowance of the Unsecured Net Revenue Claim in the full face value amount of the outstanding Bonds plus outstanding prepetition interest, shifting the burden back to the Bondholders in the estimation proceeding. See In re Benanti, 2018 WL 1801194, at *1. The Court credits the testimony of the Oversight Board's expert Mr. David Plastino and his estimation approach, including the assumptions he applied in reaching his opinion. Mr. Plastino has credibly predicted both that the net revenues which could be available to pay on the Bonds would be substantially less than predicted by the Bondholders' expert and that significant risks could have existed creating obstacles for a receiver seeking to maximize funds available for debt

service, including immediate needs to make capital expenditures on infrastructure to keep PREPA operating and generating revenues well into the future. The Bondholders "therefore had the burden of proving the validity" of their claims by a "preponderance of the truncated evidence presented at the hearing."[12] In re FRG Ltd. P'ship, 121 B.R. at 456. "Generally, a preponderance of the evidence is that evidence which is of greater weight or more convincing." In re Empresas Omajede Inc., 537 B.R. 63, 92 (Bankr. D.P.R. 2015) (internal citations omitted). It was ultimately the Bondholders' "burden to prove the amount of [their] claim in the face of evidence calling it into question." In re Benanti, 2018 WL 1801194, at *12.

3. Applicable Legal Standard for Estimation of a Claim Under Section 502(c) of the Bankruptcy Code

(a) Standards

"The goal of estimation is to reach a **reasonable valuation of the claim as of the date of the bankruptcy filing**." In re Texans CUSO Ins. Grp., LLC, 426 B.R. 194, 204 (Bankr. N.D. Tex. 2010) (emphasis added) (citing Owens Corning v. Credit Suisse First Bos., 322 B.R. 719, 721-22 (D. Del. 2005)). In Bittner v. Borne Chem. Co., Inc., the Third Circuit held that, "Where there is sufficient evidence on which to base a reasonable estimate of the claim, the

[12] The Bondholders, at the 502 Hearing, argued that the Plaintiffs are relying on affirmative defenses, and thus the burden of proof as to these defenses lies with the Plaintiffs. (See June 6 Tr. 17:23-20:18). The Bondholders are correct that, to the extent an objecting party bases an objection to the claim on an affirmative defense, the objecting party carries the burden of proof. See In re Bavelis, 490 B.R. 258, 308 (Bankr. S.D. Ohio 2013). However, unlike in the cases cited by the Bondholders, which did not involve claim estimation, the Plaintiffs are not relying on affirmative defenses to defeat the claim in its entirety; rather, the Plaintiffs make arguments (as do the Bondholders) as to how any relevant statute of limitations and the like should be considered in this estimation proceeding to appropriately value the claim, not to expunge it. The Court therefore holds that, notwithstanding the questions of law presented to the Court by virtue of arguments made by both parties, the burden of persuasion is with the Bondholders and the affirmative defense burden does not apply here.

bankruptcy judge should determine **the value**. In so doing, the court is bound by the legal rules which may govern **the ultimate value of the claim**. For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law. . . . However, there are no other limitations on the court's authority to evaluate the claim save those general principles which should inform all decisions made pursuant to the [Bankruptcy] Code." 691 F.2d 134, 135 (3d Cir. 1982) (emphasis added) (internal citation omitted). State law generally governs, and "claims are to be **valued** as of the petition date." Owens Corning, 322 B.R. at 721-22 (emphasis added).

Bankruptcy courts have wide discretion in estimating claims. See In re Chemtura Corp., 448 B.R. 635, 648 (Bankr. S.D.N.Y. 2011); In re Windsor Plumbing Supply Co. Inc., 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994) ("In determining exactly how to estimate the value of a claim, the bankruptcy court has broad discretion."); In re Woodruff, 600 B.R. 616, 637 (Bankr. N.D. Ill. 2019) ("[W]hile the estimation of a contingent claim is a fact intensive analysis, the manner in which that analysis is done is generally left to the discretion of the court."). "The court need not don the garb of the clairvoyant; rather, all that is required is a rough estimate." In re Thomson McKinnon Sec., Inc., 191 B.R. 976, 989 (Bankr. S.D.N.Y. 1996). "An estimate necessarily implies no certainty; it is not a finding or a fixing of an exact amount. It is merely the court's best estimate for the purpose of permitting the case to go forward and thus not unduly delaying the matter." In re Windsor Plumbing Supply Co., Inc., 170 B.R. at 521 (quoting In re Nova Real Estate Inv. Tr., 23 B.R. 62, 66 (Bankr. E.D. Va. 1982)). Courts do not need to make traditional findings of fact in connection with estimation hearings. See In re Chemtura Corp., 448 B.R. at 640. "An estimator of claims must take into account the likelihood that each party's version might or might not be accepted by a trier of fact. The estimated **value** of a claim is then

the **amount** of the claim diminished by probability that it may be sustainable only in part or not at all." Id. at 648.

(b) Amount vs. Value

The Bondholders argue that it is inappropriate for the Court to discount their claim to present value. Their argument is based upon In re Oakwood Homes Corp., wherein the Court of Appeals for the Third Circuit held that Bankruptcy Code section 502(b)'s direction to "determine the amount" of objected-to claims "as of the date of the filing of the petition" does not require that all claims involving a stream of payments be discounted to present value. (Defs. 502 Br. ¶ 58 (citing 449 F.3d 588, 600-01 (3d Cir. 2006)).) They point out that, in Oakwood, the Third Circuit "noted that this language was ambiguous in light of the use of the word 'amount' rather than 'value.' '[W]here the Bankruptcy Code intends a court to discount something to present value, the Code clearly uses the term 'value, as of' a certain date.'" (Defs. 502 Br. ¶ 58 (citing 499 F.3d at 597).) The Bondholders argue that the amount of their claim is properly set at the face value of the outstanding Bond obligations (without future interest, as provided by section 502(b)(2) of the Bankruptcy Code) plus interest on the Bonds due and owing as of the July 3, 2017 Estimation Date, that, accordingly, the section 502(b)(2) disallowance of unmatured postpetition interest constitutes a reduction of the claim to present value, and that to further discount the claim to reflect the time value of the future stream of payments on the Bonds would constitute a forbidden double-discounting. The Bondholders point to the Third Circuit's statement that: "[W]hether a court applies § 502(b)(2) to disallow unmatured interest, or discounts the entire amount (i.e., principal plus interest) to present value—as long as the court performs only one such operation and not both, the result is the same." Oakwood, 499 F.3d at 600.

The concept is sound, but the Bondholders' application of it in this instance misapprehends this Court's guidance on how the claim is to be valued. With respect to the use of the words "amount" vs. "value," the Bondholders argue that the allowed amount of a debt-bearing instrument should be (can only be) the "full face amount" of unpaid debt. However, in the Summary Judgment Order, the Court did not hold that, based upon the terms of the Trust Agreement, the Bondholders have a claim amounting to the full face amount of the Bonds. As can be seen in the Court's guidance to the parties, substantially reproduced above, the Court held that "the Defendants have recourse as to any deficiency in the form of a general unsecured claim under section 101(5)(b) of the Bankruptcy Code[13] arising from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance," which "equitable claim reduced to payment arising from the Trust Agreement must have no greater value than the value that could be achieved through the application of the equitable remedies to fulfill the Trust Agreement's unsecured covenant to pay the Bonds from the Net Revenues of the System." (Summary Judgment Order at 60, 65-66.) Further, the 502 Hearing Order explained that "the Court rejects Defendants' contention that estimation of the Unsecured Net Revenue Claim under section 502(c)(2) is unnecessary, as well as Defendants' contention that the proper measure of the Unsecured Net Revenue Claim is the face value of the Bonds." (502 Hr'g Order ¶ 4.)

Counsel for the Bondholders correctly recognized that the Summary Judgment Order did not "make the bonds disappear." (June 8 Tr. 76:4-5.) Nor, by defining the claim entirely by what could be collected through the equitable remedies and collection waterfall

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[13] Section 101(5)(B) provides: "The term "claim" means— . . . (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C.A. § 101(5)(B) (Westlaw through P.L. 118-6).

provided by the Trust Agreement, did the Court in any way purport to render the Bonds irrelevant. As stated by counsel to the Committee at the 502 Hearing, the Unsecured Net Revenue Claim "results from the exercise of equitable remedies": "[The Bondholders'] right to payment is not the amount of principal and interest on the bond, but, as your Honor has said, it's the value of a future stream of cash flows represented by net revenues that might be generated by PREPA." (June 8 Tr. 138:5-10.)

In other words, the value of the claim is calculated by reference to, and is capped by, the face amount of the financial undertaking in the Trust Agreement (subject to the unmatured interest limitation of section 502(b)(2) of the Bankruptcy Code), but its basis is the cumulative amount of payments the Court estimates could be recovered over time by the Bondholders through a receiver's efforts to effectuate specific performance of PREPA's undertaking to pay. The Court estimates the economic value, as of the Estimation Date, of that future stream of payments in determining the estimated value of the Unsecured Net Revenue Claim. That estimate will constitute the operative amount of the claim for purposes of these Title III proceedings.

(c) Valuation as of the July 3, 2017 Estimation Date

Certain opinions, briefs, and plans of adjustment (including the current proposed PREPA Plan) have perhaps not in practice observed the clear distinctions between "amount" and "value" drawn by the Third Circuit, while others have drawn certain distinctions. An earlier Third Circuit holding, in Bittner v. Borne Chem. Co., stated that at an estimation proceeding the "bankruptcy judge should determine the value" of the claim. 691 F.2d at 135. The Bankruptcy Court for the Southern District of New York held that an estimation determines the "estimated value of a claim" which is the "amount of the claim diminished by probability that it may be sustainable only in part or not at all." In re Chemtura Corp., 448 B.R. at 648. Most helpfully,

the Honorable Barbara J. Houser, then the Chief Judge of the Bankruptcy Court for the Northern District of Texas, has put forward the following definition, which the Court adopts as its goal in the estimation process: "**a reasonable valuation of the claim as of the date of the bankruptcy filing**." In re Texans CUSO Ins. Grp., LLC, 426 B.R. at 204 (emphasis added).

(d) No Double-Discounting

As explained above and in the Summary Judgment Order, the Unsecured Net Revenue Claim will be determined by quantifying the cumulative amounts of net revenues that the Court estimates could be channeled through the Sinking Fund and Specified Funds through use of the equitable remedies provided for under the Trust Agreement. Because the revenue stream would necessarily be paid out over time, the Court will also apply an appropriate present value factor in determining the estimated value of the Unsecured Net Revenue Claim. The Bondholders are correct that it would be improper to impose a double discount by present-valuing a claim whose amount is determined solely by the terms of an interest-bearing debt instrument whose unmatured interest has already been disallowed pursuant to section 502(b)(2) of the Bankruptcy Code. The Court takes this concern very seriously and has considered carefully the Bondholders' argument that discounting for present value as part of the process of quantifying the Unsecured Net Revenue Claim would constitute double-counting. However, the concern is inapposite here. With respect to valuing the Unsecured Net Revenue Claim, the Bondholders confuse their theory of their claim with the claim as defined by the Summary Judgment Order and the Court's subsequent statements as to the nature of the estimation process, as quoted above.

As explained above, the Unsecured Net Revenue Claim will be valued based upon an estimated revenue stream. That revenue stream is not determined by the face value of the

Bonds and a stated interest rate.[14] Accordingly, to avoid a windfall to the Bondholders, the application of a present value factor to the projected future net revenue stream is appropriate.

4. Choice of Law and Relevance of Statutes of Limitations

(a) New York vs. Puerto Rico Law

The parties disagree as to whether New York or Puerto Rico law governs the equitable remedies provided by the Trust Agreement. Section 804 of the Trust Agreement (Enforcement of remedies) provides that the Trustee may enforce its rights and the Bondholders' rights under applicable laws or under the Trust Agreement by "such suits, actions or special proceedings" either for "the appointment of a receiver as authorized by the Authority Act or for the specific performance of any covenant or agreement contained" in the Trust Agreement. (TA § 804.) The Oversight Board, citing section 1301 of the Trust Agreement, argues that these remedies are governed by New York law. (See June 6 Tr. 51:15-20, 52:13-17, 53:18-20; FOMB 502 Br. ¶ 23.) Section 1301 provides that: "The laws of the Commonwealth of Puerto Rico shall govern the construction of this [Trust] Agreement, except that the rights, limitations of rights, immunities, duties and obligations of the Trustee shall be governed by the laws of the State of New York."

The Oversight Board argues that section 1301 should be read to mean that the

[14] With this in mind, the Bondholders' argument that the claim is not contingent because there is no dispute as to liability or amount (the amount being the full face value of the claim), is inapposite. (Defs. 502 Br. ¶ 52.) The Bondholders' arguments might pertain to a circumstance where the amount of the claim was set by the Court at face value. Here, however, Court has stated clearly that it is not estimating the claim under section 501(c)(1) of the Bankruptcy Code (estimating a contingent claim), but instead under section 501(c)(2) (right to payment arising from equitable remedies). Accordingly, the value of the estimated claim is entirely determined by the contingencies that would reasonably affect the ability of PREPA or a receiver to generate and pay over net revenues, which, when run through the payment waterfall of the Trust Agreement, would be rendered collateral upon deposit into the Sinking Fund and Specified Funds.

Trustee's remedies are governed by New York law. (See June 6 Tr. 51:15-20, 52:13-17, 53:18-20; FOMB 502 Br. ¶ 23.) Under New York law, a money judgment is a prerequisite to obtaining a receiver, and money judgments are presumed to be paid and satisfied after the expiration of twenty years after the last written acknowledgment or voluntary payment made by the judgment creditor. See N.Y. C.P.L.R. §§ 211(b), 5228. The Oversight Board contends that receiver-directed payments through the waterfall provisions would not constitute written acknowledgements or voluntary payments by PREPA, and therefore that a receiver would remain in place for no more than twenty years. (See June 6 Tr. 69:12-19; FOMB 502 Br. ¶ 23 n.10.) The Bondholders argue, among other things, that section 1301 selects New York law to govern only the Trustee's obligations as a trustee and the Trustee's protections against liability in carrying out such obligations, and that Puerto Rico law governs the rights and obligations of the parties, including the appointment and powers of a receiver. (See June 6 Tr. 63:16-25, 64:1; Defs. Resp. ¶ 14.) The Court finds the Bondholders' arguments more persuasive for the following reasons.

Because the laws of Puerto Rico govern the construction of the Trust Agreement, the Court must look to Puerto Rico law when interpreting the contractual terms of the Trust Agreement. Article 1233 of the Puerto Rico Civil Code provides that, "[i]f the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed. If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail." 31 L.P.R.A. § 3471. The Court finds the language of section 1301 to be clear in stating that Puerto Rico law governs the parties' rights and remedies in enforcing the terms of the contract and that New York trustee law governs the Trustee's rights and obligations as a trustee.

To the extent that the section is considered ambiguous, the same interpretation would result. When construing a contract under Puerto Rico law, the stipulations "should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together." 31 L.P.R.A. § 3475; see also Rishell v. Med. Card Sys., Inc., 982 F. Supp. 2d 142, 153 (D.P.R. 2013); Entact Servs., LLC, 526 F. Supp. 2d 213, 221-22 (D.P.R. 2007). In light of the Trust Agreement's various references to the Authority Act, particularly in section 804, which speaks of the appointment of a receiver "as authorized by the Authority Act," even if the stand-alone meaning of section 1301 were unclear, section 1301's language read in the context of the agreement as a whole points to its invocation of New York law as governing only the rights, limitations of rights, immunities, duties and obligations of the Trustee in that capacity. Thus, the Court holds that Puerto Rico law governs the equitable remedies provided by the Trust Agreement and rejects the Oversight Board's contention that New York law imposes procedural and temporal limits on the projected revenues that can be taken into consideration in estimating the value of the Unsecured Net Revenue Claim.

(b) Puerto Rico Statute of Limitations

The Oversight Board also argues that, if Puerto Rico law governs the PREPA-Bondholder relationship, 31 L.P.R.A. section 5294, in light of the case F.D.I.C. v. Talleres Industriales De P.R., supplies a fifteen-year statute of limitations for both bringing an action and enforcing an action, including equitable actions, that would apply to the duration of an order appointing a receiver. (See June 6 Tr. 54:15-21, 55:9-11, 56:9-18; FOMB 502 Br. ¶ 25 (citing Civ. No. 87-1484(JP), 1994 WL 577882 (D.P.R. Oct. 18, 1994).) The Oversight Board therefore argues that a receiver's appointment could last for no more than fifteen years. The Bondholders, on the other hand, argue that 31 L.P.R.A section 5294 only governs the time to commence an

enforcement action, and that it has nothing to do with the duration of a receiver's power to set and collect rates once appointed. (See June 6 Tr. 65:22-25, 66:1-3; Defs. Resp. ¶ 16.) The Bondholders contend that 22 L.P.R.A section 207 allows a receiver to remain in place until all amounts due on the Bonds are paid. (See June 6 Tr. 39:19-21, 41:1-5, 13-14, 44:8-17, 65:19-24; Defs. Resp. ¶ 16.)

The Court is not persuaded by the Oversight Board's argument that section 5294 imposes a strict fifteen-year time limit on the duration of a receivership. Indeed, the Court has found, and the parties have cited, no legal basis for the proposition that an order under 22 L.P.R.A section 207 appointing a receiver would require a money judgment triggering the applicability of 31 L.P.R.A section 5294. Thus, as Puerto Rico supplies the substantive law governing the estimation of the claim, no party has identified a statute of limitations that specifically limits the potential duration of a receivership.

B. Estimating the Unsecured Net Revenue Claim

1. Defining the Unsecured Net Revenue Claim

After hearing extensive argument from all parties on how to properly define the Bondholders' claim, the Court defines the Unsecured Net Revenue Claim for the purposes of estimation as the Bondholders' right to payment in an amount equal to the present value, as of the Estimation Date, of the future revenues (net of operating and other expenses properly payable before service of the Bond debt) that a receiver could reasonably and foreseeably have directed to the Sinking Fund and Specified Funds in carrying out specific performance of PREPA's undertakings, set forth in the Trust Agreement, as to the application of System Revenues.

Here, both the Oversight Board and the Bondholders undertook to project net revenues that would become available over time, beginning from the July 3, 2017 Estimation Date and looking forward, for application to the reduction of the outstanding Bond debt through

the specific Funds in which the Bondholders have a security interest. Mr. Plastino and Dr. Chakraborty utilized competing methodologies to calculate the projected incremental revenue a receiver could reasonably raise by charging rate increases to residential, commercial, and industrial customers. In particular, Dr. Chakraborty's calculation was based on a volumetric charge rate using a load forecast model created by Dr. Susan Tierney. The load forecast model contemplated various factual assumptions and data points to determine the earliest available year when the Unsecured Net Revenue Claim could be paid in full. Mr. Plastino's model was based on a formula that used a fixed charge rate to determine rate increases that all customers would pay over time. Mr. Plastino created system analyses that include calculations from FY 2018-2118 (100 years) (Plastino Decl. Ex. A, App. 3-1) and Dr. Chakraborty created system analyses that included calculations from FY 2018-2069 (51 years) (Chakraborty Decl. Ex. C6A).

2. Scope of Equitable Remedies Under the Bonds

At the 502 Hearing, the Bondholders' expert Dr. Chakraborty stated that she extended her analysis for fifty-one years because it would "theoretically capture the length of a term of a long-term bond." (June 7, 2023 Hr'g Tr. 128:21.) Of course, under each of the several scenarios Dr. Chakraborty presented, the Bonds were fully paid within that time. (June 7 Tr. 128:25-129:2.) Dr. Chakraborty acknowledged that the Bonds were trading at a high yield-to-maturity of 10.3% as of July 2017 because of the market's assessment of a heightened risk of non-payment, but disagreed with using this yield-to-maturity as a present value discount rate in the estimation process in the absence of an adjustment for the expected risk of default to properly reflect the cost of capital; instead, Dr. Chakraborty added together the yield as of 2017 on a BAA-rated bond and a "risk premium to reflect the fact that under receivership, the credit rating of PREPA would be higher than a BAA-rated bond[,]" arriving at a 5.05% discount rate. (June 7

Tr. 100:5-14, 108:1-15.)[15] Despite the nuances and perhaps philosophically divergent views expressed with respect to the use of yield-to-maturity for discounting or not in this instance,[16] it appears more likely that Dr. Chakraborty's disagreement with factoring the risk of default into the discount rate for the Bonds stems from her assumption that full payment on the Bonds was an inevitability.

Dr. Chakraborty's assumption of predictable full payment appears to rest to a significant extent on predicate assumptions that (a) appointment of a receiver would have been an inevitability, and (b) a receiver in Puerto Rico would be not be bound by constraints imposed on PREPA by the Authority Act, including the requirement to charge "just and reasonable rates" and to bring rate cases before the Puerto Rico Energy Bureau ("PREB") for approval. See, e.g., 22 L.P.R.A. § 196. Her starting point was based not upon an analysis of the Bonds and the realities faced by Puerto Rico that would have affected collection on the Bonds, but rather the instruction of counsel "to assume that the receiver would be able to raise rates" without functional constraint. (June 7 Tr. 97:24-98:4, 99:14-20.) The failure to account for contingencies that could impede collection undermines all of the Bondholders' projections.

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15 Mr. Plastino arrived at his proposed present value discount rate by considering the cost of debt for several other regulated mainland electric utilities. (See Plastino Decl. Ex. A ¶ 28.) While Mr. Plastino described this comparison as yielding a "conservatively low" rate, Ms. Frayer persuasively argued that both experts' proposed rates were inappropriately low for valuing the claim, based upon her "last two and a half decades working on these issues, and knowledge of what is appropriate for cost-to-capital for an island utility, for what kind of returns investors might be able to get in lieu of investing in an instrument that's composed of these types of risky cash flows[.]" (June 7 Tr. 194:24-195:4.)

16 The Court also puts aside the parties' dispute as to whether Dr. Chakraborty arrived at her calculations by referencing data that was only available in 2023. (See, e.g., June 7 Tr. 100:21-101:19.)

(a) Swift and Unbridled Appointment of a Receiver Was Not Inevitable as of the Estimation Date

Responding to the Court's guidance, the parties have proposed valuations of the equitable remedies for specific performance available under the Trust Agreement. The Bondholders and Oversight Board have both assumed the swift appointment of a receiver as an inevitability, but have not convinced the Court that this would necessarily be the case. A receiver would not be appointed in a vacuum without any opposition or litigation, and the Court explicitly instructed the parties to account for the impact of actual foreseeable risks and impediments arising from "any relevant bankruptcy and nonbankruptcy law on the estimation of the claim." (Denial Order at 4.) The Committee and its expert Ms. Frayer have pointed to several of these contingencies, as has AAFAF. The extreme and unlikely speed with which the Oversight Board accounts for a receiver's appointment was assumed by the Oversight Board in order to give the Bondholders the benefit of the doubt wherever possible (FOMB 502 Br. ¶ 27), but the Committee, UTIER, and SREAEE have aptly noted that the benefit of the doubt in equity is not deserved where the Bondholders assert that their desired receiver would not be bound by equitable restraints and considerations. As explained below, the Court has, in reaching its estimate, taken into account a factor that recognizes the risk that the parties' experts' assumptions that a receiver could be in place and channeling the projected net revenue amounts into Bondholder payments within as little as twelve to eighteen months could be, in a word, wrong.

(b) A Receiver Would Have No Greater Powers than PREPA

Further, and importantly, a receiver would operate subject, once appointed, to legal constraints. It would not have, as the Committee characterized them, "superpowers"—instead, as stated by counsel to the Oversight Board and AAFAF, a receiver would step into the

shoes of PREPA and have "no greater powers" but would instead be "bound by the same laws and agreements as PREPA" and would have "to live as AAFAF has and as the government has in applicable non-bankruptcy law under the Board." (June 6 Tr. 28:2-3, 94:13-14.)

In the Summary Judgment Order, the Court, acknowledging the terms of the Authority Act, stated that a receiver could charge only "reasonable" rates (Summary Judgment Order at 60), but the Bondholders have read this statement out of the Order as something the Court "posited" or "suggested." (Defs. 502 Br. ¶¶ 34, 42.) Alternatively, the Bondholders read the requirement to set "just and reasonable" rates solely to mean rates sufficient to pay their debts and read out any responsibility to the citizenry. (Defs. 502 Br. ¶ 34 n.6 (asserting a "lack of legal impediments to the receiver increasing rates as necessary to pay the debt").) The Court now states clearly, for the avoidance of doubt, that, if appointed pursuant to 22 L.P.R.A. § 207, a receiver would be subject to the rest of the Authority Act, including section 196 thereof, which includes no exceptions relating to the party in control of PREPA's operations and provides that:

> [PREPA] shall offer and provide services at the lowest reasonable cost, through **just and reasonable rates**, consistent with sound fiscal and operational practices that provide for a reliable, adequate, and nondiscriminatory service that is consistent with the protection of the environment, as well as nonprofitable, and focused on citizen participation and its customers. . . . .
>
> **Its undertakings as a public corporation shall be characterized by** efficiency, the promotion of renewable energy use, energy conservation, and efficiency, excellence in customer service, and the **conservation and protection of the economic and environmental resources of Puerto Rico**. PREPA shall be responsible for acting consistent with the public policy on energy of the Commonwealth of Puerto Rico, the public interest, and for **complying with all the applicable rules and regulations of the Energy Commission and CEPPO**. . . . . **PREPA shall be required to coordinate any necessary efforts with the Commission, CEPPO, and any other entity or person to achieve the purposes of §§ 191-217 of this title and of any statute related to the public policy on energy of Puerto Rico** . . . .

> The remedies available by law to require the Authority's compliance with the mandates of §§ 191-217 of this title, the well-being of Puerto Rico, and the protection of customers shall not be limited in any way. [PREPA] is hereby granted and shall have and may exercise all rights and powers necessary or convenient to carry out the aforementioned purposes, including (but without limiting the generality of the foregoing) the following: . . . .
>
> (d) complete control and supervision of any undertaking built or acquired by it, including the power to determine the nature of and the need to incur all expenditures and the manner in which such expenditures shall be incurred, authorized, and defrayed; Provided, **That all actions of PREPA's management and employees and its Governing Board shall be subject to the provisions of the Government Ethics Act, and its highest fiduciary duties with the People of Puerto Rico**. . . . .
>
> **(l) PREPA shall be responsible for providing reliable electric power, contributing to the general well-being and sustainable future of the People of Puerto Rico, maximizing benefits, and minimizing the social, environmental, and economic impact. It shall offer and provide services at the lowest reasonable cost, through just and reasonable rates, consistent with sound fiscal and operational practices that provide for a reliable, adequate, and nondiscriminatory service that is consistent with the protection of the environment, as well as nonprofitable, and focused on citizen participation and its customers.**

22 L.P.R.A. § 196 (emphasis added).

The Bondholders argue that, under section 207 of the Authority Act, an appointed receiver of PREPA's undertakings that "enter[s] into and take[s]" control of such undertakings "deems" what is "reasonable," to the exclusion of any other limitations in the Authority Act simply because a receiver would be appointed pursuant to "a different section of the Authority Act[.]" (Defs. 502 Br. ¶ 42, 44.) This is a misreading of the statute; there is nothing in the text of the Authority Act that exempts a receiver acting in PREPA's stead from PREPA's mandates under the Authority Act and the Bondholders have presented no reasonable argument that a Puerto Rico court would attempt to abrogate such fundamental obligations of PREPA in any

order appointing a receiver. The relevant portion of the Authority Act's receivership provision provides in pertinent part that, following appointment of a receiver of the undertakings:

> (b) **The receiver so appointed shall** forthwith, directly or by his agents and attorneys, enter into and upon and **take possession of such undertakings** and each and every part thereof, and may exclude the Authority, its Board, officers, agents, and employees and all persons claiming under them, wholly therefrom **and shall** have, hold, use, operate, **manage**, and control the same and each and every part thereof, **and, in the name of the Authority or otherwise, as the receiver may deem best, shall exercise all the rights and powers of [PREPA] with respect to such undertakings as [PREPA] itself might do**. Such receiver shall maintain, restore, insure, and keep insured, such undertakings and from time to time shall make all such necessary or proper repairs as such receiver may deem expedient, **shall establish, levy, maintain, and collect such rates, fees, rentals, and other charges in connection with such undertakings as such receiver may deem necessary, proper and reasonable**, **and shall collect and receive all income and revenues and deposit the same in a separate account and apply the income and revenues so collected and received in such manner as the court shall direct**.

22 L.P.R.A. § 207(b) (emphasis added).

The receivership remedy provided by the Authority Act is a powerful tool, certainly. But any receiver would be constrained to manage and control PREPA's undertakings "as the Authority itself might do" and apply income and revenues in such manner as an appointing "court shall direct[.]" Id. The Bondholders have provided no legal basis for their contention that the equitable considerations, requirements to set the lowest reasonable cost, and fiduciary duties established by the Authority Act would not bind the receiver as well.

Finally, the Bondholders suggest that the distinction is without a difference because, under Dr. Chakraborty's calculations, and because it is improper for the Court to consider anything except the unimpeded best-case scenario, PREPA will be creating a remarkable excess of net revenues within a few years. (See, e.g., Defs. 502 Br. ¶ 34 n.6.) As explained below, the Court finds Mr. Plastino's methodology persuasive. Nor does the Court

find credible the Bondholders' hypothesis that a receiver would immediately have been able to revolutionize PREPA and achieve never-before-seen synergies. And, as explained above, the Bondholders' assumption that the existence of equitable duties would be immaterial to a court appointing a receiver in equity is erroneous.

(c) A Receiver Would Have Faced Extreme and Possibly Successful Opposition Were it to Attempt to Proceed as the Bondholders Contemplate

The Court instructed the parties "to address the impact of the Trust Agreement, economic projections, relevant contingencies, and **any relevant bankruptcy and nonbankruptcy law** on the estimation of the claim." (Denial Order at 4 (emphasis added).) The parties were free, even after the Court provided subsequent guidance, to argue that different factors should predominate, and the Court did not foreclose any argument to that effect.

However, at the 502 Hearing, the Bondholders not only denied, at least some of the time, that a receiver would be required to behave equitably, but stated, incorrectly, that the Court had directed the parties that the existence of PROMESA should not be considered when estimating the claim. (June 8 Tr. 72:14-20 ("It is clearly not what the Court had in mind when it set up this estimation hearing, and so we need to treat this estimation as if PROMESA did not exist and as if the Board did not exist. We are supposed to look at what a receiver would be able to accomplish in a non-bankruptcy environment with respect to the collection of net revenues under the trust agreement. That is our mission here.").) Counsel to Assured stated: "This is about what a receiver, acting under the trust agreement, would have been able to accomplish without the Board being around." (June 8 Tr. 80:11-13.)

But the Oversight Board was around, and PROMESA, enacted well in advance of the July 3, 2017 Estimation Date, is a relevant law that would have affected what rates could have been charged and net revenues collected thereafter.

The Bondholders have also urged the Court to ignore efforts that would have certainly been undertaken under Act 2-2017, the law authorizing AAFAF to enforce compliance with fiscal plans enacted by the Oversight Board, characterizing any potential such legal challenges as "lawless behavior." (June 8 Tr. 124:24.) As counsel to AAFAF noted at the 502 Hearing: "when you get the receiver in place, the receiver steps into the shoes of PREPA, no greater powers. What does that mean? That means the receiver has to live as AAFAF has and as the government has in applicable non-bankruptcy law under the Board. And the Board gets to set a budget every year." (June 6 Tr. 28:1-6.) The Court notes, in addition, that many unsuccessful attempts have been made to evade compliance with the Oversight Board's certified fiscal plans. Several other legal risks were discussed that the Court cannot ignore, including the effect of a prepetition moratorium act,[17] which, by limiting dedication of funds, might have crippled the channeling of net revenues, the only revenues to which the Bondholders are entitled, into payment accounts in accordance with the Trust Agreement. (FOMB Resp. ¶ 32.) Importantly, government action limiting revenue generation, or mandating capital expenditures, could have depressed or eliminated entirely net revenue cash flow that could be directed to Bond payments. In other words, the risk is not only that payment to the Bondholders would be proscribed, the risk is also that, for legitimate and legal reasons, net revenues would not be generated.

Any receiver would also have been required to litigate lengthy and contentious

[17] In 2018, this Court held that the Puerto Rico Financial Emergency and Fiscal Responsibility Act (Act No. 5-2017) (the "Amended Moratorium Act") was not preempted by PROMESA, despite section 303(1) of PROMESA's requirement that "territory" moratorium laws may not bind creditors nonconsensually. (See Docket Entry No. 156 in Adv. Proc. No. 17-00159 (the "Moratorium Order") at 31-36.) See 48 U.S.C. § 2163(1). The Amended Moratorium Act authorized the Governor of Puerto Rico to declare a state of emergency and prioritize payment of "essential services" over "covered obligations." (Moratorium Order at 7-8.)

rate cases before Puerto Rico Energy Bureau, which it would not necessarily win. The concept that the main or sole priority of PREB would be, or is statutorily mandated to be, to meet Bond payment obligations (as the Bondholders urge (Defs. 502 Br. ¶ 44)) is contradicted by, for one, a 2015 resolution, wherein PREC[18] denied a rate increase requested by National[19] because the information presented was "mostly focused on PREPA's obligations to its bondholders and creditors, which does not provide the complete information of PREPA's operational condition." Resolution, No. CEPR-QR-2015-0002, available at https://energia.pr.gov/en/dockets/?docket=cepr-qr-2015-0002. The Court finds no reason to believe that the priorities imposed by the Authority Act would have changed after the Estimation Date and notes that PREC stated, closer in time to the July 3, 2017 Estimation Date, that "Raising PREPA's rates sufficiently to pay the principal and interest currently due on that debt would burden Puerto Rico's economy intolerably." (UCC Resp. ¶ 26 (quoting PREC Ruling, dated Jan. 10, 2017 ¶ 17 (filed at Docket Entry No. 1707-7 in Case No. 17-4780)).)

Accordingly, the effect of, inter alia, the Oversight Board's discretionary budgeting authority and public policy with respect to PREPA's obligation to update its aging infrastructure are proper factors for consideration in estimating the claim. Any factor that reasonably could have affected the claim's value as of the Estimation Date is proper for consideration in estimating the claim. The Bondholders can argue that legal challenges to

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[18] The Puerto Rico Energy Commission ("PREC") became the Puerto Rico Energy Bureau ("PREB") and was consolidated with other governmental entities under the Public Service Regulatory Board.

[19] National Public Finance Guarantee Corporation ("National") is a monoline insurer of insured Bonds and a defendant in this adversary proceeding. After National entered into a plan support agreement with the Oversight Board as sole Title III representative of PREPA, this Court stayed this adversary proceeding and certain other matters with respect to National pending further order of the Court. (See Docket Entry No. 148.)

placing a receiver or to the receiver's exercise of authority would have been unsuccessful, but the Court will not ignore their likelihood, and the Bondholders cannot make the risk of any challenge's success improper for consideration by calling it "lawless."

(d) The Bondholders Have Not Supported their Prediction that a Receiver Would (or Could) Take the Actions Necessary to Pay the Bonds in Full

As noted above, the Bondholders argue that there would not have been any legal or practical impediments to the receiver increasing rates as necessary to pay the Bonds. (Defs. 502 Br. ¶ 34 n.6.) However, Mr. John Young, the Bondholders' expert on receiverships, presented a very different picture, one contradictory to the assumptions underlying Dr. Chakraborty's projections. Mr. Young presented a picture of a receiver bound to consider all stakeholders, pay all debts, and take reasonable steps towards those goals in conformance with applicable law. Furthermore, in response to thorough questioning by the Oversight Board, AAFAF, and the Committee, Mr. Young acknowledged a complete lack of familiarity with the legal and practical circumstances of PREPA and Puerto Rico, except to say that "the components of expense of all the utilities are basically the same." (June 7 Tr. 174:3-4.)

The relevant gravamen of Mr. Young's testimony was that he did not know what powers a court order appointing a PREPA receiver could or could not grant, legally or practically. At the same time, Mr. Young's testimony concerning his tenure as the receiver of the Environmental Services Department of Jefferson County, Alabama, shows that in his actual, and unfortunately unsuccessful, efforts to keep the department out of bankruptcy, he did not take the radical actions or achieve the remarkable efficiencies of the Bondholders' hypothetical receiver. Despite being unconstrained by a regulator such as PREB and the obligation to bring rate cases, Mr. Young testified that he adopted a gradual and responsible approach based upon affordability concerns that did not result in an immediate turnaround. (June 7 Tr. 162:25-

164:14.) Rather than serving at the behest of one constituency, a responsible receiver would, in Mr. Young's words, "develop a plan, and prioritize where the current resources go, and hopefully generate enough future resources to meet all its obligations." (June 7 Tr. 168:11-13.)

Mr. Young's testimony, as was illustrated by a helpful chart used by the Committee at closing, substantially undermined Dr. Chakraborty's projections by countering her assumptions of an entirely unrestrained receiver, or a receiver who would act without restraint even in the absence of regulatory strictures. (June 8 Tr. 52:7-54:4, 55:16-56:22.)

The effect of these contradictions and unknowns in connection with the potential ability of a receiver to raise rates meaningfully and at the rapid pace posited by Dr. Chakraborty renders the Bondholders' scenarios manifestly unlikely and unreasonable. Given the dire financial condition of PREPA at the time of the Title III filing and the circumstances surrounding the appointment, installation, and subsequent herculean tasks necessary to achieve the required outcomes, the Court is not persuaded PREPA would ever have generated sufficient net revenues to pay off the Bonds in a reasonably foreseeable time frame—much less in five years as was proffered in Dr. Chakraborty's most unrestrained model. Accordingly, the Bondholders have failed to support their proposed claim estimation by a preponderance of the evidence.

(e) A Receiver May Not Have Been in Place Forever

Although the Authority Act implies that a receiver appointed under 22 L.P.R.A. section 207 can remain in place for as long as the debts on the Bonds are due, the Court notes, and considers generally in connection with its estimation determination, the possibility that a Puerto Rico court might have imposed some form of temporal limit. See, e.g., In re Pac. Gas & Elec. Co., 295 B.R. 635, 642-43 (Bankr. N.D. Cal. 2003) (court limited its predictions as to what a judge or jury might have concluded from the evidence presented where application of the parties' legal theories to the unique facts of the case went beyond the reported cases). A Puerto

Rico court would ultimately have discretion and control over the degree to which, and how, an equitable remedy could be deployed to serve the interests of the Bondholders and the people of Puerto Rico. See, e.g., Irizarry Rivera v. WEUC FM. 88.9, JPE2000-0119, 2004 WL 2419011, at *5 (P.R. Cir. Aug. 25, 2004) (stating, with respect to a contract that did not have a fixed term but provided that it would continue until further notice, that "We are of the opinion that, in these circumstances, the Tribunal [lower court] could fix a limit for the obligation, and validate its termination[].")

The possibility that a court might have imposed a temporal limit on the tenure of a receiver is heightened by the fact that the entire purpose of the enforcement of the equitable remedy of a receiver in this scenario is to satisfy a debt, which, as discussed above, is only one of the objectives imposed upon PREPA or any receiver by the Authority Act. The Court considers this possibility in estimating the Unsecured Net Revenue Claim, and notes that is well within its discretion to do so.

(f) Conclusions With Respect to a Hypothetical Receiver

For the reasons stated above, the Court concludes that the Bondholders' experts have failed to accord the appropriate weight to the legal and practical risks attendant upon the appointment of a receiver and the ability of a receiver to ever—under the confines of the Trust Agreement and Authority Act, or in the responsible performance of its duties—raise rates sufficiently to pay off the Bonds in full. The Bondholders objected to the Oversight Board's expert's valuation of the majority of these risks at 1% or less as being arbitrary, overstated, and double-counted. (Defs. Resp. ¶ 52.)[20] Mr. Plastino explained that, by including a one-percent

[20] The Court attaches no significance to the Oversight Board's non-inclusion of these factors in the filed PREPA Best Interest Test (which was taking very different considerations into account in connection with confirmation requirements for the

factor for such risks in his computations, he was identifying as important considerations, rather than quantifying, such risks, because the occurrence of any of them could materially, if not wholly, eliminate Bondholder recoveries. (See FOMB 502 Br. ¶ 62.) The Court's incorporation of relevant risks and contingencies into the estimation of a claim need not be precise: "An estimate necessarily implies no certainty; it is not a finding or a fixing of an exact amount." In re AMR Corp., 2021 WL 2954824, at *4 (citations omitted). "The estimated value of a claim is then the amount of the claim diminished by probability that it may be sustainable only in part or not at all." In re Chemtura Corp., 448 B.R. at 648.

The Oversight Board has further argued that the Unsecured Net Revenue Claim "should be discounted based on the [risks] unique to PREPA and not modeled into PREPA's revenues and expenses nor included in the present value discount[.]" (FOMB 502 Br. ¶ 62.) Accordingly, the Court has separated out the risks discussed above, and has considered and disagrees with each of the Bondholders' counterarguments, including that risks have been double-counted, and indeed believes that both the Bondholders and the Oversight Board have significantly understated the challenges and limitations that a receiver would face in being appointed and effecting the changes urged by the Bondholders as inevitable.

The Court, having considered thoroughly the record, the parties' arguments, and its knowledge of the legal and experiential contours of Puerto Rico's debt crisis, takes the risks of legal and Oversight Board and other government action impediments to a receiver's net revenue production efforts into account in estimating the value of the Unsecured Net Revenue Claim by applying a significant—but nonetheless conservative—flat 20% reduction to the

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proposed plan of adjustment), and applies its own independent analysis. (See, e.g., Defs. Resp. ¶ 9 (citing Docket Entry No. 23412).)

computed present value of the Unsecured Net Revenue Claim to reflect the material uncertainties that a receiver would be appointed, could act as the Bondholders propose under the Trust Agreement and Authority Act or any order issued by a Puerto Rico court, or would adopt the views of and take the actions urged by the Bondholders if appointed.

C. The Court's Value Estimate is Based on a One Hundred-Year Projection of Receiver Activity and Net Revenue Collections

Even putting aside the possibility that a court in Puerto Rico would impose some form of temporal limit on a receivership, the Court finds that much uncertainty exists as to years far into the future, and therefore the Court does not find it proper to entertain extensive speculation as to net revenue forecasts beyond the one hundred years for which Mr. Plastino has provided calculations.[21] See, e.g., In re Oldco M Corp., 438 B.R. 775, 787 (Bankr. S.D.N.Y. 2010) (discussing United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991)), in which court indicated that costs underlining administrative expense claims under section 503 of the Bankruptcy Code that are not "merely speculative" can be estimated under section 502(c)); see also In re Pac. Gas & Elec. Co., 295 B.R. at 643 (acknowledging that, because the court's decision in estimation depended on its predictions as to future circumstances, court found the process too uncertain and therefore limited its predictions). The Oversight Board has argued that looking to models utilizing projections of more than twenty-five years may be excessively speculative, and additionally noted that in an ordinary business case under Chapter 11 predicting beyond five years is seen as too speculative. (See June 8 Tr. 42:6-8, 19-22, 43:7-15.) The Bondholders' expert, Dr. Chakraborty, testified that fifty years

[21] Mr. Plastino has provided projected Bondholder recoveries spanning FY 2018-FY 2118 (Plastino Decl. Ex. A, App. 3-1), Dr. Chakraborty provided forecasts spanning FY 2018-FY 2069 (Chakraborty Decl. Ex. C6A).

theoretically captures the length of a term of a long-term bond and that modeling past fifty years would have meant going beyond the maturity of such a bond. (See June 7 Tr. 128:20-24.)

The Court finds that, in light of the many assumptions, risks, and variables the parties' experts have sought to account for in order to arrive at reasoned forecasts, calculating beyond fifty years is significantly speculative. It is uncertain, so far into the future, what PREPA's cash flow would be, and whether PREPA would, across that time period, evade impact from major natural disasters or other critical disruptions including fundamental changes to energy consumption, political structure, and the island's economic stability.

Importantly, the Bondholders, and their experts, have not convinced the Court that PREPA, as it existed on the July 3, 2017 Estimation Date, would ever have succeeded in paying off the Bonds. However, the Court will give the Bondholders the benefit of an appropriately contingency-adjusted valuation based on twice Dr. Chakraborty's fifty-year length of a long-term bond—Mr. Plastino's one hundred-year net revenue forecast, from FY 2018-FY 2118.

D. Value of the Unsecured Net Revenue Claim as of the Petition Date

The Owens Corning court stated: "The Court's task at this juncture is to decide how well the expert witnesses have accorded appropriate weight to the various factors discussed above. In undertaking this comparative assessment, however, I prefer to avoid specific mathematical calculations: since mathematical precision cannot be achieved in the prediction being undertaken, it is important that we not pretend to have achieved mathematical accuracy." 322 B.R. at 725. These remarks capture well the challenge at hand and the appropriate approach to quantifying the estimate.

At the 502 Hearing, the Court heard testimony from witnesses proffered by the Oversight Board, the Bondholders, and the Committee. (See June 7 Tr.) The Oversight Board presented the testimony of Mr. David Plastino, an economist who specializes in valuation and

financial econometrics. (Plastino Decl. Ex. A ¶ 2.) The Bondholders presented the testimony of Dr. Maureen Chakraborty, an economist who specializes in economics, finance, accounting, and valuation. (Chakraborty Decl. ¶ 1.) The Committee presented the testimony of Ms. Julia Frayer, an economist who specializes in conducting economic analyses and evaluations of infrastructure assets. (Frayer Decl. ¶ 2.) While additional witnesses testified at the 502 Hearing, Mr. Plastino, Dr. Chakraborty, and Ms. Frayer were the expert witnesses who had formulated holistic estimation models and proffered comparative assessments to defend certain disparities among them.

Although the methodologies employed by each of the experts to develop their models are divergent in some respects, there are several key areas where Mr. Plastino, Dr. Chakraborty, and Ms. Frayer agree. These points of agreement provide the Court with a sufficient analytical framework to estimate the Unsecured Net Revenue Claim. The experts agree that the claim should be valued as of the Estimation Date. (Plastino Decl. ¶ 3; Chakraborty Decl. ¶ 3.) The estimation should be "forward-looking" and only rely on information reasonably available as of the Estimation Date. (June 7 Tr. 63:5-9, 72:18-22). While the experts disagree on whether a fixed charge, volumetric charge, or a blend of the two charges should be applied by way of supplement to address the liability on the outstanding Bonds, the experts agree that a rate increase formula is necessary to project the incremental revenue a receiver could reasonably raise from changes in the amounts charged to residential, commercial, and industrial customers. (Plastino Decl. Ex. 1 ¶¶ 35-36; Chakraborty Decl. ¶ 7.) Mr. Plastino and Dr. Chakraborty

generally agree that expenses[22] detailed in the 2017 PREPA Fiscal Plan[23] should be deducted from the revenues PREPA could have reasonably collected from incremental rate increases. (June 7 Tr. 38:2-5; Chakraborty Decl. ¶ 8.) Mr. Plastino and Dr. Chakraborty both extend PREPA's revenue and expense projections to estimate future streams of cash flows a receiver may be able to recover. (Plastino Decl. Ex. A, App. 3; Chakraborty Decl. App. C3.) Lastly, the calculations conducted by the experts include a discount rate to be applied to the future streams of cash flow. (Plastino Decl. ¶ 28; Chakraborty Decl. ¶¶ 16-17.) Dr. Chakraborty applies a 5.05% discount rate and Mr. Plastino applies a 6.5% discount rate. (June 7 Tr. 46:6-13, 100:5-8.) Ms. Frayer agrees that a discount rate should be applied; however, she suggests that a higher discount rate in the range between 8.46% to 16.65% is appropriate.[24] (June 7 Tr. 194:18-20, 198-199; Frayer Decl. ¶ 9.)

The Court has determined, after consideration of the evidence and expert testimony, that Mr. Plastino's model is the most appropriate model as it contemplates a net revenue stream that is set to be derived and paid through a method that should be relatively affordable for ratepayers, reflects the impact of system maintenance and improvements that will

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22 While the experts debate the exact costs of certain operational expenses, capital expenses, and the definition of Current Expenses, the Court need not settle these issues in the context of claim estimation. Mr. Plastino and Dr. Chakraborty provide sensitivity analyses that contemplate scenarios ranging from no payment to full payment of capital expenses associated with long-term operational capacity (i.e., the financing the Aguirre Offshore Gas Plant ("AOGP")). (Plastino Decl. Ex. 1, App. 3-1; Chakraborty Decl., Figure 1.) The record contains sufficient evidence to identify appropriate estimates of operational expenses for consideration in the Court's Section 502(c) determination.

23 (Plastino Decl. Ex. 3.)

24 The discount rate selected by the Court is not based on Ms. Frayer's analysis. Rather, the Court's conclusion is drawn from evidentiary submissions and testimony identifying market rates at the relevant time for securities with similar risk profiles that were compiled by a consultant as reasonable guideposts for a discount rate to be applied to the projected future streams of cash flows a receiver may be able to recover.

be required to keep the system generating revenues over a lengthy period, and includes a present value discount factor for the time value of money and general market perceptions of risk. The Court is not persuaded, however, that the discount rates proposed by Dr. Chakraborty (5.05%) and Mr. Plastino (6.5%) are adequate. Ms. Frayer provided persuasive testimony and evidentiary support for a finding that the discount rates proposed would be "unrealistic" given PREPA's financial distress and the existing market conditions in 2017. (June 7 Tr. 198:19-25, 199:1-15, 19-25.) Additionally, Ms. Frayer pointed to contemporaneous data from similarly situated Caribbean islands with investor-owned electric utilities to show that a rational investor would have had explored "other opportunities" for investment given PREPA's significant risk profile. (June 7 Tr. 199:1-15, 19-25.) In sum, the discount rates proposed by Dr. Chakraborty and Mr. Plastino do not adequately represent certain economic risk factors associated with the projected cashflows that could be generated by ratepayers. While the Court declines to adopt the discount rates proffered by Dr. Chakraborty and Mr. Plastino, the record does not support Ms. Frayer's proposed discount rate in the range of 8.46% to 16.65%,[25] as a reasonable substitution. The Court instead concludes that a discount rate of 7% should be applied to determine the present value of the net revenue cash flow projected out over the 100-year period. That discounted cash flow, using Dr. Plastino's base-case incremental revenues over a period of one hundred years and a discount rate of 7%, would be $2,985,000,000.00 before Dr. Plastino's placeholder reduction of 4% for additional types of risks. (Plastino Decl. Ex. A, App. 3-1.)

Having determined that a receiver would likely have faced significant legal opposition and regulatory roadblocks (supra section II.B.2), the Court notes that the statistical models proffered by the Oversight Board, the Bondholders, and the Committee do not

[25] (Frayer Decl. ¶ 9.)

adequately account for these additional risk factors that could impair the receiver's ability to carry out certain duties. Dr. Plastino's computations reflect them only as part of a 4% placeholder reduction and the others do not treat them at all. The Court, as explained above, finds a 20% reduction for risk of success in achieving the projected cash flow through the actions of a receiver and other equitable remedies appropriate. Accordingly, the Court will apply an additional 20% reduction for risks associated with the appointment of a receiver.

| | **CUMULATIVE CASH FLOW, USING 7% DISCOUNT RATE** | **AFTER ADDITIONAL 20% REDUCTION** |
|---|---|---|
| **FY 2018 – FY 2118** | $2,985 million | $2,388 million |

Accordingly, the Court's estimation of the value of the Unsecured Net Revenue Claim is **$2,388,000,000.00**.

E. Conclusion

For the above stated reasons, the Court estimates the value of the Unsecured Net Revenue Claim as **$2,388,000,000.00**.

SO ORDERED.

Dated: June 26, 2023

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