

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

**THE GOVERNMENT DEVELOPMENT
BANK FOR PUERTO RICO**

Applicant

**PROMESA
Title VI**

Civil No. 18-1561 (LTS)

**DESIGNATED DEPOSITORIES OF PUBLIC PROPERTY’S SUPPLEMENTAL
OBJECTION TO PROPOSED QUALIFYING MODIFICATION**

TO THE HONORABLE COURT:

COME NOW, Fundación Biblioteca Rafael Hernández Colón, Inc. (“FBRHC”) and Fundación Sila M. Calderón, Inc. (“FSMC”), through the undersigned counsel and hereby submit their Supplemental Objection to the Proposed Qualifying Modification as follows:

I. PRELIMINARY STATEMENT

FBRHC and FSMC are the owners of a participation in funds deposited in a Special Fund administered by the President of the Government Development Bank (“GDB”). In its proposed Qualifying Modification, the GDB ignores the nature of the Special Fund and the entitlement to such funds by the FBRHC and FSMC, and provides no treatment under the RSA or the Qualifying Modification. GDB also fails to otherwise classify their claims. Even though the Special Fund is held by the GDB as the custodian designated by law, GDB takes the erroneous position that it and/or the Commonwealth of Puerto Rico are the owners of such funds and; therefore, they can unilaterally modify the FBRHC and FSMC’s rights as established by law over the Special Fund through its proposed Qualifying Modification. GDB’s proposed treatment of the Special Fund in the proposed Qualifying Modification is improper and illegal, and – at best – constitutes a taking.

FBRHC and FSMC have a legal right to a participation to the Special Fund under the provisions of Act No. 290 of September 1, 2000 (“Act No. 290”), 3 L.P.R.A. §§ 1040 *et seq.* Act No. 290 has not been repealed, modified or altered. It is the applicable law to FBRHC and FSMC’s entitlement to the Special Fund. Neither the Government Development Bank nor the Government of Puerto Rico own the Special Fund. The Government of Puerto Rico has, under Act No. 290, the legal obligation to transfer a portion of the cigarette tax collections to the Special Fund. Once that happens, the Government of Puerto Rico no longer has any entitlement to the funds in the Special Fund as they have been statutorily assigned for the benefit of those entities that have been designated depositories of public records and property by the General Archives of Puerto Rico and who have certified to the Government Development Bank that they have received qualifying contributions to be matched with the Special Fund.

FBRHC and FSMC provide an essential public function by serving as custodians and depositories of public property and archives by designation of the General Archives of Puerto Rico. Stripping FBRHC and FSMC to what they are entitled under Act No. 290, as proposed by the GDB’s failure to offer a treatment in the Qualifying Modification, would constitute a deprivation of their property rights under Act No. 290 and a violation by the GDB of the provisions of Act No. 290.

No provision in PROMESA or elsewhere excuses the GDB from complying with its obligation to disburse to the designated depositories the Special Fund as provided in Act No. 290. Moreover, the Government of Puerto Rico cannot take property from the Special Fund and use it for other purposes. Such conduct would perpetuate a violation of Act No. 290.

Moreover, the Special Fund constitutes a “special deposit” under Puerto Rico law. The Special Fund was never intended to be used by the GDB or by the Commonwealth of Puerto Rico to pay its own obligations. Act No. 290 of September 1, 2000 (“Act No. 290”), 3 L.P.R.A. §§

1040 *et seq.* created the Special Fund for the benefit of those depositories of public records and property designated by the Public Archives of the Commonwealth of Puerto Rico. The FBRHC and FSMC are both designated depositories as such term is defined in Act No. 290 and are the only designated depositories who have made a claim over the Special Fund in this proceeding. The President of the GDB's role with respect to the Special Fund is restricted to the custody of the Special Fund and its distribution as provided by Act No. 290. The President of the GDB has no discretion to the use or disburse the Special Fund for any purpose that is contrary to those stated in Act No. 290. The President of the GDB acts, for all purposes, as an escrow agent with a fiduciary duty over the Special Fund. The Special Fund is earmarked by Act No. 290 for the benefit of the designated depositories. Hence, the FBRHC and FSMC's claim over the Special Fund cannot be construed as a "Bond Claim" subject to modification under Title VI, assuming that is what GDB purports to do.

Allowing the proposed Qualifying Modification would not only constitute an improper modification of the FBRHC and FSMC's rights under Act No. 290 but also an improper taking of their property under the Constitution of the United States and the Constitution of the Commonwealth of Puerto Rico.

II. FACTUAL AND LEGAL BACKGROUND

A. Act No. 290

Act No. 290 provides for the creation of a Special Fund to be funded with, among others, the assignment commencing on fiscal year 2001-2002 of 1% of the taxes collected on tobacco products up to a maximum annual amount of \$1,000,000.00 to designated depositories of public records, materials and property related to Former First Ladies and Former Governors of the Commonwealth of Puerto Rico (the "Designated Depositories"). Act No. 290 provides for the assignments to be made until the Special Fund reaches and maintains a balance of \$6,000,000.00.

3 L.P.R.A. § 1040c. The Special Fund, under the provisions of Act No. 290, is held in the GDB and administered by the President of the GDB. Act No. 290 requires the Designated Depositories to prepare annual inventories of the public property in its possession and to file it with the General Archives (“Archivo General de Puerto Rico”) and the Puerto Rico Legislature. 3 L.P.R.A. § 1040b. The distributions of the Special Fund to the Designated Depositories are made on a matching basis. The Special Fund assigns sixty six percent (66%) for every thirty three percent (33%) that is received by the Designated Depositories from private donations in money or in kind during the fiscal year. The maximum amount to be distributed by the Special Fund is the balance of the Special Fund divided by the number of Designated Depositories. Each Designated Depository is subject to annual audits of its finances, work and results consistent with the purposes of Act No. 290.

Act No. 290 states in mandatory language that the disbursements from the Special Fund “shall be made” (“se harán”) to the qualifying Designated Depositories. 3 L.P.R.A. § 1040e. See also, 11 U.S.C. § 101(53); *Kelin v. Civale & Trovato, Inc. (In re Lionel Corp.)*, 29 F. 3d 88, 94 (2d Cir. 1994) (cited with approval in *In re: The Financial Oversight and Management Board for Puerto Rico*, ___ F. 3d ___ (1st Cir. 2018), 2018 WL 3750930 (August 8, 2018)).

B. Fundación Biblioteca Rafael Hernández Colón

FBRHC is a non-profit corporation in good standing organized on June 18, 1992, under the laws of the Commonwealth of Puerto Rico located in Calle Mayor #37, Edificio Isabel II, Ponce, Puerto Rico 00730-3726. (**Exh. A**). FBRHC was organized, among others, for the purposes of serving as custodian of the records of the three (3) government administrations of Former Governor of Puerto Rico, Hon. Rafael Hernández Colón. (**Exh. B**).

On December 10, 1992, the FBRHC was designated by the General Archives of Puerto Rico (“Archivo General de Puerto Rico”) as a depository of public records and acting under this

grant of authority, the FBRHC collected, organized, catalogued and preserved public documents, property and relics for the use of the general public, academia and students. **(Exh. C)**. The FBRHC currently serves as custodian of more than 5 million public records and property owned by the Government of Puerto Rico. On February 18, 2016, the GDB certified to the FBRHC that it had a balance of unmatched certified contributions of \$3,654,255.55 and also that FBRHC had been qualified to participate in the disbursements that will be made (“que se efectuarán”) as contributions to the Special Fund once the Commonwealth of Puerto Rico deposited the 1% of the cigarette tax collections for fiscal year 2014-2015 acknowledged that payment would be made to the FBRHC starting on February 2016. **(Exh. D)**. The GDB failed to meet its stated obligations and did not make the payment to the FBRHC. The FBRHC provided requests for matching payments from the Special Fund for fiscal years 2014-2015, 2015-2016, 2016-2017, 2017-2018. **(Exh E)**. The GDB has not made any payment from the Special Fund to the FBRHC since fiscal year 2014. On January 20, 2016, the Board of Directors of the GDB authorized the disbursement to the eight (8) Designated Depositories of the matching contribution from the Special Fund up to the sum of \$500,000.00 for the fiscal year 2014-2015 **(Exh. F)**, and that a remaining amount of \$500,000.00 would also be disbursed in the future. On February 26, 2016 the GDB and the FBRHC entered into a Memorandum of Understanding (“MOU”) where the GDB stated that up to June 30, 2015 the Special Fund had a balance of \$1,000,000.00 that were going to be distributed (“serán distribuidos”) according to Act No. 290. **(Exh. G)**. The GDB agreed to disburse to the FBRHC the amount of \$125,000.00 to match the contribution for fiscal year 2014-2015. **(Exh. G)**. The GDB never complied with its stated obligation in the MOU. As reflected in an account statement produced by the GDB in this proceeding, the Special Fund has as of September 28, 2018 a balance of \$1,578,528.60. **(Exh. H)**.

C. Fundación Sila M. Calderón, Inc.

The FSMC is a non-profit corporation organized on October 13, 2004, under the laws of the Commonwealth of Puerto Rico located in #1012 Calle González, Urbanización Santa Rita, Río Piedras, P.R. 00925. (Exh. I). FSMC was organized, among others, for the purpose of publishing and promoting the gubernatorial and civic work of Former Governor Sila M. Calderón and to compile and publish books and documents relative such work, serving as custodian of records of the government administration of Former Governor Hon. Sila M. Calderón. (Exh. J)

On December 20, 2004, FSMC was designated by the Public Archives of the Commonwealth of Puerto Rico as a depository of public records and acting under this grant of authority, the FSMC collected, organized, catalogued, and preserved public documents, property, and relics for the use of the general public, academia and students. (Exh. K). The FSMC currently serves as custodian of more than 24,000 files, 22,000 audiovisual materials, 40,000 paper photographs, 5,000 digital photographs and 1,075 sets of construction drawings, all of which constitute public records and property owned by the Government of Puerto Rico.

FSMC has complied with all filings with the Government Development Bank as provided by Act No. 290 and has a balance of unpaid qualified matching contributions of \$2,423,719.83.

D. Qualification as Designated Depositories

FBRHC and FSMC are both Designated Depositories under Act. No. 290. Pursuant to the provisions of Act No. 290, the FBRHC and FSMC applied for and received their corresponding share of the Special Fund every year until fiscal year 2014. Notwithstanding the above, FBRHC and FSMC have continued to comply with all the requirements and conditions as Designated Depositories and have continued to serve as custodians, protecting and making available to the public the government archives, records and property in their possession. On February 18, 2016,

the GDB certified that the FBRHC had received qualified contributions that had not been matched by the Special Fund from previous years totaling \$3,339,579.37. As of October 2017, the FSMC had received the total amount of \$2,423,719.83 in qualifying contributions that have not been matched by the Special Fund. Neither the FBRHC nor the FSMC have loans with the GDB. Neither FBRHC nor FSMC have received disbursements from the Special Fund since fiscal year 2014.

III. OBJECTIONS

A. Act No. 290 Established a Special Fund that operates as a Trust Account

The Special Fund is neither property of the GDB nor of the Commonwealth of Puerto Rico. The tobacco tax as provided by Act. No. 290 must be distributed to the qualifying Designated Depositories. The GDB has refused to distribute the balance of the Special Fund to the qualifying Designated Depositories despite having received the applications from the FBRHC and FSMC identifying the cash and in-kind contributions received and having received certifications from the GDB of the balance of qualifying contributions subject to matching with the Special Fund.

Act No. 290 ordered the Secretary of Treasury of the Commonwealth of Puerto Rico to transfer to a Special Fund on an annual basis 1% of the cigarette tax collections. The Secretary of Treasury complied with Act No. 290 but only until fiscal year 2014-2015. As of September 28, 2018, the Special Fund held in trust by the GDB and administered by its President has a balance of \$1,578,528.60, corresponding to transfers made into the Special Fund by the Department of Treasury of Puerto Rico prior to and until fiscal year 2014-2015. Funds hold in trust by the Government Development Bank cannot be modified as part of a Qualifying Modification. The GDB accepted the deposits into the Special Fund and the account opening documents clearly reflect that the account is for the deposit of Act No. 290 funds. Act No. 290 does not give the

Government Development Bank nor its President any discretion as to the use of the funds and commands that subject to compliance with the requirements of the statute they must be distributed to Designated Depositories.

Under Title VI of PROMESA, only “Bond” obligations can be modified by a Qualified Modification. 48 U.S.C. §§ 2231. The statute defines “Bond” as a “bond, loan, letter of credit, other borrowing title, obligations of insurance, [and] other financial indebtedness for borrowed money...”48 U.S.C. § 2014(2). If a claim is not a “Bond” claim, then it cannot be modified under Title VI of PROMESA. 48 U.S.C. § 2231 (m)(D). Since the Special Fund is not a “Bond” claim, it cannot be modified under Title VI of PROMESA.

The Special Fund account is a special deposit that was accepted by the GDB who then became a trustee of those funds. In *Treasurer v. Banco Comercial de Puerto Rico*, 46 P.R.R. 298, 305-306 (1934) the Supreme Court of Puerto Rico held that “whether a deposit in a bank is general or special depends on the contract resulting from the mutual understanding and intention of the parties, or on the circumstances sufficient to create a trust relation.” Moreover, the Supreme Court further held:

[W]hen a bank accepts a special deposit it becomes a trustee of the depositor, and holds the money subject to the trust. The receipt itself affords strong if not conclusive, evidence of a special deposit. It shows that the money was placed in the bank for a special purpose... It follows, therefore, that the bank holds the money, not as a general debtor but in a fiduciary capacity. *Treasurer*, 46 P.R.R. at 317.

In this instance, the Special Fund was created as a legislative mandate created by Act No. 290. Act No. 290 created a heightened obligation on the GDB restricting the use of the Special Fund. The account opening documents clearly reflect that the account was created as the Special Fund mandated by Act No. 290. For years, the Board of the Government Development Bank authorized disbursements to Designated Depositories as required by Act No. 290. There should be

no serious question about the nature of the account and its intended purpose. The Government Development Bank has no discretion to use the Special Fund for any purpose other than that mandated by Act No. 290. More importantly, once deposited into the Special Fund the Commonwealth of Puerto Rico lost control over the funds deposited, if any it ever had over 1% of the annual cigarette tax collections after the enactment of Act No. 290. (“When the bank assumes the obligation of dedicating the funds to the intended purpose, there can be no transfer of title, for the bank lacks authority to dispose of the funds.”, *Treasurer*, 46 P.R.R. at 306-307). See also, *In re K.D. Builders, Inc.*, 382 B.R. 1, 5 (Bankr. D. Mass 2008).

Under Puerto Rico law, special account holders are not general creditors of the depository bank. They are entitled preference in payment over general depositors. *Treasurer*, 46 P.R.R. at 314. It has been decided that when a bank holding funds in trust goes insolvent, special account holders are entitled to payment in full of the amount deposited and that is because the funds deposited in an account such as the Special Account, are not to be comingled or use by the depository bank for any other purpose. See, *Burkett v. Bank of Hollywood*, 69 P.2d 422 (Cal. 1937). Therefore, the Government Development Bank cannot make the claim that the Special Fund constitutes a public deposit or could be used for any purpose. Such an assertion would violate not only the trust obligations imposed by Act No. 290 but would also perpetuate a taking of the property of the Special Fund for uses different than those stated in Act No. 290. Once the FBRHC and FSMC met the conditions set by Act No. 290, which they both did, then the Government Development Bank had no discretion but to comply with Act No. 290 and disburse the corresponding payment to both entities as Designated Depositories.

B. FBRHC and FSMC Perform Essential Public Services

The designation of both the FBRHC and FSMC as depositories of public property and records entailed maintaining custody, preserving and holding in trust the public property

transferred to their possession. The public property custodied by the FBRHC and FSMC is public property that otherwise the Commonwealth of Puerto Rico would have the obligation to protect, custody and preserve. Unfortunately, the Commonwealth of Puerto Rico's General Archives are in a deteriorated condition, which was exponentially exacerbated after the passage of Hurricane María. If not because of the work performed by the FBRHC and FSMC, the millions of public records and property in their custody would have been lost forever. Instead, as a result of the responsible management, preservation techniques and professional services performed by the staff of both the FBRHC and the FSMC, millions of public records have not only been classified and preserved but also made available to the general public. This is an essential public service that is being performed by the FBRHC and the FSMC. In exchange, the Government of Puerto Rico decided to enact Act No. 290 which provides that once an entity meets the requirements set by the General Archives of Puerto Rico and is designated as a depository of public records, then it is entitled to receive a proportionate share of a Special Fund which would consist of an annual deposit of 1% of the tobacco tax collections of the Commonwealth of Puerto Rico. Yet, to be entitled to receive this contribution from the Special Fund, the Designated Depositories needed not only to meet fiscal requirements and be subject to audits but must also certify having received private contributions and qualifying services which would serve as the basis for the receipt of a matching contribution from the Special Fund. It is uncontested that the FBRHC and the FSMC have both fully met all of the requirements imposed by Act No. 290 on Designated Depositories. It is also uncontested that both the FBRHC and FSMC have qualified contributions certified by the Government Development Bank that entitle both to receive their share from the Special Fund. The Government Development Bank has acknowledged and certified the existence of funds deposited in the Special Fund. Hence, given the restricted nature of the Special Fund, the essential public function provided by the FBRHC and FSMC and the provisions of Act No. 290, it follows that the

Government Development Bank cannot modify and/or ignore the provisions of Act No. 290 and take the property held by it in the Special Fund from the Designated Depositories.

The circumstances stated above, the nature of the public service provided by the FBRHC and FSMC and the law, require that the Court does not allow the Government Development Bank to modify existing rights by not providing any treatment to the FBRHC and FSMC in the proposed Qualifying Modification and, even worse, take the property to which both are entitled under Act No. 290 in violation of the United States Constitution and the Constitution of the Commonwealth of Puerto Rico.

C. The Petitioner Failed to Meet Notice Requirements

The Government Development Bank failed to comply with Title VI's information and notice requirements as no communication has been made to the FBRHC and FSMC regarding the Qualifying Modification or the RSA. Previous attempts made by the FBRHC to the Government Development Bank seeking information regarding the status of the Special Fund were left unattended by the Government Development Bank. Furthermore, no notice was provided to these two entities and no Solicitation Package (as this term is defined in the Application) containing the Solicitation Statement, including the Preliminary Offering Memorandum and corresponding Ballots has been distributed or notified to FBRHC and FSMC, as holders of claims against the Government Development Bank. Hence, the requirements of section 601 of PROMESA have not been met and the Application should be denied. The process followed by AAFAF and the Government Development Bank to seek approval of the RSA and present their Application failed to ensure that all parties with a stake in the Government Development Bank's restructuring have an opportunity to be heard in connection with the Title VI efforts.

D. Alternatively, the FBRHC and FSMC Are Private Depositors

Alternatively, the FBRHC and FSMC are private entities entitled to deposits held in the Special Fund. The Qualifying Modification posits that “the claims of GDB’s bondholders, municipal and private depositors, and certain other contingent creditors will be resolved by exchanging such claims for new bonds issued by a governmental entity created by the GDB Restructuring Act -- the GDB Debt Recovery Authority (the “**Recovery Authority**”)”. Yet, the RSA ignores the claims of the FBRHC and FSMC, as they are not included in the list of private depositors of the Government Development Bank.

The private obligations of the GDB with the FBRHC and FSMC are ignored in the Qualifying Modification. The claims of the FBRHC and FSMC will not be resolved through the Qualifying Modification. Moreover, the Qualifying Modification intends to use the deposits held in the Special Fund to satisfy GDB obligations to other creditors, while at the same time, ignoring the legal entitlement and statutory assignment to the FBRHC and FSMC, as Designated Depositories, to the Special Fund.

Finally, the FBRHC and FSMC, as well as any other Designated Depository, constitute a distinct and separate class of claim holders that have been ignored by the Government Development Bank in the Qualifying Modification.

E. The Proposed Qualifying Modification Would Effectuate a Taking of FBRHC and FSMC Property Without Just Compensation

Approval of any Qualifying Modification that utilizes funds of the Special Funds or funds of FBRHC and FSMC and, as such, modifies’ rights to its property would violate the Takings Clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation” and is applicable to states and commonwealths of the United States pursuant to the Fourteenth

Amendment. The Constitution of the Commonwealth of Puerto Rico contains an equivalent provision in Article II, § 9. “The Takings Clause is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (internal quotation omitted); see also First Eng. Evangelical Lutheran Ch. of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 318-319 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-125 (1978). A taking occurs when there is an actual taking of private property for which the person did not receive just compensation. Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 973 (1st Cir. 1993) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

Here, the Qualified Modification and the RSA pretend to use the assets of GDB – including the monies of FBRHC and FSM and/or the Special Fund – to pay the holders of the restructured Bond Claims. In doing so it would be confiscating the appearing parties’ property without just compensation. FBRHC and FSMC reserve and preserve all of their rights and remedies under the Takings Clause.

IV. RESERVATION OF RIGHTS

Nothing contained in this Notice constitutes an admission of the validity of the Qualifying Modification or a waiver of FBRHC and FSMC’s rights. The FBRHC and FSMC expressly reserve the right to raise objections not described herein including but not limited to takings and illegal discrimination of equally situated creditors. The FBRHC and FSMC reserve the right to amend this objection if new facts arise from the discovery that has been noticed to the GDB by both entities.

V. CONCLUSION

For the reasons stated in this Notice, FBRHC and FSMC provide notice of their objections to the Qualifying Modification and request that the Court deny the Qualifying Modification as it

does not satisfy the applicable requirements of PROMESA section 601. FBRHC and FSM also object to the Qualifying Modification to the extent it proposes the modify their rights against GDB, and any person or persons related to: (i) the GDB, or to any other party, pertaining to the maintenance of the Special Fund by the GDB, (ii) GDB President's obligation as administrator of the Special Fund; (iii) the actions of any individuals, including its officers and directors, in relation to their failure to comply with the obligations imposed by Act No. 290; (iv) any rights or claims of the FBRHC and FSMC against any other entity or person, including the Government of Puerto Rico and its Secretary of Treasury for their violation of Act No. 290.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of October, 2018.

DELGADO | FERNÁNDEZ, LLC
P.O. Box 11750
Fernández Juncos Station
San Juan, PR 00910-1750
Tel. 787-274-1414
Fax: 787-764-8241

s/Alfredo Fernández Martínez
ALFREDO FERNÁNDEZ MARTÍNEZ
USDC-PR #210511
afernandez@delgadofernandez.com

CERTIFICATE OF SERVICE

I certify that on October 23, 2018 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send notice of such filing to all attorneys of record.

In San Juan, Puerto Rico, this 23rd day of October, 2018.

DELGADO | FERNÁNDEZ, LLC

P. O. Box 11750

Fernández Juncos Station

San Juan, PR 00910-1750

Tel. 787-274-1414

Fax: 787-764-8241

s/Alfredo Fernández Martínez

ALFREDO FERNÁNDEZ MARTÍNEZ

USDC-PR #210511

afernandez@delgadofernandez.com