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

AUTONOMOUS MUNICIPALITY OF SAN JUAN, Plaintiff, v. THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, and PUERTO RICO FISCAL AGENCY & FINANCIAL ADVISORY AUTHORITY, Defendants.	Case No. 3:17-cv-02009-LTS

GDB AND AAFAF'S MOTION TO DISMISS THE AMENDED COMPLAINT AND THE INTERVENOR COMPLAINTS UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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CONSTITUTIONAL PROVISIONS

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Defendants Government Development Bank for Puerto Rico ("GDB") and Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") respectfully move for an order under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) dismissing Plaintiff's Amended Complaint (Dkt. No. 88) and the five Intervenor Complaints.[1]

PRELIMINARY STATEMENT

Having failed to obtain a preliminary injunction based on its initial complaint, Plaintiff has filed an Amended Complaint that repackages prior allegations and adds a grab-bag of new claims. Plaintiff's goal remains the same: to disrupt a proposed debt modification that is a critical part of the overall response to Puerto Rico's fiscal crisis. For the past eight months, GDB and AAFAF have worked with creditors to negotiate a voluntary modification of GDB's debt under Title VI of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). Those negotiations culminated in GDB, AAFAF, and a substantial portion of GDB's creditors executing a Restructuring Support Agreement on May 15, 2017 (the "RSA"). The Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") certified the proposed modification on July 12, 2017, thus making it a "Qualifying Modification" under Title VI. If the requisite number of creditors approve it, GDB and AAFAF expect to submit the Qualifying Modification for the Court's approval in the first quarter of 2018.

Plaintiff opposes the Qualifying Modification because it believes that municipal depositors like itself should be given preferential treatment over GDB's other depositors and public bondholders. Plaintiff, however, cannot pursue this lawsuit because the Legislative Assembly of Puerto Rico, by Article 703 of the GDB Debt Restructuring Act, has divested Plaintiff and every other municipality (including the Intervenors) of authority to challenge the

[1] The Intervenor Complaints were filed by the Municipalities of Juana Díaz, Cabo Rojo, Hormigueros, San Germán, Luquillo, San Lorenzo, and Mayagüez (collectively, the "Intervenors"). (*See* Dkt. Nos. 17-1, 33, 34, 80-1, 89.)

RSA or the Qualifying Modification, including the solicitation and voting processes that go along with it. As a political subdivision of the Commonwealth, Plaintiff is bound by the GDB Debt Restructuring Act and also lacks standing to challenge that legislation's constitutionality.

Even if Plaintiff could sue despite Article 703, its claims challenging the RSA are not ripe because they depend on uncertain and contingent events. The Qualifying Modification still needs approval from creditors and an additional certification from the Oversight Board. If either step does not occur, Plaintiff's claims will be moot. If both occur, then the Qualifying Modification will be submitted to the Court, as required under Title VI. At that point, and on that record, Plaintiff's claims may be ripe and justiciable (assuming Plaintiff can ever assert a cognizable claim). Hearing objections on a piecemeal basis before then, as Plaintiff and the Intervenors are asking the Court to do, would impose an unnecessary burden on the Court and the parties. Constitutional canons of ripeness mandate that the Court wait until creditors have had a chance to cast their votes, the Oversight Board has certified the vote, and GDB and AAFAF have submitted the Qualifying Modification for judicial approval. At that point, the Court can address creditor objections in a uniform and organized manner.

In addition to these standing and ripeness issues, the Amended Complaint fails to state a claim upon which relief can be granted under PROMESA. First, Plaintiff's claim that certain municipal tax deposits are not "Bonds" that can be restructured under Title VI fails because well-settled Puerto Rico law establishes that bank deposits are loans and therefore fall within PROMESA's broad definition of "Bond," which includes loans. *See* PROMESA § 5(2), 48 U.S.C. § 2104(2). Second, Plaintiff's claim that the transaction envisioned by the RSA would violate Title VI's pooling requirement (which prohibits secured and unsecured creditors from being placed in the same voting class) fails because Plaintiff is not a secured creditor under

Puerto Rico law; specifically, Plaintiff lacks either a setoff right or lien. Third, Plaintiff's claim that it was improper for the Oversight Board to certify the Qualifying Modification at an executive session attended by outside professionals is contradicted by the plain language of PROMESA and the Oversight Board's bylaws. And fourth, while Plaintiff claims that PROMESA preempts certain Puerto Rico laws and executive orders prohibiting most withdrawals and loan disbursements from GDB, Plaintiff does not identify any inconsistency between those enactments, which is the *sine qua non* of any preemption argument.

Plaintiff's direct claims against GDB fare no better. Plaintiff's claim that GDB breached its contractual or fiduciary duties by refusing to disburse certain municipal tax deposits (known as CAE funds) fails because none of those deposits were held in trust at GDB; rather, as required by contract, they were held in deposit accounts at GDB as *investments*. Plaintiff's attempt to impose a constructive trust over certain undisbursed loan proceeds at GDB (based on an unjust enrichment theory) also fails. Indeed, Puerto Rico does not recognize such trusts, and even if it did, a constructive trust cannot exist without a trust relationship, which Plaintiff has not adequately alleged, or where a written contract governs the relationship between the parties, as Plaintiff acknowledges is the case here. Plaintiff's request for an injunction directing GDB to disburse funds purportedly needed for "essential services" likewise fails because the statute on which Plaintiff relies expressly prohibits such disbursements. The Amended Complaint should therefore be dismissed in its entirety, as should the Intervenor Complaints, which each assert claims identical to one or more of the Amended Complaint's claims.

BACKGROUND

A. Puerto Rico's Fiscal Crisis

As the Court is well aware, the Commonwealth is in a state of fiscal emergency. On June 30, 2016, Congress enacted PROMESA to provide the Commonwealth with the tools

necessary to address its fiscal crisis and ensure future access to the capital markets. *See* PROMESA §§ 405(m)(6), 405(n), 48 U.S.C. §§ 2195(m)(6), 2195(n). Among other things, PROMESA established the Oversight Board, which is tasked with assisting the Commonwealth in reforming its fiscal governance. *See* PROMESA §§ 201, 202, and 315, 48 U.S.C. §§ 2141, 2142, and 2175.

B. GDB and AAFAF

GDB is a public corporation and an instrumentality of the Commonwealth organized under Act No. 17-1948 (the "GDB Enabling Act"). Before the onset of Puerto Rico's financial crisis, GDB acted as a bank, fiscal agent, and financial advisor to the Commonwealth. (*See* Am. Compl. ¶ 25.) Among other things, GDB provided interim and long-term financing to the Commonwealth, its instrumentalities, public corporations, and municipalities and acted as a depository for their funds. (*See id*. ¶¶ 17–18)

By 2016, GDB had become unable to satisfy its debt obligations and the fiscal crisis threatened its ability to effectively carry out its duties. Accordingly, on April 6, 2016, GDB's fiscal agent responsibilities were transferred to the newly created AAFAF under the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, Act No. 21-2016 (the "Moratorium Act"). *See* Moratorium Act § 602 (Declaration of Brad M. Elias, Esq. ("Elias Decl."), Ex. A). AAFAF was also granted the authority to "oversee all matters related to the restructuring or adjustment" of certain covered obligations, as designated by Puerto Rico's Governor. *Id.* § 602(b). Two days later, then Governor Alejandro J. García Padilla signed Executive Order 2016-10, which declared GDB to be in a state of emergency and, in accordance with the Moratorium Act, restricted withdrawals and loan disbursements.

On January 18, 2017, the Puerto Rico legislature enacted the Puerto Rico Fiscal Agency and Financial Advisory Authority Act, Act No. 2-2017 (the "AAFAF Enabling Act"), which

expanded AAFAF's authority and designated it as the only government entity authorized to renegotiate, restructure, and reach agreements with creditors in connection with public debt or any other debt issued by any government entity. *See* AAFAF Enabling Act § 8(q). AAFAF was also granted authority to compel any governmental entity to take action to comply with a Fiscal Plan certified by the Oversight Board and to take action on behalf of any government entity to ensure compliance. *See id*. §§ 8(m) and (o). Today, AAFAF acts on behalf of the Commonwealth and its related entities and instrumentalities in devising and implementing (in conjunction with the Oversight Board) the strategies necessary to meet PROMESA's dual goals of achieving fiscal responsibility and regaining access to the capital markets. *See* PROMESA § 101(a), 48 U.S.C. § 2121(a).

On January 29, 2017, the Puerto Rico legislature enacted the Puerto Rico Financial Emergency and Fiscal Responsibility Act, Act No. 5-2017 ("Act 5"), which repealed Chapters 1 and 2 of the Moratorium Act but maintained Executive Orders 2016-10 and 2016-14, thereby maintaining the restrictions on withdrawals and disbursements from GDB. (*See* Elias Decl. Ex. G, at §§ 204(c), 301.) Act 5 also extended the Emergency Period until May 1, 2017, which was later extended by Act 46-2017 until June 30, 2017, and most recently by Executive Order 2017-076 until June 30, 2018.

C. GDB's RSA and Qualifying Modification Under PROMESA Title VI

PROMESA provides two mechanisms for the Commonwealth and its instrumentalities to modify or restructure their debts: Title III creates a court-supervised process similar to a Chapter 9 bankruptcy proceeding, and Title VI provides a process for effecting a negotiated modification of debt with less than unanimous support from the affected creditors, with a narrow role for the court. *See* PROMESA §§ 301–317, 601, 48 U.S.C. §§ 2161–2177, 2231.

GDB is currently attempting to modify approximately $4.5 billion in debt using Title VI's voluntary-agreement process, which requires a majority (by outstanding claim amount) of affected creditors to consent. *See* PROMESA §§ 104(i)(2), 601(g)(2), 48 U.S.C. §§ 2124(i)(2), 2231(g)(2). To accomplish this goal, GDB and AAFAF spent months negotiating with creditors. (*See* Am. Compl. ¶¶ 67–68.) Those negotiations culminated in the RSA's execution on May 15, 2017, under which a substantial number of GDB's creditors agreed to exchange their current GDB debt for bonds issued by a newly formed government entity that would hold title to certain GDB assets. (*Id.* ¶¶ 66, 68, 70–72.)

The RSA proposes a "Modification" under Title VI,[2] but it is not self-effectuating. It is the beginning, not the end, of the Title VI process. The proposed Modification will not become effective unless and until GDB satisfies a series of statutory requirements:

First, the Oversight Board must determine whether the proposed Modification meets the requirements for "certification," including that (i) all holders of Bond Claims (as defined in PROMESA) within a pool are being treated consistently, and (ii) the Modification is consistent with any certified fiscal plan or, if no fiscal plan has been certified, otherwise provides for a sustainable level of debt. *See* PROMESA § 601(g)(2), 48 U.S.C. § 2231(g)(2). GDB completed this step on July 12, 2017, when the Oversight Board conditionally certified the proposed Modification, making it a "Qualifying Modification" under Title VI. (Am. Compl. ¶ 104); *see* PROMESA § 601(g)(2), 48 U.S.C. § 2231(g)(2).

Second, the Oversight Board must establish separate voting pools "corresponding to the relative priority or security arrangements of each holder of Bonds." PROMESA § 601(d)(3)(A), 48 U.S.C. § 2231(d)(3)(A). While the RSA contemplates that GDB will ask the Oversight Board

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[2] *See* PROMESA § 601(a)(9), 48 U.S.C. § 2231(a)(9) (allowing interested parties to propose a "Modification" of debt, that is, a "modification, amendment, supplement or waiver affecting one or more series of Bonds, including those effected by way of exchange, repurchase, conversion, or substitution").

to establish a single pool of unsecured claims (*see* Am. Compl. ¶ 105), Plaintiff does not allege that GDB has made such a request or that the Oversight Board has established any voting pools.

Third, after establishing the pool(s), GDB is required to provide the Oversight Board and affected creditors with a variety of information about the Qualifying Modification, including a description of the issuer's economic and financial circumstances. *See* PROMESA §§ 601(f), 601(h)(1), 48 U.S.C. §§ 2231(f), 2231(h)(1). Plaintiff does not allege that GDB has made these disclosures.

Fourth, after receiving GDB's disclosures, creditors may vote to approve or reject the Qualifying Modification. In order for the Qualifying Modification to become binding on nonconsenting parties, it must receive "the affirmative vote of the holders of the right to vote at least two-thirds of the Outstanding Principal amount of the Outstanding Bonds in each Pool that have voted to approve or reject the Qualifying Modification, provided that holders of the right to vote not less than a majority of the aggregate Outstanding Principal amount of all the Outstanding Bonds in each Pool have voted to approve the Qualifying Modification." PROMESA § 601(j), 48 U.S.C. § 2231(j). Plaintiff acknowledges that the vote solicitation process has yet to begin.[3] (Am. Compl. ¶ 110.)

Fifth, if the Qualifying Modification receives the requisite vote, it becomes binding on the affected creditors only upon (i) a certification from the Oversight Board that the voting requirements of Title VI have been satisfied, and (ii) the approval of a U.S. District Court after finding that the Qualifying Modification complies with Title VI's requirements. *See* PROMESA § 601(m), 48 U.S.C. § 2231(m).

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[3] In the aftermath of Hurricane Maria, the parties to the RSA agreed to push back the target dates for soliciting a creditor vote and obtaining judicial approval of the Qualifying Modification. The creditor vote is currently scheduled to be completed by March 20, 2018.

D. Plaintiff's Claims in This Action

Plaintiff contends that GDB and AAFAF are using Title VI for unlawful purposes and assert the following claims:

- Plaintiff seeks a declaration that proceeds from the Additional Special Contribution tax (*i.e.*, the "CAE Funds") purportedly held in trust at GDB are not "Bonds" within the meaning of PROMESA and therefore cannot be the subject of a Qualifying Modification. (*See* Am. Compl. ¶¶ 119–29.)

- Plaintiff seeks a declaration that pooling its purportedly *secured* deposit claims with other creditors' *unsecured* claims for voting purposes would violate Title VI. (*See id.* ¶¶ 131–40.)

- Plaintiff seeks a declaration that the Oversight Board's certification of the Qualifying Modification is invalid because it was approved at an executive session attended by professionals not employed by the Oversight Board. (*See id.* ¶¶ 142–48.)

- Plaintiff seeks a declaration that Act 109 does not preclude it from voting on or objecting to the RSA or otherwise exercising its rights under PROMESA. (*See id.* ¶¶ 150–51.)

- Plaintiff seeks a declaration that the Qualifying Modification is invalid because Plaintiff's deposits have been unlawfully held at GDB in violation of PROMESA, which purportedly preempts the Moratorium Act's restriction of withdrawals and loan disbursements from an insolvent GDB. (*See id.* ¶¶ 153–56.)

- Plaintiff alleges that GDB has breached its fiduciary duty as trustee of the Redemption Fund and its contractual obligations under the 2015 Trust Agreement by refusing to use CAE Funds to pay principal and interest on Plaintiff's loans from GDB and by miscalculating Plaintiff's Excess CAE Funds. (*See id.* ¶¶ 158–67.)

- Plaintiff seeks to impose a constructive trust over $83.3 million in purportedly escrowed funds that it has on deposit at GDB. (*See id.* ¶¶ 169–73.)

- Plaintiff seeks an injunction directing GDB to disburse $21 million of Plaintiff's deposits under Act 5 because they are purportedly needed to provide "essential services." (*See id.* ¶ 175–79.)

LEGAL STANDARD

To state a claim for relief sufficient to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), Plaintiff must allege more than the "sheer possibility that a defendant has acted unlawfully"; rather, Plaintiff must plead "factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the Court must accept as true all factual allegations in a complaint, that tenet is "inapplicable to legal conclusions." *Id.* The Court is "not bound to accept as true a legal conclusion couched as a factual allegation," and before evaluating the sufficiency of the pleadings the Court must disregard such conclusory statements. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court is also "at liberty . . . to supplement [the factual allegations in a complaint] with facts gleaned from documents incorporated by reference into the complaint." *González v. Vélez*, 864 F.3d 45 (1st Cir. 2017) (quotation marks omitted). The same principles apply when evaluating a motion to dismiss for lack of ripeness under Federal Rule of Civil Procedure 12(b)(1). *See Downing/Salt Pond Partners, L.P. v. Rhode Island*, 643 F.3d 16, 17 (1st Cir. 2011).

ARGUMENT

I. Puerto Rico Law Does Not Allow Municipalities Like Plaintiff to Challenge the RSA, and Plaintiff Thus Lacks Standing to Assert Its First Four Causes of Action.

On August 24, 2017, Governor Ricardo Rosselló Nevares signed into law the GDB Debt Restructuring Act, Act No. 109-2017 ("Act 109"), for the express purpose of enabling the Qualifying Modification under Title VI. In light of the Legislative Assembly's determination that the Qualifying Modification "is in the best interests of the people of Puerto Rico" and "is fair and equitable for all creditors of GDB," Act 109, art. 102 (Elias Decl., Ex. B at 39), Article 703 of the Act provides that "[n]otwithstanding any other law of the Government of Puerto Rico, *no Government Entity shall have authority or standing to challenge this Act, the Restructuring Transaction, or the other transactions contemplated in this Act in any local or*

federal court." Act 109, art. 703 (emphasis added) (Elias Decl., Ex. B at 68).[4] The Act defines a Restructuring Transaction to include the transactions contemplated by, or in furtherance of, the Qualifying Modification, which, in turn, is defined to mean the RSA. *Id.*, art. 103(ii), 103(pp). And the Act defines Government Entity to include "any agency, department office, public corporation, trust, fund, system, instrumentality, political subdivision, taxing authority or municipality of the Government of Puerto Rico." *Id.*, art. 103(w). Plaintiff and the Intervenors are undeniably "municipalit[ies] of the Government of Puerto Rico" and thus lack standing or authority under Article 703 to challenge any aspect of the Qualifying Modification or the terms of the RSA, including the proposed modification of their deposit claims.

A. Article 703 Is a Valid Exercise of Legislative Power.

Article 703 is a valid exercises of the Commonwealth's power over its municipalities and instrumentalities. The Puerto Rico Supreme Court has held that the Legislative Assembly has authority to approve, amend, or repeal laws that affect the powers or privileges granted to municipalities by law or contract. *See Gobierno de Ponce v. Caraballo*, 166 D.P.R. 723, 736–38 (2006) (Legislative Assembly has authority to repeal any delegation of powers previously granted to municipalities);[5] *see also City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) ("A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit."). Accordingly, the Legislative Assembly had the power in the first instance to grant municipalities the right to sue and be sued, and equally had the power

[4] Given the Legislative Assembly's stated intent to facilitate the RSA, Article 703 should be read to apply to both pending and prospective litigation. *See In re Hernández*, 487 B.R. 353, 363 (D.P.R. 2013) ("[E]ven if a Puerto Rico law does not explicitly state its retroactive effect, it should be retroactively applied if that interpretation is the most reasonable in light of its legislative intent and does not alter prior contractual relationships or vested rights."). The only claims asserted by Plaintiff prior to the adoption of Article 703 were declaratory and injunctive relief claims (*see* Dkt. No. 1), the dismissal of which would not affect Plaintiff's contractual or vested rights for the reasons described in Section II below.

[5] *See* GDB and AAFAF's Motion Submitting Certified Translations (Dkt. No. 55), Ex. A.

to restrict or withdraw that right. *See* 21 L.P.R.A. § 4051 (granting municipalities power to sue and be sued in any court of justice or administrative body).

B. Article 703 Is Not Preempted by PROMESA Section 601(n)(2).

Contrary to Plaintiff's argument in its unsuccessful preliminary injunction motion, Article 703 is not preempted by PROMESA Section 601(n)(2), which provides a private right of action to challenge the unlawful application of Title VI. Congress's decision to establish a private right of action does not preclude Puerto Rico from establishing or controlling its municipalities' capacity to sue (and therefore exercise that private right of action) or be sued. *See* Fed. R. Civ. P. 17(b) (state law always governs capacity to sue or be sued); *Arbogast v. Kansas*, 2017 U.S. App. LEXIS 6983, at *3 (10th Cir. Apr. 21, 2017) (dismissing federal claim against state agency because it lacked capacity under state law to be sued). All PROMESA Section 601(n)(2) does is create a private right of action for parties that have the capacity to sue under state law. It does not limit Puerto Rico's right to govern its municipalities' capacity to sue. Indeed, a state or territory's traditional authority to control and restrict its municipalities' power to sue or be sued is preempted only where Congress has evidenced a "*clear and manifest*" intent to do so. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States.") (quotation marks and citation omitted); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

Congress has evinced no such intent in Section 601(n)(2), which merely provides a cause of action based on the unlawful application of Title VI. *See* PROMESA § 601(n)(2), 48 U.S.C. § 2231(n)(2). The statute neither identifies the parties that may pursue this cause of action nor contains any language suggesting that Congress intended to take the extraordinary step of

denying the Commonwealth the power to exercise control over its political subdivisions.[6] This falls well short of the clear expression of Congressional intent necessary for preemption. *See, e.g.*, *Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 258–65 (1985) (state spending rules preempted where Congress expressly provided that payments "to each unit of general local government" could be used for "any governmental purpose"); *Hernández-Colón v. Sec'y of Labor*, 835 F.2d 958, 962 (1st Cir. 1988) (finding preemption where Congress expressly provided that "Governor *must* approve requests . . . filed by local government jurisdictions" and "legislative annals ma[d]e it manifest that Congress intended nothing less than" automatic approval "irrespective of gubernatorial preference."). Indeed, taken to its logical conclusion, Plaintiff's preemption argument would mean that states and territories would lose control over their political subdivisions' capacity to sue *any time Congress created a private right of action*. That is clearly not the law.

This is confirmed by PROMESA Section 303, which states that "[s]ubject to the limitations set forth in [T]itles I and II," nothing in PROMESA is intended to "limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers." PROMESA § 303, 48 U.S.C. § 2163. Because Section 303 is specifically limited only by Titles I and II, no other statutory limitations can exist under the doctrine of *expressio unis est exclusio alterius*, *i.e.*, "the expression of one thing is the exclusion of the other." In other words, the statutory interpretation doctrine of *expression unis est exclusion alterius* precludes a finding that any limitation on the Commonwealth's governmental or political powers can come from any source other than Titles I and II. *See United States v. Hernandez-Ferrer*, 599 F.3d 63, 67 (1st Cir. 2010)

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[6] The Court alluded to this during oral argument on Plaintiff's motion for a preliminary injunction, observing that "It seems to me that it recognizes a cause of action but it doesn't say who has standing to bring that cause of action to challenge unlawful application of Section 601." (Dkt. 65 at 18:9–12.)

(holding the "absence of" one express provision in a statute coupled with the "presence of" another express provision in the same statute was "highly significant" in proving that only one exception to the statute existed); *Sunshine Dev. Inc. v. FDIC*, 33 F.3d 106, 116 (1st Cir. 1994) (applying maxim of *expressio unis est exclusio alterius*). Accordingly, the generic cause of action created by Section 601(n)(2) of Title VI cannot possibly deprive the Commonwealth of the power to control Plaintiff and other municipalities.

Moreover, Plaintiff cannot argue that enforcement of Act 109 is barred by the Supremacy Clause of the U.S. Constitution—which it is not—because Plaintiff, as a political subdivision of the Commonwealth, "lacks standing under federal law to challenge the constitutionality of a state statute." *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1362 (9th Cir. 1998); *see also Charlestown v. United States*, 696 F. Supp. 800, 806 (D.R.I. 1988) ("'municipal corporations have regularly been denied standing in the federal courts to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature'") (quoting Hart & Wechsler, *The Federal Courts and the Federal System* 182 (2d ed. 1973)).[7] Put simply, Plaintiff only has the rights bestowed upon it by the Commonwealth, and the Commonwealth has chosen to divest Plaintiff of the right to assert any cause of action challenging the RSA. *See Gobierno de la Capital v. Consejo Ejecutivo de Puerto Rico Etc.*, 63 D.P.R. 434 (1944) (municipalities cannot invoke constitutional safeguards against their creator and lack any legal basis to attack the constitutionality of

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[7] While the First Circuit has yet to address this question, it is likely to follow the Ninth Circuit (rather than those circuits reaching a contrary result) because *Burbank* is better grounded in well-established Supreme Court precedent. *See Williams v. Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *City of Trenton*, 262 U.S. at 187 ("A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will."); *see also Burbank*, 136 F.3d at 1363 (acknowledging circuit split but refusing to depart from earlier precedent foreclosing municipalities from asserting constitutional claims against the state).

legislation) (certified translation forthcoming). Plaintiff's first four causes of action should be dismissed on this ground alone.

II. Plaintiff's First Four Causes of Action Should Be Dismissed for Lack of Ripeness.

Even if Plaintiff had authority to sue, its first four causes of action would still fail for lack of ripeness. Under Article III of the U.S. Constitution, a court may provide declaratory or injunctive relief only if there is a live case or controversy. *See* U.S. Const. art. III, § 2; *United States v. Davis*, 261 F.3d 1, 47 (1st Cir. 2001) (declaratory relief under Declaratory Judgment Act, 28 U.S.C. § 2201, requires live case or controversy); *González-Droz v. González-Colón*, 573 F.3d 75, 79–80 (1st Cir. 2009) (injunctive relief requires live case or controversy).

Where a case or controversy "has [not] matured sufficiently to warrant judicial intervention," a court must dismiss for lack of ripeness. *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). In its seminal decision on ripeness in the declaratory judgment context, the Supreme Court explained that the doctrine exists to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). While ripeness has a "prudential flavor," fundamentally it is part of the jurisdictional inquiry, and thus "a court has no alternative but to dismiss an unripe action." *Ernst & Young v. Depositors Econ. Prot. Corp.* ("*E&Y*"), 45 F.3d 530, 535 (1st Cir. 1995).

The ripeness analysis has two prongs: "fitness" and "hardship." *See Texas v. United States*, 523 U.S. 296, 300–01 (1998) (quoting *Abbott Labs.*, 387 U.S. at 149). The fitness test "involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *E&Y*, 45 F.3d at 535. The hardship test "turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties." *Id.* (quoting *W.R. Grace & Co. v. EPA*, 959 F.2d 360, 364

(1st Cir. 1992). A plaintiff bears the burden of alleging facts sufficient to satisfy both prongs. *See Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017). Plaintiff cannot satisfy either.

A. The First Four Causes of Action Are Not Fit for Review.

As the First Circuit has observed, "'the critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.'" *E&Y*, 45 F.3d at 536 (quoting *Mass. Ass'n of Afro-Am. Police, Inc. v. Bos. Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992)). The fitness prong "has both jurisdictional and prudential components." *Reddy*, 845 F.3d at 501. The jurisdictional component concerns "whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts." *Id.* The prudential component concerns "whether resolution of the dispute should be postponed in the name of 'judicial restraint from unnecessary decision of constitutional issues.'" *Id.* (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003)).

1. The Jurisdictional Component Is Not Satisfied.

Plaintiff's first four causes of action do not meet the jurisdictional component of the fitness prong. They depend "on a lengthy chain of speculation as to what the future has in store," *E&Y*, 45 F.3d at 538, and concern a Qualifying Modification that "may not occur as anticipated or may not occur at all," *id.* at 536. Specifically:

- GDB has yet to make all requisite disclosures under Title VI;
- the Oversight Board has yet to establish the voting pool(s);
- GDB has yet to solicit a vote from creditors, a majority of whom (by outstanding claim amount) must approve the Modification, *see* PROMESA § 601(h), (j), 48 U.S.C. § 2231(h), (j);
- the Oversight Board has yet to certify that the voting process complied with Title VI; and

- GDB has yet to submit the Qualifying Modification to this Court for final approval upon a finding that it complies with PROMESA, *id.* § 601(m)(1)(D), § 2231(m)(1)(D).

Any break in this chain would obviate Plaintiff's claims. For example, a rejection by either GDB's creditors *or* the Oversight Board would render Plaintiff's claims moot, thus demonstrating that they are dependent on precisely the type of "uncertain and contingent events" that preclude a finding of ripeness.

The First Circuit addressed a similar situation in *City of Fall River v. FERC*, 507 F.3d 1 (1st Cir. 2007), where the petitioners sought to overturn a decision by the Federal Energy Regulatory Commission granting conditional approval to build a liquid natural gas terminal. *Id.* at 7. In holding that the petitioners' claims were not ripe, the Court observed that "approval of the project [was] expressly conditioned on approval" by the U.S. Coast Guard and the Department of the Interior, neither of which had given its final approval, and thus the project "may well never go forward." *Id.* The same is true here, where the Qualifying Modification has not yet been submitted to GDB's creditors or this Court for approval, and thus the jurisdictional component of the fitness prong is not satisfied.

2. The Prudential Component Is Not Satisfied.

Plaintiff's first four causes of action also fail the fitness prong's prudential component. Resolving Plaintiff's claims now would potentially require the Court to resolve two Supremacy Clause issues that might never need to be decided: whether PROMESA preempts either (i) Article 703 of the GDB Debt Restructuring Act (*see supra* Section I), or (ii) the Moratorium Act (or Act 5, to the extent it repealed and replaced the Moratorium Act) and related executive orders (*see* Am. Compl. ¶ 153 and *infra* Section III.E). *See also E&Y*, 45 F.3d at 538 (prudential component not satisfied where deciding constitutional issue "might well prove to be completely unnecessary"); *Parker v. County of L.A.*, 338 U.S. 327, 333 (1949) ("The best teaching of this

Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.").

B. Allowing the First Four Causes of Action to Proceed Before They Ripen Would Impose Undue Hardship on GDB and AAFAF.

Requiring GDB and AAFAF to litigate every objection to the Qualifying Modification on a piecemeal basis, as Plaintiff is asking the Court to do, would impose an unnecessary burden on GDB, AAFAF, and the Court. For example, seven other municipalities have intervened in this action raising similar claims, and additional municipalities could also bring suit. Rather than litigating such claims individually, which could involve multiple sets of discovery requests and multiple motions for summary judgment, it would be far more efficient and cost-effective (and consistent with Congressional intent) for any objections to the Qualifying Modification to be heard by this Court if and when GDB's creditors approve it and GDB and AAFAF submit it for judicial approval. This is precisely what Title VI requires: that the Court weigh in at the end of the process, not at multiple times along the way. *See* PROMESA § 601(m)(1)(D), 48 U.S.C. § 2231(m)(1)(D). At that time, the Court can address all creditor objections in a uniform and organized manner, thereby avoiding any "waste of judicial resources." *See E&Y*, 45 F.3d at 538.

Deferring a ruling on the municipalities' claims, by contrast, would impose no hardship on the municipalities or other creditors. *See Reddy*, 845 F.3d at 505 (hardship prong not satisfied where "there [was] no apparent prejudice to the plaintiffs if they must wait until their claims ripen to sue"); *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 9 (1st Cir. 2012) ("mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship") (citations omitted). The municipalities' claims will be moot if the Qualifying Modification is voted down by creditors, and if it is approved, the municipalities can raise their objections with this Court when GDB and AAFAF submit it for judicial approval. *See*

PROMESA § 601(m)(1)(D), 48 U.S.C. § 2231(m)(1)(D).[8] Accordingly, Plaintiff's claims should be dismissed for lack of ripeness.

III. The Amended Complaint Fails to State a Claim upon Which Relief Can Be Granted.

A. Plaintiff's First and Second Causes of Action Fail Because Plaintiff's CAE Deposits Are "Loans" Under Puerto Rico Law and Thus Qualify as "Bonds" That Can Be Restructured Under PROMESA.

The Amended Complaint's first two claims seek declaratory judgments premised on the incorrect assertion that certain municipal tax revenues, known as CAE Funds, are not "Bond Claims" under PROMESA. (Am. Compl. ¶¶ 120, 126.) Plaintiff contends that because CAE Funds are held in trust "pursuant to a *trust agreement* that is administered by the GDB as fiduciary for the benefit of San Juan" (*see id.* ¶ 4 (emphasis added)), those deposits do not qualify as a "Bond" under PROMESA and thus cannot be the subject of a Qualifying Modification under Title VI (*id.* ¶¶ 120–21). However, while GDB serves as trustee for the Redemption Fund (*see id.* ¶ 18), the "trust agreement" relied on by Plaintiff—*i.e.*, the "2015 Trust Agreement" attached to the Amended Complaint as Exhibit A—provides that each municipality's CAE Funds "*shall be invested in deposits* within [GDB] itself." (Am. Compl. Ex. A, Attachment A at VI(B) (emphasis added).)[9] Thus, Plaintiff's allegations are undermined by the very document on which it relies: Plaintiff's CAE Funds were *required by contract* to be held in deposit accounts at GDB as *investments—not in trust accounts*. Plaintiff does not, and cannot, allege that GDB failed to comply with that legal obligation. *See Autonomous Municipality of San Juan v. Gov't Dev. Bank for P.R.*, No. SJ2016CV00102 (P.R. Ct. of First Instance July 13, 2016) (Elias Decl., Ex. C at 3–4 (certified translation)) (holding that San Juan's

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[8] The Court, of course, will need to determine whether those objections are permitted under Article 703 of Act 109.

[9] *See also* 2015 Trust Agreement, Am. Compl. Ex. A at § VII (stating that CAE Funds deposited at GDB "shall . . . be maintained invested in deposits of the Bank until such time as [CRIM] and the Bank agree otherwise.").

claim for return of CAE funds in "deposit accounts" was breach of contract claim subject to PROMESA's automatic stay).

As deposits, Plaintiff's CAE Funds constitute loans from Plaintiff to GDB under well-established Puerto Rico law. In *Portilla v. Banco Popular de Puerto Rico*, 75 D.P.R. 100 (1953), the Puerto Rico Supreme Court held that "our Civil Code defines the contract used to establish a checking account as a loan contract, not merely a deposit contract, since the depository bank has, in addition to its obligation to keep and return the money deposited, or its value, the authority to use the thing deposited." *Id.* at 113 (Elias Decl. Ex. D (certified translation)). The Puerto Rico Supreme Court reaffirmed this principle in *Santos de García v. Banco Popular de Puerto Rico*, 172 D.P.R. 759 (2007), where it held that "the creditor-debtor relationship between a bank and a depositor is a *loan agreement* that is governed by the provisions of the Civil Code." *Id.* at 774 (emphasis added) (Elias Decl., Ex. E, (certified translation)). Thus, as this Court stated during oral argument on Plaintiff's preliminary injunction motion, "the asset of the trust is the loan obligation represented by the deposit account[.]" (*See* Dkt. No. 65 at 42:22–24.)

Because deposits are loans, Plaintiff's CAE Funds fall squarely within PROMESA's broad definition of "Bond," which includes any:

> bond, *loan*, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law, in any case, related to such a bond, *loan*, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form of which the issuer, obligor, or guarantor is the territorial government.

PROMESA § 5(2), 48 U.S.C. § 2104(2) (emphasis added). Indeed, both the Puerto Rico Court of Appeals and the Puerto Rico Court of First Instance have held that PROMESA Section 405's automatic stay provision applies to claims against GDB for failure to disburse customer deposits

because deposits are "loans" under PROMESA. *See Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica v. Banco Gubernamental de Fomento*, Civil No. KLAN201601507, Judgment issued Nov. 15, 2017 (certified translation forthcoming); *Ass'n of Emps. of the Commonwealth of P.R. v. Hon. Alejandro García Padilla*, Civil No. K AC2016-1284, Judgment issued Apr. 21, 2017 (Elias Decl., Ex. F, at 8–9 (certified translation)).

Plaintiff's asserted contractual rights to its CAE Funds therefore qualify as "Bond Claims" under PROMESA, *see* PROMESA § 5(3), 48 U.S.C. § 2104(3) and those rights can be modified under Title VI, *see* PROMESA § 601(g), 48 U.S.C. § 2231(g). Plaintiff's first and second causes of action should therefore be dismissed with prejudice.

B. Plaintiff's Third Cause of Action Fails Because Municipal Depositors Do Not Possess Setoff Rights or Statutory Liens Under Puerto Rico Law.

Plaintiff seeks a declaration that it would be improper to pool it with unsecured creditors for voting purposes under Title VI because Plaintiff is a secured creditor under Puerto Rico law. Plaintiff anchors its claim in (i) a purported right to set off its deposits at GDB against its debts owed to GDB, and (ii) a purported statutory lien on CAE Funds held in trust at GDB. (*See* Am. Compl. ¶¶ 94, 131–38.) Plaintiff's argument fails, however, because it has no setoff right or statutory lien under Puerto Rico law.

Puerto Rico Civil Code Section authorizes a setoff only if *all* the following criteria are met:

(1) That each of the persons bound should be so principally, and that he be at the same time the principal creditor of the other;

(2) That both debts consist of a sum of money or, when the things due are perishable, that they be of the same kind and also of the same quality, if the latter should have been stipulated;

(3) That both debts are due;

(4) That they be determined and demandable; and

> (5) That none of them is subject to any retention or suit instituted by a third person, and of which due notice has been given the debtor.

31 L.P.R.A. § 3222.

Plaintiff does not meet at least two of those criteria. First, as the Court found in denying Plaintiff's motion for a preliminary injunction, there is no basis to allege that "both debts are due" since interest and principal payments on Plaintiff's loans come due on a biannual basis over the next twenty-plus years (*see* Am. Compl. ¶ 88). (Dkt. No. 72 at 14–15.) That alone requires dismissal of this claim. *See FDIC v. De Jesús Vélez*, 514 F. Supp. 829, 835 (D.P.R. 1981) ("a set-off of the debentures against the note was not possible since . . . [t]he debentures are not due until April 15, 1981, whereas the note is presently due"). Second, GDB's loans to Plaintiff and other municipalities are subject to claims and suits by other GDB creditors, who are seeking to use those assets to satisfy, in whole or in part, their claims against GDB.[10] Section 1150 does not provide for an automatic setoff under these circumstances because it would unfairly benefit the indebted municipalities at the expense of *pari passu* creditors, including other municipalities, whose claims against those assets would be partially extinguished. *See* 31 L.P.R.A. § 3222(5).

Plaintiff's allegation that it has a statutory lien on CAE Funds held in trust at GDB also fails. (*See* Am. Compl. ¶¶ 94.[11]) First, as described above, there are no CAE Funds held in trust at GDB. (*See supra* Section I.A.) Under the 2015 Trust Agreement, those funds were to be invested in deposit accounts. (*See* Am. Compl. Ex. A, Attachment A at VI.) Plaintiff does not, and cannot, identify any Puerto Rico statute granting Plaintiff a lien on such deposits, which are

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[10] *See, e.g.*, *Brigade Leveraged Capital Structures Fund Ltd. v. Gov't Dev. Bank for P.R.*, No. 3:16-cv-01610-FAB (D.P.R. Apr. 4, 2016) (seeking to enjoin GDB from making payments to creditors, including municipal depositors, on ground that such preferential payments would prejudice bondholders).

[11] While Plaintiff vaguely alleges, without factual support, that it is also "entitled to an equitable lien" (Am. Compl. ¶ 136), Puerto Rico does not recognize the doctrine of equitable liens. *See Rodríguez v. Solivellas & Co., Sucrs.*, 49 P.R.R. 633, 621 (1936) (holding that "the doctrine of equitable liens . . . is not in force in Puerto Rico" and "no legal existence is recognized to implied liens, created by presumptions, such as equitable liens").

unsecured loans to GDB under Puerto Rico law. (*See supra* Section I.A.) Second, even if there were CAE Funds held in trust at GDB, Act 64 does not contain any language creating a statutory lien on those funds in favor of Plaintiff. While Plaintiff points to 21 L.P.R.A. § 6016(c), that provision merely requires the Municipal Revenue Collection Center ("CRIM") to "deposit the proceeds of the special surtax in the account of the municipality in the Redemption Fund." 21 L.P.R.A. § 6016(c). While the English translation of Section 6016(c) references a "first lien," that refers to the municipality's guarantee under Section 6016(a) that it will make principal and interest payments on "general obligations bonds or notes . . . which the municipality may incur." 21 L.P.R.A. § 6016(a).[12] Thus, even if Section 6016(a) created a statutory lien[13]—which it does not—such a lien would secure the municipality's obligations to its creditors (including GDB)—it would not secure GDB's obligations to Plaintiff. In other words, Plaintiff has it backward.

Accordingly, Plaintiff has no setoff right or statutory lien that would make it a *secured* creditor. Rather, like all other municipal depositors, it is simply an *unsecured* creditor. As such, Plaintiff's deposit claims *must* be pooled with other unsecured claims that are subject to the Qualifying Modification and not guaranteed by the Commonwealth. *See* PROMESA § 601(d)(3)(A), 48 U.S.C. § 2231(d)(3)(A) ("separate Pools shall be established corresponding to

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[12] When 21 L.P.R.A. § 6016(c) refers to "the first lien," it is referencing 21 L.P.R.A. § 6016(b)'s statement "[t]o make *this guarantee* effective . . . ." (Emphasis added.) Section 6016(b)'s use of "this guarantee," in turn, refers to § 6016(a), which provides that "[t]he good faith, credit and the power of the municipality to levy unlimited taxes are hereby committed for the prompt payment of the principal and interest on all obligations evidenced by general obligations bonds or notes and the interest on obligations evidenced by notes in advance of municipal general obligation bonds which the municipality may incur."

[13] PROMESA § 2 provides that Title VI "shall apply with respect to debts, claims, and liens (as such terms are defined in section 101 of title 11, United States Code) created before, on, or after" PROMESA's enactment. PROMESA § 2, 48 U.S.C. § 2101. Courts have found statutory liens under Section 101 of the Bankruptcy Code only where the underlying statute contains mandatory, self-executing language. *See, e.g.*, *Peaje Invs. LLC v. P.R. Highways and Transp. Auth.*, No. 17-00151-LTS, slip op. at 11-14 (Dkt. No. 240) (D.P.R. Sept. 8, 2017); *In re City of Stockton*, 526 B.R. 35, 57 (Bankr. E.D. Cal. 2015) (recognizing statutory lien where statute provided that board "*shall have* a lien on the assets of a terminated [contracting] agency") (emphasis added); *In re Ball*, 2006 WL 4847274, at *3 (Bankr. D. Utah. May 4, 2006) ("An attorney *shall have a lien* for the balance of compensation due from a client on any moneys or property owned by the client that is the subject of or connected with work performed for the client . . . .") (emphasis added).

the relative priority or security arrangements of each holder of Bonds against each Issuer"). Plaintiff's third cause of action should therefore be dismissed with prejudice.

C. Plaintiff's Fourth Cause of Action Fails Because PROMESA and the Oversight Board's Bylaws Permit Professionals to Attend Executive Sessions.

Plaintiff's fourth cause of action seeks a declaration that the Oversight Board violated PROMESA Section 101(h)(4) and its internal bylaws by permitting "professionals not employed by the Oversight Board" to attend the executive session at which it certified the Qualifying Modification. (*See* Am. Compl. ¶¶ 142–148.) Yet neither of the cited provisions bars outside professionals from attending executive sessions nor suggests that their mere presence would justify nullifying Board action. *See* PROMESA § 601(n)(3), 48 U.S.C. § 2231(n)(3) (district court should nullify a Qualifying Modification only if "manifestly inconsistent" with Title VI).

PROMESA Section 101(h)(4) states that "the Oversight Board may conduct its business in an executive session that consists solely of the Oversight Board's voting members and *any professionals the Oversight Board determines necessary* and is closed to the public, but only for the business items set forth as part of the vote to convene an executive session." 48 U.S.C. § 2121(h)(4) (emphasis added). Section 101(h)(4) thus gives the Oversight Board express permission to invite any professionals that it deems necessary for business conducted in an executive session. Nothing in Section 101(h)(4) gives San Juan the right to second guess that determination or to object to the Oversight Board's exercise of its judgment on this issue.

The Oversight Board Bylaws (Rule 4.7) similarly provide that "[u]pon an affirmative vote of no fewer than four (4) members of the Board, the Board may conduct its business in an executive session. The executive session shall be closed to the public and consist solely of the Board's members and *any professionals of the Board, including staff and advisors*, the Board determines necessary." (Am. Compl. Ex. K) (emphasis added). Plaintiff contends that the

phrase "professionals of the Board" implies that any professionals attending executive sessions must be "employed" by the Board. Plaintiff's strained and overly narrow reading is contradicted by the very next clause, which makes clear that such professionals include both "staff *and advisors*." (*Id.*) Rule 4.7 thus permits the Board to invite professionals to executive sessions if the Board determines they are necessary, regardless of whether they are staff or outside advisors.

Plaintiff's throw-away assertion that "[u]pon information and belief, the Oversight Board did not properly convene the executive session at which it certified the RSA" (*see* Am. Compl. ¶ 147) likewise fails because Plaintiff pleads no facts to support that conclusory allegation, including, for example, what is required to "properly convene" an executive session and facts showing that the Oversight Board failed to comply with those requirements. Plaintiff's fourth cause of action should therefore be dismissed with prejudice.

D. Plaintiff's Fifth Cause of Action Fails Because Plaintiff Does Not Allege an Actual Case or Controversy Concerning Its Right to Vote on and Object to the Qualifying Modification.

Plaintiff's fifth cause of action seeks a declaration that Act 109 will not preclude Plaintiff from voting on the Qualifying Modification or lodging objections during the judicial approval process. (*See* Am. Compl. ¶¶ 151.) This claim is not ripe for the reasons described in Section II above. Plaintiff has not been denied an opportunity to vote on the Qualifying Modification (nor does Act 109 prohibit Plaintiff or other municipalities from doing so), and if GDB's creditors reject the Qualifying Modification, there will be no need for Plaintiff to lodge objections with the Court. If GDB's creditors approve the Qualifying Modification, the Court can decide at that time whether to hear objections from dissenting creditors (which is not required under Title VI) and, if so, whether Act 109 prohibits Plaintiff and other municipalities from objecting. Those issues need not, and should not, be decided prematurely.

In any event, Plaintiff has failed to plead facts establishing an actual case or controversy on this issue. *See Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 95 (1993) ("a party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy"). GDB and AAFAF have never denied that Plaintiff has the right to vote on the Qualifying Modification, and, if necessary, the Court—not GDB or AFFAF—will decide whether Act 109 bars Plaintiff from objecting to the Qualifying Modification. Plaintiff's fifth cause of action therefore seeks an impermissible advisory opinion and should be dismissed. *See Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945) ("The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy, where the issue is actual and adversary, and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen." (citations omitted)).

E. Plaintiff's Sixth Cause of Action Fails Because Plaintiff Does Not Allege Any Inconsistency Between PROMESA and the Moratorium Act and Related Executive Orders.

Plaintiff's sixth cause of action seeks a declaration that the Moratorium Act and related executive orders, which prohibit GDB from disbursing funds to depositors, are "unconstitutional and/or inconsistent with PROMESA and thus preempted." (Am. Compl. ¶¶ 155-56.) As a threshold matter, Plaintiff lacks standing to challenge the constitutionality of Puerto Rico statutes under the Supremacy Clause. *See supra* Section I.B (*citing Burbank*, 136 F.3d at 1362). Even if it had standing, Plaintiff does not identify any inconsistency between PROMESA and the Moratorium Act and related orders (or Act 5, to the extent it repealed and replaced portions of the Moratorium Act) that could support a finding of preemption. Plaintiff merely cites to PROMESA Section 303, which prohibits "*unlawful* executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality, or that divert funds from one territorial instrumentality to another or to the territory." PROMESA § 303(3),

48 U.S.C. § 2163(3) (emphasis added). Plaintiff must do more than simply invoke the statute, but it has alleged no facts suggesting that the Moratorium Act and related orders are unlawful.

Nor has Plaintiff alleged facts suggesting that Congress intended to preempt commonsense restrictions on withdrawals from a deeply insolvent bank, which serve to prevent a bank run and conserve GDB's limited assets until they can be distributed to creditors in an organized and equitable manner. What Plaintiff is really asking for is to be exempted from the Moratorium Act, Act 5, and related executive orders so that it can receive preferential treatment at the expense of GDB's other creditors. Plaintiff has no such right under Puerto Rico or federal law, and its sixth cause of action should be dismissed with prejudice.

F. Plaintiff's Seventh and Eighth Causes of Action Fail Because the Redemption Fund Is Required to Invest All CAE Funds in Deposit Accounts.

Plaintiff's seventh and eighth causes of action allege that GDB breached its fiduciary duty as the trustee for the Redemption Fund (referred to as "Fondo") and its contractual obligations under the 2015 Trust Agreement by (i) refusing to use CAE Funds in the Redemption Fund to pay principal and interest on Plaintiff's loans from GDB, and (ii) failing to properly calculate and disburse Excess CAE funds from the Redemption Fund. (*See* Am. Compl. ¶¶ 161, 166.) These claims rest on the false premise that the Redemption Fund actually contains CAE or Excess CAE Funds held in trust. The documents relied on in the Amended Complaint, however, show that the Redemption Fund was never designed to hold such funds in trust.

As described above, the 2015 Trust Agreement for the Redemption Fund provides that each municipality's CAE Funds "*shall be invested in deposits* within [GDB] itself." (Am. Compl. Ex. A, Attachment A at VI ("CAE-BGF Sub-Fund") (emphasis added). Plaintiff does not, and cannot, allege that GDB failed to comply with that contractual obligation. Accordingly, CAE Funds are not held in trust in the Redemption Fund—rather, "the asset of the trust is the

loan obligation represented by the deposit account." (*See* Dkt. No. 65 at 42:22–24.) Thus, GDB could not have breached any fiduciary duty with respect to how it used or disbursed CAE Funds.

To the extent Plaintiff is claiming that GDB had a fiduciary duty post-insolvency to treat the Redemption Fund's deposits differently than those of GDB's other depositors (for example, by permitting a voluntary setoff), there is no support for that assertion under Puerto Rico law. The Redemption Fund and GDB's other depositors are unsecured creditors that stand on equal footing, and GDB had no obligation to favor the Redemption Fund at those other depositors' expense. *See Santos de García*, 172 D.P.R. at 774 (Elias Decl., Ex. E (certified translation)). Plaintiff's seventh and eighth causes of action should therefore be dismissed.

G. Plaintiff's Ninth Cause of Action Fails Because Constructive Trust Is No Longer a Viable Remedy Under Puerto Rico Law, Particularly Where a Written Contract Governs the Parties' Relationship.

Plaintiff's ninth cause of action seeks to impose a constructive trust over "$83.3 million in escrowed funds that [Plaintiff] has on deposit at the GDB," which GDB has allegedly used to unjustly enrich itself. (Am. Compl. ¶ 169.) This claim fails for multiple reasons. As a threshold matter, a constructive trust is not a viable remedy under Puerto Rico law since the enactment of Act 219 of 2012 (the "Trusts Act"), *see* 32 L.P.R.A. § 3351 *et seq.*[14] Moreover, even if the establishment of a constructive trust were a viable remedy, it is unavailable under Puerto Rico law where there is a contract governing the property at issue. *See Rentas v. Claudio (In re Garcia)*, 484 B.R. 1, 16 (Bankr. D.P.R. 2012), *rev'd on other grounds*, 507 B.R. 32 (1st Cir. 2014) (finding that doctrine of constructive trust is not applicable under Puerto Rico law where there is a written contract between the parties). Here, there are written contracts between GDB

[14] Prior to the Trusts Act, the Puerto Rico Civil Code provided that trusts *should* be created by public deed. *See* 31 L.P.R.A. § 2543. Under the Trusts Act, however, trusts can be created *only* through public deed or a last will and testament, *see* 32 L.P.R.A. § 3352, and "[e]very trust constituted in Puerto Rico must be recorded in the Special Trust Registry under penalty of nullity," *id.* § 3351d. Accordingly, no Puerto Rico court has established a constructive trust since the Trust Act's enactment.

and Plaintiff governing the $83.3 million at issue (which are undisbursed loan proceeds)—as required by Act 64 of 1991. (*See* Am. Compl. ¶ 35 (describing statutorily required process for issuing notes and bonds for municipal public works projects under Act 64).) Thus, any claim by Plaintiff for failure to disburse the proceeds of those loans sounds in law, not equity, and Plaintiff's equitable claim for constructive trust must be dismissed.[15]

Even if Plaintiff were permitted to seek a constructive trust where a written contract governs the parties' relationship, Plaintiff still has not pleaded the necessary elements. First, Plaintiff has not alleged facts showing "the existence and legal source of a trust relationship." *Conn. Gen. Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 618 (1st Cir. 1988).[16] While Plaintiff alleges that GDB, as the lender, "deposited the escrowed funds in to a special account from which payments related to capital works projects by San Juan could be made" (Am. Compl. ¶ 169 (citing 21 L.P.R.A. § 6008a)), Plaintiff admits elsewhere in the Amended Complaint that this was an ordinary "checking account"—not a trust account (*see id.* ¶ 38 ("The municipality shall open a checking account with the [GDB] for each obligation from which advancements are requested." (quoting 21 L.P.R.A. § 6008a(d))). Again, it is well-established under Puerto Rico law that checking accounts do not create a trust relationship and that a bank may use the funds in those accounts for any purpose. *See Portilla*, 75 D.P.R. at 113 ("our Civil Code defines the contract used to establish a checking account as a loan contract . . . since the depository bank has . . . the authority to use the thing deposited") (Elias Decl. Ex. D (certified translation)).

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[15] *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) ("The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.").

[16] While Plaintiff alleges that the CAE Funds were subject to the 2015 Trust Agreement, Plaintiff makes no similar allegation with regard to the undisbursed loan proceeds allegedly held in escrow (which are not CAE Funds).

Second, Plaintiff has not, and cannot, allege that the $83.3 million at issue can be traced to specific funds existing at GDB today. *See Conn. Gen.*, 838 F.2d at 618 ("[T]he claimant must identify the trust fund or property and, where the trust fund has been commingled with general property of the bankrupt, sufficiently trace the property or funds—the res.").[17] For example, Plaintiff does not allege that the $83.3 million in loan proceeds was required to be kept segregated from GDB's other cash, was ever segregated, or that it remains segregated today.[18] Plaintiff's constructive trust claim thus necessarily fails.

H. Plaintiff's Tenth Cause of Action Fails Because Plaintiff Has No Statutory Right to Disbursement of the Requested Funds.

Plaintiff's tenth cause of action seeks an injunction directing GDB to disburse $21 million of Plaintiff's deposits. (*See* Am. Compl. ¶ 179.) Plaintiff contends that it is entitled to these funds under Act 5, which provides that "subject to the availability of funds and the aggregate disbursements established by the Governor, the Bank shall honor any request to withdraw or transfer any deposit held by. . . a municipality of the Territory; provided, however, that an authorized officer . . . certifies along with supporting documentation that such funds will be used for the payment of essential services." (Elias Decl. Ex. G, § 204(c)(iii).) While Plaintiff

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[17] *See also Sunflower Bank, N.A. v. FDIC*, 2010 U.S. Dist. LEXIS 103738, at *23 (D. Kan. Sept. 30, 2010) ("To claim a preference over general creditors in the distribution of the assets of an insolvent national bank, a claimant had to show: 1) the existence of a trust relationship instead of a debtor-creditor relationship; and 2) the assets of the bank were augmented by the transaction, and 3) had to trace and identify the trust res to some identifiable thing of value in the receiver's hands.").

[18] *See Lamb v. Townsend*, 71 F.2d 590, 592 (4th Cir. 1934) ("The assets involved are assets of the insolvent state bank. The bankruptcy funds deposited with that bank, whether rightly or wrongly, were deposited as a general deposit and became mingled with the general assets of the bank. The question, then, is whether the bankruptcy court, without tracing into assets which have come into the hands of the receiver the bankruptcy funds deposited, can summarily order the receiver, out of the general assets in his hands, to pay to the trustee an amount equal to the bankruptcy deposits, to the prejudice of other creditors of the bank having an interest in such assets. It is clear, we think that this question must be answered in the negative."); *Rosenberg v. Collins*, 624 F.2d 659, 663 (5th Cir. 1980) ("Under the present circumstances, none of the customers of the bankrupt could successfully trace his or her funds so as to sustain a claim for reclamation in the bankruptcy on a constructive trust theory because all of the funds from the 900 customers of the bankrupt were co-mingled in a single bank account[.]").

alleges that it has requested $21 million from GDB and certified that the funds will be used for essential services (*see* Am. Compl. ¶ 177), Plaintiff ignores Act 5's other requirements.

Most importantly, Act 5 provides that GDB "shall not disburse any loans or credit facility unless authorized by the Governor" and expressly limits municipal withdrawals for essential services to the "aggregated disbursements established by the Governor." (Elias Decl. Ex. G, § 204(a), (c)(i), (c)(iii).) In Executive Order 2016-10, the Governor authorized GDB to impose weekly limits on the aggregate amount of disbursements. (*See* Elias Decl. Ex. H, ¶ 8.) GDB's Board of Directors exercised that authority on August 30, 2016, establishing an initial disbursement limit of $2 million per week, and suspending disbursements altogether on August 23, 2017.[19] (*See id.* Exs. I at 2, J at 2.) Accordingly, GDB has properly rejected Plaintiff's $22.5 million disbursement request, which is not authorized by the Governor or Act 5.

CONCLUSION

For the foregoing reasons, Plaintiff's Amended Complaint and the Intervenor Complaints should be dismissed with prejudice.

[19] Notably, GDB suspended disbursements *after* its alleged payment to Plaintiff under Act 5 in April 2017. (*See* Am. Compl. ¶ 176.)

Dated: January 8, 2018
New York, New York

Respectfully submitted,

O'MELVENY & MYERS LLP

/s/ Peter Friedman

John J. Rapisardi (*Pro Hac Vice* pending)
Peter Friedman (Admitted *Pro Hac Vice*)
Daniel L. Cantor (Admitted *Pro Hac Vice*)
Brad M. Elias (Admitted *Pro Hac Vice*)

Times Square Tower
7 Times Square
New York, New York 10036
Tel: (212) 326-2000
Fax: (212) 326-2061

PIETRANTONI MÉNDEZ & ÁLVAREZ LLC

/s/ Oreste R. Ramos

Oreste R. Ramos
(D.P.R. Bar No. 216801)

/s/ María Dolores Trelles Hernández

María Dolores Trelles Hernández
(D.P.R. Bar No. 216801)

Popular Center, 19th Floor
208 Ponce de León Ave.
San Juan, Puerto Rico 00918
Tel: (787) 274-1212
Fax: (787) 274-1470

Attorneys for Defendants GDB and AAFAF