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

LEX CLAIMS, LLC, et al., Plaintiffs, v. ALEJANDRO GARCÍA PADILLA, et al., Defendants.	Case No. 3:16-cv-02374 (FAB)

PLAINTIFFS' RESPONSE TO THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD'S MOTION TO INTERVENE

Plaintiffs respectfully submit this response to the motion to intervene (Dkt. 62) filed by the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board").

INTRODUCTION

The intervention and stay sought by the Oversight Board should be denied. Plaintiffs respectfully submit that the proposed stay would greatly undermine the very goal that the Oversight Board and plaintiffs share: restoring Puerto Rico to fiscal and economic health as expeditiously and consensually as possible.

As this Court explained in a recent ruling in a related matter, the Board's motion does not comply with the procedural mandates of Federal Rule of Civil Procedure 24(c). Moreover, the Board's position that this Court should exercise inherent authority to stay this action *outside* of the clearly defined boundaries of Section 405(b) of PROMESA is incorrect.

With respect, the Board is also mistaken in suggesting that litigating plaintiffs' PROMESA causes of action would frustrate PROMESA's goal of fostering voluntary negotiations. To the contrary, the swift pursuit and resolution of the present litigation will greatly enhance the Oversight Board's and the Commonwealth's ability to extract appropriate concessions from the COFINA bondholders in those negotiations, while at the same time avoiding unnecessary delay if those negotiations ultimately fail and a judicial resolution is needed. This would be in stark contrast to the status quo, in which the COFINA bonds are the only financial debts supported by Commonwealth tax revenues that continue to receive funds from the Commonwealth for debt service. Such inexplicable indulgence and favoritism have left the COFINA bondholders with little incentive to compromise.

It is hard to imagine an issue whose prompt resolution could be more beneficial to PROMESA's goals than the legality of the COFINA structure. That structure depends entirely

on the incorrect proposition that the Commonwealth can, by statute, divest itself of *$55 billion* of sales and use tax ("SUT") revenues over a 50-year period. Were this artifice permissible, numerous vital protections in the Puerto Rico Constitution would be nullified—including limitations on the amount and duration of Commonwealth revenues that may be devoted to debt service, and the priority and protections afforded to Constitutional Debt. It serves no legitimate interest for the billions of dollars of COFINA bonds issued through this scheme to be protected from immediate judicial scrutiny, let alone to continue to receive payment in full when the Commonwealth is purportedly experiencing great need.

In their blizzard of statements to the press, COFINA bondholders insist that the diversion of revenues is unassailable. Tellingly, however, the COFINA bondholders have sought to file their own stay motion, in an effort to prevent this Court from confirming or refuting their supposedly ironclad position. Should the Court grant that request, the Oversight Board would face the unenviable task of having to devise a fiscal plan that respects "lawful" liens and priorities, PROMESA § 201(b)(1)(N), while lacking clear legal guidance regarding the lawfulness of the COFINA structure. The requested stay would be yet another gift to the COFINA bondholders, which is precisely why plaintiffs respectfully submit that the Oversight Board should not seek a stay and this Court should not grant it.

BACKGROUND

1. a. Plaintiffs filed this action on July 20, 2016, to enforce PROMESA's limitations on the Commonwealth's efforts to enact unlawful new measures in the interim period before the Oversight Board is fully operational. Dkt. 1. Plaintiffs thereafter filed a First Amended Complaint, on August 15, 2016, in which they challenged additional transactions by the Commonwealth under Sections 204(c)(3) and 207 of PROMESA. Dkt. 25.

The defendants named in the First Amended Complaint, who are Commonwealth officials responsible for implementing the unlawful conduct alleged therein, filed a motion to stay this action under Section 405 of PROMESA. See Dkt. 26. In support of that motion, they observed that, prior to PROMESA's enactment, plaintiffs had filed what defendants characterized as a "similar action" in the Southern District of New York, challenging the Commonwealth's Moratorium Act under the federal and Commonwealth Constitutions. *Id.* at 4; Dkt. 26-1 (attaching complaint). On September 2, 2016, this Court rejected defendants' request to stay this action. See Dkt. 32. First, the Court concluded that "[p]laintiffs could not have commenced this lawsuit before PROMESA's enactment because their claims are to enforce provisions of PROMESA by challenging conduct that occurred after PROMESA's enactment." *Id.* at 2. Second, the Court concluded that this lawsuit was not an action "to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of [PROMESA]," PROMESA § 405(b)(1), because "plaintiffs seek only declaratory and injunctive relief" and "do not seek to recover a right to payment that arose before PROMESA's enactment." Dkt. 32, at 3.

b. On October 7, 2016, plaintiffs filed a motion to amend their complaint to add claims relating to Executive Order 2016-30, in which Governor García Padilla ordered a moratorium on payment of the Commonwealth's Constitutional Debt, and the Commonwealth's Moratorium Act, pursuant to which Executive Order 2016-30 was issued. Dkt. 39.

In their Second Amended Complaint, plaintiffs currently seek to prosecute three substantive causes of action. The First Cause of Action simply carries forward plaintiffs' existing claim under Section 204(c)(3) and Section 207 of PROMESA. Dkt. 78, ¶¶ 126-134. In the Second Cause of Action, plaintiffs allege that Executive Order 2016-30 unlawfully subordinates the rights of holders of the Constitutional Debt to the rights of COFINA bondholders, and is there-

fore preempted by Section 303(3) of PROMESA, which states that "unlawful executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality . . . shall be preempted by this Act." PROMESA § 303(3); see Dkt. 78, ¶¶ 135-144. In particular, Executive Order 2016-30 reverses the Commonwealth's constitutionally mandated hierarchy of creditor protections and priorities, because it stops payment on the Constitutional Debt, which enjoys an explicit constitutional lien on and first claim to all of the Commonwealth's "available resources," P.R. Const. art. VI, § 8, but does not interrupt the Commonwealth's diversion of SUT revenues that have purportedly been assigned by statute to support the payment of bonds issued by COFINA, Dkt. 78, ¶¶ 15-20. Finally, the Third Cause of Action alleges that the Commonwealth's Moratorium Act is preempted by Section 303(1) of PROMESA, which provides that "a territory law prescribing a method of composition of indebtedness or a moratorium law . . . may not bind any creditor of a covered territory or any covered territorial instrumentality thereof that does not consent to the composition or moratorium." PROMESA § 303(1); see Dkt. 78, ¶¶ 145-150. In addition to these substantive causes of action, plaintiffs have also sought to pursue the portion of their Twelfth Cause of Action that seeks to remedy these violations of PROMESA under 42 U.S.C. § 1983. Dkt. 78, ¶¶ 191-193. In connection with these new causes of action, the Second Amended Complaint also named four additional defendants: COFINA itself, Juan Vaquer in his official capacity as Executive Director of COFINA, Bank of New York Mellon ("BNY") as trustee for bonds issued by COFINA, and the Commonwealth.[1]

[1] Plaintiffs' Second Amended Complaint also contains other causes of action challenging the Moratorium Act on additional grounds. Dkt. 78, ¶¶ 151-190. Plaintiffs have acknowledged that these claims are subject to the PROMESA stay and have not sought leave to pursue these claims at this time. Dkt. 39, at 3.

Defendants opposed plaintiffs' motion for leave to amend solely on the ground that the proposed claims are stayed by PROMESA. See Dkt. 49. On November 4, 2016, this Court granted plaintiffs' motion to the extent of allowing the Second Amended Complaint to be filed. See Dkt. 76. The Court further ruled that "[w]hether the First, Second, Third and Twelfth causes of action may be prosecuted will be decided in due course." *Ibid.*

2. The Oversight Board filed its motion to intervene on October 28, 2016. See Dkt. 62. In its motion, the Oversight Board contends that it is entitled to intervene as of right in light of Section 212(a) of PROMESA, and further requests that it be granted permissive intervention if intervention as of right is denied. See *id.* at 2-4. The Oversight Board did not accompany its motion with a proposed pleading. Instead, the Board filed a proposed opposition to plaintiffs' motion for leave to file the Second Amended Complaint and a motion to stay this action. See Ex. A to Dkt. 62. In its proposed filing, the Board contends that this case should be stayed, either under Section 405(b) of PROMESA or in an exercise of the Court's inherent authority. See *id.* at 8-10.

ARGUMENT

I. The Oversight Board Has Not Complied With Rule 24(c)'s Requirement That It File A Proposed Pleading

Plaintiffs do not oppose the Oversight Board's participation in this action upon compliance with proper procedural requirements. We note, however, that the Oversight Board's motion to intervene suffers from a procedural flaw that must be corrected before the Oversight Board may be permitted to intervene.

As this Court recently held in rejecting intervention by the Oversight Board in litigation brought by other creditors, Federal Rule of Civil Procedure 24(c) requires a would-be intervenor to accompany its motion for intervention with "a pleading that sets out the claim or defense for

which intervention is sought." Dkt. 62 in No. 16-2696, at 3. "[A] party's failure to meet [this requirement] warrants dismissal of its motion." *Id.* at 3-4.

The Oversight Board's motion in this case does not comply with Rule 24(c). Rather than file one of the pleadings set forth in Federal Rule of Civil Procedure 7, the Oversight Board has filed a proposed opposition brief to plaintiffs' motion for leave to file the Second Amended Complaint and a motion to stay this action. See Ex. A to Dkt. 62. In this respect, the Board's proposed intervention here is equivalent to what the Court has already rejected in other cases. See Dkt. 62 in No. 16-2696, at 3-4. As a result, the same disposition is appropriate here: The Board's motion to intervene should be denied without prejudice. See *id.* at 6.

II. The Oversight Board's Request For A Stay Should Be Rejected

A. PROMESA Does Not Stay This Action

The Oversight Board first contends that this action should be stayed pursuant to Section 405(b) of PROMESA. See Ex. A to Dkt. 62, at 8. The Board does not advance any independent argument on this point. Instead, it incorporates by reference the arguments pressed by defendants in their opposition to plaintiffs' motion for leave to file the Second Amended Complaint. See *ibid.* As we have previously explained in our reply to defendants' opposition, those arguments are incorrect. See Dkt. 77, at 2-10. This action is not stayed by PROMESA.

B. This Court's Inherent Authority Does Not Justify Imposition Of A Stay

The Oversight Board also contends that, even if the PROMESA stay does not apply, the Court should nonetheless stay this action in an exercise of its inherent authority. See Ex. A to Dkt. 62, at 8-10. The Court should reject that request.

As we have previously explained (see Dkt. 77, at 9-10), resort to the Court's inherent authority would make little sense in this context, where Section 405(b) of PROMESA sets forth a detailed and finely reticulated list of actions to which the PROMESA stay applies. Congress has

directly addressed the question, and its determination that certain categories of cases should be stayed reflects its judgment that others should *not* be stayed.

Against this backdrop, it would take a truly extraordinary showing to override Congress's judgment that no stay is appropriate in this case. At a minimum, such a showing would have to marshal considerations that are particular to this case, rather than generalized considerations that would apply to any litigation involving the government of Puerto Rico, and which Congress must surely have weighed in determining the categories of cases to which the PROMESA stay would apply. But, with respect, such generalized considerations are all that the Oversight Board invokes here. The Board contends that a stay is warranted because the Commonwealth needs a "breathing spell," and because litigating this action would, in the Board's view, distract the Commonwealth from working with the Board to promote voluntary negotiations with creditors. See Ex. A to Dkt. 62, at 8-9. That could be said about *any* litigation brought against the government of Puerto Rico. It thus cannot overcome Congress's decision not to extend the PROMESA stay to this action.

C. Resolution Of This Lawsuit—Particularly Plaintiffs' COFINA Cause Of Action—Will *Expedite* Voluntary Negotiations Among Creditors, The Oversight Board, And The Commonwealth

In support of its claim that the Court's inherent authority allows imposition of a stay despite PROMESA's terms—and in support of its more general position that staying this action is desirable—the Oversight Board suggests that prosecuting this action will inhibit the Board's efforts to negotiate a voluntary solution to the Commonwealth's fiscal situation. With respect, the Oversight Board is mistaken.[2] Resolving plaintiffs' claims in this case will affirmatively pro-

[2] Plaintiffs do not make this assertion lightly, and we recognize that the Oversight Board is relatively new to the fiscal situation in Puerto Rico. Plaintiffs, however, have been engaged for many months in efforts to address these issues, and are thus deeply familiar with the various le-

mote negotiations by bringing clarity to the parties' legal entitlements, which are currently mired in a seemingly irreconcilable disagreement over the meaning of certain core constitutional and legislative pronouncements. As illustrated below, that clarification is critical to negotiations regarding a fiscal plan, because any fiscal plan proposed by the Commonwealth and approved by the Oversight Board must "respect the relative *lawful* priorities or *lawful* liens . . . in effect prior to [PROMESA's] enactment." PROMESA § 201(b)(1)(N) (emphasis added). And only this Court can provide the needed clarification, because identifying which priorities and liens are "lawful" is ultimately a judicial task; it is part of the courts' role in "say[ing] what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The most obvious illustration of this dynamic lies in plaintiffs' Second Cause of Action, which alleges that Executive Order 2016-30 unlawfully reordered the lawful creditor protections and priorities—in violation of Section 303(3) of PROMESA—by stopping payments to holders of Constitutional Debt while continuing to allow available resources to be diverted to pay holders of bonds issued by COFINA. Dkt. 78, ¶¶ 17-20, 135-144. Indeed, COFINA bondholders currently occupy a uniquely—and unlawfully—privileged position as the only holders of tax-supported debt that continue to receive transfers of Commonwealth revenue for debt service. As explained below, resolution of plaintiffs' claim will remove what is currently the single biggest impediment to successful negotiations: COFINA bondholders' mistaken insistence that the COFINA structure has validly diverted approximately $55 billion in SUT revenue over a period of

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gal positions staked out by defendants and various creditor groups. Most notably, we have heard all too often the assertion that the Puerto Rico Constitution simply does not mean what it says regarding the various protections for Constitutional Debt, whereas those asserting other financial interests (*e.g.*, COFINA bondholders) insist that their position is inviolable. The unfortunate reality is that legal action appears to be necessary to separate certain stakeholders from their erroneous—but intractable—positions.

50 years. That diversion amounts to hundreds of millions of dollars on an annual basis, and approximately $51 billion over the remaining term of the outstanding bonds issued by COFINA. Clarifying that COFINA lacks an enforceable interest in these funds will materially facilitate the Oversight Board's task of developing a workable fiscal plan.

1. As noted above, PROMESA requires the Oversight Board to approve a fiscal plan that respects "lawful" liens and priorities. PROMESA § 201(b)(1)(N). COFINA's bondholders have argued in their motion to intervene in this case—and no doubt will insist in their negotiations with the Oversight Board—that the purported assignment of a portion of the Commonwealth's SUT to pay the COFINA bonds creates a legal obligation that must be respected under PROMESA. See Dkt. 50, at 15. But their view of negotiations with the Oversight Board starts from a deeply flawed premise. Contrary to the COFINA bondholders' assumption, the assignment of core tax revenue to COFINA—purportedly rendering those revenues not "available resources" of the Commonwealth available for payment of Constitutional Debt and other expenditures—is not "lawful." The COFINA structure in fact violates the Puerto Rico Constitution in numerous respects. We briefly detail certain (but not all) of these defects below.

a. First and foremost, revenues collected from the SUT are clearly "available resources" under the Puerto Rico Constitution, and are therefore subject to the Constitutional Debt's constitutional lien and first-priority claim. P.R. Const. art. VI, § 8. The SUT is a general sales and use tax covering a broad range of goods and services, and was implemented as a replacement for the Commonwealth's general excise tax, which was repealed by the same law that created the SUT. See Act of July 4, 2006, No. 117-2006. Proceeds from the SUT are core tax revenues of the sort that would traditionally be paid to the government, and they represent a canonical example of "available resources."

The undeniable reality that *all* revenues arising from the SUT are "available resources" for purposes of the Puerto Rico Constitution is also underscored by the completely arbitrary distinctions that the legislation structuring COFINA draws between portions of revenues arising from the SUT: Some days all of those revenues are concededly "available resources," whereas on other days a portion of those very same revenues supposedly are not. The total SUT levied by the Commonwealth is 10.5%. Slightly less than half of it (4.5%) is paid to the Commonwealth; no portion of that revenue is transferred to COFINA, and there is no dispute that these funds are "available resources." See Act of July 1, 2015, No. 101-2015, sec. 6, § 4210.01(b). The remainder (6.0%) is divided between the Commonwealth and COFINA according to the following process: At the start of each fiscal year (on July 1), these funds are paid to COFINA until a minimum amount (the Pledged Sales Tax Base Amount) is reached. See Official Statement for Puerto Rico Sales Tax Financing Corporation Sales Tax Revenue Bonds, First Subordinate Series 2011A, at 14-17 (2011). Even though these funds are supposedly not available resources, once the Pledged Sales Tax Base Amount is reached, the *very same* revenue stream is paid to the Commonwealth and is concededly "available resources." See *id.* at 35. Finally, once the Commonwealth has received its share, the same revenue stream is divided between the Commonwealth and COFINA, *id.* at 17; the Commonwealth's portion constitutes an "available resource," while the portion paid to COFINA supposedly does not, see *id.* at 35.

The *only* conceivable distinction between the portions of the SUT revenues that are diverted to COFINA and those that are paid to the Commonwealth is that the Commonwealth legislature has declared that the former do not constitute "available resources." 13 L.P.R.A. § 12. For constitutional purposes, however, that is no distinction at all. It is axiomatic that the Commonwealth may not rewrite the meaning of Article VI, Section 8 through mere legislation. See,

e.g., *Marbury*, 5 U.S. (1 Cranch) at 77 (distinguishing the federal Constitution from an "ordinary legislative act[]" that is "alterable when the legislature shall please to alter it"); *City of Boerne v. Flores*, 521 U.S. 507, 518-519 (1997) (holding that legislation cannot alter the meaning of the First Amendment).[3] Nor is it plausible to think that the Puerto Rico Constitution grants holders of the Constitutional Debt a constitutional lien and first-priority claim merely on *whatever the legislature happens to designate as available resources.* That would be no protection at all, and it would be nonsensical to suggest that the Puerto Rico Constitution adopts such an easily evaded rule. See, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 492 (2000) (holding State may not evade the Sixth Amendment's jury trial guarantee by labeling an element of an offense a "sentencing factor"); *INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001) (reading the federal Constitution's Suspension Clause to forbid a permanent redefinition of the scope of habeas corpus, in addition to a "temporary abrogation" of the writ).[4]

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[3] The same is true of the Commonwealth's purported disclosures concerning "available resources" in the Official Statement that accompanied the Commonwealth's issuance of general obligation bonds in 2012 and 2014. As the COFINA Bondholders have observed (Dkt. 50, at 9), these Official Statements state that the SUT revenues purportedly assigned to COFINA do not constitute "available resources" within the meaning of the Puerto Rico Constitution. But since legislation cannot modify the meaning of the Puerto Rico Constitution, it follows that "disclosures" of the purported effect of that legislation cannot do so. What is more, there are numerous other general obligation bonds issued that predate COFINA, the offering materials for which contain no such disclosure nor any suggestion that the legislature can define away what constitutes "available resources."

[4] The attempt to redefine "available resources" through mere legislation also cannot be salvaged by the artifice that the revenues diverted to COFINA are not collected by the Commonwealth. See Dkt. 78, ¶ 97 (summarizing the collection of the Commonwealth's SUT). To be sure, legislation creating COFINA provides that the funds earmarked for COFINA are purportedly "directly deposited" into a fund held by COFINA, rather than the Treasury of Puerto Rico. 13 L.P.R.A. § 12. Surely the definition of available resources cannot hinge on such an artificial mechanic, not least because this arrangement would constitute an unconstitutional attempt to surrender and suspend the Commonwealth's power to collect the diverted portion of the SUT revenues. See P.R. Const. art. VI, § 2 (providing that the legislative power to impose and collect taxes "shall never be surrendered or suspended").

b. More broadly, the Commonwealth's purported assignment of SUT revenues is also invalid because it amounts to an evasion of the Puerto Rico Constitution's carefully calibrated restrictions on the Commonwealth's ability to pledge away available resources to support the issuance of debt. The COFINA structure—if upheld—would gut the purpose of express limits on incurrence of debt imposed by Article VI, Section 2 of the Commonwealth Constitution. Under that provision, Puerto Rico may not issue or guarantee new Constitutional Debt if doing so would cause anticipated debt payments on Constitutional Debt issued by the Commonwealth in any future fiscal year, plus any amounts actually paid by the Commonwealth on guaranteed bonds in the previous fiscal year, to exceed 15% of the Commonwealth's average revenue over the previous two fiscal years. P.R. Const. art. VI, § 2. The debt limit thus assures Puerto Rico's citizens that their government may not imprudently pledge away the Commonwealth's future revenues for the benefit of creditors, while simultaneously helping to maintain the Commonwealth's creditworthiness for the benefit of the holders of its valid Constitutional Debt. Moreover, Article VI, Section 2 also limits the maturity of the Commonwealth's borrowing, by providing that Constitutional Debt must generally mature no later than 30 years from its issuance—thereby limiting the ability of one generation to encumber the governmental revenues of the next.

The COFINA structure, if upheld, would eviscerate these crucial protections. Indeed, the theory behind COFINA would allow the diversion of unlimited amounts of core tax revenues to support the issuance of debt of any maturity—leaving nothing at all left over to fund the Commonwealth's expenditures for many decades to come. Courts have noted the absurdity of such a result in rejecting efforts to evade constitutional debt limitations by diverting tax revenues to support the issuance of third-party debt. See, *e.g.*, *State ex rel. Shkurti v. Withrow*, 513 N.E.2d

1332, 1336-1337 (Ohio 1987); *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 698 (N.D. 1984); *Long v. Napolitano*, 53 P.3d 172, 189 (Ariz. Ct. App. 2002).

The threat of evasion is not an idle concern. To the contrary, COFINA's *very first issuance of debt*, in 2007, could not have been validly issued by the Commonwealth itself as Constitutional Debt. This issuance entailed both greater debt service and much longer maturities than the Constitution would have allowed if these bonds had been issued directly by the Commonwealth rather than by COFINA.[5]

Of course, the Puerto Rico Constitution's debt limit does not apply to bonds issued by COFINA. It applies only to bonds issued or guaranteed by the Commonwealth itself, and backed by a pledge of its full faith, credit, and taxing power. See P.R. Const. art. VI, § 2. But holders of COFINA bonds draw precisely the wrong lesson from this fact. To them, the absence of numeri-

[5] The constitutional debt limit requires the Commonwealth to calculate the proposed schedule of payments due on a particular bond it is seeking to issue, and to ensure that in each fiscal year those payments—together with other scheduled payments on outstanding Constitutional Debt issued by the Commonwealth, plus any amounts actually paid by the Commonwealth on guaranteed bonds in the previous fiscal year—do not exceed 15% of the average of the Commonwealth's revenues for the preceding two fiscal years. See P.R. Const. art. 6, § 2. With respect to COFINA's Series 2007A and Series 2007B issuances, from July 2007, the average of the preceding two fiscal years' revenue (as the Commonwealth has historically calculated that figure, but including the SUT revenues diverted to COFINA) was approximately $8.4 billion. See Official Statement for Commonwealth of Puerto Rico Public Improvement Bonds of 2007, Series B, at 12 (2007); Official Statement for Puerto Rico Sales Tax Financing Corporation Sales Tax Revenue Bonds, Series 2007A, at 17 (2007). Thus, if the COFINA bonds had been issued by the Commonwealth itself as Constitutional Debt, in no year of those bonds' existence could payment on all Constitutional Debt exceed 15% of that amount, or roughly $1.26 billion. But the Series 2007A and Series 2007B COFINA bonds required a payment of approximately $1.35 billion in fiscal year 2057. Moreover, most of the bonds had maturities in excess of 30 years—in some cases, up to *50 years*. See Official Statement for Puerto Rico Sales Tax Financing Corporation Sales Tax Revenue Bonds, Series 2007A, at inside cover page (2007); Official Statement for Puerto Rico Sales Tax Financing Corporation Sales Tax Revenue Bonds, Series 2007B, at inside cover page (2007). So right out of the gate, COFINA allowed the diversion of tax revenues in such a way that would have been flatly unconstitutional in multiple respects if the Commonwealth had sought to issue these bonds as lawful Constitutional Debt.

cal or durational limits on the Commonwealth's ability to pledge tax revenues to support the issuance of debt by a third party means that *anything* goes. The unmistakable inference from the structure of the Constitution's debt-related provisions, however, is that the Commonwealth simply may not irrevocably pledge away core tax revenues to support the issuance of debt *at all*. Any other result would countenance a blatant evasion of the Constitution.

2. By resolving plaintiffs' claim under Section 303(3)—and holding that the Commonwealth's purported assignment of SUT revenues to COFINA is not "lawful"—this Court would provide much needed clarification of the parties' legal entitlements, thereby facilitating voluntary negotiations among creditors, the Commonwealth, and the Oversight Board.

a. For starters, clarifying that the SUT revenues purportedly assigned to COFINA remain "available resources" would establish that these funds are subject to the Constitutional Debt's constitutional lien and first-priority claim, and that—at the very least—any interest COFINA may have in these funds is junior to that of holders of the Constitutional Debt. And because PROMESA requires that any fiscal plan must "respect the relative *lawful* priorities or *lawful* liens . . . in effect prior to [PROMESA's] enactment," PROMESA § 201(b)(1)(N) (emphasis added), the Court's decision would foreclose any attempt to divert SUT revenues to fund payment of COFINA's debt until the Constitutional Debt is paid in full.

Without this clarification, it is virtually certain that COFINA's bondholders' misguided belief that the purported assignment of SUT revenues is sacrosanct will frustrate meaningful negotiations. Simply put, COFINA bondholders' belief that COFINA has an absolute entitlement to these funds is irreconcilable with the reality that SUT revenues remain "available resources." Disabusing COFINA bondholders of their misunderstanding will remove a major roadblock to effective negotiations.

b. A conclusion that the Commonwealth's purported assignment of SUT revenues to COFINA is invalid would go even further in promoting a voluntary solution to the Commonwealth's overall fiscal situation. The Commonwealth has purportedly assigned more than $724 million in SUT revenues to COFINA for the current fiscal year, and that figure increases sharply in future fiscal years—reaching *$1.85 billion* by fiscal year 2041. See Puerto Rico Sales Tax Financing Corporation, Basic Financial Statements and Required Supplementary Information, at 26 (as of June 30, 2014).

A judicial finding that the assignment of SUT revenues to COFINA is invalid would thus free up vast quantities of current and future revenue, which the Commonwealth could use to fund essential services, other current expenditures, capital improvements, and payments on its lawful Constitutional Debt. If plaintiffs are correct that the assignment of SUT revenues to COFINA to facilitate the servicing of COFINA's debt violates the various limitations in Puerto Rico's Constitution on ceding tax revenue for the benefit of creditors, COFINA would lack *any* enforceable interest in the SUT revenues, and the COFINA bondholders' claim against COFINA would suffer accordingly.

Under these circumstances, the Oversight Board can and should approve a fiscal plan reflecting the understanding that the assignment to COFINA is not lawful. But that will no doubt be challenged by COFINA bondholders (just as a plan premised on the erroneous contrary view would be challenged by other creditors, including holders of Constitutional Debt). Delaying the inevitable judicial resolution of this key issue will do nothing to promote negotiation. The Court should accordingly take this opportunity to clarify the law and end the stalemate.

CONCLUSION

The Oversight Board's motion for leave to intervene should be denied without prejudice.

November 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE: It is hereby certified that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record which are CM/ECF system participants at their corresponding e-mail addresses and which, pursuant to Local Civil Rule 5.1(b)(2), constitutes the equivalent service.

/s/ Ramón Rivera Morales
J. Ramón Rivera Morales