No. 18-

IN THE

Supreme Court of the United States

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted nationwide, states that a security interest is perfected by filing a financing statement only if the financing statement provides the correct name of the debtor. Potential lenders search the Article 9 filing system using the debtor's name, and they will therefore only discover financing statements describing security interests against the debtor's assets if the financing statement contains the correct name for the debtor.

Recognizing the need for certainty, Article 9 provides objective rules for identifying a debtor's correct name. When a debtor is an organization created by statute, its name is "the name that is stated to be the registered organization's name" in the statute. The bondholders in the adversary proceeding below failed to include on their financing statement the name "stated to be the registered organization's name" but instead used the debtor's former name. The court below nevertheless held that a putative creditor would have searched the UCC database using both the new name and the old name, and therefore the incorrect, old name was sufficient to perfect.

The Question Presented is: Did the court below err by inventing an exception to Article 9's requirement that the name of a debtor for perfection purposes is "the name that is stated to be the registered organization's name on the public organic record . . ."?

PARTIES TO THE PROCEEDING

Petitioner here, Appellee below, is the Financial Oversight and Management Board for Puerto Rico, as representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico.

Respondents here, Appellants below, are Andalusian Global Designated Activity Company; Glendon Opportunities Fund, LP; Mason Capital Master Fund LP; Oaktree-Forrest Multi-Strategy, L.L.C. (Series B); Oaktree Opportunities Fund IX, L.P.; Oaktree Opportunities Fund IX (Parallel 2), L.P.; Oaktree Value Opportunities Fund, L.P.; Ocher Rose, L.L.C.; SV Credit, L.P.; Puerto Rico AAA Portfolio Bond Fund, Inc.; Puerto Rico AAA Portfolio Bond Fund II, Inc.; Puerto Rico AAA Portfolio Target Maturity Fund, Inc.; Puerto Rico Fixed Income Fund, Inc.; Puerto Rico Fixed Income Fund II, Inc.; Puerto Rico Fixed Income Fund III, Inc.; Puerto Rico Fixed Income Fund IV, Inc.; Puerto Rico Fixed Income Fund V, Inc.; Puerto Rico GNMA and U.S. Government Target Maturity Fund, Inc.; Puerto Rico Investors Bond Fund I, Inc.; Puerto Rico Investors Tax-Free Fund, Inc.; Puerto Rico Investors Tax-Free Fund II, Inc.; Puerto Rico Investors Tax-Free Fund III, Inc.; Puerto Rico Investors Tax-Free Fund IV, Inc.; Puerto Rico Investors Tax-Free Fund V, Inc.; Puerto Rico Investors Tax-Free Fund VI, Inc.; Puerto Rico Mortgage-Backed & U.S. Government Securities Fund, Inc.; Tax-Free Puerto Rico Fund, Inc.; Tax-Free Puerto Rico Fund II, Inc.; Tax-Free Puerto Rico

Target Maturity Fund, Inc.; and UBS IRA Select Growth & Income Puerto Rico Fund.

Altair Global Credit Opportunities Fund (A), LLC and Nokota Capital Master Fund, L.P. were Appellants below. They have since been dismissed from the underlying adversary proceeding without prejudice.

The American Federation of State County and Municipal Employees, the Official Committee of Retired Employees of the Commonwealth of Puerto Rico, and the Official Committee of Unsecured Creditors were Appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a nongovernmental corporation and is therefore not required to file a statement under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), as representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (the "System"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 914 F.3d 694 (1st Cir. 2019) and is reprinted in the Appendix hereto ("App.") beginning on page 1a. The district court's opinion is reported at 590 B.R. 577 (D.P.R. 2018) and is reprinted beginning at App. 61a. The district court's Final Judgment is reprinted at App. 58a.

STATEMENT OF JURISDICTION

The court of appeals issued its decision and judgment on January 30, 2019. App. 14a. This Court has jurisdiction to review this timely petition under 28 U.S.C. § 1254(1).

The district court had jurisdiction over the underlying adversary proceeding pursuant to 48 U.S.C. § 2166. The First Circuit had jurisdiction to hear the appeal of the district court's final

judgment under 28 U.S.C. § 1295(a)(1) and 48 U.S.C. § 2166(e).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the UCC are set forth in the Appendix beginning at 104a.

STATEMENT OF THE CASE

The decision below blatantly disregards the plain text of Article 9 of the UCC and nationwide precedent by holding that a security interest was perfected even though the secured party failed to comply with Article 9's clear rule that a financing statement include "the name that is stated to be the registered organization's name on the public organic record . . . . " This Court should grant the petition for certiorari because the decision below is manifestly incorrect and will have a significant adverse impact on both secured lending transactions nationwide and the Title III cases in which Puerto Rico is attempting to restructure its crippling debt.

The rule of law in this case is not complicated. To perfect a security interest in personal property by the filing of a financing statement, Article 9 requires a financing statement to correctly provide "the name" of the debtor, identify the secured party, and indicate the encumbered collateral. UCC § 9-502, P.R. Laws Ann. tit. 19, § 2322(a).[1] A registered organization's

[1] This case concerns the UCC as enacted by Puerto Rico. That enactment is identical to the uniform version of the UCC in all material respects.

name for Article 9 purposes is "the name that is *stated* to be the registered organization's name" in its public organic record. UCC § 9-503(a)(1), P.R. Laws Ann. tit. 19, § 2323(a)(1) (emphasis added). The parties agree that the System's public organic record is the statute that created it. The official English translation of that statute contains a clause "designat[ing]" the System's name as "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico" ("RSE"). P.R. Laws Ann. tit. 3, § 761. RSE is therefore the System's name for Article 9 purposes. A financing statement that fails to use the RSE name cannot perfect a security interest in the System's property. *See* UCC § 9-506(b), P.R. Laws Ann. tit. 19, § 2326(b) ("[A] financing statement that fails sufficiently to provide the name of the debtor in accordance with § 2323(a) of this title is seriously misleading.").

It is universally accepted that Article 9's filing rules must be strictly enforced, and for good reason. Potential lenders rely on the accuracy of UCC filings. If a debtor's name is listed incorrectly on a financing statement, a potential lender searching the UCC database under the correct name will never learn of the security interest in the encumbered collateral. Article 9 provides simple, objective rules for determining a debtor's name so that a potential lender does not have to guess under which name to search. A filer that fails to follow those objective rules and lists the debtor's name incorrectly does not perfect its security interest.[2] Even the court below

[2] The nationally recognized search logic adopted by most jurisdictions, including Puerto Rico, intentionally searches only for exact matches (except for "noise" words, such as "LLC"). It is therefore critical that

has recognized that Article 9 only works if its objective filing rules are strictly enforced. *Uniroyal, Inc. v. Universal Tire & Auto Supply Co.*, 557 F.2d 22, 23 (1st Cir. 1977) ("Efforts by courts to fashion equitable solutions to mitigate the hardship on particular creditors of literal application of statutory filing requirements would have the deleterious effect of undermining the reliance which can be placed upon them. The harm would be more serious than the occasional harshness resulting from strict enforcement.").

The decision below jettisoned Article 9's objective rules in favor of its notion that putative lenders would have searched using the System's new and old names. App. 51a–52a. The court recognized that the System's enabling statute contains a clause that "designated" its name as "RSE." App. 44a. While the court was clearly troubled that the official English translation changed the name that was left unchanged in Spanish, there is no room in the UCC to create exceptions when the rules are so clear and so necessary. The UCC allows creditors to file new financing statements with new names whenever the debtor changes names. Here, the creditors had many years to do that after the English name was changed in 2014. The court nevertheless reasoned a putative creditor would have concluded that the System has an additional name—"Employees Retirement System of the Government of the Commonwealth of Puerto Rico" ("ERS"). App. 51a–52a. According to the court,

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financing statements list a debtor's name precisely correctly. *See* UCC, Article 9 Model Admin. Rules § 503 (2015), https://www.iaca.org/wp-content/uploads/Model-Administrative-Rules.pdf.

a "reasonable creditor" supposedly would have examined other provisions in the enabling statute, over 60 years of the statute's legislative history, and the System's historical practices and determined that ERS was an equally valid name as RSE. App. 45a–52a. Manifestly, that destroys the Article 9 system. Searches for pre-existing perfected security interests must be fast and easy—not dependent on laborious analysis of statutes and legislative history.

Without clear, objective rules for determining a debtor's name, potential lenders could never be certain that a search of the UCC database will turn up encumbered collateral. Under a "reasonable creditor" test, potential lenders would never know with certainty whether they have done enough examination to conclude that they have the right name or names. The statutory rules of Article 9, using solely the name "stated" in the public organic record, are designed to avoid that risk. Unless a potential lender knows for certain that it searched under the correct name, it cannot rely on the results of its search. In fact, the UCC was revised in 2001 specifically to eliminate the putative creditor test that the decision below endorsed.

Petitioner recognizes that Article 9 is a creature of state law, and the Court typically does not review purely state-law questions. Nevertheless, the Court has done so on occasion where the issue is of national significance and the court of appeals' ruling is "plainly wrong." *Leavitt v. Jane L.*, 518 U.S. 137, 144–45 (1996) (per curiam) (collecting examples). Here, those standards are met. The UCC has been adopted by every state in the nation as well as the Commonwealth of Puerto Rico, the District of

Columbia, and the Virgin Islands, and it therefore has the same reach as a federal statute. *Barnhill v. Johnson*, 503 U.S. 393, 398 n.5 (1992); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978) ("We granted certiorari to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia . . . ." (citation omitted)); *Slodov v. United States*, 436 U.S. 238, 257 n.22 (1978). As discussed below, Article 9's filing system is critical to secured lending transactions across the nation, and thus the decision below implicates issues of national importance. *See* Point II, *infra*. Moreover, the First Circuit's ruling is indefensible because it disregards the plain text of Article 9 and resurrects a "reasonable creditor" or putative creditor test that was deliberately eliminated from the UCC. *See* Point I, *infra*.

1. In 1951, the Commonwealth of Puerto Rico established the System as a trust for the benefit of public employees. Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 (the "Enabling Act") (codified as amended at P.R. Laws Ann. tit. 3, §§ 761 *et seq.*). The System holds in trust funds to pay pension and other benefits to officers and employees of the Commonwealth government, its public corporations, and its municipalities. P.R. Laws Ann. tit. 3, § 761.

The Enabling Act was last amended in 2013. Law No. 3 of April 4, 2013, 2013 P.R. Laws 39 (codified at P.R. Laws Ann. tit. 3, § 761 *et seq.*). The official English translation of the 2013 version of the Enabling Act "designate[s]" the System's name as "the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico.'" P.R. Laws Ann. tit. 3, § 761.

2. On January 24, 2008, the System issued approximately $2.9 billion in bonds (the "Bonds") pursuant to a Pension Funding Bond Resolution (the "Resolution"). The Resolution provides that the Bonds would be secured by certain revenues collected by the System and placed into debt servicing accounts. In connection with the bond issuance, the System executed a Security Agreement, which grants holders of the Bonds a security interest in certain of the revenue collateral as described in the Resolution. The Security Agreement did not describe the collateral itself but merely referenced the collateral description in the Resolution.

3. In June and July 2008, the Commonwealth's Department of State (the "Department") received UCC-1 financing statements attempting to perfect the Bondholders' security interest in the revenue collateral described in the Resolution. Supplemental Appendix ("SA") 1–2. The financing statements list the debtor as "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" (the System's "stated" name at that time) and refer to the collateral as "The pledged property described in the Security Agreement attached as Exhibit A hereto and by this reference made a part hereof." *Id.* A copy of the Security Agreement was attached to the financing statements. The Resolution, which is the only document containing any description of the collateral, was not attached to the financing statements, however.

More than seven years later (in 2015 and 2016), the Department received two sets of UCC-3 financing statements purporting to amend the 2008 financing statements (the "Amendments"). SA3–SA10.

Critically, the Amendments continue to name the debtor as "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" ("ERS"), not the "RSE" name "designated" in the official translation of the 2013 version of the amended Enabling Act. *Id.*; *see also* P.R. Laws Ann. tit. 3, § 761. The Resolution was attached to the Amendments.

4. The Commonwealth of Puerto Rico is in the midst of what Congress has determined to be a "fiscal emergency." 48 U.S.C. § 2194(m)(1). In June 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") to address that fiscal emergency. 48 U.S.C. §§ 2101–2241. Among other things, PROMESA created the Oversight Board and authorized it to bring cases under Title III of PROMESA to restructure the debts of the Commonwealth and its instrumentalities. *Id.* §§ 2161–2177.

On May 21, 2017, the Oversight Board filed a Title III petition on behalf of the System. That triggered an automatic stay of all litigation against the System. *See* 48 U.S.C. § 2161(a) (incorporating the automatic stay from 11 U.S.C. § 362 into the Title III case).

On May 31, 2017, the Bondholders moved for relief from the automatic stay on the ground that their security interest in the System's revenues was supposedly not being adequately protected. *See* 11 U.S.C. § 362(d). In opposition, the System argued that the Bondholders are unsecured creditors because they failed to perfect their security interest

prior to the commencement of the Title III case, and they are thus not entitled to adequate protection.

Pursuant to a stipulation among the parties, the System commenced an adversary proceeding to determine whether the Bondholders' security interest was unperfected. Following discovery, the parties cross-moved for summary judgment.

5. The district court granted the System's motion for summary judgment and held that the Bondholders' security interest was not perfected. App. 61a–102a. According to the district court, the original 2008 financing statements did not perfect the Bondholders' security interest because they did not describe the collateral as required by Article 9. App. 74a–80a (citing P.R. Laws Ann. tit. 19, § 2152(1) (2008) (repealed)). The Amendments likewise did not perfect the security interest because they failed to identify the debtor by its then "stated" name. App. 80a–85a (citing P.R. Laws Ann. tit. 19, § 2322(a)(1)). According to the district court, at the time the Amendments were submitted, the System's name for Article 9 purposes was the name "designated" in the 2013 version of the Enabling Act—that is, "RSE." *Id.* Because the Amendments did not use the RSE name, they did not perfect the Bondholders' security interest. App. 82a–85a. And because the Bondholders' security interest was not perfected prior to the commencement of the Title III case, the court held that the Board could avoid the security interest under Bankruptcy Code § 544(a) (incorporated into the Title III case by 48 U.S.C. § 2161(a)). App. 86a–98a.

6. The First Circuit affirmed in part and reversed in part. App. 1a–57a. It agreed with the district court that the original 2008 financing statements failed to indicate the collateral and therefore did not perfect the Bondholders' security interest. App. 30a–36a. However, it reversed the district court's holding that the Amendments failed to identify the debtor by its correct name. App. 39a–52a.[3]

The First Circuit acknowledged that the Enabling Act "designate[s]" the System as "RSE." App. 44a. The court nevertheless held that both ERS (not a "designated" name) and RSE are valid names for the System under Article 9. App. 52a. According to the court, the System's public organic record is the official English translation of the Enabling Act, and any name appearing anywhere in that translation (even if not "designated") is a valid name for the System. App. 45a–46a. Since both the "RSE" and "ERS" names appear in the translation of the Enabling Act, the court held that ERS was a valid name—even though the Enabling Act specifically "designated" only "RSE" as the System's name. App. 46a–52a.

The First Circuit further held that a "reasonable creditor" would have concluded that "ERS" was a valid name for the System after studying the legislative history of the Enabling Act and its Statement of Motives, among other things. App. 48a–52a. According to the court, "a reasonable

[3] The First Circuit also affirmed in part and vacated in part other rulings of the district court not relevant to this petition.

creditor would be familiar with the Commonwealth law that, in a case of a discrepancy between the English and Spanish, . . . 'the Spanish text shall be preferred to the English'" and therefore would have reviewed historical versions of the Spanish version of the Enabling Act as well as its English translation. App. 48a–50a. According to the court, there is "no evidence" in that history "that the legislature of the Commonwealth intended to change the English name of the System to the RSE name and abandon the ERS name." App. 49a. The court also noted that the System has historically used "ERS" in its day-to-day business and in court filings. App. 50a–51a. "All of these reasons lead us to conclude that 'Employees Retirement System of the Government of the Commonwealth of Puerto Rico' remained a valid name for UCC purposes when the . . . Amendments were filed." App. 52a. "In our view, a searcher . . . would conclude that a search under the ERS name was required. Similarly, a reasonable filer would have concluded that the ERS name was a correct name for the debtor for UCC purposes." *Id.* The court below claimed that its decision was "narrowly decided" based on a "unique confluence of circumstances." App. 17a.

Because it concluded that the Amendments properly named the debtor, the First Circuit held that the Bondholders' security interest was perfected. App. 52a. Accordingly, the court held that the Oversight Board had no basis to avoid the Bondholders' security interest under § 544 of the Bankruptcy Code. App. 52a–53a.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MANIFESTLY IGNORED THE TEXT OF ARTICLE 9 AND COURT DECISIONS NATIONWIDE.

Article 9 is a uniform national statutory scheme governing secured lending that has been enacted in substantially similar form in every state, the Commonwealth of Puerto Rico, the District of Columbia, and other territories. *Barnhill*, 503 U.S. at 398 n.5; Kenneth Misken, *Survey of Legislation: Revised Article 9*, 24 U. Ark. Little Rock L. Rev. 415, 415 (2002). By its terms, Article 9 prescribes a series of simple, objective rules that a secured party must follow to perfect a security interest and not lose priority to subsequent creditors. UCC §§ 9-501 *et seq*., P.R. Laws Ann. tit. 19, §§ 2321 *et seq*. The decision below overtly abandoned those objective rules in favor of a "reasonable creditor" and putative creditor test—a test that was specifically eliminated from Article 9 in 2001 because it introduced too much uncertainty into the UCC filing system. By endorsing a fact-specific, "reasonable creditor" exception to Article 9's objective rules governing perfection, the decision below undermines the ability of potential lenders to rely with certainty and confidence on search results from the UCC database.

A fundamental purpose of Article 9 is to allow potential lenders to determine authoritatively, by searching a database maintained by the state or other jurisdiction, whether collateral owned by a potential borrower has been previously encumbered by another party and thus to eliminate "secret liens."

See, e.g., *McCarthy v. BMW Bank of N. Am.*, 509 F.3d 528, 530 (D.C. Cir. 2007). When the collateral is personal property, searches of the UCC database are conducted using solely the debtor's name. *See* UCC § 9-503 cmt. 2. Consequently, it is critical for a secured party to provide the correct name of the debtor on a financing statement, as the name is defined by Article 9. *Id.* ("The requirement that a financing statement provide the debtor's name is particularly important."). If the wrong name appears on the financing statement, a search using the correct name will not yield the financing statement, and the potential lender will not learn of the encumbered collateral, defeating the whole notice purpose underlying Article 9. *See* 9B Frederick H. Miller et al., Hawkland's Uniform Commercial Code Series § 9-503:1 [Rev] (2018) ("[T]he index system for Article 9 filings is based on the debtor's name, and one searching the records first looks to the index under the name of the prospective debtor to find if any of the debtor's personal property has been encumbered. As a consequence, it is of critical importance that the secured party get the debtor's name right and spell it right in the financing statement."); *id.* § 9-503:2 [Rev] (stating that there is "no wiggle room" and that "the financing statement must provide the exact name of the debtor as shown on the public record").

Accordingly, every court to consider the question since Article 9 was amended in 2001 has held that a financing statement is insufficient to perfect unless it states the name of the debtor with exacting precision; even the slightest error in the name defeats perfection. *See, e.g.*, *Receivables Purchasing*

Co. v. R & R Directional Drilling, L.L.C., 588 S.E.2d 831, 833 (Ga. Ct. App. 2003) (debtor name listed as "Net work Solutions, Inc." instead of "Network Solutions, Inc." insufficient to perfect); *see also Fishback Nursery, Inc. v. PNC Bank, Nat'l Ass'n*, __ F.3d __, 2019 WL 1548823, at *3 (5th Cir. Apr. 10, 2019) (noting that Article 9 as adopted by Tennessee and Michigan "require[s] listing the debtor's name exactly as it appears on the public documents creating the entity"); *In re C.W. Mining Co.*, 488 B.R. 715, 726–28 (D. Utah 2013) (debtor listed as "CW Mining Company" instead of "C. W. Mining Company" insufficient to perfect); *CNH Capital Am. LLC v. Progreso Materials Ltd.*, 2012 WL 5305697, at *4–5 (S.D. Tex. Oct. 25, 2012) (debtor name listed as "Progreso Material, Ltd." instead of "Progreso Materials, Ltd." insufficient to perfect); *In re PTM Techs., Inc.*, 452 B.R. 165, 167–69 (M.D.N.C. 2011) (debtor listed as "PTM Tecnologies, Inc." instead of "PTM Technologies, Inc." insufficient to perfect).

The decision below contravenes that precedent by granting the Bondholders a free pass for failing to provide the System's name precisely as required by Article 9. Worse yet, the decision stands for the proposition that no putative lender can ever know in advance when a court will decide a financing statement containing the incorrect name will be ruled sufficient for perfection and the putative lender will end up having a subordinate security interest.

A debtor's name for Article 9 purposes can easily be determined by following Article 9's simple, objective rules. Where (as here) the debtor is a registered organization, its name for UCC purposes

is the name "stated to be the registered organization's name on the public organic record." UCC § 9-503(a)(1), P.R. Laws Ann. tit. 19, § 2323(a)(1). There is no dispute that the System's public organic record is its Enabling Act—the statute that created the System. *See* UCC § 9-102(a)(68)(C), P.R. Laws Ann. tit. 19, § 2212(a)(68)(C) (stating that a "public organic record" includes "a record consisting of legislation . . . which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state . . . which amends or restates the name of the organization"). The decision below recognized that the Enabling Act is the System's public organic record. App. 45a.

The official English translation of the current version of the Enabling Act, enacted in 2013, provides: "A retirement and benefit system *to be designated* the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico,' which shall be considered a trust, is hereby created." P.R. Laws tit. 3, § 761 (emphasis added). To "designate" means to "name." Webster's American English Dictionary Expanded Edition 93 (2013). Accordingly, for Article 9 purposes, the System's English name as of 2013 is the "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico"—the name "stated to be the registered organization's name on the public organic record." UCC § 9-503(a)(1), P.R. Laws Ann. tit. 19, § 2323(a)(1). Any party after 2013 contemplating giving a loan to the System would know from Article 9's objective rules to search the UCC database using the "designated" RSE name to

determine whether the System's collateral is encumbered.

The Amendments did not employ the RSE name, however. Instead, they incorrectly identified the System as "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." SA3–SA10. That was no minor, technical error. The record is undisputed that a party searching for the correct name (RSE) would not turn up the Amendments (which used the incorrect ERS name). SA11. The Bondholders are unable to point to any other "designation" of a name for the System. Accordingly, the Amendments failed to perfect the Bondholders' security interest because they failed to provide notice of the security interest to potential lenders searching the UCC database using Article 9's rules.

The decision below ignored the fact that the Amendments did not employ the "designated" name of the debtor. App. 45a–46a. In the court's view, a reasonable lender searching the UCC database would have determined that ERS was also a correct name for the System and would have searched under *both* ERS and RSE. App. 51a–52a. In the court's view, the "reasonable creditor" would have looked beyond the provision in the Enabling Act that "designated" the System's name as RSE. App. 45a–46a. Instead, that "reasonable creditor" supposedly would have also examined other portions of the Enabling Act, the Act's legislative history, its statement of motives, and the System's historical use of "ERS" when conducting business and litigation, even though none of those other sources is a public

organic record that "designated" another name. App. 45a–52a.

The bottom line is that if UCC searches must depend on the kind of extensive legal analyses described above, the benefit of the UCC reporting system will be destroyed. It will be unreliable. To be sure, the court below recognized the problem. It attempted to solve the problem by prefacing its ruling as follows: "We craft our holding narrowly to accommodate the very unusual circumstances presented . . . ." App 17a. But that is not a solution. The decision below stands for the proposition that under conditions no putative lender can know in advance, a court can allow a financing statement containing an incorrect debtor's name to perfect a security interest. If the putative lender does not conduct extensive factual research on the history of the use of names not "stated" to be the debtor's name in the debtor's public organic record and then happen to search with the incorrect name, it will make a loan thinking it has a senior security interest when it has only a junior security interest. While secured loans are supposed to be safer and charge lower interest rates, this added risk will make them more expensive.

The holding runs directly counter to the approach codified in Article 9—which relies on *objective* criteria to determine a debtor's name to foster certainty and predictability in the system. Article 9 deliberately does not require a potential lender to engage in any research other than finding the name "stated" in the public organic record. Article 9 does not require a potential lender to

speculate on what might be a debtor's name by delving into legislative history and the debtor's historical course of conduct. Otherwise, a potential lender could never be certain that it has done sufficient investigation and is searching under the correct name.

In fact, Article 9 expressly rejects the "reasonable creditor" test. Under the previous version of Article 9, some courts had employed a "reasonable creditor" test when deciding if a name provided on a financing statement was sufficient. *See, e.g.*, *First Nat'l Bank of Lacon v. Strong*, 663 N.E.2d 432, 434–35 (Ill. App. Ct. 1996) ("When a debtor's name is inaccurately listed on a financing statement, the critical inquiry is whether a reasonably prudent subsequent creditor would be likely to discover the prior security interest."); *see also ITT Commercial Fin. Corp. v. Bank of the West*, 166 F.3d 295, 302 (5th Cir. 1999) ("[A] filing is legally sufficient only if a 'reasonably prudent subsequent creditor' would have discovered the financing statement."). The "reasonable creditor" test was expressly disavowed by the UCC's drafters when Article 9 was revised in 2001 and replaced with objective rules for determining a debtor's name. UCC § 9-506(b), P.R. Laws Ann. tit. 19, § 2326(b) ("Except as otherwise provided in subsection (c) of this section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 2323(a) of this title is seriously misleading."); *see also In re Kinderknecht*, 308 B.R. 71, 75–76 (B.A.P. 10th 2004) ("The intent [of the revisions] to clarify when a debtor's name is sufficient shows a desire to foreclose fact-intensive

tests, such as those that existed under the former Article 9 of the UCC . . ."); *In re Tyringham Holdings, Inc.*, 354 B.R. 363, 365 (Bankr. E.D. Va. 2006) (discussing differences between former and revised Article 9). By resurrecting the rejected and defunct "reasonable creditor" test, the court below ignored the plain text of the UCC and injected an unacceptable level of uncertainty into the UCC filing system.

The decision below contains at least four egregious errors. *First*, Article 9 is clear that a debtor has only one name for UCC purposes. *See* UCC § 9-506(b), P.R. Laws Ann. tit. 19, § 2326(b) (requiring a UCC form to provide "the name" of the debtor). And Article 9 provides a simple, objective rule for determining that name. 5C Frederick M. Hart et al., Forms & Procedures Under the UCC ¶ 92.08(2)(d) (2018) ("If the debtor is a registered organization, . . . the rule is simple and clear cut: the only name that can be placed on the financing statement is 'the name of the debtor indicated on the public record of the debtor's jurisdiction or organization.'"). Unsurprisingly, the decision below failed to cite a single case in which a debtor was held to have two names for Article 9 purposes.

Second, the decision below erred by relying on what a "reasonable creditor" or putative creditor would have concluded the System's name to be. App. 48a–52a. As explained above, the "reasonable creditor" test was deliberately eliminated from Article 9. The decision below resurrects the statutorily rejected and outdated concept of the "reasonable creditor" and thereby undercuts the

essential predictability underlying the modern Article 9 system.

Third, the decision below expressly disregards the UCC's simple rule for determining the name of a registered organization. Under the UCC, a registered organization's name is "the name *that is stated to be the registered organization's name* on the public organic record." UCC § 9-503(a)(1), P.R. Laws Ann. tit. 19, § 2323(a)(1) (emphasis added). The name "stated" or "designated" to be the System's name in the Enabling Act is "RES." P.R. Laws Ann. tit. 3, § 761. Although the "ERS" name appears elsewhere in the Enabling Act, nowhere is it "stated to be" the System's name.

The decision below ignored the requirement that it look to "the name that is stated to be" the System's name in the Enabling Act. In its analysis, the court below repeatedly skipped over the requirement that the name must be stated "to be the registered organization's name" when quoting Article 9. *See, e.g.*, App. 45a, 46a.

Fourth, even if the System could somehow have two names for Article 9 purposes and even if "ERS" were one of those names, the decision below erred by placing the burden on a searching party to search for both the ERS and the RSE names rather than on the filing party to file under both names. Article 9 squarely places the burden on a filing party to correctly identify the debtor on its filing statement in order to perfect. *See* UCC § 9-506 cmt. 2 ("Searchers are not expected to ascertain nicknames, trade names, and the like by which the debtor may be known and then search under each of them. Rather,

it is the secured party's responsibility to provide the name of the debtor sufficiently in a filed financing statement."). By that logic, if a debtor has two names, the burden should be on the filing party to file financing statements under *both names*. A searching party seeing that the Enabling Act "designated" the System's name as "RSE" should not be required to read beyond the designation clause and to investigate 60 years of history to determine whether the System might have additional names. There is no argument here that the Enabling Act "designated" any other name. The filing party—which bears the burden of accomplishing perfection—should be required to file two financing statements or fill in an additional debtor (as the UCC form provides) if it were even possible for a debtor to have two names for UCC purposes. *See In re Summit Staffing Polk Cty., Inc.*, 305 B.R. 347, 354 (Bankr. M.D. Fla. 2003) ("The revisions to Article 9 remove some of the burden placed on searchers under the former law, and do not require multiple searches using variations on the debtor's name.").

To be sure, the decision below purports to be decided "narrowly on the particular facts presented." App. 17a; *see also id.* ("We craft our holding narrowly to accommodate the very unusual circumstances . . . ."); *id.* (citing "unique confluence of circumstances"). But bad facts cannot justify bad law. Article 9 says what it means: A court cannot employ an ill-defined "reasonable creditor" or putative creditor test no matter the equities or how unusual the facts of the case before it. Moreover, limiting the "reasonable creditor" test to "unique" cases is circular and ineffective because a potential

lender would not know whether "unique" circumstances exist until after it conducted a massive investigation into a potential borrower's name. Thus, every lending transaction would require such an investigation.

At bottom, by resurrecting the rejected and defunct "reasonable creditor" test, the decision below ignores the text of Article 9 and effectuates a radical change in the law governing secured transactions nationwide. Given these manifest errors, the Court should consider summary reversal. *See, e.g.*, *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 (2014) (per curiam); *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam).[4]

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[4] The court below committed an additional legal error when it held that the original 2008 financing statements had not lapsed by 2015 when the first of the Amendments was filed. App. 37a–39a. In 2014, the Commonwealth amended its UCC statutes to provide that financing statements lapse after five years. P.R. Act No. 2014-17, codified at P.R. Laws Ann. tit. 19, § 2335(a). The court below held that the new five-year lapse period did not apply retroactively to financing statements filed before 2014. App. 37a–39a. But that is simply incorrect. The Puerto Rico UCC contains a transition provision expressly stating that all of the revisions apply retroactively to unperfected security interests created prior to 2014. P.R. Laws Ann. tit. 19, §§ 2402(a), 2405(c). As the court below held, the Bondholders' security interest was not perfected prior to the 2014 revision (App. 30a–36a), and the security interest is therefore subject to the five-year lapse rule.

In all events, the lapse question is irrelevant to the petition. If the Court grants the petition and reverses on the name issue, Petitioner will prevail regardless of whether the five-year or ten-year lapse rule applies.

II. THE DECISION BELOW WILL HAVE A PROFOUND EFFECT ON SECURED LENDING TRANSACTIONS NATIONWIDE.

Certiorari is further warranted because the decision below will have a significant negative impact on secured lending transactions across the nation. The decision thus implicates issues of exceptional national importance.

The Article 9 filing system depends on predictability. *See* UCC § 9-503 cmt. 2(d). "Filers need a simple and predictable system in which they can have a reasonable degree of confidence that, without undue burden, they can determine a name that will be sufficient so as to permit their financing statements to be effective." *Id.* "Likewise, searchers need a simple and predictable system in which they can have a reasonable degree of confidence that, without undue burden, they will discover all financing statements pertaining to the debtor in question." *Id.* The decision below eviscerates the predictability required for the Article 9 filing system to work by resurrecting the outdated concept of the "reasonable creditor." App. 48a–52a.

The "reasonable creditor" test is vague and leaves both filers and searching parties without an objective basis for determining a debtor's correct name until a court decides what that name is in subsequent litigation. For instance, in the decision below, the court would have required a searching party to review the Enabling Act's legislative history, consider its Spanish translation, and research the System's past practices for more than 60 years,

among other things, to determine that ERS was a valid name for the System under Article 9. App. 48a–52a. The upshot of the decision is that no party searching the Article 9 database could ever be certain that it has searched using the correct name because there always could be additional information that the searcher does not know but that could influence what the "reasonable creditor" would conclude. Potential lenders therefore could not rely on search results from the Article 9 database.

Although the decision below is binding only within the First Circuit, courts across the nation frequently look to federal Circuit Court decisions when interpreting the UCC. *See, e.g.*, *McFarland v. Brier*, 850 A.2d 965, 975 (R.I. 2004); *Nat'l Operating, L.P. v. Mut. Life Ins. Co. of N.Y.*, 630 N.W.2d 116, 126–27 (Wis. 2001); *Chase Manhattan Bank, N.A. v. Natarelli*, 93 Misc.2d 78, 88–89 (N.Y. Supr. Ct. 1977); *see also* UCC § 1-103 (calling for uniform interpretation of the UCC among all jurisdictions). The decision below opens the door for other courts to resurrect the "reasonable creditor" test or to craft other fact-dependent exceptions to Article 9's objective rules, and it thus threatens the entire Article 9 regime. This Court should intervene to protect the nationwide secured lending system from such mischief and to correct the lower court's manifest legal error. Although the decision below claims that it is limited to its facts, there is no reason to believe that other courts will not rely on the decision to craft other fact-dependent exceptions to Article 9's strict filing rules.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In view of the manifest errors in the decision below, the Court may wish to consider summary reversal.

April 30, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JANUARY 30, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1836, 18-1837

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

Debtors.

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ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Movants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO

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MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Movants, Appellees.

No. 18-1841

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS

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

Debtors.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET

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MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Movants, Appellants.

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

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v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Movants, Appellees.

No. 18-1855

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND

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MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL

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MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET

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MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

No. 18-1858

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

Debtors.

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THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-

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FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

No. 18-1868

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH

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

Debtors.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET

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MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Movants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

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v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Movants, Appellees

January 30, 2019, Decided

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

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

Before Lynch, Stahl, and Kayatta, *Circuit Judges*.

LYNCH, ***Circuit Judge***. These appeals involve bonds issued in 2008 by the Employees Retirement System of

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

the Government of the Commonwealth of Puerto Rico[1] (the "System"), which were bought by bondholders (the "Bondholders"), the appellants here. The bond documentation offered as security certain property belonging or owed to the System, as defined in a "Pension Funding Bond Resolution." The Bondholders claim that they have a perfected security interest in that property under Puerto Rico's version of the Uniform Commercial Code ("UCC").

Through the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), the System filed suit in the district court on July 21, 2017, seeking declaratory judgments on several issues related to the validity, breadth, and perfection of the Bondholders' asserted security interest, and regarding the System's compliance with a stipulation between the parties (the "January 2017 Stipulation"). The Bondholders brought nine counterclaims concerning their asserted security interest as well as an alleged violation of the January 2017 Stipulation. After both sides moved for summary judgment, the district court ruled in favor of the System, finding that the Bondholders' interest was not perfected

1. We use this name here rather than "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico," because the System, through the Financial Oversight and Management Board for Puerto Rico, filed its complaint in the district court under this name and refers to itself by this name in its brief to this court. In this opinion, the "ERS name" refers to the term beginning with "Employees Retirement System"; the "RSE name" refers to the term beginning with "Retirement System for Employees."

and so could be avoided under 48 U.S.C. § 2161(a), that there had been no violation of the January 2017 Stipulation, and that two of the Bondholders' counterclaims should be dismissed with prejudice. *The Fin. Oversight and Mgmt. Bd. for P.R. v. Altair Glob. Credit Opportunities Fund (a), LLC* (*In re: The Fin. Oversight and Mgmt. Bd. for P.R.)*, 590 B.R. 577 (D.P.R. 2018). We are told the dollar value of the security for the bonds at stake is about $2.9 billion. The Bondholders appealed.

We agree with the district court on the particular facts here that the UCC financing statements filed in 2008 (the "2008 Financing Statements") did not perfect the Bondholders' security interest, as they lacked a sufficient description of collateral. But we find that the financing statement amendments filed in 2015 and 2016 (together, the "Financing Statement Amendments") satisfied the filing requirements for perfection when read in conjunction with the 2008 Financing Statements. We reverse the district court's determination on the satisfaction of filing requirements for perfection by amendment, and hold that the Bondholders satisfied the filing requirements for perfection as of December 17, 2015.

Because the Bondholders' security interest was perfected, this interest cannot be avoided under the Puerto Rico Oversight, Management, and Economic Stability Act's ("PROMESA") incorporation of parts of the Bankruptcy Code, including 11 U.S.C. § 544(a), and so we do not reach the issue of whether PROMESA and other relevant Commonwealth law would allow for the

retroactive avoidance of *unperfected* liens.[2] Accordingly, we vacate the district court's holding on avoidance of the Bondholders' security interest. We vacate the dismissal of two of the Bondholders' counterclaims and remand to the district court for further proceedings in light of this opinion. Finally, we affirm the dismissal of the Bondholders' claim regarding the January 2017 Stipulation.

As to the first issue, concerning the 2008 Financing Statements alone, we decide narrowly on the particular facts presented. As to the issue of perfection by amendment, also narrowly decided, this case presents a unique confluence of circumstances involving two languages and a translation, particularly regarding the sufficient name of the System under Article 9 of the UCC (Secured Transactions), as adopted by the Commonwealth. Puerto Rico recognizes two official statutory languages. P.R. Laws Ann. tit. 1, § 59. We face a statutory amendment from 2013 (officially translated in 2014) that variously uses two English terms when translating the same unvaried Spanish term for the name of the System. *Id.* tit. 3, §§ 761, 763. Further, past official translations, and the System itself, have consistently used the ERS name (including in many court filings) for over sixty years. We craft our holding narrowly to accommodate the very unusual circumstances presented by a new translation that is, on its face, inconsistent, that varies from every other formal

2. Although we do not reach this issue, we acknowledge with appreciation the assistance provided by the United States Department of Justice in submitting a brief as amicus curiae in support of the appellees.

version both before and after its presentation, and that arises in a context in which there is no realistic likelihood that anyone would search the Department of State of the Government of Puerto Rico's (the "P.R. Department of State") records only under one of the two forms of the name that appear in the English translation of the amended statute.

I.

The System is a trust and government agency created in 1951 by an Act of the Commonwealth. Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 (the "1951 Enabling Act") (codified as amended at P.R. Laws Ann. tit. 3, §§ 761 *et seq.)*. The System is structured to provide pensions and other retirement benefits to employees and officers of the Commonwealth government, members and employees of the Commonwealth's Legislative Assembly, and officers and employees of the Commonwealth's municipalities and public corporations. P.R. Laws Ann. tit 3, § 764. It is designated as "independent and separate" from other Commonwealth agencies. *Id.* § 775. Until legislation that went into effect on July 1, 2017, the System was funded by mandatory contributions from employees and employers, and by the System's investment earnings. *See* Concurrent Resolution 188 of the House of Representatives of the Government of Puerto Rico; Law No. 106 of August 23, 2017.

As of 2008, the Enabling Act allowed the System to incur debt when the Board of Trustees of the System so authorized. P.R. Laws Ann. tit. 3, § 779(d) (2008). Seeking to decrease an unfunded liability of approximately $9.9

billion, the Board of Trustees adopted a "Pension Funding Bond Resolution" (the "Resolution") on January 24, 2008. The Resolution allowed for the issuance of about $2.9 billion in bonds. The Resolution was made publicly available on several governmental websites, including on the Government Development Bank for Puerto Rico's website and on the System's own website.

The Bondholders hold some of those bonds issued by the System. The System executed a security agreement (the "Security Agreement"), which purports to grant the Bondholders a security interest in "Pledged Property" belonging or owed to the System. "Pledged Property" was defined in the Resolution but not in the Security Agreement. The Resolution's definition included the required employer contributions to the System and proceeds from these contributions.[3] The Security

3. The Resolution defined "Pledged Property" as:

> 1. All Revenues.
>
> 2. All right, title and interest of the System in and to Revenues, and all rights to receive the same.
>
> 3. The Funds, Accounts, and Subaccounts held by the Fiscal Agent, and moneys and securities and, in the case of the Debt Service Reserve Account, Reserve Account Cash Equivalents, from time to time held by the Fiscal Agent under the terms of this Resolution, subject to the application thereof as provided in this Resolution and to the provisions of Sections 1301 and 1303.
>
> 4. Any and all other rights and personal property of every kind and nature from time to time hereafter pledged and assigned by the System to the Fiscal

Agreement did not itself define or otherwise describe "Pledged Property." Rather, it stated that "[a]ll capitalized words not defined herein shall have the meaning ascribed to them in the Resolution." But the Resolution was not attached to the Security Agreement, and the Security Agreement did not even say what types of property were pledged, whether the Resolution was available to the public, or where the Resolution could be found.

Security interests could be perfected by filing financing statements comporting with the requirements of Article 9 of the UCC, as adopted by the Commonwealth. In 2008, those requirements included, among other things, that a financing statement "contain[] a statement indicating the types, or describing the items, of collateral." P.R. Laws Ann. tit. 19, § 2152(1) (2008).

The Security Agreement specified that "[the System] shall cause UCC financing and continuation statements to be filed, as appropriate, and the Secured Party shall not be responsible for any UCC filings." On or about June

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> Agent as and for additional security for the Bonds and Parity Obligations.
>
> 5. Any and all cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property mentioned described in paragraphs (1) through (4) above, including, without limitation, those from the sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

The Resolution's definition of "Revenues" included, among other things, "All Employers' Contributions."

24, 2008, and July 2, 2008,[4] two financing statements (the 2008 Financing Statements) related to the System's bonds, as described above, were filed with the P.R. Department of State. The 2008 Financing Statements each used a standard "Financing Statement" form provided by the P.R. Department of State, where such statements are located. Initial financing statements are sometimes referred to as "UCC-1" statements.

The 2008 Financing Statements described the collateral as "[t]he pledged property described in the Security Agreement attached as *Exhibit A* hereto and by reference made a part thereof." The Security Agreement, Exhibit A, was attached to each of the 2008 Financing Statements as filed but, as said, did not itself describe the "Pledged Property" except as it purported to do by reference to an unattached other document. That is, the Resolution, which contained the full definition of "Pledged Property" and other key terms, was not attached. The 2008 Financing Statements do not otherwise describe or define the "Pledged Property" (meaning the collateral). In short, the documents filed with the P.R. Department of State described the collateral only by stating that it was "Pledged Property" described in a document that could only be found somewhere outside the P.R. Department of State.

Between the filing of the 2008 Financing Statements and the filing of the Financing Statement Amendments

4. The listed dates -- June 24 and July 2 -- are the dates stamped on the documents by the filing officer. The same is true for the listed dates for the Financing Statement Amendments.

in 2015 and 2016, the Commonwealth repealed its earlier version of Article 9 of the UCC and enacted a revised version, Law No. 21 of January 17, 2012, 2012 P.R. Laws 162 (codified at P.R. Laws Ann. tit. 19, §§ 2211-2409). The updated law went into effect on January 17, 2013, one year after its approval. *See* P.R. Laws Ann. tit. 19, § 2211). The new version of Article 9 made modest changes to the requirements for financing statements, and made the effective life of financing statements five years rather than ten years.

On or about December 17, 2015, and January 16, 2016, the four Financing Statement Amendments were filed. These filings all used a standard "Financing Statement Amendment" form provided by the P.R. Department of State. The Financing Statement Amendments describe the collateral as "[t]he Pledged Property and all proceeds thereof and all after-acquired property as described more fully in Exhibit A attached hereto and incorporated by reference." Unlike the 2008 Financing Statements, Exhibit A contained a full definition of "Pledged Property" drawn from the Resolution. The Financing Statement Amendments provide, in the attached Exhibit A, that the debtor is the "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." That naming of the debtor is at issue in the argument concerning whether the Financing Statement Amendments sufficed to satisfy the filing requirements for perfection.[5]

5. The issue of the proper name of the System did not arise until February 28, 2014, when a translation of the 2013 amended Enabling Act was published.

The P.R. Department of State certified in March 2017 that a search of the Commonwealth's UCC records under the name "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" revealed the 2008 Financing Statements and the Financing Statement Amendments. A copy of a UCC search report from October 17, 2017, for a search performed by Wolters Kluwer on behalf of the Bondholders, indicates the same. None of the 2008 Financing Statements and the Financing Statement Amendments had been removed from the P.R. Department of State's records as of October 2017.

After the filing of the 2008 Financing Statements and before the filing of the Financing Statement Amendments, the Commonwealth's legislature amended the Enabling Act in 2013. Law No. 3 of April 4, 2013, 2013 P.R. Laws 39 (codified at P.R. Laws Ann. tit 3, § 761 *et seq.)*. From the original Enabling Act in 1951 until 2014, the English translation of the Enabling Act, as codified, used "Employees Retirement System" as the first part of the name of the System, when translating the Spanish term "Sistema de Retiro de los Empleados." *Compare* Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 (English, "Employees Retirement System") *with id.* at 1299 (Spanish, "Sistema de Retiro de Los Empleados"). The legislature had amended the Enabling Act numerous times before 2013, including changing the name of the System in 2004 by removing "and its Instrumentalities" and by replacing "Government of Puerto Rico" with "Government of the Commonwealth of Puerto Rico." *See* P.R. Laws Ann. tit. 3, § 761 (2006). But the English translation of the System as, in part, "Employees Retirement System,"

remained the same. *See* P.R. Laws Ann. tit. 3, § 761 (2011); P.R. Laws Ann. tit. 3, § 761 (2006); P.R. Laws Ann. tit. 3, § 761 (1988).

The English language translation of the 2013 amended Enabling Act was published on February 28, 2014, more than ten months after the 2013 Act's April 4, 2013, approval in Spanish and about seven months after its effective date.[6] As codified, the translation refers to the System as both "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico" and "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 3, §§ 761, 763(36). In many sections, the translation of the Enabling Act continues to use the prior version of the English name ("Employees Retirement System of the Government of the Commonwealth of Puerto Rico"). Such continuity in the translation carries over to the "Statement of Motives" section and to the definition of the shorthand "System," as well as to dozens of other sections. In Section 1-10, which describes how the System was "to be designated," the translation uses the English formulation, "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico" for the unchanged Spanish original, "Sistema de Retiro de los Empleados del Gobierno del Estado Libre Asociado de Puerto Rico." Law No. 3 of April 4, 2013, 2013 P.R. Laws 64.

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6. Similar or lengthier gaps between the passage of laws and the promulgation of their official translations have occurred in the Commonwealth. For example, the official English translation of the 2004 amendment to the Enabling Act (passed on September 15, 2004), Law No. 296 of September 15, 2004, was certified and published on March 13, 2007.

Appendix A

Months after the Financing Statement Amendments were filed in late 2015 and early 2016, Congress enacted PROMESA, 48 U.S.C. § 2101 *et seq.*, on June 30, 2016. Among other things, PROMESA created the Oversight Board and granted the Board a range of powers over the Commonwealth's finances, *see, e.g., id.* §§ 2121-2129, including the general mandate to craft "a method [for the Commonwealth] to achieve fiscal responsibility and access to the capital markets," *id.* § 2121(a).

PROMESA incorporated by reference certain provisions of the Bankruptcy Code, *id.* § 2161(a), including the "strong-arm" provision at 11 U.S.C. § 544(a).[7] That

7. Section 544(a) provides:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
>
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law

provision "set[s] out the circumstances under which a trustee" may permissibly "pursue avoidance" of certain interests. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888, 200 L. Ed. 2d 183 (2018).

Pursuant to Section 301(c)(7) of PROMESA, the Oversight Board is the "trustee" as that term is defined in the Bankruptcy Code (except under one circumstance that is not relevant here, *see* 11 U.S.C § 926). 48 U.S.C. § 2161(c)(7). PROMESA also provides that "Subchapters III and VI shall apply with respect to debts, claims, and liens . . . created before, on, or after [June 30, 2016]." *Id.* § 2101(b)(2).

PROMESA's enactment triggered an automatic temporary stay, under Section 405, on creditors' remedies against the Commonwealth and its property. *Id.* § 2194(a)-(b). The Bondholders moved to lift that stay, but that motion was denied by the district court. *See Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 510 (1st Cir. 2017). This court vacated the district court's decision in part and remanded for further proceedings, *id.* at 516, and expressed general concerns with the protection afforded for the Bondholders' property, *id.* at 511-12.

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permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a).

On remand, the System and the Bondholders entered into the January 2017 Stipulation, in order to resolve *Altair Global Credit Opportunities Fund (A), LLC v. García-Padilla*, No. 16-cv-2696. The January 2017 Stipulation required, in relevant part, that "Employers' Contributions (as defined in the ERS Bond Resolutions) received by the ERS during the pendency of the stay imposed pursuant to [PROMESA] § 405 shall be transferred by the ERS to [a segregated account] for the benefit of the holders of the ERS bonds."

On May 3, 2017, the Oversight Board filed a petition under Title III of PROMESA on behalf of the Commonwealth. On May 21, 2017, the Oversight Board filed a Title III petition on behalf of the System, which triggered an automatic stay of litigation against the System. The Bondholders moved to lift the stay, and the parties entered into a Joint Stipulation that resolved the Bondholders' motion. The Joint Stipulation stated that an adversary proceeding would be filed by the System on or before July 21, 2017, and limited the scope of the proceeding to the "validity, priority, extent and enforceability" of the Bondholders' claimed security interest and the System's rights regarding employer contributions received during May 2017, as well as relevant counterclaims by the Bondholders.

On July 21, 2017, the System, through the Oversight Board, brought this case in federal district court against the Bondholders, seeking declarations about the status, scope, and validity of the Bondholders' claimed security interest in the "Pledged Property," and about the System's

compliance with the January 2017 Stipulation. *See In re: Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. at 583.[8] The Bondholders asserted nine counterclaims, requesting declarations concerning their asserted security interest as well as an alleged violation of the January 2017 Stipulation.

The parties both moved for summary judgment. *Id.* The System sought judgment in its favor on its four claims; the Bondholders sought the dismissal of all of the System's claims as well as judgment in their favor on all of their counterclaims. *Id.*

On August 17, 2018, the district court granted the System's motion for summary judgment in part and denied the Bondholders' cross-motion in its entirety. *Id.* at 599-600. The district court held that any security interest the Bondholders might possess had not been perfected by the 2008 Financing Statements, because those Statements did not contain an adequate description of the collateral as required under Article 9 in 2008. *Id.* at 589 (citing P.R. Laws Ann. tit. 19, § 2152(1) (2008)). The district court then determined that the Financing Statement Amendments did not perfect the Bondholders' security interest, because

8. In other litigation before the commencement of the System's Title III case, the System had stated that at least some of the Bondholders had "valid and enforceable liens in over hundreds of millions of dollars of ERS revenue." Respondent Employees Retirement System of the Government of Puerto Rico's Brief in Opposition to Motion for Relief from the PROMESA Automatic Stay at 10, *Altair Global Credit Opportunities Fund (A), LLC. v. Garcia Padilla*, Case No. 3:16-cv-02696-FAB (D.P.R. Oct. 26, 2016). The district court noted this acknowledgment. *In re: Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. at 587.

they did not identify the debtor by its correct legal name, which the court determined was the RSE name, as the court felt was required by the version of Article 9 operative in 2015 and 2016. *Id.* at 592 (citing P.R. Laws Ann. tit. 19, § 2322(a)(1)).

Starting from the determination that the Bondholders' interest was unperfected when the Title III case began, the district court then held that the Oversight Board, as trustee, could avoid the liens under the strong-arm provision at 11 U.S.C. § 544(a), which PROMESA incorporates, *see* 48 U.S.C. § 2161(a). *In re: Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. at 592-98. That is, Commonwealth law did not prevent a hypothetical creditor from obtaining a judgment lien against the System's assets at the time when the Title III case commenced. *Id.* at 594. The district court thus invalidated the Bondholders' interests pursuant to Section 544(a). The district court then held that the System did not violate the January 2017 Stipulation because the adversary proceedings were limited to claims or counterclaims related to employer contributions received during May of 2017, and the System's obligation to transfer such funds to a segregated account clearly ended with the PROMESA stay on May 1, 2017. *Id.* at 599.

Following a joint response to an order to show cause as to why the Bondholders' counterclaims One through Four "ought not to be dismissed for failure to state a claim upon which relief may be granted," the district court dismissed the Bondholders' counterclaims with prejudice on September 5, 2018.

The Bondholders timely appealed, and this court granted motions to consolidate these appeals.

II.

This case comes on summary judgment. In reviewing grants of summary judgment, "we take as true the facts documented in the record below, resolving any factual conflicts or disparities in favor of the nonmovant." *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 705 (1st Cir. 2007). Nearly all of the operative facts are undisputed here, and the grant of summary judgment turns primarily on interpretations of law, which this court reviews de novo, or mixed questions of law and fact, for which "we employ a degree-of-deference continuum, providing non-deferential plenary review for law-dominated questions and deferential review for fact-dominated questions." *Johnson v. Bos. Pub. Sch.*, 906 F.3d 182, 191 (1st Cir. 2018) (internal quotation marks omitted).

We first consider perfection by the 2008 Financing Statements on their own, and then in conjunction with the later Financing Statement Amendments, before briefly considering avoidance under PROMESA. We then address the dismissal of two of the Bondholders' counterclaims and the alleged violation of the January 2017 Stipulation.

A. Perfection by the 2008 Financing Statements

The Bondholders argue that the initial 2008 Financing Statements perfected their security interest. Under the former version of Article 9 operative in 2008,

> [a] financing statement is sufficient if it [1] gives the names of the debtor and the secured party, [2] is signed by the debtor, [3] gives an address of the secured party from which information concerning the security interest may be obtained, [4] gives a mailing address of the debtor and [5] contains a statement indicating the types, or describing the items, of collateral.

P.R. Laws Ann. tit. 19, § 2152(1) (2008). There is no dispute that the 2008 Financing Statements met the first four requirements at the time they were filed, and so those elements are not considered here. We also stress that the validity of the underlying Security Agreement is not at issue. Security agreements are private contracts between parties and do not have the same public notice purpose as financing statements. *See Webb Co. v. First City Bank* (*In re Softalk Publ'g Co., Inc.)*, 856 F.2d 1328, 1330 (9th Cir. 1988). Instead, our discussion is limited only to whether the 2008 Financing Statements "contain[] a statement indicating the types, or describing the items, of collateral," as required by the then-existing statute. *See* P.R. Laws Ann. tit. 19, § 2152(1) (2008).

The Bondholders argue that we should adopt a lenient understanding of the collateral description requirement, such that the mere reference in the Security Agreement to the definition of "Pledged Property" contained in a separate document, the Resolution, constituted a sufficient description, even though the Resolution, and thus its description of "Pledged Property," was not attached to the 2008 Financing Statements. The Bondholders cite a

number of cases to argue that incorporation by reference is appropriate in this situation. They argue this is in part because the collateral description in a financing statement is, in their view, only "a starting point" in providing notice to an interested party. *John Deere Co. of Balt. v. William C. Pahl Constr. Co.*, 34 A.D.2d 85, 88, 310 N.Y.S.2d 945 (N.Y. App. Div. 1970).

The System, joined by the Committee of Retired Employees of the Commonwealth of Puerto Rico (the "Committee") by reference in its brief, counters that the UCC's goals, like public notice, require a strict rule that interested parties should not face the burden and potential risks of further searching for a collateral description not found within or appended to a financing statement.

We clear away some arguments which are beside the point. It is not helpful for the parties to use terms such as "liberal" or "strict" construction of Article 9. And it is likely that on some facts, incorporation by reference was permissible under the version of Article 9 operative in the Commonwealth when the 2008 Financing Statements were filed. That principle is not really at issue. On the facts on this record, we, like the district court, conclude that the 2008 Financing Statements were insufficient to perfect the security interest under P.R. Laws Ann. tit. 19, § 2152(1) (2008).[9] There has been no literal compliance with this

9. The Bondholders do not cite controlling authority on this issue. In *Chase Bank of Fla., N.A. v. Muscarella*, 582 So. 2d 1196 (Fla. Dist. Ct. App. 1991), part of the collateral -- the "Partnership Interest" -- was listed in the financing statement itself, *see id.* at 1197, and so we agree that the "[*Muscarella*] opinion does not stand

rule, and this provision should be interpreted consonant with the goals of the UCC.

Our holding of an insufficient collateral description depends heavily on the facts, where a) the collateral is not described, even by type(s), in the 2008 Financing Statements or attachments; b) the 2008 Financing Statements do not tell interested parties where to find the referenced document (the Resolution) which contains the fuller collateral description; and c) the Resolution is not at the UCC filing office.

First, the 2008 Financing Statements do not describe even the type(s) of collateral, much less the items, at issue. *Cf. Elf Atochem N. Am., Inc. v. Celco, Inc.*, 187 Ariz. 89, 927 P.2d 355, 363 (Ariz. Ct. App. 1996) (finding sufficient a financing statement that described the collateral as "equipment," as further described in two specific but unattached sales orders). They also do not attach the document (the Resolution) referenced as describing the collateral. Nor do those facts alone define the issue before

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for the proposition that it is sufficient for a financing statement to merely refer to the underlying security agreement and thereby incorporate by reference that document's collateral description." *First Midwest Bank v. Reinbold (In re: I80 Equip., LLC)*, 591 B.R. 353, 361 (Bankr. C.D. Ill. 2018). In *Int'l Home Prods., Inc. v. First Bank of P.R., Inc.*, 495 B.R. 152 (D.P.R. 2013), the referenced document was attached to the financing statement rather than filed or accessible only elsewhere. *Id.* at 160 n.8.

And the citation to *John Deere* is inapposite here, because the reference in that case to a "starting point for investigation" does not refer to a description of collateral. 34 A.D.2d at 88.

us. In addition, the referenced document -- the Resolution -- was held in a different location from the UCC filing office, and the 2008 Financing Statements (including the attached Security Agreement) contain no indication of the referenced document's location or how to find it.

This total combination of facts undercuts several key goals of the UCC and its filing system. These goals include fair notice to other creditors and the public of a security interest. *See* UCC § 9-502 cmt. 2;[10] *Wheeling & Lake Erie Ry. Co. v. Keach* (*In re: Montreal, Me. & Atl. Ry., Ltd.)*, 799 F.3d 1, 11 (1st Cir. 2015) ("[A] primary goal of both Article 9 and . . . perfection rules is to ensure that other creditors have notice of [a] security interest."); *In re Softalk Publ'g Co.*, 856 F.2d 1328, 1330 (9th Cir. 1988) ("The [UCC] financing statement serves to give notice to other creditors or potential creditors that the filing creditor might have a security interest in certain assets of the named debtor."); *In re Cushman Bakery*, 526 F.2d 23, 28 (1st Cir. 1975) (stating that "the system of notice filing is designed to . . . apprise creditors that the secured party may have a security interest in the collateral described in the financing statement").[11] Article 9 was also meant to

10. "UCC Official Comments do not have the force of law, but are nonetheless the most useful of several aids to interpretation and construction of the [UCC]." *JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 57 n.6 (1st Cir. 1999) (internal quotation marks omitted).

11. Several of the cases cited by the Bondholders consider security agreements rather than financing statements. *E.g. Nolden v. Plant Reclamation* (*In the matter of Amex-Protein Dev. Corp.)*, 504 F.2d 1056 (9th Cir. 1974); *Greenville Riverboat, LLC v. Less, Getz & Lipman, P.L.L.C.*, 131 F. Supp. 2d 842 (S.D. Miss. 2000). As

facilitate the expansion of commercial practices. *See* P.R. Laws Ann. tit. 19, § 401(2).[12]

Here, as said, the 2008 Financing Statements do not describe even the type(s) of collateral; instead, they describe the collateral only by reference to an extrinsic document located outside the UCC filing office, and that document's location is not listed in the financing statement. This at best gives an interested party notice about an interest in *some* undescribed collateral, but does not

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noted, security agreements are private contracts that do not have the same public notice purpose as financing statements. *See In re Softalk Publ'g Co.*, 856 F.2d 1328, 1330 (9th Cir. 1988).

12. Where a referenced document is not in the UCC records and its location is not listed in the financing statement itself (nor how to find it), an interested party must do additional searching at its own expense to determine the collateral at issue. This remains true even where the extrinsic document is publicly available elsewhere: The interested party still has to search beyond where the initial financing statement has been filed, and do so without any guidance. It may not have been difficult for interested parties to find the Resolution here, but no party disputes that additional searching would have been necessary.

Interested parties doing such a search could well have justifiable concerns about the extrinsic referenced document. How, for example, would an interested party know whether a description of collateral in the extrinsic document is the latest operative version (rather than a superseded version), whether that document is complete, or whether the document found on another website or at another location is authentic rather than doctored in some way? Forcing interested parties to undertake additional work and expense merely to find a basic collateral description cuts against the goal of expansion of commercial practices.

adequately specify *what* collateral is encumbered. That is, an interested party knowing nothing more than this does not have "actual knowledge" and has not "received a notice," *see* P.R. Laws Ann. tit. 19, § 451(25)(a)-(b) (2008), of the collateral at issue. Requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purpose of the UCC.[13] *See, e.g., In re Quality Seafoods, Inc.*, 104 B.R. 560, 561 (Bankr. D. Mass. 1989).

The UCC filing requirements are clear. *See Uniroyal, Inc. v. Universal Tire & Auto Supply Co.*, 557 F.2d 22, 23 (1st Cir. 1977). It would not have been difficult whatsoever for the 2008 Financing Statements to provide proper notice. The Resolution could simply have been attached to these filings, as the Security Agreement was. Instead, as they stand, the 2008 Financing Statements would leave a reasonable creditor or interested party with doubts as to the collateral at issue. We do not interpret the former UCC provision in a way contrary to its purposes, above all notice, and so the description of collateral in the 2008 Financing Statements was insufficient.

Having resolved the logically antecedent question concerning the first UCC filings, we turn to the amendment issues.

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13. *In re Cushman Bakery* did not determine that further inquiry by interested parties regarding the specific encumbered collateral was required under Article 9, but instead stated only that "further inquiry from the parties concerned [would] be necessary to disclose the *complete state of affairs*" around a transaction. 526 F.2d at 28-29 (emphasis added).

B. Lapse of 2008 Financing Statements

The System and the Committee argue that the 2008 Financing Statements could not later satisfy the requirements for perfection, by amendment, because the 2008 Financing Statements had lapsed by the time the Financing Statement Amendments were filed in 2015 and 2016. The Commonwealth's enactment of a revised Article 9, they argue, shortened the effective time period of an initial financing statement from ten years to five years. *Compare* P.R. Laws Ann. tit. 19, § 2335(a) (five years) *with id.* § 2153(2) (2008) (ten years). Here, the Financing Statement Amendments were filed about seven and a half years after the 2008 Financing Statements. Because lapsed financing statements are ineffective, *see* P.R. Laws Ann. tit. 19, § 2335(c), the Committee argues that the Amendments filed by the Bondholders could not have cured the deficiencies as to the collateral description in the 2008 Financing Statements. In support of their view, the System and the Committee primarily point to a transition provision, the "Savings clause," in the revised Article 9, which states that "[e]xcept as otherwise provided in this subchapter, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect." *Id.* § 2402(a).

This argument on lapse fails for several reasons. First, as to retroactivity, this Savings clause is not intended to apply to the separate provision that shortened the life of financing statements on its effective date. The Commonwealth's Law 17 of 2014, which clarified that the effective time period of financing statements was five years, does not contain a statement concerning

retroactivity. *See* Law No. 17 of January 16, 2014. And as a textual matter, we would expect that a provision intended to apply retroactively to financing statements would directly mention financing statements, particularly given the Commonwealth's long-standing requirement that a law must "expressly so decree" in order to have retroactive effect. P.R. Laws Ann. tit. 31, § 3.

Second, the P.R. Department of State, where UCC filings are made, considered the amendment to the time period "for the life of an initial financing statement" and concluded that the decrease to five years "cannot be retroactive." P.R. Dept. of State, Circular 2014-01, *Clarifications on Term for Filing Continuing Financing Statements Based on Law 17-2014* (Jan. 24, 2014) (English trans.). That is, "for initial financ[ing] statements filed on or before January 15, 2014, [the] term is ten (10) years." *Id.* [14] Though this Circular does not have the force of law, it is informative on this issue. Consistent with this Circular, the Filing Office did not refuse to accept the Financing Statement Amendments, as it would have been required to do if the 2008 Financing Statements had lapsed. *See* P.R. Laws Ann. tit. 19, § 2336(b)(3)(B)(ii).

Third, our conclusion comports with P.R. Laws Ann. tit. 31, § 3, the general provision of the Commonwealth's Civil Code, which states that "[i]n no case shall the

14. At oral argument, counsel for the System suggested that the P.R. Department of State's Circular applied only to perfected interests. This is incorrect. The Circular refers to "initial financing statements" in bold text on both pages and does not limit its determination regarding retroactive effect to previously perfected interests.

retroactive effect of a law operate to the prejudice of rights acquired under previous legislative action."[15] Acceptance of the System's position would run afoul of this provision. The enactment of the old Article 9 into Commonwealth law was clearly a legislative action. Applying the five-year rule retroactively would harm the rights of creditors holding perfected security interests through initial financing statements that were between five and ten years old on January 16, 2014, the effective date of the modified rule. *See id.* tit. 19, § 2335(a). Nothing in the law on the effective time limit for financing statements suggests treating financing statements differently depending on perfection, and instead refers broadly to "a filed financing statement" and the "date of *filing*," *id.* (emphasis added). So, the bar on retroactivity protects all filers in the time period at issue (which includes the Bondholders in this case).

The 2008 Financing Statements had not lapsed when the Financing Statement Amendments were filed about seven and a half years later, because the ten-year rule applied to the 2008 Financing Statements.

C. Perfection by the Financing Statement Amendments in Conjunction with the 2008 Financing Statements

We next consider whether the Financing Statement Amendments cured defects in the initial Statements, when these filings are read together. *See, e.g.*, P.R. Laws Ann.

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15. As a general matter, the Supreme Court of the Commonwealth of Puerto Rico has suggested, considering this law, that it is "highly desirable that . . . [a] new rule will have prospective effect; especially, when contractual or property rights are at stake." *Almodóvar v. Róman*, 125 P.R. Offic. Trans. 218, 1990 Juris P.R. No. 11 (P.R. 1990).

tit. 19, § 2404(3)(B); *see also Miami Valley Prod. Credit Ass'n v. Kimley*, 42 Ohio App. 3d 128, 536 N.E.2d 1182, 1186 (Ohio Ct. App. 1987) ("We are willing to treat the two financing statements as a single financing statement . . . ."). We do not reach the Bondholders' alternative argument that the Financing Statement Amendments independently perfected their security interest, since we determine that the Financing Statement Amendments cured defects in the 2008 Financing Statements. Similarly, we do not reach the Bondholders' argument that Section 2323 allows the use of "other name[s]" of a debtor, *see* P.R. Laws Ann. tit. 19, § 2323(b)(1), as this would require a broader consideration of aspects of Article 9 that are beyond the necessary scope of this case.

Article 9 contemplates situations where a financing statement amendment "cures" an earlier financing statement by fixing outdated or incorrect information in the financing statement, such as after a name change by a debtor. *See, e.g., id.* § 2327(c). Under Article 9, "[a] security interest . . . (3) becomes perfected . . . (B) when the applicable requirements for perfection are satisfied." *Id.* § 2404(3)(B). As to these "applicable requirements," a financing statement is sufficient only "if it: (1) Provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party, and (3) indicates the collateral covered by the financing statement." *Id.* § 2322(a). We now consider the Bondholders' compliance with these requirements in the 2008 Financing Statements and the Financing Statement Amendments.

Appendix A

1. Name of the Secured Party and Collateral Description

The Financing Statement Amendments sufficiently provide the name of the secured party's agent in Exhibit A: "The Bank of New York Mellon, as Fiscal Agent," as required under Section 2322(a)(2).[16] No party disputes this clear point.

As to the collateral description requirement, under the new Article 9, a collateral description of personal property is sufficient "whether or not it is specific, if it reasonably identifies what is described," *id.* § 2218(a), but a "[s]upergeneric description [is] not sufficient," *id.* § 2218(c). One of the "[e]xamples of reasonable identification," *id.* § 2218(b), under Article 9 is a "[s]pecific listing" of the collateral, *id.* § 2218(b)(1).

Here, the Financing Statement Amendments described the collateral as "[t]he Pledged Property and all proceeds thereof and all after-acquired property as described more fully in Exhibit A attached hereto and incorporated by reference." Exhibit A, in turn, contained a detailed definition of "Pledged Property."[17] Each of the relevant capitalized terms in the definition of "Pledged Property" -- "Revenues," "Funds," "Accounts," "Subaccounts," "Fiscal Agent," "Debt Service Reserve

16. The 2008 Financing Statements also properly list the Secured Party as "The Bank of New York, as fiscal agent[.]"

17. The full definition of "Pledged Property" is the same as in the Resolution, and is reproduced in note 3, *supra*.

Account," and "Resolution" -- is also defined in Exhibit A. The definition of "Pledged Property" satisfied one of the "[e]xamples of reasonable identification" by providing a "[s]pecific listing" of the collateral. *Id.* It therefore suffices as a description of collateral.

2. Name of the Debtor

We now turn to the key question of whether the Financing Statement Amendments contain a sufficient "name of the debtor." Article 9 contains different requirements for the names of registered organizations and for the names of individuals. A "[r]egistered organization" is defined, in part, as "an organization organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or United States." *Id.* § 2212(a)(71). The System is a registered organization because it is an organization formed and organized by the Commonwealth's enactment of legislation: the 1951 Enabling Act. When a debtor is a registered organization,

> [a] financing statement sufficiently provides the name of the debtor . . . only if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name.

Id. tit. 19, § 2323(a)(1). Though a financing statement that "provides only the debtor's trade name does not sufficiently provide the name of the debtor," *id.* § 2323(c), an otherwise sufficient financing statement, containing a correct name of the debtor, is "not rendered ineffective by the absence of . . . [a] trade name or other name of the debtor," *id.* § 2323(b).[18]

Like the 2008 Financing Statements, Exhibit A to the Financing Statement Amendments stated the name of the debtor as "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." The 2008 Financing Statements also stated the "[e]ntity name" of the debtor as "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." The System and the Committee argue that, as of February 28, 2014, this became the incorrect name because, in their view, the English translation of the 2013 amendment to

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18. Article 9 also provides a safe harbor provision for minor errors or omissions: "A financing statement substantially satisfying the requirements of this subchapter is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading." P.R. Laws Ann. tit. 19, § 2326(a). For a name,

> if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 2323 (a) of this title, the name provided does not make the financing statement seriously misleading.

Id. § 2326(c).

the Enabling Act changed the System's English name. *Id.* tit. 3, § 761. The English translation of that Act states that "[a] retirement and benefit system to be designated as the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico' . . . is hereby created." Law No. 3 of April 4, 2013, 2013 P.R. Laws 64. In the System's view, the 2013 amendment to the Enabling Act is the relevant "public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization." P.R. Laws Ann. tit. 19, § 2323(a)(1). The System argues that Section 1-101, codified at P.R. Laws Ann. tit. 3, § 761, alone is the section which "state[s]" the name of the System under Section 2323(a)(1), and so concludes that the RSE name is the name for Article 9 purposes. That is, the System argues that it is irrelevant that other sections of the Act use "Employees Retirement System," *see, e.g., id.* § 763(36), because only Section 1-101 of the translation "purports to state, amend, or restate the registered organization's name," *id.* tit. 19, § 2323(a)(1). Even if this were a translation error, the System argues, "that erroneous translation would nevertheless constitute [the System's] name for Article 9 purposes." The System argues that any UCC filing (whether a financing statement or financing statement amendment) under "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" does not state the correct name. On this view, because a search under the correct name -- "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico" -- would not find such a UCC filing, use of the ERS name is seriously misleading. P.R. Laws Ann. tit. 19, § 2326(c).

The Bondholders make numerous arguments in opposition regarding the sufficiency of the name used, some statutory and some focused on the System's own conduct. We do not detail those arguments further, but deal with them in our analysis.

We resolve the merits of this matter on the record, which is adequate. Both the 2008 Financing Statements and the Financing Statement Amendments were filed in English. And so we look to the 2014 English translation of the Enabling Act to determine whether the Financing Statement Amendments comply with the UCC's reference to the "public organic record most recently . . . enacted by the [System's] jurisdiction of organization which purports to state, amend, or restate the [System's] name." P.R. Laws Ann. tit. 19, § 2323(a)(1). The "to be designated as" language codified at Section 761 does not mean that no other portion of the statute "state[s]" the name of the System for UCC purposes. The System misconstrues the relevant UCC provision here, by suggesting that only the first section of the Enabling Act "purports to state, amend, or restate the registered organization's name," *id.* tit. 19, § 2323(a)(1), because that section uses the following language: "A retirement and benefit system to be designated as the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico,' . . . is hereby created." *Id.* tit. 3, § 761. The requirement is that a filer "provide the name that *is stated*" in the "public organic record . . . which purports to state, amend, or restate the registered organization's name." *Id.* (emphasis added). The latter clause, starting with "which purports," plainly modifies "public organic record." So, it does not

follow that only one of many clauses in the statute must be all that can be considered when determining what "name . . . is stated" in the "public organic record."[19] Instead, this UCC provision directs focus to the entire "public organic record which purports to state, amend, or restate the registered organization's name." *Id.* The fact that Section 1-101 of the English translation of the amended Enabling Act uses "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico" does not end the inquiry.

The official English translation, on its face, repeatedly translates the exact same Spanish name in two different ways.[20] Both "Retirement System for Employees" and

19. The System's argument by analogy to the UCC's provision, P.R. Laws Ann. tit. 19, § 2323(a)(4), regarding an individual's name on a driver's license, is unpersuasive. The System argues that since an incorrect name on a driver's license must be used as the party's name in a sufficient UCC filing, if the filing is made in the same state as the driver's license was issued, the RSE name must be used here (whether or not it is a correct name). This argument by analogy is necessarily premised on the view that the 2013 amended Act states only the RSE name, whether or not it is a translation error. If, as we conclude, the amended Act states the ERS name as a name for the System, a searcher can still rely only on official records and there is no issue about a searcher having to use an "incorrect" name.

More generally, the requirement for an individual with a driver's license issued in the state is not relevant here, where we consider a registered organization that is created and designated by statute.

20. The Spanish language at issue did not change in the 2013 amendment to the Enabling Act. The language translated as "to be designated as the 'Retirement System for Employees,'" is "que se denominará 'Sistema de Retiro de Los Empleados." *Compare* Law

"Employees Retirement System," are used, seemingly interchangeably, throughout the translated Act as codified. No provision of the Act states, nor even suggests, that the ERS name is used as a trade name or nickname rather than an official, legal name.[21] We do not agree with the System that one English name (the RSE name) is official and the other (the ERS name) is merely a trade name, which would be insufficient.

The System's argument that the "to be designated" clause in Section 1-101 alone must control fails for a number of reasons. The numerous clauses using the ERS name are hardly trivial. It is true that "Retirement System for Employees" is used three times in the translated Act, as codified. *Id.* §§ 761, 763(1), 779.[22] But "Employees

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No. 3 of April 4, 2013, 2013 P.R. Laws 39 *with id.* (Spanish). This is the same Spanish language used after the last amendment to the Enabling Act in 2004. P.R. Leyes Ann. tit. 3, § 761 (2005). And indeed, the portion of the Spanish corresponding to the first part of the name of the System -- "Sistema de Retiro de Los Empleados" -- was the same in the original Enabling Act of 1951, and was translated there as "Employees Retirement System." *Compare* Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 *with id.* at 1299.

21. We do not need to decide whether a translation error occurred in this instance. We do note that in the relevant portion of the Spanish version of the Act, the Spanish preposition most commonly translated as "for" -- para -- is not used. *See* University of Cambridge, Spanish-English Dictionary, http://dictionary.cambridge.org/dictionary/spanish-english, "para."

22. It is not clear that the use in Section 779 refers to the same System, though we assume it does. This provision in English describes the "Retirement System of the Employees of the Government and its Instrumentalities," P.R. Laws Ann. tit 3, § 779,

Retirement System" is used far more often: by our count, more than thirty-five times in the Act as codified. Perhaps most importantly, "Employees Retirement System" is used in the primary definition of "[s]ystem." *Id.* § 763(36) ("System [s]hall mean the Employees Retirement System of the Government of the Commonwealth of Puerto Rico."). Other uses of the ERS name include in the heading of Section 1-101, *id.* § 761, as well as the headings of many other sections, *see id.* §§ 761a, 762, 763, 764, 765, 765a, 766, 766a, 766b, 766c, 766d, 768, 768a, 769, 769a, 770, 770a, 771, 772, 773, 774, 775, 776, 777, 778, 779, 779a, 779b, 779c, 781a, 782, 783, 784, 785, 786, 786a, 786b, 787, 788.

The System and the Committee have offered no explanation as to why, when both terms are used, the ERS name should be disregarded. It is difficult to discern why "Retirement System for Employees" is used instead of "Employees Retirement System" in the particular places where the RSE name is used. Nothing about the context suggests that one or the other should be used, and the underlying Spanish is the same.

We think a reasonable creditor would be familiar with the Commonwealth law that, in a case of a discrepancy between the English and Spanish, when the legislation originated in Spanish "the Spanish text shall be preferred to the English." P.R. Laws Ann. tit. 31, § 13; *see Republic Sec. Corp. v. P.R. Aqueduct & Sewer Auth.*, 674 F.2d 952, 956 (1st Cir. 1982) ("[I]n cases of discrepancy 'the Spanish

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rather than "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico," *id.* § 761.

text shall be preferred.'"). Further, we see no evidence that the legislature of the Commonwealth intended to change the English name of the System to the RSE name and abandon the ERS name. We would expect to see a clear statement expressing a desire to change the translation, and there is no such statement. This expectation is only reinforced by Section 13, described above.

The legislature provided a Statement of Motives to the 2013 amendment, which identified, for example, the fiscal crisis in Puerto Rico, the causes of the crisis, and the need to act promptly. Law No. 3 of April 4, 2013, 2013 P.R. Laws 39-64. And the legislature then explained "[e]ach one of the amendments," *id.* at 58, such as the "[i]ncrease in the employee contribution [rate]," *id.* at 59. There is no explanation in this section that the 2013 amendment was meant to change the name of the System. Earlier name changes, including in 2004, demonstrate generally that the legislature understands how to change the System's name when it wants to do so.

It is also significant that the RSE name referenced in the "to be designated" clause differs from prior longstanding official uses. From 1951 through 2012, translated versions of the Enabling Act used only "Employees Retirement System" in the first section. *See, e.g.*, Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 ; P.R. Laws Ann. tit. 3, § 761 (1988); *id.* (2006), *id.* (2011). It is only the translation of the 2013 amendment which breaks this consistent pattern. Of course, a long-standing name of an organization or agency that is named by statute can be changed by statute. Here, though, the legislature did change the System's

name several times, including changing the name of the System in 2004 by removing "and its Instrumentalities" ("y sus Instrumentalidades") from the end of the System's name and by replacing "Government of Puerto Rico" with "Government of the Commonwealth of Puerto Rico" ("Gobierno del Estado Libre Asociado de Puerto Rico"). Law No. 296 of September 15, 2004, § 1-101; P.R. Laws Ann. tit. 3, § 761 (2006). But, with each of these changes, the "Employees Retirement System" part of the name remained the same. Our conclusion that there was no legislative intent to change the System's name is also bolstered by post-2014 legislative action. Years after the 2014 translation of the amended Enabling Act, the official translation of the Puerto Rico Financial Emergency and Fiscal Responsibility Act of 2017 referred to the System in part as "the Employees Retirement System." P.R. Laws Ann. tit. 3, § 9433(r).

Further, the ERS name is the name consistently used by the System itself, including in court filings, before and after the translation of the amended Act in 2014. There are many examples of this; we list only a few. In its complaint in this case, the System referred to itself as "the Employees Retirement System of the Government of the Commonwealth of Puerto Rico" or "ERS." The System referred to itself in the same way in its Answer to Defendant's Counterclaims. The System did not mention "Retirement System for Employees" or "RSE" in either document.

Independently, in its Title III Petition form, dated May 21, 2017, the ERS name was used under "Debtor's

name." In the box on the Title III form asking for "[a]ll other names Debtor used in the last five years [-] Include any assumed names, trade names, and doing business as names," only a Spanish name was listed, "Adminstracion de los Sistemas de Retiro de los Empleados del Gobierna y la Judicatura," with no mention of "Retirement System for Employees." Further, the System made no statement that "Employees Retirement System" was being used as a trade name. Again, these are only a few of the many times that the System held itself out as the "Employees Retirement System" around the time of and *after* the translation of the amended Enabling Act was in effect. The district court determined, and the System now argues, that the System used the ERS name simply as a trade name after 2014. *See In re: Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. at 592. We disagree.

Finally, there is no doubt that the ERS name was the official and only name of the System for over sixty years. So, any putative creditors would have had to search under that name to find prior liens even if the System's name did change in 2014. *See* P.R. Laws Ann. tit. 19, § 2327(c) (providing that a secured party owning a lien on the debtor's property acquired prior to a name change is not required to file a new financing statement). This observation adds further support to the central proposition that any putative creditor who read the 2014 translation of the Enabling Act would conclude that, given the inconsistent use of both the ERS and RSE names, it should at the very least search under the long-standing ERS name.

All of these reasons lead us to conclude that "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" remained a valid name for UCC purposes when the Financing Statement Amendments were filed.[23] In our view, a searcher, whether another creditor or merely an interested party, would conclude that a search under the ERS name was required. Similarly, a reasonable filer would have concluded that the ERS name was a correct name for the debtor for UCC purposes.

Because the Financing Statement Amendments used "Employees Retirement System of the Government of the Commonwealth of Puerto Rico," they contained an appropriate name of the debtor under the Commonwealth's Article 9. *See* P.R. Laws Ann. tit. 19, §§ 2322(a), 2323(a)(1), 2404(3)(B). Taken together with the 2008 Financing Statements, the Financing Statement Amendments met the requirements for perfection as of December 17, 2015. *See id.* § 2322(a).

D. Avoidance under PROMESA

Because we determine that the Bondholders satisfied Article 9's perfection requirements before the passage

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23. Even were we to accept that "[t]he majority of cases decided under . . . Article 9 are unforgiving of even minimal errors [for the name of the debtor]," *In re John's Bean Farm of Homestead, Inc.*, 378 B.R. 385, 391 (Bankr. S.D. Fla. 2007), a filing under the ERS name is not such an error. The situation here is clearly unlike, for example, a filer misspelling the name of a tractor seller as "Roger" rather than "Rodger." *See Pankratz Implement Co. v. Citizens Nat. Bank*, 281 Kan. 209, 130 P.3d 57, 59 (Kan. 2006).

of PROMESA on June 30, 2016, we do not consider whether PROMESA would allow retroactive avoidance of *unperfected* liens.[24] The debtors do not argue that the strong-arm provision of the Bankruptcy Code, incorporated by reference in PROMESA, would allow them to avoid the Bondholders' interest if the interest is perfected.

And as a "basic tenet of the law of secured transactions," a "perfected security interest prevails over a subsequent lien creditor." *Ledford v. Easy Living Furniture*, 52 B.R. 706, 710 (Bankr. S.D. Ohio 1985); *accord Gen. Elec. Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184, 189 (3d Cir. 1988) (holding that because the parties filed correctly and perfected their security interest, "their rights as lienholders are superior to those of the trustee as a hypothetical lienholder under 11 U.S.C. § 544"). Commonwealth law recognizes this rule of priority by implication, in stating that a judicial creditor's lien is superior to a prior *unperfected* security interest. *See* P.R. Laws Ann. tit. 19, § 2267(a)(2)(A). "Where a creditor has an *unperfected* lien on a debtor's property, the Bankruptcy Code empowers a trustee to avoid and preserve the lien for the benefit of the estate." *DiGiacomo v. Traverse* (*In re Traverse)*, 753 F.3d 19, 26 (1st Cir. 2014) (emphasis added).

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24. Similarly, we need not consider the System's argument that the Bondholders' security interest was always inferior to subsequent perfected security interests and judicial liens under the UCC, *see* P.R. Laws Ann. tit. 19, §§ 2219(a)(1), 2212(a)(52), 2267(a)(2)(A), because this argument is necessarily premised on the Bondholders having only an unperfected security interest. The System does not argue that the UCC would grant priority over a previously perfected lien, and the statutory text is clear on this issue. *Id.* § 2267(a)(2)(A).

E. The Bondholders' Counterclaims

The Bondholders also appeal the dismissal of their second and third counterclaims, both requests for declaratory judgment. Counterclaim Two sought a declaration stating that the "Bondholders hold valid, enforceable, attached, perfected, first priority liens on and security interest in the Pledged Property whether ERS became entitled to collect such property before or after the commencement of ERS's Title III case." Counterclaim Three sought a declaration stating that "because the employer contributions constitute 'special revenues,' [Bondholders'] security interests in and liens on employer contributions received by the [System] after the Petition Date remain enforceable pursuant to 11 U.S.C. § 928(a)." The Bondholders argue that the district court did not adequately address arguments for these counterclaims.

As to Counterclaim Two, the Bondholders acknowledged in the district court that the "[11 U.S.C.] section 552 issues need not be reached in light of the Summary Judgment Decision," and did not provide "any reason that the remaining aspects of Count Two should be resolved differently from the Claims resolved by the Summary Judgment Decision." As to Counterclaim Three, the Bondholders stipulated that "in light of the Summary Judgment decision [the Bondholders] are unable to identify any need for the [district court] to reach the alternative arguments."

Because we find the 2008 Financing Statements effective as amended, we remand to the district court

for further consideration of the dismissals of these counterclaims in light of this opinion.

F. Violation of the January 2017 Stipulation

Finally, the Bondholders argue that ERS violated the January 2017 Stipulation between the parties, and the district court erred in determining that no violation occurred (or that it was beyond the scope of the proceeding). Specifically, they assert that the System violated that Stipulation because it requires that, "[t]o the extent that ERS receives any Commonwealth central government Employers' contributions, unless otherwise agreed in writing by the undersigned parties, such contributions shall be retained in the Segregated Account pending further order of the Court." The System points out that a Joint Stipulation between the parties in this case limited claims or counterclaims on employer contributions only to those received during May 2017.

Even assuming the Bondholders have not waived this argument,[25] it fails. The Joint Stipulation shows that the parties agreed that the scope of the adversary proceedings at the district court would include "ERS's rights with respect to employer contributions received *during the month of May 2017*," and beyond some other

25. Neither opening brief from the Bondholders makes a full argument concerning the alleged violation of the January 2017 Stipulation. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

stipulated claims and counterclaims, "no other claims may be made by either side" (emphasis added). So only the contributions during the month of May 2017 are properly at issue here. But as the district court correctly noted, *In re: Fin. Oversight & Mgmt. Bd. for P.R.*, 590 B.R. at 599, the Bondholders conceded in their Answer and Counterclaims below that "ERS was obligated to place Employers' Contributions into the Segregated Account only for the duration of the [PROMESA] Section 405 Stay," and the Section 405 stay expired as of May 1, 2017. The Bondholders have not explained how their argument concerning the alleged violation of the January 2017 Stipulation survives these admissions, taking into account the stipulated scope of the adversary proceedings. The district court correctly dismissed the Bondholders' claim regarding an alleged violation of the January 2017 Stipulation.

III.

We *affirm* the district court's holding that the 2008 Financing Statements did not perfect the Bondholders' security interest in the "Pledged Property." We determine that the Bondholders met the requirements for perfection beginning on December 17, 2015, and so *reverse* the district court. PROMESA's incorporation of the Bankruptcy code does not allow for the avoidance of perfected liens, and so we *vacate* the district court's holding that the Bondholders' security interest can be avoided under PROMESA. Concerning the district court's dismissal of the Bondholders' second and third counterclaims with prejudice, we *vacate and remand* to the district court for

further consideration in light of this opinion. We *affirm* the district court's dismissal of the Bondholders' claim regarding the January 2017 Stipulation. No costs are awarded.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED SEPTEMBER 5, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

3:17-BK-3283 (LTS)
PROMESA Title III
(Jointly Administered)

In Re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO AS REPRESENTATIVE OF THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Debtors.

3:17-BK-3566 (LTS)

In Re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO AS REPRESENTATIVE OF THE EMPLOYMENT RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor.

Appendix B

Adversary Proceeding No. 3:17-213 (LTS)
in 3:17-BK-3566 (LTS)

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO AS REPRESENTATIVE OF EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff,

v.

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC, *et al.*,

Defendants.

JUDGMENT

Pursuant to the "OPINION AND ORDER GRANTING AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT", filed on August 17, 2018 (Docket Entry # 215) and to the "ORDER REGARDING THE REMAINING COUNT THREE AND COUNTERCLAIMS IN THE ABOVE-CAPTIONED ADVERSARY PROCEEDING", filed on September 5, 2018 (Docket Entry #219), the adversary proceeding is now closed.

SO ORDERED.

In San Juan, Puerto Rico, this 5th day of September of 2018.

Frances Ríos de Morán, Esq.
Clerk of Court

By: s/Carmen Tacoronte
Carmen Tacoronte
Deputy Clerk

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED AUGUST 17, 2018

United States District Court for
the District of Puerto Rico

PROMESA
Title III

Case No. 17 BK 3283-LTS (Jointly Administered)

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Debtors.[1]

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1. The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747).

Appendix C

Case No. 17 BK 3566-LTS

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

Adv. Proc. No. 17-213-LTS

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF, THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff,

-against-

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC, *et al.*,

Defendants-Counterclaimants.

August 17, 2018, Decided;
August 17, 2018, Filed

Appendix C

OPINION AND ORDER GRANTING AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT

LAURA TAYLOR SWAIN, United States District Judge

The Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS" or "Plaintiff"), by and through the Financial Oversight and Management Board (the "Oversight Board"), brings this adversary proceeding against the above-captioned defendants (collectively, "Defendants"). Defendants, who hold bonds issued by ERS, assert that they have a valid and perfected security interest in a wide range of system-related employer remittances, employee loans, and amounts held in a certain segregated account pursuant to a stipulation. Plaintiff asserts four causes of action seeking declarations concerning the scope, validity, and perfection of Defendants' asserted security interest and Plaintiff's compliance with its obligations under a certain stipulation. (Docket Entry No. 1,[2] the "Complaint"). Defendants have asserted nine counterclaims seeking declaratory relief in their favor with respect to the scope, validity, and perfection of their asserted security interest, and a contention that a particular application of a statutory provision upon which Plaintiff relies would be unconstitutional. (Docket Entry No. 36, Answer and Counterclaims ¶¶ 225-308.) The parties have filed cross-motions for summary judgment. Plaintiff seeks

2. All docket entry references are to entries in Case No. 17-AP-00213, unless otherwise specified.

judgment in its favor with respect to each of its four causes of action. Defendants seek the dismissal of each of Plaintiff's causes of action and judgment in Defendants' favor on each of their nine counterclaims. (Docket Entry No. 91, the "Plaintiff's Motion" and Docket Entry No. 94, the "Defendants' Motion.") The Court has jurisdiction of this action pursuant to 48 U.S.C. § 2166. The Court has considered the submissions of the parties carefully. For the following reasons, Plaintiff's Motion is granted with respect to Counts One, Two, and Four of the Complaint, and denied with respect to Count Three of the Complaint. Defendants' motion for summary judgment is denied with respect to all four Counts of Plaintiff's Complaint and with respect to each of Defendants' nine Counterclaims.

BACKGROUND

Unless otherwise indicated, the following facts are undisputed.[3]

On May 15, 1951, the legislature of the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") enacted Act No. 447-1951 (codified, as amended, at

3. Facts characterized as undisputed are identified as such in the parties' statements pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the parties' respective Local Civil Rule 56(b) Statements (Docket Entry No. 95 ("Defs.' 56(b)") or Docket Entry No. 93 ("Pl.'s 56(b)")) incorporate by reference the parties' citations to underlying evidentiary submissions. The Court declines to address assertions proffered by the parties that are immaterial or conclusory statements of law which the parties proffer as facts.

3 L.P.R.A. §§ 761-788, the "Enabling Act"). (Pl.'s 56(b) ¶ 1; Defs.' 56(b) ¶ 10.) The Enabling Act established ERS to administer the payment of pensions and certain other benefits for the retired employees of the Commonwealth, certain public corporations in Puerto Rico, and certain municipalities. *See* 3 L.P.R.A. § 761 (2016). As originally codified, the official English-language version of the Enabling Act denominated the retirement and benefits system as the "Employees Retirement System of the Insular Government of Puerto Rico and its Instrumentalities." (Docket Entry No. 92, the "Possinger Declaration," Ex. 1.)[4]

The Enabling Act provides that ERS may both issue debt and secure such debt with the assets of ERS. On January 24, 2008, ERS issued senior and subordinate pension funding bonds (collectively, the "ERS Bonds") pursuant to a Pension Funding Bond Resolution (Compl., Ex. D, the "Resolution"). (Pl.'s 56(b) ¶ 4; Defs.' 56(b) ¶ 22.) Pursuant to the Resolution, the holders of the ERS Bonds (the "ERS Bondholders" or "Bondholders") were granted a security interest in certain "Pledged Property." Specifically, Pledged Property is defined in the Resolution to include the following:

1. All Revenues.

2. All right, title and interest of the System in

4. The official English-language version of the Enabling Act, as amended in 2013, designates the retirement and benefits system as the "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico." *See* 3 L.P.R.A. § 761 (2016).

and to Revenues, and all rights to receive the same.

3. The Funds, Accounts, and Subaccounts held by the Fiscal Agent, and moneys and securities and, in the case of the Debt Service Reserve Account, Reserve Account Cash Equivalents, from time to time held by the Fiscal Agent under the terms of this Resolution, subject to the application thereof as provided in this Resolution and to the provisions of Sections 1301 and 1303.

4. Any and all other rights and personal property of every kind and nature from time to time hereafter pledged and assigned by the System to the Fiscal Agent as and for additional security for the Bonds and Parity Obligations.

5. Any and all cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property mentioned described in paragraphs (1) through (4) above, including, without limitation, those from the sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

(Resolution at VI-36.) The Resolution defines "Revenues" as follows:

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1. All Employers' Contributions[5] received by the System or the Fiscal Agent.

2. With respect to any particular Bonds, the proceeds of any draw on or payment under any Credit Facility which is intended for the payment of such Bonds, but only for purposes of such payment and not for other purposes of this Resolution.

3. Net amounts received by the System pursuant to a Qualified Hedge.

4. Income and interest earned and gains realized in excess of losses suffered by any Fund, Account, or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

5. Any other revenues, fees, charges, surcharges, rents, proceeds or other income and receipts received by or on behalf of the System or by the Fiscal Agent lawfully available for the purposes of this Resolution and deposited by or on behalf of the System or by the Fiscal Agent in any Fund, Account,

5. The Resolution provides that "Employers' Contributions shall mean the contributions paid from and after the date hereof that are made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to Sections 2-116, 3-105 and 4-113 of the [Enabling] Act." (Resolution at VI-33.)

> or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

(*Id.* at VI-37.)

The Resolution is publicly available both electronically on the websites of the Government Development Bank, ERS, and the Electronic Municipal Market Access System, and in the hard copy records of ERS. (Defs.' 56(b) ¶ 42; *see also* Docket Entry No. 116, "Plaintiff's 56(b) Response," ¶ 42.)

On June 2, 2008, ERS executed a security agreement (Compl., Ex. E, the "Security Agreement") in connection with the Resolution. The Security Agreement grants, for the benefit of the ERS Bondholders, "a security interest in (i) the Pledged Property, and (ii) all proceeds thereof and all after-acquired property, subject to application as permitted by the Resolution." (*Id.*) The Security Agreement does not include a definition of the term "Pledged Property," instead providing that "[a]ll capitalized words not defined herein shall have the meanings ascribed to them in the Resolution." (*Id.*)

Following the execution of the Security Agreement, a series of financing statements was filed with the Department of State of the Government of Puerto Rico (the "Department of State"). Specifically, two UCC-1 financing statements were received by the Department of State on or about June 24, 2008 and July 2, 2008, respectively (together, the "2008 UCC-1s"). (Pl.'s 56(b)

¶¶ 18, 23.) The 2008 UCC-1s identify the debtor as the "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." (Possinger Decl., Exs. 6 and 9.) The field for the collateral description contains the following prompt: "this financing statement covers the following types or items [of] property." (*Id.*) In the relevant response field, the 2008 UCC-1s describe the collateral as follows: "[t]he pledged property described in the Security Agreement attached as Exhibit A hereto and by this reference made a part hereof." (*Id.*) A copy of the Security Agreement is attached to each 2008 UCC-1. (*Id.*; *see also* Pl.'s 56(b) ¶¶ 21, 22, 26, 27.) The Resolution, which sets forth the definition of Pledged Property, is not included in the 2008 UCC-1 filings, however.

In 2013, the legislature of Puerto Rico enacted Act No. 3-2013, which amended the Enabling Act, effective July 1 of that year. (*See* Possinger Decl., Ex. 5.) The official English-language version of Act No. 3-2013 amended Section 1-101 of the Enabling Act to provide that Puerto Rico's "retirement and benefit system [shall] be designated as the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico'" ("RSE"). (*Id.* § 1-101.) Throughout Act No. 3-2013's operative provisions, the names ERS and RSE are used interchangeably and seemingly inconsistently.[6]

6. The Spanish-language appellation of the system, which was not used in any of the UCC-1 filings, was not changed by Act 3-2013. Defendants note that the English-language version of 3 L.P.R.A. Section 763(36) defines the term "System" as used throughout the statute as ERS. Defendants corrected their citation to this provision in a notice of errata (Docket Entry No. 173, the "Notice of Errata"),

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On or about December 17, 2015, the Department of State received two UCC-3 amendment forms corresponding to each of the 2008 UCC-1s (collectively, the "2015 Amendments"). (Pl.'s 56(b) ¶ 29.) On or about January 19, 2016, the Department of State received two further UCC-3 amendments, further amending the 2008 UCC-1s (collectively, the "2016 Amendments" and, together with the 2015 Amendments, the "UCC-3 Amendments"). (*Id.* ¶ 33.) The information in the collateral description field of each UCC-3 Amendment reads: "[t]he Pledged Property and all proceeds thereof and all after-acquired Property as described more fully in Exhibit A hereto and incorporated by reference." (Possinger Decl., Exs. 7, 8, 10, and 11.) Exhibit A to each of the UCC-3s provides a fulsome definition of Pledged Property, including the definitions of "Revenues" and "Employers' Contributions." (*Id.*) There is no identification of the debtor's name or identity on the Form UCC-3 associated with each of the UCC-3 Amendments. (*Id.*) Rather, the UCC-3s identify the debtor entity only insofar as Exhibit A to each of the UCC-3 Amendments refers to the debtor as the "Employees Retirement System of the Government of the Commonwealth of Puerto Rico." (*Id.*)

On January 17, 2017, certain parties, including ERS, entered into a stipulation to resolve *Altair Global Credit Opportunities Fund (A), LLC v. Rossello-Nevares*, No.

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which Plaintiff moved to strike (Docket Entry No. 175, the "Motion to Strike"). The Court denies the Motion to Strike because the supplemental notice simply provides a corrected citation in support of Defendants' argument that the Enabling Act, as amended, uses the names ERS and RSE inconsistently.

16-cv-2696, 2017 U.S. Dist. LEXIS 26531, a proceeding brought in the United States District Court for the District of Puerto Rico to lift the automatic stay imposed by Section 405 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[7] 48 U.S.C. § 2194. (Compl., Ex. L, the "January Stipulation" or the "Stipulation.") This Stipulation required ERS to deposit all Employer Contributions (as defined by the Resolution) received during the pendency of the Section 405 stay into a segregated account. (Stipulation ¶¶ 2(a), (c).) Additionally, the Stipulation provides that "[t]o the extent that ERS receives any Commonwealth central government Employers' Contributions, . . . such contributions shall be retained in the Segregated Account pending further order of the Court." (*Id.* ¶ 2(d).)

DISCUSSION

The pending motions are brought pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.[8] Under Rule 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that "possess[] the capacity to sway the outcome

7. PROMESA is codified at 48 U.S.C. Section 2101 *et seq.* All references to "PROMESA" provisions in the remainder of this opinion are to the uncodified version of the legislation unless otherwise specified.

8. Federal Rule of Civil Procedure 56 is made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. *See* 48 U.S.C. § 2170.

of the litigation under the applicable law," and there is a genuine dispute where an issue "may reasonably be resolved in favor of either party." *Vineberg v. Bissonnette*, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and [] must indulge all inferences favorable to that party." *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (internal quotation marks and citation omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841-42 (1st Cir. 1993). Where the parties have submitted cross-motions for summary judgment, the court applies these principles in evaluating each motion.

Defendants claim that the holders of the bonds issued by ERS have a valid and enforceable security interest in all monies remitted and to be remitted by participating employers in respect of pension obligations and employee loan repayments, the funds deposited pursuant to the Stipulation, and interest earned thereon. While ERS has, in litigation before the commencement of ERS's debt readjustment case under Title III of PROMESA, acknowledged that the ERS Bondholders have valid and enforceable liens in current and future employee

contributions,[9] ERS now asserts that the security interest, whatever its scope, was not properly perfected. ERS invokes section 544(a) of the Bankruptcy Code, which is incorporated by Section 301 of PROMESA, as rendering invalid and unenforceable the allegedly unperfected security interest. Even if the claimed security interest was and remains perfected, ERS further asserts, it does not attach to post-Title III petition remittances because they do not constitute proceeds of property in which the Bondholders have a security interest. The parties also dispute the scope of the security interest, with ERS arguing that it extends, as relevant here, only to employer contribution remittances in respect of pension obligations that were actually received by ERS and does not encompass loans to employees or repayments of those loans. The Bondholders assert that the security interest is valid and perfected (or that there are at least disputed factual issues as to whether ERS is barred by waiver, laches, or estoppel from contesting the validity and perfection of the security interest) and extends to rights in future contributions as well as to employee loans and repayments of such loans.

The Court turns first to the issue of whether the Bondholders' security interest is perfected.

I. Perfection of Security Interest

Pursuant to Commonwealth law, security interests of the kind asserted by Defendants must be perfected

9. (*See* Defs.' 56(b) ¶¶ 58-63.)

by filing financing statements pursuant to the Uniform Commercial Code (as adopted by Puerto Rico) on the secured transactions registry maintained by the Department of State. It is undisputed here that there were six relevant filings — two in 2008 that utilized the basic UCC-1 financing statement form, and four in 2015 and 2016 that utilized the UCC-3 financing statement amendment form. ERS contends that none of these filings were sufficient to perfect the Bondholders' claimed security interest.

a. The Original Financing Statements

Plaintiff argues that the 2008 UCC-1s were not effective to perfect the Bondholders' claimed security interest because they did not contain an adequate collateral description. With respect to the UCC-3 Amendments, Plaintiff further asserts that later UCC-3 amendment filings were insufficient to cure the defects in the 2008 UCC-1 filings because the later filings did not reference the official legal name of the debtor entity, which had been changed in the interim.

Puerto Rico first adopted its version of Article 9 of the Uniform Commercial Code (the "UCC"), known as the Commercial Transactions Act of 1996 ("Former PR UCC"), on September 19, 1996. The Former PR UCC was in effect until January 13, 2013, when it was repealed and replaced with Puerto Rico's current version of the statute (the "Revised UCC"). *See* Act No. 241-1996; *see also* Act No. 21-2012. The UCC generally provides a notice system for security interests that creditors may have against the

assets of a debtor. *See Webb Co. v. First City Bank (In re Softalk Pub. Co., Inc.)*, 856 F.2d 1328, 1330 (9th Cir. 1988) (stating that "[t]he [UCC] financing statement serves to give notice to other creditors or potential creditors that the filing creditor might have a security interest in certain assets of the named debtor."). Although strict enforcement of the formal requirements of the UCC may be harsh, courts have held that "literal application of the statutory filing requirement [is necessary to prevent] the deleterious effect of undermining the reliance which can be placed upon them." *Uniroyal, Inc. v. Universal Tire & Auto Supply Co.*, 557 F.2d 22, 23 (1st Cir. 1977).

Section 9-402 of the Former PR UCC, which was in effect at the time the 2008 UCC-1s were filed, provided that a financing statement is deemed to be sufficient to perfect a security interest if it provides "the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, . . . and contains a statement indicating the types, or describing the items, of collateral." 19 L.P.R.A. § 2152(1) (2008). In turn, a collateral description is sufficient "whether or not it is specific if it reasonably identifies what is described." Former PR UCC § 9-110, 19 L.P.R.A. § 2010 (2008). Importantly, a UCC statement need not include the full collateral description on the face of the financing statement. Rather, a UCC statement may incorporate a collateral description by reference to a document attached to the UCC filing or, in certain circumstances, by reference to a description publicly filed elsewhere in the UCC clerk's records. *See Int'l Home Prods., Inc. v. First Bank of P.R.,*

Inc., 495 B.R. 152, 160 n. 8 (D.P.R. 2013) (finding sufficient a collateral description that incorporated by reference an expired UCC statement attached to the operative filing that contained a valid collateral description); *see also Canfield v. SBA (In re Tebbs Constr. Co., Inc.)*, 39 B.R. 742, 746 (Bankr. E.D. Va. 1984) (finding that a filing statement that referenced a security agreement that was not attached, but did reference a previously-filed, lapsed statement to which the relevant security agreement was attached, provided a sufficient collateral description); *but see In re Quality Seafoods, Inc.*, 104 B.R. 560, 561-62 (Bankr. D. Mass. 1989) (finding that a reference to the collateral description on a lapsed financing statement was insufficient because the lapsed statement could be removed from the public record).

Defendants argue that the 2008 UCC-1s were sufficient to perfect their security interest because a financing statement may incorporate a collateral description by reference regardless of whether the referenced document is publicly available. In support of this proposition, Defendants rely principally, however, on authority in which an extrinsic collateral description was incorporated by reference into a security agreement, rather than a UCC financing statement. *See, e.g., Greenville Riverboat, LLC v. Less, Getz & Lipman, P.L.L.C.*, 131 F. Supp. 2d 842, 848-49 (S.D. Miss. 2000). Such cases are readily distinguishable because security agreements, as creatures of contract law that govern the relationship of the parties *inter se*, may incorporate extrinsic documents by reference if the incorporation reflects the parties' express intent. UCC financing statements, by contrast, serve a public

notice function and must disclose a minimum amount of information to interested third parties. *See In re Softalk Pub. Co., Inc.*, 856 F.2d at 1330 (describing the difference between the functions of a security agreement and a UCC financing statement).

Defendants also cite *Chase Bank of Florida, N.A. v. Muscarella*, 582 So. 2d 1196, 1198 (Fl. Dist. Ct. App. 1991), for the proposition that an otherwise insufficient financing statement may refer to a description in a non-public document if the financing statement communicates to interested third parties that further inquiry is necessary to ascertain the scope and contours of the collateral. Although a financing statement is not intended to disclose a comprehensive and detailed account of the collateral, the UCC, by its plain language, requires a level of specificity sufficient to delineate the outer boundaries of the collateral. *See In re Bailey*, 228 B.R. 267, 273-74 (Bankr. D. Kan. 1998) (stating that, "[i]f the collateral is not described in any filed financing statement, the potential creditor should not need to make any further inquiry"); *see also In re H.L. Bennett Co.*, 588 F.2d 389, 393 (3d Cir. 1978) (stating that, although the UCC is a "notice filing" statute, a collateral description must meet a minimum level of specificity); *see In re Softalk Pub. Co., Inc.*, 856 F.2d at 1330-31 (stating that mere inquiry notice is not sufficient, and that a basic collateral description is required). Furthermore, to interpret Article 9 of the UCC to permit the use of a collateral description that fails to minimally describe the collateral pledged would vitiate the description requirements of Former PR UCC

Sections 9-110, 19 L.P.R.A. § 2010 (2008),[10] and 9-402, 19 L.P.R.A. § 2152(1) (2008),[11] thus rendering those sections surplusage, a construction courts must strive to avoid. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1132, 191 L. Ed. 2d 97 (2015) (stating that courts should avoid statutory interpretations that render terms and provisions as surplusage).

Defendants also contend that the reference to the definition of Pledged Property in the Resolution provides an adequate collateral description because the Resolution is publicly available. Although some courts have permitted a financing statement to incorporate collateral

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10. Former PR UCC Section 9-110 provided as follows:

> For the purposes of §§ 2001-2207 of this title any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described, provided in the case of real estate the description shall include the Registry of Property inscription data for the property.

19 L.P.R.A. § 2010 (2008).

11. Former PR UCC Section 9-402(1) provided, in relevant part, as follows:

> A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

19 L.P.R.A. § 2152(1) (2008).

descriptions by reference to "publicly filed" documents, such cases dealt only with documents that had been filed publicly in the records of the clerk's office maintaining the local UCC records. *See, e.g., In re Tebbs Constr. Co., Inc.*, 39 B.R. at 746. Requiring a third party to conduct a search for documents outside of the relevant UCC records in order to ascertain the scope of the collateral description would defeat the basic notice function of Article 9 and relegate an interested third party to an open-ended search for information. *See In re Quality Seafoods*, 104 B.R. at 561 ("Th[e] purpose [of the UCC filing requirements] is frustrated if searchers are required to pore through the records in order to piece documents together."); *cf. In re Softalk Pub. Co., Inc.*, 856 F.2d at 1330-31 (stating that mere inquiry notice is not sufficient, and that a basic collateral description is required).

The Court concludes that the 2008 UCC-1s did not contain a sufficient collateral description and therefore failed to perfect Defendants' security interest when they were filed. The 2008 UCC-1s were insufficient to satisfy the requirements of the UCC because the nature of the collateral was not described in any part of the filing, nor did the filed material point to any other materials on file with the Department of State that identified the collateral. Although a searcher examining the publicly filed 2008 UCC-1s would have been able to ascertain that the creditors held a security interest in "Pledged Property," the UCC-1s and their attached Security Agreement did not include any definition or explanation of the term's scope or meaning. As such, the collateral description was insufficient, as it did nothing to identify the collateral

beyond simply indicating that some collateral existed. *Cf. In re H.L. Bennett Co.*, 588 F.2d at 392-95 (finding insufficient, under the prior version of the UCC, a collateral description that was less specific than a listing of the types or categories of collateral).

b. The Amendments

The Court next considers Defendants' contention that the UCC-3 Amendments that were filed in 2015 and 2016 were sufficient to either (i) cure the defective collateral description in the 2008 UCC-1s or (ii) independently perfect Defendants' security interest, thereby functioning as UCC-1 financing statements. *See Miami Valley Prod. Credit Ass'n v. Kimley*, 42 Ohio App. 3d 128, 131, 536 N.E.2d 1182, 1186 (1987) (finding that two defective financing statements, read together, sufficed to perfect a security interest as of the date of the later filing); *see also Maremont Mktg., Inc. v. Marshall (In re G.G. Moss Co., Inc.)*, No. 79-01585, 1981 WL 137971 (Bankr. E.D. Va. July 20, 1981) (finding that an amendment to a defective financing statement functioned as an independent financing statement because it contained all of the necessary information). Plaintiff argues that the UCC-3 Amendments were insufficient to cure the 2008 UCC-1s or to independently perfect Defendants' security interest because they failed to include the debtor's official name, as changed from ERS to RSE in the official English-language version of the Enabling Act in 2013.[12]

12. Defendants argue that Plaintiff is foreclosed from arguing that ERS's name was changed in 2013 because it did not make that factual allegation in its Complaint. (Docket Entry No. 120,

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Under the Revised UCC, which was in effect at the time the UCC-3 Amendments were filed and governs the effect of those filings, 19 L.P.R.A. § 2402, a valid financing statement must include the debtor's name. Revised UCC § 9-502(a)(1), 19 L.P.R.A. § 2322(a)(1). Although Article 9 does not speak specifically to the names of governmental debtors, it provides that, "if the debtor is a registered organization," a financing statement provides the debtor's name sufficiently "if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name." Revised UCC § 9-503(a)(1), 19 L.P.R.A. § 2323(a)(1). Revised UCC Article 9 specifically provides that a debtor's trade name is insufficient. Revised UCC § 9-503(c), 19 L.P.R.A. § 2323(c).

Under Article 9, minor errors and omissions will not render a financing statement ineffective unless they render the statement seriously misleading. Revised UCC § 9-506(a); 19 L.P.R.A. § 2326(a). Article 9 of the Revised UCC provides that an insufficient debtor's name

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the "Defendants' Opposition," at ¶ 28, n.4 (stating that if Plaintiff made the allegation its Complaint, Defendants would have denied it, placing the issue of fact in dispute).) Because the name change was effectuated by a statute of which the Court may take judicial notice, such a factual allegation need not have been made in the Complaint. *See Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 321 (1st Cir. 2004) (stating that federal courts may take judicial notice of state law).

is seriously misleading unless "a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement" that provides the incorrect debtor's name.[13] Revised UCC §§ 9-506(b), (c), 19 L.P.R.A. §§ 2326(b), (c).

The party contesting the enforceability of a financing statement bears the initial burden of establishing that the debtor's name is not shown correctly, but the burden of persuasion then shifts to the creditor to establish that the erroneous debtor's name is not seriously misleading. *See In re John's Bean Farm of Homestead, Inc.*, 378 B.R. 385, 390 n.13 (Bankr. S.D. Fla. 2007). As noted above, ERS's Enabling Act was amended in 2013 to designate the Commonwealth's retirement system, in English, as

13. The "standard search logic" inquiry provides a clearer brightline than the "reasonably diligent searcher" test applied by courts in connection with the Former PR UCC. *See In re Summit Staffing Polk Cty., Inc.*, 305 B.R. 347, 354 (Bankr. M.D. Fla. 2003) ("Many courts [applying pre-revision versions of Article 9] held that a reasonably diligent searcher would conduct multiple searches using trade names, common misspellings of the debtor's name, and other reasonable search queries . . . . Revised Article 9 requires more accuracy in filings, and places less burden on the searcher to seek out erroneous filings."); *see also Wawel Sav. Bank v. Jersey Tractor Trailer Training, Inc. (In re Jersey Tractor Trailer Training Inc.)*, 580 F.3d 147, 158 (3d Cir. 2009) (noting that "revised U.C.C. § 9-506(c) narrows the responsibility of a reasonable searcher, providing that a misfiled financing statement will be considered seriously misleading unless 'a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose [the misfiled] financing statement . . . .'").

RSE.[14] Act No. 3-2013 § 1-101. The filed UCC-3s used only an English entity name. The Enabling Act change renders the ERS name insufficient as a designator for UCC filing purposes because it is not the official name of the retirement system according to the most recent Commonwealth legislation.[15] Revised UCC § 9-503(a)(1), 19 L.P.R.A. § 2323(a)(1).

Defendants do not proffer any evidence that the continued use of the ERS name in the UCC system is not seriously misleading within the meaning of the UCC. Revised UCC § 9-506(c), 19 L.P.R.A. § 2326(c). Defendants have not offered evidence that a search of the UCC system using the RSE name would disclose the UCC-3 Amendments.[16] Rather, Defendants argue that Plaintiff

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14. At oral argument, Defendants observed that the revised Act No. 3-2013 uses both ERS and RSE, seemingly interchangeably, as the entity name throughout its operative sections. Defendants have not articulated a clear legal theory as to why such inconsistent use should lead the Court to interpret the statute as continuing to designate Plaintiff's official English-language name as ERS. To the extent Defendants seek to imply that the use of RSE is the product of a translation error, the Court is bound to rely on English translations of Spanish-language statutes. *See* 48 U.S.C.A. § 864 (West 2017) ("All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language.").

15. The Court construes the ERS Enabling Act as the equivalent of the organizing document of a private corporation for purposes of Article 9 because, like a certificate of incorporation, the Enabling Act is the only definitive statement of the Commonwealth Government proclaiming the formal name of ERS as an entity.

16. In fact, the Official Committee of Retirees has proffered an uncontroverted certified report stating that a search of the UCC

is bound by several purported judicial admissions that its name is indeed ERS and that it had not used any other variations of that name. (*See* Docket Entry No. 121, the "DiPompeo Declaration," Ex. A; *see* Defs.' Opp'n ¶ 30; *see also* Docket Entry No. 150, the "Defs.' Reply," ¶ 12.) However, even fully crediting this argument, it fails to establish (or to create a genuine issue of material fact with respect to) the relevant questions under Article 9, namely, whether the name that appears on the UCC-3 Amendments matches that reflected in the "public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction or organization which purports to state, amend, or restate the registered organization's name" or, in the alternative, that the name used in the UCC-3s is not "seriously misleading" within the meaning of 19 L.P.R.A. §§ 2326(b) and (c).[17]

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system for the RSE name produced no results. (*See* Docket Entry No. 139, the "Retirees Committee Opposition," at 14 n.42 & Ex. 11.)

17. Furthermore, the Court finds that the statements cited by Defendants are not determinative of the legal issue central to the perfection question. Although a party is bound by prior admissions of fact, the question of ERS's official name is a legal matter of statutory construction, and thus statements as to names actually used by ERS are not probative in this regard. *See Mariano v. Gharai*, 999 F. Supp. 2d 167, 172 (D.D.C. 2013) (quoting *McNamara v. Picken*, 950 F. Supp. 2d 125, 129 (D.D.C. 2013) ("[I]t is well established that judicial admissions on questions of law have no legal effect.") (internal quotation marks omitted). Additionally, Defendants have not identified a legal basis or proffered facts to support the application of the doctrines of laches, waiver, or estoppel (*see* Defs.' Mot. ¶ 75), and there is therefore no genuine dispute as to any material fact precluding summary judgment on the issues addressed herein. Courts cannot fashion equitable exceptions to

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To the extent Plaintiff continues to represent itself to the public and other parties as ERS, "ERS" functions as a trade name, the use of which Article 9 expressly provides is insufficient to satisfy the requirement to file under the debtor's official name. Revised UCC §§ 9-503(b)(1), (c), 19 L.P.R.A. §§ 2323(b)(1), (c).

The Court concludes that the 2008 UCC-1s were inadequate to perfect Defendants' security interest when filed and that the UCC-3 Amendments failed to perfect, either independently or in conjunction with the original financing statements, Defendants' security interest when they were filed in 2015 and 2016 because they failed to reference the debtor's official name. Accordingly, Defendants do not possess a perfected security interest in any of the Pledged Property.[18]

UCC filing requirements, as doing so "would have the deleterious effect of undermining the reliance which can be placed upon them." *Uniroyal*, 557 F.2d at 23. Additionally, courts have recognized that equitable defenses based upon a debtor's prepetition conduct are not cognizable as defenses against the Bankruptcy Code's avoidance powers. *See Hassett v. McColley (In re O.P.M. Leasing Servs., Inc.)*, 28 B.R. 740, 760-61 (Bankr. S.D.N.Y. 1983) ("A trustee acts as a representative of creditors, not of the debtor, in exercising his avoiding powers under Code Sections 544 and 548."); *see also In re Sanborn, Inc.*, 181 B.R. 683, 692 n.15 (Bankr. D. Mass. 1995) ("[T]he 'unclean hands' of a pre-petition debtor are not imputed to a debtor-in-possession or trustee."); *Forman v. Salzano (In re Norvergence, Inc.)*, 405 B.R. 709, 742 (Bankr. D.N.J. 2009) ("Courts have found the In Pari Delicto defense to be inapplicable when a trustee brings an action under §§ 544(a), 544(b) or 548, but applicable to § 541 based actions.").

18. Revised UCC Section 9-507(c)(1) does not alter this result. It provides that a financing statement that becomes insufficient due to

II. Section 544 of the Bankruptcy Code

Plaintiff further argues that Defendants' unperfected security interest is invalid and should be declared to be unenforceable because Section 544 of title 11 of the United States Code (the "Bankruptcy Code") allows the Oversight Board, in its capacity as debtor representative in ERS's PROMESA Title III debt adjustment case, to invalidate the Bondholders' unperfected interest. (Docket Entry No. 115, the "Plaintiff's Opposition," at 17-18.) As discussed *infra*, Defendants argue that (i) the Oversight Board is unable to invoke Section 544 due to certain limitations imposed by applicable non-bankruptcy law and (ii) in any event, the Court should apply the principle of constitutional avoidance and construe Section 544(a) as inapplicable to liens granted prior to the enactment of PROMESA. The Court will first address the availability of Section 544 in light of applicable non-bankruptcy law and will then turn to the constitutional avoidance issue presented by Defendants.

a. Applicable Puerto Rico Non-Bankruptcy Law

Section 544(a) of the Bankruptcy Code, which is incorporated by Section 301(a) of PROMESA, vests bankruptcy trustees and debtors in possession with

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a subsequent change in the debtor's name is nonetheless "effective to perfect a security interest in collateral acquired by the debtor before, or within four (4) months after, the filed financing statement becomes seriously misleading . . ." 19 L.P.R.A. § 2327(c)(1). Here, the 2008 UCC-1s were not sufficient to perfect Defendants' security interest in the first place, and Section 9-507(c)(1) therefore does not apply.

the power to avoid an unperfected, but otherwise valid, security interest when another creditor could possess an interest that is superior to that of the unperfected creditor, whether or not such a superior creditor (commonly referred to as a "hypothetical lien creditor") actually exists. Section 544(a) of the Bankruptcy Code reads as follows:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —
>
> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
>
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to

> be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C.A. § 544(a) (West 2016). Section 301(c)(7) of PROMESA provides that the term "trustee," as used in Section 544 of the Bankruptcy Code, means the Oversight Board, which represents the debtor in the Title III proceeding. 48 U.S.C.A. § 2161(c)(7) (West 2017). The rights of the trustee, or of the Oversight Board in this case, are dependent on applicable non-bankruptcy law. *See, e.g., Rios v. Banco Popular De P.R. (In re Rios)*, 420 B.R. 57, 63 (Bankr. D.P.R. 2009) (stating that "[t]he rights of a trustee under 11 U.S.C. § 544 are determined by state law."). Thus, "Section 544(a) does not give the Trustee any greater rights than he, or any person, would have as a bona fide purchaser or judicial lien creditor under applicable state law." *Perrino v. BAC Home Loans Servicing, LP (In re Trask)*, 462 B.R. 268, 273 (B.A.P. 1st Cir. 2011). Therefore, in order to determine whether the Oversight Board is able to invoke Section 544 to invalidate Defendants' unperfected security interest, the Court must analyze whether, under Puerto Rico law, a hypothetical creditor could have obtained a lien on the property of ERS as of the commencement of the case.[19]

In the First Circuit, the burden of establishing the rights of a hypothetical lien creditor under applicable

19. On March 12, 2018, the Court directed the parties to file supplemental briefs addressing this issue. (*See* Docket Entry No. 195, *Order Directing Supplemental Submissions*.)

non-bankruptcy law is placed on the trustee. *See, e.g.*, *Ford v. Fed. Home Loan Mortg. Corp. (In re Bishop)*, Adv. No. 09-1034-MWV, 2009 Bankr. LEXIS 2264, 2009 WL 2231197, at *2 (Bankr. D.N.H. July 24, 2009) (stating that, "[t]o assert a cause of action pursuant to § 544(a)(1) or § 544(a)(3), the [Trustee] must provide adequate grounds for an inference that a transfer of property of the debtor is avoidable by a hypothetical lien creditor or bona fide purchaser."). Here, Plaintiff points to Puerto Rico's Rules of Civil Procedure, which generally empower courts to order the attachment of a lien to secure a judgment creditor's claim. *See* 32 L.P.R.A. App. III, § 56.1. While Defendants do not dispute the existence of the general rule, they argue that Act 66-2012, 3 L.P.R.A. § 9101 *et seq.* ("Act 66"), which was enacted in 2012 as Puerto Rico's fiscal crisis was looming, eliminated the ability of a creditor to obtain a judicial lien against the Commonwealth or its agencies. Defendants contend that Act 66, which generally requires that any judgment against the covered entities be paid under a payment plan rather than in a lump sum, provides the sole remedy for a judgment creditor seeking to satisfy or secure its judgment. *See* 3 L.P.R.A. § 9141.

For the reasons that follow, the Court concludes that the Oversight Board has met its burden of establishing that, under Puerto Rico law, a judgment creditor could have obtained a lien against ERS's assets as of the commencement of its Title III case. Puerto Rico Rule of Civil Procedure 56.1 provides that "in every action, before or after entering judgment, and upon motion of claimant, the court may issue any provisional order it deems necessary to secure satisfaction of the judgment."

32 L.P.R.A. Ap. III. The provisional measures that may be ordered by the court include "attachment, garnishment, the prohibition to alienate, claim and delivery of personal property, receivership, [and] an order to do or to desist from doing any specific act . . . ." *Id.*

The Enabling Act constitutes ERS as a trust that is an agency of the Government of Puerto Rico, "independent and separate" from others. 3 L.P.R.A. § 775. Jurisprudence from Puerto Rico establishes that the assets of a Puerto Rico governmental entity may be subject to attachment and seizure where the legislature has conferred sufficient operational powers upon the governmental entity to render it subject to "judicial process as any private enterprise would be under like circumstances."[20] *Arraiza v. Reyes; León, Interventor*, 70 D.P.R. 583, 587 (1949); *see, e.g., Redondo Constr. Corp. v. P.R. Highway*

20. A court may bar direct attachment of funds of such a public entity only where the attachment would interfere with the entity's "performance of its [governmental] functions." *Librotex, Inc. v. Autoridad de Acueductos y Alcantarillados de P.R.*, 138 P.R. Dec. 938, 942-43, 1995 Juris P.R. 106 (P.R. 1995) (stating that "the Legislature granted the [Puerto Rico Aqueduct and Sewer] Authority sufficient operational powers to consider it 'as subject to legal proceedings as any private entity would be in similar circumstances, so long as it does not interfere with the performance of its [governmental] functions'"). In *Librotex*, the majority found that the significant judgment sought could impact government operations in light of then-current fiscal crises and invalidated the seizure of an operating account but provided alternative security for the judgment creditor in the form of a mandatory budget provision. *Id.* at 942. *Librotex* thus confirms that a judgment creditor can obtain security under Puerto Rico law against a government entity.

& Transp. Auth., No. 09-civ-2299, ECF No. 45 (D.P.R. Feb. 13, 2012) (ordering issuance of writs of execution against the assets of a government instrumentality). The Puerto Rico Supreme Court has identified various powers and attributes that should be considered in determining whether a governmental entity was intended to be amenable to judicial process in a manner similar to a private business. *See generally Arraiza*, 70 D.P.R. at 586-87. Upon consideration of the factors enumerated in *Arraiza*, the Court concludes that ERS is an entity that is sufficiently structured like a private business that its assets may be subject to provisional remedies, including liens.[21] Accordingly, a court would have been empowered to issue any provisional order it deemed necessary and appropriate to secure satisfaction of the judgment pursuant to Puerto Rico Rule of Civil Procedure 56.1. Specifically, and as relevant here, a court could have

21. The Enabling Act for ERS provides that the entity may (i) "seek a loan from any financial institution of the Government of the Commonwealth of Puerto Rico or the Federal Government of the United States of America or through the direct placement of debts, securing said debt with the assets of [ERS]" and (ii) may invest in a multitude of stocks, fixed yield securities, and real property, both of which powers contemplate the accrual of pecuniary benefits in a manner similar to a private enterprise. (P. 56(b) ¶¶ 2-3); 3 L.P.R.A. § 779(b). Moreover, the Enabling Act established a Board of Trustees for ERS, consisting of members of differing mandated backgrounds, similar to the governing structure of a private entity. *See* 3 L.P.R.A. § 775. ERS's board can also enter into contracts and "sue and be sued under" the name of ERS. (Possinger Decl., Ex. 1, §§ 15-16.) According, ERS is inherently capable of functioning for financial and litigation purposes as a private business or enterprise, exhibiting indicia similar to the Puerto Rico Aqueduct and Sewer Authority, against which an order of attachment was upheld in *Arraiza*.

ordered the attachment of a lien against property of ERS as of the commencement of this Title III case.

Act 66 would not have limited the ability of a court to order the attachment of a lien against the assets of ERS. Section 9141 of Act 66 is titled "Applicability and payment plans." 3 L.P.R.A. § 9141. As relevant here, Section 9141 provides the following:

> *In view of the negative impact* on the fiscal and operational stability of the Commonwealth of Puerto Rico and the municipal governments *that the payment of a lump sum would entail, the provisions of this subchapter shall apply to all final and binding judgments*, except for those related to eminent domains that, on the date of approval of this Act, are pending payment and those issued during the effective term of this Act, *whereby the agencies, instrumentalities, public corporations, municipalities, or the Commonwealth of Puerto Rico are compelled to make a disbursement of funds* chargeable to the General Fund, the fund of the public corporation in question, or chargeable to the municipal budget, as the case may be.

Id. (emphasis added). Section 9142 of Act 66 provides that "the garnishment of funds to enforce a judgment issued against the Commonwealth is [] prohibited." *Id.* § 9142. By its plain terms, Act 66 addresses seizures and compulsory disbursements of funds rather than security interests in property. A court order granting a lien against the

assets of a governmental entity would not be inconsistent with the restrictions imposed by Act 66, because such an order would not by itself compel the sequestration or disbursement of any funds. Accordingly, Act 66 does not restrict a judgment creditor's ability to obtain a judicial lien to secure a judgment against ERS, although it would preclude the creditor from collecting cash payments other than through a payment plan consistent with Act 66's restrictions.

Accordingly, the Oversight Board has met its burden of establishing that, under Puerto Rico law, a judgment creditor could have obtained a lien against ERS's assets as of the commencement of its Title III case. The Oversight Board would thus ordinarily be entitled to invoke Section 544 to invalidate Defendants' unperfected security interest. However, the Court must consider whether the principle of constitutional avoidance impedes the use of Section 544(a) in this case.

b. Constitutional Avoidance

Defendants argue that the Court should not construe Section 544(a) to invalidate liens granted prior to the enactment of PROMESA, in order to avoid raising federal constitutional concerns. (Defs.' Mot. ¶ 35.) Defendants take the position that applying Section 544(a) retroactively to invalidate their security interest, which they assert is a property interest protected by the Takings Clause of the Fifth Amendment, without just compensation, would violate the ERS Bondholders' constitutional rights. (*Id.*)

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Under the canon of constitutional avoidance, a court, in deciding "which of two plausible statutory constructions to adopt . . . must consider the necessary consequences of its choice. If one [construction] would raise a multitude of constitutional problems, [then] the other [construction] should prevail . . ." *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005). However, the canon of constitutional avoidance is not a method of adjudicating constitutional questions. (*Id.* at 381.) Rather, it "is a tool for choosing between competing plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." (*Id.*) "The canon is thus a means of giving effect to congressional intent, not of subverting it." (*Id.*)

In this case, Defendants ask the Court to avoid a construction of Section 544(a) that would allow the Oversight Board to invalidate unperfected liens. However, the Court cannot invoke the canon of constitutional avoidance to subvert the clear intent of Congress. Congress enacted PROMESA in 2016 in response to the dire fiscal emergency that was then, and still is, afflicting the Commonwealth and many of its instrumentalities. Through Section 301 of PROMESA, Congress expressly incorporated Section 544 of the Bankruptcy Code into PROMESA and, therefore, granted the Oversight Board a position that is superior to that of the holders of then-existing unperfected security interests.

Defendants' reliance on *United States v. Security Industrial Bank* in support of constitutional avoidance is

misplaced here, as the context in which the interpretive issue arose in that case is quite different from that now before this Court. (*See* Defs.' Reply ¶ 32 (citing to 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982).) In that case, individual debtors attempted to utilize a provision of the newly-enacted Bankruptcy Reform Act of 1978, 11 U.S.C. § 522(f)(2), to claim exemption of certain personal property that was subject to liens granted prior to the passage of the statute. 459 U.S. at 72-73. The Supreme Court held, without deciding whether retroactive application of the provision would constitute an unconstitutional uncompensated taking, that the statutory provision could not be interpreted to apply retroactively due to the statute's ambiguity with respect to retroactive application and the Supreme Court's substantial doubt as to whether such application would comport with the Fifth Amendment. *Id.* at 81 (citing *Holt v. Henley*, 232 U.S. 637, 34 S. Ct. 458, 34 S. Ct. 459, 58 L. Ed. 767 (1914) and *Auffm'ordt v. Rasin*, 102 U.S. 620, 26 L. Ed. 262 (1881)). Recognizing that statutes are ordinarily construed as prospective only and finding Congressional intent ambiguous based on circumstances including the pre-enactment elimination of an express retroactivity provision, the Court decided, "in the absence of a clear expression of Congress's intent," not to apply the exemption provision to pre-enactment liens. *Id.* at 82 (citation and internal quotation marks omitted).

Unlike the context of *Security Industrial Bank*, where Congress had recently updated the law governing a longstanding bankruptcy system of general applicability that would be invoked not only soon after its enactment but by untold numbers of debtors in future circumstances

yet to unfold, PROMESA was enacted specifically to enable Puerto Rico to address its current debt crisis. Construction of the exemption provision of the 1978 Bankruptcy Code as prospective was not inconsistent with the broad purpose of that legislation and did not, it appears, disable its operative provisions in a manner material to its viability as a tool for effective debt relief. Such construction of Section 544 of the Bankruptcy Code in the PROMESA context would, by contrast, eviscerate (directly and by implication) the availability to Puerto Rico of lien avoidance mechanisms that are core debt relief tools.

PROMESA—as the name of the statute highlights—was specifically designed for and tailored to address, first and foremost, Puerto Rico and its current financial crisis. At the time when PROMESA was enacted, Puerto Rico was burdened with billions of dollars of outstanding debt, a substantial proportion of which was purportedly secured, and had lost the ability to access the credit markets for additional financing. With these facts in hand, Congress paved a path for Puerto Rico's financial recovery and created an Oversight Board to oversee that process. The Oversight Board was charged with the responsibility of developing "a method [for Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *See* 48 U.S.C.A. § 2121(a) (West 2017). Among its powers, Congress gave the Oversight Board the ability to investigate the "disclosure and selling practices in connection with the purchase of bonds [previously] issued by" Puerto Rico, *id.* § 2124(o), and to utilize avoidance tools under the Bankruptcy Code.

In this case, a decision to interpret Section 544 of the Bankruptcy Code—and, by implication, the additional avoidance powers that Congress specifically incorporated through Section 301 of PROMESA—prospectively only would render such tools unavailable for use in Puerto Rico's Title III debt readjustment process. Indeed, the incorporation of the arsenal of avoidance powers into PROMESA would have been meaningless, in addressing Puerto Rico's financial situation, if they could only be invoked in connection with debt incurred, and security interests granted, following the enactment of the statute. This is particularly evident in light of the fact that Puerto Rico did not have access to the credit markets at the time that PROMESA was enacted. The Court finds that Congress's enactment of PROMESA for Puerto Rico, inclusive of a carefully curated list of incorporated Bankruptcy Code avoidance powers, was a strong expression of intent that those powers be available for use by the Oversight Board in pursuit of its mission to effect the restructuring of Puerto Rico's debt, and to establish a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets.

Accordingly, the Court holds that Section 544(a) applies to invalidate the Bondholders' unperfected liens. Plaintiff is entitled as a matter of law to declarations that the ERS Bondholders' liens on Pledged Property, including any such asserted interests in employee loan payments, are unperfected, invalid, and unenforceable. Given that all of the Bondholders' claims of secured status are premised on the Resolution, Security Agreement, and UCC filings discussed above, it is unnecessary for the Court to parse

the precise scope of the now-invalidated security interests. The Court, accordingly, grants summary judgment in favor of Plaintiff, and denies Defendants' cross-motion for summary judgment, with respect to Counts One and Two of the Complaint. The Court declares that any security interest held by Defendants in the Pledged Property, including alleged security interests in the Employee Loans, the Employee Loan Payments, and monies deposited pursuant to the Stipulation, is invalidated and unenforceable against ERS pursuant to Section 544(a) of the Bankruptcy Code.[22]

III. Section 552 of the Bankruptcy Code

Plaintiff seeks a declaration that Section 552(a) of the Bankruptcy Code prevents any security interest from attaching to revenues received by ERS during the post-petition period. (Compl. ¶ 143.) Defendants contend that Section 552(a) is inapplicable in this case for various reasons. (*See generally* Defs.' Mot. at 18-25.) Having concluded that the security interest claimed by Defendants is invalid and unenforceable against ERS by virtue of Section 544(a), it is not necessary to consider separately the post-petition effect of any such security interest. Section 552 of the Bankruptcy Code is subject to the application of Section 544 because it requires the

22. The Court does not address any consequent Takings Clause issues, as they are unripe in the absence of a plan of adjustment specifying the proposed treatment of Defendants' claims. *See Ambac Assurance Corp. v. Commonwealth of Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 297 F. Supp. 3d 269, 281-82 (D.P.R. 2018).

existence of a pre-petition lien. Furthermore, Section 552(b) is not operative to preserve a lien that has been avoided through the application of Section 544(a). *In re Quaal*, 40 B.R. 619, 620 (Bankr. D. Minn. 1984) (stating that "[a]n interest claimed upon the authority of section 552(b) cannot prevail if such interest would be subject to [Section 544(a)'s] avoidance power."); *see also* ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 552.02[5][b] (16th ed. 2018) (stating that "[i]f the trustee uses the avoiding powers under subsections 544(a) or (b) to successfully avoid the secured party's lien, the lien will not extend to proceeds under section 552(b)."). Section 928(a) also operates as an exception to Section 552(a), and thus is similarly inapplicable when a lien has been avoided pursuant to Section 544(a). *See* 11 U.S.C.A. § 928(a) (West 2016) (stating that a pledge of special revenue will persist "[n]otwithstanding section 552(a) of this title").

In this case, Defendants' claimed prepetition lien has been invalidated and is not enforceable against ERS, there is no ripe controversy with respect to the operation of Section 552, and both parties' motions for summary judgment as to Count Three of the Complaint are denied.[23]

IV. Violation of the January Stipulation

The January Stipulation provides, in relevant part, that all "Employers' Contributions (as defined in the

23. To the extent Defendants request summary judgment and a declaration that any lien they possess on post-petition revenue remains operative, the Court denies this request, because the lien is invalidated by Section 544(a).

ERS Bond Resolutions) received by the ERS during the pendency of the stay imposed pursuant to § 405 of [PROMESA] shall be transferred by the ERS to [a segregated account] for the benefit of the holders of the ERS Bonds." (Compl. ¶ 145.) In Count Four of its Complaint, Plaintiff seeks a declaration that it is not in breach of the January Stipulation, notwithstanding the fact that it did not deposit employer contributions from May 2017 into a segregated account, because the obligation to transfer such funds to the segregated account ended on May 1, 2017, pursuant to the terms of the January Stipulation. (*See* Compl. ¶¶ 144-155; *see also* Pls.' Mot. at 34-35 (seeking summary judgment as to judicial declaration that ERS complied with its obligations under the January Stipulation).) Defendants have conceded that there is no issue of non-compliance as to May 2017 contributions, but argue that Plaintiff failed to comply with certain obligations under the Resolution (*see* Defs.' Opp'n ¶ 68), citing the deposition of Cecile Tirado Soto, Comptroller of ERS, for the proposition that ERS failed to place several months of employer contributions into the segregated account as required by the January Stipulation (*see* Defs.' Opp'n ¶ 69).

Defendants admitted in their Answer to the Complaint that "ERS duly complied with its obligations under the January Stipulation by placing Employers' Contributions received through April 30, 2017 into the Segregated Account." (*See* Answer and Counterclaims ¶ 150 (admitting the allegations in Paragraph 150 of the Complaint "upon information and belief").) Furthermore, Defendants expressly conceded that employer contributions received by ERS after April 30, 2017, "did not have to be transferred

into the pre-petition segregated account." (Defs.' Opp'n ¶ 68; *see also* Answer and Counterclaims ¶¶ 147, 151 (admitting that "ERS was obligated to place Employers' Contributions into the Segregated Account only for the duration of the Section 405 Stay" and that such stay expired as of May 1, 2017).) The facts underlying the relief sought by Plaintiff in Count Four are therefore undisputed, and Defendants have not raised legal arguments as to why the relief sought therein should not be granted.

Defendants' argument that Plaintiff violated the Resolution is not relevant to the relief sought by Plaintiff in Count Four of the Complaint—which only concerns performance of obligations under the January Stipulation—nor to Plaintiff's request for summary judgment with respect to Count Four. Additionally, any claim by Defendants regarding other obligations under the January Stipulation or the Resolution is outside of the stipulated scope of this adversary proceeding and is therefore dismissed without prejudice.[24]

Plaintiff's motion for summary judgment is granted with respect to Count Four of the Complaint, and Defendants' Motion is denied as to Count Four.

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24. (*See* Docket Entry No. 170 in Case No. 17-3566-LTS, at ¶ A (limiting the scope of the adversary proceeding to "the validity, priority, extent and enforceability of the prepetition and post-petition liens and security interests asserted by the Bondholders" and "ERS's rights with respect to employer contributions received during the month of May 2017," and limiting potential counterclaims to "(a) matters pertinent to the main claims, and (b) the Creditors' rights and remedies with respect to employer contributions received by the ERS during the month of May 2017").)

Appendix C

CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Plaintiff on Counts One, Two, and Four of the Complaint, and denied with respect to Count Three of the Complaint. Defendants' motion for summary judgment is correspondingly denied with respect to all four Counts and as to each Counterclaim. The Court will issue an order to show cause as to why, in light of the foregoing analysis and decision, Defendants' Counterclaims One through Four ought not to be dismissed for failure to state a claim upon which relief may be granted, and why Count Three of the Complaint, and Defendants' remaining counterclaims, ought not to be dismissed as moot or otherwise for lack of subject matter jurisdiction. This Memorandum Opinion and Order resolves Docket Entry Nos. 91, 94, and 175.

SO ORDERED.

Dated: New York, New York
August 17, 2018

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

APPENDIX D — STATUTES AND REGULATIONS

PUERTO RICO LAWS

P.R. Laws Ann. tit. 3, § 761

A retirement and benefit system to be designated as the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico', which shall be considered a trust, is hereby created. The funds of the System herein created shall be used and applied, as provided in §§ 761–788 of this title, for the benefit of the participating members of its membership, their dependents and beneficiaries, for the payment of retirement and disability annuities, death benefits and annuities, and other benefits, upon meeting the requirements set forth hereinafter, in order to achieve economy and efficiency in the administration of the Government of the Commonwealth of Puerto Rico.

The system shall be established as of the effective date of this act, and become operational on January 1, 1952, date on which the contributions and benefits shall become effective, as provided in §§ 761–788 of this title. The period from the effective date of this act to January 1, 1952, shall constitute the period of organization of the System. January 1, 1952, shall be known as the 'operative date of the system'. In the case of public enterprises and municipalities, the operative date shall be the date on which their participation in the system begins. As of the effective date fixed in the modification of the agreement entered into between the agency in charge, the Secretary of Health, and the Secretary of Education, pursuant to the provisions of §§ 813–819 of this title; the benefits of

§§ 766, 766a, 766d 774, 780, 781, 783, 785 and 786 of this title shall be coordinated with the benefits of Title II of the United States Social Security Act. In no case shall the combined payments of annuities of the Social Security and the Retirement System to participants under Chapter 2 of this Act shall be less than the annuity that would have corresponded to the System participant under Chapter 2, in accordance with the provisions of this Act. Retirement benefits provided under Chapters 3 and 5 of this Act shall not be coordinated with the benefits of Title II of the United States Social Security Act, except as it may apply under the provisions of Chapter 5.

P.R. Laws Ann. tit. 19, § 2212(a)(68), UCC § 9-102(a)(68)

(a) In this chapter:

(68) Public organic record. Means a record that is available to the public for inspection and that is:

(A) A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States which amends or restates the initial record;

(B) an organic record of a business trust consisting of the record initially filed with a state and any record filed with the state which amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state, or

(C) a record consisting of legislation enacted by the legislature of a state or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or United States which amends or restates the name of the organization.

P.R. Laws Ann. tit. 19, § 2322(a), UCC § 9-502(a)

(a) Sufficiency of financing statement. Subject to subsection (b) of this section, a financing statement is sufficient only if it:

(1) Provides the name of the debtor;

(2) provides the name of the secured party or a representative of the secured party, and

(3) indicates the collateral covered by the financing statement.

P.R. Laws Ann. tit. 19, § 2323(a)(1), UCC § 9-503(a)(1)

(a) Sufficiency of debtor's name. A financing statement sufficiently provides the name of the debtor:

(1) Except as otherwise provided in clause (3), if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name that is stated to be the registered organization's name on

the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name.

P.R. Laws Ann. tit. 19, § 2326(b), UCC § 9-506(b)

(b) Financing statement seriously misleading. Except as otherwise provided in subsection (c) of this section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 2323(a) of this title is seriously misleading.