

**APPENDIX A**

**UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO**

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In re:	PROMESA
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	Title III
as representative of	No. 17 BK 3283-LTS (Jointly Administered)
PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA),	

Debtor.<sup>1</sup>

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<sup>1</sup> 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); and (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). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations.)

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In re:

THE FINANCIAL OVERSIGHT  
AND MANAGEMENT BOARD  
FOR PUERTO RICO,

as representative of

PUERTO RICO ELECTRIC  
POWER AUTHORITY  
(PREPA),

Case  
No. 17-04780 (LTS)

Debtor.

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UNIÓN DE TRABAJADORES  
DE LA INDUSTRIA ELÉCTRICA  
Y RIEGO (UTIER),

Plaintiff,

v.

PUERTO RICO ELECTRIC  
POWER AUTHORITY; THE  
FINANCIAL OVERSIGHT  
AND MANAGEMENT BOARD  
FOR PUERTO RICO; JOSÉ B.  
CARRIÓN III; ANDREW G.  
BIGGS; CARLOS M. GARCÍA;  
ARTHUR J. GONZÁLEZ;  
JOSÉ R. GONZÁLEZ;  
ANA J. MATOSANTOS;  
DAVID A. SKEEL, JR.;  
AND JOHN DOES 1-7,

Adv. Proc.  
No. 17-228-LTS

Defendants.

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S AMENDED ADVERSARY COMPLAINT

(Filed Aug. 15, 2018)

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LAURA TAYLOR SWAIN,  
United States District Judge

Before the Court is the *Motion to Dismiss Plaintiff's Amended Adversary Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6)* (see Docket Entry No. 88 in Adversary Proceeding No. 17-00228, the “Motion”)<sup>2</sup>, filed by the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”), and the Puerto Rico Electric Power Authority (“PREPA”). José B. Carrión III, Andrew G. Biggs, Carlos M. García, Arthur J. González, José R. González, Ana J. Matosantos, David A. Skeel, Jr., and John Does 1-7 (collectively with

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<sup>2</sup> All docket entry references are to entries in Adversary Proceeding No. 17-00228, unless otherwise specified.

the Oversight Board and PREPA, the “Defendants”). Plaintiff Unión de Trabajadores de la Industria Eléctrica y Riego (“UTIER” or “Plaintiff”) asserts that the Oversight Board, which filed the Title III proceeding on behalf of PREPA, was appointed in a manner inconsistent with the requirements of the Appointments Clause of Article II, Section 2, Clause 2 of the Constitution of the United States (the “Constitution”). Accordingly, Plaintiff argues, all of the Oversight Board’s prior acts are void and its members are unconstitutionally holding office. Consequently, Plaintiff seeks an injunction barring the Oversight Board from continuing its work under PROMESA.

Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The Official Committee of Unsecured Creditors (the “Committee”), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”), and the American Federation of State, County and Municipal Employees (“AFSCME”) intervened in the above-captioned adversary.<sup>3</sup> (See Docket Entry Nos. 56, 92, 93.) The Committee joins the Defendants’ Motion. (Docket Entry Nos. 89.)<sup>4</sup> AAFAF filed a brief in support of

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<sup>3</sup> The Court entered an order on October 27, 2017 granting the Committee with intervention rights in this adversary proceeding. (See Docket Entry No. 56.)

<sup>4</sup> The Committee incorporates by reference the arguments made in its objection to the Aurelius Motions. (See Docket Entry No. 1631 in Case No. 17-BK-3283).



Defendants' Motion. (Docket Entry No. 96.) AFSCME joins the Defendants' Motion solely to the extent that it argues that Plaintiff fails to state a claim pursuant to Rule 12(b)(6) (Docket Entry No. 95) and opposes the Motion to the extent that it seeks dismissal pursuant to Rule 12(b)(1) (Docket Entry No. 99). The United States of America filed a statement (Docket Entry No. 101) supporting the position advanced by Defendants and incorporating by reference the arguments made in its responsive submission to the Aurelius Motions<sup>5</sup> (Docket Entry No. 1929 in Case No. 17-BK-3283). The Court heard argument on the instant Motion on January 10, 2018 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motion.<sup>6</sup> For the following reasons, Defendants' Motion is granted.

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<sup>5</sup> See note 6 *infra*.

<sup>6</sup> The Court also heard oral argument at the Hearing in connection with (I) the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Docket Entry No. 913 in Case No. 17-BK-3283-LTS, the "Aurelius Motion to Dismiss"), and (II) the *Motion of Aurelius for Relief from the Automatic Stay* (Docket Entry No. 914 in Case No. 17-BK-3283-LTS, the "Aurelius Lift Stay Motion" and, together with the Aurelius Motion to Dismiss, the "Aurelius Motions"). The Aurelius Motions raise issues substantially similar to those argued in this current motion practice. The Court addressed the Aurelius Motions in a separate decision. (See Docket Entry No. 3503 in Case No. 17-BK-3283-LTS, the "Opinion and Order on the Aurelius Motions.") The defined terms used in the Court's Opinion and Order on the Aurelius Motions are hereby incorporated by reference except to the extent provided herein.

## I.

BACKGROUND

The Court incorporates by reference the factual summary set forth in section I of the Court’s Opinion and Order on the Aurelius Motions. The following additional background facts are drawn from the *First Amended Adversary Complaint* (Docket Entry No. 75, the “Complaint”) filed by UTIER in the above-captioned action on November 10, 2017. UTIER is a labor union that represents certain employees of PREPA. (Compl. ¶ 15.) UTIER asserts that it has a responsibility under its collective bargaining agreement<sup>7</sup> to protect and defend the rights of PREPA’s employees. (Id. ¶ 16.)

Plaintiff contends that the government of Puerto Rico (the “Government”) enacted certain legislation between 2014 and 2017 that is “directed at undermining and impairing [the] CBA.” (Id. ¶ 24.) Plaintiff further claims that this legislation has been “illegally adopted” by Defendants in the fiscal plan for the Commonwealth certified on March 13, 2017 (the “Commonwealth Fiscal Plan”), in the PREPA fiscal plan certified on April 28, 2017 (the “PREPA Fiscal Plan”), and in the PREPA

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<sup>7</sup> The most recent collective bargaining agreement (“CBA”) negotiated by UTIER on behalf of its members had a stated effective period of August 2008 through August 2012. (Id. ¶ 17.) Although a new collective bargaining agreement has not been negotiated, Plaintiff maintains that the CBA remains valid and binding under a provision of the prior agreement that provides that the agreement “will continue dictating the labor relations between PREPA and UTIER until a new collective bargaining agreement is negotiated and comes in effect.” (Id. ¶ 61.)

budget approved on June 30, 2017 (the “PREPA Budget”). (Id. ¶¶ 24-25.) Specifically, Plaintiff identifies four pieces of legislation (collectively, the “Challenged Legislation”) that “alter, impair, take away without just compensation, or nullify different aspects of the CBA” through the PREPA Fiscal Plan and the PREPA Budget. (Id. ¶ 25.)

First, on June 17, 2014, the Government enacted the “Government of the Commonwealth of Puerto Rico Special Fiscal and Operational Sustainability Act,” Act Num. 66 of June 17, 2014 (“Act Num. 66”). (Id. ¶ 25(a).) Plaintiff argues that Act Num. 66 violates the CBA by limiting the number of vacation and sick days UTIER members can accumulate. (Id.) The second piece of legislation challenged by Plaintiff was enacted on January 23, 2017. The “Act to Attend to the Economic, Fiscal, and Budget Crisis and to Guarantee the Functioning of the Government of Puerto Rico,” Act Num. 3 of January 23, 2017 (“Act Num. 3”) allegedly suspends “all collective bargaining agreement provisions . . . contrary to its clauses.” (Id. ¶ 25(b).) Plaintiff also contends that the “Administration and Transformation of the Human Resources of the Government of Puerto Rico Act,” Act Num. 8 of February 4, 2017 (“Act Num. 8”) impairs the CBA by allowing the Government to consolidate and eliminate services, create a unified system of job classifications, implement a merit system applicable to all agencies and corporations, and facilitate the transfer or movement of employees between agencies. (Id. ¶ 25(c).) Finally, Plaintiff argues that the “Fiscal Plan Compliance Act,” Act Num. 26 of April 29,

2017 (“Act Num. 26”) “eliminates monetary compensation for excess vacation and illness days, alters the amount of days an employee can accrue of vacation or illness to make it less, eliminates any and all monetary compensations, and sets a time limit for the use of excess vacation or illness days” in violation of the CBA. (Id. ¶ 25(d).)

## II.

### DISCUSSION

Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)<sup>8</sup> to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. A court presented with motions to dismiss under both Rules 12(b)(1) and 12(b)(6) should ordinarily decide jurisdictional questions before addressing the merits. Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002). The party invoking the jurisdiction of a federal court carries the burden of proving the existence of grounds for the exercise of jurisdiction. Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007). The court also has an independent duty to assess whether it has subject matter jurisdiction of an action. See Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

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<sup>8</sup> Rules 12(b)(1) and 12(b)(6) are applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

Plaintiff's Complaint sets forth the following four Prayers for Relief. In its First Prayer for Relief, Plaintiff seeks declaratory relief that Section 101 of PROMESA, which provides for the appointment mechanism of the Oversight Board, violates the Appointments Clause and the Separation of Powers principles of the Constitution of the United States of America. (Compl. ¶ 113.) In its Second Prayer for Relief, Plaintiff seeks declaratory relief that, in light of the alleged Appointments Clause violation, the "members of the Oversight Board are therefore unconstitutionally holding office by definition." (*Id.* ¶ 115.) In its Third Prayer for Relief, Plaintiff seeks declaratory relief that the acts and determinations taken by the Oversight Board "from the time of their appointments to the present are unconstitutional and null" due to the asserted constitutional violations. (*Id.* ¶ 117.) Plaintiff's Fourth Prayer for Relief seeks injunctive relief preventing Defendants from pursuing any Title III case or exercising any other power or authority provided by PROMESA until such time that the members of the Oversight Board "are recast to comply with the Appointments Clause of the United States Constitution and an Oversight Board is constitutionally appointed." (*Id.* ¶ 119.)

A. Rule 12(b)(1): Subject Matter Jurisdiction

1. Redressable Injury

Defendants move to dismiss the Amended Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Specifically, Defendants argue that

UTIER and its members lack constitutional standing because UTIER has not established that it has suffered a concrete injury. (Mot. at 1.) In support of that assertion, Defendants contend that the PREPA Fiscal Plan serves merely as a “business plan” and, as such, UTIER has not and cannot plead any distinct injury caused by the actions of the Oversight Board. Plaintiff argues that it is a creditor with a pecuniary interest in the outcome of PREPA’s Title III case.<sup>9</sup> (Docket Entry No. 100, the “Opposition,” at 20.) Specifically, Plaintiff asserts that the outcome of thousands of pending judicial and administrative proceedings and the recovery of unappealable judgments, in actions brought by UTIER against PREPA, are at stake in this Title III case. (*Id.*) Moreover, Plaintiff argues that the Challenged Legislation, which Plaintiff further alleges was adopted by the Oversight Board into the PREPA Fiscal Plan and the PREPA Budget, substantially impairs its collective bargaining agreement. (*Id.* at 20-21.)

In resolving a Rule 12(b)(1) motion to dismiss an action for lack of standing, the court must “credit the plaintiff’s well-pled factual allegations and draw all reasonable inferences in the plaintiff’s favor.” Sanchez ex rel. D.R.-S. v. United States, 671 F.3d 86, 92 (1st Cir.

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<sup>9</sup> AFSCME advances a similar argument and contends that UTIER has standing, solely by virtue of its status as a creditor, to challenge PREPA’s bankruptcy filing as deficient. (*See* Docket Entry No. 99 at 5.) The Court does not address this argument. As discussed *infra*, UTIER sufficiently pleads that it has suffered an injury-in-fact, that the harm is fairly traceable to the Oversight Board, and that injury is likely to be redressed by a favorable judicial decision in this action.

2012). To demonstrate constitutional standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Plaintiff, as “[t]he party invoking federal jurisdiction[,] bears the burden of establishing these elements.” Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

Here, Plaintiff alleges that the Oversight Board has certified a fiscal plan that incorporates the Challenged Legislation and, as a result, alters, impairs, takes without just compensation, or nullifies various agreed-upon provisions of the CBA. Crediting these factual allegations, and drawing “all reasonable inferences in [Plaintiff’s] favor,” the Court finds that, for the purposes of a constitutional standing analysis, Plaintiff has sufficiently pled that it has suffered an injury-in-fact, that the harm is fairly traceable to the Oversight Board and the consequence of the Oversight Board’s respective actions, and that injury is likely to be redressed by a favorable judicial decision in this action. See Sanchez, 671 F.3d at 92; Spokeo, 136 S. Ct. at 1547.

## 2. Limitations on Jurisdiction Under PROMESA Section 106(e)

Section 106(e) of PROMESA provides that:

There shall be no jurisdiction in any United States district court to review challenges to

the Oversight Board's certification determinations under this Act.

11 U.S.C.A. § 2126(e) (West 2017.)

Defendants, citing to Section 106(e) of PROMESA, argue that Plaintiff lacks prudential standing and the Court lacks subject-matter jurisdiction over Plaintiff's Third and Fourth Prayers for Relief because "UTIER is not in the zone of entities or individuals to whom Congress granted the right to challenge certifications of fiscal plans and budgets." (Mot. at 2.) Plaintiff argues that Section 106(a) of PROMESA grants this Court with jurisdiction to review and entertain "any action" against the Oversight Board, including questions regarding the constitutionality of the Oversight Board. (Opp. at 25.)

As explained in this Court's decision on the Aurelius Motions, Section 106(e) of PROMESA does not deprive the Court of jurisdiction to entertain claims that a fiscal plan is invalid or unenforceable as violative of a clause of the federal Constitution. See Ambac Assurance Corp. v. Commonwealth of Puerto Rico (In re Fin. Oversight and Mgmt. Bd. for P.R.), 297 F. Supp. 3d 269, 284 (D.P.R. 2017). The Third and Fourth Prayers for Relief are not implicated by Section 106(e) because they do not challenge the Oversight Board's certification of the PREPA Fiscal Plan or claim that PROMESA's fiscal plan certification predicates have not been met. Accordingly, the Court turns to the merits of Plaintiff's Prayers for Relief.



B. Rule 12(b)(6): Failure to State a Claim

To survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The court accepts as true the non-conclusory factual allegations in the complaint and makes all reasonable inferences in the plaintiff’s favor. Miss. Pub. Emps.’ Ret. Sys. v. Boston Sci. Corp., 523 F.3d 75, 85 (1st Cir. 2008). The court may consider “documents the authenticity of which are not disputed by the parties . . . documents central to plaintiffs’ claim, [and] documents sufficiently referred to in the complaint.” Id. at 86 (citations omitted). The complaint must allege enough factual content to nudge a claim “across the line from conceivable to plausible.” Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (citing Twombly, 550 U.S. at 570).

The crux of Plaintiff’s Complaint is the argument that Section 101 of PROMESA, which provides for the appointment mechanism of the Oversight Board, violates the Appointments Clause and the Separation of Powers principles of the Constitution of the United States of America. As the Court recently explained in its Opinion and Order on the Aurelius Motions, Congress exercised its powers under the Territories Clause of the Constitution in approving Puerto Rico’s Constitution and in enacting PROMESA. The Territories Clause empowers Congress to make rules and regulations for Puerto Rico, and to alter those rules as well. In re Fin. Oversight and Mgmt. Bd. for P.R., \_\_\_

F. Supp. 3d \_\_\_, 2018 WL 3425294, at \*6 (D.P.R. July 13, 2018). The Court held as follows in its Opinion and Order on the Aurelius Motions:

[T]he Oversight Board is an instrumentality of the territory of Puerto Rico, established pursuant to Congress’s plenary powers under Article IV of the Constitution, . . . its members are not “Officers of the United States” who must be appointed pursuant to the mechanism established for such officers by Article II of the Constitution, and . . . there is accordingly no constitutional defect in the method of appointment provided by Congress for members of the Oversight Board.

Id. at \*12.

Plaintiff’s claims for declaratory relief thus fail to state a claim upon which relief may be granted, as does Plaintiff’s request for injunctive relief, which seeks to bar the Oversight Board from exercising powers specifically granted to it by PROMESA.

#### CONCLUSION

For the foregoing reasons and for substantially the relevant reasons set forth in the Opinion and Order on the Aurelius Motions, the Motion is granted and the Complaint is dismissed in its entirety. The Clerk of Court is directed to enter judgment accordingly and close this adversary proceeding.

This Opinion and Order resolves Docket Entry Nos. 88, 89, and 95.

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SO ORDERED.

Dated: August 15, 2018

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

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