

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

**CENTRO DE PERIODISMO
INVESTIGATIVO**

Plaintiff

v.

Civ. No. 17-1743 JAG

**FINANCIAL OVERSIGHT AND
MANAGEMENT
BOARD FOR PUERTO RICO**

Defendant

**PLAINTIFF CPI'S MOTION FOR A FINDING OF CONTEMPT
AND THE IMPOSITION OF CIVIL FINES AGAINST
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO**

TO THE HONORABLE JUDGE GARCÍA GREGORY:

NOW COMES THE PLAINTIFF Centro De Periodismo Investigativo (“CPI”) and respectfully requests the following relief:

(1) That this court issue *a finding* that the Financial Oversight and Management Board for Puerto Rico (“the Board”) has violated the May 4, 2018 Order of this court (hereinafter referred to as “the court’s Order), by engaging in the following conduct:

(a) failing to produce *entire categories* of documents covered by this , including, importantly, *all communications between the Board and agencies or other entities of the Commonwealth of Puerto Rico;*

(b) *unilaterally imposing deadlines* for the production of such documents and then failing to comply with those deadlines

(c) *withholding* a significant number of documents covered by this court's Order, without initially even revealing that documents were being withheld;

(d) subsequently acknowledging that the Board unilaterally made the decision to withhold certain document on the basis of privilege, but then refusing to comply with the rules regarding privilege assertions, despite the CPI's reiterated request that the Board do what every other litigant before this court must do in similar circumstances, i.e. produce a privilege log with individualized assertions of privilege; and

(e) *withholding* a significant number of other documents plainly subject to this court's Order, based on assertions that have absolutely nothing to do with privilege, without complying with the specific directives of this court to provide adequate support for the assertions of justifications for the withholding of documents, and refusing to provide individualized explanations for the decision to maintain these documents in secrecy.

(2) That this court *compel* the Board to comply fully and completely with the May 4, 2018 Order of this court, by producing all remaining documents pursuant to CPI's requests by a date certain, not to exceed *10 days*, with the possible exceptions of those subject to a *legitimate assertion of privilege*, adequately justified in conformity with the requirements of Rule 26 of the Federal Rules of Procedure;

(3) that this court find the PROMESA Board in *civil contempt* of this court, imposing a monetary sanction in the form of a daily fine in the event of further non-compliance with the Order of this court.

In further support of these requests, the CPI states as follows:

A. Introduction

1. This case was presented before this court on *June 1, 2017*. At issue are requests presented by the CPI, a non-profit investigative journalism organization, to the defendant Financial Oversight Management Board for documents which are critical to the investigative work of the CPI and to the people of Puerto Rico affected by the Board's decisions.

2. Given the journalistic efforts of this non-profit news-gathering organization, *time is of the essence*. Delayed access to the important documents covered by this court's Order has the effect of thwarting the purpose for which access to the documents is requested.

3. Nonetheless, since the beginning of this case over a year and a half ago, the Board has engaged in litigation efforts which have the effect, if not the design, to delay the eventual production of the documents. The early part of this litigation was taken up with several preliminary motions and requests for stay. (For the history of these early motions, reference can be made to *Docket Number 63* (CPI's First Motion for a Prompt Status Conference, at paragraphs 1-4), as well as in *Docket Number 65* (CPI's Motion Reiterating its Request for a Status Conference.)

4. Over *eight months ago*, on May 4, 2018, this court issued an *Opinion and Order*, which DENIED the Board's Motion to Dismiss this case. In its considered, thirty five page Opinion, this Court discussed Congress's passage of the PROMESA law, as well as the powers of Congress over Puerto Rico. This court rejected the Board's claim of Eleventh Amendment immunity and found that through PROMESA, Congress had abrogated this immunity to the degree it may have existed. Applying the well-established doctrines on the issue of preemption,

this court also rejected the Board's assertions that PROMESA had occupied the field with respect to public disclosure and the need for transparency in the work of the Board.

5. Importantly, this court also concluded that the Board was subject to the Constitutional requirements of disclosure of public documents, as affirmed by the Supreme Court of Puerto Rico in *Soto v. Secretary*, 112 DPR 377 (12 PR Offic. Tran. 597) (1982), and its well-established progeny. In its Opinion and Order, this court recognized the importance of the production of the documents requested by CPI, noting that "... a citizen's right to access public documents goes hand in hand with PROMESA's purpose. When enacting the Act, Congress expressed concern with Puerto Rico's lack of transparency and unaudited financial information ..." *Opinion and Order, May 4, 2018, Docket Number 36, at page 31*. This court went on to state that "the Board has in its possession a variety of public documents. Pursuant to Puerto Rico law, CPI, as an organization that disseminates news, has a right to inspect those documents." *Id, pages 31 and 33*.

6. This court also took note of the importance of the rights invoked in the action at bar, quoting the Supreme Court of Puerto Rico in *Bhatia v. Governor*, 199 DPR 29, 81 (P.R., 2017), and observing that "if the people are not duly informed of the way in which the public duty is performed, their liberty to express, through vote or otherwise, their satisfaction or lack of satisfaction with the people, rules or procedures that govern them, will be impaired.' Thus, the Board must produce the documents requested." *Opinion and Order, Docket 36, at page 13 (translation supplied by this court.)*

7. The Financial Oversight and Management Board for Puerto Rico *did not appeal* the Opinion and Order of this court. Nonetheless, in sharp contrast to the orderly process envisioned

by this court and by the Magistrate Judge, the Board has taken it upon *itself* to decide which documents should be produced and which not. It also refuses to produce a listing of documents it has withheld from production and has also refused to present a privilege log.

8. In the eight months since this court issued its Opinion and Order, the Board first attended matters relating to small requests, producing several negative certifications (regarding documents which it asserts do not exist), and some instances referring the CPI to records in the public sphere (many of which were not public at the time of the CPI's requests in late 2016 and early 2017.)

9. Finally, on or about October 12, 2018, *five months after this court's order*, the Board provided CPI with thousands of pages of documents which fall into the category of "records relating to communications by any member of the [Board] an/or its staff to any agency of the federal government" *See, Request number "K" in the Complaint, Docket Number 1, at page 21, Paragraph 2(k).*

B. The October documents - incomplete production and inadequate explanation

10. At the time of the October production, the Board did not deign to inform the plaintiff that it was withholding a significant number of documents. It was only through the efforts of the CPI which noticed the absence of documents referred to in the productions, that the Board finally acknowledged that it and its attorneys were making *unilateral decisions* as to which documents it will produce and which it will not.

11. Rather than producing a log of pertinent documents it has withheld from production, with an adequately developed privilege log, the Board has simply provided a listing of *categories* which it has unilaterally decided justify the refusal to produce documents.

12. The Board's categories are as follows:

(a) Documents "within the scope of the deliberative process";

(b) Documents which fall within the "mediation privilege," protected under an Order by Judge Swain in the context of the Title III litigation;

(c) Documents which are "related to law enforcement investigations";

(d) Documents which the Board believes "would cause significant harm to Puerto Rico's economy"; and

(e) Documents which "it believes the disclosure of which would be harmful to the public interest and harm the Board's ability to perform its statutory duties," which documents "include communications with Members of Congress and their staff." *See, generally, Letter from Proskauer¹ to Berkan, November 21, 2013, Exhibit A hereto.*

13. The Board's listing of "categories," as set forth in the letter referenced above, is not only based on *unilateral decisions of the Board* (for example, documents which could "harm" the Puerto Rico economy), but also fails to provide the CPI or the court with any means to discern if there is truly any basis for the withholdings. Only through the provision of a properly supported privilege log could this information be discerned. This, however, the Board has consistently refused to do.

14. The Board makes assertions about the purported need to hide certain documents from

¹There are no less than six (6) members of the Proskauer law firm who have appeared in this case or participated in litigation conferences. *See, Docket Number 42 (attorney Guy Brenner); Docket Number 45 (attorney Martin J. Bienenstock); Docket Number 46 (att. Paul Possinger); Docket Number 47 (attorney Laura Stafford); and Docket Number 49 (att. Ehud Barak.)* These appearances are in addition to two local attorneys, Ricardo Burgos Vargas and Luis Del Valle, who have appeared in the case, as well as another Proskauer attorney, Margaret Dale, who has participated in telephone conferences, but has not yet submitted an appearance.

public view because, in the view of the Board, disclosure would be harmful to certain interests. These assertions are made in general terms, without providing CPI or the court with the information it needs in order to determine whether the claims of secrecy are justified.

15. CPI acknowledges, as this court has stated, that the right of access to public documents is not absolute. *See, Opinion and Order, Docket 36, at page 33.* However, while the Board has embraced this doctrine as a justification for its withholding of documents, it seems to have ignored the remainder of the court’s analysis on this point, in particular, the court’s admonition at page 33 of the its Opinion and Order, that “... a denial of access to public documents has to be *properly supported and justified*, and cannot be denied *arbitrarily or capriciously.*” *Id.* (Citing *Bhatia, supra*)

C. Production of documents with respect to correspondence with Puerto Rico officials

16. To date, remarkably, the Board still has *not* yet provided *a single* document responsive to the request contained in paragraph “L” of the Prayer for Relief in the Complaint, at Docket No. 1, page 21. This Request refers to the following:

“[c]ommunications, reports, consultations, updates, documents or information provided by any member of the Board and/or its staff to La Fortaleza, its officers, or any other agency or official of the Government of Puerto Rico or by the Government of Puerto Rico, to the [Board], its members or staff.”

17. The production of documents pursuant to this request is crucial to the news-gathering function of the CPI and its ongoing investigative journalism. The long-awaited production is also

crucial to the right of the citizens of Puerto Rico to know what their government is doing, so as to participate in a knowing and informed fashion in the democratic processes in Puerto Rico. Plainly, it is only through disclosures on a *timely* basis that these important rights and goals can be achieved.

18. However, today (almost 200 days after this court issued the May 4th Opinion and Order), the Board *still* has not provided a *single* document reflecting the correspondence between the Board and officials and agencies of Puerto Rico. In a conferral meeting held on October 23, 2018, the Board's chief legal counsel stated that he would not be "comfortable" providing a precise date for the productions (in light of the volume thereof). Thereafter, a proposed date was provided, only to fall by the wayside.

19. The Board also has insisted that there could be no "rolling" basis for the production of this critical batch of documents. *See, letter of October 26, 2018, from Proskauer to Berkan, appended hereto as Exhibit B* ("providing the communications in a single batch will allow the Board to complete its review in an efficient and consistent manner.")

20. The timetable for the production of the correspondence between the Board and officials of Puerto Rico has also been a moving target. From the initial estimate of 150 days (to approximately October 1st) for all productions (and the commitment to a rolling production), the Board then stated that it would provide the documents "by the middle of January". *Id, Exhibit B, paragraph 2*. Then, in response to further prodding by the undersigned, the Board, in a letter of January 8, 2019, stated that it was "aiming to have them (the Puerto Rico correspondence documents) by the end of this month." *See, Exhibits C and D, (exchange of correspondence earlier this month between Berkan and Proskauer)*.

D. The Urgent Need for Court intervention

21. Over the course of this litigation, it has become clear that the Board not only is making *unilateral* decisions with respect to the production, but also is *resisting* any control by this court.

22. After a status conference some six months ago, the Magistrate Judge strongly urged the parties to attempt to resolve their differences without the need for court intervention.

23. CPI participated in this collaborative process for several months, as reflected in a number of Joint Informative Motions filed with the court. *See, Docket Numbers 54, 55, 58 and 60.*

24. Unfortunately, this led to a process whereby documents have been withheld over a period of time which has exceeded the 150 days which the Board initially estimated it would need to complete the productions.

25. However, it then became clear to the plaintiff that its good will was being tested and that the Board's delay would be ongoing. Besides not producing documents, the Board also explicitly refuses to provide a *detailed, supported, individualized* log of documents withheld. Indeed, in its latest missive, a letter dated January 8, 2019, the Board insisted that its provision of general *categories* of documents withheld is sufficient to comply with both Rule 26 and with this court's Order that any denial of access to public documents must be "*properly supported and justified, and cannot be denied arbitrarily or capriciously.*" *Opinion and Order, Docket 36, at page 33.* Flouting the court's order, the Board's attorneys have insisted that its November 21st letter (listing the general *categories* of documents withheld would be sufficient.)

26. Throughout, the Board acted without affirmatively informing the court of the reasons it was withholding documents. Indeed, it took considerable efforts by the CPI addressing major gaps in the mid-October production, to finally have the Board set forth those reasons *with respect*

to the production of the Federal correspondence (only through the mention of “categories of documents” being withheld.)

27. Even then, the Board expressed that the productions were “voluntary” and that it would not further specify the precise reasons why *individual* documents were being withheld (as required under *Bhatia* and this court’s Order).

28. This conduct on the part of the Board has prompted the CPI on three separate occasions to request a Status Conference with the court, understanding that this would be the most efficient and productive way to assure that the Board complies with its obligations. *See, Docket Number 62*, September 28, 2018, at page 3 (“The CPI is frustrated by the *extremely slow progress* being made on the process of receiving the communications subject to the May 4th order of the Court. According to the Board, further time is needed for the information to be forthcoming, since there must be review of potential privilege issues. ... Accordingly, *CPI urges the court to set a status conference at its earliest convenience*, wherein the Board can explain the reasons for the *inordinate delay* in the ongoing production process”). *See, also Docket No. 63, CPI’s Motion for Prompt Status Conference, presented to this court on October 30, 2018, and Docket Number 65 CPI’s Motion reiterating Request for Prompt Status Conference, presented on November 27, 2017.*

29. The Board opposed each of these requests, claiming that there was no need for court intervention, in part because it was “voluntarily” providing responses to CPI’s requests, *See, for example, Docket Number 66, at page 1, referring to such “voluntary” responses.*

30. For some reason, it appears that the Board’s opinion that *this court wrongly decided* the Motion to Dismiss (a contention which it has repeated often), is reason enough to characterize

its purported compliance with the court's order as "voluntary," rather than the result of a contested litigation resulting in an Opinion and Order contrary to the Board's position. *See, Docket Number 64, at page 3* ("CPI's accusation [of a cavalier attitude on the part of the Board] does not square with the fact that the Board *voluntarily provided documents* and has been trying to resolve this matter when *it could have simply appealed the Court's ruling on its motion to dismiss.*)

31. The Board has also expressed opposed to a hearing before *this court*. *See, for example, Docket Number 64, at page 1* ("any status conference would be properly held before Magistrate Judge McGiverin..."); *See, also, Docket Number 66, at page 2, footnote 2* (again expressing the Board's view that any status conference should be before the Magistrate Judge, rather than before the Article III Judge who issued the opinion which *requires* compliance with the court's order, and most certainly does not refer to *voluntary* action on the part of the Board.²

32. The entire history of this case leads inexorably to the conclusion that court intervention is required. Without clear orders from the court, CPI would have to settle for a generalized assertion of the reasons a great number of documents are being withheld, without reference to the specific documents withheld. It also would have to settle for changing dates for the productions.

33. In a Motion filed a year and a half ago, at Docket No. 18, the CPI expressed the need for a rapid resolution of the issues in this case. This litigation concerns the efforts of an independent non-profit news organization to attain access to *public documents* which are crucial to the People of Puerto Rico. As expressed by the CPI on page 5 of Docket 18, "[t]he purpose of

² The arrogance of the Board's assertion is astounding. If the Board felt that it could have appealed, it should have. However, the Board, for reasons unbeknown to the plaintiff and the court, made a decision — whether strategic or tactical — with which it must now live.

Puerto Rico’s doctrine requiring access to documents in government files is to assure that citizens are adequately informed as to the workings of government. On a daily basis, the Board is taking actions which will have a major impact on the citizens of Puerto Rico. In these difficult times, the citizens of Puerto Rico are facing difficult and wrenching decisions about their future (eg: whether to remain here or move elsewhere; how to structure their retirements in light of pension reductions; whether they can hope to send their children to the university). These citizens have the right to access the documents in the power of the Board — an entity “within” the government of Puerto Rico – so that they can make informed decisions about the matters affecting their lives significantly and which are crucial with respect to the future of Puerto Rico.”

For all of the above reasons, CPI is *urgently* requesting that the court take concrete action to assure compliance on the part of the Board, issuing, as requested above, by issuing the following relief:

(1) That this court issue *a finding* that the Financial Oversight and Management Board for Puerto Rico (“the Board”) has violated the May 4, 2018 Order of this court;

(2) That this court *compel* the Board to comply fully and completely with the May 4, 2018 Order of this court, by producing all remaining documents pursuant to CPI’s requests by a date certain, not to exceed *10 days*, with the possible exceptions of those subject to a *legitimate assertion of privilege*, adequately justified in conformity with the requirements of Rule 26 of the Federal Rules of Procedure, and other assertions for justifying withholding, in conformity with the case law in Puerto Rico concerning the right of access to public documents;

(3) that this court find the PROMESA Board in *civil contempt* of this court for any further

delay, imposing a monetary sanction for civil contempt through a daily fine in the event of further non-compliance with the Order of this court; and

(4) that this court set a HEARING on these matters at its earliest convenience.

Respectfully submitted in San Juan, Puerto Rico this 15th day of January, 2019

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CERTIFICATION: This is to certify that this motion is being submitted through the ECF filing system, which will automatically notify all counsel of record.

By: /s/ JUDITH BERKAN