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

CENTRO DE PERIODISMO INVESTIGATIVO **Plaintiff** **v.** **FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO** **Defendant**	**Civ. No. 17-1743 JAG**

CPI'S MOTION TO CONSOLIDATE
CASE NO. 17-1743 WITH CASE No. 19-1936

TO THE HONORABLE COURT:

NOW COMES PLAINTIFF, CENTRO DE PERIODISMO INVESTIGATIVO, and pursuant to Rule 42 of the FederalRules of Civil Procedure and Local Rule 42, respectfully requests this Court to **consolidate** the case at bar with the virtually identical case between the exact two same parties, Case No. 19-1936 (ADC).

Both cases involve the exact same analysis of the right of public access to documents under the Constitution of Puerto Rico. Both involve the exact same contentions by the defendants about preemption and the PROMESA law, the purported Eleventh Amendment immunity from state law claims and the significance of Sections 105 and 106 of the PROMESA law. As will be explained in more depth below, the only difference between the two cases is the *time frame* and the cut-off dates for the documents covered by the case.

A. <u>Introduction</u>

All considerations of judicial economy and fairness plainly favor consolidation and further proceedings in the instant case in conformity with the decisions *already* made by this court. Case No. 17-1743 JAG and Case No 19-1936 ADC present the *exact same issues*.

The procedural history of the instant case demonstrates why consolidation is mandated. It also demonstrated how the Board, in open and direct defiance of the Constitution, essential *forced* the CPI to present a *second* case on the *same* issues.

The pertinent procedural history begins on May 4, 2018, when this Court denied the Board's Motion to Dismiss in an Opinion and Order and required the Board to comply with its *Constitutional* obligation to provide access to public documents. *Docket Number 36,* The case was referred to the Magistrate Judge for proceedings related to the implementation of this Court's Order. *Docket Number 37.*

In the spirit of cooperation which CPI was misled into understanding was going to govern this proceeding thereafter, CPI agreed at that time to the Board's request that a "cut-off" date be established. In that same spirit, CPI agreed to limit its requests to the time period ending on April 30, 2018 (just days before this Court's May 4, 2018 Opinion and Order at Docket Number 36, denying the defendant's Motion to Dismiss). Of course, at that time, it was CPI's understanding that the productions would be done efficiently and promptly, and that the Board would fully comply with the Orders of this Court.

At the time that the CPI made this *voluntary* and *good faith* commitment, it certainly could not have anticipate the extraordinary delays which would be provoked by the Board's ongoing violation of this Court's Order. Document productions were delayed for months; commitments were broken by the Board, and the defendant steadfastly refused

to produce the privilege log to which it had committed shortly after this Court's May, 2018 Opinion and Order.

Accordingly, approximately *one year* after the initial agreement that CPI indicated to the Board that the April 30, 2018 cut-off was now unacceptable. By that time, the Board had *withheld* some 22,000 documents of the 40,000 documents which were responsive to plaintiff's initial requests for correspondence between the Board and governmental entities and position-holders. The information was certainly losing its journalistic value, and the CPI, not unreasonably, had come to abandon all hope of good faith on the part of the Board. In light of this reality, CPI argued that the time frame had to be adjusted to include more recent documents. The Board, however, *absolutely refused* to alter its position on the cut-off date.

This prompted CPI to make a *new* request for documents, outside of the instant case, with the CPI's Executive Director making a request to the Board, this time covering the period from May 1, 2018 to the present. Of course, the Constitution right under Puerto Rico law to access to documents did not stop when the lawsuit was filed. Nor did it stop when this Court ruled that the Constitution of Puerto Rico *required* it to comply with the right of access to public documents and the transparency which must take place with respect to this body, which has increasingly taken on the governance of Puerto Rico.

The Board responded by a letter addressed to the undersigned, written by the lead attorney for the Board in the instant case. In what can only be described as extraordinarily false indignation, the Board refused to comply with the Constitution, arguing that the new request "appears to be an improper attempt" by the CPI to "amend the Complaint" in the instant case. *See, Docket Number 1 in Case No. 19-1936 ADC, at ¶12,*

Given this reality, CPI decided to present a *second* complaint before the district court, Case Number 19-1936, which was assigned to Judge Aida Delgado. Last week, the Board responded to the Complaint in Case Number 19-1936 via a Motion to Dismiss. Upon review of the same, the CPI was able to observe that the Board's theories in favor of dismissal of the *second* case are *exactly* the same as those which it raised (and have lost to date) in the instant case. It is respectfully submitted that consolidation is necessary in this case.

In further support for this motion for consolidation, the CPI respectfully requests the court to consider the following more detailed description of the two cases:

Case No. 17-1743 JAG

1. The Centro de Periodismo Investigative (CPI) is a well-recognized news-gathering and transparency-seeking non-profit whose efforts over the last few years have shed light on and exposed major issues involving public corruption and have served to educate the people as to matters critical to their exercise of their democratic rights and to assure accountability on the part of private and public sector entities and individuals.

2. On June 1, 2017, after previously directing unfulfilled requests for information to the Financial Oversight and Management Board, CPI brought this action in this court, seeking access to documents critical to the people of Puerto Rico.

3. In broad terms, CPI based its claim on the following: (a) that Congress determined that the Financial Oversight and Management Board for Puerto Rico ("the FOMB" or "the Board") is an entity within the Government of Puerto Rico; (b) that Congress also determined that Puerto Rico law would apply to the Board, unless "inconsistent" with

PROMESA; and (c) that the Constitution of Puerto Rico grants broad access to public documents in the control of Puerto Rico government entities. *See, generally, Dkt No. 1.*

4. CPI invoked the jurisdiction of this Court pursuant to Section 106(a) of PROMESA which states in part that "any action against the oversight Board, and any action otherwise arising out of this Act in whole or in part, shall be brought in a United States district court for the covered territory .... [Puerto Rico]."

5. After several months of legal skirmishes over the application of the PROMESA stay to this case, the Board urged this Court to Dismiss the Complaint, based on two theories: (a) that the CPI's request for access to public documents in the possession of the FOMB was preempted by the PROMESA statute, *48 USC section 2101 et seq;* and (b) that under *Pennhurst State Hosp. v. Haldeman, 465 U.S. 89 (1984) ("Pennhurst"),* the Board is immune in federal court from claims seeking injunctive relief pursuant to Puerto Rico law. Plaintiff CPI duly opposed the requested dismissal of its action.

6. On May 4, 2018**,** this Court denied the Board's Motion to Dismiss. It did so in a lengthy Opinion and Order issued at Docket Number 36. This Court discussed at length the power Congress has over Puerto Rico, the impact of *Puerto Rico v. Sánchez Valle, 136 S.Ct. 1863 (2016)* and the approval of the PROMESA law. This Court also analyzed at length the concepts of preemption and the Eleventh Amendment *Pennhurst* doctrine. This Court determined that Congress had waived an abrogated any Eleventh Amendment sovereign immunity with respect to the Board, that *Pennhurst* is inapplicable to this case, and that the action was not barred by any preemption doctrine, be it express preemption, implied preemption or field preemption. This Court also examined in depth the Constitutional Right of Access to Public Documents under Puerto Rico law. *See, Docket No. 36.*

7. Upon denying the Board's Motion to Dismiss, this Court referred the case to Magistrate Judge McGiverin for an ISC and to set discovery deadlines. *Docket No. 37.*

8. Shortly after this Court's Opinion and Order, the FOMB indicated to the Magistrate Judge and to the CPI that it *would be producing the documents*. Based on that representation, the parties agreed to an *April 30, 2018* cut-off for the documents to be produced. The CPI entered into this agreement *in good faith*, assuming that there would be a steady flow of documents and that this Court's orders would be respected.

9. The subsequent litigation demonstrated the folly of the assumption that the Board would comply with its obligations to the Court and CPI. The document production proceed at a snail's pace. The Board also *refused* to produce a privilege log, despite CPI's consistent requests for the same (and the Board's initial commitment to produce the same).

10. The Board's actions prompted the CPI to present several requests for a status conference, followed by a Motion for Contempt and for Imposition of Fines against the Board. *Docket No. 57.* The Motion for Contempt is still pending resolution.

11. On January 24, 2019, this Court referred these matters to the Magistrate Judge for resolution, in fulfillment of an approach which was "adopted, in part, to avoid piecemeal motions practice and streamline the resolution of related issues." *Docket No. 70.*

12. Also in late January, 2019, the Board provided to the CPI that which it stated would be its "final batch of documents in response to CPI's requests for production." *Id.*

13. It was then that the CPI ascertained that the Board had withheld some *22,000* documents of a total of *40,000,* claiming that well over *one half* of the documents were subject to *exceptions* to disclosure.

14. Contrary to its prior position, the Board also insisted that it did not have to

provide any individualized showing of why these documents were entitled to confidentiality, despite Puerto Rico's broad Constitutional right of access.

15. A lengthy in-court hearing was held before the Magistrate Judge held on March 1, *2019*. At that time, the undersigned representative for the CPI indicated that in light of the inordinate delays by the Board and its apparent contempt for this court, CPI would likely change its position on the April 30, 2018 cut-off date for the productions.

16. The plaintiff had committed to that cut-off shortly after this Court ordered production of the documents. CPI did so because it *believed* that the Board would comply with the Orders of this Court. By the time of the hearing before the Magistrate Judge, however, CPI had confronted the delay tactics of the Board and had come to know that it was withholding over 50% of the documents subject to this Court's Opinion and Order of May 4, 2018. Given the delays created by the Board, which has exclusive control over the documents, as well as the CPI's work as a *journalistic* organization which depends at least in part on *contemporaneous* documents, it was not acceptable to cut off the productions to a date long in the past.

17. Despite the reasonableness of this position, the Board strenuously objected to any change in the cut-off date, claiming that it was somehow unfair for the CPI to change its position on this matter.

18. Parallel to this dispute, the Magistrate Judge began resolving some of the pending issues referred to him by this Court. In February and March, 2019, Judge McGiverin requested briefing by the parties on a number of issues, primarily relating to privilege.

19. In two Motions to the Magistrate Judge, at *Docket Numbers 79 and 90,* the

Board argued a number of points which were unrelated to the privilege questions on which the Magistrate Judge was directing his focus. The Board argued *inter alia* the following: (a) that Section 105 of PROMESA prohibits this Court from entertaining this case; (b) that the Board was providing documents on a "voluntary" basis (rather than in response to an Order of the Court); and (c) that CPI's requests were too broad.

20. Magistrate Judge McGiverin disagreed. On July 31, 2019, the Magistrate Judge issued his first Report and Recommendation, in which he rejected the Board's contention that PROMESA Section 105 provides full immunity for the FOMB and insulates it from this action. *See, Docket Number 100.*

21. Judge McGiverin observed that the Board "misapprehends §105 [of PROMESA] and why the public right of access coexists with PROMESA." *Docket No. 100, at page 6.* Referencing Judge García's May 4, 2018 Opinion and Order, the Magistrate Judge noted that Section 105 must be considered in conjunction with section 106, rejecting the FOMB's posture that it enjoyed "wholesale immunity."

22. Subsequently the FOMB presented a "Limited Objection" to the R&R (despite prevailing on the underlying issue addressed in that Report and Recommendation.) The purpose of the "Objection" was to challenge Judge McGiverin's views on the Section 105 immunity issue. *See, Docket No. 101.* Plaintiff opposed the Objection to the R&R on July 9th, and the Board Replied on July 19th. *Docket Nos. 104 and 107.* The Board's Objection to the first of two R&R's by the Magistrate is still pending resolution, as are the objections of *both* parties to a second R&R by Judge McGiverin issued shortly thereafter. *Docket Nos. 109 and 110.*

Case No. 19-1936 ADC

23. Given the intransigent position of the Board with respect to the cut-off date, CPI

decided to direct a *new* request for documents to the FOMB. This was done on August 9, 2019, through a letter CPI's Executive Director sent to the Board and its public relations team, on August 9, 2019. *See, Complaint, Docket 1 in Case Number 19-1936, at ¶ 4.1.*

24. The request for documents was for communications between the Board and different government and agencies and individuals. Accordingly, the new request was identical to *part* of the requests which are at issue in Case Number 17-1743. *Id, ¶4.1 (a) and (b).*

25. The only difference between the requests for communications which gave rise to Case No. 19-1936 and the earlier requests for all such documents is the "cut-off date." In Case Number 17-1743, the Board was absolutely refusing to provide any documents beyond April 30, 2018. Now, in Case No. 19-1936, CPI is requesting the communications from April 30, 2018 onward.

26. The fact that the two cases are virtually identical was made perfectly clear in the Board's filing last week of a Motion to Dismiss in Case No. 19-1936. Before the Motion was presented, CPI did not know if the Board would be using the resources of the People of Puerto Rico to settle the controversy by adhering to this Court's prior decisions in Case No. 17-1743, or in the alternative would use those resources to make the exact same arguments it has already made and lost in that earlier case. Unfortunately, the Motion to Dismiss has demonstrated that the latter is the case.

27. Each and every one of the arguments the Board included in its Motion to Dismiss in Case No. 19-1936 has been raised before in Case No. 17-1743. The Board again asserts that PROMESA Section 105 is an absolute bar to this litigation, that the requests are too broad, that Eleventh Immunity and *Pennhurst* are a bar to this case, and that PROMESA

preempts Puerto Rico law. The language, at times, is a direct cut-and-paste from the Board's filings in Case No. 17-1743, be it in the original Motion to Dismiss the Board filed in the summer of 2017, or in the post-hearing Motion in Compliance it filed in April of 2019, or in its two objections to Judge McGiverin's Reports and Recommendations, all of which were referenced above.

ARGUMENT

Rule 42(a) of the Federal Rules of Civil Procedure allows for consolidation of two or more cases if they involve a "common question of law or fact." *Seguro de Servicio de Salud v. McAuto Sys. Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989).* Once this threshold is met, consolidation lies within the discretion of the court, which must consider such factors as whether the joint litigation would "promote the aims of all the parties [and] economize time and effort without circumscribing the opportunity for full litigation of all relevant claims," or whether any party would be prejudiced by the action of consolidation. *González-Quiles v. Coop. De Ahorro Y Credito De Isabela, 250 F.R.D. 91, 92-93 (D.P.R. 2007).*

"Courts have stressed that the purpose of joining actions is to promote convenience and judicial economy. .... Consolidation is appropriate if it will promote the aims of all the parties [and] economize time and effort without circumscribing the opportunity for full litigation of all relevant claims". *Pino-Betancourt v. Hosp. Pavia Santurce, 928 F. Supp. 2d 393 (D. P.R. 2013)* (*internal citations and quotes omitted).* "When deciding whether to exercise such discretion, courts weigh considerations of convenience and economy against considerations of confusion and prejudice." *Id* (internal citations and quotations omitted.)

Courts should consider whether consolidation would avoid the possibility of inconsistent judgments, whether separate litigation would waste valuable judicial resources

or would imply excessive costs to the parties. *Fin. Guar. Ins. Co. v. Padilla, 2016 U.S. Dist. LEXIS 13764*. Consolidation may be appropriate, even when the two cases are based on different legal theories, if "they name the exact same Defendants, challenge the same Commonwealth actions, and involve common issues of fact and law.") *Id.*

In the case at bar, every single factor weighs in favor of consolidation. CPI's claims are the same in both cases, and as we have seen, the defendant's contentions are precisely those which the Board has previously brought before this Court. Moreover, several of the controversies between the parties are currently pending resolution before Judge García. Plainly, it would be a waste of valuable judicial resources to have a second judge go over the exact same terrain.

Consolidation, moreover, would work no prejudice whatsoever to the Board. Assuming that the Board is trying to avoid runaway spending on the part of entities within the Government of Puerto Rico, the defendant should certainly favor the joint litigation, since, as this Court noted in May of 2018, "[t]he Board is an entity paid for by the Puerto Rican people." *Docket 36, page 31.*

The separate defense of two lawsuits would cause considerable wasteful spending of the scarce funds in government coffers. This is certainly not an insignificant consideration at the current juncture in Puerto Rico. Besides the Motion to Dismiss the Board recently filed, the only other docket entries by the FOMB in Case No. 19-1936 have been Notices of Appearances and Motions for Admission *Pro Hac Vice*. Notwithstanding the virtual identity of Case No. 17-1743 and Case No. 19-1936, the Board has had *five* attorneys appear on its behalf in Case No. 19-1936, so as to make the exact same argument four of the five *same attorneys* (as well as two other attorneys from the Proskauer Rose

firm) *already* made before this Court in the case at bar. Consolidation would certainly be helpful in avoiding such duplicate efforts and additional spending.[1]

If ever there were a circumstance favoring consolidation of two cases, it is the one at bar. The parties are identical; the claims are identical. The controversies between the parties have been and are being considered, at this very moment, by Judge García. There is no reason to wait for another Judicial Officer to familiarize herself with the issues in this case. To disallow consolidation would be to sanction further delay in the implementation of fundamental rights guaranteed under the Constitution of Puerto Rico.

WHEREFORE, plaintiff CPI respectfully requests that this Court order Consolidation of Case Numbers 17-1743 JAG and 19-1936 ADC.

Respectfully Submitted in San Juan, Puerto Rico this 1st day of November, 2019.

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[1] *Four* of these attorneys are not admitted in Puerto Rico, which means that *each* paid a $300 *pro hac vice* fee drawn from the coffers of Puerto Rico's ailing budget. In all candor, although Judge Delgado *immediately* granted *pro hac vice* status to these attorneys, thus allowing this gross over-staffing at a time of economic crisis, there is something seriously wrong with the taxpayers of Puerto Rico having to foot the bill for this.