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. 19-1936**

OPPOSITION TO MOTION TO DISMISS

NOW COMES THE CENTRO DE PERIODISMO INVESTIGATIVO, INC., through undersigned counsel, and respectfully Opposes the Motion to Dismiss presented by the defendant Financial Oversight and Management Board for Puerto Rico ("the Board" or "the FOMB") at Docket No. 10.

I. Introduction

The Centro de Periodismo Investigative ("CPI") is non-profit organization which engages in Investigative Journalism, as well as education and litigation efforts designed to promote transparency regarding matters affecting the people of Puerto Rico. It was formed for the express purpose of assisting the citizenry through efforts designed to promote transparency in governmental affairs, including education programs for journalists and citizens, litigation to gain access to documents and information, and publication of investigative news stories. The Board of the CPI is made up of distinguished journalists and researchers, as well as renowned attorneys and law professors, including a former Dean of the University of Puerto Rico School of Law and a former Dean of the Interamerican University School of Law. Its journalists have been honored with several local and

international awards for the quality of their investigative research and publications.

To fulfill its mission, the CPI frequently requests information and documents from governmental entities, including state, federal and local government agencies. When, as here, a governmental agency resists complying with the clear dictates of the Constitutional law of Puerto Rico requiring citizen access to governmental information, the CPI files judicial actions to assure that the law is followed. The CPI has been widely successful in such efforts, with the courts affirming the organization's right to access public documents.

In the case at bar, CPI has requested access to all communications between the PROMESA Board and federal and Commonwealth officials, corresponding to the period of April 30, 2018 to the present. This case is a companion to an earlier litigation which began in June of 2017 and is still ongoing. In Civil No. 17-1743 JAG, CPI requested a number of documents, including communications between the Board and government officials.

In May of 2018, Judge García issued a lengthy *Opinion and Order* which he **denied** the defenses which the Board has repeated herein, rejecting all of the Board's arguments on preemption, Eleventh Amendment immunity and the application of the *Pennhurst* doctrine[1] to this case. *See, Exhibit A hereto, Opinion and Order at Docket No. 36 in Case 17-1743.* In a later Report and Recommendation Magistrate Judge Bruce McGiverin rejected a statutory argument raised by the Board, claiming immunity from suit based on Section 105 of the PROMESA law. *See, Exhibit B, Report and Recommendation, Docket No. 100 in Case 17-1743, pages 6-7.*[2]

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[1] *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).*

[2] The Board objected to the R&R. Accordingly, Section 105 immunity is presently before Judge García in Case No. 17-1743.

Given that the claims and defenses are virtually identical to Case No. 17-1743, currently before Judge García, the question is – why, then, did CPI feel that it had present this second lawsuit? This is discussed in depth in the Motion to Consolidate, presented by CPI on November 1, 2019, at Docket No. 118, in Case No. 17-1743.[3]

The need for the current lawsuit is the Board's intransigence. It steadfastly refuses to admit that the Constitution of Puerto Rico, the basis for CPI's claim, has not been totally abrogated. The Constitution restrains the actions of the PROMESA Board and compels the disclosure of the documents requested herein.

The background for the Board's extraordinary assertions is as follows: Shortly after the May 4, 2018 Order by Judge Garcia requiring the Board to produce the documents, the parties met and agreed to a cut-off date of April 30, 2018 (a few days before Judge García's Opinion and Order), with respect to the productions. At that time, CPI believed that the Board would be complying with Judge Garciá's Order with due haste, a belief which turned out to be completely erroneous, as the Board retained total control over the documents, as well as the decisions as to which were to be produced, resulting in both extraordinary delays and the absence of *any* information regarding the number and nature of documents which the Board unilaterally chose to withhold, in direct contravention to Judge García's Order.

In light of the Board's intransigence, CPI made three separate requests for a status conference. This was followed by a final request for a *Contempt* finding against the Board, a request which remains pending in Case No. 17-1743. An extensive in-court hearing was held before Magistrate Judge McGiverin in early March, 2019, during which the CPI

[3]On November 4, 2019, this Court indicated it had no objection to consolidation. *See, Docket No. 16.* However, since Judge García still has not ruled on the question, this Opposition to Dismissal is being filed solely in the case at bar.

pointed out, *inter alia,* that the Board had apparently withheld some 22,000 documents of a total of 40,000 consisting of communications between the CPI and government entities and individuals.

By this time, CPI had come to realize that the Board would simply ignore the dictates of Judge García's Opinion and Order. The delays were inordinate, and *more than half* of the correspondence documents were being withheld, without specific explanation. It was plain that the Board would use its considerable resources, paid for by the People of Puerto Rico, to hide documents from the very people it was purportedly created to defend.

In light of this situation, CPI indicated that it could no longer adhere to the cut-off point to which it agreed almost a *year* earlier. The Board, for its part, vigorously objected to any up-dating of the cut-off date, ironically accusing the CPI of going back on its word. Given this impasse, the CPI was left no choice but to direct a *new* request to the Board, asking for the same documents, but this time covering the period between April 30, 2018 to the present.

On August 9, 2019, CPI's Executive Director sent a communication directly to the Press relations contractors for the Board, requesting the later documents. *See, Complaint, Docket Number 1, ¶¶4.1-4.8*. The Board's response, unfortunately, was much as expected. Rather than respond directly to CPI's Executive Director, the FOMB had one of its many U.S.-based attorneys respond directly to the undersigned. In a letter dated September 4, 2019, the Board's attorney asserted that the request for documents from April 30, 2018 onward, was overly broad and "appears to be in improper attempt to amend the complaint in the pending litigation, without leave of court and presuming such relief has been granted." *See, Exhibit C, letter from Brenner to Berkan, September 4, 2019*. The Board then

proceeded to issue a pronouncement, as if from on high, that "the right to access documents under the Puerto Rico Constitution does not apply to the Oversight Board." *Id*.

The FOMB is paid for entirely by the People of Puerto Rico. It is *defined* by Congress as an entity *within* the Puerto Rican Government. Accordingly, it must comply with the Constitution of Puerto Rico. The Constitution does not cease to exist as a *current* document, merely because the Board says so. Nor does the operation of the Constitution turn on a commitment made by CPI with respect to a reasonable cut-off date, based on empty promises by the Board which were then broken.

As a final note in this introductory section, CPI would be remiss if it did not mention the importance that the documents disclosed in the context of Case No. 17-1743 JAG, have had for the people of Puerto Rico. Several articles have been published informing the people about communications between the Board and governmental officials. The documents were also recently mentioned by Supreme Court Justice Sonia Sotomayor, in questions put to the Board's attorney before the Supreme Court on October 15, 2019, during oral argument in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment LLC; Supreme Court No. 18-1334 (and related cases).*

In an obvious reference to the case before Judge García, Justice Sotomayor asked counsel for the FOMB, Donald B. Verrilli, Jr., about the allegation in "one amicus [brief] that suggests that in one of the litigations that's ongoing, with respect to PROMESA, that there's all sorts of evidence the Board is taking directives from federal officials." *See, the Transcript of Oral Argument in the Aurelius case, available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1334_dc8f.pdf, *(hereinafter "S.Ct. Transcript) at pages 23 to 24.* Interestingly, Mr. Verilli chose to answer

Justice Sotomayor's question by speaking of the "perils of relying on an amicus brief that relies on extra-record information," affirming also that "the vast majority … of the … documents there have not been disclosed," and stating that in any event, most had to do with providing assistance after the 2017 hurricanes. *Id., page 24.*

It is beyond serious question that the Financial Oversight and Management Board for Puerto Rico is *at this very moment* making decisions which will affect the future of our children and our grandchildren. It is critical that the people whose lives are being affected on a daily basis by this unelected entity have access to documents which will be determinative of our future. This case is not a game involving ingenious arguments to continue the Constitutional violations by depriving the people of access to these documents. The Puerto Rico Supreme Court has decreed that public access to government documents is a "fundamental right," of "constitutional rank,"which is "firmly related to the exercise of the rights of [freedom] of speech, press [and] association." *Bhatia v. Rosselló Nevares, 2017 TSPR 178, 198 DPR ____*. It is "a *fundamental pillar* in *every democratic society,"* which is critical to permitting "the citizens to *evaluate and supervise* the public duty adequately and contribute to an *effective participation of citizens* in the governmental procedures that impact [their] social environment." *Id. (Certified translation submitted by the Board at Docket 91-2 in Civ. No. 17-1743; emphasis supplied by CPI).* The Board's cavalier dismissal of Constitutional law, through reference to CPI's purportedly "improper" attempts to violate rules of Civil Procedure should not be countenanced.

II. The Motion to Dismiss

On October 25, 2019, the FOMB presented a Motion to Dismiss the Complaint in the instant case, for failure to state a claim and for lack of jurisdiction. As will be seen in more

detail below, the Board's motion is a virtual clone of the Motion to Dismiss it presented in Case No. 17-1743. The issues raised by the Board, and CPI's quick answer to the same, follow:

(a) **Section 105 of PROMESA:** The FOMB asserts an alleged bar to this action pursuant to PROMESA §105. This is a contention which takes one section of PROMESA in total isolation from the remainder of the Board's operating law. PROMESA Section 106 plainly allows for this kind of action. This is a contention which was *rejected* by Magistrate Judge McGiverin in his Report and Recommendation at Docket No. 100 (based in significant part on his understanding of Judge García's May 4, 2018 Opinion and Order.

(b) **Overbreadth and particularized need**: The Board argues that CPI's requests are overbroad and that the plaintiff has failed to provide a "particularized reason" for its requests. In support of this contention, the Board cites only decisions with *no precedential value* whatsoever, from the Puerto Rico Court of Appeals, and which are in conflict with the decisions of the *Supreme Court* of Puerto Rico;

(c) **Eleventh Amendment and *Pennhurst***: The FOMB asserts Eleventh Amendment bar, through the operation of the *Pennhurst* doctrine. The Board presented the same argument before Judge García, who *rejected* it in Case No. 17-1743. At the current juncture, the Board adds new twists to the *Pennhurst* argument, in order to address problems it has with Judge García's earlier decision.

First, according to the FOMB, the operation of the *Pennhurst* doctrine applies only to the possibility of bringing *Puerto Rico claims* to federal court. The Board affirms that *federal* claims against it would still be cognizable under Section 106, which provides for this court to be the exclusive forum for cases against the Board. The Board, however, presents

absolutely no textual or contextual support for the interpretation. Had Congress meant to limit the claims brought to this court pursuant to Section 106, it certainly would have said so. Plainly, courts should not add "absent words' to a statute; there "is a basic difference between filling a gap left by Congress's silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. U.s. Tr., 540 U.S. 526, 537 (2004)*

Second, the Board urges this Court to reject Judge García's conclusion that Congress "waived" sovereign immunity for the FOMB. The Board asserts that only Puerto Rico has the power to waive sovereign immunity. This is nothing if not an argument of entire convenience, since the Board's argument before *this* Court is impossible to square with the Board's position, recently espoused before the U.S. Supreme Court in *Aurelius*, where the FOMB emphasized the plenary power Congress has over Puerto Rico pursuant to the Territorial Clause, Article IV Section 3.[4]

As a final matter, the Board asserts that CPI has other options to obtain the information — through FOIA requests regarding Federal communications, or through local litigation against other Puerto Rican entities, but not against the Board. Besides the practical difficulties involved in these other "options," (eg: FOIA requests made in 2016 have *still* not produced results, requiring the *initiation* of the recent lawsuit), such options certainly do not preclude the filing of a lawsuit to give life to the right of public access which is firmly established in Puerto Rico.

(d) **Preemption**: In this part of the Motion to Dismiss, the Board parrots its contentions, which were considered and rejected in Judge García's Opinion and Order at Docket No. 36 in Case No. 17-1743. However, the Board adds a new twist, affirming that

[4] *See, S.Ct Transcript, at page 9.*

the statutory provision allowing the Board to "conduct its operations under such procedures as it considers appropriate" *PROMESA §101(h)(4)(2)* means that Congress intended to *thoroughly displace the Constitutional law* of Puerto Rico. As will be seen in more detail below, the Board asserts that its members (and local politicians with which Board members communicate) are justified in keeping citizens completely in the dark about the matters which are currently affecting their lives and will continue to do so in the future.

In the remainder of this Opposition, the Centro del Periodismo Investigativo will address each of these contentions in more depth.

III. ARGUMENT

A. Section 105

PROMESA Section 105, entitled "Exemption from Liability for Claims" provides that "[t]he Oversight Board, its members, and its employees shall not be liable for any obligation of or claim against the Oversight Board or its members or employees or the territorial *government resulting from actions taken to carry out this Act." 48 USC 2125, emphasis supplied*. Based on this language, the Board would have this Court conclude, contrary to the view of Magistrate Judge McGiverin in Case No. 17-1743, that the Board is thoroughly and completely immune from claims against it *under the Constitution of Puerto Rico*.

In essence, what the Board is saying is that its freedom from "liability claims" extends to *everything* it does. According to the Board, there is no distinction between claims for "liability" and a request for public disclosure of documents, guaranteed under the Constitution of Puerto Rico.

In support of its contention that Section 105 "insulates the Board" from *any* accountability in the courts, the FOMB relies on cases which are entirely inapposite, as the

Board must surely recognize. The cases cited at page 9-10 of the Board's Motion, *Hermandad de Empleados del FSE v. Puerto Rico, 2019 U.S. Dist. LEXIS 176447 (D.P.R. Sept. 27, 2019)* and *UTIER v. PRPEA, ECF No. 62 (September 26, 2018), Case No. 17-ap-229-LTS,* are claims by two labor unions questioning *the Board's essential function*, i.e. debt restructuring and the adjustment of financial obligations. Both cases questioned the *validity* of actions taken by the Board. Both were *within* the Title III rubric (the first being the Title III case for the Commonwealth; the second being within the Title III case involving the Electric Power Authority.

This is a far cry from the current action, which Judge Swain has *already* held was *not* properly before the Title III case and was *not* subject to the Stay provisions of PROMESA. It was Judge Swain, herself, who distinguished a request for *disclosure* of documents from a "claim" against the Board, observing that "because the Litigation (Case No. 17-1743) seeks only the production of documents by the FOMB, it lacks a connection to, or likelihood of interference with the Title III cases, whose principal purpose is to adjust the financial liabilities of the various debtors, including the Commonwealth." *See, Exhibit C, Docket Number 1084 in Case No. 17-03283- LTS ("the Title III case"), page 3.*

In allowing this case to proceed, Judge Swain also took note of the fact that CPI's lawsuit "does not seek *damages or a money judgment* of any kind…"*Id., page 2 (emphasis supplied).* The Judicial Officer presiding over the Title III case also took note of the fact that it was the Board, itself, which argued that "CPI's litigation would *not resolve any issues remotely relevant to the Commonwealth's Title III plan or financial claims against the Commonwealth.*" *Id, page 3, quoting from the Board's Opposition to a Motion by CPI in that case, Docket No. 959 in the Title III case (emphasis supplied).*

The Board plainly ignores the distinction between an action to question what the Board has done in furtherance of its essential functions and one which requests that it disclose documents, as required under the Puerto Rican Constitution. CPI is *not* asking this Court to *invalidate* an action of the Board. Rather, it is asking that the Board be required to *disclose* what it is doing. The request does not relate to the *substantive* actions taking by the Board in furtherance of its PROMESA obligations, but rather for access to the documents generated in the course of those actions, completely independently of whether those actions were lawful or not.

In requesting dismissal of the instant action, the Board also thoroughly ignores the import of PROMESA Section ***106,*** entitled TREATMENT OF ACTIONS ARISING FROM ACT. In May of last year, when Judge Garcia ruled against the Board on its Motion to Dismiss, he expressed his view that Section 106(a) of PROMESA, which states in relevant 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 [i.e. Puerto Rico]" is the "[m]ost salient to this case." *Docket No. 36 in Case No. 17-1743 JAG, at page 7.*

The Board's argument neglects the most fundamental rule of statutory construction, which obliges courts to "start, of course, with the statutory text...." *Saebelius v. Cloer, 569 U.S. 369 (2013).* Words mean something. Under its plain meaning, PROMESA authorizes this Court to hear an action against the Board. *See, Penobscot Nation v. Mills*, 861 F.3d 324, 330 (1stCir. 2017) ("Where the meaning of the statutory text is plain and works no absurd result, the plain meaning controls.")

Yet another fundamental principle of statutory interpretation is the rule against

superfluities. One must presume that Congress had a *reason* to enact *both* Section 105 and Section 106. *See, eg.* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, *505 U.S. 88 (1992) (plurality opinion): (*"Petitioner's interpretation of [the statutory provision] might be plausible were we to interpret that provision in isolation, but it simply is not tenable in light of the [statute's] surrounding provisions. We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law."

The Board, of course, has not offered any reason why Section 106 does not mean what it says. Congress plainly anticipated that certain actions of the Board — unrelated to its core functions as set forth above – would generate litigation, and that such litigation would have to be in this court.

This is the view expressed by both Judge García and Magistrate Judge McGiverin, at Docket Numbers 36 and 100 in Case No. 17-1743. Judge McGiverin observed that Section 105 cannot be viewed in isolation, but rather in the context of the entire statute, including, importantly, PROMESA's Section 106(a), which explicitly grants federal courts exclusive jurisdiction over cases against the Board. *Docket 100, page 6.* **T**he Magistrate Judge rejected the Board's assertion of what would be in effect "wholesale immunity" (because, according to the Board, *everything* it does are "actions to carry out PROMESA") based on Section 105. Judge McGiverin rejected this argument of absolute immunity, noting that Judge García had made it "clear that Section 105 ought not be considered without the tempering effects of Section 106."*Id, citing Docket 36, at page 12.*[5]

[5]The Board now asserts that the Magistrate misinterpreted this Court's May, 2018 ruling in that this Judge García did not mention Section 105 in its ruling. *See, the Board's Limited Objection to Judge McGiverin's R&R, Docket 101 in Case No. 17-1743, at page 7.* To be sure, Judge García did not address Section 105 *explicitly*, because the Board *did not raise that issue in its Motion to Dismiss.* This, however, does not undermine the Magistrate Judge's interpretation of the *reasoning* underlying this Court's Opinion and Order — that PROMESA must be read as a *whole* and that Section 106 plainly

As Judge McGiverin stated, Section 105 does not mean that the Board is completely immune from suit. PROMESA did not give the Board "indiscriminate immunity." Rather, the Board enjoys a "strictly defined exemption from liability." *Docket 100 in Case No. 17-1743, at page 6.* The Board has no immunity from complying with this Constitutional obligation to assure public access to government documents. Solely through an informed citizenry can there be *any* semblance of democracy in Puerto Rico.

B. **Overbreadth**

The FOMB argues that CPI's request is overbroad because (1) it is not limited in scope and (2) it does not express a particularized need for the information. Both arguments are incorrect in light of applicable law.

In affirming that the CPI must demonstrate a particularized need for the information being requested, the FOMB relies on non-binding decisions of the Puerto Rico Court of Appeals, which have no precedential value. The Supreme Court of Puerto Rico establishes the law in Puerto, and it is has been quite clear in protecting the right of access to public documents regardless of "particularized need."

In *Ortiz v. Directora Administrativa de los Tribunales, 152 DPR 161 (2000)*, the Supreme Court stated that in the context of access to information cases, the mere denial of access to a public document, in and of itself, causes the person seeking the information a clear and palpable injury. *Id., 152 DPR at 177.* In access to information cases, the movant need not demonstrate a particular interest in the requested information. It is sufficient to demonstrate that the movant made a prior request and that the request was denied. *Id.*

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grants this Court the authority to act with respect to this case.

In point of fact, this doctrine was recently incorporated into a statute that seeks to standardize procedures for access to public information in Puerto Rico. The *Ley de Transparencia y Procedimiento Expedito para el Acceso a la Información Pública*, PR Law No. 141-2019, states in Article 6 that, "[a]ny person may request public information via written or electronic request, *without having to demonstrate any particular or legal interest*."[1] (emphasis supplied). CPI's request for access to public documents cannot be conditioned on it being able to demonstrate a particular need, much less one on which the FOMB will then presumably pass judgment.

There is also no need for the CPI to limit further the scope of the public documents it seeks. Under Puerto Rico law, it is is the duty of the *government* to employ the identifying criteria provided by the person making the request in order to obtain the information being sought. As the FOMB itself recognizes, the CPI is seeking communications between the FOMB and the federal and Puerto Rico governments for a period of 18 months. *Docket no. 10 at p. 12*. This is more than enough detail to be able to adequately ascertain what documents are being sought by the CPI.

It bears mentioning that what is at stake in the present case is compliance with a fundamental constitutional right; this is not a discovery dispute. While there may be economic or other considerations which favor limiting the production of public information in a post-judgment phase, this is a far cry from an argument that the CPI does not have *the right* to obtain the public documents it seeks. Contrary to the FOMB's characterization, the Puerto Rico Constitution does not just "permit disclosure" of public documents. *Docket No. 10 at p. 11*. Rather, the constitutional right of access to public information is a critical

[1] Undersigned's translation. (Original in Spanish: *"Cualquier persona podrá solicitar información pública mediante solicitud escrita o por vía electrónica, sin necesidad de acreditar algún interés particular o jurídico."*)

component of the rights of free speech, free press and freedom of association set forth explicitly in the Bill of Rights, Article II of the Constitution of the Commonwealth of Puerto Rico. See, eg., *Soto v. Srio. Justicia, 12 P.R. Offic. Trans. 597, 607-608 (1982).*

C. Eleventh Amendment and Pennhurst

In support of dismissal, the FOMB invokes the Eleventh Amendment and the *Pennhurst* doctrine, which prohibits federal court actions against state entities and officials based on violations of state law. The Board previously made this same argument in Case No. 17-1743 before Judge García, who concluded that *Pennhurst* did not protect the FOMB from being sued in this forum.

For Judge García, the deciding factor was Section 106(a) of PROMESA, which establishes 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*." 48 USC § 2126(a) (*emphasis supplied*). As Judge García stated, "[t]he statute makes it *abundantly clear* that the Board is not immune from suit and grants the U.S. District Court for the District of Puerto Rico exclusive jurisdiction over any suit brought against the Board." *Docket Number 36 in Case No. 17-1743, Opinion and Order of May 4, 2018, at page 14* (*emphasis supplied*).

At the current juncture, the FOMB has had to find a way to circumvent Judge García's Opinion and Order. It does this in two ingenious, yet plainly erroneous contentions. *First*, the FOMB argues that section 106(a) is not a waiver of sovereign immunity at all, but rather was only meant to "designate where *federal* claims against the Board can be brought." *Docket No. 10 at p. 14 (emphasis supplied). Second,* in a change of course, the Board implicitly accepts that section 106(a) is indeed a waiver of sovereign

immunity. It argues, however, that Congress did not have the authority to waive the FOMB's immunity on behalf of the government of Puerto Rico.

In support of its *first* contention (that there was *no waiver* of sovereign immunity), the Board resorts to a total distortion of Section 106, asserting that Congress's explicit reference to federal court actions against the Board was limited to actions based on federal law. The Board utterly fails to elaborate on this peculiar interpretation of the statute, pointing to no evidence whatsoever in support of its position, and expecting this Court to adopt its interpretation on faith alone.

This is in sharp contrast to Judge García's May 4, 2018 Opinion and Order at *Docket No. 36 in Case No. 17-1743,* in which he looks to *evidence* in the legislative history. Judge García points to the Congressional record, referencing the Congressional Research Service's report on PROMESA, which describes section 106 as a *"[w]aiver of sovereign immunity"* section and also explains that the section limits "the extent to which a government unit can assert sovereign immunity. *Id, at pp. 12-13* (*citing* D. Andrew Austin, Cong. Research Serv., R44532, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328) 36 (2016)).

Objectively speaking, any statute delineating where actions against a government entity may be filed can be reasonably construed as an acknowledgment that those legal actions are cognizable. FOMB's interpretation requires a significant leap, in the absence of any reference to the statutory language, to conclude that Congress's mention of "any action against the Oversight Board" was in reality referring only to any action brought against the Board pursuant to *federal* law. Congress did not so provide. Had Congress

wanted to distinguish between actions based on Commonwealth law and federal action, it certainly would have said so.

The Board's second contention - that only Puerto Rico can waive its own sovereign immunity, is certainly brazen, in light of the directly contrary argument the Board's attorney just made before the Supreme Court in the *Aurelius* case referenced above. On October 15th, the Board's attorney, Mr. Verrilli, argued that "the difference between this situation and a state is that Congress has reserved authority under Article IV to alter the structure of a territorial government and to prescribe … its substantive law." Now, however, the Board is suddenly protective of Puerto Rico's powers as a sovereign. The hypocrisy is evident.

Similarly, Judge García relied on the infamous Territorial Clause of the U.S. Constitution and the U.S. Supreme Court's decision in *Puerto Rico v. Sánchez Valle*, *579 U.S. ___; 136 S.Ct. 1863 (2016).* ("Puerto Rico has never entered the Union as a state or been considered a sovereign distinct from the United States."). It is ironic that the FOMB is making arguments related to state sovereignty and the principles of federalism with regard to Puerto Rico, while simultaneously arguing the opposite before other courts. *See, also, the Board's Petition for Writ of Certiorari*, *FOMB v. Aurelius Capital, LLC*, U.S. Supreme Court Case No. 18-1334, April 23, 2019, pp. 15-18.[1]

The conclusion is inescapable that the FOMB's arguments are not the product of careful and considerate reasoning based on the reality of Puerto Rico, but rather momentary ideas responding to the prevailing winds in each case as it searches for doctrines which will support the result it seeks and allow it to escape its Constitutional

[1] Available at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1334.html (last visited: November 4, 2019).

obligations. The FOMB's contentions are strained and logically inconsistent, presented for the sole purpose of prying itself away from the duties imposed on it by the Constitution of Puerto Rico.

Finally, before leaving this point, the CPI must take a moment to address one more contention which the Board folds into this part of its motion --- the idea that the CPI will not be harmed or deprived of a forum if relief is not granted herein. The FOMB argues that other options are available for obtaining the requested information. With regard to the FOMB's communications with the federal government, the FOMB states that the CPI can file a Freedom of Information Act (FOIA) request. With regard to the FOMB's communications with the government of Puerto Rico, the FOMB states that the CPI can file suit against other branches and/or entities of the government in Puerto Rico in local courts. However, this argument is completely removed from the reality surrounding requests for information.

As an independent non-profit journalism medium, the CPI confronts the obstacles placed in the path of public disclosure on a daily basis. Government agencies are often loathe to comply with their obligations to inform the public. Despite these obstacles, the CPI has certainly not sat on its hands. It has directed requests for public information not only to the Board, but also to the Federal Government. CPI's FOIA requests to the federal government were met with promises for documents, based on extremely lengthy deadlines, with which the federal authorities have utterly failed to comply, leading to the case that the CPI recently filed to force the United States government to comply with the FOIA.

Requests to the Puerto Rican executive branch have been similarly frustrated. After months of requests directed at the government, CPI had to resort to the courts. A petition

for *mandamus* was filed against the government over two years ago and, after two trips to the Puerto Rico Court of Appeals, it is still being vigorously opposed by the government of Puerto Rico. Unsurprisingly, one of the arguments raised in the government's defense is that the CPI has "other remedies" available to it to obtain the requested information, specifically, suing the FOMB. Thus, the CPI is being forced into a Catch-22 situation where each party refuses to produce the documents on the basis that the CPI may obtain the same from the other source, which also refuses to comply with its obligations.

D. <u>Preemption</u>

The FOMB's argument on preemption can only be characterized as a "Hail Mary Pass." Forced to concede that the Board believes that Judge García "wrongly decided on this point," *Motion to Dismiss, Docket 10, at page 22*, the Board simply argues that it should be entitled to a wholesale lack of accountability. What's worse, the Board goes so far as to say that the People of Puerto Rico would be better off if they had *no idea* what the Board is doing. Moreover, according to the Board, Puerto Rico's elected officials would not be able to succeed unless they *lied* to the People about what they are doing. This, from the Board, whose attorney recently told the Supreme Court that "[t]he Board acts *on behalf of Puerto Rico* and that it has "been given statutory directives *to advance the interests of Puerto Rico."*

First, it is useful to examine Judge García's expressions on preemption in his May 4, 2018 Opinion and Order which the board finds so troubling. The Judge's analysis, which is found at pages 18-32 of Docket No. 36 in Case No. 17-1743, will be summarized briefly herein.

First, Judge García speaks about the Supremacy Clause and the power Congress has

to preempt state law, noting the bedrock doctrine that the key to preemptions is an analysis of Congressional *intent*. *Id., page 18* This is followed by an analysis of the PROMESA Law, for the purpose of discerning the intent of Congress, under the rubric of "Express Preemption," "Implied preemption" and "Field preemption." The Judge then looks at "Conflict Preemption," to determine whether Puerto Rico's public disclosure requirement conflicts with the PROMESA law in general and PROMESA's own disclosure procedures.

The analysis on Express Preemption and Implied Preemption is very simple. "Express preemption occurs when federal legislation contains language addressing the subject of preemption," with courts focusing on the "plain wording of the [express preemption] clause, which necessary contains the best evidence of Congress's preemptive intent." *Docket 36 in Case No. 17-1743, at page 19-20 (internal quotes and citations omitted)*. The court then went on to examine the Board's argument that Section 4 of PROMESA clause (which states that the provisions of PROMESA prevail over Puerto Rico law if the latter is *inconsistent* with PROMESA), rejecting that this can be considered an "express preemption." In so doing, Judge García noted *inter alia* that "Congress could have added language specifically preempting Purto Rico law on disclosure, but opted not to do so." *Id, page 22*.

Judge García similarly rejected the Board's argument that PROMESA *implicitly* preempted the field of public disclosure for the PROMESA Board. There is no indication whatsoever that through PROMESA, Congress intended the Federal Government to occupy the field completely or to create such a "pervasive" regulatory scheme so as to "imply" preemption. Judge García observed that "the right to access and inspect documents in Puerto Rico is not an area where the federal government has played a large role," but rather

"has been traditionally a local affair." *Id, page 24*. Moreover, "Congress has not expressed a desire, neither in PROMESA nor in its legislative history, to have federal law be exclusive in the area of disclosures by the Board." *Id*.

Nor is there any "conflict" between the right of public access guaranteed under the Puerto Rico Constitution and any "comprehensive federal regulatory efforts."*Id, page 25*. Judge García found "no conflict between Puerto Rico's law on disclosure of public documents and PROMESA," rejecting the notion that PROMESA, by requiring certain documents and meetings to be publicly disclosed, certainly did not "prevent additional disclosures by the Board." *Id., page 28*. If there are certain documents which may be withheld on the basis of privilege, this can be addressed to the court. *Id., page 29*.

Judge García also noted the importance of Puerto Rico's law on disclosure. "[T]he public's right to inspect public documents in Puerto Rico serves an important local interest." Citing cases from the Supreme Court of Puerto Rico, Judge García observed that this right is "closely related to freedom of speech and freedom of the press and, accordingly, should be highly protected … The reasoning is very simple: 'it is impossible to pass judgment on something without knowledge of the facts…" *Id., page 26 (internal citations and quotations omitted."* It is a right which is "stitched in the very fabric of Puerto Rico's democratic ideals."*Id*.

Judge García's reference to "democratic ideals" apparently was baffling to the Board. In a truly astounding part of its Motion to Dismiss, the Board actually argues that it is better for the people of Puerto Rico to be *kept in the dark* about those who exercise power here, and that the citizens are better off with incomplete information regarding the actions of those who purportedly work for their benefit.

Witness the following contentions made by the FOMB in opposition to Judge García's cogent preemption analysis:

- "PROMESA Section 101(h)(2) provides that the Board 'may conduct its operations under such procedures as it considers appropriate ...
- "[T]he Board clearly does not want to conduct its operations so as to publicize *sensitive communications* between itself and the Federal or Commonwealth Governments ...
- "As a simple example, *what government official who runs for reelection* would want *the public* to see him or her acquiescing in any *reduction* of public services?
- "Similarly, what *Board member* would want any party in interest to see him or her emphasizing to the federal government some Puerto Rico needs before others?" *FOMB's Motion to Dismiss, Docket 10, at page 19 (emphasis supplied.)*

These simply have to be some of the most eye-opening comments contained in motions relating to transparency in Government. The Board is actually stating that the interest of a government official in achieving re-election is more important than the right of the citizenry to know what that government official is actually doing. The FOMB, which wields extraordinary power in Puerto Rico, actually is saying that the interest of the citizenry in knowing what is going on and its impact on our future and that of our children and grandchildren, should yield to the *personal interests* of the Board members? Such arguments simply take one's breath away. They demean the seriousness of the issues being faced by Puerto Rico at this critical juncture.

FOR ALL OF THE ABOVE REASONS, the Centro de Periodismo Investigativo respectfully requests this court to DENY the Motion to Dismiss;

Respectfully submitted in San Juan, Puerto Rico this 5th day of November, 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.

/s/ JUDITH BERKAN