United States Court of Appeals for the First Circuit

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.

Plaintiff-Appellee

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant

On Interlocutory Appeal from the United States District for the District of Puerto Rico

Consolidated District Court Case Nos. 17-01743 JAG and 19-01936 JAG

Centro de Periodismo Investigativo, Inc., v. Financial Oversight and Control Board for Puerto Rico

Opposition Brief for Plaintiff/Appellee

JUDITH BERKAN
/S/JUDITH BERKAN
BERKAN/MÉNDEZ
CALLE O'NEILL G-11
SAN JUAN, PUERTO RICO 00918-2301

TEL: 787-764-0814; TEMPORARY PHONE 787-399-7657
FAX : 787-250-0986
bekanj@microjuris.com
berkanmendez@gmail.com

STEVEN J. LAUSELL-RECURT
/S/ STEVEN J. LAUSELL-RECURT
LEGAL CLINIC
INTERAMERICAN UNIVERSITY SCHOOL OF LAW
RB. TRES MONJITAS
HATO REY, PR 00918
PHONE 787-751-1912
slausell@gmail.com

United States Court of Appeals
for the First Circuit

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.

Plaintiff-Appellee

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1
of the Federal Rules of Appellate Procedure

The Centro de Periodismo Investigativo, Inc., is a non-profit corporation in good standing in Puerto Rico. As a non-profit organization, it does not issue stock, has no parent company and there is no publicly held corporation which has 10% or more of the corporation.

United States Court of Appeals for the First Circuit

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Plaintiff-Appellee

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant

Table of Contents

United States Court of Appeals
for the First Circuit

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.

Plaintiff-Appellee

v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant

TABLE OF AUTHORITIES

CASES

United States Supreme Court

United States Court of Appeals for the First Circuit

Other Federal Courts

Supreme Court of Puerto Rico

[1]Certified Translation submitted by FOMB at pages 68-102 of its Addendum.

CONSTITUTIONAL PROVISIONS

United States Constitution

Constitution of Puerto Rico

STATUTES

Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")

United States Court of Appeals
for the First Circuit

No. 21-1301

CENTRO DE PERIODISMO INVESTIGATIVO, INC.

Plaintiff-Appellee

v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant-Appellant

OPPOSITION BRIEF ON BEHALF OF PLAINTIFF/APPELLEE CENTRO DE PERIODISMO INVESTIGATIVO

The Centro De Periodismo Investigativo ("CPI"), a non-profit media organization focused on investigative journalism and transparency, respectfully submits this Brief in Opposition to the Interlocutory Appeal by the Financial Oversight and Management Board for Puerto Rico ("FOMB" or "the Board.")

I. Preliminary Statement

FOMB invokes interlocutory appellate jurisdiction to address issues which were resolved more than three years ago, when Judge Jay García-Gregory ("Judge García") ordered the Board to disclose thousands of

documents to CPI, and to justify any withholding of documents with specific reference to exceptions to disclosure recognized by the Puerto Rico Supreme Court.[1] The appeal comes more than two years after the Magistrate Judge ordered the Board to "give [the court] the information" which would allow it "to intelligently decide" on the exceptions raised.

FOMB is a Congressionally created entity "within" the Government of Puerto Rico, and not "a department, agency, establishment, or instrumentality of the Federal Government." PROMESA, 48 U.S.C. §2101 et seq, Sections *101(c)(1) and (2)*. The Board is paid for entirely from resources of the Commonwealth. *Id., Section 107(b)(2)(A) and (B).*[2] Congress also provided that FOMB would be subject to the laws of Puerto Rico, unless compliance therewith would be "inconsistent" with PROMESA. *Section 4, PROMESA*.[3]

The Centro de Periodismo Investigativo ("CPI") is a non-profit media organization dedicated to transparency and citizen access to public documents, as well as investigative journalism on issues of broad public interest in Puerto Rico and beyond, and litigation to enforce the right of

---

[1] *Docket 36, Case No. 17-1743.* The Opinion and Order is included in FOMB-Add, pp. 22-67. It is also available at *2018, U.S.Dist. LEXIS 77262.*

[2] *48 U.S.C.§§2107.* In this brief, CPI will refer to the individual sections of PROMESA In the Table of Authorities, these sections are cross-referenced to the codification in the U.S. Code.

[3] *48 U.S.C.§§2103.*

citizen access. Founded fourteen (14) years ago, with support from the Inter-American University School of Law, CPI has a Board of Directors composed of attorneys, journalists and civic leaders. Among its members are two former Deans of the principal law schools in Puerto Rico, and law professors, as well as distinguished journalists. Since 2007, CPI has published award-winning investigations, engaged in successful litigation to obtain documents otherwise inaccessible to the public, and trained hundreds of journalists in the field. Having started as a shoe-string operation, CPI now has a full complement of independent journalists, all working towards the goal of an informed citizenry.

The matters as to which FOMB now claims the right of interlocutory appellate review have been brewing for some five years. While FOMB would have this Court assess the availability of interlocutory review by reference only to two minute orders issued in late March, 2021, the reality is that the issues which the Board has brought before this Court were resolved in early May, 2018. At that time, District Judge Jay García-Gregory ("Judge García") rejected the Board's contentions on the Eleventh Amendment, Preemption and the statutory interpretation of PROMESA. Judge García ordered compliance with the public disclosure requirements long-established by the Puerto Rico Supreme Court.

The right of public disclosure under Article II §4 of the Puerto Rico Constitution has long been recognized as a fundamental right in Puerto Rico. It has been established, as Judge Garcia noted, by a "litany" of Supreme Court cases. *See, Docket 36, at p.26, FOMB Addendum ("FOMB-ADD"), p.48. See, Bhatia v. Governor, 199 DPR 59 (P.R. 2017);*[4] *Santiago v. Bobb, 117 P.R. Dec. 153 (1986); Soto v. Giménez Muñoz, 12 P.R. Offic. Trans. 587 (1982).*

CPI has fought for years to gain access to the documents at issue herein, as well as any indication regarding which documents are being withheld and on what basis. CPI's first efforts took place 2016, when it directed its requests to FOMB, invoking the fundamental right of access under Puerto Rico law. *See, Complaint, Joint Appendix, ("JA")18, ¶¶4.11-4.21 (detailing CPI's extrajudicial efforts before filing suit).* FOMB stymied these efforts, choosing to ignore the Puerto Rico Constitution, which is applicable to the Board as an entity within the government of Puerto Rico.

The Board's obstinance forced CPI to resort to litigation to ensure compliance with the Puerto Rico Constitution. Since Section 106(a) of

[4] Hereinafter, *"Bhatia."* Although there is no official translation of this case, FOMB has supplied a certified translation at pages 67-102 of its Addendum. *Bhatia* also references key cases decided by the high court over several decades establishing the fundamental right of access.

PROMESA[5] requires that all actions against FOMB be filed in the United States District Court for the District of Puerto Rico, CPI presented its complaint in that forum on June 1, 2017.

For more than three years before the Board belatedly presented this appeal, it acted in defiance not only of the fundamental rights pursuant to the Constitution of Puerto Rico, as recognized under firmly established Supreme Court doctrine, but also of the esteemed district judge who issued the May, 2018 Opinion and Order rejecting the very same arguments the Board now brings before this Court.

FOMB tried every trick in the book to avoid having the citizenry fully informed about the work it performs in their name. The Board's first response to the Complaint was to seek reassignment to the PROMESA Title III litigation. *JA41*. It then moved Judge García to stay the action, obtaining a temporary reprieve when the stay was granted in an Order providing that "any request to lift or vacate the stay must be filed in…Bankruptcy Case, 17-BK-03283."[6] *JA96*. CPI's then addressed a Motion to Lift the Stay to Judge

[5] *48 U.S.C §2126(a)*

[6] In May, 2017, FOMB filed Title III for the Commonwealth of Puerto Rico (17-BK-3283-LTS), the Puerto Rico Sales Tax Financing Corporation, known as"COFINA" (BK-3284-LTS) the Puerto Rico Highways and Transportation Authority(17-BK-3567-LTS) and the Employees Retirement System of the Commonwealth of Puerto Rico (17-BK-3566-LTS)

Laura Taylor-Swain, presiding judge in the Title III proceedings. The motion was granted, with Judge Taylor-Swain finding *inter alia* that the case failed to present a "likelihood of interference" with the Title III cases, "because [CPI] seeks only the production of documents by the FOMB." Judge Taylor Swain concluded that while the Board would have to dedicate "time and resources" on this matter, "the most significant effect of continuing the stay of the Litigation would be to deprive the CPI of any opportunity to obtain timely determinations as to its entitled to the disclosure it seeks on behalf of the Puerto Rican public. Accordingly, the balance of harms tips decidedly in favor of the Movant." *Docket 1084, Case 17-03283-LTS, submitted below at Docket 19-1, JA109*. At that time, FOMB did not appeal to this Court.

After the stay was lifted, FOMB presented a Motion to Dismiss ("MTD"), raising Eleventh Amendment immunity under *Pennhurst State School & Hospital v. Halderman 465 U.S. 89 (1984)* ("Pennhurst"), Preemption, and Statutory Interpretation. The Board argued *inter alia* that CPI was asking "this Court to ignore, and thereby irreparably damage, Puerto Rico's sovereignty"). *JA 115*. FOMB also argued that Preemption and PROMESA Section 105 foreclosed this litigation. *JA110-128*.

On May 4, 2018, Judge García issued an extensive Opinion and Order deciding against FOMB on all points, including Eleventh Amendment

Immunity. FOMB-Add, *pp.22-67*. The court ordered FOMB to disclose the requested documents. *Id*. If FOMB withheld documents on confidentiality of privilege grounds, it was to justify this with reference to exceptions to the rule of disclosure recognized by the Puerto Rico Supreme Court. *Id*.

FOMB then proceeded to sit on its rights. Although it *could* have filed an interlocutory appeal, it did not do so, preferring to engage in the course of action which today brings us before this Court.

For several months, FOMB acted as if it was complying with the Order, while in reality it was according itself unfettered authority to decide which documents to produce and which to retain, without providing any specific explanations.

During the summer of 2018, FOMB stated many times that it was in the process of reviewing the documents to comply with the Court's Order. *See, eg., ISC Memo, JA 153; and Joint Motions, JA 160, 163, 170 and 174*. By September, 2018, however, CPI came to know that the process would be delayed well beyond the promises offered by the Board. *See, Docket 62, JA 174, p. 3 (*"CPI is frustrated by the extremely slow progress…on…reviewing the communications subject to the May 4 order… According to the Board, further time is needed,…since there must be review of potential privilege issues. CPI understands that this simply has taken too long."*)*

In the months following the issuance of the Opinion and Order, FOMB continued to produce only those documents it chose to disclose, while refusing to specify privileges or claims of confidentiality, despite Judge García's Order. FOMB was hiding both from the court and CPI that it had no intention of producing the great majority of the documents covered by the May, 2018 Order, which to this day are still not identified.

FOMB also stated affirmatively and repeatedly that it would *not* be appealing to this Court. *See, FOMB's Opposition to Motion for Contempt, Dkt. 72, JA229,* fn.2 ("The Board respectfully disagrees with this Court's determination that it has jurisdiction…and has reserved all its rights on that issue. Instead of immediately appealing that determination, however, the Board elected to attempt to resolve this matter in a practical way by voluntarily producing documents to CPI….")

CPI eventually filed for Contempt. Judge García referred the matter to the Magistrate Judge Bruce McGiverin ("Magistrate McGiverin"), who ruled against the Board on most issues, both during a March 1, 2019 hearing and in a July 31 , 2019 Report & Recommendation ("R&R"). Magistrate McGiverin ordered FOMB "to produce a comprehensive, legally-sufficient privilege log to justify its invocation of privilege for each document which it seeks to withhold," *FOMB-ADD, p.5-22*. The Board Objected to the R&R. *JA349* . In

the meantime, FOMB stopped producing additional documents.

On the issue of interlocutory appellate jurisdiction, FOMB walked a tightrope, "reserving" its rights" and proclaiming that its litigation conduct did not constitute a waiver of any of the Board's arguments on jurisdiction, preemption and the application of PROMESA

When it became obvious that FOMB was not producing most of the documents subject to the Order, and also would refuse to produce any *current* documents comprehended in its requests, CPI filed a second action, No. 19-1936, in all major respect identical to its 17-1743, to cover later documents. The two cases were later consolidated.

Case Nos. 19-1936 and 17-1743, raise *exactly* the same issues. The only difference is that the later case covered later documents. In due time, FOMB moved to dismiss on the same grounds it had submitted two years earlier, including the argument on *Pennhurst* and the Eleventh Amendment Immunity that it had previously lost, in an the May, 2018 Opinion and Order, from which the Board did not appeal.

In March of this year, Judge García issued two Minute Orders, adopting the Magistrate's R&R of July 31, 2019 and denying the second MTD. *FOMB-ADD, 1-4*. The reasoning of the court was the same as in the May 4,2018 Opinion and Order. It is from these two minute orders of late March, 2021,

that FOMB now claims entitlement to an Interlocutory Appeal.

In its Notice of Appeal and its Docketing Statement, FOMB references only these two minute orders as the basis for jurisdiction. However, in its Brief , FOMB raises the same Eleventh Amendment, *Pennhurst,* and Statutory Interpretation contentions which were raised and rejected in 2018. The Board's reference to these minute orders seek to take attention away from its failure to appeal over three years ago.

While CPI recognizes that jurisdiction can be raised at any time, it contends that the same is not true with regard to a party's entitlement to interlocutory appellate relief. That right can be waived by litigation behavior such as that displayed by the Board in this case.

With respect to the Eleventh Amendment, it is notable that the Board's argument glosses over the crucial differences between Puerto Rico, a territory under Article IV §3 of the Constitution, and the sovereign States considered in *Pennhurst* and its progeny. Congress is the ultimate source of all sovereignty in a territory. *Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).* To the degree that the Board's contentions on Eleventh Amendment are based on Puerto Rico's sovereignty, they are wholly unconvincing.

FOMB's argument on preemption is also flawed. On appeal, FOMB abandons its arguments below on express and implied preemption of the

"field of public disclosure." Its current preemption claim is limited to conflict preemption, with the Board arguing that the Constitutional right of access, which would allow the people of Puerto Rico to know what the Board is doing in their name, is "inconsistent" with the Board's work.

This very contention was rejected not only by Judge García, but also by Judge Taylor-Swain, who presides over the extraordinarily complex Title III case and has specialized and precise knowledge of the statute and the work of the Board. The Judge considered FOMB's concern about the effect of this case on its work, but decided that any such interest was outweighed by the Constitutional right of the citizenry to be informed about the work of an entity of the Puerto Rico Government.

The Board's statutory interpretation fares no better. FOMB's argument is based almost entirely on Section 105 of PROMESA. FOMB does not make a serious attempt to harmonize Section 105 with the rest of PROMESA. In claiming virtually absolute immunity from suit, FOMB ignores other statutory provisions which create the Board as an entity within the government of Puerto Rico, subject it to Puerto Rico law, and provide for the District Court as the sole jurisdiction where actions can be brought. In essence, FOMB is arguing that Congress *intended* for the citizenry in Puerto Rico to be deprived of any judicial remedy to address FOMB's violation of a Constitutional right

which is a critical part of the very fabric of life in Puerto Rico. Its proposed statutory analysis is not only illogical, but also would render parts of the law completely superfluous.

As a final matter, CPI submts that if ever there were a case which merits the examination of a party's litigation conduct to determine if it slept on its rights, it is the one at bar. FOMB repeatedly affirmed to Judge García that it was in the process of *complying* with the the May, 2018 Order and that it had affirmatively decided *not to appeal* on an interlocutory basis. The Board waived its right to review on an interlocutory basis.

II. Jurisdictional Statement

The district court properly exercised federal-question jurisdiction since this case arises under federal law, including the explicit jurisdictional grant of jurisdiction under PROMESA Section 106(a). This Court, however, lacks jurisdiction to review via Interlocutory Appeal a non-final order on Eleventh Amendment Immunity, which was issued more than *three years ago* and from which no appeal was taken.

Remarkably, the Board's Notice of Appeal and Docketing Statement, says nothing of this history described above, referring instead to the minute orders of March, 2021. This is plainly an effort to obscure FOMB's failure to

take a timely appeal in 2018 and its waiver of the right to interlocutory review.

III. Issues presented for Review

CPI agrees that *Pennhurst*, Eleventh Amendment and Statutory Interpretation are at issue in this appeal. CPI maintains that Interlocutory Appeallate jurisdiction is also in controversy. Included below is CPI's Statement of additional issues, as well as reformulations of those included by the FOMB at page 11 of its Brief.

A. Appellate Jurisdiction, Collateral Order, Injunctions and Waiver

Does this Court have interlocutory appellate jurisdiction over an appeal brought three years after the underlying Opinion and Order denying Eleventh Amendment Immunity, or should this Court find that FOMB waived its right to "immediate" interlocutory appeal, *inter alia*, by repeatedly asserting that it would not be appealing the decision?

Can FOMB invoke the Collateral Order doctrine in a case in which there is no need for an immediate determination, the issue is not separate from the merits, and where an appeal after a final order adjudicating privileges would not render FOMB's claims unreviewable, and if so, did it waive the right to appeal under this doctrine?

Is the Order requiring FOMB to comply with the right of public access and to provide adequate support for any alleged exceptions, the equivalent of an injunction under *28 U.S.C.§1292(b)*, and if so, did FOMB foreclose interlocutory review by failing to appeal within 30 days. *Fed.R.Ap.Pr. 4(a)(1)(A)*?

B. Eleventh Amendment and Pennhurst:

Was the court correct in deciding that Congress waived or abrogated *Pennhurst* protection through its specific grant of jurisdiction to the district court, and also providing that Puerto Rico law applies to FOMB as an entity within the Puerto Rico government. Does the *Pennhurst* doctrine apply to Puerto Rico?

C. Statutory interpretation of PROMESA

Did the court correctly apply the rules of statutory interpretation in harmonizing different sections of PROMESA in concluding that Congress meant to subject the Board to suits of this nature?

D. Preemption

Was the court correct in rejecting FOMB's conflict preemption argument given that there is no inconsistency between applying the right of disclosure to the Board and FOMB's ability to perform its functions?

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. The early days of the litigation

CPI is an award-winning non-profit news organization,whose investigations have exposed major corruption on the island, and have also educated the citizenry on the importance of the right of access guaranteed under the Puerto Rico Constitution. CPI filed this case in early June, 2017, to assure an informed citizenry regarding an entity which, in many ways, is the *de facto* governing body on the island.

FOMB, part of the Commonwealth Government, has plenary powers in Puerto Rico, including the power to supersede many actions taken by officials elected by the citizenry.[7] Subject to the laws of Puerto Rico which are not "inconsistent" with PROMESA, FOMB has an obligation of transparency under the Puerto Rico Constitution. Because PROMESA states that all cases against the Board must be filed in the federal district court, CPI asserted its Puerto Rico Constitutional claim in the United States District Court for the District of Puerto Rico.

The parties have been litigating for more than four years. After Judge

---

[7] As this Court noted in *Aurelius Inv. v. Puerto Rico, 915 F.3d 838 (1st Cir. 2019) (reversed other grounds, FOMB v. Aurelius Inv, 140 S.Ct. 1649 (2020)),* "Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island 'achieve fiscal responsibility and access to the capital markets.'" As Judge Torruella observed, FOMB wields extraordinary power in Puerto Rico.

García ordered the production in May, 2018, the Board started producing thousands of documents on a piecemeal basis. The information CPI gleaned from those documents resulted in major investigations and the publication of widely-read articles of benefit not only to the citizens but also to the academic and business community in Puerto Rico. The Board, itself, has recognized the value of the documents initially supplied. "The documents…provided have not been irrelevant or immaterial;…using details obtained [therefrom]…CPI has published multiple articles discussing in-depth the Board's communications with federal government officials on issues including the potential privatization of PREPA, the Board's security procedures, and the involvement of McKinsey in the creation of the fiscal plans." *Dkt.90, p.11.*[8]

The Board's first response to the Complaint was to seek reassignment to the Title III litigation, and to have the case stayed. *Docket 5*; Docket 13, JA41* The Stay request was hendled by Judge Taylor-Swain, who presides over the Title III and, as noted earler, rejected FOMB's attempt to stay the case, which was returned to Judge García. *See, discussion ante, p.11.*

Although the Board might have fashioned an argument asserting the right to immediate appellate review, FOMB did not file an interlocutory appeal

[8] Docket90 is not in the Joint Appendix. Court filings which were not included in the Appendix, but can be accessed from the record below, will be indicated with an asterisk.

at that time.

B. Judge García's Opinion and Order

On May 4, 2018, Judge García-Gregory denied the defendant's Motion to Dismiss. He observed that "[t]he Board…[as]…an entity of the Commonwealth paid for by the Puerto Rican people…must comply with Puerto Rico law that is not inconsistent with this mandate." Dkt36, FOMB-ADD,53. Citing *Bhatia*, the Judge observed 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 of lack of satisfaction with the people, rules or procedures that govern them, will be impaired.' *Id., page 13 (translation supplied by the district court.)* The court also provided clear instructions to the FOMB that if it were to withhold documents, "a denial of access to public documents has to be properly supported and justified, and cannot be denied arbitrarily and capriciously….. Any attempt by the Board to protect documents from disclosure must be adequately supported by Puerto Rico law on this subject." *Id., page 33*.

FOMB did not take an interlocutory appeal from the May, 2018 Order even though the court had specifically denied Eleventh Amendment immunity.

C. The "good faith" period

For the next few months, it appeared that FOMB would comply with the Order. Although the Board asserted that it had "preserved" all of its rights, it also specifically stated that it would *not* appeal at that time. Judge García referred interim matters to the Magistrate McGiverin, instructing the parties to "raise any issues they might have regarding the process of producing the documents," and authorizing the Magistrate to hold hearings and issue case-management orders. The Referral Order also provided that the Magistrate McGiverin would initially be in charge of all "discovery" issues. *Docket 37.** There was no appeal at that time.

For several months, FOMB led the court and CPI to believe that it was in the process of completing the production. In the first status conference before Magistrate McGiverin on June 6, 2018, the Board stated that it would need approximately 150 days to produce the documents. CPI objected that this was too long. *Docket 73, JA 247, page 3*. The parties were then ordered present periodic Informative Motions to the court, reporting on the progress they were making.

On July 2, 2018, the parties submitted the first of such motions advising the court of the progress on the productions. *See,* Dockets 54, 55, 58, 60 and 62; *JA160-178*. CPI, perhaps naively, initially understood the FOMB would

eventually comply with May, 2018 Order.

The Board itself gave every indication that it was complying with the court's May 4th Order. *See, eg, Joint Motion, JA 171 (*describing "keyword" searches, CPI's submission of proposed lists and FOMB's analysis thereof.) Little did CPI know that FOMB was not operating in good faith and that some three years later, would be claiming the right to an "immediate" interlocutory appeal.

The goal post was a constant moving target, as FOMB changed its description of the process and its earlier commitments. *See, eg., JA198*, CPI brought its concerns to the court, alerting it to FOMB's change of position from initially offering to provide the documents on a "rolling base" to one which would have the Board supply certain categories of documents in a single batch further down the road. *See, also, JA179, at 183-185.*

Despite repeated requests, FOMB refused to even inform CPI that it was withholding documents. When the revelation was finally made, the Board refused to identify individual documents withheld. It was only through CPI's efforts that some of the missing documents were eventually identified. *Transcript, JA284* ("[w]e noticed that there were documents missing, because some…documents referred to other documents…")

The collaborative process, such as it existed, came to a halt six months

after Judge García's Order, when CPI was informed — for the first time — that FOMB was withholding well more than 50% of the documents, and that it would provide only broad expressions of the categories which it claimed supported the retentions.

FOMB sent a letter to CPI on November 21, 2018, informing it that it was withholding documents. To justify its withholdings, FOMB referred only to general categories, some of which were established in *Bhatia* and incorporated by Judge García in his May, 2018 Opinion and order. FOMB also claimed additional exceptions. For example, the Boaard claimed the right to withhold documents"relating to issues that [it] believes, if made public, would cause significant harm to Puerto Rico's economy" and those which FOMB understood "could be harmful to the public interest and harm the Board's ability to perform its statutory duties." FOMB affirmed in conclusory fashion that "the public interest served by not disclosing the record clearly outweighs any public interest in disclosure." *See, November 21, 2019 letter, Docket 65-3;JA203-04.*

FOMB did not direct its explanation to the court.[9] It did not deign to file a motion for a protective order, or comply with its burden under Puerto Rico

[9]It was CPI who submitted the November letter to the Court, understanding that the Judicial Officer who ruled against FOMB should know about its defiant conduct. *JA203-04.*

law to identify specific documents withheld and demonstrate why they are properly exempted. *Cf., Santiago v. Bobb, 117 PRDec,159*. (It is up to the state to prove specifically and unequivocally that an exception applies. Mere generalities do not suffice). Nor did FOMB suggest *in camera* review of any of the withheld documents.

FOMB refused to give a hint as to why it believed the public interest demanded secrecy and how it had arrived at the conclusion this outweighed any interest of the people in disclosure. Nor, of course, had the Board exercised its right to an interlocutory appeal.

This was in direct defiance of the constitutional right to disclosure and the court's Order. FOMB implied that the citizens in Puerto Rico could not be trusted to understand their own self-interest. It was unilaterally making "balancing" judgments, which are properly done by the courts.

Throughout, FOMB referred to its initial release of *some* documents as "voluntary" and its decision not to appeal as being "in good faith."

D. CPI files for Contempt

Throughout the latter part of 2018, CPI was requesting a status conference to address these issues. *See, eg., JA176;183*. Due in part to the Court's inaction, CPI was at the mercy of FOMB's arbitrary and contemptuous

actions. Finally, in January, 2019, CPI moved for contempt. *JA210*.

CPI pointed out that no interlocutory appeal had been taken. Rather than the good faith process the court and CPI envisioned, "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… [or] present a privilege log." *Id., JA213-14*

CPI explained that FOMB had violated the May 4, 2018 Order by: (1) failing to produce entire categories of documents; (2) unilaterally imposing deadlines…and then failing to comply therewith; (3) withholding a significant number of documents covered by the Order, without initially revealing that documents were being withheld; (4) thereafter acknowledging that certain documents were being withheld on privilege grounds, but refusing to comply with the rules regarding privilege assertions; and (5) withholding documents…without complying with the specific directives of this court to provide adequate support for the assertions individualized explanations therefor. *Id., JA210-11*.

Judge García again referred the matter to Magistrate McGiverin. On January 29, 2019, nearly nine months after the disclosure order, FOMB provided what would turn out to be its last production. *See, Joint Informative Motion, JA 247*. Ten days later, on February 8, 2019, the Board sent another

letter to CPI, in which it identified the general categories which purportedly justified the withholdings. CPI submitted the February 8th letter to the court "to fully apprise [it] of the current status of the productions…" *JA258*.

E. <u>The March 1, 2019 hearing</u>

A lengthy hearing was held on March 1, 2019 before Magistrate McGiverin. By then, FOMB admitted that it had withheld many more documents than it produced. *Transcript, JA282* (22,000 documents out of a universe of 40,000). FOMB argued, however, that it would be onerous to provide a log of the documents

CPI questioned the veracity of this assertion. By that time, CPI knew that the log *already* existed, since it was the purported basis for withholding the documents. *See, Transcript of Hearing, JA302 (*"I don't know how many attorney hours….have gone into identifying the documents. I am sure that they have… some kind of index or log of every single document….")

The Magistrate indicated that he had read the November and February letters. He stated that from the information contained therein, it would not be fruitful to order the parties to engage in further conferral efforts. He also stated that FOMB's reference to broad categories with no specifics would not help the court to determine if the confidentiality claims were warranted. *Id,*

JA293-94. ("I've looked at your letter. I don't know…without more information, whether I could make an intelligent decision based on…the information you've provided…" *Id.,JA 295*.

The Magistrate also stressed that this was nothing new. Judge García had long ago dictated that "the general rule is disclosure [a]nd withholding should be the exception to that rule….and that is based on case law from the Supreme Court of Puerto Rico." *Id.,JA 295*. Also, under Federal procedural law, "the person who is asserting the privilege has the burden of showing that the privilege applies.") *Id, JA293-94*.

"Good faith" was also discussed. CPI's attorney mentioned that FOMB had led her client to believe that "there would be production pretty fully over the summer [of 2018]." *Id, JA283*. FOMB had withheld documents without an explanation, and "there was no Protective Order filed." *Id, JA291*. It was obvious, moreover, that "[t]hey know what the documents are and we don't." *Id,JA283*

CPI also called into question FOMB's repetitive statement that it "rejects the jurisdiction of the Court, and that they've been so generous and they're doing this voluntarily," as opposed to complying with a binding order of the court. *Id,JA299*. FOMB's attorney responded by saying that the process had not been "willy-nilly," and that FOMB "has expended significant time and

energy and expense to go through the documents and produce those that it felt it had a good faith basis to withhold based on the law." *Id,JA304*.

Since the Board was not placing the court in a position where it could rule on the controversy, Judge McGiverin ordered FOMB "to give [him] the information where [he could] intelligently decide. And if that means some kind of … expanded privilege log, then it would behoove the Board to do that. *Id, JA307*. FOMB did not file an interlocutory appeal at that time.

A month later, the Board filed a motion which had been ordered by the Magistrate during and which it styled as a "Motion … in Compliance with Court's March 1, 2019 Order." Relying on general arguments, the Board identified only *six (6)* specific documents as allegedly exempt from disclosure. *Id. pages 19 and 24. See, Docket 90.**

CPI opposed the motion. ("FOMB has come before this court, not with a properly supported Motion for Protective Order, not with a log… but rather with a forty-page submission which simply explicates the nature of the privileges claimed and asserts that the Board, in general terms, has a basis [for the withholdings]…because it says so." *Docket 93, page 2.**

F. <u>FOMB's "reservation" of rights and "voluntary" productions</u>

When Judge García ruled in May, 2018 that FOMB did not enjoy

Eleventh Amendment immunity and that it had to produce the documents and justify those documents withheld, the Board made a conscious decision not to seek interlocutory Reviewl. *See, FOMB Appeal Brief ("Brief"), p15* . Since the court "rejected a sovereign-immunity defense, the Board had the right to seek an immediate interlocutory appeal," but "declined to take an immediate appeal," as a gesture of "good faith.") FOMB also did not appeal the in-court March 1, 2019 Order by Magistrate McGiverin that it present a Protective Order or its equivalent.

All the while, FOMB insisted that the productions were "voluntary," rather than in compliance with an Order from which it had not appealed. *See, JA235* ("The Board elected to forego an immediate appeal [while reserving its rights on the jurisdictional issue]... It is for this reason that the Board has accurately described its provision of documents as voluntary.") *See, also, JA232*.

On appeal, FOMB continues to affirm its "good faith," complaining that "no good deed goes unpunished." *Brief, p.15*. FOMB's attempt to claim victimhood is beyond disingenuous. At the risk of being as clichéd as the Board, CPI will resprt to an equally trite expression: "actions speak louder than words." In this David and Goliath struggle, it is not the FOMB which has been "punished." The Board has successfully manipulated the litigation and

defied court orders without suffering *any* consequence whatsoever, and CPI has demanded nothing more than compliance with the Orders of the court.

On appeal, FOMB also speaks of the "herculean" task it would have to undertake if forced to identify each privileged document, the people involved, the subject of the communication, its purpose and the applicable privileges. *Brief, p.8*. This is entirely disingenuous. In its April 1, 209 post-hearing "Motion in Compliance," FOMB stated that by that time had already examined the documents. *See, Docket 90,* p.4-5 (*Between July and September, 2018, FOMB "undertook an expansive review of its communications….. It collected and reviewed all email communications between the Board and Commonwealth and U.S. government email addresses….*")* In that filing, FOMB also provided precise numbers of documents withheld for each of seven general categories it affirmed supported privilege or confidentiality.

Another attempt to play the victim card is the Board's lament that it has only "seven unpaid individuals….and a small staff." *Brief, p.39*. This is nothing if not disingenuous. FOMB has a coterie of attorneys and consultants. *See,* Luis Valentín, "PUERTO RICO'S FISCAL CONTROL BOARD: A PARALLEL GOVERNMENT FULL OF LAWYERS AND CONSULTANTS," published by CPI, August 1, 2018 ("Valentín") (https://periodismoinvestigativo.com/2018/08/puerto-ricos-fiscal-control-board-parallel-government-full-of-lawyers-and

consultants/. As Judge Taylor-Swain concluded years ago, while FOMB will expend resources on this matter, this does not trounce the Constitutional right of access. Complying with disclosure will not "interfere" with the Board's ability to perform its functions. *JA109.*

G. The cut-off date and Case No. 19-1936

Immediately after the May 4th, 2018 Order, FOMB proposed to CPI a "cut-off" date, limiting productions to documents dated on or before April 30, 2018. CPI agreed, judging the suggestion reasonable, given FOMB's representation that there would be an efficacious process in compliance with the Order.

By the time of the hearing before Magistrate McGiverin ten months later, CPI had given up any illusion that FOMB would fully comply with the Order. FOMB had no intention of producing the majority of the documents requested or of expanding the cut-off date due to the delay. As CPI counsel stated during the hearing, CPI agreed to the cut-off "because we didn't expect to be in court a year later, not having received a bunch of documents." *Transcript, JA280.* Since the value of the documents diminishes as time goes on, CPI argued for a later cut-off. The Board refused to budge, accusing CPI of going back on its commitments.

Unable to reach an agreement regarding the cut-off, CPI presented a second case, No. 19-1936, covering documents generated after April 30, 2018. The two cases were eventually consolidated before Judge García. Except for the fact that CPI's request covered later documents, the cases are identical. The facts and legal arguments are undistinguishable. FOMB's motopm to dismiss the second case raised the same theories which Judge García had rejected in May of 2018.

Meanwhile, all productions came to a halt.

H. <u>The orders which have been appealed.</u>

On July 31, 2019, Magistrate McGiverin issued an R&R rejecting some of the Board's general justifications for withholding the documents, while allowing others. The Magistrate also reiterated the need for a privilege log. "With regard to…five categories of documents, the Board is ordered to produce a comprehensive, legally-sufficient privilege log to justify its invocation of privilege for each document which it seeks to withhold: documents with claimed deliberative process privilege, common interest privilege, Title III mediation privilege, PROMESA § 208 protections, and official information privilege." The Magistate was implementing tje Order of Judge García, which had been issued more than a year earlier.

FOMB filed a timely objection to the R&R. Thereafter, the case was at a standstill for a year and a half, until March of 2021, when the district court, in the two minute orders referenced above, rejected FOMB's challenge to the R&R and also reaffirmed the Order of May, 2018 whic the first MTD. In the Minute Order at Docket 133, *FOMB-ADD,* Judge García indicated that it was denying FOMB's second Motion to Dismiss *inter alia* "for the reasons stated in the Court's Opinion and Order, Docket No. 36…"

FOMB is invoking its right to appeal long after the decision which exposed it to further litigation and then only when it appeared to be losing control. Three years after the Court ordered production and required specific explanations to justify any withholdings, the appeal is simply too late.

The people of Puerto Rico fund the Board to be its representative, including, ironically, the defense of this very litigation. The public interest certainly is not furthered by allowing a recalcitrant and defiant litigant ignore judicial decisions, trampling the right of the citizenry in Puerto Rico to have access tp documents which will define the future of their families, their livelihood, the economy, and the long-term debts their grandchildren will bear.

V. SUMMARY OF THE ARGUMENT

(1) This Court lacks jurisdiction over this interlocutory appeal. While Eleventh Amendment immunity denials are generally appealable on an interlocutory basis, the right to such appeals is not absolute. "The law ministers to the vigilant, not to those who sleep upon perceptible rights." *U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)*. FOMB could have filed an immediate appeal several years ago, but it waived its right to do so. "The rule requiring prompt exercise of rights also "prevents litigants from engaging in certain stalling tactics, the sole purpose of which is to increase litigation costs and wear down one's adversary." *Zayas-Green v. Casaine, 906 F.2d 18, 21 (1st Cir. 1990)*.

The value of Eleventh Amendment immunity, "like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 145 (1993)*. Here, the litigation has extended for years, as FOMB gave the impression that it was complying with the order. A litigant cannot just pick and choose when to exercise its right to an "immediate" appeal. The right to an interlocutory appeal on an immunity issue certainly can be waived. *Zayas-Green, 906 F.2d at 22*.

The March, 2021 minute orders were meant to implement the original Order denying immunity and requiring precise designations for withhholdings. The orders which FOMB is using to exercise its right to an "immediate" appeal just require the Board to *continue* the process of production it began three years ago, before its unilateral decision to stop. In an attempt to show timeliness and to counter waiver, FOMB prefers to highlight the March, 2021 minute orders, but this does not change the facft that FOMB's appeal questions the May 4, 2018 Opinion and Order.[10]

FOMB also claims that the minute orders are injunctions. At no point below did the Board ever *hint* at this argument. Had it done so, CPI and the court would have had an opportunity to address whether the orders complied with any number of requirements applicable to injunctions (eg. laches, four corners, balance of harm, clean hands.)

Independently of the basis which FOMB may assert for to justify an interlocutory appeal - be it Collateral Order doctrine or a Section 1292(a)(1) "injunction" - the deadline for appealing expired three years ago. Nothing in the rules countenances an "immediate appeal" whenever a party feels it should

[10] Despite relying on the March, 2021 Minute Orders to justify this belated appeal, FOMB has no choice but to discuss the substance of Judge García's reasoning in the 2018 Order. For example, FOMB directly references the May, 2018 Opinion and Order, no less than four times in its discussion of preemption alone.

do so. *Cf., Gon v. First State Ins, 871 F.2d 863, 866 (9th Cir. 1989)* (regarding 1292(a)(1) injunction appeals) ("[A] party that has failed to appeal from an injunction cannot regain its lost opportunity simply by making a motion to modify or dissolve the injunction, having the motion denied, and appealing the denial. In such a case, the appeal .... does not extend to the propriety of the original injunction itself." *Id.*

(2) The Eleventh Amendment presents no bar to CPI's claim. FOMB may boldly asserts that "[i]t is illogical to recognize that Puerto Rico enjoys the protections of the Eleventh Amendment based on the Commonwealth's sovereignty while allowing a Puerto Rico governmental entity to be haled into federal court without concern for the interests of federalism." *Brief, page 24.* This, however, completely ignores the constitutional significance of the difference between a State and a territory such as Puerto Rico.

Pennhurst stems from concerns about *federalism* and State sovereignty. Puerto Rico does not have the sovereignty enjoyed by the States of the Union. Indeed, it is an open question whether the Eleventh Amendment even applies to Puerto Rico. See, footnote 14 infra. In fact, in his May 4, 2018 Opinion, Judge García specifically stated that he was expressing no opinion "on the availability of Eleventh Amendment immunity to Puerto Rico and its instrumentalities." *FOMB-ADD 33, fn.7*

Moreover, as Judge García explained, even if the Eleventh Amendment *did* apply to Puerto Rico, Congress, by virtue of its powers under Article IV§3, has the power to "make all needful rules and regulations" respecting Puerto Rico. Exercising that power by enacting PROMESA, Congress affirmatively waived and/or abrogated any Eleventh Amendment protection FOMB may have had through the specific provisions of PROMESA itself.

(3) Preemption presents no barriers to this case. On appeal, the Board's preemption argument is limited to the notion of "inconsistency." As both Judge García and Judge Taylor Swain have decided, it is not impossible for FOMB to comply with the Board's duties under PROMESA, and also comply with the Constitutional right of public access.

(4) PROMESA sections 105 and 106 cannot reasonably be read to mean that Congress "blocked" CPI's claim and "eliminated the need for a forum for those claims" *Brief, p.31*. The Board's analysis violates fundamental rules of statutory construction, including the rule against surplusage and the requirement that laws must be viewed in their totality to discern their meaning.

While PROMESA Section 105 provides immunity from liability for the substantive work of the Board, it does not insulate FOMB from a case to enforce the fundamental right of access to public documents. It does not

exempt FOMB from the law of disclosure. Upon a review of PROMESA as a whole, the most reasonable interpretation is that Section 105 is a strictly defined exemption, not the equivalent of wholesale immunity. FOMB's broad immunity contention has no basis in PROMESA and is, in fact, directly contradicted by the plain text of the law.

VI. ARGUMENT

A. Interlocutory Appellate Jurisdiction

Appellate jurisdiction is generally limited to "appeals from. . .final decisions of the district courts." *28 U.S.C. §1291.* This rule of finality furthers the "strong congressional policy against piecemeal review." *United States v. Nixon, 418 U.S. 683, 690 (1974).* It also plays an important role in preserving "the independence of the district judge[s]", who otherwise would be constantly looking over their shoulders in anticipation of the results of piecemeal appeals. *In Re Continental Investment Corp., 637 F.2d 1, 3 (1st Cir. 1980)* (internal citations omitted).

This Court has the duty to confirm the existence of appellate jurisdiction in every case, careful to "monitor…jurisdictional boundaries vigilantly," *Commonwealth Sch v. Commonwealth Acad. Holdings, 994 F.3d 77 (1st Cir. 2021), (internal quotes and citations omitted.)*

FOMB's claimed entitlement to interlocutory review based on the Collateral Order doctrine of *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)* or as if from an injunction under 28 U.S.C. 1292(a) is meritless. By actively participating in the litigation for three years after Judge García's Order and failing to appeal previously, FOMB waived its rights under the Collateral Order doctrine as well as to a statutory "injunction" appeal.

Time and again, in different contexts, this Court has emphasized the importance of vigilance, in order to preserve rights. *See, eg*. *Caribbean Mgmt Group v. Erikon, 966 F.3d 35 (1st Cir. 2020)* (execution of judgment)*; U.S. v. González, 949 F.3d 30, 35 (1st Cir. 2020)* (juror ineligibility, waiver found even though the government and the court were aware of the problem); *Pineda v. Whitaker, 908 F.3d 836, 842 (1st Cir. 2018) (*reopening removal in immigration case); *Candelario-Del-Moral v. UBS, 746 F.3d 30, 32 (1s Cir. 2014)* (intervention as of right); *U.S. v. Taylor, supra (*objections durng trial); *Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir., 1987)* (cross-examination)

The rule of diligence applies with equal force to interlocutory appeals on immunity grounds. *See, Zayas-Green, 906 F.2d at 19* ("We hold that by failing to raise the issue of qualified immunity originally in a timely pretrial motion or appeal, defendants have waived their right to bring an appeal at this time, prior to final judgment" although they will be able to do so after final

judgment; *Fisichelli v. Town of Methuen, 884 F.2d 17, 18 (1st Cir. 1989)* (defendants waive right to appeal before trial when they fail to bring timely appeal from ... pretrial order denying qualified immunity); *Cf., Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) ("Defendants may waive or forfeit their right not to be tried.")

This appeal is not from an injunction. In its Brief, the Board fails to explain how the minute orders meet the attributes of a Rule 65 injunction. FOMB never raised the injunction argument below, either in May of 2018 or during the hearing on March 1, 2019. Nor did it include any such discussion in its post-hearing "Motion in Compliance" on May 1, 2019. *Docket 90**. By saving this argument for appeal, FOMB has deprived both the district court and CPI of any opportunity to address the equitable and balancing analysis required for issuance of injunctions.

Even assuming *arguendo* that the two minute orders *could* be viewed as an injunction, they merely implement the underlying May 4, 2018 Order denying Immunity and requiring FOMB to disclose all documents except those for which it offers specific recognized exceptions. FOMB did not appeal within 30 days of the questioned order. *See, Kennedy v. City of Cleveland, 797 F.2d 297, 301 (6th Cir. 1986) cert.den'd, 479 U.S. 1103 (1987).* ("If the order [denying immunity] is appealable at all, it must be appealed within the time

set by law....or the right must be considered to have been waived.") Immunity denials are "governed by the same temporal limitations and subject to the same rules as other appeals, whether interlocutory or final....We conclude that [the appellants] lost that right, and any later effort to appeal would not be timely." *Id., 304-05.* A reiteration of an order addressing immunity does not set a new clock running.

In support of its contention that a Privilege Log Order is appealable on an interlocutory basis as an "injunction." FOMB references two decisions from the D.C. Circuit Court of Appeals, *Comm. of the Judiciary of the House of Representatives v. Miers, 542 F.3d 909, 910-911 (D.C. Cir. 2008)* and *Leopold v. CIA, 987 F.3d 163 (D.C. Cir. 2021).* The Board, however, ignores another D.C.Circuit case, *Citizens for Resp. & Ethics in Wash. v. Dep't of Homeland Sec., 532 F.3d 860, 863 (D.C. Cir. 2008)* ("CREW"), which was decided within months of *Miers* and which is discussed at length in *Leopold.*

In *CREW,* the Secret Service refused to produce visitor logs, arguing that they did not qualify as agency records under the Freedom of Information Act (FOIA). The district court ordered the defendant to "process [CREW's FOIA] request and produce all responsive records that are not exempt from disclosure." The Secret Service appealed.

The D.C. Circuit, certainly no stranger to FOIA or to inter-branch

disputes, ruled against interlocutory appellate jurisdiction, noting that "the Secret Service may yet be entitled to withhold some or all of the documents under one or more of [the Act's] nine exemptions. *CREW, 532 F.3d at 863*. "Under the court's order, the Secret Service will have to search for and locate any responsive documents and claim any exemptions it believes applicable. At that point, the court may agree with the agency, allowing it to withhold the requested records, in which case the government would have no cause to appeal. Or alternatively, the issues might be sufficiently narrowed to permit … a settlement. In either case, appellate review at this stage is premature." *Id., 864 (internal quotations and cites omitted.)* [11]

Even if FOMB's appeal *were* timely, however, it fails to meet basic requirements of the *Cohen* collateral order doctrine.[12] There would no immediate harm to the Board if this case proceeds to final judgment. Effective

[11]Based on CREW, one could argue that the problem with the current interlocutory appeal is not limited to waiver, but that the appeal may be *premature,* i.e not "ripe" for consideration, since the privilege-log process has yet to be produced.

[12]CPI makes this *Cohen* argument, even though it understands that the "small class of cases allowing interlocutory appeals" as collateral orders refer to categories, rather than individual cases. *Mohawk Indus. v. Carpenter, 558 U.S. 100, 107 (2009)*. On the unusual procedural record of this case, however, it is submitted that this Court should consider the Collateral Order factors." *Cf., U.S. v. Gorski, 807 F.3d 451 458 (1st Cir. 2015)* citing *Mohawk* for the proposition that "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege," since "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege ..." *(Internal citations and quotes omitted)*.

review would not be foreclosed in the absence of an immediate appeal. The Board completely fails to explain its position on this point, stating only that if it waits to an appeal on a final judgment, it "would have prepared and disclosed its privilege log and been ordered to produce non-privileged documents to the public." *Brief, p.10*. This is circular reasoning which does not justify FOMB's cliché that the "cat [would be] out of the bag." *Id.*[13]

Upon completion of the process ordered by Judge García three years ago, including the adequate identification of documents FOMB believes to be protected from disclosure, there could be effective review. *See, eg., Mohawk, supra,* discussing "effective review" in the context of attorney/client privilege).

FOMB cannot have it both ways. It cannot claim that an order to produce a privilege log is immediately appealable under *Cohen*, but also decide to participate below (albeit by delaying the process.) Except for its "good deed" defense, the Board has not explained why it did not appeal years ago, when the court rejected its Immunity Defense and denied its Motion to Dismiss. FOMB's constant claim that it is "voluntarily" cooperating while "preserving" its right to appeal at any time it chooses is simply unsustainable.

---

[13]This court's holding in *Irons v. FBI, 811 F.2d 681 (1st Cir. 1987)* is not to the contrary. In that case, the identity of sources would be revealed by compliance with the district court's orders, making the FBI's claims "essentially incapable of vindication" if reviewed after final judgment.

FOMB's only explanation for not appealing previously is that it was doing a "good deed." *Brief, page 15*. In reality, this was a litigation strategy. The Board should not be allowed to reap the fruits of its own duplicity.

B. The Eleventh Amendment

The fatal flaw in FOMB's Eleventh Amendment argument is that it fails to consider Puerto Rico's territorial status. The *Pennhurst* doctrine protects *state* sovereignty from encroachment by the federal government. The doctrine stems from the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Pennhurst, 465 U.S. at 100*. These concepts cannot be squared with the reality of Puerto Rico, including, in fact, the current role of the Congressionally-created FOMB itself.

There are both theoretical and practical differences between the "State sovereignty" in which the Eleventh Amendment is rooted and Puerto Rico's territorial status, which means that Congress exercises plenary authority over Puerto Rico pursuant to the Territorial Clause, and an unelected Board created by Congress can override decisions of the elected Government.

Any doubt regarding Puerto Rico's lack of sovereignty was dispelled on June 9 , 2016, when the Supreme Court issued its decision in *Sánchez-Valle* on the very same day that the House approved PROMESA. In *Sánchez-Valle,*

the Court examined whether Puerto Rico and the United States are separate sovereigns for purposes of double jeopardy. To answer that question, one need not examine the degree of practical autonomy Puerto Rico enjoys. The anser, rather could be found by looking at the ultimate *source* of Puerto Rico's authority. When Puerto Rico was ceded to the United States, it lacked sovereignty. Unlike the States, which ceded to the federal government certain powers associated with pre-existing sovereignty, Puerto Rico was *acquired* by the United States without the benefit of sovereignty.

After reviewing the historical record, the Supreme Court held that the ultimate source of Puerto Rico's prosecutorial power was the Federal Government—"because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol." Accordingly, Puerto Rico and the United States are *not* separate sovereigns." *Id. at 1876*.

To be sure, the Court formally confined its *Sánchez-Valle* analysis to double jeopardy and prosecutorial power. However, its observations regarding Puerto Rico's sovereignty have far broader implications. Dual sovereignty does not exist for some purposes but not for others. Without sovereignty, Puerto Rico fails to meet a pre-condition for Eleventh Amendment

protection.[14]

The Board's answer to these complex issues is to cite pre-Sánchez-Valle cases. FOMB treats the weighty issues of Constitutional law at issue in a dismissive one-line footnote at page 24 of its brief, in which FOMB affirms that even after *Sánchez-Valle*, "this Court has confirmed…that Puerto Rico continues to enjoy Eleventh Amendment immunity," citing *Borrás-Borrero v. Corporación del Fondo del Seguro del Estado, 958 F.2d 26 (1st Cir. 2020),* for this proposition.

This is highly misleading. There is not a *single* mention of *Sánchez-Valle* in *Borrás*. In fact, this Court expressly avoided the Eleventh Amendment issue (which in *Borrás* was whether the "Fondo" was an "arm of the state"). Its preference was to defer "thorny Eleventh Amendment questions" for a later date, as the case could be decided on other grounds. This is far from a ringing endorsement of defendant's current theory regarding this Court's post-*Sánchez-Valle* views on the issue.

The Board's flawed discussion of *Pennhurst* and the Eleventh

[14]Even before *Sánchez-Valle*, it was an open question whether the Eleventh Amendment applies to Puerto Rico. Although *this* Court previously held that it did, the Supreme Court purposefully left the issue unresolved. *Cf.,Metcalf & Eddy, 506 US,at 141, n. 1* ("As the case comes to us, the law of the First Circuit—that the Commonwealth of Puerto Rico is treated as a State for purposes of the Eleventh Amendment[…]—is not challenged here...we express no view on this matter.")

Amendment cannot be explained as a mere mishap. In the *Aurelius* litigation before the Supreme Court, FOMB advanced a position which on suspects it now hopes that *this* Court ignores. The Boar contended that "territorial and federal laws…are creations emanating from the same sovereignty." *See, the Board's Brief in FOMB v. Aurelius Investment: Nos. 18-1334,-1475,-1496,-1514,-1521, p.19, available at* https://www.supremecourt.gov/DocketPDF/18/18-1334/116359/20190919133807380_18-1334%20rb%20FOMB.pdf (*internal citations omitted*). FOMB also argued that Sánchez-Valle "one sovereignty" argument could not be limited to the Double Jeopardy Clause. *Id, p.18*. The position FOMB assumes on sovereignty seems to morph to whatever outcome it is seeking.

Even if the Eleventh Amendment *were* applicable to Puerto Rico, Congress, in approving PROMESA, abrogated any protection the Amendment might have provided. *See. Kimel v. Fla. Bd.of Regents, 528 U.S. 62, 73 (2000)* (Congress abrogates immunity when "its intention is unmistakably clear in the language of the statute.")

Acting pursuant to its extraordinarily broad powers under Article IV§3, Congress specifically provided in PROMESA Section 106(a) for the federal court to be the forum where the Board, an entity within the Government of Puerto Rico, could be sued under Puerto Rico law. As Judge García concluded,

by virtue of this statutory language, Congress abrogated or waived any Eleventh Amendment immunity Puerto Rico may have enjoyed. This, of course, is anathema to *Pennhurst*.

As a final point, CPI must observe the irony of the Board's *Pennhurst* argument. Far from respecting local sovereignty, the application of the doctrine to this matter would only further the far-reaching powers FOMB enjoys in Puerto Rico. CPI and the citizenry would have *no* remedy for the violations asserted herein, as the action would be precluded both in Puerto Rico and federal courts. The Board would be insulated from the mandates of the Constitutional Law of Puerto Rico, leaving CPI, and the rest of the population of Puerto Rico for that matter, in the dark.

C. **Preemption**

On appeal, FOMB's preemption argument focuses on the notion that compliance with Puerto Rico's right of access would be "inconsistent" with FOMB's exercise of its functions. Drawing from PROMESA Section 4, the Board claims that the rights of public access is "inconsistent" with its functions as a parallel government with enormous powers.

Conflict preemption occurs when it is impossible to comply with the two sets of laws or when state law is an obstacle to the accomplishment and

execution of Congress's purposes and objectives. *Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (internal quotes and cites omitted).* For there to be conflict preemption, an actual conflict must exist. Pure speculation, like that in FOMB's brief, will not suffice to preclude the application of state law. *English v. General Electric Co., 496 U.S. 72, 90 (1990).*

FOMB has not pointed to any inherent structural conflict between PROMESA's purpose and Puerto Rico's right of access. A request for documents pursuant to Puerto Rico's Constitution does not stand as an obstacle to the proper execution of PROMESA.

What, then, is the Board's argument for "conflict preemption?" *First*, FOMB argues that it cannot fulfill its objectives if it is subject to public scrutiny. *Brief, pp. 38-39.* Both Judge García and Judge Taylor-Swain were skeptical of such arguments, which go against the fundamental Constitutional law of Puerto Rico. The purpose of PROMESA is "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." *PROMESA,* Section 101(a),[15] As Judge García noted, it is "to restructure Puerto Rico's debt…not to dictate the way Puerto Rico's government discloses information to the public." *FOMB-ADD, 41.*

If the unelected Board wishes to eliminate public services and impose

[15] 48 U.S.C.§2121(a)

severe austerity on the people of Puerto Rico, it should do so openly and expose its ideas to public scrutiny. As Judge García emphasized at page 32 of the May 4, 2018 Order, "[s]unlight is said to be the best of disinfectants." L. Brandeis, OTHER PEOPLE'S MONEY 62 (1933).

Second, FOMB argues that it cannot comply with the disclosure requirements because it has only "seven unpaid individuals serving as members and a small staff". *Brief, page 39.* The irony of this assertion should not be lost in a case where there are more attorneys appearing for the Board than Board members. FOMB employs a veritable army of lawyers and consultants. *See, Valentín, supra*. ("More than 200 lawyers, consultants and other contractors....make up the workforce of the entity imposed by the federal government through the PROMESA law, according to contracts and billing examined by the CPI. To date, Puerto Rico taxpayers have paid at least $80 million in expenses related to the Board. The entity's budget for this fiscal year would add more than $60 million to the bill.") FOMB's attempt to pass itself off as a small 'mom and pop' operation is further evidence of its lack of candor in these proceedings.

Third, FOMB attempts to fashion a statutory argument that Congress "delegated" to it the capacity "to decide when to keep its communications private." *Brief,* 40. To support this contention, FOMB references PROMESA

Section 101(h)(4),[16] which allows the Board to hold certain closed executive sessions. This certainly does not support the broad proposition FOMB urges.

When Congress was fashioning PROMESA's much-heralded "carefully-crafted disclosure regime," *Brief, p. 36*, it could certainly have included a provision explicitly preempting the "field of public disclosure." When Congress decided that there would be preemption for certain matters, it did not hesitate to do so.[17] It did not in this instance.

Lastly, FOMB argues that the right of access is incompatible with PROMESA Section 104(c)(1). This Section authorizes the Board to obtain information from agencies of the federal government notwithstanding certain privacy concerns. *Brief,* p. 41. The Board argues that it might obtain "potentially sensitive information" from the federal government, which would then be subject to Puerto Rico's right of access to information.

This argument ignores that both the Puerto Rico Supreme Court and the judicial officers presiding over the case below, explicitly recognize that there are some legitimate exceptions to the right of access. If the Board is truly worried about disclosing potentially sensitive information, it should start by

[16] *48 USC § 2121(h)(4).*

[17] *See*, PROMESA, Section 303(3): "[U]nlawful executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality, or that divert funds from one territorial instrumentality to another or to the territory, shall be preempted by this Act." 48 USC § 2163(3).

producing a privilege log so that the district court could carefully and responsibly evaluate any confidentiality claims it may wish to make.

Although Congress gave extraordinary power to the Board, it did not leave it to FOMB to decide when it would comply with Puerto Rico law and when it would not. The Board is an entity of the Puerto Rico government, paid for by the Puerto Rican people. FOMB owes a commitment to transparency for the people whose lives are so greatly affected by PROMESA.[18]

D. Statutory Interpretation of PROMESA

FOMB's statutory analysis of PROMESA defies logic. The Board essentially claims absolute immunity. For the Board, only one section of the law is important. Section 105 guarantees that "the Board can perform its critical work without undue interference from....the requirements of local law."Brief, p.7.

Section 105 states that it "shall not be liable for any obligation of or claim

[18]Ironically, shortly after Judge García's 2018 Order, the Board issued a press-release titled "Oversight Board Amends Government Contracts Review Policy," in which it demanded transparency and accountability from the Government of Puerto Rico. See, FOMB Press Release, July 3, 2018, quoting FOMB Executive Director Natalie Jaresko as stating that "Oversight of Puerto Rico's government contracting processes is needed to increase effectiveness and transparency of public sector finances and increase the public's faith in this process." https://drive.google.com/file/d/1Y40j74mrKSkn7mrKSn7mrKSkn7DRjRkNvHdshYp1RqLBI/view. While the Board demands transparency of the Government of Puerto Rico (CPI agrees), it jealously defends its own right to operate in the dark, supposedly for the benefit of the people of Puerto Rico, but in fact in violation of their constitutional rights.

against [it]… resulting from actions to carry out this Act." For the Board, this gives it freedom from "liability claims" and all other kinds of actions, whatever their nature. No constitutional disclosure obligation could ever exist with respect to FOMB because, according to the Board, documents and correspondence "could have arisen only by virtue of the Board's actions carrying out PROMESA." Brief, p.33. *Ipso Facto,* the Board enjoys total immunity.

The conclusion that Section 105 offers complete protection from suit can be reached only by stripping of any meaning the words "liable" and the language extending immunity only to claims which "result from actions taken to carry out this Act." The most reasonable interpretation of Section 105 is that the Board will not be liable for claims which question the wisdom of its performance of its official duties. As Magistrate McGiverin observed, this is a strictly defined exemption which does not amount to wholesale immunity. FOMB-ADD, p.6.

The only case FOMB relies on for its novel theory of immunity is *U.S.v. Morten, 730 F.Supp.2d 11(D.D.C. 2010) ("Morten"),* a district court case which tangentially involves the Control Board for Washington, D.C, but offers nothing of consequence to the case at bar. *Morten* involved a contract claim, which was filed not against the D.C. Control Board, but rather against the

United States under the theory that the D.C. Board was an agency of the federal government. The DC Board was not even a party in *Morten*. The court's dismissal of the contract claim was not because of some immunity, but rather because none of the parties had subscribed the contracts. Then, in what is pure dicta, the court observed that even if the DC Board *were* considered an agency of the United States, it would not be liable because the statute "exempt[ed] the Board from liability for obligations of the District of Columbia". *Morten, p. 14*. The distinctions between *Morten* and the case at bar are overwhelming.

In the instant case, CPI is not questioning substantive actions taken by the Board in furtherance of its obligations under PROMESA. All it is asking is for access to the public documents generated in the course of those actions.

Had Congress wanted the Board to be absolutely immune from lawsuits, it certainly could have so stated. It did not. Had Congress wanted to insulate the Board from Puerto Rico law claims, as well as from those involving equitable and declaratory relief, it could have done so. Instead, it provided for just the opposite.

Reading Section 105 as urged by FOMB would render superfluous other parts of PROMESA, including Section 4 (Puerto Rio law applies unless inconsistent); and Sections 106(a), (c) and (e). Section 106(a) is the explicit

jurisdictional grant, meaning that the Board is indeed subject to the authority of the courts, specifically of the U.S. District Court. Section 106(c), for its part contemplates the possibility that there will be "orders entered to remedy constitutional violations," as well as those granting declaratory or injunctive relief against the Oversight Board. Section 106(e), speaks to the absence of jurisdiction in any court to review FOMB certification determinations, leaving open the possibility of litigation seeking other ends.

The first rule of statutory interpretation is to "start, of course, with the statutory text." *Sebelius v. Cloer, 569 US 369, 376 (2013)*. It is assumed that the words in a statute have meaning; all relevant provisions which might inform the scope of particular text must be considered. *NH Lottery Commission v. Rosen, 986 F.3d 38, 58 (1st Cir. 2021)*, ("the most natural reading of a statute [is] one that harmonizes the various provisions in it and avoids the oddities that a contrary interpretation would create.") *(internal cites and quotes omitted)*; *Gade v. National Solid Waste Management 505 U.S. 88,99 (1992)* ("Petitioner's interpretation…might be plausible were we to interpret that provision in isolation, but it simply is not tenable in light of the [act'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").

In its brief on appeal, FOMB argues that any interpretation other than

its expansive reading of § 105 would "invalidate", "render ineffective" and "nullify" that section of the law. *Brief, 34*. Quite the opposite is true. To accept the Board's interpretation of Section 105, other sections of the law would have to be nullified. It is presumed that Congress intended to enact all parts of PROMESA. Our task is to harmonize the different sections of the statute. There is no reason to exalt Section 105 over all others.

All the different sections of PROMESA can certainly be harmonized. The result is as follows:

(1) Suits can be brought against FOMB in the U.S. District Court for the District of Puerto Rico (§106a).

(2) The federal court can issue declaratory or injunctive relief against the Board, including relief for constitutional violations (§106c).

(3) The Board's certification determinations cannot be challenged in district courts (§106e).

(4) And the Board and its staff are not liable for damage claims resulting from actions they take pursuant to their obligations under PROMESA (§105).

FOMB's asserts that such a reading of the law is "implausible." *Brief, 34*. In its stead, however, the Board proposes a "common sense" approach which is anything but. To adopt the Board's view, one would have to conclude that Congress created a sui generis entity, placed it within the governmental

structure of Puerto Rico, subjected it to Puerto Rico law, precluded actions against it for the performing of its statutory duties. and provided that any other actions be brought in the federal court, *but* that such actions are, in fact, prohibited.

It is difficult to understand why FOMB has argued for such a plainly illogical reading of the law, if not for an undeclared paternalistic need to hide its work from the People of Puerto Rico. FOMB's arguments on appeal, as well as its litigation actions below, constitute a frontal attack on the fundamental right of access and the transparency which has been so jealously guarded by the Puerto Rico Supreme Court law over decades of applicable jurisprudence.

CONCLUSION

For all of the reasons set forth herein, this Court should confirm the decisions below and Order the Board to comply with the minute orders and all prior orders requiring production of documents and specific, individualized designations for every document withheld for any reason, as required under the law of Puerto Rico.

CPI also respectfully requests that the Board be given a date certain by which to comply with the aforementioned orders.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME TYPE-SPACE AND TYPE STYLE LIMITATIONS

This brief has **11888** words, excluding the parts of the brief exempted under Rule 32 of the Federal Rules of Appellate Procedure.

It complies with the type-style and type-face limitations in that it is prepared in Georgia, Size 14 (with footnotes in Times New Roman, Size 12).

In San Juan, Puerto Rico this 18th day of June, 2021

/s/ Judith Berkan
Judith Berkan

Attorney for Centro del Periodismo Investigativo

Berkan/Mendez
O'Neill G-11
San Juan, P.R. 00918
berkanmendez@microjuris.com

berkanj @microjuris.com
787-764-0814; Fax 787-250-0986
termporary phone 787-399-7657

CERTIFICATE OF SERVICE

This is to certify that this brief is being submitted through the electronic filing system, which will, on this date, notify all counsel of record:

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
LAURA E. STAFFORD
ADAM L. DEMING
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110

GUY BRENNER
JOSEPH S. HARTUNIAN
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, NW,
Suite 600 South
Washington, DC 20004

MARTIN J. BIENENSTOCK
MARK D. HARRIS
PROSKAUER ROSE LLP
11 Times Square
New York, New York 10036