

## **Pinto Lugo et als v. Government of the United States et als**

### **Executive Summary of Adversary Complaint Against the Financial Oversight Board Created By PROMESA Challenging its Validity and Constitutionality**

#### **I. Conceptual Background**

The Declaration of Independence of the United States of America provides that the people have a series of inalienable rights and that among those rights there are the right to life, to liberty and to the pursuit of happiness. The Declaration adds that to safeguard those rights governments are instituted deriving their just powers from the consent of the governed. Because the imposition of a Financial Oversight Board over the Government of Puerto Rico and over the People of Puerto Rico without their participation and their consent violates such principles from the Declaration of Independence, such imposition must be challenged.

A multisectorial and representative cross-section of Puerto Rican United States citizens and adverse group of civil, professional, academic, labor and non-governmental entities - including teachers, members of the academic community, *bonafide* individual bond holders and residents of Puerto Rico that comprise a full spectrum of political and ideological tendencies- have decided to sponsor and file an action in the Title III proceedings already being addressed in the Federal District Court of San Juan, initiated by the Fiscal Oversight Management Board (FOMB), supposedly in representation of the Government of Puerto Rico. The “Adversary Complaint” being filed on April 23, 2018, alleges that the enactment by Congress of Puerto Rico Oversight Management and Economic Stability Act (PROMESA) and the creation of the Fiscal Oversight Management Board (FOMB) clearly violates fundamental rights granted by the Constitution of the United States of America.

Plaintiffs assert that neither the particular *sui generis* nature, purpose or design of PROMESA, nor the “territorial” status of Puerto Rico exempts nor prevents the Government of the United States -including its executive, legislative and judicial branches- to fully comply with the Constitution of the United States and the constitutional rule of law as established by decisions of the Supreme Court of the United States. The allegations are founded in federal constitutional decisions, the congressional records and precedents derived from other Federal Courts, including bankruptcy decisions. As such, they are deemed to be neutral from the standpoint of Puerto Rican partisan politics.

Said Adversary Complaint also asserts substantive international law since covenants and treaties subscribed to by the United States and ratified by Congress, and agreements and declarations regarding human and political rights are part of the federal “law of the land” under the Constitution of the United States.

## **II. Historical Context**

PROMESA, by its English acronym, was designed by Congress and came into effect in June 30<sup>th</sup>, 2016. The act created the Fiscal Oversight and Management Board (FOMB) comprised by seven (7) individuals nominated in a by-partisan fashion by members of both chambers of Congress and appointed by the President of the United States. According to PROMESA, the FOMB has ample powers. Among others, it has the absolute authority to require the Government of Puerto Rico to submit for its final approval (“Certification”) annual “Fiscal Plans” to be complied with by the Government of Puerto Rico in its management of its General Fund and accordingly, the yearly budgets of the Government of Puerto Rico. At the same time, PROMESA established a special “Task Force” that was entrusted to prepare a report regarding measures to be taken to promote and “...spur sustainable long-term job creation,

reduce child poverty and attract investment in Puerto Rico...” (Section 409(g). The Task Force included amongst its members then outgoing Puerto Rico Resident Commissioner Jorge Pierluissi, Representatives Sean Duffy (R-Wisconsin) and Tom McArthur (R-New Jersey) and Senators Bill Nelson (D-Florida) and Robert Melendez (D-New Jersey). On December 20<sup>th</sup>, 2016, a Report was issued by that Task Force. Since then, none of its recommendations has been adopted, promoted or even advocated, neither by the Government of Puerto Rico, the FOMB or Congress.<sup>1</sup>

Just as Puerto Rico was supposed to redesign and reformulate its fiscal policy after the enactment of PROMESA, two powerful hurricanes -Irma and María- affected the Island, causing enormous devastation, historically unprecedented in the modern history of the Island, taking down 100% of its electrical and communication grids and severely affecting and restricting water supply. As to this day, the Island is far from having recovered from said devastation, nor from the unreliability of the deficient, outdated, overused, and obsolete electrical power grid, a fact that is of public knowledge, ascertainable and cannot be sufficiently overstated.

Since the approval of PROMESA and the creation of FOMB, the Puerto Rican government has already submitted at least five (5) “proposals” for Fiscal Plans to FOMB, according to its instructions. But the process is presently stalled. Public discrepancies between FOMB, the Government of Puerto Rico and even Congress through Senator Bob Bishop and the

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<sup>1</sup> PROMESA is some sui generis act itself, not only because it is the first in its class to be applicable under certain conditions to all territories, but also because regarding Puerto Rico, FOMB has imperial powers over the Island and its local, regional and national officers, democratically elected in the exercise of First Amendment rights under the Constitution of the United States. The PROMESA Act is absolutely unprecedented if compared to other federally or state enacted measures created to deal with other instances of fiscal bankruptcy (Washington, Detroit or New York). The annual budget of FOMB, presently Sixty Million Dollars (\$60,000,000) is paid in full by the Government of the Commonwealth of Puerto Rico. This year, FOMB is asking the Government of Puerto Rico to increase it by Twenty Million Dollars (\$20,000,000)

public discussion and incongruencies between political actors have demonstrated that whatever the legislative purpose of the Act is, it is not working.<sup>2</sup> Bond holders of different categories and ranges in their credits have not been able to reach agreements in almost anything, neither between them, between them and FOMB, nor between them and the Government of Puerto Rico.

Tension between the Government of Puerto Rico and FOMB has been the subject of debate in public media, precisely because the differences regarding the specific context of the last version of the very first fiscal plan to be a by-product of PROMESA, notwithstanding the fact that up to the present time the people of Puerto Rico -including Plaintiffs- are not privy to the contents of the proposed “draft” of the Fiscal Plan, nor have been to any of its previous versions until “certified”. To our best knowledge, only one (1) was approved before the path of hurricanes Irma and Maria and it is presumed to have been discarded.

Because of this uncertainty between the Government of Puerto Rico and FOMB regarding the limits of the latter’s authority beyond the strict fiscal policy and other economic public policies regarding the private sector of the economy (non-fiscal), there has been a chilling effect in the exercise of the right to constitutional expression of the residents and citizens, the ones to be dramatically affected by the measures to be adopted, which threaten the possibilities for “durable”, permanent” and “pro-growth” sustainable fiscal reforms.

The only measures presently discussed are reduction in vested proprietary rights of retired public employees’ pensions, shutting down public schools and universities, privatization of financially successful and rentable public entities that don’t depend in any way of the General

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<sup>2</sup> PROMESA specifically and even dramatically states in its Title VII, Sec. 701: “It is the sense of Congress that any durable solution for Puerto Rico’s fiscal and economic crisis should include permanent, pro-growth fiscal reforms that feature, among other elements, a free flow of capital between possessions of the United States and the rest of the United States”. (emphasis added)

Fund of the Government of Puerto Rico.<sup>3</sup> Also, the proposed “reforms” include contradictory and absurd exigencies for the increment of the rates of participation in the labor force in an economy structurally incapable of creating private-sector employments, as a prerequisite to “authorize” and increase the minimum wage. Contrary to the “intent” of Congress as provided in Section 701 of PROMESA, the only measures being considered are austerity over more austerity to the people of Puerto Rico. Meanwhile, FOMB is asking to increase their annual budget to Eighty Million Dollars (\$80,000,000).

Finally, it is of the utmost relevance and importance that -before the approval of Fiscal Plans under PROMESA- an integral and forensic audit of the public debt should be ordered and also, any restructuring efforts of the public debt should be preceded by said audit and by the certification of Puerto Rico’s Government Financial Statements. The suspicious reluctance of both the Government of Puerto Rico and the FOMB to undertake such audit is highly suspicious and their adamant opposition is inexplicable. Furthermore, some members of the Board have resumes that reveal a prior or actual relationship with financial entities related to the public debt of Puerto Rico that *prima facie* reveal conflicts of interest that should make them unable to form part of the Board.

For all the reasons above stated, Plaintiffs in this Adversary Complaint consider as their ethical duty the filing and disclosure of the present case. We summarize its judicial content hereinafter.

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<sup>3</sup> To the contrary, several of them, such as the State Insurance Fund (workers compensation) and the Automobile Accident Administration have had their own funds, autonomous and independent from the General Fund of the Government, depleted by the Government during the past years. Already between them, they have been legislated into financing the government in more than One Billion Dollars (\$1,000,000,000), taken from their reserved escrow type accounts for the payments to Claimants. These public entities are not bond issuers nor had any part in the creation of the public debt PROMESA seeks to address.

### **III. Summary of Claims or Remedies**

For the purposes of this summary and to facilitate its comprehension, we have reduced the legal matters addressed in this case into three (3) substantive matters and remedies, even though they comprise multiple legal issues and are addressed in a different fashion in the document.

#### **First Claim**

Plaintiffs ask for declaratory remedy <sup>4</sup> regarding the unconstitutionality of the creation off the FOMB because, among other reasons:

1) It renders irrelevant and ineffective the responsibilities and duties of the three (3) branches of the republican Government of Puerto Rico, democratically elected both under the Declaration of Independence, the First Amendment Rights of the Constitution of the United States of America that includes the right to vote, and the Federal Relations Act and the Constitution of the Commonwealth of Puerto Rico approved by Congress in 1952.

2) The authority conferred upon the FOMB by PROMESA is inherently contradictory and conflictive because at the same time it invests it with the duty, fiduciary in nature, to “represent” the interests of Puerto Rico in proceedings under Title III with the express mandate to restructure the public debt by means of Fiscal Plans which FOMB has interpreted include unrestricted power to absolutely control governmental public policy regarding social, tax, labor

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<sup>4</sup> A “declaratory remedy” is a legally binding determination with respect to the legality, validity and/or constitutionality of a law, contract, document, by-laws, etc., over which it exists a legitimate and justiciable controversy. This complaint is real and justifiable since it claims that PROMESA is unconstitutional in its positive judicial substantive and procedural context and in its application under federal constitutional and international law.

and non-fiscal economic matters. Such power not only violates essential elements of the right to due process but also impinges upon the fundamental rights of residents of Puerto Rico, but furthermore will benefit only the interests of bond holders of the Government.

3) The FOMB is not only intrinsically contradictory in its design in violation to the substantive and procedural constitutional rights under the V and XIV Amendments to the Constitution of the United States, but also has been configured by the appointment of several members that exhibit or appear to have specific conflicts of interests that should disqualify them to be part of FOMB, as set forth by decisions of the Supreme Court.

4) Given the conflictive and contradictory nature of the FOMB, Plaintiffs assert and ask for interlocutory remedies besides the declaratory one that should include a stay of the functions of the FOMB and the eventual creation of a representatively appointed citizen board composed by experts in economic and financial matters that should include Puerto Rican and non-Puerto Rican experts qualified to evaluate the structural problems of the economy of Puerto Rico without ruling out the possibility to also invite representatives from different sectors of Puerto Rico's society like the labor, cooperative credit union, and environmental sectors.

5. PROMESA and FOMB are confiscatory in nature, concept and design in violation of constitutionally protected rights to due process of law regarding proprietary matters.

### **Second Claim**

Plaintiffs ask for declaratory and interlocutory relief to stay the "certification" of the Fiscal Plans until Audited Financial Statements of the Government of Puerto Rico are completed and made public and an integral and forensic audit is ordered. Said claim and remedies are consequence of the evident: it will be premature and counterintuitive to submit the people of

Puerto Rico to severe and prolonged austerity measures that would only contribute to delay and prevent future “permanent” and “durable” economic growth, as required by PROMESA. If said remedies are not even considered, the result will be the promotion of more massive emigration of Puerto Ricans to the United States without even having ascertained the extent of the constitutionally valid payable public debt. That would also entail a gross violation of FOMB’s fiduciary duty to dutifully represent and defend the interests of the Puerto Rican people.

The allegations regarding the validity and enforceability of the public debt is based on Supreme Court decisions that since before 1898 have addressed the issue, requiring in the first place, a determination of the extent of the debt, second its legality, and thirdly, the financial and economic capacity of the debtor to pay without affecting sustainable and equitable economic growth, which is the same as to say “pro-growth” as specifically intended by Congress under Section 701 of PROMESA.

### **Third Claim**

The sale of the Puerto Rico Electric Power Authority (PREPA), as proposed by the Governor of Puerto Rico in Senate Bill 860 being considered now by its legislative branch of the government of Puerto Rico is unconstitutional because it promotes, abets, and authorizes the configuration of an “unconscionable” contract, as such probably null and void since its inception because it is unreasonable, unjust, leonine, unthinkable, and odious, disregarding Puerto Rico’s geographic and geological place as an island in the Caribbean Sea, all of which makes it extremely difficult and costly -if not impossible- its interconnection to other continental energy grids nowhere in the vicinity, either in North or South America. If allowed, all residents of the Island -individual, business, factories, wholesalers, small retailers and even the Government- would become hostage clients most likely of a private energy conglomerate that “acquires” the

“assets” of PREPA, including such intangible assets that we deem not susceptible to be objectively appraised, like the needs of the population for energy, in other words a captive market.

Two additional considerations pinpoints this allegation of “unconscionability” as a ground for a determination of nullity of the sale of the “assets” of PREPA, including the “intangibles” already referred to. The first is the recent unexpected hiring of a new Executive Director of PREPA with an annual compensation package close to One Million Dollars (\$1,000,000) that was solicited and approved by the corporation’s Board of Directors (“Governing Board”), which -according to massively reported news coverage- was not even known by the Governor of Puerto Rico on his own admission.<sup>5</sup> The second consideration is that Senate Project 860 puts in the hands of the Governing Board of PREPA the negotiation and conditions for the sale of the “assets” of the Public Corporation without statutorily enacted parameters, pre-requisites or public policy criteria that pursue the protection of the interests of the residents of Puerto Rico, individuals or enterprises, large and small that would be compelled *ad perpetuam* to the conditions, rates and determinations of private enterprise.

#### **IV. Participation and Public Discussion**

Plaintiffs sustain the allegations and claims of this Adversary Complaint and are confident in the judicial validity of its arguments. Inasmuch as we have summarized previously, they are based on substantive federal constitutional grounds, which includes the United States

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<sup>5</sup> Government policy regarding high ranking Executive Directors or heads of public agencies dramatically contradicts the austerity measures championed by FOMB that should be first applied in house by them and by Tittle III Court which participates of the nature and concept of a bankruptcy court. The Executive Director of the FOMB, Natalie Jaresko; the Secretary of the Public Security Umbrella, Hector Pesquera, the Secretary of the Department of Education, Julia Kelleher; the new executive in charge of the public/private office for the promotion of tourism and Walter Higgins of PREPA are examples of said contradiction. Except for Pesquera, all of them are foreigners or North Americans.

Declaration of Independence, the Constitution of the United States, treaties and documents to which the United States is signatory and international law. Beyond that, going further in the understanding of our ethical duty to present this claim using the positive legal infrastructure of the Federal Court system that has jurisdiction over said laws, we propose to disclose and divulge in Puerto Rico, the United States and the rest of the world the instance and procedural course of the present litigation, being aware that it offers an extraordinary opportunity to denounce the aberrant colonial condition of Puerto Rico in its relationship with the United States, educating and mobilizing residents and social entities that as them Plaintiffs, assume the ethical call to do so.