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

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD. et al., Plaintiffs, v. ALEJANDRO GARCÍA PADILLA et al., Defendants.	CIVIL NO. 16-1610 (FAB)

MOTION TO DISMISS

TO THE HONORABLE COURT:

COME NOW, co-defendants Hon. Alejandro García Padilla and Hon. Juan C. Zaragoza Gómez, in their respective official capacities (collectively "defendants"), specially appearing and without submitting to the jurisdiction or venue of this Court,[1] and hereby state and pray as follows:

I. INTRODUCTION

This Court is well aware of the unprecedented financial crisis facing the Commonwealth of Puerto Rico ("Commonwealth") and the efforts that the Government of Puerto Rico has undertaken to address that crisis. More than a year ago, this Court confronted one of those efforts, the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, and held it preempted by federal law, a decision later affirmed by the Supreme Court. See Franklin California Tax-Free

[1] On June 30, 2016, the President of the United States signed into law the *Puerto Rico Oversight, Management, and Economic Stability Act* ("PROMESA"), S. Res. 2328, Pub. L. No. 114-___ (2016). *See* https://www.gpo.gov/fdsys/pkg/BILLS-114s2328enr/pdf/BILLS-114s2328enr.pdf. The passage of PROMESA substantially alters the landscape of this litigation. PROMESA provides for an automatic stay of, among others, "the . . . continuation . . . of a judicial . . . proceeding against the Government of Puerto Rico that was . . . commenced before the enactment of this Act" with respect to a "Liability." *Id.* § 405(b)(1). That stay will continue until at least February 15, 2017. Reserving all rights to object to the continuation of this proceeding in light of those stay provisions, *see* Dkt. No. 72, defendants file this motion only as a protective measure, Dkt. No. 73, pending adjudication of plaintiffs' motion to lift the stay, *see* Dkt. No. 71 (noting Defendants' opposition to motion to lift stay is due July 18, 2016).

Trust v. Puerto Rico, 85 F. Supp. 3d 577 (D. P.R. 2015), aff'd, 805 F.3d 322 (1st Cir. 2015), aff'd, 579 U.S. __ (2016). Since that time, the Commonwealth's financial situation has only worsened. Just a few months ago, this Court concluded that the Commonwealth "is insolvent and no longer able to pay its debts as they become due." Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 2016 WL 1183091 at *1 (D.P.R. March 28, 2016). And the Government has now declared that "Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." Docket No. 52-1 at 50.

Faced with that hard reality, the Commonwealth exercised its police powers to ensure the protection of the life, health and general welfare of its people, P.R. Const. art II § 19, by enacting the "Puerto Rico Emergency Moratorium and Financial Rehabilitation Act" (Act 21-2016, hereinafter the "Moratorium Act"). Unlike the Recovery Act, the Moratorium Act does not create any mechanism for the Commonwealth or its instrumentalities to restructure or discharge their debt. It has a much more limited purpose and scope: It empowers the Governor to declare a temporary state of emergency for any government entity, including the Government Development Bank (GDB), and suspend the payment of that entity's debt obligations until January 2017. During that period, the Governor is able to prioritize the payment of essential services and make financial reforms so that the Commonwealth can meet its debt obligations in the future. The Governor has exercised the power given to him in the Act to declare a moratorium on some of GDB's debt obligations.

Not content to allow even this stop-gap measure, plaintiffs are seeking to enjoin various provisions of the Moratorium Act as unconstitutional. Though stopping short of challenging the Moratorium Act as a whole, plaintiffs contend that certain provisions within it violate the Contract and Takings Clauses of the federal and Puerto Rico Constitutions, are preempted by the Bankruptcy Clause and the Bankruptcy Code, fall afoul of the dormant Commerce Clause, and abridge some amorphous right to sue in federal court. None of those claims has merit, and the complaint should therefore be dismissed.

A. Procedural background

Plaintiffs Brigade Leveraged Capital Structures Fund Ltd. and others are allegedly bondholders of GDB. On April 4, 2016, plaintiffs filed a Complaint in the case of caption against GDB. Docket No. 1. Plaintiffs filed a Motion for a Temporary Restraining Order against GDB on April 5, 2016, Docket No. 3,[2] which they later withdrew on April 13, 2016, Docket Nos. 35 and 36. After several additional filings and orders, on May 20, 2016, the original plaintiffs and others filed an Amended Complaint. Docket No. 52. In addition to including several new plaintiffs, the Amended Complaint dropped GDB as a defendant and instead included the appearing parties—the Governor of Puerto Rico, Hon. Alejandro García Padilla, and the Secretary of the Puerto Rico Department of Treasury, Hon. Juan C. Zaragoza Gómez—as defendants in their respective official capacities. Id. The Amended Complaint also named as a defendant "John Doe" in his or her official capacity as receiver for the GDB.

B. The Moratorium Act and the provisions challenged by plaintiffs

On April 6, 2016, after the original complaint was filed, the Puerto Rico Legislature passed the "Puerto Rico Emergency Moratorium and Financial Rehabilitation Act" (Act 21-2016, hereinafter the "Moratorium Act"). Docket No. 52-1.[3] On April 8, 2016, the Governor of Puerto

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[2] The ex-parte relief sought therein was denied on the same date. Docket No. 5.

[3] At the motion to dismiss stage, the court may consider documents attached to the complaint and "documents the authenticity of which are not disputed by the parties; [] official public records; [] documents central to plaintiffs' claim; or [] documents sufficiently referred to in the complaint," without converting the dispositive motion into a motion for summary judgment. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). The documents referred to in this motion were either attached to plaintiffs' Amended Complaint or are official public records.

Rico issued Executive Order ("EO") 2016-10, pursuant to Sections 201 and 203 of the Moratorium Act, declaring a state of emergency for the GDB. Docket No. 52-2. And on April 30, 2016, the Governor issued EO 2016-14, ratifying EO 2016-10 and declaring a moratorium on payments owed by GDB (including bond payments due on May 1, 2016) until the end of the "Covered Period," as said term is defined in the Act.[4]

The Moratorium Act is divided into 6 chapters. Chapter 1 establishes the general provisions of the law. Docket No. 52-1 at 56. Chapter 2 authorizes the Governor to declare a moratorium and stay creditor remedies with respect to covered obligations of government entities (hereinafter, "the Stay Provisions"). Id. Chapters 3 and 4 contain amendments to GDB's Enabling Act consisting of updated receivership provisions, (Chapter 3) including provisions for a bridge-bank and related procedures (Chapter 4) (hereinafter, "the Receivership Provisions"). Id. at 58. Chapter 5 addresses the receivership provisions of the Economic Development Bank of Puerto Rico ("EDB") (id. at 58), and Chapter 6 creates a new instrumentality called the "Puerto Rico Fiscal Agency and Financial Advisory Authority" for the purpose of acting as fiscal agent, financial advisor and reporting agent of the Commonwealth. Id.

On May 5, 2016, the Legislative Assembly amended the Moratorium Act through Act No. 40-2016. Docket No. 52-3. Act 40 made clear that "the safety, soundness and stability of depository financial institutions, protecting their deposits" would be an essential service during the moratorium, Act 40, § 9, and a priority in receivership, *id.* § 6. To date, the receivership provisions of the Moratorium Act contained in Chapter 3 of said statute (Docket No. 52-1 at 74-80) have not been activated.

[4] Section 103(m) of the Moratorium Act, Docket 52-1 at 63 ("'Covered period' means the period beginning immediately upon the effectiveness of this Act through and including January 31, 2017, which period may be extended by executive order of the Governor for not more than two months.").

At issue in this litigation are Section 105 of the Moratorium Act, some of the Stay Provisions (Sections 201(b); 201(c); 203(b)(1); 203(f)) and some of the Receivership Provisions (Sections 301, 302 and 401). Docket No. 52 at ¶5. Section 105 of the Moratorium Act establishes certain immunities for individuals acting pursuant to the Act and/or for transfers of assets or withdrawal of funds approved or executed by any government entity. Docket No. 52-1 at 65.

As relevant, Section 201 authorizes the Governor to declare a temporary moratorium on the payment of certain obligations. Section 201(b) provides in part that, during a temporary emergency period that the Governor may declare pursuant to Section 201(a), no act shall be done and no action shall be commenced that may result in recovery from or a judgment against the governmental entity for which the emergency period has been declared. Id. at 67-68. Any stay of proceedings pursuant to Section 201(b) expires on January 31, 2017, unless extended through Executive Order for a period not to exceed two months. Section 103(m) of the Moratorium Act, id. at 63. Section 201(b) also provides that no contract with the relevant government entity may be terminated solely by reason of the stay of proceedings or the insolvency or financial condition of the entity. Id. at 68. Section 201(c) provides in part that any act found to be in violation of Section 201(b) shall be void and punishable by contempt of court. Id. at 69.

Section 203 includes additional measures to keep GDB afloat during the emergency period. Section 203(b), for example, allows the setting of certain conditions or restrictions **during the limited emergency period**, including dispensing with the compliance of any requirement that the bank maintain deposit reserves above a certain threshold. Id. at 71. Section 203(f) exempts disbursements made in the ordinary course, including disbursements to cover certain expenses or to pay for goods and services provided to the GDB, from Art. 14 of GDB's Enabling Act, 7 P.R. Laws Ann. §562 (renumbered now as Art. 17). Docket No. 52-1 at 72.

Sections 301 and 302 of the Moratorium Act amend the receivership remedy in Article 11 of GDB's Enabling Act. As relevant here, Section 301 specifies that a receiver will be empowered to allow, disallow, or otherwise determine claims and that each person having a claim against GDB shall in no event receive less than the amount the creditor would have been entitled to receive if the Bank had been liquidated on the date of the appointment of the receiver. See Sections 301 (F) and (H) of the Moratorium Act (Docket No. 52-1 at 76-77); see also Docket No. 52 at ¶34(d). Section 301 also provides for judicial review of any determination disallowing a claim in the Court of First Instance of Puerto Rico, Superior Part of San Juan. Docket No. 52 at ¶34(d). And, as amended by Act 40-2016, Section 301 directs the receiver to "preserve and prioritize the safety, soundness and stability of depository financial institutions and their deposits." Id. at ¶34(c). Section 302, meanwhile, authorizes the receiver to reject contracts or leases and provides that "no person may exercise any right or power to terminate, accelerate, or declare a default" under any contract with the GDB during the 90-day period after the appointment of the receiver. Id. at ¶34(e). Section 302 also establishes that depositors and other unsecured creditors will have fourth priority in receivership, following the expenses of the receiver and wages and other benefits owed to employees for work done before the appointment of the receiver, and preceding any subordinated claims of unsecured creditors. Id. at ¶34(f).

Finally, Section 401 of the Moratorium Act allows for the creation of a "bridge bank to assist the receiver in fulfilling its powers and duties." As relevant, the Act authorizes the bridge bank to assume the assets and liabilities of the Bank as the receiver deems appropriate. Id. at ¶34(g) and (h).

Plaintiffs have brought a host of constitutional challenges to these provisions. They claim that the challenged provisions violate the Contracts and Takings Clauses of the Constitutions of the United States and Puerto Rico, and the Commerce Clause of the Constitution of the United States. Id. at ¶3. Plaintiffs also allege that the Moratorium Act is preempted by federal law, in particular the Bankruptcy Code, and that it violates a supposed right to open access to the federal courts. Id.

Plaintiffs' Amended Complaint must be dismissed, for a number of reasons. As a threshold matter, plaintiffs lack standing to challenge the receivership provisions and/or those claims are not ripe for adjudication. Well-recognized doctrines of abstention also counsel restraint in this case, and the agreements upon which plaintiffs' purport to ground their suit pose an independent bar to its adjudication. Moreover, even if plaintiffs' claims could survive these threshold issues, their complaint would fail on its own terms. Plaintiffs have failed to state a plausible claim for relief under any of the relevant constitutional provisions.

II. STANDARD OF REVIEW

Federal courts are courts of limited subject-matter jurisdiction, and "the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may challenge subject-matter jurisdiction in a Motion to Dismiss, "including ripeness, mootness, the existence of a federal question, diversity, and sovereign immunity," Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001), as well as standing, *id*. at 362-63.

"In deciding a motion to dismiss, the court must 'assume the truth of all well-pleaded facts in the complaint, drawing all reasonable inferences in the plaintiffs' favor." Fitzgerald v. Harris, 549 F.3d 46, 52 (1st Cir. 2008) (citation omitted). Although it must accept as true a plaintiff's well-pled facts, the court is not required to accept a plaintiff's legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009). Indeed, a complaint must be dismissed if the facts as pled do not state a claim for relief that is "plausible" on its face. See, Iqbal, 556 U.S. at 679. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 555 (2007). Factual allegations in a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (internal citations and emphasis omitted).

"While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion." González v. United States, 284 F.3d 281, 288 (1st Cir. 2002). Even in the context of a Rule 12(b)(6) motion, however, the court may consider documents "the authenticity of which are not disputed by the parties; [] official public records; [] documents central to the plaintiffs' claim; or [] documents sufficiently referred to in the complaint." Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001).

III. ARGUMENT

A. Plaintiffs lack standing to challenge the receivership provisions.

Article III standing is an "indispensable part" of any case that must be present at every stage of litigation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "If a party lacks Article III standing to bring a matter before the court, the court lacks subject matter jurisdiction to decide the merits of the underlying case." Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (citation omitted). As aptly summarized by the First Circuit Court of Appeals, Article III requires plaintiffs to establish an injury in fact fairly traceable to the conduct complained of and likely to be redressed by a favorable decision:

> To satisfy the constitutional component of standing, a plaintiff must have suffered an "injury in fact," i.e., an invasion of a legally protected interest. That injury must

> be "concrete and particularized"; the latter term means the injury must be personal to the plaintiff. It may be shared by many others, but may not be common to everyone. The injury must also be "actual or imminent, not conjectural or hypothetical," and it must be "distinct and palpable." The latter requirement may be satisfied by environmental or aesthetic injuries. The injury need not be "significant"; a "small" stake in the outcome will suffice, if it is "direct." In addition, the injury must be fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Id. (citations omitted).

Plaintiffs have not adequately alleged an injury in fact associated with the Receivership Provisions of the Moratorium Act. (Docket No. 52 at ¶44). These challenges are not, as was the case in the Recovery Act case, challenges to the total elimination of the right to request a receiver. See Franklin California Tax-Free Trust v. Puerto Rico, 85 F. Supp. 3d 577 (D. P.R. 2015), aff'd, 805 F.3d 322 (1st Cir. 2015), aff'd, 579 U.S. __ (2016). Rather, plaintiffs' challenges are to how certain modifications of the GDB receivership remedy might operate in the future. Specifically, plaintiffs allege that certain modifications of the receivership remedy could allow "the preferential treatment of creditors of equal rank" (Docket No. 52 at ¶44(a)); provide "for preferential treatment of Puerto Rico resident institutional holders of GDB bonds over non-resident holders" (id. at ¶44(b)); "deprive creditors, including Plaintiffs, of the protections of a disinterested court overseeing the receivership process" (id. at ¶44(c)); and deprive creditors of "the right to be free from nonconsensual modification to the right to receive principal and interest" (id. at ¶44(d)).

None of these allegations relates to conduct that has already occurred or imminently will occur. A receiver could be appointed for GDB only after a recommendation by GDB's Board of Directors or the Secretary of the Treasury of Puerto Rico based on certain required findings, and even then the Governor and Secretary of the Treasury are authorized, but not required, to appoint a receiver. See Section 301 of the Moratorium Act, Docket No. 52-1 at 74. Because the findings and/or recommendations required by Section 301(A) of the Moratorium Act have not been made and no receiver has been appointed, any alleged harm based on such appointment is purely speculative. See Sea Shore Corp. v. Sullivan, 158 F.3d 51, 58 (1st Cir. 1998) ("[I]n the present case, redress from the MWMBI's alleged injury depends not only upon a reversal of the district court's decision, but also upon a state agency's decision to enforce a law[.]").

The speculative nature of plaintiffs' claims is evident from the procedural history of this case. Plaintiffs' original Complaint (Docket No. 1) was preemptively filed on April 4, 2016, **before** the Moratorium Act was enacted. Shortly after that enactment, plaintiffs switched defendants and filed a completely different Amended Complaint. Docket No. 52. Conscious of the fact that any receiver appointed pursuant to the Moratorium Act may be an indispensable party, plaintiffs named "John Doe" as a defendant, in his or her official capacity as receiver. Evidently, such an appointment does not yet exist, as the receivership provisions of the Moratorium Act have not been activated or enforced. Plaintiffs seek an order enjoining a non-existing official, who may or may not be appointed, from enforcing certain provisions of a statute that may or may not become operative. To issue declaratory and injunctive relief in these circumstances would amount to an advisory opinion.

Although plaintiffs do not appear to rely upon GDB's partial default as a basis for an injury in fact, it is worth noting that such an argument is not available to them. Plaintiffs entered forbearance and thus do not fall within the category of bondholders whose bonds were defaulted. Docket No. 52 at ¶¶27–28. Moreover, even if GDB had defaulted on their bonds, the appropriate redress would be against GDB, not the appearing defendants, and in state, not federal, court. See Reyes-Garay v. Integrand Assur. Co., 818 F. Supp. 2d 414, 427 (D.P.R. 2011) (concluding "that GDB is an arm of the state for Eleventh Amendment purposes."); GDB Senior Notes, 2012 Series

A, Docket No. 52-5 at 74 ("All Proceedings shall be instituted only in a Commonwealth court located in the Municipality of San Juan, Puerto Rico...").

B. Plaintiffs' challenges to the receivership provisions are also not ripe for resolution.

For similar reasons, plaintiffs' challenges to the receivership provisions are not ripe. "'[R]ipeness has roots in both the Article III case or controversy requirement and in prudential considerations.' The 'basic rationale' of the ripeness inquiry is 'to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 79 (1st Cir. 2013) (alteration in original) (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003)). "When the injury is not actual but threatened, the concepts of standing and ripeness merge. A litigant may lack standing because what has happened to him has not developed into an injury in fact and that is the core of the ripeness doctrine." Phillips Puerto Rico Core, Inc. v. Almodovar, 681 F. Supp. 119, 122 (D.P.R. 1988).

"Determining ripeness requires the evaluation of 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Mangual v. Rotger-Sabat, 317 F.3d at 59 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967)). "The inquiry into fitness is both a constitutional and a prudential one. The constitutional inquiry, grounded in the prohibition against advisory opinions, is one of timing." Id. "The prudential concern is whether resolution of the dispute should be postponed in the name of 'judicial restraint from unnecessary decision of constitutional issues.'" Id. (citation omitted). "By contrast, the inquiry into hardship is wholly prudential." Id. (citation omitted). "Generally, a 'mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.'" Sindicato Puertorriqueno de Trabajadores v. Fortuño, 699 F.3d 1, 9 (1st Cir. 2012) (citation omitted).

Indeed, the Supreme Court has made clear that suits based on a mere possibility of future injury raise serious ripeness concerns. In Poe v. Ullman, 367 U.S. 497 (1961), for example, the Supreme Court refused to consider a constitutional challenge to a Connecticut statute prohibiting the use of contraceptives on the ground that the statute had not been enforced for decades and presented no real threat of enforcement, commenting that courts could not "be umpire to debates concerning harmless, empty shadows," id. at 508. The Supreme Court similarly declined to consider a constitutional challenge to a price regulation of liquefied petroleum gas ("LPG") when the plaintiffs' price for LPG was lower than the maximum rate established by local regulation. Phillips Puerto Rico Core, Inc. v. Almodóvar, 681 F.Supp. 119, 120, 122 (D.P.R. 1988). The Court commented that the plaintiff had suffered no hardship, nor "immediate coercive consequences" because of the regulation, as no prosecution of the plaintiff could occur until he "raises the price for LPG such that it conflicts with the regulation, a highly unlikely event given the present market conditions of low oil prices." Id. at 123.

Plaintiffs' claims present this very problem. They challenge Receivership Provisions that, to date, have not been enforced and may never be enforced. As previously explained, for the Receivership Provisions of the Moratorium Act to be activated, a prior recommendation issued by the Board of Directors of GDB or the Secretary of the Treasury of Puerto Rico is required. See Section 301(A) of the Moratorium Act, Docket No. 52-1 at 74. This recommendation has never been made. To the contrary, part of the purpose of the Moratorium Act, as well as the emergency measures being taken by the Commonwealth of Puerto Rico, is to maximize the liquidity of the GDB and to continue its operations. See Docket No. 52-2 at 2. Although the Moratorium Act modernized some of the receivership provisions of the enabling act of the GDB—which were in place years before plaintiffs purchased their bonds—it did not mandate receivership. Plaintiffs' conclusory allegation that the default by GDB may lead the Governor to place the GDB in receivership (Docket No. 52 at ¶28) is purely speculative. Once again, any judgment regarding the constitutionality of these provisions would be tantamount to an advisory opinion.

Plaintiffs' Takings Claim based on the Receivership Provisions raises additional ripeness concerns. In that claim, plaintiffs allege that the Receivership Provisions may cause a diminution in the value of their bonds by allowing a bridge bank (that the receiver may or may not create) to "cherry-pick" which bonds are assumed by that bank, a classic regulatory takings theory. A regulatory takings claim is not ripe for review until two requirements are satisfied: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue[;]" and (2) "respondent [must] seek compensation through the procedures the State has provided for doing so." Williamson Cnty Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 194 (1985). Unlike the Recovery Act case, where plaintiffs challenged the (putative) direct abrogation of their contractual receivership right, see Franklin California, 85 F. Supp. 3d at 610-11, plaintiffs here challenge a modification to their receivership rights that may or may not be triggered in the future. Plaintiffs have not—and cannot—allege that a receiver has been appointed for GDB, that the Secretary of the Treasury has created a bridge bank, or that plaintiffs are or will be "left-behind GDB creditors." Accordingly, they cannot credibly plead any "final decision regarding the application" of the bridge-bank provision to their own assets. Williamson Cnty, 473 U.S. at 186.

Nor can plaintiffs' challenge to these provisions be cast as a direct Takings claim to evade this ripeness issue. If one characterized plaintiffs' argument as one based on a direct taking of the plaintiffs' supposed "right to be treated on a parity with deposits and other obligations of equal rank," Dkt. 52 ¶ 34(h), that claim would falter at the first step: That putative "right" derives only from unenforceable assertions made in the "Official Statements" in GDB's marketing materials. See id. ¶ 20. The Official Statements neither create, nor purport to create, any contractual rights in the bondholders, but instead state that "[a]ll references to the [bonds] are qualified in their entirety by reference to the definitive forms thereof and the information with respect thereto contained in the Indenture." Dkt. 52, Ex. E, p.8. Absent evidence in the Indenture (or some other enforceable document) of the supposed "right to parity," that right does not rise above the sort of "unilateral expectation" that the Takings Clause does not protect. See Nat'l Educ. Ass'n-Rhode Island ex rel. Scigulinsky v. Ret. Bd. of Rhode Island Employees' Ret. Sys., 172 F.3d 22, 29 (1st Cir. 1999).

C. This Court should abstain from hearing plaintiffs' claims.

Looking past these initial justiciability concerns, plaintiffs' complaint runs into a number of different abstention doctrines "designed to soften the tensions inherent in a system that contemplates parallel judicial processes." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987). Indeed, the constitutionality of the Moratorium Act is a textbook case for application of those abstention doctrines. First, the Act is a law of temporary application designed to give the Commonwealth some breathing room to survive a fiscal emergency and allow it to have sufficient liquidity to safeguard essential services and provide for the health, safety and welfare of the people of Puerto Rico. Second, the statute's driving force is inherently local, and it was enacted pursuant to the police powers of the "sovereign" Commonwealth. See Puerto Rico v. Sánchez Valle, 15-108, 2016 WL 3189527, at *8 (U.S. June 9, 2016); see also P.R. Const. art. II, §19. Finally, the Moratorium Act is a complex law, containing provisions that have not yet been applied or enforced and about whose scope and validity Commonwealth courts have not yet had the chance to pass judgment. For those reasons, abstention is appropriate pursuant to several doctrines outlined below.

1. Pullman abstention is appropriate

Pullman abstention "is warranted where (1) substantial uncertainty exists over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." Batterman v. Leahy, 544 F.3d 370, 373 (1st Cir. 2008).[5] The Pullman doctrine was developed in recognition that "[f]ew public interests have a higher claim upon the discretion of a federal [judge] than the avoidance of needless friction with state policies," whether in the administration of "**a specialized scheme for liquidating embarrassed business enterprises**" or in state court interpretation of state regulatory laws. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (emphasis ours). "Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong." Harris Cnty. Comm'rs Court v. Moore, 420 U.S. 77, 84 (1975); see also Rivera-Feliciano v. Acevedo-Vilá, 438 F.3d 50, 61 (1st Cir. 2006); Carey v. Sugar, 425 U.S. 73, 77-79 (1976).

That doctrine applies with full force here. "[A]bstention is particularly appropriate in a case involving the construction and validity of a statute of the Commonwealth of Puerto Rico." Wackenhut Corp. v. Aponte, 266 F. Supp. 401, 405 (D. P.R. 1966), *aff'd*, 386 U.S. 268 (1967) (per curiam). Puerto Rico "should have the primary opportunity through its courts to determine

[5] A state action need not be pending for the court to apply Pullman abstention. See, e.g., Barr v. Galvin, 626 F.3d 99, 112 (1st Cir. 2010) (staying proceedings under Pullman "pending resolution of the anticipated state-court action").

the intended scope of its own legislation and to pass upon the validity of that legislation under its own constitution as well as under the Constitution of the United States." *Id*. No Commonwealth court has had the opportunity to consider the Moratorium Act—let alone interpret it—and state-court construction of the Act could obviate the need for this Court's review of several of plaintiffs' claims:

First, plaintiffs allege that the Receivership Provisions, as amended, create a preference in favor of Puerto Rico resident institutional bondholders. See Am. Compl. ¶ 34(f). As discussed below, see infra, Part III.G, that alleged preference for in-state interests does not stem from the literal text of the statute. Accordingly, Puerto Rico courts should be afforded a chance to determine the scope of the statute before this Court embarks on a constitutional analysis that may prove wholly unnecessary.

Second, plaintiffs allege that the Act's Receivership Provisions are unconstitutional because they allow a receiver (who has not yet been appointed) to favor some creditors over others by (1) rejecting certain GDB contracts and (2) creating a bridge bank to which the receiver may selectively transfer some assets and liabilities but not others. Id. at ¶¶ 34(e), (g) & (h). Even assuming that plaintiffs have standing and that their allegations are ripe, a Commonwealth court should be allowed to pass judgment on the scope of these provisions before a federal court conducts a constitutional analysis of plaintiffs' claims. The resolution of those local-law issues may very well moot plaintiffs' premature constitutional concerns. See Pullman Co., 312 U.S. at 500 (1941) ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.").

2. Thibodaux and/or Burford abstention are appropriate.

Under the doctrine of Thibodaux abstention, a stay of federal court adjudication is called for when there are "issues 'intimately involved with the States' sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) (quoting Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959)). The related doctrine of Burford abstention is appropriately applied where a case presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or where adjudication in a federal court "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Id. at 726-27 (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)) (internal quotation marks omitted).[6] Adjudication of Plaintiffs' attempts to invalidate the Moratorium Act falls squarely within that rubric.

Through the exercise of the Commonwealth's "inherent and broad powers to legislate for the protection of the general welfare of its citizens," the Moratorium Act "empowers the Governor with narrowly tailored authority, within the bounds of our body of laws and our Constitution, to enable the Commonwealth and its instrumentalities to continue providing essential services to Puerto Rico's residents while addressing the critical need for structural and fiscal reform and debt restructuring." Moratorium Act, Statement of Motives, Section F, Docket No. 52-1 at 54 (citation omitted). As such, the Moratorium Act clearly involves issues intimately tied to Puerto Rico's "sovereign prerogative." City of Thibodaux, 360 U.S. at 28. Moreover, adjudicating the Act's

[6] Neither of these two doctrines requires a pending state proceeding as a prerequisite for its application. See Stoe v. Flaherty, 436 F.3d 209, 213 (3d Cir. 2006) ("[T]he existence of an ongoing state proceeding is not inherent in the nature of abstention. *Burford*, *Pullman*, and *Thibodaux* abstention, as well as other forms of abstention, apply without regard to the existence of an ongoing proceeding.").

constitutionality requires resolution of "unsettled questions of state law." *Id*. The Act (1) was passed into law less than three months ago; (2) most of its provisions have not been invoked or enforced; and (3) it has not been interpreted or tested by the Commonwealth's courts. Plaintiffs' premature lawsuit, which was filed even before the Moratorium Act had been signed into law, asks this Court to speculate about potential applications of the statute and interfere with what is a paradigmatic local and sovereign concern: the Commonwealth's management of its economic affairs during a fiscal emergency. Abstention under Thibodaux is clearly justified in these circumstances.

For similar reasons, Burford abstention is also justified. Plaintiffs complain that the Receivership Provisions potentially allow for unfavorable treatment of certain creditors, but, as discussed infra Part III.G, that interpretation of the Act is not justified by its text: on a careful reading, creditors are treated no less favorably under the Act's Receivership Provisions than they were under the original receivership provisions, which had been in place for decades when plaintiffs purchased their bonds. Given the dispute as to the meaning of the Moratorium Act, this Court should decline plaintiffs' invitation to enjoin its enforcement. Abstention would permit Puerto Rico courts to resolve any issues that arise in the application of the Act and to develop a "coherent policy" with respect to this matter of substantial public concern.

D. In the alternative, the Master Trust Indenture bars all of plaintiffs' claims.

Even if one could get past all of these threshold issues raised by plaintiffs' amended complaint, the complaint would still be barred by the very agreements upon which plaintiffs rely to bring their claims. Plaintiffs allege that GDB has sold approximately $3.75 billion in GDB bonds issued pursuant to a Master Trust Indenture, Supplemental Indentures, Authorizing Resolutions, and Official Statements, as such capitalized terms are defined in the Amended Complaint. See

Docket No. 52 at ¶¶17-21. The Master Trust Indenture dated February 17, 2006, on which plaintiffs rely in support of their Amended Complaint (id. at ¶17), includes an express no-suit clause as follows:

> Section 507. Limitation on Suits. No Securityholder of any Security of any series shall have any right to institute any proceeding, judicial or otherwise, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless (1) such Securityholder has previously given written notice to the Trustee of a continuing Event of Default with respect to Securities of such series; (2) the Securityholders of not less than twenty-five percent (25%) in principal amount of the Outstanding Securities of such series shall have made written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder (3) such Securityholder or Securityholders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request; (4) the Trustee for sixty (60) days after its receipt of such notice, request and offer of indemnity has failed to institute any such proceeding…

Docket No. 52-4 at 56-57. The Authorizing Resolutions relied on by plaintiffs (id. at ¶19), incorporate the same language. See, e.g., Docket No. 52-5 at 59-60. No-action clauses like this one "frequently are included in indentures to limit suits arising from those agreements" and "have been enforced in a variety of contexts in both federal and state courts." McMahon & Co. v. Wherehouse Ent't, Inc., 65 F.3d 1044, 1050 (2d Cir. 1995), cert. denied, 517 U.S. 1190 (citing cases).

Plaintiffs have unquestionably brought suit "with respect to the Indenture" and they have not alleged that these preconditions to filing a lawsuit have been met. In fact, plaintiffs do not even claim that they hold more than 25% of the aggregate principal amount of the notes outstanding for the relevant series, or that they have requested the Trustee[7] in writing to institute proceedings. To the contrary, plaintiffs allege that "on May 5, 2016 the Trustee under the Master Trust Indenture issued a notice of default to GDB." Docket No. 52 at ¶28. To the extent the Trustee is admittedly

[7] As defined in Docket No. 52-4 at 13.

acting pursuant to the Master Trust Indenture, plaintiffs are barred by the Indenture Agreement from bringing their claims. See Friedman v. Chesapeake & Ohio R. Co., 261 F. Supp. 728, 729–30 (S.D.N.Y. 1966), aff'd, 395 F.2d 663 (2d Cir. 1968).

E. Plaintiffs' Amended Complaint also fails to state a cause of action under the Contract Clauses.

Plaintiffs' claims fare no better on their own terms. Plaintiffs first allege that the Moratorium Act violates the Contract Clauses of the Constitutions of the United States and Puerto Rico, U.S. Const. art. I, §10; P.R. Const. art. II, §7, but their claim is foreclosed by decades of precedent.[8] It is by now well settled that the Contract Clause does not prevent a state from safeguarding the welfare of its citizens during economic crisis. See e.g., United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 41 (1st Cir. 2011); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434-35 (1934) (contract clause does not deprive state governments of "adequate authority to secure the peace and good order of society"). To the contrary, states have wide latitude to pursue necessary fiscal measures, even measures that impair contracts. See United Auto., 633 F.3d at 48 ("[S]ince 1934, the Supreme Court has only once—in U.S. Trust Co.—struck down a state law that interfered with a government contract on Contract Clause grounds."). The Contract Clause bars state legislation only when (1) it **substantially** impairs a contractual obligation, and (2) that impairment is not reasonable and necessary to serve an important government purpose. See, e.g., United Auto, 633 F.3d at 41; see also Asociación de Maestros, 190 P.R. Dec. at 869. Plaintiffs can meet neither prong of this test.

[8] Courts have long assumed—without deciding—that the Commonwealth is subject to the Contract Clause of the federal Constitution. See, e.g., Redondo Constr. Corp. v. Izquierdo, 662 F.3d 42, 48 n.3 (1st Cir. 2011); UAW v. Fortuño, 633 F.3d 37, 41 n.3 (1st Cir. 2011); Trinidad v. Commonwealth, 188 D.P.R. 828, 834 (2013) (per curiam). Defendants do not concede that the federal Contract Clause applies to Puerto Rico. But, that question is immaterial for present purposes, as plaintiffs also challenge the Moratorium Act under the Contract Clause of the Puerto Rico Constitution, which "is analogous to the Contract Clause of the United States Constitution." Franklin California, 85 F. Supp. 3d at 603; see also Trinidad, 188 D.P.R. at 834.

1. The Moratorium Act does not impair plaintiffs' alleged contracts and/or any impairment is not substantial.

As an initial matter, plaintiffs bear the burden to establish a substantial impairment of their bonds. See, e.g., El Paso v. Simmons, 379 U.S. 497 (1965) (Texas law shortening the time within a defaulted land claim could be reinstated was not a substantial impairment and thus did not violate Contract Clause). In analyzing the severity of the impairment, relevant considerations include (1) how heavily the plaintiffs relied on the provision that has been altered by legislation, (2) whether that reliance was reasonable, and (3) the damages incurred by the alteration. See, e.g., Allied Structural Steel v. Spannus, 438 U.S. 234, 244-47 (1978). "[T]he expectations of the parties to the alleged contract play an important role in determining the substantiality of the contractual impairment." Mercado-Boneta v. Ins. Com'r of P.R., 125 F.3d 9, 13 (1st Cir. 1997); Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983). In the context of an alleged impairment by a party to the contract, the existence of a remedy for breach-of-contract is also relevant. Redondo Const. Corp. v. Izquierdo, 662 F.3d 42, 48 (1st Cir. 2011). "If a state breaches a contract but does not impair the counterparty's right to recover damages for the breach, the state has not impaired the obligation of the contract." Id. See also Horwitz–Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1996) ("It would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution.").

a. The Stay Provisions

As discussed, the challenged Stay Provisions of the Moratorium Act provide for a temporary stay of actions (until January 31, 2017) against government entities such as GDB and provide that creditors may not terminate contractual relationships with GDB solely for reason of insolvency or the moratorium itself. Moratorium Act, §§ 201(b) & (c). The challenged provisions also authorize the Governor to prescribe certain temporary conditions or restrictions for the conduct or business of the GDB, such as dispensing with minimum reserve requirements (Section 203(b)), and to allow disbursements in the ordinary course, even if the bank is insolvent. The actions taken pursuant to these sections expire at the end of the Covered Period. Moratorium Act, § 203(g), Docket No 52-1 at 72.

None of these provisions amounts to a substantial impairment of GDB's bond obligations. "Impairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it. The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired." Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511 (1942). Thus, for example, the Supreme Court rejected a Contract Clause challenge in Faitoute even where municipal bonds at issue in that case were re-issued at a lower interest rate. Id. And courts around the country have repeatedly upheld moratorium statutes that merely extended the period of time for a debtor to pay but did not "impair the integrity of the … indebtedness." See, e.g., Blaisdell, 290 U.S. at 424–25; Ropico, Inc. v. City of New York, 425 F. Supp. 970, 977 (S.D.N.Y. 1976); Des Moines Joint Stock Land Bank of Des Moines v. Nordholm, 253 N.W. 701, 708 (Iowa 1934); Trompeter & Co. v. Monaco, 125 P.2d 531, 533 (Cal. Ct. App. 1942).

The objective of the Stay Provisions is not to avoid payment, but to provide enough liquidity for the GDB to keep operating and eventually pay its obligations. The provisions do not preclude a damages remedy by plaintiffs against GDB, or reduce in any way the principal or interest due on their bonds. To the contrary, GDB bonds continue accruing interest during the covered period. Moratorium Act, § 202(a), Docket No 52-1 at 69-70. And plaintiffs' ability to sue as a result of payment default by GDB remains intact after that period: the statute of limitations is tolled, and the doctrine of laches suspended for delay caused by the moratorium. In contrast with the characteristics of the Recovery Act that gave this Court concern, the Moratorium Act does not "permit[] the reduction of principal owed on [the] bonds," "affect[] *secured* bonds," or "permit[] modifications to debt obligations beyond the extension of maturity dates and adjustment of interest rates." See Franklin California, 85 F. Supp. 3d at 606. Instead, it is "beneficent" to creditors: it does no more than permit a temporary delay in payment on bonds to allow the government time to get its financial house in order so that it can make those payments in the future. See Faitoute, 316 U.S. at 507, 515-16. Plaintiffs cannot establish a substantial impairment of their obligations based on a mere extension of time for payment. See id.; City of El Paso v. Simmons, 379 U.S. 497, 515 (1965) ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.").

Nor can plaintiffs establish a substantial impairment based on Section 105, which immunizes individuals from liability for certain actions taken in connection with the Act, including fund transfers approved by government entities. *See* Am. Compl. ¶ 44a. That provision does not preclude suit on the bonds after the moratorium period or alter bondholders' rights in receivership. *See* Am. Compl. Ex. A, §§ 204, 205, 301. It is well established that "[t]he Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation," so long as it does "not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as to seriously impair the value of the right." Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co., 300 U.S. 124, 128 (1937). Indeed, a remedy "existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away." Id. To the extent individual liability for preferential transfers could be considered a bondholder "remedy," its abrogation falls squarely within that rule. See id.

b. The Receivership Provisions

Plaintiffs' challenges to the Receivership Provisions fare no better. As explained, at the moment there is no receivership in place for the GDB, and there may never be. One of the purposes behind the Stay Provisions is to avoid receivership and maximize value for all of GDB's creditors, including plaintiffs. See Faitoute, 316 U.S. at 513 ("[I]n view of the slump of the credit of the City of Asbury Park before the adoption of the plan now assailed, appellants' bonds had little value; the new bonds issued under the plan, however, are not in default and there is a very substantial market for them."). But assuming for the sake of argument that plaintiffs' challenge to these provisions is ripe for adjudication, that challenge would fail. GDB's Enabling Act included provisions for the liquidation of GDB's assets after the appointment of a receiver long before plaintiffs purchased the subject bonds, 7 P.R. Laws Ann. §559, and none of the changes to those provisions substantially alters the obligation of the bonds. See Richmond Mortg., 300 U.S. at 131.

As an initial matter, plaintiffs' challenges to the Receivership Provisions are challenges to the modification of a contractual remedy, not the elimination of it. See Blaisdell, 290 U.S. at 430 ("Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."). Long before the Moratorium Act, the GDB Act authorized—in the event of GDB's insolvency—the appointment of an equitable receiver to "take possession of the assets and liabilities, books . . . , records, papers and files" of the Bank, "collect all loans, fees and claims of the Bank," and "see to the payment of its obligations and debts and of the necessary expenditures of the receivership." 7 L.P.R.A. § 559 (2014). The Moratorium Act maintains receivership as a remedy, but moves from a receivership whose powers are largely fleshed out by the common law to a statutorily-defined receivership, see generally Am. Compl., Ex. A, § 301, and authorizes the receiver "to organize and charter a temporary bank to be referred to as a bridge bank to assist the receiver in fulfilling its powers and duties." Id. § 401.

Many of the changes plaintiffs highlight have no impact on creditors' rights. For example, the new receiver is granted broad powers under the Act, Am. Compl. ¶ 44a; id. Ex. A, § 301, just as he would have been at common law. See John M. Tanner, Equitable Receivership As An Alternative to Bankruptcy, 40 Colo. Law. Rev. 41, 46 (2011) (discussing broad common law powers of receiver). The receiver's power to reject contracts or leases under the Act, see Am. Compl. ¶ 44a, is consistent with a receiver's power to do so under the common law. Clark, Foley, & Shaw, Adoption and Rejection of Contracts and Leases By Receivers, 46 Harv. L. Rev. 1111, 1112 (1933). And Section 301's limitation of liability for the Bank and receiver to the liquidation value of particular claims reflects the reality that the bondholders would not have been able to obtain more if GDB were liquidated instead of placed in receivership, a possibility expressly contemplated by the Indenture Agreement. *See* Am. Compl., Ex. D, §§ 501, 504.

Moreover, the new provisions actually render the receivership provision *more* creditor-friendly than the original receivership provision. For example, Section 301 of the Moratorium Act expressly provides that "[e]ach person having a claim against the Bank or against the receivership shall, in no event, receive in payments and/or property less than the amount the creditor would have been entitled to receive if the Bank had been liquidated on the date of the appointment of the receiver." Docket No. 52-1 at 77. In other words, in the event of a receivership pursuant to the Moratorium Act, creditors of the GDB stand to receive no less than they would have received in liquidation under the GDB Enabling Act. Bondholders would have had no such protection under the previous remedy, where the distribution would have been subject to the broad equitable discretion of the receiver and court. Cf. Tanner, 40 Colo. Law. Rev. at 46. Bondholders can hardly claim a substantial impairment of their bonds based on modifications to the receivership remedy that leave them as well or better off than they would have been absent the Moratorium Act—particularly when they also maintain the right to sue upon their bonds after the Stated Maturities and expiration of the moratorium period. See Richmond Mortg., 300 U.S. at 131.

Section 302, which authorizes the receiver to accept or reject contracts, also provides protection for creditors. Assuming for the sake of argument that the Master Trust Indenture and additional bond documents on which plaintiffs support their claims are the sort of contracts subject to rejection by a receiver (which is denied), rejection of said contracts would not harm plaintiffs. Section 302 of the Moratorium Act provides that "[t]he liability of the receivership for the disaffirmance or repudiation of any contract pursuant to subsection (B) shall be (1) limited to actual direct compensatory damages; and (2) determined as of the date of the appointment of the receiver." See Docket No. 52-1 at 79. In the case of plaintiffs' bonds, direct compensatory damages would amount to the value of their claim as of the date of the appointment of a receiver. Plaintiffs therefore would not only suffer no harm from repudiation of their bonds, but would be in a better position than other creditors in the liquidation. This power does not impair plaintiffs' contracts in any substantial way.

Plaintiffs next allege that Section 302, as amended by Act 40-2016, provides a preference in favor of Puerto Rico resident institutional bondholders over non-resident bondholders. But as explained in the context of plaintiffs' Commerce Clause claim, no such preference or priority is found in the text of the Act.[9] To the contrary, the Act's priority provision expressly places in the

[9] Notably, not only is there not such preference in the literal text of the Act, but at present depositors of GDB are subject to the provisions of the Moratorium Act in the same way as bondholders. This Court can take judicial notice of the consolidated cases of Municipio Autónomo de Carolina v. BGF, Civil No. SJ 2016CV00091, and Municipio Autónomo de San Juan v. BGF, Civil No. SJ 2016CV00102, pending before the Superior Court of San Juan, where

same tier "[a]ny unpaid balance of money held by the Bank in its depository accounts for the credit of a depositor (including amounts owed for any reason to depository institutions) and any other [unsubordinated] general or senior liability of the Bank." Act 40, § 302, Art. 12(A)(4). Plaintiffs can establish no impairment, let alone substantial impairment, from a provision that accords all depositors and bondholders equal priority in the event of a receivership.

2. Any impairment caused by the Moratorium Act is reasonable and necessary to serve an important government purpose.

Assuming arguendo that plaintiffs could show substantial impairment, plaintiffs would still be unable to show that such impairment violates the Contract Clause. As already discussed, the Contract Clause does not prevent the state from appropriate exercise of its police power. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) ("[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States."); Manigault v. Springs, 199 U.S. 473, 480 (1905) (This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."). To the contrary, states are entitled to enact reasonable and necessary measures to serve important governmental purposes. See, e.g., United Auto, 633 F.3d at 41. And they are entitled to "meaningful deference" as to their determinations that such measures are justified. Id. at 44; Loc. Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass., 666 F.2d 618, 643 (1st Cir. 1981) ("[W]here economic or social legislation is at issue, some deference to the legislature's judgment is surely called for."). See also Asociación de Maestros v. Sistema de Retiro, 190 P.R. Dec. 854, 868 and 870 (2014) (not every impairment

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the Municipalities of Carolina and San Juan have filed suit requesting an injunction and mandamus ordering the transfer or disbursement of certain deposits held at GDB and subject to the provisions of the Moratorium Act.

of a contractual obligation is unconstitutional and the legislature's judgment is entitled to some deference). "[W]here plaintiffs sue a state—or in this case the Commonwealth of Puerto Rico—challenging the state's impairment of a contract to which it is a party, the plaintiffs bear the burden on the reasonable/necessary prong of the Contract Clause analysis," United Auto, 633 F.3d at 42, and plaintiffs cannot meet that burden.

The Moratorium Act plainly addresses a legitimate governmental purpose. As the Act itself explains, "the Government of Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." See Moratorium Act, Statement of Motives, Section A, Docket No. 52-1 at 50. Therefore, "the Commonwealth needs tools to exercise its police powers in order to protect the health, safety and welfare of the people of Puerto Rico." Id. These statements are entitled to deference and are supported by the undisputed public record of Puerto Rico's current fiscal crisis. Indeed, a few months ago this Court concluded that the Commonwealth is "insolvent" and in the midst of a financial crisis that has "metastasized into a deep humanitarian crisis requiring immediate action." Wal-Mart Puerto Rico, Inc., 2016 WL 1183091 at *1 and *9. There can be no doubt that having enough liquidity to provide essential services is a legitimate, important, and compelling government purpose.

The Moratorium Act is also a reasonable and necessary response to the fiscal crisis facing the Commonwealth. The Act does not relieve GDB of its obligations, nor permit GDB to discharge any debt. It simply declares a moratorium in payment and stays litigation during the Covered Period. And it limits the Covered Period to less than one year, thus encouraging expeditious efforts to reform Puerto Rico's financial system.

Courts have repeatedly upheld such measures against Contract Clause challenges. In Blaisdell, for example, the Supreme Court upheld a mortgage moratorium law in Minnesota as a reasonable and necessary response during the Great Depression. The Supreme Court explained that the law (1) was an emergency measure; (2) directed toward protecting a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency. Blaisdell, 290 U.S. at 444-47; see also United Auto, 633 F.3d at 46 (citing Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 n. 11 (1983) and Blaisdell). And in Ropico, a federal district court upheld the New York State Emergency Moratorium Act for the City of New York, which, among other things, suspended payment of principal on notes coming due in 1975 and 1976 for three years and reduced the interest rate after maturity. The court recognized the fiscal crisis facing New York City and found the reasoning of Blaisdell "directly controlling." Id. at 977. A fortiori, Puerto Rico's Moratorium Act, which stays action on plaintiffs' bonds for less time than the New York Moratorium and leaves interest intact, is a reasonable and necessary response to Puerto Rico's dire fiscal situation that does not offend the Contract Clause.

Plaintiffs' only argument to the contrary is that the Commonwealth could have pursued other alternatives to the Act. See Dkt. 52 ¶ 47. But, plaintiffs' proposed alternatives are either more drastic than the Act or not really alternatives at all. For example, placing GDB into a receivership, id. at ¶¶ 47a, 47e, 47f, would result in the wind down of the bank, necessarily reducing the value that bondholders might obtain on their bonds and inflicting financial upheaval on the Commonwealth. The appropriation of funds from Commonwealth instrumentalities, id. at ¶ 47b, is a purely illusory option: those instrumentalities are themselves in crisis, Dkt. 52, Ex. A, Part F, and have been subjected to litigation from their own bondholders on the limited occasions that the Government has been able to direct funds from their revenue streams to Commonwealth debt. See, e.g., Ambac Assurance Corporation v. Puerto Rico Highways and Transportation Authority, No. 16-1893 (D. P.R.). Finally, plaintiffs' conclusory assertions that the Commonwealth could simply fund essential services "from other funds" or from sums obtained through negotiations with bondholders of other instrumentalities, Dkt. 52 ¶¶ 47c-47d, is pure speculation that fails to take into account the breadth of the Commonwealth's financial crisis. For all of these reasons, Plaintiffs' Contract Clause claims should be dismissed. See United Auto, 633 F.3d at 45-47.

F. Plaintiffs' Amended Complaint also fails to state a cause of action under the Takings Clause.

Plaintiffs also allege that the new receivership and bridge bank provisions violate the Takings Clause of the federal Constitution—which provides that "private property [shall not] be taken for public use, without just compensation," U.S. Const. amend. V, and applies to Puerto Rico, Fideicomiso de la Tierra del Caño Martin Peña v. Fortuño, 604 F.3d 7, 12 (1st Cir. 2010)—and the "substantially identical" Takings Clause of the Puerto Rico Constitution, P.R. Const. art. II, § 9. Plaintiffs' claims under the Puerto Rico Takings Clause fail for the same reason their federal Takings claim fails and will not be treated separately.

As explained above, plaintiffs' complaint is best analyzed as presenting only a regulatory takings claim. See supra Part. III.B (explaining that plaintiffs cannot state a direct takings claim based on a putative "right" found only in unenforceable official marketing statements). A regulatory takings claim occurs when government regulation proves to be "so onerous that its effect is tantamount to a direct appropriation or ouster." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005); see also Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Arenas Procesadas, Inc. v. E.L.A., 132 P.R. Dec. 593, 603 (1993). Courts are hesitant to find this standard met, as the Takings Clause is not a means for federal courts to second-guess the legislature's choices about the best mechanisms to achieve what are undeniably public policy goals. Fideicomiso, 604 F.3d at 19. Regulatory takings are therefore analyzed under the "nuanced, three-pronged inquiry" outlined in Penn Central. Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 153 (1st Cir. 2012); see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002) (temporary moratorium on all development is "best analyzed within the Penn Central framework"). Plaintiffs cannot state a claim under that test, as they have identified no property interest that has been taken, have failed entirely to address the Penn Central factors, and have shown no denial of just compensation.

1. Plaintiffs lack a property interest subject to taking

As an initial matter, the contractual rights upon which plaintiffs base their Takings claim are not "property" within the meaning of the Takings Clause. Parella v. Ret. Bd. of Rhode Island Employees' Ret. System, 173 F.3d 46, 58 (1st Cir. 1999) ("[P]laintiffs must first establish an independent property right before they can argue that the state has taken that right without just compensation."). Courts have long distinguished between contractual rights to obtain payment on a debt—which are protected by the Contract Clause—and rights to particular property acquired through a contract—which are protected by the Takings Clause. See United States v. Security Industrial Bank, 459 U.S. 70, 75 (1982) (The "property right of the ... creditor in the collateral" is "quite different in legal contemplation" from the "contractual right of [the same] secured creditor to obtain repayment of his debt."); Peick v. Pension Ben. Guar. Corp., 724 F.2d 1247, 1276 (7th Cir. 1983) ("While the [Security Industrial Bank] Court noted that the 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple,' it clearly viewed that 'bundle' as being sufficiently identified with specific property that it merited the protection of the takings clause even if the simple contractual right of a creditor to be repaid would not."). Here, plaintiffs allege "takings" of only contractual rights. See Am. Compl. ¶¶ 34(f) (alleging that the creation of a bridge bank, and lack of assurance that their bonds would be transferred to that bridge bank, works a taking); 55 (alleging that amendments to Receivership Provisions work a taking). As such, plaintiffs cannot state a claim under the Takings Clause.

2. The Moratorium Act does not effectuate a taking of any cognizable property interest.

Assuming that plaintiffs possessed a cognizable property interest, they still would not be able to make out a Takings Claim. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). Except where a given regulation compels a property owner to suffer a physical invasion of his property or destroys all economically beneficial or productive use of land, Lucas, 505 U.S., at 1015-16, courts will find a regulatory taking only after conducting the "nuanced, three-pronged inquiry" outlined in *Penn Central*—examining (1) "the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations," (2) the "economic impact on the property owner," and (3) "the character of the government action." Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 153 (1st Cir. 2012); Franklin Memorial Hosp. v. Harvey, 575 F.3d 121, 126–27 (1st Cir. 2009). Plaintiffs have not even attempted to make out a Takings Clause claim under these factors, but it is clear in any event that they could not do so.

As an initial matter, none of the challenged provisions of the Moratorium Act interfere with any reasonable investment-backed expectations of the plaintiffs. Both bondholders and banks operate in a highly-regulated industry, significantly reducing any expectations that their bonds would not be subject to additional regulation. Cioppa, 695 F.3d at 154 (citing Philip Morris, Inc. v. Reilly, 312 F.3d 24, 36 (1st Cir. 2002)) (recognizing that "expectations are substantially diminished" in highly regulated industries); see also Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (no reasonable investment backed expectation that property interest would not be subject to future regulation given "the heavily regulated nature of the healthcare industry"). And plaintiff bondholders in particular invested in the bonds during a recession, well aware of the possibility of default and of regulation to avoid such default. See Texaco Puerto Rico, Inc. v. Ocasio Rodríguez, 749 F. Supp. 348, 371-72 (D.P.R. 1990) ("It would be impossible, therefore, to find that the current regulation interferes with investments in a way that was anything but wholly foreseeable. Those who chose to invest in this market are or should be fully aware that price regulation is a part of the investment climate."). The GDB Act itself contemplated liquidation and receivership and provided for by-law amendment by the Board of Directors (Section 2), legislative amendments to the Banking Law (*id.*), and other legislative actions affecting GDB (Section 19). The Stay and Receivership Provisions of the Act cannot be said to have interfered with any reasonable investment-backed expectations.[10]

Nor have the challenged provisions had any significant economic impact on the bondholders. The Stay Provisions of the Moratorium Act do not affect the value of plaintiffs' claims, but only stay collection on those claims for a few months while interest continues to accrue. The Receivership Provisions could have no economic impact on the plaintiffs unless and until a receiver is appointed, which may never occur. Plaintiffs can muster no "concrete evidence" of

[10] For the same reasons explained in Section II(D)(1)(b), supra, to the extent the Receivership Provisions provide any priority of payment in favor of depositors vis-a-vis bondholders, plaintiffs do not have a reasonable investment-backed expectation that a receivership procedure involving GDB would not be subject to such a priority scheme, given that similar statutory schemes regarding the liquidation of banks have been commonly used and constitutionally validated in the past.

impairment in the value of their bonds from the mere passage of these provisions. Cioppa, 695 F.3d at 157.

The nature of the Moratorium Act also weighs against finding a regulatory taking. See Cioppa, 695 F.3d at 157 (noting that a taking will be less readily found "when the interference arises from some public program adjusting the burdens and benefits of economic life to promote the common good"). The fiscal emergency faced by the Commonwealth and GDB is beyond dispute: "[T]he Government of Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." Docket No. 52-1 at 50. The Moratorium Act serves the important purpose of maintaining the Government afloat in order to continue providing essential services without extinguishing core property rights of creditors. The Stay Provisions do not extinguish any rights of recovery but merely stay their enforcement for a relatively brief period of time. See Andrus v. Allard, 444 U.S. 51, 65-66 ("At least where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). And the Receivership Provisions merely provide for a liquidation scenario in which creditors would not receive less than what they would have received under the original receivership provisions of GDB's Enabling Act. See Docket No. 52-1 at 77. As one court recognized when faced with similar moratorium legislation, "Even if this legislation provides for a taking of some contractual rights of the plaintiffs, given the pressing public emergency which the legislature found, such a limited taking of plaintiffs' rights without compensation or judicial review is a permissible exercise of the state's police power." Ropico, Inc., 425 F. Supp. at 977.

To the extent that plaintiffs challenge the Receivership Provisions on the ground that the amendments in Law 40 "allow[] the preferential treatment of creditors of equal rank," Am. Compl.

¶ 44(a); id. at ¶ 34, that allegation is based on a misreading of Law 40. As discussed below, Law 40 amended Section 302 more explicitly to cover depository institutions within Puerto Rico, without excluding non-Puerto Rico institutions from the same. See infra, Part III.G. That amendment did not constitute a Taking and, even if it did, plaintiffs—who are bondholders rather than depositors—would lack standing to challenge it. See id.

Because plaintiffs have not alleged sufficient facts to establish a regulatory taking, plaintiffs' takings claims should be dismissed. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 315 (1st Cir. 2005) ("Given the absence of a full-scale taking and the presence of a traditional regulatory interest, it is enough to defeat the takings claim that no reasonable investment-backed expectation is present at all.").

3. Plaintiffs have not been deprived of Just Compensation

Even if this Court were to conclude that the Moratorium Act works a taking, the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985). The requirement of "just compensation" necessitates that a party "be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." Brown v. Leg. Found. of Washington, 538 U.S. 216, 236 (2003) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

"[A]ny pecuniary compensation must be measured by [plaintiff's] net losses rather than the value of the government's gain." Brown, 538 U.S. at 237. But, in the instant cases, bondholders will not ultimately suffer any losses as a result of the Moratorium Act's Stay Provisions: the Act does not reduce the principal paid by creditors and allows interest to accrue during the period when payments are delayed. See Moratorium Act, §§ F-5, 203(b)-(d), 204(a). Likewise, the Act's

Receivership Provisions will not cause plaintiffs any uncompensated loss: Under those provisions, plaintiffs are entitled to receive no less "than the amount the creditor would have been entitled to receive if the Bank had been liquidated on the date of the appointment of the receiver," Docket No. 52-1 at 77, which is as much as any creditor could have expected to receive in a liquidation scenario under the original GDB Enabling Act.

As a matter of law and logic, "if [a party's] net loss [i]s zero, the compensation due is also zero." Id.; see also Garcia-Rubiera v. Fortuño, 752 F. Supp. 2d 180, 188-89 (D.P.R. 2010) (plaintiff not entitled to any compensation where government took possession of excess car insurance premium payments but "[p]laintiff's property rights over the duplicate premiums remain[ed] unaltered" and "[p]laintiffs have seven years to request full reimbursement"), overruled on other grounds, 665 F.3d 261 (1st Cir. 2011); Scheehle v. Justices of Supreme Court of Arizona, 508 F.3d 887, 893 n.6 (9th Cir. 2007) (attorney not entitled to just compensation for being required to serve as an arbitrator because just compensation is based on the property owner's loss and not on any benefit to the government). Accordingly, even assuming *arguendo* that the challenged portions of the Act work a taking, plaintiffs' Takings claim fails because they cannot plead the deprivation of just compensation.

G. Plaintiffs' Amended Complaint fails to state a cause of action under the Commerce Clause.

Plaintiffs next allege that the Moratorium Act violates the Commerce Clause of the Constitution of the United States, U.S. Const. art. I, §8, cl. 3, by "facially discriminat[ing] against interstate commerce." Dkt. 52 ¶¶ 34(b), 57-60. The dormant or negative aspect of the Commerce Clause prohibits states or local governments from enacting "discriminatory" legislation that provides for "differential treatment of in-state and out-of-state economic interests." Dep't of Rev. of Ky. v. Davis, 128 S.Ct. 1801, 1808 (2008); United Haulers Ass'n v. Oneida Herkimer Solid

Waste Mgmt. Auth., 127 S.Ct. 1786, 1793 (2007). Because "Puerto Rico is subject to the strictures of the dormant Commerce Clause in regard to both interstate and foreign commerce, it follows that "Puerto Rico generally may not enact policies that discriminate against out-of-state commerce." Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 327 (1st Cir. 2012). While a State or Territorial law may violate the dormant Commerce Clause by discriminating against out-of-state interests "in effect," see Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007), plaintiffs' only claim under the dormant Commerce Clause is that the challenged portions of the Moratorium Act facially discriminate against out-of-state interests. See Dkt. 52 ¶¶ 3, 4(c), 33, 36, 44, 44(b), 46, 58. "The burden to show discrimination rests on the party challenging the validity of the statute." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

Plaintiffs primarily rest their allegations of facial discrimination on Law 40's amendments to the fourth tier of priority established by Section 302, which now covers "[a]ny unpaid balance of money held by the Bank in its depository accounts for the credit of a depositor (including amounts owed for any reason to depository institutions) and any other [unsubordinated] general or senior liability of the Bank." Act 40, § 302, Art. 12(A)(4). Because a "Depository Institution" is defined to cover "[b]anks and cooperating savings and credit associations (state chartered credit unions) operating in Puerto Rico," id. §§ 103(kk), 302 Art. 12(A)(4), plaintiffs contend that Section 302 "provides that debts owed to 'depository institutions,' defined as Puerto Rico resident institutional holders of GDB bonds, should be preferred over debts owed to non-resident holders of GDB bonds of equal rank, even of the same series." Dkt. 52 ¶ 34(f).

That contention does violence to Section 302's amended text, in two respects. First, whatever distinctions it may create among depositors, Section 302 places "amounts owed for any reason to depository institutions" on equal footing with "any other general or senior liability of the bank." Act 40, § 302, Art. 12(A)(4). As they concede, Plaintiff bondholders fall into that latter category. See Official Statement, Senior Notes 2012 Series A, at 6, Doc. 52-5 at 15 ("The 2012 Series A Notes, the outstanding notes previously issued under the Indenture, and any additional notes that Government Development Bank may from time to time issue under the Indenture . . . are general, unsecured, senior obligations of Government Development Bank, ranking on a parity with all other general, unsecured and unsubordinated obligations of Government Development Bank."); see also Am. Compl. ¶¶ 20, 22. For that reason, plaintiffs lack cause and standing to object to any purported discrimination among depository institutions based on geography. See Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

Second, even if plaintiffs had standing to challenge any geographic subordination on behalf of non-Puerto Rican depositors, Section 302 works no such subordination. Instead, Law 40's clarification that "depositors" accorded fourth priority "includ[e] . . . depository institutions" merely makes explicit what was already implicit in the Moratorium Act. That is, even before Law 40, the Act separately defined "[d]epositor" to include "any person, or authorized representative thereof, who is the primary or beneficial owner of any account containing deposits held by the Bank." Moratorium Act, § 103(o). Moreover, it has always defined "[p]erson" to include "any natural person or legal entity." Id. at 103(bb). For that reason, the Moratorium Act would accord fourth (and equal) priority to all depositors—both inside and outside Puerto Rico—even if it provided no definition whatsoever for the term "depository institution." In short, Section 302 does not facially discriminate against non-Puerto Rican institutions.

To the extent that plaintiffs broadly sweep each of the other challenged provisions of the Moratorium Act into their dormant Commerce Clause claim without elaboration, see Dkt. 52 ¶ 58, they have failed to satisfy their pleading burden, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555.[11]

H. The Moratorium Act is not preempted by federal law.

Plaintiffs' federal preemption claim is equally unavailing. Rather, plaintiffs' contentions that challenged portions of the Moratorium Act are preempted by the Bankruptcy Clause and by Section 903(1) of the Bankruptcy Code, Am. Compl. ¶ 62, fly in the face of two centuries of Bankruptcy law and ignore the statutory text of Section 903(1).

1. The Bankruptcy Clause Does Not Preempt The Moratorium Act.

At the broadest level, plaintiffs allege that the Bankruptcy Clause of the federal Constitution and the federal Bankruptcy Code preempt the entire field of restructuring. See Dkt. 52, at ¶¶ 3, 62. This Court has already considered and rejected that argument in the Recovery Act case. See Franklin California, 85 F. Supp. 3d at 602. That decision is fully consistent with the Supreme Court's instruction, stretching back to the earliest days of the Republic, that there is no "dormant Bankruptcy Clause" that precludes States and Territories from enacting their own laws governing the restructuring of debts. See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-97 (1819); see generally Stephen J. Lubben, Puerto Rico & The Bankruptcy Clause, 88 Am. Bankr. L.J. 553, 563-68 (2014). Rather, State and territorial bankruptcy laws are "suspended only to the extent of actual conflict with the

[11] It is unclear whether plaintiffs intend to challenge the receivership provisions of the Moratorium Act—in particular those involving the creation of a "bridge bank"—as theoretically susceptible of being used by GDB to discriminate in favor of in-state creditor. See Am. Compl. ¶34(h). To the extent plaintiffs attempt such an argument, it fails: none of the provisions they pinpoint makes any distinction between in-state and out out-of-state creditors. In any event, plaintiffs lack standing to bring such a challenge: because the bridge bank has not yet been created and GDB has not yet indicated which funds will be transferred to the bridge bank, any potential harm to plaintiffs is purely speculative. See supra Part. III.A.

system provided by the Bankruptcy Act of Congress," Stellwagen v. Clum, 245 U.S. 605, 613 (1918), or to the extent inconsistent with another provision of the Constitution, see Franklin California, 85 F. Supp. 3d at 602.

For that reason, the mere allegation that the Act vests a potential GDB receiver with powers "tracking powers the Bankruptcy Code grants to a trustee or debtor-in-possession and exceeding in many respect the powers the Bankruptcy Code grants to a government instrumentality debtor under Chapter 9," Dkt. 52 ¶ 45, is neither here nor there. As a Puerto Rico institution, GDB is concededly ineligible to take advantage of Chapter 9. See 11 U.S.C. §109(c)(2); 11 U.S.C. § 101(52). Where the Code excludes entities — like banks and insurance companies — from reorganizing, the Supreme Court has long held that state law may provide its own mechanism to fill that gap. See, e.g., 11 U.S.C. § 109(b) & (d) (excluding banks and insurance companies from Chapters 7 and 11); Neblett v. Carpenter, 305 U.S. 297, 303-05 (1938) (upholding state statute governing rehabilitation of an insurance company); Doty v. Love, 295 U.S. 64, 70-74 (1935) (upholding state statute governing reorganization of a bank). Indeed, the vast majority of States and Territories have enacted their own restructuring regimes governing banks and insurance companies. See, e.g., La. Stat. Ann. §§ 6:391 to 6:401 (banks); Nev. Rev. Stat. §§ 667.035 to 667.205 (banks); Guam Code Ann. §§ 106401-404 (banks); Conn. Gen. Stat. §§ 38a-903 to 38a-965 (insurance companies); Idaho Code §§ 41-3301 to 41-3360 (insurance companies); V.I. Code Ann. tit. 22, §§ 1251-86 (insurance companies). The background rule, thus, is that States and Territories may fill in gaps left by the federal Bankruptcy Code, at least insofar as their laws do not conflict with the Code. See, e.g., In re Cash Currency Exch., Inc., 762 F.2d 542, 552 (7th Cir. 1985); In re Bankers Trust Co., 566 F.2d 1281, 1288 (5th Cir. 1978); Israel-British Bank (London)

Ltd. v. FDIC, 536 F.2d 509, 514 (2d Cir. 1976); In re Equity Funding Corp. of Am., 396 F. Supp. 1266, 1275 (C.D. Cal. 1975).

2. Section 903(1) Does Not Preempt the Moratorium Act.

Over and above their "dormant Bankruptcy Clause" claim, plaintiffs allege that the challenged provisions of the Moratorium Act are preempted by Section 903(1) of the Bankruptcy Code. See Dkt. 52 ¶ 40. That provision provides as follows:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—
>
> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

11 U.S.C. §903.

Section 903(1)'s preemptive effect is limited to "a State law prescribing a method of composition of indebtedness of [a] municipality." 11 U.S.C. §903(1). Accordingly, to the extent plaintiffs challenge the Moratorium as applied to the Commonwealth's own debt, Section 903(1) is simply inapposite: Section 903(1) says nothing about a State's management of its **own** finances. See 11 U.S.C. §101(40) (defining "municipality" as a "political subdivision or public agency or instrumentality of a State."). Indeed, because States are ineligible to restructure under Chapter 9, see 11 U.S.C. §109(c)(1), there is no reason to to think that Chapter 9 has any effect on state-law attempts to restructure state's debts. Any contrary result would raise serious questions about the constitutionality of Section 903. See United States v. Bekins, 304 U.S. 27, 51 (1938) (discussing the precursor to Section 903(1)) ("The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs.").

Plaintiffs' preemption argument is no more availing with respect to GDB. To succeed in their preemption claims, plaintiffs would have to establish that the relevant provisions of the Moratorium Act (1) prescribe a method of composition (2) of a municipality. Their argument fails in both respects: nothing in the Moratorium Act establishes a method of composition of debt and GDB is not a "municipality" for purposes of Section 903(1).

The Moratorium Act is unrelated to any "composition of indebtedness." A law works a "composition" only when it provides for a discharge of debt, under which creditors receive "less than their full claims in full satisfaction of their claims." Black's Law Dictionary 346 (10th ed. 2014); see also Black's Law Dictionary 381 (3d ed. 1933); Franklin, 85 F. Supp. at 597 (defining a "composition" as an "agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount"); Fed. Deposit Ins. Corp. v. Juron, 713 F. Supp. 1116, 1120 (N.D. Ill. 1989) ("A composition is an agreement between a debtor and several of his creditors in which the creditors agree to accept payment of a sum less than the debts owing to them in full settlement of their respective claims."); Richard E. Coulson, Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge, 62 Alb. L. Rev. 467, 487 (1998) (describing the "common law composition," under which "the agreement of the other creditors to take less than owed was the consideration for each creditor's releasing the debtor for less than payment in full."). By the same token, a mere extension of time for payment is not a composition. See Perry v. Commerce Loan Co., 383 U.S. 392, 398 (1966) (distinguishing "[e]xtension plans" from "wager-earner plans by way of composition" because the latter "contemplate only a partial payment of the wage earner's debts" while "under an extension plan, the wage earner who makes the required payments will have paid his debts in full and will not need a discharge"); In re Mayorga, 355 F.2d 89, 90 (9th Cir. 1966) ("Mayorga did not propose a composition of his debts by partial payment, but a payment of his debts in full during a three year extension of time for paying them."); Heldstab v. Equitable Life Assur. Soc. of U.S., 91 F.2d 655, 658-59 (10th Cir. 1937) ("Composition by creditors with their debtor in bankruptcy is an agreement between them that the latter will pay down and the former will accept a named per cent of their claims in full satisfaction. … An extension proposal is an agreement on the part of the creditors that they will extend the time within which their claims are probably to be paid, in full as to secured creditors...").

Yet, a mere extension of time over which to repay GDB's debts is all the Moratorium Act entails: It explicitly "does not provide for a composition or discharge of debts," but preserves "all claims and priorities" for payment "at the end of any moratorium period to the extent permitted by otherwise applicable law." Moratorium Act at F-5; see also id. § 204(a) ("[N]othing in this Act shall be construed to limit the rights of a holder to any collateral, security interest, or lien that secures such obligation, and nothing in this Act authorizes any government entity to compromise any obligation over the objection of a creditor."). What is more, the Act ensures that deposits within GDB continue to accrue interest during any moratorium, id. § 202(a), and provides for "adequate protection" to be accorded to creditors "to the extent required by applicable constitutional law" to prevent diminution of value "resulting from actions taken or not taken in furtherance of this Act," id. § 203(b)-(d). The Southern District of New York properly rejected an analogous challenge to New York's moratorium law under the substantively identical precursor to Section 903(1). See Ropico, 425 F. Supp. at 978. The same result is appropriate here.

In any event, even if the Moratorium Act worked a composition, GDB is not a "municipality" under Section 903(1). The Bankruptcy Code identifies only three types of public entities as "municipalities": political subdivisions, public agencies, and instrumentalities of the State. 11 U.S.C. § 101(40). The GDB is clearly not a political subdivision, such as a county or city. Nor is it the type of public utility or service provider considered to be a "public agency" under the Code. See, e.g., In re Greene Cty. Hosp., 59 B.R. 388, 390 (S.D. Miss. 1986) (county hospital is a public agency); In re Westport Transit Dist., 165 B.R. 93, 95-96 (Bankr. D. Conn. 1994) (public transit service is a public agency); In re Cty. of Orange, 183 B.R. at 602 (comingled investment pool not a public agency). And though "instrumentality of the State" lacks a "unique or canonical meaning" under the Code, In re Las Vegas Monorail Co., 429 B.R. 770, 777 (Bankr. D. Nev. 2010), it is clear from the context that the term cannot be interpreted so broadly as to include the State itself or other arms of government. See In re N. Mariana Islands Ret. Fund, 2012 WL 8654317, at *3 (D. N. Mar. I. June 13, 2012) (distinguishing the term "instrumentality" as it is used to define "governmental units" from its use in defining municipality). As the GDB is an arm of the Commonwealth, see Reyes-Garay v. Integrand Assur. Co., 818 F. Supp. 2d 414, 427 (D.P.R. 2011), it must fall outside the Bankruptcy Code's definition of municipality.

I. Plaintiffs do not have a constitutional right to sue GDB in federal court

Finally, plaintiffs allege—without pointing to any particular constitutional authority—that the challenged provisions of the Moratorium Act are unconstitutional because they prohibit plaintiffs from filing suit in federal court. *See* Dkt. 52 ¶¶ 35(d)-(e), 36; Moratorium Act §§ 201; 201(c). As an initial matter, plaintiffs' access-to-federal court claims are too vague and amorphous to establish a plausible claim for relief under the standard of pleading set forth in Iqbal and Twombly, supra. In any event, the right alleged by plaintiffs simply does not exist.

"The constitutionally-protected right of access to the courts is narrow in scope," Boivin v. Black, 225 F.3d 36, 42 (1st Cir. 2000), and is limited to vindicating "fundamental constitutional rights" under certain defined constitutional provisions not at issue here. Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Christopher v. Harbury, 536 U.S. 403, 415 n. 12 (2002) (collecting cases). In the instant case, the Moratorium Act does nothing to bar plaintiffs from mounting a constitutional challenge to the Moratorium Act—which plaintiffs have attempted to do, without merit, in this federal action. Rather, the Act's stay on suits to recovery covered obligations from the Commonwealth and GDB during the moratorium stays only claims that threaten the public fisc. See Moratorium Act § 201(b). But, that bar does nothing more than invoke the Commonwealth's and GDB's sovereign immunity. See Torres-Alamo v. Puerto Rico, 502 F.3d 20, 24 (1st Cir. 2007) (Puerto Rico "enjoys the shelter of the Eleventh Amendment in all respects"); Reyes-Garay v. Integrand Assur. Co., 818 F. Supp. 2d 414, 427 (D.P.R. 2011) (concluding "that GDB is an arm of the state for Eleventh Amendment purposes."). Because "[t]he Eleventh Amendment's primary concern is to minimize federal courts' involvement in disbursal of the state fisc," Puerto Rico is shielded from suit "when the action is in essence one for the recovery of money from the state." Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935, 939 (1st Cir. 1993).

In any event, as a contractual matter, plaintiffs never had a right to pursue a collections action in federal court. Instead, they expressly agreed that any collection action would only be filed in Commonwealth court. See GDB Senior Notes, 2012 Series A, Docket No. 52-5 at 74 ("All Proceedings shall be instituted only in a Commonwealth court located in the Municipality of San Juan, Puerto Rico for the equal benefit of all Beneficial Owners of the outstanding Notes benefited by the Covenants, and no remedy shall be sought or granted other than specific performance of any of the Covenants at issue."). In short, quite apart from any bar imposed by the Moratorium Act, plaintiffs are constitutionally and contractually precluded from filing a collections action against GDB or the Commonwealth in federal court.[12]

WHEREFORE, the appearing defendants respectfully request that the Court dismiss plaintiffs' Amended Complaint or abstain from hearing this case pursuant to the abstention doctrines outlined above.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 7th day of July, 2016.

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[12] Plaintiffs' argument that Section 105 of the Act, which provides certain immunities to government officials, unconstitutionally abridges their right to access federal courts fails on related grounds. Dkt. 52 ¶¶ 35(a), 65. "The right of access to court cannot, of course, be equated with a right to be free of all substantive legal obstacles to particular forms of recovery: substantive defenses **and immunities to a claim may be recognized by the state without a constitutional violation**." Laurence H. Tribe, American Constitutional Law 755 (2nd Ed. 1988) (emphasis added); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 660 (1st Cir. 1997) ("[W]hile there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief.").

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