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

SCOTIABANK DE PUERTO RICO et al.,

Plaintiffs,

v.

ALEJANDRO GARCÍA PADILLA et al.,

Defendants.

CIVIL NO. 16-2736 (FAB)

MOTION TO DISMISS

TO THE HONORABLE COURT:

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

I. INTRODUCTION

This is yet another post-PROMESA[1] collection action dressed as a constitutional claim. Plaintiff Scotiabank de Puerto Rico ("Scotiabank") is allegedly the original party to a loan agreement executed with co-defendant the Metropolitan Bus Authority ("AMA," for its acronym in Spanish) on March 30, 2012 (as amended, the "Loan Agreement" or the "AMA Loan"). Dkt. No. 4 at ¶ 3. Plaintiff Bank of Nova Scotia ("BNS") allegedly paid to Scotiabank the amounts owed by AMA under the Loan Agreement and became subrogated to Scotiabank's rights under

[1] "PROMESA" is the acronym for the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq., enacted on June 30, 2016.

the Loan Agreement. Id. at ¶ 6.[2] Plaintiffs allege that the Loan Agreement is secured by an assignment of a tax imposed by the Commonwealth of Puerto Rico (the "Commonwealth") on the sale of cigarettes (the "Cigarette Tax"). Id. at ¶ 4.

Plaintiffs claim that, through Executive Order 2016-30 ("EO 30"), which was issued pursuant to the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, PR Act No. 21-2016 ("Act 21")—a Commonwealth statute enacted before PROMESA to deal with the current financial crisis—the Governor suspended payment of AMA's debt obligations, including payment of the AMA Loan, as well as the Commonwealth's obligation to transfer the Cigarette Tax revenues to AMA for the repayment of said loan. Id. at ¶ 8. Plaintiffs allege that these actions have impaired plaintiffs contractual and property rights with respect to the Cigarette Tax revenues, in violation of the Constitutions of the United States and Puerto Rico, as well as PROMESA itself. Id. at ¶¶ 9-12.

In particular, plaintiffs have requested that the Court declare: (1) that the Commonwealth's actions violate § 204(c)(3) of PROMESA; (2) that Act 21[3] and EO 30 (the "challenged provisions") are preempted by PROMESA and the Bankruptcy Code; (3) that the challenged provisions violate the Contracts Clause of the United States and Puerto Rico Constitutions; (4) that the challenged provisions violate the Takings and Due Process Clauses of the U.S. Constitution.

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[2] From the text of the amended complaint it is unclear whether plaintiffs obtained the necessary or required consents in order for Scotiabank to assign its rights under the Loan Agreement to BNS. It is also unclear how, if BNS allegedly became subrogated to all of Scotiabank's rights under the Loan Agreement, both parties could simultaneously have standing to file suit. Given that this standing issue may depend on documents outside the record or not in the possession of defendants, the appearing defendants reserve the right to raise standing issues after discovery or further investigation of the facts, should plaintiffs' amended complaint survive this motion to dismiss.

[3] Although not clear from the causes of action included in the amended complaint, plaintiffs appear to challenge §201 of Act 21, which empowers the Governor to issue executive orders declaring a temporary moratorium of certain government obligations. See Dkt. No. 4 at ¶ 38.

As argued in the "Notice of Automatic Stay" filed at Dkt. No. 13, incorporated herein by reference, plaintiffs' amended complaint should be completely stayed pursuant to § 405(b) of PROMESA or this Court's inherent power to manage is docket. As discussed below, even if PROMESA does not mandate that this case be stayed in whole or in part, this action should be nonetheless temporarily stayed pursuant to the doctrine of judicial restraint or constitutional avoidance.

In the alternative, plaintiffs' claims fail and should be dismissed. First, § 204(c)(3) of PROMESA is not a source of private rights enforceable by plaintiffs. Second, the challenged provisions mandate a temporary stay or extension in the payment of certain government obligations and not the settlement, compromise or discharge of debts. Hence, they are not a preempted method of composition, do not impair plaintiffs' rights and are not preempted by PROMESA or the Bankruptcy Code.

Third, since the challenged provisions preserve all of plaintiffs' rights under the Loan Agreement and merely temporarily delay the exercise of these rights, the relevant contract is not impaired. Finally, and for similar reasons, plaintiffs cannot state a Takings or Due Process claim, given that no property is being taken and plaintiffs will not lose value during the brief stay or moratorium period, which is set to expire within a month and a half.

II. ARGUMENT

A. 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).

B. This Court should stay this litigation in accordance with the principle of constitutional avoidance.

The question of whether this case should be temporarily stayed in whole or in part pursuant to section 405 of PROMESA is currently pending before this Court. See Dkt. Nos. 13 and 18, incorporated herein by reference. On November 16, 2016 the Court entered an order considering the "Notice of Automatic Stay" filed by defendants as a motion. Dkt. No. 16. The time for plaintiffs to oppose said motion has expired. Hence, this Court should deem Dkt. No. 13 as unopposed and declare that this action is stayed by PROMESA and/or this Court's inherent power to manage its docket.

This motion is being filed as a preventive measure and in compliance with this Court's Order at Dkt. No. 19. Even if the case is not entirely stayed pursuant to PROMESA (which is denied), the appearing defendants respectfully submit that the Court should apply its inherent power to stay pending litigation, Marquis v. F.D.I.C., 965 F.2d 1148, 1154 (1st Cir. 1992), and stay this action as a whole in order to comply with the principle of constitutional avoidance.

"A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988). In prior related litigation involving PROMESA and the constitutionality of Act 21, this Court "recognize[d] that it is also bound by '[t]he principle of constitutional avoidance, rooted in Article III as well as in principles of judicial restraint.' Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 510 (1st Cir. 2011)." Brigade Leveraged Capital Structures Fund Ltd. v. García Padilla, CV 16-1610 (FAB) 2016 WL 6747846 at *15 (D.P.R. Nov. 15, 2016).

In Brigade, this Court opined that "the passage of PROMESA and the establishment of the Oversight Board creates the distinct possibility that any ruling by the Court regarding the constitutionality of the Moratorium Act and its related Executive Orders will become moot." Id. at *16. The Court explained that "[b]ecause PROMESA's provisions and action by the Oversight Board are capable of 'eliminat[ing]'—'or at the very least materially reshap[ing]'—the constitutional issues presented in these consolidated actions, it is unnecessary and premature for the Court to pass judgment on those issues at this time. See Sony BMG Music Entm't, 660 F.3d at 511 (1st Cir. 2011)." Id. In light of this possibility, this Court exercised judicial restraint and declined to vacate the automatic stay in place in Brigade. For the same reasons, this Court should exercise its inherent powers and temporarily stay this litigation pending further action by the Oversight Board, even if the automatic stay provisions in PROMESA do not apply in whole or in part.

Even though AMA allegedly defaulted on the AMA Loan in December of 2015 (Dkt. No. 4 at ¶ 31), plaintiffs filed their amended complaint in this case on October 17, 2016, halfway through the PROMESA stay period, after the appointment of the Oversight Board and just a few months before the expiration of the "Covered Period" under Act 21, which would expire on January 31, 2017. Act 21, § 103(m).[4] As a practical matter, by the time plaintiffs oppose this motion and the issue is fully briefed it may already have become moot for a number of reasons.

First, upon the expiration the "Covered Period" provided by Act 21 (currently January 31, 2017), there would be no legal obstacle for plaintiffs to pursue a collection action against AMA, subject of course to the applicability of the PROMESA stay either under Title IV of the Act or after the commencement of debt adjustment proceedings under Title III. It simply makes no practical sense for the Court to reach a determination regarding the constitutionality of government action that would expire on its own terms within a month and a half, especially when plaintiffs could have commenced a collection action against AMA before Act 21 or PROMESA were even enacted.

[4] The "Covered Period" as defined in Act 21 may be extended for two months through executive order of the Governor. Id.

Second, currently the Oversight Board stands ready to work with the Commonwealth to certify a revised fiscal plan under PROMESA by January 31, 2017.[5] As reasoned by this Court in Brigade, such a fiscal plan could supplement, modify or even do away with the challenged provisions of EO 30. It would be an exercise in futility to pass judgment on the constitutionality of an Executive Order that may not be in place even before the Court enters final judgment.

Third, allowing this action to move forward while other creditor litigation is stayed would not only run against the principle of judicial restraint but could hinder action by the Oversight Board in negotiations with other creditors and the potential voluntary restructuring of claims. As explained in the "Notice of Automatic Stay" filed at Dkt. No. 13, incorporated herein by reference, plaintiffs in this case allege that they have a security interest in Cigarette Tax revenues, while the plaintiffs in the case of Lex Claims, LLC v. García Padilla, Civil No. 16-2374, who are general obligations ("GO") bondholders, claim to have a "first lien" and priority over all Commonwealth expenditures. See Case No. 16-2374, Docket No. 78 at ¶ 5. The interplay between these and other claims requires a consolidated and comprehensive approach by the Oversight Board. See 48 U.S.C. §2194(m)(4). The premature (and futile) dismantling of state statutory provisions may hurt this process rather than aid it, by giving plaintiffs in this case an advantage over other creditors whose claims remain stayed. The doctrine of judicial restraint or constitutional avoidance counsels against addressing constitutional issues that may not only become moot within a month's time, but may actually get in the way of the purpose behind the very same statute on which plaintiffs rely in support of some of their claims.

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[5] See Nov. 23, 2016 Letter from Oversight Board Chairman to Governor García Padilla, at 3-4, available at https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/583c7b9086b20.pdf.

C. Plaintiffs lack an enforceable right of action pursuant to § 204(c)(3) of PROMESA

Section 204(c)(3)(A) of PROMESA provides as follows:

> During the period after a territory becomes a covered territory and prior to the appointment of all members and the Chair of the Oversight Board, such covered territory shall not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory as of the date of enactment of this Act, provided that any executive or legislative action authorizing the movement of funds or assets during this time period may be subject to review and rescission by the Oversight Board upon appointment of the Oversight Board's full membership.

Plaintiffs allege that EO 30, which was issued by the Governor of Puerto Rico on the same day PROMESA was enacted, allegedly permits the transfer of funds "outside the ordinary course of business" by allowing the Commonwealth to use Cigarette Tax revenues for uses other than the repayment of the AMA Loan, in violation of § 204(c)(3) of PROMESA. See Dkt. No. 4 at ¶ 56.

Plaintiffs' amended complaint seeks declaratory and injunctive relief pursuant to § 204(c)(3) of PROMESA, 42 U.S.C. § 1983 (the Civil Rights Act); and 28 U.S.C. § 2201(a) (the Declaratory Judgment Act). Id. at ¶¶ 1, 22 and 23. It is well settled that "Section 1983 does not create any independent substantive rights..." but "merely provides remedies for deprivations of rights that are enshrined elsewhere." Cardona Román v. University of Puerto Rico, 799 F. Supp. 2d 120, 131 (D.P.R. 2011) (citing Albright v. Oliver, 510 U.S. 266 (1994); Cruz–Erazo v. Rivera–Montañez, 212 F.3d 617 (1st Cir. 2000); Oklahoma City v. Tuttle, 471 U.S. 808 (1985)). The same is true of the Declaratory Judgment Act. See Akins v. Penobscot Nation, 130 F.3d 482, 490 n. 9 (1st Cir. 1997); Colonial Penn Group, Inc. v. Colonial Deposit Co., 834 F.2d 229, 232 (1st Cir. 1987) (Declaratory Judgment Act does not create a substantive cause of action). Hence, plaintiffs' source of federal rights must derive from § 204(c)(3) of PROMESA. However, this statutory provision is not the source of a private right enforceable by plaintiffs.

"Even when a federal statute does not explicitly provide for a private remedy, two different paths may be available to individuals seeking to enforce their rights under the provision. The statute may either include an implied right of action under the provision itself or be enforceable through a cause of action brought under 42 U.S.C. § 1983." Colón-Marrero v. Vélez, 813 F.3d 1, 15 (1st Cir. 2016). "The inquiries to determine whether such paths exist are similar and begin with the same question: did Congress intend to create a federal right?" Id. (citing Gonzaga University v. Doe, 536 U.S. 273, 283 (2002)).

An individual seeking to sue under an implied right of action "must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" Id. (quoting Gonzaga, 536 U.S. at 284, in turn quoting Alexander v. Sandoval, 532 U.S. 275, 286, (2001)). On the other hand, a plaintiff suing under § 1983 generally relies on that section to supply "a remedy for the vindication of rights secured by federal statutes." Id.; Gonzaga, 536 U.S. at 284.

"In order to seek redress through § 1983... a plaintiff must assert the violation of a federal **right**, not merely a violation of federal **law**." Blessing v. Freestone, 520 U.S. 329, 340 (1997) (emphasis modified). In Blessing, the Supreme Court considered three factors when determining whether such an enforceable federal right exists: 1) "**Congress must have intended that the provision in question benefit the plaintiff**", 2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence", and 3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms". Id. at 340-41 (emphasis added).

In Gonzaga, the Supreme Court disavowed certain liberal interpretations of Blessing which "allow[ed] plaintiffs to enforce a statute under s 1983 so long as the plaintiff f[ell] within the general zone of interest that the statute [was] intended to protect; something less that what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action." Gonzaga, 536 U.S. at 283. The Court specifically and categorically rejected "the notion that our cases permit anything short of an **unambiguously conferred right** to support a cause of action under § 1983." Id. (emphasis added). The Court explained that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id. (emphasis in original). Hence, the Court's implied right of action cases "should guide the determination of whether a statute confers rights enforceable under § 1983." Id.

Under Gonzaga, then, "[f]or a statute to create such private rights, **its text must be 'phrased in terms of the persons benefited**.'" Id. (quoting Cannon v. University of Chicago, 441 U.S. 677, 692 n. 13 (1979)) (emphasis added). In other words, individual rights will only be created when a statute is written "with an unmistakable focus on the benefited class." Id. (emphasis modified). "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." Id. at 286.

While the text of § 204(c)(3) of PROMESA may restrict certain actions of the Commonwealth after the enactment of the Act and while an Oversight Board is operational, it clearly does not create any new individual rights in favor of creditors of the Commonwealth such as plaintiffs. Section 204(c)(3)(A) of PROMESA specifically states that certain legislative action at odds with that provision "may be subject to review and rescission **by the Oversight Board upon appointment of the Oversight Board's full membership**." (Emphasis added.) Section 204(c)(3)(B) of PROMESA specifically grants the Oversight Board certain rescission powers "[u]pon appointment of the Oversight Board's full membership."[6] The statute clearly involves a grant of authority to the Oversight Board, not individual rights enforceable by plaintiffs.

At present, the Oversight Board is operational, has retained professional advisers,[7] is holding near-daily calls with the Commonwealth and its advisers, and has held three public meetings, the most recent of which took place in Puerto Rico on November 21, 2016. Moreover, the Board and its counsel have made requests for and received numerous updates on financial information from Commonwealth officials and advisers.[8] At the request of the Oversight Board the Commonwealth is working to submit to the Oversight Board alternate scenarios to the ones contained in the fiscal plan presented on October 14, 2016, and the Oversight Board stands ready to work with the Commonwealth to certify a revised fiscal plan by January 31, 2017.[9] Finally, the Oversight Board has made public its intention to invite the Commonwealth's creditors to negotiate the terms of restructuring after December 15. Id. In these circumstances, the question of whether EO 30 allows for the transfer of any funds or assets "outside the ordinary course of business" or whether it is subject to "rescission by the Oversight Board" (PROMESA, § 204(c)(3)) is a determination for the appointed Oversight Board to make in the exercise of its authority pursuant to PROMESA and the current status quo; it is not the basis for an individual cause of action enforceable by a creditor of the Commonwealth or its instrumentalities.

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6 It is unclear whether exercise by the Oversight Board of any power to rescind Puerto Rico legislative action would withstand constitutional scrutiny. However, such question is not before this Court. The appearing defendants reserve all their rights and defenses in this regard.

7 The Oversight Board has retained Proskauer Rose LLP as lead outside legal counsel, O'Neill & Borges LLC as outside legal counsel, and McKinsey & Co. as strategic consultant. The Board also has an outstanding request for proposals (RFPs) for firms interested in providing services to the Board as Financial Advisor. Dec. 4, 2015 Release, *available at* https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/58458a6838c56.pdf.

8 See the Oversight Board's Motion to Intervene filed in Case No. 16-2374, Dkt. No. 62 at 14.

9 See Nov. 23, 2016 Letter from Oversight Board Chairman to Governor García Padilla, at 3-4, available at https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/583c7b9086b20.pdf.

In order to establish whether a statute intends to benefit the plaintiff in such a way as to confer an enforceable right, the plaintiff must do more than show that it "is an intended beneficiary of the statute or 'within the general zone of interest that the statute is intended to protect.'" Colón-Marrero, 813 F.3d at 17. "Rather, 'the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.'" Id. (quoting City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 120 (2005)).

Section 204(c)(3) of PROMESA does not contain "rights creating language" and does not identify a "discrete class of beneficiaries." Long Term Care Pharm. All. v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004). This statutory provision does not speak of persons benefitted, whether creditors of the Commonwealth or otherwise, but instead authorizes the Oversight Board to take certain actions. When a statutory provision "focuses instead upon the state as 'the person regulated rather than individuals protected,'" such focus suggests "no 'intent to confer rights on a particular class of persons.'" Id. (quoting Sandoval, 532 U.S. at 289). Section 204(c)(3) of PROMESA attempts to place certain temporary restrictions on Commonwealth actions before the appointment of an Oversight Board. See PROMESA § 204(c)(3) (applicable "[d]uring the period after a territory becomes a covered territory and prior to the appointment of all members and the Chair of the Oversight Board"). Evidently, the purpose of these provisions is to regulate certain Commonwealth actions through the Oversight Board, not to create rights enforceable by plaintiffs.

The language of the statute serves to bolster this point. Section 204(c)(3) literally grants the Oversight Board the authority to rescind legislative action by the Commonwealth. Regardless of the constitutionality of such grant of power on a federally created entity, it is evident that Congress could not have intended to grant a private party with interests adverse to the Commonwealth the authority to rescind legislative action.

Further, when Congress wanted to create privately enforceable rights under PROMESA, it expressly did so. For example, § 407 of PROMESA creates a cause of action in favor of creditors and against transferees of property "of any territorial instrumentality of Puerto Rico [that] is transferred in violation of applicable law under which any creditor has a valid pledge of, security interest in, or lien on..." See PROMESA, § 407(a). Unlike § 204(c)(3) of PROMESA, this section specifically speaks about creditors as a discrete class of beneficiaries. It also provides a specific remedy before this Court. See PROMESA, § 407(b) ("A creditor may enforce rights under this section by bringing an action in the United States District Court for the District of Puerto Rico after the expiration or lifting of the stay of section 405, unless a stay under title III is in effect."). Had Congress wanted to provide creditors with an enforceable right and a remedy for violation of § 204(c)(3), it could have easily done so, as in the case of § 407.

Section 407 of PROMESA provides an affirmative remedy in favor of creditors for any alleged illegal transfers made by the Commonwealth or its instrumentalities. However, § 407 is expressly subject to the automatic stay provided by § 405 of PROMESA. See PROMESA, § 407(b). Plaintiff's exclusive reliance on § 204(c)(3) of PROMESA is clearly an attempt to sidestep the PROMESA stay and preemptively enjoin the Commonwealth from taking certain emergency measures while the Oversight Board fulfills the task for which it was created. Such a result is at odds with the purpose behind section 405 of PROMESA. See PROMESA § 405(n)(2) (the stay "allow[s] the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits.").

D. Act 21 and EO 30 are not preempted by § 303(1) of PROMESA or § 903(1) of the Bankruptcy Code.

Plaintiff alleges that Act 21 and EO 30 are in conflict with and preempted by § 303(1) of PROMESA, 48 U.S.C. § 2163(1), and by §903(1) of the Bankruptcy Code, 11 U.S.C. § 903(1), because they prescribe a preempted "method of composition" or otherwise restructure or impair plaintiff's rights. See Dkt. No. 4 at ¶¶ 57-58, 62-64. Act 21 and EO 30 simply stay the payment of the AMA Loan for an additional month and a half from the filing of this motion and expressly preserve all of plaintiff's rights under the AMA Loan. Hence, they are clearly not preempted by PROMESA or the Bankruptcy Code.

Section 903(1) of the Bankruptcy Code 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—
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> (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

11 U.S.C. §903.

On the other hand, § 303(1) of PROMESA provides as follows:

> Subject to the limitations set forth in subchapters I and II of this chapter, this subchapter does not limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers of the territory or territorial instrumentality, including expenditures for such exercise, but whether or not a case has been or can be commenced under this subchapter—
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> (1) a territory law prescribing a method of composition of indebtedness or a moratorium law, but solely to the extent that it prohibits the payment of principal or interest by an entity not described in section 109(b)(2) of Title 11, may not bind any creditor of a covered territory or any covered territorial instrumentality thereof that does not consent to the composition or moratorium;

48 U.S.C. § 2163. Clearly, § 303(1) of PROMESA was modelled after § 903(1) of the Bankruptcy Code. Hence, to the extent Act 21 and EO 30 do not prescribe a "method of composition of indebtedness," they are not preempted either by PROMESA or the Bankruptcy Code.[10] Likewise, to the extent EO 30 does not alter, amend or modify plaintiff's rights, but merely temporarily stays their exercise for a brief period of time, it is not preempted by PROMESA.

1. Act 21 and EO 30 do not prescribe a "method of composition of indebtedness."

Act 21 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 California Tax-Free Trust v. Puerto Rico, 85 F. Supp. 3d 577, 597 (D.P.R. 2015), aff'd, 805 F.3d 322 (1st Cir. 2015), aff'd, 579 U.S. __ (2016). (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

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[10] Section 303(1) of PROMESA addresses the potential interplay between PROMESA and a moratorium law, "but solely to the extent that it prohibits the payment of principal or interest by an entity not described in section 109(b)(2) of Title 11." 48 U.S.C. § 2163(1). In its amended complaint, plaintiff specifically alleges that "Plaintiffs do not seek repayment of any debt obligations with this action." Dkt. No. 4 at ¶50. Hence, by plaintiff's own admission, this provision of § 303(1) of PROMESA is not at issue in this action.

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 the debts of the Commonwealth and its entities, including AMA, is all that Act 21 entails. Act 21 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." Act 21 Statement of Motives, Section F; 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 AMA's alleged debt to plaintiffs will 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 has properly rejected an analogous challenge to a moratorium law enacted by the State of New York under the substantively identical precursor to Section 903(1). See Ropico, Inc. v. City of New York, 425 F.Supp. 970, 982 (E.D.N.Y.1976) (explaining that "a composition is a present settlement and an extension is a moratorium, and that the two are entirely distinct and separate. If the proposal is to reduce debts, it is a composition; if the proposal is merely to postpone payment, it is an extension...."). The same result is appropriate here.

This Court has recently held that executive orders that defer payment of government obligations, in order to address Puerto Rico's ongoing fiscal crisis, do not constitute a preempted "method of composition." In Financial Guaranty Insurance Co. v. García Padilla, CV 16-1095 (FAB) 2016 WL 5794715 (D.P.R. Oct. 4, 2016), this Court passed judgment over a challenge to certain executive orders issued in 2015, on similar preemption grounds. In particular, the plaintiffs in Financial Guaranty challenged Executive Order ("EO") 2015-46, which temporarily "'retained assigned revenue' (*i.e.* 'clawed back' previously allocated funds) from Commonwealth agencies." Id. at *3. The retained or "clawed back" revenues expressly included the Cigarette Tax revenues at issue in this case. See EO 2015-46 at 3.[11]

In holding that EO 2015-46 was not preempted by § 903(1) of the Bankruptcy Code this Court "adopt[ed] the interpretation espoused in the holding of Ropico in which the district court recognized that extensions differ from compositions. This decision is consistent with the Court's recent preemption analysis in Franklin [supra]." Financial Guaranty, 2016 WL 5794715 at *7. The Court concluded that because the challenged statutes and executive orders did not "relieve or

[11] http://estado.pr.gov/es/ordenes-ejecutivas/

reduce the Commonwealth's obligation to pay the debt owed on the bonds in full, no composition of debt has occurred. Accordingly, these documents are not expressly preempted state laws that prescribe a method of composition of municipal indebtedness in violation of Section 903." Id. at *9.

The holding in Financial Guaranty is equally applicable in this case. Like the challenged executive order in that action, which temporarily retained the Cigarette Tax revenues, EO 30 temporarily suspends the transfer of the Cigarette Tax revenues and the payment of debt obligations of AMA, including the AMA Loan, until the expiration of the "Covered Period," which pursuant to Act 21 lasts until January 31, 2017. See EO 30 at 4; Act 21, § 103(m) ("'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.").

Act 21 protects the value of plaintiffs' claim during the "Covered Period," requiring that AMA's obligation accrue interest at the contractual rate and, to the extent it comes due during the emergency period, be paid at the end of that period. See Act 21, § 202. Act 21 also protects "the rights of a holder to any collateral, security interest or lien that secures" an obligation that "was otherwise due or became due before or during an emergency period" and "becomes payable at the end of the covered period as a result of this Act." Id. § 204(a). All that Act 21 does is temporarily defer payment of the AMA Loan until January 31, 2017, for an additional month and a half. Act 21 and EO 30 clearly involve the temporary deferral or extension of a payment due, not its release, settlement or restructuring. Since Act 21 and EO 30 clearly do not prescribe a "method of composition" of AMA's debt with plaintiff, they are not preempted by PROMESA or the Bankruptcy Code.

E. Plaintiffs' amended complaint fails to state a cause of action under the Contract Clauses.

Plaintiffs allege that Act 21 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.[12] 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 v. Sistema de Retiro, 190 P.R. Dec. 854, 869 (2014). Plaintiffs can meet neither prong of this test.

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[12] 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. Act 21 does not impair the AMA Loan and/or any impairment is not substantial.

As an initial matter, plaintiffs bear the burden to establish a substantial impairment of the relevant contract. 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.").

Act 21 provides for a temporary stay of actions (until January 31, 2017) against government entities such as AMA and allows the Governor to temporarily suspend the payment of certain obligations for the same time period. Act 21, §§ 201(a) & (b). Act 21 does not discharge any obligations or permanently foreclose any remedies, and even provides for the accrual of interest during the "Covered Period." Id., § 202(a). EO 30 suspended the payment of AMA's obligations, including the AMA Loan, until January 31, 2017. At the end of this period (unless extended for only two more months by the Governor), plaintiff will be able to pursue any and all available remedies against AMA and the Cigarette Tax revenues provided as a source of repayment of the AMA Loan will be available pursuant to the relevant statutory provisions.

Neither Act 21 nor its application to AMA through EO 30 amount to a substantial impairment of plaintiffs' rights under the AMA Loan. "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 Act 21 and EO 30 is not to avoid payment, but to provide enough liquidity for the Commonwealth and AMA, among other government entities, to keep operating and eventually pay their obligations. Neither Act 21 nor EO 30 preclude a damages remedy by plaintiffs against AMA, nor reduce in any way the principal or interest due on the relevant loan. To the contrary, the loan will continue accruing interest during the covered period. Act 21, § 202(a). In contrast with the characteristics of the Recovery Act that gave this Court concern in

Franklin, Act 21 does not "permit[] the reduction of principal owed on [obligations]" 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 obligations 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.").

2. Any impairment caused by Act 21 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 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.

Act 21 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 Act 21, Statement of Motives, Section A. 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. v. Zaragoza Gómez, 174 F.Supp.3d 585, 592 and 602 (D.P.R. 2016) aff'd, 834 F.3d 110 (1st Cir. 2016).

In enacting PROMESA and its provision of a temporary stay similar to the one contained in Act 21, Congress made the following findings, among others:

> (1) A combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico.

> (2) As a result of its fiscal emergency, the Government of Puerto Rico has been unable to provide its citizens with effective services.
> (3) The current fiscal emergency has also affected the long-term economic stability of Puerto Rico by contributing to the accelerated outmigration of residents and businesses.
> (4) A comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.
> (5) Additionally, an immediate--but temporary--stay is essential to stabilize the region for the purposes of resolving this territorial crisis.

48 U.S.C. §2194(m). There can be no doubt that having enough liquidity to provide essential services in a time of a fiscal emergency is a legitimate, important, and compelling government purpose.

Act 21 is also a reasonable and necessary response to the fiscal emergency facing the Commonwealth. The Act does not relieve AMA of its obligations, nor permit AMA 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 Act 21, which stays action on plaintiffs' claims for less time than the New York Moratorium and leaves principal and interest intact, is a reasonable and necessary response to Puerto Rico's dire fiscal situation that does not offend the Contract Clause.

F. Plaintiffs' amended complaint fails to state a cause of action under the Takings Clause and Due Process Clauses.

Plaintiffs allege that the temporary suspension of AMA's payment obligations through Act 21 and EO 30 violates 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). They also claim that Act 21 and EO 30 deprive plaintiffs of their property without due process in violation of the U.S. Constitution. To the extent plaintiffs are attempting to make a substantive due process claim, such claim is subsumed by their takings claim. See Graham v. Connor, 490 U.S. 386, 395 (1989); Parella v. Ret. Bd. of Rhode Island Employees' Ret. Sys., 173 F.3d 46, 58 (1st Cir. 1999); S. Cty. Sand & Gravel Co. v. Town of S. Kingstown, 160 F.3d 834, 835 (1st Cir. 1998) ("Because SCS's lament, at bottom, is a garden-variety regulatory takings claim, the Takings Clause, not substantive due process, would seem to supply the proper decisional framework."). In other words, to the extent plaintiffs' takings claim fails, so does any claim for an alleged violation of substantive due process rights.

Plaintiffs' fifth cause of action can only be characterized as a regulatory takings claim, since neither Act 21 nor EO 30 involve the physical or direct appropriation of plaintiffs' property by the government. 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). 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 the "taking" of a contractual right to payment. See Dkt. No. 4 at ¶ 75. 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 Act 21 interfere with any reasonable investment-backed expectations of the plaintiffs. As alleged by plaintiffs themselves, the source of repayment of the AMA Loan, the Cigarette Tax revenues, is heavily regulated and its availability is conditioned by statute and the Constitution of Puerto Rico. See Dkt. No. 1 at ¶ 28 (explaining, among other issues, the interplay between the Cigarette Tax revenues allocated to AMA and the public debt priority provisions of the PR Constitution). The fact that the sources of funds available for the repayment of the AMA Loan is subordinated to the payment of public debt and other government obligations significantly reduces any expectations that the availability of these funds 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 Scotiabank loaned funds to AMA in 2012 (Dkt. No. 4 at ¶ 26) in the midst of a recession and an already looming government-wide fiscal crisis, 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 brief moratorium in the payment of the AMA Loan effected by Act 21 and EO 30 cannot be said to have interfered with any reasonable investment-backed expectations.

Nor have the challenged provisions had any significant economic impact on plaintiffs' loan. Act 21 and EO 30 do not affect the value of plaintiffs' claims, but only stay collection on those claims for a few months while interest continues to accrue. Plaintiffs can muster no "concrete evidence" of impairment in the value of their claims from the mere passage of these provisions. Cioppa, 695 F.3d at 157.

The nature of the Act 21 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 is beyond dispute. See 48 U.S.C. §2194(m); Wal-Mart Puerto Rico, Inc., 174 F.Supp.3d at 592. Act 21 serves the important purpose of maintaining the Government afloat in order to continue providing essential services without extinguishing core property rights of creditors. Act 21 and EO 30 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."). As one court recognized when faced with similar moratorium legislation, "[e]ven 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.

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 Act 21 works a taking (which is denied), 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 [plaintiffs'] net losses rather than the value of the government's gain." Brown, 538 U.S. at 237. But, in this case, plaintiffs will not ultimately suffer any losses as a result of the temporary moratorium in the payment of the AMA Loan and the stay of their collection claim: the act does not reduce the principal owed and allows interest to accrue during the period when payments are delayed. See Act 21, §§ F-5, 203(b)-(d), 204(a).

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

Act 21 and EO 30 work a taking, plaintiffs' Takings claim fails because they cannot plead the deprivation of just compensation.

WHEREFORE, the appearing defendants respectfully request that this Court stay this action or in the alternative dismiss plaintiffs' amended complaint, with prejudice.

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 16th day of November, 2016.

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