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

DIONISIO TRIGO GONZÁLEZ, *et al*. Plaintiffs, vs. ALEJANDRO GARCÍA PADILLA, *et al*. Defendants.	CIVIL NO. 16-02257

PLAINTIFFS' POST HEARING MEMORANDUM

TO THE HONORABLE COURT:

NOW COME Plaintiffs DIONISIO TRIGO GONZÁLEZ, *et al*, represented by their undersigned attorneys, and respectfully tender and submit to this Honorable Court the instant Memorandum in accordance with the Court's Order at Dkt. No. 46:

INTRODUCTION

The challenged sections of the Moratorium Act, namely Secs. 105, 201, 203, 301, 302, and 401 are alleged to violate the Constitution of the United States, which is the Supreme Law of the Land.

The Moratorium Act's challenged sections are either constitutional or unconstitutional. This Article 3 Court has the authority, the jurisdiction and the duty to resolve this constitutional challenge.

The question squarely before us is when?

Since the Oversight Board cannot rule on issues of constitutionality, if the stay is not lifted, the Court does not entertain nor adjudicate Plaintiffs' constitutional challenge. The Commonwealth Defendants would be entitled to proceed under the legal assumption

that the Moratorium Act is fully in compliance with the Constitution unless and until declared unconstitutional. Executive Orders, laws and other unilateral actions under color of law could be taken by the Commonwealth to further deplete assets and resources of The Government Development Bank of Puerto Rico (hereinafter "GDB") that could be available to pay all or part of Plaintiff bondholders' interest and principal, rendering their investment in GDB and PFC bonds worthless.

If the stay continues in effect through February 15, 2017 or is extended until May, 2017, we respectfully submit that any subsequent eventual determination by the Court that the challenged sections of the Moratorium Act violate the Constitutions of the United States of America and/or of the Commonwealth of Puerto Rico would, in all likelihood, have chaotic irreversible consequences, and could prove perfunctory with regard to the rights and expectations of Plaintiffs to eventually recover on their investment. On the other hand, if the stay is lifted and Moratorium Act is found to violate the Constitution(s), the parties, and the PROMESA Oversight Board will be able to proceed without the trepidation engendered by the underlying unresolved questions about the unconstitutionality of the (Moratorium) Act that clearly jeopardize stability and the legality of certain actions taken under said Act. Likewise, if the stay is lifted and the Moratorium Act is found free of constitutional infirmity, the parties and the Oversight Board shall be in position to proceed with that knowledge and to govern themselves accordingly.

Plaintiffs respectfully submit that resolving the constitutionality challenges now would serve justice and the speedy inexpensive determination of the consolidated actions.[1]

PLAINTIFFS' POSITION REGARDING
STATEMENT OF INTEREST OF THE UNITED STATES

At the threshold of the hearing on the consolidated requests of Plaintiffs in several cases to grant relief from the automatic stay of litigation, the United States filed a Statement of Interest (Dkt. No. 40), urging the Court "to narrowly construe Section 405(e)(2)" of PROMESA which allows the Court to grant relief from the automatic stay. The United States requests that, in the absence of irreparable damage, the Court postpone granting relief from the automatic stay until the Oversight Board is fully operational and in a position to determine whether to intervene in these cases. (Dkt. No. 40 p. 1)

The existence and risk of continued irreparable damage to Plaintiffs in this case, was evidenced at the hearing through the testimony of two Plaintiffs, to wit, Messrs. Ernesto A. Smith and Rafael Rojo Montilla. See Transcript of the hearing held September 22, 2016 (hereinafter "Tr. 9/22") pp. 220-241, in particular, p. 224 l. 13 – p. 227 l. 3 and p. 236 l. 22 – p. 239 l. 5. See also as to irreparable damages, testimony of Dr. Carlos Colón de Armas at Transcript of the hearing held September 23, 2016 (hereinafter "Tr. 9/23") p. 37 ll. 2 – 6.

As to the time it may take for the Oversight Board to be "fully operational", see the testimony of Mr. Bradley Meyer, who estimated that it would take a minimum of six

[1] In accordance with Rule 1 of the Federal Rules of Civil Procedure.

months before the Oversight Board is prepared to engage in a real negotiation or have tools in order to be effective, Tr. 9/22 p. 207 l. 15 – p. 209 l. 9, and the testimony of Dr. Colón de Armas that the Board will not be prepared to take actions until late in 2017. Tr. 9/23 p. 53 l. 21 – p. 54 l. 22.

The Court can take judicial notice about the intensity of the Puerto Rican electoral process and the major complications that ensue with a change of government, transition committees, production and evaluation of financial and other data regarding government, and even disputes regarding certification of elected officials and results of the elections. The budget and the 5-year plan that the current government administration may provide to the Oversight Board is not likely to coincide with the budget and plan of an incoming administration (since there will necessarily be a change in the governorship, as well as changes in the Governor's cabinet and in the direction of agencies, public corporations and instrumentalities). Thus, the *ex-officio* member of the Oversight Board, will be someone other than Governor Alejandro García-Padilla, beginning in 2017. Waiting for the Oversight Board to be fully operational and in position to make decisions as to possible intervention in these cases, is an open-ended proposition, likely to take us well into the year 2017. Maintaining the PROMESA stay during such an open-ended and uncertain wait, would mean not resolving the constitutional questions squarely before the Court at this time, and allowing the Commonwealth Defendants and their successors to proceed on the premise that the Moratorium Act, as amended, falls within the legal boundaries set by the constitutions of the United States and Puerto Rico.

In its Statement of Interest, the United States correctly asserts that PROMESA was enacted to provide an approach to Puerto Rico's "fiscal, management and structural

problems and adjustments . . . involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." (Statement of Interest at p. 2). Nevertheless, the restructuring of existing debts in a "fair and orderly process", cannot contemplate the unilateral slanting of the playing field by the Government of Puerto Rico as a result of confiscatory unconstitutional actions predicated on the Moratorium Act, as amended. A level playing field is of critical and transcendental importance to any "fair and orderly process". The depletion of assets engineered by the Commonwealth Defendants under the Moratorium Act, reduces creditors on one side of the restructuring of debts to mere sideline spectators while the Government feeds on funds and resources available to entities like the GDB in order to satisfy a spending agenda that seems to have no bounds, diminishing cash and further affecting liquidity, without accountability (other than paying lip service as to health, security and educational needs). Despite having had ample opportunity to account for the diversion of funds and the use of those funds, the Government Defendants shyed away from providing any such accountability during the hearing held on September 22 and 23. See, for example, the disclaimers as to knowledge and responsibility about any cost-reducing efforts made in cross-examination by Defendants' witness Yaime Rullán-Cabrera. Tr. 9/23 p. 92 l. 7 – p. 93 l. 18.

At p. 2 of its Statement of Interest, the United States covers and lists the broad authority granted to the Oversight Board. That authority, of course, does not include authority to adjudicate the constitutionality issues raised in the consolidated cases. Such authority is reserved to Article 3 Courts exclusively. The constitutionality issues are ripe, and squarely before the Court, and we respectfully submit that adjudication

thereof will serve to aid the Oversight Board in conducting a "fair and orderly process", and eliminate destabilizing and unproductive uncertainty. Further in its Statement of Interest, the United States invokes Congress' finding that the PROMESA ". . . stay is essential to stabilize the region for the purposes of resolving " Puerto Rico's physical crisis. (See Statement of Interest at p. 3) The unspoken, but undeniable fact is that stabilization is threatened and jeopardized by the uncertainty created as a result of the Moratorium Act and executive actions taken pursuant thereto outside the ordinary course of business that unilaterally divert funds from agencies and instrumentalities like the GDB, in patent violation of creditors' rights and without a vestige of accountability. Maintaining the Moratorium Act in place, as if it is legislation that complies with the Constitution, would create chaos if, after an eventual lifting of the stay, the statute or portions thereof are declared unconstitutional, and actions taken thereunder would need to be reverted, if at all possible.

With regard to the United States' assertions that the PROMESA stay "is intended to allow 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' . . . and that the stay also seeks to ensure that 'all creditors have a fair opportunity to consensually renegotiate terms of repayment . . .'" (Dkt. No. 40 p. 4) Plaintiffs recall the testimony of Mr. Meyer regarding three separate series of negotiations, all of which fell through or broke down (the last of which "broke down because of the Moratorium Act" (Tr. 9/22 p. 183 l. 3 – p. 186 l. 23). This testimony belies arguments proposing fair opportunities to consensually renegotiate terms of repayment. In light of Mr. Meyer's testimony it is significant to note, apart from the fact

that he participated in three failed negotiations, that players on the Government side of negotiations would change with any new administration. Thus, there would not appear to be a way to "ensure" that all creditors have a fair opportunity to consensually renegotiate terms. Consider, also, that Plaintiffs, owning over $100,000,000.00 in bonds of GDB and/or the Public Finance Corporation, were never accorded an opportunity to consensually negotiate any terms. The challenged Moratorium Act gave the Commonwealth Defendants a formidable platform from which to manipulate resources, funds and liquidity, without notice or negotiation with creditors.

At p. 6 of its Statement of Interest, the United States proposes that the Court ". . . construe the 'for cause' provision [for lifting of the stay] as narrowly as possible in determining whether 'cause' exists here." This narrow interpretation of "for cause" is apparently suggested to mean that the Court look the other way from the constitutional issues while the Government engages in unconstitutional action and further depletes assets, usurps rights of creditors and alienates capital markets. It is hard to fathom and to understand why the United States would urge the Court to postpone consideration and adjudication of constitutionality issues that would provide guidance and, perhaps finality, to all the parties involved on the issue of the Moratorium Act, including the Oversight Board.

The United States asserts that:

> To the extent the plaintiffs are challenging the Moratorium Act and the executive orders issued thereunder, time is needed to determine whether the plaintiffs will in fact be harmed.

We submit that the evidence presented at the hearing held on September 22 and 23 unquestionably established that the Plaintiffs are being harmed, and that the damages

shall be irreparable if the Commonwealth Defendants continue their course of action under the Moratorium Act with the "protection" of the PROMESA stay. In that sense, the stay would be interpreted to apply unilaterally to Plaintiffs, without any limitation or constraint upon the Government. Again, at the end of the day, all that Plaintiffs are requesting is the declaration of unconstitutionality of challenged sections of the Moratorium Act and the undoing of certain actions taken in connection therewith, or after its enactment, that deprive them of their rights and violate their contracts with GDB and PFC, without due process of law. Some of these actions, including Executive Orders Nos. 14 and 30, and Act No. 74, constitute clear violations of, and are contrary to the United States' assertions at p. 7 of their Statement of Interest with regard to the prohibitions under PROMESA §303(1), 48 U.S.C. §2163(3) [prohibiting the application of any territorial law prescribing a method of composition of indebtedness or moratorium on the indebtedness of the territory or its instrumentalities to a creditor who does not consent to the composition or moratorium], and PROMESA §303(3), 48 U.S.C. §2163(3) [preemption of unlawful executive orders that alter, amend or modify the rights of holders of debt or that divert funds from one instrumentality to another or to the territory].

In closing, the United States asserts that "the automatic stay seeks to ensure order while the Oversight Board establishes its foundational structure . . ." Plaintiffs respectfully submit that a lifting of the stay in order to resolve the key threshold constitutional issues squarely before the Court challenging the Moratorium Act and actions taken thereunder and thereafter, and ruling on the constitutional challenges raised, are what in fact and *de jure*, would fairly ensure order and provide guidance.

GENERAL DISCUSSION

The Commonwealth Defendants, through counsel, Michael F. Williams, at the hearing regarding the existence or non-existence of cause to lift the PROMESA stay, asserted that ". . . at a certain point the stay will dissipate and these Plaintiffs can start presenting their claims through other legal frameworks." Tr. 9/22 p. 39 ll. 6 – 8. Subsequently, after the Court inquired why it should wait to make a finding as to whether the Moratorium Act or parts of it are unconstitutional, and counsel for Defendants agreed that determinations regarding constitutionality are the job of an Article 3 Judge, Mr. Williams advanced the argument that Plaintiffs are not "special". There is no requirement in the law nor in any documentation before the Court, nor elsewhere, that a Plaintiff requesting a finding of unconstitutionality show that he/she/it is "special" in order to have standing. By the same token, Plaintiffs in the Trigo case were not required to be "special" in order to acquire their notes/bonds, and make their investment with GDB and/or PFC. The monies that they advanced to GDB and/or PFC, and that were accepted by those Defendants, and used by them, did not have the label "special". Further, although Defendants' counsel made the imputation that Plaintiffs, in general (assuming he was referring to Plaintiffs in all consolidated cases) were not "special", he made no assertion, statement nor offer of proof regarding the Trigo Plaintiffs on this matter. This is not to say that Plaintiffs in the other cases with regard to whom Mr. Williams made certain expressions in his argument, needed to demonstrate that they were "special" in any particular way in order to achieve standing before this Court to challenge the constitutionality of a statute under which the Government Defendants are causing them harm.

Having sat through the hearings held on September 22 and September 23 last, and having read the transcripts of the same, the undersigned counsel respectfully submits that there is not one statement, argument or citation presented by the Commonwealth Defendants that stands for the proposition that an Article 3 Court with jurisdiction to rule on the constitutionality of a statute must wait or look the other way or in any way condone unconstitutionality or any action or omission (e.g. not even communicating with certain bondholders like the Plaintiffs) that take place under the purported legality of a statute that has been challenged as unconstitutional. If the stay is lifted, Plaintiffs will not need to prove "special" status to have the Court rule on the constitutional questions raised in their complaint. If the Moratorium Act is unconstitutional in any way, as asserted by Plaintiffs, allowing it to remain Law, and waiting to make the appropriate finding, will simply make matters worse, not only for Plaintiffs, not only for Defendants, but for the Oversight Board, and for all of Puerto Rico, whose credit, or absence thereof, lies in the balance.

The Court should not abstain from ruling on the constitutionality of Act No. 21 of 2016, as amended, known as the Moratorium Act. It is an issue that is ripe and presently before the Court, to prevent further complication of a murky panorama involving Puerto Rico's public debt.

The Moratorium Act is the source of numerous Executive Orders issued by the present Commonwealth Government which with one single exception, i.e., Executive Order No. 10, permitted the Governor of Puerto Rico to accomplish numerous diversions of funds, ordinarily destined for certain specific uses. The funds diverted outside the ordinary course of business are funneled without any clear nor strict accountability, to pay

many selected non-essential expenses. Rhetorical lip service from the present Commonwealth Administration would have the public believe that the diverted funds are being destined for security, health, education and general welfare of the Puerto Rico citizenry.

The Commonwealth Government has used funds regularly destined in previous budgets for the payment of public debt, to cover additional non-essential expenses, all because it claims it lacks liquidity. Despite not allocating roughly $1.2 billion to debt service as was done last year, the current fiscal year budget adds roughly $400 million increased operational expenses. Tr. 9/23 p30 l16-25. This is a condition that was self-inflicted as result of voluntary determinations made by the Government, doing itself out of the financial markets. Despite the occurrence of such the Government has continued to overspend in non-essential services. See Testimony of Dr. Colón de Armas @ Tr. 9/23 p28 l. 17, p29 l. 21 and p31 l20, p32 l13. This overspending binge, which was accentuated in 2015 and has been maintained via the Moratorium Act's implementation, has permitted the Commonwealth Government to indiscriminately divert or "claw-back" funds from other government agencies, that are separate or independent from the central government, but for whose financial obligations the central government is not legally responsible. As a result, the central government of the Commonwealth is feeding on funds that it has diverted[2], in order to conduct its administrative operations, failing to account for such funds other than by paying lip service to security, health, education and general welfare, as talismanic causes that warrant the illegalities that have destroyed

[2] For example, in one fell swoop, by virtue of PR Act No. 74, approved July 20, 2016, the Government approved depleting more than $1.7 Billion from the GDB loan portfolio, depriving the bank of assets that could serve to fund all or part of its obligations to creditor bondholders.

Puerto Rico's access to the financial markets. See Testimony of Dr. Colón de Armas @ Tr. 9/23, p43 l71 – p36, l4.

All such acts are contrary to the provisions of Section 204(c)(3) of PROMESA, which seeks to maintain a level playing field for the creditors of the Commonwealth Government, as well as for the Government itself, to permit an orderly composition and restructuring of the latter's debts and resources.

Defendants allege that it is Congress' intention for the Oversight Board to engage in the imposition of orderly discipline in the Government's finances in order to stabilize the region during the stay provided under PROMESA. They further argue that the Oversight Board will commence its activities in the very near future. For this reason, they claim that the Oversight Board, rather than this Court, should oversee the review of the fiscal and administrative maneuvering under the Moratorium Act, without the intervention of this Court. Contrary to that argument, it would be destructive to permit the Central Government to continue to engage in the ill-advised diversion of funds, undertaken since 2015. This will exacerbate the fiscal havoc that has been accentuated since the passage of the Moratorium Act, which is clearly contrary to the United States and the Puerto Rico Constitutions and will permit a lame-duck administration to continue wasting away those funds, until the Oversight Board eventually assumes an active role over the finances of the Commonwealth. The defendants' claim is based on the flawed and unwarranted assumptions that the Oversight Board will effectively intervene to fix everything that is wrong with Puerto Rico's finances, and that said intervention will be sooner rather than later. There exists at this time an absolute lack of certainty as to how the Oversight Board will assume its supervisory function over the Commonwealth's finances. The time factor,

based on the length of time it has taken, since the approval of PROMESA, to name the members of the Oversight Board and in turn for those members from different regions of our nation, to designate its Chair, and considering that the executive director has not been designated nor has the staff of the Board been hired and set in place, it is realistic to predict that the Oversight Board will not be fully operational and effective for several more months. And further, when we add to this the fact that elections in the Mainland and in Puerto Rico will be held in a months' time and that in both jurisdictions new administrations and new legislatures will come into office, the estimated date for the Oversight Board to fully achieve active functionality may be assumed will be further delayed into 2017. Once the Oversight Board actively takes possession, it will review budgets and reports prepared by the new administration based on its particular fiscal priorities. See Testimony of Dr. Colón de Armas @ Tr. 9/23, p53 l21 – p54 l22. These will be re-submitted back and forth between the Oversight Board and the new administration delaying further the new administration's compliance with the indexes the Oversight Board may have adopted by then. In the meantime, the prior administration's havoc and unaccountability with respect to funds, resources and expenditures shall have been the order of the day, unless the constitutional boundaries and restraints on governmental action are determined and set in place at this time.

Funds wasted today will be wasted forever. Thus, it seems imperative that this Court resolve the constitutional challenges to the Moratorium Act and provide a degree of certainty to Puerto Rico, including its Government and citizenry and preventing further waste of funds and uncertainty regarding actions undertaken based on the Moratorium Act which clearly violates the United States and Puerto Rico Constitutions. An early

determination of the constitutionality of the Moratorium Act will provide the Commonwealth of Puerto Rico, the People of Puerto Rico, the plaintiffs in these cases, and other investors and the Oversight Board, the clear path and guidelines needed to proceed to achieve, in these times of uncertainty, the lofty goals set in PROMESA.

A ruling striking the constitutionality of the Moratorium Act will do no harm to the fiscal condition of the Commonwealth and would go a long way towards preserving the fiscal status quo in order to facilitate the monumental task of the Oversight Board instead of fostering further chaos and complication before it can become fully operative. Such ruling will finalize the judicial controversies in this consolidated process and any others that may arise questioning the constitutionality of the Moratorium Act. The plaintiffs, as result of the stay imposed by PROMESA would be unable to collect any funds from the Commonwealth or its several governmental agencies, while the stay is in place. Thus, no Commonwealth resources would be diverted as alleged by defendants as result of such ruling. Even GDB's resources, if necessary, could be protected by the issuance of an Executive Order, without the need of having the Moratorium Act in effect.

Finally, such a ruling by this Article 3 Court would enforce the Supreme Law of the Land and serve the Oversight Board and the Commonwealth's present and future executive and legislative branches in the process.

WHEREFORE Plaintiffs respectfully request that this Honorable Court find cause to have been shown to lift the PROMESA stay and accordingly order that such stay be lifted, and that proceedings in the instant case continue.

RESPECTFULLY SUBMITTED.

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

CERTIFICATE: It is hereby certified that on this date the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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