No. 18-1836, 18-1837, 18-1841, 18-1855, 18-1858, and 18-1868 (Consolidated)

In The

United States Court of Appeals for the First Circuit

NO. 18-1836

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

On Appeal from the United States District Court
for the District of Puerto Rico (San Juan)
Nos. 17-ap-00213-LTS, 3:17-bk-03283-LTS, & 17-bk-03566-LTS
(*Case Caption Continues Inside*)

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Movants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAXFREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS

TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Movants, Appellees.

NO. 18-1837

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE-FORREST MULTISTRATEGY, L.L.C. (SERIES B); OAKTREE OPPORTUNITIES FUND IX,

L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Movants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Movants, Appellees.

NO. 18-1841

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO

RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Movants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Movants, Appellees.

NO. 18-1855

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

v.

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND , INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND

III, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAXFREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAXFREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

NO. 18-1858

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

v.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME

FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAXFREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAXFREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

NO. 18-1868

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, A/K/A COFINA; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND,

INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Movants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Movants,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtor, Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES; OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Movants, Appellees.

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INTRODUCTION

The district court correctly applied Puerto Rico's Uniform Commercial Code (the "UCC") to hold that the security interests claimed by Appellants, two groups of bondholders (collectively, the "Bondholders") of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS"), are not perfected.[1] (Add. 20.) The district court also correctly held that by incorporating 11 U.S.C. §544 into the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§2101-2241 ("PROMESA"), Congress intended to, and did, grant the Financial Oversight and Management Board (the "Board") the ability to avoid the Bondholders' unperfected liens. (Add. 28-29.)

The Bondholders urge this Court to reverse, contending that the district court's invalidation of their liens on "nonexistent technicalities" was in error. But as the Board thoroughly sets forth in its brief, when a secured party seeks to perfect its interest under the UCC, "technicalities," like the correct name of the debtor and an accurate collateral description, matter. *See Uniroyal, Inc. v. Universal Tire & Auto Safety*, 557 F.2d 22, 23 (1st Cir. 1977). The Bondholders failed to comply with these

[1] Citations to the "Altair Br." are to the brief filed by certain ERS bondholders in Case No. 18-1836, Entry ID: 6198733. Citations to "Add. ___" are to the addendum to that brief and citations to "App.___" are to the appendix to that brief. Citations to "SApp.___" refer to the Board's Supplemental Appendix.

rules, and as the district court correctly held, their own failure invalidated their security interests. (Add. 20.)

The Bondholders also argue that despite Congress's incorporation of §544 into PROMESA (*see* 48 U.S.C. §2161(a)), Congress did not intend for the Board to use §544 to invalidate pre-PROMESA debt. (Altair Br. 63-72.) The Bondholders are wrong. Congress did not deliver the Board a locked toolbox. To hold that the Board is powerless to use the Bankruptcy Code's avoidance powers would be in direct conflict with the plain language of PROMESA, which makes §544 applicable to pre-existing debt (48 U.S.C. §2101(a), (b)(2)), and also with the "fresh start" policy that the Supreme Court long ago firmly established and which remains at the core of the modern-day Bankruptcy Code. *See Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

The decision of the district court should be affirmed.

STATEMENT OF THE CASE

The Official Committee of Retired Employees of the Commonwealth of Puerto Rico (the "Retiree Committee") adopts the Statement of the Case in the Board's brief, and adds only the following description of the individuals the Retiree Committee represents and the context relevant to their interests in this appeal.

The Retiree Committee represents Puerto Rico's 167,000 retired teachers, police officers, firefighters, judges, municipal clerks, engineers, and other government workers whose pensions, as of the commencement of the Title III cases,

were collectively underfunded by more than $50 billion. Approximately 125,000 of the Retiree Committee's constituents are retirees who received pensions and other retiree benefits from ERS. The ERS funds used to pay these pensions consisted of employer contributions and employee contributions that retirees made to ERS during their working years.

To address this liquidity issue, the Puerto Rico legislature passed (and the Board adopted), H.R. Joint Resolution 188 on June 6, 2017. Joint Resolution 188 eliminated employer contributions and called for liquidation of ERS's assets for distribution to the Commonwealth's general fund to defer the costs of and to implement a new, "pay-as-you-go" method for paying retirees' benefits. Puerto Rico subsequently passed Act 106 of 2017, the "Law to Guarantee Payment to our Pensioners and Establish a New Plan for Defined Contributions for Public Servants," which terminated the obligation of all employers to make contributions to any of Puerto Rico's retirement systems, including ERS. Act 106 §§3.5, 6.8. Following Act 106, public corporations and municipalities are required to pay the pensions of their current retirees, and active employees are now required to make a mandatory contribution into an individual, segregated retirement account. *Id*.

SUMMARY OF THE ARGUMENT

The district court correctly held that the Board may use §544 to avoid the Bondholders' liens. While this holding seems unremarkable—after all, Congress

enacted PROMESA to provide debt relief to Puerto Rico and made applicable the Bankruptcy Code tools necessary to accomplish that objective—its importance cannot be overstated. The Bankruptcy Code's avoidance powers are essential to the Board's ability to restore Puerto Rico's fiscal health and access to credit markets. Indeed, as the district court noted, "a decision to interpret Section 544 of the Bankruptcy Code—and, by implication, the additional avoidance powers that Congress specifically incorporated through Section 301 of PROMESA—prospectively only would render such tools unavailable for use in Puerto Rico's Title III debt adjustment process." (Add. 28.)

I. Section 544 is a powerful tool, routinely used by commercial debtors, municipalities, and trustees in bankruptcy cases to avoid unperfected liens. Congress expressly made §544 applicable to PROMESA, 48 U.S.C. §2161(a), and did so retroactively, 48 U.S.C. §2101(a), (b)(2). If the Bondholders' arguments were the law, the Board would not be able to use §544 at all, or at most only to avoid liens and obligations incurred after June 30, 2016, PROMESA's effective date. Such a holding would effectively render §544 useless, as Puerto Rico incurred the entirety of the principal amount of its bond debt before June 30, 2016. To hold that the Board is powerless to exercise its avoidance powers would be in direct conflict with the fresh start policy embodied in PROMESA: "One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of

oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co.*, 292 U.S. at 244 (citation omitted).

Assuming the Bondholders are correct that §544 must apply retroactively to avoid their liens, the district court correctly held that Congress clearly intended that PROMESA apply retroactively in that sense. Section 544 of the Bankruptcy Code was incorporated into PROMESA via §301 of that Act. *See* 48 U.S.C. §2161(a). Section 301 is the first section in Subchapter III of PROMESA. And PROMESA states that "Subchapters III and VI shall apply with respect to debts, claims, and liens … created *before, on, or after*" PROMESA's effective date, June 30, 2016. 48 U.S.C. §2101(a), (b)(2) (emphasis added).

Section 544 vests a bankruptcy trustee with the status of a judicial lien creditor and gives the trustee the rights and powers to avoid any transfer that would be voidable by such a lien creditor. 11 U.S.C. §544(a)(1). PROMESA provides that "trustee" as used in §544 means the Board. 48 U.S.C. §2161(c)(7). The Bondholders argue that the Board cannot avoid their unperfected liens because Puerto Rico law does not permit a judgment creditor to obtain a lien on government property. (Altair Br. 58.) The Retiree Committee joins in the Board's arguments that the Puerto Rico statute upon which the Bondholders' argument is premised, Act 66 of 2014, does not apply to ERS. But even if it did, neither Act 66 nor any other Puerto Rico law

prevents the creation of a judgment lien, alters the relative priorities of creditors, or eviscerates the status of judicial lien creditors under Puerto Rico law. Puerto Rico law plainly provides that a judicial creditor's lien is superior to an unperfected security interest. 19 L.P.R.A. §2267(a)(2)(A); 19 L.P.R.A. §2267(a)(52). The district court correctly held that the Board, standing in the shoes of such a judicial lien creditor, may avoid the Bondholders' liens.

II. Because the district court held that the Bondholders' security interests were not perfected, it denied both the Board's and the Bondholders' motions for summary judgment on Count III of the Complaint, which sought a declaratory judgment that the Bondholders' security interests in "Pledged Property" did not attach to "Revenues" received during the post-petition period (each as defined in the ERS Bond Resolution. (App. 1088, 1089.) The district court correctly dismissed Count III as moot.

The district court properly dismissed the Bondholders' related counterclaims with prejudice for failure to state a claim because they were premised on an "enforceable security interest in and liens on employer contributions," which the district court held they did not have. (App. 1409, 1414; *see also* Add. 30.) If this Court were to reverse the district court, Count III of the Board's Complaint would no longer be moot, and the parties' arguments with respect to that Count preserved. The Retiree Committee submits that in such a case, the district court would still

have a basis to dismiss the Bondholders' counterclaims with prejudice for failure to state a claim because there was no post-petition property to which the Bondholders' purported security interests could attach.

III. The Board's brief explains why the district court correctly held that the Bondholders' security interests were not perfected. The Retiree Committee joins in, and does not duplicate, the Board's arguments that the original financing statement failed to adequately describe the collateral and that the amendments failed to identify the correct debtor. As a result of these errors, the Bondholders never perfected their security interests. But even had the amendments correctly identified the debtor's name, they still could not have cured the deficiencies in the original financing statement. This is because the Bondholders' 2008 financing statements had lapsed by the time of the amendments and a lapsed filing statement cannot be revived by a later filing. *See* 19 L.P.R.A. §2335 ("Upon lapse, a financing statement ceases to be effective ....").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE OVERSIGHT BOARD MAY AVOID THE BONDHOLDERS' UNPERFECTED LIENS.

The Bondholders' argument that the district court erred when it held that the Board may avoid the Bondholders' unperfected liens is wrong for at least three reasons. *First*, interpreting PROMESA to expressly provide the Board with the

power to avoid liens, but to place temporal limitations on that power that render it essentially useless, directly contradicts PROMESA's stated purpose and the "fresh start" that is a fundamental part of all bankruptcy proceedings. *Second*, regardless of whether PROMESA applies prospectively (as the Bondholders contend) or retroactively (as PROMESA itself provides), the Bondholders' liens, which were unperfected both before and after PROMESA, are subject to the Board's avoidance powers. *Third*, §544 gives the Board the status of a judicial lien creditor, and Puerto Rico law provides that a judicial lien creditor is superior to an unperfected creditor. To the extent Act 66 applies to judicial lien creditors of ERS at all (and the Retiree Committee joins in the arguments of the Board that it does not), neither it nor any other Puerto Rico law alters this priority structure. The district court's ruling that §544 allows the Board to avoid the Bondholders' unperfected liens should be affirmed.

A. The Bankruptcy Code's Avoidance Powers Are Necessary To Effectuate PROMESA's Purpose.

Congress enacted PROMESA to address Puerto Rico's fiscal crisis. PROMESA is replete with Congress's findings that Puerto Rico is in a dire financial state, and it provides measures for restoring the territory to fiscal health. *See, e.g.*, 48 U.S.C. §§2121, 2124, 2141, 2161-2177, 2194(m), (n), 2196-2199, 2211-2217. Title III of PROMESA, modeled after chapter 9 of the Bankruptcy Code, permits the Board to effectively place Puerto Rico in bankruptcy for the purpose of adjusting

its debts. 48 U.S.C. §§2161-2177. Section 301(a) of PROMESA makes certain Bankruptcy Code sections applicable to Title III cases, including the Code's avoidance powers. 48 U.S.C. §2161(a).

The Bondholders argue that notwithstanding Congress's express purpose in enacting PROMESA, Congress's incorporation of §544, and Congress's stated expectation that the Board would use §544's avoidance powers, the Board is either: (a) limited to using §544's avoidance powers during the eleven-month period after PROMESA was enacted and before the Title III cases were commenced (Altair Br. II.B.); or (b) that it may not use them at all (Altair Br. II.A.). As set forth in parts I.B and I.C, *infra*, PROMESA and applicable Puerto Rico law rebut this argument. The Bondholders' position is also in direct conflict with the fresh start policy that Congress embedded in PROMESA.

In *Local Loan Co. v. Hunt*, the Supreme Court firmly established the fresh start policy that remains at the core of the modern-day Bankruptcy Code. The Court explained:

> One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. The various

> provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. Local rules subversive of that result cannot be accepted as controlling the action of a federal court.

292 U.S. at 244-45 (citations and internal quotation marks omitted).

The district court correctly recognized that Puerto Rico cannot achieve this fresh start without the Bankruptcy Code avoidance powers made applicable to PROMESA. It explained, "a decision to interpret Section 544 of the Bankruptcy Code—and, by implication, the additional avoidance powers that Congress specifically incorporated through Section 301 of PROMESA—prospectively only would render such tools unavailable for use in Puerto Rico's Title III debt adjustment process." (Add. 28.) As set forth below, Congress obviously did not intend this result.

B. This Court Need Not Apply §544 Retroactively, But It May Do So.

The Bondholders contend that the Board cannot avoid the Bondholders' liens because PROMESA's incorporation of §544 does not apply retroactively. According to the Bondholders, because their liens "were already in existence when PROMESA was enacted," PROMESA's incorporation of §544 cannot be applied to their liens unless it applies retroactively. (Altair Br. 64.) And the Bondholders contend that §544 cannot be construed to apply retroactively unless Congress provided an "'explicit command'" that it does so. (*Id.*)

The Bondholders are doubly wrong. First, this Court need not apply §544 retroactively in order to hold that it applies to the Bondholders' liens. As courts have held in the context of §544's application to individual debtors under the Bankruptcy Code, it is the creditor's failure to perfect its lien, not §544, that results in the avoidance of the creditor's property interest under state law. *Washburn & Roberts, Inc. v. Park East (In re Washburn & Roberts, Inc.)*, 17 B.R. 305, 308 (Bankr. E.D. Wash. 1982); *Tort Claimants Committee v. Roman Catholic Archbishop of Portland in Oregon (In re Roman Catholic Archbishop of Portland in Oregon)*, 335 B.R. 868, 888 n.18 (Bankr. D. Or. 2005) (agreeing with *Washburn*'s analysis). The passage of PROMESA on June 30, 2016 put the Bondholders on notice that unperfected liens on ERS assets could be avoided under §544 going forward. Yet the Bondholders still did not seek to perfect their liens between then and May 21, 2017, when the Board filed a Title III petition on behalf of ERS. It is that post-PROMESA failure to perfect their liens, not any pre-PROMESA behavior, that triggers §544's avoidance provision here. Thus, §544 need not be applied retroactively in this case.

On the other hand, if the Bondholders are correct that §544 must apply retroactively to avoid their liens, then the district court correctly held that Congress clearly intended that PROMESA apply retroactively in that sense. Congress explicitly stated that PROMESA's incorporation of §544 applied to pre-existing liens. 48 U.S.C. §2101(a), (b)(2). And in any event, because PROMESA was enacted

precisely to address the Commonwealth's *existing* debt crisis, PROMESA's incorporation of §544 would have been utterly meaningless if it did not apply to unperfected security interests that existed when PROMESA was enacted. Unless this Court believes that Congress intended PROMESA's incorporation of §544 to be a dead letter, it should construe §544 to apply retroactively here.

1. Section 544 Permits The Board To Avoid The Bondholders' Liens Even If It Does Not Apply Retroactively.

The crucial premise of the Bondholders' retroactivity argument is that §544 cannot apply to the Bondholders' liens on the ERS assets unless PROMESA's incorporation of that statute applies retroactively. That is wrong. PROMESA was passed on June 30, 2016, and the incorporation of §544 was effective on that date. *See* 48 U.S.C. §2161(a) (incorporating §544 of title 11 via the first section of Subchapter III of PROMESA); *id.* §2101 (providing that Subchapter III of PROMESA has an effective date of "June 30, 2016"). As of that date, the Bondholders were on notice that if they failed to perfect their liens, those liens could be avoided in a Title III proceeding by operation of §544. Yet §544 did not apply to the Bondholders' liens until the commencement of the ERS Title III case on May 21, 2017. (Altair Br. 9); *see* 11 U.S.C. §544(a) (Section 544 applies from "the commencement of the case"). Thus, for nearly a year after PROMESA's enactment, the Bondholders could have immunized themselves from §544 by perfecting their liens. It is that failure to perfect their liens *after* PROMESA's enactment, not the

creation of the liens *before* PROMESA's enactment, that triggers the application of §544 and allows the Board to avoid the Bondholders' liens. Thus, §544 need not be applied retroactively to avoid the Bondholders' liens.

At least one court has applied that logic to conclude that §544 of the Bankruptcy Code permitted a bankruptcy trustee to avoid transfers of property and obligations that were not perfected between the Code's enactment and the initiation of bankruptcy proceedings. In *Washburn*, the debtor-in-possession executed and transferred a statutory warranty deed prior to the effective date of the Bankruptcy Code—October 1, 1979. 17 B.R. at 308. But the deed was not recorded before that date, as Washington state law required. As a result, the debtor-in-possession (acting as trustee) was able to avoid the transfer. *Id.* at 307-08. The recipient of the deed argued that because the execution occurred prior to the Code's effective date, "any application of 11 U.S.C. [§]544(a)(3) … would be a retroactive application," *id.* at 308, but the court rejected that argument:

> If upon enactment of the Code the defendants had been divested of its [sic] property their due process argument might have been valid. Yet, the enactment did not divest the defendants of the property, but rather *the divestiture is occasioned by their failure to record the deed*. Thus, almost three months after the effective date of the Code the plaintiff filed for relief under Chapter 11 proceeding, and it was *at that time* that the provisions of 11 U.S.C. [§] 544(a) (3) became operative.

Id. (emphases added); *see also In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. at 888 n.18 (agreeing with *Washburn*'s analysis).

As the *Washburn* court held, it was the defendants' failure to record the deed during the three months after the Code's enactment and before the filing of the debtor's petition that triggered §544, and so §544 did not need to be applied retroactively to avoid the defendants' property interest. The same is true here. The Bondholders' failure to perfect their liens after PROMESA's enactment is what "divest[ed]" them of their property interest, not PROMESA's incorporation of §544. *In re Washburn*, 17 B.R. at 308. Thus the district court did not need to apply §544 retroactively to avoid the Bondholders' liens.[2]

2. If §544 Must Apply Retroactively To Avoid The Bondholders' Liens, It Does So.

But even if the Bondholders are correct that §544 (as made applicable to PROMESA) can only apply to the Bondholders' liens if that provision applies retroactively, Congress made clear that it intended §544 to apply to liens created before PROMESA's enactment. As the Bondholders explain—citing *Holt v. Henley*, 232 U.S. 637 (1914), and *United States v. Security Industrial Bank*, 459 U.S. 70 (1982)—courts generally may only apply a federal statute retroactively if there is

[2] The Bondholders may respond that because PROMESA imposed an automatic temporary stay on creditors' remedies against the Commonwealth and its instrumentalities, that the stay prevented perfection of their liens during this time period. *See* 48 U.S.C. §2194(a)-(b). But the problem with this argument is that the statute allowed creditors to obtain relief from the stay, *id.* §2194(e)(2), and in fact, the Bondholders availed themselves of that right during this time period. Despite doing so, however, the Bondholders never sought relief from the stay to correct the problems with the perfection of their liens.

"clear congressional intent authorizing retroactivity." *Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994). (*See* Altair Br. 64, 66-68.)[3]

Here, Congress's intent is abundantly clear: in PROMESA, Congress provided that §544 would apply to liens like the Bondholders' liens. Section 544 of the Bankruptcy Code was incorporated into PROMESA by section 301 of that Act. *See* 48 U.S.C. §2161(a). Section 301 is the first section in Subchapter III of PROMESA. And PROMESA states that "Subchapters III and VI shall apply with respect to debts, claims, and liens … created *before, on, or after*" PROMESA's effective date, June 30, 2016. 48 U.S.C. §2101(a), (b)(2) (emphasis added). Thus, Congress explicitly stated that §544, as incorporated into PROMESA via Subchapter III of that Act, would apply to liens (like the Bondholders') that were created "before" June 30, 2016.

This language is exactly the type of "explicit command from Congress" that the Supreme Court held was sufficient to apply a bankruptcy statute retroactively. *Security Indus. Bank*, 459 U.S. at 81. Indeed, the Supreme Court and this Court have repeatedly interpreted identical "before, on, or after" language to "indicate

[3] The Bondholders do not separately argue in the alternative that PROMESA's incorporation of §544 would be unconstitutional if it applies retroactively; instead, they only warn that it may be and thus ask this Court to avoid answering the constitutional question by construing the statute to apply prospectively. For that reason, the Bondholders have forfeited any argument that PROMESA's incorporation of §544 is unconstitutional if construed to apply to their liens.

unambiguously [Congress's] intention to apply specific provisions retroactively." *INS v. St. Cyr.*, 533 U.S. 289, 318-19 (2001); *Vartelas v. Holder*, 566 U.S. 257, 267 (2012) (such language "expressly direct[s] retroactive application"); *Martin v. Hadix*, 527 U.S. 343, 355-56 (1999) (same language is "explicitly retroactive"); *Peralta v. Gonzales*, 441 F.3d 23, 27 (1st Cir. 2006) (same); *Goncalves v. Reno*, 144 F.3d 110, 132 (1st Cir. 1998) (same); *Gittens v. Menifee*, 428 F.3d 382, 384-85 (2d Cir. 2005) (per curiam) (same).

Even absent that express language, however, §544 would still apply retroactively. The Supreme Court has long held that "a statute shall not be given retroactive effect, unless such construction is required by explicit language *or by necessary implication*." *United States v. St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 3 (1926) (emphasis added); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (same); *Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952) (same). As the district court correctly recognized (Add. 28), and as set forth *supra* in I.A., PROMESA's very purpose necessarily implies that Congress intended to apply §544 retroactively (Add. 28).

In passing PROMESA, Congress recognized that the Commonwealth was in the midst of an "immediate existing and imminent crisis" caused by the Commonwealth's *existing* debts. 48 U.S.C. §2194(n)(1). It was that "current fiscal emergency" that motivated Congress to pass a statute that would "allow for an

orderly adjustment of all of the Government of Puerto Rico's [existing] liabilities." *Id.* §2194(m)(3), (n)(4). PROMESA was not intended as some sort of ongoing debt restructuring framework for the Commonwealth. Indeed, the Board's limited tenure will terminate once Puerto Rico meets certain financial benchmarks. *See* 48 U.S.C. §2149. And the statute envisions a one-time process for restructuring the debts of the Commonwealth and its instrumentalities via the filing of a Title III petition. Thus, PROMESA's primary aim was to create a process that would allow the Commonwealth to restructure its existing debts. It was no accident that the statute was named the *Puerto Rico* Oversight, Management, and Economic Stability Act.

Given that obvious aim, it would have been nonsensical for Congress to incorporate provisions of the Bankruptcy Code with the understanding that *none* of those provisions would ever apply to *any* of the Commonwealth's existing debts as of PROMESA's enactment. After all, as the district court explained, if the Bondholders are correct about §544, presumably many of the other provisions of the Code that Congress incorporated into the Title III process would be equally inapplicable to the pre-existing debts of the Commonwealth or its instrumentalities. (Add. 28.) Thus, under the Bondholders' reading of PROMESA, Congress set up a one-time process for restructuring the Commonwealth's existing debts, and incorporated huge swaths of the Bankruptcy Code to govern that process, but for some reason intended that those provisions would apply only to future (and at this

point, entirely hypothetical) proceedings under PROMESA, rather than the massive existing fiscal crisis that Congress repeatedly identified as its primary concern. That defies common sense.

In the context of ordinary bankruptcy proceedings, courts have regularly applied §544 retroactively when Congress clearly intended that it would apply. For example, in *Washburn & Roberts*, the Ninth Circuit was confronted with whether §544 "applied retroactively" to the "so-called 'gap period' between the Bankruptcy Code's enactment date, November 6, 1978, and its effective date, October 1, 1979, of the Bankruptcy Code of 1978." *Washburn & Roberts, Inc. v. Park East (In re Washburn & Roberts, Inc.)*, 795 F.2d 870, 873 (9th Cir. 1986). The court concluded that Congress's intent to apply §544 retroactively was clear—but not because of any express language in §544. *Id.* The Bankruptcy Code states that any bankruptcy case commenced after October 1, 1979 is not subject to the old Bankruptcy Act of 1898. Thus, "unless section 544 applie[d] retroactively, transactions occurring during the gap period could never be avoided, if the bankruptcy petition was filed after October 1, 1979." *Id.* The court thought it clear that Congress did not "intend[] to immunize transactions occurring during the gap period from the avoidance powers of [a] bankruptcy trustee." *Id.* It therefore had no trouble concluding that §544 applied retroactively. This Court should similarly have no trouble concluding that PROMESA's incorporation of §544 applies retroactively, because otherwise

Congress would have intended that no avoidance provisions would apply to virtually all of the Commonwealth's existing debt, the very debt that PROMESA was enacted to address.

Further support for this argument is the case law developed applying chapter 12 of the Bankruptcy Code. Chapter 12 was enacted to address the farm crisis of the 1980s. Despite the fact that chapter 12 of the Bankruptcy Code did not contain an express provision applying that chapter retroactively the courts nonetheless did so because "[c]hapter 12 of the Bankruptcy Code was drafted in 1986, specifically for family farmers." *Dahlke v. Doering*, 94 B.R. 569, 570 (D. Minn. 1989). It "was enacted as an emergency response to a then-existing farm debt crisis." *Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 360 (11th Cir. 1989). But the statute "contains, on its face, no explicit language granting retroactive effect. Indeed, the statute does not include any language indicating Congress's intent to affect pre-existing loans." *Dahlke*, 94 B.R. at 574.

Nonetheless, courts have found it utterly implausible that Congress did not intend the statute to apply retroactively. For one thing, the "statute by its terms expire[d] after only seven years." *Id.* at 575. For another, "[h]ad Congress intended Chapter 12 to be applied only prospectively, its security-adjusting feature would be rendered trivial." *Id.* As the Eleventh Circuit held: "[w]e have no doubt that Congress intended the provisions of Chapter 12 to apply to debts incurred before its enactment.

Although Chapter 12 does not explicitly state that it is to be applied retroactively, any contrary view would render Chapter 12 a triviality." *Travelers*, 878 F.2d at 360.

As the district court correctly held, the same logic applies here. PROMESA is designed primarily to address a single existing fiscal crisis—that in Puerto Rico—and yet the Bondholders' reading would "render[] trivial" many of the Bankruptcy Code provisions incorporated into PROMESA to address that crisis. *Dahlke*, 94 B.R. at 575. The Bondholders' crabbed reading of PROMESA should be rejected.

In sum, though this Court need not apply §544 retroactively in order to permit the Board to avoid the Bondholders' liens, Congress did make clear—both by its express statement in PROMESA and by implication—its intent to apply §544 retroactively to unperfected liens like those the Bondholders claim.

C. The Oversight Board As A "Lien Creditor" Or "Judicial Lien Creditor" May Avoid Or Subordinate The Bondholders' Unperfected Liens.

The Bondholders argue that the Board cannot avoid the Bondholders' unperfected liens under §544 because Puerto Rico law does not permit a judgment creditor to obtain a lien on government property. (Altair Br. 48-50.) The Retiree Committee joins in the Board's arguments that the Puerto Rico laws relied upon by the Bondholders do not apply to ERS and, even if they did, those laws do not preclude the Board from avoiding the Bondholder's unperfected liens.

The Retiree Committee makes three additional points in response to the

Bondholders' arguments. *First*, the Bondholders ignore that under Puerto Rico law, a "lien creditor" has priority over a creditor holding an unperfected security interest. 19 L.P.R.A. §2267(a). The Board is a "lien creditor" under Puerto Rico law both because §544 grants it that status *and* because it is a trustee in bankruptcy. 19 L.P.R.A. §2212(a)(52); 48 U.S.C. §2161(a). Thus, the Board's rights are superior to the Bondholders' unperfected liens even without invoking its avoidance powers under §544.

Second, the Bondholders' contention that the Board may not use §544(a)(1) because Puerto Rico may temporarily prohibit a judicial lien creditor from seizing ERS's property is a red herring. (Altair Br. 48.) Section 544 vests the Board with the status of a hypothetical judicial lien creditor. 11 U.S.C. §544(a)(1). Local law then applies to determine the rights and powers of that judicial lien creditor against other creditors. It is of no moment that a judicial lien creditor may temporarily be unable to seize assets of ERS outside of a payment plan. So long as that judicial lien is superior to an unperfected creditor under Puerto Rico law (and it is), the Board can use §544(a)(1) to avoid the unperfected interest.

Third, neither Act 66 nor any other Puerto Rico law eliminates the status of a judicial lien creditor under Puerto Rico law or changes the priority of a judicial lien creditor over other, unperfected, creditors. In short, §544(a)(1) applies here and allows the Board to avoid the Bondholders' liens.

1. As A "Lien Creditor" Under Puerto Rico Law, The Board May Subordinate The Bondholders' Unperfected Security Interests Without Invoking §544.

The Bondholders posit that the relevant inquiry for determining whether the Board can avoid their unperfected liens is: "whether anyone, under local law at the commencement of the Title III case, could have obtained a lien superior to the unperfected interest the trustee wishes to avoid." (Altair Br. 48.) The answer to this question is yes.

Puerto Rico law incorporates revised Article 9 of the UCC. 19 L.P.R.A. §2267(a) (the equivalent of U.C.C. §9-317) provides that a security interest is subordinate to the rights of a person who becomes a "[l]ien creditor" before the security interest is perfected. 19 L.P.R.A. §2267(a)(2)(A). A "lien creditor" is defined under Puerto Rico law to include "a trustee in bankruptcy from the date of the filing of the petition," *or* "[a] creditor that has acquired a lien on the property involved by attachment, levy, or the like." 19 L.P.R.A. §2212(a)(52). Under PROMESA, a trustee in bankruptcy means the Board. 48 U.S.C. §2161(c)(7). The Board is therefore a "lien creditor" under Puerto Rico law both because it has the rights and powers of a judicial lien creditor under §544 *and* because it is a trustee in bankruptcy. *See id.*; 19 L.P.R.A. §2212(a)(52). Either way, it can avoid or subordinate the Bondholders' unperfected security interests.

As a lien creditor, the Board's rights to ERS's personal property are superior

to the Bondholders' unperfected security interest under Puerto Rico law. Put differently, Puerto Rico law provides the Board with an independent basis to avoid the Bondholders' liens, without needing to invoke its avoidance powers under §544(a)(1): "[T]he UCC makes the lien rights of the holder of an unperfected security interest subordinate to the rights of a trustee in bankruptcy, without any requirement to avoid the lien under the Bankruptcy Code." *GAF Linden Emps. Fed. Credit Union v. Robertson (In re Robertson)*, 232 B.R. 846, 850 (Bankr. D. Md. 1999); *see also In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349, 358 (3d Cir. 1969) (an unperfected security interest "is subordinate to the rights of the trustee under both §70(c) of the Bankruptcy Act and §9-301(1)(b) and (3) of the Uniform Commercial Code");[4] *Richardson v. Countrywide Home Loans (In re Gregory)*, 316 B.R. 82, 92 n.18 (Bankr. W.D. Mich. 2004) ("Technically, a bankruptcy trustee does not even have to rely upon 11 U.S.C. §544(a)(1) to prevail over a creditor claiming an unperfected security interest" because it can rely on the UCC).[5]

Thus, even if the Bondholders were correct that the Board cannot invoke

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[4] UCC §9-301 is the predecessor to the current 19 L.P.R.A. §2267 and contained the same rule that the rights of a "lien creditor" are superior to the rights of the holder of an unperfected security interest.

[5] The UCC is a uniform act. 19 L.P.R.A. §401(2)(c). As such, it is to be construed and applied to promote its underlying purposes and policies, which include "to make uniform the law among the various jurisdictions," *Northrup Corp. v. Litronic Industries*, 29 F.3d 1173 (7th Cir. 1994), and decisions of courts outside of Puerto Rico interpreting its provisions are persuasive authority.

§544(a)(1) (and as set forth below they are not), the Puerto Rico UCC permits the Board to prevail over the Bondholders' unperfected liens.

2. Section 544 Does Not Require That A Judicial Lien Creditor Have The Ability To Seize ERS Assets As Of ERS's Petition Date.

The Bondholders argue that because Puerto Rico law as of the commencement of the Title III case may have prevented a judicial lien creditor from seizing assets of ERS, the Board cannot invoke §544(a)(1) to avoid the Bondholders' unperfected security interests. (Altair Br. 48-63.) The Bondholders misunderstand §544(a)(1).

"The purpose of [§544's] 'strong arm clause' is to cut off unperfected security interests, secret liens, and undisclosed prepetition claims against the debtor's property as of the commencement of the case." *Ostrander v. Gardner (In re Millivision, Inc.)*, 331 B.R. 515, 522 n.12 (Bankr. D. Mass. 2005), *aff'd*, 474 F.3d 4 (1st Cir. 2007) (quoting Collier on Bankr. ¶ 544.03 (15th ed., Alan N. Resnick & Henry J. Sommer eds., 2005)). To effectuate this purpose, §544(a)(1) permits the trustee to assume the status of a hypothetical judicial lien creditor. *See In re Santos & Nieves, Inc.*, 814 F.2d 57, 61 (1st Cir. 1987); *Perrino v. BAC Home Loan Servicing (In re Trask)*, 462 B.R. 268, 273 (B.A.P. 1st Cir. 2011). Cloaked with this status, the trustee—and here, the Board—can then avoid whatever inferior liens could be avoided by such a judicial lien creditor. In other words, "the Trustee's status is crafted by federal law" but "the effect of those rights against other parties claiming

a competing interest is determined by applicable state law." *In re Trask*, 462 B.R. at 273; *see also Sotos-Rios v. Banco Popular de Puerto Rico*, 662 F.3d 112, 116 (1st Cir. 2011) (discussing analogous §544(a)(3): "The instant that a bankruptcy petition is filed, the bankruptcy trustee is vested with the status of a hypothetical bona fide purchaser of real property, and may ordinarily avoid any transfer of the property or obligation of the debtor to the extent allowed under state law.").

Contrary to this Circuit's precedent, the Bondholders seek to collapse this analysis, looking to state law both to define the Board's *status* as a judicial lien creditor and its *rights and powers* as a judicial lien creditor. (Altair Br. 48-55.) The Bondholders argue that because Puerto Rico law may temporarily restrict a judgment creditor from seizing property of ERS outside a payment plan, the Board cannot hold the status of a judicial lien creditor under §544(a)(1). (Altair Br. 55-60.) The Bondholders miss the point. To be sure, if Puerto Rico did not recognize the superiority of a judicial lien creditor, then a trustee standing in the shoes of a hypothetical lien creditor would not have the ability to avoid inferior liens. But Puerto Rico law does give judicial lien creditors priority, and, as set forth below, nothing in Act 66 or other Puerto Rico law bars the creation of a judicial lien or changes that priority. The Bondholders—holders of unperfected liens—cannot use Act 66's restrictions on a judicial lien creditor's enforcement remedy to defeat §544(a)(1).

The district court's rejection of a similar challenge in *Millivision* is instructive:

> Congress made its choices long ago by providing estate representatives with hypothetical judicial lien status as of the date of case commencement. *See* Bankruptcy Act of 1878, Sec. 70(c), *amended by* 11 U.S.C. §110(c) (repealed 1978); *see also,* 11 U.S.C. §544(a) (2005). It is hardly an accident that §544(a) has been characterized as a "strong arm power." To protect unperfected secured creditors from the effect of §544(a) would be to rewrite the Bankruptcy Code. *In re Planned Protective Serv., Inc.*, 130 B.R. at 98.

331 B.R. at 523-24. Thus, the Board holds the status of a judicial lien creditor under §544(a)(1), and as set forth below nothing in Act 66 or Puerto Rico law bars the Board from using this status to avoid the Bondholders' unperfected liens.

3. Act 66 And Other Puerto Rico Law Do Not Change The Priority Of A Judicial Lien Creditor Over The Holder Of An Unperfected Lien.

The Bondholders contend that Act 66 of 2014, entitled "Plans for Final and Binding Judgments Pending Payment," does not permit a judgment creditor to obtain a lien on government property. (Altair Br. 48-49.) In fact, Act 66 does nothing to preclude a judgment creditor from employing the procedures set forth in Puerto Rico's Rules of Civil Procedure to obtain a judicial lien. The word "lien" never even appears in Act 66. Even assuming that the Bondholders are correct that Act 66 applies to judgment creditors of ERS, a review of its text makes clear that it does not eliminate existing judicial liens nor does it preclude the creation of new judicial liens. At most, it places a temporary restriction on the ability of a judgment lien creditor to foreclose on its lien and seize ERS's property outside of a payment plan.

And most importantly, Act 66 does not impair the superiority of a judicial lien creditor over the holder of an unperfected security interest.

a. *Puerto Rico Law Permits A Judgment Creditor To Obtain A Judicial Lien Against A Governmental Entity.*

Puerto Rico's Rules of Civil Procedure set forth the procedures by which a judgment creditor may obtain a judicial lien or attachment over real and personal property, and do so without regard to whether the holder of that property is a private or governmental entity. 32 L.P.R.A. App. III (Puerto Rico Rules of Civil Procedure for the General Court of Justice at §§51.2-51.7). The Puerto Rico Rules of Civil Procedure for the General Court of Justice permit a judgment holder to execute a final judgment within five years by submitting a "writ of execution" to the marshal. 32 L.P.R.A. App. III §§51.1, 51.2. Rule 51.3 establishes the process for executing the writ over real or personal property. *Id.* §51.3. "If the writ of execution is against the property of the judgment debtor, it shall require the marshal to satisfy the judgment, with interest, out of the personal property of such debtor." *Id.* §51.5. Puerto Rico's Civil Code gives courts wide latitude to craft a remedy to enforce a judgment, including, "order[ing] the attachment, garnishment, [] *or … any other measure [courts] deems necessary*." 32 L.P.R.A. App. III §56.1 (emphasis added). Except in limited circumstances, Puerto Rico law expressly waives sovereign immunity for the Commonwealth of Puerto Rico and its agencies and instrumentalities, including ERS. 32 L.P.R.A. §3077. ERS's Enabling Act provides

that it may "be sued" and does not restrict the ability of a judgment creditor to execute a lien or attachment on its property. 3 L.P.R.A. §776.

The Bondholders argue: "under Puerto Rico law, a judgment lien on personal property can be obtained only through attachment" and "attachment requires seizure." (Altair Br. 55-57.) But the Bondholders' own authority dispels the notion that actual seizure of ERS's property is necessary to create a judicial lien.

FDIC v. Shearson-American Express, Inc., 996 F.2d 493 (1st Cir. 1993) is instructive. There, this Court considered the relative priority of two judgment creditors, the FDIC and Banco Cooperativo. Banco Cooperativo received its judgment on September 15, 1987, and the FDIC received its judgment two years later, on October 16, 1989. *Id.* at 501-03. On May 16, 1990, the FDIC moved for a writ of attachment and execution, which the district granted on May 17, 1990. *Id.* at 495. The district court ordered the bankruptcy court to direct the funds at issue to the district court to then be disbursed to the FDIC, but as a result of legal challenges to the district court's ruling, the FDIC did not receive the funds until March 11, 1992. *Id.* at 496. Ultimately, this Court affirmed the district court's holding that notwithstanding the later date of its judgment, the FDIC had priority over Banco Cooperativo because the FDIC "properly executed the judgment by attaching the funds at issue on May 17, 1990." *Id.* at 501. It was the order of attachment—*not the seizure of the funds*—that this Court held gave the FDIC priority.

Shearson-American Express illustrates the fallacy of the Bondholders' position. The law does not require a judgment creditor to simultaneously execute its attachment and seize funds to attain the status of a judicial lien creditor. As the Puerto Rico Supreme Court explained in *Oronoz & Co. v. Alvarez*, 23 Dec. P.R. 536, 538 (1916), "[s]eizure *or some other similar measure* is necessary to give a judgment priority." (emphasis added). (*See* Add. 104, *3.)

The Puerto Rico Civil Code and Act 66 provide such similar measure. As set forth below, nothing in Act 66 prevents a judgment creditor from obtaining an order for attachment or from receiving payments from ERS on account of that order. *See Meléndez v. Departamento de Corrección y Rehabilitación*, No. KLRX201600017, 2016 WL 3383265 (P.R. Cir. May 31, 2016) (Add. 91-100). Indeed, the exact fact pattern at issue in *Shearson-American Express* could be replicated post-Act 66, with the same outcome: the judgment creditor who took the additional step of obtaining an order of attachment (even if that judgment creditor was restricted to a payment plan) would be superior to a judgment creditor who did nothing.

b. *Neither Act 66 Nor Other Puerto Rico Law Prohibit A Judgment Creditor Of ERS From Obtaining A Judicial Lien.*

Contrary to the Bondholders' assertions, Act 66 contains no express or even implied limitation on a creditor's ability to obtain a lien or attachment, nor does it change the relative priorities of creditors under Puerto Rico law. *See generally* Act

66. The Bondholders conclude that because Act 66 limits *enforcing* a judicial lien during the term of the Act against certain Commonwealth entities, it also prohibits *obtaining* a judicial lien. (Altair Br. 61-63.) But a limit on enforcing a judicial lien does not itself eliminate the right to obtain the judicial lien in the first instance. Indeed, a creditor might have good reason to obtain a judicial lien even if enforcement of the lien is delayed. Puerto Rico law requires a judicial lien to be obtained within five years of the judgment. 32 L.P.R.A. App. III §51.1. A creditor would not want to delay obtaining the lien and then be unable to do so once Act 66 (which itself states that it is intended to be a temporary measure) no longer applies. *See* 3 L.P.R.A. §9141 ("during the effective term of this Act").

1. The Bondholders' arguments center around two sections of Act 66, neither of which prohibit a judgment creditor from obtaining a lien on ERS's property. Section 28—"Applicability and payment plans" (3 L.P.R.A. §9141) provides in part:

> In view of the negative impact on the fiscal and operational stability of the Commonwealth of Puerto Rico and the municipal governments that the payment of a lump sum would entail, the provisions of this subchapter shall apply to *all final and binding judgments* ... that, on the date of approval of this Act, are pending payment and those issued *during the effective term of this Act*, whereby the agencies, instrumentalities, public corporations, municipalities, or the Commonwealth of Puerto Rico are compelled *to make a disbursement of funds chargeable to the General Fund, the fund of the public corporation in question, or chargeable to the municipal budget*, as the case may be.

3 L.P.R.A. §9141 (emphasis added).[6] Where applicable, Section 28 provides that "regardless of the nature of the judgment," the judgment will be paid pursuant to a payment plan instead of in a lump sum or by foreclosure of a judicial lien. 3 L.P.R.A. §9141. The payment plans under §28 vary in length depending on the amount of the debt, but the starting date for each is the time the payment obligation becomes "final and binding." 3 L.P.R.A. §9141(a)-(e). Section 28's use of the phrase "regardless of the nature of the judgment," acknowledges that the payment plan may apply to judgments in whatever their form. It limits certain judicial lien creditors from seizing government assets during the term of the Act, but it does not terminate existing judicial liens or bar a judgment creditor from employing the Puerto Rico Rules of Civil Procedure to obtain a judicial lien during the effective term of the Act.

If the Puerto Rico legislature had intended to eliminate existing liens and bar future liens, it could have done so explicitly, but it did not. As this Court explained in *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 499 (1st Cir. 2011), where "[a legislature] has enumerated a set of express exceptions, rules of statutory interpretation instruct that [the legislature] intended to make no other exceptions

[6] As the Board argues, because ERS is not a public corporation or a municipality, and because a judicial lien against ERS would be payable only from ERS trust assets and not from "funds chargeable to the General Fund, the fund of the public corporation in question, or chargeable to the municipal budget," Act 66 does not apply to judgment creditors of ERS.

than those specified." (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) ("finding under maxim *expressio unius est exclusio alterius* that enumerated exceptions are the sole exceptions intended within the Endangered Species Act"))).

Act 66 affirms in multiple places that the judgments subject to its provisions are "binding obligations" and "obligations to be met" that the Commonwealth is "committed and willing to pay," but imposes, for a certain period of time, "an orderly and structured payment process." Nothing in the plain language of Act 66 strips a judicial lien creditor of its lien for all time or prevents a creditor who is awarded a judgment during the Act's pendency from obtaining a judicial lien that it can enforce to secure its position ahead of an unperfected security interest in the meantime. Nor should it, because liens serve to protect a creditor's rights vis-à-vis other creditors, not to change the debtor's obligations to the lienholder.

Section 29, "Actions against the Commonwealth, municipalities, and officials," also does not support the Bondholders. As its title makes clear, Section 29 applies to actions against three types of defendants, none of which are ERS. Where applicable, it prevents a judicial lien creditor from compelling payment on a "previously authorized judgment or payment plan[] when there are no funds available." 3 L.P.R.A. §9142. In such an instance, it requires the agency or instrumentality to certify the lack of funds, and directs the payment of interest on the amount owed. *Id.* Section 29 prohibits the garnishment of funds only against the

Commonwealth; it places no similar restriction on the garnishment of funds of ERS, nor does it restrict other forms of a lien, such as an attachment.[7] *See FDIC v. Debtor & Trustee (In re Moscoso Villaronga)*, 111 B.R. 13, 16 (Bankr. D.P.I. 1989) ("attachment" means a lien securing a judgment creditor's claim). By restricting the ability of creditors of only certain named entities or defendants to compel payment and to exercise a particular remedy (garnishment), Section 29 implicitly permits the creditors of other, unnamed entities and defendants, including ERS, to exercise that remedy and all other available remedies. *See Scotiabank De Puerto Rico v. Burgos (In re Plaza Resort Palmas, Inc.)*, 741 F.3d 269, 277 (1st Cir. 2014).

2. None of the cases cited by the Bondholders hold or even suggest that Act 66 changes the priority of a judicial lien creditor over the holder of an unperfected security interest under Puerto Rico law. If anything, the Bondholders' authority confirms that a judgement creditor remains superior.

[7] In Section 28, the statute provides "*[O]nly for purposes of the application of this section*, the term Commonwealth shall include the Commonwealth of Puerto Rico, its agencies and instrumentalities, public corporations, and municipalities." 3 L.P.R.A. §9141 (emphasis added). Thus, under well-established principles of statutory construction, the use of "Commonwealth" in Section 29 refers to the Commonwealth only, and not any other entities. *Scotiabank De Puerto Rico v. Burgos (In re Plaza Resort Palmas, Inc.)*, 741 F.3d 269, 277 (1st Cir. 2014) ("[W]hen a legislature 'includes particular language in one section of a statute but omits it in another ... it is generally presumed that [the] legislature acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Meléndez v. Departamento de Corrección y Rehabilitación, No. KLRX201600017, 2016 WL 3383265 (P.R. Cir. May 31, 2016), is instructive. There, the petitioner sought a writ of mandamus ordering the Department of Correction to establish a payment plan under Act 66. The Puerto Rico court granted the writ, ordering the Department to prepare a payment plan to satisfy the petitioner's judgment with interest. *Id.* at *8-10. (*See* Add. 98-99.) In *Dachman Sandler v. Munícipío de San Juan*, No. KLCE201501046, 2015 WL 9688023 (P.R. Cir. Nov. 30, 2015), the Puerto Rico circuit court denied an appeal from the lower court's order denying a motion to enforce a judgment against the municipality. But the circuit court did not deny the appeal because the petitioner could not obtain an execution of her judgment at all; rather, it did so because the petitioner "requested execution of the judgment in full, when Act 66-2014 allows only for a payment plan." *Id.* at *5 (the plaintiff "did not ask the [Court of First Instance] for what the law provides, but rather for judgment in full"). (Add. 76.)

Similarly, in *A&E Group Corp. v. Autoridad de Edificios Públicos*, No. KLCE201800409, 2018 WL 3037827 (P.R. Cir. Apr. 30, 2018), a Puerto Rico circuit court confirmed that notwithstanding the imposition of a payment plan, the municipality's obligation to "comply with the judicial ruling" remained:

> [Section 28's payment plan] **does not dispense with the** agency's **obligation and responsibility** to comply with the judicial ruling and pay what is owed to the other party. We emphasize that the provisions of subsection (g) **only postpone the installment terms** for complying

> with the obligation to pay the balance of the amount owed. That is to say, the responsibility of the agency or instrumentality **persists** and must be satisfied in full, as agreed, even if it is subject to the extended installments. This will safeguard the continuation of public efforts, as proclaimed by Act 66, while ensuring that the creditor receives the balance of its credit as soon as possible. The intent of Act No. 66-2014 is to establish a careful balance between the fiscal responsibility of the public administration and the rights of the Government to demand the payment of the goods and services rendered.

Id. at *6 (emphasis in original). (Add. 50.)

The other cases cited by the Bondholders do not support their argument that Act 66 changed the ability of a judgment creditor to obtain a lien. (Altair Br. 51-55.) The First Circuit's decision in *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez,* 834 F.3d 110 (1st Cir. 2016) limits its discussion of Act 66 to the Act's limitation on the means of payment. Similarly, in *Aldarondo & Lopez Bras P.S.C. v. Munícipío de Arecibo,* No. KLCE20151959, 2016 WL 3148627 (P.R. Cir. Apr. 27, 2016), the court required the creditor to collect its judgment pursuant to a payment plan, but it said nothing about the ability of the creditor to obtain a judicial lien in the first instance. In *Librotex, Inc. v. Autoridad de Acueductos y Alcantarillados*, 138 Dec. P.R. 938 (1995), a pre-Act 66 case, the court affirmed the lower court's decision to set aside the attachment of the municipal entity's proceeds, but provided "alternative relief of an equitable nature" by ordering the judgment to be paid from the next budget. *Id.* at 942. (Add. 84.) But *Librotex* did not alter the priority of the judgment lien creditor; indeed, it reaffirmed that status: "we acknowledge that the petitioners

are the Authority's creditors by judgment." *Id.* In short, none of the Bondholders' cases address the issue before this Court—a creditor's ability to obtain a judicial lien and that creditor's priority against the holder of an unperfected security interest.

3. The Bondholders also argue that because Act 66 has supremacy over any other Puerto Rico law, a creditor may not obtain a judicial lien against ERS. (Altair Br. 52.) Generally, supremacy matters when two laws conflict. In this case, Act 66 is silent on a creditor's right to hold a judicial lien or to employ the applicable procedures under Puerto Rico law to obtain a judicial lien. It merely mandates that a judicial lien creditor accept a payment plan on account of the lien. The First Circuit instructs, where "[a legislature] has enumerated a set of express exceptions, rules of statutory interpretation instruct that [the legislature] intended to make no other exceptions than those specified." *Sony BMG Music*, 660 F.3d at 499. Because Act 66 could have, but did not, eliminate a creditor's right to obtain or hold a judicial lien, the Puerto Rico laws that provide that right and define the priority of a holder of such a lien remain applicable and are not preempted by Act 66. There is no conflict, so supremacy is not at issue.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE BONDHOLDERS' SECOND AND THIRD COUNTERCLAIMS WITH PREJUDICE.

Count III of the Board's Complaint sought a declaratory judgment that, under 11 U.S.C. §552, the Bondholders' security interest in "Pledged Property" did not

attach to "Revenues" received by ERS post-petition. Section 552 cuts off a secured creditor's liens in post-petition property with two exceptions: (a) "proceeds" of the secured creditor's pre-petition collateral (11 U.S.C. §552(b)(1)); and (b) "special revenues" within the meaning of section 928(a) (11 U.S.C. §928). (*See* App. 1303-05.) The Bondholders' second and third counterclaims argue that these exceptions apply. They clearly do not.

The Bondholders' second counterclaim seeks a declaratory judgment that the Bondholders held valid and enforceable liens on any post-petition "Revenues" because they were proceeds of pledged property under section 552(b)(1). The Bondholders' third counterclaim seeks a declaratory judgment that the post-petition "Revenues" were "special revenues" within the meaning of section 928(a) and exempt from section 552. (*See* App. 1407-11.)

Importantly, for the Bondholders' second and third counterclaims to state a claim, the Bondholders must first show that they have a perfected security interest, and second that there is post-petition property subject to that security interest. The district court properly dismissed the counterclaims with prejudice because it found that the Bondholders did not have perfected security interests. But even if they did (which they do not), the district court still could have dismissed them with prejudice; Puerto Rico's "pay-as-you-go" ("Pay Go") Act bypasses ERS with the result that the source of the Bondholders' collateral post-petition ceased to exist.

A. The Second And Third Counterclaims Fail To State A Claim Upon Which Relief Can Be Granted Because The Bondholders Do Not Hold Perfected Security Interests.

Because the district court held that the Bondholders' security interests were not perfected, it denied both the Board's and the Bondholders' motions for summary judgment on Count III of the Complaint and correctly dismissed Count III as moot. (App. 2038.) The district court also denied the Bondholders summary judgment on its counterclaims and dismissed the Bondholders' second and third counterclaims for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Bondholders assert that because the district court never addressed the Bondholders' arguments on its counterclaims, it erred when it dismissed them with prejudice. (Altair Br. 73-74.) Not so. Counterclaims two and three were premised on the Bondholders' status as holders of perfected and enforceable liens. As a result of the district court's holding that their liens are not perfected, the Bondholders cannot state a claim that their security interests attach to "Revenues," regardless of whether "Revenues" were generated pre- *or* post-petition. (Add. 29-30; App. 1089.) Moreover, to the extent this Court were to reverse the district court (and the Retiree Committee submits that it should not), Count III of the Board's Complaint would no longer be moot, and the parties' arguments with respect to that Count, along with the Bondholders' rights to assert their counterclaims, preserved. *See, e.g.*, *Lussier*

v. Runyon, 50 F.3d 1103, 1113 n.12 (1st Cir. 1995) (noting that the plaintiff could "of course, renew the [preserved] argument before the district court on remand."); *see also Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 815 (2011) ("To the extent Halliburton has preserved any further arguments ... they may be addressed in the first instance by the Court of Appeals on remand.").

B. The Second And Third Counterclaims Fail To State A Claim Upon Which Relief Can Be Granted Because There Was No Post-Petition Property That Was Subject To The Bondholders' Purported Security Interests.

Even if the district court had addressed the substance of the Bondholders' second and third counterclaims, the Retiree Committee submits that the court still would have dismissed them for failure to state a claim, irrespective of its finding that the Bondholders' security interests were not perfected. This is so because Puerto Rico's recent enactment of a "Pay Go" requirement for public employers to pay pensions eliminated the source of the Bondholders' collateral.

The starting point for this analysis is the definition of "Pledged Property" in the Bond Resolution and the Bondholders' Security Agreement. The "Pledged Property" that purportedly was the subject of the Bondholders' security interest is defined principally as "Revenues" and ERS's right to receive those Revenues. (App. 1088, 1089.) "Revenues" means "employers' contributions *received by* [ERS]" and "Employer Contributions" means "the contributions paid from and after the date hereof that are made by the Employers and any assets in lieu thereof or

derived thereunder which are payable to [ERS] pursuant to [Act 447]." (App. 1085, 1089 (emphasis added).) Post-petition, ERS did not receive any "Employer Contributions," none were paid to it, and it had no right to them. The Pay Go legislation repealed Act 447's requirement that employers make contributions to ERS and terminated all employer contributions to ERS, period. *See* Joint Resolution 188, §4; Act 106 §§3.5, 6.8.

That the Puerto Rico legislature could make such a change was disclosed at the time of the bond issuance. The ERS Bonds Official Statement made this clear to the Bondholders, twice:

> The Legislature of the Commonwealth could reduce the Employer Contribution rate or make other changes in existing law that adversely affect the amount of Employer Contributions.

(App. 764; *see also* 775.) The Bond Resolution contained an implied warning to the same effect:

> The System shall oppose any attempt by the Legislature of the Commonwealth to reduce the Employers' Contribution Rate or to make any other change in the Act or any other relevant legislation that would have a material adverse effect on Bondholders. Such opposition shall include delivering written position papers … to make legislators and other government officials aware that such reductions in the Employers' Contribution Rate or other changes may adversely affect the ability of the System to comply with its obligations ….

(App. 1068 at §709(2).) The Bondholders acknowledge in a separate adversary complaint they filed before the district court that the Puerto Rico legislature made this change when Act 106 became law: "The Act [] reiterates that in accordance with

Joint Resolution 188 the Commonwealth would assume any payments that the ERS could not make, *see* Act 106, §§1.3, 1.4, that the ERS would contribute its assets to the Commonwealth, *id.*, and *that the Commonwealth, its public corporations, and its municipalities would stop making employer contributions to the ERS, id.*" (SApp. 025, ¶ 91 (emphasis added).)

Once the Pay Go legislation eliminated Employer Contributions, there was no property and no proceeds of that property to which the Bondholders' security interest could attach. *See* U.C.C. §9-203(b)(2) (a security interest does not attach until the debtor (here, ERS) has rights in the collateral). Even if the pre-petition employer contribution obligations existed at the time ERS pledged them to secure the Bonds, after Pay Go, employer contributions to ERS and ERS's right to receive them ceased to exist. With their primary collateral having been legislated out of existence, the post-petition proceeds in which the Bondholders could retain a security interest also ceased to exist; there was no collateral giving rise to proceeds.

Put another way, the purported pre-petition collateral on which the Bondholders' second and third counterclaims depend was collateral that ERS (and not the Commonwealth or the public employers who were not parties to the Bondholders' Security Agreement) pledged to the Bondholders based on prior legislation only for so long as that legislation gave ERS a right to receive it. The description of the "Pledged Property" in the Bondholders' Security Agreement no

longer fit any property interests of ERS after Pay Go was enacted. ERS had an asset only when the trigger for each public employer payment—an employee providing services and earning a paycheck, and that employee's employer then making its required contribution to ERS—occurred *and ERS had a right to that payment*. Like accounts receivable financing, a right to payment does not become property until the payment obligation to the account creditor (in this case ERS) comes into existence. Because Pay Go eliminated that payment obligation (*i.e.* employer contributions to ERS), the obligation never arose. Thus, the Bondholders' second and third counterclaims fail to state a claim upon which relief may be granted, because the Bondholders no longer have any collateral or proceeds of collateral.[8]

III. THE AMENDMENTS TO THE BONDHOLDERS' 2008 FINANCING STATEMENTS WERE INEFFECTIVE BECAUSE THE 2008 FINANCING STATEMENTS HAD LAPSED.

The Bondholders' original UCC-1 financing statements were filed in June and July 2008 (together, the "2008 Financing Statements"). (App. 1135, 1138.) As the district court correctly held, the 2008 Financing Statements were deficient and did

[8] As the Retiree Committee argued before the district court, even if the Pay Go legislation had not expressly terminated employer contributions, §552 cut off the Bondholders' security interest in post-petition employer contributions because: (a) those contributions were not proceeds of prepetition collateral; (b) employer contributions are not special revenues under the Bankruptcy Code; and (c) the Bondholders did not have a right to tie up, for the next 40 years, future employer contributions that did not exist on the petition date and thereby deny the Commonwealth the fresh start contemplated by PROMESA.

not perfect the Bondholders' security interests because they failed to attach any documents describing the collateral. (Add. 15.) Years later, after their initial 2008 Financing Statements lapsed under revised Article 9 as adopted in Puerto Rico, the Bondholders belatedly attempted to fix their perfection problem of an inadequate collateral description by filing UCC-3 financing statement amendments (together, the "Amendments") (App. 1142-71, 1294-95, 1388), rather than filing or additionally filing new original financing statements that met Puerto Rico's revised Article 9 filing requirements.

The Board and the Retiree Committee argued to the district court that the Amendments were ineffective because the 2008 Financing Statements, which the Amendments purported to amend, had lapsed. The district court did not reach that issue; it correctly held that the Amendments were not sufficient to cure the errors in the 2008 Financing Statements and perfect the Bondholders' security interests because they failed to reference the debtor's official name. (Add. 20.) Even apart from the district court's ruling that the Amendments incorrectly identified the debtor, the district could also have ruled that the Amendments did not cure the deficiencies in the 2008 Financing Statements because those statements had lapsed.

A. Under The Transition Rules Of Puerto Rico's Revised Article 9, The Initial Financing Statements Lapsed Before They Were Amended.

Puerto Rico's revised Article 9, §9-515(a), reduced the duration of filed financing statements from ten years to five years to correspond with the uniform regime of revised Article 9 as adopted by the rest of the United States a decade earlier. §9-515(a); 19 L.P.R.A. §2335(a) (eff. Jan. 16, 2014). Section 9-702 of Puerto Rico's revised Article 9 provided that revised Article 9 applied retroactively: "Except as otherwise provided in this subchapter, this act applies to a transaction or lien within its scope, *even if the transaction or lien was entered into or created before this act takes effect*." 19 L.P.R.A. §2402(a) (eff. Jan. 16, 2014) (emphasis added).

To protect the rights of a secured party with a security interest that was perfected by filing for ten years before revised Article 9's adoption, Puerto Rico adopted two transition provisions: a three-year transition period to allow a perfected secured creditor to stay continuously perfected under §9-703 (19 L.P.R.A. §2403 (eff. Jan. 16, 2014)), and a one-time duration of ten years for existing effective financing statements from the date that revised Article 9 took effect—§9-705(c) (19 L.P.R.A. §2405(c) (eff. Jan. 16, 2014)). These provisions, by their terms, apply only to *perfected* security interests and effective financing statements as of revised Article 9's effective date.

The Bondholders' 2008 Financing Statements could have benefited under these transition exceptions to a five year duration, but only if they perfected the Bondholders' security interests when filed and when revised Article 9 was adopted in Puerto Rico. As the district court correctly held, they did not. Thus, the Bondholders did not qualify for the extended time to continue or amend their 2008 Financing Statements granted by §9-703(b) and §9-705(c). The Bondholders' 2008 Financing Statements—which failed to perfect their security interests—lapsed in 2013, five years after their original filing dates.

This result is sensible. A secured creditor with an unperfected security interest before Puerto Rico adopted revised Article 9 should not be able to use extended transition grace periods to perfect a security interest relating back to the original ineffective filing. It is also consistent with §9-512(c) of revised Article 9 which provides that an amendment to a financing statement adding collateral perfects the secured party's security interest in the added collateral only from the date of the amendment filing. 19 L.P.R.A. §2332(c) (eff. Jan. 17, 2013).

Because the Bondholders' security interests were unperfected when revised Article 9, including its transition rules, took effect, their 2008 Financing Statements' duration was limited to five years from their filing date. That did not deprive the Bondholders of any substantive rights, as they could have filed a new financing statement for $25 with a proper collateral description. But the Bondholders did not

do so, and their original financing statements lapsed. For the additional reasons set forth below, even apart from the Bondholders' identifying the debtor by an unofficial rather than its official or legal name, their financing statement Amendments were ineffective.).

B. The Bondholders' Amendments Of The Lapsed 2008 Financing Statements Were Ineffective.

1. A Lapsed Financing Statement May Not Be Amended.

Under §9-515(c), once a financing statement lapses, it ceases to be effective:

> (c) **Lapse and continuation of financing statement.** The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d) of this section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise.

19 L.P.R.A. §2335(c) (eff. Jan. 17, 2013); *see also* U.C.C. §9-512(b) (an amendment of a financing statement does not extend the period of effectiveness of the original financing statement); 19 L.P.R.A. §2332(b) (eff. Jan. 17, 2013). A lapsed financing statement may not be amended; a new financing statement must be filed. *In re Quality Seafoods*, 104 B.R. 560, 561 (Bankr. D. Mass. 1989); *see also Albany Discount Corp. v. Mohawk Nat'l Bank of Schenectady*, 28 N.Y.2d 222, 269 N.E.2d 809 (1971) (if a filing expires, the secured party should file a new financing statement); *Bank One v. Bononi (In re Aliquippa Machine Co.)*, 343 B.R. 145, 148-49 (Bankr. W.D. Pa. 2006); *Gordon Square Pharmacy, Inc. v. Harris Wholesale Co.*

(In re Gordon Square Pharmacy, Inc.), 138 B.R. 533, 535-36 (Bankr. N.D. Ohio 1992). Here, because the 2008 Financing Statements had lapsed before the Amendments were filed, the Amendments were not effective.

2. The Bondholders' Amendments Should Not Serve As Financing Statements Under Revised Article 9.

The Bondholders also may not point to the Amendments as substitutes for the original UCC filings to perfect their security interests. Puerto Rico's UCC-1 form provides that an original financing face page must indicate the debtor's name and address in the debtor box. The filing officer indexes an original or initial UCC filing so that filing personnel know when the original financing statement lapses, when they can accept continuation statements affecting that filing, when they can reject amendments and other filings relating to it after its lapse date, when they can remove a lapsed filing from its records after one year, and what financing statements to retrieve in response to a search request.

The Bondholders' Amendments were clearly identified as amendments and used form PRUCC-3. (App. 1142-71, 1294-95, 1388.) They were not labeled or filed as an original filing, and they did not have the debtor's name and address on the face of it as required by revised Article 9 and Puerto Rico's form of original financing statement. (*Compare* App. 1135-41 *with* App. 1142-71, 1294-95, 1388.) The Amendments did not alert the filing office that they were really intended to be initial financing statements for purposes of setting the lapse date and the six-month period

in which continuation statements can be filed to extend it for another five years.[9] In short, the Amendments did not follow the formal and necessary requirements of revised Article 9 for original financing statements.

A rule that would allow the Amendments to stand as original financing statements would undermine the integrity of revised Article 9's UCC financing statement system including its use of a modernized computerized filing system. *SEC v. ISC, Inc.*, No. 15-cv-45-jdp, 2017 WL 3736796 (W.D. Wis. Aug. 30, 2017) (improper spacing in the name of the debtor caused state's computerized search logic not to discover financing statement). Because the Bondholders' Amendments do not properly qualify as initial financing statement filings they should not be deemed to perfect their security interest. *See, e.g.*, *In re Metrobility Optical Systems, Inc.*, 279 B.R. 37 (Bankr. D.N.H. 2002) (late continuation filing could not constitute an original filing; notice filing not enough where UCC filing formalities or rules not observed, citing *Uniroyal*); *Lanser v. First Bank Financial Centre (In re Voboril)*,

[9] Model rules that govern how state administrators in UCC filing offices handle the filing, retention, lapse, termination, search and other actions regarding UCC financing statements under Revised Article 9's UCC filing system were promulgated and revised in 2015 by the International Association of Commercial Administrators ("IACA"). All 50 states and the District of Columbia have adopted use of IACA's Model Rules for administering UCC financing statement filings. Those rules show the importance of the lapse date based on the initial financing statement's filing date. The Model Rules use the term "lapse" or some form of it 42 times (not counting the index) for the actions that the filing officer is to take or not take arising from that date. *See* SApp.044-068.

568 B.R. 797, 802 (Bankr. E.D. Wis. 2017) (debtor's name listed in wrong field of financing statement); *In re Uptown Variety*, 6 U.C.C. Rep. Serv. 221, 225 (Bankr. D. Or. 1969) (financing statement must be indexed according to the name of the debtor in the upper left-hand corner of the financing statement form); *see also Crestar Bank v. Neal (In re Kitchin Equipment Co. of Va., Inc.*), 960 F.2d 1242, 1246 (4th Cir. 1992) (checking wrong box on financing statement amendment terminated it); *Gulf National Bank v. Franke (In re Katz)*, 563 F.2d 766, 768 (5th Cir. 1977) (face of financing statement filing controlled over attachment).

Complying with revised Article 9's UCC financing statement filing rules as adopted in Puerto Rico and the rest of the United States is not difficult or expensive. This Court should not condone the Bondholders' failure to comply with those rules by their using an incorrect debtor legal name, their filing amendments after the original financing statements they amend have lapsed, and their using amendments which do not meet the form and filing requirements for original financing statements.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing brief has been prepared in Microsoft Word 2013 using 14-point Times New Roman typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 12,383 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). Microsoft Word 2013 was used to compute the word count.

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CERTIFICATE OF SERVICE

I certify that, on October 19, 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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