Hearing Date: TBD

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

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, *et al.*, Debtors.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, Debtor.	PROMESA Title III No. 17 BK 3566-LTS

[1] The Debtors in these jointly-administered PROMESA Title III cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are: (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (Bankruptcy Case No. 17 BK 3284) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686).

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC, *et al*., Plaintiffs, v. THE COMMONWEALTH OF PUERTO RICO, *et al.*, Defendants.	Adv. Proc. Nos. 17-219, 17-220

REPLY IN SUPPORT OF JOINDER OF INTERVENOR OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO TO THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD'S MOTION TO DISMISS THE AMENDED COMPLAINT

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The Official Committee of Retired Employees of the Commonwealth of Puerto Rico (the "**Retiree Committee**") submits its Reply in support of its Joinder to the Motion to Dismiss.[1]

PRELIMINARY STATEMENT REGARDING SCOPE OF INTERVENTION

Throughout their Opposition, the Bondholders argue that the Retiree Committee's arguments must parrot those of the FOMB, *even though* the Retiree Committee's arguments are nothing more than additional support for the FOMB's position that the Complaint should be dismissed. (*See* Opp. 52, 55, 57, 60-61.) That extreme limitation on the ability of a committee to represent its constituents is not supported by the text of this Court's November 8, 2017 Order or any provision of the Bankruptcy Code or PROMESA. [Adv. Dkt. No. 38.] Although the Court stated that the Retiree Committee was "limited in its briefing to the issues already raised by the existing parties," its Order also stated that the Retiree Committee should "avoid duplication" of the parties' briefs. (*Id.* at 9, 10.) Clearly the Court would not have asked the Retiree Committee to avoid duplication while simultaneously requiring the Committee to duplicate precisely the FOMB's arguments.

That the Court could not have intended such an absurd outcome is underscored by the Court's citation to the First Circuit's decision, *In re Financial Oversight & Management Board for Puerto Rico*, which merely held that courts may "restrict intervention to 'the *claims* raised by the original parties.'" 872 F.3d 57, 64 (1st Cir. 2017) (quoting *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 737 n.11 (D.C. Cir. 2003) (emphasis added)). A claim is a right to relief, *see* Fed. R. Civ. P. 8(a), not an argument as the Bondholders mistakenly suggest. The First Circuit did not hold or suggest that a committee's "right to be heard" under 11 U.S.C. §1109 is limited to reiterating the FOMB's arguments; it simply held that the Court may restrict a committee from raising new claims for relief when it intervenes. Indeed, what would be the point of intervention if

[1] Capitalized terms used herein and not defined shall have the meanings given to them in the Joinder.

the Retiree Committee could only parrot the FOMB?

Moreover, reading this Court's Order as the Bondholders do would plainly violate §1109, which "grants a right to raise, appear and be heard on *any issue*." *In re Caldor Corp.*, 303 F.3d 161, 169 (2d Cir. 2002) (emphasis in original) (internal citations omitted). Given the broad right to be heard that §1109 grants to committees, the only sensible reading of this Court's intervention Order is that it prohibits the Retiree Committee from raising its own *claims* in this adversary proceeding, but it does not, nor could it, bar the Retiree Committee from raising its own *arguments* in support of dismissal of the Complaint. That reading is consistent with the case law. As one court explained, §1109 "clearly shows that Congress intended the participation ... not to be limited only to issues already present in the proceedings ... [i]nstead the statute [allows intervenors to] raise new issues." *In re D.H. Overmyer Telecasting Co., Inc.*, 53 B.R. 963, 976 (N.D. Ohio 1984), *aff'd*, 787 F.2d 589 (6th Cir. 1986). Indeed, even an amicus curiae may present arguments that diverge from those of the parties; as a statutory intervenor, the Retiree Committee can have no lesser right. *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 454 (3d Cir. 1982) ("The language of [1109(b)] seems clearly to require that more than mere participation as an amicus be allowed"). Accordingly, the Court should reject the Bondholders' attempts to muzzle the Retiree Committee.

REPLY

The Bondholders' Opposition is a continued attack on critically important legislation that the Commonwealth enacted to advance the public welfare. The Bondholders' claim that the "clear and sole intent" of the Post-Petition Legislation was to "deprive the Bondholders of their constitutionally protected property interests" smacks of self-interestedness and ignores reality. (Opp. 8.) Let this much be clear: Joint Resolution 188 and Act 106 are essential to the well-being of the Commonwealth's 160,000 government retirees, and any disruption to pensions would have far reaching and adverse consequences for the Commonwealth's retirees and economy, as several

leading economists recently found. *See* P. Gluzmann, M. Guzman, and J. Stiglitz, *An Analysis of Puerto Rico's Debt Relief Needs to Restore Debt Sustainability* 28 (2018) ("any spending-reducing reform as cuts in pensions will more likely deepen the recession in the short-term").[2]

This should come as no surprise to the Bondholders. Since the ERS Bonds' issuance, the Bondholders have been on notice that the Commonwealth could enact new legislation that could adversely affect their bonds. (Joinder Ex. A at 26, 37; Compl. Ex. A §709.2.) When the Commonwealth chose to reform its pension system to "safeguard the wellbeing of [its] pensioners and retirees," this eventuality occurred. (Comp. Ex. C at 5.) But it does not follow that the Commonwealth's actions were unlawful, nor that they were taken with the "sole intent" to "evade ERS's obligations to repay the ERS Bonds." (Opp. 8.) The Bondholders' attempt to prevent the Commonwealth from implementing Joint Resolution 188 and Act 106 fails as a matter of law because the Bondholders cannot state a claim upon which relief may be granted with respect to any of the Counts of their Complaint. Nothing in their Opposition cures these defects.[3]

I. Count I Should Be Dismissed Because The Post-Petition Legislation Is An Exercise Of The Commonwealth's Governmental Powers And Does Not Violate The Stay.

Count I must be dismissed because the Bondholders cannot overcome a fundamental obstacle. Section 305 of PROMESA prohibits this Court from interfering with the Commonwealth's exercise of its governmental powers. *See* 48 U.S.C. §2165. In the Complaint, the Bondholders attempt to invoke ERS's automatic stay to protect their singular interests. But even if §305 of PROMESA did not preempt any such stay violation (and it does), the Post-Petition Legislation fits squarely within §362(b)(4)'s police and regulatory exception.

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[2] http://espaciosabiertos.org/wp-content/uploads/2018/01/Final-Report-DSA-2018.01.pdf.

[3] The Retiree Committee joins in the arguments that the FOMB makes in its Reply.

A. Section 305 Of PROMESA Prohibits The Bondholders From Using This Court To Disrupt The Post-Petition Legislation.

Section 305 of PROMESA provides: "notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with [] any of the political or governmental powers of the debtor." 48 U.S.C. §2165(1). The Bondholders argue that §305's prohibition does not apply because: (i) the Commonwealth is not a debtor in ERS's title III case; and (ii) the Post-Petition Legislation is not an exercise of "political or governmental powers," and even if it were, that the declaratory relief the Bondholders seek in their Complaint is not barred by §305. (Opp. 35-44.) The Bondholders' reasoning should be rejected.

As to the Bondholders' first argument, there is no question that the Commonwealth is a title III debtor and if the Court were to grant the relief the Bondholders seek, it would be a "stay, order or decree" that would "interfere with" the Commonwealth's "governmental powers." 48 U.S.C. §2165. Section 305 provides that orders that do so, whether entered in "the case *or otherwise*," are outside of the court's jurisdiction. Indeed, §305 would be toothless if a litigant could avoid its jurisdictional bar by filing a suit outside of the title III case in another court.

As to their second argument, it is hard to conceive of any governmental power that is more fundamental than protecting the public welfare. As the First Circuit explained in *National Association of Tobacco Outlets, Inc. v. City of Providence, R.I.*, the states' "historic powers include the protection of the health and welfare of the state's citizens." 731 F.3d 71, 79 (1st Cir. 2013) (internal citations omitted). The Post-Petition Legislation does just that.[4] It terminates the

[4] Under the ERS system the employer made a fixed contribution based on the number of active participants, coupled with annual contributions. 3 L.P.R.A. §787f. As the system ran out of assets to cover pensions, it was impractical to continue funding the system with employer contributions that had no relation to the dollars needed to pay the pensions of former employees. (*See* Compl. Ex. C at 9-12.) Because the system was incapable of providing the assets to pay the pensions, the Commonwealth's solution was to transition

unfunded ERS pension system and establishes the PayGo system "as a new method of safeguarding pensions for Government retirees," "the most vulnerable members of our society." (Compl. Ex. B at 2; Ex. C at 1-2.) The Bondholders nevertheless contend that the Post-Petition Legislation is merely an "adjustment of the Commonwealth's financial relationship with ERS." (Opp. 37-38). Under their reasoning, any exercise of governmental authority that implicates a sovereign's bottom line would fall outside of the "political and governmental powers" that are reserved for territories under §305. The Bondholders' interpretation not only renders §305 effectively meaningless, but is also inconsistent with case law interpreting §904 of the Bankruptcy Code, upon which §305 is based.

Lyda v. City of Detroit is instructive, and the Bondholders' attempt to distinguish it is unavailing. 841 F.3d 684 (6th Cir. 2016). In *Lyda*, the court dismissed a complaint that sought both injunctive and declaratory relief directing the municipality not to terminate water service for non-payment. *Id.* at 695-96. The Bondholders argue that *Lyda*'s holding provides "no support" for the Retiree Committee's position that the Post-Petition Legislation is an exercise of the governmental powers reserved for the Commonwealth by §305. (Opp. 40.) They are wrong. As the court explained in *Lyda*, §904 (on which §305 is based) "makes clear that the court may not interfere with the choices a municipality makes as to what *services and benefits it will provide*." *Lyda*, 841 F.3d at 695 (quoting *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994)) (emphasis added); *see also* H.R. Rpt. 95-595 at 398. Just as §904 precluded the bankruptcy court from interfering with the City of Detroit's decision *not* to provide certain services, this Court is prohibited from interfering with the Commonwealth's decision *to* provide pension benefits to its retirees, many of whom depend on those benefits to meet their basic living expenses.

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to a PayGo structure where employers pay the full pension benefits of their former employees instead of fixed percent based on active participants. (*See id.*)

The Bondholders' citation to *In re City of Stockton (Stockton II)*, 526 B.R. 35 (Bankr. E.D. Cal.), *aff'd in part, dismissed in part*, 542 B.R. 261 (B.A.P. 9th Cir. 2015), to support their misguided interpretation of §305 also fails. (Opp. 37-40.) In *Stockton II* the court found that a state statute that provided for a statutory lien and prohibited rejection of the state's contract with CalPERS, a retirement system, did "not relate to basic matters of government and exercise of police and regulatory powers" and related instead to "administrative terms of employment that are tangential [] to government." 526 B.R. at 54. The Bondholders assert that *Stockton II* "held that retiree health benefits did not qualify as 'political or governmental powers.'" (Opp. 40.) That is not the holding. The *Stockton II* court held that there was nothing "inherently 'governmental' or 'political' about a CalPERS municipal pension, *as opposed to* a municipal pension administered by a different entity"—in other words, bestowing unique advantages on a *particular* quasi-private pension administrator was not "governmental or political"—and in any event, §365 preempted the state statute. 526 B.R. at 53-54 (emphases added). Here, the Commonwealth did not bestow an advantage on one of several quasi-private pension administrators. It terminated a failing pension system in favor of an entirely new PayGo system. That decision is not "administrative." It is a comprehensive overhaul of a public benefit expressly designed to protect the public welfare.

Further, §305 bars not only the Bondholders' request for injunctive relief, but also their request for declaratory relief. (Opp. 42-44) As the Sixth Circuit explained in *Lyda*:

> Preliminary or permanent injunctions directing DWSD to stop terminations or to provide water service [] necessarily interfere[s] with the city's governmental powers, its 'property [and] revenues, as well as its 'use [and] enjoyment of … income-producing property. … *A declaration that DWSD's practices are illegal or unconstitutional does the same.* Section 904 strips the bankruptcy court of authority to order anything of the sort.

841 F.3d at 696 (internal citations and quotations omitted; emphasis added). Unable to distinguish this point, the Bondholders critique *Lyda*'s holding on the basis that the "court offered neither

authority nor reasoning" for its conclusion. (Opp. 43.) For their part, however, the Bondholders cannot direct this Court to any applicable authority or reasoning supporting their position that §305 does *not* bar declaratory relief. Even if they could, their claim would still fail because, in their words, "[a] declaration that Defendants violated the automatic stay would not force them to *do* anything." (Opp. 43) As the First Circuit has explained, "issuance of a declaratory judgment deeming past conduct illegal is ... not permissible as it would be merely advisory." *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013).

B. The Post-Petition Legislation Does Not Violate The Automatic Stay.

Contrary to the Bondholders' assertion, the Retiree Committee does dispute that the Post-Petition Legislation violates the automatic stay. (Opp. 31; *see* Joinder 10.) As set forth above, and in the Retiree Committee's Joinder, §305 of PROMESA preempts any alleged stay violation. But even if it did not, the Bondholders still could not allege a stay violation because §362(b)(4) excepts from the stay "the commencement or continuation of an action or proceeding by a governmental unit … to enforce such governmental unit's … police or regulatory power." 11 U.S.C. § 362(b)(4). Under analogous facts, the court in *In re Lacoquille Inv. Co.*, 44 B.R. 731, 733 (Bankr. S.D. Fla. 1984), explained as follows:

> It appears both clear and obvious to me that the enactment of this ordinance by this municipality, if valid under applicable state law, was an *exercise* of the town's police or regulatory power and as such it was not subject to the automatic stay. If it was an action or proceeding subject to the automatic stay, it was necessarily an action or proceeding to enforce the town's police or regulatory power, and, therefore, expressly exempt under § 362(b)(4).

Id. at 733 (emphasis in original). The same is true here. The Post-Petition Legislation is an exercise of the Commonwealth's political and governmental powers under §305; if it violated the stay (which it does not), it would otherwise be exempt under §362(b)(4).

In their Opposition, the Bondholders dispute both that the Post-Petition Legislation is an exercise of the Commonwealth's police powers and that it is an "action or proceeding." (Opp. 31-

35). ERS existed as a vehicle to provide public pensions, not to pay the Bondholders. As even the Bondholders admit, ERS suffered from "chronic underfunding." (Compl. ¶ 59.) Faced with this grim reality, the Commonwealth enacted the Post-Petition Legislation to "safeguard the wellbeing of [the Commonwealth's] pensioners and public servants." (Compl. Ex. C at 5.) The Retiree Committee does not dispute that the Post-Petition Legislation has a financial element—but if that alone rendered §362(b)(4) inapplicable, no exercise of a government's police powers that implicated its budget would fit within the exception. The Post-Petition Legislation was "designed primarily to protect the public safety and welfare" and it therefore fits the police and regulatory exception. *Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757, 763 (1st Cir. 2016) (internal quotations and citations omitted); *see also United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37, 45 (1st Cir. 2011) (noting that when "the record of what and why the state has acted is laid out in ... legislation, it is not difficult to discern the state's motivation") (internal quotations and citations omitted).

The Bondholders' argument that the Commonwealth's passage of the Post-Petition Legislation is somehow not an "action" is equally unpersuasive. Under the Bondholders' theory, it would be a stay violation for the Commonwealth to enact the Post-Petition Legislation, but not to enforce the Post-Petition Legislation through a court proceeding if ERS failed to comply. Such an absurd result is not supported by §362(b)(4), which places no limitation on the word "action."

The Bondholders' sole authority, *In re Albion Disposal, Inc.*, 217 B.R. 394 (W.D.N.Y. 1997), is distinguishable on its facts. There, the court found that §362(b)(4)'s exception did not apply where the town enacted an ordinance post-petition that was inconsistent with the town's post-petition agreement with the debtor. *Id.* at 410. Here, the Commonwealth's Post-Petition Legislation is entirely consistent with representations made in the pre-petition ERS Offering Statement that the "Commonwealth could reduce the Employer Contribution rate or make other

changes in existing law that adversely affect the amount of the Employer Contributions." (Joinder Ex. A at 26, 37 (emphasis in original); *see also* Compl. Ex. A §709.2).

Finally, as the Joinder argues, the Bondholders cannot state a claim for a stay violation with respect to future employer contributions ERS would have received had the Commonwealth not enacted the Post-Petition Legislation. (Joinder 10-11.) A debtor's "expectation or hope of receiving something in the future is not a property right." *In re Bronikowski*, 569 B.R. 48, 52 (Bankr. W.D.N.C. 2017); *see also In re Morales García*, 507 B.R. 32, 43 (B.A.P. 1st Cir. 2014). The Bondholders offer no response to this argument, tacitly conceding the point.

II. Counts II and III Should Be Dismissed Because They Duplicate Pending Claims And The Bondholders Fail To State A Claim That They Are Secured Creditors.

Counts II and III should be dismissed because they duplicate claims pending in the ERS Action and also because they fail to adequately plead a perfected security interest. The Bondholders dispute that Counts II and III are duplicative, but the Opposition's constant refrain that this Court must look to court filings and exhibits in the ERS Action to prop up their claims in this lawsuit proves the point. (*See, e.g.*, Opp. 9, 11-13.) Finally, this Court should dismiss Counts II and III because the Bondholders cannot state a claim to any post-petition employer contributions.

A. Counts II And III Depend On The Resolution Of The ERS Action And Should Be Dismissed.

The Bondholders' current argument that perfection of their liens "is not at issue in this litigation" is belied by the plain language of Counts II and III, in which they seek a determination that they hold "valid, perfected liens" against ERS and the Commonwealth. (Compl. ¶¶ 116-117, 130-31.) Indeed, the Complaint alleges that they are secured creditors or hold perfected liens at least ten times (*Id.* ¶¶ 4, 5, 58, 116, 117, 120, 130, 131, 140, 152), and their prayer for relief seeks a determination that they hold secured claims against ERS and the Commonwealth (*Id.* ¶ 177). In the Opposition, the Bondholders argue that this Court should look to their filings in the ERS Action

as support for their perfection allegations in this case. (Opp. 9, 11-13.) The Bondholders cannot argue, on one hand, that Counts II and III do not duplicate their claims in the ERS Action, while, on the other hand, trying to salvage Counts II and III by reference to the ERS Action.

Litigation is duplicative where "judgment in one [case] is a bar to the others." *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851 (1st Cir. 1947); *see also United States v. The Haytian Republic*, 154 U.S. 118, 124 (1894). Here, the validity of the Bondholders' liens—the question before the Court in the pending and first-filed ERS Action—is part and parcel of the relief the Bondholders seek in Counts II and III of the Complaint. If the Court concludes in the ERS Action that the Bondholders' liens are not perfected, that judgment bars the relief the Bondholders seek in this adversary proceeding. Acknowledging as much, the Bondholders concede that Counts II and III should not go forward until this Court decides the lien perfection question in the ERS Action: "The proper course [] is to address lien-perfection questions in the ERS Action, pursuant to the parties' stipulation, before taking up Counts II and III in this action." (Opp. 12, 14.) In light of the obvious duplicative prior pending litigation, this Court should dismiss Counts II and III.[5]

B. Counts II And III Of The Complaint Fail To State A Claim That The Bondholders Are Secured Creditors.

Counts II and III should also be dismissed because the Complaint fails to state a claim that the Bondholders are secured creditors of ERS and the Commonwealth. As the Retiree Committee argued in its Joinder, the Complaint offers nothing more than "labels and conclusions" with regard to the question whether the Bondholders perfected their alleged liens, and therefore fails to meet the necessary pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In response, the

[5] The Bondholders suggest that this Court should stay, rather than dismiss, Counts II and III. But because Counts II and III, as well as all other counts of the Complaint, fail to state a claim, judicial economy does not support a stay, and the Retiree Committee urges the Court to dismiss Counts II and III.

Bondholders argue that because a lien is valid until avoided in bankruptcy, they "had no reason to allege the details of lien perfection." (Opp. 11.) But Counts II and III seek more than a judicial determination that the Bondholders hold liens—they seek a judicial determination that they are "secured creditors to the full extent of their claims" against ERS and the Commonwealth. (Comp. ¶¶ 117, 131.) Thus, contrary to their assertions, the Bondholders *were* required to assert facts in support of perfection to support a plausible ground for relief. Recognizing that the Complaint fails to allege these facts, the Bondholders suggest this Court should look to allegations and attachments in their court filings in the ERS Action to save their claims. (Opp. 11.) It is black letter law, however, that the complaint itself must adequately plead its claims. *See Solomon v. Khoury*, No. 16-10176, 2017 WL 598758, at *3 (D. Mass. Feb. 13, 2017) ("[M]odifying causes of action in an opposition to [a] motion to dismiss is improper."). Counts II and III should be dismissed.

C. Counts II And III Should Be Dismissed Because The Bondholders Cannot State A Claim To Any Post-Petition Employer Contributions.

Even if the Bondholders could state a claim that their security interests in the pre-petition employer contribution "Revenues" were perfected (and they cannot), their claims in Counts II and III to post-petition employer contributions, if any, should be dismissed because §552 of the Bankruptcy Code cuts off any such post-petition liens. In a single sentence in a footnote, the Bondholders summarily respond that they "have a right to post-petition employer contributions, because those funds are 'proceeds' exempt from 11 U.S.C. §552(a) and 'special revenues' under 11 U.S.C. §902." (Opp. 12 n.7.) Because their Complaint fails to plead allegations supporting that statement, the Bondholders again direct the Court to their filings in the separate ERS Action. (*Id.*)

But as the Retiree Committee explained (Joinder 14-15), the post-petition employer contributions cannot be "proceeds" because ERS was only entitled to receive contributions for work performed by their employees as that work was performed. *See* P.R. LAWS ANN. tit. 3 §787f. Put another way, there was no pre-petition act that created a continuous stream of proceeds—each

employer contribution paid to ERS was contingent on a particular employee showing up to work. Nor are the post-petition employer contributions "special revenues" under §902. ERS collected employee and employer contributions to administer pensions. It did not generate revenues. Further, the Bondholders failed to allege that the post-petition employer contributions were "special revenues" in their Complaint and cannot do so for the first time in their opposition. *Solomon*, 2017 WL 598758, at *3.

The Bondholders offer *no* response to the Retiree Committee's argument that Count III should be dismissed because it fails to state a claim to the extent it seeks a declaration that the Bondholders have a security interest in payments the Commonwealth might receive from public corporations and municipalities under the PayGo system. (*See* Joinder 14-15; Compl. ¶¶ 124-25.) As the Joinder explains, even assuming this Court finds that the Bondholders have a lien on ERS's right to receive "employer contributions," the Post-Petition Legislation does not *transfer* ERS's right to receive those employer contributions to the Commonwealth. Rather, it *terminates* the municipalities' and public corporation's legal obligation to make those contributions. (Compl. Ex. B at ¶ 4.) Thus, there is no legal basis on which the Bondholders can claim a lien in monies received by the Commonwealth under the new system. The Bondholders never held lien rights against the Commonwealth, and in any event, under UCC §9-203(b), ERS could not grant the Bondholders a lien in employer contributions to the PayGo system, because such contributions did not exist at the time of the ERS Bond Resolution. P.R. LAWS ANN. tit. 19 §2233. Count III should be dismissed.

III. The Bondholders' Takings Claims (Counts V-VII) Should Be Dismissed.

A. The Bondholders' Just-Compensation Claims (Counts VI-VII) Are Premature.

The Bondholders' claim that their property has been taken without just compensation is premature. "[N]o constitutional violation occurs" under the Takings Clause "until just compensation has been denied." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473

U.S. 172, 194 n.13 (1985). The Bondholders concede that they can seek a Tucker Act remedy in the Court of Federal Claims to obtain compensation from the United States for the very same alleged taking that is the subject of their claim in this court. (Opp. 61.) They also do not dispute that they have not yet been denied just compensation in that forum. Nor do they dispute that they have not sought just compensation from the Commonwealth. (*See id.* at 57.) Accordingly, just compensation has not been denied the Bondholders, and no constitutional violation has occurred. *Williamson Cty.*, 473 U.S. at 194-95.

The Bondholders agree that the Court of Federal Claims is the proper forum for their just compensation claim, but complain that "Congress designated this Court to be the proper forum for suits against the Oversight Board" to obtain a declaration that the Post-Petition Legislation is unconstitutional. (Opp. 61.) That may be true, but it is utterly beside the point. In virtually every case in which *Williamson County* applies, a federal district court is the appropriate forum to seek an injunction or declaratory relief, and the Court of Federal Claims is the appropriate forum to seek just compensation. The question is not whether this Court has the power to declare a statute unconstitutional, but when it may do so. *Williamson County* requires that a plaintiff who can pursue just compensation pursue it first because a statute does not violate the Takings Clause until just compensation has been denied. *See* 473 U.S. at 194 n.13. Thus, all that matters here is that the Bondholders agree they can seek a Tucker Act remedy in the Court of Federal Claims. *Williamson County* requires that they do so first.

Unable to dispute the law, the Bondholders muster only the vague retort that "directing the suit to the Court of Federal Claims … ignores the Commonwealth's role." (Opp. 61.) But the Bondholders' indecision about which governmental entity is responsible for the alleged taking here does not relieve them of their obligation to seek just compensation. The Bondholders have stated in the Court of Federal Claims that the United States is legally obligated to pay them *all* of

the compensation they think they are owed. *See* Complaint, *Altair Global Credit Opportunities Fund(A), LLC v. United States*, No. 17-cv-970-SGB (Fed. Cl. July 19, 2017). Whether that suit will highlight "the Commonwealth's role" to the Bondholders' satisfaction is irrelevant; all that matters is that it may provide full and just compensation for the taking they allege.[6]

In any event, even if (contrary to reality) the Bondholders' position was that *only* the Commonwealth is responsible for the alleged taking, they would still have to first pursue just compensation through an inverse condemnation remedy against the Commonwealth. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Downing/Salt Pond Partners, L.P. v. Rhode Island & Providence Plantations*, 643 F.3d 16, 20 (1st Cir. 2011) (quoting *Williamson Cty.*, 473 U.S. at 195). "It is well settled that the burden of demonstrating the absolute lack of [an adequate] state proceeding is on the plaintiff." *Id.* at 25 (internal quotation marks omitted). Indeed, "[e]ven where the most that can be said is that it remains *unclear* whether the inverse condemnation remedy applies to the type of taking alleged by the plaintiff, the state litigation requirement is not excused." *Id.* (internal quotation marks omitted). The Bondholders therefore must pursue that remedy before bringing this suit.

The Bondholders' only response is their claim that the Post-Petition Legislation falls within an exception to the *Williamson County* state-litigation rule because it allegedly "involves the direct appropriation of [their] funds." (Opp. 57-58 (quoting *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 19 (1st Cir. 2007)); *see*

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[6] The Bondholders also contend that the Retiree Committee "likely lacks standing" to raise this argument because the FOMB did not do so (Opp. 61), citing *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017). But *Town of Chester* holds merely that an intervenor must possess Article III standing to seek *relief* different than that sought by the party it supports. The relief sought by the Retiree Committee with respect to its Tucker Act argument, as with its other arguments, is a dismissal without prejudice, the same relief the FOMB seeks. The Retiree Committee does not need standing to make this argument.

also id. at 58-61.) That exception applies, according to the Bondholders, when "a claim for compensation would entail an utterly pointless set of activities" because "[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *Id.* at 58 (quoting *E. Enterprises v. Apfel*, 524 U.S. 498, 521-22 (1998) (plurality op.)).

Assuming there is such an exception to *Williamson County*,[7] it is limited to cases involving statutes "requiring direct transfers of money to the government," as the Bondholders' cases make clear. *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995); *Apfel*, 524 U.S. at 521 (same); *Flores Galarza*, 484 F.3d at 19-20 (same). In these cases, the plaintiff could meet its burden of showing that a compensation remedy was foreclosed—because in no conceivable world could the government have intended to appropriate the plaintiff's money and then pay the same amount back as just compensation.

By contrast, "where the most that can be said is that it remains *unclear*" whether a just compensation award would be pointless, "the state litigation requirement is not excused." *Downing/Salt Pond Partners*, 643 F.3d at 25 (emphasis added). Thus, as long as it is "unclear" whether the government would want to proceed with the alleged taking if it had to pay just compensation, the *Williamson County* requirement applies. That is almost always the case except when the government appropriates a definite, known sum of money that will be *exactly* equal to a just compensation award, as in the Bondholders' cited cases. For example, the government often chooses to seize a parcel of land even if it has to pay just compensation. *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960), illustrates the point. There, the plaintiffs had liens on underlying collateral, and the United States took that collateral. But because it was not abundantly clear that

[7] The reasoning of the primary First Circuit precedent on which the Bondholders rely, *Flores Galarza*, was subsequently rejected by that court in *Downing/Salt Pond Partners*. 43 F.3d at 24 (First Circuit "reject[ing] application of the language and reasoning in the *Flores Galarza* majority opinion that purportedly reworked the *Williamson County* state litigation test").

the United States would not have seized the collateral if it had to pay just compensation, the plaintiffs had to seek just compensation for the value of their liens—they could not simply sue to enjoin the United States from obtaining the collateral or to declare that seizure unlawful.

This case is like *Armstrong*, not the "direct transfer of funds" cases the Bondholders cite, because it "remains unclear" whether the Commonwealth might rationally have wanted to transfer the ERS's existing assets while paying just compensation to the Bondholders. The Post-Petition Legislation does not transfer the Bondholders' money; it transfers ERS's money, which the Bondholders allege impairs the value of their liens. The value of those liens (and so any just compensation award) has not been determined, and is especially uncertain given the Bondholders' concession that their liens were subject to the Commonwealth reducing the ERS employer contribution rate to a "trickle." Thus, unlike when the government directly appropriates a definite, known amount of the plaintiff's funds, here the just compensation award may be more or less than the ERS funds transferred by the Post-Petition Legislation. The Bondholders therefore cannot meet their burden of showing that it is *clear* that the Commonwealth would prefer having the Post-Petition Legislation enjoined or declared unlawful to having to pay just compensation.

B. The Bondholders Possess Only An Unsecured Contract Right, The Remedy For Which Is Filing A Proof Of Claim Against ERS For Breach Of Contract.

As the Retiree Committee explained, the Bondholders failed to allege facts explaining how they perfected their alleged security interest in employer contributions to ERS. (Joinder 13-14.) The Bondholders do not address this deficiency, simply restating the conclusory allegation that "they hold valid, perfected security interests." (Opp. 45.) The Bondholders thus properly allege only that they possess an unsecured contract claim. Although courts have held that certain contract claims do not constitute property—and the Committee preserves that argument—even if they do, the proper remedy for an alleged breach of a contract with a government agency is a breach of contract suit, not a Takings Claim. *Masso-Torrellas v. Municipality of Toa Alta*, 845 F.3d 461, 468

(1st Cir. 2017). The Bondholders can pursue their claim against ERS in the title III cases.

C. The Post-Petition Legislation Does Not Take The Bondholders' Property.

Even if the Bondholders have properly alleged a property interest, it is a separate question whether the Post-Petition Legislation impaired—much less "took"—that property.

The Bondholders concede that the ERS offering documents "define[] the scope of [their] property interest." (Opp. 46.) But as the Retiree Committee explained, the ERS Bond Resolution (and ERS Offering Statement) each independently make clear that their property right, if it exists, presupposed that the Commonwealth could "reduce the Employer Contribution rate or … make other changes in existing law that adversely affect the amount of Employer Contributions." (Compl. Ex. A at §709(2); *see* Joinder Ex. A at 26.) In light of this language, the Bondholders concede that nothing "would foreclose the Commonwealth from changing the rate of contribution"—indeed, not even from "slow[ing]" the "employer contribution rate … to a trickle." (Opp. 49, 47.) But the ERS Bond Resolution warns against both "reduc[tions]" in the employer contribution rate *and* "other change[s] in the Act or any other relevant legislation" that could have a "material adverse effect" on the bonds. (Compl. Ex. A at §709(2).) That language clearly warns of legislative changes beyond reductions in the employer contribution rate, including eliminating the contributions. Because the Bondholders' alleged property right was expressly subject to future legislative changes like the Post-Petition Legislation, that legislation does not impair that right.

D. The Bondholders' Public-Use Claim (Count V) Fails.

The Bondholders argue that Claim V, their public-use claim, should not be dismissed because they have alleged that the "true purpose" of the Post-Petition Legislation is simply to transfer property from one party to another. (Opp. 51.) That type of bare allegation, without any supporting factual allegations, is insufficient. The Supreme Court has made clear that that so long as a statute is "*rationally related to a conceivable public purpose*," the "public use" test is satisfied.

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added); *accord Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, 604 F.3d 7, 18 (1st Cir. 2010). The Bondholders try to distinguish *Hawaii Housing Authority* and *Fideicomiso* on their facts, but whether those cases "involve[d] ... obvious transfers of funds from *A* to *B*" or not, (Opp. 51-52), they clearly set forth the standard of review governing *all* public-use claims, including the Bondholders' claims. Yet the Bondholders do not even attempt to argue that there is *no* "conceivable" purpose to which the legislation could be "rationally related." The purposes both are obvious and were articulated by the Commonwealth: setting up a new pension funding system, and dismantling the old, to safeguard the livelihood of the Commonwealth's vulnerable pensioners. (*See* Joinder 25.)

In any event, the Bondholders' strained attempts to distinguish the Court's public-use cases—and the many others just like them—fail. *Hawaii Housing Authority* involved a compelled transfer of real property from one private party to another. *Id.* at 241-42. That transfer served a broader purpose only in the sense that *any* redistribution of property from wealthy to poor would: it reduced the concentration of property ownership. Yet the Supreme Court upheld that statute against the argument that it gave property from *A* to *B*, because of "[the Court's] longstanding policy of deference to legislative judgments in this field." *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). That standard has led courts even to uphold statutes that simply direct lump sums of cash be paid from landlords to evicted tenants, *see Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1080 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017), or that reduce the wages of one class of citizens to help another, though that "take[s] from Peter to pay Paul," *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 375-76 (2d Cir. 2006). The Bondholders do not even mention, much less distinguish, these cases.

Given that statutes that *actually* took property from private party *A* and gave it to private party *B* have been upheld when accompanied by a conceivable public purpose, this legislation—

which transfers governmental assets between government accounts—must as well.

IV. The Bondholders' Contracts Clause Claim Should Be Dismissed.

The Bondholders assert that they have properly alleged that the Post-Petition Legislation substantially impaired their contractual rights. But the Bondholders agree that if a legislative change is a "foreseeable risk," that legislative change does not even violate the contract, much less substantially impair it. (Opp. 65.) Indeed, for this reason, the Bondholders are forced to acknowledge that a reduction in the employer contribution rate would not violate their contract—even if the ERS was unable to make timely debt payments. (*See id.* 64-65.) Thus, even the Bondholders agree that the question for this Court is whether the ERS Bond Resolution put them on notice that the Commonwealth might modify employer contributions during a fiscal crisis. As explained above, the answer to that question is undisputedly yes.

In a footnote, the Bondholders further argue that the Post-Petition Legislation impairs their ability to obtain a remedy because it "dismantl[es]" ERS. (Opp. 67 n. 32.) But nothing prevents the Bondholders from pursuing a breach of contract action against ERS in the title III action by filing a proof of claim against ERS. (*See* Joinder 27-28 (citing *Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011) (to satisfy substantial impairment a plaintiff must show defendants "have somehow impaired its ability to obtain a remedy")).) Their remedy is unimpaired.

The Bondholders next restate their claim that they can dispute the legislation's stated purpose using conclusory allegations that it was (secretly) intended to harm the Bondholders. (Opp. 67-68.) Not so. The First Circuit has made clear that when "the record of what and why the state has acted is laid out in … legislation, it is not difficult to discern the state's motivation." *Fortuño*, 633 F.3d at 45 (quoting *Buffalo Teachers Fed'n*, 464 F.3d at 365). The Bondholders cannot evade the Post-Petition Legislation's stated purpose because they have no specific allegations supporting their alternative, supposedly nefarious purpose.

Finally, the Bondholders rehash their claim that they have sufficiently alleged that the legislation was neither reasonable nor necessary. But aside from parroting the factors from *United Automobile*, the Complaint does not allege *facts* credibly showing that the legislation was anything other than an emergency measure to further the basic societal interest in protecting pensioners during a fiscal crisis and to move to a new, better structured retirement system. The Bondholders argue that it would have been more reasonable to simply keep trying with the ERS system, but the Complaint itself refutes the reasonableness of that approach, acknowledging that the employer-funded ERS pension system was chronically underfunded and failed, time and again, to achieve stability. (Compl. ¶¶ 55-59.) The Bondholders' Contracts Clause claim must be dismissed.

V. The Bondholders' Unjust Enrichment Claim (Count IV) Should Be Dismissed.

The Bondholders do not, and cannot, plead the elements necessary to sustain their unjust enrichment claim. The Complaint alleges no facts to support its conclusion that the Commonwealth was unjustly enriched, and argument in the Opposition cannot remedy this pleading omission. *Solomon*, 2017 WL 598758, at *3. Even if the Opposition's argument could be considered, Count IV should still be dismissed. The Commonwealth is assuming the obligations for all pensions previously administered by the ERS, JRS, and TRS under the new Post-Petition Legislation. Moreover, as the Retiree Committee argued in its Joinder, Puerto Rico law does not permit the Bondholders to assert a claim for unjust enrichment, where, as here, the Bondholders have other remedies at law. *Westernbank P.R. v. Kachkar*, No. 07-1606 (ADC/BJM), 2009 WL 6337949, at *29 (D.P.R. Dec. 10, 2009), *report and recommendation adopted*, 2010 WL 1416521 (D.P.R. Mar. 31, 2010). Count IV should be dismissed.

CONCLUSION

The Retiree Committee respectfully requests that this Court dismiss the Bondholders' Complaint in its entirety and with prejudice and grant such other relief as may be just.

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