

**UNITED STATES DISTRICT COURT
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)

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

Plaintiff,

v.

HON. PEDRO R. PIERLUISI URRUTIA in his official
capacity as Governor of Puerto Rico; THE PUERTO
RICO FISCAL AGENCY AND FINANCIAL
ADVISORY AUTHORITY; HON. JOSÉ LUIS
DALMAU SANTIAGO, in his official capacity as a
representative of the Puerto Rico Senate; and HON.
RAFAEL HERNÁNDEZ MONTAÑEZ, in his official
capacity as a representative of the Puerto Rico House
of Representatives,

Defendants.

Adv. Proc. No. 21-00072-LTS

¹ The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico ("Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17- BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17- BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

**MEMORANDUM OF INTERVENOR SERVICE EMPLOYEES INTERNATIONAL
UNION IN OPPOSITION TO PLAINTIFF’S SUMMARY JUDGMENT MOTION**

To the Honorable United States Magistrate Judge Judith G. Dein:

Service Employees International Union (“SEIU”), an intervenor in the above-captioned adversary proceeding, respectfully submits this memorandum in opposition to the summary judgment motion of Plaintiff Financial Oversight and Management Board for Puerto Rico (“Oversight Board”), Docket Entry #20.²

PRELIMINARY STATEMENT

The Oversight Board’s attack on Act 7-2021 (“Act 7”) rests on a fundamental misconception of the statute. In its complaint (“Complaint”), the Oversight Board claims that Act 7 must be struck down because, it asserts, the statute “makes radical structural changes to the Commonwealth’s three primary public retirement systems and purports to supplant the Oversight Board’s proposed plan of adjustment.” Complaint, Docket Entry #1, at ¶1. In fact, the statute does no such thing. Despite its length and apparent complexity, Act 7 at its core does nothing more than articulate a series of public policies of the Commonwealth and declare that the Commonwealth will not take legislative or other steps to implement a plan of adjustment inconsistent with those public policies. Specifically, the statute declares that the Commonwealth’s public policy opposes cuts to Government pensions and also opposes a restructuring of the Commonwealth’s bonds that would leave the Commonwealth with an unsustainable debt burden.

² SEIU is a labor union that represents approximately 2 million service workers throughout North America. SEIU members employed by the Commonwealth of Puerto Rico belong to one of two SEIU local chapters: SEIU Local 1996/Sindicato Puertoriqueno de Trabajadores y Trabajadoras and SEIU Local 1199/Union General de Trabajadores. Approximately 18,000 SEIU members are employed by the Commonwealth or its instrumentalities.

SEIU is a member of the Official Committee of Unsecured Creditors. SEIU submits this brief in its individual capacity and not in its capacity as a Committee member, nor in any way on behalf of the Committee.

The statute calls for the drafting of a “model” plan of adjustment that the Commonwealth would support, one that protects pensions and deeply reduces debt service to financial creditors. But the model plan of adjustment is just that: a model. The statute does not propose an actual adjustment plan to the Court or to creditors. It simply provides for the drafting of a blueprint of what the Commonwealth thinks an acceptable plan would look like. The legislation also calls for the design of a new retirement trust for the Commonwealth, but that retirement trust would only come into existence under the statute *if* a plan of adjustment consistent with the model plan were adopted, meaning if such a plan were proposed by the Oversight Board and confirmed by this Court.

If the Court evaluates the real Act 7, and not the strawman that the Oversight Board attacks, the Court will quickly realize that the statute does not come close to violating the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), 48 U.S.C. §§2101-2241. To the contrary, the statute comports fully with the power-sharing structure created by PROMESA. That power-sharing structure authorizes the Oversight Board to propose plans of adjustment. But PROMESA preserves the right of the elected representatives of the Puerto Rican people to decide whether and under what circumstances they will agree to exercise legislative and other governmental functions to implement such plans. Because Act 7 does not violate PROMESA, the Oversight Board’s suit should be dismissed.

Even if the Court were to find that certain parts of Act 7 violate PROMESA, the Court should refrain from nullifying the statute in its entirety. It should preserve the statute to the extent that it does nothing more than set forth a statement of public policies and declare the Government’s refusal to support a plan of adjustment inconsistent with such policies. Because statutes constitute the expressed will of the people, courts should only void those parts that

offend the law, and should save the rest. That is particularly so where, as here, the legislature made clear that it considered the statute severable. Accordingly, if the Court finds that parts of Act 7 violate PROMESA, it should sustain the rest of the statute.

BACKGROUND

Act 7

Act 7 expresses “public policy of the Government of the Commonwealth of Puerto Rico.” Docket Entry #7-1, at §2.01. It states that the Commonwealth’s public policy, among other things, “shall be to” reject any proposed plan of adjustment that “reduces, harms, threatens, subordinates or worsens” public-employee pensions, *id.* §2.01(b), “produces an unsustainable restructuring of the bonds of the Government of the Commonwealth of Puerto Rico,” *id.* §2.01(c), or “whose feasibility or payment guarantee for debt service requires cuts to essential public services,” *id.* §2.01(j).

The statute further states that no action by the Commonwealth Government “will be taken to permit confirmation of any Adjustment Plan that is inconsistent with the provisions of this Public Policy,” *id.* §2.01(l), and that no “funds and resources” of the Commonwealth “shall be directed towards the achievement of any Adjustment Plan inconsistent with the provisions of this Act,” *id.* §2.01(n).

Act 7 further declares that the Commonwealth Government shall only “enable” a plan of adjustment “that complies with the provisions of this Act.” *Id.* §2.14(a). Specifically, only when a plan of adjustment complies with Act 7 may the Government issue legislation, regulations or orders “to facilitate the confirmation” of the plan, *id.* §2.14(a)(1), issue authorizations to confirm the plan, *id.* §2.14(a)(2), or provide advice or any legal report to the Oversight Board to facilitate the plan, *id.* §2.14(a)(3).

Act 7 instructs the Commonwealth Government to draft a model plan of adjustment “that is consistent with the provisions” of the statute. *Id.* §2.14(b). Chapter 4 of Act 7 sets forth certain terms that would be in such a model plan, including terms for the classification and treatment of the claims of bond and pension creditors.

Act 7 also makes it Commonwealth public policy to “seek” to create a pension trust fund known as the “Trust Fund for the Joint Administration of the Retirement Systems,” or, by its Spanish-language acronym, “FACSiR.” *Id.* §2.01(o). Section 3.01 requires the Commonwealth Government to use its authority “for the design, planning, and *future* creation” of the FACSiR. *Id.* §3.01 (emphasis added). Chapter 3 of Act 7 sets forth terms that would govern the FACSiR.

Significantly, Act 7 does not establish the FACSiR. Rather, the statute makes creation of the FACSiR contingent on implementation of a plan of adjustment consistent with the terms of Act 7: “FACSiR shall exist by virtue of its organic law *once the authorization of an Adjustment Plan* modeled in accordance with Chapter 4 of this Act -- which shall serve as a cornerstone for the establishment, financing, and sustainability of FACSiR -- *has been legislated.*” *Id.* §3.01 (emphasis added).

Finally, Article 5.01 of Act 7 sets forth an express and painstakingly-detailed severability provision intended to save any part of the statute not voided by judicial decree:

Should any clause, paragraph, subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, subheading or part of this Act be annulled or declared unconstitutional, the order issued to that effect shall not affect, harm, or invalidate the remainder of this Act. The effect of said order shall be limited to the chapter, subchapter, subheading or part thereof that was thus annulled or declared unconstitutional ... *It is the express and unequivocal will of this Legislature that the courts enforce the provisions and application of this Act even if any of its*

parts are voided, annulled, invalidated, damaged or declared unconstitutional

(Emphasis added).

Legislative History

The legislative history of Act 7 confirms that the Legislature intended Act 7 to be no more than an expression of certain public policies and a prohibition on the Commonwealth Government taking steps to implement a plan of adjustment inconsistent with those policies. Generally, the most reliable form of legislative history is the report of the legislative committees that were responsible for the bill that led to the statute. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (noting that committee reports “are a particularly reliable source” for determining legislative intent) (Sotomayor, J., concurring); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill”). Here, we have the report (“Report”) on the bill that later became Act 7, issued jointly by the Puerto Rico Senate’s Committee of Finance, Federal Affairs and the Fiscal Oversight Board and by its Committee of Human Rights and Labor Affairs. A certified English translation of the Report is attached hereto as Exhibit A.

The Report states that the bill “describes the circumstances under which the Government of Puerto Rico should collaborate with the [Oversight Board] during the public debt restructuring process under Title III of PROMESA.” *Id.* at 2. It explains that the bill “outlines the *suggested parameters* for a Debt Adjustment Plan,” *id.* (emphasis added), and describes the drafting of a model plan of adjustment by the Government “as a *merely suggestive and aspiring exercise*, [the] purpose of which is not to enact a Debt Adjustment Plan through law.” *Id.* at 4 (emphasis added). According to the Report, the bill “does not constitute a formal offer of terms to creditors, but rather ... serves as a *guide* over those parameters and guidelines which the

Government of Puerto Rico must pursue within the debt restructuring process, for the approval of an actual Plan of Adjustment.” *Id.* (emphasis added).

The Report similarly notes that the creation of the FACSIR is contingent on the enactment of a plan of adjustment consistent with Act 7, stating that “*if this model Adjustment Plan is finally approved, [the bill] proposes to establish a trust for joint management of the Island’s government retirement system*” *Id.* at 2 (emphasis added); *see also id.* (objectives of the bill include the “establishment of a closed-end Trust, created and insured by the bankruptcy process, called the FACSIR, *once the authorization of the Debt Adjustment Plan has been legislated in accordance with the provisions of Chapter 4 of H.B. 120.*”) (emphasis added). The Report explains that funding for the pension trust would come from a reduction in debt service on bonds under the terms of the model plan of adjustment and that, without implementation of the model plan, the FACSIR would likely not “reach fiscal viability.” *Id.* at 18.

The Report makes clear that none of the bill’s provisions “including the inception of the FACSIR” are “enforceable in view of its approval.” *Id.* at 35. It explains that “[a]ll the material financial provisions of this law depend on the adoption and approval of an Adjustment Plan which complies with all of the guidelines of [the bill].” *Id.*

The Oversight Board’s Suit

In the instant adversary proceeding, the Oversight Board asks the Court to nullify Act 7 in its entirety. *See* Complaint, Docket Entry #1, at 29. The Oversight Board’s complaint incorrectly alleges that Act 7 “purports to *impose* a new plan of adjustment” in Puerto Rico’s restructuring process, a plan that would reduce bondholder recoveries below those provided in the current settlement agreement between bond creditors and the Oversight Board. *Id.* ¶2 (emphasis added). Ignoring the contingent nature of the FACSIR, the complaint also incorrectly asserts that Act 7 would “create a new pension trust,” a pension trust that the Oversight Board

claims would become insolvent. *Id.* The Oversight Board’s pleading claims that the changes supposedly “mandated” by Act 7 would “fundamentally undermine the Commonwealth’s ability to achieve fiscal stability and access to capital markets.” *Id.*

Counts 1 and 3 of the Oversight Board’s complaint set forth claims under PROMESA 108(a)(2), asserting that Act 7 would “impair or defeat the purposes of PROMESA.” *Id.* ¶59; *see also id.* ¶82. Count 2 seeks nullification of Act 7 under PROMESA 204(a) on the ground that the Commonwealth Government failed to comply with Oversight Board directives to refrain from implementing it and to repeal it. *See id.* ¶78. Count 4 seeks nullification of Act 7 under PROMESA Section 207, on the false grounds that the Act “modifies the Commonwealth’s debt.” *Id.* ¶87. Count 5 seeks nullification under PROMESA Section 204(c) on the false claim that Act 7 requires “reprogramming” of monies in the Commonwealth’s certified budget without Oversight Board approval. *Id.* ¶101. Finally, Count 6 claims that Act 7 is inconsistent with, and thus preempted by, PROMESA. *See id.* ¶105.

On August 13, 2021, the Oversight Board moved for summary judgment on the claims in its complaint.

ARGUMENT

I. NOTHING IN PROMESA PROHIBITS THE COMMONWEALTH FROM DECLARING UNDER WHAT CIRCUMSTANCES IT WILL TAKE STEPS TO IMPLEMENT A PLAN OF ADJUSTMENT

This litigation raises a fundamental question about the extent of the Oversight Board’s authority under PROMESA. Specifically, it raises the question whether the Oversight Board’s authority is so all-encompassing that it divests Puerto Rico’s elected representatives of the power to declare under what circumstances they will cooperate with the Oversight Board’s reorganization plans. PROMESA’s language, and this Court’s case law interpreting it, provide a clear answer: the Oversight Board’s power does not reach that far.

As this Court has recognized, the Oversight Board is not a control board that rules Puerto Rico. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 583 B.R. 626, 633 (D.P.R. 2017); *see also id.* at 635 (“Congress did not make the [Oversight Board] an operating trustee”). Judge Swain has noted that the Oversight Board does *not* have the power “to take any and all actions it believes are necessary to further its role under PROMESA.” *Id.* at 634. In particular, Congress did not give the Oversight Board “power to affirmatively legislate.” *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 330 F.Supp.3d 685, 701 (D.P.R. 2018). Legislating remains a prerogative of the Commonwealth.

Judge Swain has explained that PROMESA “leaves the elected government in place and does not suspend it in favor of direct management by the [Oversight Board].” 583 B.R. at 635. Indeed, PROMESA Section 303 expressly reserves political, legislative and governmental power to the Commonwealth, stating that, with certain exceptions not relevant here, Title III “does not limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers of the territory or territorial instrumentality.” 48 U.S.C. §2163. PROMESA Section 405 makes clear that by creating the Oversight Board, Congress’ goal was not to preempt the Commonwealth’s traditional governmental authority but instead to “provide an *oversight mechanism to assist* the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring.” *Id.* §2194(n)(3) (emphasis added).

By limiting the Oversight Board’s authority, and broadly reserving the Commonwealth’s right to govern, PROMESA created what Judge Swain has described as an “awkward power-sharing arrangement.” 330 F.Supp.3d at 701; *see also* 583 B.R. at 637 (noting

“power sharing structure created by PROMESA”). Judge Swain has explained that because the Oversight Board shares power with the Commonwealth Government, it must obtain “buy-in from the elected officials and legislators,” for those measures that require the adoption or modification of legislation. 330 F.Supp.3d at 701. By recognizing that the Oversight Board must obtain the Commonwealth’s “buy-in,” this Court acknowledged that the Commonwealth remains free to decide under what circumstances it will support the Oversight Board.

That certainly applies in the case of a proposed plan of adjustment. PROMESA Section 315 authorizes the Oversight Board to submit a plan of adjustment, *see* 48 U.S.C. §2175, but Section 314(b)(5) makes confirmation of such a plan contingent on the Oversight Board obtaining “any legislative, regulatory, or electoral approval necessary under applicable law to carry out any provision of the plan.” *Id.* §2174(b)(5). Even following confirmation, the success of a plan of adjustment depends on the cooperation of the Government. As Judge Swain explained, “[a] feasible plan of adjustment must ... be premised on a functioning and credible government structure that will execute the plan of adjustment long after the [Oversight Board] is dissolved. That is doubtless one reason that PROMESA leaves the elected government in place and does not suspend it in favor of direct management by the [Oversight Board].” 583 B.R. at 636.

The power-sharing structure created by PROMESA leaves no doubt that the Commonwealth retains the prerogative to decide under what circumstances it will support a proposed plan of adjustment. The Commonwealth has every right to declare whatever public policies it believes best for the people of Puerto Rico, regarding public-employee pensions, government-backed debt, and any other matter of public concern. It also has every right to declare that it will not legislate or take other actions to implement a plan of adjustment that

contravenes those stated policies. Because Act 7 does nothing more than that, it falls comfortably within the zone of authority that PROMESA left to the Commonwealth.³

A. There Is No Rational Basis for Concluding that Act 7 Impairs or Defeats the Purposes of PROMESA Within the Meaning of PROMESA Section 108(a)(2)

The Oversight Board relies primarily on PROMESA Section 108(a)(2), which forbids the Governor and Legislature to “enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board.” 48 U.S.C. §2128. This Court has held that it will sustain a determination by the Oversight Board that legislation impairs or defeats the purposes of PROMESA within the meaning of Section 108(a)(2) if that determination has a “rational basis” and is supported by substantial evidence. *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 511 F.Supp.3d 90, 120 (D.P.R. 2020); *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 616 B.R. 238, 253 (D.P.R. 2020). For example, the Court found a rational basis for the Oversight Board’s conclusion that Law 29 impaired or defeated the purposes of PROMESA because that statute eliminated municipalities’ obligations to reimburse the Commonwealth for pension payments and thus increased the Commonwealth’s expenses beyond that permitted by the certified fiscal plans and budgets. *See* 616 B.R. at 254. Similarly, the Court struck down Act 176, which increased the paid vacation

³ In response to the Governor’s stated refusal to support a plan of adjustment that cuts pensions, the Oversight Board has taken the entirely novel position that it can issue new bonds called for by a plan of adjustment without the Commonwealth Legislature authorizing such bonds. *See* July 27, 2021 *Disclosure Statement for the Sixth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al.*, [Docket Entry #17517], at 585-87. SEIU, like the Governor, *see id.* at 66-69, disputes that the Oversight Board has such authority. But if the Oversight Board is right, that it can achieve confirmation and execution of a plan of adjustment without the Commonwealth Government’s support, that makes Act 7 even less vulnerable to legal challenge: if the Oversight Board does not need the Government’s support, it faces no harm from a statute declaring that the Government will withhold such support.

and sick day allowance of Government employees, since “increasing the price that the Government pays for labor” was at odds with the certified fiscal plan. 511 F.Supp.3d at 132.

Here, by contrast, the Oversight Board has no rational basis for deeming Act 7 to impair or defeat the purposes of PROMESA. Unlike the Commonwealth statutes that the Court has previously nullified under PROMESA, Act 7 has *no* concrete or immediate impact on the Commonwealth’s finances or operations. The Report of the Senate committees, discussed above, provides authoritative support for that conclusion. The Report explains that the bill that became Act 7 only “suggested parameters” for a plan of adjustment, Exhibit A at 2, and that the model plan it called for was “a merely suggestive and aspiring exercise.” *Id.* at 4. Moreover, the Report explains that the statute would have no immediate or definite impact, because “[a]ll the material financial provisions of this law depend on the adoption and approval of an Adjustment Plan which complies with all of the guidelines of [the bill].” *Id.* at 35.

Act 7 is no more than an expression of public policies and a stated refusal to support a plan of adjustment inconsistent with those policies. As explained above, by curbing the Oversight Board’s authority and reserving the Commonwealth governmental powers, PROMESA left the Commonwealth well within its rights to enact such declaratory legislation. Indeed, to conclude that Act 7 impairs or defeats the purposes of PROMESA, one would have to find that one of PROMESA’s purposes is to enact whatever plan of adjustment the Oversight Board proposes. But that is clearly *not* a purpose of PROMESA. PROMESA authorizes the Oversight Board to propose its vision of Puerto Rico’s reorganization, but it leaves room for others to object and, in the case of the Commonwealth, to withhold support. Hence, Judge Swain’s observation that the Oversight Board needs to obtain the Government’s “buy-in.” 330 F.Supp.3d at 701.

For these reasons, the Oversight Board’s Section 108(a)(2) claims fail as a matter of law.

B. Because Act 7 Has No Immediate or Concrete Impact on the Commonwealth’s Finances or Operations, The Oversight Board’s Claims Under PROMESA 207 and 204(c) Also Fail

Because Act 7 has no immediate or definitive impact on the Commonwealth’s finances or operations, the Oversight Board’s claims under PROMESA Sections 207 and 204(c) also fail. Section 207 provides that, absent the Oversight Board’s consent, the Commonwealth Government cannot “issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt.” 48 U.S.C. §2147. Act 7 does not violate Section 207 because it does not require or instruct the Commonwealth Government to engage in any of the debt-related transactions listed in Section 207. Indeed, the Oversight Board does not contend that Act 7 mandates that the Commonwealth Government engage in any of those transactions.

Rather, the Oversight Board asserts that Act 7 violates Section 207 because it “modifies the Commonwealth’s debt by purporting to dictate the treatment of billions of dollars of Commonwealth bond debt, and preventing the Commonwealth government from taking any action to support a plan of adjustment that alters that treatment.” Complaint, Docket Entry #1, at ¶87. This allegation conflates the Commonwealth’s *declaration* in Act 7 regarding what debt provisions it would support in a proposed plan of adjustment with an *actual modification* of the Commonwealth’s existing debt. PROMESA prohibits the latter but permits the former. Accordingly, the Oversight Board’s Section 207 claim fails.

The Oversight Board’s Section 204(c) claim fails for the same reason: Act 7 requires no immediate or definitive change in the Commonwealth’s finances or operations. Section 204(c) prohibits the Commonwealth Legislature from “reprogramming” funds provided

for in a certified Commonwealth budget unless the Oversight Board “certifies that such reprogramming will not be inconsistent with the Fiscal Plan and Budget.” 48 U.S.C. §2144(c)(2). Act 7 does not violate Section 204(c) because it does not require any reprogramming of funds in a certified Commonwealth budget.

The Oversight Board claims that Act 7 “necessarily effectuates a reprogramming of funds” because the FACSIR pension system would allegedly require the Commonwealth to spend billions more in pension costs than the amount provided for in the fiscal plan. Complaint, Docket Entry #1, at ¶93. In fact, Act 7 requires *no* additional pension spending by the Commonwealth, but simply declares that the Commonwealth Government will not support a proposed plan of adjustment that cuts pensions. Act 7 does contemplate the creation of the new FACSIR pension system, but that new pension system would only come into existence if a plan of adjustment consistent with the policies stated in Act 7 were proposed by the Oversight Board and confirmed by this Court. Absent that, there would be no FACSIR and no additional pension costs. Accordingly, Act 7 does not mandate any “reprogramming” of funds in violation of Section 204(c). For that reason, the Oversight Board’s Section 204(c) claim also fails as a matter of law.

C. The Oversight Board’s Claims Under PROMESA Sections 4 and 204(a) Fail Because Act 7 Is Not Inconsistent with PROMESA or the Fiscal Plan

The Oversight Board is no more successful with its claims under PROMESA Sections 4 and 204(a). PROMESA Section 4 provides that the statute preempts any territorial law “inconsistent” with PROMESA. 48 U.S.C. §2103. The Section 4 claim fails because, as explained above, Act 7 is not inconsistent with PROMESA.

PROMESA Section 204(a)(4)(B) authorizes the Oversight Board, if it deems a Commonwealth law to be “inconsistent” with the fiscal plan, to direct the Commonwealth

Government to “correct” the law to “eliminate the inconsistency” or to provide “an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.” 48 U.S.C. §2144(a)(4)(B). The Oversight Board alleges that it informed the Government that Act 7’s purported inconsistency with the fiscal plan could not be corrected and that no explanation for the inconsistency would suffice. *See* Complaint, Docket Entry #1, at ¶78 & Exhibit 16 thereto. It thus directed the Governor to refrain from implementing Act 7 and directed the Legislature to repeal it. *See id.* ¶78. The Oversight Board claims that the Governor’s and Legislature’s failure to comply with those directives provide grounds for nullification of Act 7 under Section 204(a). *See id.* ¶¶79-80.

The Oversight Board’s Section 204(a) claim fails because Section 204(a) nowhere says that nullification of the law at issue constitutes the automatic remedy for failure to comply with an Oversight Board directive under Section 204(a)(4)(B). Failure to comply merely triggers the Oversight Board’s right to seek judicial relief. Section 204(a)(5) sets forth the consequences of the Commonwealth Government’s failure to comply with an Oversight Board directive under Section 204(a)(4)(B). It provides only that the “Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government’s compliance with the fiscal plan, including preventing the enforcement or application of the law.” 48 U.S.C. §2144(a)(5). In other words, to achieve the remedy it seeks here -- nullification of Act 7 -- the Oversight Board must do more than just show that the Governor and Legislature did not follow its directives; the Oversight Board must establish to the satisfaction of the Court that the statute is inconsistent with the fiscal plan. The Oversight Board cannot establish that Act 7 is inconsistent with the fiscal plan because, as discussed above, Act 7 has no immediate or definitive impact on the

operations or finances of the Commonwealth Government. It merely declares a set of public policies and a refusal to support a plan of adjustment inconsistent with those policies. Moreover, the contemplated new pension trust would come into being only *if* the Oversight Board proposed, and the Court confirmed, a plan of adjustment with the terms sought in Act 7. Accordingly, the Oversight Board's Section 204(a) claim fails as well.

II. BECAUSE ACT 7 IS SEVERABLE, THE COURT SHOULD STRIKE DOWN ONLY THOSE SECTIONS THAT IT MAY DEEM TO VIOLATE PROMESA

Even if the Court were to find that parts of Act 7 violated PROMESA, it should strike down only those parts, and leave the rest standing. In particular, it should sustain those provisions of Act 7 which do no more than declare the Commonwealth's public policy and its refusal to support a plan of adjustment inconsistent with that public policy. As explained above, such a declaration falls comfortably within the traditional governmental prerogatives that PROMESA's power-sharing arrangement left to the Commonwealth.

When reviewing statutes, federal courts use a scalpel, not a bludgeon, excising only those provisions that must be removed. As the Supreme Court recently explained, “we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.” *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2209 (2020) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010)). “The ‘normal rule’ is ‘that *partial*, rather than facial, invalidation is the required course.” *Free Enterprise Fund*, 561 U.S. at 508 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)) (emphasis added); see, e.g., *Arizona v. United States*, 567 U.S. 387, 416 (2012) (finding parts of state statute preempted by federal law, but leaving rest of statute standing).

Indeed, a court should nullify a partially-flawed statute in its entirety only when it finds that the legislature intended the statute to stand or fall in its entirety. *See Brockett*, 472 U.S. at 506. A severability clause in the statute precludes any such finding. *See Seila Law*, 140 S. Ct. at 2209 (“When Congress has expressly provided a severability clause, our task is simplified”); *Brockett*, 472 U.S. at 506. Here, the severability clause in Article 5.01 of Act 7 makes abundantly clear that Legislature intended that only those portions of the act that might be found repugnant to PROMESA should fall, while the rest should remain in effect. Article 5.01 provides that an order annulling parts of the act “shall not affect, harm, or invalidate the remainder of this Act.” Docket Entry #7-1, at §5.01.

Accordingly, even if the Court were to find certain parts of Act 7 to violate PROMESA, it should strike down only those parts. In particular, however the Court construes and evaluates other aspects of Act 7, it should leave standing those provisions that do no more than state the Commonwealth’s public policy and its decision to withhold support for a plan of adjustment that contravenes that policy.

CONCLUSION

For the foregoing reasons, the Oversight Board’s summary judgment motion should be denied. Because Act 7 does not violate PROMESA, the Oversight Board’s suit should be dismissed.

Dated: August 27, 2021

COHEN, WEISS AND SIMON LLP

/s/ Peter D. DeChiara _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August 2021, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will notify all counsel of record by email.

/s/ Peter D. DeChiara

Peter D. DeChiara