UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Jonathan Hernández Zorrilla, et als Plaintiffs, v. **Ricardo Rosselló-Nevares,** et als., Defendants.	CIVIL NO. 19-cv-1397 (GMM) Consolidated with case number 19-cv-1414 Civil Rights Violation, Declaratory and Injunctive Relief, Compensatory and Punitive

PLAINTIFFS' OPPOSITION TO NOTICE OF INJUNCTION

TO THE HONORABLE COURT:

COME NOW, the plaintiffs of the instant case, through the ACLU Puerto Rico and the undersigned attorney, and very respectfully state and pray:

I. INTRODUCTION

1. On May 5, 2023, in response to a pending motion requesting entry of default, the Court noted that despite being properly served, numerous Defendants had not appeared before the Court nor filed responsive pleadings. **DE No. 73.** The Court correctly noted that entry of default was warranted pursuant to FRCP 55(a) and ordered the named Defendants[1] to show cause as to why the Court should not order an entry of default.

[1] The co-defendants named in the Court's order are Beatriz I. Areizaga, Carmen L. Arroyo Casiano, Conjugal Partnership Escalera-Arroyo, Conjugal Partnership Pesquera-Quintero, Conjugal Partnership Rosselló-Areizaga, Miguel A. Cruz Toro, Félix Flores Carreras, Elliot García Caraballo, Ignacio Loubriel Camareno, David Medina Ríos, Fernando Navarro Pérez, Luis E. Ortiz Ortiz, Javier Piñeiro Declet, and Marisol Quintero.

2. With the exception of defendants Beatriz I. Areizaga and the Conjugal Partnership Rosselló-Areizaga, whom to this day have not appeared nor filed responsive pleadings, on May 11, 2023 the remaining Defendants jointly filed a *Motion in Compliance and Notice of Permanent Injunction Pursuant to the Confirmation Order Issued by the Title III Court*. **DE No. 78.** In sum, they argue that the Plan of Adjustment approved as part of the PROMESA Title III litigation contains a discharge of claims which is applicable here and the corresponding injunction that entered into effect in March 2022 deprives this Court of jurisdiction. They further argue that Plaintiffs' only recourse was to file an administrative expense claim within the PROMESA Title III case.

3. The Defendants are incorrect. The discharge and corresponding injunction established by the Adjustment Plan do not apply to the Defendants in this case because they are being sued in their personal capacity. Secondly, claims involving gross negligence and/or willful misconduct, such as the present § 1983 claim, are exempted from the aforementioned discharge. Lastly, the government of Puerto Rico waived the application of the injunction in cases presented pursuant to 32 LPRA § 3077(a). For all of these reasons, Defendants' motion should be denied.[2]

II. ARGUMENT

Defendants' argument is based on the *Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico* ("Adjustment Plan")

[2] A supplemental memorandum of law will be filed, with the permission of this Court, in support of Plaintiffs' position challenging PROMESA under the Uniformity Clause and on grounds of Public International Law, and International Human Rights.

submitted for the Court's approval in the PROMESA Title III litigation.[3] The Adjustment Plan was adopted by the Court on January 18, 2022 in its *Order and Judgment Confirming Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico* ("Confirmation Order").[4]

Section 92.2 of the Adjustment Plan, entitled "Discharge and Release of Claims and Causes of Action", contains a general release of claims against the State, and states in part:

> (a) […] Upon the Effective Date [of the Plan], the Debtors and Reorganized Debtors shall be deemed discharged and released from any and all Claims, Causes of Action and any other debts that arose, in whole or in part, prior to the Effective Date. […]
>
> (b) Except as expressly provided in the Plan or the Confirmation Order, all Entities shall be precluded from asserting any and all Claims against the Debtors and Reorganized Debtors[…] As of the Effective Date, and in consideration for the value provided under the Plan, each holder of a Claim in any Class under this Plan shall be and hereby is deemed to release and forever waive and discharge as against the Debtors and Reorganized Debtors, and their respective Assets and property and all such Claims.

The Adjustment Plan defines 'Debtors' as "[c]ollectively, the Commonwealth, [Employee Retirement System] and [Public Buildings Authority]." It defines 'Reorganized Debtors' as "[t]he Debtors, from and after the Effective Date." *See* Sections 1.200 and 1.425 of the Adjustment Plan, respectively.

[3] Docket No. 19784, PROMESA Title III Case No. 17-BK-3283-LTS.
[4] Docket No. 19813, PROMESA Title III Case No. 17-BK-3283-LTS.

The general release of claims contained in Section 92.2 of the Adjustment Plan was reproduced in Paragraph 56 of the Confirmation Order. *See* Docket No. 19813, PROMESA Title III Case No. 17-BK-3283-LTS.

Section 92.3 of the Adjustment Plan, entitled "Injunction on Claims", encompasses the operative part of the discharge, stating in part that:

> […] all Entities who have held, hold or in the future hold Claims or any other debt or liability that is discharged or released pursuant to Section 92.2 […] are permanently enjoined, from and after the Effective Date, from (a) commencing or continuing, directly or indirectly, in any manner, any action or other proceeding […] of any kind on any such Claim or other debt or liability that is discharged pursuant to the Plan against any of the Released Parties.

In their filing, Defendants do not reference Section 92.3 of the Adjustment Plan. Instead, they mention Paragraph 59 of the Confirmation Order, which is a reproduction of Section 92.3 of the Adjustment Plan.

A. Defendants, in their personal capacities, are not 'Debtors' under the Adjustment Plan.

Plaintiffs' claims for compensatory relief are directed at the Defendants in their personal capacity. *See Opinion and Order,* **DE No. 27.** As such, they are not covered by the discharge of claims established in the Adjustment Plan.

As previously mentioned, Section 92.2 of the Adjustment Plan discharges claims against the 'Debtors' and the 'Reorganized Debtors'. In another section however, the Adjustment Plan defines those two terms, expressing in clear and concise fashion that they refer to the Commonwealth of Puerto Rico. *See* Sections 1.200 and 1.425 of the Adjustment Plan. The Adjustment Plan's definition of the terms 'debtors' and 'reorganized debtors' does not include natural persons such as the Defendants.

Therefore, under no circumstances could the Defendants be considered debtors under the Adjustment Plan.

Plaintiffs' claims seeking relief against the individual officers in their personal capacities under Section 1983 of the Civil Rights Act, provide for a private cause of action for constitutional violations. *Cao v. Puerto Rico*, 525 F.3d 112 (1st Cir. 2008). It is the individual Defendants, then, and not the Commonwealth, who are liable for compensatory damages, since state officials, sued in their individual capacities, are "persons" within the meaning of § 1983. *See Hafer v. Melo*, 502 U.S. 21 (1991) (*holding that* (1) state officers may be personally liable for damages under § 1983 based upon actions taken in their official capacities; (2) officers' potential liability is not limited to acts under color of state law that are outside their authority or not essential to operation of state government, but also extends to acts within their authority and necessary to performance of governmental functions; and (3) Eleventh Amendment does not erect a barrier against suits to impose individual and personal liability on state officers under § 1983).

The fact that the government of Puerto Rico has assumed the cost of the Defendants' legal representation and potentially the payment of an adverse judgment, as authorized by PR Law 104 of June 29, 1955[5], does not entitle them to be released from the present claims pursuant to the Adjustment Plan. The benefits provided by Law 104 do not alter or modify the nature of Plaintiffs' section 1983 claims against the Defendants. Puerto Rico's Law 104 permits an official, charged in a civil rights action relating to official duties, to voluntarily request legal representation by the Commonwealth, and it permits the Commonwealth to subsequently assume payment of any judgment. P.R. Laws Ann. tit. 32, § 3085 (This particular aspect of Law 104 is commonly referred to as 'Law 9' because of the amendment that created it.). But, under the statute, labeled by the

[5] P.R. Laws Ann. Title 32 Secs 3085, *et seq.*

First Circuit as "idiosyncratic" in nature, the Puerto Rico Secretary of Justice has discretion to decide in which cases the Commonwealth assumes representation and "subsequently, after considering the findings of the court or which arise from the evidence presented," whether it is "in order" to pay the judgment. *Id.* § 3087. *See Whitfield v. Municipality of Fajardo,* 564 F.3d 40, 42 (1st Cir. 2009); *Ortiz Feliciano v. Toledo Díaz,* 175 F.3d 37 (1st Cir. 1999). Moreover, under the Eleventh Amendment, plaintiffs are unable to request an execution of monetary judgment against the Commonwealth, even when the Secretary of Justice has granted the judgment debtors' request to indemnify them with respect to the judgment. *See Ortiz-Feliciano supra*, at 40. *Pietri-Giraldi v. Alvarado-Santos* 443 F. Supp. 2d 214, 217 (D.P.R. 2006) (holding that pursuant to Section 3085 of Law 104, the claim for indemnification concerning payment of judgment lies with defendant public officers, not with the plaintiff).

Hence, the benefits provided by Law 104 do not constitute a substitution of parties or an admission of liability for the Commonwealth. It is ultimately an arrangement between the Defendants and Puerto Rico Department of Justice in which the Secretary retains the discretion to provide ongoing legal representation and potentially pay the judgment against individual defendants pursuant to certain conditions established by law, and subject to available resources. *See* P.R. Laws Ann. Tit. 32 sec. 3092; P.R. Laws Ann. Tit. 32 sec. 3085 ("[T]hese provisions shall not be construed, for any reason whatsoever, as making the Commonwealth an insurer of the aforesaid public servants, nor as a waiver of the sovereign immunity of the Commonwealth.").

In their motion, Defendants do not attempt to explain why the claims against them in their personal capacity should be considered discharged pursuant to Section 92.2 of the Adjustment Plan. They do not make any distinction on this point. The Defendants simply maintain that the

discharge is applicable to them, without any supporting arguments. In fact, they are incorrect. Plaintiffs' claims against the Defendants are not subject to the discharge of claims of the Adjustment Plan because it is aimed expressly at claims against 'debtors' and 'reorganized debtors' and, pursuant to the definition of those terms in the Adjustment Plan, the Defendants cannot be considered debtors. Thus, discharge of claims contained in Section 92.2 of the Adjustment Plan is not applicable to the present case.

B. Claims involving 'gross negligence' and/or 'willful misconduct', such as the present case, cannot be discharged under the Adjustment Plan.

Section 1.421 of the Adjustment Plan defines what constitutes a 'Released Claim' for purposes of the aforementioned discharge. However, the definition contains a crucial exception, which states the following:

> "Released Claims" is not intended to include, nor shall it have the effect of including, Claims or Causes of Action unrelated to the Debtors or *Claims or Causes of Action for gross negligence, willful misconduct or intentional fraud* asserted, or that could have been asserted, whether sounding in contract or tort[.]

(Emphasis added.)

The claims exempted from discharge by this section are consistent with claims against officials in their personal capacity under § 1983 where, in order to prevail on a claim of supervisory liability, a plaintiff must show that (1) "one of the supervisor's subordinates abridged the plaintiff's constitutional rights"; and (2) "the supervisor's action was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference." *Guadalupe-Baez v. Pesquera,* 819 F.3d 509, 515 (1st Cir. 2016).

The Defendants' motion makes no mention of the exception contained in Section 1.421 of the Adjustment Plan, and certainly does not attempt to explain why it would not apply to the

present case. In any event, the definition of what constitutes 'Released Claims' contained in Section 1.421 establishes that claims of "willful misconduct" (as the claims arising under § 1983), such as this one, are out of reach of the discharge and subsequent injunction established by the Adjustment Plan.

C. The injunction has been waived with regard to the supplemental state law claims.

It has already been established that the claims against Defendants, whom are being sued in their personal capacity, are not covered by the discharge and corresponding injunction of the Adjustment Plan. However, the same is true with regard to the Plaintiffs' pendent state law claims. *See Opinion and Order*, **DE No. 27.**

In the *Order Extending Administrative Claim Bar Date for Certain Parties and Modifying Discharge Injunction*[6] ("Modification Order"), issued on October 20, 2022 in the PROMESA Title III litigation, the parties waived the injunction with regard to claims against the Commonwealth of Puerto Rico under 32 LPRA § 3077(a):

> 6. The injunctions contained in section 92.3 of the Plan and decretal paragraph 59 of the Confirmation Order are modified solely to the limited extent of allowing litigation with respect to claims authorized to be asserted pursuant to 32 LPRA § 3077(a), to the extent the amount of such claim asserted is within such statutory limitation of $75,000 or $150,000, as applicable, to proceed to final judgment and execution, including any appeals.

Plaintiffs' supplemental state law claims were filed pursuant to 32 LPRA § 3077(a), and therefore are not subject to the discharge and corresponding injunction invoked by the Defendants.

[6] Docket No. 22650, PROMESA Title III Case No. 17-BK-3283-LTS.

D. Plaintiffs' claims are not 'administrative expenses'.

Although there is no precise definition of "administrative expenses" in Section 503 of the Bankruptcy Code[7], the statute contains a listing of such expenses, all of which have to do with the "actual, necessary costs and expenses of preserving the estate". 11 USC § 503(a). These include, for example, "wages, salaries, and commissions for services rendered" after the commencement of the case; back pay wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay (independently of when the claim arose); tax liabilities and fines, penalties, or reductions in credit relating to such taxes; compensation and reimbursement awarded for "necessary services rendered by a trustee, examiner or other persons authorized to receive compensation under section 330(a) of this title [11 USCS § 330(a)] and costs related thereto, and similar expenses. *See*, Section 503(B)-(F).

The paramount objective of a Chapter 11 reorganization is to rehabilitate and preserve the value of the financially distressed business. *In re Swiss Chalet*, 2012 Bankr. LEXIS 3195 (P.R.B. 2012) (Judge Lamoutte) at *10, citing *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 41 (1st Cir. 2003). To further that objective, Section 503 of the Bankruptcy Code allows as administrative expenses the actual and necessary costs and expenses to preserve and/or benefit the bankruptcy estate. As Judge Lamoutte explained, "[a] principal

[7] The First Circuit has observed that "Congress chose to incorporate the entirety of § 503 into PROMESA." *In re Oversight and Management Board for Puerto Rico*, 7 F.4th 31, 38 (1st Cir. 2021).

aim of Section 503 is to encourage parties to render post-petition services to debtors by ensuring that payment will be made on a priority basis in the post-petition period. *In re Swiss Chalet, supra*, at *11-12. Section 503(b)(1) is important to provide an incentive for creditors to continue doing business with a debtor and an incentive for others to engage in business transactions with the debtor. Section 503 derives its importance from Section 507, which sets forth the categories of expenses and claims that are entitled to priority treatment in the distribution of a debtor's estate.

There is a two-prong test to determine whether or not a claim qualifies as an administrative expense: (1) the right to payment must arise from a post-petition transaction with the debtor estate, rather than from a pre-petition transaction with the debtor, and (2) the consideration supporting the right to payment must be "beneficial to the estate" of the debtor. *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). These criteria have no applicability to the Plaintiffs' claims in the instant case. Although certainly "post-petition," there was no consideration for the "right to payment," which arises only because the Commonwealth violated its obligations pursuant to the Constitution and to statute.

Additionally, the term "administrative expense claim" is defined in Section 1.52 of the Adjustment Plan as: "A Claim against the Debtors or their Assets constituting *a cost or expense of administration* of the Title III Cases […] in accordance with sections 503(b) and 507(a)(2) of the Bankruptcy Code. (Emphasis added.) This definition is plainly inapposite to the claims being litigated by Plaintiffs.

Lastly, while waiving the injunction with respect to claims under 32 LPRA § 3077(a), the parties to the PROMESA Title III litigation expressly exempted these claims from any requirement to file administrative expense claims. In the *Notice of (A) Entry of Order Confirming Modified Eighth Amended Title III Plan of Adjustment of the Commonwealth of Puerto Rico, et al. Pursuant to Title III PROMESA, (B) Occurrence of the Effective Date, And (C) Extension of Administrative Claim Bar Date for Certain Parties*[8], the Court clarified that the injunction under the Adjustment Plan would not apply to claims against the Government under 32 LPRA § 3077(a):

> **Exceptions to filing Administrative Expense Requests**
> […]
> 8. If you are a party to a litigation, proceeding, or action asserting a claim pursuant to 32 L.P.R.A. § 3077(a), to the extent the amount of such claim asserted is within such statutory limitation of $75,000.00 or $150,000.00, as applicable, the injunctions in Section 92.3 of the Plan and decretal paragraph 59 of the Confirmation Order have been modified to allow such litigation to proceed to final judgment and execution, including any appeals.

Contrary to Defendants' contention, Plaintiffs' causes of action are not administrative expenses for which a proof of claim had to be filed. Defendants are misusing the concept of "administrative expense claims" which typically arise post-petition, *in order to allow for a continuation of the business of the Commonwealth,* during the pendency of the PROMESA Title III litigation. Plaintiffs' causes of action against the Defendants for excessive use of force, a fundamental right with basis in the Fourth and Fourteenth Amendments to the U.S. Constitution and the 1964 Civil Rights Act are not an administrative expense.

[8] Docket No. 22663, PROMESA Title III Case No. 17-BK-3283-LTS.

III. CONCLUSION

Several months after being served with process in the present case, Defendants were ordered to show cause as to why the Court should not order an entry of default. **DE No. 73.** Only then did the Defendants decide to appear before the Court, making a blanket invocation of the Adjustment Plan's injunction, which by then had already been in effect for *over a year*.[9] In their filing, Defendants made no attempt to explain why the injunction applies despite them being sued in their personal capacity. They also made no mention of an important, and relevant, exception to the injunction for cases involving gross negligence and willful misconduct. Neither did they deem it necessary to mention a subsequent modification whereby the injunction was waived with regard to claims under Puerto Rico law. As has been established above, these three points are decisive on the inapplicability of the Adjustment Plan's injunction to the present case.

The Court must take care to apply the injunction in a manner that guarantees the clearly established constitutional rights of individuals like the Plaintiffs in this case. Generic invocations of the injunction, such as the one made by the Defendants, should not be used to avoid accountability for violations of constitutionally protected rights.

WHEREFORE, Plaintiffs request that the Court deny Defendants' motion at DE No. 78.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 25th day of May 2023.

CERTIFICATE OF SERVICE: I hereby certify that copy of this motion has been

[9] The Adjustment Plan went into effect on March 15, 2022.

electronically filed on this date with the Clerk of the Court using the CM/ECF system.

S/FERMÍN L. ARRAIZA NAVAS
FERMÍN L. ARRAIZA NAVAS
USDC-PR 215705
farraiza@aclu.org

WILLIAM RAMIREZ-HERNÁNDEZ
wramirez@aclu.org
American Civil Liberties Union of Puerto Rico
Union Plaza
416 Ave. Ponce de León, Suite 1105
San Juan, PR 00918
Tel: 787-753-8493
Fax: 787-753-4268

S/STEVEN P. LAUSELL RECURT
STEVEN P. LAUSELL RECURT
USDC-PR 226402
slausell@gmail.com
For ACLU, PR
PO Box 194876
San Juan, PR 00919
Tel: 787-751-1600