

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO
RICO,

Debtors.¹

PROMESA
Title III

Case No. 17-3283 (LTS)
(Jointly Administered)

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HON. RICARDO ANTONIO ROSSELLÓ
NEVARES (in his official capacity), and THE
PUERTO RICO FISCAL AGENCY AND
FINANCIAL ADVISORY AUTHORITY,

Plaintiffs,

v.

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,
JOSÉ B. CARRIÓN III, ANDREW G. BIGGS,
CARLOS M. GARCÍA, ARTHUR J. GONZÁLEZ,
JOSÉ R. GONZÁLEZ, ANA J. MATOSANTOS,
DAVID A. SKEEL, JR., and NATALIE A.
JARESKO (in their official capacities),

Defendants.

Adv. Proc. No. 18-080-LTS in
17 BK 3283-LTS

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OPINION AND ORDER GRANTING IN PART DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT

¹ The Debtors in the underlying Title III Case, 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 (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); and (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747).

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LAURA TAYLOR SWAIN, United States District Judge

Before the Court is the Defendants' *Motion Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to Dismiss Plaintiffs' Complaint Dated July 5, 2018* (Docket Entry No. 16 in Adversary Proceeding No. 18-00080, the "Motion"),² filed by the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), José B. Carrión III, Andrew G. Biggs, Carlos M. García, Arthur J. González, José R. González, Ana J. Matosantos, David A. Skeel, Jr., and Natalie A. Jaresko (collectively, and together with the Oversight Board, the "Defendants"). The Court heard argument on the Motion on July 25, 2018 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motion.³ Except as explained below, the Court has subject matter jurisdiction of this action pursuant to 48 U.S.C. § 2166. For the following reasons, the Motion is granted in part and denied in part.⁴

² All docket entry references are to entries in Adversary Proceeding No. 18-00080, unless otherwise specified.

³ The Court has received and reviewed the *Tendered Legal Brief of Amicus Curiae Popular Democratic Party Caucus of the Puerto Rico Senate in Support of the Commonwealth of Puerto Rico* (Docket Entry No. 31, Ex. A, the "Amicus Brief"). The motion for leave to file the brief is granted, and the Court has considered the Amicus Brief in connection with its determination of the Motion to dismiss the Complaint.

⁴ The Court also heard oral argument at the Hearing in connection with a motion to dismiss the complaint in Rivera-Schatz et al. v. Financial Oversight and Management Board for Puerto Rico et al., 18-AP-081-LTS (D.P.R.) (the "Legislative Assembly Lawsuit"), an adversary proceeding filed in the Commonwealth's Title III case that raises issues related to those argued in connection with this Motion. The Court will address separately the motion to dismiss the Legislative Assembly Lawsuit.

I.

BACKGROUND

The following recitation of facts is drawn from the *Adversary Complaint for Declaratory and Injunctive Relief* (Docket Entry No. 1, the “Complaint”), filed on July 5, 2018, by the Honorable Ricardo Antonio Rosselló Nevares (the “Governor”) in his official capacity as the Governor of the Commonwealth of Puerto Rico (the “Commonwealth” or “Puerto Rico”) and the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF” and, together with the Governor, “Plaintiffs”), except where otherwise noted.

A. Certification of the Fiscal Plan and Budget

On June 30, 2016, the United States Congress (“Congress”) enacted the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) to “stabilize Puerto Rico’s economy by establishing oversight of the Government’s budget and fiscal policies and by providing a mechanism for the Commonwealth to restructure its debts.” (Compl. ¶ 21.)⁵ PROMESA created the Oversight Board as “an entity within the territorial government” of Puerto Rico and tasked the Oversight Board with developing “a method [for Puerto Rico] to achieve fiscal responsibility and access to the capital markets.” 48 U.S.C.A. §§ 2121(a), (c)(1) (West 2017). In aid of that purpose, PROMESA empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities. *Id.* §§ 2141–2152; 2175(a).

⁵ PROMESA is codified at 48 U.S.C. § 2101 *et seq.* References to “PROMESA” section numbers in the remainder of this opinion are to the uncodified version of the legislation.

On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA.⁶ (See Docket Entry No. 1 in Case No. 17-03283). Shortly thereafter, the Oversight Board commenced Title III proceedings on behalf of certain Puerto Rican government instrumentalities.

Between January 24, 2018, and April 5, 2018, the Governor submitted four versions of a proposed Commonwealth fiscal plan for fiscal year 2019 to the Oversight Board for its approval. (Compl. ¶¶ 46, 47, 48, 50 (detailing fiscal plans submitted by the Governor to the Oversight Board on January 24, 2018, February 12, 2018, March 23, 2018, and April 5, 2018).) The Oversight Board rejected each proposed fiscal plan. (Id. ¶¶ 46-51.) On April 19, 2018, in connection with the Oversight Board's rejection of the Governor's fourth proposed Commonwealth fiscal plan (the "Governor's April 2018 Fiscal Plan"), the Oversight Board certified its own fiscal plan for the Commonwealth (the "April 2018 Board Fiscal Plan") pursuant to Sections 202(d)(2) and 202(e)(2) of PROMESA. (Id. ¶ 51.) The April 2018 Board Fiscal Plan was substantially similar to the Governor's April 2018 Fiscal Plan, but included certain policy initiatives that had previously been rejected by the Governor and that accounted for an additional 1.7 percent of the incremental savings contemplated by the April 2018 Board Fiscal Plan. (Id.)

On April 26, 2018, the Oversight Board sent the Governor a letter dated April 24, 2018, setting forth a proposed schedule for developing and certifying the Commonwealth's fiscal year 2019 budget and a revenue forecast for fiscal year 2019. (Id. ¶ 56.) On May 2, 2018, the Oversight Board sent a letter to AAFAF (i) describing detailed expense reductions and right-sizing measures aimed at achieving savings of \$345 million in fiscal year 2019, (ii) including a

⁶ See 48 U.S.C.A. §§ 2164; 2172-2174 (West 2017).

draft budget resolution for adoption by the Legislative Assembly of the Commonwealth of Puerto Rico (the “Legislature”), and (iii) proposing detailed expense measures that set forth line-by-line amounts for expense items, including right-sizing measures, healthcare measures, subsidy reductions, and specific personnel and non-personnel expenditure amounts for each Commonwealth agency or instrumentality covered by the Commonwealth budget. (Id. ¶ 57.) On May 4, 2018, the Governor submitted a proposed Commonwealth budget for fiscal year 2019 (the “Governor’s Proposed Budget”) to the Oversight Board. (Id. ¶ 58.)

On May 6, 2018, the Governor submitted a written statement, pursuant to Section 205(b)(3) of PROMESA, to the Oversight Board, the President of the United States, and leaders of Congress. (Id. ¶ 59.) In this written statement, the Governor explained that certain “policy initiatives” outlined by the Oversight Board in connection with the April 2018 Board Fiscal Plan were, in fact, “recommendations” under Section 205 of PROMESA that could not be imposed by the Oversight Board on the elected government of Puerto Rico. (Id.) Specifically, the Governor identified five measures included in the April 2018 Board Fiscal Plan that he had rejected: (i) private-sector human-capital and labor reforms, (ii) pension reforms, (iii) government agency consolidations, (iv) compensation related initiatives, and (v) reductions in appropriations to the University of Puerto Rico (“UPR”). (Id.) The Governor asserted that the Oversight Board lacks power to impose these measures on the Government.⁷ (Id.)

On May 10, 2018, the Oversight Board issued a notice of violation under PROMESA Section 202(c)(1)(B)(i) to the Governor, stating that the Governor’s Proposed Budget was not compliant with the April 2018 Board Fiscal Plan and requesting that the

⁷ As used in this Opinion and Order, the term “the Government” is a collective reference to the Governor and members of the Legislative Assembly.

Governor submit a revised budget. (Id. ¶ 60.) The notice identified several inconsistencies between the April 2018 Board Fiscal Plan and the Governor's Proposed Budget, including (i) the Governor's failure to include UPR and workforce development reinvestments generated from comprehensive labor reform, (ii) the Governor's inclusion of Christmas bonuses for government employees, and (iii) a number of informational deficiencies in the Governor's Proposed Budget. (Id.)

After a period of negotiations, on May 20, 2018, the Governor and the Oversight Board agreed that the Oversight Board would amend and recertify the April 2018 Board Fiscal Plan to include a \$101 million reduction of the projected annual surplus for fiscal year 2019 and to exclude the Oversight Board's prior measures reducing the minimum number of vacation and sick days for private sector employees and eliminating Christmas bonuses. (Id. ¶ 63.) In exchange, the Governor agreed to present a bill to repeal Puerto Rico's Wrongful Termination Act, Law No. 80 of May 30, 1976 (as amended, "Law 80"), for approval by the Legislature by June 27, 2018. (Id.) On May 28, 2018, the Governor submitted to the Legislature a standalone bill to repeal Law 80. (Id. ¶ 64.) On May 30, 2018, the Oversight Board certified an amended version of the April 2018 Board Fiscal Plan, which contained the agreed-upon revisions. (Id. ¶ 65.) The Oversight Board delivered a compliance certification letter and a copy of the May 30, 2018, fiscal plan to the Governor, the President of the Senate of Puerto Rico, and the Speaker of the House of Representatives of Puerto Rico as required by PROMESA Section 201(e)(2). (Id. ¶ 66.)

On June 4, 2018, the Oversight Board submitted a letter to the Honorable Jorge Navarro Suárez, the President of the Government Commission of the Puerto Rico House of Representatives, stating that, if the Legislature failed to repeal Law 80, the Oversight Board

would revert to its April 2018 Board Fiscal Plan and would submit a budget consistent with that earlier fiscal plan to the Governor and the Legislature. (*Id.* ¶ 67.) The Oversight Board also stated its intent, if Law 80 were not repealed, to impose a budget eliminating certain appropriations and maintaining the elimination of the Christmas bonus and cuts to the Legislature and Judiciary budgets. (*Id.*)

After the failure of the Legislature to repeal Law 80, the Oversight Board certified a revised Commonwealth fiscal plan on June 29, 2018 (the “Fiscal Plan,” Compl. Ex. 5) that is substantially similar to the April 2018 Board Fiscal Plan. (*Id.* ¶ 68.) The Oversight Board delivered a compliance certification letter as required by PROMESA Section 201(e)(2) on the same day. (*Id.*)

On June 29, 2018, the Puerto Rico House of Representatives and the Senate of Puerto Rico voted to approve a fiscal year 2019 Commonwealth budget, which the Governor later signed and which did not provide for Law 80’s repeal. (*Id.* ¶ 70.) On June 30, 2018, the Oversight Board certified a separate Commonwealth budget for fiscal year 2019 (the “Budget”). (*Id.* ¶ 71.) The Budget incorporates four legislative resolutions, two of which are at issue here: (i) a joint resolution authorizing expenditures from the General Fund (the “General Fund Resolution,” Compl. Ex. 6), and (ii) a joint resolution authorizing expenditures for certain special, permanent, or temporary programs (the “Special Resolution,” Compl. Ex. 7 and, together with the General Fund Resolution, the “Challenged Budget Resolutions”). (*Id.* ¶ 72.)

B. The Challenged Provisions

The Fiscal Plan and the Challenged Budget Resolutions collectively incorporate certain measures (the “Challenged Provisions”) which are challenged by the Governor. First, both the Fiscal Plan and the Challenged Budget Resolutions provide for the suspension of any

power of the Puerto Rico Treasury, budget, and financial authorities to authorize reprogramming or extensions of budget appropriations from prior fiscal years. (Id. ¶¶ 69, 73.) Specifically,

Section 11.2.1 of the Fiscal Plan provides that:

Any power of [the Office of Management and Budget (“OMB”), [AAFAF] or the Department of the Treasury, including the authorities granted under [Act 230], to authorize the reprogramming or extension of appropriations of prior fiscal years is hereby suspended. Notwithstanding this section, the appropriations approved in the budget certified by the Oversight Board may be modified or reprogrammed with the approval of the Oversight Board.

(Fiscal Plan § 11.2.1.) Section 7 of each Challenged Budget Resolution includes identical language, and Section 10 of the General Fund Resolution further provides that OMB may withhold from any of the allocations to the Commonwealth’s executive agencies “the amounts necessary to pay for the pay-go contribution, unemployment insurance, or taxes withheld from their employees, when OMB determines that such a withholding is necessary to ensure compliance with these obligations by the agencies concerned. Any such amounts withheld by OMB shall solely be reprogrammed to pay the corresponding outstanding obligations . . . as allowed in this Section.” (General Fund Resolution §§ 7, 10; Special Resolution § 7.)

The second Challenged Provision is a Fiscal Plan provision that is characterized by Plaintiffs as requiring government agency consolidations (the “Consolidation Measure”).

Section 12.1 of the Fiscal Plan, which is captioned “Changes to agency operational expenditures,” includes the following language: “the right-sized Government of the future should wherever possible reflect mainland U.S. benchmarks in terms of both number of agencies and size of agencies themselves to deliver services in as efficient a manner possible . . . the Government should consolidate the 114 agencies into 22 groupings and a number of independent agencies.” (Fiscal Plan § 12.1 (emphasis removed).)

The third Challenged Provision is a section of the Fiscal Plan that contemplates automatic budget reductions and workforce reductions for fiscal years following any such year in which the third-quarter actual figures for “efficiency savings” for particular agency groupings fall short of budgeted projections. Section 12.3 of the Fiscal Plan provides that:

If, after the third fiscal quarter of any fiscal year there remains unrealized agency efficiency savings for any grouping relative to the projected agency efficiency savings in the New Fiscal Plan for the applicable fiscal year, the Oversight Board will automatically reduce the budget for the corresponding grouping for the following fiscal year in the amount equal to the unrealized agency efficiency savings. In particular, if the Oversight Board determines that there is material underperformance in agency efficiency savings relative to the projections set forth in the New Fiscal Plan, intentional workforce reductions will be necessary to meet the agency efficiency savings targets set forth herein.

(Fiscal Plan § 12.3.)

The fourth category of Challenged Provisions includes the following (collectively, the “Employee Benefits Reduction Measure”): (i) the Fiscal Plan’s characterization of a hiring freeze, limitations on paid holidays, restrictions on sick and vacation days, and elimination of the Christmas bonus as policies that the Government must continue, and (ii) the Challenged Budget Resolutions’ alleged elimination of the Christmas bonus. (*Plaintiffs’ Opposition to Defendants’ Motion to Dismiss* (the “Opposition”), Docket Entry No. 22, § II.C.1.) The Christmas bonuses are mandatory under Puerto Rico’s Christmas Bonus Act, Law No. 148 of June 30, 1969, as amended. (Compl. ¶ 69.)

The fifth Challenged Provision requires specific types of corrective action in the event of budgetary noncompliance, and declares that spending in excess of budgetary appropriations is a violation of an existing Puerto Rico criminal statute. At issue in this regard

are four provisions of the Challenged Budget Resolutions. Section 15 of General Fund Resolution and Section 14 of the Special Resolution provide that:

If during the fiscal year the government fails to comply with the liquidity and budgetary savings measures required by the New Fiscal Plan for Puerto Rico certified by the Oversight Board, the Government shall take all necessary corrective action, including the measures provided in PROMESA sections 203 and 204.

(General Fund Resolution § 15; see also Special Resolution § 14.) Additionally, Section 16 of the General Fund Resolution and Section 15 of the Special Resolution prohibit territorial entities from “spending or encumbering during fiscal year 2019 any amount that exceeds the appropriations authorized for such year,” and provide that any “violation of this prohibition shall constitute a violation of [the Resolutions] and Act 230.” (General Fund Resolution § 16; see also Special Resolution § 15.)

Plaintiffs assert that, in his May 6, 2018 communication to the Oversight Board and federal government officials, the Governor had objected to each of the Challenged Provisions as a “non-binding recommendation” under Section 205(a) of PROMESA, and that the communication constituted a formal rejection of each of the Challenged Provisions pursuant to the procedures set forth in Section 205(b) of PROMESA.⁸ (See Opp’n at 27.) Plaintiffs argue that compliance with such rejected recommendations cannot be mandated by a fiscal plan or a budget imposed unilaterally by the Oversight Board.

II.

DISCUSSION

Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and

⁸ Sections 205(a) and (b) of PROMESA are discussed in further detail infra.

12(b)(6)⁹ to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. A court presented with motions to dismiss under both Rules 12(b)(1) and 12(b)(6) should ordinarily decide jurisdictional questions before addressing the merits. Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002). The party invoking the jurisdiction of a federal court carries the burden of proving the existence of proper grounds for the exercise of jurisdiction. Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007). The Court also has an independent duty to assess whether it has subject matter jurisdiction of an action. See Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

Plaintiffs' Complaint pleads the following three Counts. In Count One, Plaintiffs seek **declarations** that certain **Challenged Provisions incorporated** into the Fiscal Plan are merely **recommendations** that cannot be mandated and enforced by the Oversight Board, and general declarations regarding the **status of certain types of Fiscal Plan provisions as non-binding recommendations**. In Count Two, Plaintiffs seek **similar relief** with respect to certain Challenged Provisions incorporated into the **Challenged Budget Resolutions and certain types of budgetary provisions**. In Count Three, Plaintiffs seek **injunctive relief prohibiting the implementation and enforcement of the Fiscal Plan and Challenged Budget Resolution provisions Plaintiffs characterize as policy recommendations that the Governor has rejected**, and such provisions that **Plaintiffs contend exceed the Oversight Board's powers under PROMESA's budget-related provisions**.

⁹ Rules 12(b)(1) and 12(b)(6) are applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

A. Rule 12(b)(1): Subject Matter Jurisdiction

The crux of the issues raised in Plaintiffs' Complaint is whether PROMESA grants the Oversight Board the power to include mandates in the Fiscal Plan and Budget that are premised on public policy decisions with which the Governor of Puerto Rico does not agree. Related to this issue is the relationship between the Oversight Board's fiscal plan and budgetary powers and pre-existing Puerto Rico law – whether the Oversight Board's actions can modify, suspend, or override certain features of Puerto Rico law that were in place prior to the enactment of PROMESA. Defendants assert that the declaratory and injunctive relief Plaintiffs seek would result in decertification of the certified Fiscal Plan, and that the Court is prohibited from entertaining their claims by Section 106(e) of PROMESA. (Docket Entry No. 17 (“Defs.’ Mem.”), at 27.) Defendants also contend that Plaintiffs’ requested declarations are improper requests for advisory opinions. (*Id.*)

1. Limitations on Jurisdiction Under PROMESA Section 106(e)

Section 106(e) of PROMESA provides that:

There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this [Act].

48 U.S.C.A. § 2126(e) (West 2017). Defendants argue that the Court lacks subject matter jurisdiction of Plaintiffs' claims because they implicitly seek invalidation of the certified Fiscal Plan and Budget.¹⁰ (Defs.’ Mem. at 28 (citing *Ambac Assurance Corp. v. Commonwealth of*

¹⁰ Defendants also argue that Plaintiffs are judicially estopped from asserting that the Court has jurisdiction of their claims in this adversary proceeding because Plaintiffs argued in a prior adversary proceeding that fiscal plans and budgets are beyond challenge under Section 106(e) of PROMESA. (Defs.’ Mem. at 28.) In response, Plaintiffs argue that they are not judicially estopped from asserting that jurisdiction exists in this case because the issues in this case are not identical to those in prior cases. (Opp’n at 29.) As explained herein, Plaintiffs’ positions are not truly inconsistent because Plaintiffs

P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 297 F. Supp. 3d 269, 284 (D.P.R. 2018)

(holding that the Court lacks subject matter jurisdiction of claims that “implicitly or explicitly[] seek invalidation of the certification of the Fiscal Plan”).) Plaintiffs assert, however, that they “do not challenge the [Oversight] Board’s certification decisions or contest that the fiscal plan meets PROMESA’s certification criteria.” (Opp’n at 29.) Instead, Plaintiffs argue, the “sole issue presented by this action is the effect” and enforceability of certain provisions of the certified Fiscal Plan and Challenged Budget Resolutions. (Id. at 28.) Plaintiffs’ characterization of their claims is accurate and, for the following reasons, Section 106(e) does not preclude the Court from exercising jurisdiction of this action.

Although PROMESA grants the Oversight Board exclusive authority to certify fiscal plans and “also insulates the Oversight Board’s certification determinations . . . from challenge by denying all federal district courts jurisdiction to review such challenges,” Section 106(e) does not deprive the district court of jurisdiction to entertain all conceivable litigation touching on certified documents. See Ambac, 297 F. Supp. 3d at 283-84 (holding that PROMESA Section 106(e) did not preclude consideration of federal constitutional challenges to fiscal plan). Here, Plaintiffs seek determinations as to whether PROMESA grants the Oversight Board authority to promulgate certain provisions of the certified Fiscal Plan and Budget, and as to whether such challenged provisions of those documents are merely, as a matter of law, recommendations that the Governor and Legislature are free to ignore. There is a material

advance different legal arguments in this adversary proceeding. Accordingly, Plaintiffs are not judicially estopped from asserting that jurisdiction exists here. See United States v. Levasseur, 846 F.2d 786, 794 (1st Cir. 1988) (finding judicial estoppel did not apply because “the doctrine is applied only when the positions are truly inconsistent . . . for the invocation of the doctrine, the two positions must be diametrically opposed”) (internal citations omitted). In any event, the Court is obligated to make its own determination as to subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3).

difference between an action seeking review of the Oversight Board's determination that a plan or budget meets the requirements for certification or is compliant with particular aspects of PROMESA Section 201(b) (specifying required features of a fiscal plan), and litigation seeking clarification as to the effect of particular provisions of a certified fiscal plan or budget on preexisting Puerto Rico law, or on the powers of the executive and legislative branches of the government of Puerto Rico. The questions before the Court implicate the impact, rather than the propriety, of the certification of the Fiscal Plan and Budget, and their determination is not precluded by Section 106(e).¹¹

2. Case or Controversy Requirement – Do Plaintiffs Seek Advisory Opinions?

Article III, Section 2 of the Constitution of the United States limits the exercise of federal judicial power to actual cases and controversies. U.S. Const. art. III, § 2; Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239-41 (1937). The authority conferred on federal courts by the Declaratory Judgment Act, 28 U.S.C. § 2201, is likewise limited to controversies that are within the constitutionally-constrained scope of federal jurisdiction. Aetna, 300 U.S. at 240. A justiciable controversy must be “a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an

¹¹ This reasoning is not inconsistent with this Court's prior decision in Ambac and in related prior cases. In Ambac, this Court held that Section 106(e) of PROMESA bars any claim that challenges the Oversight Board's certification decision itself and any implicit challenges of a certification decision as violating the requirements set forth in Section 201(b) of PROMESA. See Ambac, 297 F. Supp. 3d at 284. Here, Plaintiffs do not challenge the Oversight Board's certification decisions with respect to either the Fiscal Plan or Budget. Moreover, Plaintiffs do not dispute that the Fiscal Plan complies with the requirements of Section 201(b) of PROMESA. (Opp'n at 29.) Instead, Plaintiffs seek a determination regarding the effect and enforceability of a discrete set of provisions contained within the certified Fiscal Plan and Budget. Even if the Court were to determine that certain of the Challenged Provisions constitute non-binding recommendations, decertification of the Fiscal Plan and Budget would not be required.

opinion advising what the law would be upon a hypothetical state of facts.” Aetna, 300 U.S. at 241. Federal courts are not empowered to issue advisory opinions where there is no such actual controversy. See id.; Golden v. Zwickler, 394 U.S. 103, 108 (1969); Shell Oil Co. v. Noel, 608 F.2d 208, 213 (1st Cir. 1979).

The constitutional requirement that controversies be justiciable and “admit[] of specific relief through a decree of a conclusive character” requires more than strong or even significant disagreement, however high the stakes, to obtain declaratory relief. The issue must be raised, and the relief sought, in a fashion that would address a specific live controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Golden, 394 U.S. at 108, 110. Rulings on isolated or abstract principles that will merely be useful in formulating or litigating future choices that might or might not be made are outside the authorized scope of declaratory relief.

i. The Consolidation Measure

As detailed in Section I, supra, Plaintiffs’ claims focus on five Challenged Provisions. The Consolidation Measure is one of those Challenged Provisions. Plaintiffs argue that the proposed agency consolidation constitutes an improper attempt by the Oversight Board to “dictate how the Government will organize itself to conduct day-to-day operations.” (Compl. ¶ 69.) However, as Defendants point out in their response, the challenged Fiscal Plan language is not posed in mandatory terms -- “the statement in the Fiscal Plan that the Government should consolidate the agencies does not compel Plaintiffs to do anything . . . There is no significant dispute here and certainly no imposition.” (Def.’ Mem. at 22; see also Reply at 14.) At oral argument, counsel for Plaintiffs conceded this point, agreeing that the budget could provide

funding for less than the full current complement of agencies, forcing the Government to make choices in order to stay within the budget allocation, without violating the law.

Accordingly, there is no case or controversy as to whether the Fiscal Plan improperly mandates agency consolidations and Paragraph 80 of Count One of the Complaint, which seeks a declaration that “the provisions seeking to impose Government agency consolidations under Board Fiscal Plan section 12 . . . are non-binding recommendations” is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of a justiciable case or controversy.

ii. The Employee Benefits Reduction Measure

Paragraph 82 of Count II demands a declaration that “the provision requiring the elimination of certain mandatory benefits under Board Fiscal Plan section 12.4 – which ‘places controls on expenditures for personnel’ and ‘reduc[es] benefit costs’ under PROMESA section 205(a)(1) – is a non-binding recommendation that the Oversight Board cannot unilaterally alter through the Board Fiscal Plan and force on the Government.” Section 12.4 of the Fiscal Plan, titled “Compensation-related initiatives,” sets forth three initiatives related to employee benefits that the motion briefing and argument indicate are challenged by Plaintiffs: (i) the institution of a payroll freeze, (ii) the standardization of healthcare provided to government employees, and (iii) the reduction of certain non-salary compensation paid to employees and other personnel policies. (See Fiscal Plan at 69-70.) Specifically, Section 12.4 mandates that the “measure to freeze all payroll expenses” included in the March 2017 Commonwealth Fiscal Plan “**must be continued** through the duration of the New Fiscal Plan.” *Id.* (emphasis in original). The Fiscal Plan also requires that the Government continue to enforce certain policies related to non-salary compensation paid to employees, including “asserting a hiring freeze,” “prohibiting any future

liquidation of sick and vacation days,” and “eliminating the Christmas bonus for all public employees.” (Id.) The healthcare provision calls for adjustment of the amount spent by the Commonwealth for healthcare for each public employee to \$100 per month. (Id.)

Plaintiffs argue that Section 12.4 of the Fiscal Plan “places controls on expenditures” and “reduc[es] benefit costs” within the meaning of PROMESA Section 205(a)(1), and that this Section should therefore be considered a non-binding policy recommendation because it is among the types of measures enumerated in PROMESA’s non-exhaustive description of the types of measures regarding which the Oversight Board can submit recommendations to the Governor under Section 205. Defendants proffer, and Plaintiffs do not contest, that the measures other than the hiring freeze and the elimination of the Christmas bonus are already provided for under Commonwealth law. Defendants argue that the hiring freeze mandated by Section 12.4 of the Fiscal Plan is a means to “enable the achievement of fiscal targets” pursuant to Section 201(b)(1)(G) of PROMESA, and that the elimination of the Christmas bonus for all public employees serves to advance the aims of the Fiscal Plan pursuant to PROMESA Sections 201(b)(1)(D), (F), and (G). (Defs.’ Mem. at 20; Reply at 13.) With respect to the elimination of Christmas bonuses, Defendants also assert, and Plaintiffs do not deny, that the budget does not prohibit payment of the bonus. Rather, the payroll amounts provided are ones that are insufficient to cover current compensation of the full current complement of employees plus Christmas bonuses and, as Plaintiffs’ counsel put it at oral argument, “It’s the Governor who has to make some difficult choices, because he’s the one who has to answer to the people. The Oversight Board is just, here’s how much money you get. If people have to be let go, if Christmas bonuses don’t get paid because of that, that’s on us. That’s

on the chief executive officer of Puerto Rico to make a determination how to implement that budget guideline.” (Tr. at 127:2-8.)

Because the parties agree that the current budget does not eliminate Christmas bonuses or impose a hiring freeze, there is no ripe case or controversy as to the Board’s ability to make such measures mandatory. Nor does there appear to be any justiciable controversy as to the other enumerated salary and benefit measures, which appear to be consistent with current Commonwealth law. Accordingly, the Court lacks subject matter jurisdiction of the issues raised in Paragraph 82 of Count I and the similar claim asserted in Paragraph 87 of Count II of the Complaint and Defendants’ Motion will be granted pursuant to Federal Rule of Civil Procedure 12(b)(1) insofar as it is directed to those paragraphs.

iii. The Remaining Challenged Provisions

Plaintiffs’ claims as to the other three Challenged Provisions (the “Remaining Challenged Provisions”) present justiciable issues that are capable of conclusively and immediately resolving the disputes as to the extent to which the Government must act in accordance with the certified Fiscal Plan and Budget. The question of whether the Oversight Board has the power to impose those Remaining Challenged Provisions as mandatory presents a ripe controversy that must be resolved to clarify for operational purposes the scope and limitations of the Oversight Board’s power and its relationship to the role and powers of the elected Government of Puerto Rico, so that the parties can proceed with proper implementation of the budget for the current fiscal year and work effectively with each other to accomplish the restorative purposes of PROMESA. This is an issue of practical immediacy for the parties and for the people of Puerto Rico. Certain of Plaintiffs’ requests for legal determinations are, however, of a speculative and abstract nature and are thus, as explained below, of insufficient

immediacy to rise to the constitutional level of justiciability.

The Court now turns to Plaintiffs' specific claims and requests for relief as set forth in the Complaint, examining whether they are ripe for determination or seek advisory opinions, and, for those that are ripe, whether they state claims upon which relief may be granted.

B. The Remaining Challenged Provisions and Requests for Relief

To survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The court accepts as true the non-conclusory factual allegations in the complaint and makes all reasonable inferences in the plaintiff's favor. Miss. Pub. Emps.' Ret. Sys. v. Boston Scientific Corp., 523 F.3d 75, 85 (1st Cir. 2008). The court may consider "documents the authenticity of which are not disputed by the parties . . . documents central to plaintiffs' claim, [and] documents sufficiently referred to in the complaint." Id. at 86 (citations omitted). The complaint must allege enough factual content to nudge a claim "across the line from conceivable to plausible." Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (citing Twombly, 550 U.S. at 570).

As detailed in Section I, supra, Plaintiffs' claims focus on certain Challenged Provisions and foundational questions of whether the Oversight Board can, through fiscal plans and budgets, mandate actions implementing policies that have specifically been rejected by the Governor, and whether the Oversight Board's budget can modify or override pre-PROMESA Commonwealth law. Prior to examining the Remaining Challenged Provisions, an overview of the relevant statutory framework is in order.

1. Statutory Framework

At the core of this dispute are questions of statutory interpretation regarding the interplay of Sections 205 and 201(b)(1)(K) of PROMESA, the effect of certification of an Oversight Board-developed budget under Section 202 of PROMESA, the Oversight Board's powers to sanction non-compliance with such a certified budget, and the scope of PROMESA's preemption of pre-existing Commonwealth law. change of tone?

Section 205(a) of PROMESA authorizes the Oversight Board to "submit recommendations" to the Governor or the Legislature of Puerto Rico at any time "on actions the territorial government may take to ensure compliance with the Fiscal Plan, or to otherwise promote the financial stability, economic growth, management responsibility, and service delivery efficiency of" the Government. 48 U.S.C.A. § 2145(a) (West 2017). Section 205(a) provides a non-exhaustive list of matters that implicate significant policy choices about the direction and operation of the government of Puerto Rico. Specifically, such matters include managing territorial financial affairs, placing controls on personnel expenditures and reducing benefit costs, ^{limitando} reforming procurement practices, controlling the structural relationships among entities within the territorial government, ^{no pagando} establishing alternative means of meeting pension obligations, and ^{eliminando} modifying the types of services rendered directly by the territorial government or through alternative service delivery mechanisms. See *id.* Section 205(b) requires the relevant government entity to respond to the Oversight Board within 90 days with a statement as to whether the Government will adopt the recommendations. *Id.* § 2145(b). If the recommendations are to be adopted, the statement must include a written plan and timetable for implementation of the recommendations. *Id.* If the Government declines to adopt the recommendation, the Governor or the Legislature must include in the statement "explanations for the rejection of the recommendations," and that statement must be submitted to the President and

Congress of the United States as well as to the Oversight Board. Id. Section 205 does not address further the fate of rejected recommendations.

Section 201 of PROMESA governs the development, approval, and certification of territorial and instrumentality fiscal plans covering periods of five or more fiscal years. In relevant part, it first contemplates a process in which the Governor formulates and proposes a plan to the Oversight Board, the Oversight Board comments and recommends revisions, and the Governor proposes revisions (multiple times, if necessary). If the Oversight Board ultimately determines, in its sole discretion, that the Governor’s proposed plan meets the fiscal plan specifications identified in Section 201(b) of the statute, the Oversight Board certifies the plan and delivers a compliance certification to the Governor and the Legislature. See 48 U.S.C.A. § 2141(e)(1) (West 2017). In the event the Oversight Board determines “in its sole discretion” that the Governor’s proposed plan is not satisfactory, the Oversight Board must develop and submit to the Governor and Legislature its own fiscal plan that satisfies the statutory specifications. In such event, the Oversight Board’s plan is deemed approved by the Governor, and the Oversight Board issues a compliance certification for its plan to the Governor and the Legislature. Id. §§ 2141(c)(3), (d)(2).¹² Section 201(b) identifies fourteen specific objectives and requirements that a fiscal plan must meet. As relevant here, Section 201(b)(1)(K) expressly provides that a fiscal plan shall “adopt appropriate recommendations submitted by the Oversight Board under [Section 205(a)].” Id. § 2141(b)(1)(K) (West 2017). Section 201(c)(3) provides the Oversight Board with “sole discretion” to determine whether a proposed fiscal plan satisfies the requirements of Section 201(b). Id. § 2141(c).

¹² A plan developed jointly by the Governor and the Oversight Board for a fiscal year may also be certified. See 48 U.S.C.A. § 2141(f) (West 2018).

The parties generally agree that Section 205 allows the Oversight Board to make policy “recommendations” to the Government “at any time” and that such recommendations may be proposed as standalone policy considerations or as part of a certified fiscal plan. (Compl. ¶¶ 5, 29; Defs.’ Mem. at 11-12.) Plaintiffs argue, however, that such provisions can never be more than “‘recommendations’ under PROMESA section 205, which the Government is free to

La ley permite que hagan las recomendaciones que deseen, como plan o como política pública, y emitirlas al gobernador, quien las acoge o no, pero..si no acoge.... reject,” even when they are included in a fiscal plan. (Compl. ¶ 5; *id.* ¶¶ 38-43.) Defendants argue that Section 201(b)(1)(K) empowers the Oversight Board to “adopt” in a certified fiscal plan, and thus make binding, any recommendation that the Oversight Board deems appropriate. (Defs.’ Mem. at 11-12.)¹³ Defendants rely principally on PROMESA Section 201(b)(1)(K) and point also to Section 201(e)(2), which expressly provides that a fiscal plan certified by the Oversight Board is “deemed approved by the Governor.” (*Id.* at 12.)

Section 202 of PROMESA governs the development of budgets, which must cover at least one fiscal year. Following certification of a fiscal plan, Section 202(c)(1) places the initial responsibility to develop proposed budgets that are consistent with the applicable fiscal plan in the hands of the Governor and the Legislature. See 48 U.S.C. §§ 2142(c)(1), (d)(1) (West

¹³ Defendants acknowledge that the Oversight Board’s power to make recommended measures binding through fiscal plan adoption is not unlimited. Recognizing that certification results in deemed approval by the Governor but not the Legislature, Defendants do not claim the ability to use a fiscal plan to impose measures that would have to be implemented through new legislation. (Defs.’ Mem. at 11-12.)

Alternatively, Defendants argue that the Challenged Provisions are not “recommendations” within the meaning of Section 205 of PROMESA, such that the process of soliciting the views of the Governor or the Legislature was unnecessary and that the disputed measures could have been mandated unilaterally under the authority of more general provisions of Section 201(b). (See generally, Defs.’ Mem. § II.C.) Because all of the Challenged Provisions are measures comprehended by the categories enumerated under Section 205 and were aired with the Governor, who provided written objections, prior to their incorporation into the Fiscal Plan, the Court need not reach the Oversight Board’s alternative proposition to resolve this motion practice.

2017). PROMESA provides the Oversight Board with authority to review any such proposed budget to determine whether it is compliant with the applicable fiscal plan and, if so, to certify it. See *id.* § 2142(e)(1). As with the process for development of a fiscal plan, the Oversight Board can notify the Governor and Legislature of its views as to noncompliance and request corrective measures, and the Governor and Legislature are afforded multiple opportunities to submit revised proposed budgets. *Id.* §§ 2141(c), (d). Absent submission of a compliant proposed budget, the Oversight Board is required to develop and submit a compliant budget of its own no later than the day before the beginning of the fiscal year to which the budget is being developed. See *id.* §§ 2142(c)(2), (d)(2). PROMESA expressly provides that a budget developed and certified by the Oversight Board as compliant with the fiscal plan is deemed approved by the Governor and the Legislature and goes into “full force and effect” beginning on the first day of the applicable fiscal year. See *id.* § 2142(e)(3). Section 4 of PROMESA provides that the Act’s provisions “shall prevail over any general or specific provisions of territory law . . . or regulation that is inconsistent with [the Act].” *Id.* § 2103. Section 108(a)(2) of PROMESA prohibits the Governor and Legislature from exercising any supervision or control over the Oversight Board or its activities, and from enacting, implementing or enforcing any “statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight Board.” *Id.* § 2128(a).

Courts must construe statutes as a whole, in light of all of their provisions, and giving effect to each part. See, e.g., *United Savs. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (noting that “[s]tatutory construction . . . is a holistic endeavor”); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (in interpreting a statute, a court “must

not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy” (internal quotation marks omitted)).

The power bestowed on the Oversight Board by Section 205(b)(1)(K) of PROMESA allows the Oversight Board to make binding policy choices for the Commonwealth, notwithstanding the Governor’s rejection of Section 205 recommendations. This power is consistent with PROMESA’s framework, particularly in light of (i) the mandate that the Oversight Board “provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets” (48 U.S.C.A. §2121(a) (West 2017)), (ii) the Oversight Board’s “sole discretion” to certify fiscal plans and put budgets of its own devising into effect (*id.* §§ 2141, 2142), (iii) PROMESA’s preemption of laws inconsistent with its provisions (*id.* § 2103), and (iv) PROMESA’s prohibition of gubernatorial oversight and of implementation of any policy that would “impair or defeat the purposes of [PROMESA] as determined by the Oversight Board” (*id.* § 2128(a)(2)). “[A]ppropriate,” as used in Section 201(b)(1)(K), means appropriate in the judgment of the Oversight Board, which has sole discretion as to fiscal plan and budget certification and the determination of whether and to what extent policies would impair or defeat the purposes of PROMESA, as informed by the Governor’s articulated reasons for opposing the recommendation. Section 201(b)(1)(K) does not distinguish between recommendations that are ultimately approved by the Government and those that are rejected. Instead, Section 201(b)(1)(K) speaks only of recommendations that were “submitted” by the Oversight Board, regardless of whether or not they were rejected by the Government. Consistent with this structure, PROMESA also provides that a budget or fiscal plan that is certified by the Oversight Board is “deemed approved by” the Governor. *Id.* § 2141(e)(2). Something that is “deemed approved” by the Governor need not actually have been approved by the Governor.

That this powerful authority to make certain important policy determinations ultimately rests with the Oversight Board does not, however, render the elected Governor irrelevant or toothless. PROMESA requires the Oversight Board to look first to the elected government for fiscal plan and budgetary direction, and requires extensive and specific communications, with opportunities for revision of proposals, in the event the Oversight Board considers a proposed plan or budget violative of PROMESA or of the fiscal plan, as the case may be. The parties acknowledge that there were extensive discussions and negotiations prior to the Oversight Board's certification of its Fiscal Plan and Budget, and it is a testament to their hard work and good faith that only five areas of disagreement are currently in contention. Indeed, as Plaintiffs' counsel noted at the Hearing, the Fiscal Plan spans "113" pages, and a "tremendous amount of working together" and "of listening" has narrowed the current dispute to the five issues. (Tr. at 128:25-129:4.)

Any fiscal plan provision adopting a recommendation over the Governor's objection can be certified only after the Governor has had a formal opportunity to make his objections public and, indeed, to communicate any such objections to Congress and to the President. Those bodies could take negative legislative action or exercise powers affecting the composition of the Oversight Board were they to believe that the Governor had the better of the argument. Furthermore, the Oversight Board, in adopting a policy over such objections, faces the challenge of managing implementation of the policy in a way that garners the genuine cooperation of Puerto Rico's elected government and the citizens of the island who voted for them, as well as the confidence of stakeholders and potential new investors whose interest in doing business with the Commonwealth will be crucial to the Oversight Board's ability to fulfill its charge of providing a method to achieve access to the capital markets.

It is thus clear that the Oversight Board's ability to impose a rejected policy is not one to be exercised lightly. Nor is it, as a practical matter, one that is unconstrained. Although a budget approved and adopted by the Oversight Board as compliant with a certified fiscal plan becomes law insofar as it is in full force and effect without further action on the part of the Governor or the Legislature, and inconsistent Commonwealth laws are preempted, the Oversight Board has not been given power to affirmatively legislate. Thus, with respect to policy measures that would require the adoption of new legislation or the repeal or modification of existing Commonwealth law, the Oversight Board has only budgetary tools and negotiations to use to elicit any necessary buy-in from the elected officials and legislators. Elected officials and legislators, on the other hand, have the ability to obstruct implementation altogether, or complicate it in such a way as to cripple Puerto Rico's ability to use it to promote the needed return to fiscal responsibility and access to capital markets. PROMESA is an awkward power-sharing arrangement and, as the Court noted in its decision rejecting the Oversight Board's attempt to appoint a Chief Transformation Officer for PREPA, is "fraught with potential for mutual sabotage." In re Fin. Oversight & Mgmt. Bd. for P.R., 583 B.R. 626, 637 (D.P.R. 2017). "These negative possibilities should," as the Court stated in that opinion, "motivate the parties to work together, quickly, for positive change" within the statutory structure in which neither of them holds all of the cards. Id.

Although this governance structure infringes on the scope of the authority of the elected Government, it was nonetheless contemplated and written into law by Congress. As the parties have noted in their submissions, Congress considered imposing an even more powerful board, similar to the one that was put in place for a time in the District of Columbia, when developing the legislation that was ultimately enacted as PROMESA. While Congress revised

the precursor of Section 205 to remove a provision that unambiguously allowed the Oversight Board to override the Government's judgment, it simultaneously added Section 201(b)(1)(K) which, as described above, has a similar practical effect. Commentary in the legislative history of PROMESA is generally consistent with the view that certified fiscal plans would be able to adopt recommendations even absent approval by the Government. See H.R. Rep. No. 114-602 (2016), reprinted in 2016 WL 3124840, at *46 (“The Oversight Board may incorporate any recommendations—even those not adopted by the Legislature or Governor—into the development of Fiscal Plans.”); 162 Cong. Rec. S4690-02, S4695 (June 29, 2016) (statement of Sen. Menendez), reprinted in 2016 WL 3544524 (“While this section calls these comments recommendations, another section allows the board to ‘adopt appropriate recommendations’ submitted by the Oversight Board under section 205. So, in essence, they can adopt the very essence of what they are saying is a recommendation.”); Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA): Markup Memorandum H.R. 5278 From Majority Committee Staff of H. Comm. on Natural Resources, 114th Cong. 3 (2016) (“The Board’s broad powers include: the imposition of legislative or executive recommendations . . .”).¹⁴ Plaintiffs’ argument that Section 303 of PROMESA, which reserves governance powers of a territory, precludes mandatory adoption of rejected recommendations thus fails, because Section 303’s reservation is explicitly made “[s]ubject to the limitations set forth in [Titles] I and II” of PROMESA (48 U.S.C.A. § 2163 (West 2017)), and Section 202, which is part of Title II,

¹⁴ Although Puerto Rico’s non-voting member of the United States House of Representatives submitted a statement asserting that the final versions of Section 201 and Section 205 had removed a provision “empowering the oversight board to impose its recommendations over the objection of the Puerto Rico government,” H.R. Rep. No. 114-602 (2016), reprinted in 2016 WL 3124840, at *114, his comment did not acknowledge, much less address directly, the simultaneous addition of Section 205(b)(1)(K) to the bill.

permits the Oversight Board to adopt recommendations with any requirement of gubernatorial approval (*id.* § 2142).

The Court turns now to the viability of Plaintiffs' attack on the Remaining Challenged Provisions.

2. Remaining Challenged Provisions

i. Budgetary Reprogramming

Section 11.2.1 of the Fiscal Plan is titled "Enforcement of the budget" and provides, in relevant part, that any power of AAFAF, the OMB, or the Department of the Treasury, "including the authorities granted under Act 230-1974, as amended, known as the 'Puerto Rico Government Accounting Act' ('Act 230'), to authorize the reprogramming or extension of appropriations of prior fiscal years is hereby suspended." (Fiscal Plan § 11.2.1.) Section 7 of the General Fund Resolution and Section 7 of the Special Resolution incorporate this same language. Plaintiffs also challenge Section 10 of the General Fund Resolution, which grants OMB the ability to withhold from any allocations to the executive agencies the amounts necessary to pay for the pay-go contribution, unemployment insurance, or taxes withheld from their employees, "when OMB determines that such a withholding is necessary to ensure compliance with these obligations by the agencies concerned," and provides that "[a]ny such amounts withheld by OMB shall solely be reprogrammed to pay the corresponding outstanding obligations related to pay-go contributions, unemployment insurance, or taxes withheld from employees as allowed in" Section 10. (See General Fund Resolution §§ 7 and 10; Special Resolution § 7.) Plaintiffs argue that these Challenged Provisions (*i.e.*, Fiscal Plan Section 11.2.1, General Fund Resolution Sections 7 and 10, and Special Resolution Section 7) are merely optional recommendations, because they "place controls on expenditures" and alter "the management of the [Commonwealth's] financial affairs" within the meaning of Section

205(a)(1) of PROMESA. (Opp'n at 22.) Plaintiffs also contend that these provisions of the Fiscal Plan and the Challenged Budget Resolutions are beyond the powers granted to the Oversight Board by PROMESA because they are inconsistent with the PROMESA provision that specifically addresses reprogramming. That provision, set forth in PROMESA Section 204(c), reads as follows:

If the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request. . . . The Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget.

48 U.S.C.A. 2144(c) (West 2017) (emphasis added). Because the reprogramming provision of the statute addresses only amounts that are provided for within a particular budget, Plaintiffs argue that PROMESA does not prohibit the Governor and territorial officials from reprogramming unused appropriations from prior fiscal years. (See Compl. ¶¶ 79, 88.)

Defendants, who define reprogramming as “moving funds from one budget appropriation to another, or using funds appropriated in a prior year in a subsequent year,” argue that power to restrict reprogramming of appropriations from prior years is inherent in the Oversight Board’s power and obligation to certify that a fiscal plan satisfies Sections 201(b)(1)(A), (D), (F), and (G) of PROMESA, and that its authority to include such restriction in a budget follows from Section 202(c)(1) of PROMESA. (Defs.’ Mem. at 17-18; see also Docket Entry No. 28, Defendants’ Reply (the “Reply”), at 11.)

In Paragraph 79 of Count I of the Complaint, Plaintiffs seek a declaration that “the suspension of Act 230 and reprogramming authorization for prior fiscal years under Board Fiscal Plan section 11.2.1 . . . is a non-binding recommendation because (i) it is inconsistent with the reprogramming standard under PROMESA section 204(c), which does not prohibit reprogramming requests for prior fiscal years, (ii) inappropriately attempts to modify AAFAF’s powers under Law 2-2017 and Act 230, among others, without following PROMESA’s provisions for reviewing legislation, and (iii) is an inappropriate use of the Board’s budget power to shift responsibilities of Government officials.” Paragraph 88 of Count II seeks a substantially identical declaration regarding the corresponding budgetary resolution provisions. These aspects of the Complaint fail as a matter of law to state claims upon which relief may be granted.

PROMESA grants the Oversight Board the exclusive authority to certify a fiscal plan, and to certify a budget for periods covering one or more fiscal years. See 48 U.S.C.A. §§ 2141(c), 2142(e) (West 2017). Among the mandatory purposes of the certified fiscal plan with which the budget must comply are “to ensure the funding of essential public services,” “provide for the elimination of structural deficits,” and “improve fiscal governance, accountability and internal controls.” Id. § 2141(b). A budget must cover a specific fiscal year or years. It beggars reason, and would run contrary to the reliability and transparency mandates of PROMESA, to suppose that a budget for a fiscal year could be designed to do anything less than comprehend all projected revenues and financial resources, and all expenditures, for the fiscal year. Since a certified budget is in full effect as of the first day of the covered period, means and sources of government spending are necessarily rendered unavailable if they are not provided for within the budget. A prior year authorization for spending that is not covered by the budget is inconsistent with PROMESA’s declaration that the Oversight Board-certified budget for the fiscal year is in

full force and effect, and is therefore preempted by that statutory provision by force of Section 4 of PROMESA. Accordingly, the Fiscal Plan language regarding suspension of authority to approve off-budget reprogramming may well be superfluous, and in any event merely has the same effect as PROMESA's explicit provisions. The exclusive scope of a certified budget also makes pellucid the reason that Section 204(c)'s reprogramming provision speaks only to the then-current fiscal year – the budget does not make any other resources available for reprogramming.

Accordingly, Paragraph 79 of Count I and Paragraph 88 of Count II the Complaint fail to state claims upon which relief may be granted and are for that reason dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

ii. Automatic Budget Reductions

Section 12.3 of the Fiscal Plan provides the following:

If, after the third fiscal quarter of any fiscal year there remains unrealized agency efficiency savings for any grouping relative to the projected agency efficiency savings in the New Fiscal Plan for the applicable fiscal year, the Oversight Board will automatically reduce the budget for the corresponding grouping for the following fiscal year in the amount equal to the unrealized agency efficiency savings. In particular, if the Oversight Board determines that there is material underperformance in agency efficiency savings relative to the projections set forth in the New Fiscal Plan, intentional workforce reductions will be necessary to meet the agency efficiency savings targets set forth herein.

(Fiscal Plan at 68-69.) In Paragraph 81 of Count I of the Complaint, Plaintiffs assert that they are entitled to a declaration that “the provision requiring automatic budget reductions for future fiscal years (including intentional workforce reductions) under Board Fiscal Plan section 12.3 – which ‘places controls on expenditures’ under PROMESA section 205(a)(1) – is a non-binding recommendation because (i) the Board cannot mandate workforce reduction through the budget

process, and (ii) nothing in PROMESA allows the Oversight Board to dictate personnel decisions for the Commonwealth.” Defendants contend that the imposition of automatic budget reductions is within the Oversight Board’s power to mandate “improve[ments in] fiscal governance, accountability, and internal controls” pursuant to a fiscal plan under Section 201(b)(1)(F) of PROMESA and its authority to impose certain expenditure reductions pursuant to PROMESA Section 203(d)(1) in the event of noncompliance with a certified budget. (Defs.’ Mem. at 22; Reply at 14.)

While it is true that PROMESA Section 201(b)(1)(F) provides that a certified fiscal plan shall “improve fiscal governance, accountability, and internal controls” (11 U.S.C.A. § 2141(b)(1)(F) (West 2017)) and recommendations that the Oversight Board could adopt in a Fiscal Plan include “placing controls on expenditures for personnel” (*id.* § 2145(a)(1)), Section 201(b) does not explicitly authorize building triggers into one budget that automatically restrict appropriations in a subsequent budget. Section 203, on the other hand, explicitly provides a protocol for assessing compliance with a budget on a quarterly basis, including assessment of third quarter performance, that requires the Oversight Board to determine whether there is an inconsistency between actual and budget figures, advise the territorial government to correct any such inconsistency and certify any uncorrected inconsistency to the President, certain Congressional Committees, the Governor, and the Legislature, and authorizes the Oversight Board to make appropriate reductions in non-debt expenditures to true up actual revenues and expenditures with approved budgetary provisions for the relevant period. For subsequent fiscal years that are not covered by the certified budget, Section 202 of PROMESA requires the interactive process of soliciting proposals and revisions from the Government before the

Oversight Board can impose unilateral measures. Nothing in the statute authorizes automatic budgetary or personnel restrictions across separate budgets.

Paragraph 81 of Count I thus states a claim upon which relief may be granted, and Defendants' Motion to dismiss the Complaint is denied insofar as it is directed to Paragraph 81 thereof.

iii. Corrective Measures

Section 15 of the General Fund Resolution and Section 14 of the Special Resolution provide that, “[i]f during the fiscal year the government fails to comply with the liquidity and budgetary savings measures required by the [fiscal plan] certified by the Oversight Board, the Government shall take all necessary corrective action, including the measures provided in PROMESA sections 203 and 204.” (General Fund Resolution § 15; Special Resolution § 14.) Additionally, Section 16 of the General Fund Resolution and Section 15 of the Special Resolution provide that:

The Secretary of Treasury, the treasurer and Executive Directors of each agency or Public Corporation covered by the New Fiscal Plan for Puerto Rico certified by the Oversight Board, and the Director of the OMB (or their respective successors) shall be responsible for not spending or encumbering during fiscal year 2019 any amount that exceeds the appropriations authorized for such year. This prohibition applies to every appropriation set forth in this Joint Resolution, including appropriations for payroll and related costs. Any violation of this prohibition shall constitute a violation of this Joint Resolution and Act 230.

(General Fund Resolution § 16; see also Special Resolution § 15.)

Plaintiffs argue that because the Budget, by invoking Act 230, makes spending funds in excess of appropriations a misdemeanor and also alters Act 230 by making excess spending a strict liability criminal offense, General Fund Resolution Section 15 and Special Resolution Section 14 affect “the territory’s laws . . . on the operations of the territorial

government” and are therefore recommendations pursuant to PROMESA Section 205(a)(7). 48 U.S.C.A. § 2145(a)(7) (West 2017). Plaintiffs also contend that General Fund Resolution Section 16 and Special Resolution Section 15 exceed the Oversight Board’s powers under PROMESA because they “(i) amend existing legislation to expand criminal penalties under Act 230 and (ii) go beyond the Board’s limited power to discipline Government officials under PROMESA section 104(I).” (Opp’n at 21.) Defendants argue that the measures at issue serve to “improve fiscal governance, accountability, and internal controls” in keeping with PROMESA § 201(b)(1)(F). (Def.’ Mem. at 23.) Additionally, Defendants rely on PROMESA Sections 203 and 204 for the proposition that the Oversight Board has the authority to require corrective measures in the event that the Governor fails to comply with a certified budget. (*Id.*) In any event, Defendants argue, the penalties set forth in Section 16 of the General Fund Resolution and Section 15 of the Special Resolution merely restate existing Commonwealth law under Act 230. (*Id.* at 24.)

Paragraph 89 of Count II of the Complaint seeks a declaration that “the provision in the Board Budget requiring the Government to take all necessary and corrective action to comply with the Board Fiscal Plan measures under General Fund Resolution section 15 and Special Resolution section 14 – which ‘places controls on expenditures’ under PROMESA section 205(a)(I) is not enforceable because such provisions are (i) an impermissible attempt to expand the Board’s limited budget enforcement powers under PROMESA section 203(d)(1), (ii), inconsistent with the reprogramming procedure under [PROMESA] section 204(c), and (iii) an abuse of the Board’s budget powers as a backdoor attempt to legislate.”

In Paragraph 90 of Count II, Plaintiffs assert that they are “entitled to a judicial declaration . . . that the provision expanding the Board’s punishment powers for non-compliance

under General Fund Resolution section 16 and Special Fund Resolution section 15 which would ‘effect the territory’s laws . . . on the operation of the territorial government’ is not enforceable because (i) such provisions seek to impose Act 230 punishments on appropriation violations, which include criminal punishments that can only be established by the Legislature, and (ii) the Board’s punishment powers for budget non-compliance are limited to PROMESA section 104(l), which does not include the power to apply criminal punishment to the actions of Government officials.”

Sections 203 and 204 of PROMESA prescribe procedures and limited remedies in the event of noncompliance with certified budgets and fiscal plans. Neither authorizes the Oversight Board to write into the law of Puerto Rico a general declaration that violations of the provisions of the appropriations provisions of the budget are an independent violation of law and, while PROMESA specifies certain consequences upon the Commonwealth’s failure to correct an inconsistency of expenditures versus the budget, the statute itself does not impose affirmative obligations on the Commonwealth or any of its officers or agents to take corrective action. Es que no es necesario, ellos mismos lo pueden hacer al someter u propio plan y que quede aprobado. Nor does PROMESA, by virtue of its provision rendering an Oversight Board-certified budget effective, create new liability under Puerto Rico law for violations of the budget.

Defendants disclaim any intent effectively to amend Act 230 (the criminal provision) or claim prosecutorial authority, asserting at oral argument that the resolutions merely state the Oversight Board’s position that a violation of the certified budget is a crime within the meaning of the statute. (See Reply § III.D; Tr. at 113:19-25.) Nonetheless, these provisions of the Resolutions, read in the light most favorable to Plaintiffs, appear to claim powers and impose consequences in excess of those authorized by PROMESA. Accordingly, Paragraphs 89 and 90 Count II state

claims upon which relief may be granted and Defendants' Motion is denied to the extent it is directed to those paragraphs.

3. Remaining Relief Sought

The remaining relief-related provisions of the Complaint seek declarations of a more general nature. Paragraph 78 of Count I demands a declaration that "the rejected policy recommendations in the Board Fiscal Plan are non-binding recommendations and that the Government is not obligated to implement any of these policies, and that the Oversight Board may not take any actions to force compliance with such recommendations." As explained above, the Oversight Board is not precluded from adopting the rejected policy recommendations in a fiscal plan. The Complaint therefore fails to state a claim upon which relief may be granted with respect to the Challenged Provisions, and Defendants' Motion is granted insofar as it is directed to the claim asserted in Paragraph 78 of Count I.

In Paragraph 83 of Count I and Paragraph 91 of Count II, Plaintiffs essentially seek declarations that any fiscal plan or budgetary provision that the Governor determines in his discretion is a policy recommendation and rejects, now or in the future (whether identified in the Complaint or otherwise) is not binding on the Commonwealth and need not be implemented by the Governor. For substantially the reasons already explained above, this broad proposition fails to state a claim upon which relief may be granted, and Defendants' Motion is granted insofar as it is directed to these aspects of Counts I and II.

Plaintiffs' final declaratory judgment claim is set forth in Paragraph 92 of Count II, which seeks a declaration "that any provisions of the Board Budget that exceed the Board's powers under PROMESA § 202 are invalid." Plaintiffs do not specify what provisions are challenged in this connection, nor do they identify the powers with which they are concerned.

Plaintiff's Complaint is, accordingly, too abstract in this regard to frame a justiciable case or controversy or, to the extent it can be read to satisfy the constitutional requisite for standing, it lacks sufficient grounding in specific factual pleading to state plausibly a claim upon which relief may be granted. The declaratory judgment claim asserted in Paragraph 92 of the Complaint is, accordingly, dismissed.

Plaintiffs' final Count pleads an entitlement to injunctive relief "prohibiting the Defendants from implementing and enforcing the Oversight Board's policy recommendations contained in the Board Fiscal Plan and Board Budget . . ." (Paragraph 93, Count III.) Because Plaintiffs have stated some claims upon which relief may be granted, the possibility of propriety of injunctive relief is not so remote that dismissal of Count III is warranted at this juncture. Defendants' Motion is denied insofar as it is directed to Count III of the Complaint.

CONCLUSION

For the foregoing reasons, the Motion is granted pursuant to Federal Rule of Civil Procedure 12(b)(6) insofar as it seeks dismissal of the claims asserted in Paragraphs 78, 79, and 83 of Count I, and those asserted in Paragraphs 88 and 91 of Count II. The Motion is granted pursuant to Federal Rule of Civil Procedure 12(b)(1) insofar as it seeks dismissal of the claims asserted in Paragraphs 80 and 82 of Count I and Paragraphs 87 and 92 of Count II. Defendants' Motion is denied in all other respects. This adversary proceeding remains referred to Magistrate Judge Dein for general pretrial management.

This Opinion and Order resolves Docket Entry Nos. 16 and 31.

SO ORDERED.

Dated: August 7, 2018

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge