UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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CENTRO DE PERIODISMO INVESTIGATIVO,

Plaintiff,

v. Civil No. 17-1743 (JAG)

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Defendant.

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DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE JAY A. GARCIA-GREGORY:

Defendant Financial Oversight and Management Board for Puerto Rico (the "Board") respectfully submits this reply in support of the Board's motion to dismiss the complaint to address two arguments raised in the opposition brief filed by Plaintiff Centro de Periodismo Investigativo ("CPI" or the "Plaintiff"), as well as arguments raised by the Reporters Committee for the Freedom of the Press in its *amicus curiae* brief filed in support of CPI's opposition to the Board's motion to dismiss.

ARGUMENT

I. Plaintiff's Claims Are Barred by the Eleventh Amendment.

As set forth in the Board's opening brief, Plaintiff's claims are barred by Eleventh Amendment sovereign immunity as articulated by the U.S. Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). *See* Dkt. No. 22 at 5-9. In its opposition brief, Plaintiff asks the Court to ignore thirty-six years of unbroken First Circuit precedent and find that the Eleventh Amendment does not apply to the Commonwealth of Puerto Rico. Dkt. No. 25 at 10. CPI bases its argument on a case that it contends the Board "ignored" in its opening brief—the United States Supreme Court's decision in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016). CPI argues that *Sanchez Valle* supports its view that the Eleventh Amendment does not apply to Puerto Rico (and, by extension, to the Board). *See* Dkt. 25 at 10. It is true that the Board did not address the *Sanchez Valle* decision. That is because—contrary to CPI's assertion—the case is irrelevant and does not alter Puerto Rico's Eleventh Amendment immunity from suit, as confirmed by at least three post-*Sanchez Valle* decisions that expressly rejected the exact argument that Plaintiff now makes. *See Payne v. Alvarez-Ortiz*, 229 F. Supp. 3d 115 (D.P.R. 2017); *Borras-Borrero v. State Ins. Fund Corp.*, No. 16-cv-1114, 2017 WL

1088284 (D.P.R. Mar. 22, 2017); *Rivera-Astacio v. Puerto Rico*, No. 15-cv-3181, 2017 WL 835173 (D.P.R. Mar. 2, 2017).

Sanchez Valle addressed the narrow question of whether, for double-jeopardy purposes, Puerto Rico and the United States were "separate sovereigns" or "dual sovereigns." In addressing that issue, the Supreme Court applied a "narrow, historically focused" test that is different from the test used to determine sovereignty in other contexts. 136 S. Ct. at 1867. As the majority noted, "'sovereignty' in [the double jeopardy] context . . . does not bear its ordinary meaning," and "the test . . . to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty." *Id.* at 1870. Applying that analysis, the Supreme Court held that, for double-jeopardy purposes, Puerto Rico and the United States were not separate sovereigns. *Id.* at 1868. Nowhere in the opinion does the Court discuss Puerto Rico's sovereignty under the Eleventh Amendment, let alone render a decision on the question. To the contrary, "even while the narrow holding in *Sanchez Valle* bent to the will of an idiosyncratic test, the Supreme Court still reaffirmed Puerto Rico's 'sovereignty' in the ordinary sense of the word." *Morales-Font v. Air Charter, Inc.*, Civil. No. 17-1033 (SEC), 2017 WL 4119620, at *5 (D.P.R. Sep. 15, 2017).

As Plaintiff concedes, the First Circuit has "consistently recognized that Puerto Rico enjoys the same immunity from suit that a State has under the Eleventh Amendment." Dkt. No. 25 at 7 (quoting *Consejo de Salud de la Comunidad de la Playa de Ponce, Inc. v. Gonzalez-Feliciano*, 695 F.3d 83, 102 n.15 (1st Cir. 2012)); *see also Acevedo Lopez v. Police Dep't of P.R.*, 247 F.3d 26, 28 (1st Cir. 2001) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."); *Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000) (citing a "phalanx" of cases to show that the court has

"consistently . . . held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity"). But what Plaintiff fails to mention is that courts that have considered Puerto Rico's sovereign immunity after *Sanchez Valle* (and the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")) have held that Puerto Rico remains immune from suit. In *Payne v. Alvarez-Ortiz*, for example, the court held that Puerto Rico "is still immune from suit under the Eleventh Amendment," rejecting the plaintiff's argument that recent legal and political developments, including the Supreme Court's decision in *Sanchez Valle* and Congress's enactment of PROMESA, had "eroded Puerto Rico's autonomy and especially, any claim to 'sovereignty.'" 229 F. Supp. 3d at 116-117. Similarly, in *Borras-Borrero*, the plaintiff argued that *Sanchez Valle*, "reverses, supersedes and overrides" all First Circuit cases holding that Puerto Rico has sovereign immunity pursuant to the Eleventh Amendment. 2017 WL 1088284, at *1. The court soundly rejected this argument, holding that "*Sanchez Valle* did not erode Puerto Rico's Eleventh Amendment sovereign immunity." *Id.* at *2; *see also Rivera-Astacio*, 2017 WL 835173, at *1, *3 (dismissing Puerto Rico commonwealth law claims on immunity grounds, crediting defendant's argument that *Sanchez Valle* does not "support the contention that the Eleventh Amendment does not apply to Puerto Rico").

It is thus clear that *Sanchez Valle* did not alter Puerto Rico's sovereign immunity. As such, this Court should reject Plaintiff's attempt to expand *Sanchez Valle*'s ruling beyond what the Supreme Court decided and in a manner that would undercut Puerto Rico's sovereignty. Instead, the Court should find, as decades of First Circuit precedent requires, that Plaintiff's claims are barred by the Eleventh Amendment pursuant to *Pennhurst* as outlined in the Board's opening brief.

II. PROMESA's Jurisdiction Provision is Constitutional.

CPI further argues that if the Eleventh Amendment bars its suit from being heard in federal court, then PROMESA's requirement that suits against the Board be brought in specified federal district courts (48 U.S.C. § 2126(a), the "jurisdiction provision") is "unconstitutional." Dkt. No. 25 at 7, 10. But CPI provides no basis for this conclusory statement—not a single citation to a constitutional provision, case law, or any other authority—and the Board is unaware of any doctrine supporting this novel contention. Accordingly, in the absence of any legal authority for CPI's argument, the Court should reject it.

Although the Court need not go any further to dispose of CPI's argument, the underlying premise of that position is meritless as well. CPI complains that the *Pennhurst* doctrine leaves it "without a remedy." Dkt. No. 25 at 10. But that does not make PROMESA unconstitutional, nor does it permit the Court to expand its subject-matter jurisdiction in a manner contrary to the Eleventh Amendment. In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), the United States Supreme Court explained that even in cases involving public rights that are "susceptible of judicial determination, . . . congress may or may not bring [them] within the cognizance of the courts of the United States, as it may deem proper."

A situation similar to the present one arises in the intellectual property context, where the interplay between exclusive federal-court jurisdiction and the Eleventh Amendment deprives plaintiffs of a remedy for an alleged violation of their rights by a State. Specifically, when a State infringes a party's copyright, but that State has not waived its immunity to such actions, the copyright holder is without recourse because federal law preempts state law in the area of copyright protection, 17 U.S.C. § 301(a), and the federal courts have exclusive jurisdiction to hear copyright infringement cases, 28 U.S.C. § 1338(a). *See, e.g., Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. Of Ga.*, 633 F.3d 1297 (11th Cir. 2011) (holding

Congress did not abrogate States' sovereign immunity with respect of copyright infringement claims); *Mktg. Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088 (S.D. Cal. 2008) (holding state-law claims preempted by federal copyright law and dismissing federal copyright-infringement claims against state actor on immunity grounds).[1] In neither of these cases did the court conclude that the absence of recourse resulted in a constitutional violation. The same reasoning applies here and establishes that the application of exclusive federal court jurisdiction under § 106(a) and the Eleventh Amendment do not give rise to a constitutional violation.

III. The Arguments Raised by *Amicus* Do Not Save CPI's Case from Dismissal.

The arguments raised in the *amicus curiae* brief submitted by the Reporters Committee for Freedom of the Press (the "Committee") are largely duplicative of those submitted by CPI and are easily dispelled. As an initial matter, the Committee barely addresses one of the Board's two bases for dismissal: As a matter of Eleventh Amendment sovereign immunity, this Court has no jurisdiction to order the FOMB to comply with Puerto Rico law. *See* Dkt. No. 22 at 5-9 (citing *Pennhurst*). Like CPI, the Committee has no valid response to *Pennhurst*.

In the final paragraph of its brief, the Committee makes two half-hearted responses to *Pennhurst*. First, it cites PROMESA § 106(a) (48 U.S.C. § 2126(a)), PROMESA's jurisdictional provision, as evidence that Congress supposedly did not intend for the Board "to be immune from suit." Dkt. No. 26-1 at 11. But § 106(a) merely provides that any action brought against

[1] Courts have held that Puerto Rico's sovereign immunity also protects it from federal copyright claims. *Berio-Ramos v. Fores-Garcia*, No. 13-cv-1879, 2016 WL 270385 (D.P.R. Jan. 21, 2016) (rejecting post *Sanchez-Valle* argument that the Eleventh Amendment does not apply to Puerto Rico and dismissing copyright infringement case); *De Romero v. Institute of Puerto Rican Culture*, 466 F. Supp. 2d 410 (D.P.R. 2006) (dismissing copyright infringement claim based on finding that "the Commonwealth is entitled to Eleventh Amendment Immunity in suits arising out of copyright infringement . . . .").

the Board must be brought in federal court. It says nothing about the claims the Board is subject to or Congress's intent with respect to the scope of the Board's immunity from suit.

In any event, the Committee's intent argument fails because Congress can abrogate Eleventh Amendment immunity only if it unequivocally expresses its intention to abrogate the Eleventh Amendment bar to suits against states in federal court. *Pennhurst*, 465 U.S. at 99. Section 106(a) does not unequivocally express Congress's intent to abrogate the Board's Eleventh Amendment immunity; in fact, § 106(a) does not mention Eleventh Amendment immunity at all. Moreover, Congress can abrogate sovereign immunity only when exercising its powers under certain constitutional provisions, *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 876 (7th Cir. 2006), and the Board is aware of no authority holding that Congress can abrogate sovereign immunity when legislating pursuant to the Territories Clause, as it did when enacting PROMESA. *See* PROMESA § 101(a)(2). Accordingly, there has been no abrogation, and the Eleventh Amendment as interpreted in *Pennhurst* bars this Court from considering CPI's claim.

As a back-stop, the Committee contends that if the Eleventh Amendment bars CPI's claim in federal court, this Court should find that § 106(a) is unconstitutional and permit CPI to bring its claim in Commonwealth court. Dkt. No. 26-1 at 11. Putting aside the fact that such relief has not been requested by CPI and is not ripe for adjudication,[2] the Committee's argument that § 106(a) is unconstitutional fails on the merits for the reasons set forth above. Tellingly, the Committee cites only one inapposite case to support its position. In that case, the Supreme Court was dealing with a statute under which agency decisions were reviewable unless Congress precluded judicial review or committed the questioned act to the agency's discretion. The case

[2] The only issue for the Court to decide is whether CPI can bring its claim in *federal court*. This is not the occasion for the Court to address what should happen if CPI theoretically brings this claim in the courts of the Commonwealth at some later date.

turned on the latter, namely that the agency terminated an employee for homosexuality under a statute that committed the decision to the agency's discretion. The terminated employee raised constitutional claims and sought review. The Supreme Court reaffirmed that where Congress intends to preclude review of constitutional claims, its intent must be clear. *Webster v. Doe*, 486 U.S. 592, 603 (1988). The court noted it had twice previously made the same ruling in *Johnson v. Robison*, 415 U.S. 361 (1974), and *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *Webster v. Doe*, 486 U.S. 592, 603 (1988), the Supreme Court found that the statutory language committing the decision to the agency's discretion did not evidence a clear intent to preclude review of constitutional claims. That ruling is of no relevance or aid to CPI. It is free of doubt that under the Supremacy Clause, a federal statute can defeat rights guaranteed under *State* (or *Commonwealth*) law, such as the rights asserted by CPI here. *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2472-77 (2013) (holding that federal statute prevented plaintiff from bringing claim under New Hampshire law). Accordingly, no constitutional problem would arise if § 106(a) left CPI without the ability to vindicate the rights that it claims under Puerto Rico law, and there is thus no basis to "sever" § 106(a), as the Committee advocates. Dkt. No. 26-1 at 11.

The Committee's preemption argument fares no better. The Committee relies heavily on what it calls a "presumption against preemption." *Id.* at 1, 6. However, the Committee admits that PROMESA contains an express preemption provision, *id*. at 8, and the Supreme Court recently held that there is no presumption against preemption when a statute contains an express preemption provision, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("[B]ecause the statute contains an express pre-emption clause, we do not invoke any

presumption against pre-emption . . . ." (quotation marks omitted)). Accordingly, no presumption aids CPI's cause.

The Committee also misses the mark when it contends the Board's proposed reading of PROMESA would "strip" Puerto Rico citizens of their rights. Dkt. No. 26-1 at 2, 6. Prior to PROMESA, there was no Board and therefore no right to access documents from the Board. PROMESA created the Board, but at the same time it included express language that preempts inconsistent disclosure requirements. PROMESA is therefore not taking away any rights from Puerto Rico citizens. The same documents subject to disclosure prior to PROMESA remain subject to disclosure, but the newly created Board is not subject to disclosure requirements inconsistent with those in PROMESA.

PROMESA's express preemption provision also distinguishes this case from the primary case relied on by the Committee, *De J. Cordero v. Prensa Insular De P.R., Inc.*, 169 F.2d 229 (1st Cir. 1948) (cited in Dkt. No. 26-1 at 2, 4, 6). In that case, the federal statute at issue had no express preemption provision. The First Circuit therefore held that a Puerto Rico disclosure statute was not preempted because "Congress has expressed no intent . . . to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress." *Id.* at 233 (quotation marks omitted). Here, by contrast, Congress has expressed its intent to preempt inconsistent Puerto Rico disclosure rules, and for the reasons discussed in the Board's opening brief, the disclosure requirements invoked by CPI are inconsistent with PROMESA. *See* Dkt. No. 22 at 9-13.[3]

[3] The Committee's discussion of *United States v. Hernandez-Ferrer*, 599 F.3d 63 (1st Cir. 2010), is puzzling. That case supports the notion that when Congress imposes specific disclosure obligations it intends to exclude others. *See* Dkt. No. 22 at 11. The Committee argues that *Hernandez-Ferrer* shows that if Congress intended to preempt Puerto Rico's disclosure laws, it

The Committee's remaining preemption contentions are policy arguments irrelevant to the interpretation of PROMESA. *See Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1668 (2017) ("[V]arious policy arguments cannot overcome the statute's plain language."). Those policy arguments are also off the mark. Contrary to the Committee's assertion, there is no indication that Congress's "aim" in passing PROMESA was "making the [FOMB] open to the public." Dkt. No. 26-1 at 2. To the contrary, if Congress were primarily interested in transparency, it would have made such intent clear in the text of the statute. Instead, Congress expressly limited the information that the Board was required to disclose to the public. *See* Dkt. No. 22 at 10-12. Otherwise, Congress left it to the Board's discretion to determine when transparency would advance the FOMB's stated goal of helping the Commonwealth "achieve fiscal responsibility and access to the capital markets." PROMESA § 101. The Committee's citation to a signing statement by President Obama proves the point. Dkt. No. 26-1 at 4. The President expressed his *hope* that the FOMB would choose to establish an "open process," demonstrating that transparency was given to the FOMB's discretion. *Id.*

The only legislative history cited by the Committee to support its policy argument is a statement by Senator Orrin Hatch that has nothing to do with the issue in this case. Dkt. No. 26-1 at 3-4. Senator Hatch lamented the Puerto Rico government's failure to properly manage its finances or provide audited financial statements to Congress. However, Senator Hatch did not say anything about the FOMB disclosing information about its deliberations to the public.

At bottom, the Committee's argument for disclosure boils down to a contention that Congress thinks that transparency is a good policy in all circumstances. But that is plainly not the case; to the contrary, Congress recognizes that there are situations where transparency is not

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would have said so. Dkt. No. 26-1 at 7. But Congress *did say so* in PROMESA § 4, which states that laws inconsistent with PROMESA are preempted.

the best policy. Indeed, in PROMESA itself, Congress stated that the Board could hold meetings outside the public purview in some circumstances. 48 U.S.C. § 2121(h)(4). The Committee's argument for transparency at all costs should be rejected because it runs counter to the plain text and goals of PROMESA.

CONCLUSION

For the reasons set forth in the Board's opening brief and above, the Court should dismiss Plaintiff's complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief may be granted.

Dated: October 30, 2017
San Juan, Puerto Rico

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to all CM/ECF participants in this case.

/s/ Luis F. del Valle-Emmanuelli
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