UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	PROMESA Title III
as representative of	:	Case No. 17-BK-3283 (LTS)
THE COMMONWEALTH OF PUERTO RICO, et al.,	:	(Jointly Administered)
Debtors.[1]	:	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE DEBTORS (OTHER THAN COFINA),	:	Adv. Proc. No. 18-00101
Plaintiff,	:	
v.	:	
THE COMMONWEALTH OF PUERTO RICO, THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, AND THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	
Defendants.	:	

OMNIBUS OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS (OTHER THAN COFINA) TO MOTIONS TO DISMISS COMMITTEE'S COMPLAINT RELATING TO GDB RESTRUCTURING FOR LACK OF STANDING

[1] The Debtors in these title III cases, along with each Debtor's respective title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283 (LTS)) (Last Four Digits of Federal Tax ID: 3481), (ii) 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), (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567 (LTS)) (Last Four Digits of Federal Tax ID: 3808), (iv) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284 (LTS)) (Last Four Digits of Federal Tax ID: 8474); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780) (Last Four Digits of Federal Tax ID: 3747).

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The Official Committee of Unsecured Creditors of all Title III Debtors[2] (other than COFINA) (the "Committee") hereby submits this omnibus objection (the "Objection") to the *Financial Oversight and Management Board's Motion to Dismiss and Memorandum of Law in Support of its Motion to Dismiss Committee's Complaint for Lack of Standing* [Docket No. 7] (the "Oversight Board Motion to Dismiss") and *GDB's and AAFAF's* ("GDB/AAFAF") *Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss Committee's Complaint for Lack of Standing* [Docket Nos. 8, 9] (the "GDB/AAFAF Motion to Dismiss" and, together with the Oversight Board Motion to Dismiss, the "Motions to Dismiss").[3] In support of the Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Court has already held that the Committee has Article III standing to be heard in these Title III cases concerning the GDB Restructuring. In its recent decision on the Committee's motion to enforce the automatic stay in the Title III cases (the "Stay Decision"),[4] the Court determined that the Committee had satisfied all three elements of constitutional standing—injury, causation, and redressability—by alleging that the GDB Restructuring "would harm the Title III Debtors" by "diminish[ing] the pool of assets available to satisfy obligations to [their] creditors" and that such harm "would be redressed if the Court were to order that the GDB Restructuring be halted."[5] The same is true of the Committee's claims in this adversary proceeding: at bottom, they allege that a statute signed into law by the Commonwealth's

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[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Complaint. [Docket No. 1].

[3] GDB, AAFAF, and the Oversight Board are collectively referred to herein as the "Movants".

[4] *See Memorandum Order Denying Motion of Official Committee of Unsecured Creditors for Entry of an Order Enforcing the Automatic Stay*, *In re Commonwealth of Puerto Rico*, No. 17-3283 (Bankr. D.P.R. Sept. 18, 2018) [Docket No. 3941] (the "Stay Decision").

[5] Stay Decision, at 3.

governor is preempted by PROMESA because such statute conflicts with PROMESA. If proven, this would stop the GDB Restructuring in its tracks and prevent harm to the Title III Debtors' creditors. The Committee thus has constitutional standing to bring these claims.

2. GDB/AAFAF acknowledge the Stay Decision but nevertheless ask the Court to somehow find that the Committee lacks constitutional standing in this adversary proceeding, despite offering no reason why it involves circumstances meaningfully different from those underlying the Stay Decision. They and the Oversight Board also ask the Court to determine that, even if the Committee has Article III standing, it lacks prudential standing (an issue not reached in the Stay Decision) to bring its claims in this adversary proceeding. These arguments are misguided and should be rejected.

3. The Motions to Dismiss focus heavily on the Committee's alleged lack of derivative standing to pursue claims on behalf of the Title III Debtors, with the Oversight Board accusing the Committee of "improperly seek[ing] to invade the Oversight Board's exclusive role as sole representative of the Title III Debtors."[6] This argument misunderstands the nature of the Committee's claims. The Committee asserts not only claims against GDB on behalf of the Title III Debtors—claims which the Committee is separately seeking derivative standing to pursue[7]—but also claims ***directly against the Commonwealth, a Title III Debtor; AAFAF, the Title III Debtors' statutory representative; and the Oversight Board.*** Specifically, the Committee has alleged that the Commonwealth passed an unlawful statute in the GDB Restructuring Act and

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[6] Oversight Board Motion to Dismiss, at 3.

[7] The Committee's derivative standing motion seeks an order "grant[ing the Committee] derivative standing to act on behalf of the Title III Debtors (other than COFINA) with respect to the GDB Restructuring for the purpose of objecting to and challenging the legality of the GDB Restructuring." *See* Derivative Standing Motion at Proposed Order [Case No. 17-03283-LTS, Docket No. 3881]. Simultaneously with this filing, the Committee is filing a reply (the "Reply") to the objections of AAFAF, GDB, and the Oversight Board to the Derivative Standing Motion. The Committee hereby incorporates by reference, to the extent necessary, the arguments set forth in the Reply in support of its standing to pursue claims in this adversary proceeding against GDB and other defendants derivatively on behalf of the Title III Debtors.

that AAFAF and the Oversight Board have unlawfully facilitated the GDB Restructuring by negotiating and/or agreeing to it, purportedly on behalf of the Title III Debtors. Neither Motion to Dismiss cites a single case for the proposition that a statutory committee lacks standing to pursue such direct claims against the debtor in its bankruptcy case (*i.e.*, the Commonwealth) or against an entity (*i.e.*, AAFAF) which represents the debtor (subject to the Oversight Board's powers under PROMESA). No such cases exist because the law is to the contrary.

4. The Motions to Dismiss also err in arguing that the Committee's claimed injuries are not "redressable" because the Title III Debtors are free under PROMESA to dispose of their assets and enter into settlements without Court approval. This argument conflates the ***merits*** of the Committee's claims with its ***standing*** to assert those claims. The Court made this distinction clear in the Stay Decision, where it performed a two-part analysis: first, an analysis of whether the Committee had Article III standing to bring its motion, and, second, assuming such standing, an analysis of whether section 305 or other provisions of PROMESA defeated the Committee's motion on its merits. The same inquiry applies here. Whether section 305 ultimately defeats the Committee's claims—and, to be clear, the Committee strongly believes it does not for reasons it will articulate—is not presently at issue. The only question before the Court is whether the Committee has standing to pursue its claims,[8] and section 305 (along with the other PROMESA sections Movants cite) is irrelevant to that question.

5. Finally, there is no merit to the Oversight Board's assertion that the Committee's complaint should be dismissed because the Committee has engaged in impermissible "claim splitting." According to the Oversight Board, the Committee should have brought all of the claims in its complaint as part of either its motion to enforce the automatic stay or its preliminary

[8] *See* Order Setting Schedule for Committee's Derivative Standing Motion and Adversary Complaint [Docket No. 5] at ¶ 2 (permitting parties to "move to dismiss the Adversary Complaint for lack of standing").

objection in the Title VI case. This is nonsense. "Claim splitting" is when a party with multiple claims arising out of the same operative set of facts brings one lawsuit asserting just some of the claims and then brings another lawsuit asserting the remaining claims, which is manifestly not what the Committee is doing. Rather, the Committee is seeking different relief in different cases in the face of arguments by the Oversight Board and others that it has no standing to appear anywhere or seek any form of relief regarding the GDB Restructuring. There is nothing improper about the Committee fighting for its right to be heard.

OBJECTION

6. In resolving a motion to dismiss for lack of standing, the court must "credit the plaintiff's well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor."[9] Applying this standard to this adversary proceeding, it is clear that the Committee has sufficiently alleged all facts necessary to satisfy both Article III and prudential standing requirements.

I. The Committee Has Article III Standing to Pursue its Claims

7. Notwithstanding the Stay Decision, both Movants argue that the Committee lacks Article III standing to pursue its claims in the adversary proceeding. These arguments lack merit and should be rejected. Article III standing requires the party bringing an action to demonstrate that it (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.[10] The Committee satisfies each element.

8. First, the Committee has alleged an injury as a result of the GDB Restructuring. The GDB Restructuring, if approved, will cause, among other things, (i) the elimination of

[9] *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 92 (1st Cir. 2012).

[10] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

claims of the Title III Debtors against GDB and certain related parties, (ii) the elimination of the Committee's or a creditor's ability to seek the appointment of a trustee to pursue avoidance claims against GDB on the Title III Debtors' behalf under section 926(a) of the Bankruptcy Code, and (iii) the transfer of GDB's valuable assets away from the reach of the Title III Debtors.[11] As a result, the Title III Debtors will have fewer and less valuable assets available to satisfy their obligations to unsecured creditors, thus decreasing distributions to creditors.[12] As the Court held in the Stay Decision, this is an injury to the Committee's constituents, not merely to the Title III Debtors.[13]

9. The Oversight Board, in apparent disregard of the Stay Decision, argues that the Committee's injury is not sufficiently "direct" or "particularized" to support Article III standing.[14] This argument should be rejected, as it contravenes the well-settled proposition that a statutory committee (or an individual creditor or other party-in-interest) has the right to commence litigation to protect the value of a debtor's estate.[15] For example, a committee has standing to pursue an adversary proceeding to determine whether assets are property of the estate without obtaining court approval to initiate such an action.[16] A committee also unquestionably has standing in a chapter 11 case to challenge a debtor's disposal of assets under section 363 of

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[11] *See* Complaint [Docket No. 1] at ¶¶ 3, 4, 23-25, 28, 31, 33; Stay Decision at 3.

[12] *Id*. The Oversight Board repeats in its Motion to Dismiss its refrain that the Title III Debtors are not affected by the GDB Restructuring because they are net obligors to GDB. This assertion is demonstrably false for the reasons discussed in the Committee's preliminary objection to the Title VI Application [No.18-1561, Docket No. 136] and in the Committee's Reply in support of its motion for derivative standing.

[13] Stay Decision at 3.

[14] Oversight Board Motion to Dismiss at 6-7.

[15] *See* 7 Collier on Bankruptcy P 1103.05 (16th ed. 2018) ("Section 1109(b) gives creditors' committees and equity security holders' committees the right to appear and be heard on any issue arising in a chapter 11 case. ***A committee may initiate a contested matter or initiate an adversary proceeding in its own name in the chapter 11 case***.") (emphasis added).

[16] *See Committee of Tort Litigants v. The Catholic Diocese of Spokane*, 2006 U.S. Dist. LEXIS 6025 (E.D. Wash. Jan. 24, 2006) (district court recognizes that committee has right to pursue such action pursuant to sections 1103 and 1109 of Bankruptcy Code without having to seek derivative standing).

the Bankruptcy Code.[17] Although section 363 does not apply in Title III, the same principle applies for standing purposes: if a Title III debtor has taken unlawful actions (as the Committee alleges the Commonwealth and AAFAF have done here) that diminish the value of its assets, then its creditors have suffered a sufficient injury for a committee to challenge those actions.

10. GDB/AAFAF's argument that the Committee overstates the scope of the releases in the GDB Restructuring has no bearing on the Committee's standing.[18] Through a belated informative motion, GDB and AAFAF recently attempted to "clarify" the scope of the releases as applying only to "current" (as opposed to current and former) officers, directors, agents, and other representatives of GDB in their capacity as such. This purported clarification does not somehow cure the GBD Restructuring of its ill-effects. The releases still purport to release valuable claims of the Title III Debtors against GDB itself, which claims are apparently not limited to any particular time period. The GDB Restructuring also still transfers all of GDB's valuable assets to a new entity for the benefit of certain favored unsecured creditors, outside the reach of the Title III Debtors. Any narrowing of the releases therefore does not eliminate the Committee's injury for standing purposes.

11. Second, the Committee has alleged that its injury is directly traceable to the Title III Debtors' participation in the unlawful GDB Restructuring, thereby satisfying the second element of the constitutional standing test. Specifically, the Committee has alleged that the GDB Restructuring and certain of its components, including the GDB Restructuring Act, violate

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[17] *See generally In re Spa Chakra*, 2010 WL 779270 (Bankr. S.D.N.Y. Mar. 5, 2010) (committee objected to sale of all or substantially all of debtors' assets); *In re Verified Identity Pass, Inc.*, 2010 WL 2822165 (Bankr. S.D.N.Y. Apr. 16, 2010) (committee objected to debtor's asset sale); *In re GPX Int'l. Tire Corp.*, 2009 WL 8032841 (Bankr. D. Mass. Dec. 15 2009) (committee objected to § 363 asset sale); *In re Torch Offshore, Inc.*, 327 B.R. 254 (E.D. La. 2005) (committee objected to sale under § 363 as *sub rosa* plan of reorganization); *In re Loral Space & Commc'ns Ltd.*, 2004 WL 1078728, at *1 (Bankr. S.D.N.Y. May 6, 2004) (committee objected to sale of insurance policy under § 363).

[18] GDB/AAFAF Motion to Dismiss at 2-3.

PROMESA and the Bankruptcy Code and/or are unconstitutional. This unlawful statute and transactions are precisely what will cause harm to the Title III Debtors' unsecured creditors by depleting the Title III Debtors' assets and diminishing creditor recoveries. The Committee has thus readily demonstrated a sufficient "causal link" between the allegedly unlawful conduct and the injury suffered. The Movants do not seriously argue otherwise.

12. Third, the Committee's injury is redressable by the relief it seeks. The Committee asks the Court to enter a declaratory judgment that the GDB Restructuring Act and other aspects of the GDB Restructuring violate multiple provisions of the Bankruptcy Code, PROMESA, and/or the U.S. and Puerto Rico Constitutions. If the Court agrees with the Committee, and holds that these violations have occurred, then the GDB Restructuring Act is invalid and the GDB Restructuring cannot be consummated. And if the GDB Restructuring is not consummated, the Committee and its constituents will not be injured.

13. The Movants argue that because section 305 and other provisions of PROMESA allow the Title III Debtors to enter into settlements, such as the GDB Restructuring, without Court approval, then the Committee's claims against the Title III Debtors must fail and, therefore, the Committee's injury is not "redressable." This argument confuses two separate issues. As the Court recognized in the Stay Decision, section 305[19] goes to the ***merits*** of the Committee's claims, not to its standing.[20] The Court need not consider section 305 (or any other provision of PROMESA that allegedly provides a defense to the Committee's claims) until after it has determined that the Committee has standing to proceed. The Movants seek to reverse the analysis, asking the Court to first evaluate the merits of any defenses ***before*** ruling on standing.

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[19] In any event, the section 305 argument is bizarre. If the GDB Restructuring Act is preempted or illegal because it conflicts with PROMESA, it cannot be "saved" by application of section 305 of PROMESA.

[20] Stay Decision at 5-6.

This is not the law. Proceeding in this manner would perversely require a court to fully resolve the merits of an action before resolving the issue of Article III standing. This would necessarily require a court to conclude that if a plaintiff loses on the merits of its claim, then it never had standing to be heard in the first place—an obviously nonsensical proposition.

14. The two cases the Oversight Board and GDB/AAFAF cite— *see Knick v. Twp. of Scott*, 862 F.3d 310, 318 (3d Cir. 2017), *cert. granted in part on other grounds*, 138 S. Ct. 1262 (2018), and *Renne v. Geary*, 501 U.S. 312, 318-19 (1991)—do nothing to support their arguments. In *Knick*, the court held that the plaintiff's injury resulting from a search of her property under an allegedly unlawful ordinance was not redressable because the search complied with the Fourth Amendment.[21] In so holding, the court noted that the lower court had already concluded, and the plaintiff subsequently ***conceded***, that the Fourth Amendment permitted the search.[22] There has been no such concession by the Committee here. In *Renne*, the Supreme Court suggested in *dicta* that the injury suffered by plaintiffs who had challenged a provision of the California constitution might not be redressable because a separate California statute that plaintiffs had not challenged might permit the allegedly unlawful conduct.[23] No separate statute exists here. Rather, the Committee argues that the defendants' actions are unlawful notwithstanding section 305 of PROMESA, either because they violate other, more specific provisions of PROMESA or because they are unconstitutional. If the Committee prevails on this argument, then the GDB Restructuring cannot be consummated, and unsecured creditors will not be harmed by it. Accordingly, the Committee's injury is indeed redressable by the relief it seeks.

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[21] 862 F.3d at 318.

[22] *Id*. ("Because Knick does not challenge that ruling on appeal, she has accepted the District Court's conclusion that her Fourth Amendment rights were not violated.").

[23] *Renne*, 501 U.S. at 319.

II. The Committee Has Prudential Standing to Pursue its Claims

15. GDB/AAFAF and the Oversight Board alternatively ask the Court to conclude that the Committee lacks prudential standing because it cannot demonstrate that "its claims are premised on its own legal rights (as opposed to those of a third party)"[24] and that the Committee does not fall within the "zone of interests" that the statutes at issue in the adversary proceeding are designed to protect.[25] Although the Court did not resolve this issue in the Stay Decision, an analysis of the relevant law shows that the Committee does indeed have prudential standing to pursue the claims at issue in this adversary proceeding.

16. In the Stay Decision, the Court observed that "serious questions" existed as to whether the Committee had prudential standing to enforce the automatic stay under section 362, but then declined to decide the issue. Had the Court done so, the Committee believes it would have concluded that the Committee has such standing. That a creditor's committee has standing to enforce the automatic stay should be clear from the First Circuit's decision in *In re 110 Beaver St. P'ship*, 355 F. App'x 432 (1st Cir. 2009). In that case, the court recognized the Fifth Circuit's definitive holding that creditors have standing to enforce the automatic stay and strongly suggested that the First Circuit would do the same, though it ultimately did not reach the issue.[26] The court instead affirmed the dismissal of the adversary proceeding before it because the debtor's principals—the parties who sought damages for a third party's violations of the automatic stay—were not creditors of the debtor and had only alleged an injury to the debtor and

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[24] *See* Oversight Board Motion to Dismiss at 8.

[25] *See* GDB/AAFAF Motion to Dismiss at 9-10.

[26] *Id*. at 438-39 & n.9 (citing *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533 (5th Cir. 2009)). In *Labuzan*, the Fifth Circuit held that a debtor's prepetition creditors have both Article III and prudential standing to assert a damages claim under section 362(k) of the Bankruptcy Code for post-petition stay violations. 579 F.3d at 545. Specifically, the Court recognized (i) that creditors are in the "zone of interests" that section 362 is designed to protect and (ii) that a creditor who has been harmed by a stay violation is not merely asserting claims that are derivative of the debtor's estate.

not to themselves.[27] Where, as here, the debtor's creditors have alleged injuries to creditors because of a stay violation, the First Circuit would likely follow the lead of the Fifth Circuit and hold that such creditors have standing to enforce the automatic stay.[28]

17. The same analysis also applies to the Committee's other claims for relief, which similarly ask the Court to find that the defendants, including the Commonwealth and AAFAF, have violated specific provisions of PROMESA, the Bankruptcy Code, and/or the U.S. and Puerto Rico Constitutions. On each claim, the Committee seeks to assert the rights of the unsecured creditors against these defendants, not merely the rights of the Title III Debtors or any other party—thus, the Committee's claims are indeed premised "on its own legal rights." The Committee also falls squarely within the zone of interests of the bankruptcy statutes and related constitutional provisions that the Committee seeks to enforce. These statutes and constitutional provisions are by their very nature designed to protect a debtor's stakeholders, including its creditors, from the consequences of the debtor's unlawful actions. Section 601 of PROMESA, for example, makes clear that creditors of the Title III Debtors are bound by the proposed Qualifying Modification.[29] Such creditors are therefore among the parties that the various provisions of Title VI are designed to protect.

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[27] *In re 110 Beaver St. P'ship*, 355 F. App'x at 438-39. This holding of the First Circuit is fully consistent with the Fifth Circuit's decision in *Labuzan*. In that case, the creditors who asserted the stay violation claim were also the debtor's principals. The Fifth Circuit made clear that they had standing to pursue the stay violation claim only in their capacity as creditors and not as owners/equity holders of the debtor. *Labuzan*, 579 F.3d at 545.

[28] To the extent the Movants would argue that the Committee does not have standing because the harm it seeks to redress is suffered by all unsecured creditors, and therefore the claim belongs only to the debtor, this argument should be rejected. Here, the Committee is asserting claims against the debtor itself, not merely claims that the debtor holds against third parties. As noted above, creditors and committees plainly have standing to object to a debtor's sale or disposal of assets in a chapter 11 case, even though the harm they seek to redress (the depletion of the value of the estate's assets) is felt by all creditors equally. The circumstances are no different here.

[29] The Oversight Board misreads section 601 in arguing that it is not binding on creditors of the Title III Debtors. Section 601(m)(2) states that the Qualifying Modification is binding "as to the territorial government Issuer, other territorial instrumentalities of the territorial government Issuer, and any creditors of such entities. . . ." In turn, "Issuer" under section 601(a)(8) "means, as applicable, the Territory Government Issuer or an Authorized

18. The Oversight Board makes two arguments, both of which fail, to support its position that the Committee lacks prudential standing: (1) the Committee does not own or control any of its constituents' claims, and (2) its constituents are at most creditors of a creditor (the Title III Debtors) of GDB.[30] Taking the Oversight Board's second argument first, it suffers from the same flaw as the Movants' "derivative standing" arguments. Again, the Committee is not merely asserting claims against GDB on behalf of the Title III Debtors, but it is also asserting direct claims against the Commonwealth, which is a Title III Debtor, and AAFAF, which serves as the Title III Debtors' statutory representative (subject to the Oversight Board's PROMESA powers) in the Title III Cases, for their respective roles in passing the GDB Restructuring Act and otherwise facilitating the GDB Restructuring. There is no "creditor of a creditor" issue as to these claims because the Committee's constituents are direct creditors of the debtor-defendant. To the extent the Committee ***also*** seeks to pursue claims against GDB, it is seeking derivative standing to pursue those claims on behalf of the Title III Debtors.

19. The Oversight Board's other argument—that the Committee does not own or control its constituents' claims—fares no better. The Committee by its very nature serves to represent and act on behalf of its constituents. Indeed, the First Circuit recently recognized the importance of the Committee's ability to represent the interests of unsecured creditors in the

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Territorial Instrumentality that has issued or guaranteed at least one Bond that is Outstanding." The "Territory Government Issuer" is "the Government of Puerto Rico or such covered territory for which an Oversight Board has been established pursuant to section 101," while an "Authorized Territorial Instrumentality" is a covered territorial instrumentality that the Oversight Board has authorized to avail itself of Title VI. PROMESA §601(a)(15). Reading these definitions together, pursuant to section 601(m)(2), the Qualifying Modification is binding on the Government of Puerto Rico and/or the Title III Debtors for which the Oversight Board has been appointed, ***and on their creditors***. This construction of section 601 makes sense given that the Commonwealth is a guarantor of GDB bonds, as the definition of "Issuer" contemplates. The fact that a Title VI Qualifying Modification is binding on the Title III Debtors' creditors provides further evidence that they fall within the "zone of interests" that the provisions of Title VI are designed to protect. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 78 (2d Cir. 2006) (holding that a non-party has standing to appeal (which is usually much more limited than initial standing) a judgment where it is bound by that judgment or otherwise has an interest affected by it).

[30] Oversight Board Motion to Dismiss at 8.

Title III Cases in holding that the Committee has the right to intervene in the Title III Debtors' adversary proceedings. The First Circuit noted in its decision that "[a] creditors' committee is arguably the one party in interest that, for all practical purposes, typically represents stakeholders with the most interest in the outcome of virtually every proceeding."[31] The court further recognized that, under the "quite broad" statutory language of section 1109(b) of the Bankruptcy Code, "a creditor's committee . . . may raise and may appear and be heard on ***any issue in a case*** under this chapter,"[32] regardless of whether the Committee is a creditor itself of the Title III Debtors. As a well-known treatise and the decisions of bankruptcy courts have made clear, a creditors' committee may "initiate a contested matter or initiate an adversary proceeding in its own name in the chapter 11 case."[33] The Committee thus has standing in the Title III Debtors' cases to bring this adversary proceeding on behalf of their unsecured creditors.

III. The Committee Has Standing On Each of Its Claims

20. Both Motions to Dismiss purport to contain a claim-by-claim analysis of the Committee's lack of standing to bring this adversary proceeding. Nearly all of these arguments confuse the merits of the Committee's claims—something not at issue on the Motions to Dismiss—with the Committee's standing. All merits-based arguments should be disregarded by the Court at this time and instead be considered later, in connection with summary judgment briefing. To the extent the Movants raise legitimate standing arguments regarding particular claims, these arguments should be rejected.

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31 *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 872 F.3d 57, 60 (1st Cir. 2017) .

32 *Id*. (quoting 11 U.S.C. § 1109(b)) (emphasis added by 1st Cir.).

33 7 Collier on Bankruptcy P 1103.05 (16th ed. 2018); *see also Catholic Diocese of Spokane*, 2006 U.S. Dist. LEXIS 6025 (holding that committee had standing to seek declaratory judgment in adversary proceeding that certain property was property of the estate).

A. First Cause of Action - Declaration of Invalidity and Unenforceability of GDB Restructuring Act as De Facto Bankruptcy Law

21. In this cause of action, the Committee seeks to invalidate the GDB Restructuring Act as unconstitutional. The Committee alleges an injury common to all of the Committee's claims—that the GDB Restructuring Act, if not invalidated, will harm the Title III Debtors' unsecured creditors by diminishing the value of the Title III Debtors' assets and reducing distributions to creditors. As discussed above, the Court found this to be a valid injury for standing purposes when it issued the Stay Decision. Moreover, there is no question that this injury (i) is proximately caused by the GDB Restructuring Act and (ii) would be redressed by the invalidation of the GDB Restructuring Act. The Committee has thus satisfied all the elements of Article III standing with regard to this claim.

22. Contrary to the Oversight Board's contention, this cause of action should not be dismissed for lack of prudential standing because it is derivative of the rights of the Title III Debtors. Rather, the Committee asserts this claim not only against GDB in a derivative capacity but also as a direct claim against the Commonwealth, whose governor signed the GDB Restructuring Act into law, and AAFAF, which orchestrated the GDB Restructuring on behalf of both the Title III Debtors and GDB. The Commonwealth and AAFAF must be held accountable for their actions and the harm they will cause to the Title III Debtors' unsecured creditors. The Committee thus has direct standing to pursue its claim against these defendants.

B. Second Cause of Action - Declaration of Invalidity and Unenforceability Due to Inconsistency With Third-Party Release Prohibition of PROMESA Section 601(m)(2)

23. Through this cause of action, the Committee alleges that the releases in section 702 of the GDB Restructuring Act violate section 601(m)(2) of PROMESA, and thus the application of section 4 of PROMESA is triggered to preempt the GDB Restructuring Act. The

Committee has direct standing to assert this claim for the same reasons it has direct standing in its First Cause of Action to assert that the GDB Restructuring Act is unconstitutional—*i.e.*, because the Commonwealth and GDB/AAFAF took actions regarding the GDB Restructuring Act that resulted in harm to the Title III Debtors' creditors.

24. The Oversight Board's arguments concerning the proper interpretation of section 601(m)(2) go to the merits of the Committee's claims, not its standing. These arguments are, in any event, unavailing. The Oversight Board contends that the Committee omits language from its quotation of section 601 indicating that a Qualifying Modification is not binding on creditors of any "Territorial Government Issuer" other than GDB. This assertion is incorrect for reasons noted above.[34] It is also irrelevant. The Committee's argument in this cause of action (in contrast to arguments it has made elsewhere) is not that the ***Qualifying Modification*** violates section 601 by binding creditors of the Title III Debtors, but rather that the GDB Restructuring Act does so by purporting to discharge claims of the Title III Debtors against GDB, thereby injuring the Title III Debtors' creditors. The Oversight Board's argument as to the reach of section 601 therefore misses the mark.

C. Third Cause of Action - Declaration of Invalidity and Unenforceability Due to Inconsistency With PROMESA-Incorporated Bankruptcy Code Section 362

25. This cause of action alleges that the GDB Restructuring Act's purported release of the Title III Debtors' rights and claims violates the automatic stay under section 362 of the Bankruptcy Code because, among other things, it constitutes an attempt to take possession of or exercise control over property of the Title III Debtors. This claim also relies on section 4 of PROMESA, which states that territorial laws, such as the GDB Restructuring Act, are preempted

[34] *See* n. 29 *supra*.

by any contrary provisions of PROMESA or its incorporated provisions of the Bankruptcy Code. Such a conflict exists here between the releases of the Title III Debtors' claims against GDB imposed by the GDB Restructuring Act and the automatic stay in section 362. The Committee has standing to assert this claim for all the reasons discussed above and in the Stay Decision.

D. Fourth Cause of Action – Declaration of Invalidity and Unenforceability Due to Inconsistency With PROMESA-Incorporated Bankruptcy Code Section 926

26. GDB/AAFAF and the Oversight Board are apparently especially concerned with the Committee's standing to pursue this cause of action, as they spend several pages arguing why the Committee's claim is not redressable, is unripe, and is unavailable to a statutory committee. These arguments all miss the mark.

27. The redressability argument—like the Movants' similar arguments regarding other claims—conflates the merits with standing. Specifically, they contend that sections 303 and 305 of PROMESA would allow the Title III Debtors to settle avoidance actions notwithstanding the right of a creditor under section 926 to seek the appointment of a trustee to pursue avoidance actions on the debtor's behalf. As discussed in the Stay Decision, this argument goes to the merits, not standing. In any event, the argument is wrong, as sections 303 and 305 of PROMESA do not trump section 926(a), somehow reading it out of the statute. Indeed, such a construction of PROMESA would violate the well-settled principle of statutory interpretation that a provision of a statute should not be interpreted in a manner that renders another provision superfluous.[35] That is exactly what would happen if the Court accepts the Movants' argument here: no creditor could ever use section 926(a) to seek the appointment of a

[35] *See Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558, 1560, 173 L. Ed. 2d 443 (2009) ("The Government's reading is thus at odds with the basic interpretive canon that [a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotations omitted).

trustee to pursue avoidance claims that the debtor refuses to pursue because the debtor would just settle those claims itself under sections 303 or 305. This argument must be rejected.

28. The Movants' "ripeness" argument must also be rejected. As an initial matter, the argument is impermissibly raised at this time because ripeness is a separate concept from standing,[36] and the scheduling order calls only for the adjudication of standing issues on the present motions to dismiss. The ripeness argument also fails on its merits because it misconstrues the relief the Committee seeks. The Committee does not seek to exercise rights under section 926(a) at this time; rather, it seeks to prevent the Title III Debtors from entering into a restructuring transaction that will release the Title III Debtors' avoidance claims against GDB and thereby prevent the Committee and individual creditors from ***ever*** seeking to have a trustee appointed under section 926 to pursue such claims.[37] This harm the Committee seeks to avoid will occur immediately upon consummation of the GDB Restructuring, thus rendering the Committee's claim ripe for adjudication.

29. The Movants' final argument that the Committee has no right to seek relief under section 926(a) because it is not a "creditor" is similarly unavailing. As noted above, the

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[36] *See Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 167 (3d Cir. 2016) ("[r]ipeness is a separate doctrine from standing," even though both arise from same Article III case or controversy requirement).

[37] To the extent GDB/AAFAF contend that the Committee has failed to identify specific avoidance claims, this is a situation of their own making. As discussed in the Committee's Reply in support of its motion for derivative standing, GDB/AAFAF have done nothing to determine what avoidance claims might exist or their potential value, all the while stonewalling the Committee's efforts to perform such an investigation on its own. In fact, it was only on September 21, 2018 that the Committee finally received, after more than a year of resistance and delay, the minutes of the GDB's board meetings, which are the logical starting point of any investigation and should have been produced on day one. This delay persisted, even though GDB's counsel represented at the July 25 Omnibus Hearing that such materials would be promptly made available—and the Court ordered that the "Board minute issue needs to be addressed and produced [before August 15]." *See* July 25, 2018 Transcript, at 78:25 to 79:1. Moreover, the Committee has in fact already identified some potential avoidance actions, including potential constructive fraudulent transfer claims in connection with the more than $450 million of net proceeds derived from GDB's offering of general obligation bonds that GDB transferred to the Public Building Authority ("PBA") to repay the PBA's line of credit with GDB and to provide PBA with working capital. *See* Reply at ¶ 43.

Committee is not presently seeking relief under section 926 but rather is preserving the rights of its creditor constituents to do so in the future. These creditors unquestionably have a right to pursue relief under section 926, and the Committee unquestionably can take action in these Title III Cases on their behalf.[38] It is the Committee's statutory duty to protect the rights of the Title III Debtors' unsecured creditors. To foreclose the Committee from asserting this cause of action would effectively prevent the Committee from carrying out its role in these cases. The Movants' arguments must therefore be rejected.

E. Fifth Cause of Action – Declaration of Invalidity and Unenforceability Due to Inconsistency With PROMESA Section 601(n)(2)

30. This claim alleges that section 703 of the GDB Restructuring Act violates PROMESA section 601(n)(2), which states that "there shall be a cause of action to challenge unlawful application of this section." Specifically, section 703 of the GDB Restructuring Act violates section 601(n)(2) by purporting to deprive the Title III Debtors of any ability to challenge the GDB Restructuring Act. The Committee has direct standing to assert this claim for the same reason it has direct standing to assert its other challenges to the GDB Restructuring Act, including those set forth in the First and Second Causes of Action—namely, because the Commonwealth, a defendant in this action, passed and had its governor sign into law the GDB Restructuring Act in violation of PROMESA.

31. GDB/AAFAF argue that section 601(n)(2) is not sufficiently "clear and manifest" to preempt Puerto Rico's traditional authority to control and restrict its instrumentalities' power to sue or be sued.[39] The case law they cite, however, does not support this conclusion. In *Rice v.*

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[38] *See* 11 U.S.C. §§ 1103(c)(5) (stating that a committee may perform services "as are in the interests of those represented), 1109(b) (stating that a committee "may raise and may appear and be heard on any issue in a case").

[39] GDB/AAFAF Motion to Dismiss at 18-19.

Santa Fe Elevator Corp., the Supreme Court indicated that the "clear and manifest" standard applies where "Congress [has] legislated . . . in field which the States have traditionally occupied."[40] The field that PROMESA occupies is federal bankruptcy law, which is not a traditional area of state regulation.[41] GDB/AAFAF's argument is also flawed because it disregards the clear language of section 4 of PROMESA. That section provides that "[t]he provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act."[42] By preventing all government entities from challenging the GDB Restructuring, section 703 of the GDB Restructuring Act is at the very least "inconsistent" with section 601(n)(2), because it prevents government entities from taking advantage of the right of action that section 601(n)(2) explicitly creates.

F. Sixth Cause of Action - Declaration of Invalidity and Unenforceability Due to Supremacy Clause of U.S. Constitution

32. Like the Fifth Cause of Action, this claim also challenges section 703 of the GDB Restructuring Act, albeit on a different legal basis. Specifically, this claim argues that section 703 is unconstitutional under the Supremacy Clause of the U.S. Constitution. The injury that the Committee has suffered and the proximate cause of that injury are the same as those alleged in the Fifth Cause of Action. The Committee thus has standing for the same reasons.

33. GDB/AAFAF argue, citing to *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), that the Committee lacks standing to pursue this claim because the Supremacy

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40 331 U.S. 218, 230 (1947).

41 Notably, the outcome of *Rice* actually supports the Committee's position, as the Court held that Congress had preempted the state statute in question. *Id.* at 237 ("The test . . . is whether the matter on which the State assets the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission since on each one Congress has declared its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the Supremacy Clause.").

42 PROMESA § 4.

Clause "does not create a cause of action."[43] This argument has no merit. In *Armstrong*, the Supreme Court considered whether two private medical providers had the right under the Supremacy Clause to bring an action arguing that certain Idaho state reimbursement rates violated the Medicaid Act, 42 U.S.C. §1396, et seq. The Court rejected the challenge on the grounds that Congress can decide for itself whether a private party may bring a cause of action under a federal statute, and the Medicaid Act "implicitly precludes private enforcement."[44] PROMESA, however, is very different in that it explicitly allows parties to challenge the lawfulness of a Title VI Qualifying Modification.[45] The Committee therefore has standing to pursue this cause of action.

G. Seventh Cause of Action - Declaration of Invalidity and Unenforceability Due to Inconsistency With PROMESA Section 201(b)(1)(M)

34. In this claim, the Committee seeks a declaration that the GDB Restructuring Act, by providing for the transfer of assets from one government instrumentality to another, violates section 201(b)(1)(M) of PROMESA, which prevents such asset transfers from being included in a fiscal plan. The Committee has standing to pursue this claim because the Title III Debtors' unsecured creditors are impacted by these asset transfers and by any fiscal plan that incorporates them. The argument of GDB/AAFAF and the Oversight Board that PROMESA gives the Oversight Board sole discretion to approve a fiscal plan goes to the merits of the Committee's claim, not its standing, and misses the point in any event. The fact that the Oversight Board has discretion to approve a fiscal plan does not mean that such approval will always go unchecked.

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[43] GDB/AAFAF Motion to Dismiss at 19.

[44] *Armstrong*, 135 S. Ct. at 1383-85.

[45] *See* PROMESA § 601(n)(2) ("Notwithstanding section 106(e), there shall be a cause of action to challenge unlawful application of this section"). This is exactly what the Committee has done in commencing this adversary proceeding in these Title III cases and also by pursuing its preliminary objection in the Title VI cases in accordance with the scheduling order entered in that case.

Although section 106(e) of PROMESA states that no court has jurisdiction to challenge Oversight Board certifications, section 601(n)(2) contains a carve-out from section 106(e) for actions challenging the lawfulness of a Title VI restructuring.[46] Here, the Committee alleges that the GDB Restructuring is unlawful insofar as it causes the GDB fiscal plan to transfer assets between government entities in violation of section 201(b)(1)(M). Accordingly, neither AAFAF nor the Oversight Board can use section 106(e) to insulate their actions from judicial review.

H. Eighth Cause of Action - Declaration of Invalidity and Unenforceability Due to Violation of PROMESA Section 303

35. The Committee seeks a declaration in this cause of action that the GDB Restructuring Act violates section 303 of PROMESA insofar as its purported discharge of claims is a composition of indebtedness that prevents the payment of principal and interest and to which the Title III Debtors have not legitimately consented. The Committee pursues this claim directly against the Commonwealth in its Title III case based on the effect that the GDB Restructuring Act has on the Commonwealth and its unsecured creditors. The Committee thus has standing to pursue this claim for the same reasons it has standing to pursue its other claims alleging the unlawfulness of the GDB Restructuring Act.

IV. The Committee Has Not Engaged in Impermissible Claim Splitting

36. In a final improper attempt to derail this adversary proceeding for a reason unrelated to the Committee's standing, the Oversight Board argues that the adversary proceeding should be dismissed because the Committee has engaged in impermissible "claim splitting." Specifically, the Oversight Board argues that under the doctrine of claim splitting, the Committee has no right to pursue both this adversary proceeding and its preliminary objection in the Title VI case. This argument has no merit.

[46] *Id.*

37. As an initial matter, the fact that the Committee has pursued its challenge to the GDB Restructuring in multiple forms across two cases is a result of the Movants' own actions. GDB/AAFAF, along with the Oversight Board, have devised a process in GDB's Title VI case that purportedly permits parties to challenge the GDB Restructuring. At the same time, they have vehemently contested the Committee's standing to be heard in that process. Under these circumstances, the Committee is duty-bound on behalf of its constituents to find some other means to challenge the GDB Restructuring, including by filing this adversary proceeding and the stay enforcement motion. These actions are not "claim splitting" or any other procedural gamesmanship—they are simply efforts by the Committee to protect the rights of its constituents under circumstances where GDB/AAFAF and the Oversight Board are doing everything in their power to prevent the Committee from being heard.

38. Setting aside the equities of the situation, claim splitting is inapplicable under the present circumstances as a matter of law. Similar to *res judicata*, claim splitting occurs where a party commences a lawsuit against a defendant that would, if litigated to its merits, preclude a second lawsuit against the same defendant arising from the same nucleus of operative facts.[47] The law is clear, however, that a dismissal for lack of standing is not a dismissal on the merits and therefore has no *res judicata* effect on subsequent litigation.[48] Here, the Oversight Board argues both that (i) the Committee must pursue its claims at issue in this adversary proceeding in the Title VI case and (ii) the Committee lacks standing to be heard in that case. The Oversight Board cannot have it both ways. So long as it objects to the Committee's standing to challenge

[47] *Katz v. Gerardi*, 655 F.3d 1212, 1218 (10th Cir. 2011) (analyzing claim splitting as an aspect of *res judicata* and stating that claim splitting inquiry requires court to determine "whether the first suit, assuming it were final, would preclude the second suit").

[48] *See Media Techs. Licensing, LLC. v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) ("Because standing is jurisdictional, lack of standing precludes a ruling on the merits. Thus, the district court erred in giving preclusive effect to the Telepresence judgment because its dismissal of Telepresence's complaint for lack of standing was not a final adjudication of the merits.")

the GDB Restructuring either in the Title III cases or in the Title VI case, the Committee has no choice but to fight for its right to be heard in both places.

CONCLUSION

39. For the foregoing reasons, the Court should deny the Motions to Dismiss in full.

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