

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

FINANCIAL GUARANTY INSURANCE CO.

Plaintiff

v.

ALEJANDRO GARCÍA PADILLA, JUAN C.  
ZARAGOZA GÓMEZ, INGRID RIVERA  
ROCAFORT, MELBA ACOSTA FEBO, LUIS  
F. CRUZ BATISTA, VÍCTOR A. SUÁREZ  
MELÉNDEZ, CÉSAR A. MIRANDA  
RODRÍGUEZ, JUAN FLORES GALARZA,  
and JOHN DOES 1-40

Defendants

Civil No. 16-1095 (JAF)

**REPLY TO OPPOSITION TO MOTION TO DISMISS**  
**CLAIMS AGAINST MELBA ACOSTA FEBO, PRESIDENT OF THE GOVERNMENT**  
**DEVELOPMENT BANK FOR PUERTO RICO**

**TO THE HONORABLE COURT:**

COMES NOW co-defendant, Melba Acosta Febo, in her official capacity as President of the Government Development Bank for Puerto Rico (“Acosta”), specially appearing and without submitting to the jurisdiction or venue of this Court, through the undersigned attorney, and respectfully alleges and prays:

**I. Introduction**

On February 10, 2016, Acosta filed a Motion to Dismiss joining the arguments set forth by Co-defendants Hon. Alejandro García Padilla, Hon. Juan C. Zaragoza Gómez, Hon. Luis Cruz Batista, Hon. Víctor Suárez Meléndez, Hon. César Miranda Rodríguez, Hon. Melba Acosta Febo, solely in her official capacity as member of the Working Group for the Fiscal and Economic Restoration of Puerto Rico (the “Working Group”), and Hon. Juan Flores Galarza, in their respective official capacities

(herein jointly referred to as “Co-defendants”) pertaining to the Eleventh Amendment Immunity and preemption. Docket No. 41. Acosta thus joined Co-defendants’ basis for dismissal and, alternatively, their request that the case is stayed until final disposition of Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 582 (2015) (No. 15-233), by the United States Supreme Court. Alternatively, Acosta also requested dismissal for Plaintiff’s failure to plead a claim against Acosta in her official capacity as President of the Government Development Bank for Puerto Rico (“GDB”). Docket No. 41. On February 29, 2016, Plaintiff filed an opposition to the motion to dismiss filed by Co-defendants on Eleventh Amendment Immunity and preemption grounds. Docket No. 47. On that same day, Plaintiff also filed an opposition to Acosta’s motion. Docket No. 46. Today, Co-defendants filed a reply to Plaintiff’s opposition to their motion to dismiss in Docket No. 47. See Docket No. 52. For the same reasons stated by Co-defendants in their reply, it is settled that Acosta is also immune from suit under the Eleventh Amendment of the U.S. Constitution and that Section 903(1) of the United States Bankruptcy Code, 11 U.S.C. § 903(1), does not preempt Section 8, Article VI of the Constitution of the Commonwealth of Puerto Rico, the Management and Budget Office Organic Act of Puerto Rico (the “OMB Act”) or the two Executive Orders issued by the Governor of Puerto Rico, Hon. Alejandro García Padilla, on November 30 and December 8, 2015 (jointly, the “Executive Orders”). As such, **Acosta hereby joins and incorporates by reference all arguments set forth by Co-defendants in reply (Docket No. 52) to Plaintiff’s opposition and equally requests that the Complaint be dismissed and, alternatively, stayed until final disposition of Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 582 (2015) (No. 15-233).** Alternatively, Acosta hereby replies to Plaintiff’s arguments in opposition to the dismissal of the Complaint for failure to state a claim against Acosta in her capacity as President of the GDB (Docket No 46).

In its Opposition, Plaintiff argues that it has stated a claim against Acosta as President of the GDB because it alleged that Acosta “is empowered to implement” the Executive Orders at issue and because it requested an injunction against Defendants, including Acosta, to prevent the implementation

of the Executive Orders. Docket No. 46 at pp. 5-6. Plaintiff further sustains that additional facts support the assertion that Acosta is empowered and required to implement the Executive Orders. Docket No. 46 at pp. 6-9. And that Plaintiff's allegations against Acosta ought to be endorsed by the Court because the information containing the details of Acosta's alleged involvement in the implementation of the Executive Orders is under the control of the GDB. Docket No. 46 at p. 10. Plaintiff's arguments in opposition to the dismissal of the claims against Acosta are insufficient and the Court should reject its unjustified plea for latitude in what is clearly a factually insufficient pleading against Acosta.

## II. Discussion

Plaintiff's opposition to Acosta's request for dismissal is premised on its assertion that, having pled that Acosta is empowered to implement the Executive Orders at issue and sought injunctive relief against her in order to prevent future implementation of the Executive Orders, it has pled a plausible claim against Acosta in the Complaint in Docket No. 1. This argument is not only meritless but it also contradicts Plaintiff's position that the Eleventh Amendment Immunity of the U.S. Constitution does not bar the claims asserted in the Complaint. Plaintiff cannot have it both ways. It cannot, on the one hand, claim that the Complaint only seeks to challenge the validity of the Governor's Executive Orders (Docket No. 47 at p. 15), but on the other, claim that Acosta must remain in the suit merely because she is purportedly empowered to implement them. If all that Plaintiff seeks is that the Court finds that the Governor's Executive Orders are unconstitutional, Acosta's power to implement them – and she has none – is irrelevant. Either it seeks to prevent implementation of state law (the Executive Orders which implement Article VI, Section 8 of the Puerto Rico Constitution) and fall under the purview of Pennhurst, or it seeks to prevent violations to federal law. If Plaintiff's argument is that it does not seek to prevent implementation of state law and, therefore, that the Eleventh Amendment Immunity does not pose a bar to suit against Defendants, then its allegation that Acosta may be “empowered to

implement the Executive Orders” is irrelevant to this Court’s 12(b)(6) inquiry. In either case, the Complaint against Acosta ought to be dismissed without further consideration.

1. The allegation that Acosta is “empowered to implement the Executive Orders” is conclusory and devoid of any factual premise to meet the plausibility standard required under Twombly/Iqbal.

Plaintiff posits that because it alleged that Acosta was “empowered to implement the Executive Orders” (Docket No. 1 at ¶ 14) and it **generally** requested injunctive relief against all Defendants to prevent enforcement of the Executive Orders (Docket No. 1 at ¶¶ 146-151, 156-161, 166-170) it has pled a plausible claim against Acosta. This is not the case. It is settled that under the Twombly/Iqbal doctrine grounds for entitlement to relief require more than labels and conclusions; conclusory allegations are not to be credited (or taken as true) by the Court in adjudicating a motion to dismiss. Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555, 557 (2007) (naked assertions get the complaint close to stating a claim but without further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief); Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) (formulistic recitation of elements of a cause of action and conclusory allegations are not presumed to be true). Note that Plaintiff’s generic allegation as to the “power to implement” is generally directed at all Defendants (see Docket No. 1 at ¶¶ 12-28), including simultaneously to Acosta in her capacity as President of the GDB and Acosta in her capacity as member of the Working Group (see Docket No. 1 at ¶ 14) under the “Parties” subsection of the Complaint. Plaintiff makes no distinction as to the authority that could have been delegated to Acosta in her capacity as President of the GDB and Acosta in her capacity as member of the Working Group, or as to the authority delegated to any of the Co-defendants. There is absolutely no factual basis in Plaintiff’s Complaint from which to infer that Acosta or the GDB are empowered to implement the Executive Orders at issue or that they have taken, or will undertake, any action to implement such orders. For instance, Plaintiff has not pled facts from which to infer that Acosta has the authority to implement the Executive Orders or that she has in fact taken any actions to implement the Executive Orders. There is thus no reasonable inference

that can be drawn from Plaintiff's statement that Acosta is empowered to implement the Executive Orders to conclude that the injunctive relief sought by Plaintiff to prevent the implementation of the Executive Orders would have any effect if issued against Acosta. Indeed, Plaintiff's attempt to flesh out new facts in section II of its opposition in Docket No. 46 bolsters Acosta's claim that Plaintiff failed to include in the Complaint a factual basis upon which Acosta could plausibly be held liable in this case.

2. The additional facts included by Plaintiff in its opposition do not cure the deficiencies of the Complaint.

Plaintiff cites to two (2) documents attached to the Complaint and to the GDB Charter to attempt to bolster its allegation that Acosta is "empowered to implement the Executive Orders". Specifically, Plaintiff makes use of the referenced documents to sustain that as a governmental agency, as well as a fiscal agent, paying agent and financial advisory and reporting agency of the Commonwealth and its instrumentalities, the GDB is empowered to implement the Executive Orders. Note, however, that the facts that Plaintiff is now trying to elaborate in its opposition **were nowhere included in the Complaint and, as such, the Court should not consider them in adjudicating Acosta's motion to dismiss.** Litton Indus., Inc. v. Colón, 587 F.2d 70, 74 (1<sup>st</sup> Cir. 1978) (when considering a motion to dismiss under Rule 12(b)(6), the Court's focus must be limited to the allegations in the complaint) (emphasis added). Further, far from providing factual support to its conclusory allegation that Acosta is empowered to implement the Executive Orders, these documents stand for the contrary conclusion.

Making reference to Executive Order 2015-49 in Exhibit C of the Complaint (the "Second Executive Order"), Plaintiff argues that because it instructs "all heads of governmental agencies" to prioritize spending in their entities according to the budgetary priorities and adjustments established by the Director of the Office of Management and Budget ("OMB") and the guidelines established by the Working Group, Acosta is empowered to implement the Executive Orders. This argument is

unavailing. From Paragraphs First, Second and Third of the Second Executive Order it is evident that the power to implement the Executive Orders was delegated to (1) the Director of the OMB, who would be making the necessary budget adjustments in accordance with available resources, (2) the Working Group, who would be establishing guidelines to manage the cash flow and make disbursement of funds in a manner consistent with the budgetary adjustments, and (3) the Secretary of the Treasury, who would handle the cash flow and make the disbursement of funds in accordance with the guidelines. Docket No. 1 at Exhibit C, p. 3.<sup>1</sup> The reference to “all heads of governmental agencies” in paragraph Four of the Second Executive Order to instruct them to prioritize their spending according to the budgetary priorities and adjustments made by the OMB and the guidelines established by the Working Group is nothing more than a general directive for all governmental agencies to comply with the law. Docket No. 1 at Exhibit C, p. 3. Nothing in that paragraph supports the conclusion that any one head of agency, or Acosta, is empowered to implement the Executive Orders. Otherwise, according to Plaintiff, “all heads of governmental agencies” of the Commonwealth of Puerto Rico would be proper defendants in this case.

Plaintiff’s reference to Circular Letter No. 1300-15-16 (Docket No. 1, Exhibit D) is also unavailing. The purpose of the Circular Letter issued by the Sub-Secretary of Treasury was to establish the guidelines for the disbursements of funds within the custody of the Department of Treasury and to inform government agencies with funds in the Department of Treasury the procedure to request such disbursements. Like the Second Executive Order, this letter does not support the conclusion that governmental agencies, such as the GDB, are involved in the implementation of the Executive Orders. Plaintiff’s argument that GDB, as a mere addressee of the Second Executive Order and the Circular Letter, is “empowered to implement the Executive Orders” is the sort of speculative pleading that must

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<sup>1</sup> Note that Plaintiff pled that the **Sub-Secretary of the Department of Treasury** partially implemented Executive Order 2015-49 by issuing the Circular Letter in Exhibit D of the Complaint. Docket No. 1 at ¶ 113. Furthermore, Plaintiff pled that it was the Second Executive Order, **which was issued by the Governor of Puerto Rico**, that implemented the first Executive Order. Docket No. 1 at ¶ 107.

be rejected under the Twombly/Iqbal plausibility doctrine.

Plaintiff's third line of argument is that because the GDB acts as a fiscal agent, paying agent and financial advisory and reporting agency to the Governor of Puerto Rico, the Secretary of Treasury, and Puerto Rico Highways and Transportation Authority ("PRHTA"), the Puerto Rico Convention Center District Authority, and the Puerto Rico Infrastructure Financing Authority, it is necessarily involved in the implementation of the Executive Orders. Once again, Plaintiff's argument is speculative. Plaintiff offers no explanation as to how the GDB's role as a fiscal agent, paying agent and financial advisory and reporting agency is in any way related to the implementation of the Executive Orders. And Plaintiff's reference to the PRHTA Event Notice (Docket No. 46 at Exhibit 1) does not support Plaintiff's position. Note that what Plaintiff has attached to its opposition is a document titled Municipal Secondary Market Disclosure Information Cover Sheet filed by the GDB, which incorporates the Event Notice **issued by the PRHTA**. In the disclosure cover sheet filed by the GDB, the GDB, in its role as fiscal agent of the PRHTA, informs the Municipal Securities Rulemaking Board of the Event Notice issued by the PRHTA. The GDB is merely acting as a conduit by transmitting to the regulatory agency a notice issued by the issuer of bonds; in this case the PRHTA. Nothing in the cover sheet supports the conclusion that the GDB had any involvement in issuing the Event Notice or in implementing the decision to withhold the Clawback Revenues referred to therein. In fact, the Event Notice is clear that it was issued by the PRHTA and that the "Secretary of Treasury has begun to withhold the Clawback Revenues". See Docket No. 46 at Exhibit 1.

3. The Court should reject Plaintiff's generic request for latitude.

Lastly, Plaintiff posits that it is entitled to latitude because the information regarding details of the GDB's involvement in the implementation of the Executive Orders is within the GDB's control. Docket No. 46 at p. 10. In support of this argument, Plaintiff cites First Circuit precedent in García Catalán v. United States, 734 F.3d 100, 103 (1<sup>st</sup> Cir. 2013), Pruell v. Christi, 678 F.3d 10, 15 (1<sup>st</sup> Cir.

2012) and Menard v. CSX Transportation, 698 F.3d 40, 45-46 (1<sup>st</sup> Cir. 2012). In all three cases the Court found that, despite not having access to additional information, plaintiffs had nonetheless pled plausible claims based upon the information available to them and that, without discovery, plaintiffs could not reasonably be expected to have the information needed to provide more detailed factual allegations in support of their relief. See García Catalán v. United States, 734 F.3d 100, 103-104 (1<sup>st</sup> Cir. 2013) (slip and fall action for damages where plaintiff pled a plausible claim as to the dangerous condition or negligence of defendant); Pruell v. Christi, 678 F.3d 10, 15 (1<sup>st</sup> Cir. 2012) (complaint looked plausible based on what was known to plaintiff); Menard v. CSX Transportation, 698 F.3d 40, 45-46 (1<sup>st</sup> Cir. 2012) (plaintiff pled plausible claim upon the information that was known; distinguishing information and belief from mere speculation).

As discussed above, there are no facts in Plaintiff's Complaint from which a plausible claim against Acosta may be inferred. Further, contrary to Plaintiff's allegations, information related to the implementation of the Executive Orders by the Government of Puerto Rico is public and there is thus no reasonable basis to conclude that without discovery Plaintiff would be unable to provide a factual basis for its claims against Acosta. See e.g. Santana-Colón v. Houghton Mifflin Harcourt Pub. Co., 81 F.Supp.3d 129, 138-139 (D.P.R. 2014). Plaintiff has also failed to identify the information it claims is needed but within the GDB's control. Plaintiff's generic claim that some relevant information may be within the GDB's control is insufficient to allow its claim against Acosta to go forward. Home Orthopedics Corp. v. Rodríguez, 781 F.3d 521, 532 (1<sup>st</sup> Cir. 2015) (a generic claim for latitude is insufficient). There is thus no need to depart from the Twombly/Iqbal pleading requirements and the Court should reject Plaintiff's request for latitude. See Twombly, 550 U.S. at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management'"); Iqbal, 556 U.S. at 686 ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in

this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”).

### **III. Conclusion**

The Complaint is devoid of any factual basis for Acosta’s liability. Plaintiff’s reference to facts, which were not included as part of the Complaint, are insufficient to cure the deficiencies of the Complaint. And the documents discussed by Plaintiff in its opposition provide no support to its allegation that Acosta is empowered to implement the Executive Orders. Plaintiff should not be granted latitude and the Complaint should be dismissed for failure to state a plausible claim against Acosta.

**WHEREFORE**, Melba Acosta, as President of the GDB, respectfully requests that the Honorable Court dismiss the Complaint against her.

### **RESPECTFULLY SUBMITTED.**

**I HEREBY CERTIFY:** That on this same date, the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will notify all counsel of record of such filing.

In San Juan, Puerto Rico, this 10<sup>th</sup> day of March, 2016.

s/ Giselle López Soler  
Giselle López Soler  
**USDC-PR-224010**

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