

**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)

MOTION TO DISMISS

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 January 19, 2016, Plaintiff filed the captioned Complaint seeking declaratory and injunctive relief. Through its Complaint, Plaintiff claims that Section 8 of Article VI of the Constitution of the Commonwealth of Puerto Rico (the “Commonwealth Constitution”), the Management and Budget Office Organic Act of Puerto Rico (the “OMB Act”), and two Executive Orders issued by the Governor of Puerto Rico, Hon. Alejandro García Padilla, on

November 30 and December 8, 2015 (the “Executive Orders”), are unconstitutional. See Docket No. 1. Specifically, Plaintiff claims that federal bankruptcy law preempts Section 8, Article VI of the Commonwealth Constitution, the OMB Act, and the Executive Orders. See generally, Docket No. 1, ¶¶ 74-92. Alternatively, Plaintiff claims, much like the plaintiffs in Assured Guaranty Corp. v. García Padilla, Civil No. 16-1037 (JAF), that the Executive Orders infringe their constitutional rights under the Contracts, Due Process, and Takings Clause by diverting, for unauthorized uses, certain funds which it claims have been pledged to secure the payment of “Authority Bonds” (as that term is defined in the Complaint), the payment of which it insures.

Like in Assured Guaranty Corp. v. García Padilla, Civil No. 16-1037 (JAF), the claims against Acosta in her official capacity as President of the Government Development Bank for Puerto Rico (“GDB”) should be dismissed. See Civil No. 16-1037 at Docket No. 30. A suit against Acosta in such capacity is a suit against the GDB, an arm of the state entitled to Eleventh Amendment Immunity and thus barred by the Eleventh Amendment and Pennhurst State School and Hospital et al v. Halderman, 465 U.S. 89 (1984). Further, Section 8, Article VI of the Commonwealth Constitution, the OMB Act, and the Executive Orders are not preempted by Section 903(1) of the United States Bankruptcy Code, 11 U.S.C. § 903(1) (“Section 903(1)”). Because both of these arguments have already been developed by co-defendants in their motion to dismiss at Docket No. 37, Acosta hereby **joins** such motion and requests dismissal of the Complaint on the basis of the arguments set forth therein. Alternatively, even if there was no jurisdictional bar to this suit and the preemption arguments were not flawed, both of which are denied, the Complaint should still be dismissed as against Acosta in her official capacity because there are no factual allegations in the Complaint that state a plausible claim to relief as to that defendant in that capacity.

II. Standard of Dismissal Pursuant to Fed. R. Civ. P. 12(b)

Fed. R. Civ. P. 12(b)(1) is the proper vehicle for a defendant to raise the defense of lack of subject matter jurisdiction. See Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362 (1st Cir. 2001). One of the various challenges to subject matter jurisdiction that may be raised pursuant to this rule is sovereign immunity. Id. This type of motion is entitled to precedence. See Dynamic Image Techs. Inc. v. U.S., 221 F.3d 34, 37 (1st Cir. 2000).

“Pursuant to Rule 12(b)(6) [of the Federal Rules of Civil Procedure], a complaint should be dismissed when a plaintiff does not ‘state a claim to relief that is plausible on its face.’” Iqbal, 129 S.Ct. at 1949, citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible on its face when “the complaint alleges enough facts to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555, citing 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004). “Dismissal for failure to state a claim is appropriate if the complaint fails to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.” Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008), quoting Centro Médico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005).

In judging the sufficiency of a complaint, courts must “differentiate between well-pleaded facts, on the one hand, and ‘bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like,’ on the other hand; the former must be credited, but the latter can safely be ignored.” LaChapelle v. Berkshire Life Ins., 142 F.3d 507, 508 (1st Cir. 1998). Thus, Plaintiffs must rely on more than unsupported conclusions or interpretations of law, as these will be rejected. Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997). A plaintiff must offer “more than an unadorned, the defendant-unlawfully-harmed-me accusation” in order to claim a

“plausible entitlement to relief and survive a motion to dismiss”. Sánchez v. Pereira-Castillo, 590 F.3d 31, 48 (1st Cir. 2009), citing Iqbal, 129 S.Ct. at 1949.

III. Discussion

In the Complaint, Plaintiff names Acosta, in her official capacity as President of the GDB, as a defendant. See Docket No. 1, ¶ 14. By suing Acosta, in her official capacity as President of the GDB, Plaintiff is, in effect, asserting a claim against the GDB in everything except in name. See Hafer v. Melo, 502 U.S. 21, 25 (1991) (“Suits against state officials in their official capacity should therefore be treated as suits against the State. [...] Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity’s policy or custom must have played a part in the violation”) (internal quotation marks and citations omitted); Kentucky v. Graham, 473 U.S. 159, 165-166 (1985) (“Official capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity.”) (internal quotations marks and citations omitted).

The GDB, however, is an arm of the state entitled to Eleventh Amendment Immunity. See Reyes-Garay v. Integrand Assurance Co., 818 F. Supp. 2d 414, 427 (D.P.R. 2011) (concluding that the GDB is an arm of the state entitled to Eleventh Amendment Immunity); Vélez Rivera v. Agosto Alicea, 334 F. Supp. 2d 72, 83 (D.P.R. 2004) (dismissing claims in light of GDB’s entitlement to Eleventh Amendment Immunity). As such, it is immune from suit (and consequently so is Acosta in her official capacity) unless a viable exception to the Eleventh Amendment is established. Here, however, no such valid exception is applicable and, instead, pursuant to Pennhurst, 465 U.S. 89 (1984), this case must be dismissed in its entirety for lack of

subject matter jurisdiction. The reasons for dismissal pursuant to the Eleventh Amendment are more fully explained by co-defendants in their **Motion to Dismiss at Docket No. 37, which Acosta hereby joins and incorporates by reference.**

Furthermore, as more fully argued by co-defendants in their **Motion to Dismiss at Docket No. 37, which Acosta also joins and incorporates by reference herein**, Section 903(1) of the Bankruptcy Code does not preempt Section 8, Article VI of the Commonwealth Constitution, the OMB Act, or the Executive Orders and Plaintiff's first and second alleged causes of action (Docket No. 1 ¶¶ 142-151) ought to be dismissed and, alternatively, stayed until the 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, the Complaint should be dismissed in its entirety as to Acosta, in her official capacity as President of the GDB. Plaintiff **did not include a single allegation** as to actions by Acosta, as President of the GDB, or the GDB as an entity, that would suffice to state a claim as against such entity. Indeed, the **sole** mention of Acosta as President of the GDB occurs at paragraph 14 of the Complaint, and **all that is said in that regard is that Acosta is the President of the GDB.**

The failure to include *any* factual, non-conclusory allegation concerning Acosta or the GDB is fatal to Plaintiff's Complaint, at least insofar as Acosta, in her official capacity as GDB President, is concerned. See Ashcroft v. Iqbal, 550 U.S. 544 (2007) (explaining that dismissal of Complaint was proper as against two of the defendants because there were no *factual*, non-conclusory allegations, as against those two defendants that actually stated a claim against them). After all, the Federal Rules of Civil Procedure's notice pleading standard requires that Plaintiff put *each* defendant on notice of what it is that Plaintiff claims she did wrong. Bank of America,

N.A. v. Knight, 725 F.3d 815, 818 (7th Cir. 2013) (“A contention that ‘the defendants looted the corporation’- without any details about who did what- is inadequate. Liability is personal. An allegation that *someone* looted a corporation does not propound a plausible contention that *a particular person* did anything wrong. The Rules of Civil Procedure set up a system of notice pleading. Each defendant is entitled to know what he or she did that is asserted to be wrongful.”).¹ Plaintiff failed to meet that standard.

Indeed, **Plaintiff seeks no remedy as to the GDB or Acosta in her official capacity as President of the GDB.** Its request for relief is limited to seeking declarations that Section 8, Article VI of the Commonwealth Constitution, the OMB Act, and the Executive Orders are preempted by federal bankruptcy law and that the Executive Orders are unconstitutional, and injunctions so that unspecified Defendants do not take any action pursuant to the Executive Orders. See Docket No. 1 pp. 51-52. However, **as the Complaint fails to include any allegation that the GDB is performing any action pursuant to the Executive Orders, it is clear that neither the declaratory nor injunctive relief requested have any bearing on the GDB.**

In light of the foregoing, Plaintiff’s Complaint against Acosta in her official capacity as President of the GDB should be dismissed with prejudice because the GDB and Acosta in her official capacity are entitled to Eleventh Amendment immunity, Section 8, Article VI of the Commonwealth Constitution, the OMB Act, and the Executive Orders are not preempted by

¹ See also Peñalbert Rosa v. Fortuño Burset, 631 F.3d 592 (1st Cir. 2011) (affirming dismissal as against named defendants because, although Plaintiff had adequately pled a plausible claim against *someone*, her Complaint did not adequately plead facts that stated a plausible claim against the named defendants, and noting that “an adequate complaint must include not only a plausible claim but also a plausible defendant”); Ball v. Takeda Pharmaceuticals America, Inc., 963 F. Supp. 2d 497, 503 (E.D. Va. 2013) (dismissing Complaint against seven defendants because there were no allegations that they played a role in the allegedly unlawful conduct).

Section 903(1) of the Bankruptcy Code and, alternatively, because Plaintiff has not plead a claim against Acosta in her official capacity as President of the GDB.

WHEREFORE, Melba Acosta, as President of the GDB, respectfully requests that the Honorable Court grant the instant motion and dismiss the Complaint.

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 10th day of February 2016.

s/ Giselle López Soler

Giselle López Soler

USDC-PR-224010

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