

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

PROMESA
Title III

as representative of

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

THE COMMONWEALTH OF PUERTO
RICO et al.,

Debtors.¹

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THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

Adv. Proc. No. 19-00393-LTS

Plaintiff,

v.

HON. WANDA VÁZQUEZ GARCED and THE
PUERTO RICO FISCAL AGENCY AND
FINANCIAL ADVISORY AUTHORITY,

Defendants.

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¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority (“PBA”) (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

OPINION AND ORDER GRANTING IN PART THE
OVERSIGHT BOARD'S MOTION FOR SUMMARY JUDGMENT

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LAURA TAYLOR SWAIN, United States District Judge

The Financial Oversight and Management Board for Puerto Rico (the “Oversight Board” or “Plaintiff”) initiated the above-captioned adversary proceeding on July 3, 2019, challenging the ability of the elected government of the Commonwealth of Puerto Rico (the “Commonwealth”) to implement and enforce legislation and related policy measures that the Oversight Board argues were enacted in violation of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) and are inconsistent with the Oversight Board’s fiscal policies and determinations. In *The Financial Oversight and Management Board for Puerto Rico’s Verified Complaint for Declaratory and Injunctive Relief Against the Governor of Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority* (Docket Entry No. 1 in Adversary Proceeding No. 19-00393,² the “Complaint”), the Oversight Board seeks declarations that Governor Wanda Vázquez Garced and the Puerto Rico Fiscal Agency and Financial Advisory Authority (collectively, the “Defendants”) violated sections 108(a), 204(a), 204(c), and 207 of PROMESA in connection with the enactment and enforcement of a statute that shifts pension reimbursement obligations from the Commonwealth’s municipalities to the Commonwealth and additional measures providing for spending outside of the Commonwealth’s fiscal plan. The Court previously denied the *Defendants’ Motion to Dismiss Plaintiff’s Complaint Dated July 3, 2019 Under Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6)* (Docket Entry No. 17, the “Motion to Dismiss”) in its entirety.

Now before the Court is the *Financial Oversight and Management Board’s Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 77, the

² All docket entry references herein are to entries in Adversary Proceeding No. 19-00393, unless otherwise specified.

“Motion for Summary Judgment”). The Court heard argument on the Motion for Summary Judgment on March 5, 2020 (the “Hearing”), and has considered carefully all of the arguments and submissions made in connection with the Motion for Summary Judgment. The Court has subject matter jurisdiction of this action pursuant to 48 U.S.C. § 2166. For the reasons that follow, the Motion for Summary Judgment is granted in favor of the Oversight Board with respect to Counts I, III, IV, VI, and VII of the Complaint, and is denied with respect to Counts II, V, and VIII of the Complaint.

I.

BACKGROUND

The following facts are undisputed, except as otherwise indicated.³

PROMESA was enacted on June 30, 2016, in order to address the fiscal emergency in Puerto Rico created by a “combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing.” 48 U.S.C.A. § 2194(m)(1) (Westlaw through P.L. 116-135).⁴

³ Facts characterized as undisputed are identified as such in the Oversight Board’s statement pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Oversight Board’s Local Civil Rule 56(b) Statement (see Docket Entry No. 79, “Pl.’s 56(b)”) incorporate by reference the Oversight Board’s citations to underlying evidentiary submissions. Citations to the “Jaresko Declaration” and exhibits thereto reference the Oversight Board’s underlying evidentiary submissions (see Docket Entry No. 77, the “Jaresko Decl.”), and citations to the “Appendix of Laws” reference the Puerto Rico laws and joint resolutions appended to the Motion for Summary Judgment (see Docket Entry No. 77-1, the “Appx.”). The Court declines to address assertions proffered by the parties that are immaterial and conclusory statements of law which the parties proffer as facts.

⁴ PROMESA is codified at 48 U.S.C. § 2101 et seq. References to “PROMESA” section numbers in the remainder of this Opinion and Order are to the uncodified version of the legislation.

PROMESA “empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets, review new legislative acts, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities.” Fin. Oversight & Mgmt. Bd. for P.R. v. Hon. Wanda Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 403 F. Supp. 3d 1, 5 (D.P.R. 2019) (the “Motion to Dismiss Order”) (citing 48 U.S.C. §§ 2141–2152, 2175(a)). The Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA on May 3, 2017. (See Docket Entry No. 1 in Case No. 17-3283.)

A. PayGo

On March 13, 2017, the Oversight Board certified a fiscal plan for the Commonwealth (the “2017 Fiscal Plan”). (Pl.’s 56(b) ¶ 1.) The 2017 Fiscal Plan incorporated several pension reform measures, including a “pay-as-you-go” (“PayGo”) system for the payment of pension benefits. (Id. ¶ 2.)

On August 23, 2017, the Legislature of the Commonwealth (the “Legislature”) passed the “Act to Guarantee the Payment of Pension Benefits to our Retirees and to Establish a New Defined Contribution Plan for Public Employees” (“Act 106”). (Id. ¶ 3.) Act 106 acknowledged the “serious fiscal emergency” faced by Puerto Rico’s public retirement systems, directed the Commonwealth to pay all pension costs, and established the PayGo system in order to fund the pension liabilities established by Act 106. (Id. ¶¶ 5-6.) The PayGo system requires that the Commonwealth pay pension benefits as they come due to retirees, and that each public employer, including municipalities, reimburse the Commonwealth by making a monthly

payment (the “PayGo Fee”) in an amount equal to the benefits paid by the Commonwealth to such employer’s respective retirees. (Id. ¶ 7.)

On May 9, 2019, the Oversight Board certified the most recent fiscal plan for the Commonwealth (the “2019 Fiscal Plan”). (Id. ¶ 10.) The 2019 Fiscal Plan contemplates the Commonwealth’s continued receipt of PayGo Fees from municipalities and public corporations. (Id. ¶ 11 (citing Jaresko Decl. Ex. 6 at 31 (“The 2019 Fiscal Plan includes receipts from municipalities and public corporations that participate in ERS to cover PayGo expenditures covered by the Commonwealth.”))).)

B. Law 29

On May 13, 2019, the Legislature passed the “Act for Reductions of the Administrative Burdens of the Municipalities” (“Law 29”). (Id. ¶ 17.) The “Statement of Purpose” for Law 29 provides that Law 29 “eliminates the obligation of municipalities to contribute to the Government health plan and ‘Pay as you Go system.’” (Law 29, Appx. Ex. A3 at 1.) On May 17, 2019, the Oversight Board sent a letter to the then-Governor of Puerto Rico, the President of the Senate of Puerto Rico, and the Speaker of the House of Representatives of Puerto Rico in response to the Legislature’s recent passage of Law 29. (Pl.’s 56(b) at ¶ 19; see also Jaresko Decl. Ex. 18.) The Oversight Board estimated therein that the “potential fiscal impact” of Law 29 would be “approximately \$311 million for FY20 and \$1.7 billion over the next five fiscal years,” and that Law 29 would not be “compliant with the Certified Fiscal Plan, which includes municipalities’ full payment of their obligations to [the Government health plan] and PayGo.” (Jaresko Decl. Ex. 18.) Governor Ricardo Rosselló signed Law 29 into law on May 17, 2019. (Pl.’s 56(b) ¶ 20.)

On June 3, 2019, the Oversight Board received a copy of Law 29 and an accompanying “Compliance Certificate of New Joint Resolution Pursuant to 48 U.S.C. § 2144[(a)](2)(b)” (the “Certificate”) from Defendants and the Puerto Rico Office of Management and Budget. (Id. ¶ 22; see also Jaresko Decl. Ex. 8.) The Certificate includes the following “estimate of impact” of Law 29 on expenditures and revenues:

[Law] 29 has an impact on the budget of [the Government health plan] of approximately \$119.7 million for Fiscal Year 2020, and \$161.6 million for each fiscal year from 2021 to 2024.

As for the [PayGo] system, [Law] 29 has an impact of approximately \$166 million for Fiscal Year 2020. An actuarial study has been requested to determine the impact on expenditures for subsequent fiscal years.

Notwithstanding the foregoing, said impact will not be incremental, because these expenditures will be covered using budgeted resources and other measures in response to possible additional federal funding in Fiscal Year 2020, and are already required expenditures under the [PayGo] framework set forth in [Act 106].

(Jaresko Decl. Ex. 8 at 2.) The Certificate also states that Law 29 “is not significantly inconsistent with the [2019 Fiscal Plan].” (Id.; see also Pl.’s 56(b) ¶ 28.)

The Oversight Board sent a letter to the Governor of Puerto Rico, the President of the Senate of Puerto Rico, and the Speaker of the House of Representatives of Puerto Rico on June 12, 2019 (the “Notification”), stating its determination that the Certificate was “deficient” because it “failed to provide the formal estimate of the fiscal impact that [Law 29] will have, as required under paragraph (2)(A) of Section 204(a)” of PROMESA. (Pl.’s 56(b) ¶ 29; Jaresko Decl. Ex. 19.) Additionally, the Oversight Board stated in the Notification that Certificate was deficient in two specific ways. First, the Notification provides that “whatever fiscal impact that [Law 29] will have will be determined to a significant degree by the PayGo actuarial projections for the years after fiscal year 2020 . . . The Section 204(a)(2)(A) formal estimate cannot conclude

that [Law 29] is not significantly inconsistent with the Commonwealth Fiscal Plan without this actuarial study having been completed.” (Jaresko Decl. Ex. 19 at 1.) Second, the Notification states that the Certificate is deficient because it does not provide an analysis of the impact that Law 29 will have on the Commonwealth’s Fiscal Plan, and a section 204(a) certification “must include an analysis of the impact that [Law 29] will have on the Commonwealth’s Fiscal Plan before it can certify that the law is not significantly inconsistent with the Fiscal Plan.” (Id. at 2.) The Oversight Board informed the recipients of the Notification, pursuant to section 204(a)(3)(A) of PROMESA, that the formal estimate required by section 204(a)(2)(A) of PROMESA was missing from the Certificate, and directed the recipients, pursuant to section 204(a)(4)(A), to provide the missing estimate within seven business days and an amended Certificate reflecting such estimate. (Id.) Defendants did not respond to the Notification. (Pl.’s 56(b) ¶ 32.)

C. Budgets and Joint Resolutions

The Oversight Board certified a fiscal year 2018 budget for the Commonwealth on June 30, 2017 (the “2018 Budget”), a fiscal year 2019 budget for the Commonwealth on June 30, 2018 (the “2019 Budget”), and a fiscal year 2020 budget for the Commonwealth on June 30, 2019 (the “2020 Budget” and, collectively with the 2018 Budget and the 2019 Budget, the “Budgets”). (Pl.’s 56(b) ¶¶ 36-38; Jaresko Decl. Exs. 3, 4, & 7.)

Between January 4, 2018, and July 27, 2018, Governor Rosselló signed certain joint resolutions into law (the “Joint Resolutions”). (See Pl.’s 56(b) ¶ 39 (enumerating twenty-three joint resolutions).) Defendants submitted copies of each of the Joint Resolutions, along with the accompanying certifications required by section 204(a) of PROMESA, to the Oversight Board between five and eleven months after enactment of the applicable Joint Resolutions. (Id. ¶

40.) The Joint Resolutions together authorize millions of dollars in expenditures not included in any certified budget. (Id. ¶ 42.) Defendants did not seek Oversight Board certifications under section 204(c) of PROMESA as to the Joint Resolutions. (Id. ¶ 44.)

D. The Additional Laws and Additional Joint Resolutions

As of July 3, 2019, Defendants had not submitted section 204(a) certifications for fifty-eight laws that were enacted between July 10, 2018, and June 21, 2019 (the “Additional Laws”) and fifty-five joint resolutions that were enacted between January 27, 2018, and June 21, 2019 (the “Additional Joint Resolutions”). (Id. ¶¶ 55-56.) The Oversight Board asserts that, as of December 13, 2019, Defendants have failed to submit section 204(a) certifications for five of the Additional Laws and Additional Joint Resolutions (the “Non-Certified Laws and Joint Resolutions”). (Id. at ¶ 59.) However, Defendants dispute the Oversight Board’s assertion, stating instead that, “[w]ith the exception of one law that is not being enforced, certifications for all laws and joint resolutions passed before December 31, 2019 have been submitted.” (Docket Entry No. 87-1, Defs.’ Resp. to Pl.’s 56(b) at 21.)

E. Procedural Background

The Oversight Board filed the Complaint on July 3, 2019, pleading eight counts. In Count I, the Oversight Board seeks a declaration that the Governor has failed to comply with PROMESA section 204(a)(1), that the Oversight Board has the authority under PROMESA section 204(a)(5) to prevent enforcement of a law to ensure that the law will not adversely affect compliance with the 2019 Fiscal Plan, and that, due to Defendants’ failure to certify Law 29 properly, Defendants “are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity.” (Compl. ¶ 61.) In Count II, and pursuant to both sections 104(k) and 207 of PROMESA, the Oversight Board seeks a declaration that Law 29 is unenforceable and of no

effect and that, due to Defendants’ violation of PROMESA section 207, Defendants “are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity.” (Id. ¶ 65.) In Counts III and V, the Oversight Board seeks mandatory permanent injunctions prohibiting Defendants from implementing and enforcing Law 29 and compelling the Governor to submit compliant section 204(a) certifications for the Non-Certified Laws and Joint Resolutions. (Id. ¶¶ 76, 91.) In Count IV, the Oversight Board seeks a declaration that Law 29 and the Joint Resolutions violate section 204(c) of PROMESA, and therefore are unenforceable and of no effect. (Id. ¶ 81.) In Counts VI and VII, the Oversight Board seeks declarations that Law 29 and the Joint Resolutions violate section 108(a) of PROMESA, and therefore are unenforceable and of no effect. (Id. ¶¶ 99, 105.) In Count VIII, the Oversight Board asserts that the Governor maintains a policy of not providing compliance certificates and seeks a declaration, pursuant to sections 104(k), 204, and 108(a)(2) of PROMESA, that such policy is unlawful and prohibited. (Id. ¶ 111.)

At the request of the parties, the Court expedited the early stages of this adversary proceeding. (See Docket Entry Nos. 6 and 7.) Defendants filed the Motion to Dismiss on July 15, 2019, and the Court heard oral argument on the Motion to Dismiss on August 15, 2019. The Court issued the Motion to Dismiss Order on August 22, 2019, denying the Motion to Dismiss in its entirety. On September 10, 2019, Defendants answered the Complaint. (See Docket Entry No. 73.)

The Oversight Board filed the Motion for Summary Judgment on December 13, 2019, asserting that there are “no genuine issues of material fact that Law 29, the Joint Resolutions, and the Additional Laws and Additional Joint Resolutions were enacted and

implemented in violation of PROMESA” and seeking summary judgment as to its claims. (MSJ at 17.)

II.

DISCUSSION

The pending motion is brought pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.⁵ Under Rule 56(a), summary judgment is appropriate if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that “possess[] the capacity to sway the outcome of the litigation under the applicable law,” and there is a genuine dispute where an issue “may reasonably be resolved in favor of either party.” Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal citations and quotations omitted). The Court must “review the material presented in the light most favorable to the non-movant, and [] must indulge all inferences favorable to that party.” Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal citations and quotations omitted). When a properly supported motion for summary judgment is made, the non-moving party must set forth “specific facts showing that there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (internal citation and quotations omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. See Goldman v. First

⁵ Federal Rule of Civil Procedure 56 is made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See 48 U.S.C. § 2170.

Nat. Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (internal citations and quotations omitted).

The Oversight Board seeks summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56. The Oversight Board argues that the undisputed facts demonstrate that Defendants violated sections 108(a)(2), 204(a), 204(c), and 207 of PROMESA by enacting and implementing Law 29, and violated sections 108(a)(2), 204(a), and 204(c) of PROMESA by enacting and implementing the Joint Resolutions. The Oversight Board contends that summary judgment for “violation of any one of the foregoing sections [of PROMESA] entitles the Oversight Board to nullification of Law 29 and the Joint Resolutions, and to injunctions against their implementation and enforcement.” (MSJ at 4-5.)

Defendants generally assert that only section 204(a) of PROMESA should govern the Court’s analysis of the Oversight Board’s claims, as invalidating Law 29 and the Joint Resolutions under sections 108(a)(2), 204(c), and/or 207 would expand the Oversight Board’s power by granting it a “super-veto over any legislation it deems inconsistent with its view of PROMESA.” (*Defendants’ Opposition to the Financial Oversight and Management Board for Puerto Rico’s Motion for Summary Judgment* (the “Opposition”), Docket Entry No. 87 at 27.) Section 204(a), Defendants argue, sets forth a “carefully calibrated process” for the Oversight Board to review legislation in a way that is intended to “respect the territorial Government’s political and governmental powers.” (*Id.* at 25-26.) Defendants urge the Court to construe the Oversight Board’s powers “as narrowly as possible while still preserving its powers to accomplish PROMESA’s goals.” (*Id.* at 26.)

In the Motion to Dismiss Order, the Court analyzed the meaning and effect of the following statutory provisions in considering “foundational questions of whether, when, and to what extent PROMESA empowers the Oversight Board to challenge or thwart the implementation of legislative acts of the Commonwealth’s government.” Motion to Dismiss Order, 403 F. Supp. at 11.

Section 204(a) of PROMESA, 48 U.S.C. § 2144(a), establishes a sequential process for the submission of legislative acts to the Oversight Board and related Oversight Board action under certain circumstances. Section 204(a)(1) generally requires the Governor to submit laws to the Oversight Board within seven business days of their enactment.⁶ With each such submission, section 204(a)(2) requires the Governor to provide the Oversight Board with documentation addressing two issues. The Governor must deliver a “formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues.” 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 116-135). The Governor must also provide a certification by the “appropriate entity” that the submitted law “is not significantly inconsistent with the Fiscal Plan for the fiscal year,” *id.* § 2144(a)(2)(B), or that the submitted law is “significantly inconsistent with the Fiscal Plan for the fiscal year,” *id.* § 2144(a)(2)(C).

⁶ Section 204(a)(1) provides as follows:

Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

48 U.S.C.A. § 2144(a)(1) (Westlaw through P.L. 116-135).

Pursuant to section 204(a)(3) of PROMESA,⁷ the Oversight Board “shall send a notification to the Governor and the Legislature” if the Governor fails to submit an estimate, fails to submit a certification, or submits a certification that a law is significantly inconsistent with the fiscal plan. Id. § 2144(a)(3).

If the Governor fails to submit an estimate or certification, section 204(a)(4)(A) provides the Oversight Board with authority to direct the Governor to supply the missing submission. See id. § 2144(a)(4)(A). If the Governor submits a certification that the law was significantly inconsistent with the governing fiscal plan, section 204(a)(4)(B) provides the Oversight Board with authority to direct the territorial government to “correct the law to eliminate the inconsistency” or to “provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.” Id. § 2144(a)(4)(B).

Section 204(a)(5) provides that, if the territorial government fails to comply with the Oversight Board’s direction pursuant to section 204(a)(4), “the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment

⁷ Section 204(a)(3) provides, in full, that:

The Oversight Board shall send a notification to the Governor and the Legislature if--

(A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);

(B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or

(C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

Id. § 2144(a)(3).

or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." Id.

§ 2144(a)(5).

The Court now turns to claims upon which the Oversight Board seeks summary judgment. For the reasons that follow, the Motion for Summary Judgment is granted in part and denied in part. The Oversight Board is entitled to judgment as a matter of law with respect to Counts I, III, IV, VI and VII of the Complaint. The Motion for Summary Judgment is denied with respect to Counts II, V, and VIII of the Complaint.

A. Count I: Section 204(a)(5) of PROMESA

In Count I of the Complaint, the Oversight Board seeks a declaration that the Governor has failed to comply with section 204(a)(1) of PROMESA, that the Oversight Board has the authority under section 204(a)(5) of PROMESA to prevent enforcement of a law to ensure that the law will not adversely affect compliance with the Fiscal Plan, and that, due to Defendants' failure to certify Law 29 properly, Defendants are enjoined from implementing and enforcing Law 29 and the law shall be deemed a nullity. (Compl. ¶ 61.) The Oversight Board seeks summary judgment in its favor on Count I, arguing that the Certificate does not qualify as a "formal estimate" under section 204(a)(2)(A) of PROMESA, that Defendants failed to respond to the Oversight Board's direction pursuant to section 204(a)(4)(A) of PROMESA to provide a proper and complete formal estimate, and that section 204(a)(5) of PROMESA authorizes the Oversight Board to prevent the enforcement of Law 29.

Defendants again assert that PROMESA does not empower the Oversight Board to challenge the sufficiency of the Governor's formal certification and estimate required under section 204(a) of PROMESA. (Opp. at 33.) Defendants argue that, even if the Oversight Board

could “second-guess” the Governor’s certification and cost estimate, the Oversight Board has failed to prove beyond dispute that the Governor’s certification and cost estimate for Law 29 were insufficient. (Id. at 35.) Specifically, Defendants argue that the Oversight Board has not demonstrated that the estimate of the effect that a law will have on the “Fiscal Plan for the fiscal year” under section 204(a)(2)(B) of PROMESA must encompass five years. (Id.) Defendants also contend that Law 29 is not significantly inconsistent with the Fiscal Plan because (i) the Commonwealth’s guaranty of municipal pension obligations is already contemplated in the Fiscal Plan, and (ii) the Oversight Board has not demonstrated that expenditures associated with Law 29 are actually inconsistent with the Fiscal Plan. (Id. at 35-36.)

The Court concludes that the Oversight Board is entitled to summary judgment in its favor on Count I of the Complaint. The Court has previously rejected the argument that PROMESA does not empower the Oversight Board to challenge the Governor’s section 204(a) certifications and estimates. Motion to Dismiss Order, 403 F. Supp. at 13 (“It must be assumed in construing PROMESA, a statute that created the Oversight Board and fiscal plan structure as means of remedying long-standing deficits and fiscal irregularities, that Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good faith, and the statute does not expressly provide that the Governor's documentation is preclusive of inquiries as to its sufficiency or accuracy.”). Section 204(a)(2) of PROMESA required the Governor to submit to the Oversight Board with Law 29 a formal estimate of the impact that Law 29 would have on expenditures and revenues and a certification that Law 29 was not “significantly inconsistent” with the 2019 Fiscal Plan. 48 U.S.C.A. § 2144(a)(2) (Westlaw through P.L. 116-135). The projections and analysis contained in the 2019 Fiscal Plan cover a five-year period. It is therefore apparent that the Governor’s formal estimate and certification

were required to address the fiscal impact of Law 29 on the entire period covered by the 2019 Fiscal Plan. By addressing only 2019, the Governor's estimate was non-compliant with section 204(a)(2) of PROMESA.

Furthermore, the undisputed facts establish that the Oversight Board sent a notification to the Governor and the Legislature in accordance with section 204(a)(3) of PROMESA, and that the Governor and the Legislature failed to respond to that notification. Section 204(a)(5) allows the Oversight Board to prevent the application or enforcement of a law when the Commonwealth government fails to comply with a direction given by the Oversight Board pursuant to section 204(a)(4) of PROMESA. The Oversight Board is not required to prove to the Court that Law 29 is significantly inconsistent with the fiscal plan but, in any event, it is patently obvious that the elimination of the municipalities' obligation to reimburse the Commonwealth for pension obligations is inconsistent with the 2019 Fiscal Plan.

For the foregoing reasons, summary judgment is granted in favor of the Oversight Board with respect to Count I of the Complaint. The Court holds that the Governor has failed to comply with section 204(a)(1) of PROMESA, that the Oversight Board has the authority pursuant to section 204(a)(5) of PROMESA to prevent enforcement of a law to ensure that the law will not adversely affect compliance with the Fiscal Plan, and that, due to Defendants' failure to properly certify Law 29, Defendants are enjoined from implementing and enforcing Law 29 and Law 29 is deemed a nullity.

B. Counts III and IV: Sections 204(a) and 204(c) of PROMESA

In Count III of the Complaint, the Oversight Board seeks a "mandatory permanent injunction prohibiting Defendants from implementing Law 29." (See Compl. ¶¶ 66-76.) In Count IV, the Oversight Board seeks an order declaring that "Law 29 and the Joint Resolutions

are unenforceable and of no effect.” (See *id.* ¶¶ 77-81.) Count III and Count IV challenge Law 29 and the Joint Resolutions on the basis that Law 29 and the Joint Resolutions reprogram funds in violation of section 204(c) of PROMESA, which generally curtails the ability of the Commonwealth government to adopt or effectuate any reprogramming absent certification from the Oversight Board that such reprogramming will not be inconsistent with the fiscal plan and budget. The Oversight Board argues that it is entitled to summary judgment on Counts III and IV because Law 29 and the Joint Resolutions reprogram funds without the requisite certification by the Oversight Board.

Defendants “respectfully re-assert their argument that PROMESA section 204(c) is irrelevant to [Law 29 and the Joint Resolutions] because it applies to reprogramming requested by the Governor, not the [Legislature].” (Opp. at 31.) Defendants argue that the Oversight Board has submitted no evidence demonstrating that the Governor requested any reprogramming in Law 29 or the Joint Resolutions, and that the requirements set forth in section 204(c) therefore cannot apply to Law 29 or the Joint Resolutions. (*Id.* at 32.) Even if section 204(c) of PROMESA applied to reprogramming initiated by the Legislature, Defendants contend that Law 29 would not be subject to section 204(c) because Law 29 merely “excuses municipalities from contributing to the Government health plan and PayGo system” and does not itself reprogram funds. (*Id.*) With respect to the Joint Resolutions, Defendants re-assert the argument that section 204(c) does not apply to reprogramming of funds from prior fiscal years, but prohibits reprogramming only of funds provided in a certified budget. (*Id.* at 36-37.) Defendants argue that the Oversight Board has failed to offer any evidence that the Joint Resolutions concern funds provided in a certified budget. (*Id.* at 37.) In any event, Defendants contend that the Joint

Resolutions have already been implemented and that Count IV is therefore moot insofar as it seeks nullification of the Joint Resolutions. (Id. at 37-38.)

In section 204(c) of PROMESA, Congress expressly prohibited the Commonwealth government from reprogramming funds absent the Oversight Board's analysis and certification that the requested reprogramming will not be significantly inconsistent with the fiscal plan and budget. Specifically, section 204(c)(1) of PROMESA provides that, "[i]f the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request." 48 U.S.C.A. § 2144(c)(1) (Westlaw through P.L. 116-135). Section 204(c)(2) of PROMESA provides that "[t]he Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget." Id. § 2144(c)(2).

The Court concludes that Law 29 and the Joint Resolutions effectuate unapproved reprogramming in violation of section 204(c) of PROMESA. The Court has previously held that "Section 204(c)(2) incorporates no temporal limitations; it prohibits both the adoption and the carrying out of unapproved reprogramming legislation. Defendants' arguments that excusing municipalities from making payments does not constitute reprogramming, and that Section 204(c) is inapplicable to the extent that funds are purportedly taken from sources not covered by the certified Budgets, are equally unavailing." Motion to Dismiss Order, 403 F. Supp. at 18. Here, Defendants ask that the Court distinguish between reprogramming and the creation of "a

revenue deficiency in the budget that the Government would likely have to remedy through reprogramming.” (Opp. at 32.) The Court declines to draw this distinction. Law 29 patently constitutes reprogramming – it requires the Commonwealth to assume hundreds of millions of dollars in pension obligations that would otherwise have been borne by the Commonwealth’s municipalities. The Joint Resolutions similarly effectuate reprogramming by appropriating funds for expenses not provided for in a certified budget. Furthermore, it is undisputed that the Oversight Board did not certify any of the reprogramming that the Commonwealth government effectuated and continues to effectuate through Law 29 and the Joint Resolutions.

For the foregoing reasons, the Oversight Board is entitled to summary judgment as to Counts III and IV of the Complaint. Accordingly, the Court holds that Law 29 and the Joint Resolutions are unenforceable and of no effect and hereby issues a mandatory permanent injunction prohibiting Defendants from implementing and enforcing Law 29.

C. Count V: Section 204(a) of PROMESA

In Count V, the Oversight Board seeks a mandatory permanent injunction compelling the Governor to submit compliant section 204(a) certifications for the Non-Certified Laws and Joint Resolutions. (Compl. ¶ 91.) The Oversight Board argues in the Motion for Summary Judgment that it is entitled to a permanent injunction enjoining the implementation and enforcement of (i) the “Non-Certified [] Laws and Joint Resolutions that do not purport to reprogram funds until seven days after they are submitted to the Oversight Board for review, and either the Oversight Board issues no objection or until the Court determines they are enforceable over the Oversight Board’s objection,” and (ii) the Additional Laws and Additional Joint Resolutions “that do purport to reprogram funds, until they are reviewed and certified as consistent with the applicable fiscal plan and budget by the Oversight Board under” section

204(c). (MSJ at 32.) Defendants assert that, with the exception of one law that is not being enforced, certifications for all laws and joint resolutions passed before December 31, 2019, have been submitted to the Oversight Board in compliance with section 204(a). (See Defs.’ Resp. to Pl.’s 56(b) at 21.)

The Oversight Board has not demonstrated that it is entitled as a matter of law to the relief that it seeks in Count V. The Oversight Board did not meaningfully contest Defendants’ factual proffer regarding the submission of certifications for the Non-Certified Laws and Joint Resolutions in its Reply or at the Hearing. In the event that certifications for some or all of the Non-Certified Laws and Joint Resolutions have now been submitted to the Oversight Board, some or all of the relief sought in Count V would be moot. Indeed, it is not at all clear whether there is a justiciable case or controversy with respect to the relief sought in Count V of the Complaint. The Motion for Summary Judgment is therefore denied with respect to Count V.

D. Counts VI and VII: Section 108(a)(2) of PROMESA

In Count VI, the Oversight Board seeks entry of an order declaring that Law 29 is not enforceable and is of no effect pursuant to sections 204 and 108(a)(2) of PROMESA.⁸ (See Compl. ¶¶ 92-99.) In Count VII, the Oversight Board seeks entry of an order declaring that the Joint Resolutions are not enforceable and are of no effect pursuant to sections 104(k), 204, and

⁸ Although the Oversight Board does not explicitly invoke section 104(k) of PROMESA, which allows the Oversight Board to seek judicial enforcement of its authority to carry out its statutory responsibilities, as a basis for relief in Count VI, the Oversight Board does generally invoke the authority provided in section 104(k) in Paragraph 5 of the Complaint. (Compare Count VI (seeking relief pursuant to “§§ 204 and 108(a)(2) of PROMESA”), with Count VII (seeking relief pursuant to “§§ **104(k)**, 204, and 108(a)(2)”) (emphasis added).) In the Motion to Dismiss Order, the Court construed Paragraph 5 of the Complaint as invoking section 104(k) with respect to all of the Oversight Board’s claims for relief. The Court construes the Complaint in the same fashion for purposes of this Opinion and Order.

108(a)(2) of PROMESA. (See id. ¶¶ 100-105.) The Oversight Board asserts that, because the undisputed facts establish that Law 29 and the Joint Resolutions impair and/or defeat the purposes of PROMESA, as determined by the Oversight Board, in violation of section 108(a)(2), the Oversight Board is entitled to summary judgment on Counts VI and VII of the Complaint. (MSJ at 29.)

Defendants assert that section 108 of PROMESA does not grant the Oversight Board such broad “un-reviewable” powers (Opp. at 28), pointing to other provisions of PROMESA that expressly insulate decisions made by the Oversight Board from judicial review. Defendants further assert that the title of section 108 (“Autonomy of the Oversight Board”) establishes that the Oversight Board may only invoke section 108(a)(2) to nullify statutes that challenge the Oversight Board’s autonomy. (Id. at 27-28.) Defendants also argue that the Oversight Board’s interpretation of section 108(a)(2) would “nullify” Congress’s “carefully crafted balance of power in PROMESA section 204(a).” (Id. at 28.) They argue that the Court should reject the Oversight Board’s interpretation of section 108(a)(2), reasoning that it would “supplant the will of the people of Puerto Rico acting through its elected Government.” (Id. (citing Powell v. McCormack, 395 U.S. 486, 547 (1969)).) Defendants point to the provision of section 204(a)(2) that tasks “an appropriate entity of the territorial government with expertise in budgets and financial management,” rather than the Oversight Board, with determining whether a law is significantly inconsistent with the fiscal plan, arguing that Congress “would never have adopted section 204(a)” if it intended to give the Board power to review new laws for consistency with the fiscal plan. (Id. at 29.)

The Court, having considered carefully the provisions of the statute and the parties’ arguments, concludes that the Oversight Board is entitled to summary judgment on

Counts VI and VII of the Complaint. The Oversight Board has determined that Law 29 impairs or defeats the purposes of PROMESA, asserting that (i) Law 29 is significantly inconsistent with the 2019 Fiscal Plan, (ii) Law 29 defeats fiscal responsibility by relieving the municipalities of the obligation to pay for the pensions of their own retired employees, (iii) Law 29 deprives the Commonwealth of hundreds of millions of dollars, requiring the Commonwealth to use other funds in place of revenues from municipalities and thereby diminishing market access, and (iv) Law 29 violates section 207 of PROMESA, and its enactment and implementation violate sections 204(a) and 204(c) of PROMESA. (MSJ at 29.) The Oversight Board has further determined that the Joint Resolutions impair or defeat the purposes of PROMESA because the Joint Resolutions appropriate funding not included in certified fiscal plans and budgets and are significantly inconsistent with the fiscal plans and budgets certified by the Oversight Board for the Commonwealth. (Id.) As the Court concluded when it rejected Defendants' earlier effort to secure the dismissal of the Oversight Board's section 108(a)(2) claims, these determinations "regarding the alleged impairment that Law 29 and the Joint Resolutions would effectuate rise to a level warranting this Court's review under any objective standard of reasonableness, and the authority that the Oversight Board presently seeks to exercise is therefore well within the contemplation of Section 108(a)(2) of PROMESA." Motion to Dismiss Order, 403 F. Supp. at 20.

Defendants' argument that section 108 of PROMESA does not empower the Oversight Board to nullify legislation is misplaced. The plain language of section 108 allows the Oversight Board to challenge statutes that it has determined impair or defeat the purposes of PROMESA. Section 108(a) does not itself authorize the Oversight Board to nullify legislation; however, section 104(k) allows the Oversight Board to seek judicial enforcement of its authority

to carry out its responsibilities under PROMESA, including its responsibilities pursuant to section 108(a).

Furthermore, the Oversight Board's power to challenge Commonwealth statutes, resolutions, policies, or rules pursuant to section 108(a)(2) is not, as Defendants suggest, "unreviewable." (Opp. at 28.) Congress did not, in section 108 of PROMESA, enable the Oversight Board to take unilateral, unreviewable action in preventing the enactment, implementation, or enforcement of statutes that the Oversight Board has determined would impair or defeat the purposes of PROMESA. Had Congress intended that the Oversight Board's section 108(a)(2) determinations be insulated completely from judicial review, the language of PROMESA would clearly preclude the Court from reviewing the Oversight Board's section 108(a)(2) determinations. C.f., e.g., 48 U.S.C.A. § 2126(e) (Westlaw through P.L. 116-135) ("There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under" PROMESA.). PROMESA instead requires that the Oversight Board seek judicial enforcement of its section 108(a)(2) determinations, thus subjecting those determinations to review by this Court.

In Counts VI and VII of the Complaint, the Oversight Board seeks judicial enforcement of its determinations, pursuant to section 108(a)(2), that Law 29 and the Joint Resolutions impair or defeat the purposes of PROMESA. In order to resolve the pending Motion for Summary Judgment, the Court must determine what weight to give the Oversight Board's underlying section 108(a)(2) determinations. In enacting PROMESA, Congress did not specify a standard for this Court's review of such determinations, nor did it expressly define the scope of matters that would impair or defeat the purposes of PROMESA. It simply gave the Oversight Board authority to make the determinations and required the Board to seek judicial enforcement

of those determinations. In this respect, the Oversight Board's powers and functions are similar to those of agencies charged by Congress with carrying out the provisions of statutes. See, e.g., 48 U.S.C. §§ 2141-2144. Although Congress invoked the Territories Clause of Article IV of the Constitution in enacting the statute and PROMESA expressly provides that the Oversight Board "shall not be considered to be . . . [an] agency . . . of the Federal Government," 48 U.S.C.A. § 2121(c)(2) (Westlaw through P.L. 116-135), this operational similarity renders precedent governing judicial review of federal agency actions instructive in considering whether the Oversight Board has acted in a manner consistent with the provisions of PROMESA. Congress has tasked the Oversight Board with implementing PROMESA and making critical determinations, including those at issue in the present dispute, under the statute.

When agency action is grounded in an interpretation of the statute that the agency administers, the reviewing court must apply the framework set forth by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See Flock v. United States Dep't of Trans., 840 F.3d 49 (1st Cir. 2016). Under Chevron, the reviewing court "first ask[s] whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, using the traditional tools of statutory construction, the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Flock, 840 F.3d at 54 (citing Chevron, 467 U.S. at 842-43). If Congress has not unambiguously expressed its intent as to the precise question at issue, the agency's interpretation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. Id. An agency's construction is accorded "substantial deference, and courts are not to substitute their own judgment for that of the agency." Id. at 55. Under the arbitrary and capricious standard, the Court must decide whether the Oversight Board's determinations were supported by a rational basis and must

affirm the Oversight Board’s decisions if they are “reasoned, and supported by substantial evidence in the record.” Trafalgar Capital Assoc., Inc. v. Cuomo, 159 F.3d 21, 26 (1st Cir. 1998) (internal quotation and citation omitted).

Congress unambiguously empowered the Oversight Board to make determinations pursuant to section 108(a)(2), but has not unambiguously expressed its intent as to the particulars or characteristics of territorial government actions that would impair or defeat the purposes of PROMESA. The parties have cited no aspects of PROMESA’s legislative history that elucidate congressional intention as to the meanings of the terms “impair” and “defeat,” as used in section 108(a)(2), and the Court’s own research has disclosed no legislative history that is helpful in this regard.⁹ Congress has, however, given the Oversight Board the mission of providing a “method for a covered territory to achieve fiscal responsibility and access to the capital markets.” 48 U.S.C.A. § 2121(a) (Westlaw through P.L. 116-135). In aid of that purpose, Congress provided the Oversight Board with staffing and extensive powers in connection with the formulation and conduct of the Commonwealth’s fiscal affairs, and specifically established the Oversight Board’s determinations as the benchmark for the operation of section 108(a)(2)’s prohibition of territorial actions that “would impair or defeat the purposes of” PROMESA. Id. § 2128(a)(2). In doing so, Congress has put the Oversight Board in a position of responsibility, resources, expertise, and experience that warrants the Court’s

⁹ As the Oversight Board notes in its *Reply in Support of Financial Oversight and Management Board Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 92, the “Reply”), however, the legislative history does underscore the breadth of the Oversight Board’s authority under section 108. “Congress substantially *expanded* § 108 . . . [t]he original, proposed § 108 . . . did not include the language ultimately included in § 108 that broadly prohibits the Governor or Legislature from implementing laws or taking other actions ‘that would impair or defeat the purposes of’ [PROMESA].” (Reply at 16, n.20 (citing H. Comm. on Natural Resources, Discussion Draft, March 29, 2016, § 109).)

deference to its determinations as to whether the challenged Commonwealth actions impair or defeat the purposes of PROMESA. See Chevron, 467 U.S. at 844-45 (stating that the Supreme Court has consistently applied the principle of deference as to decisions involving conflicting policy “and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency” authority (internal quotation and citation omitted)). This deference, however, is not blind or unconstrained. See Trafalgar Capital Assoc., Inc., 159 F.3d at 26 (stating that this standard of review, while highly deferential, is not a “rubber stamp”). The question, therefore, is whether the Oversight Board’s determinations that Law 29 and the Joint Resolutions impair or defeat the purposes of PROMESA should be set aside as “arbitrary, capricious, or manifestly contrary to the statute.” Chevron, 467 U.S. at 843-44. The Oversight Board’s determinations pass muster under this test.

The Oversight Board has articulated an entirely rational basis for its determinations that Law 29 and the Joint Resolutions impair or defeat the purposes of PROMESA. The record demonstrates that Law 29 and the Joint Resolutions appropriate funding that is not included in certified fiscal plans and budgets, and are significantly inconsistent with the fiscal plans and budgets certified by the Oversight Board for the Commonwealth. Congress explicitly found that the ongoing fiscal emergency in Puerto Rico was created in part by a “combination of severe economic decline, and, at times, accumulating operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing.” 48 U.S.C.A. § 2194(m)(1) (Westlaw through P.L. 116-135). The express purpose of the Oversight Board is to “provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.” Id. § 2121(a). The Oversight Board’s determination that Law 29 impairs or defeats

the purposes of PROMESA is clearly rational in light of the undisputed fact that Law 29 converted the Commonwealth's guaranty of pension payments into a primary obligation of the Commonwealth by eliminating the reimbursement obligations of the municipalities and thus increasing the Commonwealth's expenses by the amount of the now-eliminated reimbursements. The discrepancy necessarily impairs the functioning of financial measures approved by the Oversight Board in the exercise of powers explicitly conferred upon it by PROMESA. Similarly, the Oversight Board's determinations that the Joint Resolutions are significantly inconsistent with the fiscal plans and budgets certified by the Oversight Board for the Commonwealth and that the Joint Resolutions therefore impair or defeat the purposes of PROMESA are reasoned and supported by a rational basis and substantial record evidence.

The Court therefore grants the Motion for Summary Judgment in favor of the Oversight Board with respect to Counts VI and VII of the Complaint. The Court holds that Law 29 and the Joint Resolutions are not enforceable and are of no effect.

E. Count VIII: Sections 204(a) and 108(a)(2) of PROMESA

In Count VIII, the Oversight Board seeks entry of an order ruling the Governor's alleged policy of not providing compliance certificates unlawful and prohibited pursuant to sections 104(k), 204, and 108(a)(2) of PROMESA. (Compl. ¶¶ 106-111.) The Oversight Board seeks summary judgment on Count VIII, arguing that section 204(a) of PROMESA requires the Governor to submit within seven business days of the enactment of "any law during any fiscal year" the law, a formal cost estimate, and a compliance certification to the Oversight Board. (MSJ at 30.) It is, the Oversight Board argues, undisputed that this requirement has been violated numerous times. (*Id.*) The Oversight Board has also determined that the failure to comply with section 204(a) of PROMESA impairs or defeats the purposes of PROMESA within

the meaning of PROMESA section 108(a)(2). (Id. at 31.) The Oversight Board therefore asserts that, in order to grant summary judgment to the Board on Count VIII, the Court need only decide whether repeated violations of section 204(a) constitute a policy within the meaning of section 108(a)(2). (Id.)

The Oversight Board contends that a “policy” is simply a “‘decision to adopt [a] particular course of action’ by a government or government official.” (Id. (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)).) One way to establish a “policy” is, according to the Oversight Board, by showing that “a person with final policymaking authority” caused the harm at issue. (Id. (citing Rodriguez v. Municipality of San Juan, 659 F.3d 168, 181 (1st Cir. 2011)).) Here, the Oversight Board asserts, the Governor has final decision-making authority with respect to section 204(a) certifications and repeatedly failed to provide the statutorily-required certifications in a timely fashion, which caused harm by depriving the Oversight Board of its statutory right to review new laws for consistency with the fiscal plan and budget. (Id. at 31-32.) The Oversight Board therefore argues that Defendants have had a policy of non-compliance with section 204(a) as a matter of law and based on the undisputed facts, and that the Oversight Board is therefore entitled under section 108 to summary judgment on Count VIII barring the Governor from continuing such policy. (Id. at 32.)

Defendants argue that the Oversight Board has failed to demonstrate that the Governor has ever had a policy of failing to comply with section 204(a)’s certification requirement. Defendants point specifically to changes instituted by Governor Vázquez’s administration that “reflect a policy of redoubled compliance and a desire to work collaboratively with the Board to achieve PROMESA’s goals.” (Opp. at 18.) For example, Defendants point to Executive Order 2019-057, which adopts procedures explicitly designed to

promote compliance with section 204(a), as an example of the current administration's compliance efforts.¹⁰ (Id. at 18.) Defendants state that the average time to prepare section 204(a) certifications since Governor Vázquez took office has decreased from an average of 58.32 business days for laws and 126.70 business days for joint resolutions to 7.01 business days for laws and 7.90 business days for joint resolutions. (Id. at 20.) Defendants also argue that the Oversight Board has failed to offer indisputable evidence that the former administration intentionally failed to comply with section 204(a) of PROMESA. Defendants proffer the Marrero Declaration (Opp. Ex. 3) in support of their contention that the Commonwealth's failure to provide timely certifications resulted from practical difficulties in preparing the certifications rather than a deliberate refusal to comply. (Opp. at 23-24.)

In the Motion to Dismiss Order, the Court held that the Oversight Board "has pleaded facts sufficient to support the existence of an ongoing practice of refusal by the Governor to comply with the requirements of Section 204 of PROMESA sufficient to survive a motion to dismiss." Motion to Dismiss Order, 403 F. Supp. at 21. However, the Court expressly recognized that "the Commonwealth now has a new Governor. [The Court's] determination that

¹⁰ On October 25, 2019, Governor Vázquez issued Executive Order 2019-057, which "establishes the public policy of the Government of Puerto Rico in compliance with requirements of Section 204(a) of *PROMESA*, prescribes a uniform procedure to comply, and orders all agencies and public corporations of the Government of Puerto Rico to collaborate in order to comply with the terms and requirements set forth in *PROMESA* Section 204(a)." (Opp. at 19 (citing the Declaration of Omar J. Marrero (Docket Entry No. 87-3, the "Marrero Declaration"), Ex. 3 at 3 (internal quotations omitted)).) Executive Order 2019-057 requires that the Governor receive information necessary to evaluate whether a new law complies with the governing fiscal plan before signing it, requires government entities to punctually provide underlying information necessary to analyze and certify new legislation, and requires that the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") submit the new law and accompanying section 204(a) certification on time (or that AAFAF seek an extension prior to the expiration of the statutory deadline with an explanation of why such extension is necessary). (Opp. at 19-20.)

the Complaint states a claim based on allegations regarding the actions of the former Governor is not preclusive of the development of a record and further determinations as to whether the alleged policy actually exists or continues to exist.” Id. at 21 n.14.

In Pembaur, the Supreme Court held that, “[i]f the decision to adopt [a] particular course of action is properly made by that government’s authorized decisionmakers, it surely represents an act of official government ‘policy’ as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.” 475 U.S. at 481. The Oversight Board relies on this language in arguing that a policy “simply means” a decision by a government or a government official to adopt a particular course of action. (MSJ at 31.) Defendants argue that Pembaur actually held that “the question is whether the action is directed by those who establish government policy,” and that there is no evidence that the former or current Governor directed repeated non-compliance with section 204(a). (Opp. at 24 (emphasis added).) Defendants misrepresent the holding in Pembaur, but the record does not support the Oversight Board’s argument that the former Governor’s actions established a policy of section 204(a) non-compliance to which the Commonwealth adheres, necessitating judicial nullification and injunctive relief.

Here, Defendants have provided properly supported evidence of disputed material facts sufficient to overcome the Oversight Board’s Motion for Summary Judgment on Count VIII of its Complaint. Governor Vázquez’s efforts to ensure compliance across the Commonwealth’s instrumentalities with the requirements of section 204(a) are sufficient to refute the notion that the Governor has a “policy of not providing certifications as required under PROMESA § 204.” (Compl. at 33.) Additionally, the Marrero Declaration offers a plausible

alternative justification for the former administration's delay in providing section 204(a) certifications. The Motion for Summary Judgment is therefore denied with respect to Count VIII.¹¹

III.

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment is granted in favor of the Oversight Board with respect to Counts I, III, IV, VI, and VII of the Complaint, and is denied with respect to Counts II, V, and VIII of the Complaint. This adversary proceeding remains referred to Magistrate Judge Dein for general pretrial management. Law 29 and the Joint Resolutions are hereby declared unenforceable and of no effect. Defendants are, furthermore, permanently enjoined from implementing and enforcing Law 29.

At the March 5, 2020, Omnibus Hearing, counsel for Defendants requested that, if the Court were inclined to nullify Law 29, the Court delay the effective date of its order for two weeks "so that the municipalities, the Oversight Board, and the government can work together to try to come up with another solution to the problem." (Docket Entry No. 105, Hr'g Tr., at 36:11-19.) The Oversight Board consented to Defendants' request. (Id. at 39:20-21.) In light of the additional challenges facing the parties during the COVID-19 public health crisis, the Court hereby delays the effective date of this Opinion and Order for three weeks, through May 6, 2020,

¹¹ In light of the foregoing conclusions, the Court declines to address the Oversight Board's Motion for Summary Judgment insofar as it seeks summary judgment on Count II of the Complaint. The Oversight Board seeks in Count II a declaration pursuant to sections 104(k) and 207 of PROMESA that Law 29 is a nullity and enjoining its implementation and enforcement. The Court has already declared Law 29 a nullity and enjoined its implementation and enforcement. Count II of the Complaint is therefore moot.

subject to extension upon joint petition of the parties.

This Opinion and Order resolves Docket Entry No. 77 in Adversary Proceeding No. 19-00393.

SO ORDERED.

Dated: April 15, 2020

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