UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of COMMONWEALTH OF PUERTO RICO, et al., Debtors.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
ASSURED GUARANTY CORP.; ASSURED GUARANTY MUNICIPAL CORP.; FINANCIAL GUARANTY INSURANCE COMPANY; and NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, Plaintiffs, v. COMMONWEALTH OF PUERTO RICO; FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; HON. RICARDO ANTONIO ROSSELLÓ NEVARES; GERARDO PORTELA FRANCO; CARLOS CONTRERAS APONTE; JOSÉ IVÁN MARRERO ROSADO; HON. RAÚL MALDONADO GAUTIER; and NATALIE A. JARESKO, Defendants.	Adv. Proc. No. 17-155-LTS in 17 BK 3283-LTS Adv. Proc. No. 17-156-LTS in 17 BK 3567-LTS

OPINION AND ORDER GRANTING MOTION TO
DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12 (B)(1) AND (B)(6)

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are (i) the Commonwealth of Puerto Rico (the "Commonwealth") (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 ("PRHTA") (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); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 04780-LTS) (Last Four Digits of Federal Tax ID: 3747).

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LAURA TAYLOR SWAIN, United States District Judge

Before the Court is Defendants' *Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Fed. R. Civ. P. 12 (b)(1) and (b)(6)* filed in each of the above-captioned adversary proceedings (docket entry[2] no. 46 (the "Motion")). The Court heard argument on the Motion on November 21, 2017 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motion. For the reasons that follow, the Court finds that it has jurisdiction pursuant to 48 U.S.C. § 2166 of all but one element of Plaintiffs' Claims. The remainder of Plaintiffs' Claims are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.[3]

I.

BACKGROUND

The following recitation of facts is drawn from the amended complaint (Docket Entry No. 39, the "Amended Complaint"), except where otherwise noted.

Plaintiffs are financial guarantee insurers that have insured various bonds issued by certain public corporations of the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico"). (Am. Compl. ¶¶ 31-32.) Specifically, Plaintiffs Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, "Assured") and Financial Guaranty Insurance Company ("FGIC") insure bonds (collectively, the "Authority Bonds") issued by the Puerto Rico

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2 Identical submissions were filed in each of the above-captioned adversary proceedings. All docket entries refer to case no. 17 AP 155, unless otherwise specified.

3 Plaintiffs have requested that the Court take judicial notice of Exhibits 3-12 that were attached to the Declaration of Ellen M. Halstead, dated September 12, 2017 (Docket Entry No. 68-1) and Defendants have raised evidentiary objections to the requests. The Court need not address the objections and declines to take judicial notice of the documents, as they are immaterial to the decisions set forth in this Opinion.

Highways and Transportation Authority ("PRHTA"), the Puerto Rico Convention Center District Authority ("PRCCDA"), and the Puerto Rico Infrastructure Financing Authority ("PRIFA", and together with PRHTA and PRCCDA, the "Authorities"). (Id. ¶ 32.) Plaintiff National Public Finance Guarantee Corporation ("National") also insures bonds issued by PRHTA. (Id.) Plaintiffs assert that the Authority Bonds are secured by statutory and contractual liens on specific pledged special revenue streams (collectively, the "Pledged Special Revenues"). (Id.)

PRHTA was created in 1965 pursuant to Act No. 74-1965 (the "Enabling Act") to, among other things, oversee and manage the development of roads and various means of transportation in Puerto Rico. (Id. ¶ 33; see generally 9 L.P.R.A. § 2002.) PRHTA issued several series of bonds (the "PRHTA Bonds") pursuant to Resolution No. 68-18 (docket entry no 39-7, the "1968 Resolution") and Resolution No. 98-06 (docket entry no. 39-8, the "1998 Resolution" and, together with the 1968 Resolution, the "Resolutions"). (Id.) Plaintiffs assert that, pursuant to the Enabling Act and the Resolutions, the PRHTA Bonds are secured by a gross lien on (i) the revenues derived from PRHTA's toll facilities (the "Pledged Toll Revenues"); (ii) gasoline, diesel, crude oil, and other special excise taxes levied by the Commonwealth (the "PRHTA Pledged Tax Revenues"); and (iii) special excise taxes consisting of motor vehicle license fees collected by the Commonwealth (the "Vehicle Fees" and, together with the PRHTA Pledged Tax Revenues, the "PRHTA Pledged Special Excise Taxes"). (Id. ¶ 34.)

The PRHTA Resolutions established sinking funds (collectively, the "Sinking Funds"). (Resolutions § 401.) Each Sinking Fund includes three separate accounts (the "Accounts"): (i) a bond service account, (ii) a redemption account, and (iii) a reserve account. (Id.) Pursuant to the Resolutions, PRHTA is required to deposit pledged revenues on a monthly basis with the fiscal agent. (Id. ¶ 37; Resolutions § 401.) Once the funds are received, the fiscal

agent is required to deposit the funds in the Accounts based on the protocol established by the Resolutions. (Resolutions § 401.)

In 2016, the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") was enacted by the U.S. Congress and signed into law to provide, among other things, federal statutory authority pursuant to which the Commonwealth and its instrumentalities may restructure their debts.[4] See PROMESA § 405(m). Pursuant to PROMESA, a Financial Oversight and Management Board (the "Oversight Board") was established with the purpose of developing "a method [for the Commonwealth] to achieve fiscal responsibility and access to capital markets." Id. § 101(a). "Among other things, PROMESA (i) establishes a process for the Oversight Board to approve fiscal plans . . . and budgets of the Commonwealth and its instrumentalities, including PRHTA;" (ii) establishes a process for the Oversight Board to file a bankruptcy-type petition on behalf of the Commonwealth and its instrumentalities, including PRHTA; and (iii) establishes "an alternative mechanism for adjusting the Commonwealth's bond debt or the bond debt of its instrumentalities outside of a bankruptcy proceeding . . . ." (Am. Compl. ¶ 57.)

The Oversight Board has thus far certified, as relevant here, two fiscal plans: (i) the Commonwealth's 2017-2026 fiscal plan (attached as "Exhibit A" to the Amended Complaint, the "PR Fiscal Plan") and (ii) PRHTA's 2017-2026 fiscal plan (attached as "Exhibit B" to the Amended Complaint, the "PRHTA Fiscal Plan" and, together with the Commonwealth Fiscal Plan, the "Fiscal Plans"). (Id. ¶ 3.) To implement certain measures consistent with the Fiscal Plans, the Commonwealth enacted a Fiscal Plan Compliance Law (H.B. 938, Commonwealth

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[4] PROMESA is codified at 48 U.S.C. §2101 et seq. References to "PROMESA" in the remainder of this opinion are to the uncodified version of the legislation.

Act No. 26-2017, the "Compliance Law") on or about April 29, 2017. (Id. ¶ 68.) Plaintiffs assert that the Fiscal Plans authorize the Commonwealth to redirect and misappropriate the Pledged Toll Revenues and the PRHTA Pledged Special Excise Taxes (collectively, the "PRHTA Pledged Special Revenues") from PRHTA to the Commonwealth unlawfully. (Id. ¶ 58.)

On July 1, 2016, PRHTA defaulted on a debt service payment on PRHTA Bonds aggregating approximately $4.5 million. (Id. ¶ 42.) Approximately $4 million of the default amount was insured and paid to holders of PRHTA Bonds (the "PRHTA Bondholders") by National and $83,039.34 was reinsured and paid to the PRHTA Bondholders by Assured. (Id.) PRHTA subsequently defaulted on a debt service payment on January 1, 2017, totaling approximately $1 million on certain bonds insured and paid to the PRHTA Bondholders by National. (Id.)

On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth under Title III of PROMESA.[5] (Id. ¶ 78.) Shortly thereafter, on May 21, 2017, the Oversight Board commenced such a proceeding on behalf of PRHTA. (Id. ¶ 79.) On June 3, 2017, Plaintiffs commenced the above-captioned adversary proceedings, alleging that PRHTA's failure to continue to make payments on the PRHTA Bonds as they come due violates Sections 922(d) and 928(a) of the Bankruptcy Code (which are made applicable in Title III proceedings by Section 301 of PROMESA) and requesting declaratory relief regarding the ownership of certain funds held in the reserve accounts created by the Resolutions (collectively, the "Reserve Accounts.") (See generally Docket Entry No. 1 (the "Complaint"), and the Am. Compl.)

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[5] See 48 U.S.C.S. §§ 2164, 2172-2174 (LexisNexis 2017).

On June 20, 2017, the Puerto Rico Fiscal Agency and Advisory Authority ("AAFAF"), on behalf of PRHTA, delivered an instruction to the Bank of New York Mellon ("BNYM"), as Fiscal Agent, instructing BNYM to "refrain from making the scheduled July 1, 2017 payment to the Bondholders from the [Reserve] Account" and asserting that any such payment would constitute "an act to exercise control" over PRHTA's property in violation of the automatic stay that arose under 11 U.S.C. § 362(a), as incorporated by Section 301 of PROMESA, upon the filing of PRHTA's Title III petition.[6] Following the delivery of the instruction, on July 3, 2017, PRHTA defaulted on a scheduled bond payment in the amount of $219 million. (Id. ¶ 109.) Plaintiffs are subrogated to the rights of the PRHTA bondholders whose claims they have paid. (Id.)

II.

Discussion

Defendants move pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Rule 12(b)(1)") to dismiss the Amended Complaint for lack of subject matter jurisdiction, and pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") to dismiss the Amended Complaint for failure to state a claim upon which relief may be granted. A court "confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), [] ordinarily ought to decide the former before broaching the latter." Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002) (internal citations omitted).

A. Rule 12(b)(1): Subject Matter Jurisdiction

A wide variety of challenges to the Court's subject matter jurisdiction may be

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6 See Docket Entry No. 39-4.

asserted under Fed. R. Civ. P. 12(b)(1), including challenges going to ripeness, mootness, the existence of a federal question and sovereign immunity. See Valentín v. Hospital Bella Vista, 254 F.3d 358, 362–63 (1st Cir. 2001). The Court also has an independent duty to assess whether it has subject matter jurisdiction of an action. See Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction"). "When a defendant moves to dismiss for lack of federal subject matter jurisdiction, 'the party invoking the jurisdiction of a federal court carries the burden of proving its existence.'" Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)).

1. Impact of PROMESA Section 305.

Defendants argue that Section 305 of PROMESA deprives this Court of "jurisdiction to grant the relief Plaintiffs seek, namely, an order declaring PRHTA revenues must be disbursed to pay principal and interest on the PRHTA bonds and affirmatively enjoining Debtors to require those payments." (Mot. at 18.) As federal courts are ones of limited jurisdiction, the Court must address the issue of subject matter jurisdiction prior to engaging with the merits of an action. See Fed. R. Civ. P. 12(h)(3) (providing that if a federal "court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); see also Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The Court therefore turns first to the question of whether Section 305 of PROMESA implicates the Court's jurisdiction or instead only circumscribes the powers of and remedies that are available to the Court.

Section 305 is titled "Limitation on Jurisdiction and Powers of Court" and provides that:

> Subject to the limitations set forth in titles I and II of [PROMESA], notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—
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> (1) any of the political or governmental powers of the debtor;
> (2) any of the property or revenues of the debtor; or
> (3) the use or enjoyment by the debtor of any income-producing property.

48 U.S.C.S. § 2165 (LexisNexis 2017). The language of Section 305 substantially mirrors that of Section 904 of title 11 of the United States Code ("Section 904" and the "Bankruptcy Code," respectively), which similarly limits the powers of courts adjudicating municipal bankruptcy cases. Defendants' argument that Section 305 limits the subject matter jurisdiction of the Court is focused on the section's title, "Limitation on Jurisdiction and Powers of Court." 48 U.S.C.S. § 2165 (LexisNexis 2017).

The Supreme Court has cautioned that courts should avoid characterizing statutory threshold requirements and other preconditions to suit as limitations on a court's subject matter jurisdiction unless Congress expressly characterizes the provision in question as such. Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006). While a statute's title or heading may be instructive in resolving ambiguities, a court's determination as to whether a statutory provision is jurisdictional should turn on an examination of the statutory language in the context of the entire statutory scheme. See Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998) (declining to rely on a statute's title where the text was not ambiguous); see also GMC v. Darling's, 444 F.3d 98, 108 (1st Cir. 2006) (quoting Darling's v. Ford Motor Co., 2003 ME 21, 825 A.2d 344, 346 (2003) (stating that courts "examine[] the plain meaning of the statutory language and consider[] the language the context of the whole statutory scheme") (internal quotations marks and citations omitted).)

Here, an evaluation of Section 305 in the context of the immediately following provision of Title III indicates that Section 305 does not limit the Court's subject matter jurisdiction. Section 306 of PROMESA explicitly delineates the Court's subject matter, personal, and property jurisdiction in the Title III context, thus implying that Section 305 complements the grant and limitations of jurisdiction by delineating certain restrictions on the Court's remedial powers when functioning within the jurisdictional landscape mapped by Section 306. Indeed, the language of Section 305, which focuses specifically on the Court's ability to interfere with the debtor's governmental functions, revenues, or property absent Oversight Board consent, clearly indicates a concern with the powers and remedies a court may employ in adjudicating a Title III case, and does not present itself as restricting the court's ability to hear matters raising issues implicating such matters. See Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1052 (Fed. Cir. 2012) ("[A] court's power to grant relief is not synonymous with its ability to exercise jurisdiction, as these two concepts are separate and distinct. Power does not necessarily envelop the concept of jurisdiction.").

Moreover, the mere inclusion of a reference to jurisdiction in Section 305's title, without any elaboration on the issue of jurisdiction in the body of the provision, does not necessarily indicate an intention that Section 305 should operate to limit the Court's subject matter jurisdiction. The title refers to both jurisdiction and powers of the Court; the body of the statute speaks exclusively to power, and nothing in the statute expressly ties issues of power to issues of jurisdiction. Congress's use of jurisdictional language in the body of PROMESA Section 306 reinforces the distinct purposes of the two statutory provisions. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

or exclusion.'" Sioux Honey, 672 F.3d at 1052, quoting Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). In light of the Supreme Court's instruction in Arbaugh that limitations on jurisdiction should not be implied absent clear Congressional intent, the Court will not treat Section 305 as a jurisdictional provision[7] and will next consider whether the basic constitutional predicate for the exercise of federal court jurisdiction—Article III's case-or-controversy requirement—has been satisfied. See Arbaugh, 546 U.S. at 515-16.

2. Do Plaintiffs' Claims Present a Justiciable Case or Controversy?

Article III courts are empowered to hear only actual controversies that are "real and substantial . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). Such relief may be declaratory in character "[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." Id. at 241. "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Md. Cas. Co v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941).

When considering a complaint requesting a declaratory judgment, courts will often analyze the case or controversy requirement through the lens of ripeness. See In re NSCO,

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[7] While some courts have cursorily characterized 11 U.S.C. § 904, which contains substantially the same provisions and is similarly titled, as jurisdictional, this Court is aware of no other courts that have explicitly addressed this issue in light of Arbaugh. See, e.g., In re Sanitary & Improv. Dist. No. 7, 96 B.R. 967, 970 (Bankr. D. Neb. 1989) ("Therefore, this Court rules as a matter of law that it has no jurisdiction to entertain this suit against the SID under Section 904 of the Code or the Nebraska statutes.").

Inc., 427 B.R. 165, 176 (Bankr. D. Mass. 2010). A court will first "consider whether an issue is fit for review, e.g., whether a challenged . . . action is final and whether determination of the merits turns upon facts which may not yet be sufficiently developed and [will then] . . . consider the question of hardship, a question which typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 495 (1st Cir. 1992) (quotation marks and internal citations omitted). "The linchpin of ripeness under the Declaratory Judgment Act, as in all Article III cases, is adverseness," which requires "legal interests, of sufficient immediacy and reality." Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 692-93 (1st Cir. 1994) (quoting Md. Cas. Co., 312 U.S. at 273) (internal quotation marks omitted). A sound measure of adverseness is "conclusivity," which is an evaluation as to whether the "specific relief [sought] through a decree [is] of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id. (quoting Aetna, 300 U.S. at 239-42).

In their First Claim for Relief, Plaintiffs assert, and seek declarations, that the PRHTA bonds are secured by special revenues within the meaning of certain sections of the Bankruptcy Code, that the application of such revenues to payments on the bonds is exempted from the automatic stay by Section 922(d) of the Bankruptcy Code, and that Defendants' failure to continue to remit such revenues during these PROMESA Title III proceedings to satisfy debt service obligations on the PRHTA Bonds violates Sections 922(d) and 928 of the Bankruptcy Code, which have been incorporated into PROMESA. Their Third Claim for Relief seeks an injunction against further violations of Sections 922(d) and 928. Defendants dispute on a number of grounds the propositions that Sections 922(d) and 928 require the continuation of PRHTA Bond payments during the pendency of the Title III proceedings. The Fourth Claim for

Relief seeks an injunction requiring Defendants to remit revenues securing the bonds in accordance with Sections 922(d) and 928. The parties' submissions clearly frame a ripe controversy with respect to the question of whether the cited Bankruptcy Code sections require continued payments, one that can conclusively be resolved through a declaration of the import of the statutes and the rights and obligations of the parties. The claims for injunctive relief frame and arise from the same current controversy and, if Plaintiffs prevail on their basic contention, will also present a ripe issue for adjudication as to the Court's power to grant the requested injunctive relief. Accordingly, the Court concludes that it has subject matter jurisdiction of Plaintiffs' First and Fourth Claims for Relief. Plaintiffs' Third Claim for Relief also focuses on Sections 922(d) and 928, seeking an injunction prohibiting Defendants from further violating Sections 922(d) and 928. While there is a question of whether this claim for relief is duplicative of the First and Fourth Claims for Relief, it is sufficient to frame a case or controversy for jurisdictional purposes.

In their Second Claim for Relief, Plaintiffs allege that all of the funds held in the Reserve Accounts "are property of the PRHTA Bondholders, held in trust for their benefit, and subject to a lien in their favor," and seek declarations that all funds in the Reserve Accounts are property of the PRHTA Bondholders and that "PRHTA lacks an interest sufficient to prevent funds held in the Reserve Accounts from flowing to the PRHTA Bondholders, unless and until all outstanding PRHTA Bonds have been fully retired or defeased." (Am. Compl ¶¶ 118, 122-23.) This Second Claim appears to be premised on three different theories of bondholder interests in the Reserve Account—that the bondholders are the direct owners of the funds therein, that the funds are held in trust under terms that exclude cognizable property interests of PRHTA in those funds, and that the funds are property of PRHTA but subject to a lien in favor

of the PRHTA Bondholders. Plaintiffs' Second Claim presents justiciable issues that are capable of conclusively resolving their issue regarding PRHTA's right to prohibit disbursement of the Reserve Account to the extent Plaintiffs assert that PRHTA has insufficient property interests to prevent the payments, although PROMESA Section 305's limitations on the Court's powers to grant relief may ultimately impede Plaintiffs' ability to state a claim upon which relief may be granted. To the extent, however, their claim of rights in the account is limited to a lien on property of PRHTA, they have neither alleged facts nor proffered a legal theory that would entitle them to a determination that the parties' respective property interests are such as to preclude PRHTA from preventing disbursement of the funds. A determination of the nature or extent of any PRHTA lien interest would therefore be merely advisory, requiring further facts and litigation to ascertain its impact, if any, on rights to control disbursements from the Reserve Account. The Court concludes that it lacks subject matter jurisdiction of the Second Claim for Relief to the extent that claim is premised solely on Plaintiffs' assertion of a lien interest in the Reserve Account funds. A determination of the lien interest, standing alone, will not resolve conclusively the question of whether, when and from what, if any, funds the PRHTA bondholders are entitled to be paid. Such lien-related issues are implicated in the First and Fourth Claims for Relief, and may ripen in other respects in the future in connection, for instance, with claims and objections to claims, and litigation concerning confirmation of a plan of adjustment.

The Court now turns to the merits issues presented by Plaintiffs' remaining claims and the instant motion practice—whether Plaintiffs have stated claims upon which relief may be granted.

B. Rule 12(b)(6): Merits

In order to survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A court should "accept well-pled factual allegations in the complaint as true and make all reasonable inferences in the plaintiff's favor." Melendez-Morales v. Dep't of Army, No. CIV.08-1298 DRD BJM, 2011 WL 925561, at *2 (D.P.R. Jan. 28, 2011) (citing Miss. Pub. Employees' Ret. Sys. v. Boston Scientific Corp., 523 F.3d 75, 85 (1st Cir. 2008)). The court may "consider documents the authenticity of which [is] not disputed by the parties, documents central to the plaintiffs' claim, and documents sufficiently referred to in the complaint." Id. (citing to Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007)). The complaint must allege enough factual content to nudge a claim "across the line from conceivable to plausible." Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (citing Twombly, 550 U.S. at 570).

1. Plaintiffs' First, Third and Fourth Claims for Relief

As noted above, Plaintiffs request: (1) a declaratory judgment stating that application of the PRHTA Pledged Special Revenues does not violate the automatic stay and that Defendants' failure to remit post-petition payments to the PRHTA Bondholders violates Sections 922(d) and 928(a) of the Bankruptcy Code; (2) an order enjoining Defendants from further violations of Section 922(d) and 928(a); and (3) an injunction ordering Defendants "remit revenues securing the PRHTA Bonds in accordance with Sections 922(d) and 928(a)." (Am. Compl. ¶¶ 114, 125, 129.) Defendants move to dismiss Plaintiffs' claims for injunctive and declaratory relief regarding Defendants' alleged obligation pursuant to Sections 922(d) and 928(a) to remit payments to PRHTA Bondholders during the pendency of these Title III

proceedings, arguing that those Bankruptcy Code sections, which are incorporated into Title III by Section 301 of PROMESA, do not require PRHTA to make payments during the pendency of the Title III proceeding. Because the viability of Plaintiffs' claims turns on whether the cited Bankruptcy Code sections mandate current payments, the Court leaves aside for the moment the question of whether Plaintiffs have a valid security interest in pledged special revenues and examines in the first instance the parties' contentions concerning Sections 928 and 922(d) of the Bankruptcy Code.

Plaintiffs argue that Section 928(a) of the Bankruptcy Code not only overrides the general rule of Bankruptcy Code Section 552(a) (which provides that property acquired by a debtor after the commencement of a bankruptcy proceeding is not subject to liens resulting from pre-petition security agreements), by providing for attachment of liens post-petition to the extent they secure certain special revenue bonds, but also requires, either alone or in concert with Section 922(d), continuity of payments on such bonds during the Title III proceeding. Section 928 reads in its entirety as follows:

> (a) Notwithstanding section 552(a) of [the Bankruptcy Code] and subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C.S. § 928 (LexisNexis 2010). The Court again turns to the traditional tools of statutory construction, examining the plain language of the section in the context of the Bankruptcy Code, and, to the extent there is any ambiguity, the legislative history. See Perez-Olivo v. Chavez, 394 F.3d 45, 49-51 (1st Cir. 2005) (using standards tools of statutory construction including the plain

language of the statute, the context of the section within the whole statute, and legislative history to evaluate the reasonableness of an agency interpretation). By its plain language, Section 928(a) merely exempts consensual prepetition liens on special revenues acquired by the debtor post-petition from Section 552(a) of the Bankruptcy Code, which could otherwise invalidate such liens with respect to revenues acquired post-petition. See 11 U.S.C.S. § 552(a) (LexisNexis 2016); 6 COLLIER ON BANKRUPTCY ¶ 928.02 (16th ed. 2017).

Section 928(a) includes no language that could be construed to implicate the payment of special revenues to the bondholders or the timing thereof. The statute clearly and simply provides that certain pre-petition liens will remain in place after the filing of the petition, notwithstanding Section 552(a)'s general protection of after-acquired property from pre-petition liens. Section 928 does not address lien enforcement at all, nor does it address payment of the secured obligation; it thus neither expressly nor impliedly provides any exception from, inter alia, the stay imposed by Bankruptcy Code Section 362(a)(4) on "any act to . . . enforce any lien against property of the estate." Nor does any provision of Section 928 purport to mandate action on the part of the obligor.

The Court notes that its reading of the statute, as unambiguous and limited to protecting post-petition attachment of certain liens, is consistent with the legislative history of the 1988 Municipal Bankruptcy Amendments, Pub. L. No. 100-597 (1988) (the "1988 Amendments"). The legislative history reflects Congressional concern that, notwithstanding the protection provided to municipalities by Bankruptcy Code Section 904 from involuntary interference with their governmental functions and use of the property, Section 552(a) could, by invalidating special revenue bond liens, subject municipal debtors to treatment of special revenue obligations as general obligations. In Section 928, Congress sought only to address the narrow

concern that Section 552(a) not invalidate a lien on post-petition special revenues. See S. Rep. No.100-506, at 12-13, 22-23 (1988) (stating that Section 928 "is intended to negate Section 552(a)," which "could terminate the security for municipal revenue bonds," but "to go no further."); see H.R. Rep. 100-1011, at 4-5, 7-8 (1988) (Commenting that without the enactment of Section 928 "the risk exists that a lien on special revenues could be avoided under Bankruptcy Code Section 552(a), effectively turning the revenue bond into a general obligation bond"); see also Bank of N.Y. Mellon v. Jefferson Cnty. (In re Jefferson Cnty.), 482 B.R. 404, 432-36 (Bankr. N.D. Ala. 2012) ("[T]he purpose for the changes . . . brought about by the 1988 Amendments was to make clear that retention of the pre-bankruptcy lien status of pledged special revenues should occur in a municipal bankruptcy."). Based on the plain language of Section 928, its context within the Bankruptcy Code, and the confirmatory content of its legislative history, the Court concludes that Section 928 does not mandate the turnover of special revenues.[8]

Plaintiffs' assertions that Section 922(d) of the Bankruptcy Code requires Defendants to turn over the revenues allegedly securing the PRHTA Bonds, and that Section 922(d) exempts bondholder enforcement actions from the automatic stays otherwise in effect pursuant to Sections 362(a) and 922(a) of the Bankruptcy Code,[9] are also unavailing. Section 922(d) provides that:

> Notwithstanding section 362 of [the Bankruptcy Code] and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a

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8 Plaintiffs, furthermore, have failed to proffer any factual allegations that would plausibly support a claim that Defendants have violated any lien protection afforded to bondholders by Section 928(a).

9 (Opp'n at 42.)

> manner consistent with section 92[8] of [the Bankruptcy Code] to payment of indebtedness secured by such revenues.

11 U.S.C.S. § 922(d) (LexisNexis 2010). The plain language of Section 922(d) makes clear its limited purpose and effect, and refutes Plaintiffs' contention that it imposes a payment obligation. Section 922(d) exempts "the application of pledged special revenues" from the automatic stay. It does not address actions to enforce liens on special revenues, which are stayed by Section 362(a)(4), and it does not sanction non-consensual interference with governmental properties or revenues, which is constrained by PROMESA Section 305 (which, as noted above, operates in substantially similar fashion to Section 904 of the Bankruptcy Code). Nothing in the language of Section 922(d) requires debtors, or third parties holding special revenues, to apply the revenues to outstanding obligations. Section 922(d) simply carves out one type of action (application of revenues) from the automatic stay, without addressing any other constraints that may apply to that action, without any grant of relief from other aspects of the automatic stay, and without imposing any requirement that the action be taken. It makes clear that the automatic stay is not an impediment to continued payment, whether by the debtor or by another party in possession of pledged special revenues, of indebtedness secured by such revenues, if other relevant circumstances permit or require such payments.[10] Id.; see also 6 COLLIER ON BANKRUPTCY ¶ 922.05. Nor does anything in the plain language of Section 922(d) demonstrate that Congress intended that the provision give holders of instruments secured by such revenues

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[10] Because neither Section 922(d) nor 928 provides for the compulsory payment of the special revenue to the bondholders, the Court need not address at this juncture the parties' arguments concerning the identification of "operating expenses" to which liens on special revenues may be subject under Section 928(b).

the power to compel continued application of such revenues to payments during the course of a Chapter 9 bankruptcy proceeding.

This reading of the unambiguous language of Section 922(d) is consistent with the legislative history of the 1988 Amendments, which introduced Section 922(d) into the Bankruptcy Code. As relevant here, Committee reports show that Congress intended that the amendments would address two issues. First, Congress recognized that a municipality might want to keep special revenue bond payments current through the course of Chapter 9 bankruptcy proceedings in order to retain access to credit markets, prevent any inadvertent exposure of general revenues to claims of special revenue bondholders, and/or to keep itself in compliance with financial strictures imposed by state law.[11] S. Rep. No.100-506 at 6-7 ("[A] municipality might well attempt to ignore [the termination of a pledge under Section 552] and continue to pay bondholders as originally promised" in order to "ensure the debtor's continued access to credit markets."); H.R. Rep. 100-1011, at 3, 7 ("[S]ection 922[(d)] states that the automatic stay of the Bankruptcy Code . . . does not operate to stay paying pledged revenues"). Second, Congress, realizing that the automatic stay imposed by Section 362(a) of the Bankruptcy Code broadly prohibits all collection efforts against a debtor including the application of "the debtor's funds held by a secured lender to secure indebtedness," sought to permit such third-party applications, in the context of municipal restructurings, to proceed without having to seek relief from the automatic stay. S. Rep. No.100-506 at 11, 21. Congress did not, however, exempt such

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[11] Plaintiffs point to a passage in the Senate Report that observes that "[r]easonable assurance of timely payment is essential to the orderly marketing of municipal bonds and notes and continued municipal financing" as evidence that Section 922(d) was intended to mandate payment. S. Rep. No.100-506 at 21. This observation is, however, equally consistent with the proposition that Congress sought to permit municipalities to continue to pay special revenues voluntarily in order to maintain their continued standing in credit markets.

application of revenues by third parties from the restrictions on non-consensual interference with debtor property that are imposed by Section 904 of the Bankruptcy Code in connection with municipal bankruptcies and by Section 305 of PROMESA in connection with this Title III proceeding. As with Section 928, there is no indication that Congress intended to require continued payments, or to grant bondholders power to compel such payments, and the statute is silent with respect to the consequences of failure to apply pledged special revenues to timely continued bond payments.

This narrow, straightforward reading of Section 922(d) is consistent with Section 904 of the Bankruptcy Code and, as relevant here, Section 305 of PROMESA and gives adequate effect to both sections. The Court is mindful that, "[w]here possible, [different] provisions of a statute should be read so as not to create a conflict," but "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." La. Public Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986) (statutes should be read to avoid conflicts between various sections); United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985) (statutes should be interpreted to give effect to all words and phrases). Reading Section 922(d) to permit, but not compel, bond payments gives meaning to Section 922(d) while also respecting the Bankruptcy Code and PROMESA prohibitions on judicial interference with a municipality's governmental functions and revenues. See La. Public Serv. Comm'n, 476 U.S. at 370 (statutes should be read to avoid conflicts between various sections); see Ven-Fuel, 758 F.2d at 751-52 (statutes should be interpreted to give effect to all words and phrases). Indeed, the legislative history evidences Congress' concern that applicability of the automatic stay provisions to municipality-authorized payments on revenue bonds would be inconsistent with the protections afforded to municipalities under Section 904. See S. Rep. No.100-506 at 21 ("the

use of an automatic stay may be contrary to Section 904 and interfere with the government, affairs and the municipality's use or enjoyment of income producing property.").

Plaintiffs cite In re Jefferson County, 474 B.R. 228 (Bankr. N.D. Ala. 2012), in support of their argument that Section 922(d) mandates the turnover of special revenues. While the Jefferson County court made references to expectations of continued payment of pledged special revenues during that municipal bankruptcy case, no issue of refusal to pay had been presented to the court. Rather, the question before the court was what funds qualified as pledged special revenues pursuant to Sections 922(d) and 928 of the Bankruptcy Code. Id. at 262-74.[12]

Plaintiffs' alternative theory, that Section 922(d) exempts bondholder enforcement actions from the automatic stay, is similarly unavailing. As explained above, the plain language and the legislative history of Section 922(d) suggest that Congress, in granting the exemption, only permitted municipalities and others in possession of pledged special revenues to apply those revenues to the relevant debt without running afoul of the automatic stay. Sections 362(a) and 922(a), on the other hand, explicitly stay the prosecution of certain actions against the debtor. Section 922(d) excepts the "application" of special revenues from the automatic stay but does not address other types of enforcement actions that are stayed by sections 362(a) and 922(a). The Court therefore concludes that Section 922(d) does not except actions to enforce special revenue liens.

Finally, in their opposition brief, Plaintiffs request that the Court invoke Bankruptcy Code Section 105 and use its equitable power to "issue any order, process, or

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[12] The Jefferson County court's decision in a related proceeding, Bank of N.Y. Mellon v. Jefferson Cnty. (In re Jefferson Cnty.), was similarly limited to an issue arising from a dispute of over the computation of ongoing post-petition payments. See generally 482 B.R. 404 (Bankr. N.D. Ala. 2012).

judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" to require Defendants to remit the special revenues to PRHTA Bondholders. See 11 U.S.C.S. § 105(a) (LexisNexis 2014). The Court's authority under Section 105 is discretionary and "should not be used contrary to the clear wording of the Bankruptcy Code, its legislative history, and the Rules of Bankruptcy Procedure." Marrama v. Citizens Bank of Mass., 313 B.R. 525, 532 n.6 (B.A.P. 1st Cir. 2004). Because neither Section 922(a) nor 928 mandates the turnover of funds, the Court finds that Section 105 does not authorize the transformation of a permissive Bankruptcy Code provision in to a mandatory one. See id.

Because neither Section 922(d) nor Section 928 requires or empowers the Court to order the payment of the pledged special revenues to the PRHTA Bondholders, Plaintiffs' First, Third and Fourth Claims for Relief fail to state claims upon which relief may be granted and are therefore dismissed.[13]

2. Second Claim for Relief

In the Second Claim for Relief of the Amended Complaint, Plaintiffs seek orders declaring that (i) all funds held in the Reserve Accounts are property of the PRHTA Bondholders and (ii) PRHTA lacks an interest sufficient to prevent funds held in the Reserve Accounts from flowing to the PRHTA Bondholders, unless and until all outstanding PRHTA Bonds have been fully retired or defeased. (Am. Compl. ¶¶ 122-23.) As noted above, the structure of the allegations in Plaintiffs' Second Claim for Relief, particularly in paragraph 118 of the Amended

[13] Plaintiffs' request, in the First Claim for Relief, for a declaration that "the filing of a Title III petition by PRHTA does not operate as a stay of the application of PRHTA Pledged Special Revenues to the payment of the PRHTA bonds" (Am. Compl. ¶ 113) does not, in and of itself, frame a justiciable case or controversy. There appears to be no dispute that the statute says what it says, to wit, that application of pledged special revenues is not stayed. Thus, a grant of the relief sought in paragraph 113 would be a redundant advisory opinion.

Complaint, suggests that Plaintiffs are proceeding on three theories of entitlement to the reserve funds—first, that the PRHTA Bondholders own outright the funds in the Reserve Account (See Am. Comp. ¶ 118 ("all funds in the Reserve Accounts are property of the PRHTA Bondholders")), second, that the PRHTA Bondholders are beneficiaries of a trust that holds the funds in the Reserve Account (see id. ("all funds in the Reserve Accounts are . . . held in trust for their benefit")), and third, that the PRHTA Bondholders hold a lien on the funds in the Reserve Account (see id. ("all funds in the Reserve Accounts are . . . subject to a lien in their favor")). The Court has already determined that the Court lacks subject matter jurisdiction of the Second Claim for Relief to the extent it is premised solely on the existence of a lien. The Court will now address the merits of Plaintiffs' ownership- and trust-based theories.

a. Bondholders as Reserve Account Owners

Plaintiffs allege that they (or their subrogors) own the Reserve Account funds and, on the basis of such alleged ownership, assert that neither the automatic stay nor Section 305 of PROMESA presents a barrier to collection of the funds because they are not the property of any Title III debtor. Indeed, Plaintiffs assert throughout the Amended Complaint that the "funds held in the Reserve Accounts are the exclusive property of the PRHTA Bondholders" and not of the Commonwealth.[14] (Am. Compl. ¶¶ 4, 6, 35, 36.) In support of this proposition, Plaintiffs appear to rely on Section 401 of the Resolutions and certain statutory provisions. (Id. ¶¶ 4, 35-36, 106).

Section 401 of the 1968 Resolution provides, in relevant part, that:

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[14] Although Plaintiffs appear to assert distinct theories of outright ownership and beneficial ownership of the Reserve Account assets, the Amended Complaint tends to conflate these two arguments and the factual allegations supporting them. (See Am. Compl. ¶ 35.)

> The moneys in [the Reserve] Account[] shall be held by the Fiscal Agent in trust and applied as hereinafter provided with regard to . . . such . . . Account and, pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution and for the further security of such holders until paid out or transferred as herein provided.

(Docket Entry No. 39-7 at 41.) Section 401 of the 1998 Resolution includes language that is substantially similar. (See Docket Entry No. 39-8 at 47.) These provisions are devoid of language that could plausibly support an inference that PRHTA has conferred a full exclusive ownership interest in Reserve Account funds on the PRHTA Bondholders. Indeed, the recitations that the funds are to be held "in trust" and are subject "to a lien and charge" for "the further security" of the Bondholders are facially incompatible with full legal ownership of the funds in the Reserve Accounts by the PRHTA Bondholders. "[T]he assertion of a lien is inconsistent with the assertion of [a] title" interest. William W. Bierce, Ltd. v. Hutchins, 205 U.S. 340, 347 (1907). The existence of a trust is equally inconsistent with full, outright ownership because a trust divides ownership of property, placing legal title with trustee while the beneficiary enjoys an equitable interest. See U.S. Fid. & Guar. Co. v. Guzman, No. CIV. 10-1078 FAB/MEL, 2012 WL 4790314, at *5 (D.P.R. Sept. 20, 2012), report and recommendation adopted sub nom. United States Fid. & Guar. Co. v. Cobian-Guzman, No. CIV 10-1078 (FAB), 2012 WL 12996294 (D.P.R. Oct. 5, 2012) (citing 31 L.P.R.A. § 2541).

The statutes cited by Plaintiffs only authorize the collection, deposit, and pledge of the highway tolls and excise taxes, and do not in any way suggest that the PRHTA Bondholders were granted an ownership interest in such funds or accounts. See 13 L.P.R.A. § 31751(a)(1) (authorizing the deposit and pledge of taxes collected on petroleum products and

governing the payment of associated bonds); 9 L.P.R.A. § 2021 (authorizing the deposit and pledge of vehicle license fees and prescribing the use of such funds); 9 L.P.R.A. § 5681 (same).[15]

The Court finds that Plaintiffs have failed to plead plausibly that the PRHTA Bondholders hold an outright ownership interest in the Reserve Accounts.

b. Bondholders as Beneficiaries of a Trust

The Court now turns to Plaintiffs' assertion that the funds held in the Reserve Accounts are "held in trust" by the fiscal agent, BNYM, for the benefit of the PRHTA Bondholders. (See, e.g., Am. Compl. ¶¶ 105, 118.) Plaintiffs rely on Sections 401 and 501 of the 1968 Resolution, as well as Sections 401 and 410 of the 1998 Resolution.[16] Section 501 of the 1968 Resolution is titled "**Deposits Constitute Trust Funds**; Security for Deposits" and provides, in relevant part, that "[a]ll moneys deposited with the Fiscal Agent under the provisions of [the] Resolution **shall be held in trust** . . . and shall not be subject to lien or attachment by any creditor of [PRHTA]." Id. § 501 (emphasis added) (Docket Entry No. 39-7). The Section goes on to state that "[a]ll moneys deposited with the Fiscal Agent [] shall be continuously secured, for the benefit of the Authority and the holders of the bonds . . . ." Id. Section 410 of the 1998 Resolution provides that "moneys held for the credit" of the relevant Reserve Account "shall be held in trust and disbursed by the Fiscal Agent." 1998 Resolution § 410 (Docket Entry No. 39-8). Sections 207 and 711 of the 1998 Resolution also make reference

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15 Plaintiffs also reference 9 L.P.R.A. § 2013(a)(2), which grants bondholders the right to commence a suit against PRHTA for an accounting "as if it were the trustee of an express trust." The right to sue PRHTA "as if it were the trustee" provides no plausible basis for an inference that the bondholders already own the revenues.

16 The relevant language of Section 401 of the 1968 Resolution is substantially similar to that of Section 401 of the 1998 Resolution.

to "trusts [] created" by the resolution. 1998 Resolution §§ 207, 711

Defendants argue that the use of the word "trust" in the resolutions is not, alone, sufficient to create a trust under the law of Puerto Rico, and that the full nature of the contemplated transaction should be considered. Defendants assert that the funds in the Reserve Accounts are only "held in trust first for the 'further security' of the [PRHTA] [B]ondholders and then to be disbursed to PRHTA once the bondholders are fully paid" and, as such, the funds are "not held in trust for the sole purpose of paying the bondholders." (Mot. at 23 (citing 1968 Resolution § 401; 1998 Resolution § 401).)

While multiple interpretations could plausibly be supported by the documentation and the allegations of the Amended Complaint, each contemplates that PRHTA has title or at minimum some contingent reversionary beneficial interest in the trust corpus. The Amended Complaint acknowledges, furthermore, that public revenues are the source of the Reserve Funds. Under these circumstances, PROMESA Section 305's prohibitions on interference with Debtor property interests, revenues and use and enjoyment of income-producing property deprive this Court of power to interfere with the Debtors' dealings with the Reserve Fund property.[17] The Second Claim for Relief, accordingly, fails to state a claim upon which relief may be granted to the extent it is premised on the contention that the Reserve Fund assets are held in trust for

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[17] Defendants, citing to cases applying Section 541 of the Bankruptcy Code, argue that "a remote or theoretical contingent reversionary interest in a debt service reserve fund is insufficient to make such a fund property of the estate." (Opp'n at 52.) However, the issues before the Court is not whether a contingent reversionary interest constitutes property of the debtor's estate for purposes of Section 541 of the Bankruptcy Code. Section 541 is not incorporated into PROMESA and Section 305 of PROMESA does not reference "property of the estate." Instead, Section 305 deprives this Court of power to interfere with, among other things, "any of the property" of the debtor. See 48 U.S.C.S. § 2165(2) (LexisNexis 2017). A contingent reversionary interest constitutes property of the debtor.

bondholders.

III.

CONCLUSION

For the foregoing reasons, Defendants' motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the First, Third and Fourth Claims for Relief of the Amended Complaint is granted. The Second Claim for Relief is dismissed pursuant to Rule 12(b)(6) to the extent that Claim for Relief is premised on a claim of outright PRHTA Bondholder ownership of the funds in the Reserve Accounts or trust beneficiary status, and dismissed pursuant to Rule 12(b)(1) to the extent it is premised on a lien on the Reserve Accounts. This Opinion and Order resolves docket entry nos. 46 and 47 in 17 AP 155, and docket entry nos. 48 and 49 in 17 AP 156. The Clerk of Court is directed to enter judgment accordingly and close this adversary proceedings.

SO ORDERED.

Dated: January 30, 2018

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