

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

IN RE:

CASE NO. 12-01076 (ESL)

NATIONAL PROMOTERS AND
SERVICES INC.

CHAPTER 11

Debtor

ADV. PROC. NO. 13-00051 (ESL)

NATIONAL PROMOTERS AND
SERVICES, INC.

Plaintiff

vs.

MULTINATIONAL LIFE INSURANCE
COMPANY

Defendant

OPINION AND ORDER

The issues before the court are whether the contract between National Promoters and Services, Inc. (hereinafter referred to as “NAPRO” or “Plaintiff”) and Multinational Life Insurance Company (hereinafter referred to as “Multinational” or “Defendant”) was validly terminated and whether Multinational owes NAPRO the amount of \$115,000.00 corresponding to the December 2011 monthly fee.

NAPRO contends that: (i) Multinational breached its obligations under the Service Agreement when it failed to provide the December payment to the Debtor; (ii) “[i]t is undisputed that the terms of the Service Agreement provide for the payment of a fixed monthly amount of \$115,000.00. Payment of this amount was not conditioned nor limited in any way in the Service Agreement. The evidence showed that the amounts due under the Service Agreement were paid by National Life Insurance Company (hereinafter referred to as “NALIC”), up to the time in which management of NALIC, now Multinational, changed. On December 2011 the contract was terminated unilaterally by Multinational; (iii) “[i]n this case the terms of the contract are clear,

1 therefore there is no need to go to the intent of the parties when establishing the obligations under
2 Article 5 of the Service Agreement which leads to conclude that the Debtor is entitled to receive
3 the December 2011 payment of \$115,000.00, since the same was not conditioned and the contract
4 was not validly terminated prior to the termination date of December 31, 2011;" (iv) "[i]f the
5 Court agrees with Mr. Iguina, who testified he did not have the authority to terminate the contract,
6 that the contract was in fact terminated by November 30, 2011, then it should also conclude that
7 such termination was caused by Multinational unilaterally and not agreed by NAPRO who had
8 the mechanisms to perform, even after Mr. Iguina took away NAPRO's key employees;" (v)
9 "[t]he Service Agreement did not provide any cause for the unilateral termination of the
10 agreement. Therefore, Multinational did not have a legal basis to unilaterally terminate the
11 agreement;" (vi) "Multinational alleged a debt owed by NAPRO in the amount of \$58,361.83
12 from a payment of \$264,309.72 made by Evertec on February 10, 2010 due to a reimbursement
13 from Evertec to National Group." No evidence was admitted to sustain the defense of
14 compensation; (vii) Multinational also alleges that it is owed \$75,000.00 from a loan made by
15 NALIC to NAPRO. The record is devoid of a single piece of evidence and thus the defense is
16 waived; and (viii) the amended 2009 financial statements reflect that there are no intercompany
17 receivables for NALIC and the amended 2010 financial statements reflect intercompany
18 receivables for NALIC in the amount of \$9,643 from parent, various subsidiaries and various
19 affiliates (Docket No. 217, pgs. 16-19)

20 Multinational argues that: (i) the parties mutually agreed to terminate the contract as a
21 result of the meeting of Attorney Iguina- Oharriz and Mr. Rafael Rios Miranda; (ii) NAPRO did
22 not have the personnel nor was rendering services for the month of December 2011 for almost all
23 items covered by the Service Agreement, such as Finance, Accounting, Products and Public
24 Relations, Computer Related Matters and Reinsurance respectively. NAPRO was not providing
25 the services it was obliged to perform under terms of the contract; (iii) the Service Agreement
26 was not previously approved by the Officer of the Insurance Commissioner (OCS) under Article
27 29.230 of the Insurance Code of Puerto Rico; (iv) the Service Agreement was not approved by a

1 valid constituted Board of Directors of NALIC because at the time there was none and there was
2 no corporate resolution from NALIC authorizing it to enter into the Agreement with NAPRO.
3 This is in violation of NALIC's By-Laws; namely; Section 1 of Article II and Section 6 of Article
4 II. Moreover, the persons that acted as directors at the time did not approve nor ratify the contract;
5 (v) the contract between NALIC and NAPRO did not have the authorization from the Office of
6 the Insurance Commissioner; (vi) since May 2011 there was an Order to Safeguard the assets of
7 NALIC, thus the December 2011 monthly fee payment required the authorization of the OCS
8 because any disbursement under the same had to be approved by OCS; (vi) NALIC's obligation
9 to pay the December fee was extinguished by Article 1138 of the Puerto Rico Civil Code, 31
10 L.P.R.A. §3193 that establishes that the debtor is released from the obligation when the benefit is
11 legally or physically impossible; (viii) Multinational is not obliged to pay the December 2011
12 service fee because it has presented evidence that it had credits in excess of \$115,000 to
13 compensate or offset its alleged debt with NAPRO pursuant to Articles 1110 and 1149 of the
14 Puerto Rico Civil Code which establishes compensation as a way to extinguish a debt (Docket
15 No. 216, pgs. 23-25).

16 For the reasons discussed below, the court finds that the contract between NAPRO and
17 Multinational was not validly terminated and thus, Multinational breached the same by not
18 making the December 2011 fixed monthly payment. The court further finds that the evidence
19 presented by the Defendant regarding its setoff defense pursuant to 11 U.S.C. §553 and Articles
20 1110 and 1149 of the PR Civil Code, 31 L.P.R.A. §§ 3151 & 3221 failed to evince that
21 Multinational had a setoff claim. For the reasons stated herein, the court holds that Multinational
22 owes NAPRO the monthly flat fee in the amount of \$115,000.00 for the month of December
23 2011.

24 Jurisdiction

25 The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a). This is a core
26 proceeding pursuant to 28 U.S.C. §§157(b)(1) and (b)(2). Venue of this proceeding is proper under
27 28 U.S.C. §§1408 and 1409.

Relevant Procedural Background

The court will only include in this *Opinion and Order* the relevant procedural background regarding the controversies before the court at this juncture. For a detailed procedural background of this adversary proceeding refer to the April 6, 2020 *Opinion and Order* at Docket No. 175. Debtor filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code on February 15, 2012 (Lead Case No. 12-01076). The deadline to file a proof of claim for all creditors was June 21, 2012 (Lead Case No. 12-01076, Docket No. 4).

The Debtor included in Schedule B- Personal Property, an account receivable from Multinational in the amount of \$115,000 for administrative fees for the month of December 2011 (Lead case No. 12-01076, Docket No. 8, pg. 26). On March 14, 2013, the Debtor filed the instant adversary proceeding against Multinational for breach of contract and collection of monies owed pursuant to a service contract executed between the Plaintiff and Defendant National Life Insurance Company (NALIC), now Multinational Life Insurance Company (Docket No. 1). On May 9, 2013, the Defendant filed its *Answer to Complaint* and *Counterclaim* (Docket No. 10). On May 28, 2013, the Plaintiff filed its *Answer to Crossclaim*¹ (Docket No. 12).

Subsequently, on February 28, 2018, the evidentiary hearing was held. The court stated that regarding adversary proceeding 13-00051, it needed to know if the contract submitted is the contract and the other issue would be what happened in late November 2011 and early December 2011 to determine if there is any liability as to Defendant Multinational to pay the \$115,000 (Docket No. 167). At the conclusion of the evidentiary hearing, the court stated, "... that at this point it was not going to hear evidence on the counterclaim. The court instructed the defendant to file its motion with the evidence as to the basis for the counterclaim and the Plaintiff/Debtor will

¹ The court notes that the Plaintiff titled its motion, *Answer to Crossclaim*. However, no crossclaim has been filed in this adversary proceeding. Only a counterclaim at docket no. 10.

1 have time to oppose. Irrespective of the evidence to be presented, the court is concerned as to what
2 at this juncture may be collected from a debtor corporation that has a confirmed plan for actions
3 arising during that period. The court stated that you have to go over the hurdle of the effects of a
4 confirmed plan in making any claim against the debtor. Hearing evidence on that issue now without
5 entertaining the legal issue will be a waste of time. The court ordered the defendant/counter
6 claimant to move the court within thirty (30) days regarding the basis for the counterclaim and
7 whether it can be collected at this time considering the juncture of the case. The Debtor has thirty
8 (30) days to reply” (Docket No. 167, pgs. 18-19).

9
10 The following findings were made by the court regarding the instant adversary proceeding:
11 (i) that the chapter 11 petition was filed on February 15, 2012; (ii) Multinational was not scheduled
12 as a creditor; (iii) a review of the record shows that Multinational did not file a proof of claim; and
13 (iv) that the plan filed on May 5, 2014 (Docket No. 379) was confirmed on May 23, 2014 (Docket
14 No. 386) and Multinational was not included in the plan in Docket No. 379 (Docket No. 167).

15
16 On April 6, 2020, this Court in its *Opinion and Order* held the following: (i) the filing of
17 a proof of claim is not a prerequisite to asserting the right of setoff; (ii) the Defendant in an
18 adversary proceeding does not have to file a motion for relief of the automatic stay to assert its
19 setoff rights as an affirmative defense or to file a counterclaim; (iii) setoff may be treated as an
20 affirmative defense if no distribution from the bankruptcy estate is requested or it may be asserted
21 as a permissive counterclaim if affirmative relief is sought; and (iv) in the instant case, 11 U.S.C.
22 §553 takes precedence over 11 U.S.C. §1141. The court scheduled an evidentiary hearing for
23 September 30, 2020 for the Defendant to present the documentary and witness evidence in support
24 of its setoff defense, including the conclusion of the testimony of Pedro González (Docket No.
25 175). On July 24, 2020, the court ordered the parties to inform the court within fourteen (14) days
26 whether the proposed findings of fact submitted on February 19, 2018 by both Plaintiff (Docket
27

1 No. 159) and Defendant (Docket No. 160) are what the parties will present to the court on
2 September 30, 2020 (Docket No. 176). On August 10, 2020, NAPRO filed a *Motion Requesting*
3 *Short Extension of Time to Comply with Order* and the same was granted on August 11, 2020
4 (Docket Nos. 178 & 179). On August 12, 2020, Multinational filed a *Motion Requesting Extension*
5 *of Time to Comply with Order* (Docket No. 176) and the same was granted on August 14, 2020
6 (Docket Nos. 180 & 182).

7
8 On August 17, 2020, the Plaintiff filed a *Motion in Compliance with Order* by which it
9 requested until September 14, 2020 to supplement its proposed findings of fact to include reference
10 to the additional testimony and evidence which will be presented during the September 30, 2020
11 hearing as to the setoff defense and counterclaim (Docket No. 184). The same was granted on
12 August 26, 2020 (Docket No. 185). On September 1, 2020, Multinational filed a *Motion to Extend*
13 *Time to Comply with Court Order* requesting an extension of three days after Plaintiff files its
14 Amended Proposed Findings of Fact to object and/ or further supplement our proposed findings
15 of fact to include references to the additional testimony and evidence which will be presented
16 during the hearing of September 30, 2020 (Docket No. 187). On September 3, 2020 the court
17 granted Multinational's request (Docket No. 188). On September 4, 2020, the Plaintiff filed a
18 *Motion Requesting that Filing of Updated Proposed Findings of Facts be Simultaneous* arguing
19 that the court should reconsider its *Order* because allowing the Defendant three additional days
20 would provide an unfair advantage (Docket No. 189). Also, on September 4, 2020, NAPRO filed
21 an *Urgent Motion Requesting Order Directing Defendant to Comply with Order of the Court*
22 requesting the Court to Order the Defendant to comply with the Order at Docket No. 167 to file its
23 evidence as to the basis for the Counterclaim on or before September 11, 2020 (Docket No. 190).
24 On September 8, 2020, the court granted NAPRO's motion (Docket NO. 189) ordering the parties
25 to file simultaneous updated proposed findings of fact on September 17, 2020 (Docket No. 192).
26
27

1 Also, on September 8, 2020, the Court granted NAPRO's *Urgent Motion* (Docket No. 190) and
2 ordered the Defendant to file its evidence as to the basis of its counterclaim on or before September
3 11, 2020 (Docket No. 193).

4 Thereafter, on September 11, 2020, the Defendant filed a *Motion in Compliance with Order*
5 *and Extension of Time* requesting until September 15, 2020 to further supplement its list of
6 evidence (Docket No. 196). On September 15, 2020, the Defendant filed a *Supplementary Motion*
7 *Notifying Evidence to be Used at Hearing* (Docket No. 197). On September 16, 2020, NAPRO
8 filed the *Plaintiff & Counter Defendant's Notice of Intent to Oppose Belated Evidence Not*
9 *Previously Produced in Discovery* (Docket No. 198). On September 17, 2020, Multinational filed
10 its *Amended Memorandum of Facts and Applicable [Law]* (Docket No. 199). On September 17,
11 2020, NAPRO filed its *Updated Proposed Findings of Fact* (Docket No. 200). On September 24,
12 2020, NAPRO filed an *Objection and Reaffirmation of Motion in Limine* regarding Mr. Carlos
13 Iguina's testimony and requesting the court to exclude witnesses or evidence not identified or
14 produced previously (Docket No. 202). On September 25, 2020, NAPRO filed a *Motion*
15 *Requesting Authorization to Submit Evidence under Seal* and the same was granted on September
16 28, 2020 (Docket Nos. 203 & 205). On September 28, 2020, Multinational filed a *Motion in*
17 *Compliance with Court Order Docket 201* (Docket No. 206).

18 On September 28, 2020, the Defendant filed a *Motion Filing Exhibits and Witness List as*
19 *well as the Exhibit* (Docket No. 207). Also, on September 28, 2020, Multinational filed its
20 *Opposition to Objection and Reaffirmation of Motion in Limine* (Docket No. 208). On September
21 28, 2020, the Plaintiff filed a *Sealed Motion Submitting Rebuttal Declarations* (Docket No. 209).
22 Also, on September 28, 2020, NAPRO filed a *Sealed Motion Submitting Rebuttal Evidence*
23 (Docket No. 210). On September 28, 2020, the Plaintiff filed a *Motion in Compliance with Order*
24 *at Docket No. 201* submitting the list of evidence and copy of the evidence to be presented at the
25
26
27

1 September 30, 2020 hearing (Docket No. 211). On September 29, 2020, NAPRO filed a *Motion*
2 *to Inform Regarding Declarations* (Docket No. 212). On September 29, 2020, the Plaintiff filed
3 a *Sealed Motion Submitting Declarations and Evidence* to substitute those submitted at Dockets
4 Nos. 209 and 210 (Docket No. 213). On September 30, 2020, the *Minutes* of the September 30,
5 2020 hearing were docketed (Docket No. 214). On October 30, 2020, the Defendant *filed its Post-*
6 *Trial Memoranda and Proposed Findings of Fact and Law* (Docket No. 216). On October 30,
7 2020, the Plaintiff filed its *Post-Trial Brief* (Docket No. 217).

8
9 **Findings of Fact**

10 After considering the parties' proposed findings of fact, the evidence presented and the
11 testimonies of the witnesses, the court finds that the following facts are not in controversy:

12 1. On January 4, 2011, NAPRO and NALIC, now Multinational, executed a Service
13 Agreement (**JE I & JE II**).

14 2. Mr. Rafael Rios Miranda was the vice president of administration for NAPRO since
15 the year 1986 until the year 2011 (**JE VI B; Testimony of Mr. Rafael Rios, Docket No. 167, pg.**
16 **6; Exhibit 4**).

17 3. Mr. Rafael Rios signed the service agreement between NAPRO and NALIC on behalf
18 of NAPRO (**JE I, pg. 4; Testimony Mr. Rafael Rios Miranda, Docket No. 167, pg. 6: Exhibit**
19 **4**).

20 4. NAPRO and NALIC were part of a trade name known as National Group. Another
21 member of National Group was National Insurance Company ("NIC"). National Group is a trade
22 name that consists of the companies that were under the control of Carlos Benitez Rivera such as:
23 National Insurance Company; National Life Insurance Company (NALIC); Insurance Adjusters
24 and Appraisers; INSCO (technology business) and NAPRO amongst others. NAPRO provided
25
26
27

1 administrative services to the conglomerate of companies, including NALIC for many years
2 **(Testimony of Mr. Pedro González Gorgas, Docket No. 214, pg. 3).**

3 5. The Service Agreement detailed the different services that were to be provided by the
4 NAPRO to NALIC. The services included among others, advice to the Board of Directors, upon
5 demand by NALIC, in the following fields: finance, accounting, reinsurance, insurance risk, etc.
6 It also included human resources services and administrative work in general, including
7 administration of real estate, coordination of reinsurances, printing services, messenger, mailing
8 and purchase of materials **(JE I & II).**

9
10 6. The Service Agreement provided that the Debtor could consult other parties and was
11 allowed to contract external services, if necessary **(JE I & II, Article 3).**

12 7. The Service Agreement provided in Article 5 for a fixed monthly flat fee for the services
13 described in Article 1 in the amount of \$115,000.00, equivalent to \$1,380,000.00 annually **(JE I**
14 **& II, Article 5).**

15 8. The Service Agreement original term began in the year 2007 and was renewed annually
16 for years 2008 until the year 2011 under the same terms and conditions agreed to in the original
17 contract. Testimony Rafael Rios Miranda (Docket No. 167, pg. 6: **Exhibit 4**).

18 9. The term of the Service Agreement was for one (1) year, commencing on January 1,
19 2011 and ending on December 31, 2011 **(JE I & II, Article 6).**

20 10. The court noted that the services contract does not include any specific clause regarding
21 termination **(Docket No. 167, pg. 17: Exhibit 4).**

22 11. In the year 2011, NIC and NALIC had cross ownership among them, meaning that
23 NIC was a shareholder of NALIC while at the same time NALIC was a shareholder of NIC **(JE**
24 **VII).**

1 12. On May 17, 2011, the Office of the Insurance Commissioner issued an order to NALIC
2 prohibiting sales, liquidation, transfers of assets, etc. to safeguard the assets of the company (**JE**
3 **VIII**).

4 13. NAPRO was a shareholder of NALIC.

5 14. On October 11, 2011 and November 10, 2011, Aseguradora Ancon S.A., an insurance
6 company authorized to do business in Puerto Rico, received approval from the Office of the
7 Insurance Commissioner (OCS) to purchase NALIC's shares through a series of transactions (**JE**
8 **IV, pg. 28**).

9 15. NALIC paid all the fees for services up to November 2011 (**Testimony of Mr. Rafael**
10 **Ríos Miranda, Docket No. 167, pg. 6, Exhibit 4; RE 10**).

11 16. Attorney Iguina Oharriz testified that since the year 2013 he is the president of
12 Multinational Life Insurance Company (**Testimony of Attorney Iguina, Docket No. 167, pgs. 9-**
13 **10; Exhibit 4**).

14 17. Attorney Iguina testified that in August 2011, Mr. Tobias Carrero Nacar (who is the
15 ultimate owner of the Grupo Multinacional de Seguros) hired Iguina's law firm to deal with the
16 purchase of NIC which was being liquidated by the Office of the Insurance Commissioner
17 (**Testimony of Attorney Iguina, Docket No. 167, pg. 10; Exhibit 4**).

18 18. Attorney Iguina testified that he was instructed by Mr. Tobias Carrero to review and
19 investigate all the contracts that NALIC had with all their service providers to ensure that they
20 were reasonable and sound for the company in order to change the financial and regulatory
21 situation of that company (**Testimony of Attorney Iguina, Docket No. 167, pg. 10; Exhibit 4**).

22 19. On November 29, 2011, Carlos R. Iguina Oharriz sent a letter to Mr. Rafael Ríos
23 Miranda, (vice president of administration of NAPRO) advising of NALIC's intent to terminate
24 the Service Agreement and inviting to meet and discuss the actions to follow (**JE V**).

1 20. Mr. Rafael Rios testified that he received a letter from Mr. Iguina in November 2011
2 requesting a meeting to discuss the Service Agreement between NALIC and NAPRO. He further
3 stated that pursuant to this letter, Mr. Iguina was requesting a meeting to discuss the contract. Mr.
4 Rios testified that after receiving this letter he did not receive any other letter from Mr. Iguina
5 terminating the contract and that he did not receive the monthly payment fee for December 2011
6 **(JE V; Testimony of Mr. Rafael Rios Miranda, Docket No. 167, pg. 6; Exhibit 4).**

7
8 21. Attorney Carlos R. Iguina Oharriz had no authorization to terminate the Service
9 Agreement. He testified that he sent letters to terminate some contracts with the authorization of
10 Mr. Tobias Carrero **(Testimony of Attorney Iguina, Docket No. 167, pg. 12, Exhibit 4).**

11 22. After November 30, 2011, Multinational did not request any services from NAPRO
12 and no services were rendered by NAPRO for NALIC for the month of December 2011
13 **(Testimony of Attorney Iguina, Docket No. 167, pg. 13, Exhibit 4).**

14 23. On December 2, 2011, Mr. Carlos Benítez, President of NAPRO, sent a letter to Mr.
15 Rafael Ríos informing him that NAPRO will cease its operations permanently as of today and all
16 of its employees will be laid off effective December 2, 2011 at 5:00pm **(R-11).**

17
18 24. NALIC did not make the monthly payment of \$115,000.00 for the month of December
19 2011 **(Testimony of Mr. Rafael Ríos; Docket No. 167, pg. 6; Exhibit 4).**

20 25. On December 14, 2011, NALIC changed its name to Multinational Life Insurance
21 Company **(JE IV, pg. 9).**

22 26. Mr. Rafael Ríos testified that he did not send a collection letter to Multinational for
23 the monthly payment of December 2011 and that he did not send a collection letter to Multinational
24 during the entire year of 2012. Mr. Ríos testified that it was not until the 2013 complaint that
25 NAPRO claimed that Multinational owed them \$115,000.00 **(Testimony of Mr. Rafael Rios**
26 **Miranda, Docket No. 167, pg. 8; Exhibit 4).**
27

1 27. The Debtor filed its petition under Chapter 11 of the Bankruptcy Code on February
2 15, 2012.

3 28. On March 14, 2013, the Plaintiff/Debtor filed the complaint for the collection of the
4 \$115,000.00 allegedly owed by Multinational pursuant to the Service Agreement.

5 29. On December 4, 2006, National Group Corp. entered into a Master Service Agreement
6 with Evertec, Inc. for the rendering of services pertaining to data processing, check imaging, credit
7 and debt transaction, among others (**JE 10**).

8 30. Pedro González Gorgas testified that he began working as director of internal audit for
9 Multinational as of March 2012 to August 2015 and from September 2015 onward he has held the
10 position of vice president of auto liability coverage (**Testimony of Pedro González Gorgas,**
11 **Docket No. 167, pg. 18: Exhibit 4**).

12 31. Mr. González Gorgas testified that Multinational's management requested him to
13 perform an audit for the period of February 2010 through summer 2012 because the check from
14 Evertec regarding the reimbursement created reasonable doubt in the new management and they
15 wanted to make sure that there was no more over invoicing (**Testimony of Pedro González**
16 **Gorgas, Docket No. 214, pg. 3**).

17 32. Mr. González Gorgas testified that he audited the over invoicing related to NAPRO in
18 June 2012 (**Testimony of Pedro González Gorgas, Docket No. 167, pg. 18: Exhibit 4**).

19 33. Evertec's services under the Master Service Agreement covered services provided to
20 the corporations that formed part of the National Group, including NALIC (**Testimony of Pedro**
21 **González Gorgas, Docket No. 214, pg. 3**).

22 34. Evertec issued a check dated February 10, 2010 in the amount of \$264,309.72 payable
23
24
25
26
27

1 to the order of National Group and the same was deposited in a NAPRO account on
2 February 17, 2010 with FirstBank (JE 11; Testimony of Pedro González Gorgas,
3 Docket No. 214, pgs. 3-4).

4
5 **Issues before the court**

6 The first issue before the court is whether there was a breach of the Service Agreement by
7 Multinational for failure to pay the monthly fixed fee to NAPRO for the month of December 2011
8 or whether the same was validly terminated. Multinational contends that its obligation to pay the
9 December 2011 fee was extinguished by Article 1138 of the Puerto Rico Civil Code, 31 L.P.R.A.
10 §3193 that established that the debtor is released from the obligation when the benefit is legally or
11 physically impossible. Multinational also finds support in Article 1077 of the PR Civil Code, 31
12 L.P.R.A. §3152 in which the faculty to resolve the obligations is implicit in reciprocal ones if one
13 of the parties does not comply with what is incumbent upon him. Ancillary legal issues that have
14 been argued by Multinational attacking the validity of the contract are the following: (i) the same
15 was not previously approved by the Office of the Insurance Commissioner under Article 29.230
16 of the Insurance Code of Puerto Rico; (ii) the Service Agreement was not approved by a valid
17 constituted Board of Directors of NALIC because at the time there was none and there was no
18 corporate resolution from NALIC authorizing it to enter into the Agreement with NAPRO. This is
19 in violation of NALIC's By-Laws; namely; Section 1 of Article II and Section 6 of Article II. The
20 persons that acted as directors at the time did not approve or ratify the contract; and (iii) since May
21 2011 there was an Order to Safeguard the Assets of NALIC, thus the December 2011 monthly fee
22 payment required the authorization of the OCS. If the court determines that the Service Agreement
23 was a valid contract as of December 2011 and Multinational breached the same for failure to make
24 the December 2011 payment, then the court will have to delve upon the second legal issue; namely

whether Multinational's setoff defense pursuant to Articles 1110 and 1149 of the Puerto Rico Civil Code is valid.

Applicable Law & Analysis

The Civil Code of Puerto Rico of 1930 ("PR Civil Code) was superseded on June 1, 2020 by Act No. 55 and the same pursuant to Article 1820² became effective one hundred and eighty days (180) after its enactment; that is on November 28, 2020. However, in the instant case the applicable PR Civil Code is the one prior to the amendment that is the Civil Code of 1930. Thus, the court's analysis will be based on the 1930 PR Civil Code. Article 9³ of the PR Civil Code of 2020 provides that there is no retroactive effect except when it expressly states the contrary. The retroactive effect of a law may not prejudice the acquired rights under the prior law. Article 1812⁴ of the PR Civil Code of 2020 provides that contracts executed under the prior legislation and that were valid pursuant to the same take effect under the prior law with the limitations established in this Code. The acts and contracts executed under the prior legislation that result ineffective under this legislation, do not acquire validity due to the fact that this Code provides something different in relation to its validity (effectiveness).

² Article 1820 of the amended PR Civil Code provides in the Spanish language: "Este Código comienza a regir a los ciento ochenta (180) días después de su aprobación."

³Article 9 of the amended PR Civil Code provides in the Spanish language: "La ley no tiene efecto retroactivo, excepto cuando se dispone expresamente lo contrario. El efecto retroactivo de una ley, no puede perjudicar los derechos adquiridos al amparo de una ley anterior."

⁴⁴Article 1812 of the amended PR Civil Code provides in the Spanish language: "Los actos y contratos celebrados bajo el régimen de la legislación anterior y que son válidos con arreglo a ella, surten todos sus efectos según la misma, con las limitaciones establecidas en este Código. Los actos y contratos celebrados bajo la legislación anterior y que resultan ineficaces bajo dicha legislación, no adquieren validez por el hecho de que este Código disponga algo distinto con relación a su eficacia."

1 *Analysis of contract pursuant to the Puerto Rico Civil Code of 1930*

2 The Service Agreement is devoid of a clause that explicitly determines the jurisdiction of
3 the applicable law by which the contract shall be construed. However, both parties agree that the
4 PR Civil Code of 1930 is the applicable law. Moreover, “[p]roperty and contract rights implicated
5 in bankruptcy disputes are determined in accordance with state law.” Butner v. United States, 440
6 U.S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979); Ralar Distrib., Inc. v. Rubbermaid, Inc. (In re
7 Ralar Distrib., Inc.), 4 F.3d 62, 67-68 (1st Cir. 1993).

8
9 Article 1233 of the PR Civil Code provides, “[i]f the terms of a contract are clear and
10 leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations
11 shall be observed. If the words should appear contrary to the evident intention of the contracting
12 parties, the intention shall prevail.” 31 L.P.R.A. §3471. In the instant case, the court notes that
13 both parties agree that the terms of the contract are clear and there are no issues as to the intent of
14 the parties.

15
16 Article 1206 of the PR Civil Code provides: “[a] contract exists from the moment one or
17 more persons consent to bind himself or themselves, with regard to another or others, to give
18 something or to render some service.” 31 L.P.R.A. §3371. Article 1207 of the Puerto Rico Civil
19 Code provides: “[t]he contracting parties may make the agreement and establish the clauses and
20 conditions which they may deem advisable, provided they are not in contravention of law, morals,
21 or public order.” 31 L.P.R.A. §3372. Article 1210 of the Puerto Rico Civil Code provides:
22 “[c]ontracts are perfected by mere consent, and from that time they are binding, not only with
23 regard to the fulfilment of what has been expressly stipulated, but also with regard to all the
24 consequences which, according to their character, are in accordance with good faith, use, and
25 law.” 31 L.P.R.A. §3375. Article 1213 provides: “[t]here is no contract unless the following
26 requisites exist: (1) the consent of the contracting parties. (2) A definite object which may be the
27

1 subject of the contract. (3) The cause for the obligation which may be established.” 31 L.P.R.A.
2 §3391.

3 Article 1044 of the PR Civil Code provides: “[o]bligations arising from contracts have
4 legal force between the contracting parties, and must be fulfilled in accordance with their
5 stipulations.” 31 L.P.R.A. §2994. Article 1077 establishes, “[t]he right to rescind the obligations
6 is considered as implied in mutual ones, in case one of the obligated persons does not comply
7 with what is incumbent upon him. The person prejudiced may choose between exacting the
8 fulfilment of the obligation or its rescission, with indemnity for damages and payment of interest
9 in either case. He may also demand the rescission, even after having requested its fulfilment,
10 should the latter appear impossible. The court shall order the rescission demanded, unless there
11 are sufficient causes authorizing it to fix a period. This is understood without prejudice to the
12 rights of third acquirers, in accordance with §§3496 and 3499 of this title, and with the provisions
13 of the Mortgage Law and of the Property Registry, §§ 2001 et seq. of Title 30.” 31 L.P.R.A.
14 §3052
15

16 Article 1110 provides: “[o]bligations are extinguished by: [t]heir payment or fulfilment;
17 by the loss of the thing due; by the remission of the debt; by the merging of the rights of the
18 creditor and debtor; by compensation and by novation.” 31 L.P.R.A. §3151. Article 1138 of the
19 PR Civil establishes: “[i]n obligations to do, the debtor shall also be released when the prestation
20 appears to be legally or physically impossible” 31 L.P.R.A. §3193.
21

22 Article 1138 is under Subchapter II which is titled, Loss of Thing Due. Article 1136
23 establishes, “[a]n obligation, consisting in the delivery of a specified thing, shall be extinguished
24 when said thing should be lost or destroyed without fault of the debtor and before he should be in
25 default.” 31 L.P.R.A. §3191. Article 1137 provides, “[w]henever the thing should be lost, when
26 in the possession of the debtor, it shall be presumed that the loss occurred by his fault and not by
27

1 a fortuitous event, unless there is proof to the contrary and without prejudice to the provisions of
2 § 3013 of this title.” 31 L.P.R.A. §3192.

3 Commentator Puig Brutau explains that the concept of impossibility of the prestation has
4 a general meaning such as having lost the thing owed, and also that what had to be done became
5 impossible to do. Of particular interest is the cause of the extinguishment of the obligation due to
6 impossibility that affected a prestation that was possible when the obligation was constituted, but
7 that later without fault of the debtor, the fulfillment (compliance) of that obligation becomes
8 impossible in an absolute and definitive manner.⁵ José Puig Brutau, Fundamentos de Derecho
9 Civil, Tomo I, Vol. 2, 355 (Bosch, Casa Editorial, S.A. 1985). The concept of impossibility of
10 the prestation has three (3) modalities namely: (i) the initial objective impossibility; (ii) the initial
11 subjective impossibility; and (iii) the impossibility that arose subsequent to the initial obligation.
12 José Puig Brutau, Fundamentos de Derecho Civil, Tomo I, Vol. 2, 357 (Bosch, Casa Editorial,
13 S.A. 1985). In our case the pertinent modality is the impossibility that arose subsequent to the
14 initial obligation. Commentator Puig Brutau further explains that there are differences depending
15 on whether the obligation is to give or the obligation is to do. Article 1138 of the PR Civil Code
16 pertains to an obligation to do. Commentator Puig Brutau analysis is the following: “A case
17 pertaining to the extinguishment due to impossibility would be the death of the person obliged to
18 do a particular type work because of his or her personal qualities in the same manner that the
19 person obliged is unable to finish a particular type of work due to some (extraneous) cause
20
21
22
23

24 ⁵ Commentator Puig Brutau in the Spanish language: “Hemos visto que el concepto amplio de prestación se refiere a
25 la conducta del sujeto obligado, tanto en las obligaciones de dar como en las de hacer o no hacer. Por ello, el concepto
26 de imposibilidad de la prestación tiene un sentido general y se refiere, tanto al caso de haberse perdido la cosa debida,
27 como al de haberse convertido en imposible lo que se tenía que hacer. Como causa de extinción de la obligación la
imposibilidad que interesa es la sobrevenida, esto es, la que afecta a una prestación que era posible cuando la
obligación quedó constituida, pero que después, sin culpa del deudor, resulta de imposible cumplimiento de una
manera absoluta y definitiva.” José Puig Brutau, Fundamentos de Derecho Civil, Tomo I, Vol. 2, 355 (Bosch, Casa
Editorial, S.A. 1985).

1 (reason) independent of his will, in conformity with art. 1595⁶ of the same Code with all of the
2 effects that the same determines. Refer to art. 1161.⁷

3 In order for the debtor not to be found at fault (or in breach) pursuant to art. 1184⁸ it is
4 necessary that the obliged is not guilty (responsible) of the legal or physical impossibility that
5 arose subsequent to the initial obligation. The general rule is that the debtor's obligation does not
6 change due to the fact that the compliance becomes more onerous than what was anticipated at
7 the time he or she became obliged" (translation ours)⁹. José Puig Brutau, Fundamentos de
8 Derecho Civil, Tomo I, Vol. 2, 363-364 (Bosch, Casa Editorial, S.A. 1985).
9

10 Multinational contends that its obligation to pay the December 2011 fee was extinguished
11 pursuant to Article 1138 of the Puerto Rico Civil Code, 31 L.P.R.A. §3193 which establishes that
12 the debtor is released from the obligation when the benefit is legally or physically impossible.
13 Multinational supports its assertion that the benefit was legally or physically impossible during
14 the month of December 2011 because on December 2, 2011, Mr. Carlos Benítez, President of
15 NAPRO, sent a letter to Mr. Rafael Ríos informing him that NAPRO would cease its operations
16
17

18 ⁶ The equivalent of article 1595 of the Civil Code of Spain is Article 1487 of the PR Civil Code, 31 L.P.R.A. §4128.
19 Article 1487 provides: "[w]hen a certain work has been entrusted to a person by reason of his personal qualifications,
20 the contract is rescinded by the death of said person. In such case, the owner must pay to the heirs of the constructor,
in proportion to the price agreed upon, the value of the part of the work executed, and that of the prepared materials,
provided he may obtain any benefit from such materials. The same shall be understood if the person who contracted
for the work cannot finish it by reason independent of his will." 31 L.P.R.A. §4128.

21 ⁷ The equivalent of article 1161 of the Civil Code of Spain is Article 1115 of the PR Civil Code, 31 L.P.R.A. §3165.

22 Article 1115 provides: "In obligations of doing, the creditor cannot be compelled to receive the prestation or the
services from a third party, when the quality and circumstances of the person of the debtor should have been taken
into account in establishing the obligation" 31 L.P.R.A. §3165.

23 ⁸ The equivalent of article 1184 of the Civil Code of Spain is Article 1138 of the PR Civil Code, 31 L.P.R.A. §3193.

24 ⁹ Commentator Puig Brutau in the Spanish language: "Como un caso de extinción por imposibilidad ha de considerarse
el fallecimiento del obligado a quien se encargó cierta obra por razón de sus cualidades personales, y lo mismo se
entenderá cuando el obligado no pueda terminar la obra por alguna causa independiente de su voluntad, como dispone
el art. 1.595 del mismo Código, con los efectos que determina. Véase el art. 1.1161.

25 Por supuesto que para la liberación del deudor a que se refiere el art. 1.184, es necesario que el mismo
26 obligado no sea culpable de la imposibilidad legal o física sobrevenida.

27 Por regla general la obligación del deudor no ha de alterarse por el hecho de que el cumplimiento le resulte
más gravoso de lo que era presumable cuando quedó obligado. El derecho del acreedor no puede estar pendiente de
que el deudor tenga mayores o menores dificultades para cumplir la prestación" José Puig Brutau, Fundamentos de
Derecho Civil, Tomo I, Vol. 2, 363-364 (Bosch, Casa Editorial, S.A. 1985).

1 permanently and all of its employees will be laid off effective December 2, 2011. Multinational
2 contends that NAPRO did not have the personnel nor was rendering services for the month of
3 December 2011 for almost all items covered by the Service Agreement, such as Finance,
4 Accounting, Products and Public Relations, Computer Related Matters and Reinsurance
5 respectively. NAPRO was not providing the services it was obliged to perform under terms of the
6 contract. However, Multinational through Mr. Iguina's testimony also contends that it did not
7 request any services from NAPRO, and no services were rendered by NAPRO for NALIC for the
8 month of December 2011.
9

10 NAPRO counters that after December 2, 2011, it could render the services through
11 executive personnel of the National Group and it could also contract specialized personnel
12 pursuant to Article 3 of the Service Agreement.

13 The court finds that Article 1138 is inapplicable in the instant case because the compliance
14 of the obligations pertaining to the Service Agreement for the month of December 2011 never
15 materialized into an impossibility simply because Multinational did not request any services to
16 be rendered during that month. Therefore, NAPRO's obligation to render services never became
17 legally or physically impossible and NAPRO did not have to resort to Article 3 of the Services
18 Agreement. The court finds this argument hypothetical in nature and premature given that
19 Multinational did not request services from NAPRO during the month of December 2011 and
20 therefore NAPRO did not fail to render the services that were not requested in an absolute and
21 definitive manner. Therefore, NALIC's obligation to pay the December fee was not extinguished
22 by Article 1138 of the PR Civil Code.
23
24

25 Multinational further argues that the parties mutually agreed to terminate the contract as
26 a result of the meeting of Attorney Iguina-O'harriz and Mr. Rafael Ríos Miranda. The letter dated
27 November 29, 2011 was sent to Mr. Rafael Ríos Miranda, (vice president of administration of

1 NAPRO) informing NALIC's intent to terminate the contractual relation with NAPRO Services
2 and stating that it was their intent for said termination to occur in an organized manner by which
3 the parties would comply with their obligations. Mr. Iguina invited Mr. Ríos to communicate with
4 him to meet and discuss the actions to follow. The letter was signed by Mr. Carlos Iguina Oharriz.
5 (JE V¹⁰). Mr. Rafael Rios Miranda testified that after receiving the November 29, 2011 letter he
6 did not meet with Mr. Iguina and attorney Iguina Oharriz testified that the meeting took place.

7
8 The court finds that the letter expresses the interest of ending a contractual relationship
9 with NAPRO Services and that the same be carried out in an organized manner by which both
10 parties can comply with their obligations. The court also finds that the letter does not state that
11 the interest of NALIC, now Multinational, is to terminate the current Services Agreement for the
12 month of December 2011 because NAPRO is unable to render the services under the agreement.
13 Notwithstanding, attorney Carlos Iguina Oharriz testified that he had no authorization to terminate
14 the Services Agreement and also testified that he sent letters to terminate some contracts with the
15 authorization of Mr. Tobias Carrero.

16
17 The court concludes that the November 29, 2011 letter and the alleged subsequent meeting
18 between Mr. Rafael Ríos Miranda and attorney Iguina Oharriz did not constitute a valid
19 termination of the Services Agreement in controversy.

20 The next issue is whether the Office of the Insurance Commissioner had to approve the
21 Services Agreement pursuant to Article 29.230 of the Insurance Code of Puerto Rico, 26 L.P.R.A.

22
23
24
25

¹⁰ The letter states the following in the Spanish language: Estimado Sr. Ríos:
26 "Es el interés de NALIC de finalizar la relación contractual con NAPRO Services. También es nuestro deseo que
27 dicha terminación se efectúe de una manera organizada en la cual las partes cumplamos con nuestras obligaciones.
Agradeceré que se comunique con el suscribiente para pautar una reunión durante esta semana en la que podamos
dialogar sobre los pasos a seguir.
Esperando por usted, me despido" (Docket No. 217-6, JE V).

1 §2923 (“PR Insurance Code). Article 29.230 of the PR Insurance Code, titled, Prohibited interest
2 of officers and directors in certain transactions, provides:

3 “(1) No director or officer of an insurer shall accept, except for the insurer, or be the
4 beneficiary of any fee, brokerage, gift, or other emolument because of any investment,
5 loan, deposit, purchase, sale, exchange, reinsurance, or other similar transaction made by
6 or for the insurer, or be pecuniarily interested therein in any capacity except on behalf of
7 the insurer.

8 (2) This section does not prohibit such a director or officer from becoming a policyholder
9 of the insurer and enjoying thereunder all the rights and privileges usually and customarily
10 provided therein for holders of such policies in general. This section shall not apply with
11 respect to bona fide insurance agency contracts to which any such director or officer is a
12 party on his own account or on account of parties other than the insurer.” 26 L.P.R.A.
13 §2923.

14 The court finds that Article 29.230 of the PR Insurance Code is inapplicable to the instant
15 controversy. The next article, namely Article 29.240, titled, Management and exclusive agency
16 contracts, provides:

17 “(1) No cooperative or mutual cooperative stock insurer shall make any contract whereby
18 any person is granted or is to enjoy in fact the management of the insurer or the controlling
19 or preemptive right to produce substantially all insurance business for the insurer, unless
20 such contract is filed with the Commissioner and be subject to his disapproval. The
21 contract shall be deemed effective unless disapproved by the Commissioner within thirty
22 days after date of filing, subject to such reasonable extension of time as the Commissioner
23 may require by notice given within such thirty days. Each disapproval shall be delivered
24 to the insurer in writing, stating the grounds therefor.

25 (2) The Commissioner shall disapprove any such contract if he finds that it:
26 (a) subjects the insurer to excessive charges; or
27 (b) is to extend for any unreasonable length of time; or
(c) does not contain fair and adequate standards of performance, or
(d) contains other inequitable provisions or provisions which jeopardize the proper
interests of stockholders, partners, or members of the insurer.” 26 L.P.R.A. §2924.

28 Article 29.240 of the PR Insurance Code specifically refers to a contract in which a person
29 is granted the management of the insurer or the controlling right to produce substantially all of
30 the insurance business for the insurer is generally not permitted unless this particular contract is
31 filed with the Commissioner and the same is deemed effective unless disapproved by the

Commissioner within a thirty (30) days after having been filed. Article 1.6¹¹ of the Services Agreement, titled, Administration and Human Resources, provides for NAPRO to assist NALIC in managing its personnel system, organizational structure, development of the work environment, payroll and attendance pursuant to the instructions that it receives from NALIC's President and to make recommendations to the Board of Directors and the President of NALIC regarding matters related to the general administration of NALIC. The court finds that the Services Agreement does not grant the management of the insurer the controlling right to produce substantially all of its business. Moreover, if NALIC, now Multinational, deemed that such contract provided these rights to NAPRO then it was NALIC's duty to file the same with the Office of the Commissioner and seek its approval.

Notwithstanding, the court notes that in the Report on Examination of Multinational Life Insurance Company as Amended as of December 31, 2010, the Office of the Insurance Commissioner found that the corporation was in violation of section 29.230(1) as it was clear that directors and officers of the company had entered into an administrative agreement with Option Healthcare Network , which represented a conflict of interest. In addition, the company was found to be in violation of Section 29.240 of the Insurance Code of Puerto Rico because the agreement was not filed with the OCS for approval (JE IV, pgs. 11-12). The Report on Examination as of December 31, 2010 classified the Services Agreement with NAPRO as an intercompany

¹¹ Article 1.6, titled, Administration and Human Resources, provides:

"Make recommendations to the Board of Directors and the President of the Corporation about the human resources policy to be followed by the Corporation, the classification, recruitment, compensation, promotion, transfer, removal, training and retention of personnel in general of the Corporation.

Pursuant to the instructions that it receives from the President of the Corporation, assist the Corporation in managing its personnel system, organizational structure, development of the work environment, payroll and attendance.

Make recommendations to the Board of Directors and the President of the Corporation about matters related to the general administration of the Corporation and implement any matters related to this subject matter that the Board of Directors of the Corporation may entrust to the Services Company. Perform the administrative work described in Attachment A of this document, which is made a part hereof." (JE II, pgs. 1-2).

1 agreement to provide certain services and the fees pursuant to the contract were based on a
2 monthly flat fee in the amount of \$115,000.00 (JE, pgs. 14-15).

3 The court finds that Multinational failed to adequately argue this particular legal issue
4 given that it did not explain how Article 29.230 or Article 29.240 of the PR Insurance Code was
5 applicable to the Services Agreement in controversy. The court concludes that this argument, as
6 presented, is devoid of legal justification.

7
8 The next issue the court will delve into is whether the Service Agreement was invalid
9 (void *ab initio*) because it was not approved by a valid constituted Board of Directors of NALIC
10 and in violation of NALIC's by-laws and there was no corporate resolution from NALIC
11 authorizing it to enter into the Agreement with NAPRO.

12 Section 1 of Article II of NALIC's by-laws provide:

13 “(1) Powers: [t]he business and property of the Corporation shall be conducted and
14 managed by a Board of ten (10) Directors, which may exercise all of the powers of the
15 Corporation, except such as are by statute, by the charter, or by the By-Laws conferred
16 upon or reserved to the stockholders. The number of Directors may be increased by
17 resolution of the Board of Directors, provided, however, that the number of directors shall
18 not in any case exceed twelve (12), and vacancies occurring by reason of an increase in
19 the number of directors may be filled in the manner hereinafter provided. The Board of
20 Directors shall elect a chairman who shall preside at all Meetings of the Stockholders and
21 the Board of Directors at which he shall be present. The Board of Directors shall elect a
22 Vice Chairman who at the request of the Chairman or during his absence or inability shall
23 exercise the powers of the Chairman and when so acting shall have the powers of the
24 Chairman” (JE IX, pgs. 3-4).

25 Section 6 of Article II of the by-laws provides:

26 “Quorum: [a]t all meetings of the Board of Directors, a majority of the directors shall
27 constitute a quorum for the transaction of business. Except in cases in which it is by
Statute, by the Charter of the By-Laws otherwise provided, the vote of a majority of such
quorum at a duly constituted meeting shall be sufficient to elect and pass any measure. In
the absence of a quorum, the directors, present, by a majority vote and without notice
other than by announcement, may adjourn the meeting from time to time until a quorum
shall attend. At any such adjourned meeting at which a quorum shall be present, any
business may be transacted which might have been transacted at the meeting as originally
notified” (JE IX, pg. 8).

1 The court notes that the Report on Examination of Multinational Life Insurance Company,
2 amended as of December 31, 2010, which was dated June 27, 2012, disclosed that during the
3 period under examination there were only five directors that comprised the Board of Directors
4 and, thus, the corporation was not in compliance with Article II, Section 1 of its by-laws which
5 requires ten directors. Footnote 3 of this Report on Examination states, “[t]he Company has
6 indicated that since this exam it has implemented such a procedure to comply with its by-laws.
7 After the exam, the Board of Directors is comprised of ten (10) directors which is in compliance
8 with the Company’s by-laws” (JE IV, pgs. 6, 11). The Report on Examination disclosed various
9 intercompany agreements, including the Services Agreement NALIC had with NAPRO. It also
10 disclosed as a subsequent event that the contract was cancelled in November 2011 following the
11 sale of the Company (JE IV, pg. 17).
12

13 NALIC was represented in the execution of the Service Agreement by its senior vice-
14 president and NAPRO was represented in this act by its vice-president. Neither had a corporate
15 resolution approving their representation on behalf of said corporations. No corporate resolution
16 was referenced in the intercompany Services Agreement.
17

18 Article III, Section 2, titled, President, of NALIC’s by-laws provide:

19 “[t]he President shall have, subject to the control of the Board of Directors, the general
20 administration and supervision of the business of the Corporation; he may sign and
21 execute, in the name of the Corporation, all authorized deeds, mortgages, bonds, contracts
22 or other instruments, except in cases in which the signing and execution thereof shall have
23 been expressly delegated to some other officer, or agent of the Corporation; and he shall
24 perform such other duties as, from time to time, may be assigned to him by the Board of
25 Directors” (JE IX, pgs. 9-10).

26 Article III, Section 3, titled, Vice-President, of NALIC’s by-laws provides:

27 “[t]he Vice President or Vice Presidents, at the request of the President or in his absence
or during his inability to act, shall perform the duties and exercise the functions of the
President and, when so acting, shall have the powers of the President. If there be more
than one Vice President, the Board of Directors may determine which one or more of the
Vice President shall perform any of such duties or exercise any of such functions, or, if

1 such determinations is not made by the Board of Directors, the President may make such
2 determination. Otherwise, any of the Vice President, may perform any of such duties or
3 exercise any of such functions. The Vice President shall have such other duties (JE IX,
4 pgs. 10-11).

5 Article 4.02(a) of the General Corporations Act of Puerto Rico, 14 L.P.R.A. §3562
6 provides:

7 “(a) Every corporation organized in accordance with this subtitle shall have officers with
8 such titles and duties as are provided in the by-laws of the corporation or in a resolution
9 of the board of directors which is not inconsistent with such bylaws, and as may be
10 necessary to allow the corporation to execute instruments and stock certificates in
11 compliance with subsection (a)(2) of § 3503 of this title and § 3591 of this title. One of
12 the officers shall be appointed president, chief executive officer or other analogous title.
13 One of the officers shall record all of the minutes of all meetings of the stockholders of
14 the corporation and of the board of directors in a book to be kept for said purposes. An
15 officer may simultaneously hold one (1) or more of the offices established, unless the
16 certificate of incorporation or the bylaws provide otherwise. To secure the performance
17 of his/her duties, the board of directors may require any officer to post a bond, in the
18 amount and with such surety or sureties as the board may provide.” 14 L.P.R.A. §3562.

19 According to commentator Díaz Olivo, “[t]he obligations, titles and the faculties that these
20 possess are specified in the corporate statutes or in the resolutions of the Board of Directors”
21 (translation ours¹²). C. Díaz Olivo, Corporaciones: Tratado sobre Derecho Corporativo,
22 Columbia, 2016, pg. 193. Professor Díaz Olivo further explains that, “[b]esides the authority
23 explicitly given (authorized/bestowed) in the statutes or issued by the board through corporate
24 resolutions, the officers possess very little authority that is inherent to his/her position.¹³” Id. at
25 193-194 (translation ours). Díaz Olivo sustains that, “[i]n the case of the president, the authority
26 to act on behalf (in the name) of the corporation cannot be assumed and that the president does
27 not possess inherent powers to purchase or dispose of properties for the corporation because he

12 Commentator Díaz Olivo in the Spanish language: “[l]as obligaciones, los títulos y las facultades que estos posean se especifican en los estatutos de la corporación o en las resoluciones de la junta de directores.” C. Díaz Olivo, Corporaciones: Tratado sobre Derecho Corporativo, 2016, pg. 193.

13 Commentator Díaz Olivo in the Spanish language: “[a]parte de la autoridad concedida expresamente en los estatutos o por las resoluciones de la junta, los oficiales poseen muy poca autoridad inherente a su posición” Id. at 193-194.

1 is not the representative (power of attorney) of the corporation. It has also been resolved that even
2 in the cases in which the president has authority to execute contracts in the ordinary course of
3 business, such authority is limited, and does not allow the president to bind the corporation in
4 transactions that are unusual or extraordinary¹⁴” Id. at 193-194 (translation ours).

5 Professor Díaz Olivo sustains that the determination of whether an officer or an agent of
6 the corporation has the capacity to bind and act in the name of the corporation does not depend
7 on his/her title, but on the authority that was conferred or that was apparently conferred.¹⁵” Id. at
8 195 (translation ours). Díaz Olivo explains that real authority is defined as the one that the
9 principal makes the agent realize (understand) that he/she possess. Id. at 195. Real authority may
10 be express or implicit. Id. The express real authority is the one that is conferred in the statutes or
11 the resolutions of the Board of Directors. The implicit real authority is the one that is inferred
12 through the words and the conduct of the corporation and the agent or officer framed in the context
13 of the relationship between them. Id. The figure of apparent authority has also been recognized
14 and it has the particularity that said figure is only recognized by third parties. Id. at pgs. 195-196
15 (translation ours)¹⁶.

19 ¹⁴ Díaz Olivo in the Spanish language: “Se ha indicado que en el caso del presidente, la autoridad para actuar a nombre
20 de la corporación no puede presumirse y que este no posee poder inherente para comprar o disponer de propiedades
21 para la corporación. Esto es así porque el presidente no es de por sí un mandatario de la corporación. También se ha
22 resuelto, respecto al presidente, que aun cuando su cargo le confiera autoridad para efectuar contratos en el curso
23 ordinario de los negocios, tal autoridad es limitada, y no por esto puede vincular a la corporación en transacciones
24 poco usuales o extraordinarias” Id. at 193-194.

25 ¹⁵ Commentator Díaz Olivo in the Spanish language: “Asimismo, Díaz Olivo sostiene que la determinación de si un
26 oficial o agente de la corporación posee la capacidad para vincular y actuar a nombre de la misma no depende de su
27 título, sino que depende de la autoridad que le fue conferida o que aparentemente se le confirió” Id. at 195.

¹⁶ Professor Díaz Olivo in the Spanish language: “Para determinar si en efecto la persona posee la autoridad para
representar o vincular a la corporación se han desarrollado varias figuras. La primera de ellas es la de la autoridad real.
La autoridad real se define como la que el principal da a entender al agente que posee. Id. at 195. A su vez, la autoridad
real puede ser expresa o implícita. Id. La autoridad real expresa es la que se confiere en los estatutos o en las
resoluciones de la junta de los directores. Id. Por otro lado, la autoridad real implícita es aquella que se infiere de las
palabras y de la conducta de la corporación y del agente o funcionario enmarcado en el contexto de la relación entre
estos. Id. También se ha reconocido la figura de la autoridad aparente, la cual tiene la particularidad de que solo es
reconocida frente a terceras personas.” Id. at 195-196.

1 Pursuant to NALIC's by-laws which are considered express real authority, the Vice-
2 President at the request of the President or in his absence or during his inability to act, shall
3 perform the duties and exercise the functions of the President and, when so acting, shall have the
4 powers of the President which include signing and executing contracts in the name of the
5 Corporation. The court finds that Multinational's allegations lack factual and legal foundation as
6 it failed to present evidence and legal arguments that supported its position. Thus, based on the
7 analysis herein, the court finds that pursuant to NALIC's by-laws the vice-president had the
8 express real authority to execute contracts in the name of the corporation. NALIC also failed to
9 establish the reason(s) or particular by-laws that established that an intercompany service
10 agreement had to be approved by the Board of Directors.
11

12 Lastly, Multinational argues that the Services Agreement did not have the authorization
13 from the Office of the Insurance Commissioner and that since May 2011 there was an Order to
14 Safeguard the assets of NALIC, thus the December 2011 monthly fee payment required the
15 authorization of the OCS because any disbursement had to be approved by the OCS. On May 17,
16 2011, the Office of the Insurance Commissioner issued an order to NALIC prohibiting the sale,
17 liquidation, transfers of assets, exchanges, or the disposal of its assets in any other manner,
18 without the prior authorization of the Office of the Insurance Commissioner (**JE VIII**).
19

20 The court notes that the notes to NALIC's amended financial statements for the year ended
21 December 31, 2010 disclose the following regarding the Order to Safeguard Assets, "On May 17,
22 2011 OCS issued the Company an order to safeguard assets ("NALIC Order") as a cautionary
23 measure to protect the Company's assets. The NALIC Order did not impose business or product
24 restrictions but required the company to obtain pre-approvals from the OCS for the sale,
25 liquidation, transfer, exchange or any type of disposition of assets" (R-14, 2.V., pg. 19.7). The
26
27

1 notes to the financial statements also disclosed that, “[o]n November 14, 2011 the OCS removed
2 the order to safeguard assets imposed to the Company in May 2011” (R-14, 2.VI, pg. 19.7).

3 The court finds that the Order is to safeguard NALIC’s assets and therefore prohibits
4 NALIC from disposing of its assets pursuant to certain business transactions with legal
5 implications, but there is no prohibition regarding NALIC’s day-to-day payment of its monthly
6 operating expenses such as the service contract it had with NAPRO in which it paid \$115,000
7 monthly. Consequently, the court concludes that disbursements regarding monthly operating
8 expenses, such as the monthly service fee of \$115,000.00 did not require prior authorization from
9 the OCS.
10

11 For the reasons explained herein, the court determines that the Service Agreement was a
12 valid contract as of December 2011 and that Multinational breached the same for failure to make
13 the December 2011 fixed fee payment.

14 The second legal issue before the court is whether Multinational’s setoff defense pursuant
15 to 11 U.S.C. §553 and Articles 1110 and 1149 of the Puerto Rico Civil Code, 31 L.P.R.A. §§
16 3151 & 3221 is valid.
17

18 *The right of setoff pursuant to 11 U.S.C. §553*

19 The right of setoff is a right of equitable origin that “allows entities that owe each other
20 money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making
21 A pay B when B owes A” Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18, 116 S. Ct. 286,
22 289, 133 L. Ed. 2d 258, 262 (1995) (quoting Studley v. Boylston Nat. Bank, 229 U.S. 523, 528,
23 57 L. Ed. 1313, 33 S. Ct. 806 (1913)). Even though the right of setoff is equitable in origin, the
24 Bankruptcy Code provides no general equitable mechanism for disallowing setoff rights that are
25 preserved by section 553. “Consistent with the text of section 553, the best statement of modern
26 law and practice is that, if the relevant claim and debt constitute mutual obligations within the
27 meaning of section 553, a right of setoff should be recognized in bankruptcy unless the right is

1 invalid in the first instance under applicable nonbankruptcy law, or unless it is otherwise
2 proscribed by some express provision of the Code. There remains no general equitable power to
3 disallow a valid right of setoff preserved under section 553.” Richard Levin & Henry J. Sommer,
4 5 Collier on Bankruptcy ¶553.02[3] (16th ed. 2020).

5 “In general, Section 553¹⁷(a) recognizes and preserves a right of setoff where four
6 conditions exist: (1) the creditor holds a ‘claim’ against the debtor that arose before the
7 commencement of the case; (2) the creditor owes a ‘debt’ to the debtor that also arose before the
8 commencement of the case; (3) the claim and debt are ‘mutual’; and (4) the claim and debt are
9 each valid and enforceable.” Richard Levin & Henry J. Sommer, 5 Collier on Bankruptcy
10 ¶553.01[1] (16th ed. 2020). It is important to note that section 553 does not create setoff rights, it
11 preserves those that already exist under applicable law and the requirements of section 553 must
12 be satisfied. Id at ¶553.01[2]. The party asserting setoff has the burden of proof. See Pester
13 Refining Co. v. Mapco Gas Products, Inc. (In re Pester Refining Co.), 845 F. 2d 1476, 1486 (8th
14 Cir. 1988).

15
16
17
18
19
20 ¹⁷ 11 U.S.C. §553(a) provides:

21 “(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not
22 affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before
23 the commencement of the case under this title against a claim of such creditor against the debtor that arose
24 before the commencement of the case, except to the extent that—

- 25 (1) the claim of such creditor against the debtor is disallowed;
- 26 (2) such claim was transferred, by an entity other than the debtor, to such creditor—
 - 27 (A) after the commencement of the case; or
 - (B) (i) after 90 days before the date of the filing of the petition; and
(ii) while the debtor was insolvent (except for a setoff of a kind described in section
362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561 or
- (3) The debt owed to the debtor by such creditor was incurred by such creditor—
 - (A) After 90 days before the date of the filing of the petition;
 - (B) while the debtor was insolvent; and
 - (C) for the purpose of obtaining a right of setoff against the debtor (except for a setoff of
a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556,
559, 560, or 561.” 11 U.S.C. §553(a).

Article 1110 of the PR Civil Code provides: “[o]bligations are extinguished by: [t]heir payment or fulfilment; by the loss of the thing due; by the remission of the debt; by the merging of the rights of the creditor and debtor; by compensation and by novation.” 31 L.P.R.A. §3151.

Article 1149 of the PR Civil Code provides: “[c]ompensation shall take place when two (2) persons, in their own right, are mutually creditors and debtors of each other.” 31 L.P.R.A. §3221.

Article 1150 of the PR Civil Code provides: In order that compensation may be proper, it is required:

(1) That each of the persons bound should be so principally, and that he be at the same time the principal creditor of the other.

(2) That both debts consist of a sum of money or, when the things due are perishable, that they be of the same kind and also of the same quality, if the latter should have been stipulated.

(3) That both debts are due.

(4) That they be determined and demandable.

(5) That none of them is subject to any retention or suit instituted by a third person, and of which due notice has been given the debtor.” 31 L.P.R.A. §3222.

It is important to note that there are three kinds of compensation: legal, judicial and voluntary. The legal compensation is the one governed by the Civil Code, and it is produced when there is compliance with all the requirements of articles 1149 and 1150 of the PR Civil Code. Furthermore, there is a requirement that there be no legal prohibition to compensation. Walla Corporation v. Banco Comercial de Mayaguez, 114 D.P.R. 216, 1983 PR Sup. Lexis 103 (P.R. 1983).

Multinational’s setoff claim is based on a check dated February 10, 2010 issued by Evertec and payable to National Group in the amount of \$264,309.72 which was deposited in a NAPRO bank account (JE XI). Multinational alleges that Evertec issued the check due to over invoicing to the National Group and that NAPRO had to allocate amongst the different corporations that comprised the National Group the total amount of the check, and that NALIC’s allocation of the

1 Evertec reimbursement was in the amount of \$58,361.83. However, no evidence was admitted by
2 the court as to the NALIC's alleged allocation of the check (\$58,361.83) and that said allocation
3 was accounted as an intercompany receivable by NALIC and an account payable by NAPRO.
4 Thus, Multinational did not satisfy its burden of proof.

5 Multinational also alleges a setoff claim in the amount of \$70,000.00 based on NAPRO's
6 answer to paragraph 13 of Multinational's counter-claim and its answer to interrogatory question
7 nine (9) (Docket No. 216, pgs. 18-19).

8
9 Multinational in its counter-claim alleged the following:

10 "[u]pon information and belief, as part of the relationship the parties had between them,
11 NAPRO was loaned and/or owed money to NA[L]IC and/or Multinational Life Insurance
12 Company totaling an amount not less than \$75,000.00. At this time, NAPRO has, without
13 justification, failed to repay those monies to Multinational Life Insurance Company. Said
14 debt was never condoned by Multinational Life Insurance Company and, thus, the same
15 remains outstanding up to this date" (Docket No. 10, pg. 7).

16 NAPRO's answer to paragraph 13 of the counter-claim was as follows:

17 "Paragraph 13 of the crossclaim is denied as alleged. It is alleged that due to the special
18 relationship between the companies that formed the National Group, of which both
19 National Insurance Company and NAPRO were part of, there is a debt, but the amount is
20 not as alleged" (Docket No. 12, pg. 3).

21 Interrogatory question nine (9) was the following:

22 "With specific reference to your denial of paragraph 13 of the counterclaim, please explain
23 the special relationship that you alleged existed between the companies that formed
24 National Group, how the debt originated, when the debt originated, who supervised or
25 overlooked this accounting exception, allowance or payment, what amount you alleged is
26 supposedly owed" (JE XII, pg. 9)

27 NAPRO's answer to question nine (9) was as follows:

"Companies that formed National Group were mostly founded by the same person, Carlos Benitez Jimenez, as they were needed to provide services for one another. NAPRO does not know when or how the specific debt of \$70,000.00 originated, but it is older than 3 years, and originated before Ancon acquired NALIC's shares owned by National Insurance Company and the rest of NALIC's shares, and changed its name to Multinational Life Insurance Company. The debt was never claimed by NALIC or

1 Multinational Life Insurance Company before NAPRO filed its bankruptcy” (JE XIII, pg. 6).

2 Interrogatory question ten (10) posed by Multinational was as follows:

3 “With specific reference to your denial of paragraph 13 of the counterclaim, please explain
4 who requested the loan and/or accounting allowance which is now referred to as the “debt”
5 of paragraph 13, who approved the loan, what were the agreements reached for the
6 payment of said “debt,” and state if there were ever any notes, endorsements and/or
documents drafted with regards to this debt” (JE XII, pg. 9).

7 NAPRO’s answer to question ten (10) was the following:

8 “NAPRO has no recollection of when or how the debt arose. There are no documents to
9 explain the origin of the debt” (JE XIII, pg. 6).

10 NALIC’s financial statements for the year ended December 31, 2010, disclose in line item
11 #23 receivables from parent, various subsidiaries and various affiliates in the amount of
12 \$2,377,667 (JE III). NALIC’s amended financial statements for the year ended December 31,
13 2010 disclose in line item #23 receivables from parent, various subsidiaries and various affiliates
14 in the amount of \$9,643 (R-14, pg. 2). The court did not find an explanation for this marked
15 decrease in the notes to the financial statements nor was it provided by Multinational. However,
16 the court notes that certain assets that are designated as “non-admitted” are excluded from the
17 statutory statement of admitted assets, liabilities, capital and surplus by a charge to surplus. The
18 notes to the financial statements disclose other receivables as a non-admitted asset in the amount
19 of \$3,432,672 (R-14, pg. 19.1). Line item #23 receivables from parent, various subsidiaries and
20 various affiliates is a non-admitted asset. Consequently, Multinational did not prove to the court
21 that its alleged setoff claims remained unpaid and constituted part of NALIC’s receivables as
22 reported in the financial statements.
23
24

25 Based on the analysis discussed herein, the court concludes that Multinational did not
26 satisfy its burden of proof regarding its setoff defense. Therefore, the court concludes that
27 Multinational did not prove that it held a pre-petition claim against the debtor.

Conclusion

In view of the foregoing, this court holds that the contract between NAPRO and Multinational was not validly terminated. The court also finds that Multinational's obligation to pay the December fee was not extinguished by Article 1138 of the PR Civil Code, 31 L.P.R.A. §3193. Therefore, Multinational breached the Service Agreement by not making the December 2011 fixed monthly payment. The court concludes that the evidence presented by the Defendant as to its setoff defense pursuant to 11 U.S.C. §553 and Articles 1110 and 1149 of the PR Civil Code, 31 L.P.R.A. §§ 3151 & 3221 failed to evince that Multinational had a setoff claim. Consequently, Multinational owes NAPRO the monthly flat fee in the amount of \$115,000.00 for the month of December 2011.

Judgment will be entered accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 12th day of March, 2021.


Enrique S. Lamoutte
United States Bankruptcy Judge