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

LEX CLAIMS, LLC, *et al.*, *Plaintiffs*, -v- ALEJANDRO GARCÍA PADILLA, *et al.*, *Defendants*.	Civil No. 16-2374 (FAB)

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S MOTION TO STAY THE ACTION PENDING APPEAL OR IN THE ALTERNATIVE FOR AN EXTENSION OF TIME TO FILE A RESPONSIVE PLEADING

TO THE HONORABLE COURT:

COMES NOW the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), through its undersigned attorneys, and respectfully alleges and prays:

PRELIMINARY STATEMENT

After weeks of negotiations, on March 13, 2017, the Oversight Board certified the Commonwealth's amended fiscal plan, a necessary and important first step towards resolving the immediate and imminent fiscal crisis facing the Commonwealth and its citizens. The Oversight Board has approximately 45 days left before the PROMESA stay will end and, absent a Title III filing, the Commonwealth will then be inundated with creditor lawsuits. The Oversight Board requests that it be given these six weeks to negotiate with the Commonwealth and its creditors and, therefore, asks the Court to stay this action pending the Oversight Board's appeal of the Court's February 17, 2017, Opinion and Order (the "Decision") denying the Oversight Board's and the Commonwealth Defendants' motions to enforce the PROMESA stay or issue a separate litigation stay covering all of Plaintiffs' claims. (Dkt. No. 184.) Concurrently with this motion,

the Oversight Board filed its merits brief and a motion for an expedited briefing schedule and consideration of its appeal with the Court of Appeals.

The Oversight Board deserves every chance to see if it can fulfill its mandate before the expiration of the PROMESA stay. As Congress found and as the Court has observed, allowing creditor lawsuits to proceed will undermine PROMESA by forcing the Oversight Board and the Commonwealth to concentrate on costly creditor lawsuits instead of on negotiations with those same creditors. The Oversight Board has strong arguments on appeal that this litigation should have been stayed in its entirety pursuant to Section 405(b) of PROMESA and it should be given the opportunity to pursue those arguments without this litigation hanging over its head.

On the other hand, the Plaintiffs will suffer no harm if this litigation is stayed pending appeal. For instance, although a portion of the sales and use tax revenues to which the Plaintiffs claim priority will have gone to other uses (*i.e.*, other than debt service) while the stay is in place, as they have since 2006 when this revenue stream was first transferred to COFINA, the sales and use tax revenues are perpetual and will remain available even if efforts to negotiate a consensual fiscal plan fail and the Plaintiffs are ultimately able to establish their priority claims. Plaintiffs' damages derive from the delay in payment, not from the elimination of the source of payment.

In sum, the pendency of the appeal, the absence of any prejudice or harm to Plaintiffs, the compelling public interest, and the balance of the equities favor the imposition of a stay on all further proceedings in this action pending appeal. Alternatively, the Oversight Board requests that the Court extend the Oversight Board's current litigation deadlines from March 20, 2017, to May 19, 2017. Such an extension would serve the public interest underlying PROMESA and its automatic stay provisions and prevent the unnecessary expenditure of

resources on the part of both the Court and the parties to this action pending a decision by the Court of Appeals.

BACKGROUND

Plaintiffs originally asserted a single substantive cause of action, alleging a breach of Section 204(c)(3) of PROMESA, which prohibits the Commonwealth from enacting certain laws prior to the full appointment of the Oversight Board, and Section 207 of PROMESA, which prohibits the Commonwealth from issuing, guaranteeing, repurchasing, exchanging, modifying, or redeeming, debt without the Oversight Board's consent.[1] On September 2, 2016, the Court held that Section 405(b)(1) of PROMESA did not stay prosecution of the amended complaint because (1) "Plaintiffs could not have commenced [the] lawsuit before PROMESA's enactment because their claims are to enforce provisions of PROMESA by challenging conduct that occurred after PROMESA's enactment," and (2) "[P]laintiffs do not seek to recover a right to payment that arose before PROMESA's enactment." (Dkt. No. 32 at 2–3.)

Plaintiffs later moved for leave to file a second amended complaint that asserted 11 new causes of action and named four new defendants (the "Second Amended Complaint"). Plaintiffs conceded that nine of the 13 causes of action were stayed by PROMESA, but sought to pursue their other four causes of action which – according to Plaintiffs – were not subject to the PROMESA stay. The Commonwealth Defendants objected to this piecemeal approach to the litigation and moved to stay the entire action, arguing that all claims were stayed by Section 405(b) of PROMESA and, in the event the Court held they were not, that the Court

[1] The original complaint only asserted a claim under Section 204(c)(3) of PROMESA. In their first amended complaint, Plaintiffs added a claim under Section 207 of PROMESA. Both complaints also asserted an alternative cause of action seeking relief from the automatic stay in the event the Court held that the action was stayed under Section 405(b) of PROMESA.

should nonetheless exercise its discretion to stay the entire action.[2] The Oversight Board intervened on behalf of the Commonwealth Defendants and separately moved for a stay of the entire action so that the Oversight Board could focus on the tasks it is required by PROMESA to perform – to negotiate and certify fiscal plans that restructure the Commonwealth's crushing debt and to take steps to ensure the Commonwealth's reentry into capital markets.

On February 17, 2017, the Court issued its Decision granting the Oversight Board leave to intervene in this action, but denying the motions of the Commonwealth Defendants, the COFINA Defendants, and the Oversight Board to stay the action. (Dkt. No. 184.) The Court also entered a separate order directing the Oversight Board to file a pleading setting out the "claims or defenses for which intervention is sought" by March 20, 2017, and directing that "[a]ll parties may file any motion they may deem appropriate to file, including any dispositive motion, by that date." (Dkt. No. 185.)

On March 3, 2017, the Oversight Board timely filed its notice of appeal of the Court's denial of the motions to stay the action. (Dkt. No. 193.) On March 15, 2017, the Oversight Board filed its merits brief and a separate motion requesting an expedited briefing schedule and consideration of its appeal by the Court of Appeals. A copy of the Oversight Board's merits brief is attached as Exhibit A.

[2] For purposes of this Motion, the Oversight Board refers to the Commonwealth, the Governor of the Commonwealth, the Secretary of the Treasury of the Commonwealth, and the Director of the Office of Management and Budget of the Commonwealth collectively as the "Commonwealth Defendants." The Puerto Rico Sales Tax Financing Corporation ("COFINA"), the Executive Director of COFINA, and the Bank of New York Mellon are referred to collectively as the "COFINA Defendants."

ARGUMENT

I. THE COURT SHOULD STAY ENFORCEMENT OF ITS DECISION PENDING THE OVERSIGHT BOARD'S APPEAL

In deciding whether to grant a stay pending appeal, courts apply the traditional four-part test applicable to a preliminary injunction: (1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As the Supreme Court has observed, the first two factors "are the most critical." *Id.*; *see also Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002) (per curiam) (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)). Thus, "[w]hat matters . . . is not the raw amount of irreparable harm [a] party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits . . . ." *Elias v. Sumski (In re Elias)*, 182 Fed. Appx. 3, 4 (1st Cir. 2006) (citations omitted). The circumstances of this case demonstrate that a stay pending appeal is warranted.

A. The Oversight Board Has a Strong Chance of Succeeding on Its Appeal

In its Decision denying the motions to stay this action, the Court properly recognized that, in analyzing whether Plaintiffs' first, second, third and twelfth causes of action (the "PROMESA Claims") should be stayed, the Court should look to how other courts have interpreted the virtually identical automatic stay provisions of Section 362 of the Bankruptcy Code. In addition, the Court acknowledged that the automatic stay is self-executing upon filing of a petition for bankruptcy and "'is extremely broad in scope,' applying 'to almost any type of formal or informal action taken against the debtor.'" (Dkt. No. 184 at 13 (internal citations omitted).) Despite recognizing the breadth of the PROMESA stay provisions, the Court

interpreted them narrowly and applied them piecemeal, allowing what is in essence a collection action to proceed.[3] As a result, the Decision has undermined the PROMESA process.

The Oversight Board believes that the Court erred in allowing Plaintiffs to prosecute the PROMESA Claims and that it has a substantial likelihood of winning on appeal. The Oversight Board's arguments are more fully set forth in the Oversight Board's merits brief. They are summarized here for the Court's convenience.

First, although Plaintiffs concede that the vast majority of the claims in the Second Amended Complaint could have been brought before the enactment of PROMESA and are, therefore, stayed, the Court incorrectly held that Section 405(b) of PROMESA applied to individual claims instead of to the entirety of the "action or proceeding." (Dkt. No. 184 at 14–15.) Plaintiffs' proposed piecemeal resolution of the claims in this action is contrary to both the letter of PROMESA (it applies to an entire "action or proceeding") and the spirit of PROMESA (Congress intended that the Commonwealth be given a breathing spell to concentrate on negotiations, not costly creditor lawsuits). *See* 48 U.S.C. § 2194(b)(1), (m), (n)(2).

Second, the Court incorrectly held that Section 405(b)(1) of PROMESA does not stay Plaintiffs' second cause of action. That cause of action, although ostensibly challenging Executive Order 30-2016, is premised on the alleged unlawfulness (*i.e.*, unconstitutionality) of the COFINA enabling act. It has nothing to do with PROMESA, and could have been brought long before enactment of PROMESA.

[3] The Oversight Board also questions whether the Court continues to have jurisdiction over this case while the Oversight Board's appeal is pending. As the Supreme Court has recognized, "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); *United States v. George*, 841 F.3d 55, 71 (1st Cir. 2016). Here, it cannot be denied that continued prosecution of this case would involve aspects of this case that are implicated in the Oversight Board's appeal (*e.g.*, the applicability of the PROMESA stay to the very claims being pursued), and under these circumstances, the upcoming March 20, 2017, pleading deadline should be deemed moot.

Third, the Court incorrectly held that Plaintiffs assertion of the PROMESA Claims, which seek injunctive and declaratory relief that would have the effect of freezing Government assets, garnishing them from third parties, and attaching or segregating them for the eventual payment of Plaintiffs' bonds, is not an "act to collect" that is stayed pursuant to Section 405(b)(6) of PROMESA. Although the PROMESA Claims if granted would not result in the immediate repayment of their outstanding bonds, these acts are the first step in collecting on the money judgments that Plaintiffs will eventually seek. In the bankruptcy context, "[e]ventual, or even planned, collection of a debt may constitute a violation of § 362(a)(6)." *Trevino v. HSBC Mortg. Servs., Inc. (In re Trevino)*, 535 B.R. 110, 149 (Bankr. S.D. Tex. 2015).

Fourth, the Court incorrectly held that assertion of the PROMESA Claims is not an act to exercise control over property of the Government of Puerto Rico that is stayed by Section 405(b)(3) of PROMESA. Section 405(b)(3) of PROMESA, like the other stay sections, is broad, and applies to requests for declaratory and injunctive relief insofar as they prevent the Commonwealth from using its assets or otherwise have an effect on Commonwealth property. There can be no question that the relief requested by Plaintiffs would interfere with the Commonwealth's ability to use its assets.

Fifth, the Court incorrectly held that Plaintiffs' assertion of the PROMESA Claims is not an act to create, perfect, or enforce a lien against property of the Government of Puerto Rico that is stayed by Sections 405(b)(4) and 405(b)(5) of PROMESA. Plaintiffs are either asking the Court to declare their alleged lien on SUT revenue superior to the COFINA bondholders' lien and to enter an injunction freezing, garnishing, attaching, or segregating funds for Plaintiffs' benefit (acts to enforce a lien), or seeking a *de facto* judicial attachment of Commonwealth or COFINA property (an act to create or perfect a lien). In either case, the

requested relief falls squarely within the conduct prohibited by Sections 405(b)(4) and 405(b)(5) of PROMESA.

Finally, the Court incorrectly held that PROMESA foreclosed the Court's ability to stay any claims that it found were not specifically covered by Sections 405(b)(1)–(b)(6) of PROMESA. This holding is inconsistent with well-established case law, which authorizes a bankruptcy court to extend the automatic stay in appropriate circumstances to claims and parties that would otherwise be outside of the purview of the bankruptcy stay, and contradicted by PROMESA itself, which expressly authorizes the Oversight Board to intervene in an action and seek a stay of litigation. The Court was required to balance the equities and determine whether a stay was appropriate, but failed to do so.

B. Allowing this Case to Proceed Will Interfere with the PROMESA Process

The unprecedented fiscal crisis facing the Commonwealth and Congress' clear intention in staying litigation against the Commonwealth, its instrumentalities, and its public officials for a short period of time to allow for a "breathing spell" are well documented and not in dispute. *See* 48 U.S.C. § 2194(m), (n). Ongoing litigation has been and continues to be a major distraction that interferes with the Oversight Board's congressional mandate to oversee a "fair and orderly" restructuring of the Commonwealth's debt. That is especially so now that the negotiation process has reached a critical point. On March 13, 2017, the Oversight Board certified the Commonwealth's amended fiscal plan, and the parties now need to focus their energies on negotiations against the backdrop of that fiscal plan. These last few weeks of the PROMESA stay will be extremely intense and pressing times for the parties. The Oversight Board believes that its and the Commonwealth's limited resources are better spent working together and negotiating with creditors rather than defending this case during the last 45 days of the PROMESA stay. Moreover, allowing this litigation to proceed could moot the Oversight

Board's appeal. The Oversight Board deserves to have the chance to present its arguments to the Court of Appeals, especially since Plaintiffs' first cause of action, which seeks to invalidate Executive Order 30-2016 pursuant to Sections 204(c)(3) and 207 of PROMESA, directly implicates the Oversight Board's authority to review and repeal or approve Commonwealth legislation and debt modifications.

C. <u>Plaintiffs Will Not Be Harmed by a Stay</u>

In contrast to the manifest harm that continued litigation will have on the PROMESA process, Plaintiffs would not suffer irreparable harm or prejudice if the action were stayed pending appeal. *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989) ("[I]f money damages will fully alleviate harm, then the harm cannot be said to be irreparable."). There are multiple provisions in PROMESA that protect the Plaintiffs' interests during the duration of any stay. *See* 48 U.S.C § 2194(k), (l), 2195(a); *Brigade Leveraged Capital Structures Fund Ltd. v. Garcia-Padilla*, No. 16- 1610 (FAB), 2016 U.S. Dist. LEXIS 158046, at *49 (D.P.R. Nov. 15, 2016) ("Any financial loss sustained over the next few months could also be handled through certain remedial provisions found within PROMESA, provisions that were built into the statute precisely to offer greater 'protection of creditors' from the unlawful transfer of their interests.").

Currently-due payments will not be made now, but the SUT revenue stream (allegedly $51 billion over the next 40 years (*see* Dkt. No. 127 at 15)) that Plaintiffs claim secures their general obligation bonds will still be available for future payments under potential future modifications to the certified fiscal plan or in future proceedings under PROMESA. *See Peaje Invs. LLC v. Garcia-Padilla*, 845 F.3d 505, 512 (1st Cir. 2017) (affirming this Court's finding that the existence of a constantly replenishing revenue stream constitutes "adequate protection"); *Brigade Leveraged Capital Structures Fund Ltd*, at *48–49 (noting that any

"financial harm could effectively be dealt with through the voluntary negotiations process fostered by PROMESA and supervised by the Oversight board, or through future title III restructuring proceedings.").

D. Staying the Litigation Is in the Public Interest

As discussed above, the Oversight Board needs these last 45 days to focus on negotiations with the Commonwealth and its creditors against the backdrop of the Commonwealth's recently–approved fiscal plan. Staying this litigation pending the Oversight Board's appeal is in the public interest because it puts the Oversight Board in the best position to make progress towards restructuring Puerto Rico's outstanding public debt and facilitating the Commonwealth's reentry into the public capital marketplace and outweighs any potential monetary harm the Plaintiffs may suffer as a result of a stay. *See Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936) ("Especially in cases of extraordinary public moment, the individual may be required to submit to [a limited] delay . . . if the public welfare or convenience will thereby be promoted."). As the Court recognized in the *Brigade* case, allowing Plaintiffs to pursue their claims now "would, in essence, permit them to 'jump to the front of the line' to protect their own interests before other creditors have had the opportunity to defend theirs," would "work against a comprehensive restructuring that is fair and equitable to all stakeholders," and would "frustrate Congress' intent in designing PROMESA." *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *55, *57 n.11.

II. ALTERNATIVELY, THE COURT SHOULD EXTEND THE OVERSIGHT BOARD'S DEADLINE TO FILE A RESPONSIVE PLEADING

It is beyond cavil that the Court has the power to control its own docket and to set deadlines and grant extension of those deadlines. *See, e.g.*, *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1154 (1st Cir. 1992). Moreover, Federal Rule of Civil Procedure 6 authorizes a court to extend

any party's time to file a pleading for "good cause." Fed. R. Civ. P. 6(b)(1)(A). Courts have explained that "good cause" is not difficult to show, and extensions of time should generally be granted absent bad faith on the part of the requesting party or prejudice to the adverse party. *See, e.g.*, *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259–60 (9th Cir. 2010). The Oversight Board can easily meet this standard.

As discussed more fully above, the Oversight Board believes that the last 45 days of the PROMESA stay will be critical, and defending ongoing litigation will interfere with the Oversight Board's ability to negotiate with the Commonwealth and its creditors. No party to this litigation will be prejudiced by extending the Oversight Board's March 20, 2017, deadlines to May 19, 2017, and extending the deadlines will allow the parties to litigate all of the claims at the same time, which will conserve the parties' and the Court's resources. Accordingly, if the Court does not stay the litigation, the Oversight Board believes that good cause exists to extend the Oversight Board's time to file a responsive pleading to May 19, 2017.

CONCLUSION

For the foregoing reasons, the Oversight Board requests that the Court enter an order (i) staying this action in its entirety pending resolution of the Oversight Board's appeal of the Decision or, in the alternative, extending the Oversight Board's deadline to file a responsive pleading from March 20, 2017, to May 19, 2017, and (ii) granting such other and further relief as the Court deems just and proper.

WE HEREBY CERTIFY that on March 15, 2017, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 15th day of March, 2017.

/s/ Luis F. del Valle-Emmanuelli
LUIS F. DEL VALLE-EMMANUELLI
USDC NO. 209514
P.O. Box 79897
Carolina, Puerto Rico 00984-9897
Tel. 787.977.1932
Fax 787.722.1932
dvelawoffices@gmail.com

Of counsel for
Bufete Adames-Soto
434 Hostos Avenue
San Juan, Puerto Rico 00918
Tel. 787.751.6764/763.0565
Fax 787.763.8260
eadames@adameslaw.com
mrodriguez@adameslaw.com

- and -

/s/ Michael Luskin
Michael Luskin*
Stephan E. Hornung*
LUSKIN, STERN & EISLER LLP
Eleven Times Square
New York, New York 10036
Tel. 212.597.8200
Fax 212.974.3205
luskin@lsellp.com
hornung@lsellp.com
*Admitted *pro hac vice*

Attorneys for the Financial Oversight and Management Board for Puerto Rico

EXHIBIT A

[The Oversight Board's Appellate Brief]

United States Court of Appeals

for the

First Circuit

Case No. 17-1241

LEX CLAIMS, LLC, JACANA HOLDINGS, LLC, JACANA HOLDINGS II, LLC, JACANA HOLDINGS III, LLC, JACANA HOLDINGS IV, LLC, JACANA HOLDINGS V, LLC, MPR INVESTORS, LLC, ROLSG, LLC, RRW I LLC, SL PUERTO RICO FUND II, L.P.,

Plaintiffs-Appellees,

– against –

ALEJANDRO GARCIA PADILLA, JUAN C. ZARAGOZA-GOMEZ, LUIS G. CRUZ-BATISTA, THE PUERTO RICO SALES TAX FINANCING CORPORATON, a/k/a Cofina, JUAN VAQUER, BANK OF NEW YORK MELLON CORP., THE COMMONWEALTH OF PUERTO RICO,

Defendants-Appellees,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR INTERVENOR-APPELLANT FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

MICHAEL LUSKIN
STEPHAN HORNUNG
LUSKIN, STERN & EISLER LLP
Eleven Times Square
New York, New York 10036
(212) 597-8200

Attorneys for Intervenor-Appellant Financial Oversight and Management Board

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") states that it is a governmental entity of the Commonwealth of Puerto Rico created under Section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187 ("PROMESA"), 48 U.S.C. § 2121. On August 31, 2016, the President of the United States appointed seven members to serve on the Oversight Board: José B. Carrión III, Andrew G. Biggs, José R. González, Ana J. Matosantos, Carlos M. García, Arthur J. González, and David A. Skeel Jr. Elías Sánchez serves on the Oversight Board *ex officio* pursuant to Section 101(e)(3) of PROMESA, 48 U.S.C. § 2121(e)(3).

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE ISSUES ON APPEAL 5

STATEMENT OF THE CASE 6

A. The Moratorium Act and the Executive Order 6

B. PROMESA and the Automatic Stay 7

C. The Oversight Board 12

D. The Original and Amended Complaints 13

E. Plaintiffs' Motion to Amend Their Complaint and for Partial Relief from the Automatic Stay 16

F. The Second Amended Complaint 18

G. The District Court's Decision 20

STANDARD OF REVIEW 24

SUMMARY OF THE OVERSIGHT BOARD'S ARGUMENT 25

ARGUMENT 28

I. Section 405(b) of PROMESA Should Be Interpreted Broadly in Accordance with Congressional Intent to Advance PROMESA's Stated Objectives 28

II. The District Court Incorrectly Held That the First, Second, Third and Twelfth Causes of Action Were Not Stayed by Section 405(b) of PROMESA 30

A. PROMESA Stays the Entirety of an "Action or Proceeding" 30

TABLE OF CONTENTS
(continued)

Page

B. Plaintiffs' Second Cause of Action Is a 10-year Old Constitutional Claim Unrelated to PROMESA That Could Have Been Brought Prior to Its Enactment 33

C. Plaintiffs' Request to Freeze, Garnish, Attach, and Segregate Government Assets for Their Benefit Is an Act to Collect That Is Stayed by Section 405(b)(6) of PROMESA 37

D. Plaintiffs' Request to Freeze, Garnish, Attach, and Segregate Government Assets Is an Act to Exercise Control Over Government Assets That Is Stayed by Section 405(b)(3) of PROMESA 44

E. Plaintiffs' Requests to Establish the Priority of Their Alleged Lien and to Freeze, Garnish, Attach, and Segregate SUT Revenue Are Acts to Create, Perfect, or Enforce a Lien That Are Stayed by Sections 405(b)(4) and (b)(5) of PROMESA................................ 47

III. The District Court Improperly Denied the Oversight Board's Motion to Stay the Entire Action.. 52

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

Cases

Amplifier Research Corp. v. Hart,
144 B.R. 693 (E.D. Pa. 1992) 46, 47

Arthurs v. Stern,
560 F.2d 477 (1st Cir. 1977) 25

Austin v. Unarco Indus., Inc.,
705 F.2d 1 (1st Cir. 1983) 55

B.F. Goodrich Emps. Fed. Credit Union v. Patterson (In re Patterson),
967 F.2d 505 (11th Cir. 1992) 48, 49

Brigade Leveraged Capital Structures Fund Ltd. v. Garcia-Padilla,
No. 16-1610 (FAB), 2016 U.S. Dist. LEXIS 158046,
(D.P.R. Nov. 15, 2016) 29, 30, 33, 43, 44, 52, 53, 54, 56, 57

Citizens Bank of Md. v. Strumpf,
516 U.S. 16 (1995) 40, 41

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 3

Divane v. A and C Elec. Co., Inc.,
193 B.R. 856 (N.D. Ill. 1996) 39

Eddleman v. U.S. Dep't of Labor,
923 F.2d 782 (10th Cir. 1991) 3

Houston Pipeline Co. LP v. Bank of Am., N.A.,
213 S.W.3d 418 (Tex. Ct. App. 2006) 44, 45, 50

I.C.C. v. Holmes Transp., Inc.,
931 F.2d 984 (1st Cir. 1991) 28

In re Bellman Farms, Inc.,
86 B.R. 1016 (Bankr. D.S.D. 1988) 49

In re Guinn,
102 B.R. 838 (Bankr. N.D. Ala. 1989) 37

In re Holland,
21 B.R. 681 (Bankr. N.D. Ind. 1982) 38

In re Jefferson Cty.,
484 B.R. 427 (Bankr. N.D. Ala. 2012) 45

In re Nat'l Cattle Cong., Inc.,
179 B.R. 588 (Bankr. N.D. Iowa 1995) 45

In re Weidenbenner,
521 B.R. 74 (Bankr. S.D.N.Y. 2014) 40, 44

Jeffries v. Browning (In re Reserves Dev. Corp.),
78 B.R. 951 (W.D. Mo. 1986) 49, 51

JPMorgan Chase Bank, N.A. v. Kingman Holdings, LLC,
No. 5:15-CV-144-DAE, 2015 U.S. Dist. LEXIS 169253
(W.D. Tex. Dec. 17, 2015) 37, 48, 49, 50

Kansas City S. Ry. Co. v. United States,
282 U.S. 760 (1931) 52

K-Mart Corp. v. Oriental Plaza, Inc.,
875 F.2d 907 (1st Cir. 1989) 54

Knowles v. Bayview Loan Servicing, LLC (In re Knowles),
442 B.R. 150 (B.A.P. 1st Cir. 2011) 41, 42

Landis v. N. Am. Co.,
299 U.S. 248 (1936) 52, 55

Landmark v. Schaefbauer,
41 B.R. 766 (Bankr. D. Minn. 1984) 49

Larami Ltd. v. Yes! Entm't Corp.,
244 B.R. 56 (D.N.J. 2000) 47

Luckerman v. Narragansett Indian Tribe,
787 F.3d 621 (1st Cir. 2015) 3, 4

Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc. (In re Mid-Atl. Handling Sys., LLC), 304 B.R. 111 (Bankr. D.N.J. 2003) 32

Mari. Elec. Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1991) 31, 32

Marquis v. F.D.I.C., 965 F.2d 1148 (1st Cir. 1992)....................52

Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995)....................55

Morgan Guar. Trust Co. of N.Y. v. Am. Sav. & Loan Ass'n., 804 F.2d 1487 (9th Cir. 1986) 42

Negron-Almeda v. Santiago, 528 F.3d 15 (1st Cir. 2008)....................25

Palmdale Hills Prop., LLC v. Lehman Commer. Paper, Inc. (In re Palmdale Hills Prop., LLC), 654 F.3d 868 (9th Cir. 2011) 24, 25

Peaje Invs. LLC v. García-Padilla, 845 F.3d 505 (1st Cir. 2017)....................33

Pereira v. 397 Realty LLC (In re Heavey), 549 B.R. 1 (Bankr. E.D.N.Y. 2016) 48

Pinpoint IT Servs., LLC v. Rivera (In re Atlas IT Exp. Corp.), 761 F.3d 177 (1st Cir. 2014)....................3

Rosas v. Monroe Cty. Tax Claim Bureau (In re Rosas), 323 B.R. 893 (Bankr. M.D. Pa. 2004) 37, 38

Southside Leasing Co. v. Merchs. Plaza, Inc. (In re Merchs. Plaza, Inc.), 35 B.R. 888 (Bankr. E.D. Tenn. 1983) 45

Thompson v. GMAC, LLC, 566 F.3d 699 (7th Cir. 2009) 44, 45

Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331 (1st Cir. 2008)....................25

Trevino v. HSBC Mortg. Servs., Inc. (In re Trevino),
535 B.R. 110 (Bankr. S.D. Tex. 2015) 39

United States v. Gold (In re Avis),
178 F.3d 718 (4th Cir. 1999) 49

United States v. Inslaw, Inc.,
932 F.2d 1467 (D.C. Cir. 1991)..47

United States v. Ron Pair Enters., Inc.,
489 U.S. 235 (1989).. 30, 31

Watman v. Groman (In re Watman),
458 F.3d 26 (1st Cir. 2006)..24

Constitutional Provisions and Statutes

P.R. Const. art. VI, § 8 .... 34, 35

13 L.P.R.A. § 11a(b) 34

13 L.P.R.A. § 12 34

11 U.S.C. § 362.. 21, 25, 29, 48

11 U.S.C. § 362(a) 29, 31, 32, 42, 47

11 U.S.C. § 362(a)(3).. 44, 45

11 U.S.C. § 362(a)(4).. 48, 49

11 U.S.C. § 362(a)(5)..49

11 U.S.C. § 362(a)(6).. 22, 37, 39, 40, 41, 42

11 U.S.C. § 362(a)(7)..40

28 U.S.C. § 1291 3

28 U.S.C. § 1331 2

42 U.S.C. § 1983 .... 19, 39

48 U.S.C. § 2104(7) 8

48 U.S.C. § 2104(11) 46

48 U.S.C. § 2104(18)..8

48 U.S.C. § 2121(a) 8

48 U.S.C. § 2121(b)(1)....................8
48 U.S.C. § 2121(d)(1)(A)....................8, 9
48 U.S.C. § 2121(e)(1)(A)....................8
48 U.S.C. § 2126(a)....................2
48 U.S.C. § 2126(b)....................3
48 U.S.C. § 2141....................8, 12
48 U.S.C. § 2142....................8, 12
48 U.S.C. § 2143....................8
48 U.S.C. § 2144....................8
48 U.S.C. § 2144(c)(3)....................53
48 U.S.C. § 2144(c)(3)(A)....................14
48 U.S.C. § 2147....................8, 14
48 U.S.C. § 2151....................8
48 U.S.C. § 2152(a)....................8, 9
48 U.S.C. § 2152(b)....................9
48 U.S.C. § 2152(b)(1)....................56
48 U.S.C. § 2161....................8
48 U.S.C. § 2164....................12
48 U.S.C. § 2177....................8
48 U.S.C. § 2194(a)(1).................... 10, 11
48 U.S.C. § 2194(a)(2)(B).................... 10, 11
48 U.S.C. § 2194(b)(1).................... 9, 30, 33
48 U.S.C. § 2194(b)(3)....................9, 44
48 U.S.C. § 2194(b)(4)....................9, 47
48 U.S.C. § 2194(b)(5)....................47
48 U.S.C. § 2194(b)(6)....................9, 37

48 U.S.C. § 2194(d) 11

48 U.S.C. § 2194(e)(1) 2, 3

48 U.S.C. § 2194(i)(1) 9

48 U.S.C. § 2194(k) 54

48 U.S.C. § 2194(l) 54

48 U.S.C. § 2194(m) 33, 53

48 U.S.C. § 2194(m)(4) 7, 8, 30

48 U.S.C. § 2194(m)(5) 10

48 U.S.C. § 2194(m)(5)(A) 10

48 U.S.C. § 2194(n) 53

48 U.S.C. § 2194(n)(1) 33

48 U.S.C. § 2194(n)(2) 10, 30, 33

48 U.S.C. § 2195(a) 54

Puerto Rico Emergency Moratorium and Financial Rehabilitation Act,
Public Act 21-2016 § 103(l) 7

Puerto Rico Emergency Moratorium and Financial Rehabilitation Act,
Public Act 21-2016 § 103(m) 7

Puerto Rico Emergency Moratorium and Financial Rehabilitation Act,
Public Act 21-2016 § 201(a) 7

Puerto Rico Emergency Moratorium and Financial Rehabilitation Act,
Public Act 21-2016 § 201(b) 7

Puerto Rico Emergency Moratorium and Financial Rehabilitation Act,
Public Act 21-2016 § 201(d)(ii) 7

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 106(a),
130 Stat 549 (2016) 2

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 106(b),
130 Stat 549 (2016)....................3

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 204(c)(3),
130 Stat 549 (2016).................... 13, 14, 15, 18, 19

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 204(c)(3)(A),
130 Stat 549 (2016).................... 14, 53

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 204(c)(3)(B),
130 Stat 549 (2016)....................53

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 207,
130 Stat 549 (2016).................... 14, 15, 18, 19

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 212,
130 Stat 549 (2016)....................56

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 212(a),
130 Stat 549 (2016)....................8

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 303(1),
130 Stat 549 (2016).................... 18, 19, 43

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 303(3),
130 Stat 549 (2016).................... 5, 18, 19, 33, 35, 43

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(a)(1),
130 Stat 549 (2016)....................10

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(a)(2)(B),
130 Stat 549 (2016)..10

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b),
130 Stat 549 (2016).. *passim*

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b)(1),
130 Stat 549 (2016)... 5, 16, 21, 22, 26, 28, 30, 33, 34

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b)(3),
130 Stat 549 (2016).. 6, 23, 27, 28, 44, 46

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b)(4),
130 Stat 549 (2016)... 6, 23, 27, 28, 47, 48, 49, 51

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b)(5),
130 Stat 549 (2016)... 6, 23, 27, 28, 47, 48, 49, 51

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(b)(6),
130 Stat 549 (2016)... 5, 22, 23, 27, 28, 37, 38, 39, 40, 42

Puerto Rico Oversight, Management, and Economic Stability Act,
Pub. L. No. 114-187, § 405(e)(1),
130 Stat 549 (2016)..2

Other Authorities

H.R. REP. NO. 114-602 (2016)..9, 10

PRELIMINARY STATEMENT

This appeal arises out of the District Court's Opinion and Order (the "Decision") denying the motions of the Commonwealth Defendants[1] and the Oversight Board to stay this action pursuant to Section 405(b) of PROMESA and the District Court's inherent power to control its own docket. The District Court improperly ruled that the PROMESA stay applied piecemeal – to some but not all of the claims in the complaint – rather than to the entire action. It also improperly analyzed the four claims it ruled are not stayed by PROMESA and failed to characterize them for what they are: efforts by Plaintiffs to enforce their rights and to ensure payment on the general obligation bonds they hold at some time in the future. The declaratory and injunctive relief Plaintiffs seek is akin to prejudgment relief that any plaintiff would seek in a collection action when acting aggressively to enforce its rights under a contract or financial instrument, and had the District Court properly seen Plaintiffs' claims for what they are, it would have had no choice but to rule that the PROMESA stay applies and that all of Plaintiffs' claims are stayed. This was clear error of law. In addition, the District Court abused its

[1] For purposes of this appeal, the Oversight Board refers to the Commonwealth, the Governor of the Commonwealth, the Secretary of the Treasury of the Commonwealth, and the Director of the Office of Management and Budget of the Commonwealth collectively as the "Commonwealth Defendants." The Puerto Rico Sales Tax Financing Corporation ("COFINA"), the Executive Director of COFINA, and the Bank of New York Mellon Corp. are referred to collectively as the "COFINA Defendants."

discretion by failing to grant the Oversight Board's separate motion for a stay of the entire action – a stay wholly separate from the automatic stay under PROMESA but nevertheless a stay that was well within the District Court's discretion to grant pursuant to its inherent power.

As a result of the District Court's improper ruling, the Oversight Board and other parties face litigation deadlines to file pleadings and dispositive motions (the current deadline is March 20, 2017), and are engaged in precisely the kind of activity that is supposed to be on hold during the pendency of the PROMESA stay. Instead of being in a quiet period for negotiation of the fiscal plans required to resolve Puerto Rico's financial crisis, which is what Congress intended when it enacted PROMESA, the parties will have to battle in public. This will not create consensus; it will destroy it. Given the short period of time left for the parties to reach a consensual plan (the PROMESA stay currently expires on May 1, 2017), there would be no prejudice to anyone if the PROMESA stay were properly applied and this action was stayed in its entirety. It is hard to imagine circumstances where the public interest is so clear and the decision below is so wrong.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Sections 106(a) and 405(e)(1) of PROMESA. 48 U.S.C. §§ 2126(a),

2194(e)(1). This Court has jurisdiction under 28 U.S.C. § 1291 and Section 106(b) of PROMESA. 48 U.S.C. § 2126(b).

In the bankruptcy context, an order granting relief from the automatic stay is an immediately appealable final order. *See Pinpoint IT Servs., LLC v. Rivera (In re Atlas IT Exp. Corp.)*, 761 F.3d 177, 182 (1st Cir. 2014) ("Orders granting stay relief are orders 'disposing of a discrete dispute' and so are final and appealable as of right — on this point every circuit (including this one) that has considered the question agrees."). The District Court's decision here – finding that the automatic stay was inapplicable – had the exact same effect as an order lifting the stay, and therefore is final for purposes of appellate jurisdiction. *See Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 785 (10th Cir. 1991) (order determining the applicability of the bankruptcy stay is an appealable final order).

Alternatively, the District Court's Decision finding that the action was not stayed by Section 405(b) of PROMESA is appealable pursuant to the collateral order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–47 (1949). The collateral order doctrine allows the immediate appeal of an order that, while not technically final, nonetheless ought to be considered by the appellate court. To be considered a collateral order, the order must involve:

> (1) an issue essentially unrelated to the merits of the main dispute, capable of review without disrupting the main trial; (2) a complete resolution of the issue, not one that is 'unfinished' or 'inconclusive'; (3) a right incapable of vindication on appeal from final judgment;

> and (4) an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion.

Luckerman v. Narragansett Indian Tribe, 787 F.3d 621, 623 (1st Cir. 2015). The District Court's Decision easily meets this standard.

First, there is no question that the District Court's Decision conclusively determined whether the PROMESA stay applied to Plaintiffs' claims. Second, the applicability of the stay is important and wholly separate from the merits of Plaintiffs' underlying challenges to the COFINA enabling act, the Executive Orders, and the Moratorium Act (as defined below), and it can be reviewed without disrupting or unduly delaying an eventual trial on the merits. Third, because the PROMESA stay will expire by its terms in less than two months, the District Court's decision would be unreviewable on an appeal from a final judgment. Fourth, the interpretation of the extent of the PROMESA stay is an important legal question, and not merely a question of the trial court's proper exercise of discretion. PROMESA was enacted under unique circumstances to address the imminent fiscal crisis facing the Commonwealth and its citizens. It is a one-of–a-kind statute, and without appellate review now, the scope of the PROMESA stay may never be reviewed.

On March 3, 2017, the Oversight Board timely filed its notice of appeal. A481–82.[2]

STATEMENT OF THE ISSUES ON APPEAL

This appeal presents six issues:

1. Where eight of 13 causes of action are admittedly stayed pursuant to Section 405(b) of PROMESA, did the District Court err in holding that the remaining four could proceed and that the entire action was not stayed pursuant to Section 405(b)(1) of PROMESA?

2. Where Plaintiffs' second cause of action alleging preemption pursuant to Section 303(3) of PROMESA is premised on the unconstitutionality of the COFINA enabling act passed in 2006, did the District Court err in holding that Plaintiffs' second cause of action could not have been brought prior to PROMESA's enactment?

3. Did the District Court err in holding that Plaintiffs' request to freeze Commonwealth assets, garnish them from third parties, and attach or segregate them for the eventual payment of Plaintiffs' bonds is not an act to collect that is stayed pursuant to Section 405(b)(6) of PROMESA?

4. Did the District Court err in holding that Plaintiffs' request to freeze Commonwealth assets, garnish them from third parties, and attach or segregate

[2] All citations to "A__" are to the Oversight Board's Appendix.

them for the eventual payment of Plaintiffs' bonds is not an act to obtain possession of property or exercise control over property of the Government of Puerto Rico that is stayed pursuant to Section 405(b)(3) of PROMESA?

5. Did the District Court err in holding that Plaintiffs' request to freeze Commonwealth assets, garnish them from third parties, and attach or segregate them for the eventual payment of Plaintiffs' bonds is not an act to create, perfect, or enforce a lien that is stayed pursuant to Sections 405(b)(4) and 405(b)(5) of PROMESA?

6. Did the District Court err in holding that the terms of PROMESA prohibited the District Court from exercising its discretion to stay the action in its entirety?

STATEMENT OF THE CASE

A. The Moratorium Act and the Executive Order

On April 6, 2016, the Governor signed Public Act 21-2016, the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (as amended by Public Act 40-2016, the "Moratorium Act"), into law. Among other things, the Moratorium Act:

- Authorizes the Governor to issue executive orders (1) declaring a "state of emergency" with respect to the Commonwealth or its instrumentalities, and (2) suspending payment of principal and interest on

"covered obligations" during any state of emergency through January 31, 2017, extendable to March 31, 2017. Moratorium Act §§ 103(l), (m), 201(a).

- Permits the Governor to (1) "expropriat[e] property or rights in property interests" and (2) suspend or modify any statutory or other obligation (defined as an "enumerated obligation") to transfer money for the payment of, or to secure, any covered obligation, so that instrumentalities subject to the Moratorium Act are able to pay for "essential services." Moratorium Act § 201(b), (d)(ii).

Pursuant to the authority granted to him under the Moratorium Act, the Governor issued several executive orders, among them Executive Order 30-2016 ("Executive Order 30"), which is the one at issue in this case. Pursuant to Executive Order 30, issued on June 30, 2016, the Governor suspended "the Commonwealth's obligation to make payments on any bonds or notes issued or guaranteed by the Commonwealth," other than payments to the Government Development Bank for Puerto Rico (the "GDB"). A121–24.

B. PROMESA and the Automatic Stay

On June 30, 2016, the President of the United States signed PROMESA into law. PROMESA was intended to provide "[a] comprehensive approach to [Puerto Rico's] fiscal, management, and structural problems and adjustments . . . involving

independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." 48 U.S.C. § 2194(m)(4). Specifically, PROMESA established a seven-member Oversight Board that was intended "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a), (b)(1), (e)(1)(A).

PROMESA grants the Oversight Board broad authority over Puerto Rico and its instrumentalities to ensure fiscal responsibility. The Oversight Board is empowered to, among other things, approve territorial and instrumentality fiscal plans and budgets, 48 U.S.C. §§ 2141–42; enforce budget and fiscal plan compliance, 48 U.S.C. §§ 2143–44; approve the territorial government's issuance and guarantee of debts or modifications or similar transactions with respect to its debts, 48 U.S.C. § 2147; analyze pensions, 48 U.S.C. § 2151; and file petitions to adjust debts through procedures similar to chapter 9 of the United States Bankruptcy Code (governing municipal bankruptcies). 48 U.S.C. §§ 2161–77.

In addition, Section 212(a) of PROMESA authorizes the Oversight Board to intervene as of right in any litigation filed against the Government of Puerto Rico or any "covered territorial instrumentality." 48 U.S.C. §§ 2104(7), 2104(18),

2121(d)(1)(A), 2152(a).[3] PROMESA specifically authorizes the Oversight Board to seek injunctive relief in any action in which it intervenes. 48 U.S.C. § 2152(b).

Importantly, Section 405(b) of PROMESA also imposes an automatic stay of certain litigation against the Commonwealth, any instrumentalities, and any elected and appointed officials, directors, officers, or employees acting in their official capacities on behalf of the Government of Puerto Rico. 48 U.S.C. § 2194(b)(1), (i)(1). In particular, PROMESA stays, "with respect to a Liability . . . the commencement or continuation . . . of a judicial . . . action or proceeding against the Government of Puerto Rico [or its instrumentalities] that was or could have been commenced before the enactment of [PROMESA]." 48 U.S.C. § 2194(b)(1). PROMESA also automatically stays the commencement or continuation of a judicial proceeding "to recover a 'Liability Claim' against the Government of Puerto Rico that arose before the enactment of [the] Act." *Id.* The PROMESA stay also prohibits acts "to collect," "to exercise control" over Commonwealth property, and to "create, perfect or enforce" a lien against Commonwealth property. 48 U.S.C. § 2194(b)(3), (4)–(6).

Congress believed that "an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving" the Commonwealth's fiscal

---

[3] The Oversight Board has, so far, designated 63 "covered" instrumentalities.

crisis. 48 U.S.C. § 2194(m)(5). The automatic stay was intended to "allow[] the Oversight Board the opportunity to establish its foundational structure and begin its monumental task of ensuring Puerto Rico regains access to capital markets," H.R. REP. NO. 114-602, at 52 (2016), and to provide the Oversight Board a short period of time "to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation." 48 U.S.C. § 2194(m)(5)(A). The automatic stay was also intended to "allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits." 48 U.S.C. § 2194(n)(2).

Section 405(a)(1) of PROMESA defines a "Liability" as follows:

> The term "Liability" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—
>
> (A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and
>
> (B) the date of issuance or incurrence precedes the date of enactment of this Act.

48 U.S.C. § 2194(a)(1).

Section 405(a)(2)(B) of PROMESA defines a "Liability Claim," in relevant part, as follows:

> The term "Liability Claim" means, as it relates to a Liability . . . . (B) [The] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

48 U.S.C. § 2194(a)(2)(B).

For purposes of the PROMESA stay, it makes no difference whether Plaintiffs' asserted right to relief arises under Plaintiffs' bonds themselves, or some other source of law, such as the Constitutions or statutes of the United States or Puerto Rico. The statute specifies that a "Liability" includes "rights, entitlements, or obligations . . . related to . . . a bond," regardless of "whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law." 48 U.S.C. § 2194(a)(1).

The PROMESA stay remains in effect until the earlier of (1) February 15, 2017, with a possible extension of 60 or 75 days, and (2) with respect to the Commonwealth or any of its instrumentalities, the date on which the Oversight Board files a petition on behalf of the Government of Puerto Rico or any of its instrumentalities to commence debt-adjustment proceedings pursuant to Title III of PROMESA. 48 U.S.C. § 2194(d). On February 14, 2017, the

Oversight Board exercised its discretion under PROMESA and extended the PROMESA stay until May 1, 2017. ADD7, n.3.[4]

C. The Oversight Board

On August 31, 2016, the President of the United States appointed seven members to the Oversight Board. Since its appointment, the Oversight Board has been working diligently to fulfill the tasks it is required to perform under PROMESA – to develop and certify fiscal plans, negotiate consensual restructuring agreements where appropriate or, failing consensus, to institute proceedings under Title III of PROMESA in order to relieve the Commonwealth's current financial distress and to take steps to ensure the Commonwealth's reentry into capital markets. 48 U.S.C. §§ 2141–42, 2164.

The Oversight Board and its counsel have been meeting with representatives of the parties to this action and many of the other similar actions and have made information requests of the Governor and the Commonwealth officials and advisors. The Oversight Board has worked with the Commonwealth to establish information sharing and expense review protocols applicable to all covered instrumentalities. The PROMESA process now is well under way. The Oversight Board has retained advisors and is working with the Commonwealth to develop fiscal plans and with creditors to negotiate consensual restructuring agreements as

[4] All citations to "ADD__" are to the Addendum attached to this brief.

required under PROMESA. A469, A476. As has been well publicized, the Commonwealth has submitted multiple drafts of its proposed fiscal plan, and the Oversight Board has commented on them. These efforts culminated on March 13, 2017, when the Oversight Board approved the Commonwealth's amended fiscal plan.[5]

D. The Original and Amended Complaints

Plaintiffs are beneficial owners of bonds that are protected by the Puerto Rico Constitution. These bonds fall into two categories: (1) the Commonwealth's general obligation bonds ("GO Bonds"), which were issued by the Commonwealth and secured by a pledge of the Commonwealth's good faith, credit, and taxing power and (2) bonds issued by certain of the Commonwealth's public corporations and guaranteed by the same pledge by the Commonwealth (the "GO-Guaranteed Bonds" and together with the GO Bonds, "GO Debt" or "Constitutional Debt"). A340.

On July 20, 2016, Plaintiffs filed a complaint asserting a single substantive cause of action,[6] alleging a breach of Section 204(c)(3) of PROMESA, which

[5] Copies of the Governor's Fiscal Plan, the Oversight Board's certification, and other key documents are available at the Oversight Board's website: www.oversightboard.pr.gov.

[6] The complaint also asserted an alternative cause of action seeking relief from the automatic stay in the event the District Court held that the action was stayed by Section 405(b) of PROMESA.

prohibits the Commonwealth from enacting certain laws prior to the full appointment of the Oversight Board.[7] A46, Dkt. No. 1.

On August 15, 2016, Plaintiffs filed an amended complaint alleging that in addition to a breach of Section 204(c)(3) of PROMESA, the "Commonwealth Officer Defendants" (at the time, the only defendants were officers of the Commonwealth)[8] also violated Section 207 of PROMESA, which prohibits the Commonwealth from issuing, guaranteeing, repurchasing, exchanging, modifying, or redeeming debt without the Oversight Board's consent. A79, A88, A90.

The amended complaint sought a declaration that (1) Executive Order 30, (2) Puerto Rico's Fiscal Year 2017 budget, and (3) Act 74-2016 (which authorized the GDB to restructure loans owed to the GDB by the Commonwealth and its

---

[7] Section 204(c)(3)(A) of PROMESA provides that after PROMESA's enactment and before the complete appointment of the Oversight Board, the Commonwealth "shall not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory." 48 U.S.C. § 2144(c)(3)(A).

Section 207 of PROMESA states that "[f]or so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt." 48 U.S.C. § 2147.

[8] The Commonwealth Officer Defendants are Alejandro García-Padilla, Juan Zaragoza Gómez, and Luis Cruz Batista.

instrumentalities) violated Sections 204(c)(3) and 207 of PROMESA. A71–72, A89–91, A94.

In addition to declaratory relief, Plaintiffs also sought an injunction:

> (1) requiring the Commonwealth Officer Defendants to segregate and preserve all funds clawed back, to be clawed back, or available to be clawed back under contractual and legal provisions expressly acknowledging that those funds are subject to turnover for purposes of paying GO Bonds or GO-Guaranteed Bonds;
>
> (2) prohibiting the Commonwealth Officer Defendants from making certain transfers to the public employee pension funds contemplated in the Fiscal Year 2017 budget and limiting the Commonwealth to the contribution it made in Fiscal Year 2016;
>
> (3) prohibiting the Commonwealth Officer Defendants from transferring $250 million to the GDB as contemplated by the Fiscal Year 2017 budget; and
>
> (4) prohibiting the Commonwealth Officer Defendants from making certain additional transfers to the GDB authorized by Act 74-2016.

A89–95.

On August 22, 2016, the Commonwealth Officer Defendants filed a notice of stay, arguing that the case was automatically stayed by Section 405(b) of

PROMESA. A136–41. At the District Court's direction, Plaintiffs filed a response on August 25, 2016. A47, Dkt. Nos. 27, 28.

By order dated September 2, 2016, the District Court held that Section 405(b)(1) of PROMESA did not stay prosecution of the amended complaint because (i) "Plaintiffs could not have commenced [the] lawsuit before PROMESA's enactment because their claims are to enforce provisions of PROMESA by challenging conduct that occurred after PROMESA's enactment," and (ii) "[P]laintiffs do not seek to recover a right to payment that arose before PROMESA's enactment." A198–99.

On September 7, 2016, the Commonwealth Officer Defendants filed a motion for reconsideration requesting that the District Court reconsider its notice of stay. A48, Dkt. No. 34. On November 4, 2016, the District Court denied the motion for reconsideration. A52, Dkt. No. 75.

E. Plaintiffs' Motion to Amend Their Complaint and for Partial Relief from the Automatic Stay

On October 7, 2016, Plaintiffs filed a motion for leave to file a second amended complaint (the "Second Amended Complaint") and for partial relief from the automatic stay. A200–87. The proposed Second Amended Complaint asserted 11 new substantive causes of action and named four new defendants: The Commonwealth, the Puerto Rico Sales Tax Financing Corporation (a/k/a COFINA), Juan Vaquer, in his official capacity as Executive Director of COFINA,

and Bank of New York Mellon Corp., as trustee for certain COFINA bonds. However, Plaintiffs sought to pursue only four of the 13 causes of action (the first, second, third, and twelfth, the "PROMESA Claims") while the PROMESA stay remained in place with respect to the other causes of action. Plaintiffs argued that they could pursue the four claims based upon the provisions of PROMESA because they could not possibly have been brought prior to the enactment of PROMESA. A201–02. Plaintiffs said they were asserting the other eight substantive causes of action "as a protective measure" to ensure that these claims were not lost "under the doctrine of claim preclusion." A212–13.

On October 24, 2016, the Commonwealth Officer Defendants filed their response. The Commonwealth Officer Defendants objected to Plaintiffs' proposed piecemeal approach to the litigation, arguing that all of the claims were stayed by Section 405(b) of PROMESA and, to the extent they were not, that the entire action should nonetheless be stayed pursuant to the District Court's inherent power to control its own docket. A288–306.

On October 28, 2016, the Oversight Board moved to intervene. A307–12. In the proposed pleading attached to its intervention motion, the Oversight Board opposed Plaintiffs' motion for leave to amend and for partial relief from the PROMESA stay, adopting the Commonwealth Officer Defendants' papers in their entirety, and moved, in the event the District Court determined that one or more of

the causes of action was not subject to the PROMESA stay, to stay the action in its entirety based upon the District Court's inherent power to control its own docket. A314–24.

On November 4, 2016, the District Court granted Plaintiffs leave to file the Second Amended Complaint and stated that it would determine whether Plaintiffs could prosecute the PROMESA Claims in due course. A52, Dkt. No. 76. Plaintiffs filed the Second Amended Complaint the same day. A52, Dkt. No. 78.

F. The Second Amended Complaint

Plaintiffs sought to pursue only four of the 13 causes of action asserted in the Second Amended Complaint which, they argued, were not subject to the PROMESA stay:

(1) The First Cause of Action, which alleges that the Commonwealth's post-PROMESA enactments violate Section 204(c)(3) and Section 207 of PROMESA;

(2) The Second Cause of Action, which alleges that Executive Order 30 is preempted by Section 303(3) of PROMESA;

(3) The Third Cause of Action, which alleges that the Moratorium Act is preempted by Section 303(1) of PROMESA; and

(4) The Twelfth Cause of Action, which seeks relief under 42 U.S.C. § 1983, insofar as it is based on the Commonwealth's alleged violations of Sections 204(c)(3), 207, 303(1), and 303(3) of PROMESA.

A383–89, A400–01.

In addition to the injunctive relief Plaintiffs sought in their amended complaint, Plaintiffs also sought, for the first time, an injunction:

(1) prohibiting the diversion of revenues arising from collection of the sales and use tax ("SUT") (or any substitute revenues) to COFINA and requiring the Commonwealth Defendant officers, in their official capacities as officers of the Commonwealth, and the COFINA Defendants to direct such funds to Puerto Rico's Treasury;

(2) directing the COFINA Defendants to transfer any revenues received from the collection of the Commonwealth's sales and use tax in their possession or held on behalf of COFINA to the Commonwealth;

(3) directing the Commonwealth Officer Defendants to segregate and preserve such funds arising from collection of the sales and use tax or transferred from the COFINA Defendants; and

(4) prohibiting the enforcement of the Moratorium Act and Executive Order 30 as applied to the so-called Constitutional Debt.

A402–405.

On November 7, 2016, the Commonwealth Officer Defendants filed a notice of automatic stay, which reiterated many of the same arguments the Commonwealth Officer Defendants made in their opposition to Plaintiffs motion for leave to amend. A408–426. On November 16, 2016, the District Court entered a docket text order stating that it would treat the "notice" as a motion to stay the action. A55. On the same day, the Commonwealth Officer Defendants filed a motion to stay the action, which incorporated by reference its "notice." A427–432. The COFINA Defendants joined the Commonwealth Officer Defendants' motion to stay. A58, Dkt. No. 134; A63, Dkt. No. 163.

G. The District Court's Decision

On February 17, 2017, the District Court issued its Decision granting the Oversight Board leave to intervene in this action, but denying the motions of the Commonwealth Defendants, the COFINA Defendants, and the Oversight Board to stay the action. ADD40–41.[9] The District Court also entered a separate order directing the Oversight Board to file a pleading setting out the "claims or defenses for which intervention is sought" by March 20, 2017, and directing that "[a]ll parties may file any motion they may deem appropriate to file, including any dispositive motion, by that date." A479.

---

[9] In its Decision, the Court also addressed additional intervention motions filed by several groups of COFINA bondholders, granting intervention to some and denying intervention to others. ADD32–41.

In its Decision, the District Court properly recognized that, in analyzing whether the PROMESA Claims should be stayed, the District Court should look to how other courts have interpreted the virtually identical automatic stay provisions of Section 362 of the Bankruptcy Code. In addition, the District Court acknowledged that the automatic stay is self-executing upon filing of a petition for bankruptcy and "'is extremely broad in scope,' applying 'to almost any type of formal or informal action taken against the debtor.'" ADD13 (internal citations omitted). Nevertheless, the District Court, after recognizing the breadth of both the bankruptcy stay and the PROMESA stay, determined that Plaintiffs were entitled to pursue the PROMESA Claims.

1. Section 405(b)(1) of PROMESA

Although Plaintiffs concede that the vast majority of the claims in the Second Amended Complaint could have been brought before the enactment of PROMESA and are therefore stayed, the District Court rejected Defendants' argument that the plain language of Section 405(b)(1) of PROMESA imposing an automatic stay of an "action or proceeding" applies to all of Plaintiffs' causes of action in this case. ADD14–15. Instead, relying on two factually inapposite cases from the Third Circuit, the District Court addressed the PROMESA Claims separately. ADD15.

With respect to Plaintiff's first cause of action, the District Court relied on its previous ruling that "[p]laintiffs could not have commenced this lawsuit before PROMESA's enactment because their claims are to enforce provisions of PROMESA by challenging conduct that occurred after PROMESA's enactment" and that "count one did not assert a right to recover a 'Liability Claim' inasmuch as it did 'not seek to recover a right to payment that arose before PROMESA's enactment.'" ADD14.

With respect to the second and third causes of action, the District Court agreed with the Commonwealth that those claims "implicate the lawfulness of the Commonwealth's assignment of [SUT] revenues to COFINA," which occurred well before the enactment of PROMESA, but nonetheless concluded those claims fell outside of Section 405(b)(1) of PROMESA because "the asserted legal premise" is based on PROMESA. ADD16.

2. <u>Section 405(b)(6) of PROMESA</u>

The District Court acknowledged that Section 362(a)(6) of the Bankruptcy Code, on which Section 405(b)(6) was modeled, is very broad. However, the District Court ruled that Section 362(a)(6) – and therefore Section 405(b)(6) – does not apply to "any non-harassing, non-coercive act to ensure eventual payment from the debtor or the debtor's estate." ADD17. The District Court found no evidence that Plaintiffs "brought this action to coerce or harass any defendant." ADD19. In

addition, the District Court concluded that the PROMESA Claims do not constitute a "Liability Claim" that arose before the enactment of the statute "notwithstanding the fact that the GO Bondholders now [in counts two and three] also seek injunctions that, *inter alia*, prohibit the diversion of [SUT] revenues to COFINA, and direct the COFINA defendants to transfer revenues held on behalf of COFINA to the Commonwealth." ADD19–20. The District Court concluded that because the PROMESA Claims "are not aimed at confiscating any property of, or obtaining any form of payment from, the Commonwealth" they are not stayed by Section 405(b)(6) of PROMESA. ADD21.

3. Section 405(b)(3) of PROMESA

The District Court properly recognized that to exercise control is to exercise "'restraining or directing influence over' or 'to have power over,'" but nonetheless determined that the injunctive relief sought by Plaintiffs here (garnishment, attachment, and segregation of revenues) "would not permit [Plaintiffs] to have any possession, influence, or power over any asset, much less any asset of the Commonwealth." Accordingly, the District Court held that Section 405(b)(3) of PROMESA did not apply to the PROMESA Claims. ADD21–23.

4. Sections 405(b)(4) and 405(b)(5) of PROMESA

The District Court held that if the Plaintiffs have a valid first lien on resources of the Commonwealth as they allege, the lien has already been perfected

by operation of the Puerto Rico Constitution. If Plaintiffs' alleged lien is not valid, the District Court held that the PROMESA counts "do nothing to create or perfect any lien." Further, the District Court held that the "mere assertion of the PROMESA counts, which at this juncture does nothing to affect the Commonwealth's interests in its property," is not an "act" to create or perfect a lien. Finally, the District Court held that neither the assertion of the PROMESA counts nor the injunctive relief sought in those counts was an act "to enforce a lien." ADD24–26.

5. <u>The Court's Inherent Authority to Stay the Action</u>

Finally, having concluded that the PROMESA Claims fell outside of the PROMESA stay, the District Court declined to exercise its discretion and balance the equities to determine whether a stay was nonetheless appropriate. Even though PROMESA explicitly authorizes the Oversight Board to seek a stay of litigation, the District Court concluded that because "Congress intended PROMESA to stay only certain types of claims, and not others," it would be inappropriate to extend the stay to the PROMESA Claims. ADD26–27.

STANDARD OF REVIEW

On appeal, this Court reviews a district court's "conclusions of law *de novo* and its factual findings for clear error." *Watman v. Groman (In re Watman)*, 458 F.3d 26, 31 (1st Cir. 2006). The scope or applicability of the PROMESA

automatic stay is a question of law to be reviewed *de novo*. *See Palmdale Hills Prop., LLC v. Lehman Commer. Paper, Inc. (In re Palmdale Hills Prop., LLC)*, 654 F.3d 868, 875 (9th Cir. 2011) ("We review de novo the scope or applicability of the automatic stay under the Bankruptcy Code, 11 U.S.C. § 362, because it is a question of law.").

This Court reviews a district court's decision denying a party's motion to stay for abuse of discretion. *Arthurs v. Stern*, 560 F.2d 477, 479–80 (1st Cir. 1977). A district court abuses its discretion "if it fails to consider a significant factor . . . , if it relies on an improper factor . . . , or if it considers all the appropriate factors but makes a serious error in judgment." *Negron-Almeda v. Santiago*, 528 F.3d 15, 21–22 (1st Cir. 2008) (quoting *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 335–36 (1st Cir. 2008)). An error of law is a *per se* abuse of discretion. *Id.* at 22.

SUMMARY OF THE OVERSIGHT BOARD'S ARGUMENT

The PROMESA framework was a *sui generis* response to the unprecedented fiscal crisis that is facing the Commonwealth and its citizens. The PROMESA stay was, among other things, designed to protect the Commonwealth from costly creditor lawsuits, and was supposed to give the Commonwealth a breathing spell so that it could concentrate on negotiating with creditors and working with the Oversight Board towards extricating the Commonwealth from its crippling debt.

The PROMESA stay, thus, can be given meaning only by reference to the circumstances facing the Commonwealth, and should be interpreted broadly in accordance with PROMESA's intent. Despite recognizing the breadth of the PROMESA stay provisions, the District Court interpreted them narrowly and applied them piecemeal, allowing what is in essence a collection action to proceed. As a result, the decision has undermined the PROMESA process. The Court should reverse.

First, the District Court incorrectly held that Section 405(b) of PROMESA applies to individual claims asserted by Plaintiffs instead of to the entirety of the "action or proceeding." Plaintiffs' and the District Court's proposed piecemeal resolution of the claims in this action is contrary to both the letter and the spirit of PROMESA.

Second, the District Court incorrectly held that Section 405(b)(1) of PROMESA does not stay Plaintiffs' second cause of action. That cause of action, although ostensibly challenging Executive Order 30, is premised on the alleged unlawfulness (*i.e.*, unconstitutionality) of the COFINA enabling act. It has nothing to do with PROMESA, and could have been brought long before enactment of PROMESA.

Third, the District Court incorrectly held that assertion of the PROMESA Claims, which seek injunctive and declaratory relief that would have the effect of

freezing government assets, garnishing them from third parties, and attaching or segregating them for the eventual payment of Plaintiffs' bonds, is not an act to collect that is stayed pursuant to Section 405(b)(6) of PROMESA. Although, if sustained, Plaintiffs' claims would not result in immediate repayment of their outstanding bonds, these acts are the first step in collecting on the money judgments that Plaintiffs will eventually seek; these claims are akin to a request for a pre-judgment attachment, which clearly would be stayed.

Fourth, the District Court incorrectly held that assertion of the PROMESA Claims is not an act to exercise control over property of the Government of Puerto Rico that is stayed pursuant to Section 405(b)(3) of PROMESA. Section 405(b)(3) of PROMESA, like the other sections, is broad and applies to requests for declaratory and injunctive relief insofar as they prevent the Government from using its assets or otherwise have an effect on Government property.

Fifth, the District Court incorrectly held that the assertion of the PROMESA Claims is not an act to create, perfect, or enforce a lien against property of the Government of Puerto Rico that is stayed pursuant to Sections 405(b)(4) and (b)(5) of PROMESA. To the extent Plaintiffs already have a first lien on the SUT revenue assigned to COFINA, the requested relief constitutes an act to enforce a lien. To the extent Plaintiffs do not have a lien on the SUT revenues, Plaintiffs are

attempting to create a *de facto* judicial lien. In either case, the requested relief falls within the broad purview of Section 405(b)(3) of PROMESA.

Finally, the District Court incorrectly held that PROMESA foreclosed the District Court's ability to stay any claims that it found were not specifically covered by Sections 405(b)(1)–(6) of PROMESA. This holding is inconsistent with well-established case law, which allows a court to extend the automatic stay to actions that are otherwise beyond the automatic stay where their continued prosecution would interfere with a debtor's ability to reorganize, and is contradicted by PROMESA itself, which expressly authorizes the Oversight Board to seek a stay of litigation.

ARGUMENT

I. Section 405(b) of PROMESA Should Be Interpreted Broadly in Accordance with Congressional Intent to Advance PROMESA's Stated Objectives

In the bankruptcy context,

> [t]he automatic stay is designed to effect an immediate freeze of the status quo at the outset of the chapter 11 proceedings, by precluding and nullifying most post-petition actions and proceedings against the debtor in non-bankruptcy fora, judicial or nonjudicial, as well as most extrajudicial acts against the debtor, or affecting property in which the debtor, or the debtor's estate, has a legal, equitable or possessory interest.

I.C.C. v. Holmes Transp., Inc., 931 F.2d 984, 987 (1st Cir. 1991).

The District Court properly observed that Section 405(b) of PROMESA was modeled after Section 362(a) of the Bankruptcy Code, and that cases interpreting Section 362(a), therefore, provide guidance in determining whether the PROMESA stay applies to Plaintiffs' causes of action. ADD13. The District Court also properly observed that Section 362 of the Bankruptcy Code "is extremely broad in scope" and applies "to almost any type of formal or informal action taken against the debtor." *Id.* However, after observing the breadth of the bankruptcy stay and the PROMESA stay provisions, the District Court then proceeded to apply them narrowly to the claims asserted in this case.

Although Section 362 is a useful starting point, context matters, and blind reference to Section 362 alone ignores fundamental differences between the two statutes, "the lack of a 'one-to-one' relationship between section 405 of PROMESA and Section 362 of the Bankruptcy Code," and the need to be "mindful of the specific Congressional findings and the enumerated purposes of PROMESA's automatic stay contained within Section 405 . . . [which] offer valuable insight into Congress' basic motive in including the stay provision and [which] have no counterpart in Section 362 of the Bankruptcy Code." *Brigade Leveraged Capital Structures Fund Ltd. v. Garcia-Padilla*, No. 16-1610 (FAB), 2016 U.S. Dist. LEXIS 158046, at *27–28 (D.P.R. Nov. 15, 2016).

PROMESA embodies "[a] comprehensive approach to fiscal, management, and structural problems and adjustments." 48 U.S.C. § 2194(m)(4). A central purpose of the statute is to "allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits." 48 U.S.C. § 2194(n)(2). This Court should analyze the asserted claims and the relief sought against this backdrop, and this Court's interpretation of the stay provisions "should advance the larger, overarching purposes for which PROMESA was enacted." *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *28. This Court should interpret the PROMESA stay broadly to cover the actions pursued and the relief sought by Plaintiffs.

II. The District Court Incorrectly Held That the First, Second, Third and Twelfth Causes of Action Were Not Stayed by Section 405(b) of PROMESA

A. PROMESA Stays the Entirety of an "Action or Proceeding"

Section 405(b)(1) of PROMESA stays the commencement or continuation of an "action or a proceeding against the Government of Puerto Rico." 48 U.S.C. § 2194(b)(1). Under ordinary principles of statutory interpretation, the stay, then, applies to the entirety of an action or proceeding, and not just to a portion of it. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it

according to its terms." (internal quotes and citations omitted)). Thus, the PROMESA stay applies not only to the nine causes of action that Plaintiffs concede are stayed, but to all 13 causes of action – that is, the entire action.

Notwithstanding the clear language of PROMESA, the District Court concluded that it must examine each of Plaintiffs' claims separately to determine whether each individual claim was stayed by PROMESA. Reasoning that the PROMESA Claims were not explicitly covered by the stay, the District Court held that Plaintiffs could pursue those claims even though the other causes of action were admittedly stayed. In support of its erroneous conclusion, the District Court relied on two cases from the Third Circuit. However, in neither of those cases did the court separately analyze individual claims asserted against a debtor, and, therefore, neither of those cases supports the District Court's decision to do so here.

In *Maritime Electric Company v. United Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991), there was no dispute that Section 362(a) applied to all claims asserted *against* the debtor. At issue was whether Section 362(a) also stayed the prosecution of claims asserted *by* the debtor. *Id.* at 1205. The Third Circuit observed that where there are claims, cross-claims, and counter-claims, the Court must "disaggregate[]" the claims and analyze them separately to determine "which of [the] respective *proceedings* are subject to the bankruptcy stay." *Id.* at 1204–05

(emphasis added). The court continued, "[t]hus, within one case, actions *against* a debtor will be suspended even though closely related claims asserted *by* the debtor may continue." *Id.* at 1205 (emphasis in original).[10] Based upon the plain language of Section 362(a) of the Bankruptcy Code, the Third Circuit held that while all claims against the Debtor were stayed, the claims asserted by the debtor clearly were not. *Id.* The Third Circuit did not decide whether Section 362(a) might stay fewer than all claims asserted against a debtor such that some claims may proceed against a debtor, while others may not.

The issue in *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc. (In re Mid-Atl. Handling Sys., LLC)*, 304 B.R. 111, 128 (Bankr. D.N.J. 2003), was whether the bankruptcy stay extended to claims asserted against a non-debtor co-defendant. On this sole issue, the bankruptcy court – relying on *Maritime Electric* – analyzed claims asserted by and against a debtor separately and concluded that Section 362(a) did not stay claims asserted against a non-debtor co-defendant, and allowed the claims against the co-defendant to proceed. *Id.* at 128–29. As in *Maritime Electric*, the bankruptcy court did not analyze causes of action asserted against a debtor individually and did not hold that doing so was appropriate.

---

[10] Indeed, the issue in each of the seventeen cases cited by the Third Circuit in *Maritime Electric* was whether the automatic stay applied to claims asserted by the debtor against non-debtors. *Id.* at 1205–06.

To allow Plaintiffs to split their claims and to pursue this litigation piecemeal would undermine explicit Congressional intent that the Commonwealth be given a short period of time to concentrate on negotiations instead of defending creditor lawsuits so that it and the Oversight Board can address the "immediate . . . and imminent" fiscal crisis facing the Commonwealth and its citizens. 48 U.S.C. § 2194(m), (n)(1), (n)(2); *see Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 513 (1st Cir. 2017). And it would undoubtedly "harm the PROMESA process by undermining the comprehensive, consolidated restructuring approach that the statute was ultimately designed to facilitate." *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *54. "All stakeholders, including the Oversight Board, collectively deserve the chance to avoid [a] piecemeal approach to resolving Puerto Rico's fiscal emergency and to allow the PROMESA process to function as designed." *Id.* at *55–56.

B. Plaintiffs' Second Cause of Action Is a 10-year Old Constitutional Claim Unrelated to PROMESA That Could Have Been Brought Prior to Its Enactment

Plaintiffs second cause of action is stayed under Section 405(b)(1) of PROMESA for the independent reason that it could have been brought long before the enactment of PROMESA. *See* 48 U.S.C. § 2194(b)(1). While Plaintiffs ostensibly challenge Executive Order 30 because they claim it is preempted by Section 303(3) of PROMESA, the substance of the claim is that Plaintiffs seek to

invalidate the COFINA enabling act because it violates the Puerto Rico Constitution. This claim has nothing to do with PROMESA; it could have been brought years before and, accordingly, is stayed pursuant Section 405(b)(1) of PROMESA.

The Commonwealth Legislative Assembly established COFINA in 2006. The COFINA enabling act was designed to retire Commonwealth debt obligations payable solely from government budgetary appropriations. Among other things, it authorizes COFINA to "issu[e] bonds and utilize[e] other financing mechanisms." 13 L.P.R.A. § 11a(b). The COFINA enabling act dedicates a certain percentage of the Commonwealth's SUT revenue to COFINA to repay debts. 13 L.P.R.A. § 12. COFINA bonds are non-recourse bonds secured by a statutory lien against pledged SUT revenue. Importantly, the COFINA enabling act makes clear that SUT income does not constitute a resource "available" to the Commonwealth. 13 L.P.R.A. § 12. This "availability" of resources is a direct reference to Article VI, Section 8 of the Puerto Rico Constitution, which provides:

> In case the ***available revenues*** including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law.

P.R. Const. art. VI, § 8 (emphasis added). COFINA's bond offering documents accordingly disclose that SUT revenue is not an "available resource" for purposes of satisfying the public debt priority. *See* A49, Dkt. No. 50 at 9.

Plaintiffs insist that the second cause of action challenging the lawfulness of Executive Order 30 is not stayed by PROMESA. More specifically, Plaintiffs contend that SUT revenue is an available resource for purposes of Article VI, Section 8 of the Puerto Rico Constitution. Plaintiffs argue that because Executive Order 30 *did not* claw back SUT money from COFINA to service the Commonwealth's GO Debt, it is "unlawful" and thus preempted by Section 303(3) of PROMESA. A337–407, ¶¶ 2, 13, 20, 92, 95, 99, 107–10.

Plaintiffs' claim is a thinly-veiled attempt to pursue their constitutional claims now, ahead of other creditors and without being required to establish cause to lift the PROMESA stay. The fundamental fact, which Plaintiffs do not attempt to – and indeed cannot – escape, is that their second cause of action depends on the District Court's answer to one fundamental question: Are the SUT carve-outs assigned to COFINA pursuant to the COFINA enabling act "available resources" within the meaning of Article VI, Section 8 of the Puerto Rico Constitution? At their core, Plaintiffs' constitutional challenges to Executive Order 30 are just that– constitutional challenges.

Plaintiffs do not dispute this. Indeed, their own arguments prove that the "unlawful" conduct Plaintiffs seek to challenge is the establishment of the COFINA structure itself and the assignment of SUT revenues to COFINA in the first instance, not Executive Order 30 or any other post-PROMESA action taken by the Commonwealth. In the District Court, Plaintiffs conceded that the constitutionality of the COFINA structure "must be resolved" as part of their claims. A457; *see also* A441 (arguing that "resolution of [P]laintiffs' claims" will determine whether the COFINA structure is valid); A442 ("[T]he assignment of core tax revenue to COFINA—purportedly rendering those revenues not 'available resources' of the Commonwealth available for payment of Constitutional Debt and other expenditures—is not 'lawful.' The COFINA structure in fact violates the Puerto Rico Constitution in numerous respects."). If Plaintiffs are correct that the COFINA structure is unlawful, then any unlawful action occurred at the time the COFINA enabling act was passed in 2006, *see* A344–45, and Plaintiffs' claims "could have been commenced" prior to PROMESA's enactment – or at any time over the last 10 years.

The District Court acknowledged and then proceeded to ignore this fact, placing talismanic significance on "the asserted legal premise underlying" Plaintiffs' claims. ADD16. Since Plaintiffs' asserted claims are allegedly premised on PROMESA itself, the District Court reasoned that Plaintiffs could not

possibly have raised them before PROMESA was passed. *Id.* However, Plaintiffs should not be permitted to do an end-run around the automatic stay through artifices of pleading. It is entirely appropriate for a court to look beyond the face of a claim to the "objective" of the relief sought to determine whether an action is stayed. *See JPMorgan Chase Bank, N.A. v. Kingman Holdings, LLC*, No. 5:15-CV-144-DAE, 2015 U.S. Dist. LEXIS 169253, at *3–4 (W.D. Tex. Dec. 17, 2015) (staying case where plaintiff's "objective" was to obtain a declaration that its lien was superior). Here, the objective of Plaintiffs' second cause of action is to invalidate the COFINA enabling act, which, not coincidentally, is exactly the relief Plaintiffs seek in their fourth and fifth causes of action. *See* A389–91. Everyone agrees that those claims are stayed and so too should this claim be stayed.

C. Plaintiffs' Request to Freeze, Garnish, Attach, and Segregate Government Assets for Their Benefit Is an Act to Collect That Is Stayed by Section 405(b)(6) of PROMESA

Section 405(b)(6) of PROMESA stays "any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of [PROMESA]." 48 U.S.C. § 2194(b)(6). Courts interpreting the reach of Section 362(a)(6) of the Bankruptcy Code have noted that "the word 'collect' is not to be given a narrow, legal-action type of meaning." *In re Guinn*, 102 B.R. 838, 842 (Bankr. N.D. Ala. 1989). "The language in Section 362(a)(6) is extremely broad in scope and encompasses any act to collect a pre-petition claim

from a debtor" or "any act to collect a claim . . . against the debtor, or against property of the debtor." *Rosas v. Monroe Cty. Tax Claim Bureau (In re Rosas)*, 323 B.R. 893, 898 (Bankr. M.D. Pa. 2004); *In re Holland*, 21 B.R. 681, 687 (Bankr. N.D. Ind. 1982).

In connection with their first cause of action, Plaintiffs request that the Commonwealth "segregate and preserve all funds clawed back, to be clawed back, or available to be clawed back" for the benefit of GO Bondholders. A404. Plaintiffs also seek orders prohibiting the Commonwealth from implementing certain transfers to government entities pursuant to the approved Commonwealth budget for Fiscal Year 2016-2017 and contemplated by PR Act No. 74-2016, to preserve funds for the payment of Plaintiffs' bonds. A404–05. These forms of injunctive relief, which are designed to freeze government assets, garnish funds from third parties, and attach or segregate them for the eventual payment of Plaintiffs' bonds, are "acts to collect" under Section 405(b)(6) of PROMESA.

The same is true of Plaintiffs' second and third causes of action, through which Plaintiffs seek an injunction:

> 1. prohibiting the diversion of revenues arising from collection of the SUT (or any substitute revenues) to COFINA and requiring the Commonwealth Officer Defendants, in their official capacities as Commonwealth Officers, and the COFINA Defendants to direct such funds to Puerto Rico's Treasury;

> 2. directing the COFINA Defendants to transfer any revenues received from the collection of the Commonwealth's SUT in their possession or held on behalf of COFINA to the Commonwealth;
>
> 3. directing the Commonwealth Officer Defendants to segregate and preserve such funds arising from collection of the SUT or transferred from the COFINA Defendants; and
>
> 4. prohibiting the enforcement of the Moratorium Act and [Executive Order 30] as applied to the Constitutional Debt.

A403–04.[11]

That the funds will not immediately be turned over to Plaintiffs for repayment of their bonds does not take these actions outside the scope of Section 405(b)(6) of PROMESA. "Eventual, or even planned, collection of a debt may constitute a violation of § 362(a)(6)." *Trevino v. HSBC Mortg. Servs., Inc. (In re Trevino)*, 535 B.R. 110, 149 (Bankr. S.D. Tex. 2015); *see also Divane v. A and C Elec. Co., Inc.*, 193 B.R. 856, 860 (N.D. Ill. 1996) ("Section 362(a)(6) . . . does not require that the creditor take some action to obtain possession of or to exercise control over the debtor's property . . . . That is because the aim of Section 362(a)(6) is *not* the protection of the debtor's property as such but rather the protection of the debtor itself." (emphasis in original)). There can be little doubt

[11] Plaintiffs' twelfth cause of action pursuant to 42 U.S.C. § 1983 is not a free-standing independent claim against Commonwealth officials, but rather the vehicle by which Plaintiffs seek relief for purported violations of PROMESA, the United States Constitution, and the Puerto Rico Constitution. To the extent the first, second, and third causes of action are stayed, so too must this claim be stayed.

that Plaintiffs will seek to have the attached funds applied to their outstanding bonds as soon as they are able to do so.

The District Court began its analysis by observing that Section 362(a)(6) of the Bankruptcy Code upon which Section 405(b)(6) of PROMESA is based is "very broad," but then proceeded to interpret it narrowly, holding that Section 405(b)(6) did not prohibit Plaintiffs' attempts to freeze, garnish, and attach the sales and use tax revenues at issue in this case, because the District Court found there was no evidence that Plaintiffs sought to "coerce or harass any defendant." ADD17, 19. In support of its erroneous holding, the District Court cited three cases, but none of those cases supports the District Court's interpretation.

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995), is a decision about whether placing an administrative hold on a bank account while the bank seeks relief from the automatic stay to effect a setoff in and of itself constitutes a "setoff" in violation Section 362(a)(7) of the Bankruptcy Code.[12] To the extent *Strumpf* is relevant beyond that specific fact pattern, the Supreme Court's holding with respect to Section 362(a)(6) of the Bankruptcy Code was premised on the fact

---

[12] Numerous courts have questioned whether *Strumpf* has any applicability beyond the narrow "bank dilemma" fact pattern that was before the Supreme Court. *See, e.g.*, *In re Weidenbenner*, 521 B.R. 74, 81 (Bankr. S.D.N.Y. 2014) (noting that "[o]n its face, *Strumpf* is clearly limited to setoff rights" and collecting cases noting its limited application).

that the contents of the debtor's bank account did not actually belong to the debtor. *Id.* at 21. Rather, the Supreme Court observed that the relationship "consists of nothing more or less than a promise to pay, from the bank to the depositor," and the administrative hold was, therefore, "merely a refusal to perform its promise." *Id.* The Supreme Court recognized that if the "bank account [had] consisted of money belonging to the depositor and held by the bank" its decision might well be different. *Id.* Ultimately, the Supreme Court concluded that it could not give an interpretation of Section 362(a)(6) that would proscribe conduct – a temporary refusal of a creditor to pay a debt that is subject to a setoff against a debt owed by the debtor – that is specifically authorized in other places in the Bankruptcy Code. *Id.* No setoff rights are implicated here and the relationship is not one of bank-depositor; Plaintiffs are attempting to gain control over Government assets for future payment on their debt, and *Strumpf* has no relevance to this case.

Equally irrelevant is the court's observation in *Knowles v. Bayview Loan Servicing, LLC (In re Knowles)*, 442 B.R. 150, 160 (B.A.P. 1st Cir. 2011), that a "mere request for payment does not violate the [automatic] stay." The issue in *In re Knowles*, was whether providing a "payoff statement" requested by the debtor, sending a copy of an annual tax statement, or filing of a proof of claim violated the automatic stay. *Id.* Here, Plaintiffs' lawsuit and attempts to have money set aside for eventual payment on their bonds extend far beyond any of the actions – done

either at the plaintiff's request or in accordance with applicable bankruptcy and tax laws – found to be acceptable in *In re Knowles*.

Finally, at issue in *Morgan Guaranty Trust Company of New York v. American Savings & Loan Association.*, 804 F.2d 1487 (9th Cir. 1986), was whether a note by a bankrupt maker presented for payment by a holder in due course violated Section 362(a)(6) of the Bankruptcy Code. The Ninth Circuit held that "[t]he mere act of presentment does not interfere with orderly administration of the estate, the debtor's 'breathing spell,' or the status quo." *Id.* at 1491. The court refused to characterize presentment as "harassment" where the creditor presented the notes to the payor bank and not the debtor. *Id.*[13] To the extent *Morgan Guaranty Trust Company of New York* is relevant at all, it actually supports application of Section 405(b)(6) of PROMESA to the facts of this case. Plaintiffs cannot deny that Defendants must affirmatively act to defend this action or risk losing the ability to control the use of the SUT revenues. *See id.* (noting that Section 362(a) of the Bankruptcy Code prohibits activities that "require the debtor to act affirmatively to protect its interests").

---

[13] The Ninth Circuit was also influenced by the fact that the Bankruptcy Code was amended to codify case law holding that presentment of negotiable instruments is exempt from the bankruptcy stay. *Id.* at 1490–92.

The District Court was evidently swayed by Plaintiffs' purported "disclaime[r] [of] any attempt to collect" from the Commonwealth, *see* ADD19, but Plaintiffs' actions speak louder than their words. It is not surprising that Plaintiffs do not seek payment now because such a request would squarely fall within the scope of the PROMESA stay. Instead, Plaintiffs seek to have money set aside so that it can eventually be used to repay the GO Bonds they hold, but the delay in payment does not make it any less an "act to collect."

Notably, the District Court previously rejected nearly identical arguments made by plaintiffs in another PROMESA-stay related case. *See Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *13, *70. In *Brigade*, plaintiffs requested declaratory and injunctive relief, alleging, among other things, that the Moratorium Act and Executive Order 30 are preempted by Sections 303(1) and 303(3) of PROMESA. The *Brigade* plaintiffs argued that granting such relief would not diminish the assets available to other creditors, but the District Court "reject[ed] plaintiffs' attempts to pull the wool over its eyes" and denied relief from the stay in the consolidated actions. *Id.* at *56 n.11. The District Court explained that "the true harm resulting to plaintiffs from the continued existence of the challenged provisions of the Moratorium Act and related Executive Orders is largely (if not purely) pecuniary in nature." *Id.* at *46. Accordingly, the District Court concluded, plaintiffs' "ultimate aim [was] to obtain

money judgments against their borrowers or 'to gain an advantage in anticipated restructuring proceedings.'" *Id.* at *57 n.11. That is exactly the situation that was before the District Court here.

D. Plaintiffs' Request to Freeze, Garnish, Attach, and Segregate Government Assets Is an Act to Exercise Control Over Government Assets That Is Stayed by Section 405(b)(3) of PROMESA

Section 405(b)(3) of PROMESA stays "any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico." 48 U.S.C. § 2194(b)(3). As several courts have observed, and as the District Court properly found, "[t]o 'exercise control' is 'to exercise restraining or directing influence over' or 'to have power over.'" *In re Weidenbenner*, 521 B.R. 74, 79–80 (Bankr. S.D.N.Y. 2014) (quoting *Thompson v. GMAC, LLC*, 566 F.3d 699, 702 (7th Cir. 2009)). "Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition, as well as within the commonsense meaning of the word." *Thompson*, 566 F.3d at 702.

Courts have held that a broad range of actions violate the provisions of Section 362(a)(3) of the Bankruptcy Code. *See, e.g., In re Weidenbenner*, 521 B.R. 74, 79 (Bankr. S.D.N.Y. 2014) (placing administrative freeze on debtor's bank account); *Houston Pipeline Co. LP v. Bank of Am., N.A.*, 213 S.W.3d 418,

427–28 (Tex. Ct. App. 2006) (court order which had the effect of barring creditor from asserting security interest in estate property was an act to exercise control over estate property); *In re Nat'l Cattle Cong., Inc.*, 179 B.R. 588, 597–98 (Bankr. N.D. Iowa 1995) (attempted revocation of debtor's dog racing license); *Southside Leasing Co. v. Merchs. Plaza, Inc. (In re Merchs. Plaza, Inc.)*, 35 B.R. 888, 893–94 (Bankr. E.D. Tenn. 1983) (service of post-petition notices of default, cancellation, and termination of debtor's lease); *see also Thompson*, 566 F.3d at 703 ("[T]he act of passively holding onto an asset constitutes 'exercising control' over it . . .").

It matters not that a party seeks only declaratory or injunctive relief. *In re Jefferson Cty.*, 484 B.R. 427, 446–447 (Bankr. N.D. Ala. 2012) (noting that "[a]ny action that affects property of the debtor in a manner within the automatic stay's sphere, including a declaratory judgment action, is subject to § 362(a)(3)."). "A declaratory judgment action against a debtor is an 'act to . . . exercise control over property of the estate' insofar as it seeks to affect . . . estate property." *Houston Pipeline Co. LP*, 213 S.W.3d at 427 (internal citations omitted).

Here, Plaintiffs seek an order (1) freezing "clawed back" funds and SUT revenues; (2) prohibiting certain transfers pursuant to the budget of the Commonwealth; (3) prohibiting the transfer of funds to COFINA; and (4) requiring COFINA to transfer SUT revenues back to the Commonwealth for Plaintiffs'

benefit. A404–05. The District Court's unsupported conclusion that an injunction of this ilk "would not permit [Plaintiffs] to have any possession, influence, or power over any asset, much less any asset of the Commonwealth" cannot be reconciled with the allegations in the Second Amended Complaint. ADD23.

If the SUT revenues are property of the Commonwealth as Plaintiffs allege, Plaintiffs' attempt to attach, garnish, freeze, and segregate those revenues for their benefit is an act to exercise control over them.[14] Such an injunction would restrain or direct influence over, have power over, prohibit the beneficial use of, or at a minimum, have an effect on Government assets, and would interfere with the Commonwealth's ability to operate during this fiscal crisis, which is precisely what PROMESA sought to prevent. Regardless of the merits of Plaintiffs' claims, the mere assertion of these claims is an "act" to exercise control over property of the Commonwealth that is stayed pursuant to Section 405(b)(3) of PROMESA.

None of the cases relied on by the District Court is analogous to the facts of this case (*see* ADD23–24), and none supports the District Court's conclusion that Plaintiffs' claims are not acts to exercise control over the Commonwealth's property. In *Amplifier Research Corporation v. Hart*, 144 B.R. 693, 695 (E.D. Pa.

[14] The same would be true if the SUT revenues are property of COFINA, as the PROMESA stay applies to COFINA and any act to exercise control over its property. *See* 48 U.S.C. § 2104(11).

1992), at issue was whether the bankruptcy stay prevented prosecution of a defamation action, which sought to enjoin further publication of an allegedly libelous report. In *Larami Limited v. Yes! Entertainment Corporation*, 244 B.R. 56, 59–60 (D.N.J. 2000), the district court found that a post-petition patent infringement action was not stayed by Section 362(a) of the Bankruptcy Code, reasoning that the suit sought to enjoin the patent infringing activity, not exercise control over any property. Finally, the issue in *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1471 (D.C. Cir. 1991), was whether the post-petition use of intangible trade secrets in the non-debtor's possession and whose ownership was in dispute amounted to an exercise of control over property of the estate. None of these cases dealt with a situation where a plaintiff was attempting to attach, freeze, garnish, and segregate funds for future application to a pre-petition debt.

E. Plaintiffs' Requests to Establish the Priority of Their Alleged Lien and to Freeze, Garnish, Attach, and Segregate SUT Revenue Are Acts to Create, Perfect, or Enforce a Lien That Are Stayed by Sections 405(b)(4) and (b)(5) of PROMESA

Section 405(b)(4) of PROMESA stays "any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico," and Section 405(b)(5) stays "any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this Act." 48 U.S.C. § 2194(b)(4), (b)(5). The District Court concluded that neither the "injunctive relief sought" nor the

"mere assertion of the PROMESA counts" constituted an act prohibited by Sections 405(b)(4) and 405(b)(5) of PROMESA. ADD25–26. This is reversible error.

In this case, Plaintiffs are either asking the District Court to declare their alleged lien on SUT revenue superior to the COFINA bondholders' lien and to enter an injunction freezing, garnishing, attaching, or segregating funds for Plaintiffs' benefit (acts to enforce a lien), or seeking a *de facto* judicial attachment of property of the Government of Puerto Rico (an act to create or perfect a lien). In either case, the requested relief falls squarely within the conduct prohibited by Sections 405(b)(4) and (b)(5) of PROMESA.

In interpreting the analogous provisions in Section 362 of the Bankruptcy Code, courts have interpreted the term "act" broadly, finding that freezing assets, seeking a declaration of lien priority, attempting to obtain an attachment, or even, in appropriate circumstances, inaction may be considered an act. *See, e.g.*, *Pereira v. 397 Realty LLC (In re Heavey)*, 549 B.R. 1, 10 (Bankr. E.D.N.Y. 2016) ("For purposes of § 362 the Second Circuit has interpreted 'act' broadly, and it is well established that an 'act' for purposes of a § 362(a)(4) violation need not be significant, or even be an "act" at all."); *JPMorgan Chase Bank, N.A.*, 2015 U.S. Dist. LEXIS 169253, at *3–4 (action to obtain a declaration that its lien in the debtor's real property was superior to that held by another party); *B.F. Goodrich*

Emps. Fed. Credit Union v. Patterson (In re Patterson), 967 F.2d 505, 512 (11th Cir. 1992) (freezing of assets by a creditor); *Jeffries v. Browning (In re Reserves Dev. Corp.)*, 78 B.R. 951, 957–58 (W.D. Mo. 1986) (prejudgment attachment); *In re Bellman Farms, Inc.*, 86 B.R. 1016, 1020 (Bankr. D.S.D. 1988) (even where no procedure required for state to create or perfect tax lien other than delivery of tax list to county treasurer with warrant of county auditor, lien is prohibited by Section 362(a)(4)).

A broad reading of "act" under Sections 362(a)(4) and (a)(5) of the Bankruptcy Code – and, by extension, Sections 405(b)(4) and (b)(5) of PROMESA – is essential to ensure that creditors are not able to use the judicial process to obtain an advantage over other similarly situated creditors. *See United States v. Gold (In re Avis)*, 178 F.3d 718, 722–23 (4th Cir. 1999) (broad interpretation of "act" for purposes of § 362(a)(5) appropriate; "chief aim of § 362(a)(5) . . . is to prevent the post-petition perfection of interests in a debtor's bankruptcy estate."); *Landmark v. Schaefbauer*, 41 B.R. 766, 768 (Bankr. D. Minn. 1984) ("Congress's main concern in enacting Section 362(a)(4) was to prevent the post-petition creation of liens against property of the estate, so the status quo of creditors' security and priority would be preserved pending administration of the bankruptcy estate and allowance of the debtors' claim of exemption.").

Plaintiffs allege – and Defendants dispute – that Plaintiffs have a "first lien" and priority over all Commonwealth expenditures. All of Plaintiffs' claims are premised on the alleged constitutional priority of their purported lien over "available resources" which, Plaintiffs contend, includes the SUT revenue. Thus, to grant Plaintiffs the relief they request, the District Court must determine the extent of that alleged lien and whether it extends to the SUT revenue that has been assigned to COFINA. (*See* A447 (arguing that "clarifying that the SUT revenues purportedly assigned to COFINA remain 'available resources' would establish that these funds are subject to the Constitutional Debt's constitutional lien and first-priority claim, and that—at the very least—any interest COFINA may have in these funds is junior to that of holders of the Constitutional Debt.").) Seeking such a determination of its lien priority is unquestionably an act to enforce a lien. *See JPMorgan Chase Bank, N.A.*, 2015 U.S. Dist. LEXIS 169253, at *3–4 (seeking declaration of lien priority in estate property stayed pursuant to Section 362(a)(5) of the Bankruptcy Code); *Houston Pipeline Co. LP*, 213 S.W.3d at 428 (holding that a determination as to the priority of security interests in estate property was an act to enforce a lien).

Moreover, Plaintiffs also ask the District Court to freeze "clawed back" funds and certain funds slated for transfer pursuant to the Commonwealth's 2017 budget, and seek an order attaching or garnishing SUT revenues received by

COFINA and directing that those revenues be turned over to the Commonwealth's treasury and segregated for the payment of Plaintiffs' bonds. To the extent Plaintiffs have an existing first priority lien on SUT revenues and other funds, their request that Commonwealth assets be turned over to the Commonwealth's Treasury or garnished, frozen, or segregated so that Plaintiffs can eventually liquidate their security interest is an act to enforce their lien.

To the extent Plaintiffs do not have a lien on SUT revenues, which pursuant to applicable law are ordinarily transferred to third parties for the eventual payment of COFINA bonds, Plaintiffs' attempt to attach or garnish these funds, in which COFINA may have an interest, and hence gain a priority interest over them, is "an act to 'create' or 'perfect' a lien on this property." *See In re Reserves Dev. Corp.*, 78 B.R. at 958 (holding that "[t]he net effect of [a prejudgment] attachment would be to create a lien on the property and give appellants a priority interest over any intervening creditor pending the outcome of the pending state court action.").

The District Court's conclusion that the mere assertion of the PROMESA Claims does not affect the Commonwealth's property interest "at this juncture" misses the point of Sections 405(b)(4) and (b)(5). What is important is what Plaintiffs are attempting to do: Obtain a declaration that determines Plaintiffs' alleged lien priority in the SUT revenues and an injunction that freezes, garnishes, attaches, and segregates those revenues for their benefit. If successful, those

attempts would unquestionably affect the Commonwealth's property interests, and they are, therefore, acts to create, perfect, or enforce a lien.[15]

III. The District Court Improperly Denied the Oversight Board's Motion to Stay the Entire Action

It is well established that "federal district courts possess the inherent power to stay pending litigation." *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1154 (1st Cir. 1992). In deciding whether to stay a case, a district court must analyze and balance the competing interest of the parties to determine whether a stay is appropriate. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936); *Kansas City S. Ry. Co. v. United States*, 282 U.S. 760, 763–64 (1931). The District Court, however, did not perform this careful balancing test. Instead, the District Court denied the Oversight Board's and the Commonwealth Defendants' stay motions based solely on the fact that, in its view, four of the causes of action were not explicitly covered by Section 405(b) of PROMESA. ADD26–27. This was an abuse of the District Court's discretion.

---

[15] Equally misplaced is the District Court's conclusion that Plaintiffs' PROMESA Claims "do not seek any form of payment from the Commonwealth." ADD26. In fact, that is exactly what they seek, albeit in the future. As the District Court recognized in another context, a creditor's "ultimate aim is to obtain money judgments against their borrowers or 'to gain an advantage in anticipated restructuring proceedings.'" *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *57 n.11.

The unprecedented fiscal crisis facing the Commonwealth and Congress' clear intention in staying litigation against the Commonwealth, its instrumentalities, and its public officials for a short period of time to allow for a "breathing spell" are well documented and not in dispute. *See* 48 U.S.C. §§ 2194(m), (n). Ongoing litigation has been and continues to be a major distraction that interferes with the Oversight Board's congressional mandate to oversee a "fair and orderly" restructuring of the Commonwealth's debt.[16] That is especially so now that, after weeks of negotiations, the Oversight Board has certified the Commonwealth's fiscal plan. The parties may now focus their energies on negotiations against the backdrop of that fiscal plan. These last few weeks of the PROMESA stay will be extremely intense and pressing times for the parties. The Oversight Board believes that its and the Commonwealth's limited

[16] Moreover, allowing Plaintiffs to proceed under Section 204(c)(3)(A) of PROMESA would also interfere with the Oversight Board's ability to do its job. The Oversight Board is now up and running, and should be given the opportunity to exercise its sole discretion to review and, if appropriate, rescind any offending laws pursuant to Section 204(c)(3)(B) of PROMESA. 48 U.S.C. § 2144(c)(3); *see Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *62 (noting that the Oversight Board may "unilaterally dismantle" any offending provisions of the Moratorium Act and the challenged executive orders "by exercising its 'sole discretion' to rescind any law that 'alters pre-existing priorities of creditors in a manner outside the ordinary course of business or inconsistent with the territory's constitution or the laws of the territory.'").

resources are better spent working together and negotiating with creditors, rather than defending this case.

None of the Plaintiffs would suffer irreparable or even material harm if the action were stayed in its entirety. *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989) ("[I]f money damages will fully alleviate harm, then the harm cannot be said to be irreparable."). There are multiple provisions in PROMESA that protect Plaintiffs' interests during the duration of any stay. *See* 48 U.S.C. §§ 2194(k), (l), 2195(a); *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *49 (observing that PROMESA contains provisions designed to protect creditors during the pendency of the PROMESA stay).

Currently-due payments will not be made now, but the SUT revenue stream (allegedly $51 billion over the next 40 years (*see* A465)) that Plaintiffs claim secures their GO Bonds will still be available for future payments under potential future modifications to the certified fiscal plan or in future proceedings under PROMESA. *See Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *48–49 (noting that any "financial harm [to plaintiffs] could effectively be dealt with through the voluntary negotiations process fostered by PROMESA and supervised by the Oversight Board, or through future title III restructuring proceedings.").

Allowing the Oversight Board to undertake its statutory duty is in the public interest and outweighs any potential monetary harm the Plaintiffs may suffer as a result of the stay. *See Landis v. N. Am. Co.*, 299 U.S. at 256 ("Especially in cases of extraordinary public moment, the individual may be required to submit to [a limited] delay . . . if the public welfare or convenience will thereby be promoted."). The District Court should have exercised its inherent power to stay this entire action so that the Oversight Board could concentrate on fiscal plans and capital market strategy instead of on this litigation.

Even if the District Court were correct that the PROMESA Claims are technically not covered by the explicit terms of PROMESA, this would not be an impediment to the District Court exercising its inherent discretion. Indeed, in the bankruptcy context, courts routinely use their discretionary power to extend the automatic stay to actions that are expressly not covered by the automatic stay. *See, e.g.*, *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978–79 (1st Cir. 1995) (noting a bankruptcy court's power to enjoin actions proceeding against non-debtors); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 5 (1st Cir. 1983) (noting the Court's authority to "stay . . . proceedings in the interest of judicial economy and fairness to the parties"), *cert. dismissed*, 463 U.S. 1247 (1983).

Moreover, Congress clearly envisioned that the District Court might be called upon to determine if cases that fall outside of the strict confines of Section

405(b) of PROMESA nonetheless ought to be stayed. Section 212 of PROMESA specifically authorizes the Oversight Board to seek "a stay of litigation." 48 U.S.C. § 2152(b)(1). That Section 212 of PROMESA does not create an independent basis to grant a stay of litigation simply means that the District Court must balance the equities to determine whether a stay is appropriate.

Here, the District Court failed to conduct the required balancing test. Indeed, it does not appear that the District Court even considered the Oversight Board's arguments with respect to the disruption that this litigation has had and will continue to have on the Oversight Board and the Commonwealth. The District Court held that allowing the litigation to proceed would not "spurn" congressional intent, but in other PROMESA-stay related litigation, the District Court agreed that the creditors' "ultimate aim is to obtain money judgments against their borrowers or 'to gain an advantage in anticipated restructuring proceedings.'" *Brigade Leveraged Capital Structures Fund Ltd.*, 2016 U.S. Dist. LEXIS 158046, at *57 n.11. Allowing Plaintiffs to pursue their claims now "would, in essence, permit them to 'jump to the front of the line' to protect their own interests before other creditors have had the opportunity to defend theirs," would "work against a comprehensive restructuring that is fair and equitable to all stakeholders," and would "frustrate Congress' intent in designing PROMESA." *Id.* at *55, *57 n.11.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and stay the action.

Dated: March 15, 2017

Respectfully submitted,

LUSKIN, STERN & EISLER LLP

/s/ Michael Luskin
Michael Luskin (Bar # 1177315)
Stephan E. Hornung (Bar # 1177316)
Eleven Times Square
New York, New York 10036
Phone: (212) 597-8200
Fax: (212) 974-3205
luskin@lsellp.com
hornung@lsellp.com

Attorneys for Intervenor-Appellant
Financial Oversight and Management Board for Puerto Rico

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B) . The brief contains 12,980 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirement of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Executed: New York, New York
March 15, 2017

/s/ Michael Luskin
Michael Luskin

Attorney for Intervenor-Appellant
Financial Oversight and Management Board
for Puerto Rico

ADDENDUM

TABLE OF CONTENTS

	Page
Opinion and Order of the Honorable Francisco A. Besosa, filed February 17, 2017	ADD1
The Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 405, 48 U.S.C. § 2194	ADD42

Case 3:16-cv-02374-FAB Document 184 Filed 02/17/17 Page 1 of 41

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

LEX CLAIMS, LLC, *et al.*, **Plaintiffs**, **v.** ALEJANDRO GARCIA-PADILLA, *et al.*, **Defendants.**	**Civil No.** 16-2374 (FAB)

OPINION AND ORDER

BESOSA, District Judge.

This action arises from the Commonwealth of Puerto Rico (the "Commonwealth")'s default on general obligation bonds ("GO bonds"). Plaintiffs ("GO Bondholders") are beneficial owners of GO bonds. The GO Bondholders filed suit against the Commonwealth, the Governor of the Commonwealth, the Secretary of the Treasury of the Commonwealth, the Director of the Office of Management and Budget of the Commonwealth, the Puerto Rico Sales Tax Financing Corporation ("COFINA"), the Executive Director of COFINA, and the

Bank of New York Mellon Corporation (collectively "defendants").[1] Among other things, the GO Bondholders seek declaratory and injunctive relief pursuant to the Puerto Rico Oversight Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. § 2121 *et seq.*

Before the Court are six motions: (1) the Commonwealth and COFINA defendants' motion to stay the action in its entirety pursuant to section 405 of PROMESA (Docket No. 106);[2] (2) the Financial Oversight and Management Board for Puerto Rico ("Oversight Board")'s motion to intervene pursuant to PROMESA and Fed.R.Civ.P. 24 (Docket No. 62); (3) Ambac Assurance Corporation ("Ambac")'s motion to intervene as a defendant pursuant to Fed.R.Civ.P. 24, and to stay this action pursuant to PROMESA (Docket No. 55); (4) the COFINA Senior Bondholders motion to

[1] The Court will refer to the Commonwealth, the Governor of the Commonwealth, the Secretary of the Treasury, and the Director of the Office of Management and Budget as the "Commonwealth defendants." COFINA, the Executive Director of COFINA, and the Bank of New York Mellon will together be referred to as the "COFINA defendants." Furthermore, the second amended complaint named "Bank of New York Mellon Corporation" as defendant. (Docket. No. 78.) The Court granted Bank of New York Mellon's uncontested motion to change the captioned name to "The Bank of New York Mellon, as indenture trustee" ("BNYM Trustee"). (Docket Nos. 118 and 135.)

[2] BNYM Trustee moved to join the Commonwealth defendant's motion to stay. (Docket No. 134.) The Court granted the motion to join. (Docket No. 135.)

intervene pursuant to Fed.R.Civ.P. 24 (Docket No. 50); (5) Puerto Rico-based funds (the "Puerto Rico Funds")'s motion to intervene pursuant to Fed.R.Civ.P. 24 (Docket No. 95); and (6) the Major COFINA Bondholders' motion to intervene pursuant to Fed.R.Civ.P. 24 (Docket No. 113). The GO Bondholders have opposed all motions (Docket Nos. 87, 93, 110, 127, 145, 146, 155 and 166) and each movant, except the Oversight Board, has filed a reply (Docket Nos. 94, 133, 157, 159 & 170.)

The Court has considered the submissions filed in support of, and in opposition to, each of the pending motions. For the reasons set forth below, the Court **DENIES** the defendants' motion to stay (Docket No. 106), and the Senior COFINA Bondholder's motion to intervene (Docket No. 50), and **GRANTS** the motions to intervene of: the Oversight Board (Docket No. 62), Ambac (Docket No. 55), the Puerto Rico Funds (Docket No. 95), and the Major COFINA Bondholders (Docket No. 113).

I. BACKGROUND

The GO Bondholders are "beneficial owners" of GO bonds. (Docket No. 78 at p. 4.) GO bonds are issued by the Commonwealth and backed by a pledge of the Commonwealth's good faith, credit, and taxing power. Id. The GO Bondholders define GO bonds as "constitutional debt" because Article VI, Section 8 of the Puerto Rico Constitution declares that if "available resources" are

insufficient to finance the Commonwealth's obligations, "interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law." Id. (citing P.R. Const. Art. VI, Sec. 8.)

According to the GO Bondholders, the Commonwealth's obligation to pay GO bonds takes precedence over competing financial obligations, including obligations on bonds issued by COFINA, an instrumentality of the Commonwealth government. Id. at p. 8. These COFINA bonds are secured by, and payable from, a percentage of the revenues the Commonwealth collects from its Sales and Use Tax, known in Spanish as the Impuesto sobre Ventas y Uso ("IVU"). Id. The GO Bondholders allege that because IVU revenues constitute "available resources" within the meaning of Article VI, Section 8, these revenues must first satisfy GO Bond obligations, not COFINA bond obligations. Id.

A. PROMESA

On June 30, 2016, President Obama signed PROMESA into law. PROMESA seeks to address the dire fiscal emergency in Puerto Rico, and sets forth "[a] comprehensive approach to [Puerto Rico's] fiscal, management and structural problems and [. . .] a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." PROMESA

Case 3:16-cv-02374-FAB Document 184 Filed 02/17/17 Page 5 of 41

§ 405(m)(4). PROMESA establishes a seven-member Oversight Board for Puerto Rico. Id. §§ 101(b)(1), (e)(1)(A). "The purpose of the Oversight Board is to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." Id. § 101(a). The Oversight Board operates as an entity within the Government of Puerto Rico, id. § 101(c), and is given broad authority over the Commonwealth and any of its instrumentalities that the Board designates as "covered" instrumentalities, id. § 101(d)(1). For instance, the Oversight Board has the authority to develop, review, and approve territorial and instrumentality fiscal plans and budgets, id. §§ 201-202; to enforce budget and fiscal plan compliance, id. §§ 203-204; to seek judicial enforcement of its authority to carry out its responsibilities under PROMESA, id. § 104(k); and to intervene in any litigation filed against the Commonwealth or its instrumentalities, id. § 212. All members of the Oversight Board were appointed on August 31, 2016.

Among PROMESA'S provisions is an automatic stay of all debt-related litigation against the Commonwealth, which was or could have been commenced before the statute's enactment. PROMESA § 405(b). Congress deemed that component of the legislation "essential to stabilize the region for the purposes of resolving" the Commonwealth's financial crisis. Id. § 405(m)(5). The stay

is designed to "allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits." Id. § 405(n)(2). The stay also helps "to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment" and allows the Oversight Board time "to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation." Id. § 405(m)(5)(B), (A). Congress indicated that by serving these important purposes, PROMESA's automatic stay was ultimately intended to "benefit the lives of 3.5 million American citizens living in Puerto Rico." Id. § 405(n)(5).

The automatic stay, however, is "limited in nature," PROMESA § 405(m)(5)(B), and remains in effect until the earlier of (1) February 15, 2017, with a possible extension of sixty or seventy-five days, or (2) the date on which the Oversight Board files a petition on behalf of the Government of Puerto Rico or any of its instrumentalities to commence debt-adjustment proceedings

pursuant to Title III of PROMESA.[3] Id. § 405(d). The Court may, however, grant relief from the stay to "a party in interest" either "for cause shown," or "to prevent irreparable damage" to the party's interest in property. Id. § 405(e)(2), (g).

B. The Moratorium Act and Executive Order 30

On April 6, 2016, the Commonwealth enacted the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act ("Moratorium Act").[4] The Commonwealth acknowledged that the ongoing financial crisis had been brought to a "perilous tipping point." Moratorium Act, Stmt. of Motives. § A. The Moratorium Act aims to provide the Commonwealth with the "tools" it needs "to continue providing essential services to the people" of the Commonwealth despite insufficient "resources to comply with debt service obligations as originally scheduled." Id. To that end, the Moratorium Act empowers the Governor to issue executive orders

[3] PROMESA's automatic stay expires by its own terms on the earlier of those dates. On February 14, 2017 the Oversight Board extended the stay for an additional 75 days. Letter From the Board to Governor Ricardo Rossello Regarding the Extension of PROMESA Stay, February 14, 2017, https://juntasupervision.pr.gov/index.php/en/documents/ (last visited Feb. 17, 2017). The stay will remain in effect until May 1, 2017.

[4] On January 27, 2017 Governor Ricardo Rosello signed the Puerto Rico Financial Emergency and Fiscal Responsibility Act of 2017. This legislation repeals the "emergency periods" that initiated the debt moratorium and litigation stay set forth in the previous administration's Moratorium Act. Stmt. of Intent p. 41.

(1) declaring a "state of emergency" with respect to the Commonwealth or its instrumentalities, and (2) suspending payment of principal and interest on "covered obligations," during a "covered period" through January 31, 2017. Moratorium Act §§ 103(m), 201(a). It also authorizes the Governor to "expropriat[e] property or rights in property interests" and to suspend or modify any statutory or other obligation to transfer money for the payment of, or to secure, any covered obligation, so that instrumentalities subject to the Moratorium Act are able to pay for "essential services." Id. §§ 201(b), (d)(ii).

Immediately following the enactment of PROMESA, former Governor of Puerto Rico Alejandro Garcia-Padilla issued Executive Order 2016-30 ("Executive Order 30") pursuant to the authority invested in him by the Moratorium Act. (Docket No. 78 at p. 5.) In fact, on the same day of PROMESA's enactment, Executive Order 30 suspended the Commonwealth's obligation to make payments on bonds or notes issued or guaranteed by the Commonwealth, other than payments to the Government Development Bank ("GDB"). Id. Essentially, Executive Order 30 halted payments on GO bonds. Id.

On July 1, 2016, the Commonwealth defaulted on $817 million in GO bond payments (Docket No. 78 at p. 26.) The GO Bondholders commenced this case on July 20, 2016 by filing a

complaint (Docket No. 1), which they subsequently amended twice (Docket Nos. 25 and 78.)

C. The Second Amended Complaint

The first two renditions of the GO Bondholders' complaint set forth two causes of action arising under PROMESA to challenge Executive Order 30, the Commonwealth's failure to allocate funds for future GO bond obligations, and legislation diverting funds to the GDB.[5] (Docket Nos. 1 and 25.) The GO Bondholders alleged that the Commonwealth defendants violated sections 204(c)(3) and 207 of PROMESA.[6] Id. The Commonwealth defendants filed a motion to stay pursuant to section 405 of PROMESA. (Docket No. 26.) The Court denied this motion. (Docket No. 32.) The Commonwealth defendants then filed a motion for

---

[5] The complaint and the amended complaint asserted only one substantive cause of action. The second count of the complaint and the amended complaint simply sought relief from the debt-litigation stay.

[6] Section 204(c)(3) of PROMESA provides that after PROMESA's enactment and before the complete appointment of the Oversight Board, the Commonwealth "shall not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory." Section 207 of PROMESA states that "[f]or so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt."

reconsideration, which the Court also denied. (Docket Nos. 34 and 75.)

With the Court's leave, the GO Bondholders later filed a second amended complaint. (Docket No. 78.) The second amended complaint set forth an additional twelve counts, and named additional defendants, including the COFINA defendants. (Docket No. 78.) The GO Bondholders concede that with the exception of the first, second, third, and twelfth counts (the "PROMESA counts"), the second amended complaint is subject to the section 405 debt-litigation stay of PROMESA. (Docket No. 39 at p. 2.)

The first count of the second amended complaint is substantively the same as that of the amended complaint, and names only the Commonwealth defendants. The second, third and twelfth counts assert causes of action against both the Commonwealth and the COFINA defendants pursuant to various provisions of PROMESA.

The second count alleges that Executive Order 30 is preempted by § 303(3) of PROMESA, which states:

> [U]nlawful executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality, or that diverts funds from one territorial instrumentality to another or to the territory, shall be preempted by this Act.

After PROMESA's enactment and pursuant to Executive Order 30, the Commonwealth defaulted on payments to GO Bondholders. (Docket No. 78 at 51.) The Commonwealth, however, continued to

fund COFINA with IVU revenues. Id. In so doing, the GO Bondholders allege the Commonwealth "impair[ed] their right to receive payment before the Commonwealth may use funds for any other purpose." Id. The GO Bondholders request that the Court declare that Executive Order 30 is unlawful, and grant injunctive relief.[7] Id. at p. 67.

The third count challenges the legality of the Commonwealth's Moratorium Act pursuant to section 303(1) of PROMESA. Id. at p. 52. Section 303(1) states that:

> A territory law prescribing a method of composition of indebtedness or a moratorium law, but solely to the extent that it prohibits the payment of principal or interest [. . .] may not bind any creditor of a covered territory that does not consent to the composition or moratorium.

Because the Moratorium Act "purports to prohibit the payment" on GO bonds without first obtaining creditor consent, the GO Bondholders allege that the Moratorium Act runs afoul of section 303(1). Id. The GO Bondholders request a declaration

[7] The forms of injunctive relief the GO Bondholders seek in connection with the PROMESA counts include: (1) a prohibition of the enforcement of Executive Order 30 and the Moratorium Act; (2) a prohibition of the diversion of IVU revenues to COFINA; (3) a requirement that COFINA transfer IVU revenues to the Commonwealth; (4) a requirement that the Commonwealth preserve and segregate funds transferred from COFINA; (5) a prohibition of the implementation of "outsized transfers" to public employee pension funds, and the diversion of funds to the GDB; and (6) a requirement that the Commonwealth segregate and preserve "all funds clawed back, to be clawed back, or available to be clawed back" for the purpose of paying Constitutional debt. (Docket No. 78 at pp. 49-50, 66-69.)

Case 3:16-cv-02374-FAB Document 211 Filed 03/13/17 Page 97 of 135

that the Moratorium Act cannot bind them without their consent, and injunctive relief. Id. at p. 67.

Lastly, the twelfth count alleges that the Commonwealth and COFINA defendants have violated 42 U.S.C. § 1983[8] insofar as they have deprived the GO Bondholders "of rights, privileges, and immunities secured by the laws of the United States," namely, PROMESA.

The Court will first address whether the debt-litigation stay pursuant to section 405 of PROMESA is applicable, and will then address the pending motions to intervene.

II. The Motion to Stay Pursuant to Section 405 of PROMESA

Section 405(b) of PROMESA stays lawsuits that are "with respect to a Liability" if those lawsuits fall within one of the categories listed in subsections (b)(1) through (b)(7). PROMESA § 405(b). Here, defendants argue that the PROMESA Counts are stayed by sections 405(b)(1), (b)(6), (b)(3), (b)(4) and (b)(5) of PROMESA.

[8] 42 U.S.C. 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any [. . .] Territory [. . .] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 405 of PROMESA was patterned on the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362. Indeed, the two provisions are nearly identical. Thus, the Court looks to how courts have interpreted section 362 in the bankruptcy context for guidance in deciding whether the PROMESA counts are stayed by section 405.

In the bankruptcy context, the automatic stay becomes operative upon the filing of a bankruptcy petition, and "is extremely broad in scope," applying "to almost any type of formal or informal action taken against the debtor." Montalvo v. Autoridad de Acueductos y Alcantarillados, 537 B.R. 128, 140 (Bankr. D.P.R. 2015) (citing Alan N. Resnick & Henry J. Sommer, 3 Collier on Bankruptcy ¶ 362.03 (16th ed. 2015)). The automatic stay, however, "is not all encompassing." E.g., Rodriguez v. Biltoria Realty LLC, 203 F. Supp. 2d 290, 291 (E.D.N.Y. 2002) (holding that automatic stay did not preclude victims from suing manufacturer for claims stemming from a post-petition accident). For instance, "proceedings or claims arising post-petition are not subject to the automatic stay." In re Gull Air, Inc., 890 F.2d 1255, 1263 (1st. Cir. 1989) (action to reallocate airport arrival slots not subject to section 362 stay because the claims arose post-petition).

With this framework in mind, the Court now turns to the merits of defendants' arguments in support of a stay.

A. Section 405(b)(1) of PROMESA

Section 405(b)(1) of PROMESA stays "actions or proceedings against the Government of Puerto Rico that w[ere] or could have been commenced before the enactment of [PROMESA]." It also stays judicial actions "to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of [PROMESA]." Id.

In an earlier opinion, the Court held that count one of the amended complaint, which is substantively identical to count one of the second amended complaint, does not fall into either of the two types of judicial actions stayed by section 405(b)(1) of PROMESA. (See Docket No. 32.) In relevant part, the Court reasoned that "[p]laintiffs could not have commenced this lawsuit before PROMESA's enactment because their claims are to enforce provisions of PROMESA by challenging conduct that occurred after PROMESA's enactment." Id. The Court further reasoned that count one did not assert a right to recover a "Liability Claim" inasmuch as it did "not seek to recover a right to payment that arose before PROMESA's enactment." Id.

The Commonwealth and COFINA defendants now argue that because the GO Bondholders have asserted numerous causes of action

in the second amended complaint which they concede are stayed, this entire action should be stayed because section 405(b)(1) of PROMESA does not stay particular causes of action, but "actions or proceeding[s]." (See Docket No. 84.) The Court is not persuaded.

Courts interpreting section 362 of the Bankruptcy Code have observed that each claim in an action must be analyzed separately for purposes of determining whether that particular claim is subject to an automatic stay. See, e.g., Mar. Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1991) ("Multiple claim and multiple party litigation must be disaggregated so that particular claims [. . .] are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay."); In re Mid-Atl. Handling Sys., LLC, 304 B.R. 111, 128 (Bankr. D.N.J. 2003) ("Especially in multiple claim and multiple party litigation, it is the function of the court to analyze each claim independently in determining whether the automatic stay should apply to that particular claim."). Interpreting section 405(b)(1) of PROMESA in a manner consistent with how other courts have interpreted the analogous stay provision of the Bankruptcy Code compels the Court to conclude that merely because some counts in the second amended complaint are stayed, it does not necessarily follow that all counts in the second amended complaint are stayed.

Invoking section 405(b)(1) of PROMESA, defendants further argue that counts two and three are stayed "for the independent reason that they could have been brought long before the enactment of PROMESA." (Docket No. 84 at 7.) In so doing, they argue that these counts do not actually arise under PROMESA, but present a constitutional challenge to COFINA because resolution of these claims would ultimately require a determination as to whether IVU revenues assigned to COFINA constitute "available resources" within the meaning of Article VI, Section 8 of the Puerto Rico Constitution. (Docket No. 84 at pp. 7-8.) Defendants' argument is unpersuasive because it is based on a misinterpretation (or mischaracterization) of what the GO Bondholders have actually pled.

While counts two and three certainly implicate the lawfulness of the Commonwealth's assignment of IVU revenues to COFINA, the asserted legal premise underlying these counts is that Executive Order 30 and the Moratorium Act are preempted by sections 303(1) and 303(3) of PROMESA. The GO Bondholders could not have possibly raised these claims prior to the enactment of PROMESA because they seek to enforce a specific provision of PROMESA. Accordingly, there is no basis to hold that counts two and three are stayed pursuant to section 405(b)(1) of PROMESA.

B. Section 405(b)(6) of PROMESA

Section 405(b)(6) of PROMESA stays "any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before" PROMESA's enactment. A Liability Claim is defined as a "right to payment" or "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." PROMESA § 405(a)(2). According to defendants, the PROMESA counts are stayed by section 405(b)(6) because the forms of injunctive relief which the GO Bondholders seek through the PROMESA counts "are designed to freeze government assets, garnish the same from third parties, and attach or segregate them for the eventual payments of plaintiffs' bonds." (Docket No. 84 at pp. 9-10.) Thus, defendants assert that the forms of injunctive relief sought in these claims "are 'acts to collect.'" Id. The Court disagrees.

Section 362(a)(6) of the Bankruptcy Code, the provision after which section 405(b)(6) of PROMESA was modeled, "is very broad." E.g., In re Claudio, No. 11-02792, Adv. No. 11-00237, 2012 Bankr. LEXIS 5041, at *8 (D.P.R. Oct. 25, 2012) (Godoy, J.). Its breadth, however, extends only to a creditor's acts to "collect, assess, or recover" a prepetition debt, not to any non-harassing, non-coercive act to ensure eventual payment from the debtor or the debtor's estate. 11 U.S.C. § 326(a)(6); see also

Citizens Bank v. Strumpf, 516 U.S. 16, 21 (1995) (holding that bank's placing an administrative hold on a bankruptcy debtor's account did not violate sections 362(a)(3) or 362(a)(6) because the administrative hold did not take something from the bankruptcy debtor, or exercise dominion over property that belonged to the bankruptcy debtor); In re Knowles, 442 B.R. 150, 160-61 (B.A.P. 1st Cir. 2011) (observing that "a 'mere request for payment' does not violate the stay unless it is coercive or harassing," and holding that "the filing of the proof of claim is not an act against property of the debtor."); Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n., 804 F.2d 1487, 1491 (9th Cir. 1986) (observing that "[t]he activities that are specifically prohibited [by 11 U.S.C. § 362(a)(6)] all involve attempts to confiscate the debtor's property or require the debtor to act affirmatively to protect its interests.")

To support their overly broad interpretation of section 362(a)(6), defendants cite numerous cases which involve either coercive or harassing conduct on the part of a creditor, or a creditor's direct efforts to collect on a claim from a debtor. See Divane v. A & C Elec. Co., 193 B.R. 856, 861 (N.D. Ill. 1996) (holding that health benefit plan's act of sending notice to employees that debtor employer was delinquent in making payments to the plan constituted "harassment or coercion," and was therefore

a violation of section 362(a)(6)); In re Hellums, 772 F.2d 379 (7th Cir. 1985) (holding that credit union violated section 362(a)(6) in applying automatic deductions from bankruptcy debtor's wages to loan repayment); In re Guinn, 102 B.R. 838 (Bankr. N.D. Ala. 1989) (holding that credit union's refusal to accept mortgage payments from debtor violated section 362(a)(6) because this refusal constituted an effort to collect payment of unsecured debts discharged in bankruptcy); In re Trevino, 535 B.R. 110, 149 (Bankr. S.D. Tex. 2015) (holding that debtors had stated a viable claim pursuant to 362(a)(6) in light of their allegation that creditor sent a letter that "threatened to bill them on account of a pre-petition claim after they had obtained a bankruptcy discharge if they did not provide proof of payment.").

Indeed, the cases defendants cite are inapposite because the GO Bondholders, unlike the creditors involved in those cases, have explicitly "disclaimed any attempt to collect." (Docket No. 27 at 9.) What is more, the Court has no basis to find that the GO Bondholders have brought this action to coerce or harass any defendant, and defendants have raised no argument to the contrary.

As the Court previously concluded in holding that count one of the amended complaint was not stayed, "this is not an action to recover a liability claim against the government of Puerto Rico"

that arose before the enactment of PROMESA because the GO Bondholders seek only declaratory and injunctive relief. See Docket No. 28 at 2. The additional PROMESA counts asserted in the second amended complaint do not alter this conclusion notwithstanding the fact that the GO Bondholders now also seek injunctions that, *inter alia*, prohibit the diversion of IVU revenues to COFINA, and direct the COFINA defendants to transfer revenues held on behalf of COFINA to the Commonwealth.

In suggesting that section 405(b)(6) would extend even to the GO Bondholders' claims against the COFINA defendants and BNYM Trustee, defendants point out that courts have stayed actions seeking recovery of a debtor's post-petition transfers or payments to third parties. See Docket 84 at 11-12. The cases defendants cite for this proposition, however, all involve actions to recover money from third parties to satisfy the pre-petition debts of a bankruptcy debtor. See In re Teleservices Grp., Inc., 463 B.R. 28, 35 (Bankr. W.D. Mich. 2012) (holding that section 362(a)(6) stayed a creditor's unjust enrichment claim seeking money from third-party bank that had received fraudulent transfers from the debtor, which were traceable to the creditor); In re Colonial Realty Co., 980 F.2d 125, 132 (2d Cir. 1992) (holding that the bankruptcy stay applied to creditor's action against third-party to recover funds that had allegedly been fraudulently conveyed by

debtor); In re Saunders, 101 B.R. 303 (Bankr. N.D. Fla. 1989) (holding that bankruptcy stay applied to creditor's action against a third-party "to recover assets allegedly transferred [by debtor] in fraud of creditors."). None of these cases involve actions seeking only declaratory and injunctive relief.

Indeed, the GO Bondholders' PROMESA counts are not aimed at confiscating any property of, or obtaining any form of payment from, the Commonwealth. Thus, the PROMESA claims are not stayed by section 405(b)(6).

C. Section 405(b)(3) of PROMESA

Section 405(b)(3) of PROMESA stays "any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico." Courts have defined the exercise of control as "restraining or directing influence over' or 'to have power over.'" In re Weidenbenner, 521 B.R. 74, 79 (Bankr. S.D.N.Y. 2014) (quoting Thompson v. GMAC, LLC, 566 F.3d 699, 702 (7th Cir. 2009)). Put differently, "to exercise control" over something without actually possessing it is to have "constructive possession." In re Weidenbenner, 521 B.R. at 79 (observing that, "at some point, 'control' over another's property becomes constructive possession."); See Black's Law Dictionary (10th ed. 2014) (defining "constructive possession" as "[c]ontrol

or dominion over a property without actual possession or custody of it”).

Defendants do not argue that the PROMESA counts seek to obtain possession from, or the property of, the Commonwealth. On the contrary, defendants argue only that the GO Bondholders seek to exercise control over the Commonwealth’s property through the PROMESA counts. To support this argument, defendants emphasize that the injunctive relief sought in the PROMESA counts would: (1) require the segregation and preservation of certain funds, (2) prohibit certain transfers pursuant to the Commonwealth’s budget; (3) prohibit the transfer of IVU revenues to COFINA; and (4) require COFINA to transfer IVU revenues to the Commonwealth. (Docket No. 84 at p. 13.) In essence, defendants’ argument is reduced to this: the GO Bondholders’ request for injunctive relief amounts to an act to exercise control over the Commonwealth’s property because, if the GO Bondholders prevail on the PROMESA counts, the Commonwealth will be not be at complete liberty to dispose of its assets as it deems fit.

To support their contention that the GO Bondholders seek to exercise control over the Commonwealth’s property, defendants rely on two cases, both of which involve taking affirmative steps to control a debtor’s assets. See In re Weidenbenner, 521 B.R. at 79-80 (holding that bank’s freezing the funds in debtor’s account

while unilaterally determining who would have access to those funds amounted to "control over property of the estate"); In re Patterson, 967 F.2d 505, 511-12 (11th Cir. 1992) (holding that credit union's act of freezing debtor's funds "constituted an act to exercise control over the property of the bankruptcy estate in violation of Section 362(a)(3)" because the freeze deprived the debtors "of any control of those funds and invested exclusive control in the [c]redit [u]nion.").

Unlike the acts determined to constitute "exercises of control" in Weidenbenner and Patterson, the injunctive relief the GO Bondholders seek would not permit them to have any possession, influence, or power over any asset, much less any asset of the Commonwealth. Rather, the injunctive relief the GO Bondholders seek would, if the GO Bondholders ultimately prevail, preclude the Commonwealth from dissipating its assets in a manner that violates PROMESA. Consequently, the Court holds that the PROMESA counts are not stayed by section 405(b)(3). See, e.g., Amplifier Research Corp. v. Hart, 144 B.R. 693, 695 (E.D. Pa. 1992) (concluding that section 362(a)(3) "protects interests in a debtor's property, not tortious uses of that property by the debtor."); Larami Ltd. v. Yes! Entm't Corp., 244 B.R. 56, 60 (D.N.J. 2010) ("Section 362(a)(3) was intended to prevent interference with a bankruptcy court's orderly disposition of the property of the estate, it was

not intended to preclude post-petition suits to enjoin unlawful conduct.”); United States v. Inslaw, Inc., 932 F.2d 1467, 1473 (D.C. Cir. 1991) (“The object of the automatic stay provision is essentially to solve a collective action problem -- to make sure that creditors do not destroy the bankrupt estate in their scramble for relief. Fulfillment of that purpose cannot require that every party who acts in resistance to the debtor’s view of its rights violates § 362(a) . . .”) (citation omitted).

D. Sections 405(b)(4) and 405(b)(5) of PROMESA

Sections 405(b)(4) and 405(b)(5) of PROMESA stay “any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico.” Defendants suggest that the PROMESA counts are stayed by sections 405(b)(4) and 405(b)(5) because the injunctive relief sought in connection with these counts “is clearly an act to create, perfect, or enforce a lien.” (See Docket No. 84 at 16.) This argument lacks merit.

As defendants acknowledge in their motion to stay, the second amended complaint alleges that the GO Bondholders have a first lien on available resources of the Commonwealth — resources which the GO Bondholders allege include IVU revenues and certain Commonwealth expenditures — pursuant to Article VI of the Puerto Rico Constitution. See Docket Nos. 84 at p. 16; 78 at p. 5. If the GO Bondholders are correct, their liens already exist and have

been perfected by operation of the Puerto Rico Constitution. If the GO Bondholders are incorrect, the PROMESA counts will do nothing to create or perfect any lien, and the GO Bondholders will simply not be entitled to the relief they seek. Regardless, the mere assertion of the PROMESA counts, which at this juncture does nothing to affect the Commonwealth's interests in its property, does not constitute an act to create or perfect any lien on property of the Commonwealth.

Additionally, it would be improper to characterize the GO Bondholders' assertion of the PROMESA counts as an act "to enforce" a lien. Arguing otherwise, defendants contend that the GO Bondholders' request that IVU revenues be transferred to the Commonwealth's treasury is "an act to enforce a lien." (Docket No. 84 at 16.) To support this proposition, defendants cite In re Reserves Dev. Corp., a case that is inapposite because it does not even address what constitutes an act to enforce a lien. 78 B.R. 951, 958 (W.D. Mo. 1986) (holding that act of attaching "the debtors' coalwashing unit for the purpose of securing the payment of past-due wage claims" amounted to "an act to 'create' or 'perfect' a lien on this property" and thus was an act falling within the scope of Section 362(a)(4)).

If the GO Bondholders ultimately prevail on their claims, their requested relief would have the effect of precluding

the Commonwealth from continuing to spend and transfer its assets in a manner that violates PROMESA. In light of this, the Court is not convinced that the injunctive relief sought in connection with the PROMESA counts constitutes an act to "enforce" a lien, particularly because these claims do not seek any form of payment from the Commonwealth.

D. The Court's Inherent Authority to Stay this Action

Defendants argue that even if the Court disagrees that the entire case is stayed pursuant to Section 405(b) of PROMESA, the Court should nonetheless exercise its inherent authority to stay this case in its entirety to avoid piecemeal litigation in contravention of the purpose of the PROMESA stay. Defendants argue that a stay is appropriate to give effect to PROMESA's purpose of allowing the Commonwealth time to restructure its debts in an orderly way. To do otherwise, defendants suggest, "would spurn Congress's express objectives in passing PROMESA." (Docket No. 84 at p. 14.) The Court disagrees.

If Congress had intended to stay all claims against the Commonwealth for a particular period of time, it could have included language to this effect in PROMESA. That Congress did not do so indicates that Congress intended PROMESA to stay only certain types of claims, and not others. See Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must

presume that a legislature says in a statute what it means and means in a statute what it says there.”).

Because the Court has held that the PROMESA counts are not stayed by the express provisions of PROMESA enacted by Congress, the Court disagrees that staying these counts would "spurn Congress's express objectives." Accordingly, the Court will not stay the PROMESA claims in the exercise of its inherent authority.

III. Motions to Intervene[9]

Having determined that the PROMESA counts are not stayed, the Court turns to the merits of the five pending motions to intervene filed by: (1) the Oversight Board; (2) Ambac, which provides the Commonwealth with financial guaranty insurance on billions of dollars in debt, including insurance on $800 million for outstanding bonds issued by COFINA, (Docket No. 55 at p. 1); and (3) the COFINA Senior Bondholders, the Puerto Rico Funds, and the

[9] In their respective motions to intervene, Ambac, the COFINA Senior Bondholders, and the Oversight Board raise arguments in support of an automatic stay. To the extent these motions to intervene also request a stay, the motions are denied for the reasons the Court already set forth in determining that the PROMESA counts are not stayed.

Major COFINA Bondholders, all of whom own COFINA bonds in differing amounts.[10]

A. Rule 24 Standard

Federal Rule of Civil Procedure 24 ("Rule 24") provides two avenues by which a party may successfully intervene: intervention by right and permissive intervention. Fed.R.Civ.P. 24.

A party is entitled to intervene by right if "it is given an unconditional right to intervene by a federal statute." Fed.R.Civ.P. 24(a)(1). If no federal statute grants an unconditional right to intervene, the Court is nonetheless required to grant a party's motion to intervene if that party has "demonstrate[d] that: (1) its motion is timely; (2) it has an interest relating to the property or transaction that forms the foundation of the ongoing action; (3) the disposition of the action threatens to impair or impede its ability to protect this interest; and (4) no existing party adequately represents its interest."

[10] Senior COFINA Bondholders include Jose Rodriguez and institutional holders who together own approximately $2 billion dollars of senior secured bonds issued by COFINA. (Docket No. 50 at p. 4.) Puerto Rico Funds are institutional holders of approximately $435 million in senior secured COFINA bonds and $210 million in subordinate COFINA bonds. (Docket No. 95 at p. 2.) Major COFINA Bondholders are mutual funds that hold $748,214 in senior bonds and $2,893,748 in subordinate bonds issued by COFINA. (Docket No. 113 at p. 5.)

Ungar v. Arafat, 634 F.3d 46, 50 (1st Cir. 2011) "Failure to satisfy any one of the four requirements defeats intervention by right." Students for Fair Admissions v. Fellows of Harvard College, 807 F.3d 472, 474 (1st Cir. 2015). Determining whether a proposed intervener has fulfilled these requirements "calls for discretion in making a series of judgment calls, a 'balancing of factors that arise in highly idiosyncratic factual settings.'" Id. (quoting Arafat, 634 F.3d at 50; see also R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 8 (1st Cir. 2009) ("[E]ven in the case of a motion to intervene as of right, the district court's discretion is appreciable.").

Even if a proposed intervener is not entitled to intervene as of right, it may request permissive intervention. Pursuant to Rule 24(b), the Court may allow a party to intervene when that party's "claim or defense and the main action have a question of law or fact in common." Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 108 (1st Cir. 1999). The Court "can consider almost any factor rationally relevant" and "enjoys very broad discretion" in granting or denying a motion for permissive intervention. Id. at 113.

Whether moving for intervention by right or for permissive intervention, a motion to intervene must "state the grounds for intervention and be accompanied by a pleading that

sets out the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c).[11]

1. The Oversight Board

The Oversight Board's motion to intervene satisfies the requirements set forth in Rule 24(a), permitting intervention when a party "is given an unconditional right to intervene by a federal statute." See Peaje Invs. LLC v. García-Padilla, 845 F.3d 505, 516 (1st Cir. 2017) (noting that "PROMESA appears to grant the Board" the right to intervene in bondholder litigation pursuant to Section 212(a) of PROMESA). In drafting PROMESA, Congress specifically stated that the Oversight Board "may intervene in any

[11] The Court finds that all pending motions to intervene are timely and place no undue prejudice on the existing parties. This case is in the initial stages, when "the balance of prejudices … weigh heavily in favor of the [proposed intervener]." P.R. Tel. Co. v. Sistema de Retiro de los Empleados del Gobierno y la Judicatura, 637 F.3d 10, 16 (1st Cir. 2011), citing Zurich Capital Markets, Inc. v. Coglianese, 236 F.R.D. 379, 384-85 (N.D. Ill. 2006) (motion to intervene filed over two years after proposed intervener was placed on notice found timely where plaintiff could show no prejudice from the delay). The COFINA Senior Bondholders, Ambac, and the Oversight Board filed motions to intervene before the GO Bondholders filed the second amended complaint. (Docket Nos. 50, 55 & 62.) The Puerto Rico Funds and the Major COFINA Bondholders filed motions to intervene the same month that the GO Bondholders filed the second amended complaint. (Docket Nos. 95 & 113.) Notably, the GO Bondholders neither dispute that the motions to intervene are timely, nor do they argue that intervention will result in undue prejudice.

Case 3:16-cv-02374-FAB Document 184 Filed 02/17/17 Page 31 of 41

litigation filed against the territory."[12] PROMESA § 212(a). The second amended complaint names as a defendant the Commonwealth of Puerto Rico. (Docket No. 78.) Accordingly, the text of PROMESA compels the Court to allow the Oversight Board to intervene as of right pursuant to Rule 24(a).

The Oversight Board failed to attach a pleading to its motion to intervene. In fact, the GO Bondholders' sole argument opposing intervention is based on this procedural defect. (Docket No. 110 at p. 5.) While Rule 24(c) does, indeed, demand "a pleading that sets out the claim or defense for which intervention is sought," failure to comply with this requirement does not necessarily preclude intervention. See, e.g., City of Bangor v. Citizens Commc'ns Co., 532 F.3d 70, 95 n.11 (1st Cir. 2008) (no abuse of discretion where Court excused failure to file a pleading with motion to intervene). As the First Circuit Court of Appeals recently held, "denial of a motion to intervene based solely on the movant's failure to attach a pleading, absent prejudice to any party, constitutes an abuse of discretion." Peaje, 845 F.3d at 515.

In this case, there is no basis to find that the Oversight Board's failure to attach a pleading to its motion to

[12] According to section 5(20) of PROMESA, the term "territory" includes Puerto Rico.

intervene has caused prejudice to the GO Bondholders. Nor have the GO Bondholders identified any such prejudice. Following binding precedent, the Court will avoid an "overly technical reading[] of Rule 24(c)," and will excuse the Oversight Board's failure to attach a pleading. Id. Because the Oversight Board is statutorily entitled to intervene in this action, its motion to intervene is granted.

2. Ambac

In support of its motion to intervene, Ambac claims a direct interest in this litigation because it insures over $800 million of COFINA bonds, and will have to make payments to COFINA bondholders should COFINA default on its obligations. (See Docket No. 55 at pp. 8-10.) Ambac further argues that the disposition of this case could impair its interests insofar as there is a "realistic and practical threat that Ambac would have to pay claims" if the GO Bondholders prevail. Id. at p. 10. For instance, if the GO Bondholders prevail, a possible hold on the transfer of IVU revenues to COFINA may result in COFINA's inability "to make its debt payments in a timely manner." Id.

The GO Bondholders do not specifically contest that Ambac has an interest in this litigation, or that its disposition could potentially impair Ambac's legitimate interest in avoiding having to pay insurance claims on COFINA bonds. Rather, the GO

Bondholders raise two arguments to support the contention that the contract by which Ambac has agreed to insure bonds issued by COFINA (the "Ambac Insurance Policy") divests Ambac of any "legally cognizable" interest in this case, and specifically bars Ambac from intervening.

As to their first argument, the GO Bondholders argue that Ambac lacks any interest in this litigation because the Ambac Insurance Policy allows Ambac to become subrogated to the rights of the COFINA bondholders only to the extent that it makes payment of principal of or interest on insured COFINA bonds. (Docket No. 93 at p. 7.) The GO Bondholders' argument does not persuade the Court.

The subrogation provision of the Ambac Insurance Policy to which the GO Bondholders make reference merely states that if Ambac pays a claim on an insured bond, it will be subrogated to the rights of the bondholders. (See Docket No. 93-1, at Ex. B, at 12.) Nothing in this provision, however, either limits Ambac's right to intervene in an action pursuant to Rule 24, or otherwise limits the scope of the interests Ambac may seek to protect.

The GO Bondholders' second argument posits that even if Ambac were subrogated to the rights of the COFINA bondholders, Ambac's intervention would nevertheless be foreclosed because the COFINA Bondholders contractually delegated any right

they may have had to participate in this action to BNYM Trustee, the trustee for their bonds. (Docket No. 93 at 8-11.) Specifically, Ambac points to language on the COFINA bonds stating that COFINA bondholders

> "have no right to enforce the provisions of this Resolution, to institute action to enforce the provisions of the Resolution or to institute, appear in or defend any suit or other proceeding with respect thereto, except as provided in the Resolution."

(Docket No. 93 at 8.) The GO Bondholders proceed to cite the no-action provision of the Resolution referenced on the Ambac-insured COFINA bonds, which allows bondholders to "step into the shoes of the Trustee and 'institute [a] suit . . . or other proceeding'" only if certain prerequisites are satisfied. Id. at 10.

The GO Bondholders' second argument does not convince the Court that Ambac is contractually barred from intervening in this action for two reasons. First, insofar as the language on the COFINA bonds limits COFINA Bondholders' rights to "appear in or defend" suits, it does so only with respect to the "provisions of the Resolution." (Docket No. 93-1, at Ex. A, at 2.) Because this case does not stem from any alleged violation of the

"provisions of the Resolution," the language from the COFINA bonds which the GO Bondholders reference is not dispositive.[13]

Second, the selected provisions of the Resolution that the GO Bondholders reference, read in context, make clear that they set forth procedures bondholders must follow to pursue claims pursuant to the Resolution. To illustrate, the complete, relevant language of section 1106 of the Resolution that the GO Bondholders cite states:

> No owner of any Bond shall have any right to institute any suit, action, mandamus or other proceeding in equity or at law hereunder, or for the protection or enforcement of any right under this Resolution, unless [. . . .]

---

[13] It bears emphasis that the GO Bondholders acknowledge that they are not parties to the Resolution, (Docket No. 93 at p. 9), but nonetheless seek enforcement of the no-action clause, relying on cases of the Delaware Court of Chancery allowing non-parties to enforce no-action clauses. Feldbaum v. McCrory Corp., Civ. No. 11186, 1992 WL 119095 (Del. Ch. June 2, 1992); In re Enron Corp. Sec., Deriv. & ERISA Litig., Civ. No. H-01-3624, 2008 WL 744823 (S.D. Tex. Mar. 19, 2008). Even if the Court were to agree with the GO Bondholders' interpretation of the Resolution, the Court would not allow the GO Bondholders to enforce the provisions of the Resolution because the overwhelming weight of authority supports the conclusion that a non-party to a contract cannot generally enforce the provisions of that contract. See, e.g., Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 86 (2d Cir. 2014) (observing "that the terms of a contract may be enforced only by contracting parties or intended third-party beneficiaries of the contract."); Aho v. Bank of Am., N.A., Civ. No. 15-cv-128-JL, 2015 U.S. Dist. LEXIS 169357, at *8 (D.N.H. Dec. 18, 2015) (observing that under New York law, "a non-party lacks standing to enforce a contract unless the contract contains a clear indication of an intent to allow it."); Davidson v. Yihai Cao, 211 F. Supp. 2d 264, 283 (D. Mass. 2011) (observing that under Illinois law "[t]here is a strong presumption that a non-party to a contract cannot enforce the contract.").

Because Ambac's motion to intervene is unrelated to the Resolution, the Court fails to see how the Ambac insurance policy precludes Ambac from intervening.[14]

As Ambac has filed a timely motion to intervene, and established that it has an interest in this litigation, the disposition of which could impair its interests, the Court is satisfied that Ambac is entitled to intervene pursuant to Fed.R.Civ.P. 24(a)(2).

3. COFINA Senior Bondholders

The COFINA Senior Bondholders filed a motion to intervene for the limited purpose of seeking enforcement of the

---

[14] Although the GO Bondholders have not specifically argued otherwise, the Court notes that Ambac has made the required "minimal showing that the representation afforded by a named party would prove inadequate." B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 545 (1st Cir. 2006). This is so because, unlike the other named defendants, there is a reasonable likelihood that Ambac would suffer direct economic harm if the GO Bondholders are ultimately successful in this case. To illustrate, the transfer of IVU revenues from COFINA to the Commonwealth's treasury could potentially deplete COFINA's assets, resulting in COFINA defaulting on its bond obligations. Consequently, Ambac would have to pay insurance claims to COFINA Bondholders. By contrast, the Commonwealth's treasury will only grow larger if the GO Bondholders prevail, as IVU revenues would be transferred from COFINA to the Commonwealth. In light of the potential for this litigation to have a disparately adverse impact on Ambac than on other defendants, the Court is satisfied that Ambac has made a showing of inadequate representation. See, e.g., Kellogg USA, 440 F.3d at 547 (holding that a showing that "the potential for … litigation to have a greater adverse impact on [the potential intervenor] is sufficient to establish that a named party is an inadequate representative.").

PROMESA stay (Docket No. 50.) Subsequently, the GO Bondholders filed the second amended complaint, in addition to a response in opposition to the COFINA Senior Bondholder's motion. (Docket Nos. 78 & 87.) With the Court's permission, the COFINA Senior Bondholders then filed a reply in which they reiterated their request for intervention for the limited purpose of enforcing the PROMESA stay. (Docket No. 94.)

Courts may deny motions to intervene when the underlying purpose for which intervention is sought is non-existent. See 4MVR, LLC v. Hill, 2015 U.S. Dist. LEXIS 81904, at *25 (D. Mass 2015) (motion to intervene for the purpose of opposing leave to amend denied as moot after the Court denied underlying motion to amend). The COFINA Senior Bondholder's motion to intervene is moot in light of the Court's conclusion that the PROMESA counts are not stayed. Consequently, the COFINA Senior Bondholders' motion to intervene is denied.

4. Puerto Rico Funds and Major COFINA Bondholders

The Puerto Rico Funds and the Major COFINA Bondholders' respective motions to intervene raise similar arguments as to why each should be permitted to intervene as of right. Specifically, both the Puerto Rico Funds and the Major COFINA Bondholders argue that they have an interest in the IVU revenues that back the COFINA bonds which they hold. See Docket

Nos. 95 at p. 10 & 113 at p. 5. They also argue that the disposition of this litigation threatens to impair their interests insofar as the GO Bondholders seek to divert IVU revenues to the Commonwealth's treasury for the purpose of prioritizing payments to the GO Bondholders at the expense of COFINA Bondholders. See Docket Nos. 95 at pp. 5-6 & 113 at 11. Finally, the Puerto Rico Funds and the Major COFINA Bondholders assert that no existing party to this action can adequately represent their respective interests. See Docket Nos. 113 at 6-8 & 95 at 11. It is only this last point which the GO Bondholders contest in opposing the Puerto Rico Funds and the Major COFINA bondholders' respective motions to intervene.[15] (Docket Nos. 146 & 155.)

According to the GO Bondholders, COFINA Bondholders "contractually delegated any right they may have had to participate in this lawsuit to BYN[M] [Trustee], the trustee for their bonds." (Docket Nos. 146 at p. 6 & 115 at p. 7.) Thus, the GO Bondholders

[15] It is apparent to the Court that the COFINA bonds owned by the Puerto Rico Funds and the Major COFINA Bondholders represent a legitimate interest related to the subject matter of this case, the disposition of which could potentially impair the Puerto Rico Funds and the Major COFINA Bondholders' interest in the value of their bonds. Indeed, the GO Bondholders tacitly concede this point, acknowledging that "[t]o the extent that the Court holds that the Commonwealth's actions [with respect to IVU revenues] violate federal and Puerto Rico law, [the Puerto Rico Funds and the Major COFINA Bondholders] will have to surrender their . . . privileged position among the Commonwealth's creditors." (Docket Nos. 146 at pp. 3-4 & 155 at p. 3.)

contend, BNYM Trustee adequately represents the interests of all COFINA Bondholders, including the Puerto Rico Funds and the Major COFINA Bondholders. See Docket Nos. 146 at pp. 6-11 & 155 pp. 6-13.

The GO Bondholders' argument mirrors the failed argument they raised in opposition to Ambac's motion to intervene, relying on language set forth on the COFINA bonds and the Resolution these bonds cross-reference. As previously discussed, the COFINA bonds and the Resolution generally restrict COFINA Bondholders' ability to litigate disputes stemming from the Resolution. They do not, however, pose an absolute bar to their ability to defend against actions that have nothing to do with a dispute arising from the Resolution.

In any event, the Court is satisfied that the Puerto Rico Funds and the Major COFINA Bondholders have met their modest burden of showing that there is a possibility that no named defendant may adequately represent their interests. Conservation Law Found., Inc. v. Mosbacher, 966 F.3d 39, 44 (1st Cir. 1992) ("An intervenor need only show that representation may be inadequate, not that it is inadequate."). They have met this burden, if for no other reason, than that BNYM Trustee — the named defendant the GO Bondholders allege adequately represents the interests of the Puerto Rico Funds and the Major COFINA

Bondholders—has moved to dismiss the second amended complaint on grounds that could result in BNYM Trustee being dismissed as a defendant. See Docket No. 162. Should BNYM Trustee prevail on its motion to dismiss, no COFINA Bondholder representative would remain as a litigant in this case unless the Court permits intervention.[16]

Because the Puerto Rico Funds and the Major COFINA Bondholders have satisfied each of the four requirements to intervene as of right, the Court will must allow them to intervene pursuant to Fed.R.Civ.P. 24(a)(2).[17]

V. Conclusion

For the reasons set forth above, the Court **DENIES** the Commonwealth Defendants' motion to stay (Docket No. 106), and the

[16] In deciding whether the Puerto Rico Funds and the Major COFINA Bondholders have made a showing of inadequate representation, the Court has not considered the extent to which either party could adequately represent the other's interest. This is so because neither the Puerto Rico Funds nor the Major COFINA Bondholders were named parties at the time they filed their respective motions to intervene. See Kellogg, 440 F.3d at 546 (observing that relevant inquiry as to whether a proposed intervenor has shown inadequate representation is limited to whether its interests are adequately represented by a "named party.").

[17] Even if the Puerto Rico Funds and the Major COFINA Bondholders were not entitled to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2), the Court would nonetheless permit them to intervene pursuant to Fed.R.Civ.P. 24(b) because their interest in COFINA bonds implicates at least one legal question shared in common with this litigation, namely, whether the use of IVU revenues to secure COFINA bonds is unlawful. See Fed.R.Civ.P. 24(b)(2)(B).

COFINA Senior Bondholders motion to intervene (Docket No. 50). The Court **GRANTS** the motions to intervene of the Oversight Board (Docket No. 62), Ambac (Docket No. 55), the Puerto Rico Funds (Docket No. 95), and the Major COFINA Bondholders (Docket No. 113). To the extent the Oversight Board and Ambac have requested a stay of this action in their respective motions, the motions are **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, February 17, 2017.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

Case: 17-1241 Case 3:16-cv-02374-FAB Document 211 Filed 03/15/17 Page 127 of 135 Entry ID: 6076220

(1) the Bureau of the Census should conduct a study to determine the feasibility of expanding data collection to include Puerto Rico and the other United States territories in the Current Population Survey, which is jointly administered by the Bureau of the Census and the Bureau of Labor Statistics, and which is the primary source of labor force statistics for the population of the United States; and

(2) if necessary, the Bureau of the Census should request the funding required to conduct this feasibility study as part of its budget submission to Congress for fiscal year 2018.

SEC. 405. AUTOMATIC STAY UPON ENACTMENT.

48 USC 2194.

(a) DEFINITIONS.—In this section:

(1) LIABILITY.—The term "Liability" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—

(A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and

(B) the date of issuance or incurrence precedes the date of enactment of this Act.

(2) LIABILITY CLAIM.—The term "Liability Claim" means, as it relates to a Liability—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(b) IN GENERAL.—Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment of this Act) in accordance with section 101 operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11, United States Code), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this Act, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico, of a judgment obtained before the enactment of this Act;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

Case: 17-1241 Case 3:16-cv-02374-FAB Document 115 Filed 03/15/17 Page 128 of 135 Entry ID: 6076220

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this Act;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this Act against any Liability Claim against the Government of Puerto Rico.

(c) STAY NOT OPERABLE.—The establishment of an Oversight Board for Puerto Rico in accordance with section 101 does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

Deadline. Time periods.

(d) CONTINUATION OF STAY.—Except as provided in subsections (e), (f), and (g) the stay under subsection (b) continues until the earlier of—

(1) the later of—

(A) the later of—

(i) February 15, 2017; or

(ii) six months after the establishment of an Oversight Board for Puerto Rico as established by section 101(b);

Certification.

(B) the date that is 75 days after the date in subparagraph (A) if the Oversight Board delivers a certification to the Governor that, in the Oversight Board's sole discretion, an additional 75 days are needed to seek to complete a voluntary process under title VI of this Act with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

Determination.

(C) the date that is 60 days after the date in subparagraph (A) if the district court to which an application has been submitted under subparagraph 601(m)(1)(D) of this Act determines, in the exercise of the court's equitable powers, that an additional 60 days are needed to complete a voluntary process under title VI of this Act with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(2) with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, the date on which a case is filed by or on behalf of the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, as applicable, under title III.

(e) JURISDICTION, RELIEF FROM STAY.—

(1) The United States District Court for the District of Puerto Rico shall have original and exclusive jurisdiction of any civil actions arising under or related to this section.

(2) On motion of or action filed by a party in interest and after notice and a hearing, the United States District Court for the District of Puerto Rico, for cause shown, shall grant relief from the stay provided under subsection (b) of this section.

(f) TERMINATION OF STAY; HEARING.—Forty-five days after a request under subsection (e)(2) for relief from the stay of any act against property of the Government of Puerto Rico under subsection (b), such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (e)(2). A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (e)(2). The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (e)(2) if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the thirty-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

Time periods.
Notice.
Courts.

(g) RELIEF TO PREVENT IRREPARABLE DAMAGE.—Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (b) as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (e) or (f).

Courts.

(h) ACT IN VIOLATION OF STAY IS VOID.—Any order, judgment, or decree entered in violation of this section and any act taken in violation of this section is void, and shall have no force or effect, and any person found to violate this section may be liable for damages, costs, and attorneys' fees incurred in defending any action taken in violation of this section, and the Oversight Board or the Government of Puerto Rico may seek an order from the court enforcing the provisions of this section.

(i) GOVERNMENT OF PUERTO RICO.—For purposes of this section, the term "Government of Puerto Rico", in addition to the definition set forth in section 5(11) of this Act, shall include—

Definition.

(1) the individuals, including elected and appointed officials, directors, officers of and employees acting in their official capacity on behalf of the Government of Puerto Rico; and

(2) the Oversight Board, including the directors and officers of and employees acting in their official capacity on behalf of the Oversight Board.

(j) NO DEFAULT UNDER EXISTING CONTRACTS.—

(1) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, the holder of a Liability Claim or any other claim (as such term is defined in section 101 of title 11, United States Code) may not exercise or continue to exercise any

Case: 17-1241 Case 3:16-cv-02374-FAB Document 211 Filed 03/15/17 Page 130 of 135 Entry ID: 6076220

remedy under a contract or applicable law in respect to the Government of Puerto Rico or any of its property—

(A) that is conditioned upon the financial condition of, or the commencement of a restructuring, insolvency, bankruptcy, or other proceeding (or a similar or analogous process) by, the Government of Puerto Rico, including a default or an event of default thereunder; or

(B) with respect to Liability Claims—

(i) for the non-payment of principal or interest; or

(ii) for the breach of any condition or covenant.

Definition.

(2) The term "remedy" as used in paragraph (1) shall be interpreted broadly, and shall include any right existing in law or contract, including any right to—

(A) setoff;

(B) apply or appropriate funds;

(C) seek the appointment of a custodian (as such term is defined in section 101(11) of title 11, United States Code);

(D) seek to raise rates; or

(E) exercise control over property of the Government of Puerto Rico.

(3) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, a contract to which the Government of Puerto Rico is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, solely because of a provision in such contract is conditioned on—

(A) the insolvency or financial condition of the Government of Puerto Rico at any time prior to the enactment of this Act;

(B) the adoption of a resolution or establishment of an Oversight Board pursuant to section 101 of this Act; or

(C) a default under a separate contract that is due to, triggered by, or a result of the occurrence of the events or matters in paragraph (1)(B).

(4) Notwithstanding any contractual provision to the contrary and so long as a stay under this section is in effect, a counterparty to a contract with the Government of Puerto Rico for the provision of goods and services shall, unless the Government of Puerto Rico agrees to the contrary in writing, continue to perform all obligations under, and comply with the terms of, such contract, provided that the Government of Puerto Rico is not in default under such contract other than as a result of a condition specified in paragraph (3).

(k) EFFECT.—This section does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation. This section does not impair or affect the implementation of any restructuring support agreement executed by the Government of Puerto Rico to be implemented pursuant to Puerto Rico law specifically enacted for that purpose prior to the enactment of this Act or the obligation of the Government of Puerto Rico to proceed in good faith as set forth in any such agreement.

(l) PAYMENTS ON LIABILITIES.—Nothing in this section shall be construed to prohibit the Government of Puerto Rico from making any payment on any Liability when such payment becomes due during the term of the stay, and to the extent the Oversight Board, in its sole discretion, determines it is feasible, the Government of Puerto Rico shall make interest payments on outstanding indebtedness when such payments become due during the length of the stay.

(m) FINDINGS.—Congress finds the following:

(1) A combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico.

(2) As a result of its fiscal emergency, the Government of Puerto Rico has been unable to provide its citizens with effective services.

(3) The current fiscal emergency has also affected the long-term economic stability of Puerto Rico by contributing to the accelerated outmigration of residents and businesses.

(4) A comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.

(5) Additionally, an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis.

(A) The stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this Act to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.

(B) The stay is limited in nature and narrowly tailored to achieve the purposes of this Act, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this Act.

(6) Finally, the ability of the Government of Puerto Rico to obtain funds from capital markets in the future will be severely diminished without congressional action to restore its financial accountability and stability.

(n) PURPOSES.—The purposes of this section are to—

(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis;

(2) allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits;

Case: 17-1241 Case 3:16-cv-02374-FAB Document: 00117145472 Page: 219 Filed 03/15/17 Date Filed: 03/15/2017 Page 132 of 135 Entry ID: 6076220

(3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring;

(4) make available a Federal restructuring authority, if necessary, to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities; and

(5) benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its longstanding fiscal governance issues and return to economic growth.

(o) VOTING ON VOLUNTARY AGREEMENTS NOT STAYED.—Notwithstanding any provision in this section to the contrary, nothing in this section shall prevent the holder of a Liability Claim from voting on or consenting to a proposed modification of such Liability Claim under title VI of this Act.

SEC. 406. PURCHASES BY TERRITORY GOVERNMENTS.

The text of section 302 of the Omnibus Insular Areas Act of 1992 (48 U.S.C. 1469e), is amended to read as follows: "The Governments of the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands are authorized to make purchases through the General Services Administration.".

48 USC 2195.

SEC. 407. PROTECTION FROM INTER-DEBTOR TRANSFERS.

(a) PROTECTION OF CREDITORS.—While an Oversight Board for Puerto Rico is in existence, if any property of any territorial instrumentality of Puerto Rico is transferred in violation of applicable law under which any creditor has a valid pledge of, security interest in, or lien on such property, or which deprives any such territorial instrumentality of property in violation of applicable law assuring the transfer of such property to such territorial instrumentality for the benefit of its creditors, then the transferee shall be liable for the value of such property.

(b) ENFORCEABILITY.—A creditor may enforce rights under this section by bringing an action in the United States District Court for the District of Puerto Rico after the expiration or lifting of the stay of section 405, unless a stay under title III is in effect.

SEC. 408. GAO REPORT ON SMALL BUSINESS ADMINISTRATION PROGRAMS IN PUERTO RICO.

Section 15 of the Small Business Act (15 U.S.C. 644) is amended by adding at the end the following new subsection:

"(t) GAO REPORT ON SMALL BUSINESS ADMINISTRATION PROGRAMS IN PUERTO RICO.—Not later than one year after the date of enactment of this subsection, the Comptroller General of the United States shall submit to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report on the application and utilization of contracting activities of the Administration (including contracting activities relating to HUBZone small business concerns) in Puerto Rico. The report shall also identify any provisions of Federal law that may create an obstacle to the efficient implementation of such contracting activities.".

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on March 15, 2017 the foregoing Brief for Intervenor-Appellant Financial Oversight and Management Board for Puerto Rico was filed through the CM/ECF system and served electronically on parties in the case.

Mark T. Stancil
Gary A. Orseck
Ariel N. Lavinbuk
Donald Burke
ROBBINS, RUSSEL, ENGLERT, ORSECK UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006

Counsel to Plaintiffs-Appellees Lex Claims, LLC Lex Claims, LLC, Jacana Holdings I LLC, Jacana Holdings II LLC, Jacana Holdings III LLC, Jacana Holdings IV LLC, Jacana Holdings V LLC, MPR Investors LLC, ROLSG, LLC, RRW I LLC, and SL Puerto Rico Fund II, L.P.

Erin E. Murphy
Michael F. Williams
Peter A. Farrell
KIRKLAND & ELLIS LLP
655 Fifteenth Street NW
Washington, DC 20005

Counsel to Defendants-Appellees, the Commonwealth of Puerto Rico, Alejandro García-Padilla , Juan Zaragoza Gómez, and Luis Cruz Batista

Christopher M. Mason
Robert N. H. Christmas
Christopher J. Fong
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022

Giselle López Soler
LAW OFFICES OF GISELLE LÓPEZ SOLER
PMB 257
Rd. 19 1353
Guaynabo, PR 00966

Counsel to Defendants-Appellees Puerto Rico Sales Tax Financing Corporation and the Honorable Juan Vaquer

Eric A. Schaffer
Luke A. Sizemore
REED SMITH LLP
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222

Lee Sepulvado Ramos
Albéniz Couret-Fuentes
SEPULVADO & MALDONADO, PSC
252 Ave. Ponce de León, Suite 1900
Citibank Tower San Juan, PR 00918

Counsel to Defendant-Appellee Bank of New York Mellon Corp.

Susheel Kirpalani
Eric Winston
Daniel Salinas
Eric Kay
Brant Duncan Kuehn
QUINN EMANUEL URQUHART
& SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

Rafael Escalera
Sylvia M. Arizmendi
Carlos R. Rivera-Ortiz
REICHARD & ESCALERA
255 Ponce de León Avenue
MCS Plaza, 10th Floor
San Juan, PR 00917-1913

Counsel to Intervenors-Appellants, the COFINA Senior Bondholders

Required paper copies will be sent to the court upon the court’s approval.

/s/ Robyn Cocho
Robyn Cocho