

**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.

Case No. 3:16-cv-02374 (FAB)

**MEMORANDUM OF LAW IN SUPPORT OF COFINA SENIOR BONDHOLDERS'
MOTION FOR LEAVE TO INTERVENE FOR THE LIMITED PURPOSE OF
SEEKING ENFORCEMENT OF THE PROMESA STAY**

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Proposed intervenors Jose F. Rodriguez and certain institutional holders who together hold approximately \$2 billion of senior secured bonds issued by the Puerto Rico Sales Tax Financing Corporation (“COFINA”),¹ move to intervene in this action (the “GO Action”) commenced by certain holders (the “Plaintiffs”) of general obligation bonds (the “GO Bonds”) issued by the Commonwealth of Puerto Rico (the “Commonwealth”), pursuant to Rule 24 of the Federal Rules of Civil Procedure (“FRCP”), for the limited purpose of seeking enforcement of the mandatory litigation stay enacted by the U.S. Congress in the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), 48 U.S.C. § 2101 *et seq.*

PRELIMINARY STATEMENT

Plaintiffs commenced the GO Action on July 20, 2016, shortly after the President of the United States signed PROMESA into law. The first two versions of the complaint asserted a single cause of action in which Plaintiffs challenged the Governor's June 30, 2016 executive order (the “Executive Order”) compelling the Commonwealth Treasury to halt payments to GO bondholders. Dkt. 25 (Aug. 15, 2016) (the “Amended Complaint”). Plaintiffs contended that the Governor's action violated PROMESA and was preempted by the newly enacted federal law.

On October 7, 2016, Plaintiffs filed a motion seeking leave to file a Proposed Second Amended Complaint (“PSAC”) and a partial modification of the PROMESA stay (the “Motion to Amend”). Dkt. 39 (Oct. 7, 2016). The PSAC seeks to add 12 new causes of action, including

¹ Mr. Rodriguez and the institutional holders of the COFINA senior bonds shall be referred to herein as the “COFINA Senior Bondholders” or the “Intervenors.” In addition to Mr. Rodriguez, the COFINA Senior Bondholders are the following entities, either as beneficial holders or on behalf of managed funds and accounts: Decagon Holdings 1, L.L.C.; Decagon Holdings 2, L.L.C.; Decagon Holdings 3, L.L.C.; Decagon Holdings 4, L.L.C.; Decagon Holdings 5, L.L.C.; Decagon Holdings 6, L.L.C.; Decagon Holdings 7, L.L.C.; Decagon Holdings 8, L.L.C.; Decagon Holdings 9, L.L.C.; Decagon Holdings 10, L.L.C.; GoldenTree Asset Management LP; Merced Capital, L.P.; Old Bellows Partners LP; Scoggin Management LP; Taconic Master Fund 1.5 L.P.; Taconic Opportunity Master Fund L.P.; Tilden Park Capital Management LP; Värde Credit Partners Master, L.P.; Värde Investment Partners, L.P.; Värde Investment Partners (Offshore) Master, L.P.; The Värde Skyway Master Fund, L.P.; Whitebox Advisors LLC.

three causes of action (Counts 2, 3, and 12) relating to COFINA (the “COFINA Counts”) that Plaintiffs allege are not subject to the PROMESA stay. In the COFINA Counts, Plaintiffs seek to interfere with the statutory transfer of sales and use tax from the point of collection to COFINA, thus disrupting COFINA’s ability to service its debt obligations to the Intervenors. Despite their attempted reliance on PROMESA’s preemption provisions, Plaintiffs fail to identify a single law or executive order affecting COFINA’s rights that has been enacted since PROMESA became law, and concede that the Commonwealth has never touched COFINA’s funds since they were transferred to COFINA by the Legislative Assembly of Puerto Rico nearly a decade ago. PSAC at ¶ 97. Indeed, Plaintiffs’ complaint is based on the Commonwealth’s *compliance* with pre-existing Puerto Rico law, which in fact PROMESA requires.

COFINA is a separate legal instrumentality of the Commonwealth, created under laws that the Commonwealth first enacted in 2006. Under the laws creating it, COFINA is authorized to issue bonds to the public. The bonds are non-recourse bonds secured by a statutory lien against sales tax revenues that the Commonwealth transferred to COFINA by statute. Over the last ten years, more COFINA bonds were issued than any other public debt, and more COFINA bonds were sold and continue to be held by residents of Puerto Rico than any other public debt of Puerto Rico.² Interrupting payment on COFINA bonds issued years ago would violate the private rights of thousands of individuals and institutions, including the Intervenors, who are the ultimate targets of the COFINA Counts in the PSAC.

The COFINA Counts are plainly subject to PROMESA’s stay. In an attempt to manufacture a legally cognizable claim, Plaintiffs employ an artifice in pleading that the

² Bonds issued by COFINA are the debt instruments of the Commonwealth and its instrumentalities that are most-widely held in Puerto Rico—more than seven times more widely held than GO Bonds—and enforcement of the stay also protects the interests of those local bondholders during this critical period. Commonwealth Fiscal Plan, Oct. 14, 2016, at 71.

COFINA Counts arise under PROMESA. According to Plaintiffs, the COFINA Counts are an extension of this Court’s earlier decision finding the PROMESA stay inapplicable to the single count that challenged the Executive Order halting payments to GO bondholders. This argument is premised on a fundamental mischaracterization of PROMESA’s intersection with Puerto Rico law.

- **Misconstruction of Section 303.** Section 303 of PROMESA preempts unlawful executive orders that alter pre-existing Puerto Rico constitutional or statutory law. It does not provide a grant of judicial power to override pre-existing territorial law. Since longstanding Puerto Rico law *requires* the continuing payment of COFINA’s sales and use tax, Section 303 cannot be utilized to preempt laws mandating the transfer of the sales and use tax to COFINA. Plaintiffs’ grievance is that the Governor of Puerto Rico acted improperly in targeting GO Bonds and should have instead stopped payment on bonds issued by COFINA. But preemption does not go further than invalidating an unlawful executive order. It does not give license to the GO bondholders to ask this Court to write new executive orders to their liking.
- **Incorrect Reading of Sections 204 and 207.** The COFINA Counts ask the Court to invalidate a decade-old statutory framework that established COFINA’s rights and the private rights of COFINA bondholders—a request that itself flouts the text of Sections 204 and 207 of PROMESA. These sections of PROMESA specifically require maintaining the status quo of bondholder rights in accordance with pre-existing laws pending a court-approved restructuring authorized by Title VI or Title III of PROMESA. Indeed, Plaintiffs’ demand undermines the relief they themselves seek under their First Cause of Action, which is premised on the argument that the Executive Order itself violated PROMESA’s requirement to uphold pre-existing Puerto Rico law. In essence, the Plaintiffs first ask the Court to invalidate the Executive Order because it violates the pre-existing legal rights of GO bondholders under Puerto Rico law, and at the same time ask the Court to do the same to COFINA bondholders.

At bottom, the Plaintiffs seek to use PROMESA’s preemption provision as a vehicle to litigate the question of whether the Dedicated Sales Tax was validly transferred and made the property of COFINA nearly a decade ago, or whether the Dedicated Sales Tax was or still is an “available resource” under the Puerto Rico Constitution—contrary to the clear language of the

offering materials pursuant to which the GO Bonds were purchased.³ While they are without merit, these claims could have been brought a decade before PROMESA was enacted, when the Legislative Assembly of Puerto Rico first transferred the Dedicated Sales Tax to COFINA. Act of May 13, 2006, No 91-2006, 2006 P.R. Laws 246 *et seq.* (codified as amended at P.R. Laws Ann. tit. 13, § 12) (as amended, “Act 91”). This fact is fatal to Plaintiffs’ attempts to evade PROMESA’s litigation stay—and ultimately fatal to their claims on the merits, when and if litigated.

The PROMESA stay is a fundamental protection to the Intervenors as they, the Oversight Board, the Commonwealth, and other creditor constituencies wish to continue participating in restructuring negotiations that Congress considered worthy of protection when it enacted PROMESA. For now, the Intervenors seek only an order declaring that the COFINA Counts are stayed under Section 405 of PROMESA. As such, the Court should summarily reject Plaintiffs’ attempt to expand this Court’s September 2, 2016 decision. Because prosecution of the COFINA Counts would violate the rights of the COFINA Senior Bondholders under the mandatory PROMESA stay and because the parties to the PSAC cannot adequately represent their interest, the Intervenors should be permitted to intervene under FRCP 24 for the limited purpose of seeking enforcement of the PROMESA litigation stay.⁴

³ See Section C, below. The silence of holders of billions of dollars of GO bonds over the last 10 years underscores the manifest deficiencies in Plaintiffs’ newfangled claims. In any case, this motion is unrelated to adjudication on the merits.

⁴ Because of the unique nature of the issue of pure law presented by Plaintiffs’ Motion to Amend, the Intervenors, for now, only seek to intervene to seek enforcement of the stay under PROMESA. *Accord Hyland v. Harrison*, No. Civ.A. 05-162-JJF, 2006 WL 288247, at *5-6 (D. Del. Feb. 7, 2006) (finding that request to stay case was appropriate use of intervention). Intervenors have incorporated their motion to enforce the stay within this Motion, and have not attached a separate pleading to the motion.

BACKGROUND

A. PROMESA and its Mandatory Litigation Stay

PROMESA contains two potential paths for restructuring the Commonwealth's and its instrumentalities' debts: Title VI and Title III. Generally, Title VI of PROMESA provides a voluntary method of modifying the terms of bonds through an agreement with all classes of bondholders of an issuer. PROMESA §§ 601-02. Title III provides a court-supervised process for debt modification, with or without agreement of all classes of bondholders. *Id.* §§ 301-17.

A centerpiece of PROMESA is the establishment of a seven-member Financial Oversight and Management Board (the "Oversight Board") for the Commonwealth. Congress provided that the Oversight Board would play a prominent role in both Title VI and Title III proceedings. Towards that end, the Oversight Board is expected to use the information and expertise it acquires after its appointment to carry out its multiple Congressional mandates.

In recognition of the sheer volume of work imposed on the Oversight Board, Congress provided that "an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis[.]" that "[t]he stay advances the best interests common to all stakeholders," and that the stay is "narrowly tailored to achieve the purposes of [PROMESA], 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[.]" *Id.* § 405(m)(5). Congress found that a primary purpose of this stay was 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.* at § 405(n)(2).

As Congress clearly set out, the stay is designed to protect against the burden of litigation itself at this stage of the recovery process, and is of critical importance to all participants

interested in the stabilization of Puerto Rico's fiscal affairs and the resolution of Puerto Rico's financial crisis, by negotiation if at all possible. As the Oversight Board recently stated, "ongoing litigation is a major distraction that interferes with the Oversight Board's congressional mandate and that all parties' time and resources would be better spent negotiating the fiscal plans required by PROMESA." Mot. to Intervene, *Brigade Leveraged Cap. Structures Fund Ltd v. Padilla*, No. 16-cv-1610, (D.P.R. Oct. 21, 2016) (Dkt. 137).

Since the summer of 2015, the Commonwealth has been actively involved in negotiations and discussions with creditors, including affiliates of the Plaintiffs and some of the Intervenors, in an effort to find a solution to the territory's debt problems. Congress envisioned a continuation of that process, albeit with the Oversight Board assuming a central role. Pending the assumption of that role, upholding the mandatory litigation stay imposed by Section 405 of PROMESA is paramount. If the COFINA Counts are allowed to proceed despite Congress's clear mandate, it will deprive the COFINA Senior Bondholders of the "opportunity to consensually renegotiate terms of repayment" without the distraction of litigation. Indeed, unless the COFINA Counts are stayed, the COFINA Senior Bondholders may be forced to file their own claims in order to defend their rights under Puerto Rico statutes, as well as the Puerto Rico and United States Constitutions.

In addition to the stay, PROMESA includes several other key provisions designed to ensure protection of private rights pending an orderly and fair restructuring process approved by a federal court. In particular, Section 204(c)(3) preserves the status quo by prohibiting the Commonwealth from passing *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 as of the date of enactment” of PROMESA, and, upon appointment of the Oversight Board, gives the Board the “sole discretion” to rescind any such law. PROMESA § 204(c)(3).

Similarly, in response to executive orders signed while Congress was considering passage of PROMESA, Section 303 limits the authority of the Governor to modify private rights by executive fiat by specifically preempting “unlawful executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality, or that divert funds from one territorial instrumentality to another or to the territory[.]” *Id.* at § 303(3). In other words, the Commonwealth and its instrumentalities must continue to exercise governmental powers consistent with pre-existing law, but any *unlawful executive orders* that alter rights of creditors or divert funds are preempted.

B. The Lex Claims Litigation and the Proposed Second Amended Complaint

Plaintiffs filed a complaint commencing this litigation on July 20, 2016 (the Complaint”), and filed the Amended Complaint on August 15, 2016. Both the initial Complaint and the Amended Complaint named only the Governor and certain other governmental officials as defendants and both asserted only one substantive claim for relief: that the Executive Order violated PROMESA (the “First Cause of Action”). Amended Complaint at ¶¶ 64-73. On September 2, 2016, the Court issued its opinion holding that the claim asserted in the Amended Complaint was not subject to the stay as it was based upon an alleged violation of PROMESA itself and not laws existing prior to its enactment (the “Stay Order”). Dkt. 32 (Sept. 2, 2016).

On October 7, 2016, Plaintiffs filed the Motion to Amend seeking to file the PSAC. Dkt. 39 (Oct. 7, 2016). The PSAC adds 12 new causes of action, four additional defendants, and broadly rewrites the factual and legal scope of both the Complaint and the Amended Complaint. The PSAC would add as defendants COFINA, its Executive Director (Juan Vaquer), and the Bank of New York (“BONY” or the “Trustee”), as trustee for the COFINA bonds (collectively,

the “COFINA Defendants”), as well as the Commonwealth itself (collectively with the Governor and the other original defendants, the “Commonwealth Defendants”).⁵

The PSAC alleges, for the first time, that the transfer of the Dedicated Sales Tax to COFINA a decade ago was a “diversion” that violated the GO bondholders’ rights to the “available resources” under the Puerto Rico Constitution, because at all times the Dedicated Sales Tax was inherently an “available resource.” PSAC at ¶¶ 2, 95, 99. Of relevance to this Motion to Intervene, the PSAC adds a Second Cause of Action premised on these allegations, which seeks declaratory and injunctive relief against the Commonwealth Defendants and the COFINA Defendants.⁶ In essence, Plaintiffs allege that the Governor’s supposed failure to interfere with the decade-old laws transferring the Dedicated Sales Tax to the COFINA Trustee is preempted by Section 303(3) of PROMESA, and that Section 303(3) “grants Plaintiffs a right to enforce the requirements of that provision.” *Id.* at ¶¶ 135-44.

Because the Court has yet to allow the Motion to Amend, the Interveners do not seek to intervene on the merits at this point. Rather, the Interveners submit that the PSAC should be stayed. However, several false and misleading statements and critical omissions in the PSAC must be corrected here given the posture of the litigation.

- **First**, contrary to Plaintiffs’ repeated allegations (*Id.* at ¶¶ 5, 19, 65, 110, 125 153, 167 n.5), GO bondholders have no lien on any Commonwealth property and are unsecured creditors.⁷ The 2014 GO Official Statement disclaims any such security: “**There is no collateral securing the Bonds**, and the Bonds cannot be accelerated upon a default. **The Bonds are**

⁵ While the Motion to Amend concedes that relief from the stay is required to pursue certain claims asserted in the PSAC, the Motion to Amend incorrectly asserts that the COFINA Counts are not subject to the stay. Dkt. 39, at 2.

⁶ While implausibly premised on the preemption provision of Section 303 of PROMESA, the scope of Plaintiffs Third and Twelfth Causes of Action with respect to COFINA are ambiguous, and are flawed for the same reasons as the Second Cause of Action.

⁷ Plaintiffs cite statements by government officials referring to a “lien” even though they know no such lien exists. PSAC at ¶¶ 7, 68. Such imprecise statements are irrelevant to the legal structure pursuant to which GO bondholders purchased their bonds, and sophisticated investors such as Plaintiffs (and their attorneys) understand the distinction between such public statements and the relevant offering materials.

not secured by a lien on any physical asset of the Commonwealth.” *Official Statement for Commonwealth of P.R. Gen. Ob. Bonds of 2014, Series A*, at p.16 (first emphasis in original).

- **Second**, Official Statements for GO Bonds have consistently stated that COFINA’s Dedicated Sales Taxes “**do not constitute ‘available resources’** “within the meaning of the Puerto Rico Constitution and “**is not available for the payment of principal of and interest on the Bonds.**” *Id.* p. 29 (emphasis added). For example, while the PSAC quotes extensively from the offering materials for the 2012 and 2014 GO Bond issuances, the PSAC fails to mention that the Official Statements for both of these offerings unambiguously exclude COFINA’s Dedicated Sales Tax Funds from the funds available to GO bondholders, and any claim to COFINA’s Dedicated Sales Tax is directly contradicted by these clear disclosures.⁸
- **Third**, contrary to Plaintiffs’ unsupported allegations, PSAC at ¶¶ 15, 94, COFINA was not created to evade the Puerto Rico debt limit. When Puerto Rico created COFINA and COFINA first issued bonds during the Commonwealth’s 2006-2007 financial crisis, Puerto Rico had ample capacity to issue additional GO debt, but chose to utilize the COFINA securitization structure because it offered a safer security for investors with substantially lower borrowing costs—a benefit the Commonwealth has recognized publicly.⁹

In the event that Plaintiffs are permitted to proceed with the PSAC, Intervenors reserve all rights with respect to being heard on the other claims asserted in the PSAC, including the right to move to dismiss and/or seek a stay of such claims.

ARGUMENT

I. INTERVENTION BY COFINA SENIOR BONDHOLDERS IS APPROPRIATE

A. The COFINA Senior Bondholders Can Intervene as a Matter of Right

FRCP Rule 24(a)(2) grants anyone the right to intervene when the intervening party “claims an interest relating to the property or transaction that is the subject of the action, and is

⁸ For example, the 2014 GO Official Statement discloses that: “**Act 91 provides that the Dedicated Sales Tax Fund created by such law, the funds on deposit therein and the Commonwealth sales and use tax pledged to COFINA, do not constitute ‘available resources’ of the Commonwealth for purposes of Section 2 and Section 8 of Article VI of the Commonwealth Constitution and are not available for use by the Secretary of the Treasury. As a result, the portion of the Commonwealth sales and use tax allocated to COFINA is not available for the payment of principal of and interest on the Bonds.**” *Id.* p.29 (emphasis added). Other GO official statements include similar disclosures.

⁹ In late 2013, the Interim President of the Government Development Bank for Puerto Rico (the “GDB”) emphasized the benefit of COFINA to the Commonwealth and stated that “**total net savings from issuing COFINA bonds, compared to other available options, are estimated between \$66 million and \$132 million for every \$1 billion issued in bonds.**” Press Release, Puerto Rico Department of the Treasury, GDB, Treasury Secretary and Interim GDB President Announce Amendments to COFINA Act that Will Facilitate More Cost-effective Financing for the Commonwealth, Sept. 25, 2013 (emphasis added).

so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed R. Civ. P. 24(a)(2). A court must grant intervention as of right if an applicant meets four conditions: "(1) the party must claim an interest in the property; (2) disposition of the case without intervention, would, 'as a practical matter, impair or impede [the party's] ability to protect that interest'; (3) the party's interest is inadequately represented by the existing parties; and (4) the motion for intervention is timely made." *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008). The COFINA Senior Bondholders satisfy all four conditions.

1. The COFINA Senior Bondholders' Motion to Intervene Is Timely

This motion is timely because the litigation is still in its incipient stages and the Intervenor filed this motion promptly after Plaintiffs filed their motion for leave to file the PSAC, which, for the first time, asserts claims against COFINA. There can be no claim of prejudice. *P.R. Tel. Co. v. Sistema de Retiro de los Empleados del Gobierno y la Judicatura*, 637 F.3d 10, 15 (1st Cir. 2011).

2. The COFINA Senior Bondholders Have an Interest in Enforcing the Mandatory Stay Provisions of PROMESA

An intervenor must have a "direct and substantial interest in the subject matter of the action," and while "there is no precise and authoritative definition of the interests required to intervene," "the intervenor's claim must bear a sufficiently close relationship to the dispute between the original litigants." *Cabot LNG Corp. v. P.R. Elec. Power Auth.*, 162 F.R.D. 427, 430 (D.P.R. 1995) (internal quotation marks omitted). Here, the COFINA Senior Bondholders' rights are secured by a senior lien on the property of COFINA, and thus have something at stake in the underlying action. COFINA bondholders have a paramount interest in opposing Plaintiffs' requested relief with respect to COFINA. *First*, the attempt to evade PROMESA's stay impairs

critical rights provided by Congress to all stakeholders, including the COFINA Senior Bondholders. *Second*, any attempt to stop the transfer of the Dedicated Sales Tax to COFINA, as required under Commonwealth law and the COFINA bond resolution adopted on July 13, 2007 and amended and restated on June 10, 2009 (as amended, restated and supplemented, the “Bond Resolution”) (which has the force of law), directly harms the COFINA Senior Bondholders’ pecuniary interests and impairs their property rights. Indeed, Plaintiffs’ request to interrupt the flow of the Dedicated Sales Tax to COFINA seeks relief that would itself violate Section 204 of PROMESA.

3. Without Intervention, the COFINA Senior Bondholders Will Be Unable to Protect Their Interest in Seeking to Enforce PROMESA’s Mandatory Stay

Denying the COFINA Senior Bondholders’ motion to intervene to be heard on the stay with respect to the COFINA Counts would impair and impede their ability to protect their interest in seeking to enforce the mandatory stay provisions of PROMESA. The applicable standard is effectively a “‘practical’ test of adverse effect.” *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110 (1st Cir. 1999). As set out in Section A above, the efforts of the COFINA Senior Bondholders to continue negotiations with the Commonwealth and other creditors—and to begin negotiations with the newly established Oversight Board—would be impaired should the COFINA Counts be excluded from PROMESA’s stay. This Court previously recognized that the stay under “[s]ection 405(b) of PROMESA is modeled after the automatic stay provision of the federal Bankruptcy Code. Compare PROMESA § 405(b), 48 U.S.C.A. § 2194(b), with 11 U.S.C. § 362(a).” *Brigade Leveraged Cap. Structures Fund Ltd. v. Padilla*, No. 16-cv-2257, __F.Supp.3d__, 2016 WL 4435660, at *5 n.2 (D.P.R. Aug. 22, 2016). The First Circuit has recognized that the automatic

stay protects not only debtors but also a debtor's creditors. *In re Soares*, 107 F.3d 969, 977 (1st Cir. 1997).

4. No Defendant Can Adequately Represent the COFINA Senior Bondholders' Interest in Enforcing the Mandatory Stay Provisions of PROMESA

Finally, none of the Defendants can adequately represent the COFINA Senior Bondholders' interests. The showing necessary to satisfy this requirement is "minimal" and it is enough for the Intervenors to establish that the current representation "would prove" inadequate to represent their rights. *W Holding Co. v. Chartis Ins. Co.-Puerto Rico*, 845 F. Supp. 2d 422, 428 (D.P.R. 2012).

This minimal showing is easily established here. While the Commonwealth Defendants have advocated for an application of PROMESA's stay in this litigation, they have declined to aggressively defend and protect COFINA as a separate instrumentality insulated from the Commonwealth's overall fiscal problems. More recently, they have shown waning interest in attempting a voluntary debt restructuring of COFINA pursuant to Title VI of PROMESA. The Commonwealth Defendants appear to take a view that the role of PROMESA's mandatory stay is solely for the benefit of the Commonwealth as opposed to furthering voluntary creditor negotiations and utilizing Title VI's consensual restructuring tools. Moreover, in its recent opposition to the Motion to Amend, the Commonwealth Defendants have failed to acknowledge that the Dedicated Sales Tax is, indisputably, COFINA's property. Given the myriad (and indeed competing) concerns of the Commonwealth Defendants, the COFINA Senior Bondholders cannot expect the Commonwealth Defendants to adequately represent the rights of COFINA bondholders.

The COFINA Defendants similarly do not adequately represent the COFINA Senior Bondholders' rights. While independent by statute, COFINA and Executive Director Vaquer

appear to have adopted the restructuring strategy of the Commonwealth Defendants. To illustrate this point, when one of the Intervenor wrote to COFINA on February 8, 2016 requesting that COFINA “retain independent legal and financial advisors to protect and defend COFINA’s Bondowners ‘against all claims and demands of all persons whomsoever,’” COFINA ignored those concerns, threatened legal action, and directed the Intervenor to the Commonwealth’s legal advisors. Copies of the Intervenor’s February 8, 2016 letter to COFINA and COFINA’s February 10, 2016 response are attached as Exhibits A and B.

Lastly, BONY, is unlikely to act without direction and indemnification from the requisite number of all COFINA bondholders, which is almost impossible to obtain in the short timeframe demanded by this litigation. But even if direction and indemnification were provided, the COFINA securitization is split into two tranches—senior bonds and subordinate bonds—whose interests may diverge at some point. For example, if there are any defaults under the Bond Resolution, COFINA senior bonds are contractually entitled to payment in full prior to any payment on the COFINA subordinate bonds, and, following acceleration by COFINA senior bondholders, COFINA senior bondholders are also entitled to control all remedies. This potential for conflict between two tranches of COFINA bondholders likely will hamper the Trustee’s ability to adequately represent the COFINA Senior Bondholders.

B. The Court Should Permit the COFINA Senior Bondholders to Intervene

Even if the COFINA Senior Bondholders did not satisfy the requirements of FRCP 24(a), “the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact[,]” so long as the motion is timely and there is no prejudice to the original parties. Fed. R. Civ. P 24(b)(1)(B). As explained in Section I.A.1, above, the COFINA Senior Bondholders’ motion is timely filed and there will be no prejudice to the parties. The COFINA senior bonds are secured by a statutory lien on property of COFINA,

including the Dedicated Sales Tax. The COFINA Senior Bondholders’ right to a stay to ensure their ability to protect that interest shares with the main action the facts and law implicated by the Plaintiffs’ attack on COFINA’s property rights. These commonalities, therefore, all weigh in favor of permitting intervention under FRCP 24(b).

II. THE COURT SHOULD ENFORCE THE MANDATORY STAY PROVISIONS OF PROMESA AND STAY THE COFINA COUNTS

Despite Plaintiffs’ “artful pleading,” the COFINA Counts are no more than a request to declare that the Dedicated Sales Tax that was transferred to COFINA is an “available resource” under the Puerto Rico Constitution. Such a claim (while meritless) could have been brought before PROMESA was enacted. In fact, the claim could have been brought a decade ago, when the Legislative Assembly of Puerto Rico first transferred (nearly unanimously) the Dedicated Sales Tax to COFINA. This fact is fatal to Plaintiffs’ attempts to evade PROMESA’s mandatory litigation stay, and likely fatal to their claims based on timeliness under statutes of limitation or equitable doctrines of laches and estoppel.

Staying the COFINA Counts now is consistent with this Court’s September 2, 2016 Stay Order. In that decision, this Court found that because the challenged conduct occurred after PROMESA’s enactment, the claims could not have been brought before its enactment, and were thus not stayed.¹⁰ Stay Order, at 2. Any relief under the COFINA Counts, by contrast, is entirely dependent on challenging actions that occurred before PROMESA was passed—in many cases, a decade before. Every single factual allegation in the PSAC with respect to COFINA occurred prior to June 29, 2016. This relief would fall directly within Section 405(b)(1) of PROMESA, which stays “the commencement or continuation, including the issuance or

¹⁰ Plaintiffs appear not to dispute that the claim is “with respect to a liability.” Motion to Amend at 2; PSAC at ¶ 199.

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. . . .” PROMESA § 405(b)(1); *cf.* Stay Order, at 2 (holding that Plaintiffs’ challenge to “measures taken by the Commonwealth of Puerto Rico *after* PROMESA’s enactment” and that “could not have [been] commenced...before PROMESA’s enactment” were not subject to stay) (emphasis in original).

Plaintiffs’ attempt to characterize the COFINA Counts as arising out of Section 303 of PROMESA is meritless. First, it seeks an absurd outcome by asking the Court to determine that a failure to act is preempted by Section 303. Any argument that a federal law can preempt the *absence* of a new law is unsupported by both logic and the statutory language. Second, pursuit of the COFINA Counts is fundamentally inconsistent with the allegations of the Complaint, the Amended Complaint, and the First Cause of Action of the PSAC, all of which are premised on the assertion that the post-PROMESA Executive Order that stopped legally-mandated bond payments was a violation of Sections 204 and 207 of PROMESA. If Plaintiffs are correct that the Executive Order violated Sections 204 and 207, then the requested relief—interruption of legally-mandated payments to COFINA—would also be a violation of Sections 204 and 207 for the same reason. These logical inconsistencies demonstrate the actual nature of the claims—an effort to challenge legislation passed a decade ago, long before the enactment of PROMESA.

Because Plaintiffs’ COFINA Counts could have been brought prior to the enactment of PROMESA and are with respect to a liability claim, the COFINA Counts are subject to the mandatory litigation stay of Section 405 of PROMESA.

RESERVATION OF RIGHTS

This Motion to Intervene does not limit, restrict or waive any and all rights, claims, actions, remedies, and defenses that the COFINA Senior Bondholders may have, all of which are

preserved, including the right to be heard on the merits of any claims asserted in the PSAC and the right to seek a stay and/or dismissal of any and all claims asserted in the PSAC.

CONCLUSION

For the foregoing reasons, the COFINA Senior Bondholders' Motion to Intervene for the Limited Purpose of Seeking to Enforce the PROMESA Stay should be granted.

DATED: October 24, 2016

Respectfully submitted,

REICHARD & ESCALERA

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EXHIBIT A

JOSE F. RODRIGUEZ PERELLO
P. O. BOX 8848
SAN JUAN, P. R. 00910

February 8, 2016

Puerto Rico Sales Tax Financing Corporation
c/o Government Development Bank for Puerto Rico
Roberto Sánchez Vilella Government Center
De Diego Avenue, Stop 22
Santurce, Puerto Rico 00940

Attention: Executive Director

Re: Demand to Observe and Comply with COFINA Covenants

Ladies and Gentlemen:

Reference is made to that certain Amended and Restated Sales Tax Revenue Bond Resolution adopted on July 13, 2007, as amended on June 10, 2009 (the "Resolution") governing the issuance of Senior Bonds by the Puerto Rico Sales Tax Financing Corporation ("COFINA" or the "Corporation"). Capitalized terms used but not defined herein have the meaning ascribed in the Resolution. I am an Owner of Senior Bonds.

Under section 705 of the Resolution, the Corporation agrees that "[t]he Bonds are and will be the valid and legally binding special obligations of the Corporation enforceable in accordance with their terms and the terms of the Resolution," and that the Corporation must at all times "defend, preserve and protect the pledge of Pledged Property and all rights of . . . the Bondowners under the Resolution against all claims and demands of all persons whomsoever." Under section 704 of the Resolution, the Corporation must take all steps that "may be necessary or desirable" to eliminate any asserted clouds on title of the Pledged Property.

On September 9, 2015, the Working Group for the Fiscal and Economic Recovery of Puerto Rico (the ("Working Group"), *which includes the Executive Director of COFINA*), published a document titled the Puerto Rico Fiscal and Economic Growth Plan.

On September 24, 2015, notice was sent by counsel for the holders of approximately \$1.6 billion of accreted value of Senior Bonds, identifying specific misstatements made by the Working Group and requesting the Corporation to remedy such misstatements and provide further assurances as required by the Resolution. The Corporation has not cured the misstatements or provided the assurances requested.

Instead, on February 1, 2016, the Working Group published a document titled the Puerto Rico Restructuring Proposal and an accompanying press release referring to COFINA debt as debt of the Commonwealth itself. This is not only patently false, but the antithesis of protecting and defending the Pledged Property for the benefit of Bondowners. The press release even includes COFINA debt service within the Commonwealth's own debt service-to-revenue and then calculates that ratio with reference to the Constitutional limits on general obligations bonds of *the Commonwealth*. The press release concludes by stating the Working Group's agenda is to "improve *the Commonwealth's* credit-worthiness." The Commonwealth created COFINA in 2006 for the specific reason of reducing borrowing costs resulting from its deteriorating credit-worthiness and it is the most important securitization of Puerto Rico.

The Working Group's repeated statements cannot be reconciled with the Corporation's duties and covenants made to Bondowners.

I hereby demand that the Corporation immediately publish its own press release renouncing the Working Group's treatment of and misstatements about COFINA. I further demand that the Corporation appoint independent legal and financial advisors to protect and defend COFINA's Bondowners "against all claims and demands of all persons whomsoever," including any actions and misstatements by COFINA's own agents who have participated in the Working Group in breach of the Resolution.

The failure to comply with this request to remedy the foregoing failures within thirty (30) days will constitute an Event of Default pursuant to section 1101(1)(ii).

I do not waive any Events of Defaults that previously existed or may now or hereafter exist under the Resolution. I hereby reserve any and all rights, remedies, claims, and causes of action arising out of or relating to the Resolution, the Senior Bonds, or any offering documents (including the Official Statements) that exist at law or in equity. Nothing in this letter nor any delay in the exercise or omission to exercise any rights, powers, or remedies available to me, now or from time to time, shall impair any such rights, powers, or remedies or be construed to be a waiver of such rights, powers, or remedies.

Sincerely,



JOSE F. RODRIGUEZ PERELLO

cc: Rafael Escalera, Esq.
Susheel Kirpalani, Esq.

EXHIBIT B



COMMONWEALTH OF
PUERTO RICO

Puerto Rico Sales Tax Financing
Corporation

February 10, 2016

Jose F. Rodriguez Perelló
P.O. Box 8848
San Juan, P.R. 00910

Re: Response to Letter Dated February 8, 2016 Re: Demand to Observe and Comply with COFINA Covenants

Dear Mr. Rodriguez Perelló,

We are in receipt of your letter dated February 8, 2016 (the “February 8 Letter”), wherein you make reference to (i) the Amended and Restated Sales Tax Revenue Bond Resolution adopted on July 13, 2007, as amended on June 10, 2009 (as amended, the “Resolution”) governing the issuance of senior bonds and subordinate bonds by the Puerto Rico Sales Tax Financing Corporation (“COFINA”), (ii) the Puerto Rico Fiscal and Economic Growth Plan released on September 9, 2015 (the “FEGP”), and (iii) the Puerto Rico Restructuring Proposal and accompanying press release released on February 1, 2016 (together, the “Proposal”), and demand that COFINA comply with certain covenants that you allege have been breached by various statements contained in the FEGP and the Proposal, among other allegations. Capitalized terms used herein but not defined shall have the meanings ascribed to them in the Resolution.

We categorically disagree with the allegations contained in your February 8 Letter, which rest wholly on mistaken interpretations of the Resolution and a fundamental misreading of the contents and purpose of the FEGP and the Proposal. While we do not believe it would be productive to address each of your allegations in detail at this time, we reject any notion that COFINA has breached any of its respective obligations under the COFINA bonds or that any Event of Default has occurred or may occur as a result of the statements you identify in the FEGP and the Proposal. Accordingly, we decline to accede to your demands.

Any action you may seek to take based upon the Event of Default you incorrectly perceive to have occurred may cause substantial damages to COFINA, and we intend to hold you liable for any damages, including attorney’s fees, that may result therefrom. We hereby request that you

immediately and unconditionally withdraw your allegations and cease pursuit of any declaration of an Event of Default under the Resolution and any remedies you may believe you are entitled to as a result thereof. COFINA reserves all rights and remedies it may have under applicable law with regard to the matters covered in this letter, including direct and indirect damages and losses caused by any action you may take in connection therewith. Nothing contained herein shall constitute a waiver of any rights, remedies or claims contained in the Resolution, the COFINA bonds or any other documents related thereto.

Regardless of the ill-founded claims you have asserted against COFINA, we nonetheless invite you to participate in the negotiations that we, the Commonwealth and various other instrumentalities are conducting with our creditors in order to reach a consensual solution to the grave economic situation that the Government of Puerto Rico and each of its constituents are facing. As you are likely aware, certain holders of COFINA senior bonds, through their advisors, have already been involved in discussions with the Commonwealth's restructuring advisors, and we look forward to continuing a dialogue with our creditors as to their role in such a solution.

Finally, if you would like to be in contact with the Commonwealth's restructuring advisors with respect to this matter and any future matters we request that you copy Richard J. Cooper (rcooper@cgsh.com) and Eduardo Arias (earias@pmlaw.com), on any correspondence related thereto.

Very truly yours,



Karolee García
Director

cc: Richard J. Cooper
Eduardo Arias
Rafael Escalera
Susheel Kirpalani