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)

NOTICE OF AUTOMATIC STAY

TO THE HONORABLE COURT:

COME NOW, co-defendants Hon. Alejandro García Padilla, Hon. Juan C. Zaragoza Gómez and Hon. Luis Cruz Batista, in their respective official capacities (collectively "defendants"), specially appearing and without submitting to the jurisdiction or venue of this Court, and hereby state and pray as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint on July 20, 2016. Dkt. No. 1. On August 15, 2016, plaintiffs filed a first amended complaint. Dkt. No. 25. On October 7, 2016, plaintiffs sought leave to file a second amended complaint. Dkt. No. 39. This proposed second amended complaint purported to add eleven new causes of action and several new co-defendants, including the Commonwealth of Puerto Rico (the "Commonwealth"), the Puerto Rico Sales Tax Financing Corporation (a/k/a "COFINA," for its acronym in Spanish), Mr. Juan Vaquer, in his capacity as Executive Director of COFINA, and Bank of New York Mellon Corp., as trustee for certain COFINA bonds. Docket No. 39-1.

In their motion for leave to amend the complaint a second time, plaintiffs concede that most of their thirteen causes of action are temporarily stayed by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 et seq., which was enacted into law on June 30, 2016. Dkt. No. 39. Nevertheless, plaintiffs argued that Counts 1-3 and Count 12 of their proposed second amended complaint are not stayed by PROMESA.

On November 4, 2016, this Court entered an Order granting plaintiffs' request for leave to file a second amended complaint, but only "to the extent of allowing the second amended complaint to be filed." Dkt. No. 76. The Court specifically held that "[w]hether the First, Second, Third and Twelfth causes of action may be prosecuted will be decided in due course." Id.

Plaintiffs filed their second amended complaint on November 4, 2016. Dkt. No. 78.[1] "An amended complaint, once filed, normally supersedes the antecedent complaint. Thereafter, the earlier complaint is a dead letter and 'no longer performs any function in the case.'" Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (citations omitted). As will be shown below, all of plaintiffs' causes of action in the second amended complaint, including but not limited to Counts 1-3 and 12, are currently stayed by PROMESA, and plaintiffs have not shown cause to lift the stay to allow these claims to proceed. In the alternative, and in the exercise of this Court's inherent power to manage its docket, the entire case should be stayed because allowing piecemeal litigation would contravene the express purposes of PROMESA.

[1] Pursuant to Fed.R.Civ.P. 15(a)(3), were this action not stayed as a whole, the time to answer the second amended complaint would expire on November 21, 2016. However, as will be shown below, the entirety of this action, including Counts 1-3 and 12 of the second amended complaint, is temporarily stayed pursuant to PROMESA.

II. PROMESA AND CASE BACKGROUND

A. The Purpose of PROMESA and Its Stay Provisions

Congress enacted PROMESA in response to "a fiscal emergency in Puerto Rico." PROMESA § 405(m)(1). In particular, Congress determined that "[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." Id. § 405(m)(4). To that end, Congress found that "an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis." Id. § 405(m)(5).

As Congress explained, "[t]he 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." Id. § 405(m)(5)(A). Further, "[t]he 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." Id. § 405(m)(5)(B). The stay will "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).

Immediately upon enactment, PROMESA thus automatically stayed, "with respect to a "Liability," "the commencement or continuation ... of a judicial ... proceeding against the

Government of Puerto Rico that was or could have been commenced before the enactment of this Act." Id. § 405(b)(1).[2] PROMESA also automatically stayed 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.

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.

PROMESA § 405(a)(1) (emphasis added).

PROMESA defines a "Liability Claim," in relevant part, as follows:

> The term "Liability Claim" means, as it relates to a Liability....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.

PROMESA, § 405(a)(2)(B) (emphasis added).

For purposes of the PROMESA automatic 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

[2] The term "Government of Puerto Rico," as defined in PROMESA, includes officers such as defendants, sued in their official capacity (§ 405(i)(1)), as well as government instrumentalities (§ 5(11)).

any other source of law." PROMESA § 405(a)(1). This court has already stayed similar actions containing constitutional claims challenging PR Act No. 21-2016, pursuant to PROMESA. See, e.g., Brigade Leveraged Capital Structures Fund Ltd. v. The Government Development Bank for Puerto Rico, Civ. No. 16-1610 at Dkt. No. 99.

Section 405 of PROMESA, which was modelled after § 362 of the Bankruptcy Code, 11 U.S.C. § 362, not only stays certain claims that were or could have been commenced before the enactment of PROMESA, but also stays, among others:

- 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;
- any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;
- 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;
- any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act.

48 U.S.C. § 2194(b)(3-6).

B. Plaintiffs' Claims

Plaintiffs allege that they "are beneficial owners of substantial amounts of bonds that are explicitly protected by Puerto Rico's Constitution." Dkt No. 78 at ¶ 5. In their second amended complaint, plaintiffs contend that actions taken by the Commonwealth pursuant to the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, PR Act No. 21-2016 ("Act 21")—a Commonwealth statute enacted before PROMESA to deal with the looming financial crisis—as well as the Fiscal Year 2017 budget enacted by the Legislative Assembly of Puerto Rico and PR Act No. 74-2016, both unlawfully impair their rights under the relevant bonds ("General Obligation Bonds" or "GO Bonds") and violate certain provisions of PROMESA.

They further allege two thinly veiled constitutional claims dressed up as PROMESA preemption claims. Namely, they contend that the constitutionality of COFINA's 10-year-old Enabling Act—which established COFINA and exempted certain sales use tax ("SUT" revenue) from constitutionally "available resources" to repay general obligation bonds—is somehow a now-ripe question for this Court that could not have been brought prior to enactment of PROMESA.

Plaintiffs seek declaratory and injunctive relief against officials of the Commonwealth, requesting that the Court require the defendants to undertake certain set-asides of funds for payment on bond debts and to prohibit certain transfers that plaintiffs claim might threaten payment on bond debts. Plaintiffs also seek to challenge Act 21 on constitutional grounds and pursuant to PROMESA itself. Because plaintiffs' standing to bring all their claims hinges on their status as holders of the bonds, their claims clearly "relate to" their rights with respect to the bonds. But for their claimed interest in these bonds, plaintiffs would have no claims. Plaintiffs recognize this fact. See Dkt. No. 28 at 5 ("plaintiffs [do] not dispute that this lawsuit is 'related to' their bonds in some sense and is thus 'with respect to a Liability' in some fashion.").

III. THE SECOND AMENDED COMPLAINT IS STAYED BY PROMESA

All claims in plaintiffs' second amended complaint, including Counts 1-3 and 12, are stayed by PROMESA. Count 1 alleges violations of §§ 204(c)(3) and 207 of PROMESA. Count 2 is allegedly premised on § 303(3) and count 3 on § 303(1) of the Act, but both are nothing more than aging constitutional claims that could have been brought years ago. Docket No. 78 at 47-53. Count 12 requests relief under 42 U.S.C. § 1983, based on the above underlying violations of PROMESA. Id. at 64-65. Plaintiffs have argued that counts 1-3 and 12 of their second amended complaint are not stayed by § 405(b)(1) of PROMESA because they rest on

provisions of PROMESA itself and hence could not have been commenced before the enactment of PROMESA. Docket No. 39 at 12. Accordingly, they contend, no relief from stay is needed to prosecute counts 1-3 and 12. This simplistic view of the PROMESA stay fails to take into account the broader scope of the stay provisions in § 405(b) of PROMESA, modelled after § 362 of the Bankruptcy Code, and fundamentally misconstrues the relief sought by counts 2 and 3.

A. Counts 1-3 and 12 are stayed by § § 405(b)(1) of PROMESA.

1. Section 405(b)(1) Stays "An Action or Proceeding"

Plaintiffs concede that the vast majority of claims in the second amended complaint are with respect to a Liability and could have been brought before enactment of PROMESA, and thus are stayed. In arguing that counts 1-3 and 12 are nonetheless unaffected by the PROMESA stay, plaintiffs overlook the text of the statute. Section 405(b)(1) of PROMESA mandates a stay of the commencement or continuation of an "action or proceeding." It does not, as plaintiffs suggest, apply to a portion of the claims brought in an action or proceeding. With the filing of plaintiffs' new stayed claims, the entire "action or proceeding" is thus subject to PROMESA's automatic stay and relief may only be granted for: (1) cause "after notice and a hearing" (§405(e)(2)), or if (2) "necessary to prevent irreparable damage" if there is not an opportunity for a hearing (§405(g)).

2. Counts 2 and 3 Are Aging Constitutional Claims Unrelated to PROMESA

Counts 2 and 3 are also subject to stay under PROMESA § 405(b)(1) for the independent reason that they could have been brought long before the enactment of PROMESA. Though dressed as PROMESA preemption claims, through these counts, plaintiffs seek a declaration that COFINA's Enabling Act unlawfully altered the constitutional order of priority for repayment of

public debts. These counts have nothing to do with PROMESA, could have been brought years before and, accordingly, must be stayed.

The Commonwealth Legislative Assembly established COFINA in 2006. The Enabling Act was designed to retire Commonwealth debt obligations payable solely from government budgetary appropriations. Among other things, it authorizes COFINA to "issu[e] public bonds and utilize[e] other financing mechanisms." 13 L.P.R.A. § 11a(a). The Enabling Act dedicates a certain percentage of the Commonwealth's sales and use tax ("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 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 resources*** 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.

COFINA's bond offering documents accordingly disclose that SUT revenue is not an "available resource" for purposes of satisfying the public debt priority.

Plaintiffs, who are holders of general obligation ("GO") debt, insist that Counts 2 and 3 challenging the lawfulness of Executive Order 2016-30 and Act 21 are 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. Because Executive Order 2016-30 and the Act 21 did not claw back SUT money from COFINA to service the Commonwealth's GO debt, plaintiffs contend, they are unlawful and thus preempted by PROMESA §§ 303(3) and 303(1), respectively. Dkt. 78 ¶¶ 2, 95, 99.

Plaintiffs' claims, however, amount to little more than a pleading artifice. The fundamental fact, which plaintiffs cannot escape, is that Counts 2 and 3 depend on this Court's answer to one fundamental question: Do SUT carve-outs for COFINA bonds pursuant to the COFINA Enabling Act constitute "available resources" within the meaning of Article VI, Section 8 of the Puerto Rico Constitution? At their core Plaintiffs' constitutional challenges to Executive Order 2016-30 and the Moratorium Act are just that—constitutional challenges. Properly viewed in that light, plaintiffs' COFINA claims "could have been commenced" prior to PROMESA's enactment—or at any time over the last 10 years—and thus must be stayed under PROMESA § 405(b)(1). To rule otherwise would be tantamount to asking this Court to enjoin the non-clawback of SUT funds, which makes little sense.

B. Counts 1-3 and 12 are stayed by § 405(b)(6) of PROMESA.

Counts 1-3 and 12 of plaintiffs' second amended complaint are stayed by § 405(b)(6) of PROMESA.[3] This provision stays "any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act." 48 U.S.C. § 2194(b)(6).

In connection with their first cause of action, plaintiffs request that defendants "segregate and preserve all funds clawed back, to be clawed back, or available to be clawed back" for the benefit of GO bondholders. Docket No. 78 at 68. They also seek several orders prohibiting defendants from implementing certain transfers to government entities, pursuant to the approved Commonwealth budget for Fiscal Year 2016-2017 ("FY17") and contemplated by PR Act No. 74-2016, in order to preserve funds for the payment of plaintiffs' bonds Id. at 68-69. These forms

[3] Count 12 seeks a declaration that defendants Padilla, Gómez and Batista violated plaintiffs right under 28 U.S.C. § 1983. This is not a free-standing, independent claim against these officials but rather the vehicle by which plaintiffs allege certain acts by these defendants. To the extent Counts 1-3 are stayed, so too must Count 12 be stayed.

of injunctive relief, which are designed to freeze government assets, garnish the same from third parties, and attach or segregate them for the eventual payment of plaintiffs' bonds, are "acts to collect" pursuant to § 405(b)(6) of PROMESA, modeled after §362(a)(6) of the Bankruptcy Code, 11 U.S.C. § 362(a)(6). See, e.g., Matter of Holland, 21 B.R. 681, 687 (Bankr. N.D. Ind. 1982) (Section 362(a)(6) should be read "to be broader in its prohibitions than just acts against the debtor. The language of the stay encompasses any act to collect a claim against the debtor.").

The same is true of Counts 2 and 3, through which plaintiffs seek an injunction:

> 1. prohibiting the diversion of revenues arising from collection of the SUT [sales and use tax] (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;
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> 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 the Executive Order as applied to the Constitutional Debt.

Dkt. No. 78 at 68.

The fact that the funds plaintiffs intend to freeze, garnish, attach, or segregate will not be immediately turned over to plaintiffs is irrelevant to the applicability of § 405(b)(6). See Divane v. A and C Elec. Co., Inc., 193 B.R. 856, 860 (N.D. Ill. 1996) ("Section 362(a)(6)'s . . . 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."). By its own terms §362(a)(6), and by analogy § 405(b)(6) of PROMESA, applies to "any act" and "prevents

creditors from attempting in any way to collect a prepetition debt." Id. at 859 (quoting In re Hellums, 772 F.2d 379, 381 (7th Cir. 1985)).

In the bankruptcy realm, § 362(a)(6) of the Bankruptcy Code stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." In interpreting this statutory provision, "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." In re Trevino, 535 B.R. 110, 149 (Bankr. S.D. Tex. 2015) "Eventual, or even planned, collection of a debt may constitute a violation of § 362(a)(6)." Id.

A number of courts have held this provision applicable to actions regarding post-petition transfers or payments and considered actions to recover any such transfers—even actions against non-debtor, third parties—to involve "a claim against the debtor that arose before the commencement of the case," given that, but for such a claim, there would be no action available regarding the post-petition transfer. See, e.g., In re Teleservices Grp., Inc., 463 B.R. 28, 35 (Bankr. W.D. Mich. 2012) ("In sum, postpetition fraudulent transfer actions by creditors are prohibited by the automatic stay because they cannot stand independent of that creditor's claim against the debtor."); In re Colonial Realty Co., 980 F.2d 125, 132 (2d Cir. 1992) ("While a fraudulent transfer action may be an action against a third party, it is also an action 'to recover a claim against the debtor.' Absent a claim against the debtor, there is no independent basis for the action against the transferee.")); In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989) (same); see also Matter of Hellums, 772 F.2d 379, 381 (7th Cir. 1985) ("We hold that Congress

intended the stay of section 362(a)(6) to apply to the automatic (as well as coerced) transfer and application of post-petition funds to the prepetition debts of Chapter 7 debtors.").

It is disingenuous for plaintiffs to claim that because they are not actually receiving money at this time, their efforts to freeze assets of the Commonwealth, including avoiding transfers of funds pursuant to the Government's approved budget and COFINA's Enabling Act, are not "acts to collect" pursuant to § 405(b)(6) of PROMESA. Plaintiffs' request for injunctive relief is clearly stayed, regardless of its legal basis or whether it involves alleged acts or omissions that took place post-PROMESA.

C. Counts 1-3 and 12 are stayed by §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). In their second amended complaint, plaintiffs seek an injunction freezing "clawed back" funds and enjoining certain transfers pursuant to the approved FY17 budget. Despite plaintiffs' best efforts to argue otherwise, the Commonwealth's actions are merely exercises of control over the Commonwealth's property. In addition, plaintiffs allege that sales use tax ("SUT") revenues used to pay COFINA bonds are not collected by the Commonwealth, but received by third parties for eventual transfer to the trustee of the COFINA bonds. Docket No. 78 at p. 36, ¶ 97. They claim that this payment mechanism is an "artifice" to avoid using SUT revenues to pay General Obligation ("GO") bondholders (id.), because allegedly "[r]evenues arising from collection of the Commonwealth's SUT are a quintessential example of 'available resources' for purposes of the Constitutional Debt Priority Guarantee." Id. at ¶ 104.

As recently explained by the bankruptcy court in In re Weidenbenner, 521 B.R. 74 (Bankr. S.D.N.Y. 2014):

> Congress amended the Code in 1984 to add the phrase "exercise control over" property of the estate. Amplifier Research Corp. v. Hart, 144 B.R. 693, 694 (E.D.Pa.1992). Although there is no legislative history explaining why this amendment was added, In re Albion Disposal, Inc., 217 B.R. 394, 405 (W.D.N.Y.1997), the court in Amplifier stated that "Congress evidently believed that the purpose of staying acts for possession was defeated if plaintiffs were still free to try to control or otherwise direct how the debtor used his property. Clearly at some point, 'control' over another's property becomes constructive possession." Id. The phrase "to exercise control" should be interpreted in a way that gives effect to its plain meaning. Thompson v. GMAC, LLC, 566 F.3d 699, 702 (7th Cir. 2009). To "exercise control" is "'to exercise restraining or directing influence over' or 'to have power over.'" Id. ("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.").

Id. at 79. See also Shimer v. Fugazy (In re Fugazy Exp., Inc.), 982 F.2d 769, 776 (2d Cir.1992) (Section 362(a)(3) also precludes "any act to transfer control over property of the estate.").

Plaintiffs' request for injunctive relief pursuant to Counts 1-3 and 12 of their second amended complaint is nothing more than a demand to prohibit the Commonwealth from using its own assets. Plaintiffs intend to obtain injunctive relief by (1) freezing "clawed back" funds and SUT revenues, (2) prohibiting certain transfers pursuant to the budget of the Commonwealth of Puerto Rico; (3) prohibiting the transfer of funds to COFINA pursuant to applicable law; and (4) requiring COFINA to transfer SUT revenues back to the Commonwealth for plaintiffs' benefit. These requested remedies clearly foreclose, limit, or prohibit the Commonwealth's beneficial use of its own assets. Regardless of the merits of plaintiffs' claims, these are clearly acts to exercise control over property of the Government of Puerto Rico that are stayed pursuant to § 405(b)(3) of PROMESA.

Plaintiffs cannot simultaneously claim, for example, that SUT revenues are property of the Commonwealth but that their request for injunctive relief asking for the attachment,

garnishment, freeze, or segregation of this property is not an act to obtain possession or otherwise exercise control over it. Plaintiffs' purported remedies would severely affect the ability of the Commonwealth to operate during this time of fiscal crisis, which is precisely what PROMESA sought to prevent. See 48 U.S.C. § 2194(n). See also I.C.C. v. Holmes Transp., Inc., 931 F.2d 984, 987 (1st Cir. 1991) ("The 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 postpetition actions and proceedings against the debtor in nonbankruptcy 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**." (emphasis added)).

D. Counts 1-3 and 12 are stayed by §§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," while § 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 chapter." 48 U.S.C. § 2194(b)(4) and (b)(5). In interpreting analogous provisions in § 362 of the Bankruptcy Code, courts have held that under § 362(a)(4), "the time in which the claim arose is irrelevant." Matter of Reserves Dev. Corp., 78 B.R. 951, 958 (W.D. Mo. 1986).

In Matter of Reserves, the West Virginia Attorney General's office ("appellants") filed suit on behalf of the West Virginia Commissioner of Labor and eleven of the debtors' employees, seeking recovery of unpaid post-petition wages. Appellants obtained a prejudgment attachment of a coalwashing facility. Plaintiffs-appellees held a security interest in certain coalwashing units located on the facility. Id. at 954. The Bankruptcy Court concluded that the

appellants' attachment of the coalwashing facility was in violation of the automatic stay and voided the attachment. Id. On review before the district court, appellants argued that the stay provided by section § 362(a)(1) of the Bankruptcy Code was inapplicable, because the wage claim justifying the attachment arose post-petition. Id. at 958. The district court rejected this theory and concluded that the operative provision was § 362(a)(4), which does not contain a temporal limitation similar to § 362(a)(1). The district court went on to hold as follows:

> ...appellants sought to attach the debtors' coalwashing unit for the purpose of securing the payment of past-due wage claims. The net effect of such an 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. Thus, appellants' attempt to attach property of the debtors' bankruptcy estate was indeed an act to "create" or "perfect" a lien on this property, and this Court holds that the Bankruptcy judge correctly applied § 362(a)(4) as the governing provision.

Id.

Courts have further determined that the freezing of assets by a creditor "violated the automatic stay as an act to enforce a lien against property of the estate." In re Patterson, 967 F.2d 505, 512 (11th Cir. 1992). It must be noted that whether the creditor takes affirmative steps to be in actual or constructive possession of the asset is not dispositive. The definition of "act" pursuant to § 362(a)(4) is so broad that at times not even an affirmative act of the creditor may be required for the stay provision to apply. See 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. For example, the creation or perfection of a post-petition lien violates the automatic stay even when such creation or perfection becomes effective by operation of law.") (internal citations omitted); see also In re Penfil, 40 B.R. 474, 476 (Bankr. E.D. Mich. 1984) ("the mere recording of a Sheriff's deed after a foreclosure sale is, in and of itself, a violation of

the automatic stay of § 362(a) since it is "an act to . . . enforce any lien against property of the estate.").

Plaintiffs in this case allege in their second amended complaint that they have a "first lien" and priority over all Commonwealth expenditures. Docket No. 78 at ¶ 5. Defendants reject that characterization, and reserve the right to contest it. In any event, accepting as true plaintiffs' allegations for purposes of this Notice, plaintiffs' requested form of relief is clearly an act to create, perfect, or enforce a lien under § 405(b)(4) of PROMESA, regardless of when the claim arose.

On the one hand, plaintiffs are requesting that this court freeze "clawed back" funds and certain funds slated for transfer pursuant to the Commonwealth's budget for FY17. Plaintiffs are also requesting an order attaching or garnishing SUT revenues received by COFINA and requesting that they be turned over to the Commonwealth's treasury and therein segregated for the payment of plaintiffs' bonds. 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 "indeed an act to 'create' or 'perfect' a lien on this property." Matter of Reserves Dev. Corp., 78 B.R. at 958.

On the other hand, to the extent plaintiffs do have a "first lien" on SUT revenues and other funds outlined in the second amended complaint, which is denied, their request that Commonwealth assets be turned over to the Commonwealth's Treasury and/or garnished, frozen, or segregated for plaintiffs' benefit is an act to enforce a lien under § 405(b)(4) of PROMESA, regardless of when the alleged claim to these funds arose or whether the alleged cause of action was available before or after the passage of the Act. Id. In any event, plaintiffs' request for

injunctive relief in protection of their alleged "first lien" on all Commonwealth revenues is clearly stayed by § 405(b)(4) of PROMESA, or by § 405(b)(5) to the extent the alleged "first lien" being enforced secured a Liability Claim that arose before the enactment of PROMESA.

IV. IN THE ALTERNATIVE, THE ENTIRE CASE SHOULD BE STAYED BECAUSE ALLOWING PIECEMEAL LITIGATION WOULD CONTRAVENE THE EXPRESS PURPOSES OF PROMESA.

Plaintiffs' second amended complaint, including Counts 1-3 and 12, should be stayed pursuant to PROMESA for the reasons described above. But if the Court disagrees and concludes that not all counts are stayed, it should nevertheless exercise discretion to stay the entire case rather than permitting piecemeal litigation in contravention of the purpose of the PROMESA stay.

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). As outlined above, plaintiffs concede that most, but not all, of their claims are subject to the PROMESA stay. In so doing, plaintiffs attempt to transform PROMESA into something Congress expressly declared it is not meant to be: a piecemeal restructuring mechanism. See PROMESA § 405(m)(4). This fragmented vision of the PROMESA stay not only contradicts the need for the breathing space mandated by PROMESA but is inconsistent with the approach taken by many courts in restructuring proceedings. For instance, the automatic stay under Section 362 of the Bankruptcy Code—the language of which is analogous to PROMESA—is routinely applied in a broad, exhaustive fashion. See, e.g., In re Leonard, 231 B.R. 884, 889 (Bankr. E.D. Pa. 1999) ("As a general rule, the automatic stay applies to all claims, even those that may be excepted from discharge; in this regard, the scope of the stay is broad."). Indeed, one of Section 362's

principal goals is to protect creditors and debtors alike by avoiding piecemeal litigation that may result in inconsistent or inequitable outcomes.

Section 362 is instructive here, for Congress enacted PROMESA to accomplish similar ends. PROMESA embodies a "comprehensive approach to fiscal, management, and structural problems and adjustments . . . involving [an] independent [O]versight [Board] and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." PROMESA § 405(m)(4). To be sure, a core purpose and benefit of having an Oversight Board at the center of the PROMESA process is the capability to organize a consolidated approach to restructuring the Commonwealth's tax-supported debts. Plaintiffs' bid for a splintered disposition of their claims, however, precludes such a consolidated and comprehensive course of action, and is further evidence that the entire case is simply an action to recover payments from the Commonwealth. Accordingly, plaintiffs' quest to charge forward invites this Court to spurn Congress's express objectives in passing PROMESA. The Commonwealth defendants respectfully submit that this invitation should be declined.

WHEREFORE, for the foregoing reasons, this action has been automatically stayed as a matter of law by section 405 of PROMESA. In the alternative, defendants' respectfully request that the Court stay the piecemeal litigation and disposition of Counts 1-3 and 12 of the second amended complaint in the exercise of its discretion and its inherent power to manage its docket.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 7th day of November, 2016.

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