

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

VOYA INSTITUTIONAL TRUST COMPANY,
as Trustee for the University of Puerto Rico
Deferred Compensation Plan,

Plaintiff,

v.

UNIVERSITY OF PUERTO RICO; CELESTE
FREYTES, in her official capacity as President
thereof; and ALEJANDRO J. GARCÍA
PADILLA, in his official capacity as Governor
of Puerto Rico,

Defendants.

Civil No. 16-2519 (FAB)

UNIVERSIDAD DE PUERTO RICO
Plaintiff,

v.

VOYA INSTITUTIONAL TRUST COMPANY,
Defendant.

Civil No. 17-01014 (FAB)

VOYA INSTITUTIONAL TRUST COMPANY'S MOTION TO CONSOLIDATE

By order dated January 18, 2017, the Court sought the parties' positions on whether the above-captioned cases should be consolidated. For the reasons stated below, Voya Institutional Trust Company ("Voya") believes that consolidation is appropriate, and respectfully requests that the Court consolidate the two matters for further proceedings pursuant to Rule 42 of the Federal Rules of Civil Procedure.¹

¹ Despite repeated efforts to meet and confer with the UPR regarding consolidation and other matters concerning the efficient resolution of these cases, Voya was unable to determine the UPR's position in advance of the due date of this response.

I. ARGUMENT

Before the Court are two nearly identical lawsuits. The cases involve the same parties, the same facts and circumstances, and the same legal issues. Both actions seek the same relief: a judicial determination whether certain trust assets lawfully may be disposed of as the UPR has requested.

The only difference between the cases is that the UPR's complaint seeks to avoid, through artful pleading, the unavoidable PROMESA questions at the heart of this dispute. The UPR filed its action in Superior Court four months after Voya's federal lawsuit, Voya timely removed it to this Court, and the UPR has recently moved to remand.² Voya's brief in opposition to remand will demonstrate not only that removal was proper, but that this Court is the *only* forum with jurisdiction over the UPR's claims. Federal law gives this Court exclusive jurisdiction over issues arising out of PROMESA. 48 U.S.C. § 2126(a) (2016). Voya's obligations as trustee over the assets in question simply cannot be determined without resolving whether the UPR's request complies with PROMESA's restrictions on transfers of government property. Because resolution of the PROMESA issues is necessary to deciding the UPR's claim, no matter how carefully the UPR attempts to plead around them, removal was warranted. 14B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. Juris § 3722.1 (4th ed. through Apr. 2016 update). The UPR is plainly wrong to characterize PROMESA as merely a "defense" to its claim for an order directing Voya to transfer the trust assets. (Dkt. 17-1014 No. 9, at 4.) To the extent PROMESA precludes that relief, that is because its comprehensive scheme for claims concerning government assets pre-empts the state law upon which the UPR relies. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.

² The UPR's Motion to Remand was filed on January 25, 2017. Thus, Voya's response is due on February 8, 2017. L.R. 7(b).

1, 24 (1983) (“if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily ‘arises under’ federal law.”).

Consolidation of the cases is clearly warranted. A court may consolidate actions if they “involve a common question of law or fact.” Fed.R.Civ.P. 42(a). “Rule 42(a) is designed to encourage consolidation where common questions of law or fact are present.” Gonzalez-Quiles v. Coop. De Ahorro Y Credito De Isabela, 250 F.R.D. 91, 92 (D.P.R. 2007) (Besosa, J.). Thus, the “threshold issue is whether the ... proceedings involve a common party and common issues of fact or law.” Seguro de Servicio de Salud v. McAuto Sys. Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989). If they do, courts have broad discretion to consolidate cases. Id.; Gonzalez-Quiles, 250 F.R.D. at 93. In deciding to consolidate cases, “courts weigh considerations of convenience and economy against considerations of confusion and prejudice.” Gonzalez-Quiles, 250 F.R.D. at 93 (citations and quotation marks omitted).

Here, there is but a single set of relevant facts. The cases involve the same parties (excepting two individuals named in their official capacities), the same agreements, the same deferred compensation plan, and the same decision by the UPR to remove Voya as trustee and distribute plan assets in a way that raises questions of compliance with PROMESA and the Trust Agreements. The legal questions in both cases concern the rights and obligations of Voya, as trustee, and the UPR, as an instrumentality of the government of Puerto Rico, the owner of the trust assets, and the fiduciary of the deferred compensation plan at issue, under federal and state law. To be sure, as noted above, the UPR’s Complaint carefully avoids acknowledging the relevance of PROMESA. But this artful pleading does not change the fact that no lawful transfer of assets can occur in the absence of a judicial determination that PROMESA permits it.

Consolidation also would not create any inconvenience, delay, expense or prejudice to the Court or the litigants. To the contrary, both cases have already been assigned to this Court and will proceed in parallel even in the absence of consolidation. The cases are in the early stages. No discovery has occurred in either case and neither case is presently under any scheduling order. Thus, consolidation will not delay the proceedings. Moreover, this Court has not yet entered any substantive order in either case, so there is no risk of conflicting guidance or rulings from the Court. To the contrary, the only risk of inconsistency would arise from a lack of coordination. No party will be prejudiced or inconvenienced by consolidation.

II. CONCLUSION.

For the foregoing reasons, Voya respectfully requests that the Court order these cases consolidated.

Date: January 27, 2016.

Respectfully submitted,

**ADSUAR MUÑIZ GOYCO SEDA
& PÉREZ-OCHOA, P.S.C.**

s/ Pedro Jiménez

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