United States Court of Appeals

for the

First Circuit

Case No. 16-2437

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD.; BRIGADE DISTRESSED VALUE MASTER FUND LTD.; TASMAN FUND LP; CLAREN ROAD CREDIT MASTER FUND, LTD.; CLAREN ROAD CREDIT OPPORTUNITIES MASTER FUND, LTD.; FORE MULTI STRATEGY MASTER FUND, LTD.; SOLA LTD.; ULTRA MASTER LTD.; SOLUS OPPORTUNITIES FUND 5 LP; FIR TREE VALUE MASTER FUND, L.P.; FIR TREE SPECIAL OPPORTUNITIES FUND V, LP; FIR TREE CAPITAL OPPORTUNITY MASTER FUND, L.P.; FIR TREE SPECIAL OPPORTUNITIES FUND IV, LP; NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR MOVANT-APPELLANT FINANCIAL OVERSIGHT AND MANAGEMENT BOARD

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

Attorneys for Movant-Appellant Financial Oversight and Management Board

v.

ALEJANDRO J. GARCÍA-PADILLA, in his official capacity as Governor of Puerto Rico; JUAN C. ZARAGOZA-GÓMEZ, in his official capacity as Secretary of the Puerto Rico Department of the Treasury; JOHN DOE, in his/her official capacity as receiver for the Government Development Bank of Puerto Rico,

Defendants-Appellees,

GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO,

Defendant,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Movant-Appellant.

Case No. 16-2438

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

Plaintiff-Appellee,

v.

ALEJANDRO J. GARCÍA-PADILLA; JUAN C. ZARAGOZA-GÓMEZ; LUIS F. CRUZ-BATISTA,

Defendants-Appellees,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Movant-Appellant.

Case No. 16-2439

US BANK TRUST NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v.

ALEJANDRO GARCÍA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; COMMONWEALTH OF PUERTO RICO; UNIVERSITY OF PUERTO RICO; CELESTE FREYTES-GONZÁLEZ, in her official capacity as President of the University of Puerto Rico,

Defendants-Appellees,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Movant-Appellant.

Case No. 16-2440

DIONISIO TRIGO-GONZÁLEZ; CARMEN REGINA SUÁREZ-SEIN; BENIGNO TRIGO-GONZÁLEZ; TERESA ZAPATA-BIRD; TRIGO CORP.; GUILLERMO L. MARTÍNEZ; BERTITA MARTÍNEZ-MARTÍNEZ; GUSTAVO HERMIDA-CEDA; GLORIA COLON; RAMON GONZÁLEZ-CORDERO; KETTY SIMOUNET DE GONZÁLEZ; JORGE HESS; REGINA TRIGO DE HESS; TRIMAR INVESTMENTS CORP.; SAN RAFAEL HOLDINGS, LLC; CECI MONTILLA-ROJO; 322 DE DIEGO HOLDINGS, LLC; JOSE A. VALDES-MAZAURIETA; ADRIENNE MUENTES-ORTIZ; VALMU TRUST; 2015, LLC; ADRIEL LONGO-RAVELO; ERNESTO A. SMITH; SARESS E. SMITH; FEDERICO M. STUBBE ARZUAGA; FREDERICO STUBBE GONZÁLEZ; STUGO, LLC; FSA INVESTMENTS, LLC; NORTHSHORE MANAGAMENT, CORP.; HEIRS OF THE ESTATE OF ROSARIO FERRE RAMIREZ DE ARELLANO COMP BY BTF-RLTF-LATF; 419 PONCE DE LEON, INC.; CONJUGAL PARTNERSHIP TRIGO-SUÁREZ; CONJUGAL PARTNERSHIP TRIGO-ZAPATA; CONJUGAL PARTNERSHIP MARTÍNEZ-MARTÍNEZ; CONJUGAL PARTNERSHIP HERMIDA-COLON; CONJUGAL PARTNERSHIP GONZÁLEZ-SIMOUNET; CONJUGAL PARTNERSHIP HESS-TRIGO; CONJUGAL PARTNERSHIP VALDES-MUENTES; CONJUGAL PARTNERSHIP SMITH-SMITH,

Plaintiffs-Appellees,

CARMEN FELICIANO VARGAS; FIRST MEDICAL HEALTH PLAN, INC.; EDUARDO ARTAU GÓMEZ; ARTAU FELICIANO CONJUGAL PROPERTY PARTNERSHIP,

Plaintiffs,

v.

ALEJANDRO GARCÍA-PADILLA, in his official capacity as Governor of Puerto Rico; JUAN C. ZARAGOZA-GÓMEZ, in his official capacity as Secretary of the Department of the Treasury of Puerto Rico; THE GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO; MELBA ACOSTA-FEBO, in her official capacity as President of the Government Development Bank of Puerto Rico and of the Puerto Rico Public Finance Corporation; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; VICTOR SUÁREZ-MELENDEZ, in his official capacity as Executive Director of the PR Fiscal Agency and Financial Advisory Authority; PUERTO RICO PUBLIC FINANCE CORPORATION,

Defendant-Appellees,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Movant-Appellant.

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 an instrumentality of the Government 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. Governor-elect Ricardo Rosselló Nevares recently named Elías Sánchez to serve on the Oversight Board *ex officio* (replacing Richard Ravitch) pursuant to Section 101(e)(3) of PROMESA, 48 U.S.C. § 2121(e)(3).

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PRELIMINARY STATEMENT

This appeal is from the District Court's Orders denying the Oversight Board's motions to intervene in four actions that were consolidated for trial before the United States District Court for the District of Puerto Rico.[1] The Oversight Board is an instrumentality of the Government of Puerto Rico created pursuant to Section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187 ("PROMESA"), 48 U.S.C. § 2121, and tasked with helping the Commonwealth and its instrumentalities extricate themselves from their crippling financial distress and regain access to capital markets.

Two related provisions of PROMESA are at issue in this consolidated appeal. The first – Section 405(b) – stays liability-related litigation (for instance, actions to collect on bonds or to assert rights against collateral) against the Commonwealth, its officers, and instrumentalities. The second – Section 212(a) – authorizes the Oversight Board to intervene in any action filed against the government of Puerto Rico or one of its "covered" instrumentalities.

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[1] The Oversight Board has also appealed from the District Court's denial of the Oversight Board's motions to intervene in three other consolidated actions. *See Peaje Investments LLC v. García Padilla*, Civil No. 16-2430 (1st Cir.); *Assured Guar. Corp. v. Puerto Rico*, Civil No. 16-2431 (1st Cir.); *Altair Global Credit Opportunities Fund (A), LLC v. García Padilla*, Civil No. 16-2435 (1st Cir.).

Under the broad authority granted to the Oversight Board by Section 212(a) of PROMESA, the Oversight Board moved to intervene in each of the four actions that had been consolidated by the District Court in order to oppose each Plaintiff's lift stay motion. There can be no dispute that the Oversight Board was entitled to intervene in the two actions that named either the Commonwealth or one of its covered instrumentalities as defendants. In the other two actions, the complaints named only officers of the Commonwealth or its covered instrumentalities acting in their official capacities. The statutory framework leads to the inescapable conclusion that Congress intended actions naming government officials to be covered by Section 212(a) of PROMESA, but if this happenstance of pleading brings those two actions outside the purview of Section 212(a), then the Oversight Board was entitled to intervene in those actions pursuant to Federal Rule of Civil Procedure 24(a)(2) to protect its interest in ensuring that the PROMESA stay remains in place or pursuant to Rule 24(b)(1)(B) because of the common issues of law and fact among the four cases.

All of the parties consented to the Oversight Board's motions to intervene, but the District Court nonetheless denied the Oversight Board's motions on a procedural technicality without reaching the merits. The District Court held that the Oversight Board had failed to comply with Federal Rule of Civil Procedure 24(c)'s requirement that the intervention papers include a proposed "pleading," and

that the Oversight Board's opposition brief was not, according to the District Court, "a pleading that sets out the claim or defense for which intervention is sought." The District Court apparently believed that it could not grant the Oversight Board's motion unless the Oversight Board attached to its motion an answer or other formal pleading responding to the merits of the underlying constitutional claims. This was reversible error.

The District Court cited this Court's statement in *Public Service Company of New Hampshire v. Patch*, 136 F.3d 197, 205 n.6 (1st Cir. 1998), that a failure to attach a pleading ordinarily requires dismissal of an intervention motion, but the District Court misconstrued that case. *Public Service Company of New Hampshire* has no applicability here. The Oversight Board did, in fact, file a pleading that sets forth its opposition to the lift stay motions.

Federal Rule of Civil Procedure 24(c) requires a pleading that fits the circumstances of the particular case before the court. The District Court erred here by denying the Oversight Board's motion without reaching the merits. The Court should reverse the District Court Orders and grant the Oversight Board leave to intervene in each of the consolidated actions.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over each of the consolidated actions pursuant to 28 U.S.C. § 1331 and Sections 106(a) and 405(e)(1) of

PROMESA. 48 U.S.C. §§ 2126(b), 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).

The District Court's Opinion and Order denying the Oversight Board's motion to intervene as of right in each action is an immediately appealable order. *See Rhode Island v. United States EPA*, 378 F.3d 19, 26 (1st Cir. 2004) ("An order flatly denying a motion to intervene in a judicial proceeding is an immediately appealable collateral order."); *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 33 (1st Cir. 2000) ("The denial of intervention claimed as of right is immediately appealable.").[2]

On November 28, 2016, the Oversight Board timely filed its notice of appeal in each of the actions. A211–12, A271–72, A294–95, 389–90.[3]

STATEMENT OF THE ISSUES ON APPEAL

This appeal presents two issues:

1. Did the District Court misconstrue Federal Rule of Civil Procedure 24(c) and err by concluding that the Oversight Board's proposed

[2] Whether this Court's jurisdiction is based on the collateral order rule, an "exception" to the final decision rule, or a "practical construction" of the final decision rule, it is clear that denial of the Oversight Board's motion is immediately appealable. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Candelario-Del-Moral v. UBS Fin. Servs. Inc. of P.R. (In re Efron)*, 746 F.3d 30, 34 (1st Cir. 2014); *Rhode Island*, 378 F.3d at 26.

[3] All citations to "A__" are to the Appendix filed by the Oversight Board in these consolidated appeals.

opposition to the Defendants' motions for relief from the PROMESA stay failed to satisfy the Rule's pleading requirement?

2. Did the District Court misconstrue Section 212(a) of PROMESA and err by denying the Oversight Board's motions to intervene?

STATEMENT OF THE CASE

A. The Moratorium Act and the Executive Orders

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:

- Grants immunities to persons acting in furtherance of the Moratorium Act by providing that no person (including any person, director, officer, employee, contractor, agent, or representative) shall have any liability for actions taken, or not taken, in good faith in furtherance of the Moratorium Act (*e.g.*, claims that "essential services" payments are illegal). Moratorium Act § 105, A348–49.
- 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. *Id.* §§ 103(l), (m), 201(a), A345–46, A350.

- 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." *Id.* § 201(b), (d)(ii), A350–52.
- Suspends the operation of "ipso facto" clauses and stays recovery actions against the Commonwealth and its instrumentalities. *Id.* § 201(b), A350–52.
- Provides that violation of the stay imposed under Section 201(b) is punishable by contempt of court. *Id.* § 201(c), A352.
- Establishes new receivership provisions with respect to the Government Development Bank ("GDB"). *Id.* §§ 301, 302, 401, 501, 502, A357–74.

Pursuant to the authority granted to him under the Moratorium Act, the Governor issued five executive orders (each an "Executive Order" and together, the "Executive Orders") that are at issue in these cases:

1. Executive Order 10-2016 ("EO-10")

Pursuant to EO-10, the Governor (1) declared a state of emergency with respect to the GDB, (2) imposed limits on withdrawals by GDB depositors and transfers to GDB creditors, and (3) suspended payment of any obligations guaranteed by the GDB. EO-10 ¶¶ 1, 8, 11, A107–11.

2. Executive Order 14-2016 ("EO-14")

Pursuant to EO-14, the Governor declared a moratorium on the payment of GDB covered obligations, other than (1) deposits, and (2) interest obligations that were not required to be paid in cash. EO-14 ¶ 3, A247.

3. Executive Order 18-2016 ("EO-18")

Pursuant to EO-18, the Governor (1) declared a state of emergency with respect to the Puerto Rico Highways and Transportation Authority ("PRHTA"), and (2) suspended the PRHTA's obligation to transfer toll revenues pledged to holders of PRHTA bonds. EO-18 ¶¶ 1, 3, A254–55.

4. Executive Order 30-2016 ("EO-30")

Pursuant to EO-30, the Governor (1) suspended the Commonwealth's obligation to make payments on any bonds or notes issued or guaranteed by the Commonwealth, other than payments to the GDB, (2) extended the emergency period with respect to the PRHTA to the end of the covered period, and (3) suspended the PRHTA's obligation to make certain specified debt payments. EO-30 ¶¶ 1, 2, A258.

5. Executive Order 31-2016 ("EO-31")

Pursuant to EO-31, the Governor (1) declared a state of emergency with respect to the Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS"), (2) suspended the ERS's obligation to transfer employer contributions to ERS's Fiscal Agent, (3) suspended the Commonwealth's obligations to make employer contributions to the ERS up to the amount of debt service payable by the ERS during fiscal year 2016-2017, and (4) continued the suspension of the PRHTA's obligation to transfer pledged toll revenues to the Fiscal Agent. EO-31 ¶¶ 4–6, A381–82.

B. PROMESA

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, among other things, to 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).[4] PROMESA specifically authorizes the Oversight Board to seek injunctive relief in any action in which it intervenes. 48 U.S.C. § 2152(b).

[4] The Oversight Board is authorized to decide whether a territorial instrumentality should be covered by PROMESA or excluded from its requirements. 48 U.S.C. §§ 2104(7), 2121(d). It has, so far, designated 63 "covered" instrumentalities. A copy of the Oversight Board's designations of covered territorial instrumentalities is available on the Oversight Board's website: https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/58345e7a9bd5a.pdf.

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). Among other actions, PROMESA stays, "with respect to a Liability . . . the commencement or continuation . . . of a judicial . . . action . . . 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).

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

The automatic 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).

The District Court may, however, grant relief from the stay to "a party in interest" either "for cause shown" after notice and a hearing, or "to prevent irreparable damage to the interest of an entity in property" with or without a hearing. 48 U.S.C. § 2194(e)(2), (g).

C. The Oversight Board

On August 31, 2016, the President of the United States appointed seven members to the Oversight Board.[5] Since it was appointed, the Oversight

[5] Those members are: Chairman, José B. Carrión III (an insurance executive), Andrew G. Biggs (a Social Security expert from the American Enterprise Institute), José R. González (a Puerto Rican banker), Ana J. Matosantos (a former director of the California Department of Finance), Carlos M. García (a private equity manager and former bank president), Arthur J. González (a former bankruptcy judge), and David A. Skeel Jr. (a professor of corporate law at the University of Pennsylvania). *See* https://juntasupervision.pr.gov/index.php/en/home. Governor-elect Ricardo Rosselló Nevares recently named Elías Sánchez to

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 begun to meet with representatives of the parties to these actions and many of the other similar actions and have made information requests of the Governor and the Commonwealth officials and advisors.[6] The Oversight Board is also working with the

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serve on the Oversight Board *ex officio* (replacing Richard Ravitch) pursuant to Section 101(e)(3) of PROMESA, 48 U.S.C. § 2121(e)(3).

[6] There are 15 actions in all, including the four that are currently before the Court on this consolidated appeal. Three were separately consolidated below and also on appeal by this Court. *See Peaje Investments LLC v. García Padilla*, Case Nos. 16-2377, 16-2430 (1st Cir.); *Assured Guar. Corp. v. Puerto Rico*, Case No. 16-2431 (1st Cir.); *Altair Global Credit Opportunities Fund (A), LLC v. García Padilla*, Case Nos. 16-2431, 2435 (1st Cir.). Four cases are stayed. *See Assured Guar. Corp. v. García Padilla*, Civil No. 16-1037 (D.P.R.); *Fin. Guar. Ins. Co. v. García Padilla*, Civil No. 16-1095 (D.P.R.); *Ambac Assurance Corp. v. Puerto Rico Highways and Transp. Auth.*, Civil No. 16-1893 (D.P.R.); *Jacana Holdings I LLC v. Puerto Rico*, Civil No. 16-4702 (S.D.N.Y.). In three cases, lift stay motions are *sub judice*. *Lex Claims, LLC v. García Padilla*, Civil No. 16-2374 (D.P.R.); *Scotiabank de Puerto Rico v. García Padilla*, Civil No. 16-2736 (D.P.R.); *Oriental Bank v. García Padilla*, Civil No. 16-2877 (D.P.R.). In *Voya Institutional Trust Co. v. Univ. of Puerto Rico*, Civil No. 16-2519 (D.P.R.), the University of Puerto Rico's motion to dismiss is *sub judice*.

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 required under PROMESA. A184–86. As has been well publicized, the Commonwealth submitted its draft fiscal plan following the Oversight Board's first public meeting. The Oversight Board has been meeting with the Commonwealth about the draft fiscal plan, and continues to work with the Commonwealth to develop a realistic base-line budget to use for the restructurings and reforms required by PROMESA.[7]

D. The Consolidated Actions

The Plaintiffs in these consolidated cases include holders and insurers of bonds issued by the GDB, the PRHTA, the Puerto Rico Public Finance Corporation ("PRPFC"), and the Puerto Rico Industrial, Tourist, Educational, Medical and Environmental Control Facilities Financial Authority, as well as a trustee for holders of bonds issued by the University of Puerto Rico ("UPR"). The Plaintiffs seek to challenge the constitutionality of certain provisions of the

[7] Copies of the Governor's Fiscal Plan, the Letter from the Chair of the Oversight Board to the Governor regarding the Fiscal Plan, other key documents, and recordings of the Oversight Board's public meetings are available at the Oversight Board's website: www.oversightboard.pr.gov.

Moratorium Act and the Executive Orders. Specifically, the Plaintiffs claim in their complaints that certain provisions of the Moratorium Act and the Executive Orders (1) improperly deprive the Plaintiffs of contractual and constitutional rights and security interests; (2) improperly reorder priorities among creditors; (3) unfairly discriminate among creditors with similar priorities; (4) attempt to impose a debt restructuring on creditors without their consent; and (5) deprive the Plaintiffs of their right to challenge the Moratorium Act and Executive Orders in federal court. A97–102, A239–44, A286–87, A321–30.

While the Plaintiffs' interests, arguments, and relief sought are not identical, the Plaintiffs collectively seek the following:

- A declaration that Sections 105, 201, 202, 203, 301, 302, and 401 of the Moratorium Act violate the Constitutions of the United States and Puerto Rico;
- A declaration that any Executive Orders predicated on the foregoing sections of the Moratorium Act (including EO-10, EO-14, EO-18, EO-30, and EO-31) violate the Constitutions of the United States and Puerto Rico;
- A declaration that Sections 105, 201, 203, 301, 302, and 401 of the Moratorium Act are preempted by Section 903(1) of the Bankruptcy Code;

- A declaration that Section 201 of the Moratorium Act and EO-31 are preempted by Sections 303(1) and 303(3) of PROMESA; and
- An injunction prohibiting the Appellees from enforcing the challenged provisions of the Moratorium Act and the Executive Orders.

A97–102, A239–44, A286–87, A321–30.

The Plaintiffs in *Brigade*, *National*, and *Trigo Gonzalez* seek only prospective, non-monetary relief declaring that the Moratorium Act and Executive Orders are unconstitutional. *See* A97–102, A239–44, A286–87. U.S. Bank Trust National Association ("U.S. Bank Trust") also sought an injunction requiring the UPR to transfer specified "Pledged Revenues" to the trustee to be held in a reserve account for application to principal and interest payments owed to bondholders as they become due. A299; A63, Dkt. No. 2.

1. <u>Brigade Leveraged Capital Structures Fund Ltd.</u>

On April 4, 2016, Brigade Leveraged Capital Structures Fund Ltd. and eight other entities commenced an action against the GDB. A15, Dkt. No. 1. On May 20, 2016, the original plaintiffs and four new entities (together, the "Brigade Plaintiffs") filed an amended complaint. The amended complaint dropped the GDB as a defendant and instead named the Governor, the Secretary of

the Puerto Rico Department of the Treasury and the receiver for the GDB, all acting in their official capacities (together, the "Brigade Defendants"). A71–105.[8]

The Brigade Plaintiffs claim to hold collectively more than $750 million in bonds issued by the GDB. A74. The Brigade Plaintiffs seek: (1) a declaration that Sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302 and 401 of the Moratorium Act violate the Contracts Clauses of the United States and Puerto Rico Constitutions; (2) a declaration that Sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302 and 401 of the Moratorium Act violate the Takings Clauses of the United States and Puerto Rico Constitutions; (3) a declaration that Sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302 and 401 of the Moratorium Act violate the Commerce Clause of the United States Constitution; (4) a declaration that Sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302 and 401 of the Moratorium Act are preempted by the Bankruptcy Clause and Supremacy Clause of the United States Constitution; and (5) an injunction prohibiting the Commonwealth's officials from enforcing the challenged provisions of the Moratorium Act and the Executive Orders. A97–102.

On July 1, 2016, the day after PROMESA was signed into law, the Brigade Plaintiffs filed a motion for a determination that the PROMESA stay did

[8] The receiver for the GDB was named as a "John Doe" defendant.

not apply to the Brigade Plaintiffs' constitutional claims or, in the alternative, for relief from the PROMESA stay. A21, Dkt. No. 71. On July 8, 2016, the Brigade Defendants filed a "notice" that the action was stayed by PROMESA. A21, Dkt. No. 76. The District Court treated the notice as a motion, and directed the parties to brief the applicability of the PROMESA stay to the action. A21, Dkt. No. 78.

On July 7, 2016, the Brigade Defendants filed a motion to dismiss. A21, Dkt. No. 74. On August 5, 2016, the Brigade Plaintiffs filed their opposition to the motion to dismiss and filed a cross-motion for partial summary judgment arguing that certain provisions of the Moratorium Act were preempted by the Bankruptcy Code and the United States Constitution. A23, Dkt. No. 91. As a result of the District Court's denial of the lift stay motions discussed more fully below, the motions to dismiss and for partial summary judgment have never been fully briefed or submitted to the District Court for decision.

2. National Public Finance Guarantee Corporation

On June 15, 2016, National Public Finance Guarantee Corporation ("National") commenced an action in the District Court against the Governor, the Secretary of the Treasury, and the Director of the Office of Management and Budget (together, the "National Defendants"). A213–45. National claims to insure approximately $3.84 billion of debt issued by the Commonwealth and related entities. A213. National seeks: (1) a declaration that Sections 201(a), (b),

(d) and (e) of the Moratorium Act violate the Bankruptcy Clause and the Supremacy Clause of the United States Constitution and are preempted by the Bankruptcy Code; (2) a declaration that Sections 201 and 202 of the Moratorium Act violate the Takings Clause and the Fourteenth Amendment of the United States Constitution; (3) a declaration that Sections 201 and 202 of the Moratorium Act violate the Contracts Clause of the United States Constitution; and (4) an injunction prohibiting the Commonwealth's officials from enforcing the challenged provisions of the Moratorium Act. A239–244.

On June 22, 2016, National filed an emergency motion for partial summary judgment alleging that certain provisions of the Moratorium Act were preempted by the Bankruptcy Code and the United States Constitution. A34, Dkt. No. 21. The National Defendants filed opposition papers on July 11, 2016. A35, Dkt. Nos. 34, 35.

On July 7, 2016, the National Defendants filed a "notice" that the action was stayed by PROMESA. A34, Dkt. No. 28. The District Court treated the notice as a motion, and directed the parties to brief whether the PROMESA stay applied to the action. A34, Dkt. No. 29.

On July 26, 2016, the National Defendants filed a motion to dismiss. A35, Dkt. No 41. National filed opposition papers on August 12, 2016. A36, Dkt. No. 48.

As a result of the District Court's denial of the lift stay motions discussed more fully below, the motions to dismiss and for partial summary judgment have never been fully briefed or submitted to the District Court for decision.

3. Dionisio Trigo Gonzalez

On June 30, 2016, Dionisio Trigo Gonzalez and 34 other individuals and entities (together, the "Trigo Gonzalez Plaintiffs") commenced an action in the District Court against the Governor, the Secretary of the Department of Treasury, the GDB, the PRPFC, the President of the GDB and the PRPFC, the Puerto Rico Fiscal Agency and Financial Advisory Authority, and the Executive Director of the Puerto Rico Fiscal Agency and Financial Advisory Authority (together, the "Trigo Gonzalez Defendants"). A273–87. The Trigo Gonzalez Plaintiffs claim to hold collectively more than $100 million in bonds issued by the GDB or the PRPFC. A276. The Trigo Gonzalez Plaintiffs seek: (1) a declaration that Sections 105, 201, 203, 301, 302 and 401 of the Moratorium Act violate the Takings Clauses and Contract Clauses of the United States and Puerto Rico Constitutions; (2) a declaration that Sections 105, 201, 203, 301, 302 and 401 of the Moratorium Act violate the Supremacy Clause of the United States Constitution; (3) a declaration that numerous sections of the Moratorium Act are preempted by the Bankruptcy Clause of the United States Constitution; and (4) an injunction prohibiting the

Commonwealth's instrumentalities and its officials from enforcing the challenged provisions of the Moratorium Act. A286–87.

On July 7, 2016, the Trigo Gonzalez Defendants filed a "notice" that the action was stayed by PROMESA. A51, Dkt. No. 5. The District Court treated the notice as a motion, and directed the parties to brief whether the PROMESA stay applied to the action. A51–52, Dkt. No. 6.

On July 26, 2016, the Trigo Gonzalez Defendants filed a motion to dismiss. A52, Dkt. No. 14. The Trigo Gonzalez Plaintiffs filed opposition papers on August 17, 2016. A53–54, Dkt. No. 24. As a result of the District Court's denial of the lift stay motions discussed more fully below, the motion to dismiss has never been fully briefed or submitted to the District Court for decision.

4. U.S. Bank Trust National Association

On August 19, 2016, U.S. Bank Trust, the successor collateral trustee under a trust agreement among Banco Popular de Puerto Rico, as co-trustee, and the UPR, commenced an action in the District Court against the Commonwealth, the Governor, the UPR, and the President of the UPR (together, the "U.S. Bank Trust Defendants"). A296–331. Under the trust agreement, UPR issued more than $430 million in bonds secured by revenues that UPR collects from third parties, including student tuition and fees. UPR is required to transfer all pledged revenues

to U.S. Bank Trust to hold as collateral for the bonds pursuant to the trust agreement. A304.

U.S. Bank Trust seeks: (1) to lift the PROMESA stay for "cause" pursuant to Section 405(e)(2) of PROMESA; (2) a declaration that Section 201 of the Moratorium Act and EO-31 violate the Takings Clauses of the United States and Puerto Rico Constitutions; (3) a declaration that Section 201 of the Moratorium Act and EO-31 violate the Contracts Clauses of the United States and Puerto Rico Constitutions; (4) a declaration that EO-31 is preempted by Section 303(3) of PROMESA; (5) a declaration that Section 201 of the Moratorium Act and EO-31 are preempted by Section 303(1) of PROMESA; (6) an injunction compelling the Commonwealth's officials to comply with the applicable trust agreements; and (7) an injunction prohibiting the Commonwealth, its instrumentalities and its officials from enforcing the challenged provisions of the Moratorium Act and the Executive Orders. A321–30.

On the same day it filed its complaint, U.S. Bank Trust filed a motion for relief from the automatic stay. A63, Dkt. No. 2. As a result of the District Court's denial of the lift stay motions discussed more fully below, the U.S. Bank Trust Defendants' answer will not be due until after the PROMESA stay expires.

E. The Lift Stay Motions

By order dated July 20, 2016, the District Court consolidated the *Brigade*, *National* and *Trigo Gonzalez* actions "for the purpose of resolving the issue [of] whether PROMESA stays the cases." A22, Dkt. No. 83; A35, Dkt. No. 38; A52, Dkt. No. 12, A121. On August 22, 2016, the District Court entered an order finding that the PROMESA stay applied to each of the actions, and directing that the cases would be stayed "until February 15, 2017, or as otherwise provided in Section 405(d) of PROMESA," unless the Plaintiffs could "show cause for relief from the stay pursuant to Section 405(e) of PROMESA." A121–24, A127. The District Court scheduled an evidentiary hearing for September 22 and 23, 2016. A24, Dkt. No. 102; A36, Dkt. No. 52; A54, Dkt. No. 30.

By Order dated September 1, 2016, the District Court consolidated *U.S. Bank Trust* with other three cases to determine whether cause existed to lift the PROMESA stay. A64–65, Dkt. Nos. 19, 23–24.

On September 22 and 23, 2016, the District Court held a consolidated evidentiary hearing. A66–67, Dkt. Nos. 46, 48, 49.

F. The Oversight Board's Intervention Motions

On October 7, 2016, the Oversight Board filed a motion in each of the consolidated cases seeking additional time to file a response to the Plaintiffs' motions for relief from the automatic stay and for leave to intervene. A155–64.

On October 13, 2016, the District Court granted a 14-day extension and directed the Oversight Board to file its intervention motion by October 21, 2016. The order directed the Oversight Board to comply "strictly" with the provisions of Federal Rule of Civil Procedure 24(c). A27, Dkt. No. 133; A38, Dkt. No. 78; A57, Dkt. No. 57; A69, Dkt. No. 68.

On October 21, 2016, the Oversight Board moved to intervene in each of the four consolidated actions pursuant to Section 212(a) of PROMESA. A170–200. The Oversight Board argued that it was entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(1) and Section 212(a) of PROMESA because the four actions were against the Commonwealth, one of its "covered" instrumentalities, or other government officials acting in their official capacities as representatives of the Commonwealth or of "covered" instrumentalities. A172–73. The Oversight Board argued alternatively that if the District Court determined that Section 212(a) did not apply to actions naming only government officials, it was entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) in order to protect its interests in ensuring that the PROMESA stay remained in place, or should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B) because of the common issues of law and fact among the four cases. A173–74.

In accordance with Federal Rule of Civil Procedure 24(c), the Oversight Board attached to its motions its proposed opposition to the lift stay motions. A178–200. The Oversight Board did not attach any other pleading – for instance, an answer with counter- or cross-claims or a motion to dismiss – because it did not then wish to be heard on the merits of the Plaintiffs' proposed constitutional challenges. The Oversight Board proposed to respond to the only pleadings that were of immediate concern: the lift stay motions in each of the four actions.

All of the parties consented to the Oversight Board's motions to intervene,[9] but on November 15, 2016, the District Court nonetheless denied the motions, concluding in each case that the Oversight Board had failed to file a pleading within the meaning of Federal Rule of Civil Procedure 24(c). ADD13.[10]

[9] *See* A207 (noting that the Brigade Plaintiffs "do not object to the Oversight Board's intervention"); A264 (noting that National "welcomes . . . the Oversight Board's intervention"); A289 (noting that the Trigo Gonzalez Plaintiffs "welcome" the Oversight Board's intervention); A386 (noting that U.S. Bank Trust "agrees that the Oversight Board's involvement in this action would be constructive, and . . . [it] therefore supports the Motion to Intervene.").

[10] All citations to "ADD__" are to the Oversight Board's Addendum attached to this brief.

G. The District Court's Decision

The District Court dedicated one page of its 55-page Opinion and Order to the Oversight Board's intervention motions. The bulk of the opinion addressed the District Court's denial of each of the four lift stay motions.[11]

The District Court denied the Oversight Board's intervention motions because of what it perceived to be a "procedural deficiency" without reaching the merits. ADD13. The District Court held that the Oversight Board's proposed opposition to the lift stay motions was not "a pleading that sets out the claim or defense for which intervention is sought." ADD13. The District Court then concluded that it was required to deny the Oversight Board's motion to intervene for failure to comply with Federal Rule of Civil Procedure 24(c). ADD13. Although the District Court's analysis was not entirely clear, the District Court appeared to conclude that the Oversight Board should have attached to each of its intervention motions an answer to each Plaintiff's complaint.

On November 28, 2016, the Oversight Board timely appealed each of the orders denying its intervention motions. A211–12, A271–72, A294–95, A389–90.[12]

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[11] None of the Plaintiffs in these consolidated actions has appealed. However, movants in two of the other related cases have. *See* Case Nos. 16-2377, 16-2433.

[12] The Oversight Board has also appealed the orders denying its motions to intervene in three other actions that had been consolidated for trial by the District

STANDARD OF REVIEW

A district court's decision on a motion to intervene as of right is reviewed for abuse of discretion. *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000). 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.* Within this framework, decisions on issues of law are reviewed *de novo* and decisions on issues of fact are reviewed for clear error. *Id.* at 25; *Ewers v. Heron*, 419 F.3d 1, 3 (1st Cir. 2005).

SUMMARY OF THE OVERSIGHT BOARD'S ARGUMENT

As is specifically authorized by Section 212(a) of PROMESA, the Oversight Board moved to intervene in each of the four consolidated actions in order to oppose the Plaintiffs' requests for relief from the PROMESA automatic stay. In accordance with Federal Rule of Civil Procedure 24(c), the Oversight Board attached to its motion a proposed opposition to each of the lift stay motions

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Court and have been consolidated on appeal by this Court. *See Peaje Investments LLC v. García Padilla*, Civil No. 16-2430 (1st Cir.); *Assured Guar. Corp. v. Puerto Rico*, Civil No. 16-2431 (1st Cir.); *Altair Global Credit Opportunities Fund (A), LLC v. García Padilla*, Civil No. 16-2435 (1st Cir.).

then before the District Court. The Oversight Board did not attach any other pleading – for instance, an answer with counter- or cross-claims, and did not move to dismiss – because the Oversight Board did not then wish to take a position on the merits of the Plaintiffs' constitutional claims. The Oversight Board proposed to respond to the only pleadings that were (and remain) of immediate concern to its work under PROMESA: the lift stay motions. Despite the consent of all parties to the consolidated actions, the District Court denied the Oversight Board's motions without reaching the merits.

The District Court based its decision entirely on a rigid interpretation of Rule 24(c)'s pleading requirement. It appears to have concluded, without any analysis, that Rule 24(c) could only be satisfied by filing one of the formal pleadings listed in Federal Rule of Civil Procedure 7(a).[13] This narrow interpretation constitutes reversible error. Rule 24(c) must be interpreted to require a pleading that is appropriate to the party making the filing and the proceeding

[13] Rule 7(a) lists seven "pleadings." They are "(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer." Fed. R. Civ. P. 7(a). Rules 7(b) and 12(b) govern motions generally and motions to dismiss, respectively, including motions addressed to pleadings on the merits (*e.g.*, for failure to state a claim) and on procedural grounds (*e.g.*, for improper venue, insufficient process, etc.). Fed. R. Civ. P. 7(b); Fed. R. Civ. P. 12(b).

actually before the court. Here, that meant papers in opposition to the Plaintiffs' lift stay motions.

Moreover, even where there is a complaint on file (which is true in most but not all cases), an intervening party is not required to take a substantive position on the underlying merits raised in the complaint. To the contrary, a party may seek to intervene for purposes wholly unrelated to the merits of the underlying dispute. Thus, here, it was appropriate for the Oversight Board to seek to intervene in these actions solely for the purpose of opposing the lift stay motions or seeking a stay of the actions pursuant to Section 212(b)(1) of PROMESA and the District Court's inherent power to control its own docket.[14]

Finally, requiring the Oversight Board to take a position on the Plaintiffs' constitutional claims now would undermine clear Congressional intent. The PROMESA stay was intended to provide the Commonwealth with a breathing spell that would allow it to concentrate on negotiation with creditors and to allow the Oversight Board time to get up and running before deciding whether it wanted to take a substantive position in any pending litigation. Among other things,

[14] This is what the Oversight Board has in fact done in another pending action in which a complaint has been filed and some (but not all) aspects of the litigation have been stayed. The Oversight Board has moved under Section 212(b)(1) of PROMESA to stay the entire action. *See Lex Claims, LLC v. García Padilla*, Civil No. 16-2374 (FAB) (D.P.R.), Dkt. No. 62. That motion is *sub judice*.

forcing the Oversight Board to take sides on the merits of the parties' underlying dispute would undermine the Oversight Board's ability to negotiate consensual restructuring agreements – one of the very things PROMESA charges it to do. The Oversight Board has a vested interest in making sure that the PROMESA stay remains in place so it can fulfill its statutory mandate, and it should have been allowed to intervene in the lift stay proceedings to advance its position.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT THE OVERSIGHT BOARD FAILED TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 24(C) IS CONTRARY TO APPLICABLE LAW AND SHOULD BE REVERSED

The District Court incorrectly held that the Oversight Board failed to attach a pleading to its intervention motion and denied the Oversight Board's intervention motion without reaching the merits. The District Court appears to have based its decision on the incorrect view that the Oversight Board was required to file an answer or other pleading responding to the Plaintiffs' complaints. This was incorrect as a matter of law and was an abuse of the District Court's discretion.

A. The Oversight Board's Opposition to the Lift Stay Motions Satisfied Rule 24(c)'s Pleading Requirement

Contrary to the District Court's holding, the Oversight Board did, in fact, attach to each of its intervention motions a pleading that satisfies Federal Rule of Civil Procedure 24(c). Rule 24(c) requires a putative intervenor to attach to its

motion "a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Rule 24(c) should be interpreted flexibly to require a pleading that is appropriate for the particular proceeding and circumstances. *See* Fed. R. Civ. P. 1 (directing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); Fed. R. Civ. P. 8(e) (directing a court to construe pleadings "so as to do justice"); *Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1074 (5th Cir. 1980) (rejecting an interpretation of Rule 24(c) that would render federal pleadings "excessively technical" in violation of Rule 8(e)). Here, that meant requiring the Oversight Board to file its proposed opposition to the Plaintiffs' lift stay motions, which is precisely what the Oversight Board did, and to construe the Oversight Board's opposition papers as the "pleading" required by Rule 24(c).

The District Court did not do this. Rather, it exalted form over substance, and it was error to do so. *See, e.g., City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 95 n.11 (1st Cir. 2008) (finding "no abuse of discretion in the district court's decision to elevate substance over form" and to allow the State of Maine to intervene notwithstanding its failure to file a traditional "pleading"); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783–84 (1st Cir. 1988) (noting that a district court may entertain a procedurally deficient motion to

intervene); *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004) (noting that a court should ignore non-prejudicial technical defects in an intervenor's papers); *Piambino v. Bailey*, 757 F.2d 1112, 1121 (11th Cir. 1985) (same); *Spring Contr. Co., Inc. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980) (same); *United States v. Petters*, No. 08-5348 ADM/JSM, 2008 U.S. Dist. LEXIS 100589, at *2–6 (D. Minn. Dec. 12, 2008) (noting that a common sense application of Rule 24 is appropriate when intervention is sought for a limited purpose, such as seeking relief from a stay); *Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 412 (W.D. Pa. 2006) (holding that a motion to compel arbitration and stay proceedings satisfied Rule 24(c)); *Inmates of The R.I. Training Sch. v. Martinez*, 465 F. Supp. 2d 131, 136–37 (D.R.I. 2006) (while "not a conventional motion to intervene," the court explained that "[r]ather than engaging in a convoluted analysis in order to fit the facts of this Motion's square peg into the Rule's round hole, the Court will fall back on the 'reasonable measure of latitude' that has been afforded by the First Circuit to the District Court in the practical application of Rule 24(a)(2)").

In fact, courts routinely find that an intervening party satisfies Rule 24(c)'s pleading requirement so long as its moving papers fairly and adequately apprise the parties and the court of the intervenor's position. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474–75 (9th Cir. 1992)

(noting that intervention motions should be granted even without a "pleading" where the court was otherwise apprised of the grounds for the motion); *City of Bangor v. Citizen Commc'ns Co.*, No. 02-183-B-S, 2007 U.S. Dist. LEXIS 38762, at *13, *19 (D. Me. May 25, 2007) (allowing the State of Maine to intervene and file a consent decree rather than a pleading because intervention decisions "must be driven by the merits of the motion, especially when the record otherwise makes clear exactly what claims or defenses the proposed intervenor seeks to pursue or otherwise resolve," and in this case "the other submissions . . . adequately describe the State's basis for intervention"), *aff'd* 532 F.3d at 70 n.11 (1st Cir. 2008); *Frank M. Sheesley Co.*, 239 F.R.D. at 412 ("Though no pleading--as that term is strictly defined in FED. R. CIV. P. 7--accompanies [intervenors'] motion, [intervenor] has included its Motion to Compel and Stay, and the purpose of the intervention and the [intervenor's] conduct that the parties can expect going forward are quite clear.").

Here, there can be no question that the Oversight Board met this flexible standard. The Oversight Board attached to its intervention motion proposed opposition papers that responded to the only pleadings it was addressing: the lift stay motions.

B. The Oversight Board Was Not Required to Respond to the Complaints

The Oversight Board was not required to respond to the complaints and take a substantive position on the Plaintiffs' constitutional claims when it moved to intervene. Courts routinely allow parties to intervene and to seek relief or take positions that are unrelated to the merits of the underlying litigation, including to seek a stay of an action. *See, e.g.*, *Public Citizen*, 858 F.2d at 783–84 (holding that intervention is the appropriate mechanism for a third party to seek modification of a protective order); *Beckman Indus., Inc.*, 966 F.2d at 474–75 (finding that intervention to modify a protective order was appropriate); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987) (recognizing intervention as a proper method for a nonparty to seek protected materials); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (holding that intervention under Rule 24(b) is the proper method for third party challenges to a protective order); *Frank M. Sheesley Co.*, 239 F.R.D. at 412 (holding that a motion to compel arbitration and stay proceedings complied with Rule 24(c)); *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1009–11 (E.D.N.Y. 1992) (granting the United States' motions to intervene and to stay discovery).

The District Court appears to have misunderstood this Court's observation in *Public Service Company of New Hampshire v. Patch*, 136 F.3d at

205 n. 6, that ordinarily a failure to attach a pleading setting forth the claim or defense for which intervention is sought warrants denial of an intervention motion. ADD13. However, in that case, the putative intervenors did not attach anything to their motions to intervene. Although a complete failure to comply with Rule 24(c) might justify denial of an intervention motion, that is not what happened here. *Public Service Company of New Hampshire* says nothing about the form a pleading must take or whether the pleading must be addressed to the merits of an action, and the case simply should not apply to a situation like this, where the intervenor submitted a proposed pleading addressing the issues then before the District Court (the lift stay motions) and making its position on those issues (opposition to the motions) abundantly clear.

This Court's decision in *Public Citizen* is instructive. In *Public Citizen*, a non-party informally sought to modify a protective order after judgment had been entered in the underlying case pursuant to a local rule. 858 F.2d at 783. This Court explained that the appropriate mechanism for seeking a modification of a protective order was a motion to intervene pursuant to Federal Rule of Civil Procedure 24. *Id.* at 783–84. Although the Court cautioned that future litigants should not use the Court's opinion to circumvent the motion requirement of Rule 24(c), *see id.* at 784, *Public Citizen* makes clear that in appropriate circumstances a party may seek to intervene without taking a position on the

underlying merits and without filing an answer to the complaint. This is one of those cases, and it was entirely appropriate for the Oversight Board to intervene in these actions solely to oppose the Plaintiffs' lift stay motions.

As discussed in Section I.C below, the Oversight Board had (and has) good reasons not to want to address the constitutional challenges now, as doing so would impede the negotiation of consensual restructuring agreements. Affording the Oversight Board the latitude and discretion to intervene to enforce the PROMESA stay is consistent with both its statutory mandate and with the required liberal construction of Rule 24(c).

C. The District Court's Decision Undermines PROMESA

Requiring the Oversight Board to respond to the merits of these actions now would undermine clear Congressional intent. The PROMESA 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). It would be illogical to require the Oversight Board to file an answer to the complaints in these actions when the named defendants are

not yet required to answer them,[15] and will not be required to answer them until sometime later when the PROMESA stay expires.[16] Even more important, forcing the Oversight Board to take sides on the merits of the parties' underlying dispute would compromise the Oversight Board's ability to negotiate consensual restructuring agreements – one of the very things PROMESA charges it to do. In accordance with express Congressional intent, the Oversight Board sought to intervene in these actions to preserve the breathing spell provided by the PROMESA stay so that all parties can concentrate on fiscal plans and capital market strategy instead of on multiple litigations.

II. THE DISTRICT COURT SHOULD HAVE GRANTED THE OVERSIGHT BOARD'S MOTIONS TO INTERVENE

Because the District Court incorrectly found that the Oversight Board had failed to attach a "pleading" to its motions, the District Court never reached

[15] In *Brigade*, *National*, and *Trigo Gonzalez*, the Defendants filed pre-answer motions to dismiss, and in *Brigade* and *National*, the Plaintiffs filed pre-answer motions for partial summary judgment. The motions were partially briefed, but never submitted to the District Court for decision. *See* Statement of the Case, Section D, *supra*. None of the Defendants in any of these actions has filed an answer.

[16] The PROMESA stay expires on February 17, 2016, but can be extended 60 or 75 days under certain circumstances. 48 U.S.C. § 2194(d). The stay also terminates as to the "government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities" if the Oversight Board commences a proceeding under Title III of PROMESA, 48 U.S.C. § 2194(d)(2), though the automatic stay under Section 362 of the Bankruptcy Code would then take its place. 28 U.S.C. § 2161(a); 11 U.S.C. § 362.

the merits of the Oversight Board's intervention motions. Had it considered the Oversight Board's motions on their merits, the District Court would have been compelled to grant them.

Federal Rule of Civil Procedure 24(a) provides that a party may intervene as "of right" if the party "(1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is 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). Alternatively, a party may be granted permission to intervene in an action pursuant to Federal Rule of Civil Procedure 24(b)(1)(B) if the party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Oversight Board satisfied each of these tests.

A. The Oversight Board Was Entitled to Intervene in All Four Actions Pursuant to Section 212(a) of PROMESA

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). In *Trigo Gonzalez*, the Plaintiffs named the GDB – a covered instrumentality – and in *U.S. Bank Trust*, the Plaintiffs named the Commonwealth. The Plaintiffs in those actions supported the Oversight Board's

intervention motion, and there can be no question that the Oversight Board was, therefore, entitled to intervene in them.

PROMESA does not specifically state whether the Oversight Board's authority under Section 212(a) extends to actions where only government officials acting in their official capacities – as opposed to the Commonwealth or its instrumentalities – are named as defendants. However, reading the statute as a whole as the Court is required to do, *see Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013) ("'[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)), leads to the inescapable conclusion that Congress intended Section 212(a) to cover actions commenced against government officials acting in their official capacities. To hold otherwise would allow the Plaintiffs to plead around Section 212(a) and effectively circumvent Congress' clear intent that the Oversight Board should be able to participate in litigation that could affect the restructuring of Puerto Rico's public debt by naming, for example, the Governor or the Secretary of the Department of Treasury, but not the Commonwealth or the Department of Treasury, even though the relief being sought was identical. As the Plaintiffs in *Brigade* and *National* name government officials acting in their official capacities, and all parties in both actions consented to the Oversight

Board's intervention motions, the Oversight Board should have been allowed to intervene in those actions pursuant to Section 212(a) of PROMESA.

B. The Oversight Board Was Entitled to Intervene as of Right in *Brigade* and *National* to Protect Its Interest in Ensuring That the PROMESA Stay Remained in Place

Even if Section 212(a) of PROMESA does not apply to actions against government officials, the Oversight Board was still entitled to intervene as of right in *Brigade* and *National* pursuant to Federal Rule of Civil Procedure 24(a)(2) in order to advance its interest in protecting the PROMESA process. To succeed on a motion to intervene as of right pursuant to Rule 24(a)(2), a putative intervenor must establish (1) the timeliness of its motion to intervene; (2) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (3) a realistic threat that the disposition of the action will impede its ability to protect that interest; and (4) the lack of adequate representation of its position by any existing party. *Id.*; *Negron-Almeda v. Santiago*, 528 F.3d 15, 22 (1st Cir. 2008). The Oversight Board established all four requirements.

First, the Oversight Board's motions were unquestionably timely, as the District Court specifically directed the Oversight Board to file its intervention motion by October 21, 2016, and the Oversight Board did so. A27, Dkt. No. 133; A38, Dkt. No. 78; A57, Dkt. No. 57; A69, Dkt. No. 68. In any event, the

Oversight Board was only appointed on August 31, 2016, the cases were still at their initial stages, and all parties consented to the Oversight Board's motions.

Second, the Oversight Board had (and continues to have) a direct and substantial interest in the issues before the District Court. The Oversight Board is the sole instrument by which Congress envisioned that PROMESA would achieve its purpose of "stabiliz[ing] the region for the purposes of resolving" the Commonwealth's financial crisis. 48 U.S.C. § 2194(m)(5). The Oversight Board's interest in these cases was not in the outcome of the underlying disputes between the parties over the constitutionality of the Moratorium Act and related Executive Orders challenged by the Plaintiffs, but in ensuring that the PROMESA stay remains in place 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 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). As noted above, the Oversight Board has been meeting with the Commonwealth about its proposed fiscal plan and has been meeting (and will continue to meet) with creditors in an effort to reach consensual resolutions. These multiple litigations remain an impediment to the negotiation process.

Third, lifting the stay could impair the Oversight Board's ability to perform its statutory functions. As is evident from the multiple cases filed in the District Court seeking relief from the PROMESA stay to invalidate all or part of the Moratorium Act and related Executive Orders and the five other appeals arising out of the *Peaje*, *Assured* and *Altair* actions that are already before the Court, the Commonwealth and the Oversight Board have been inundated with litigation related to PROMESA, and the Court's decision on this consolidated appeal will likely resolve other pending lift stay motions and influence other creditors' decisions to pursue PROMESA-related litigation.

Ongoing litigation is a major distraction that interferes with the Oversight Board's congressional mandate to oversee a "fair and orderly" restructuring of the Commonwealth's finances. 48 U.S.C. § 2194(m)(4). The Oversight Board believes that the Commonwealth's limited resources are better spent working with the Oversight Board and helping the Oversight Board complete its tasks of developing fiscal plans and ensuring that Puerto Rico regains access to capital markets, rather than litigating.

Finally, it is unlikely that the other parties to these actions will adequately represent the Oversight Board's interests.[17] The Oversight Board is

[17] The showing a party must make on adequacy of representation is "minimal." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104,

charged with, among other things, attempting to negotiate consensual restructuring agreements and pushing for an immediate resolution of the various constitutional and statutory issues, and forcing the Oversight Board to take a public position on these issues could impede negotiations rather than advance them, for instance by giving one party or the other overwhelming negotiating leverage. This would only guaranty time-consuming appeals that would derail the PROMESA process, especially given the tight deadlines the Oversight Board is working under. This perspective is unique to the Oversight Board, and the District Court should have allowed the Oversight Board to intervene so it could advance its position and fulfill its statutory duties.

C. Alternatively, the Oversight Board Should Have Been Permitted to Intervene in *Brigade* and *National* Because of the Common Issues of Law and Fact Among All Four Actions

In the event the Oversight Board is found not to be entitled to intervene in *Brigade* or *National* as of right, the Oversight Board should be permitted to intervene in those actions pursuant to Federal Rule of Civil Procedure 24(b)(1)(B) because there are common issues of law and fact among the four actions. As the District Court recognized when it consolidated the four actions for trial, these actions raises similar factual and legal issues: Should the

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114 (1st Cir. 1999). "An intervenor need only show that representation may be inadequate, not that it is inadequate." *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (citations omitted).

PROMESA stay be lifted to allow the Plaintiffs to pursue their constitutional claims? The Oversight Board was unquestionably entitled to intervene as of right in two of the four actions that named the Commonwealth or its covered instrumentalities, and it would make no sense to prohibit the Oversight Board from participating in the other two actions because the Plaintiffs chose to name government officials as defendants rather than the covered instrumentalities they represent, especially where, as here, all parties consented to the Oversight Board's intervention. The Oversight Board's position with respect to the PROMESA stay was equally applicable to each of the four consolidated actions.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court Orders and grant the Oversight Board leave to intervene in each of the consolidated actions.

Dated: December 19, 2016

Respectfully submitted,

LUSKIN, STERN & EISLER LLP

/s/ Michael Luskin

Michael Luskin (Bar # 1177315)
Stephan 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 Movant-Appellant Financial Oversight and Management Board for Puerto Rico

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation provided in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 9,967 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief also complies with the typeface requirements of Rule 32(a)(5) and the type styles requirement of Rule 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
December 19, 2016

/s/ Michael Luskin
Michael Luskin

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

ADDENDUM

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

BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD., *et al.*, **Plaintiffs,** **v.** ALEJANDRO GARCIA-PADILLA, *et als.*, **Defendants.**	**Civil No.** 16-1610 (FAB)
NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, **Plaintiff,** **v.** ALEJANDRO GARCIA-PADILLA, *et al.*, **Defendants.**	**Civil No.** 16-2101 (FAB)
DIONISIO TRIGO-GONZALEZ, *et al.*, **Plaintiffs,** **v.** ALEJANDRO GARCIA-PADILLA, *et al.*, **Defendants.**	**Civil No.** 16-2257 (FAB)
U.S. BANK TRUST NATIONAL ASSOCIATION, **Plaintiff,** **v.** THE COMMONWEALTH OF PUERTO RICO, *et al.*, **Defendants.**	**Civil No.** 16-2510 (FAB)

OPINION AND ORDER

BESOSA, District Judge.

Before the Court are the parties' arguments as to whether there is sufficient "cause" to grant plaintiffs relief from the automatic stay imposed by section 405(b) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Pub. L. No. 114-187, 130 Stat. 549 (2016). For the reasons discussed below, the Court holds that there is not and therefore **MAINTAINS** the stay.

Also before the Court is the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board" or the "Board")'s motion to intervene in these consolidated cases. (Civil No. 16-1610, Docket No. 137; Civil No. 16-2101, Docket No. 89; Civil No. 16-2257, Docket No. 65; Civil No. 2510, Docket No. 72.) Having considered the content of the Board's motion, the Court **DENIES** the motion **WITHOUT PREJUDICE**.

I. BACKGROUND

A. The Moratorium Act and Ensuing Executive Orders

On April 6, 2016, the Commonwealth of Puerto Rico enacted the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act ("Moratorium Act") to address its grave fiscal crisis, which has been brought to a "perilous tipping point." Moratorium Act, Stmt. Of Motives, § A. The Moratorium Act aims to give the Puerto Rico Government the "tools" it needs "to continue providing essential services to the people" of Puerto Rico in light of the Government's

lack of "sufficient resources to comply with debt service obligations as originally scheduled." Id. To that end, the Moratorium Act empowers 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 a "covered period" through January 31, 2017.[1] 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).

Pursuant to the authority vested in him by these provisions of the Moratorium Act, the Governor has issued a series of executive orders (collectively, the "Executive Orders"). Of particular relevance in these four consolidated actions are: (1) Executive Order 10, which declared a state of emergency with respect to the Government Development Bank of Puerto Rico ("GDB"), imposed limits on transfers to GDB creditors, and suspended payment of any obligations guaranteed by GDB; (2) Executive Order 14, which declared a moratorium on the payment of GDB covered obligations; (3) Executive Order 18, which declared a state of emergency with

[1] The Moratorium Act expires by its own terms at the end of the "covered period."

respect to the Puerto Rico Highways and Transportation Authority ("PRHTA") and suspended PRHTA's obligation to transfer toll revenues pledged to PRHTA bondholders; (4) Executive Order 30, which extended the emergency period with respect to PRHTA, suspended PRHTA's obligation to make certain debt payments, and suspended the Commonwealth's obligation to make payments on bonds or notes issued or guaranteed by the Commonwealth, other than payments to GDB; and (5) Executive Order 31, which continued the suspension of PRHTA's obligation to transfer pledged toll revenues, declared a state of emergency with respect to the University of Puerto Rico ("UPR") and the Puerto Rico Public Finance Corporation ("PRPFC"), and suspended UPR's obligations to transfer pledged revenues to UPR bondholders.

B. Plaintiffs' Claims in the Underlying Litigation

1. Civil No. 16-1610

Plaintiffs in Civil No. 16-1610 (the "Brigade plaintiffs") allege that they are investors who collectively hold more than $750 million worth of outstanding bonds issued by the GDB. (Civil No. 16-1610, Docket No. 52 at p. 4.) They challenge certain provisions of the Moratorium Act "that retroactively and unconstitutionally strip them" of certain "contractual and property rights embodied in their existing GDB bonds." They seek a declaration that sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302, and 401 of the Moratorium Act should be declared null and void because they: (1) violate the Contract and Takings Clauses of

the United States and Puerto Rico Constitutions, (2) violate the Commerce Clause of the United States Constitution, (3) are preempted by both the Bankruptcy Clause of the United States Constitution and section 903(1) of the Bankruptcy Code, 11 U.S.C. § 903(1), and (4) violate the United States Constitution by staying federal court proceedings. Id. at p. 31-32. The Brigade plaintiffs also seek an injunction prohibiting the Commonwealth defendants from enforcing any of these challenged provisions.

2. Civil No. 16-2101

In Civil No. 16-2101, plaintiff National Public Finance Guarantee Corporation ("National") alleges that it provides insurance for approximately $3.84 billion of debt issued by both PRHTA and the Puerto Rico Industrial, Tourist, Educational, Medical and Environmental Control Facilities Financial Authority ("AFICA"). (Civil No. 16-2101, Docket No. 1 at p. 1.) National asserts that its insurance "enabled the Commonwealth and many of its instrumentalities to borrow funds on more favorable terms than they otherwise could have." (Civil No. 16-2101, Docket No. 1 at p. 1.) It further asserts that, in exchange for providing this insurance, it obtained "various property and contractual rights relating to the debt," and that the Moratorium Act has effectively "taken these property interests and substantially impaired these contractual rights." Id. at p. 15-16.

National argues that the Moratorium Act is preempted by federal law and that it violates the United States Constitution "in

a number of independent ways." Id. at p. 2. It therefore seeks a declaration that: (1) Sections 201(a), (b), (d), and (e) of the Moratorium Act are preempted by both the Bankruptcy Clause of the United States Constitution and section 903(1) of the Bankruptcy Code, 11 U.S.C. § 903(1), (2) sections 201 and 202 of the Moratorium Act violate both the Takings and Contracts Clauses of the United States Constitution, and (3) section 201(b) of the Moratorium Act violates the Supremacy Clause of the United States Constitution by purporting to bar access to the federal courts. Id. at p. 31. It also seeks an injunction prohibiting the Commonwealth defendants from taking any action pursuant to those challenged provisions of the Moratorium Act. Id.

3. Civil No. 16-2257

Plaintiffs in Civil No. 16-2257 (the "Trigo plaintiffs") allege that they are a group of predominantly Puerto Rican individuals and corporations who together hold more than $100 million worth of GDB and PRPFC bonds. (Civil No. 16-2257, Docket No. 1 at p. 4.) They assert that the Moratorium Act "creates a framework and scaffolding for the systematic stripping of assets" of the GDB and the PRPFC "that will render each unable to meet its obligations to bondholders." Id. at p. 5-6. The Trigo plaintiffs therefore seek a declaration that sections 105, 201, 203, 301, 302 and 401 of the Moratorium Act are null and void because they: (1) violate the Takings and Contracts Clauses of the United States and Puerto Rico Constitutions, (2) are preempted by both the

Bankruptcy Clause of the United States Constitution and section 903(1) of the Bankruptcy Code, 11 U.S.C. § 903(1), and (3) violate the United States Constitution by staying federal court proceedings. Id. at p. 14-15. They also seek an injunction prohibiting the Commonwealth defendants from enforcing any of these challenged provisions.

4. Civil No. 16-2510

In Civil No. 16-2510, plaintiff U.S. Bank Trust National Association ("U.S. Bank") alleges that it is a national banking association and the trustee under a certain trust agreement authorizing and securing UPR bonds with an outstanding principal amount of $431,790,000. (Civil 16-2510, Docket No. 1 at p. 1.) It argues that Executive Order 31 allows UPR and the Commonwealth to "divert and expropriate pledged revenues," including approximately $89 million in tuition and fees, "to meet expenses other than debt service." Id. at p. 1, 3. According to U.S. Bank, this "threatens irreparable harm" both to its interest as trustee and to the bondholders by inviting the "permanent loss of collateral pledged to secure" the UPR bonds. Id. at p. 3-4. Plaintiff U.S. Bank also alleges that it is currently in possession of certain funds deposited in its UPR bond trust accounts, which it wishes to apply to the payment of those bonds. Id. at p. 4.

U.S. Bank seeks a declaration that (1) section 201 of the Moratorium Act and Executive Order 31 violate the Takings Clauses of the United States and Puerto Rico Constitutions, (2) section 201

of the Moratorium Act and Executive Order 31 violate the Contracts Clauses of the United States and Puerto Rico Constitutions, (3) Executive Order 31 is preempted by PROMESA section 303(3), and (4) section 201 of the Moratorium Act and Executive Order 31 are preempted by PROMESA section 303(1). (Civil 16-2510, Docket No. 1 at p. 34.) It also seeks a preliminary injunction compelling UPR to transfer pledged revenues of tuition fees and student fees, as well as a permanent injunction prohibiting the Commonwealth defendants from enforcing Executive Order 31 or any of the challenged provisions of the Moratorium Act. Id.

C. PROMESA and its Automatic Stay Provision

On June 30, 2016, the President signed PROMESA into law. The legislation seeks to address the dire fiscal emergency in Puerto Rico. It is designed to establish "[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." PROMESA, § 405(m)(4). PROMESA establishes the seven-member Oversight Board for Puerto Rico. PROMESA §§ 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 Puerto Rico Government, 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). The Board is endowed with a variety of significant powers, including 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 liability-related litigation against the Commonwealth of Puerto Rico, which was or could have been commenced before the law's enactment. PROMESA § 405(b). Congress deemed that component of the legislation "essential to stabilize the region for the purposes of resolving" Puerto Rico'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). It 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 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.[2] 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).

D. Significant Procedural Developments

On August 22, 2016, the Court found that plaintiffs' claims in Civil No. 16-1610, Civil No. 16-2101, and Civil No. 16-2257 were brought "with respect to a Liability," and therefore fell "squarely within the scope of cases automatically stayed pursuant to section 405(b)(1) of PROMESA." (Civil No. 16-1610, Docket No. 99 at p. 11.)[3] Accordingly, the Court stayed those actions and held an evidentiary hearing on September 22 and 23, 2016 to determine

[2] PROMESA's automatic stay expires by its own terms on the earlier of those dates.

[3] For the sake of convenience, the Court will only cite to the docket for Civil No. 16-1610 when referring to filings and orders that appear in the dockets for all four of these consolidated cases.

whether, pursuant to section 405(e) of PROMESA, relief from stay was warranted.[4]

Just prior to that hearing, on September 21, 2016, the United States Department of Justice filed a Statement of Interest on Behalf of the United States urging the Court to "narrowly construe" PROMESA's "for cause" provision and to "postpone granting any relief from the automatic stay until the Oversight Board . . . is fully operational and in a position to determine whether to intervene" in this litigation. (Civil No. 16-1610, Docket No. 116 at p. 2.)

On October 7, 2016, before the parties submitted their post-hearing memoranda, the Oversight Board filed a motion seeking an extension of time to allow it to "retain staff and counsel, to review the record in these cases" and "to prepare its responses to the lift stay motions." (Civil No. 16-1610, Docket No. 126 at p. 3.) Citing its statutory right to intervene in any litigation filed against the Commonwealth or any "covered territorial instrumentality," PROMESA §§ 101(d)(1)(A), 212, as well as congressional intent that the automatic stay provide the Oversight

[4] Plaintiff U.S. Bank in Civil No. 16-2510 did not challenge the applicability of PROMESA's automatic stay to its case. Rather, its preliminary focus has been on seeking relief from the stay pursuant to Section 405(e) of PROMESA. See Civil No. 16-2510, Docket No. 2. Thus, on August 25, 2016, it filed a motion seeking to join the hearing scheduled for Civil No. 16-1610, Civil No. 16-2101, and Civil No. 16-2257. Id. Docket No. 19. The Commonwealth defendants consented to that request, and on September 1, 2016, the Court issued an order both granting U.S. Bank's request to join the hearing and staying its action pursuant to section 405(b)(1) of PROMESA. Id., Docket Nos. 23-24.

Board time to determine whether to exercise that right, id. § 405(m)(5)(A), the Oversight Board maintained that there was "good cause" to grant its request. (Civil No. 16-1610, Docket No. 126 at p. 3.) The parties were given an opportunity to respond to the Oversight Board's motion, Civil No. 16-1610, Docket No. 128, and no objection was made. Thus, on October 13, 2016, the Court granted the Oversight Board's request for additional time. (Civil No. 16-1610, Docket No. 133.)

On October 21, 2016, the Oversight Board moved the Court to intervene in these four consolidated cases either as of right pursuant to section 212 of PROMESA and Federal Rule of Civil Procedure 24(a), or permissively pursuant to Federal Rule of Civil Procedure 24(b). (Civil No. 16-1610, Docket No. 137.) The parties were afforded an opportunity to respond to the Board's request for intervention. Id., Docket No. 133.

With a full cast of characters now before it, the Court turns to address the essential issues at hand: (1) whether the Oversight Board is entitled to intervene in these consolidated actions, and (2) whether plaintiffs in any of these four cases have shown sufficient "cause" to vacate PROMESA's automatic stay in order to allow their individual claims to proceed to litigation on the merits.

II. DISCUSSION

A. The Oversight Board's Motion to Intervene

The Oversight Board asserts that it is entitled to intervene as of right in these consolidated actions pursuant to Federal Rule of Civil Procedure 24(a) and section 212 of PROMESA. Alternatively, it argues that the Court should grant it permissive leave to intervene pursuant to Federal Rule of Civil Procedure 24(b).

1. Procedural Deficiency pursuant to Rule 24(c)

Although the Oversight Board's motion to intervene indicates its opposition to vacating the stay in these cases, it is not "accompanied by a pleading that sets out the claim or defense for which intervention is sought," as required by the federal rules of procedure. Fed. R. Civ. P. 24(c). Rather, the Board merely states that it is "not at this time taking any position on the merits of the parties' claims and defenses in the pending challenges to the Moratorium Act and related Executive Orders." (Civil No. 16-1610, Docket No. 137 at p. 10.)

The First Circuit Court of Appeals has indicated, however, that Rule 24(c)'s requirements are mandatory and that a party's failure to meet them warrants dismissal of its motion. See Public Service Company of New Hampshire v. Patch, 136 F.3d 197, 205 n. 6 (1st Cir. 1998). Given the procedural deficiency in the Oversight Board's motion to intervene, the Court is obligated to **DENY** that motion.

B. Plaintiffs' Motions to Vacate PROMESA'S Automatic Stay

Plaintiffs in all four cases argue that the Court should vacate the automatic stay "for cause shown," pursuant to section 405(e) of PROMESA. (Civil No. 16-1610, Docket No. 71; Civil No. 16-2101, Docket No. 36; Civil No. 16-2257, Docket No. 11; Civil No. 16-2510, Docket No. 2.) Unlike plaintiffs in the other three cases - who seek relief from stay solely to litigate their constitutional claims - plaintiff U.S. Bank in Civil No. 16-2510 also seeks to vacate the stay in order to: (1) impose a preliminary injunction forcing its borrower, UPR, to transfer pledged student tuition and fees to U.S. Bank's trust accounts, and (2) disburse funds currently held in a reserve account to UPR bondholders. (Civil No. 16-2510, Docket No. 2 at p. 2.)

The Commonwealth defendants oppose these requests for relief and seek a continuation of PROMESA's automatic stay. (Civil No. 16-1610, Docket No. 81; Civil No. 16-2101, Docket No. 74; Civil No. 2257, Docket No. 53; Civil No. 16-2510, Docket No. 33.) GDB, PRPFC, and UPR filed additional post-hearing briefs in support of maintaining the stay. (Civil No. 16-2257, Docket No. 54; Civil No. 16-2510, Docket No. 61.)

1. Vacating the Automatic Stay "For Cause": Establishing the Governing Standard

The automatic stay imposed by section 405(b) of PROMESA is not absolute in nature. Although Congress unambiguously expressed its view that the stay is needed to "provide the Government of Puerto Rico with the resources and the tools it needs

to address an immediate existing and imminent crisis," PROMESA § 405(n)(1), it also seemed to anticipate that certain circumstances might justify relief from the stay's significant, rigid effects. It therefore included a form of safety valve in section 405(e) of PROMESA to allow certain holders of "liability claims" against the Government of Puerto Rico to proceed with their actions, provided that they could effectively demonstrate "cause" for doing so.

The text of PROMESA, however, does not indicate what, exactly, a party in interest must do to establish "cause" for relief from the automatic stay successfully. Rather, it leaves the task of defining the boundaries of that specific term to the discretion of the courts. Thus, before it can proceed to review the arguments and evidence presented by the various parties, the Court must first attempt to hash out and clarify the meaning and parameters of the governing principle of "for cause shown."

i. Defining "Cause" for Relief from Stay

Section 405 of PROMESA was patterned on the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362, ("section 362"). Indeed, the two provisions are, in some respects, nearly identical. In light of these appreciable similarities, the Court will attempt to give meaning to the concept of "cause" by looking first to judicial interpretations of that term within the bankruptcy context. It will then reflect upon certain additional considerations that ought to inform its

understanding of what constitutes proper "cause" to vacate the PROMESA stay.

a. Prevailing Interpretations of "Cause" within Bankruptcy Case Law

Similar to section 405 of PROMESA, section 362 of the United States Bankruptcy Code provides that courts may grant relief from the automatic stay to a party in interest "for cause." 11 U.S.C. § 362(d)(1). Also like PROMESA, however, section 362 does not provide concrete guidance on how that term ought to be construed and applied in practice.

United States courts of appeals reviewing motions to vacate the Bankruptcy Code's automatic stay pursuant to section 362(d) have consistently found that the decision to grant that relief is largely discretionary with the court. See, e.g., In re Myers, 491 F.3d 120, 130 (3d Cir. 2007) (commenting on the "wide latitude accorded to the Bankruptcy Court to balance the equities when granting relief from the automatic stay."); Brown v. Chestnut (In re Chestnut), 422 F.3d 298, 303-04 (5th Cir. 2005) (noting that 11 U.S.C. § 362 gives the bankruptcy court broad discretion to vacate the automatic stay and "flexibility to address specific exigencies on a case-by-case basis"); Claughton v. Mixson, 33 F.3d 4, 5 (4th Cir. 1994) (noting that Congress "has granted broad discretion to bankruptcy courts to lift the automatic stay" and that "the courts must determine when discretionary relief is appropriate on a case-by-case basis."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987)

(applying abuse of discretion standard to court's decision granting relief from the automatic stay); Matter of Holtkamp, 669 F.2d 505, 507 (7th Cir. 1982) (emphasizing that section 362(d) "commits the decision of whether to lift the stay to the discretion of the bankruptcy judge.")

To help guide their analysis of whether to enforce or vacate the stay, some courts, including those in this district, have relied upon a laundry list of assorted factors. See, e.g., Sonnax Industries, Inc. v. Tri Component Prods. Corp. (In re Sonnax Industries, Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990) (enumerating 12 different factors to be utilized in determining whether there is "cause" to vacate a bankruptcy stay, including the "impact of the stay on the parties and the balance of harms"); see also C&A, S.E. v. P.R. Solid Waste Mgmt. Auth., 369 B.R. 87, 94-95 (D.P.R. 2007) (Casellas, J.) (considering factors similar to those spelled out in Sonnax).

In the end, however, the process of evaluating whether there is sufficient "cause" to vacate the automatic stay in bankruptcy cases requires the court to engage in an equitable, case-by-case balancing of the various harms at stake. See, e.g., Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997) (suggesting that cause generally exists "when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor . . . if the stay is lifted."); In re Robinson, 169 B.R. 356, 359 (E.D. Va. 1994) (noting that, "in

deciding whether 'cause' has been shown, the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the automatic stay is not lifted, against the potential prejudice to the debtor" if it is.); In re Turner, 161 B.R. 1, 3 (Bankr. D. Me. 1993) ("Cause may exist for lifting the stay whenever the stay harms the creditor and lifting the stay will not unduly harm the debtor."); In re Harris, 85 B.R. 858, 860 (Bankr. D. Colo. 1988) (holding that vacating the automatic stay is appropriate where "no great prejudice will result to the debtor" and "the hardship to the creditor resulting by continuing the stay considerably outweighs the hardship to the debtor by modification of the stay."); In re Opelika Mfg. Corp., 66 B.R. 444, 448 (Bankr. N.D. Ill. 1986) ("Cause to lift the stay exists when the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors.")

The Court finds that this general framework employed in the bankruptcy context is also applicable to these proceedings pursuant to PROMESA. Thus, in deciding whether the plaintiffs in these cases have established "cause" for relief from the PROMESA stay, the Court's ultimate task is to perform a careful balancing of the equities involved. It must assess the hardships realistically borne by plaintiffs if their requested relief is denied and determine whether those outweigh the harm likely to be visited upon the Commonwealth defendants if that relief is granted.

b. "Lack of Adequate Protection" as Sufficient "Cause"

Section 362 of the Bankruptcy Code includes one specific type of "cause" sufficient to grant a party in interest relief from stay: "the lack of adequate protection of an interest in property." 11 U.S.C. § 362(d)(1). This provision has allowed courts to vacate the stay in bankruptcy proceedings where a secured party, faced with a decrease in the value of its collateral while the stay is in effect, is not supplied by the debtor with an alternative form of relief that will safeguard its interest in that collateral. See In re Monroe Park, 17 B.R. 934, 937 (D. Del. 1982) ("[T]he concept of adequate protection requires a debtor to propose some form of relief that will preserve the secured creditor's interest in the collateral, pending the outcome of bankruptcy proceedings.")

Section 405(e) of PROMESA, however, does not explicitly identify "lack of adequate protection" as a ground for obtaining relief from stay. At first blush, that omission would seem to suggest that Congress simply did not intend for inadequate protection to justify a secured creditor's circumvention of PROMESA's automatic stay. Indeed, the Commonwealth defendants make this exact argument and entreat the Court, in interpreting the statute, to view the absence of "lack of adequate protection" as a purposeful exclusion of significant consequence. See 9/22/16 Tr. at 58:18-59:4.

The Court, however, declines to oblige the Commonwealth on this request. Rather, it finds that Congress was not required to have included "lack of adequate protection" in the statutory text in order for that particular, long-standing means of showing "cause" to be available to creditors in PROMESA lift-stay proceedings. This is because the concept of "adequate protection" has constitutional roots, not just statutory ones. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 339 (1977) (the concept of adequate protection "is derived from the Fifth Amendment protection of property interests."); see also In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380, 1390 (5th Cir. 1986), aff'd, 484 U.S. 365 (1988) ("Case law had made adequate protection of the secured creditor a major consideration long before the draft predecessor of the [1978 Bankruptcy Code] proposed to codify it as a requirement.") Secured creditors are, in short, "entitled to constitutional protection for [their] bargained for property interest." In re Jug End in the Berkshires, Inc., 46 B.R. 892, 899 (Bankr. D. Mass. 1985). Thus, although Congress did not overtly include "lack of adequate protection" as an example of proper cause in PROMESA's section 405(e), the United States Constitution nevertheless affords secured creditors the right to invoke that exception when seeking relief from the PROMESA automatic stay.

c. Additional Considerations in Interpreting "Cause"

Before the Court transitions to its evaluation of whether adequate "cause" to vacate the stay exists in these

cases, it acknowledges the lack of a "one-to-one" relationship between section 405 of PROMESA and section 362 of the Bankruptcy Code. In other words, it recognizes that the concept of "cause" embraced by the Court for the purposes of the PROMESA stay need not precisely mirror that adopted in the bankruptcy context. Although the Court endorses the general analytical approach to "cause" followed in the bankruptcy arena, it is nevertheless mindful of the specific Congressional findings and the enumerated purposes of PROMESA's automatic stay contained within section 405 of the legislation. These statutory provisions offer valuable insight into Congress' basic motive in including the stay provision and have no counterpart in section 362 of the Bankruptcy Code. As such, the Court's resolution of the motions currently before it ought to be consistent with these provisions and should advance the larger, overarching purposes for which PROMESA was enacted.

2. Outlining the Alleged Harms

Having established the parameters of the "for cause" standard that will apply to these lift-stay proceedings, the Court's next step is to drill down the precise "harms" that the parties seek to place on their respective sides of the balancing scale.

i. Plaintiffs' Arguments and Evidence on Harm

a. The Brigade Plaintiffs

The Brigade plaintiffs in Civil No. 16-1610 assert that they "will suffer serious constitutional injury" if the

stay is not vacated to allow their claims to go forward. (Civil No. 16-1610, Docket No. 71 at p. 15.) This injury would stem from the continued existence and application of certain "unconstitutional" provisions of the Moratorium Act, which "retroactively alter GDB bondholder rights by, among other things, adjusting bondholder priorities." (Civil No. 16-1610, Docket No. 129 at p. 4.) They allege that those provisions strip them of the benefit of their "bargained-for contractual rights," including "the right to recover on par with all other senior unsecured debt of GDB and the 'absolute and unconditional right' that their entitlement to principal and interest would not be changed without their consent." (Civil No. 16-1610, Docket No. 87 at p. 10-11.) Thus, unless the Court relieves them from the PROMESA stay, plaintiffs "will continue to suffer injury from [those] patently unconstitutional provisions of the Moratorium Act," which "purport to allow the restructuring of creditor claims against GDB without creditor consent" and "to *mandate* unfair discrimination among creditors of equal rank." (Civil No. 16-1610, Docket No. 71 at p. 16-17.)

The Brigade plaintiffs also submit that the challenged provisions of the Moratorium Act have injected a "tremendous amount of legal uncertainty" into the voluntary negotiation process. (Civil No. 16-1610, Docket No. 129 at p. 4). This uncertainty, according to plaintiffs' witness Mr. Bradley Meyer, has stymied meaningful restructuring negotiations between

the Commonwealth and its creditors. Mr. Meyer's testimony indicated, for example, that Law 40, which amended the Moratorium Act, essentially derailed negotiations to consummate a restructuring of the GDB, even after plaintiffs and the GDB had successfully developed a framework agreement to guide those negotiations. See 9/22/16 Tr. at 176:18-179:7. In light of this evidence, the Brigade plaintiffs suggest that another major "harm" in refusing to allow their constitutional claims to go forward is the perpetuation of a destabilizing level of uncertainty, which ultimately keeps the parties from returning to their positions at the bargaining table.

The Brigade plaintiffs contend, however, that by vacating the stay and allowing their claims to proceed, the Court has the opportunity to eliminate this "obstacle of uncertainty." They argue that by adjudicating the constitutionality of the challenged provisions of the Moratorium Act now the Court can clarify the "rules of the road," which in turn will help foster the sort of voluntary restructuring negotiations that PROMESA was designed to facilitate. To emphasize the importance of achieving that clarity, plaintiffs proffered the testimony of Mr. Meyer, who explained that:

> clarification around the rules of the road . . . is exceptionally important in terms of stabilizing the entire Commonwealth going forward. It's important because it provides certainty as to those relative priorities vis-à-vis creditors . . . within the Commonwealth so that we don't have confusion around how certain relative priority rights of creditors will be treated."

9/22/16 Tr. at 181: 12-24. The Brigade plaintiffs further assert that adjudicating its claims will facilitate the work of the Oversight Board by definitively establishing "whether the framework for any restructuring can be based on the current priority structure specified by the Moratorium Act." (Civil No. 16-1610, Docket No. 129 at p. 17.) The Brigade plaintiffs maintain that resolving that issue now will provide the Board with both needed guidance and the beginnings of a "firm foundation," while also preventing it from "wast[ing] effort, time, and scarce resources" developing a restructuring that is premised on unconstitutional law. Id. at p. 10.

b. Plaintiff National

Similar to the Brigade plaintiffs, plaintiff National in Civil No. 16-2101 asserts that, if the Court fails to exercise its discretion to vacate the stay, the Commonwealth defendants "will continue to infringe National's and other creditors' constitutional and contractual rights with impunity." (Civil No. 16-2101, Docket No. 36 at p. 8.) More specifically, National contends that it will continue to be harmed by the "flagrantly unlawful" actions of the Puerto Rican government, which "wipe out" critical investor protections and permit the Commonwealth to assert control over secured revenues pledged to the repayment of the bonds that it insures. National's evidence establishes that the Commonwealth has, in an "unprecedented" move, blocked roughly $11 million in combined secured monthly revenue

streams from reaching trust accounts maintained on behalf of PRHTA and AFICA bondholders.[5] (Civil No. 16-2101, Docket No. 75 at p. 7-8.) National argues that this misappropriation of bondholder collateral by the Commonwealth amounts to sufficient "cause" to vacate the PROMESA stay because it significantly and unconstitutionally harms its business as a bond insurer. Id. Based on the expert testimony of Mr. Robert Lamb, National maintains that the continued diversion of pledged bond revenues will result in two distinct harms to its financial interests: a forced reexamination of its reserve levels and "a higher capital charge by the rating agencies in order to maintain [its] rating" in the insurance market. 9/22/16 Tr. at 139:17-24.

National also shares the Brigade plaintiffs' concern that various provisions of the Moratorium Act, as well as the Executive Orders issued pursuant to it, have created a debilitating level of legal uncertainty. National argues that this uncertainty has "hamper[ed] negotiated resolutions" and made it fundamentally "harder for the parties to reach agreement at the bargaining table." (Civil No. 16-2101, Docket No. 75 at p. 15, 14.) It therefore echoes the need to have the Court "determine the rules of the road now," and suggests that the adjudication of its

[5] During the evidentiary hearing, National's expert witness on municipal finance, Mr. Robert Lamb, testified that PRHTA's secured creditors are losing $10.6 million dollars each month in toll revenue collateral, and that AFICA's secured bondholders are losing approximately "$500,000 a month" in UPR lease payment collateral. 9/22/16 Tr. at 102:16-20, 100:3-6.

constitutional claims would "help provide the certainty necessary to rebuild trust with creditors." Id. at p. 6, 15. Allowing the Commonwealth "to hide behind the stay to avoid a reckoning on the constitutionality of its unilateral stripping of liens and diversion of assets," on the other hand, would only "prolong uncertainty and keep parties away from the bargaining table." Id. at p. 15, 6.

c. The Trigo Plaintiffs

The Trigo plaintiffs in Civil No. 16-2257 reiterate the same basic harm emphasized by both the Brigade plaintiffs and National. They argue that the Moratorium Act and the Executive Orders continue to cause them constitutional injury by "unilaterally divert[ing] funds from agencies and instrumentalities [of the Commonwealth] . . . in patent violation of creditor rights and without a vestige of accountability." (Civil No. 16-2257, Docket No. 52 at p. 6.) Adjudication of their constitutional claims is therefore needed to put an end to the Commonwealth's "confiscatory unconstitutional actions," which "deplete assets and resources" that otherwise "could be available to pay all or part of [the] bondholders' interest and principal." Id. at p. 5, 2.

The Trigo plaintiffs posit that vacating the stay would also help to "eliminate destabilizing and unproductive uncertainty," provide guidance to the parties and the Oversight Board, and ensure that all creditors have the chance to participate

in a restructuring process that is both "fair and orderly." Id. at pp. 5-7 (citing PROMESA § 405(m)(4)). They argue that the looming harm if the stay is not vacated includes not only the "further chaos and complication" that would ensue if parts of the Moratorium Act are later declared unconstitutional, but also the continued existence of a "slant[ed . . . playing field" on which certain creditors are effectively reduced "to mere sideline spectators." Id. at p. 14, 5.

d. Plaintiff U.S. Bank

Unlike the three sets of plaintiffs discussed above, plaintiff U.S. Bank in Civil No. 16-2510 does not seek relief from PROMESA's automatic stay merely to obtain adjudication of its underlying constitutional claims against the Commonwealth. Rather, it requests that the stay be vacated so that it may also: (1) compel UPR - through a preliminary injunction issued concurrently by the Court - to transfer certain pledged revenues to the trust accounts held for the benefit of UPR bondholders, and (2) apply funds currently held in those trust accounts in accordance with the terms of the relevant trust agreement. See Civil No. 16-2510, Docket No. 3 at p. 28.

U.S. Bank argues that the requisite "cause" for granting its first request for relief is established by its lack of adequate protection in the pledged revenues, which serve as hard collateral for the payment of the UPR bonds. U.S. Bank contends that these funds, which include student tuition and fees, will

continue to be diverted and expropriated by the Commonwealth and UPR during the pendency of the stay in order "to meet expenses other than debt service." Id. at p. 6. It further alleges that, once diverted, the pledged revenues are "gone forever" and that "[n]one of the after-the-fact remedies provided by the Moratorium Act or PROMESA" is sufficient to replace them. (Civil No. 16-2510, Docket No. 65 at p. 7, 3.) Rather, U.S. Bank claims that the pledged revenues "are the only reliable source of repayment" for the UPR bonds and that "[a]ny damages remedy would merely substitute, for hard collateral, an unsecured claim that the Commonwealth or UPR cannot pay." (Civil No. 16-2510, Docket No. 3 at p. 16, 6.) Thus, if the stay is not vacated to halt the "plundering of its collateral," U.S. Bank will allegedly be converted "from a fully secured creditor entitled to be paid in full to a second-priority unsecured creditor that may eventually be paid pennies on the dollar." (Civil No. 16-2510, Docket No. 40 at p. 3.)

As for the disbursement of funds currently held in its trust accounts, U.S. Bank contends that relief from stay is appropriate because the Commonwealth itself "does not appear to have any objection" to the application of funds in U.S. Bank's possession. (Civil No. 16-2510, Docket No. 3 at p. 27.)

ii. The Commonwealth's Arguments and Evidence on Harm

The Commonwealth defendants maintain that vacating the stay would cause significant harm to the Government of Puerto

Rico and its people. They argue, for example, that granting relief to the plaintiffs in these cases would further divert important Commonwealth personnel and resources from addressing the financial crisis and the Government's obligations under PROMESA. (Civil No. 16-1610, Docket No. 131 at p. 3-4.) At the hearing, the defendants presented the testimony of Assistant Secretary of the Treasury Yaimé Rullán-Cabrera as support for this point. Ms. Rullán's testimony demonstrated how the burdens of litigation at this preliminary stage of the proceedings are "already drawing Commonwealth officials away from their governmental responsibilities." Id. at p. 3. Ms. Rullán testified that she has had to appear in court on several occasions and that Commonwealth officials "have had to provide all the documentary information in preparation for this and other litigation." 9/23/16 Tr. at 75:22-25, 16-17. These burdens interfere not only with government officials' efforts to govern the Commonwealth on a day-to-day basis, but also with their work in helping to "complete what would be a sustainable fiscal recovery plan." Id. at 90:9-12. Citing these concrete burdens associated with litigation, defendants argue that vacating the stay in these cases "would only result in more, and potentially more damaging, diversion of the Commonwealth's personnel and resources." (Civil No. 16-1610, Docket No. 131 at

p. 5.)[6] They conclude, therefore, that granting plaintiffs their requested relief would directly contravene the PROMESA stay's purpose of "provid[ing] the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis." PROMESA § 405(n)(1).

The defendants, including GDB, also argue that granting relief in these cases could thwart the Commonwealth's ability to perform basic government functions by "upending everything that [it has] been relying on for the past several months." 9/22/16 Tr. at 48:25-49:1. In other words, by producing "the premature dismantling of statutory provisions created to address the current fiscal emergency in Puerto Rico," (Civil No. 16-1610, Docket No. 81 at p. 13), vacating the stay here might fundamentally "disrupt the Government's processes for managing the Commonwealth" and "interfere with the government's ability to provide essential services to residents of the Commonwealth." (Civil No. 16-1610, Docket No. 131 at p. 5.); see also Civil No. 16-2257, Docket No. 54 at p. 14-15 (GDB emphasizing "the burden [that] a judgment invalidating all or part of the Moratorium Act

[6] In its own separate post-hearing memorandum, Civil No. 16-2257, Docket No. 54, GDB reinforces this point regarding the burden and distraction that further lift-stay litigation would cause to the Commonwealth and its instrumentalities. GDB argues that a decision to vacate the stay in these cases would "engender tremendous amounts of work for GDB, . . . involve distraction of the Commonwealth and GDB officers" and divert "resources now focused not only on the PROMESA process but on continuing to operate and provide essential services to the public in the face of the Commonwealth's fiscal crisis." (Civil No. 16-2257, Docket No. 54 at pp. 12-13.)

and executive orders will impose on the Commonwealth and its instrumentalities.") The testimony of Ms. Rullán was proffered to substantiate this danger of "calling into immediate question the ground rules established by the Moratorium Act and executive orders" upon which the Commonwealth's day-to-day operations are currently based. (Civil No. 16-2257, Docket No. 54 at p. 8.) Ms. Rullán testified that the invalidation of the Moratorium Act and related Executive Orders would severely restrict the Commonwealth's ability to manage daily demands with current assets. See 9/23/16 Tr. at 88:3-18. This difficulty, in turn, would eventually require Commonwealth officials "to just paralyze the government," an act that would impede their ability to "tend to the emergency situation" that continues to unfold on the island. Id. at 88:12-89:1. Based on this testimony, defendants conclude that vacating the stay here would result in a "death spiral" in which a "paralyzed" government would ultimately be prevented from funding "the essential services necessary to promote economic stability and growth." (Civil No. 16-1610, Docket No. 131 at p. 5.)

The Commonwealth defendants additionally allege that granting relief to plaintiffs in these cases is likely to "touch off more lawsuits" and "invite more requests to lift the PROMESA stay," something that will further divert the Commonwealth's limited resources and "deprive the Commonwealth of breathing room from litigation that PROMESA is supposed to provide." Id. at p. 7. To support this claim, defendants offered the testimony of

Dr. Jonathan Arnold. Dr. Arnold opined that plaintiffs who "have already filed a case will also seek to have stays lifted" and that the result will be a "wave of litigation, first at the stage of petitioning to lift the stay, and then to the extent that it's granted, then it will be the ongoing litigation after that." 9/23/16 Tr. at 223:15-18. Based on this testimony, the defendants conclude that granting relief here will open the litigation floodgates and encourage "a slew of . . . other creditors" currently "on the sidelines" to pursue their claims against the Commonwealth outside the PROMESA framework.[7] (Civil No. 16-1610, Docket No. 131 at p. 6.) In this way, vacating the stay "would force the Commonwealth to divert its attention from negotiating a voluntary resolution with its creditors to defending costly lawsuits, the exact opposite of what Congress intended." (Civil No. 16-2510, Docket No. 33 at p. 8.)

Finally, the Commonwealth defendants argue that vacating the stay will fundamentally inhibit the Oversight Board's central role in the PROMESA process. They contend that granting the requested relief here will: (1) interfere with the Board's

[7] The United States and GDB also raise this concern in their respective filings with the Court. In its Statement of Interest, the United States warns of "the potential cascading effect that granting relief to one creditor may have on the overall scheme designed by PROMESA, as there may be numerous other similarly situated creditors." (Civil No. 16-1610, Docket No. 116 at p. 6.) GDB posits that "the effects of lifting the stay would reverberate beyond these four cases" by "leading to a cascade of further litigation and lift-stay proceedings" in which the Commonwealth and GDB would be forced to participate. (Civil No. 16-2257, Docket No. 54 at pp. 13-14.)

need to address the financial crisis on a "comprehensive basis," and (2) thwart its ability to organize a consolidated restructuring approach effectively. (Civil No. 16-1610, Docket No. 131 at p. 7.) With respect to the first point, defendants emphasize Congress' explicit finding that a "comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary . . . to restructure debts in a fair and orderly process." PROMESA § 405(m)(4). Defendants maintain that allowing these plaintiffs to go forward with their claims would work against this "comprehensive approach" and hinder the work of the Oversight Board by preventing it from crafting a restructuring that is fair and equitable to all stakeholders. To support this position, defendants offered the testimony of Ms. Elizabeth Abrams, a managing director at Millstein & Company who leads the restructuring team for Puerto Rico. Ms. Abrams testified that "[t]he Oversight Board has fairly broad authority to oversee, for lack of a better word, the negotiations to set the rules and ultimately to approve the restructuring agreements that are reached." 9/23/16 Tr. at 139:15-18. Consequently, if the stay were to be vacated here to allow these plaintiffs to litigate a solution in court, the purpose of the Oversight Board in facilitating an organized and coordinated restructuring process "is effectively preempted." Id. at 139:19-22.

With regard to the second point, defendants emphasize "the advantage of a consolidated approach to restructuring the debts of an entity like Puerto Rico." (Civil No. 16-1610, Docket No. 131 at p. 10.) A consolidated restructuring approach, Ms. Abrams testified, represents "the optimal outcome" and "the most fair and equitable way for the Commonwealth . . . and for the creditors to determine what the appropriate recoveries are, given that all of their debt is . . . effectively supported by the same economy." 9/23/16 Tr. at 101:25-102:6. Defendants maintain that one of the benefits of having an Oversight Board at the center of the PROMESA process is that it is capable of orchestrating that particular line of attack. Indulging plaintiffs' requests for "piecemeal resolution" of their claims, however, is "antithetical" to the concept of consolidated restructuring and would therefore frustrate the Board's ability to coordinate any approach to resolving Puerto Rico's fiscal crisis that is based on that principle. (Civil No. 16-1610, Docket No. 131 at pp. 11-12.)

3. Balancing the Equities

Having outlined the harms and interests at stake on both sides of this contentious issue, the Court must now decide whether any of the plaintiffs in these consolidated cases have carried their burden of showing adequate "cause" for relief from the automatic stay pursuant to section 405(e)(2) of PROMESA. For the

reasons developed below, the Court concludes that none of them has done so.

i. With Respect to Plaintiffs' Constitutional Claims, the Balance of Equities Favors that the Stay be Maintained

Because plaintiffs have the initial burden of showing proper cause for relief from stay, see In re Bogdanovich, 292 F.3d 104, 110 (2d Cir. 2002), the Court begins by critically analyzing the nature and extent of the harm that they allegedly face if their requested relief is denied.

As developed above, plaintiffs in each of these cases assert that leaving the stay in place will subject them to further constitutional injury. This injury would arise from the continued existence and application of certain "unlawful" provisions of the Moratorium Act and related Executive Orders issued by the Governor of Puerto Rico. While the plaintiffs' interests and arguments are not identical, they collectively assert that those actions by the Commonwealth unconstitutionally (i) deprive them of bargained-for contractual rights and security interests; (ii) reorder priorities among creditors; (iii) discriminate among creditors with similar priorities; and (iv) attempt to impose a debt restructuring on creditors without their consent.

The mere fact that plaintiffs bring claims pursuant to the Federal and Commonwealth Constitutions does not, however, entitle them to automatic circumvention of the PROMESA stay. See,

e.g., In re City of San Bernardino, 2016 WL 5019089, at *5 (C.D. Cal. 2016) (finding that there is no exception to the Bankruptcy Code's automatic stay for constitutional claims, even if that category of claims is "deserving" of an exemption.) Rather, plaintiffs must still satisfy the relevant balancing analysis applicable to all proceedings seeking relief from stay "for cause shown." That is, they must still demonstrate that the harm flowing from the continuation of those alleged constitutional violations outweighs the detriment that the Commonwealth would suffer if the stay were vacated to address them.

In each of these four cases, the evidence suggests 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. For the Brigade plaintiffs, the failure to vacate the stay to address their constitutional claims ultimately raises the specter of preferential transfers of GDB monies to other creditors, something which inherently decreases their overall share of a finite pool of GDB assets. For National, the harm - brought about by the continued misappropriation of $11 million in pledged revenues intended to secure repayment of the bonds that it insures

- is predominantly financial.[8] See 9/22/16 Tr. at 20:12-14 ("I don't know what more harm - what more concrete harm could possibly be shown than people taking our money every single month.") For the Trigo plaintiffs, the harm is found in the continued delinquency on interest and principal payments owed to them, as well as a reduction in the market (as opposed to face) value of their bonds. See Id. at 29:19-23 ("The Plaintiffs . . . were thus deprived of their absolute and unconditional . . . right to receive payment of principal and interest of their bond without notice or consent."); id. at 231:21-25 ("Q. Other than . . . the lack of payment of interest since May, is that the extent of your damages to date? A. Yes. And the fact that the value of those bonds have reduced considerably.") And for U.S. Bank, the harm consists of the prolonged diversion of pledged revenues that serve as hard collateral for UPR bondholders. See Civil No. 16-2510, Docket No. 3 at p. 6. Thus, between the four sets of plaintiffs in these cases, the true harm in upholding the automatic stay appears to be, as National suggested at the evidentiary hearing, allowing the Commonwealth to continue "taking other people's money away under color of the Moratorium Act." See 9/22/16 Tr. at 19:17-19.

[8] National argues that the continued monthly diversion of this sum of money by the Commonwealth will jeopardize its liquidity and produce a concomitant downgrade in its credit rating by the rating agencies. While those adverse consequences are theoretically possible, National simply has not alleged sufficient facts to convince the Court that this harm is anything more than speculative in nature.

The Court agrees with the Commonwealth defendants, GDB, PRPFC and UPR that this monetary damage incurred by plaintiffs during the stay could be quantified and therefore would not be "permanent" or "irreparable." (Civil No. 16-1610, Docket No. 131 at p. 13; Civil No. 16-2257, Docket No. 54 at p. 11; Civil No. 16-2510, Docket No. 61 at pp. 3-4; see also 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.") Rather, this financial harm could effectively be dealt with through the voluntary negotiations process fostered by

PROMESA and supervised by the Oversight Board,[9] or through future title III restructuring proceedings. 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. See PROMESA § 407. Section 407(a), for example, provides that "if any property of any territorial instrumentality . . . is transferred in violation of applicable law under which any creditor has a valid

[9] The Brigade plaintiffs, National and the Trigo plaintiffs all assert that the Moratorium Act and the Executive Orders have fundamentally stymied the voluntary negotiations process by obfuscating the "rules of the road" governing creditor priorities and the Commonwealth's existing debt structure. See, e.g., 9/22 Tr. at 15:18-19. (Brigade plaintiffs claiming that the Moratorium Act "was a hand grenade that was thrown into the restructuring."). They further suggest that meaningful, productive levels of cooperation at the proverbial bargaining table will remain elusive until the Court resolves the constitutionality of the Commonwealth's challenged actions. See, e.g., Civil No. 16-2101, Docket No. 75 at p. 12. (National arguing that, "[t]o negotiate effectively, parties must know whether their interests are secure, and this requires a ruling on the Moratorium Act's constitutionality.") At the same time, however, the Brigade plaintiffs admit that they were able successfully to negotiate a framework - complete with key terms - for a restructuring of GDB in the aftermath of the Moratorium Act. See 9/22 Tr. at 190:6-10; 199:5-18. Other evidence also suggests - but does not definitively establish - that negotiations between the parties continued even after the Moratorium Act was amended in May of 2016. See 9/23 Tr. at 127:14-17. In light of this evidence, the Court is skeptical that adjudication of plaintiffs' constitutional claims is needed to restore voluntary negotiations between the Commonwealth and its various creditors. Rather, the Court agrees with the Commonwealth defendants that, even without resolution of the constitutional issues, negotiations are possible. Indeed, the additional, supervisory involvement of the Oversight Board should make the possibility of fruitful consensual negotiations all the more likely.

pledge of, security interest in, or lien on such property . . . then the transferee shall be liable for the value of such property." Id. § 407(a). Creditors are empowered to enforce their rights pursuant to section 407(a) "by bringing an action in the U.S. District Court for the District of Puerto Rico after the expiration or lifting of the stay of section 405." Id. § 407(b). Taken together, these two provisions establish a mechanism for the negation and recovery of any improper transfer that harms a creditor's interests while the Oversight Board is in existence. Though admittedly imperfect, that remedial vehicle will be available to allow plaintiffs in these cases to undo any monetary loss that they suffer during the pendency of the automatic stay. Despite their arguments to the contrary, there is simply no compelling reason why plaintiffs cannot be expected to utilize it.

In contrast to the monetary, fixable harm faced by plaintiffs if their relief is denied, vacating the stay has the potential to cause serious prejudice to the Commonwealth defendants and the PROMESA process. Although the Court disagrees that vacating the stay would engender crushing levels of additional work for the Commonwealth in defending ***these particular cases***, it is nevertheless mindful of the impact that granting relief here could have in spawning additional proceedings to vacate the stay. The Court is, in other words, sensitive to the possibility of provoking a massive "wave of litigation" by other creditors who are eager to obtain relief outside the PROMESA process. In addition to these

four consolidated actions, the Court counts ten other lawsuits that have been commenced against the Commonwealth, its covered instrumentalities, and its public officials in this district.[10] This fact - combined with the intuitive observation that vacating the stay "will invite other participants in the litigation process to seek to do the same," 9/23/16 Tr. at 223:4-6 - is enough to convince the Court that granting plaintiffs' their desired relief will only embolden more creditors and spark the type of race to the courthouse that the PROMESA stay was designed to guard against. See H.R. Rep. No. 114-602, at 52 (2016) (noting that the automatic stay is "critical" in part because "it preempts a rush to the courts by aggrieved creditors – an event that could increase the impact of and accelerate Puerto Rico's debt crisis.")

While it is true that the Court would be able to handle additional lift-stay motions on a case-by-case basis, the Commonwealth would nevertheless be obligated to respond to each and every proceeding initiated against it. The Court agrees with the Commonwealth defendants, GDB, and PRPFC that the distraction and expense inherent in this "cascading" litigation would stretch the

[10] See Assured Guar. Corp. v. García Padilla, Civil No. 16-1037; Fin. Guar. Ins. Co. v. García Padilla, Civil No. 16-1095; Ambac Assurance Corp. v. Puerto Rico Highways and Transp. Auth., Civil No. 16-1893; Peaje Investments LLC v. García Padilla, Civil No. 16-2365; Lex Claims, LLC v. García Padilla, Civil No. 16-2374; Assured Guar. Corp. v. Puerto Rico, Civil No. 16-2384; Voya Institutional Trust Co. v. University of Puerto Rico, Civil No. 16-2519; Altair Global Credit Opportunities Fund (A), LLC v. García Padilla, Civil No. 16-2696; Scotiabank de Puerto Rico v. García Padilla, Civil No. 16-2736; Oriental Bank v. García Padilla, Civil No. 16-2877.

government's resources and personnel, and quickly deprive the Commonwealth of the breathing room that Congress believed it would need both to fulfill its crucial obligations to the Oversight Board and to reopen constructive dialogue with its creditors. See Civil No. 16-1610, Docket No. 131 at p. 6-7; Civil No. 16-2257, Docket No. 54 at p. 13-14.) A denial of stay relief in these cases would therefore help to advance PROMESA's explicit purpose of allowing "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." PROMESA § 405(n)(2).

The Court also finds that vacating the stay here would harm the PROMESA process by undermining the comprehensive, consolidated restructuring approach that the statute was ultimately designed to facilitate. In drafting PROMESA, Congress specifically found that "[a] ***comprehensive approach*** to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico ***is necessary*** . . . for the Government of Puerto Rico to restructure debts in a ***fair and orderly process***." PROMESA § 405(m)(4) (emphasis supplied). By forcing "all claims [to be] considered in parallel", see 9/23/16 Tr. at 222:7-11 (J. Arnold), this type of approach arguably helps "to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment." PROMESA § 405(m)(5)(B). The parties themselves appear to agree on the inherent advantage in adopting a

comprehensive, consolidated approach to dealing with Puerto Rico's debt crisis. See 9/22/16 Tr. at 192:4-6. ("Q. That is, if you want to fix the problem and you can do it, you would go for a consolidated approach; true? A. If you could, yes.") (B. Meyer); 9/23/16 Tr. at 101:25-102:2 ("the optimal outcome for the Commonwealth is to reach a settlement with all of its . . . holders of its tax supporte[d] debt at once.") (E. Abrams); id. at 222:5-11 (J. Arnold). Allowing the creditors in these actions to litigate their individual solutions in court, however, would interfere with the orchestration of this approach. It 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.[11] 9/22/16 Tr. at 60:25-61:1. All stakeholders, including the Oversight Board, collectively deserve the chance to avoid this piecemeal approach to resolving Puerto Rico's fiscal emergency and to allow the PROMESA process to function as designed. In other words, they deserve the opportunity to pursue the "ideal" solution of "solv[ing] the entire puzzle" at once through a comprehensive,

[11] Plaintiffs vehemently maintain that they are interested only in challenging the constitutionality of the Moratorium Act, and that the adjudication of their claims therefore will not, as defendants allege, "cleave off value" to the detriment of other stakeholders. See, e.g., 9/23 Tr. at 143:22-145:10. In theory, plaintiffs are correct about this: a decision invalidating the Moratorium Act would not, on its own, decrease the total assets available to all creditors in a consolidated, global restructuring. The Court nevertheless rejects plaintiffs' attempts to pull the wool over its eyes. As Dr. Arnold noted:

> "[I]t's natural to think that businesses and their lawyers are not incentivized just to challenge the constitutionality of laws for the sake of the public good to get an answer to that question. That's not the end of the line. The end point is then to use the result of that in order to get money later. So it's obvious what the steps in the chain will be leading down the road from here."

9/23 Tr. at 223:19-224:2; see also id. at 144:14-18 ("Presumably, the creditors are looking . . . for relief from the stay and to pursue their claims about the constitutionality of the Moratorium Act so that they can pursue remedies against the issuer.") (E. Abrams). Like Dr. Arnold and Ms. Abrams, the Court is skeptical of plaintiffs' true motives and agrees with the Commonwealth defendants, GDB and PRPFC that their ultimate aim is to obtain money judgments against their borrowers or "to gain an advantage in anticipated restructuring proceedings." (Civil No. 16-1610, Docket No. 131 at p. 15-16; Civil No. 16-2257, Docket No. 54 at p.11.) Because the acquisition of that sort of advantage would work against a comprehensive restructuring that is fair and equitable to all stakeholders, it would also frustrate Congress' intent in designing PROMESA. The Court is unwilling to risk these undesirable consequences of a decision to vacate the stay here.

consolidated restructuring approach. See 9/22 Tr. at 191:21-25 (B. Meyer). Maintaining the stay in these cases would help to preserve that model option for the benefit of all parties.

Based on the foregoing analysis, the Court finds that the harm to plaintiffs in preventing their constitutional claims from going forward does not outweigh the likely harm that vacating the stay to address those claims would cause to both the Commonwealth defendants and the PROMESA process. Because the equities tilt against them, plaintiffs have not demonstrated the level of "cause" necessary to obtain their requested relief. Accordingly, their respective requests to lift PROMESA's automatic stay are **DENIED.**[12]

4. The Court Need Not Resolve Plaintiffs' Constitutional Claims at This Time

Pursuant to the "for cause" standard developed earlier, the fact that plaintiffs' threatened harm is of a "lesser" stripe

[12] This is not, of course, to say that the Court gives credence to each of the Commonwealth's stated harms in its balancing calculus. It is not, for example, persuaded by the defendants' postulation of an apocalyptic "death spiral" following invalidation of the Moratorium Act. Heeding the expert opinion of Dr. Carlos Colon de Armas that "the Government of Puerto Rico has the revenues to cover essential services and pay its debt commitments," the Court finds the Commonwealth's hypothesized catastrophe to be a melodramatic exaggeration divorced from reality. See 9/23 Tr. at 28:11-13. Nevertheless, the Court's holding regarding the lack of "cause" in these cases is driven by a simple, reasoned determination: that the fixable financial harm confronted by the plaintiffs if the stay remains in effect does not, on balance, outstrip the harm to the Commonwealth and the PROMESA process that a decision vacating the stay would engender. That the defendants advance certain implausible arguments regarding the precise extent of that harm does not change this basic, dispositive conclusion.

than that faced by the Commonwealth is, on its own, sufficient to deny plaintiffs their requested relief. Nevertheless, the Court identifies yet another reason militating in favor of a decision to maintain the PROMESA stay in these consolidated actions: the need to comply with the principle of constitutional avoidance.[13]

It is the province of the Court, as an Article III Court, to interpret the Constitution. See Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") This basic reality has been acknowledged by the parties, who recognize that neither PROMESA nor the Oversight Board usurps the Court's authority to address constitutional issues that are brought before it. Nevertheless, the Court recognizes that it is also bound by "[t]he principle of constitutional avoidance, rooted in Article III as well as in principles of judicial restraint." Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 510 (1st Cir. 2011). The Court finds that this principle governs here.

[13] The fact that the constitutionality of the Moratorium Act and Executive Orders is not the issue before the Court in these lift-stay proceedings does not render the doctrine of constitutional avoidance inapposite here. In essence, the Court has two options before it. It can: (1) vacate the stay to adjudicate plaintiffs' challenges to the Moratorium Act now, or (2) maintain the stay and leave room for the PROMESA process and action by the Oversight Board to deal with those provisions. The former option necessarily requires the Court to address constitutional issues, while the latter allows time for those issues to disappear or to be modified extrajudicially. Because this second avenue allows the Court to avoid reaching constitutional questions before absolutely necessary, the principle of constitutional avoidance is applicable and counsels in favor of pursuing that option here.

"A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988); see also Camreta v. Greene, 563 U.S. 692, 705 (2011) (emphasizing the rule that courts must avoid resolving constitutional questions unnecessarily); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598 (2007) ("[F]ederal courts . . . must 'refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function.'" (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982))); United States v. Resendiz-Ponce, 549 U.S. 102, 104 (2007) ("'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))); Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") The courts of appeals, including the First Circuit Court of Appeals, have consistently heeded this command from the Supreme Court to avoid unnecessary constitutional rulings. See, e.g.,

Buchanan v. Maine, 469 F.3d 158, 172 (1st Cir. 2006); United States v. Coker, 433 F.3d 39, 50-51 (1st Cir. 2005).

Here, the passage of PROMESA and the establishment of the Oversight Board creates the distinct possibility that any ruling by the Court regarding the constitutionality of the Moratorium Act and its related Executive Orders will become moot. In fulfilling its congressional mandate to help Puerto Rico "achieve fiscal responsibility and access to the capital markets," PROMESA § 101(a), the Board has the ability, for example, to develop and approve a Fiscal Plan that curtails or even prohibits the enforcement of those challenged provisions. It can also unilaterally dismantle them 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." PROMESA § 204(c)(3)(B). Moreover, in the event that debt adjustment proceedings become necessary, the provisions of title III may effectively unwind the government's controversial actions. Section 303(1), for example, prohibits the application of any territory law prescribing a method of composition of indebtedness or moratorium on the indebtedness of the territory or its instrumentalities to a creditor who does not consent to the composition or moratorium. PROMESA, § 303(1). Section 303(3) further preempts unlawful executive orders that alter, amend, or

modify the rights of holders of debt, or that divert funds from one instrumentality to another or to the territory. Id. § 303(3).

All of this is to show that, in drafting PROMESA, Congress intentionally provided many of the tools needed to deal effectively with the "unconstitutional" conduct that plaintiffs collectively challenge here. Because PROMESA's provisions and action by the Oversight Board are capable of "eliminat[ing]" - "or at the very least materially reshap[ing]" - the constitutional issues presented in these consolidated actions, it is unnecessary and premature for the Court to pass judgment on those issues at this time. See Sony BMG Music Entm't, 660 F.3d at 511 (1st Cir. 2011). Accordingly, declining to vacate the automatic stay here puts the Court in compliance with the principle of judicial restraint and its obligation to "avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng, 485 U.S. at 445.

5. U.S. Bank Does Not Lack Adequate Protection

As discussed above, the Court finds that a secured creditor's lack of adequate protection in its collateral can establish the requisite "cause" for vacating the PROMESA stay pursuant to section 405(e). The essential question in Civil No. 2510 therefore becomes whether U.S. Bank's interest in UPR's pledged revenues is in fact adequately protected against loss from the Commonwealth's acts of diversion. The Court holds that it is.

The term adequate protection is not explicitly defined in the Bankruptcy Code. Courts, however, have determined that "[t]he focus of the [adequate protection] requirement is to protect a secured creditor from diminution in the value of its interest in [its] particular collateral during the period of use by the debtor." In re Satcon Tech. Corp., 2012 WL 6091160, at *6 (Bankr. D. Del. 2012); see also In re Swedeland Dev. Group, Inc., 16 F.3d 552, 564 (3d Cir. 1994) ("The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy."); In re Born, 10 B.R. 43, 48 (Bankr. S.D. Tex. 1981) ("The very heart of the concept of adequate protection is to assure the secured creditor that as the bankruptcy procedures unfold he will not be faced with a decrease in the value of his collateral."); In re Dynaco Corp., 162 B.R. 389, 393 (Bankr. D.N.H. 1993) ("The Court must ensure that, to the extent the debtor is entitled to use cash collateral, there is adequate protection of the creditor's security interest so as to maintain the 'benefit of the bargain' that the secured creditor originally made with the debtors.") Thus, the concept of adequate protection generally requires a debtor to propose some alternative form of relief that will preserve the secured creditor's interest in the collateral, pending the outcome of bankruptcy proceedings. Indeed, "[i]t is well settled that the debtor bears the burden to demonstrate that a creditor is adequately protected." In re S. Side House, LLC, 474 B.R. 391, 408 (Bankr. E.D.N.Y. 2012). The exact form of

protection, however, is flexible. See In re Monroe Park, 17 B.R. 934, 940 (D. Del. 1982) (noting that adequate protection in the context of relief from the automatic stay "is a flexible concept which requires a Court to make decisions on a case-by-case basis, after full consideration of the peculiar characteristics common to each proceeding.") Such protection may include an additional or replacement lien, periodic payments, or any other method that provides the creditor with the "indubitable equivalent" of its interest in the property. See 11 U.S.C. § 361.

Here, the evidence unequivocally establishes that the Commonwealth and UPR have engaged in the diversion of pledged revenues that serve as hard collateral for the repayment of UPR bondholders. See 9/22 Tr. at 147-48. U.S. Bank maintains that no acceptable substitute for those pledged revenues is available, only an unsecured second-priority claim against the Commonwealth, which is "grossly inadequate given the Commonwealth's asserted and adjudged inability to pay even its first-priority general obligation bonds." (Civil No. 16-2510, Docket No. 65 at p. 7.) In arguing this lack of adequate protection, however, U.S. Bank unjustifiably discounts provisions of both the Moratorium Act and PROMESA that effectively preserve its contractual security interest in UPR's pledged revenues. See Moratorium Act § 204(a) (protecting "the rights of a holder to any collateral, security interest or lien that secures" an obligation that "was otherwise due or became due before or during an emergency period" and "becomes payable at

the end of the covered period as a result of this Act."); PROMESA § 405(k) (providing that the automatic stay "does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation.") Because of these provisions, and because UPR'S pledged revenues are constantly replenished by an annual stream of student tuition and fee payments, U.S. Bank continues to hold a security interest in a stable, recurring source of income that will eventually furnish funds for the repayment of the UPR bondholders. Though U.S. Bank will not receive the pledged revenues during the stay period,[14] this enduring security interest means that it faces only a "delay in recouping such funds," not a permanent loss of them.

The Court finds that the existence of this continuing lien on a perpetual source of revenue satisfies the "flexible" standard applicable to determinations of adequate protection. It therefore holds that the Commonwealth has carried its burden of showing that the UPR bondholders will, in due time, receive the "indubitable equivalent" of their current interest in UPR's pledged revenues. Accordingly, plaintiff U.S. Bank's motion to lift the

[14] The fact that U.S. Bank will not have the benefit of additional UPR pledged revenues during the stay period is of no real consequence here. U.S. Bank admits that there are sufficient funds in its reserve account to service the UPR bond debt until December 2017. See 9/22 Tr. at 33: 17-18. Because UPR bondholders would not miss a single principal or interest payment during the pendency of the automatic stay, they will suffer no financial harm if the stay is maintained.

stay for the purpose of enforcing a preliminary injunction against UPR is **DENIED.**

The Court, on the other hand, sees no reason to deny that part of U.S. Bank's motion seeking relief from stay in order to disburse monies held in its reserve account. The funds held in that trust account are not subject to the Moratorium Act, see Moratorium Act § 103(l)(ii), and the Commonwealth has not specifically opposed this request at any time during these proceedings. The Court therefore **GRANTS** that portion of the motion and **VACATES** the PROMESA stay for the limited purpose of allowing U.S. Bank to transfer those funds in accordance with the terms of the relevant trust agreement.

C. A Brief Word to the Commonwealth Defendants

In a previous memorandum and order denying other plaintiffs relief from the PROMESA stay,[15] the Court urged the Commonwealth defendants not to waste time in reinvigorating consensual negotiations with its various creditors. The Court reiterates that same counsel here.

At bottom, the Commonwealth has three - theoretical - options going forward. In order to help extricate itself from its current financial predicament, it can: (1) make a serious commitment to negotiate voluntarily with its creditors, (2) seek to be placed into debt restructuring proceedings pursuant to title III of

[15] See Civil No. 16-2365, Docket No. 74; Civil No. 16-2384, Docket No. 59; Civil No. 16-2696, Docket No. 68.

PROMESA, or (3) recommence making payments to all of its bondholders. The third option is undoubtedly the most ideal, and is expressly permissible during the PROMESA stay period. See PROMESA § 405(l) (providing that the automatic stay provision does not "prohibit the Government of Puerto Rico from making any payment on any Liability when such payment becomes due.") Taking the Commonwealth at its word that its outstanding debt obligations are truly not payable, however, that option is an infeasible avenue to fiscal redemption. Although the second option may become necessary in the future, debt adjustment proceedings pursuant to title III must first be certified by the Oversight Board. See PROMESA § 302(2). This certification, in turn, requires a would-be debtor to prove to the Board that it has, among other things, made meaningful attempts to reach a consensual resolution with its creditors. See Id. § 206(a) ("The Oversight Board, prior to issuing a restructuring certification regarding an entity . . . shall determine, in its sole discretion, that . . . the entity has made good-faith efforts to reach a consensual restructuring with creditors.") Thus, the second option will not become available to the Commonwealth and its covered instrumentalities unless and until the first has been faithfully attempted. In light of this fact, the earnest revitalization of the voluntary negotiation process is the Commonwealth's only realistic pathway forward. With the added benefit and breathing room afforded by the Court's decision today, the defendants must not delay in pursuing it.

III. CONCLUSION

For the reasons outlined above, the Oversight Board's motion to intervene in these consolidated actions is **DENIED WITHOUT PREJUDICE.** (Civil No. 16-1610, Docket No. 137; Civil No. 16-2101, Docket No. 89; Civil No. 16-2257, Docket No. 65; Civil No. 2510, Docket No. 72.) Plaintiffs' respective requests to vacate the PROMESA automatic stay pursuant to section 405(e) are also **DENIED.** (Civil No. 16-1610, Docket No. 71; Civil No. 16-2101, Docket No. 36; Civil No. 16-2257, Docket No. 11; Civil No. 16-2510, Docket No. 2.) U.S. Bank may, however, proceed to disburse funds held in its reserve account to UPR bondholders pursuant to the terms of its trust agreement. (Civil No. 16-2510, Docket No. 2.)

IT IS SO ORDERED.

San Juan, Puerto Rico, November 15, 2016.

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

AFFIDAVIT OF SERVICE

----------X

Brigade Leveraged Capital Structures Fund Ltd., et al

v.

Alejandro Garcia Padilla, et al.

----------X

I, Robyn Cocho, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on December 19, 2016

I served the **Brief for Movant-Appellant Financial Oversight and Management Board** within in the above captioned matter upon:

SEE ATTACHED LIST

via **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

In addition, this Brief has been filed through the courts CM/ECF system.

Sworn to before me on December 19, 2016

/s/ Robyn Cocho
Robyn Cocho

Job # 269743

Consolidated Cases – Service List

Attorneys for Plaintiffs-Appellees (16-2437):

Brigade Leveraged Capital Structures Fund Ltd.;
Brigade Distressed Value Master Fund Ltd.;
Tasman Fund LP;
Claren Road Credit Master Fund, Ltd.;
Claren Road Credit Opportunities Master Fund, Ltd.;
Fore Multi Strategy Master Fund, Ltd.;
Sola Ltd.;
Ultra Master Ltd.;
Solus Opportunities Fund 5 LP;

Donald S. Bernstein
Michael Sean Flynn
Benjamin S. Kaminetzky
Brian M. Resnick
Mara Theophila
Marc J. Tobak
David B. Toscano
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, New York 10017
Tel: (212) 450-4000

Harold D. Vicente-Colon
Harold D. Vicente-Gonzalez
Vicente & Cuebas
PO Box 11609
San Juan, Puerto Rico 00910
Tel: (787) 751-8000

Attorneys for Plaintiffs-Appellees (16-2437):

Fir Tree Value Master Fund, L.P.;
Fir Tree Capital Opportunity Master Fund, L.P.;
Fir Tree Special Opportunities Fund IV, LP;
Fir Tree Special Opportunities Fund V, LP

Brett G. Canna
K. Ann McDonald
Jayne S. Robinson
Robinson McDonald & Canna LLP
61 Broadway, Suite 1415
New York, New York 10006
Tel: (212) 953-3400

Harold D. Vicente-Colon
Harold D. Vicente-Gonzalez
Vicente & Cuebas
PO Box 11609
San Juan, Puerto Rico 00910
Tel: (787) 751-8000

Attorney for Plaintiff-Appellee (16-2438):

National Public Finance Guarantee Corporation

Marcia Goldstein
Eric C. Hawkins
Jonathan D. Polkes
Salvatore A. Romanello
Gregory Silbert
Edward Soto
Weil Gotshal & Manages LLP
767 Fifth Avenue
New York, New York 10036
Tel: (212) 310-8000

Alexandra C. Casellas-Cabrera
Eric Perez-Ochoa
Francisco Manuel Viejo Lopez
Adsuar Muniz Goyco Seda & Perez-Ochoa, PSC
PO Box 70294
San Juan, Puerto Rico 00936
Tel: (787) 756-9000

Attorneys for Plaintiff-Appellee (16-2439):

US Bank Trust, N.A.

Philip Bentley
Douglas Buckley
Amy Caton
Thomas Moers Mayer
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas, 28th Floor
New York, New York 10036
Tel: (212) 715-9100

Ileana C. Cardona-Fernandez
Leticia Casalduc-Rabell
David C. Indiano-Vicic
Claudia Quinones-Vila
Jeffrey M. Williams-English
Indiano & Williams PSC
207 Del Parque St., 3rd Floor
San Juan, Puerto Rico 00912
Tel: (787) 641-4545

Attorneys for Plaintiffs-Appellees (16-2440):

Dionisio Trigo-Gonzalez;
Carmen Regina Suarez-Sein;
Benigno Trigo-Gonzalez;
Teresa Zapata-Bird;
Trigo Corp.;
Guillermo L. Martinez;
Bertita Martinez-Martinez;
Gustavo Hermida-Ceda;
Gloria Colon;
Ramon Gonzalez-Cordero;
Ketty Simounet de Gonzalez;
Jorge Hess;
Regina Trigo de Hess;
Trimar Investments Corp.;
San Rafael Holdings, LLC;
Ceci Montilla-Rojo;
322 De Diego Holdings, LLC;
Jose A. Valdez-Mazaurieta;
Adrienne Muentes-Ortiz;
Valmu Trust; 2015, LLC; Adriel Longo-Ravelo;
Ernesto A. Smith;
Saress E. Smith;
Federico M. Stubbe Arzuaga; Stugo LLC;
FSA Investments LLC;
Northshore Management Corp.;
Heirs of the Estate of Rosario Ferre Ramirez de
Arellano Comp by BTF-RLTF-LATF;
419 Ponce de Leon Inc.;
Frederico Stubbe Gonzales;
Carmen Feliciano Vargas;
First Medical Health Plan, Inc.;
Eduardo Artau Gomez

Juan E. Rodriguez Diaz
Etienne Totti del Valle, III
Totti & Rodriguez Diaz
Union Plaza, Suite 1200
416 Ponce de Leon Ave.
San Juan, Puerto Rico 00918
Tel: (787) 753-7910

Attorneys for the Defendants-Appellees (16-2437, 16-2438, 16-2439, 16-2440):

Alejandro J. Garcia-Padilla;
Commonwealth of Puerto Rico;
Juan C. Zaragoza-Gomez;
Luis G. Cruz-Batista;
Puerto Rico Fiscal Agency and Financial
Advisory Authority;
Victor A. Suarez-Melendez

Peter A. Farrell
Susan Marie Davies
Michael Francis Williams
Erin E. Murphy
Matthew D. Rowen
Kirkland & Ellis LLP
655 15th Street NW, Suite 1200
Washington, DC 20005
Tel: (202) 879-5000

Attorneys for Defendants-Appellees (16-2439):

University of Puerto Rico;
Celeste Freytes-Gonzalez

Edgardo Barreto-Pagan
Luis A. Oliver-Fraticelli
Ricardo L. Ortiz-Colon
Fiddler Gonzalez & Rodriguez PSC
PO Box 363507
San Juan, Puerto Rico 00936
Tel: (787) 753-3113

Defendants-Appellees (16-2440):

Government Development Bank of Puerto Rico;
Melba Acosta-Febo;
Puerto Rico Public Finance Corporation

Jose Luis Gonzalez-Castaner
Magaly Rodriguez-Quinones
Gonzalez Castaner PSC
128 F. D. Roosevelt, 2nd Floor
San Juan, Puerto Rico 00919
Tel: (787) 758-7819