IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

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., 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, Fore Multi Strategy Master Fund, Ltd., Sola Ltd, Ultra Master Ltd, Solus Opportunities Fund 5 LP, Plaintiffs, - against - 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, and John Doe, in his/her official capacity as receiver for the Government Development Bank for Puerto Rico, Defendants.	**CIVIL NO. 16-01610 (FAB)**

PLAINTIFFS' POST-HEARING MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF FROM THE PROMESA STAY AND IN RESPONSE TO THE DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST

TABLE OF CONTENTS

TO THE HONORABLE COURT:

COME NOW Plaintiffs, by and through their undersigned counsel, and very respectfully state and pray as follows:

PRELIMINARY STATEMENT

Two days of testimony, argument by the parties, and the "Statement of Interest" filed by the United States Department of Justice have offered no compelling reason why the Court should delay adjudication of the constitutional claims before the Court. To the contrary, the record—and the reality facing Puerto Rico outside the courtroom—demonstrates that continuing the PROMESA Stay[1] and delaying adjudication of this case will work against the very purpose of the PROMESA Stay and the interests of Puerto Rico and all of its creditors.

The purpose of the PROMESA Stay, like the automatic stay imposed by Section 362 of the Bankruptcy Code, is to facilitate voluntary restructuring negotiations and to keep the parties in interest focused on charting the course of the restructuring. On this the parties agree. This case is the rare case in which lifting the stay and adjudicating the pending claims on the merits will advance these goals, while maintaining the stay will frustrate them. Plaintiffs and their fellow members of the Ad Hoc Group of GDB Bondholders are the only creditors to reach a framework agreement in the months since the passage of the Moratorium Act. The testimony before the Court revealed that their—and GDB's—efforts to consummate a restructuring based on the framework agreement have been stymied by the unconstitutional provisions of the Moratorium Act and the amendments made to the Act by Law 40.

By lifting the stay, and clarifying the "rules of the road" by determining the constitutionality of the challenged provisions of the Moratorium Act, this Court can eliminate a

[1] Capitalized terms not defined herein have the meaning assigned to them in Plaintiffs' Motion for a Determination that the PROMESA Stay Does Not Stay Pls.' Constitutional Claims, or, in the Alternative, for Relief from the Stay (Dkt. 30) ("Motion" or "Mot.").

substantial obstacle to voluntary restructuring negotiations and provide needed guidance to the Oversight Board that will begin evaluating the Commonwealth's—and GDB's—fiscal plan in a matter of days.

None of the Commonwealth's irrelevant evidence and obfuscation offers any reason why the Court should delay ruling on the matters before it. Ultimately, all of the alleged harms the Commonwealth asserts would flow from lifting the stay—aside from the paltry cost of finalizing briefing on the pending dispositive motion—easily fall away in light of the narrow relief the *Brigade* Plaintiffs are seeking and, more importantly, are not seeking. The *Brigade* action is a targeted, surgical challenge to only the unconstitutional provisions of the Moratorium Act. The *Brigade* suit does not challenge the provisions of the Moratorium Act that authorize the Governor to declare a "state of emergency" at any indebted Commonwealth instrumentality (or for the Commonwealth itself). The *Brigade* suit does not challenge the provisions of the Moratorium Act that allow the Commonwealth and its instrumentalities to suspend their obligation to pay principal and interest on their bonds when due—even when due to the *Brigade* Plaintiffs. And the *Brigade* suit does not challenge the provisions of the Moratorium Act that allow GDB to curtail deposit withdrawals not made to pay for essential services—indeed, the *Brigade* Plaintiffs are relying on the Commonwealth and GDB to follow those provisions and conserve GDB assets. Instead, the *Brigade* Plaintiffs challenge only those provisions of the Moratorium Act that attempt to retroactively alter GDB bondholder rights by, among other things, adjusting bondholder priorities. And the sole remedy that the *Brigade* Plaintiffs seek is prospective declaratory and injunctive relief that will clarify the "rules of the road" so that the parties and the Oversight Board can turn to the real work of developing solutions—based on valid law—that will put the Commonwealth and its instrumentalities on a stable footing.

ARGUMENT

Section 405(e)(2) of PROMESA authorizes this Court to grant relief from the automatic stay "for cause shown."[2] It is undisputed that the Court's assessment of whether "cause" to lift the stay exists turns on balancing the equities among the parties and considering the public interest, including how the stay will affect the restructuring.

The Department of Justice urges this Court to construe the "for cause" provision "as narrowly as possible." (*See* Statement of Interest at 6.)[3] But however narrowly the "for cause" provision is read, it is hard to imagine any case better suited for relief from the stay than the *Brigade* action. As explained below, the evidence presented at the hearing demonstrates that this case is the rare instance where litigation will foster—not frustrate—restructuring efforts.

I. The Stay Should Be Lifted Because Deciding This Case Will Advance the Purposes of PROMESA

A. Lifting the Stay Will Foster Voluntary Restructuring

Lifting the stay, and adjudicating the legality of the challenged provisions of the Moratorium Act, will establish the "rules of the road" to guide the voluntary restructuring negotiations that PROMESA was intended to foster. Both the *Brigade* Plaintiffs' financial advisor and the Commonwealth's own financial advisor agree that clear, established rules regarding the relative priorities of creditors make negotiations easier and build the trust in negotiations that is essential to reaching agreement. Plaintiffs' advisor, Mr. Meyer, explained:

> [C]larification around the rules of the road . . . is incredibly important, not only for the GDB. . . . it 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 not only

[2] "Cause" and "irreparable harm" are two distinct concepts under Section 405 of PROMESA. Section 405(e), which governs Plaintiffs' motion, provides for relief from the stay "for cause shown" after notice and a hearing; whereas, Section 405(g), under which Plaintiffs have not sought relief, provides for immediate relief from the stay upon the more demanding showing of "irreparable harm."

[3] "Statement of Interest" refers to the Statement of Interest of the United States, Dkt. No. 116.

> in the GDB but elsewhere within the Commonwealth so that we don't have confusion around how certain relative priority rights of creditors will be treated. (Hr'g Tr., Sept. 22 , at 181:12-24 (Meyer).)

The Commonwealth's financial advisor, Ms. Abrams, agreed:

> [m]ore certainty is better than less when you are trying to reach resolution with your creditors. . . . [K]nowing what the rules are gives the creditors the ability to sort of have faith in the negotiations and ultimately reach an agreement. (Hr'g Tr., Sept 23, at 131:4-9 (Abrams).)
>
> [Mr. Kaminetzky:] And I think you just testified that in your experience, reaching a voluntary restructuring is more likely if the parties at the table have a clearer understanding of their relative rights and priorities, if they know what we have been calling the last two days the rules of the road.
>
> [Ms. Abrams:] Yes. (Hr'g Tr., Sept 23, at 150:16-21 (Abrams).)

Resolving the uncertainty caused by the unlawful provisions of the Moratorium Act is of particular importance to GDB and Plaintiffs because they have each invested substantial time, money, and effort to develop an agreed framework to restructure and stabilize GDB as a first step towards a broader restructuring of the Commonwealth's debt. While Commonwealth-wide negotiations have not yet borne fruit, Plaintiffs and GDB have agreed to indicative terms of a two-step restructuring of GDB. The first step, a "GDB only" restructuring, would reduce the face value of GDB's debts by 43.75% (approximately $1.64 billion). Consummating this step alone would represent the first consummated restructuring of a Commonwealth entity and stabilize the GDB while the parties work towards a Commonwealth-wide restructuring. At the second step, Plaintiffs would agree to a further haircut equivalent to 53% of the face value of their GDB bonds—reducing GDB's debt by a total of nearly $2 billion. (Hr'g Tr., Sept. 22, at 174:12-17, 175:8-176:6 (Meyer).) Both Plaintiffs and GDB testified that they stand ready to resume negotiations based on this framework. (*E.g.*, Hr'g Tr., Sept 22, at 181:11 (Meyer) ("Ultimately, we want to get back to the bargaining table."); *see also* Hr'g Tr., Sept 22, at 191:1-

2, 202:21-203:1 (Meyer); Hr'g Tr., Sept. 23, at 145:11-17 (Abrams) ("Q: Is the GDB still interested in pursuing this framework?" "A: Yes, I believe they would be.")) To be sure, there are certainly many challenges facing Puerto Rico and many hurdles to surmount to consummate a voluntary restructuring for GDB and for the Commonwealth. But one is solely and presently within the power of this Court to resolve by lifting the stay: the "tremendous amount of legal uncertainty" (Hr'g Tr., Sept. 22, at 181:5-7 (Meyer)) that the unlawful provisions of the Moratorium Act introduced into the voluntary negotiation process.

Lifting the stay to rule on Plaintiffs' constitutional claims—and thereby removing the obstacle of uncertainty—will therefore accomplish, not frustrate, the purpose of PROMESA and the PROMESA Stay. The Department of Justice argues that the stay is intended to allow the Commonwealth to focus on negotiating a voluntary resolution with creditors. (*See* Statement of Interest at 3 (citing PROMESA § 405(n)(2), 48 U.S.C. § 2194(n)(2)).) We agree. But where, as here, lifting the stay will foster voluntary resolution while maintaining the stay will frustrate those voluntary resolutions, the purpose of PROMESA and the stay are best served by lifting the stay so that these constitutional questions and uncertainty can be expeditiously resolved.

The Commonwealth cannot deny that clarifying the legal rules governing the Commonwealth and GDB's debt will facilitate voluntary restructuring. Nor can the Commonwealth contest that facilitating a voluntary restructuring is one of the purposes of PROMESA generally and the stay provisions specifically. The Commonwealth has instead attempted to obfuscate the point by arguing that the passage of the Moratorium Act did not immediately terminate negotiation regarding a GDB restructuring, and that the Commonwealth may now wish to pursue a global restructuring rather than a GDB-specific restructuring. For example, the Commonwealth argues that the GDB framework agreement was announced on May

2, after the April 6 passage of the Moratorium Act, and that negotiations between Plaintiffs and GDB continued well into May and June, following the May 5 enactment of Law 40's amendments to the Moratorium Act. (Hr'g Tr., Sept. 23, at 127:11-128:13 (Abrams).) Ms. Abrams also asserts that consummating a GDB-only restructuring would reduce the size of the settlement "pie" available for all Commonwealth creditors. (Hr'g Tr., Sept. 23, at 101:22-102:21 (Abrams).)

These attempts at misdirection fail. Mr. Meyer's testimony demonstrates that Law 40's unlawful preference for certain bondholders over others derailed negotiations to consummate a restructuring based on the framework agreement. (Hr'g Tr., Sept. 22, at 176:18-179:7 (Meyer).) Indeed, Plaintiffs do not dispute that they did their best to negotiate with GDB even after Law 40 was passed. Rather, Plaintiffs' uncontroverted testimony is that Law 40 stymied efforts to consummate a transaction because Law 40 encouraged the local co-ops to walk away from further discussions around the framework agreement as that (unconstitutional) law dangled the prospect of a higher recovery based solely on their Puerto Rico address. (Hr'g Tr., Sept. 22, at 218:1-5 (Meyer) (Law 40 "provided a framework whereby local investors, in particular the co-ops, felt they could receive a higher and better recovery as compared to other *pari passu* [obligations.]")[4]

The Commonwealth's professed desire to pursue global restructuring negotiations weighs

[4] The bond price information put forth by the Commonwealth's proffered and discredited "economics expert," Dr. Arnold, is utterly irrelevant. Dr. Arnold offered no evidence or even opinion that the short-term trading prices of GDB bonds reveal anything at all about the prospect for a voluntary restructuring of GDB. Accordingly, his testimony asserting that the Moratorium Act did not "adversely affect[] the value of the bondholders possessed [bonds]" is irrelevant. (Hr'g Tr., Sept. 23, at 211:24-212:3 (Arnold).) As Mr. Meyer's testimony (and even a cursory reading of the complaint) made clear, the *Brigade* Plaintiffs do not seek to lift the stay to recover the lost value of the bonds or even to get paid principal or interest on the bonds; rather, Plaintiffs seek to lift the stay to resolve the legal uncertainty caused by the unconstitutional provisions of the Moratorium Act and its amendment that have made it impossible to consummate a voluntary restructuring of GDB. In addition, much of Dr. Arnold's testimony was an attempt to show that Plaintiffs could not establish "irreparable harm." But, as noted above, the standard for relief from the stay under PROMESA Section 405(e) is "for cause," rendering Dr. Arnold's testimony irrelevant.

in favor of lifting the stay, not against it. Resolving the uncertainty flowing from the unlawful provisions of the Moratorium Act will facilitate restructuring negotiations across the Commonwealth's capital structure, whether the Commonwealth chooses to pursue a global resolution or entity-by-entity restructurings. The Commonwealth's professed concern that consummating a GDB-only restructuring will reduce the total "pie" for a global resolution is irrelevant. As Ms. Abrams admitted, resolution of this constitutional action will not alter the size of the restructuring "pie" available to creditors. (Hr'g Tr., Sept. 23, at 145:4-9 (Abrams).) Once negotiations restart, the Commonwealth will be free to consummate a GDB restructuring based on the framework agreement—which would commit the Plaintiffs to participation in a global restructuring—or, if it sees fit, to abandon all of the work and expense invested to date in favor of a new single-step global restructuring.

B. Lifting the Stay to Determine the Unconstitutionality of the Challenged Provisions of the Moratorium Act Will Facilitate the Oversight Board's Work

Of course, fostering negotiation of voluntary restructurings is not the only way in which lifting the stay and adjudicating the constitutionality of the Moratorium Act will further the purposes of PROMESA and facilitate the work of the Oversight Board. Under PROMESA, the Oversight Board is responsible for approving fiscal plans, evaluating voluntary restructuring proposals and directing any bankruptcy-like restructuring of a Commonwealth entity. *See generally* PROMESA Titles II, III, VI. Each of these duties will require the Oversight Board to understand the law governing the relevant Commonwealth instrumentality, and whether those Commonwealth laws are themselves valid under the Federal and Commonwealth constitutions. And, as the fiscal plan for the Commonwealth, including GDB, is due on October 14, 2016, just

seven days from today, the sooner the Board can receive guidance, the sooner it will have a firm foundation from which to work.[5]

The Department of Justice has asked this Court to await the Oversight Board's decision to intervene in this action before granting relief from the stay. (*See* Statement of Interest at 8.) But the Department of Justice and the Commonwealth offer no reason why the Court should await the Board's potential intervention. The Constitution and laws of the United States empower this Court—not the Department of Justice or the Oversight Board—to decide the constitutionality of the challenged provisions of the Moratorium Act. The Board's view—if it elects to express any—on the constitutionality of these provisions is also not likely to aid the Court. The parties have comprehensively briefed the salient issues: Defendants' motion to dismiss spanned 46 pages; Plaintiffs' opposition and cross-motion for summary judgment on their federal preemption claims covered 43 pages. Defendants' (already drafted but yet to be filed) consolidated reply in support of their motion to dismiss and opposition to Plaintiffs' cross-motion for summary judgment will likely be of commensurate length. There is no reason to believe the recently-appointed Board or its yet-to-be-retained legal advisors would direct the Court to a precedent or argument that the parties have overlooked or failed to raise.

Moreover, lifting the stay now will avoid the possibility that the Board will waste effort, time, and scarce resources in developing plans or evaluating restructuring proposals premised on the unconstitutional provisions of the Moratorium Act. Further delaying a ruling on these issues risks that any plan based on these provisions of the Moratorium Act will be undone after this Court ultimately rules on their constitutionality. It is hard to imagine a more destructive

[5] *See* Financial Oversight and Management Board for Puerto Rico, *Covered Entities Under PROMESA Act (proposed)*, *available at* http://www.juntasupervision.pr.gov/Oversightboard1/Documents/COVERED%20ENTITIES%20UNDER%20THE%20PROMESA%20ACT%20-%20PDF.pdf (setting October 14, 2016 deadline for receipt of Fiscal Plan for the Commonwealth and instrumentalities including GDB).

approach than to waste time and effort to develop an unlawful restructuring—and to risk bearing the costs of litigation to unwind such a restructuring. The Board ought to know now, at the outset, whether the challenged provisions of the Moratorium Act can stand.

II. Lifting the Stay Will Benefit—Not Injure—the Commonwealth

Plaintiffs have shown that lifting the stay will benefit Puerto Rico by removing an obstacle to voluntary restructuring and by facilitating the work of the Oversight Board. In response, the Commonwealth asserts it will suffer four categories of harm if the stay is lifted: (i) interference with the provision of essential services, (ii) litigation burdens, including more litigation, and diversion of resources from governance to litigation, (iii) interference with the PROMESA process, and (iv) elimination of guidance to Commonwealth officials. Upon a close examination of the Commonwealth's evidence, however, it is clear that Defendants merely presented the Court with one detour and distraction after another. Many of these issues simply have no bearing at all on this action as Plaintiffs have not challenged the Commonwealth's ability to suspend bond payments or expend resources on essential services, and the alleged expenses required to decide the *Brigade* litigation are miniscule or have already been incurred.

Most concerning perhaps is the notion underpinning the Commonwealth's entire argument: that the Court should maintain the stay because the Commonwealth will be deprived of the unconstitutional provisions of the Moratorium Act should the Court lift the stay and hold those provisions unconstitutional. Indeed, in argument after argument the Commonwealth appears to concede—albeit implicitly—that the challenged provisions of the Moratorium Act are unconstitutional, and therefore a decision to lift the stay would be tantamount to a decision to invalidate those provisions. (*See* Hr'g Tr., Sept. 23, at 155:21-156:2 (Abrams) ("Q: "[I]sn't it true that your only concern has nothing to do with lifting the stay? It has to do with the fact that the Court might rule that the Moratorium Act and the executive orders are actually [il]legal and

in violation of the United States Constitution. . . . A: I think that's a concern, yes."); Hr'g Tr., Sept. 23, at 253:14-21 (Arnold) ("Q: "So it's really not a matter of lifting the stay. What you are really saying is that, as long as no one knows [if the Moratorium Act is constitutional], these things won't happen. . . . A: Yea, either in whole or in part, I agree with that."); *see also* Hr'g Tr., Sept. 23, at 136:25-137:5 (Abrams); Sept. 23 Hr'g Tr., Sept. 23., at 224:11-15 (Arnold).)

Plaintiffs agree that the provisions are unconstitutional. But there is simply no precedent or principle that allows the Commonwealth to keep an unconstitutional law in place for any length of time simply because the Commonwealth finds it convenient to do so. As any grade school civics student can explain, the very purpose of a constitution is to limit the scope of permissible government action even (indeed, especially) when such action would seem politically advantageous or expedient.

A. Lifting the Stay to Allow This Action to Proceed Will Not Authorize a Run on the GDB or Interfere with Expenditures for Essential Services

The Commonwealth argues that lifting the stay will interfere with the provision of essential services by authorizing a run on GDB if the Moratorium Act is held unconstitutional, or because lifting the stay will force the Commonwealth to spend its resources on paying bondholders rather than paying for essential services. Both arguments are simply false as applied to this action.

Both Ms. Abrams and Ms. Rullán-Cabrera presented this Court with a terrifying—but utterly false—choice: Either the Court leaves the stay in place or the Moratorium Act will be invalidated and cause a "run on the bank." (*See* Hr'g Tr., Sept. 23, at 185:10-20 (Abrams); Hr'g Tr., Sept. 23, at 87:12-20 (Rullán-Cabrera).) It is simply not true that a judgment for the *Brigade* Plaintiffs will allow a run on GDB. Plaintiffs are not challenging the provisions of the Moratorium Act that authorized the Governor and GDB to impose restrictions on deposit

withdrawals and thereby prevent any run on GDB; a judgment for Plaintiffs would leave all of these provisions in place. Section 203(b)(ii) authorizes the Governor to impose withdrawal restrictions on GDB. Section 203(b)(iii) authorizes the Governor to order GDB to suspend loan disbursements and payments on guarantees and letters of credit; Sections 203(b)(iv) and (v) allow the Governor broad discretion to conserve GDB liquidity and to delegate such authority to GDB. Plaintiffs' complaint challenges none of these provisions. (Am. Compl., Prayer for Relief.) A judgment in favor of the *Brigade* Plaintiffs would leave all of these provisions intact, and thus, maintain the authority the Governor exercised in the Executive Order imposing withdrawal restrictions at GDB. *See* Executive Order OE-2016-010, at ¶¶ Third–Sixth, Eighth. Accordingly, lifting the stay to decide this action will not and cannot authorize a "run" on GDB.

The Commonwealth's other argument—that lifting the stay will cause payments to flow to bond creditors rather than essential services—is equally false. The Commonwealth again ignores the fact that Plaintiffs are not seeking payment on their bonds or to invalidate the Moratorium Act provisions that authorize GDB not to pay principal and interest when due. For example, Mr. Arnold testified that—as a "matter of economics"—"payments to bond and noteholders will ultimately divert funds from essential services." (*See* Hr'g Tr., Sept. 23, at 222:7, 222:22-23 (Arnold); *see also* Commonwealth Ex. 25, at 23, 25 (concluding that "payments to bond and note holders will diverting [*sic*] funds from essential expenditures" and "lifting the stay, and requiring disbursements to creditors, will divert money from essential services").) And following the hearing, the Governor of the Commonwealth warned of the "dangers hanging over yours and the rest of our peoples' health care, education and security if the federal court accepts the petition of a group of creditors to eliminate the temporary protections against collection actions." Press Release, Office of the Governor, *Gobierno*

establece principios del Plan Fiscal a la Junta de Supervisión Fiscal (Sept. 29, 2016).

These statements sidestep the obvious: Who is seeking to "divert funds"? Who is pursuing a "collection action"? Not the *Brigade* Plaintiffs. As the Department of Justice grudgingly acknowledged in its statement, the *Brigade* Plaintiffs only seek "prospective, nonmonetary relief declaring [certain provisions of] the territorial Moratorium Act unconstitutional." (*See* Statement of Interest at 4.) If the stay is lifted as to the *Brigade* Plaintiffs, the Court may determine that the challenged provisions of the Moratorium Act are unconstitutional. But this will not require any change to the Executive Orders directing GDB not to pay its bondholders, nor will it require a diversion of resources from essential services.

When confronted with the simple reality that this is not a collections suit and the *Brigade* Plaintiffs are not seeking to cause GDB to resume paying near-term maturities, the Commonwealth attempts to write claims into Plaintiffs' complaint by "presuming" that Plaintiffs will later try to sue GDB for payment. (*See, e.g.*, Hr'g Tr., Sept. 23, at 144:14-18 (Abrams) ("Presumably, the creditors are looking—and maybe I have assumed too much—for relief from the stay . . . so that they can pursue remedies against the issuer."); Hr'g Tr., Sept. 23, at 223:19-25 (Abrams) ("I think it's natural to think that businesses and their lawyers are not incentivized just to challenge the constitutionality of laws . . . . The end point is then to use the result of that in order to get money later.").) This baseless conjecture only highlights that Plaintiffs are not seeking to compel payment on their bonds, and that the Commonwealth's argument that lifting the stay of this action will cause funds to be diverted to bondholder payments is based on a false premise.

Finally, while the Commonwealth devoted much time in its presentation to proving that the Commonwealth is facing extraordinarily difficult financial conditions, this testimony, too, is

irrelevant. (*See, e.g.*, Hr'g Tr., Sept. 23, at 79:21-87:1 (Rullán-Cabrera) (testifying regarding the mounting debts being incurred by the Commonwealth and its inability to pay such debts).) Plaintiffs do not dispute that the Commonwealth is facing extraordinary fiscal difficulties. Indeed, these very difficulties are the reason why Plaintiffs have agreed in principle to restructure GDB's debt at a very significant discount, why Plaintiffs have been willing to accept that discount to stabilize GDB until a Commonwealth-wide restructuring can be developed and executed, and why they seek this Court's guidance to facilitate restructuring negotiations.

B. The Burden of Lifting the Stay to Determine This Case Is Minimal and Unlikely to Engender Other Litigation

The Commonwealth next attempts to argue that lifting the stay of this action will engender additional litigation and require diversion of resources from governance to litigation. But the Commonwealth adduced no evidence suggesting that lifting the stay of this action would require more than a minimal expenditure of resources to finalize a brief already written or any reason to believe that the stay would alter other creditors' decisions to sue or refrain from suit. As the Court is fully aware, Plaintiffs in this action ask this Court to decide a purely legal issue: Whether the challenged provisions of the Moratorium Act are preempted by the Bankruptcy Code and PROMESA. The *Brigade* Plaintiffs' motion for summary judgment is nearly fully briefed—the Court stayed these actions a matter of hours before the Commonwealth's opposition was due. Any modest investment required to finalize and electronically file the opposition brief will cause the Commonwealth little distraction or expense. In fact, Ms. Rullán-Cabrera did not dispute this in her testimony, and Ms. Abrams fully admitted that to the extent opposing a motion for summary judgment imposed distraction and burden on the Commonwealth, "[t]he distraction and burden was already incurred." (*See* Hr'g Tr., Sept. 23, at 152:12-15 (Abrams); *see also* Hr'g Tr., Sept. 23, at 91:15-23 (Rullán-Cabrera).)

There is also no reason to fear the deluge of litigation that the Commonwealth imagines. This Court need only decide the constitutionality of the challenged Moratorium Act provisions once because doing so would resolve the issue across the Commonwealth's entire capital structure. As to the Commonwealth's fear that other creditors may try to have the stay lifted this Court will consider them as it does with every motion: on a case-by-case basis. On cross-examination, Ms. Abrams acknowledged this fact but stated that it "doesn't preclude the Court from also [lifting the stay] in other cases." (*See* Hr'g Tr., Sept. 23, at 142:12-17 (Abrams).) But whether this Court may or may not decide to lift the stay in other cases based on the facts of those other cases has no bearing on whether the Court should decide to exercise the discretion accorded by Congress to lift the stay in this case.

C. Lifting the Stay to Determine This Action Will Facilitate—Not Interfere with—the Operation of the Oversight Board

The Commonwealth's claim that this litigation will interfere with the PROMESA process and operation of the Oversight Board is equally baseless. At the outset, the Commonwealth has not articulated how the Court's decision regarding the constitutionality of the challenged provisions of the Moratorium Act would interfere with the Board's operation. Both Ms. Abrams and Mr. Arnold offered only bare assertions that lifting the stay "preempts" the Oversight Board. (*See* Hr'g Tr., Sept. 23, at 139:12-22 (Abrams); *see also* Hr'g Tr., Sept. 23, at 221:16-222:11 (Arnold).) That is certainly not the case, as only this Court may decide whether the challenged provisions of the Moratorium Act are constitutionally valid. However the Court may decide that issue, the Board will retain its full scope of rights and responsibilities with respect to the matters Congress delegated to it, including the review of the Commonwealth's fiscal plans, reviewing voluntary restructuring proposals, or developing restructuring plans for the Commonwealth and its entities. In reality, lifting the stay now will only facilitate the Oversight Board's work by

clarifying whether the framework for any restructuring can be based on the current priority structure specified by the Moratorium Act. *See supra* Part I.B.

D. Commonwealth Officials Have No Cognizable Interest in "Guidance" from Unlawful Provisions of the Moratorium Act

The Commonwealth finally asserts that the stay should remain in place because a decision invalidating parts of the Moratorium Act will deprive Commonwealth officials of "guidance" necessary to carry out their duties. Not so. PROMESA provides Commonwealth officials with a comprehensive set of rules regarding the treatment of the Commonwealth's public debt, premised on Congress's direction that the Commonwealth should not attempt to alter creditor rights and priorities retroactively, transfer funds among entities, or seek to legislate in areas fully occupied by the Bankruptcy Code and, now, PROMESA. In any event, to the extent Commonwealth officials are relying on unconstitutional provisions of the Moratorium Act for "guidance," it is all the more important that the status of those provisions of the Moratorium Act be adjudicated sooner rather than later to minimize the number of decisions and/or transfers that must be undone (at exponentially higher litigation costs and distraction to the Commonwealth than that which needs to be expended on the case at bar) once those portions of the Act are invalidated. The Commonwealth is not entitled to maintain an unconstitutional law in force just because the Commonwealth would like to continue relying on it for "guidance" without regard to its unconstitutionality.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' Motion and presented at the evidentiary hearing, the Court should issue an order granting relief from the stay and allowing Plaintiffs to continue litigating the constitutional claims of the Amended Complaint to a final judgment on the merits.

RESPECTFULLY SUBMITTED,

Dated: October 7, 2016
San Juan, Puerto Rico

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on October 7, 2016, I caused to be electronically filed the Plaintiffs' Reply in Support of Plaintiffs' Motion for a Determination That the PROMESA Stay Does Not Stay Plaintiffs' Constitutional Claims, or, in the Alternative, for Relief from the Stay with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 7, 2016
San Juan, Puerto Rico

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