

**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 al.*,

Defendants.

Civil Action No. 16-1610 (FAB)

NATIONAL PUBLIC FINANCE
GUARANTEE CORPORATION,

Plaintiff,

v.

ALEJANDRO GARCIA-PADILLA, *et al.*,

Defendants.

Civil Action No. 16-2101 (FAB)

DIONISIO TRIGO-GONZALEZ, *et al.*,

Plaintiffs,

v.

ALEJANDRO GARCIA-PADILLA, *et al.*,

Defendants.

Civil Action No. 16-2257 (FAB)

U.S. BANK TRUST NATIONAL
ASSOCIATION,

Plaintiff,

v.

THE COMMONWEALTH OF PUERTO
RICO, *et al.*,

Defendants.

Civil Action No. 16-2150 (FAB)

STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517,¹ the United States respectfully submits this Statement of Interest to urge the Court to narrowly construe Section 405(e)(2) of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. L. No. 114-187, 130 Stat. 549 (2016), which permits this Court to grant relief from the automatic stay of litigation imposed by PROMESA “for cause shown.” 48 U.S.C. § 2194(e)(2). Consistent with PROMESA’s purpose, the United States further urges the Court, in the absence of irreparable damage, to postpone granting any relief from the automatic stay until the Oversight Board—created to help address Puerto Rico’s fiscal crisis—is fully operational and in a position to determine whether to intervene in these cases.

BACKGROUND

I. PROMESA

As the Court is aware, PROMESA was enacted against the backdrop of the worst fiscal crisis in Puerto Rico’s history. *See* Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (“Moratorium Act”), Law No. 21 of 2016, at 1 (discussing Puerto Rico’s fiscal and economic crisis); *see generally* *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, 3:15-cv-03018, -- F. Supp. 3d --, 2016 WL 1183091, at *9 (D.P.R. Mar. 28, 2016), *aff’d sub nom.* 2016 WL 4447261 (1st Cir. Aug. 24, 2016). Puerto Rico is unable to both meet its crushing debt obligations and provide essential services to the 3.5 million Americans in Puerto Rico. *See* Moratorium Act at 1. The human costs to the people on the Island—in terms of access to health

¹ 28 U.S.C. § 517 provides that “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

care, education, electricity and basic public safety—are real. *See* the White House, *Puerto Rico Hill Update – Humanitarian Crisis*, 2 (Apr. 19, 2016), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Blog/Puerto%20Rico%20Humanitarian%20Crisis%20.pdf> (last accessed Sept. 21, 2016).

With strong bipartisan support, PROMESA was signed into law on June 30, 2016, 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.” PROMESA, § 405(m)(4), 48 U.S.C. § 2194(m)(4). Specifically, PROMESA establishes a seven-member Financial Oversight and Management Board (“Board” or “Oversight Board”) as “a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.” PROMESA, § 101(a), (b)(1), (e)(1)(A); 48 U.S.C. § 2121(a), (b)(1), (e)(1)(A). The Board is granted broad authority over the territory and its instrumentalities to ensure fiscal responsibility, and is empowered to, among other things, approve territorial and instrumentality fiscal plans and budgets (§§ 201-202); enforce budget and fiscal plan compliance (§§ 203-204); approve the territorial government’s issuance and guarantee of debts or modification or similar transactions with respect to its debt (§ 207); and file petitions to adjust debts through procedures similar to chapter 9 of the United States Bankruptcy Code (§§ 301-317). It may either designate a territorial instrumentality as an entity covered by PROMESA or exclude it from the requirements of PROMESA (§ 101(d)(1)(A), (d)(2)). Further, it may seek judicial enforcement of its authority to carry out its responsibilities under the Act (§ 104(k)) and intervene in any litigation filed against the territorial government (§ 217). The President appointed all seven Board members on August 31, 2016.

“[A] critical component of the legislation” is the automatic stay of all liability-related litigation against the Government of Puerto Rico and its related entities. H.R. Rep. No. 114-602, at 52 (2016); *see* PROMESA, § 405(b), 48 U.S.C. § 2194(b). Congress found that “an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving” Puerto Rico’s fiscal crisis. PROMESA, § 405(m)(5), 48 U.S.C. § 2194(m)(5). Specifically, the automatic stay is 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.” PROMESA, § 405(n)(2), 48 U.S.C. § 2194(n)(2). It also seeks to ensure that “all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority.” PROMESA, § 405(m)(5)(B), 28 U.S.C. § 2194(m)(5)(B). Moreover,

[t]he stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this Act to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.

PROMESA, § 405(m)(5)(A), 28 U.S.C. § 2194(m)(5)(A). Congress’s statutory findings and the context in which Congress enacted the law demonstrate the legislative intent to provide a reprieve to the Government of Puerto Rico as it struggles to pay for essential services. Thus, the automatic stay is designed to “preempt[] a rush to the courts by aggrieved creditors—an event that could increase the impact of and accelerate Puerto Rico’s debt crisis,” and to “ensure[] order during the initial few months of the Oversight Board’s existence, thereby allowing 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.

II. PLAINTIFFS' SUITS

The plaintiffs are bondholders or insurers of bonds issued by the Commonwealth of Puerto Rico or its related entities, and a trustee for bonds issued by the University of Puerto Rico. They challenge the constitutionality of the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (“Moratorium Act”), as amended, Law Nos. 21 and 40 of 2016. The Puerto Rico Legislature enacted the Moratorium Act in April 2016, because “depleted resources and strained liquidity threaten[ed] to bind the Commonwealth to a choice between honoring its commitments to bondholders or continuing to provide the residents of Puerto Rico with essential services.” Moratorium Act, Law No. 21 at 1. The Moratorium Act empowers the Governor to declare, through an executive order, any government entity to be in a state of emergency and a moratorium on the payment of enumerated obligations until January 31, 2017. Moratorium Act, §§ 103(m), 201(a). As amended, the Act further provides that if the Commonwealth’s fiscal agent, the Government Development Bank, were to be placed into receivership, deposits by savings and credit cooperatives and banks are to be paid first. Law No. 40 of 2016. The Governor has since issued several executive orders under the Moratorium Act, some directly affecting the plaintiffs according to their complaints.

The plaintiffs in these four cases now seek relief from the automatic stay, alleging that they can show “cause” under § 405(e)(2) of PROMESA. The *Brigade, Trigo-Gonzalez*, and *National Public Finance Guarantee Corporation* plaintiffs argue that they should be granted relief from the automatic stay because they seek only prospective, nonmonetary relief declaring the territorial Moratorium Act unconstitutional. *See* Civil No. 16-2101, Docket No. 36 at 9; Civil No. 16-2257, Docket No. 11 at 3-4; Civil No. 16-1610, Docket No. 87, 5-9. The *U.S. Bank Trust National Association* plaintiff, a trustee for bonds issued by the University of Puerto Rico,

argues that the Governor’s executive order regarding the University of Puerto Rico renders the trustee without adequate protection of its collateral (Civil No. 16-2150, Docket No. 3 at 11-12) and is, in any event, preempted by PROMESA (*id.* at 18-19).

DISCUSSION

The United States has a strong interest in ensuring that PROMESA’s statutory purpose—stemming the downward spiral of Puerto Rico’s fiscal and economic condition—is not vitiated by a broad application of the “for cause” provision of PROMESA. The United States recognizes that the Court has discretion in determining whether “cause” exists to grant relief from the automatic stay imposed by Section 405(e)(2) of PROMESA, *cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 847 (1st Cir. 1987); *In re Unanue-Casal*, 159 B.R. 90, 94 (D.P.R. 1993), and in fashioning the appropriate relief from the automatic stay, *cf. C & A, S.E. v. Puerto Rico Solid Waste Mgmt. Auth.*, 369 B.R. 87, 94 (D.P.R. 2007). The United States nevertheless expresses its view that, given the unique context of a Federal statute that provides a comprehensive framework for Puerto Rico to restructure its debts in a fair and orderly process (*see* PROMESA §§ 301-307, 48 U.S.C. §§ 2161-2177), as well as the establishment of an independent Oversight Board to ensure fiscal responsibility (PROMESA, titles I-II), relief from the automatic stay at this juncture could frustrate Congress’s intent in designing PROMESA.

As the Supreme Court has said, “the meaning of statutory language, plain or not, depends on context.” *Holloway v. United States*, 526 U.S. 1, 7 (1999) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and *King v. St. Vincent’s Hospital*, 502 U.S. 215, 221 (1991)). Statutory text must be considered “not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose.’” *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)). *See also King v. Burwell*, 135 S. Ct. 2480,

2496 (2015) (relying on statutory context and structure to “avoid the type of calamitous result that Congress plainly meant to avoid”).

In light of the unprecedented nature of PROMESA and the important purposes sought to be served by the automatic stay, a broad interpretation of the “for cause” provision would “frustrate Congress’ manifest purpose” in enacting PROMESA. *United States v. Hayes*, 555 U.S. 415, 427 (2009). Accordingly, the United States urges this Court to construe the “for cause” provision as narrowly as possible in determining whether “cause” exists here.

Circumstances typically found to constitute “cause” in an ordinary bankruptcy proceeding may not be sufficient to establish “cause” in the extraordinary posture of these cases before the Court.

Specifically, in determining whether “cause” exists, this Court should consider the impact of its decision on the 3.5 million Americans living in Puerto Rico, whom PROMESA ultimately intends to benefit (*see* PROMESA, § 405(n)(5), 48 U.S.C. § 2194(n)(5)). If Puerto Rico’s revenues are diverted from essential services for the health, safety, and welfare of the inhabitants of Puerto Rico to payments of debt service, the human cost of such a decision could be significant. This Court should also consider 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. In considering the harm to the plaintiffs, this Court should take into account the fact 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 obligations.” PROMESA, § 405(k), 48 U.S.C. § 2194(k). Moreover, PROMESA requires the Government of Puerto Rico to make interest payments on outstanding indebtedness during the length of the automatic stay, if the Oversight Board, in its sole discretion, determines that such payments are feasible. PROMESA, § 405(l), 48 U.S.C. § 2194(l). Section 407 of PROMESA

further protects creditors from unlawful inter-debtor transfers of property of Puerto Rico's instrumentalities that occurred while the Oversight Board is in existence by authorizing suit in this Court after the expiration or lifting of the Section 405 automatic stay (unless a stay under the title III of PROMESA is in effect). PROMESA, § 407, 48 U.S.C. § 2195.

To the extent the plaintiffs are challenging the Moratorium Act and the executive orders issued thereunder, time is needed to determine whether the plaintiffs will in fact be harmed. Indeed, with certain exceptions, title III of PROMESA 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), 48 U.S.C. § 2163(3). Furthermore, it 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. PROMESA, § 303(3), 48 U.S.C. § 2163(3). The Oversight Board may very well approve fiscal plans that supplant the executive orders issued under the Moratorium Act. PROMESA, § 201(d)(2), 48 U.S.C. § 2141(d)(2). The Board may also exclude certain Puerto Rico instrumentalities and their debts from the scope of PROMESA. PROMESA, § 101(d)(2), 48 U.S.C. § 2121(d)(2). And, the Board may review and rescind certain fund transfers undertaken by the Puerto Rico Government after enactment of PROMESA. PROMESA, §§ 204(c)(3), 407, 48 U.S.C. §§ 2144(c)(3), 2195.

In considering whether "cause" exists to grant relief from the automatic stay under section 405(e)(2) of PROMESA, the Court should also give significant weight to the Oversight Board's interests. As Congress made clear in PROMESA, another important purpose of the automatic stay is to allow the Oversight Board an opportunity to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation. *See* PROMESA,

§§ 212(a), 405(m)(5)(A), 48 U.S.C. §§ 2152(a), 2194(m)(5)(A). The automatic stay seeks to ensure order while the Oversight Board establishes its foundational structure so that the Board may begin its monumental task of tackling the debt crisis. The Board was only fully constituted on August 31, 2016, and to our knowledge, it has yet to complete a variety of statutorily required tasks that will precede full operational activities. For these reasons, absent a plaintiff's showing of irreparable damage (*cf.* PROMESA, § 405(g), 48 U.S.C. § 2194(g)), the United States urges this Court to narrowly construe Section 405(e)(2), consistent with its statutory purpose, and to postpone granting any relief from the automatic stay until the Oversight Board is operational and in a position to determine whether to intervene in this litigation.

CONCLUSION

For the reasons set forth above, the United States respectfully urges this Court to narrowly interpret section 405(e)(2) of PROMESA and to postpone granting any relief until such time as the Oversight Board can determine whether it wishes to intervene in this litigation.

Dated: September 21, 2016

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

CARLOTTA WELLS
Assistant Director
Federal Programs Branch

/s/ Jean Lin
JEAN LIN (USDC-PR No. G02514)
Special Counsel
U.S. Department of Justice, Civil Division,
Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Phone: (202) 514-3716

Fax: (202) 616-8202

Email: jean.lin@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2016, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Jean Lin
JEAN LIN