

**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 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)

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD'S MOTION FOR LEAVE  
TO INTERVENE IN THESE CONSOLIDATED ACTIONS**

**TO THE HONORABLE COURT:**

COMES NOW the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), through its undersigned attorneys, and respectfully alleges and prays:

**PRELIMINARY STATEMENT**

The Oversight Board seeks to intervene in these four actions in order to make known its views on the Plaintiffs' pending motions to lift the automatic stay imposed under Section 405 of PROMESA. Section 212 of PROMESA provides the Oversight Board the unconditional right to intervene in any action against the Government of Puerto Rico or any of its covered territorial instrumentalities. As these consolidated actions name the Commonwealth, its public officials, and multiple covered territorial instrumentalities, the Oversight Board is entitled to intervene as of right in each of these consolidated actions.

To the extent the Court holds that Section 212 of PROMESA does not extend to *National* and *Brigade* because those actions name only government officials (and not the Commonwealth or a covered instrumentality), the Court should grant the Oversight Board leave to intervene in those actions because the Oversight Board's interests under PROMESA could be impaired without its participation, and because the issues being decided in *National* and *Brigade* unquestionably share common issues of fact and law with *Trigo-Gonzalez* and *U.S. Bank Trust*.

**BACKGROUND**

By Orders dated July 20, 2016, and September 1, 2016, the Court ordered that these four actions be consolidated for purposes of determining whether the automatic stay should be lifted or modified. *See Brigade*, Dkt. No. 83; *U.S. Bank Trust*, Dkt. Nos. 19, 23–24.

On October 7, 2016, the Oversight Board filed its motion requesting additional time to file a response to the Plaintiffs' lift stay motions and for leave to intervene (the "Extension Motion") in each of these consolidated actions. *See, e.g., Brigade*, Dkt. No. 126. By Order dated October 13, 2016, the Court granted the Extension Motion, directing that any motion to intervene be filed by October 21, 2016. *Id.*, Dkt. No. 128.

## ARGUMENT

### I. THE OVERSIGHT BOARD IS ENTITLED TO INTERVENE IN EACH OF THESE CONSOLIDATED ACTIONS

#### A. Intervention as of Right

The Oversight Board is entitled to intervene in these consolidated actions as of right. Rule 24(a) of the Federal Rules of Civil Procedure provides that a party may intervene as "of right," if the party (i) "is given an unconditional right to intervene by a federal statute" or (ii) "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). Here, the Oversight Board is entitled to intervene under either test.

#### 1. The Oversight Board Is Entitled Intervene as of Right Pursuant to Section 212 of PROMESA

Section 212 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." *See* PROMESA §§ 5(7), 5(18), 101(d)(1)(A), 212. PROMESA does not specifically state whether the Oversight Board's authority under Section 212 extends to actions where only public officials – as opposed to the Commonwealth or its instrumentalities – are named as defendants. However, reading the statute as a whole leads to the inescapable conclusion that Congress intended Section 212 to cover actions commenced against government

officials acting in their official capacity. To hold otherwise would allow plaintiffs to artfully plead around Section 212 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.<sup>1</sup> Here, because these consolidated actions name the Commonwealth, multiple instrumentalities,<sup>2</sup> and multiple public officials acting in their official capacities,<sup>3</sup> the Oversight Board is entitled to intervene as of right in each of these consolidated actions.

**2. The Oversight Board Is Entitled to Intervene as of Right in *Brigade* and *National* to Protect its Interests**

The Oversight Board is also entitled to intervene in each of these consolidated actions because (i) it has an interest relating to the transaction (lifting the automatic stay) that is the subject matter of these actions; (ii) lifting the stay could impair the Oversight Board's ability to perform its function; and (iii) the other parties to these litigations are not likely to represent the Oversight Board's interest adequately. *See* Fed. R. Civ. P. 24(a)(2).

Congress created the Oversight Board specifically to address the Commonwealth's well-documented debt crisis and to help facilitate the Commonwealth's reentry

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<sup>1</sup> Indeed, the Plaintiffs in *Brigade* and *Trio-Gonzalez* seek substantially identical relief with respect to the receivership provisions related to the Government Development Bank for Puerto Rico (the "GDB"). Yet in *Brigade*, the Plaintiffs name only public officials (the original Complaint named GDB); in *Trigo-Gonzalez*, the Plaintiffs name GDB in addition to public officials. *Compare Brigade*, Dkt. No. 52 with *Trigo-Gonzalez*, Dkt. No. 1.

<sup>2</sup> The Government Development Bank of Puerto Rico, the Puerto Rico Public Finance Corporation, and the Puerto Rico Fiscal Agency and Financial Advisory Authority are named in *Trigo-Gonzalez*. The Commonwealth of Puerto Rico and the University of Puerto Rico are named in *U.S. Bank Trust*.

<sup>3</sup> The Governor, the President of the University of Puerto Rico, the Secretary of the Department of Treasury, the President of the Government Development Bank, the Receiver of the Government Development Bank, the Executive Director of the Puerto Rico Fiscal Agency and Financial Advisory Authority, the Director of the Puerto Rico Office of Management and Budget, and the President of the Puerto Rico Public Finance Corporation are named in the consolidated actions.

to public capital markets, and, at the same time, imposed the automatic stay to (among other things) “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). If the Court lifts the stay now, before the Oversight Board has become fully operational, it will interfere with the Oversight Board’s ability to perform its congressional mandate. The Oversight Board brings a unique perspective to the lift-stay dispute that cannot be adequately represented by the parties to these actions. Accordingly, the Oversight Board is entitled to intervene in *National* and *Brigade* as of right.

**B. Permissive Abstention**

Alternatively, to the extent the Court finds that the Oversight Board is not entitled to intervene in *National* and *Brigade* as of right, the Court should grant the Oversight Board permissive leave to intervene in those actions pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure because the Oversight Board “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). As the Court recognized when it consolidated these four actions for trial, each of these actions addresses identical factual and legal issues: Should the PROMESA stay be lifted to allow Plaintiffs to pursue their constitutional claims? The Oversight Board is entitled to intervene as of right in two of the four actions, and it would make no sense to prohibit the Oversight Board from participating in the other two actions because they name public officials as opposed to the Commonwealth or its instrumentalities. The Oversight Board’s position is equally applicable to each of the four consolidated actions.

Pursuant to Rule 24(c) of the Federal Rules of Civil Procedures, a copy of the Oversight Board’s Opposition to Plaintiffs’ Motions to Lift the Automatic Stay to be filed in each of the consolidated actions is attached as Exhibit A.

**CONCLUSION**

For the foregoing reasons, the Court should grant (i) leave to the Oversight Board to intervene in each of these consolidated actions, and (ii) such other and further relief as the Court deems just and proper.

**WE HEREBY CERTIFY** that on October 21, 2016, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico this 21st day of October, 2016.

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**EXHIBIT A**

[Oversight Board's Opposition]



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DIONISIO TRIGO-GONZALEZ, *et al.*,

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-v-

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*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)

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD'S OPPOSITION TO  
PLAINTIFFS' MOTIONS TO LIFT THE AUTOMATIC STAY**

**TO THE HONORABLE COURT:**

COMES NOW the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), through its undersigned attorneys, and respectfully alleges and prays:

**PRELIMINARY STATEMENT**

The Oversight Board seeks to intervene in these four consolidated actions in order to make known its views on the Plaintiffs' pending motions to lift the automatic stay imposed under Section 405 of PROMESA. The Oversight Board's paramount concern is that the motions be resolved in a way that best promotes PROMESA's goals, and the Oversight Board's mandate, to negotiate and approve fiscal plans to restructure Puerto Rico's outstanding public debt and to facilitate the Commonwealth's reentry into the public capital marketplace. The Oversight Board believes that to achieve those goals the stay must remain in place.

The Oversight Board 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. It believes that ongoing litigation is a major distraction that interferes with the Oversight Board's congressional mandate and that all parties' time and resources would be better spent negotiating the fiscal plans required by PROMESA. It does not appear to the Oversight Board that any of the Plaintiffs would suffer irreparable or even material harm during the pendency of the stay: whatever damages the Plaintiffs incur would be quantifiable and could be dealt with as part of the negotiation process or in future restructuring proceedings under PROMESA. By contrast, forcing the Commonwealth to respond to multiple litigations (not just these four, but at least eight others as well) is a significant expense to the Commonwealth and a burdensome distraction to the Governor and the other public officials whose time would be better

spent working with the Oversight Board to develop fiscal plans for the Commonwealth and its instrumentalities. And while it is possible that the dire consequences predicted by the Commonwealth if the stay were lifted and the Moratorium Act and Executive Orders were struck down might not materialize, the uncertainty and the magnitude of the potential disruption tips the scale in favor of leaving the stay in place. The Court should deny the lift stay motions since on balance, the monetary harm to the Plaintiffs caused by leaving the stay in place is far outweighed by the harm that will befall the Commonwealth and the disruptive effect that ongoing litigation will have on the Oversight Board's monumental task.

In order to ensure that the Oversight Board is able to realize the full benefit of the PROMESA stay, the Oversight Board requests that the Court include in its order denying the lift stay motions the following requirements: (i) the Commonwealth must account for the funds over which it has already exercised control pursuant to the Moratorium Act and the Executive Orders, for future revenues and expenditures, and for all transfers to and from the Government Development Bank ("GDB") since April 6, 2016; (ii) the Commonwealth must give the Oversight Board immediate and unfettered access to the Commonwealth's financial officials and advisors; (iii) the Commonwealth must provide the Oversight Board with proposed cash management guidelines and procedures, including for its prioritization of payments, no later than October 30, 2016; (iv) the Commonwealth must immediately begin rolling production of the information requested by the Oversight Board on October 5 and 20, 2016, with such production to be completed no later than October 30, 2016; and (v) the Commonwealth must provide the Oversight Board with an information production protocol that will establish procedures and timetables for requesting and producing information, sharing information and maintaining its confidentiality as appropriate, and resolving any disputes over the production of information.

Each of these requirements is designed to increase transparency between the Commonwealth and its creditors and to enable negotiations between the major parties in interest – which have been stagnant since litigation was commenced – to resume.

The Oversight Board also believes that during the continued stay, the Governor should agree not to execute any additional Executive Orders relating to the Moratorium Act or PROMESA absent Oversight Board approval. The Oversight Board suggests that the parties return to the Court in 30 days to report on the status of the Oversight Board’s progress. All parties would reserve all of their rights with respect to their claims, liens, and priorities and their rights under PROMESA. In the event that circumstances change, the Plaintiffs should be allowed to renew their requests to lift the stay on an expedited basis.

### **BACKGROUND**

#### **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 representatives) 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.
- Authorizes the Governor to issue executive orders (i) declaring a “state of emergency” with respect to the Commonwealth or its instrumentalities, and (ii) 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).

- Permits the Governor to (i) “expropriat[e] property or rights in property interests” and (ii) 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).
- Suspends the operation of “ipso facto” clauses and stays recovery actions against the Commonwealth and its instrumentalities. *Id.* § 201(b).
- Provides that violation of the stay imposed under Section 201(b) is punishable by contempt of court. *Id.* § 201(c).
- Establishes new receivership provisions with respect to the GDB.

*Id.* §§ 301, 302, 401, 501, 502.

Pursuant to the authority granted to him under the Moratorium Act, the Governor has issued at least five executive orders (each an “Executive Order” and together, the “Executive Orders”) that are challenged in these consolidated actions:

**1. Executive Order 10-2016 (“EO-10”)**

Pursuant to EO-10, the Governor declared a state of emergency with respect to the GDB (EO-10 ¶ 1), imposed limits on withdrawals by GDB depositors and transfers to GDB creditors (*id.* ¶ 8), and suspended payment of any obligations guaranteed by the GDB. (*Id.* ¶ 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 (i) deposits, and (ii) interest obligations that were not required to be paid in cash. (EO-14 ¶ 3.)

**3. Executive Order 18-2016 (“EO-18”)**

Pursuant to EO-18, the Governor declared a state of emergency with respect to the Puerto Rico Highways and Transportation Authority (“PRHTA”) (EO-18 ¶ 1), and suspended the PRHTA’s obligation to transfer toll revenues pledged to holders of PRHTA bonds. (*Id.* ¶ 3.)

**4. Executive Order 30-2016 (“EO-30”)**

Pursuant to EO-30, the Governor 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 (EO-30 ¶ 1), extended the emergency period with respect to the PRHTA to the end of the covered period, and suspended the PRHTA’s obligation to make certain specified debt payments. (*Id.* ¶ 2.)

**5. Executive Order 31-2016 (“EO-31”)**

Pursuant to EO-31, the Governor declared a state of emergency with respect to the University of Puerto Rico (“UPR”) and the Puerto Rico Public Finance Corporation (“PRPFC”) (EO-31 ¶¶ 9, 10), continued the suspension of the PRHTA’s obligation to transfer pledged toll revenues to the “Fiscal Agent” (*id.* ¶ 5), and suspended UPR’s obligations to make principal and interest payments and to transfer revenues pledged to holders of UPR bonds. (*Id.* ¶ 9.)

**B. PROMESA**

On June 30, 2016, the President of the United States signed PROMESA into law. As is relevant to the issues currently before the Court, PROMESA did three important things relevant to the pending lift stay motions:

First, PROMESA established the Oversight Board to help Puerto Rico “achieve fiscal responsibility and access to the capital markets.” PROMESA § 101(a). As discussed more fully in other submissions to the Court, under PROMESA, the Oversight Board is granted broad authority over Puerto Rico and its instrumentalities to ensure fiscal responsibility, and is empowered to, among other things, approve territorial and instrumentality fiscal plans and budgets, *id.* §§ 201–202; enforce budget and fiscal plan compliance, *id.* §§ 203–204; approve the territorial government’s issuance and guarantee of debts or modifications or similar transactions with respect to its debts, *id.* § 207; and file petitions to adjust debts through procedures similar to chapter 9 of the United States Bankruptcy Code, *id.* §§ 301–317. The Oversight Board is authorized to decide whether a territorial instrumentality should be covered by PROMESA or excluded from its requirements. *Id.* §§ 101(d)(1)(A), (d)(2).

Second, PROMESA authorized the Oversight Board to intervene as of right in any litigation filed against the Government of Puerto Rico or any “covered territorial instrumentality.” *Id.* §§ 5(7), 5(18), 101(d)(1)(A), 212.

Third, PROMESA stayed litigation against the Commonwealth, any covered instrumentalities, and any elected and appointed officials, directors, officers or employees acting in their official capacities on behalf of the Government of Puerto Rico. *Id.* §§ 405(b)(1), (i)(1).

### **C. The Oversight Board**

As the Court has previously observed, PROMESA envisioned that the Oversight Board would be fully appointed by September 15, 2016, and fully operational sometime thereafter. *Brigade*, Dkt. No. 99 (citing PROMESA §§ 101(e)(2)(G), (h)). In fact, the President appointed seven members to the Oversight Board on August 31, 2016. (*See Brigade*, Dkt. No. 126-1, Declaration of Jose Carrión III, dated October 7, 2016 (“Carrión Decl.”) ¶ 3.)

Since their appointment on August 31, 2016, the seven members of the Oversight Board have held telephonic and in-person meetings to address threshold organizational issues and to educate themselves regarding the issues facing Puerto Rico and its instrumentalities. Members of the Oversight Board have also met multiple times in Washington, D.C. with the United States Department of the Treasury to receive technical assistance briefings. (*Id.* ¶¶ 4–6.)

On September 30, 2016, the Oversight Board held its first public meeting, during which it (i) elected José Carrión III as Chair; (ii) adopted written bylaws; (iii) made its initial designation of covered instrumentalities under PROMESA, including multiple defendants in these consolidated actions; (iv) requested a Fiscal Plan from the Governor; (v) established a process for the hiring of an Executive Director and other key personnel, including a Revitalization Coordinator and General Counsel; and (vi) authorized the Chair to contract for services needed to organize, support and carry out the responsibilities required of the Oversight Board, open bank accounts, sign leases, sign contracts, implement reimbursement policies and conduct the other official business of the Oversight Board. (*Id.* ¶¶ 7–8.)

On October 14, 2016, the Oversight Board held its second public meeting, during which the Governor presented his first Fiscal Plan, which the Oversight Board has begun to review. During the meeting, the Chair of the Oversight Board also provided an update to interested parties, and the Oversight Board addressed guidelines for covered territorial instrumentalities and requested additional fiscal plans for various covered entities.<sup>1</sup>

On October 7, 2016, the Oversight Board filed its motion requesting an extension of time to file a response to the lift stay motions and for leave to intervene (the “Extension

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<sup>1</sup> Copies of the agenda for the October 14, 2016 meeting, the Governor’s Fiscal Plan, and other key documents, as well as recordings of both of the Oversight Board’s public meetings are available at the Oversight Board’s website: [www.oversightboard.pr.gov](http://www.oversightboard.pr.gov).



Motion”) in each of these actions. *See, e.g., Brigade*, Dkt. No. 126. No objections were filed, and on October 13, 2016, the Court granted the Extension Motion and directed the Oversight Board to file its motion to intervene by October 21, 2016. *Id.*, Dkt. No. 128.

Since filing the Extension Motion, the Oversight Board – through its counsel – has begun to meet with representatives of the parties to these consolidated actions, including the Commonwealth,<sup>2</sup> and has made information requests of the Governor and Commonwealth officials and advisors.<sup>3</sup> The Oversight Board is working with the Commonwealth to establish an information sharing and expense review protocol applicable to all covered instrumentalities and it expects the flow of information and expense review process to begin shortly.

#### **D. The Consolidated Actions**

The Plaintiffs in these consolidated cases are bondholders, a trustee for bondholders, and an insurer of bonds issued by the Commonwealth or its instrumentalities, who challenge the constitutionality of certain provisions of the Moratorium Act and the Executive Orders. Specifically, the Plaintiffs claim that certain provisions of the Moratorium Act and the Executive Orders (i) improperly deprive Plaintiffs of contractual and constitutional rights and security interests; (ii) improperly reorder priorities among creditors; (iii) unfairly discriminate

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<sup>2</sup> The Oversight Board is also aware of at least ten additional actions commenced against the Commonwealth, its covered instrumentalities, and its public officials. They are: *Assured Guar. Corp. v. García Padilla*, Case No. 16-1037 (D.P.R.); *Fin. Guar. Ins. Co. v. García Padilla*, Case No. 16-1095 (D.P.R.); *Ambac Assurance Corp. v. Puerto Rico Highways and Transp. Auth.*, Case No. 16-1893 (D.P.R.); *Peaje Investments LLC v. García Padilla*, Case No. 16-2365 (D.P.R.); *Lex Claims, LLC v. García Padilla*, Case No. 16-2374 (D.P.R.); *Assured Guar. Corp. v. Puerto Rico*, Case No. 16-2384 (D.P.R.); *Voya Institutional Trust Co. v. University of Puerto Rico*, Case No. 16-2519 (D.P.R.); *Altair Global Credit Opportunities Fund (A), LLC v. García Padilla*, Case No. 16-2696 (D.P.R.); *Scotiabank de Puerto Rico v. García Padilla*, Case No. 16-2736 (D.P.R.); and *Jacana Holdings I LLC v. Puerto Rico*, Case No. 16-4702 (S.D.N.Y.). The Oversight Board understands that the Court has scheduled a consolidated hearing in the *Peaje Investments*, *Assured Guaranty Corp.* (Case No. 16-2384), and *Altair Global Credit Opportunities Fund* actions for November 3, 2016. *See* Case No. 16-2696, Dkt. No. 27. The Oversight Board intends to meet with the parties to these actions, and believes that any lift stay motions in these actions should be resolved in the same manner as the Oversight Board proposes here.

<sup>3</sup> On October 5 and 20, 2016, the Oversight Board sent letters to the Governor requesting financial information relating to the Commonwealth. Copies of the letters are attached as Exhibits A and B.

among creditors with similar priorities; (iv) attempt to impose a debt restructuring on creditors without their consent; and (iv) deprive Plaintiffs of their right to challenge the Moratorium Act and Executive Orders in federal court. *See Brigade*, Dkt. No. 52 ¶¶ 3–4; *National*, Dkt. No. 1 ¶¶ 1–7; *Trigo-Gonzalez*, Dkt. No. 1 at 2–3; *U.S Bank Trust*, Dkt. No. 1 ¶ 1–11.

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

- 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 301(3) of PROMESA; and
- An injunction prohibiting Defendants from enforcing the challenged provisions of the Moratorium Act and the Executive Orders.

*See Brigade*, Dkt. No. 52 at 27–32; *National*, Dkt. No. 1 at 27–32; *Trigo-Gonzalez*, Dkt. No. 1 at 14; *U.S Bank Trust*, Dkt. No. 1 at 27–35.

The Oversight Board understands that the Plaintiffs in *Brigade*, *Trigo-Gonzalez*, and *National* seek only prospective, non-monetary relief declaring that the Moratorium Act and Executive Orders are unconstitutional. *See, e.g., U.S. Bank Trust*, Dkt. No. 45 at 4. The Plaintiff in *U.S. Bank Trust* also seeks an injunction requiring UPR to transfer specified “Pledged

Revenues” to U.S. Bank Trust to be held in a reserve account for application to principal and interest payments owed to bondholders as they become due. *Id.*; *U.S. Bank Trust*, Dkt. No. 2.

**E. The Lift Stay Motions**

The Plaintiffs in *Brigade* ask the Court to lift the stay and decide whether Sections 105, 201(b), 201(c), 203(b)(i), 203(f), 301, 302, and 401 of the Moratorium Act are preempted by the Bankruptcy Code and PROMESA. *Brigade*, Dkt. No. 129 at 2, 13.

The Plaintiff in *National* claims irreparable harm and seeks to lift the automatic stay so that it can pursue its constitutional challenges to Sections 201 and 202 of the Moratorium Act, which suspend the transfer of pledged revenues and payment of principal and interest, reorder priorities among creditors, impair bondholders’ rights, and stay litigation against the Commonwealth and its instrumentalities. *National*, Dkt. No. 1 at 27–32, Dkt. No. 130 at 2.

The Plaintiffs in *Trigo-Gonzalez* claim they are suffering irreparable harm as a result of, among other things, provisions in the Moratorium Act that would allow the GDB and the PRPFC to deplete assets that would otherwise be available to holders of GDB and PRPFC bonds, and seek relief from the automatic stay to pursue their claims that Sections 105, 201, 203, 301, 302 and 401 of the Moratorium Act and the related Executive Orders are unconstitutional and preempted by the Bankruptcy Code and the Constitutions of the United States and Puerto Rico. *Trigo-Gonzalez*, Dkt. No. 1 at 14–15, Dkt. No. 52 at 2–3.

Finally, the Plaintiff in *U.S. Bank Trust* claims that the Moratorium Act and EO-31 – which suspended UPR’s obligation to transfer student tuition pledged to U.S. Bank Trust on behalf of holders of UPR bonds – are causing it irreparable harm. *U.S. Bank Trust*, Dkt. No. 3 at 14, Dkt. No. 57 at 4–6, 13–14. In addition to seeking relief from the automatic stay to pursue its constitutional claims, U.S. Bank Trust seeks entry of a preliminary injunction requiring UPR

to resume transferring pledged revenue (student tuition) to the reserve account in accordance with the governing documents. *U.S. Bank Trust*, Dkt. No. 3 at 14, Dkt. No. 57 at 4–6, 13–14.

On September 22 and September 23, 2016, the Court held a consolidated evidentiary hearing. On October 7, 2016, the parties filed their post-trial briefs.

## **ARGUMENT**

### **I. THE COURT SHOULD DENY THE LIFT STAY MOTIONS**

The Court should deny the lift stay motions and defer resolution of the Plaintiffs’ preemption and constitutional challenges. Lifting the stay would divert the attention of the Oversight Board and the Commonwealth away from the fiscal plan negotiation and certification process as well as the other tasks assigned to the Oversight Board under PROMESA, and has the potential to have a severe adverse impact on the Commonwealth. On the other hand, continuing the stay would allow time for the development of protocols for the sharing of information and for review of governmental expenses and generally increase transparency for the Commonwealth, creditors and other parties in interest. On balance, the benefits of keeping the stay in place far outweigh any potential harm to the Plaintiffs over the next four months.

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.” PROMESA § 405(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.” *Id.* § 405(n)(2).

PROMESA authorizes the Court, after notice and a hearing, to grant relief from the automatic stay “for cause shown.” PROMESA § 405(e)(2). PROMESA – like the Bankruptcy Code provision on which it is based (11 U.S.C. § 362) – does not define cause, but “generally speaking, ‘cause’ is said to exist when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor or the debtor’s estate if the stay is lifted.” *Peerless Ins. Co. v. Rivera*, 208 B.R. 313, 315 (D.R.I. 1997). The determination of whether cause is shown is left to the court’s discretion. *See, e.g., Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 303–304 (5th Cir. 2005) (bankruptcy courts have “broad discretion to lift stays” and “flexibility to address specific exigencies on a case-by-case basis”). In this District, bankruptcy courts have considered a variety of factors including “the impact of the stay on the parties” and “the balance of hurt.” *See, e.g., C&A, S.E. v. P.R. Solid Waste Mgmt. Auth.*, 369 B.R. 87, 94–95 (D.P.R. 2007).

The unprecedented fiscal crisis facing the Commonwealth, and Congress’ clear intention in staying litigation against the Commonwealth, its instrumentalities, and its public officials for a short period of time to allow for a “breathing spell” are well documented and not in dispute. *See* PROMESA §§ 405(m), (n). The Oversight Board believes that the Commonwealth’s limited resources are better spent working with the Oversight Board and helping the Oversight Board begin its monumental tasks of negotiating fiscal plans and ensuring that Puerto Rico regains access to capital markets, rather than litigating these four cases, the other eight related cases the Commonwealth is currently defending, and the additional cases that will likely follow in the event the stay is lifted. The Commonwealth introduced testimony at the lift stay hearing outlining the severe adverse impact that it believes lifting the stay and deciding the merits of the parties’ claims could have on the Commonwealth and its ability to function, and

demonstrating that even without resolution of the constitutional issues, negotiations are possible. *See* 9/22/16 Hrg. Tr. 198; 9/23/16 Hrg. Tr. 87–89, 107–09, 126, 136–40, 222–25.

By contrast, the Plaintiffs’ claims of irreparable harm appear to be overstated. The damage to revenue bond holders would not be permanent or “irreparable” – currently-due payments would not be made now, but the perpetual revenue streams that secure their claims would still be available for future payments under yet-to-be negotiated fiscal plans or in future proceedings under PROMESA. The Court should deny the lift stay motions since on balance, the monetary harm that leaving the stay in place would cause to the Plaintiffs is far outweighed by the harm that lifting the stay would cause to the Commonwealth and by the benefit to the Oversight Board of it being able to concentrate on fiscal plans and capital market strategy instead of on multiple litigations.

In order to ensure that continuation of the stay does not interfere with the Oversight Board’s congressional mandate and to make sure that the Oversight Board is able to get as much done as possible during the short duration of the stay, the Oversight Board requests that the Court include in its order denying the lift stay motions the following requirements, which the Oversight Board believes will alleviate some of the Plaintiffs’ concerns and, at the same time, bring about much needed transparency and facilitate negotiation with creditors and of required fiscal plans:

- The Commonwealth must account for (i) all funds that are subject to creditors’ security interests (“Security Interest Funds”) and over which it has exercised control pursuant to the Moratorium Act and Executive Orders (“Intercepted Funds”), (ii) future revenues and expenditures, and (iii) all transfers to and from the GDB since April 6, 2016;

- Any reserve funds held by creditors pursuant to their bond indentures and other governing documents should be available for debt service payments as they become due and as is provided for in the governing agreements, provided, however, that creditors must account for any payments made out of reserve funds;
- The Commonwealth must immediately begin rolling production of information requested by the Oversight Board on October 5 and 20, 2016, with such production to be completed no later than October 30, 2016;
- The Commonwealth must provide the Oversight Board the guidelines and procedures and priorities for payments it is using to make disbursements by October 30, 2016;
- The Commonwealth may continue to use the Security Interest Funds (including the Intercepted Funds) for “essential services” and for categories of other government expenses;
- The Oversight Board must be given immediate unfettered access to the Commonwealth’s financial officials and advisors; and
- The Commonwealth must provide to the Oversight Board an information sharing protocol that will establish, among other things, procedures and timetables for requesting and producing information, sharing information and maintaining its confidentiality as appropriate, and resolving any disputes.

The Oversight Board requests that the Court’s order make clear that all parties’ rights with respect to their claims, liens, and priorities and their rights under PROMESA are reserved. The Oversight Board suggests that the Court schedule a hearing in approximately 30 days at which time the parties will report to the Court regarding their progress. Finally, the Oversight Board

believes that the Governor should agree not to execute any new executive orders relating to the Moratorium Act or PROMESA during the continuation of the stay.

In the interim, the Oversight Board would endeavor to open a dialogue with the Commonwealth and all creditors, including the Plaintiffs in these actions and in the other actions pending against the Commonwealth, its instrumentalities, and their officials. The Oversight Board believes that its suggested approach appropriately balances the harm the Plaintiffs might suffer (money damages that can be calculated) against the disruption that continued litigation is already causing (and will continue to cause) and that a decision invalidating the Moratorium Act and Executive Orders could cause, and is consistent with PROMESA's directive and well within the Court's broad discretion.

### **CONCLUSION**

For the foregoing reasons, the Court should (a) grant the Oversight Board's motion to intervene in these four actions; (b) deny the lift stay motions and continue the stay under Section 405 of PROMESA; (c) direct the Commonwealth to comply with the requirements set forth above; (d) schedule a conference in approximately 30 days for the parties to report to the Court; (e) reserve all of the parties' rights with respect to their claims, liens, and priorities, and their rights under PROMESA; and (f) grant such other and further relief as the Court deems just and proper.

**WE HEREBY CERTIFY** that on October 21, 2016, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.



**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico this 21st day of October, 2016.

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- and -

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*Attorneys for the Financial Oversight and  
Management Board for Puerto Rico*

# EXHIBIT A

Financial Oversight and Management Board  
for Puerto Rico

*José B. Carrión III*  
Chair

October 5, 2016

**VIA MAIL AND ELECTRONIC MAIL**

Honorable Alejandro García Padilla  
Governor of Puerto Rico  
La Fortaleza  
PO Box 9020082  
San Juan, PR 00902-0082

Dear Governor García Padilla:

I hope this letter finds you well. I am writing to you in my capacity as Chair of the Fiscal Oversight and Management Board for Puerto Rico ("Oversight Board") created under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA").

We thank you for the diligence background materials that were sent to the members of the Oversight Board last September 29<sup>th</sup>, including the Fiscal and Economic Growth Plan (FEGP) prepared in September 2015 and the updated version of January 2016.

In our meeting held last Friday, September 30<sup>th</sup> in New York City, the Oversight Board respectfully requested that your administration provide by October 14<sup>th</sup> the most recent Fiscal and Economic Growth Plan for the Government of Puerto Rico and that such plan be presented at the next meeting of the Oversight Board by you or your representatives.

The next Oversight Board meeting is scheduled for Friday, October 14<sup>th</sup> in the morning in New York City. We would appreciate if the FEGP to be presented by you or your representatives on October 14<sup>th</sup> is sent to the members of the Board at least 48 hours prior to the meeting. In addition, the Oversight Board requested certain information of your administration in order to begin our work.

Pursuant to section 104 (c) of PROMESA, the Oversight Board respectfully requested the following information with the frequency stated below:

Financial Oversight and Management Board  
for Puerto Rico

- 1- Weekly cash flow report, including all revenues received and all expenses paid (including any debt service) and broken down by main categories.
- 2- Monthly downloads of bank account data and statements of all principal banking accounts (provided directly to the Board by each bank).
- 3- Monthly and year to date report of compliance with the current approved budget by budgetary fund and by agency (including local special funds and federal funds).
- 4- Monthly and year to date detailed report on revenues and a narrative about collection efforts and main initiatives of the Puerto Rico Treasury Department.
- 5- Monthly detailed payroll report by agency.
- 6- Monthly reports on federal funds received and disbursed by area and by agency.
- 7- Monthly report of all debt obligations due this current fiscal year and which have been paid.
- 8- Quarterly report on each agency's productivity and performance with appropriate metrics and a narrative description.
- 9- Quarterly report on key Puerto Rico economic, financial, social and labor statistics.

We would appreciate if the first reports as of September 30, 2016 are provided on or before the end of October. If there is a report that cannot be provided by the end of this current month, please let me know so we may discuss its delivery date.

We thank you for your assistance in this matter and we look forward to working with you for the benefit of the people of Puerto Rico.

Sincerely,

# EXHIBIT B

Financial Oversight and Management Board  
for Puerto Rico

*José B. Carrión III*  
Chair

October 20, 2016

**VIA MAIL AND ELECTRONIC MAIL**

Honorable Alejandro García Padilla  
Governor of Puerto Rico  
La Fortaleza  
PO Box 9020082  
San Juan, PR 00902-0082

Dear Governor García Padilla:

I am writing to you in my capacity as Chair of the Fiscal Oversight and Management Board for Puerto Rico ("Oversight Board") created under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA").

We thank you for your presentation last week in New York City. In order for the Board to have a baseline understanding of the current state of the Commonwealth of Puerto Rico's finances and as a starting point for the Board's review of the Fiscal and Economic Growth Plan that you delivered to the Board, we are eagerly awaiting the information requested from you pursuant to section 104 (c) of PROMESA and confirmed in my October 8<sup>th</sup> letter.

I respectfully request that you add to such requested information that is due by the end of this month the following information and to the extent possible that you provide this information to the Oversight Board on a rolling basis as quickly as possible.

- 1. Detailed explanation about the guidelines and priorities for payments that your Administration is using when making disbursements of funds from "Covered Entities" of the Central Government.**
- 2. Cashflow forecast for the current fiscal year, through June 30, with actuals to date. The forecast should include monthly balances, as well as projected high points and low points during the month, a summary of aggregate revenues and expenditures, as well as detail by major revenue sources and program areas.**

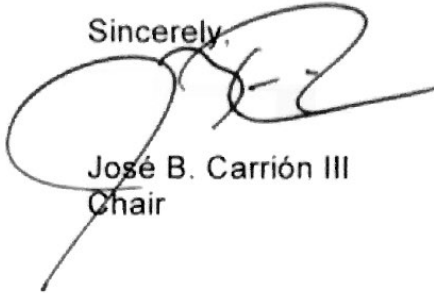
Financial Oversight and Management Board  
for Puerto Rico

**3. Detailed explanation of the types of debt service being paid and the rationale for continued payments.**

Please do not hesitate to contact me if you have any questions as to this additional request.

We thank you for your assistance in this matter and we look forward to continue working with you for the benefit of the people of Puerto Rico.

Sincerely,

A handwritten signature in black ink, appearing to be "JC", written over the word "Sincerely,".

José B. Carrión III  
Chair