IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

DIONISIO TRIGO GONZÁLEZ, et al., Plaintiffs, -against- ALEJANDRO GARCÍA PADILLA, in his official capacity as Governor of Puerto Rico, et al., Defendants.	Case No. 16-CV-02257 (FAB)

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO'S POST-HEARING MEMORANDUM OF LAW IN OPPOSITION TO LIFTING THE PROMESA STAY

GONZÁLEZ CASTAÑER, P.S.C.
128 F.D. Roosevelt Ave., 2nd Floor
San Juan, Puerto Rico 00918-2409
Tel. (787) 758-7819
Fax. (787) 758-4152

José Luis González Castañer
USDC-PR No. 201905
E-mail: jgonzalez@gcpsc.com

Magaly Rodríguez Quiñones
USDC-PR No. 205010
E-mail: mrodriguez@gcpsc.com

Date: October 7, 2016

Attorneys for the Government Development Bank For Puerto Rico

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TO THE HONORABLE COURT:

COMES NOW the Government Development Bank for Puerto Rico ("GDB") the Puerto Rico Public Finance Corporation (PRPFC), and their President in its official capacity, without submitting to the jurisdiction of this Honorable Court,[1] through the undersigned counsel, and in compliance with the Court's September 29, 2016 Order, respectfully submits this motion and requests that the Court deny plaintiffs' request to lift PROMESA's automatic stay over this action and those actions with which it has been consolidated and preserve the stay to allow the Oversight Board to accomplish its congressionally-mandated purpose and prevent irreparable harm to the Commonwealth of Puerto Rico (the "Commonwealth") and GDB.

ARGUMENT

I. THE COURT SHOULD PERMIT THE OVERSIGHT BOARD TO ACCOMPLISH ITS CONGRESSIONALLY MANDATED PURPOSE

To further the Oversight Board's purpose of "provid[ing] a method for a covered territory [the Commonwealth] to achieve fiscal responsibility," PROMESA § 101(a), Congress gave the Oversight Board the power to review and rescind, within a specified date range, any law that "alters pre-existing priorities of creditors in a manner outside the ordinary course of business or inconsistent with the territory's constitution or the laws of the territory." PROMESA § 204(c)(3)(B). Congress expressly granted to the Oversight Board this power to rescind laws enacted after May 4, 2016, which includes certain of the very laws against which the plaintiffs

[1] Pending before the Court is a Motion to Dismiss this action on the ground—among other arguments, which GDB preserves and does not waive—that it is barred by the 11th Amendment, in which GDB has joined. ECF Nos. 14, 16. While GDB continues to assert its immunity from suit, it submits this brief without submitting itself to the jurisdiction of this Court in order to be heard on the issue of the PROMESA stay in relation to its pending motion and in compliance with this Court's Order. *See* ECF No. 46.

have now brought constitutional challenges.[2] Not only could the Oversight Board rescind Law 40 and various executive orders but fiscal plans and budgets could also limit or preclude continued enforcement of the Moratorium Act and related executive orders in whole or in part.[3] Steeped in the particularities of the Commonwealth's fiscal crisis, Congress provided the Oversight Board with the tools to address the very issues raised in this litigation. The Court should permit this process to function rather than lift the temporary stay to rule on issues that may be mooted in whole or in part.

In addition, Congress designed PROMESA with an understanding of the Commonwealth's affairs and of the very legislation and executive orders that plaintiffs now challenge. Congress was well aware of the litigation pending against the Commonwealth, and chose to permit only litigation that was filed before December 18, 2015, to proceed during the limited stay that PROMESA provided. The facts and arguments raised by Plaintiffs were known to Congress and did not persuade it to permit them to go forward. Furthermore, the stay is a key component of PROMESA, a carefully crafted statutory restructuring framework that is the product of deliberate policy choices by Congress, all aimed at addressing Puerto Rico's crisis.

[2] While the GDB believes there is no basis for the Oversight Board to rescind any of the challenged legislation, even if the Oversight Board disagreed, it would be in the context of development of a fiscal plan and budgets that would provide an organized alternative for the continued preservation of essential services to residents of the Commonwealth. By contrast, were this Court to strike down the legislation, it could lead to complete paralysis. *See, e.g.*, Tr. of Civil Hr'g 88:9-18, Sept. 23, 2016, ECF No. 45 (uncontroverted testimony that given insufficient funds, "not having the executive orders or the Moratorium Act, we would be obligated just to paralyze the government.").

[3] In addition to the Oversight Board, there are a number of other moving pieces, including the Commission for the Comprehensive Audit of Puerto Rico's Public Debt, which is in the process of studying whether certain issuances were even valid. The Commission's conclusions will undoubtedly be studied and incorporated into the Oversight Board's direction on the fiscal plan and budgets.

Nothing has changed since Congress enacted PROMESA that could justify lifting the limited stay.

A. By Allowing the Oversight Board to Perform Its Role, the Court Would Comply with the Doctrine of Constitutional Avoidance

Judicial restraint requires the Court to avoid deciding constitutional issues unless absolutely necessary. *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 511 (1st Cir. 2011) (compiling cases) (overturning decision that ruled on constitutional issues rather than order remittitur which could have "eliminated" or "materially reshaped" the constitutional issues); *see also, Camreta v. Greene*, 563 U.S. 692, 705 (2011) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)) (A "'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'"); *United States v. Vilches-Navarrete*, 523 F.3d 1, 9 (1st Cir. 2008) (compiling cases) ("[T]he doctrine of constitutional avoidance requires us to refrain from ruling on the constitutionality of [a] statute [where] the posture of [the] case does not *require* us to pass upon this issue." (original emphasis)).

The recent formation of the Oversight Board, its designation of GDB as a Covered Territorial Instrumentality and the imminent deadline for submission of the fiscal plan for the Commonwealth provide an avenue by which the Court can avoid the present need to resolve the constitutional claims plaintiffs seek to pursue before the expiry of the PROMESA stay. Congress empowered the Oversight Board to address the legislation and executive orders now before the court, including by empowering it to rescind laws that alter pre-existing priorities in violation of the law. Fiscal plans and budgets may also limit or preclude continued enforcement of the Moratorium Act and related executive orders in whole or in part. Because Oversight Board action may eliminate or at least materially reshape the constitutional questions before the

Court, and because, as described below, the balance of harm tips in favor of the defendants, the Court should decline to lift the stay until the Oversight Board has had the opportunity first to perform the task for which Congress created it.

None of this is to suggest that Congress has diverted the Court's Article III power to the Oversight Board, or that the Court should abandon its constitutional role. To be sure, the interpretation of the Constitution remains the province of the Court. While not usurping this Court's function, the Oversight Board has its own congressionally mandated function to perform. The automatic stay is a temporary measure of critical importance to the Oversight Board's task and its congressional mandate to oversee the restructuring process. Indeed, Congress constructed the stay with the express purpose of allowing the Oversight Board time to constitute itself and decide whether and how to address pending litigation against the Commonwealth. PROMESA § 405(m)(5)(A) ("The 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.") (emphasis added). While constitutional questions undoubtedly remain the province of the Court, it is the more limited province of Congress to establish the timing and parameters for decision.[4] By allowing the Oversight Board to perform its function, as Congress intended, the Court can avoid prematurely, and potentially unnecessarily, ruling on a constitutional issue.[5]

[4] This Court has already determined that the stay does not itself pose constitutional concerns. *See* Mem. and Order (Docket No. 99, Case No. 16-cv-1610) (FAB).

[5] *See also* Statement of Interest of the United States, Dkt. No. 40, at 7 (as Oversight Board "may very well" supplant or rescind the laws plaintiffs challenge, "time is needed to determine whether the plaintiffs will in fact be harmed.").

B. Undermining the Ground Rules Established by the Moratorium Act and Executive Orders Would Unduly Complicate the PROMESA Process

In addition to the harms to the Commonwealth and GDB described below, lifting the stay would hamper the process of developing a fiscal plan. Although just constituted, the Oversight Board has already begun its work and established an expeditious timeline. In the short time since the Court heard argument regarding the stay, the Oversight Board has selected a chairperson, designated the list of covered territorial instrumentalities subject to its oversight and established October 14, 2016, as the deadline for submission of the fiscal plan for the Commonwealth, GDB and others. *See* General Public Release, Financial Oversight and Management Board for Puerto Rico (Sept. 23, 2016), annexed as Exhibit A to the Commonwealth Defendants' Post-Hearing Brief.[6]

Lifting the stay now would disrupt this auspicious beginning. Developing a fiscal plan through PROMESA absent the burden of litigation is already a challenging task, and calling into immediate question the ground rules established by the Moratorium Act and executive orders under which the Commonwealth and GDB are conducting their day-to-day operations would introduce further uncertainty into that process. Specifically, the fiscal plan will incorporate estimates of revenues and expenditures, based on applicable laws. PROMESA, 130 Stat. 549, § 201(b)(1)(A). GDB and the Commonwealth have already devoted enormous resources to developing this material and updating the Fiscal and Economic Growth Plan to provide expense and revenue projections based on continued application of many of the laws and executive orders plaintiffs now seek to invalidate. Ruling now on plaintiffs' claims runs the risk of interfering with the Commonwealth's preparation of a fiscal plan—which is due in a mere week—and the

[6] Indeed, this progress undercuts any suggestion that the Oversight Board will be unable to make meaningful progress in the time period of the stay.

Oversight Board's review thereof. In addition, as described below and in the Commonwealth's submission, the judgment plaintiffs seek threatens to entirely halt government operations and the provision of essential services. Tr. of Civil Hr'g 87:10 – 89:2, Sept. 23, 2016, ECF No. 45.

II. NOTHING HAS CHANGED SINCE CONGRESS EXPRESSED ITS INTENT TO STAY THIS VERY LITIGATION

Congress enacted PROMESA specifically in response to the Puerto Rican fiscal crisis. It designed the statute to fill a hole in the Bankruptcy Code by providing restructuring relief to the Commonwealth and its instrumentalities, whose fiscal crisis animated Congress' action. In particular, Congress enacted Section 405, crafting the terms and extent of the automatic stay, with full knowledge of the suits before the Court and the claims they raise, and with the clear intention of imposing a stay upon them.

So certain was the congressional determination that these cases should not be permitted to impede the Commonwealth's orderly restructuring—or otherwise sabotage PROMESA's mission—that when it enacted PROMESA it simultaneously stayed this litigation. Congress explicitly selected the cases it would stay, drafting Section 405(c)(1) to permit litigation filed before December 18, 2015, to proceed and to stay all other litigation. The facts raised by the plaintiffs in these actions were known to Congress when, on June 30, 2016, just three months ago, Congress determined to stay these very cases. The arguments plaintiffs now raise in these actions did not persuade Congress to let these cases go forward then, and should not persuade the Court to allow them to go forward now, particularly where the constitutional issues may be mooted or viewed in a very different light depending on the Oversight Board's analysis of Commonwealth laws.

A comparison to Section 362 of the Bankruptcy Code underscores the uniqueness of the congressional judgment embodied in Section 405 as applied to the Commonwealth and the

current litigation. Section 362 is a generic statute, drafted and enacted to be applied generally, and without any consideration of the particular circumstances of a specific debtor or the litigation pending against it. Section 362 also provides an open-ended stay for the entire length of a bankruptcy proceeding. Section 405, meanwhile, explicitly names the debtor for whom Congress intended the section to provide breathing room —the Commonwealth— and fully aware of the litigation before the Court, Congress provided a date range that provided for a temporary stay of litigation filed after December 2015. That stay is also targeted and narrow in time: The Commonwealth has the benefit of the stay for only four more months. § 405(d). Nothing has changed to warrant overriding Congress' judgment.

III. THE TRIGO PLAINTIFFS HAVE NOT MET THEIR BURDEN

Because the harm lifting the stay would cause to the Commonwealth and GDB far outweighs any harm the stay might purportedly cause to the plaintiffs in *Dionisio Trigo González, et al. v. García Padilla, et al.*, 16-cv-02257 (the "Trigo Plaintiffs"), the Court should keep the stay in place to protect GDB assets and the interests of all creditors.

A. The Plaintiffs Have Failed to Meet Their Burden of Demonstrating the Stay Should Be Lifted

Under Section 405(e)(2), it is the moving party's burden to demonstrate that the Court should lift the stay. The Trigo Plaintiffs have not met this burden: Nothing in the scant evidence they have presented to the Court supports lifting the stay. To the contrary, they have presented no evidence to support their claims of irreparable injury; by contrast, the record reflects that lifting the stay will present precisely such grave harm to the Commonwealth, the GDB, and the citizens they serve.

First, many of the mechanisms the plaintiffs object to in the Moratorium Act and executive orders have not been implemented; nor is there any indication they will be any time

soon. To date, the receivership provisions have not been used. A bridge bank has not been created. Act 74 has not been put into effect, and merely provides legal authorization for GDB to consolidate a number of credit facilities provided to the Commonwealth; it does not require it to do so. Not only has GDB not carried out any such consolidation but given the designation of GDB as a Covered Territorial Instrumentality PROMESA would clearly require the Oversight Board's approval for such a transaction. Yet from the plaintiffs' agitation, one would expect these provisions not only to be in active use but to have caused the plaintiffs great harm. Neither expectation matches reality.

Second, in the case of the Trigo Plaintiffs, the hearing was limited to whether the PROMESA stay should be lifted, and yet their only claimed injury was missed interest payments and a reduction in the trading or market (as opposed to face) value of their bonds. *See, e.g.*, Tr. of Civil Hr'g 231:21-25, Sept. 22, 2016, ECF No. 44. Needless to say, such claimed injuries are certainly not irreparable. Moreover, as they have made clear repeatedly, the plaintiffs are **not** purporting to seek a money judgment or any relief that would require payment by the defendants. *See, e.g.*, Tr. of Civil Hr'g 25:20-22, Sept. 23, 2016, ECF No. 45. Accordingly, their asserted injuries would not be alleviated by a lifting of the stay; nor do they explain how the stay is causing them harm, because it is not. The inconsistency between the alleged injuries about which the plaintiffs testified and their stated goals in this litigation is underscored by the testimony of the Commonwealth's expert, Dr. Jonathan Arnold, that plaintiffs typically don't "challenge the constitutionality of laws for the sake of the public good and to get an answer to that question. . . . The end point is then to use the result of that in order to get money later." *Id.* at 223:19-25. The plaintiffs here do not break the mold, and at bottom and despite their claims to the contrary, have eventual money judgments in mind. This explains the disconnect between the only evidence of

harm they have adduced—monetary losses—and the declaratory and injunctive relief they purport to seek.

Finally, the Trigo Plaintiffs' own expert, Dr. Carlos Colon de Armas, offered testimony in support of preserving the stay, asserting that the Commonwealth and its instrumentalities ultimately have sufficient resources to pay the Trigo Plaintiffs and others in full. *See, e.g.*, *id.* at 49:12-14. If this were correct, it is difficult to see the harm to plaintiffs from maintaining a temporary stay. In addition, Dr. Colon testified that Executive Order 2016-10, issued pursuant to the Moratorium Act and challenged by the plaintiffs, "protects the Plaintiffs" by preventing the "unnecessary removal of cash from GDB, which was the protection of the liquidity." *Id.* at 50:2-9. By plaintiffs' own admission, the relief they seek would thus harm not only GDB but their own interests.

The duration of the stay is brief, and plaintiffs have failed to establish that allowing breathing room to the already struggling Commonwealth and GDB, and time to the Oversight Board to carry out its mission until mid-February, will cause them such harm that the stay must now be lifted.

B. The Harm Lifting the Stay Will Do to the Commonwealth and GDB Cannot be Underestimated and Could Force Liquidation of GDB

While the Trigo Plaintiffs have offered no evidence of the harm a continued stay might cause them, lifting the stay would place significant burdens on the Commonwealth and GDB and stymie restructuring efforts. Lifting the stay immediately would be to the detriment not only of the Commonwealth and GDB but of all of GDB's creditors.

First, in the *Trigo* action, lifting the stay would engender tremendous amounts of work for GDB, with little concomitant benefit for the *Trigo* plaintiffs. GDB would be required to draft and file a Reply to the plaintiffs' Opposition to the Motion to Dismiss (filed five days before the

Court granted the stay), and to the extent such motion was not granted in full, proceed to discovery (both documentary and testimonial, not to mention related discovery disputes) and merits litigation. Permitting those proceedings at this stage will involve distraction of the Commonwealth and GDB officers and diversion of resources now focused not only on the PROMESA process but on continuing to operate and provide essential services to the public in the face of the Commonwealth's fiscal crisis.

Second, and more broadly, plaintiffs' suggestion that lifting the stay would require no more "additional burden, distraction, and expense . . . [than] to push the button and electronically file" the defendants' summary judgment papers, Tr. 91:6-22, ECF No. 45, ignores the realities of complex litigation and the extent of the burden, distraction and delay complete briefing and argument would impose on GDB, the Commonwealth and the restructuring process.[7] At the outset, it presumes that the *Brigade* plaintiffs' summary judgment motion will be granted, with no further proceedings. Furthermore, the effects of lifting the stay would reverberate beyond these four cases. As Elizabeth Abrams, a managing director at Millstein & Company, testified, "lifting the stay in one case is an invitation to creditors . . . to also get the stay lifted in their cases." *Id.* at 142:7-10. "It will probably increase the number of lawsuits that will be filed," Dr. Arnold opined, generating plaintiffs "who will then ultimately seek to have a stay lifted." *Id.* at 223:1-9. Once set in motion, the disruptive effect of lifting the stay will be difficult if not impossible to contain.[8]

[7] Notably, this argument is not even applicable to the *Trigo* action, where briefing on the motion to dismiss is not even complete, plaintiffs' opposition having been filed just days before the Court ruled on the application of the PROMESA stay.

[8] *See also* H.R. Rep. No. 114-602, at 52 (2016) (Congress designed Section 405 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

This is true in spite of the Court's ability to address, in its discretion, lift-stay proceedings on a case-by-case basis, as similarly situated plaintiffs are likely to use a decision to lift the stay to file additional litigation and motions to lift the stay, leading to a cascade of further litigation and lift-stay proceedings. However the Court decides this additional wave of lift-stay motions, the Commonwealth and GDB will be forced to draft and file motions, retain experts and appear at additional lift-stay hearings. Indeed, the lift-stay proceedings that gave rise to the current motion themselves demonstrate just how burdensome the proceedings can be: two full day of evidentiary hearings, plus briefing and preparation time, in which Commonwealth advisors and management were distracted from their core focus on accomplishing the fiscal plan and ultimately a restructuring. In the event the Court decides to lift the stay here, Commonwealth and GDB advisors and officials will no doubt be subjected to many such hearings.

All this is to say nothing of the burden a judgment invalidating all or part of the Moratorium Act and executive orders will impose on the Commonwealth and its instrumentalities. Even the plaintiffs' expert recognized that there has to be some mechanism to pay creditors in an orderly manner, *id.* at 47:23-25, and that the challenged laws in part were "intended to protect Plaintiffs," *id* at 48:12-16. As the Assistant Secretary of the Treasurer, Yaime Rullan-Cabrera, testified, absent the Moratorium Act and related executive orders, the Commonwealth and GDB would be left without any orderly way in which to manage daily demands on inadequate resources. *Id.* at 87:10 – 89:2. It is thus lifting the stay, rather than a temporary preservation of the status quo and much-needed breathing room, that threatens the greatest harm to the Commonwealth. Were the Court to lift the stay and ultimately enjoin

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establish its foundational structure and begin its monumental task of ensuring Puerto Rico regains access to capital markets.").

enforcement of these essential laws—all while the Commonwealth and GDB are attempting to draft fiscal plans—GDB could find itself forced to seek to liquidate the bank. While plaintiffs challenge the Moratorium Act's provisions on the appointment of a receiver (which have not been exercised), GDB's organic act contains underdeveloped receivership provisions that were superseded by the Moratorium Act. All parties to these proceedings have affirmed that they would prefer a coordinated resolution for both the Commonwealth and its instrumentalities. Forcing GDB into liquidation pursuant to the receivership provisions in its organic act would engender a disconnected proceeding to wind up the affairs of GDB only (without the Commonwealth and other covered instrumentalities), and would operate to the detriment of all creditors.

WHEREFORE, for all of the reasons stated above and those set forth in the submissions of the Commonwealth and its officials, GDB respectfully requests that the Court enter an order (i) denying plaintiffs' motions to lift the PROMESA stay, and (ii) granting such other and further relief as is just and proper.

I hereby certify that on this same date, I have electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which will send notification of such filing to all attorneys of record.

RESPECTFULLY SUBMITTED
in San Juan, Puerto Rico, on October 7, 2016.

GONZÁLEZ CASTAÑER, P.S.C.
128 F.D. Roosevelt Ave., 2nd Floor
San Juan, Puerto Rico 00918-2409
Tel. (787) 758-7819
Fax. (787) 758-4152

/s/ José Luis González Castañer
JOSÉ LUIS GONZÁLEZ CASTAÑER
USC-PR No. 201905
E-mail: jgonzalez@gcpsc.com

MAGALY RODRÍGUEZ QUIÑONES
USDC-PR No. 205010
E-mail: mrodriguez@gcpsc.com