

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

U.S. BANK TRUST NATIONAL  
ASSOCIATION

Plaintiff,

v.

COMMONWEALTH OF PUERTO RICO et  
al.,

Defendants.

CIVIL NO. 16-2510 (FAB)

**OPPOSITION TO MOTION AND MEMORANDUM OF LAW REQUESTING  
RELIEF FROM THE PROMESA STAY**

**TO THE HONORABLE COURT:**

COME NOW, co-defendants the Commonwealth of Puerto Rico (the “Commonwealth”), and Hon. Alejandro García Padilla, in his official capacity (collectively “defendants”), specially appearing and without submitting to the jurisdiction or venue of this Court, and hereby state and pray as follows:

**I. INTRODUCTION AND FACTUAL BACKGROUND**

Plaintiff purports to be the successor trustee (“Trustee”) under a certain Trust Agreement with the University of Puerto Rico (“UPR”) dated as of June 1, 1971, allegedly authorizing and securing UPR University System Revenue Bonds (the “UPR Bonds”). On August 19, 2016 plaintiff filed a complaint for declaratory and injunctive relief against the appearing defendants, the UPR and the President of the UPR, in her official capacity. Docket No. 1. This action is clearly stayed by § 405 of the recently enacted Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187 (2016) (“PROMESA”). Docket No. 24.

In its complaint, plaintiff requested relief from the PROMESA stay pursuant to § 405(e)(2) of the Act. Docket No. 1 at 26-27. Plaintiff has also filed a motion and memorandum of law in support of its request for lifting of the stay and preliminary injunctive relief. Docket Nos. 2-3 (the “Motion”). A hearing on plaintiff’s request for relief from the stay has already been scheduled for September 22, 2016. Docket No. 24. This opposition brief addresses the arguments raised in that motion and legal memorandum in support of plaintiff’s request for relief from stay. A responsive pleading in this case would not be due unless and until the PROMESA stay is lifted by the Court. Further, a hearing on plaintiff’s request for preliminary injunctive relief cannot be scheduled unless and until the stay is lifted. Hence, this brief addresses plaintiff’s arguments in the context of § 405(a)(2) of PROMESA. Defendants reserve the right to address the merits of plaintiff’s claims, including arguments in support of a preliminary injunction, in separate briefing should the Court determine that relief from stay is warranted in this case.

Plaintiff alleges that pursuant to the Trust Agreement UPR has pledged certain revenues, including tuition and student fees collected from all students of the UPR (the “Pledged Revenues”) as collateral for the payment of the UPR bonds. Plaintiff claims that through PR Act 21-2016, the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (“Act 21”), as amended by PR Act 40-2016, and Executive Order (“EO”) 2016-31, approved pursuant to it, defendants have engaged in a taking of the Pledged Revenues in violation of the Constitutions of the United States and Puerto Rico. Plaintiff also alleges that § 201 of Act 21 is preempted by § 303(1) of PROMESA.<sup>1</sup>

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<sup>1</sup> Regardless of the scope of § 303(1) of PROMESA, the applicability of this section is not automatic, but depends on the actions of the Oversight Board. Section 101(d)(2) of PROMESA expressly provides that the Oversight Board, in its discretion, may exclude any territorial instrumentality from the requirements of the Act. To the extent UPR is a “territorial instrumentality” as defined by PROMESA, the applicability of PROMESA’s provisions to UPR depends on the determinations of the Oversight Board. Hence, even if the challenged provisions of Act 21 could fall within the purview of § 303(1) of PROMESA (which is denied), whether this section even

Chapter 2 of Act 21 authorizes the Governor of Puerto Rico to declare a moratorium in the payment of certain obligations and stay creditor remedies with respect to obligations of the government entities covered by the moratorium. Docket No. 4-5 at 9. However, it also provides conditions on the government's use of a moratorium and provides protections for creditors, such as preserving security interests and collateral used to secure various obligations. *Id.*; see also Act 21 § 204.

Section 201(a) of Act 21 authorizes the Governor, through executive order, to declare any government entity to be in a state of emergency and identify in such order enumerated obligations and, if the executive order so provides, no payment on a covered obligation of such government entity shall be made, other than as provided in sections 202 or 204 of this Act, during the emergency period for such government entity. Docket No. 4-5 at 21. Act 21 defines the "emergency period" as the period beginning on the date designated by the Governor in an executive order and ending on the last day of the "covered period." Act 21, § 103(q). The "covered period" means "the period beginning immediately upon the effectiveness of this Act through and including January 31, 2017, which period may be extended by executive order of the Governor for no more than two months." Act 21, § 103(m).

EO 31-2016, issued pursuant to Act 21, a pre-PROMESA statute, declared the UPR to be in a state of emergency, announced the commencement of an emergency period for UPR and temporarily suspended any obligation of the UPR to transfer Pledged Revenues to the Trustee pursuant to the Trust Agreement, for the duration of the "covered period." Docket No. 4-7 at 5.

Plaintiff argues that "cause" exists to lift the stay pursuant to section 405(e)(2) of PROMESA because allegedly it will suffer irreparable harm if the Pledged Revenues (tuition,

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applies in this case is a factual matter that depends on the actions of the Oversight Board, in the exercise of its discretion. The status quo should be preserved pending a determination of the Oversight Board in this regard.

student fees) are diverted to other uses during the pendency of the stay. Since this cash will allegedly be “lost,” plaintiff claims that it will suffer irreparable harm if the stay is not lifted now to allow plaintiff to receive—through the Sinking Fund<sup>2</sup> established under the Trust Agreement—enough tuition payments in the coming semester to replenish this fund.

Plaintiff’s argument fails because the harm that it alleges is neither irreparable nor out of the ordinary among the secured creditors of the Commonwealth and its instrumentalities. At bottom, plaintiff claims a loss on a debt, and that type of injury does not qualify as “irreparable damage” of the sort that would warrant lifting the PROMESA stay. Were it otherwise, then any secured creditor could seek relief alongside the plaintiff, and there is no way that PROMESA would grant the Commonwealth and its instrumentalities the breathing room necessary to reorganize their debts.

## II. ARGUMENT

### A. **Movant has not shown “cause” to lift the automatic stay.**

#### 1. **Standard and scope of review**

PROMESA authorizes this Court, after notice and a hearing, to “grant relief from the stay provided under subsection (b) of this section” **only** “for cause shown.” See PROMESA § 405(e)(2)). Otherwise, a court may grant relief from the stay only where “irreparable damage to the interest of an entity in property” will occur “before there is an opportunity for notice and a hearing.” *Id.* § 405(g).<sup>3</sup> “The burden is on the moving party ... to make an initial showing of cause” to lift the stay. *In re Bogdanovich*, 292 F.3d 104, 110 (2d Cir. 2002). “If the movant fails

<sup>2</sup> As said term is defined by plaintiff in its memorandum. See Docket No. 3 at 9.

<sup>3</sup> In support of its request for relief from stay, plaintiff also relies on § 405(f), which provides that the PROMESA stay is terminated within 45 days of a request for relief under § 405(e)(2), “unless unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (e)(2).” The final hearing on plaintiff’s motion is slated to commence and conclude before the expiration of this 45-day period. Hence, the automatic termination of the stay provided for in § 405(f) is inapplicable in this case.

to make an initial showing of cause ... the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.” In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2d Cir. 1990). It is plaintiff who bears the initial burden of establishing cause to lift the stay.

Plaintiff’s only argument regarding “cause” is that it will suffer irreparable harm if the Trustee does not receive Pledged Revenues through the Sinking Fund during the pendency of the stay, because any tuition and other revenues used for other purposes during the stay period will be lost forever. As will be shown below, not only will plaintiff not suffer any harm during the pendency of the PROMESA stay, but also any potential harm is outweighed by the harm that would be suffered by the Commonwealth and its instrumentalities as a result of the lifting of the stay.

**2. Plaintiff will not suffer any harm during the duration of the stay.**

Plaintiff has shown no harm to the UPR Bonds from the automatic stay, let alone irreparable harm. Act 21 protects the value of those bonds during any emergency period declared, requiring that they accrue interest at the contractual rate and, to the extent they come due during the emergency period, be paid at the end of that period. See Act 21, § 202. Act 21 also protects “the rights of a holder to any collateral, security interest or lien that secures” an obligation that “was otherwise due or became due before or during an emergency period” and “becomes payable at the end of the covered period as a result of this Act.” Id., §204(a). PROMESA further provides that its interim stay “does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation.” § 405(k). Plaintiff thus can show no harm to the UPR Bonds during the interim stay. After all, Pledged Revenues are just money, the delay in recouping such funds cannot be

irreparable harm. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914 (1st Cir. 1989) (“[I]f money damages will fully alleviate harm, then the harm cannot be said to be irreparable.”).

At its core, plaintiff’s claim of irreparable harm, in the context of a creditor whose claim is allegedly secured by Pledged Revenues, is tantamount to claim that plaintiff is not “adequately protected” during the pendency of the PROMESA stay. This argument is flawed, however, because the PROMESA stay established in § 405 does not include the absence of adequate protection as cause to lift the stay.

Furthermore, if the mere fact of insolvency in the bankruptcy context constituted irreparable harm for creditors and were a cause for lifting the stay, the protection afforded by the automatic stay would be dead letter, as any creditor could easily lift the stay at any stage of an insolvent debtor’s bankruptcy. In this case, if UPR bondholders, whose debt service payments may in any event be kept current during the “emergency period” and whose claims and liens securing them would not be modified or discharged, without their consent, at any time, can lift the stay based solely on the alleged insolvency of their debtor, then any bondholder whose payments may have been suspended during the emergency period by Act 21 and the Executive Orders—including, but not limited to payment on so-called General Obligation (“GO”) bonds—would have equal grounds to lift the stay. This would make section 405 of PROMESA absolutely meaningless and would lead to a race to the courthouse, specifically the result PROMESA was designed to prevent. To allow such a result to materialize, especially just a month and a half after the enactment of PROMESA and days after the appointment of the members of the Oversight Board, would be extremely prejudicial to the Commonwealth and all of its creditors, and would turn PROMESA on its head.

It bears emphasis that PROMESA is an unprecedented federal statute designed to deal with a fiscal emergency affecting the Government of Puerto Rico and its instrumentalities. PROMESA § 405(m). The stay mandated by PROMESA “is essential to stabilize the region for the purposes of resolving this territorial crisis.” *Id.* § 405(m)(5). Some of the express purposes of the stay are to: “(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis; (2) 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; (3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring.” *Id.* § 405(n). Ultimately, one of the main purposes of PROMESA is to “benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its long standing fiscal governance issues and return to economic growth.” *Id.* § 405(n)(5). The lifting of the stay requested by plaintiff would defeat these purposes.

The lifting of the stay would also fly in the face of the choices that Congress made in enacting PROMESA. Specifically, Congress chose to establish an Oversight Board for Puerto Rico and to vest that Oversight Board with the authority to approve Fiscal Plans (as defined in the Act) for the Commonwealth or its instrumentalities. *See* PROMESA §§ 101(b)(2), 201. It authorized the Board to provide recommendations relating to the effect of Puerto Rico laws and court orders on the operations of the government. *Id.* § 205(a)(7). And it authorized the Oversight Board, in its discretion, to exclude any instrumentality of the Government of Puerto Rico from the requirements of the Act. *Id.* § 101(d)(2). Rather than allow the Oversight Board to consider the application of UPR’s revenue streams or approve a fiscal plan for UPR, plaintiff

essentially asks this Court to pretermitt the Oversight Board's review and foist its own decision upon UPR. Far from showing "cause," this argument reveals the inappropriateness of movant's request.

Moreover, lifting of the stay in this case may lead other plaintiffs to also attempt to lift the stay of their claims involving a "Liability" under the Act. This would force the Commonwealth to litigate a multiplicity of actions, including constitutional claims, which could lead to inconsistent results. See, e.g., City of Detroit, 501 B.R. at 709 (stay provisions of Bankruptcy Code are "designed to consolidate into the bankruptcy case all proceedings that relate to and impact the case, so that the debtor, and, for that matter, all of the other parties, are not required to endure the expense and complexity of litigating multiple issues in multiple courts. Such duplicative litigation also creates the risk of inconsistent results."). At a minimum, it would force the Commonwealth to divert its attention from negotiating a voluntary resolution with its creditors to defending costly lawsuits, the exact opposite of what Congress intended. See PROMESA § 405(n).

At this juncture, just weeks after the approval of PROMESA and days after the appointment of the members of an Oversight Board for Puerto Rico, the public interest mandates establishing "breathing room" for the Commonwealth and avoiding a rush to the courthouse or the premature dismantling of statutory provisions created to address the current fiscal emergency in Puerto Rico. Indeed, it must be noted that bondholders for other territorial instrumentalities have alleged that negotiations and settlements with other investors could lead to preferential transfers. See, e.g., Trigo v. García Padilla et al., Civil No. 16-2257 (FAB), Docket No. 1 at ¶ 51. Although defendants disagree with this contention, it underscores the need for a stay, in the interest of all stakeholders (PROMESA § 405(m)(5)(A)), to allow for an organized and

coordinated process to take place pending action by the Oversight Board and after the Board makes certain decisions taking into consideration PROMESA's mandate and the current legal framework (including Act 21) applicable to plaintiff's and other bondholder claims.

**WHEREFORE**, defendants respectfully request that the Court deny plaintiff's motion and memorandum of law at Docket Nos. 2 and 3 and order the continuation of the stay of this action as provided by § 405 of PROMESA.

**RESPECTFULLY SUBMITTED.**

**I HEREBY CERTIFY** that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 12<sup>th</sup> day of September, 2016.

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