

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

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In re: PROMESA
Title III

THE FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD FOR PUERTO RICO,

as representative of No. 17 BK 3283-LTS

THE COMMONWEALTH OF PUERTO RICO *et al.*, (Jointly Administered)

Debtor.¹

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CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Movant,

against

THE FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO,

Respondent.

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**OPPOSITION OF FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR
PUERTO RICO, AS COMMONWEALTH REPRESENTATIVE, TO
MOTION FOR RELIEF FROM AUTOMATIC STAY**

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284) (Last Four Digits of Federal Tax ID: 8474); and (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17 BK 3567) (Last Four Digits of Federal Tax ID: 3808).

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To the Honorable United States District Judge Laura Taylor Swain:

The Financial Oversight and Management Board for Puerto Rico (“FOMB”), as representative of the Commonwealth of Puerto Rico pursuant to section 315(b) of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), 48 U.S.C. §§ 2101-2241, and Defendant in the matter of *Centro de Periodismo Investigativo* (“CPI”) v. *Financial Oversight and Management Board for Puerto Rico*, Civil No. 17-1743 (JAG) (D.P.R.), and respondent in this contested matter, hereby avers as follows:

PRELIMINARY STATEMENT

Dissatisfied with the disclosures Congress requires the FOMB to provide pursuant to PROMESA and the materials Congress protects from public disclosure, CPI has brought its own action to compel disclosures beyond what Congress requires and which interfere in the FOMB’s ability to carry out PROMESA. And, CPI wants this Court to bless its pursuit of that agenda. We respectfully submit that to state CPI’s request is to refute it.

Section 4 of PROMESA, labeled “Supremacy,” makes clear that Congress intends PROMESA to preempt Commonwealth law. PROMESA carefully specifies what it wants the FOMB to disclose and what should or may not be disclosed. Section 101(h)(1) of PROMESA requires public disclosure of the bylaws, rules, and procedures governing the FOMB’s activities under PROMESA. Section 109(b) requires disclosure by FOMB members and designated staff of their financial interests. Conversely, section 101(h)(4) expressly provides the FOMB may conduct business it specifies in “executive session,” which shall be “closed to the public.” PROMESA section 104(p) requires the FOMB to publicize the findings of any investigation it performs pursuant to section 104(o) into the disclosure and selling practices of Commonwealth debt. Significantly, Congress requires disclosure of the investigation’s findings, but not all correspondence and other data leading up to the findings.

PROMESA section 108(a)(1) expressly bars the Governor and Legislature from exercising, among other things, any oversight or review of the FOMB and its activities. Yet, CPI requests the Court to approve its pursuit of oversight and review beyond what PROMESA allows, notwithstanding that PROMESA section 105 insulates the FOMB and all its members and employees from any liability or obligation for any claim arising from its actions taken to carry out PROMESA.

Manifestly, for CPI's action to have any merit at all, Congress had to have wasted its time announcing PROMESA's supremacy and carefully designating what the FOMB must disclose, if CPI is entitled to virtually all of FOMB's documents pursuant to the Puerto Rico Constitution.

Puerto Rico is in the midst of a grave fiscal and economic crisis. One of Congress's responses to that crisis was to create the FOMB, a Board of uncompensated individuals charged with overseeing the Commonwealth's attainment of fiscal responsibility and capital market access. The Commonwealth and several of its most indebted instrumentalities have commenced PROMESA Title III cases to restructure their debts while at the same time they are implementing fiscal and operational reforms prescribed by their FOMB-certified Fiscal Plans. The FOMB is the representative of the debtor in each of the five Title III cases. These are crucial and time-consuming tasks.

The FOMB and its members should not be distracted from these critical tasks by being forced to defend against CPI's lawsuit seeking nearly all the FOMB's documents, including those Congress did not require to be disclosed and expressly protected from disclosure. Contrary to CPI's suggestion, its lawsuit is no "simple matter." CPI seeks production of sixteen broad categories of documents, including every communication between the FOMB and a Commonwealth official and every communication between the FOMB and the federal

government. The lawsuit will involve the demonstration that its varied document requests are preempted by PROMESA. For whatever production is not preempted—if any—collecting documents from every member, reviewing and redacting if necessary, and producing that volume of documents is acutely burdensome when the FOMB's focus must be on its ongoing restructuring efforts and statutory missions. Although we do not believe any production would be required beyond what the FOMB already discloses, any additional production will entail disputes over privilege (including the executive, deliberative-process, attorney-client, and work-product privileges).

CPI's suit has barely gotten off the ground because U.S. District Judge Garcia-Gregory determined it was automatically stayed pursuant to Bankruptcy Code section 362(a), made applicable by PROMESA section 301(a). Defending this suit would impose a huge burden on the FOMB at a critical juncture in the Title III cases for minimal, if any benefit. As the Court knows, the FOMB maintains a website on which it posts extensive categories of documents required or permitted by PROMESA, including without limitation, its contracts, its bylaws, its codes of conduct, its members' financial disclosures, its certified fiscal plans and budgets, and key correspondence with the Governor. All docketed documents in each of the Title III cases are also online on websites maintained by Prime Clerk and Epiq. Moreover, all the foregoing documents are available to the public at no charge whatsoever.

Consequently, there is no basis for stay relief. Any burden on CPI caused by delaying its suit is minor. CPI has already brought suit against the Commonwealth seeking many of these same documents, and it can make a FOIA request to the federal government for the communications between the FOMB and the federal government. Conversely, the burden on the FOMB from defending this suit is significant.

By making the FOMB an entity within the Commonwealth government, Congress assured the FOMB would have the benefit of the automatic stay. More importantly, Congress clearly preempted CPI's action by announcing the supremacy of PROMESA and making clear what must be disclosed, while protecting the FOMB from other oversight and review.

RELEVANT BACKGROUND

The FOMB was created by Congress “to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.” PROMESA § 101(a). To that end, Congress imbued the FOMB with significant authority over the Commonwealth, including the “sole discretion” to review and certify the Commonwealth’s budgets and long-term Fiscal Plan, *id.* §§ 201-02, the power to commence a Title III case to allow the Commonwealth to restructure its debts under Court supervision, *id.* § 315(a), and the authority to serve as the Commonwealth’s exclusive representative in its Title III case, *id.* § 315(b).

On May 3, 2017, the FOMB commenced a Title III case on behalf of the Commonwealth. Pursuant to section 362(a)(1) of the Bankruptcy Code, made applicable to the Commonwealth’s Title III case by PROMESA § 301(a), the commencement of the Title III case stayed “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title” 11 U.S.C. § 362(a)(1); *see also* PROMESA § 301(a) (incorporating 11 U.S.C. § 362 into Title III case).

Since then, the FOMB has commenced four additional Title III cases – on behalf of COFINA, HTA, the Employees Retirement System of the Government of the Commonwealth of Puerto Rico, and the Puerto Rico Electric Power Authority. It is also engaged in Court-supervised mediations involving the five entities for which Title III cases have been filed, as well as other Commonwealth instrumentalities.

On June 1, 2017, the movant, CPI, filed a complaint with the United States District Court for the District of Puerto Rico seeking to compel the FOMB to produce documents to CPI. *See* Ex. 1. CPI contends the Puerto Rico Constitution guarantees citizens a right to access certain government documents and that this right extends to documents in the possession of the FOMB. *Id.* ¶¶ 5.1-5.12. Not even mentioning PROMESA’s supremacy, CPI seeks an order requiring the FOMB to turn over sixteen broad categories of documents, including (i) all communications and documents exchanged between the FOMB and “any [] agency or official of the Commonwealth”; (ii) all records relating to communications between the FOMB and “any agency of the federal government” or “federal government official”; and (iii) nine separate categories of economic data concerning various agencies of the Commonwealth government. *Id.* at 20-21.

On June 13, the FOMB moved to reassign CPI’s case to this Court as a related case under Local Rule 3A. The district court denied the motion, concluding that “[a]t this time,” it “sees no reason to transfer this case.” Ex. 2 at D.I. 9. The district court, however, ordered the parties to brief the issue of whether the case was subject to the automatic stay. *Id.*

On July 14, the district court ruled CPI’s lawsuit is stayed under 11 U.S.C. § 362(a)(1). Ex. 3. As the Court observed, PROMESA created the FOMB as “an entity within the [Commonwealth government]” and decreed that all of the FOMB’s funding would be paid by the Commonwealth. *Id.* at 2 (citing 48 U.S.C. §§ 2121(c)(1), 2127(b)). Accordingly, “an action against the Board is an action against the Commonwealth” that is stayed under 11 U.S.C. § 362(a)(1). *Id.*

For the reasons set forth below, CPI’s request for stay relief should be denied.

ARGUMENT

Context matters. This is no garden variety stay relief motion. CPI’s motion asks the Court to allow CPI to consume the FOMB’s uncompensated members’ time and the

Commonwealth's resources in pursuit of its quest for the District Court to rule that CPI can enforce the Puerto Rico Constitution to compel more disclosure than PROMESA requires, and some disclosure PROMESA shelters, notwithstanding PROMESA's supremacy and cardinal principles of federal express, conflict, and field preemption. *See Arizona v. United States*, 567 U.S. 387, 397-400 (2012).

An order lifting the automatic stay is an "extraordinary remedy." *In re 234-6 West 22nd St. Corp.*, 214 B.R. 751, 757 (Bankr. S.D.N.Y. 1997). As such, a court may lift the automatic stay only upon a showing of cause. 11 U.S.C. § 362(d)(1) (incorporated into Title III case by PROMESA § 301).¹ "Cause" is not defined in the Bankruptcy Code. *In re Unanue-Casal*, 159 B.R. 90, 95-96 (D.P.R. 1993), *aff'd* 23 F.3d 395 (1st Cir. 1994). In deciding whether "cause" to lift a stay exists, courts typically balance a number of factors, including:

- (1) whether relief would result in complete or partial resolution of the issues;
- (2) the lack of any connection with or interference with the bankruptcy case;
- (3) whether the foreign proceeding involves the debtor as fiduciary;
- (4) whether a specialized tribunal has been established to hear the cause of action at issue;
- (5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
- (6) whether the action essentially involves third parties rather than the debtor;
- (7) whether the litigation could prejudice the interest of other creditors;
- (8) whether a judgment in the foreign action is subject to equitable subordination;
- (9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor;

¹ Although there are other grounds for lifting the stay, *see* 11 U.S.C. § 362(d)(2)-(4), CPI moves only on the basis of cause.

- (10) the interest of judicial economy and the expeditious and economical determination of litigation for the parties;
- (11) whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and
- (12) the impact of the stay on the parties and the “balance of hurt.”

In re Unanue-Casal, 159 B.R. at 95-6. These are commonly referred to as the “*Sonnax* factors” because they derive from the Second Circuit decision in *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990).

No one factor is dispositive; instead, courts “engage in an equitable, case-by-case balancing of the various harms at stake” and will lift the stay only if the harm engendered by allowing the stay to remain in place outstrips the harm caused by lifting it. *Brigade Leveraged Capital Structures Fund Ltd. v. Garcia-Padilla*, 217 F. Supp. 3d 508, 518, 529 n.12 (D.P.R. 2016). CPI bears the burden of establishing cause, *id.*, and when the movant is not a secured claimholder claiming a lack of adequate protection, that burden is a high one, *In re Breitburn Energy Partners LP*, No. 16-10992, 2017 WL 1379363, at *4 (Bankr. S.D.N.Y. Apr. 14, 2017). The burden is impossible for CPI to carry here, where so much disclosure already exists on the FOMB’s website and elsewhere, and additional disclosure would require the upending of PROMESA’s supremacy.

It is therefore no surprise that the *Sonnax* factors point squarely towards maintaining the stay and against awarding the extraordinary remedy CPI seeks here. *First*, forcing the FOMB to defend against CPI’s suit would interfere with this and the other Title III cases and the Commonwealth’s overall recovery effort by diverting the FOMB’s attention and resources away from the critical tasks assigned to it by Congress. *Second*, the FOMB’s defense costs would be paid by the Commonwealth; accordingly, allowing the suit to go forward would drain Commonwealth resources and thereby prejudice its creditors. *Third*, there is no efficiency to be

gained by allowing the suit to go forward. CPI's suit has barely gotten off the ground, and it will take substantial time to resolve. Where, as here, a case is in its nascent stages, it is not efficient to lift the stay. *Fourth*, CPI's case will not resolve any preliminary non-bankruptcy issues that will expedite the Title III case. *Fifth*, the balance of harms strongly favors maintaining the stay.²

A. CPI's Suit Would Interfere with the FOMB's Mission and the Title III Cases.

Contrary to CPI's contention, lifting the stay to allow CPI's case to go forward would interfere with this and the other pending Title III cases and the overall effort to restore Puerto Rico to fiscal health. As part of PROMESA's mandate, the FOMB—a Board comprised of seven voting members, an *ex officio* member, and eight staff members—is now acting as the sole representative of the Commonwealth in this Title III case, as well as the representative of four Commonwealth instrumentalities in their Title III cases. At the same time, the FOMB is overseeing the Commonwealth's recovery effort, including the certification and implementation of the Fiscal Plans developed by the Commonwealth and its covered instrumentalities and efforts to revitalize Puerto Rico's infrastructure. Distracting the FOMB from these critical tasks by forcing it to defend against claims seeking production of documents would only serve to tax and distract the FOMB's efforts to lead Puerto Rico's fiscal recovery and the Commonwealth's Title III actions. *See, e.g., In re Residential Capital, LLC*, No. 12-12020, 2012 WL 3860586, at *6 (Bankr. S.D.N.Y. Aug. 8, 2012) (denying lift-stay motion in part because “[t]he new litigation in non-bankruptcy courts would hinder the Debtors’ attempts to reorganize by forcing the Debtors to utilize time and resources that would otherwise be spent in resolution of the Debtors’ chapter 11 cases.”).

² CPI does not argue that any of the other *Sonnax* factors supports lifting the stay.

In this regard, *In re City of Stockton* is directly on point. 484 B.R. 372 (Bankr. E.D. Cal. 2012). There, plaintiff brought a wrongful termination suit against the City Manager and Deputy City Manager of the City of Stockton, which was then in bankruptcy. *Id.* at 374. The case was stayed under 11 U.S.C. § 922. 484 B.R. at 374. Plaintiff then moved to lift the stay, arguing that allowing the suit to go forward would not interfere with the Chapter 9 case. *Id.* at 378. The court disagreed, holding that plaintiff's suit "necessarily would consume the time and attention of those two officers during the period in which there is intense focus on the basic substantive issues in this chapter 9 case." *Id.* "It is apparent to the court that their undivided time and attention will continue to be required at least for a number of months." *Id.*

The holding in *City of Stockton* applies doubly to the FOMB, whose time and attention is critical not only to the success of five separate Title III cases, but also to the very survival of the Commonwealth. Congress recognized that the FOMB's full attention would be required for Puerto Rico's recovery efforts to be successful, and it therefore enacted measures to protect the FOMB from lawsuits that would distract from its task. *See* PROMESA § 105 (broadly exempting the FOMB and its members from claims); PROMESA § 106(e) (barring suits challenging the FOMB's certification decisions). Congress further protected the FOMB from distracting lawsuits by making it an entity within the government of Puerto Rico, PROMESA § 101(c)(1), which gives it the benefit of the Title III automatic stay, *see* Ex. 3 at 2. Forcing the FOMB to defend against CPI's suit would undermine the goals of PROMESA by unnecessarily distracting the FOMB from its all-consuming, critical tasks at a time when its focus must be on guiding successful Title III reorganizations and other efforts to improve the Commonwealth's economic prospects.

Accordingly, CPI's contention that the Commonwealth would not be harmed if the stay is lifted because the Commonwealth is not a defendant in CPI's suit misses the mark. Dkt. 724 at 5. The reality is that the Commonwealth would be harmed if the stay is lifted because the FOMB would be pulled away from its oversight duties at a critical juncture in the five pending Title III cases. *See In re Jefferson Cty.*, 491 B.R. 277, 285 (Bankr. N.D. Ala. 2013) (explaining that a key purpose of municipal bankruptcy is "the breathing spell provided by the automatic stay"; "[i]f the automatic stay is to be lifted routinely to allow claimants to assert their claims in state court, a municipality will not have the time, opportunity or ability to confirm a plan"). Moreover, it is undisputed that the costs of defending against CPI's claims are ultimately borne by the Commonwealth.

B. Lifting the Stay Would Prejudice Creditors.

CPI asserts without support that "[a]llowing the Litigation to proceed will cause absolutely no prejudice to the interest of other creditors." Dkt. No. 724 at 5. That *ipse dixit* is false. Any time consumed by the CPI action is time the creditors want the FOMB spending on their claims, mediations, and litigation. Any money expended by the FOMB to defend against CPI's claim would come from the Commonwealth's coffers. *See* 48 U.S.C. § 2127(b). Accordingly, defending this suit would reduce the amounts available for the Commonwealth's creditors in a Title III restructuring, a factor that numerous courts have recognized counsels against lifting a bankruptcy stay. *See, e.g., In re Plumberex Specialty Prod., Inc.*, 311 B.R. 551, 563-64 (Bankr. C.D. Cal. 2004) (rejecting effort to lift stay in part because "the cost of protracted litigation of a separate proceeding in a non-bankruptcy forum would prejudice the interests of other creditors of the estate"); *In re Residential Capital*, 2012 WL 3860586, at *6 (holding that "[o]ther creditors are further prejudiced by litigation of the California Actions because such litigation will diminish the estate's assets, resulting in a smaller distribution under a chapter 11

plan of reorganization” and denying lift-stay motion); *In re Motors Liquidation Co.*, No. 09-50026, 2010 WL 4630327, at *4 (S.D.N.Y. 2010) (finding no abuse of discretion where bankruptcy court concluded in denying lift-stay motion that “allowing Appellant to proceed with the ERISA suit would force [debtor] to expend estate resources to defend that” and thus “would prejudice the interests of other creditors”); *see also In re City of Stockton*, 484 B.R. at 379 (declining to lift stay in part because the “expense of further litigation [] will deplete the coffers of the City treasury”).

C. The Judicial Efficiency Factors Also Weigh Against Lifting the Stay.

Sonnax factors four, ten, and eleven also support maintaining the stay because CPI’s lawsuit had not progressed beyond the filing of the complaint before it was stayed. Accordingly, the parties are nowhere close to being prepared for trial or a final resolution (*Sonnax* factor 11). To the contrary, if the case were to continue, the FOMB would move to dismiss on a number of grounds, including federal preemption and the *Pennhurst* and *Barton* doctrines.³

Even if CPI were able to survive a motion to dismiss, it would have to overcome objections to its far-reaching document demands, and there would almost certainly be extensive disputes concerning the applicability of various privileges (including the executive, deliberative-process, attorney-client, and work-product privileges) given the unbridled demands for the FOMB’s communications with the United States government and the Commonwealth. Accordingly, CPI’s assertion that its litigation is a “simple matter” that “will be resolved expeditiously,” Dkt. No. 724 at 5, is only true to the extent CPI loses, which it almost certainly

³ The *Pennhurst* doctrine holds that that federal courts lack subject-matter jurisdiction over suits against state entities for the violation of state law in carrying out their official duties. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The *Barton* doctrine holds that suit against a trustee or other representative of an insolvent entity under court supervision requires prior leave of the bankruptcy court (here, the Title III court) as such litigation affects the administration of the case. *Barton v. Barbour*, 104 U.S. 126, 127-29 (1881).

will on the ground of federal preemption. To any extent that CPI's complaint is not dismissed, this is far from a "simple matter."

Because CPI's case is in its infancy, lifting the stay would not promote judicial efficiency (*Sonnax* factor 10). *See* Dkt. No. 668 (Order from this Court refusing to lift stay where "the Litigation is in its very early stages"). For that reason, this case is easily distinguishable from other matters where this Court has lifted the stay. For instance, this Court allowed an arbitration to proceed because the hearing in that matter had already occurred and the parties were merely waiting for the award. *See* Dkt. No. 620; *see also* Dkt. No. 617 (lifting stay for sole purpose of determining motion to dismiss in part because Commonwealth had already filed its moving papers). Where another tribunal has already made considerable progress towards resolving an issue, it is efficient to allow that tribunal to finish what it started. Here, however, CPI's case has not gotten off the ground— all that has happened is that a complaint was filed, a reassignment of the case to this Court was denied, and it was determined to be automatically stayed. There is thus no efficiency gained by allowing the case to go forward during the stay.⁴

Moreover, many of the disputes over executive and attorney-client privilege likely to arise from any portion of CPI's litigation that survives a motion to dismiss, are also likely to be adjudicated by this Court during discovery in the Title III cases. Efficiency is not promoted by having the same issues litigated concurrently in front of two separate tribunals. *See, e.g., In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 526 (Bankr. S.D.N.Y. 1996), *corrected* (Sept. 18, 1996) (denying stay relief in part because "necessity of

⁴ *Sonnax* factor 4 also counsels against lifting the stay because there has not been any special tribunal constituted to resolve CPI's case.

simultaneously conducting two proceedings in two different courts regarding [the same issue] would be neither expeditious nor economical”).⁵

D. The “Complete Resolution” Factor Favors Maintaining the Stay.

CPI is wrong when it argues that the first *Sonnax* factor—whether relief would result in complete or partial resolution of the issues—supports lifting the stay. According to CPI, litigating whether it is entitled to the documents it seeks would “completely resolve the question of whether the CPI has the right to access the documents it has requested.” Dkt No. 724 at 5. In so arguing, CPI distorts the meaning of the first *Sonnax* factor. It is not sufficient that the separate litigation would eventually resolve the issues *in that litigation*. If that were the test, the first *Sonnax* factor would *always* favor lifting the stay because every lawsuit eventually resolves the issues in that particular proceeding.

Instead, the first *Sonnax* factor primarily focuses on whether the separate litigation would expeditiously resolve issues relevant *to the bankruptcy case*. See, e.g., *In re Taub*, 413 B.R. 55, 62 (Bankr. E.D.N.Y. 2009) (lifting stay because non-bankruptcy litigation “would resolve significant open issues in the Debtor's bankruptcy case, and would assist the Debtor in pursuing the confirmation of a [] plan”). Accordingly, many courts characterize this factor as whether the non-bankruptcy proceeding would result in “the resolution of preliminary bankruptcy issues.” See, e.g., *In re Murrin*, 477 B.R. 99, 109 (D. Minn. 2012); *In re Cummings*, 221 B.R. 814, 818 (Bankr. N.D. Ala. 1998). CPI’s litigation would not resolve any issues remotely relevant to the

⁵ In addition, in conjunction with the Title III cases, the FOMB is engaged in extensive and multifaceted negotiations with creditors in an effort to reach a consensual restructuring. The production of information – including potentially confidential communications the disclosure of which could put the FOMB at a disadvantage in the negotiations – is more appropriately overseen by this Court.

Commonwealth's Title III plan or to financial claims made against the Commonwealth, and therefore the first *Sonnax* factor does not support lifting the stay.

Where the non-bankruptcy litigation would be unable to resolve an issue expeditiously, the first *Sonnax* factor weighs against lifting the stay. *See, e.g., In re Motors Liquidation*, 2010 WL 4630327, at *4 (holding that the first *Sonnax* factor supported maintaining the stay because “the bankruptcy court reasonably found that granting Appellant relief from the stay would more likely expose [the debtor] to protracted litigation rather than speedily resolve the ERISA suit.”).

E. The Balance of Harms Favors Maintaining the Stay.

Lifting the stay to permit CPI's case to proceed would have a damaging effect on the Commonwealth's Title III case (as well as the other pending Title III cases) and the Commonwealth's overall restructuring efforts. Time is precious for the Commonwealth and its people, and time spent on the CPI action is FOMB time not spent on its statutory missions including the restructurings. The FOMB is a Board comprised of seven voting members and one *ex officio* member (supported by only eight staff members). The FOMB is responsible for overseeing all aspects of the Commonwealth's recovery effort as well as its efforts to revitalize its infrastructure. Forcing the FOMB to expend time, attention, and resources defending against CPI's lawsuit would only serve to distract the FOMB from the tasks it was commissioned by Congress to undertake. The FOMB should not be sidetracked from its critical endeavor. *See, e.g., In re Residential Capital*, 2012 WL 3860586, at *8 (denying motion to lift stay and concluding that “the balance of the harms[] weighs in favor of maintaining the stay because the burden imposed on the Debtors in terms of the time, financial resources, and attention necessary to defend [] in the [] Litigation is great in light of their ongoing chapter 11 cases”); *In re City of Stockton*, 484 B.R. at 378 (declining to lift stay of case against officials of debtor because “[i]t is

apparent to the court that [the officials'] undivided time and attention will continue to be required [for the chapter 9 case] at least for a number of months”).

Conversely, any harm caused by delaying CPI's suit would be minor. CPI acknowledges in its complaint that it first requested the documents at issue in the fall of 2016. Ex. 1, ¶¶ 4.16-4.14. It nevertheless did not bring a suit seeking the documents until May 2017. If acquiring these documents were an urgent matter, CPI would not have waited more than half a year to press for them.

Moreover, many of the most significant documents CPI seeks are *already available* to CPI on the FOMB's web site. See <https://juntasupervision.pr.gov/index.php/en/documents/> (last visited August 5, 2017). The available documents include the FOMB members' financial disclosure forms (requested by CPI in Ex. 1 at 21, ¶ p); FOMB meeting minutes (requested in Ex. 1 at 21, ¶ o); the FOMB's contracts with private entities (requested in Ex. 1 at 21, ¶ m); various official communications between the FOMB on the one hand and the Commonwealth or the federal government on the other (requested in Ex. 1 at 21, ¶¶ k-l); and scores of other documents pertaining to the FOMB's oversight of the Commonwealth and its instrumentalities. The web site is frequently updated with new documents, including several that were uploaded earlier this month. Accordingly, any harm to CPI from delaying its lawsuit has been mitigated.

Furthermore, CPI has other avenues for acquiring many of the documents it seeks through this litigation. For example, CPI has alleged that many of the documents are in the possession of federal agencies. See, e.g., Ex. 1, ¶ 4.23 (seeking disclosure forms submitted to the U.S. Department of Treasury); *id.* at 21, ¶ 2(k) (seeking communications between FOMB and “any agency of the federal government”). CPI can request those documents directly from the federal government under the Freedom of Information Act. See 5 U.S.C. § 552. Moreover, CPI

has filed a separate lawsuit against Governor Ricardo Rosselló Nevares seeking many of these same documents, *see Centro de Periodismo Investigativo, Inc. v. el Gobernador del Estado Libre Asociado de Puerto Rico, et.al*, SJ2017cv00396 (C.P.R. June 1, 2017), and the Commonwealth has already produced some of the documents that CPI seeks from the FOMB. *See* Ex. 1 ¶ 4.5(a)-(i); *id.* at 20-21 ¶¶ 2(a)-(i), (l).

F. The Allegedly “Constitutional” Nature of CPI’s Claim Is Irrelevant.

Having failed to establish cause to lift the stay, CPI resorts to arguing that it is entitled to special treatment because it has brought a claim under the Puerto Rico Constitution. Dkt. No. 724 at 6-7. As explained above, CPI’s reliance on the Puerto Rico Constitution is actually the reason its action should be dismissed based on federal preemption. Moreover, this Court has already squarely rejected that position. *See Brigade Leveraged Capital*, 217 F. Supp. 3d at 526 (“The mere fact that plaintiffs bring claims pursuant to the Federal and Commonwealth Constitutions does not, however, entitle them to automatic circumvention of the PROMESA stay.”). Although the *Brigade Leveraged Capital* Court made its ruling in the context of the stay imposed by PROMESA § 405, it made clear that its holding applies equally to the automatic stay under § 362 of the Bankruptcy Code. *Id.* (citing *In re City of San Bernardino*, 558 B.R. 321, 330 (C.D. Cal. 2016), for the proposition that “there is no exception to the Bankruptcy Code’s automatic stay for constitutional claims, even if that category of claims is ‘deserving’ of an exemption”). To the extent that there is any conflict between the automatic stay and CPI’s claim under the Puerto Rico Constitution, the federal automatic stay prevails. PROMESA § 4.

None of the authority cited by CPI in connection with its “constitutional” argument supports lifting the stay because none involved a lift-stay motion. Dkt. No. 724 at 6-7. Instead, those cases involved the question of whether the stay applies in the first place, which is an issue

already resolved against CPI by Judge Garcia-Gregory and which is not before this Court. *See* Ex. 3.

In any event, none of CPI's cases undercuts Judge Garcia-Gregory's considered ruling that the automatic stay applies here. Contrary to CPI's suggestion, Judge Young did not reject the application of the automatic stay in *Cruz-Rodriguez v. Administración de Corrección de Puerto Rico*; he merely asked for additional briefing on the issue. No. 17-cv-1464, Dkt. No. 11 (D.P.R. June 20, 2017). In *Vázquez-Carmona v. Dep't of Educ.*, the Court declined to apply the stay because the plaintiff sought "to enforce a *federally protected right*" and, according to the Court, PROMESA "expressly contemplates that the temporary stay will not apply to suits to enforce *federal rights*." No. 16-1846, 2017 WL 2352153, at *1 (D.P.R. May 31, 2017) (citing 48 U.S.C. § 2106) (emphasis added). No federal rights are implicated by CPI's action other than the action's attempt to defy the supremacy of PROMESA, and *Vazquez-Carmona* does not support the position that CPI's *state-law* claim falls outside the automatic stay.⁶ Similarly, *Atilés-Gabriel v. Commonwealth* was a *habeas* case decided solely on the basis that the automatic stay does not suspend the Constitutional *habeas* right. No. 15-2108, 2017 WL 2709757, at *3-4 (D.P.R. June 23, 2017). The court recognized that the section 362(a)(1) stay is "nearly all-encompassing," *id.* at *3, but it drew a narrow exception for *habeas* petitions, *id.* As such, *Atilés-Gabriel* is inapposite to this case.

G. The Remand of the *Bhatia Gautier* Matter Is Irrelevant.

Finally, CPI's reliance on this Court's Order remanding the *Bhatia Gautier* matter is misplaced. *See* Dkt. No. 724 at 7-8 (citing Dkt. No. 16 of Adversary Proceeding No. 17-BK-

⁶ In all events, the holding in *Vazquez-Carmona* is not correct. The court there held that PROMESA § 7 forbids the application of the PROMESA automatic stay to suits that seek to enforce a federally protected right. 2017 WL 2352153, at *1. However, PROMESA § 7 applies only to federal health, safety, and environmental laws, not every federal law.

136, attached hereto as Exhibit 4). That Order neither involved the applicability of the automatic stay nor a motion to lift the automatic stay. The sole issue before the Court was whether a claim for government documents from Commonwealth officials (and not the FOMB) under the Puerto Rico Constitution was more appropriately adjudicated by the Title III Court or a Commonwealth court. Ex. 4 at 7-8. The Court ultimately remanded because the claim “exclusively involves Puerto Rico law,” “Commonwealth legal issues substantially predominate,” and the issues pertaining to the document claim are “greatly attenuated from the core issues on which [the Title III case] will turn.” *Id.* In so ruling, the Court noted that the defendants in that case had not shown that the “outcome of the litigation”—i.e., the legal rulings by the Commonwealth court—would affect the Commonwealth’s adjustment of debts or the treatment of its property in the Title III case. *Id.* at 7. Federal preemption was not raised there because the action was not against the FOMB.

No aspect of that Order is helpful to CPI’s position. The Order said nothing about the automatic stay, and its statement that the outcome of the litigation would not affect rights in the Commonwealth’s property or the Commonwealth’s ultimate plan of adjustment is irrelevant. No one is arguing that legal rulings in CPI’s case will determine parties’ rights in the Title III case. Instead, CPI’s case should remain stayed because it would distract the FOMB from its critical business of prosecuting five Title III cases and overseeing the Commonwealth’s ultimate return to fiscal health, and would expend Commonwealth funds at a time when those funds should be preserved for creditors.

CONCLUSION

For the reasons set forth above, the motion to lift the automatic stay should be denied.

REQUEST FOR HEARING

Pursuant to the Court's order scheduling briefing for this motion (D.I. 745), the FOMB respectfully reserves its right to request a hearing once the motion is deemed fully submitted.

Dated: August 8, 2017
San Juan, PR

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*Attorneys for The Financial Oversight and
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representative of The Commonwealth of Puerto
Rico*

CERTIFICATE OF SERVICE

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 notifications of such filing to all CM/ECF participants in this case.

/s/ Hermann D. Bauer _____

Hermann D. Bauer

Exhibit 1

(To the August 8, 2017 Opposition of Financial Oversight and Management Board of Puerto Rico, as Commonwealth Representative, to Motion for Relief from Automatic Stay)

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

**CENTRO DE PERIODISMO
INVESTIGATIVO**

Plaintiff

v.

**FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR
PUERTO RICO**

Defendant

CIVIL NO. 2017-

COMPLAINT FOR DECLARATORY
RELIEF; PRELIMINARY AND
PERMANENT INJUNCTION;
MANDAMUS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

“To permit the government to manage public affairs under the mantle of secretiveness is to invite arbitrary actions, poor administration, governmental indifference, public irresponsibility and corruption. A citizenry which is alert and militant against these potential evils of all government machinery can perform its fiscalizing function only if it has possession of the information which will permit it to discover the potential dangers in a timely manner and demand responsible action. To deprive the citizenry of this information is equivalent to producing an aggravated collective paralysis attributable to civil myopia of a citizenry which knows only part of the actions of its government or knows only half-truths related thereto.”

Efrén Rivera Ramos, *La libertad de información: Necesidad de su reglamentación en Puerto Rico*, 44 REV. JUR. UPR 67, 69 (1975)
(translation provided)

TO THE HONORABLE COURT:

**NOW COMES the plaintiff CENTRO DE PERIODISMO
INVESTIGATIVO, (hereinafter “CPI”) represented by the undersigned attorneys
and respectfully states and prays as follows:**

I. INTRODUCTION

1.1 This action for declaratory, injunctive and mandamus relief seeks access to information necessary to inform the citizenry of the workings of the government of Puerto Rico and to allow citizens to make informed decisions about their future.

1.2 This **action** is brought before this court pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 and the All Writs Act, 28 U.C. §1651, well as the specific jurisdictional provisions of the “Puerto Rico Oversight, Management and Economic Stability Act of 2016.

1.3 Plaintiff **Centro de Periodismo Investigativo (“CPI”)** is a non-profit organization dedicated to investigative reporting, access to information litigation and journalist’s training, as ways to obtain information necessary for the people of Puerto Rico to make informed decisions and better understand the realities of the current climate, wherein determinations are being made behind closed doors, or by people who have not been elected by the people of Puerto Rico.

1.4 Through this action, the **CPI** seeks access to documents which are within the power and possession of the **Financial Oversight and Management Board of Puerto Rico** (hereinafter, *the Junta*, for its Spanish first name), an organism promulgated by the United States Congress, which granted *the Junta* plenary powers in Puerto Rico, including the power to supersede many actions taken by

Puerto Rico officials elected by the citizenry.

1.5 **CPI** has previously made requests to the **Junta** for the documents sought through this action, but the **Junta** has either ignored the requests or provided inadequate or incomplete documentation through its website.

1.6 The actions of the **Junta** violate the Constitution of Puerto Rico, which guarantees access to government documents and information.

1.7 The granting of the relief sought herein will advance the interest of the people of Puerto Rico, who have a right to know the events which will affect their daily lives and the future of Puerto Rico.

1.8 The plaintiff is seeking solely declaratory, injunctive and mandamus relief, requesting access to information. No damages are sought herein.

1.9 Accordingly, the current action bears no relationship to the recent “Petition for Covered Territory or Covered Instrumentality,” presented by the Commonwealth of Puerto Rico on May 3, 2017 pursuant to Title III of the “Puerto Rico Oversight Management and Stability Act” or “PROMESA,” hereinafter referred to as the “Law Creating the Junta.” *See, Case No. 17-01578, before Judge Laura Taylor Swain, appointed by the Chief Judge of the United States of America.*

II. JURISDICTION

2.1 The jurisdiction of this court is invoked pursuant to Law Creating the

Junta, which in its Section 106, 48 U.S.C. §2126, provides in relevant part that “... any action against the Oversight Board shall be brought in a United States district court for the covered territory...” (i.e Puerto Rico).

2.2 This is an action “against the Oversight Board” (otherwise known as the “Junta”).

2.3 Jurisdiction is also founded on the All Writs Act, 28 U.S.C. §1651(a), which provides for all courts established by Act of Congress to issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law, including the Writ of Mandamus.

2.4 Venue is proper in this court pursuant to the above-cited Section 106.

III. PARTIES

The Centro de Periodismo Investigativo

3.1 The plaintiff **Centro de Periodismo Investigativo (“CPI”)** is a non-profit organization which was founded in 2007.

3.2 It is a news organization which engages in investigative journalism and has won more than 15 national awards for its work in this field.

3.3 The **CPI** has a website, www.periodismoinvestigativo.com, where citizens *inter alia* can access its investigative pieces, and which is visited by some 500,000 unique users on an annual basis.

3.4 Since its inception, the **CPI** has published articles which are available for free to interested readers and which have been reproduced by more than 25 other news media outlets in Puerto Rico, the United States and beyond.

3.5 In addition to its work as a news medium, the **CPI** has two other important missions: to assure that the citizens of Puerto Rico have access to the information they require to exercise their basic rights as citizens, and to monitor “fiscalizar” those governmental bodies which make decisions affecting the rights and the future of the public.

3.6 These two areas of work are related to litigation to assure proper access to information, and education and training of both professionals in the field of journalism and lay-people as to the right to access to information and the methods for assuring compliance with these rights.

3.7 Among the employees, contractors and Board members of the **CPI** are dedicated journalists and attorneys who engage in work designed to assuring that the citizenry in Puerto Rico has access to the information necessary to the exercise of democratic rights.

3.8 As stated on its website, “the **CPI** recognizes that the fundamental requirement for a true democracy is that the citizenry be well informed ...” The **CPI** engages in work to avoid the citizens being “ill informed, unaware of

important truths, and limited in their capacity to democratically monitor those who hold power. Being convinced that these tendencies have to be combated, this is the vision that nourishes the **CPI** and all of its work.” (Translation supplied)

3.9 “With this vision in mind, [the **CPI**] was organized as an autonomous non-profit entity, which allows it to act with independence from political and commercial interests.” (*Id.*, Translation supplied).

The Financial Oversight and Management Board for Puerto Rico

3.10 The Financial Oversight and Management Board for Puerto Rico (“the **Junta**”) was created by virtue of the provisions of the “Puerto Rico Oversight, Management, and Economic Stability Act,” Public Law 114-187, approved by the 114th Congress of the United States on June 30,2016, and signed by then President Barack Obama. 48 U.S.C. §2121(b)(1).

3.11 The **Junta** was established pursuant to Congress’s invocation of its power under Article IV §3 of the Constitution of the United States, commonly known as the Territorial Clause. This Clause grants plenary power to the Congress of the United States to dispose of and make all “needful Rules and Regulations” for the territory held by the United States.

3.12 According to Public Law 114-187, “the purpose of the Oversight Board is to provide a method for [Puerto Rico] to achieve fiscal responsibility and access

to the capital markets.” 48 U.S.C §2121(a).

3.13 Public Law 114-187 provides that the **Junta** is to be considered “an entity within the territorial government for which it is established...” (i.e. Puerto Rico), 48 U.S.C §2121(c)(1), and all expenses of the Junta are paid for by the Government of Puerto Rico. 48 U.S.C §2127(b).

3.14 Congress has provided that the **Junta** “shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.” 48 U.S.C §2121(c)(2).

3.15 The seven members of the **Junta** were all appointed by the President of the United States. Two members of the **Junta** were selected from a list submitted by the Speaker of the House of Representatives, Paul Ryan. Two were selected from a list submitted by the Majority Leader of the Senate, Mitch McConnell. Two others were selected from a list submitted by the Minority Leader of the House of Representatives, Nancy Pelosi, and two were selected from a list submitted by the Minority Leader of the Senate of the United States, Harry Reid. The final member was selected by then President Barack Obama. *See*, 48 U.S.C §2121(e)

3.16 The Governor of Puerto Rico is an *ex officio* member of the Junta, without any voting rights. 48 U.S.C §2121(e)(3).

3.17 Among other things, the **Junta** has the power to “secure copies,

whether written or electronic, of such records, documents, information, data or metadata from the territorial government (Puerto Rico) necessary to enable the Oversight Board to carry out its responsibilities ... At the request of the Oversight Board [it] shall be granted direct access to such information systems, records, documents, information or data as will enable [it] to carry out its responsibilities under this Act." 48 U.S.C §2124(c).

IV. FACTS

4.1 For the first several months after Public Law 114-187 was passed, there was a lengthy process of selecting the members of the **Junta**.

4.2. After the **Junta's** members were selected, it held its first meeting in the City of New York on September 30, 2016, where the President of the **Junta** was selected and its By-laws were adopted.

4.3 Although the September 30th meeting was open to the public, the determinations reached therein had been previously agreed to by the **Junta**.

4.4 As part of the first public meeting of the **Junta** on September 30, 2016, the President of the Junta, José Carrión stated during the press conference that the members of the Junta had gone through a "rigorous process" with the United States Department of the Treasury, prior to their selection as members of the Junta, during which they submitted financial disclosure and conflict of interest

documents.

4.5 During that same meeting, the **Junta** requested the Government of Puerto Rico a number of documents, including the following:

- a. Weekly cash flow reports, including all revenues received and all expenses paid (including any debt service) and broken down by main categories;
- b. Monthly downloads of bank account data and statements of all principal banking accounts (provided directly to the Board of each bank);
- c. 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);
- d. Monthly and year to date detailed report on revenues and a narrative about collection efforts and main initiatives of the Puerto Rico Treasury Department;
- e. Monthly detailed payroll reports by agency;
- f. Monthly reports on federal funds received and disbursed by area and by agency;
- g. Monthly reports of all debt obligations due this current fiscal year and which have been paid; and
- h. Quarterly report on each agency's productivity and performance with

appropriate metrics and a narrative description.

i. Quarterly report on key Puerto Rico economic, financial, social and labor statistics.

4.6 On October 24, 2017, the **Junta** contracted the services of **Forculus PR** (also known as **Forculus Strategic Communications**), a firm specializing in communications, public relations and media management services, with a Resident Agent in the Beverly Hills sector in Puerto Rico.

4.7 This firm, whose employees and/or contractors include Edward Zayas and José Cedeño, was hired by the Junta to *inter alia* develop and market the “reputation (branding) of the **Junta** and its members.” (Parenthesis in the original).

4.8 As set forth in the website for **Forculus PR**, this firm has performed communications, public relations and media management services for the Government of Puerto Rico, including the Government Development Bank of Puerto Rico, and its “Public-Private Partnership Arm, the Puerto Rico Industrial Development Company” (Fomento), as well as “the Office of the Governor of Puerto Rico and the Office of Management and Budget.”

4.9 In communications with José Cedeño, the **CPI** was informed that all press requests had to be made through Forculus, PR using official emails jcedeno@forculuspr.com and ezayas@forculuspr.com.

4.10 At all times relevant to this complaint and as to the matters set forth herein, **Forculus PR**, and its agents, including employees and/or contractors Edward Zayas and José Cedeño, acted as agents of the Junta.

4.11 On November 16, 2016, Joel Cintrón Arbasetti, a reporter with the **CPI**, made a request to Edward Zayas, of **Forculus, PR**, to be given to access to any and all of the documents listed in ¶4.5 above, which were supposed to be provided by the Government of Puerto Rico to the Junta.

4.12 Since September 30, 2016, Carla Minet, a veteran journalist who is the Executive Director of the **CPI**, requested the federal Office of Government Ethics (OGE) to provide the **CPI** with all financial disclosure and conflict of interest documents which the seven members of the Junta were supposed to submit during their evaluation process. Ms. Minet also submitted the request to the United States Department of Treasury and to The White House, as suggested by **Junta** President Carrión and the OGE.

4.13 Ms. Minet was informed by the OGE on a follow-up phone conversation that the documents had to be requested from the **Junta**, rather than from the federal agencies.

4.14 On December 12, 2016, Ms. Minet directed an email to Edward Zayas and José Cedeño of **Forculus PR**, in which, on behalf of the **CPI**, she requested all

financial disclosure and conflict of interest documents which the seven members of the Junta submitted to the United States Department of Treasury, as stated by Junta President Carrión during the September 30th meeting referenced at ¶¶4.2 - 4.4 above.

4.15 Ms. Minet indicated to Messrs. Zayas and Cedeño that a prompt response was required, since the **CPI** was working on a news article for which the information was required.

4.16 On that same day, Mr. Cedeño responded to Ms. Minet that her request would be “processed” and that a response “would be offered as soon as possible.” (Translation provided).

4.17 Subsequent emails with respect to these matters yielded no response from the **Junta**.

4.18 On February 9, 2017, **CPI** Executive Director Carla Minet did additional follow-up with respect to the requests made on November 16, 2016 by **CPI** reporter Joel Cintrón Arbasetti.

4.19 At that time, Ms. Minet also followed up with respect to a separate communication which had been sent on December 12th, 2016, wherein Ms. Minet solicited additional documents and information from the **Junta**, via Edward Zayas, from **Forculus PR**.

4.20 The documents requested in the February 9th communication included the following: (a) records relating to communications, inquiries or requests for information, documents, reports or data by any member of the **Junta** and/or its staff to any agency of the federal government or federal government official, or by the federal government, its agencies or staff, to the **Junta**; (b) communications, reports, consultations, updates, documents or information provided by any member of the **Junta** and/or its staff to La Fortaleza, its officers, or any other agency or official of the Government of Puerto Rico, or by the Government of Puerto Rico to the **Junta**, its members or staff; (c) contracts granted by the **Junta** to private entities (also originally requested on November 11, 2016); (d) protocols, regulations, manuals or memorandums generated by the **Junta** to conduct its work; and (e) minutes of meetings held by the **Junta** and its committees or its members.

4.21 On or about February 28, 2017, the **Junta** published on its website certain financial information forms regarding the individual members of the **Junta**. The documents of the seven board members were dated in February 2017.

4.22 On the following day, March 1, 2017, Ms. Minet, on behalf of the CPI, directed a number of questions to the Junta regarding the documents published on the website.

4.23 In her March 1st email to Edward Zayas, of **Forculus PR**, Ms. Minet requested *inter alia* the following information: whether the published documents were the same ones submitted to the U.S. Department of the Treasury, as part of the “rigorous process” referred to by **Junta** President José Carrión in the meeting in New York on September 30, 2016, as set forth in ¶¶4.2 to 4.4 above; to which agency the documents were submitted; why there was missing information on the documents, including but not limited to the signatures of the Ethics official, salary information for some of the Junta member, and financial information concerning spouses of the Board members.

4.24 Ms. Minet indicated to Mr. Zayas that the inquiries were urgent, since the information was needed for a deadline for publication later that day.

4.25 To date, neither **Forculus PR** nor the Junta has provided any substantive response to the inquiries and document requests set forth at ¶¶4.5 and ¶¶4.11-4.21 above.¹¹

4.26 To date, the **CPI** has received no response to the inquiries made in Ms.

¹¹ On February 10th, 2017, the CPI received from the Commonwealth of Puerto Rico certain documents, in response to similar requests for information which had been directed to the Commonwealth itself. The documents are as follows: Letter to Governor and to newly elected Governor, December 20, 2016; Press Communiqué of the Junta, January 18, 2017; Letter from the Junta to Governor Rosselló, January 18, 2017; Press Communiqué, January 20, 2017; Letter from Governor Rosselló a the Junta, January 21, 2017; Letter from Governor Rosselló to the Junta, January 23, 2017; Liquidity Plan, January 28, 2017; Puerto Rico fiscal update, January 28, 2017; Debt service payments, February 1, 2017; Letter from the Junta to Elías Sánchez, February 7, 2017. With the exception of the document related to debt service payments, all of these documents can be found on the website of the Junta.

Minet's email of March 1, 2017.

V. CAUSE OF ACTION

5.1 In declarations made when he announced the appointment of the seven members to the **Junta**, then President Barack Obama stated that “[i]n order to be successful, the Financial Oversight and Management Board will need to establish an open process for working with the people and Government of Puerto Rico... [in order to build] a better future for all Puerto Ricans.”

5.2 Since the Junta is not considered a federal organism, but rather is “an entity within the territorial government for which it is established...” (i.e. Puerto Rico),⁴⁸ *U.S.C §2121(c)(1)*, and all expenses of the Junta are paid for by the Government of Puerto Rico, *48 U.S.C §2127(b)*, the Constitution and laws of the Commonwealth of Puerto Rico apply to its operations.

5.3 Pursuant to Section 4 of the “Puerto Rico Oversight, Management, and Economic Stability Act,” *48 U.S.C §2103*, Puerto Rico law applies with respect to the operation of the Junta, as long as it is not “inconsistent with [the] Act.”

5.4 There is nothing inconsistent between the right of access to information and the Act establishing the Junta.

5.5 In point of fact, providing access to the requested documents would further the purpose of the Financial Oversight and Management Board, as publicly

stated by the then President of the United States, Barack Obama, set forth in ¶5.1 above.

5.6 Under the Constitution of Puerto Rico, there exists an undisputed right of the people to access information produced or in the power of the Government of Puerto Rico.

5.7 This right derives from the Constitution of Puerto Rico and is considered a fundamental human right. *See, for example, Trans Ad PR v. Junta Subastas*, 174 DPR 56, 67 (2008); *Colón Cabrera v. Caribbean Petroleum*, 170 DPR 582, 590 (2007); *Ortiz v. Dir. Adm. Tribunales*, 152 DPR 161, 175 (2000).

5.8 The Supreme Court of Puerto Rico has observed that this right is a critical component of the rights of free speech, free press and freedom of association set forth explicitly in the Bill of Rights, Article II of the Constitution of the Commonwealth of Puerto Rico. *See, eg., Soto v. Srio. Justicia*, 12 P.R. Offic. Trans. 597, 607-608 (1982).

5.9 As expressed by the Puerto Rico Supreme Court, access to information constitutes an important component of a democratic society, in which the citizen can issue an informed judgment regarding the actions of the government. *Colón Cabrera*, 170 DPR at 590. The right to redress grievances is also implicated, in that without knowledge of the facts, one cannot judge, nor demand remedies with

respect to grievances against the government either through judicial or electoral processes.

5.10 Given the importance of this right under the Constitution of Puerto Rico, the Government cannot deny access to documents capriciously.

5.11 The **Junta**, as an organism “within” the government of Puerto Rico, has a ministerial duty to comply with the Constitution of Puerto Rico with respect to the public nature of the information and documents sought herein.

5.12 The critical role of the press in guaranteeing access to information has also been recognized in the Constitutional law of Puerto Rico. “[T]he press constitutes a vehicle of information and opinion to inform and educate the public, to offer criticism, to provide a forum for discussion and debate, and to act as a surrogate to obtain for readers news and information that individual citizens could not or would not gather on their own.” Santiago v. Bobb y El Mundo, 17 P.R. Offic. Trans. 182, 190 (1986) (citing B. F. Chamberlain & J. Brown, *The First Amendment Reconsidered* 110, New York, Longman (1982)).

5.13 The right of access to information is also codified in Article 409 of the Código de Enjuiciamiento Civil, 32 LPRA § 1781 (2015), which provides for access to “public documents” in Puerto Rico.

5.14 To date, the Junta has held seven (7) public meetings on the following

dates: October 14, 2016 (New York); November 18, 2016 (Fajardo, Puerto Rico); January 28, 2017 (Fajardo, Puerto Rico); March 13, 2017 (New York); March 31, 2017 (San Juan, Puerto Rico); and April 28, 2017 (New York).

5.15 Other than the brief public sessions, largely to reaffirm decisions already made, and the placement of some selected documents on its website, the **Junta** has not provided the citizenry of Puerto Rico with substantive access to the proceedings of the **Junta**, which take place behind closed doors.

5.16 The **Centro de Periodismo Investigativo** has attempted to obtain documents which are critical for providing the citizens of Puerto Rico with the access to information guaranteed under the Constitution and Laws of Puerto Rico and to allow the CPI, as an important and respected news organization, to provide information to the citizens regarding the operations of the **Junta**.

5.17 These efforts by the **CPI** have been met with stonewalling on the part of the **Junta** and its designated marketing and branding group, **Forculus PR**.

5.18 Access to the information requested by the CPI is essential to assure an informed citizenry and the validation of the rights existing under the Constitution and laws of Puerto Rico.

5.19 The aforementioned rights apply to the **Junta**, as they are not inconsistent with Law 114-187.

5.20 Since Congress designated the Junta not only to be paid for by the people of Puerto Rico, but also to be an entity “within” the government of Puerto Rico, the Constitution and laws of the Commonwealth of Puerto Rico apply to the Junta.

5.21 There is no adequate remedy at law to address the fundamental constitutional harms for which redress is sought herein.

5.22 The citizens of Puerto Rico and the population served by the investigative and reporting work done by the CPI will be irreparably harmed if the relief requested herein is not granted.

5.23 The public interest will be served by the granting of the relief requested herein, be it in the form of injunctive relief or through the issuance of a writ of Mandamus.

5.24 Mandamus is an appropriate writ to assure that **Junta** exercises its ministerial duty to assure compliance with the Constitution and laws of Puerto Rico.

WHEREFORE, the plaintiff **Centro de Periodismo Investigativo** hereby requests the following relief:

1. A Declaratory Judgment that the actions of the Junta in effectively denying access to the documents and information set forth in ¶¶4.4 to 4.26 above.

2. Issue a preliminary injunction and a permanent injunction ordering the **Junta** to deliver to the **Centro de Periodismo Investigativo** the following documents:

a. Weekly cash flow reports, including all revenues received and all expenses paid (including any debt service) and broken down by main categories;

b. Monthly downloads of bank account data and statements of all principal banking accounts (provided directly to the Board of each bank);

c. 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);

d. Monthly and year to date detailed report on revenues and a narrative about collection efforts and main initiatives of the Puerto Rico Treasury Department;

e. Monthly detailed payroll reports by agency;

f. Monthly reports on federal funds received and disbursed by area and by agency;

g. Monthly reports of all debt obligations due this current fiscal year and which have been paid; and

h. Quarterly report on each agency's productivity and performance with

appropriate metrics and a narrative description.

i. Quarterly report on key Puerto Rico economic, financial, social and labor statistics.

j. All financial statements and other financial and conflict of interest submissions made by the members of the Junta prior to their designations or subsequent thereto.

k. Records relating to communications, inquiries or requests for information, documents, reports or data by any member of the **Junta** and/or its staff to any agency of the federal government or federal government official, or by the federal government, its agencies or staff, to the **Junta**;

l. Communications, reports, consultations, updates, documents or information provided by any member of the Board and/or its staff to La Fortaleza, its officers, or any other agency or official of the Government of Puerto Rico, or by the Government of Puerto Rico to the **Junta**, its members or staff;

m. Contracts granted by the **Junta** to private entities;

n. Protocols, regulations, manuals or memorandums generated by the **Junta** to conduct its work;

o. Minutes of meetings held by the **Junta**, its committees or its members;

p. Complete financial disclosure forms for all **Junta** members.

3. Issue a Writ of Mandamus requiring the **Junta** to comply with its ministerial duty to provide the information and documents set forth in the previous paragraph.

4. Issue whatever other relief this court deems just and appropriate.

In San Juan Puerto Rico, this 1st day of June, 2017.

Respectfully Submitted

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Calle O'Neill G-11
San Juan, Puerto Rico 00918-2301
Tel.: (787) 764-0814
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By: /s/ Judith Berkan
Judith Berkan
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/s/ Steven Lausell Recurt
Steven Lausell Recurt
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Exhibit 2

(To the August 8, 2017 Opposition of Financial Oversight and Management Board of Puerto Rico, as Commonwealth Representative, to Motion for Relief from Automatic Stay)

**United States District Court
District of Puerto Rico (San Juan)
CIVIL DOCKET FOR CASE #: 3:17-cv-01743-JAG**

Centro de Periodismo Investigativo, Inc. v. Financial Oversight and Management Board for Puerto Rico Date Filed: 06/01/2017
Assigned to: Judge Jay A. Garcia-Gregory Jury Demand: None
Cause: 28:1331 Fed. Question Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Centro de Periodismo Investigativo, Inc.

represented by **Steven P. Lausell-Recurt**
PO Box 9023951
San Juan, PR 00902-3951
787-529-2338
Email: slausell@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Judith Berkan
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ATTORNEY TO BE NOTICED

V.

Defendant

Financial Oversight and Management Board for Puerto Rico

represented by **Luis F. Del-Valle-Emmanuelli**
Del Valle Emanuelli Law Offices
PO Box 79897
Carolina, PR 00984-9897
787-977-1932
Fax: 787-722-1932
Email: dvelawoffices@gmail.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/01/2017	<u>1</u>	COMPLAINT for preliminary and permanent injunctive relief and mandamus against Financial Oversight and Management Board for Puerto Rico (Filing fee \$400 receipt number 0104-5465316.), filed by Centro de Periodismo Investigativo, Inc.. Service due by 8/30/2017, (Attachments: # <u>1</u> Category Sheet, # <u>2</u> Civil Cover Sheet, # <u>3</u> Exhibit address form, # <u>4</u> Exhibit address form)(Berkan, Judith) (Entered: 06/01/2017)
06/01/2017	<u>2</u>	NOTICE of filing Summons as to Financial Oversight and Management Board for Puerto Rico (Berkan, Judith) Modified on 6/2/2017 (su). (Entered: 06/01/2017)

06/02/2017	3	NOTICE OF JUDGE ASSIGNMENT Case has been assigned to Judge Jay A. Garcia-Gregory (arg) (Entered: 06/02/2017)
06/02/2017	4	Summons Issued as to Financial Oversight and Management Board for Puerto Rico (Attachments: # 1 Summons) (arg) (Entered: 06/02/2017)
06/13/2017	5	MOTION to Reassign Case to Judge Laura Taylor Swain filed by Luis F. Del-Valle-Emmanuelli on behalf of Financial Oversight and Management Board for Puerto Rico Responses due by 6/27/2017. NOTE: Pursuant to FRCP 6(a) an additional three days does not apply to service done electronically. (Del-Valle-Emmanuelli, Luis) (Entered: 06/13/2017)
06/14/2017	6	ORDER re 5 MOTION to Reassign Case. Plaintiff shall respond by 6/20/2017. Signed by Judge Jay A. Garcia-Gregory on 6/14/2017. (AP) (Entered: 06/14/2017)
06/15/2017	7	NOTICE of Appearance by Steven P. Lausell-Recurt on behalf of Centro de Periodismo Investigativo, Inc. (Lausell-Recurt, Steven) (Entered: 06/15/2017)
06/15/2017	8	RESPONSE in Opposition to Motion filed by Centro de Periodismo Investigativo, Inc. Re: 5 MOTION to Reassign Case to Judge Laura Taylor Swain filed by Financial Oversight and Management Board for Puerto Rico filed by Centro de Periodismo Investigativo, Inc.. (Attachments: # 1 Exhibit Judge Swain's June 13th ruling in Bhatia case)(Berkan, Judith) (Entered: 06/15/2017)
06/16/2017	9	ORDER denying Defendant's 5 Motion to Reassign Case. At this time, the Court sees no reason to transfer this case to the docket of Judge Swain. The Court orders the parties to address in further detail whether this action is subject to the automatic stay incorporated into Title III of Promesa. Defendant shall file a brief on this issue on or before 6/26/2017. Plaintiff shall then respond on or before 7/3/2017. For purposes of consistency and clarity, the parties shall refer to Defendant as the Board or Defendant in short in all future filings. Signed by Judge Jay A. Garcia-Gregory on 6/16/2017. (AP) (Entered: 06/16/2017)
06/21/2017	10	MOTION for Extension of Time to File Answer <i>or Otherwise Plead</i> re: 9 Order on Motion to Reassign Case,, 1 Complaint, filed by Centro de Periodismo Investigativo, Inc. filed by Luis F. Del-Valle-Emmanuelli on behalf of Financial Oversight and Management Board for Puerto Rico Responses due by 7/5/2017. NOTE: Pursuant to FRCP 6(a) an additional three days does not apply to service done electronically. (Related document(s) 9 , 1) (Del-Valle-Emmanuelli, Luis) (Entered: 06/21/2017)
06/21/2017	11	RESPONSE in Opposition to Motion filed by Centro de Periodismo Investigativo, Inc. Re: 10 MOTION for Extension of Time to File Answer <i>or Otherwise Plead</i> re: 9 Order on Motion to Reassign Case,, 1 Complaint, filed by Centro de Periodismo Investigativo, Inc. filed by Financial Oversight and Management Board for Puerto Rico filed by Centro de Periodismo Investigativo, Inc.. (Berkan, Judith) (Entered: 06/21/2017)
06/23/2017	12	ORDER granting in part 10 MOTION for Extension of Time to File Answer. Defendant's Answer is due on or before 7/14/2017. Signed by Judge Jay A. Garcia-Gregory on 6/23/2017. (AP) (Entered: 06/23/2017)
06/26/2017	13	Motion In Compliance <i>Brief in Support of Application of Automatic Stay</i> as to 9 Order on Motion to Reassign Case,, filed by Luis F. Del-Valle-Emmanuelli on behalf of Financial Oversight and Management Board for Puerto Rico Responses due by 7/10/2017. NOTE: Pursuant to FRCP 6(a) an additional three days does not apply to service done electronically. (Related document(s) 9) (Del-Valle-Emmanuelli, Luis) (Entered: 06/26/2017)
07/03/2017	14	RESPONSE in Opposition to Motion <i>for Application of PROMESA stay, and in compliance with Order at Docket 9</i> filed by All Plaintiffs Re: 13 Motion In Compliance

		<i>Brief in Support of Application of Automatic Stay</i> as to 9 Order on Motion to Reassign Case,, filed by Financial Oversight and Management Board for Puerto Rico filed by All Plaintiffs. (Attachments: # 1 Exhibit Exhibit A - Judge Young order in Cruz Rodriguez; Exhibit B - Judge Swain's order in Mandamus case by Senator Bhatia; Exhibit C - excerpts from complaint in Rodriguez Perell case)(Berkan, Judith) (Entered: 07/03/2017)
07/04/2017	15	MOTION for Leave to File Document <i>Reply</i> filed by Luis F. Del-Valle-Emmanuelli on behalf of Financial Oversight and Management Board for Puerto Rico Responses due by 7/18/2017. NOTE: Pursuant to FRCP 6(a) an additional three days does not apply to service done electronically. (Attachments: # 1 Exhibit)(Del-Valle-Emmanuelli, Luis) (Entered: 07/04/2017)
07/14/2017	16	ORDER noted 13 Motion In Compliance. Signed by Judge Jay A. Garcia-Gregory on 7/14/2017. (AP) (Entered: 07/14/2017)
07/14/2017	17	ORDER granting 15 Motion for Leave to File. Signed by Judge Jay A. Garcia-Gregory on 7/14/2017. (AP) (Entered: 07/14/2017)
07/14/2017	18	MEMORANDUM & ORDER STAYING CASE pursuant to 48 U.S.C. sec. 2161(a) and 11 U.S.C. sec. 362(a) and 922. Any request to lift or vacate the stay must be filed in the bankruptcy court in Bankruptcy Case No. 17-BK-03283 (LTS). Signed by Judge Jay A. Garcia-Gregory on 7/14/2017. (AP) (Entered: 07/14/2017)

PACER Service Center			
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08/08/2017 13:16:26			
PACER Login:	proskauerbos	Client Code:	33260/011/1150
Description:	Docket Report	Search Criteria:	3:17-cv-01743-JAG
Billable Pages:	3	Cost:	0.30

Exhibit 3

(To the August 8, 2017 Opposition of Financial Oversight and Management Board of Puerto Rico, as Commonwealth Representative, to Motion for Relief from Automatic Stay)

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

CENTRO DE PERIODISMO
INVESTIGATIVO, INC.,

Plaintiff,

v.

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

Defendant

CIVIL NO. 17-1743 (JAG)

MEMORANDUM & ORDER

GARCIA-GREGORY, D.J.

Before the Court is Defendant Financial Oversight and Management Board for Puerto Rico's (the "Board") Brief in Support of Application of Automatic Stay. Docket No. 13. Plaintiff Centro de Periodismo Investigativo, Inc. ("Plaintiff") filed a timely Response. Docket No. 14. The Board filed a Reply. Docket No. 15-1. For the reasons set forth below, this case is stayed pursuant to 48 U.S.C. § 2161(a) and 11 U.S.C. §§ 362(a), 922. Any request to lift or vacate the stay must be filed in the bankruptcy court in Bankruptcy Case No. 17-BK-03283 (LTS).

The Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101, *et seq.*, was enacted by Congress to address Puerto Rico's financial crisis. *See Peaje Investments LLC v. García-Padilla*, 845 F.3d 505, 509 (1st Cir. 2017). Title III of PROMESA provides for a bankruptcy-like procedure for the Commonwealth of Puerto Rico ("The Commonwealth") and covered territorial instrumentalities to restructure their debts. 48 U.S.C. §§ 2161-77. A Title III proceeding was filed by the Board on behalf of The Commonwealth on May 3, 2017.

As part of the Title III proceeding, PROMESA incorporates the Bankruptcy Code's automatic stay of actions against the debtor or against the property of the debtor. 48 U.S.C. § 2161; 11 U.S.C. §§ 362, 922. Specifically, § 362 stays “the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the [Title III case], or to recover a claim against the debtor that arose before the commencement of a [Title III case].” The automatic stay is broad in its scope and it is intended to provide the debtor “a breathing spell” from creditors. 2 Norton Bankr. L. & Prac. 3d § 43:4.

Plaintiff admits that the automatic stay is “quite broad.” Docket No. 14. However, Plaintiff contends that it does not apply to this lawsuit for two reasons. The Court is unconvinced.

First, Plaintiff argues that the automatic stay does not apply to this action because Plaintiff is not requesting money damages, or equitable relief “implying diminution of the property of the debtor.” Docket No. 14 at 4-12. Specifically, Plaintiff points to the definition of a “claim” in the Bankruptcy Code, 11 U.S.C. § 101, to argue that it is not asserting a “claim,” and thus the stay does not apply. Docket No. 14 at 4-12. The automatic stay, however, is not limited to “claims” against the property of the debtor. *See Advanced Computer Servs. of Michigan, Inc. v. MAI Sys. Corp.*, 161 B.R. 771, 774 (E.D. Va. 1993) (“There is no merit to the argument that a suit for injunctive and declaratory relief is an equitable suit and not a ‘judicial action’ as to which a stay is applicable.”). As the Board correctly points out, the automatic stay applies to (1) an action “against the debtor that was or could have been commenced before” the Title III proceeding, *or* (2) an action “to recover a claim against the debtor . . .” 11 U.S.C. § 362. Since Plaintiff’s suit could have been commenced prior to the Title III proceeding, it falls into the first category of actions covered by the automatic stay.

Second, Plaintiff argues that the Board is not the “debtor” in the Title III action. Docket No. 14 at 12-15. The Court disagrees. PROMESA created the Board “as an entity within the

[Commonwealth's government]." 48 U.S.C. § 2121(c)(1). Moreover, the Board's funding comes entirely from the Commonwealth's budget. *Id.* § 2127(b). In fact, Plaintiff's basis for this lawsuit is that the Board, as an entity within the Commonwealth's government, must guarantee the public access to information and documents pursuant to Commonwealth's Constitution. Docket No. 1. Under this same logic, an action against the Board is an action against the Commonwealth.

Accordingly, this case is subject to PROMESA's automatic stay. Any request to lift or vacate the stay must be filed in the bankruptcy court in Bankruptcy Case No. 17-BK-03283 (LTS).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 14th day of July, 2017.

S/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge

Exhibit 4

(To the August 8, 2017 Opposition of Financial Oversight and Management Board of Puerto Rico, as Commonwealth Representative, to Motion for Relief from Automatic Stay)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, <i>et al.</i> Debtors. ¹	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
HON. EDUARDO BHATIA GAUTIER, IN HIS CAPACITY AS SPEAKER OF THE POPULAR DEMOCRATIC PARTY IN THE SENATE OF PUERTO RICO, Plaintiff, v. HON. RICARDO ROSSELLÓ-NEVARES, IN HIS CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; THE COMMONWEALTH OF PUERTO RICO, Defendants.	Adv. Proc. No: 17-136-LTS

MEMORANDUM OPINION AND ORDER

Plaintiff Eduardo Bhatia Gautier (“Plaintiff”) originally filed this action (the “Mandamus Action”) in the Commonwealth of Puerto Rico Court of First Instance, San Juan Part (the

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); and (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284) (Last Four Digits of Federal Tax ID: 8474).

“Commonwealth Court”) seeking to compel Defendants (as defined below) to make public a copy of a draft budget (the “Draft Budget”) that the Governor’s office provided to the Financial Oversight and Management Board for Puerto Rico (the “Board”). Defendants removed the action to the United States District Court for the District of Puerto Rico. (Docket Entry No. 1.) The Defendants’ notice of removal (the “Removal Notice”) asserts that the Court has original jurisdiction of the action, pursuant to 48 U.S.C. § 2166(a)(2), because it arises “under,” arises “in” or is “related to” the Title III proceeding *In re Commonwealth of Puerto Rico*, No. 3:17-bk-3283 (D.P.R. May 3, 2017) (the “Title III Proceeding”) filed pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”). Plaintiff now moves for entry of an order remanding this action to the Commonwealth Court, arguing that this Court lacks subject matter jurisdiction. Defendants move pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b) to dismiss the case, and Plaintiffs have requested that the Court hold the dismissal motion in abeyance (the “Abeyance Request”) pending the determination of the remand motion. The Court has considered carefully all of the parties’ submissions. For the following reasons, Plaintiff’s Abeyance Request is granted, and Plaintiff’s remand motion is granted. In light of its conclusion that it lacks jurisdiction of this action, the Court does not address the Defendants’ motion to dismiss the complaint.

BACKGROUND

Except as otherwise indicated, the following facts are alleged in the Removal Notice or drawn from the documents annexed thereto. Plaintiff is the leader of the Popular Democratic Party of Puerto Rico in Puerto Rico’s Senate. (Removal Notice ¶ 1.) The Defendants are the Commonwealth of Puerto Rico (the “Commonwealth” or “Puerto Rico”) and the Honorable Ricardo Rosselló-Neves, in his capacity as Governor of Puerto Rico. (Removal Notice at 1.)

Under PROMESA, Governor Rosselló may submit fiscal plans and budgets to the Board for review and certification. See 48 U.S.C. § 2141. On March 13, 2017, the Board certified Puerto Rico’s fiscal plan. (Removal Notice ¶ 3.) Governor Rosselló submitted the Draft Budget to the Board for certification on April 30, 2017. (Id. ¶ 1.)

The Board, as representative of the Commonwealth, commenced the above-captioned Title III Proceeding on May 3, 2017. Case No. 17-BK-3283-LTS, Docket Entry No. 1. (D.P.R. May 3, 2017). The next day, Plaintiff filed a petition for writ of mandamus before the Commonwealth Court seeking public disclosure of the Draft Budget pursuant to Section 1781 of Puerto Rico’s Code of Civil Procedure, which provides that “[e]very citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law.” 32 L.P.R.A. § 1781. (Mot. to Dismiss at 3-4.)

On May 12, 2017, Defendants filed the Removal Notice, removing the action to this Court. (Docket Entry No. 1.) On May 19, 2017, Plaintiff filed an *Urgent Motion to Remand Case to the Commonwealth Court of First Instance and/or Request for Abstention* (the “Motion”) arguing that this Court lacks subject matter jurisdiction. (Docket Entry No. 4.) On May 26, 2017, Defendants filed their opposition to Plaintiff’s Motion (the “Opposition”) and a *Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), Fed. R. Bankr. P. 7012(b)* (the “Motion to Dismiss”). (Docket Entry Nos. 11, 12.) The Plaintiff subsequently replied to the Opposition and filed the Abeyance Request. (Docket Entry Nos. 13, 14.)

DISCUSSION

Plaintiff’s Abeyance Request is granted, insofar as the Court must always first determine whether it has jurisdiction of an action before addressing the merits of the action. See Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 46 (1st Cir. 2003). Title III of PROMESA permits the

removal of a civil action pending in another court to this district court, if the district court has jurisdiction of the claim or cause of action under PROMESA’s jurisdictional grant. 48 U.S.C. § 2166(d)(1). If a case is removed and the district court determines that it lacks jurisdiction over the matter, the court must order remand. 28 U.S.C. § 1447. The removal statute is “strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute.” Rios Ortiz v. Velazquez-Ortiz, No. CIV. 14-1467 JAF, 2014 WL 3734490, at *1 (D.P.R. July 28, 2014) (internal citation omitted). The Court may also remand a claim or cause of action of which it has PROMESA Title III jurisdiction “on any equitable ground.” 48 U.S.C. § 2166(d)(2).

Defendants assert that this Court has jurisdiction of this action pursuant to 48 U.S.C. § 2166(a)(2), which confers on district courts “original but not exclusive jurisdiction of all civil proceedings arising under [PROMESA], or arising in or related to cases under [PROMESA].” (Removal Notice ¶¶ 7-8.) The jurisdictional language of 48 U.S.C. § 2166(a)(2) is analogous to that of 28 U.S.C. § 1334(b), which confers exclusive jurisdiction of “all civil proceedings arising under title 11, or arising in or related to cases under title 11” upon the district courts. Decisions construing Section 1334(b) thus provide persuasive authority with respect to the construction of PROMESA’s jurisdictional language.

Defendants’ contention that the Mandamus Action arises “in” the Commonwealth’s Title III case or arises “under” PROMESA is premised on the proposition that any litigation regarding the Commonwealth’s fiscal plan or budget has “no existence outside of the Title III Proceeding” because those documents are foundational to a plan of adjustment under Title III and, as such, any litigation regarding those documents would necessarily take place in the context of the Title

III Proceeding and “can have no existence outside” of the Title III Proceeding. (Removal Notice ¶ 9; Opp’n at 8). Defendants’ theory is flawed.

Construing 28 U.S.C. § 1334(b) in the context of cases under title 11 of the United States Code (the “Bankruptcy Code”), the First Circuit has explained that “‘arising under’ proceedings are (at least) those cases in which the cause of action is created by” the Bankruptcy Code. In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002). The Draft Budget, and controversies concerning rights of access to it, clearly did not arise under Title III. The obligations to create and certify fiscal plans and related budgets are imposed by Title II of PROMESA, which is not addressed by the 48 U.S.C. § 2166 jurisdictional grant. Indeed, the Draft Budget was created and submitted to the Oversight Board before the commencement of the Commonwealth’s Title III Proceeding. No provision of PROMESA addresses access to such draft documents. Rather, Plaintiff’s claim of a right of access is premised solely on the laws of Puerto Rico. Accordingly, there is no plausible factual or legal basis for the proposition that the Mandamus Action arises “under” Title III of PROMESA. Nor, for substantially the same reasons, can the Mandamus Action be said to have arisen “in” the Commonwealth’s Title III Proceeding.

“Arising in” proceedings are generally “those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” Middlesex Power, 292 F.3d at 68. It is not, however, sufficient for “arising in” jurisdiction that a claim merely arises in the context of a bankruptcy case or that it only exists because of the bankruptcy filing. Gupta v. Quincy Med. Ctr., No. 15-1183, 2017 WL 2389407, at *6 (1st Cir. June 2, 2017) (internal citation omitted). Instead, “for ‘arising in’ jurisdiction to apply, the relevant proceeding must have ‘no existence outside of the bankruptcy.’” Id. (citation omitted).

“[T]he fundamental question is whether the proceeding by its nature, not its particular factual circumstance, could arise only in the context of a bankruptcy case.” Id. (emphasis in original) (citation omitted).

The Mandamus Action predates the Commonwealth’s Title III Proceeding and, while it is being maintained during the Title III Proceeding, it does not arise “in” that proceeding. Mere temporal concurrency is insufficient to bring a controversy within the scope of the jurisdictional grant for matters “arising” in a Title III Proceeding. The Mandamus Action could, and did, exist outside of the Title III context. It was brought independently, outside of PROMESA, and invokes Puerto Rican substantive and procedural law. See 32 L.P.R.A. § 1781.

Defendants have likewise failed to demonstrate that this action is “related to” the Commonwealth’s PROMESA Title III case within the meaning of the jurisdictional statute. The First Circuit has recognized the well-established Pacor standard for determining whether a proceeding is “related to” a bankruptcy case. In re Santa Clara Cty Child Care Consortium, 223 B.R. 40, 45 (B.A.P. 1st Cir. 1998) (citing In re Parque Forestal, Inc., 949 F.2d 504, 509 (1st Cir. 1991) and In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991)). This standard, first adopted by the Third Circuit in Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984) and since followed by most Circuit Courts of Appeal, holds that “related to” jurisdiction exists when “the outcome of [the] proceeding could conceivably have any effect on the estate being administered in bankruptcy.” Pacor, 743 F.2d at 994 (internal citations omitted). Although the proceeding “need not necessarily be against the debtor or against the debtor’s property,” its “outcome” must be one that “could alter the debtor’s rights, liabilities, options or freedom of action (either positively or negatively)” and in some way “impact[] . . . the handling and administration of the bankruptcy estate.” Id. “[T]he mere fact that there may be common issues of fact between a

civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope” of the provision. Id.

The Mandamus Action falls short of this conceivable effects test. Although litigation outside the Title III Proceeding, over rights of access to financial documents developed by the Commonwealth under PROMESA, could complicate the prosecution of the Title III Proceeding, there has been no showing that the outcome of the litigation regarding access to the documents could affect the Commonwealth’s rights, liabilities or freedom of action, or otherwise conceivably have an effect on the adjustment of its debts or treatment of its property, in the context of this Title III Proceeding.

Furthermore, even if the conceivable effect of the Mandamus Action on this Title III Proceeding could be deemed sufficient to support “related to” jurisdiction, the Court finds that equitable remand of the issues herein, which are raised solely under Puerto Rican law, is appropriate because any such effect is greatly attenuated from the core issues on which this debt adjustment proceeding will turn. As noted above, PROMESA permits the remand of a claim or cause of action “on any equitable ground.” See 48 U.S.C. § 2166(d)(2). Under the analogous statutory provision that applies to the remand of actions within the bankruptcy jurisdictional grant under 28 U.S.C. § 1452, courts in the First Circuit look to the following non-exclusive list of factors in determining whether equitable remand of a bankruptcy-related claim or cause of action is appropriate:

- (1) the effect of the action on the administration of the bankruptcy estate;
- (2) the extent to which issues of state law predominate;
- (3) the difficulty of applicable state law;
- (4) comity;
- (5) the relatedness or remoteness of the action to the bankruptcy case;
- (6) the existence of the right to a jury trial;
- and (7) prejudice to the involuntarily removed party.

Santa Clara, 223 B.R. at 46. These factors favor equitable remand of the Mandamus Action. As explained above, the Defendants have failed to articulate any plausible way in which the action will affect the administration of the Title III Proceeding. Plaintiff's claim exclusively involves Puerto Rican law. Comity considerations favor remand, as Commonwealth legal issues substantially predominate in the Mandamus Action. Finally, Defendants have not identified any prejudice, other than complication of discovery issues, that would result from this action being remanded to the Puerto Rican court.

CONCLUSION

For the foregoing reasons, Plaintiff's Abeyance Request and Motion are granted. The Clerk of Court is directed to effectuate the remand and close this case. The Court does not address Defendants' Motion to Dismiss the complaint, which may be prosecuted in the original forum. This Memorandum Opinion and Order resolves Docket Entry Nos. 4, 12 and 14.

SO ORDERED.

Dated: June 13, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge