UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SANDRA RODRÍGUEZ COTTO; RAFELLI GONZÁLEZ COTTO,

Plaintiffs-Appellees,

v.

PEDRO R. PIERLUISI-URRUTIA, Governor of Puerto Rico; DOMINGO EMANUELLI HERNÁDEZ, Secretary of Department of Justice of Puerto Rico; ALEXIS TORRES RÍOS, Secretary of Puerto Rico Department of Public Safety; ANTONIO LÓPEZ FIGUEROA, Puerto Rico Police Commissioner, all in their official capacities,

Defendants-Appellants.

No. 23-1626

APPELLEES' RESPONSE TO ORDER TO SHOW CAUSE

In accordance with the Court's April 5, 2024, Order to Show Cause, Appellees Sandra Rodríguez-Cotto and Rafelli González-Cotto respectfully submit the following response.

BACKGROUND

Article 5.14(a) of the Law of the Puerto Rico Department of Public Safety, Law No. 20 of 2017, P.R. Laws Ann. tit. 25, §§ 3501, *et seq.* ("the Act") criminalizes certain types of speech relating to disasters in Puerto Rico. Dist. Ct. ECF No. 94-1

at 1. The provision challenged here was enacted on April 6, 2020, and amended in July 2020. *Id.* at 2.

On May 20, 2020, journalists Sandra Rodríguez-Cotto and Rafelli González-Cotto ("Appellees") brought this Section 1983 lawsuit against the Governor of Puerto Rico, the Secretaries of Puerto Rico's Departments of Justice and Public Safety, and the Commissioner of the Puerto Rico Police Bureau ("Appellants") in their official capacities, seeking declaratory and injunctive relief barring the law's enforcement, as well as costs and attorney's fees. Dist. Ct. ECF. No. 1. Appellees filed an amended complaint on July 29, 2020. Dist. Ct. ECF No. 47.

On July 21, 2022, the District Court consolidated the preliminary and permanent injunction proceedings. Dist. Ct. ECF No. 91. On March 31, 2023, the District Court held that Article 5.14(a) facially violates the First Amendment and enjoined Appellants from enforcing it. Dist. Ct. ECF No. 92. After a hearing, the District Court denied Appellants' motion for reconsideration. Dist. Ct. ECF No. 103. This appeal followed.

"PROMESA was enacted in 2016 to help the Commonwealth of Puerto Rico combat its rapidly ballooning government debt crisis. To do so, PROMESA creates a voluntary, in-court bankruptcy process for the Commonwealth and its instrumentalities modeled on the reorganization process for municipalities, codified in Chapter 9 of the Bankruptcy Code." *Colón-Torres v. Negron-Fernandez*, 997 F.3d

63, 69 (1st Cir. 2021). PROMESA incorporates the bankruptcy automatic stay provisions of 11 U.S.C. §§ 362 and 922, and the bankruptcy discharge provisions of 11 U.S.C. §§ 944 and 524(a)(1) and (2). *See* 48 U.S.C. § 2161(a).

The Commonwealth of Puerto Rico filed a petition on May 3, 2017, under Title III of PROMESA, 48 U.S.C. §§ 2161, *et seq.*, for adjustment of its debts. "[W]hen the Commonwealth filed its Title III petition in May 2017, it became a 'debtor' for purposes of PROMESA, and all actions enforcing a claim against the Commonwealth were automatically stayed." *Colón-Torres*, 997 F.3d at 69. On January 18, 2022, the Title III court confirmed the Commonwealth's Title III plan. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 636 B.R. 1 (D.P.R. 2022). The plan's effective date was March 15, 2022.

This Court has directed the parties to show cause whether any filings or orders in the District Court proceedings were subject to the automatic stay provisions incorporated into PROMESA. This Court further directed the parties to show cause whether the appeal can proceed in light of the Title III Plan's discharge (§ 92.2) and discharge injunction (§ 92.3) provisions, and the express inclusion of "employees" and "officials" in the Title III court's Confirmation Order ¶ 56(b). The Court asked the parties to address: (1) "whether any party has a proof of claim or administrative expense claim resolved or pending in Title III process that involves the issues in this matter and the status of such claims"; (2) "whether any party sought or received a

retroactive lift of the automatic stay in the Title III court that is applicable to the district court matter and/or this appeal"; and (3) "whether it is possible to place the First Amendment challenge to Article 5.14 before the Title III court as an adversary proceeding and, if so, the mechanism by which that might be accomplished." Order at 2.

Appellees are not aware of any proof of claim or administrative expense claim resolved or pending in Title III process that involves the issues in this matter. Appellees have not sought or received a retroactive lift of the automatic stay in the Title III court that is applicable to the District Court matter and/or this appeal. As set forth below, Appellees respectfully submit that the automatic stay does not apply to their causes of action for declaratory and injunctive relief, and that these causes of action were not discharged by the Commonwealth's Title III Plan—because Section 1983 official-capacity causes of action for declaratory and injunctive relief are generally not subject to PROMESA's stay and discharge provisions. Appellees further submit that it is not possible to place this First Amendment challenge to Article 5.14 before the Title III court as an adversary proceeding, because 48 U.S.C. § 2165 bars the Title III court from issuing injunctive relief that interferes with the "political or governmental powers of the debtor."

ARGUMENT

I. PROMESA's stay provisions did not apply to Appellees' causes of action for declaratory and injunctive relief.

The bankruptcy stay provisions incorporated into PROMESA are extraordinarily broad, but they do not insulate unconstitutional statutes from judicial review by an Article III court. Under PROMESA, "the people of Puerto Rico continue to enjoy their constitutional rights as United States citizens." *Atiles-Gabriel v. Puerto Rico*, 256 F. Supp. 3d 122, 128 (D.P.R. 2017). The Act expressly provides that "nothing in this chapter shall be construed as impairing or in any manner relieving a territorial government . . . from compliance with Federal law or requirements." 48 U.S.C. § 2106.

PROMESA therefore "recognizes the Commonwealth's continued responsibility to operate a government, and contemplates continued '[c]ompliance with Federal laws,'" including the First Amendment. *Atiles-Gabriel*, 256 F. Supp. 3d at 128; *see also Vázquez-Carmona v. Puerto Rico Dep't of Educ.*, 255 F. Supp. 3d 298, 299 (D.P.R. 2017) (Gelpi, J.) ("PROMESA expressly contemplates that the temporary stay will not apply to suits to enforce federal rights." (citing 48 U.S.C. § 2106)). Actions for injunctive and declaratory relief to prevent unconstitutional conduct are the irreducible means to protect Puerto Ricans' rights under federal law, and such actions are therefore excluded by Section 2106 from PROMESA's stay provisions. *See Vázquez-Carmona*, 255 F. Supp. 3d at 299. "Moreover, given []

Puerto Rico's unique status and the unparalleled scope of the Commonwealth's obligations to both creditors and citizens, an overbroad application of the automatic stay would risk transgressing PROMESA's statutory framework and the boundaries of the Constitution." *Atiles-Gabriel*, 256 F. Supp. 3d at 128.

Properly construed, the stay provisions at issue here do not conflict with either 48 U.S.C. § 2106 or the Constitution, because they do not apply to official-capacity causes of action seeking declaratory and injunctive relief against the enforcement of unconstitutional statutes. "PROMESA's automatic stay derives from two sections of the Bankruptcy Code," *Victor J. Salgado & Assocs. Inc. v. Cestero-Lopategui*, 34 F.4th 49, 57 (1st Cir. 2022), 11 U.S.C. §§ 362 and 922. Section 362 "applies to proceedings brought directly against the debtor or its property." *Id.* at 53. Section 922 "is an additional provision, specifically made applicable in municipal bankruptcies and proceedings under Title III of PROMESA," that "provides for a stay of actions brought against, among others, officials of the debtor (rather than the debtor or its property) where the actions 'seek[ ] to enforce a claim against the debtor.'" *Id.* (alteration in original) (quoting 11 U.S.C. § 922(a)(1)). "The difference between the two provisions is the nominal target of the lawsuit or enforcement action being stayed: Section 362 applies only to suits 'against the debtor,' while Section 922 also stays actions against 'officer[s] or inhabitant[s] of the debtor.'" *Colón-Torres*, 997 F.3d at 69. Essentially, "Section 922 makes clear that for automatic stay

purposes, an action can seek to enforce a claim against a governmental debtor even if it only does so indirectly." *Victor J. Salgado*, 34 F.4th at 53–54.

For several reasons, Appellees' causes of action for declaratory and injunctive relief are not subject to PROMESA's bankruptcy stay provisions. *First*, Appellees' causes of action for equitable relief address a criminal statute enacted long after the Commonwealth filed its Title III petition. *See supra* at 2. Actions to abate unlawful post-petition conduct are not stayed under Section 362(a)(1). *See* 11 U.S.C. § 362(a)(1) (staying any judicial proceeding "that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title").

Second, Appellees' causes of action for declaratory and injunctive relief are not actions against the Commonwealth or its property for purposes of Section 362. It is well-established that "official-capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). That is because, as a matter of law, public officials do not act on behalf of the government when they enforce unconstitutional laws. *See Ex parte Young*, 209 U.S. 123, 159 (1908) ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not

affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.").

Appellees' causes of action for declaratory and injunctive relief are also not indirect actions against the Commonwealth or its property for purposes of Section 922. Although this Court held in *Victo J. Salgado* that a Section 1983 *damages* action against a Puerto Rico official may constitute an indirect claim against the Commonwealth for purposes of Section 922, its holding was predicated on the likelihood "that the Commonwealth would indemnify [the defendant officials] should any judgment be entered against them." *Victor J. Salgado*, 34 F.4th at 56. As the panel explained, "Section 922 was enacted to prevent creditors from artfully pleading around the Section 362 automatic stay by bringing an action against an officer or inhabitant of [the debtor], rather than the [debtor] itself." *Id.* at 54. Because "[a]ny hope for meaningful recovery" on the plaintiffs' $30 million damages claim in that case "necessarily rest[ed] on the possibility that the Commonwealth [would] in some manner step into the shoes of its officials," and the Commonwealth had already indicated it would indemnify the officials by assuming the costs of their defense, this Court concluded that "the action [did] indeed have as one of its targets the Commonwealth's purse." *Id.* Here, by contrast, Appellees' declaratory and

injunctive causes of action against Appellants leave nothing for the Commonwealth to indemnify.

Third, Appellees' causes of action against for declaratory and injunctive relief do not qualify as "claims" under Sections 362 and 922. Section 101(5) of the Bankruptcy Code, which is incorporated into PROMESA, defines "claim," as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

28 U.S.C. § 101(5).

"Under § 101(5)(B), a right to an equitable remedy, whether or not fixed, disputed, or reduced to judgment, is a 'claim' within the meaning of the Bankruptcy Code, and subject to bankruptcy proceedings, *if 'a monetary payment is an alternative for the equitable remedy*.'" *Rederford v. U.S. Airways, Inc.*, 589 F.3d 30, 36 (1st Cir. 2009) (emphasis added) (quoting *Air Line Pilots Ass'n v. Cont'l Airlines*, 125 F.3d 120, 133 (3d Cir.1997)). The provision's legislative history confirms that this distinction is grounded in the function and purpose of bankruptcy proceedings. *See* 124 Cong. Rec. 32393 (1978) (remarks of Rep. Edwards) ("Section 101(4)(B) [now § 101(5)(B)] . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the

result that the equitable remedy will be susceptible to being discharged in bankruptcy."). For one thing, "[i]f no monetary alternative exists for an equitable remedy, the bankruptcy court will not be able to liquidate it and so cannot readily prioritize it relative to other claims." *Rederford*, 589 F.3d at 36. Moreover, "if the equitable remedy involves the abatement of ongoing conduct that is causing harm, rather than the remediation of past harms, the remedy is not a 'repackaged claim for money damages' and does not threaten the finality of the proceedings." *Id.* at 37.

Applying this reasoning, federal district judges in Puerto Rico have consistently held that causes of action for purely non-monetary relief, whether against Puerto Rico or its officials, are not "claims" subject to stay under PROMESA. *See Ruíz-Colón v. Rodríguez-Elias*, No. 17-02223-WGY, 2018 WL 2041964, at *2 (D.P.R. 2018) ("It is now pretty clear that where a litigant may be entitled to equitable relief, the stay cannot frustrate the grant of that relief even though an award of *monetary damages* may be stayed and the Commonwealth has to spend funds litigating the matter." (emphasis added)); *Vázquez-Carmona*, 255 F. Supp. 3d at 299 ("Plaintiff seeks injunctive and declaratory relief to enforce a federally protected right. . . . Therefore, this action is not subject to the PROMESA stay."); *Atiles-Gabriel*, 256 F. Supp. 3d at 125 ("The statute's text makes clear that a claim concerns 'an ultimate right to payment.' . . . The statutory definition of 'claim' does not include a petition for writ of habeas corpus within its scope."

(quoting *In re City of Stockton*, 499 B.R. 802, 806 (Bankr. E.D. Cal. 2013))); *Cruz-Rodriguez v. Administración de Corrección de P.R.*, No. 3:17-014 64-WGY, 2017 WL 10543881, at *1 (D.P.R. Jun. 20, 2017) ("While it is true that this action seeks, inter alia, money damages and is thus at present an unliquidated chose in action arguably properly subject to the automatic stay, a close reading of the complaint reveals that the plaintiff . . . is in fact complaining of alleged wrongful imprisonment in violation of 28 U.S.C. § 1983, a deprivation of liberty that is ongoing. . . . [T]his case is not stayed.").

These holdings are consistent with the consensus of federal courts outside of Puerto Rico. *See, e.g.*, *In re Roman Catholic Archdiocese of New Orleans*, 653 B.R. 524, 535 (Bankr. E.D. La. 2023) ("Appellants seek to enjoin current and future conduct that they allege to be discriminatory . . . . Federal courts around the country have concluded that suits based on allegedly tortious or unlawful post-petition conduct are not subject to the automatic stay provisions of § 362(a)." (collecting authorities)); *In re City of Stockton*, 499 B.R. at 805–08 (holding that the stays imposed by Sections 362 and 922 did not apply to the movant's state law cause of action challenging the accuracy of the city's proposed ballot statement, because the request for relief did not include any monetary award).

As the Sixth Circuit explained in *Dominic's Restaurant of Dayton, Inc. v. Mantia*, "[t]he automatic stay provision 'was intended to prevent interference with a

bankruptcy court's orderly disposition of the property of the estate, it was not intended to preclude post-petition suits to enjoin unlawful conduct.'" 683 F.3d 757, 760 (6th Cir. 2012) (quoting *Larami Ltd. v. Yes! Entm't Corp.*, 244 B.R. 56, 60 (Bankr. D.N.J. 2000)). Otherwise, "bankrupt businesses which operated post-petition could violate [plaintiffs'] rights with impunity." *Id.* (alteration in original) (quoting *Larami*, 244 B.R. at 60).[1]

This limitation on the scope of the stay provisions is consistent with 48 U.S.C. § 2165 which—like 11 U.S.C. § 904, on which it is modeled—prohibits the Title III court from "interfere[ing] with . . . any of the political or governmental powers of

[1] *But see Newberry v. City of San Bernardino (In re City of San Bernardino)*, 558 B.R. 321 (Bankr. C.D. Cal. 2016). There, the bankruptcy court held that Section 362(a)(3) stayed the plaintiff's action for injunctive relief requiring the city to reform its search practices. The court reasoned that the injunction sought to control the city's "property" by regulating how its employees discharged their job duties and by requiring the city to expend additional funds to implement the reforms. *Id.* at 329. As another bankruptcy court subsequently observed, the decision unpersuasively contradicts the balance of authority insofar as it suggests that Section 362 routinely stays requests to enjoin unlawful post-petition conduct. *In re Roman Catholic Archdiocese of New Orleans*, 653 B.R. at 535–37; *see also City of Chicago v. Fulton*, 592 U.S. 154, 160 (2021) (holding that Section 362(a)(3) applies to "collection efforts outside the bankruptcy proceeding"). *San Bernardino* "is better understood as applying a 'damages'-like theory threatening prepetition municipal assets, as the court there was concerned that the citywide injunction transforming the city's search-and-seizure practices would compel the city to spend monies it would not otherwise have spent, thereby altering the city's uses for its income-producing property." *In re Roman Catholic Archdiocese of New Orleans*, 653 B.R. at 537. Here, by contrast, the injunction merely prohibits the Commonwealth from enforcing a criminal statute enacted *after* the Commonwealth filed its Title III petition.

the debtor." *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, 927 F.3d 597, 602 (1st Cir. 2019). If this Court were to conclude that Appellees' declaratory and injunctive causes of action against Appellants constitute claims against the Commonwealth under PROMESA, Section 2165 would prevent the Title III court from awarding Appellees their requested relief in an adversary proceeding. *See In re City of Detroit*, 841 F.3d 684, 696 (6th Cir. 2016) ("Municipal governments indisputably do not have 'governmental power' to violate citizens' constitutional rights. But it does not follow that the bankruptcy court has judicial power to enjoin such violations. Section 904 says it does not.").

The limitations imposed by 11 U.S.C. § 904 and 48 U.S.C. § 2165 underscore that Article III federal courts are the appropriate forum for adjudicating constitutional challenges to the laws or policies of bankrupt governmental entities, at least where the relief requested does not require the expenditure of government funds. *See In re City of Stockton*, 499 B.R. at 809 (observing that "it would be strange" if Sections 362 and 922 stayed an action for injunctive relief against the municipality, given that Section 904 barred the bankruptcy court from awarding that relief). Because 48 U.S.C. § 2106 affirmatively states that PROMESA does not abrogate the Commonwealth's obligation to comply with federal laws, including the Constitution, this Court should not interpret the Act to stay Section 1983 causes of

action for declaratory and injunctive relief that the Title III court could not itself award.

II. For the same reasons, the Title III plan's discharge and injunction do not apply to Appellees' causes of action for declaratory and injunctive relief.

The Title III Plan's discharge and injunction, which bar judgments and claims dischargeable in bankruptcy, likewise do not apply to Appellees' causes of action for declaratory and injunctive relief. *See Deocampo v. Potts*, 836 F.3d 1134, 1144 n.13 (9th Cir. 2016) (observing that the Bankruptcy Code's "discharge provisions are narrower than the automatic stay provisions").

PROMESA incorporates the Bankruptcy Code's discharge provisions, 11 U.S.C. §§ 524 and 944. *See* 48 U.S.C. § 2161(a). These provisions bar actions relating to the debtors' discharged debts, regardless of whether such actions are directly against the debtor. 11 U.S.C. §§ 524(a), 944(b). The Bankruptcy Code defines a "debt" as "a liability on a claim." 11 U.S.C. § 101(12). As already discussed, the Bankruptcy Code and PROMESA do not define "claim" to include causes of action for prospective injunctive relief, and so such requests are neither dischargeable nor discharged in bankruptcy. *See, e.g.*, *Matter of Udell*, 18 F.3d 403, 409 (7th Cir. 1994) (holding that enforcement of a covenant not to compete was not a "claim" dischargeable in bankruptcy); *In re Torwico Electronics, Inc.*, 8 F.3d 146,

150 (3d Cir. 1993) (holding that state agency's claim for injunctive relief to abate ongoing pollution was not a "debt" within the meaning of the Bankruptcy Code).

The Confirmation Order and Title III Plan reflect this distinction. *In re Fin. Oversight & Mgmt. Bd.*, 636 B.R. at 37–38. Paragraph 56(a) of the Confirmation Order states that the Debtors and Reorganized Debtors' debts are discharged. *Id.* Paragraph 56(b) bars entities from "asserting any and all *Claims* against the Debtors and Reorganized Debtors, and each of their respective employees, officials, Assets, property, rights, remedies, Claims, or Causes of Action of any nature whatsoever, *relating to the Title III Cases, the Debtors or Reorganized Debtors or any of their respective Assets and property*." *Id.* at 38 (emphases added). In other words, the provision bars *inter alia* suits against the Debtors' employees and officials for discharged claims against the Debtors. It does not purport to discharge actions against the Debtors' employees or officials that do not relate to the Debtors, their property, or the Tile III cases. Likewise, Section 92.2 of the Title III Plan discharges "all Claims or Causes of Action against the Debtors and Reorganized Debtors that arose, in whole or in part, prior to the Effective Date [03/15/22], relating to the Title III Cases, the Debtors or Reorganized Debtors or any of their respective Assets, property, or interests of any nature whatsoever." *Id.* at 231. And Section 92.3 of the Title III Plan enjoins actions to recover on the discharged claims. *Id.* at 234.

As already discussed, Appellees' causes of action for declaratory and injunctive relief against Appellants in their official capacities are not claims, and as a matter of law they do not concern the Commonwealth or its property. These equitable causes of action are therefore not subject to the Confirmation Order's discharge provisions. Even if the Confirmation Order could be read to bar Appellees' equitable causes of action, moreover, any such interpretation or application of the Order would be *ultra vires* and void. That is because the Title III court, like other bankruptcy courts, cannot exceed the jurisdictional limits on its authority established by the Bankruptcy Code and incorporated into PROMESA. *See, e.g.*, *Matter of Leeds Bldg. Prod., Inc.*, 160 B.R. 689, 691 n.3 (Bankr. N.D. Ga. 1993) ("[A] court cannot establish jurisdiction merely by inserting such a provision into the confirmation order. This Court has no power to reserve jurisdiction beyond what Congress has given or what is necessary to effectuate the plan of reorganization." (citing *Grimes v. Graue (In re Haws)*, 158 B.R. 965, 969 (Bankr. S.D. Tex. 1993)).

III. Appellees' requests for fees and costs are independent from their causes of action for equitable relief, and are not currently before this Court.

Finally, Appellees' request for attorney's fees and costs pursuant to 42 U.S.C. § 1988 has no bearing on whether their causes of action for declaratory and injunctive relief were stayed or discharged. *See In re Roman Catholic Archdiocese of New Orleans*, 653 B.R. at 536–37 ("[T]he Court is aware of no binding authority that would necessitate the conclusion that, by appending a request for attorney's fees

to a suit to enjoin unlawful post-petition conduct, a case that would not be stayed under the long line of authorities like *Larami* and *Dominic's Restaurant* would become subject to a stay under § 362(a)(3).").

It is "indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain," because "[s]uch an award does not remedy the injury giving rise to the action." *Budinich v. Becton Dickson*, 486 U.S. 196, 200 (1988) (holding that an unresolved issue of attorney's fees does not prevent judgment on the merits from being final). "Section 1988," in particular, "provides for awards of attorney's fees only to a 'prevailing party.'" *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). "Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" *Id.* at 451–52. "Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial." *Id.* at 452.

As this Court recognized in *Colón-Torres*, PROMESA may apply to a collateral proceeding in a Section 1983 case without necessarily applying to the underlying action. *See Colón -Torres*, 997 F.3d at 72 ("[T]he operative 'action or proceeding' for the purposes of determining whether Colón seeks to bring to bear 'a

claim against the debtor' is Colón's claim for enforcement and not the original § 1983 complaint." (citations omitted)); *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204-05 (3d Cir. 1992) ("[S]ection 362 does not necessarily stay all other claims in the case. Within a single case, some actions may be stayed, others not. Multiple claim and multiple party litigation must be disaggregated so that particular claims, counterclaims, crossclaims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay."), *reh'g granted and opinion vacated* (Jan. 10, 1992), *opinion reinstated on reh'g* (Mar. 24, 1992). In sum, even if this Court were to conclude that Appellees' requests for fees and costs were either stayed or discharged, that would not affect Appellees' underlying causes of action for declaratory and injunctive relief.

But this Court need not resolve whether PROMESA's bankruptcy stay applies to Appellees' requests for fees and costs, because that issue is not part of this appeal. A petition for attorney's fees in equity is "an independent proceeding supplemental to the original proceeding." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939). Here, the fee petition proceeding has not yet begun, because District of Puerto Rico Local Civil Rule 54 provides that fees and costs will not be adjudicated

until 14 days after this Court's issuance of the mandate—and then only if Appellees are prevailing parties.[2]

In the absence of a final order on Appellees' request for fees and costs, this Court lacks appellate jurisdiction over that proceeding. *See Pigford v. Veneman*, 369 F.3d 545 (D.C. Cir. 2004) (dismissing the appeal for lack of appellate jurisdiction where the fee petition had not been finally resolved). And while the Commonwealth could appeal a denial of its motion to stay the fee proceeding pursuant to PROMESA, *see Victor J. Salgado*, 34 F.4th at 52 n.5, no such motion has been filed and no appealable order has issued—because Appellees' fees and costs petition is still premature under the district court's local rules. This Court therefore lacks jurisdiction to resolve the applicability of PROMESA's stay provision to a still hypothetical fee proceeding before the district court.

If this Court disagrees and elects to reach the merits, Appellees respectfully submit that due process concerns militate against the conclusion that Appellees' claims for fees and costs were discharged, particularly as Appellees never received direct notice of the Title III proceedings prior to discharge. This Court has made clear that a known creditor in bankruptcy proceedings—defined as a creditor "whose claims and identity are actually known or 'reasonably ascertainable' by the debtor"

[2] Appellees filed a motion for costs, but the district court denied the motion without prejudice until 14 days after the issuance of the mandate from this Court, pursuant to Local Civil Rule 54(a). Dist. Ct. ECF No. 108.

from its own records, regardless of whether the claims are contingent or liquidated—is constitutionally entitled to "direct notice of each stage" in the proceedings. *In re Arch Wireless, Inc.*, 534 F.3d 76, 80–81 (1st Cir. 2008) (quoting *Tulsa Prof'l Collection Servs. Inc. v. Pope*, 485 U.S. 478, 490 (1988)). Here, the Puerto Rico Department of Justice has been defending this lawsuit since its inception, so Appellees' fees and costs claims were reasonably ascertainable from the Commonwealth's own records. And because Appellees were known creditors, "notice by publication" is "entirely insufficient," regardless of whether Appellees were generally aware of the Title III proceedings. *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 98 (1st Cir. 1974); *accord In re Arch Wireless*, 534 F.3d at 83–87. Thus, Appellees fees and costs claims are not barred by the Title III plan.[3]

CONCLUSION

For the foregoing reasons, PROMESA's automatic stay provisions did not apply to the proceedings in the District Court, and the Title III Plan's discharge and injunction provisions do not bar this appeal.

[3] As discussed above, Appellees' declaratory and injunctive causes of action were never subject to the discharge order. But if they were, due process principles would also preclude any discharge of those causes of action without prior direct notice.

Dated: May 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document is served to all counsel of record registered in ECF on May 15, 2024, including to opposing counsel at the Puerto Rico Department of Justice, P.O. Box 90200192, San Juan, Puerto Rico 00902.

Dated: May 15, 2024

/s/ Brian Hauss
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