

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

In re:  
THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,  
as representative of  
THE COMMONWEALTH OF PUERTO RICO, *et al.*,  
Debtors.

PROMESA  
Title III  
Case No. 17 BK 3283-LTS  
(Jointly Administered)

In re:  
THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,  
as representative of  
THE PUERTO RICO ELECTRIC POWER  
AUTHORITY,  
Debtor.

Case No. 17 BK 4780-LTS

THE SENATE OF PUERTO RICO, represented by its  
president, HON. JOSÉ LUIS DALMAU,

Plaintiff,

v.

COMMONWEALTH OF PUERTO RICO, HON.  
PEDRO PIERLUISI-URRUTIA, in his official  
capacity as Governor of the Commonwealth of Puerto  
Rico, et al.

Defendants.

Adv. Pro. No. 21-00059

**MOTION TO REMAND AND/OR IN OPOSITION TO NOTICE OF REMOVAL**

To the Honorable United States District Judge, Laura Taylor Swain:

**COMES NOW**, The Senate of Puerto Rico, represented by its president, The Honorable Jose Luis Dalmau Santiago ("the Remanding Party"), without submitting to this Court's jurisdiction, and very respectfully states the following in support of the instant motion for remand:

## I. INTRODUCTION

The relevant facts are outlined in section II of this motion. The civil action in question was filed on June 1, 2021, in the Puerto Rico Court of First Instance in San Juan (hereinafter "trial court") under the caption *Senado de Puerto Rico, Represented by its President, Hon. José Luis Dalmau Santiago v. Commonwealth of Puerto Rico, et al.*, civil case number 2021CV03356. The Complaint identifies claims sounding exclusively under Puerto Rican statutory law and the Puerto Rico Constitution. On June 3, 2021, Efran Paredes Maisonet, the Executive Director of the Puerto Rico Electric Power Authority, in his official capacity, and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("the Removing Parties") filed a Notice of Removal before this Honorable Court.

This Court should remand this action according to 28 U.S.C. § 1446 to the appropriate courts of Puerto Rico and do so on an emergency basis, with a briefing, argument, and disposition schedule expedited accordingly. Several considerations dictate the remand of this case to the Puerto Rico courts. First, the matter at hand is a non-core issue; thus, mandatory abstention is warranted. Second, the plaintiffs' Complaint raises issues exclusively of Commonwealth law and cannot be read to confer jurisdiction upon this federal Court for purposes of removal or otherwise. Moreover, the Agreement between the parties, the object of the Remanding Party's Complaint ("the Agreement") contains a forum selection clause in which the Parties freely, fairly, and thoroughly negotiated, acknowledged, understood, and agreed that all claims arising out of the Agreement would be brought forth before the Commonwealth Court. Second, the Removing Parties have violated the rule of unanimity and rendering it invalid as a matter of law. Alternatively, assuming this Court were to construe the Complaint as raising some question of federal law, the correct

course would still be to remand the case; at a minimum, this Court must remand remaining questions of Commonwealth law for Puerto Rico courts so that they can resolve the matter at hand.

## II. FACTUAL BACKGROUND<sup>1</sup>

In early 2018, then governor of Puerto Rico, Ricardo Rosselló Nevares, announced a Puerto Rico energy system transformation. His announcement was followed by presenting what became Law 120-2018, as amended, and known as the "Law to Transform the Puerto Rico Electric System." Alleged among the grounds for enacting said legislation was the deterioration of the infrastructure of the Electric Power Authority (PREPA), which worsened with the passage of Hurricanes Irma and María over Puerto Rico. As a result of both atmospheric events, the Government of the United States of America delegated to the United States Army Corps of Engineers the energy system's recovery process. The Army Corps of Engineers became the body with the final decision on matters related to the purchase and distribution of equipment, materials, and supplies and the assignment of reconstruction tasks and brigades. Given the preceding and of the problems faced by the different generation unit systems, which are twenty-eight (28) years older than the average systems in the electric power industry in the United States, the Legislature began a process through the enactment of Law No. 120-2018, which, in short, began the process to transform the energy system into one that is modern, sustainable, reliable, efficient, and cost-effective. Law No. 120-2018 served as a framework to monitor the market and open the call for companies interested in transforming the electrical system. With the law mentioned above, the creation of Public-Private Partnerships would be carried out, following the processes established by law, with the transparency and flexibility necessary for a negotiation, which would result in a better financially viable energy system. The law would allow the Authority to sell its generation

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<sup>1</sup> Fact taken from the Remanding Party's Original State Complaint Translation found in 21-00059-LTS Doc#:6-1.

and transfer-related assets or delegate its operations, functions, or services to the established Public-Private Partnership. That said, and with that legal framework established through legislation, this gave way for the creation in January 2020 of LUMA Energy, which, through a Public-Private Partnership for a term of fifteen (15) years, would assume the operation, maintenance, and modernization of the country's energy service transmission and distribution system. Unfortunately, although the law was conceived with the idea that it should be done transparently, it was different in practice. The country found out about the negotiating process through the *Wall Street Journal* newspaper, and it was later that the local media was summoned to report on the transaction that, in short, would put Puerto Rico's electrical system in private hands. When the law mentioned above was enacted, it was established that it would present an innovative sustainable model, advanced technology, and resilience to the ravages of nature. It was argued that the changes would benefit all the people and would be responsive to all interested parties in the Authority, that is, the consumer, the entrepreneur or small merchant, and the citizen.

The Public-Private Partnership (PPP) contract was signed on June 22, 2020, and three parties signed it: the Public-Private Partnerships Authority (PPPA), the Electric Power Authority (PREPA), and the private consortium of LUMA Energy, LLC (LUMA). The second phase of said contract would enter effect on June 1, 2021. Said contract was signed in a simple document, without the nature of a public deed or participation of a notary public. In section 20.4 of the contract mentioned above, titled "Entire Agreement (the "Agreement" henceforth)," it is expressly established that said document constitutes the entire Agreement between the parties and supersedes any other document between them. The second phase consists of transferring the operations comprised by the contract to LUMA, which essentially only excludes energy generation. The same would begin on June 1, 2021. From a search in the Puerto Rico Digital Real Estate Registry

(KARIBE), no deed, writ, or registry entry was found presented by the PPPA, PREPA, or LUMA Energy, LLC to record the PPP contract dated June 22, 2020.

The Remanding Party filed on June 1, 2021, in the trial court of Puerto Rico. Said Complaint identifies claims sounding exclusively under Puerto Rican statutory law and the Puerto Rico Constitution. On June 3, 2021, the Removing Parties filed a Notice of Removal before this Honorable Court.

### III. ARGUMENTS

***a. The matter at hand is a non-core issue; thus, mandatory abstention is warranted under PROMESA.***

The Remanding Party moves for abstention under PROMESA §§ 306(d)(2) and 309 (codified at 48 U.S.C. § 2166(d)(2) and 48 U.S.C. § 2169 respectively). PROMESA § 306(d)(2) permits the Court to remand a removed case as long as this Court does not have exclusive jurisdiction over the claims therein ("[t]he district court to which the claim or cause of action is removed . . . may remand the claim or cause of action on any equitable ground.") (emphasis added). See also PROMESA § 306(a) (conferring exclusive and not exclusive jurisdiction over certain proceedings). PROMESA § 309 confirms that ability by providing that "[n]othing in this title prevents a district court in the interests of justice from abstaining from hearing a particular proceeding arising in or related to a case under this title." (emphasis added). Asociacion de Salud Primaria de Puerto Rico, Inc. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 667, 679-680, 2018 U.S. Dist. LEXIS 121337, \*13-14.

In re Federacion De Maestros De P.R., Inc., 2014 Bankr. LEXIS 805 explains two types of abstention provided by 28 U.S.C. § 1334(c), mandatory and discretionary. Mandatory abstention under §1334(c)(2) provides that, upon timely motion of a party in a proceeding based upon a State

law claim or State law cause of action, "related to" a case under title 11 but not arising under title 11 or arising in a case under title 11, to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction. Thus, the Court is called to evaluate whether: 1) there is a timely motion for abstention by a party; 2) the proceeding is based upon a state law claim or cause of action; 3) if the proceeding "related to" a case under the Bankruptcy Code, but not "arising under" or "arising in" a title 11 case; 4) the case could not have been brought in federal court absent the bankruptcy proceeding; 5) and if the suit is capable of being timely adjudicated in a state court. If all of the foregoing requirements are met, then the Court must abstain. 28 U.S.C. § 1334(c)(2). "Pursuant to section 1334(c)(2), the 'district court must abstain from hearing a purely state law claim where there is no other basis for federal jurisdiction other than its relatedness to a bankruptcy proceeding (including one where the debtor is a party) and where the claim can be timely adjudicated in state court.'" In re Interamericas Turnkey Development Co., Inc., 94 B.R. 9, 13 (D.P.R. 1988), citing Matter of Candelero Sand & Gravel, Inc., 66 B.R. 903, 908 (D.P.R. 1986)(quoting State Bank of Lombard v. Chart House, 46 B.R. 468, 472 (N.D. Ill. 1985)). In re Federacion De Maestros De P.R., Inc., 2014 Bankr. LEXIS 805, \*9-10.

The First Circuit defines non-core proceedings as "claims concerned only with state law issues that did not arise in the core bankruptcy function of adjudicating debtor-creditor rights..." In re Arnold Print Works, Inc., 815 F.2d 165 (quoting 130 Cong. Rec. H1848 (daily ed. March 21, 1984) (statement of Representative Kindness)). Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). We now turn to whether this Court should consider abstaining from this proceeding.

In the matter brought forth before this Court, this instant motion serves as a timely request for abstention. Furthermore, the Remanding Party's Complaint focuses on the effect of the parties' failure to register the Agreement in Puerto Rico's Property Registry, an issue solely concerning Puerto Rico state law and jurisprudence. The Complaint is a non-core issue related to a bankruptcy case but does not arise from the same; it is strictly a controversy of subject to Commonwealth court review between parties submitted to the Commonwealth Jurisdiction to an extent in which the pure state law issues predominate over bankruptcy matters that are of unsettled nature of the applicable state law that could only be resolved by permitting the Complaint to be adjudicated by the Commonwealth Court. Furthermore, the Parties freely, fairly, and thoroughly negotiated, acknowledged, understood, and agreed that all claims arising out of the Agreement would be brought forth before the Commonwealth Court. Had it not been for the Removing Parties' Motion, the case would have never seen a Federal Docket as it would have been timely adjudicated in the Commonwealth Courts.

The issues brought forth in the Remanding Party's Complaint are contract interpretation issues and are, by the terms of the Agreement, governed by Puerto Rico law. As much as the Removing Parties would like to convince otherwise, there are no unique bankruptcy issues that need to be decided by this Court at this moment. Discretionary abstention under 28 U.S.C. § 1334(c)(1) is warranted when claims based entirely on state law, there is an open and ongoing state court proceeding available to the debtor, and debtor's resort to this court at this time can be viewed as forum shopping. In re Latin American Roller Co., 412 B.R. 15 (Bankr. P.R. 2009). At the medulla of this controversy, two parties entered into a lawfully binding agreement that specifically included a clause determining the Commonwealth Court to be the appropriate forum to resolve any dispute. To that effect, the parties understood when entering into the Agreement that the

Commonwealth Court is the better forum to make the appropriate determinations and conclusions of law.

Therefore, having complied with elements for mandatory abstention, this Court should abstain from resolving the present controversy and remand it to the Commonwealth Court.

The Remanding Party contends that the Complaint the Removing Parties are trying to remove to this honorable Court is a non-core matter.

***b. Should this Court determine that this matter is a core issue, it must exercise discretionary abstention.***

Discretionary abstention is appropriate core matters. See Bankruptcy Law Manual § 2:19 (5th Ed.). The bankruptcy court may discretionally abstain in the interest of judicial economy and comity. C.H. Properties, Inc., 2006 WL 3909779 (Bkrcty. P.R.); affirmed: In the matter of CH Properties, Inc., 381 B.R. 20 (D. P.R. 2007); In re Abraham Petroleum, 447 B.R. 412 (Bankr. P.R. 2011). Discretionary abstention under 28 U.S.C. § 1334(c)(1) is warranted when claims based entirely on state law, there is an open and ongoing state court proceeding available to the debtor, and debtor's resort to this court at this time can be viewed as forum shopping. In re Latin American Roller Co., 412 B.R. 15 (Bankr. P.R. 2009).

In determining whether the discretionary abstention is appropriate, the Court may consider several factors. Among them, (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy Court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be



entered in state court with the enforcement left to the bankruptcy court; (9) the burden of the Court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of nondebtor parties. Acevedo v. Bayron (In re Acevedo), 546 B.R. 496, 505, 2016 Bankr. LEXIS 803, \*23-24 & Flores Rivera v. Telemundo Group, 133 B.R. 674, 1991 U.S. Dist. LEXIS 16902.

Applying those factors to the issues raised by the Remanding Party's Complaint, the Court should find that abstention is the most favorable conclusion at this moment. First, the efficient administration of the bankruptcy proceedings under Title III of PROMESA will not be disrupted by litigating the issues brought forth in the Remanding Party's Complaint. On the contrary, the efficient administration of the bankruptcy proceedings mandates that these issues be litigated in the Commonwealth Court. Second, Commonwealth law issues dominate the subject matter of this controversy and, while the Removing party seeks to characterize the issues as bankruptcy issues, they are simply contracting law interpretation issues that are, by the terms of the Agreement, governed by Commonwealth law. Simply put, there are no unique bankruptcy issues needed to be decided by this Court. Discretionary abstention under 28 U.S.C. § 1334(c)(1) is warranted when claims based entirely on state law. See In re Latin American Roller Co. Third, assuming, for the sake of argument, that this Court finds that it has jurisdiction over the matter, which the Remanding Party contends it does not, it is also evident that the Commonwealth court also has jurisdiction, in fact, according to the forum selection clause included in the Agreement, the Commonwealth Court has jurisdiction over all the parties. Finally, "[f]orum selection clauses are presumptively valid and enforceable, absent compelling public policy considerations or serious inconvenience to the parties." See, e.g., M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); In re Diaz

Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987); Coastal Steel Corp. v. Tilgman Wheelabrator, Ltd., 709 F.2d 190, 202 (3d Cir.), cert. denied, 364 U.S. 938 (1983). Therefore, should the Court enter in an exercise of determining whether requesting a Removal is an attempt to forum shop, it is significant that the parties named in the Remanding Party's Complaint agreed that all issues under the Agreement would be determined in the Commonwealth Courts.

Moreover, PROMESA §§ 306 and 309 authorize this Court to abstain in certain circumstances. PROMESA §§ 306 and 309 are substantially similar to 28 U.S.C. § 1452 and 28 U.S.C. § 1334, provisions of the U.S. Code which govern district court removal and abstention, respectively, for bankruptcy cases. Courts evaluating abstention in bankruptcy cases under those provisions have established a set of factors to consider. Asociacion de Salud Primaria de Puerto Rico, Inc. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 667, 682, 2018 U.S. Dist. LEXIS 121337, \*19. The Remanding Party contends that this Court should apply the same standards as it did in Asociación de Salud Primaria de Puerto Rico, Inc. As in Asociación, in the matter at hand, the Court lacks exclusive jurisdiction over the Removed Complaint. PROMESA § 306 extends original and exclusive jurisdiction of all cases under this title; and . . . original but not exclusive jurisdiction of all civil proceedings arising under this title or arising in or related to cases under this title." Asociación. Also, in Asociación, this Court established the standard for abstention under PROMESA, determining that §§ 306 and 309 authorize abstention in certain circumstances. In Asociación, this Court found that federal issues predominated yet, even though it was a factor that weighed against abstention, that alone did not mandate retention of the proceedings. In our case, there are no federal issues at all; it is a matter of pure state law that should be allowed to run its course in the Commonwealth Court. We contend that this Court should

consider the weight of pure state law interpretation as a factor in deciding in favor of abstention and remand.

To that effect, if determined that the matter brought forth constitutes a core issue, the Remanding Party requests that, for the reasons stated above, the Court exercise its discretionary abstention and remand the case to the Commonwealth courts.

***c. Removing Parties have violated the unanimity rule.***

28 U.S.C. § 1441 provides that a defendant in a state court action may remove the case to federal court if the plaintiff could have originally filed the case in federal court. Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 75 (1st Cir. 2009). "Where the action involves multiple defendants, however, the right of removal is subject to the so-called 'unanimity requirement.'" *Id.* (citing Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247-48, 20 S. Ct. 854, 44 L. Ed. 1055 (1900)).

The Rule of Unanimity serves in the interest of all parties involved in litigation, including the Court. Plaintiffs are advantaged because were the right to removal an independent rather than joint right, defendants could split the litigation, forcing a plaintiff to pursue its case in two separate forums. See Autoridad de Energia Electrica v. Vitol Inc., 2016 U.S. Dist. LEXIS 39714, \*22-23, citing Sansone v. Morton Mach. Works, Inc., 188 F. Supp. 2d 182, 184 (D.R.I. 2002) (citing Getty Oil Corp., Div. of Texaco, Inc. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 n. 11 (5th Cir. 1988)). Defendants also benefit from the requirement, as it precludes one defendant from imposing his choice of forum on a co-defendant. *Id.* (citation omitted). Furthermore, in 2011, 28 U.S.C. § 1446 was amended to codify the unanimity requirement. See Autoridad, 2016 U.S. Dist. LEXIS 39714 Federal Court Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758; see also 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is removed solely under [28 U.S.C. §

1441(a)], all defendants who have been properly joined and served must join in or consent to the removal of the action."). Prior to the 2011 amendments, the unanimity requirement was "derived from 28 U.S.C. § 1446, which sets forth the procedure for removing a state action to federal court." Esposito, 590 F. 3d at 75 (citing Loftis v. UPS, 342 F.3d 509, 516 (6th Cir. 2003)).

In the matter at hand, the plaintiff, the Senate of Puerto Rico represented by its president, sued multiple Removing Parties. However, to this date, not all defendants have notified their consent to the removal.

Therefore, the Remanding Party respectfully requests that this honorable Court deny Removing Parties' motion to remove for failure to comply with the unanimity rule.

#### **IV. CONCLUSION**

The Remanding party has presented the specific criteria and requirements that govern the consideration of petitions to remand. The essential facts have been presented, and the central or "core" issue regarding this action has been expressed, and it is clearly and strictly one pertaining to Puerto Rico's local, civil, and contractual law. The contracting parties expressly agreed in the text of the contract at the center of this action that all legal disputes arising from it would be adjudicated by the Courts of the Commonwealth of Puerto Rico. None of this is in contention. Add to this that the rule of unanimity has not been met, either. All the elements are present. It is a textbook case requiring it to be remanded back to the Commonwealth of Puerto Rico's court.

Furthermore, if the Remanding party prevails on the merits of its suit on the local court, the Removing parties will not be prohibited or enjoined from reaching a new contract or agreement that complies with the FOMBPR's applicable fiscal plan under PROMESA. They

will just have to do it complying also with applicable Puerto Rican Law. Laws are made to be followed.

For the reasons mentioned above, the Remanding Party respectfully requests that this Honorable Court deny the Removing Parties' Motion for Removal, grant the instant motion, and remand this matter back to the Commonwealth Court.

Dated: June 10, 2021, San Juan Puerto Rico

**CERTIFICATE OF SERVICE**

It is hereby certified 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.

Respectfully submitted,

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