

**IN THE 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 No. 17-BK-3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	PROMESA Title III No. 17-BK-4780-LTS

DACO's Opposition to Urgent Motion to Enforce the Automatic Stay

TO THE HONORABLE LAURA TAYLOR SWAIN:

COMES NOW the Puerto Rico Department of Consumer Affairs (“DACO” for its Spanish acronym), through its Secretary and undersigned attorneys; who very respectfully allege and pray as follows:

I. Introduction

LUMA Energy, LLC and LUMA Energy ServCo, LLC’s (“LUMA”) Urgent Motion asks this Court to treat a narrow consumer protection dispute—centered on the Puerto Rico Energy Bureau’s (“PREB”) unauthorized grant of a liability waiver—as if it implicated estate property subject to the automatic stay, even though Congress preserved such police power actions from federal interference.

Title III is not a refuge from public law. Congress wrote PROMESA to preserve not paralyze, territorial enforcement. PROMESA incorporates the Bankruptcy Code’s

automatic stay together with its police power exceptions, and then repeats those protections throughout the statute to ensure that governmental enforcement actions proceed unimpeded and without being federalized. See 48 U.S.C. § 2161(a) incorporating 11 U.S.C. § 362(b)(4); 48 U.S.C. § 2194(c)(2) excluding police power actions from the initial stay; 48 U.S.C. § 2166(d)(1) barring removal of those actions; and 48 U.S.C. § 2165 forbidding this Court from interfering “by any stay, order, or decree” with the Commonwealth’s political or governmental powers.

LUMA asks this federal court to assume jurisdiction over a dispute rooted exclusively in Puerto Rican public law, one that is already pending before the Puerto Rico Supreme Court. And to do so at the behest of a private operator that is not a Title III debtor. That invitation places courts in direct conflict over questions of Puerto Rican law that do not implicate debtor property. PROMESA’s text forecloses such an outcome. Police power enforcement lies outside the automatic stay, outside the statute’s removal provisions, and outside this Court’s power to direct how a Commonwealth agency exercises its public authority. 48 U.S.C. §§ 2194(c)(2), 2166(d)(1), 2165.

Against this backdrop, LUMA rests its motion on a mischaracterization of Article 4.1(g) of the Transmission and Distribution OMA (“OMA”). See Dkt. No. 29962-2 at p. 51-52 of 337. Article 4.1(g) is not a liability waiver provision. It does not grant LUMA immunity, release any liabilities, or vest enforceable rights against third parties. It merely obligates the parties to “**agree to apply**” to PREB for inclusion of waiver language in a rate order. PREB always retained discretion to deny, limit, or condition any such waiver.

DACO’s declaratory action challenges PREB’s *ultra vires* attempt to grant sweeping immunity that the Legislature never authorized. This challenge does not seek to impair the OMA as a whole, nor the Puerto Rico Electric Power Authority’s (PREPA)

restructuring. And it does not interfere with “property of the estate,” because a mere opportunity to petition a regulator is not property under 11 U.S.C. § 541. Unlike the Senate’s effort in *In re Fin. Oversight Bd. v. Commonwealth*, 2022 WL 17413011 (D.P.R. Feb. 7, 2022), which sought to void the OMA in its entirety, DACO’s case targets only PREB’s unlawful administrative act. This discrete action does not seek to impair the OMA’s overall framework, any part of the OMA or PREPA’s restructuring. Rather, it seeks to enforce statutory limits on a regulator’s authority and preserve consumers’ long-standing rights of action.

LUMA’s stay argument also fails for a more basic reason: the OMA already insulates PREPA and consumers from the very liabilities LUMA claims are at risk. Sections 7.6(a)(i) and 18.2(b)(ii) designate as “Disallowed Costs” any liabilities resulting from LUMA’s own negligence, gross negligence, or willful misconduct. See Dkt. No. 29962-2 at p. 104 of 337 and Id at p. 151 of 337, respectively. Such costs must be borne exclusively by LUMA and cannot be reimbursed by PREPA or passed on to ratepayers. As PREPA itself explained to the Puerto Rico Supreme Court, the invalidation of PREB’s unlawful waiver would not increase PREPA’s liabilities or disrupt its restructuring, because the contract’s own structure assigns those risks to LUMA. See Exhibit 1.

Finally, even if Article 4.1(g) could somehow be construed as touching estate property (which it cannot), DACO’s action falls squarely within the **police and regulatory power exception** of § 362(b)(4). The First Circuit’s recent decision in *Milk Indus. Reg. Off. v. Ruiz (In re Ruiz)*, 122 F.4th 1 (1st Cir. 2024), confirms that regulatory enforcement actions—even those that incidentally affect estate property—remain exempt so long as they protect public policy and consumer welfare rather than a pecuniary

interest. DACO's lawsuit, which seeks only declaratory relief to preserve consumer rights, fits perfectly within that rule.

For all these reasons, the automatic stay does not apply, and LUMA's Urgent Motion must be denied.¹

II. Factual and Procedural Background

A. The OMA and Article 4.1(g)

In June 2020, the Puerto Rico Public-Private Partnerships Authority, PREPA, and LUMA executed the OMA. The OMA transferred operational control of PREPA's transmission and distribution system to LUMA.

Article 4.1(g) of the OMA provides, in its relevant part, that the "Parties agree to apply for inclusion in the Rate Order that the associated tariff or terms of service include ... a waiver of liability." See Dkt. No. 29962-2 at p. 51-52 of 337. Given its significance, the full text of Article 4.1(g) is reproduced below:

(g) Liability Waiver. In connection with the submission of the Initial Budgets to PREB [the Puerto Rico Energy Bureau], **the Parties agree to apply for** inclusion in the Rate Order that the associated tariff or terms of service include: (i) a waiver of Owner's, ManagementCo's and ServCo's liability to customers or any Person receiving Power and Electricity for any Losses arising in any way out of or in connection with the operation of the System and the provision of Power and Electricity including any events of interrupted, irregular or defective electric service due to Force Majeure Events, other causes beyond Owner's, ManagementCo's or ServCo's control or ordinary negligence, gross negligence or willful misconduct of Owner, ManagementCo or ServCo, or their respective employees, agents or contractors; and (ii) a waiver in all cases of responsibility for any loss of profits or revenues, special, exemplary, punitive, indirect, incidental or consequential damages, including loss of revenue, loss of use of equipment,

¹ Due to the abbreviated period set forth in the Court's September 19, 2025 Scheduling Order, DACO has been unable to verify the accuracy of the English translations submitted with LUMA's Urgent Motion. DACO expressly reserves the right to alert the Court should any relevant discrepancies between the original Spanish documents and the translations become apparent. DACO further notes that the exhibits filed with the Motion are incomplete, as LUMA failed to include the attachments to the Declaratory Judgment Complaint before the Puerto Rico Court of First Instance.

cost of capital, cost of temporary equipment, overtime, business interruption, spoilage of goods, claims of customers of electric customers or other economic harms, in each case howsoever and whensoever arising, including where caused by any of Owner's, ManagementCo's or ServCo's ordinary negligence, gross negligence or willful misconduct (collectively the "Liability Waiver").

Id. (Emphasis added)

By its plain terms, the clause is not self-executing. It does not grant LUMA any contractual immunity or release of liability. Rather, it requires the parties only to apply to the PREB, which retained full discretion to approve, deny, or limit any requested waiver.

This distinction is critical. Article 4.1(g) does not create a vested contractual right. It does not insulate LUMA from consumer claims. At most, the clause preserved a procedural opportunity for LUMA to petition PREB. Whether such a petition could ever be granted consistent with Puerto Rico law remained an entirely separate question. PREB's authority to act was and remains, bound by statute, subject to constitutional separation of powers, and subordinate to substantive provisions of the Civil Code governing tort liability. See Article 1536 of the Civil Code, 31 PR Laws Ann. § 10801.

Indeed, PREPA itself never enjoyed immunity from consumer claims. Even as a public corporation, PREPA maintained a claims process by which consumers could seek compensation for damages caused by negligent acts or service fluctuations.² It would be anomalous, and contrary to public policy, for LUMA—a private operator—to acquire greater immunity than its public predecessor merely by pointing to a contractual clause

² Prior to the execution of the OMA between LUMA, the P3 Authority, and PREPA, the public corporation maintained a procedure through which consumers could submit claims for damages caused by negligence or service fluctuations, entitled "*Procedure for the Analysis, Processing, and Payment of Claims to Third Parties*," dated February 15, 2016. (See Exhibit 4).

that obligated nothing more than an “application.” LUMA cannot transform an agreement to ask for a waiver into a guarantee of immunity.

Thus, the reference to Article 4.1(g) in the OMA is legally irrelevant to the question before this Court. The controversy does not arise from the contract, whose validity DACO does not contest and has never contested, but from PREB’s subsequent administrative action purporting to convert a contractual “application clause” into an across-the-board liability waiver. That regulatory action, not the OMA, is what DACO seeks to have declared null and void by the Puerto Rico Supreme Court. See Dkt. No. 29962-4 at pp. 10-12 of 87, 29-39 of 87 and 40 of 87.

B. PREB’s 2021 Resolution and the Grant of Sweeping Immunity

On May 31, 2021, PREB issued a Resolution purporting to approve the inclusion of a broad liability waiver in LUMA’s terms of service. See Dkt. No. 29962-3 at p. 10-12. The waiver extended to LUMA, its affiliates, directors, officers, employees, agents, and contractors, and sought to immunize them from consumer claims for damages arising not only from ordinary negligence, but even from gross negligence and willful misconduct.

This regulatory act exceeded PREB’s statutory authority. No Puerto Rico law authorizes PREB to grant blanket immunity from civil liability to a private concessionaire entrusted with operating the electric grid. By purporting to do so, PREB attempted to nullify causes of action long recognized under Puerto Rico law, including consumers’ substantive rights under the Civil Code to seek redress for negligent service. See Article 1536 of the Civil Code, 31 PR Laws Ann. § 10801. Such a sweeping elimination of remedies is legislative in character, yet no statute enacted by the Legislative Assembly confers PREB that power.

It is also particularly telling that the PREB resolution expressly excluded claims arising out of gross negligence. See Dkt. No. 29962-3 at p. 10-12. By doing so, PREB confirmed that Article 4.1(g) was not a blanket conveyance of property rights, but a circumscribed provision that neither created nor transferred any automatic entitlements.

LUMA nevertheless treated PREB's resolution as a final and unconditional shield. It invoked the resolution repeatedly to deny consumer claims, admitting in public hearings that it had rejected more than 1,800 consumer petitions for compensation based solely on this supposed immunity.³

C. DACO's Targeted Declaratory Action on PREB's Unlawful Immunity Grant

On July 22, 2025, DACO filed a declaratory judgment action in the Puerto Rico Court of First Instance. See Dkt. No. 29962-3. In its initial Complaint, DACO requested a judicial declaration that (i) PREB's May 31, 2021 Resolution granting LUMA broad immunity was *ultra vires* and void; and (ii) Article 4.1(g) of the OMA, insofar as it could be read to presume PREB's authority to approve such an immunity, was likewise invalid.

By the time the matter reached the Puerto Rico Supreme Court, however, DACO had clarified and narrowed its request. In its submissions there, DACO made explicit that the controversy centered on whether "an administrative agency may, by resolution alone, confer on a private operator a general immunity from tort liability, including ordinary

³ On May 27, 2025, during a hearing before the Puerto Rico House Consumer Affairs Committee in the House of Representatives, Rebecca Maldonado, a LUMA representative, testified under oath that LUMA had denied 1,828 consumer damage claims, explaining that "the complaints we received cannot be paid according to the release of liability." See News Is My Business, Lawmakers investigate LUMA's rejection of 1,800 damage claims (May 28, 2025), available at: <https://newsismybusiness.com/lawmakers-investigate-lumas-rejection-of-1800-damage-claims>

A court may take judicial notice "of a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); see *Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 n. 5 (1st Cir. 2010) (taking judicial notice "of the relevant facts provided on the [government] website, which [were] 'not subject to reasonable dispute.'").

negligence, thereby displacing the Civil Code’s liability regime without legislative authorization.” See Dkt. No. 29962-4 at p. 10 of 87. (Translation Ours). In other words, the focus was squarely on PREB’s Resolution, not the OMA itself. Article 4.1(g) was cited only to contextualize LUMA’s petitioning mechanism.

By drawing this distinction, DACO underscored that the OMA’s operative framework remains intact regardless of the Resolution’s validity. The declaratory action is directed exclusively at restoring the statutory and constitutional boundaries on PREB’s authority and preserving consumers’ access to remedies, not at disturbing PREPA’s estate or impairing the OMA itself.⁴

Finally, if any doubt remained as to the narrow scope of the controversy, it was dispelled by PREPA’s own filings before the Puerto Rico Supreme Court on September 23, 2025. PREPA itself urged the Court to clarify whether DACO’s challenge—that PREB’s May 31, 2021 Resolution approving the “Modified Terms of Service” was unconstitutional and *ultra vires*—had merit. See Exhibit 1. PREPA acknowledged that DACO was not attacking the OMA, but rather asking the Court to decide whether PREB’s administrative action, by purporting to eliminate liability for negligence, violated applicable law and the constitutional separation of powers.

That position was echoed by both the Puerto Rico Senate and the House of Representatives, which likewise stressed that the Resolution was null and void because

⁴ LUMA’s assertion in paragraph 35 of its motion that DACO’s Complaint represents “the latest attempt by the Government to interfere with PREPA’s property interest,” mischaracterizes DACO’s statutory role. DACO is not part of the Commonwealth’s energy-sector components of government, and it does not participate in PREPA or P3 Authority deliberations. Its jurisdiction is strictly limited to the protection of consumer rights under Puerto Rico law. To frame DACO’s statutory enforcement of consumer remedies as part of a coordinated governmental campaign against PREPA is both inaccurate and incorrect. DACO’s Complaint is narrowly directed at safeguarding consumers from PREB’s *ultra vires* Resolution, not at impairing PREPA’s contractual property interests.

only the Legislature, not an administrative agency, could enact such a sweeping change in liability rules. See Exhibit 2. In other words, all parties agreed that the controversy centered exclusively on the validity of PREB's Resolution, and that if the Resolution is struck down, LUMA remains liable for negligence under the Puerto Rico Civil Code and the OMA itself, as we will discuss below. This outcome does not affect in any way the validity or enforceability of the OMA, which continues fully operative, because waiver of liability for negligence was never embedded in the OMA to begin with.

D. PREPA's Supreme Court Brief Underscores Contractual Safeguards Against LUMA's Negligence

When DACO's action reached the Puerto Rico Supreme Court through a petition for intrajurisdictional certification, PREPA filed a brief with its position. See Exhibit 1. PREPA acknowledged that it had authorized LUMA to seek a liability waiver under Article 4.1(g) but explained that this provision was never self-executing and did not entitle LUMA to blanket immunity. Id at p. 15. Rather, its purpose was to create a regulatory petition process subject to PREB's statutory limits. Id at p. 15.

Importantly, PREPA emphasized that even without PREB's waiver, the OMA already protects PREPA and its customers by placing the risks of LUMA's misconduct squarely on LUMA itself. Citing Sections 7.6 and 18.2 of the OMA (See Dkt. No. 29962-2 at p. 104 of 337 and at p. 151 of 337), PREPA explained that any liabilities stemming from LUMA's ordinary negligence, gross negligence, or willful misconduct are designated as "Disallowed Costs." By contract, those costs cannot be transferred to PREPA or its ratepayers but must be absorbed entirely by LUMA from its own funds. Section 18.2(b) of the OMA makes this explicit, carving out negligence and willful misconduct from PREPA's indemnification obligations. Id at p. 151 of 337.

PREPA further noted that Section 18.3 imposes dollar limits on LUMA's exposure for ordinary negligence, but never eliminates it. Thus, even within the OMA framework, LUMA remains financially responsible for its own wrongful acts. For that reason, PREPA argued, if PREB's 2021 Resolution were struck down as *ultra vires*, neither PREPA's estate nor consumer rates would be affected. Id at p. 16.

By underscoring these contractual protections, PREPA confirmed that the controversy does not jeopardize PREPA's restructuring or impair estate property. To the contrary, the OMA's design ensures that liability for negligence rests with LUMA, not with PREPA or Puerto Rico's consumers.

Furthermore, the OMA's only express administrative expense mechanism is the Front-End Transition administrative expense treatment in Section 4.1(c), which by its terms applies exclusively to the initial transition period. See Dkt. No. 29962-2 at pp. 48-49 of 337. It does not create a perpetual pass-through for all future liabilities.

E. LUMA's Litigation Posture

In opposing DACO's intrajurisdictional petition for certification before the Supreme Court, LUMA raised a variety of arguments—including alleged lack of standing, failure to join indispensable parties, and lack of constitutional novelty. Notably absent was any mention of the automatic stay under PROMESA. The automatic stay was first invoked only in the present proceedings.

In addition, LUMA's urgent motion (in paragraph 44) invokes paragraph 1.H of the Court's case management procedures, certifying that it created no urgency through lack of diligence, and that it made "a bona fide effort to resolve the matter without a hearing" through "reasonable good faith communications." See Urgent Motion, Dkt. No. 29962 at ¶ 44. On September 18, 2025, at 9:14 am counsel for LUMA sent DACO an email

requesting that DACO withdraw its Commonwealth Court complaint and certification petition by 3:00 p.m. that same day, indicating that otherwise LUMA would seek relief in federal court. See Exhibit 3. DACO responded in writing, explaining its position that the automatic stay did not apply and that it would not withdraw its filings. Id. The matter proceeded to this Court shortly thereafter. This sequence of events underscores that LUMA's communications did not reflect the type of genuine, collaborative engagement contemplated by paragraph 1.H, but rather a last-minute ultimatum that left no room for meaningful dialogue.

These circumstances provide context for the timing of LUMA's motion and demonstrate that the question of the stay was not previously raised in the Commonwealth proceedings. The present dispute therefore represents the first occasion on which the automatic stay has been placed before a court for determination; and second, that LUMA's current resort to the stay is a litigation tactic of convenience.

F. Lack of quorum forecloses any Oversight Board authority to halt enforcement of DACO's enabling act

LUMA's reliance in paragraph 45 of its motion only underscores the absence of any lawful Oversight Board action before this Court. LUMA reports that the Board "has informed LUMA" that the stay should apply, while at the same time acknowledging that the Board "takes no position on the merits." An informal statement of this nature is not a Board determination and carries no legal effect. PROMESA requires an affirmative vote of a majority of the Board's appointed membership to exercise the very power LUMA is effectively invoking here, namely, to cause a Commonwealth legislative act not to be enforced under section 2144. Absent such a majority vote, there is no Board decision to

which this Court can defer. See 48 U.S.C. § 2121(h)(2); see also LUMA Urgent Motion ¶ 45.

PROMESA also limits who may act on behalf of the Oversight Board. “Any member or agent” may take an action only “if authorized by the Oversight Board.” 48 U.S.C. § 2124(b). A staff view or a communication from counsel that has not been approved by a majority vote is not authorization within the meaning of the statute. To accept LUMA’s recital as a substitute for a formal Board vote would permit a single member or staffer to exercise powers that Congress reserved to the Board acting collectively, including the power to ask a federal court to halt the operation of a Commonwealth law. See 48 U.S.C. §§ 2121(h)(2), 2124(b), 2144.

Because the Board presently lacks a quorum, it cannot meet the statutory requirement of a majority vote of its full appointed membership to seek to block the enforcement of DACO’s enabling act—or to take any action with the same practical effect. LUMA’s effort to leverage an informal, staff level “position” to achieve that outcome circumvents both PROMESA’s voting rule and the Board’s own governance framework. The Court should therefore give no weight to LUMA’s paragraph 45 and should reject any suggestion that a non-voted staff communication can authorize federal intervention to restrain a Commonwealth regulator acting pursuant to its enabling act.

III. DACO’s Enabling Act Confirms Its Broad Powers to Protect Consumers

DACO is a cabinet-level agency created by the Puerto Rico Legislature to safeguard the rights of consumers and regulate fair commercial practices across the Commonwealth. See P.R. Laws Ann. tit. 3, § 341 et seq. From its inception, DACO has

been vested with broad statutory powers to “vindicate and implement the rights of the consumer.” 3 PR Laws Ann. § 341.

To fulfill this statutory mission, the Legislature vested DACO’s Secretary with expansive enforcement authority. The Secretary may, *inter alia*, investigate and resolve consumer complaints against private entities, enforce and vindicate consumer rights through quasi-judicial adjudications and declaratory orders, represent consumers before tribunals, boards, and commissions in matters affecting consumer rights, issue subpoenas and compel the production of documents, adopt regulations necessary to protect consumers, and file legal actions in court to ensure compliance with Puerto Rico’s consumer protection regime. See 3 PR Laws Ann. § 341e.

These powers are not incidental. The Legislature deliberately equipped DACO with them to offset the “marked imbalance of resources” between individual consumers and powerful private entities. By law, DACO stands in the place of consumers when systemic issues arise, ensuring that private actors cannot use superior bargaining power or regulatory gaps to deprive Puerto Ricans of basic protections guaranteed by statute or by the Civil Code.

Furthermore, pursuant to Article 6(i) of Law No. 5 of April 23, 1973, DACO is expressly empowered to “take any legal remedies necessary to give effect to the purposes of this law and to enforce the rules, regulations, orders, resolutions and determinations of the Department.” 3 PR Laws Ann. § 341e(i). This mandate complements and reinforces subsections (e) and (f) cited above, by giving DACO comprehensive power not only to appear on behalf of consumers, but also to deploy all available legal means to uphold their rights against abusive, deceptive, or unfair practices, while ensuring that the Department’s determinations are truly effective. In other words, the Legislative Assembly

conferred upon DACO the authority to take action in court with the same vigor with which it acts in administrative proceedings, precisely to guarantee that consumers' rights are never deprived of remedy.

DACO's declaratory action against PREB's May 31, 2021 Resolution arises directly from this statutory mandate. PREB's unprecedented administrative act has already nullified consumers' substantive rights under Article 1536 of the Civil Code, 31 L.P.R.A. § 10801, which guarantees the right to recover damages caused by negligent service.

Standing in defense of those statutory rights is not optional for DACO. It is the very essence of the agency's role. When an administrative determination jeopardizes consumer protections or exceeds statutory boundaries, DACO is legally bound to intervene. In filing its declaratory action, DACO did not act as a private litigant seeking damages or contractual relief. Rather, it acted in its capacity as the Commonwealth's consumer protection authority, exercising its statutory responsibility to ensure that consumers retain access to the remedies the law provides.

IV. Argument

A. Article 4.1(g) Grants No Waiver, No Release, and No Enforceable Rights

The OMA's text at issue is unambiguous. It requires the parties only to **apply for** a waiver in the PREB's rate order. Unlike an actual contractual release clause, Article 4.1(g):

- Does not provide LUMA with an immunity shield.
- Does not discharge claims or liabilities.
- Does not vest any rights enforceable against third parties.

The only conceivable interest here is the procedural opportunity to request regulatory relief—an option LUMA possesses regardless of whether the OMA contains a

clause acknowledging it. There is a fundamental distinction between enforceable contractual rights and mere aspirational obligations to petition a regulator. A speculative expectation of future regulatory approval cannot, as a matter of law, constitute “property of the estate.”

LUMA repeatedly describes Article 4.1(g) as a “liability waiver provision.” This mischaracterization ignores that the clause is not self-executing. By collapsing the distinction between a waiver granted by contract and an agreement to apply for regulatory approval, LUMA seeks to manufacture a property interest where none exists.

At most, the clause preserves the procedural opportunity to petition PREB for relief. That opportunity exists regardless of whether Section 4.1(g) is in the OMA. A mere expectation that a regulator might grant immunity does not create a cognizable legal interest, let alone “property of the estate.” See Butner v. United States, 440 U.S. 48, 55 (1979) (estate property is defined by enforceable legal or equitable interests under applicable law).

Courts have consistently recognized that agreements to petition a regulator create procedural duties, not substantive rights. *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–68; 470 (1985). Additionally, Courts consistently enforce such “efforts” or “apply” provisions according to their plain meaning. Under Puerto Rico law, when contract language is clear, it must be applied as written without

resort to extrinsic evidence.⁵ Delaware courts interpreting similar covenants uniformly distinguish between a duty to use efforts and an absolute obligation to achieve a result.⁶

Even more fundamentally, PREB lacked statutory authority to grant a blanket waiver of civil liability. A regulatory act that exceeds statutory limits is *ultra vires* and cannot create vested rights. See *Arlington v. FCC*, 569 U.S. 290, 297–98 (2013) (agency action beyond its jurisdiction or authorized application is *ultra vires* and thus invalid). An administrative body cannot expand its mandate by contract or resolution; private parties contract at their peril when they rely on an agency to confer powers it does not lawfully possess. Thus, neither PREPA’s estate nor LUMA ever acquired an enforceable property interest in a liability shield that Puerto Rico law does not allow PREB to grant. DACO’s action seeks only to correct this unlawful overreach.

B. Section 4.1(g) Is Not a Material Clause of the OMA

Even apart from its narrow text, Section 4.1(g) is collateral, not material, to the OMA. Nothing in the agreement conditions its effectiveness on PREB granting a waiver. Nor does the contract provide that LUMA’s rights or obligations would change if the waiver were rejected or modified. By contrast, other OMA provisions expressly condition

⁵ See *UBS Fin. Servs. Inc. of P.R. v. Unión de Empleados*, 223 F. Supp. 3d 134, 138 (D.P.R. 2016) (“When the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.”).

⁶ In *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017), the Supreme Court held that a covenant to use “commercially reasonable efforts” to obtain a tax opinion imposed only a process-based duty, not a guaranty of outcome. Likewise, in *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 755-756 (Del. Ch. 2008), the court enforced “reasonable best efforts” clauses as obligations of conduct, not results. And in *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *87, 96-97 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018), the court explained that only a “hell-or-high-water” covenant—requiring the buyer to take “any and all actions necessary”—could be construed as an outcome commitment. Absent such language, the obligation is limited to making the application itself. Here, the absence of any “all actions necessary” clause is telling: the OMA requires nothing more than filing the waiver request, and PREB’s independent decision cannot be imputed to the contracting parties.

performance on regulatory approvals, such as Sections 4.1(a)–(f) (Dkt. No. 29962-2 at pp. 48-51 of 337) and 5.1–5.2 (Id at pp 7071 of 337). The omission of such contingency language in 4.1(g) confirms that the waiver was never central to the bargain.

PREPA itself underscored this point in its filings before the Puerto Rico Supreme Court. PREPA explained that even if PREB’s waiver were invalidated, consumers and PREPA’s estate would remain insulated from LUMA’s negligence because the OMA already designates such liabilities as “Disallowed Costs” borne solely by LUMA. See OMA §§ 7.6(a)(i), 18.2(b)(ii), 18.3. See Exhibit 1 at 14. These provisions make clear that losses caused by LUMA’s negligence, gross negligence, or willful misconduct cannot be shifted to PREPA or its ratepayers. In short, the contract itself ensures that nullifying PREB’s *ultra vires* resolution would not increase rates or impair PREPA’s restructuring.

This structural reality shows that Section 4.1(g) is dispensable. The OMA stands on its own without it. DACO’s declaratory action, which challenges only PREB’s unlawful resolution and the collateral presumption that such a waiver could be secured by regulatory action, does not impair estate property. Cf. *Milk Indus. Reg. Off. v. Ruiz (In re Ruiz)*, 122 F.4th 1 (1st Cir. 2024) (holding that a regulator’s enforcement of its statutory mandate fell within the police power exception even though it affected a debtor’s contractual interests).

C. In re Fin. Oversight Bd. v. Commonwealth Is Inapposite: DACO Targets Only PREB’s *Ultra Vires* Resolution

In *In re Fin. Oversight & Mgmt. Bd. v. Commonwealth*, 2022 WL 17413011 (D.P.R. Feb. 7, 2022), the Puerto Rico Senate sought to void the OMA in its entirety. The Court held that attempt violated § 362 because the OMA itself—an integrated post-petition contract—constituted property of the estate.

Here, DACO does not seek to void the OMA. It challenges PREB's separate administrative action granting an unlawful waiver. Unlike in *Oversight Bd.*, there is no attempt to impair or invalidate the contract itself. The challenged provision (Art. 4.1(g)) never created estate property to begin with, because it is only an agreement to apply.

Property of the estate includes enforceable rights, not hopes or possibilities. The right to petition a regulator is not estate property—just as a license applicant has no property interest until a license is granted. LUMA, however, operates as if PREB's 2021 resolution was the inevitable and automatic consequence of Article 4.1(g), treating the waiver as if it was contractually secured and beyond PREB's discretion. That assumption is legally flawed. PREB always retained the authority to deny or limit any such waiver, and Article 4.1(g) did not and could not, strip the regulator of its discretion.

DACO's action therefore does not interfere with PREPA's estate. It merely vindicates the limits of PREB's statutory authority and underscores that neither LUMA nor PREPA ever acquired a vested property interest in an unconditional waiver.

D. Invalidating the PREB-Authorized Waiver Does Not Undermine the OMA, and PROMESA's Stay Cannot Be Stretched Beyond Its Purpose

LUMA exaggerates the consequences of invalidating the PREB waiver resolution, suggesting that it would unravel the entire OMA. See Dkt. No. 29962 at p. 17. That claim is unfounded. The OMA's central purpose—the operation and maintenance of PREPA's transmission and distribution system—remains wholly intact without the waiver contemplated and to be “appl[ied] for” under Article 4.1(g). The provision is collateral, not essential.

This makes the present case starkly different from *In re Fin. Oversight Bd. v. Commonwealth*, 2022 WL 17413011 (D.P.R. Feb. 7, 2022), where the Puerto Rico Senate

sought to void the OMA in its entirety. There, this Court properly held that an attack on the whole OMA implicated estate property. Here, DACO challenges only an unlawful regulatory-approved waiver that was not contractually mandated.

To extend the stay here would improperly transform an invalid administrative act into estate property and immunize LUMA from legitimate consumer oversight.

E. The OMA Already Insulates PREPA and Consumers Through the Disallowed Costs Framework

LUMA argues that DACO's action threatens PREPA's estate because invalidating PREB's waiver would expose PREPA and its restructuring to additional liabilities. That argument collapses under the OMA's own terms. As PREPA itself explained in its brief before the Puerto Rico Supreme Court, the contract expressly insulates both PREPA and consumers from bearing the costs of LUMA's negligence through the Disallowed Costs provisions.

Section 7.6(a)(i) defines "Disallowed Costs" to include any losses, expenses, or liabilities incurred "to the extent arising out of or resulting from the Operator's own negligence, gross negligence, or willful misconduct." See Dkt. No 29962-2 at p. 104 of 337. In plain terms, if LUMA acts negligently—or even recklessly—it must bear those costs itself. They cannot be reimbursed by PREPA, charged to ratepayers, or recovered as part of the service fee.

Section 18.2(b)(ii) reinforces this allocation. It excludes from PREPA's indemnification obligations any damages, claims, or losses that "result from the negligence or willful misconduct of any Operator Indemnatee." See Dkt. No 29962-2 at p. 151 of 337. This clause makes it explicit that PREPA cannot be compelled to indemnify LUMA for liabilities caused by LUMA's own wrongful acts. The structure of indemnity

under the OMA is thus narrow, carefully designed to shield PREPA and the public from paying for LUMA's mistakes.

Together, these provisions form a contractual firewall. They ensure that the risks of LUMA's negligence rest solely with LUMA, not with PREPA or Puerto Rico's consumers. The omission of PREPA's indemnity for negligence is not accidental, it reflects the parties' deliberate allocation of risk when the OMA was negotiated.

LUMA's attempt to reframe PREB's waiver as indispensable to the OMA ignores this careful design. Even without PREB's unlawful resolution, the OMA already provides that negligence-based liabilities are "Disallowed Costs" for which LUMA alone is responsible. As PREPA emphasized in its Supreme Court brief, the invalidation of Article 4.1(g) or PREB's resolution would not increase PREPA's costs or compromise its restructuring. To the contrary, it would simply leave in place the very risk allocation the contract already prescribes.

This reality is fatal to LUMA's claim that the automatic stay must be extended. There is no estate property at risk, because PREPA has no duty to shoulder LUMA's negligence costs in the first place. What LUMA seeks through PREB's waiver is not the protection of a bargained-for contractual right, but the deletion via judicial fiat of a contractual risk it voluntarily assumed in 2020. That overreach cannot be dressed up as an urgent stay issue.

F. DACO's Action Falls Within the Police and Regulatory Power Exception

Even if *arguendo* Article 4.1(g) touched on estate property, which it does not, DACO's declaratory action falls squarely within the police and regulatory power exception of 11 U.S.C. § 362(b)(4). That exception provides that the automatic stay does not apply to "the commencement or continuation of an action or proceeding by a governmental unit

... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment.”

i. The Ruiz Decision Confirms the Breadth of the Exception

The First Circuit's recent decision in *Milk Indus. Reg. Off. v. Ruiz (In re Ruiz)*, 122 F.4th 1 (1st Cir. 2024), is directly on point. There, Puerto Rico's milk regulator (ORIL) revoked a debtor's dairy license for trafficking and ordered him to dispose of his milk quota. When the debtor refused, ORIL scheduled an auction of the quota. The bankruptcy and district courts both held the auction violated the automatic stay, but the First Circuit reversed. It held that ORIL's actions “fall squarely within the police power exception” because they were taken to enforce a regulatory judgment, not to collect a debt or advance a pecuniary interest. *Id.* at 6.

The court emphasized that § 362(b)(4) ensures agencies can enforce laws “affecting health, welfare, morals and safety.” *Id.* at 13. The auction, although implicating property of the estate, was simply the enforcement of a non-monetary regulatory judgment—the revocation of a license. It rejected the debtor's argument that any overlap with estate property barred application of the exception, stressing instead that the focus is on the purpose of the government action.

ii. Public Policy and Pecuniary Purpose Tests Both Point to Exemption

As the First Circuit explained, courts apply both the public policy test and the pecuniary purpose test to determine whether § 362(b)(4) applies. Under the public policy test, proceedings that effectuate public policy fall within the exception, while those adjudicating private rights do not. Under the pecuniary purpose test, actions designed to protect public welfare qualify, while those motivated by revenue collection or economic gain do not. *Ruiz*, 122 F.4th at 14–16. Applying these tests, the First Circuit held ORIL's

actions were exempt because they enforced Puerto Rico's regulatory regime for milk production which is a matter of public welfare, and any financial consequences were merely incidental.

That reasoning applies with equal, if not greater, force here. DACO's declaratory action enforces Puerto Rico's consumer-protection regime and vindicates the Legislature's determination that consumers must retain access to judicial remedies for negligence. Under the public policy test, DACO's action protects consumers from being stripped of remedies by an agency lacking statutory authority. Under the pecuniary purpose test, DACO has no financial stake; it seeks no damages or revenue for the Commonwealth. Its only aim is to prevent PREB from granting blanket tort immunities it was never authorized to confer. Just as in *Ruiz*, where incidental financial consequences did not negate ORIL's regulatory purpose, any collateral effect here on PREPA's estate does not alter the fundamentally public and regulatory character of DACO's suit.

DACO's action thus satisfies both tests. It is quintessential public policy enforcement: restraining regulatory overreach and preserving substantive rights guaranteed under the Puerto Rico Civil Code. It is also free of any pecuniary motive, as DACO neither seeks nor could obtain a money judgment. The sole purpose of the action is to restore the statutory and constitutional boundaries on PREB's authority and protect consumers from unlawful deprivation of remedies.

To hold otherwise would, as the First Circuit cautioned, improperly extend the stay to shield "ongoing debtor conduct which would seriously threaten the public safety and welfare." *Ruiz*, 122 F.4th at 15.

iii. Allowing the Stay to Block DACO Would Upend Congress' Design

Such an interpretation would upend Congress's design in PROMESA, which deliberately preserved the police power exception to safeguard core consumer protections. To hold otherwise would extend the stay to shield *ultra vires* acts that strip consumers of substantive rights from judicial oversight, an outcome flatly inconsistent with the text, purpose, and case law surrounding §362(b)(4).⁷ Congress drafted PROMESA to balance restructuring with the preservation of Puerto Rico's regulatory authority. It expressly incorporated the police power exception so that essential consumer protections, like DACO's, would not be paralyzed by bankruptcy litigation. The House Report makes this point plain, explaining that PROMESA incorporated the Bankruptcy Code "without narrowing the scope of existing exceptions," including §362(b)(4). H.R. Rep. No. 114-602, at 45 (2016). Indeed, PREPA itself has conceded that the OMA already prevents ratepayers from bearing the costs of LUMA's negligence; DACO's suit only ensures that PREB cannot legislate away liability it has no authority to erase. In that sense, this action strengthens, rather than undermines, the statutory framework governing PREPA's restructuring.

V. Conclusion

Article 4.1(g) is not a liability waiver, not a contractual release, and not a vested right. It is merely an agreement to apply to PREB, leaving the regulator free to exercise

⁷ See *Board of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 40-41 (1991) (holding that automatic stay does not bar agency enforcement of regulatory authority, even where debtor's property is implicated, because "[t]he language of § 362(b)(4) is intended to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court"); *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000) (explaining that § 362(b)(4) "is to be construed broadly to permit governmental units to pursue actions to protect the public health and safety"); accord *In re First Alliance Mortg. Co.*, 263 B.R. 99, 107 (B.A.P. 9th Cir. 2001) (same).

its statutory discretion. PREB's attempt to grant LUMA sweeping immunity was *ultra vires* and cannot convert a speculative expectation into property of the estate.

Moreover, the OMA's Disallowed Costs provisions already place the financial responsibility for negligence squarely on LUMA. PREPA and consumers cannot be saddled with those liabilities, whether or not PREB's waiver stands. LUMA's effort to invoke the stay is thus not about protecting estate property but about evading contractual risks it voluntarily assumed in 2020.

DACO's action enforces Puerto Rico's consumer protection laws and prevents PREB from overstepping its statutory bounds. Under § 362(b)(4) and the First Circuit's ruling in *In re Ruiz*, such regulatory enforcement is exempt from the stay. Extending the stay to shelter PREB's unlawful waiver would contradict PROMESA's text and purpose, harming consumers while unjustly relieving LUMA of obligations it agreed to bear.

Accordingly, this Court should hold that the automatic stay does not apply to this controversy and should **deny LUMA's Urgent Motion in its entirety**.

WE HEREBY CERTIFY that on this date we electronically filed the present motion with the Clerk of Court using the CM/ECF system which will send electronic notification of said filing to all parties of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd day of October 2025.

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