

**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 SUR-REPLY

TO THE HONORABLE COURT:

The Puerto Rico Department of Consumer Affairs (“DACO”), through its Secretary and undersigned counsel, respectfully submits this Sur-Reply to address LUMA Energy, LLC and LUMA Energy ServCo, LLC’s (“LUMA”) Omnibus Reply (Dkt. 30048).

I. Introduction

LUMA’s Reply mischaracterizes both the facts and the law in an effort to recast a narrow consumer-protection enforcement action as a collateral attack on PREPA’s property interests. It does so by introducing new and unsustainable theories, asserting political motives where none exist, proposing a “condition precedent” theory unsupported by the OMA and applicable law, and misapplying the concept of “Regulatory Law” under Section 14.5(f) to portray DACO’s lawful enforcement action as a contractual threat. These arguments distort the record and misconceive both the nature of DACO’s petition and the limits of PROMESA’s automatic stay.

DACO’s declaratory action does not seek to amend, rescind, or modify any law or contractual term. It enforces existing law by challenging a single regulatory act: the Puerto Rico

Energy Bureau’s (“PREB”) Resolution purporting to grant LUMA sweeping immunity from consumer liability. PREB’s unilateral attempt to create civil immunity usurped the exclusive prerogative of the Puerto Rico Legislature to define and delimit tort liability. DACO’s petition before the Puerto Rico Supreme Court simply seeks a judicial determination restoring the rule of law as enacted by the Legislature, not a “change in Regulatory Law” within the meaning of the OMA.

LUMA’s invocation of the automatic stay seeks to convert PROMESA’s limited protection of estate property into a tool for shielding private conduct from lawful oversight. That inversion of statutory purpose cannot stand. DACO’s action vindicates the Commonwealth’s core sovereign authority to ensure that consumers retain the remedies guaranteed by Puerto Rico’s Civil Code and to confirm that administrative agencies act within the bounds of legislative delegation. The First Circuit’s decision in *Milk Industries Regulatory Office v. Ruiz*, 122 F.4th 1 (1st Cir. 2024), squarely confirms that such governmental enforcement actions—rooted in the exercise of police and regulatory power—fall outside the reach of § 362(a).

The record makes clear that DACO seeks no damages, no injunction affecting PREPA’s operations, and no modification of the OMA. It merely asks Puerto Rico’s highest court to declare that PREB exceeded its statutory authority. This Court should reject LUMA’s attempt to transform PROMESA into a barrier against legitimate Commonwealth oversight and reaffirm that the statute was enacted to preserve, not paralyze, Puerto Rico’s sovereign regulatory powers.

II. Argument

A. DACO’s Enforcement Action is a Proper Exercise of Regulatory Power, Not a Political or Contractual Attack

LUMA’s reply is built upon a flawed premise—that DACO’s petition before the Puerto Rico Supreme Court forms part of a “political effort” to terminate the OMA. The record is devoid

of any evidence supporting that allegation. DACO's action arises directly from its statutory mandate to protect consumers from unlawful administrative acts. The proceeding challenges a single regulatory resolution issued by PREB on May 31, 2021, which purported to grant LUMA broad immunity from civil liability, including negligence. That act exceeded PREB's statutory authority and contravened the public policy of Puerto Rico. DACO's filing seeks declaratory relief to restore those statutory limits. It neither requests monetary damages nor impairs PREPA's contractual framework.

LUMA's recitation of political statements or public commentary cannot transform a legitimate exercise of police power into a coordinated political campaign. The automatic stay inquiry must focus on the *purpose and effect* of the governmental proceeding, not on conjecture about motive. LUMA's speculation about intent cannot be a substitute for an objective analysis of statutory enforcement. DACO's suit enforces public law, not private or pecuniary interests, and thus remains beyond the reach of the stay.

B. LUMA's "Condition Precedent" Theory Rests On A Legal Fiction

LUMA now argues that the existence of a liability waiver "in full force and effect" under § 4.5(p) of the OMA constitutes a condition precedent to service commencement. This newly minted theory was absent from its Urgent Motion and collapses upon scrutiny. A condition precedent cannot depend on the occurrence of an unlawful act. If PREB lacked authority to grant a waiver, there was never a valid event capable of satisfying that condition. LUMA's argument thus presumes the very proposition in dispute (i.e. that a lawful waiver exists) and uses that

presumption to manufacture an estate interest. Such circular reasoning cannot sustain an automatic stay.¹

Even on its own terms, the OMA's structure refutes LUMA's claim. The agreement lists numerous explicit conditions to service commencement—budget approvals, rate orders, and regulatory filings—but never makes a liability waiver determinative. Article 4.1(g) is ancillary and non-essential, and its omission from the list of material conditions is dispositive. The OMA allocates regulatory risk through termination and change-in-law provisions, not through the creation of an unconditional right to immunity. If the waiver were truly indispensable, the contract would have expressly addressed its denial. It did not. The plain text defeats LUMA's revisionist interpretation.

Worse yet, even assuming *arguendo* that § 4.5(p) of the OMA could be read to make service commencement contingent on the existence of a liability waiver, that interpretation collapses under Puerto Rico law. Article 1044 of the Civil Code, P.R. Laws Ann. tit. 31 § 3043, renders void any obligation “whose fulfillment depends upon the exclusive will of the debtor.”

In *Punta Lima, LLC v. Punta Lima Dev. Co., LLC*, Civ. 425 F. Supp. 3d 87 (D.P.R. 2019) (Besosa, J.), citing *Jarra Corp. v. Axxis Corp.*, 155 D.P.R. 764 (2001), the court held that § 3043 exists to “condemn illusory promises.” A condition that turns performance on a party's unilateral will—or, worse, on an unlawful act—is purely potestative and therefore void. LUMA's “condition precedent” theory violates both principles. The OMA was executed on June 22, 2020, while the PREB resolution purporting to grant LUMA a liability waiver was not issued until May 31, 2021. By claiming that its duty to perform depended on that later and unauthorized waiver, LUMA

¹ Nor can § 4.5(p) alter that conclusion. Its reference to operations proceeding “subject to” rate orders and approvals presuppose lawful agency action; it does not endow PREB with new authority or transform an *ultra vires* waiver into a valid condition precedent. PREB's powers are bound by statute, and nothing in the OMA can expand them.

effectively turns its contractual obligation into a promise subject entirely to an *ultra vires* act. This is the quintessential illusory promise that § 3043 and *Punta Lima* condemn.

The Punta Lima court further tied this rule to the Civil Code’s broader mandate that contracts must be interpreted to “presuppose fairness, correction and good faith” and to avoid “absurd or unfair results.” When a party reserves to itself (or as here, to a regulator) the power to decide whether its obligations ever ripen—especially through an illegal or *ultra vires* act—the result is precisely the kind of illusory commitment the Code forbids.

Under *Punta Lima* and § 3043, a void administrative act cannot trigger contractual rights, and a party cannot rely on illegality to evade its duties. LUMA’s “condition precedent” argument is thus of no legal moment and should be rejected.

C. Section 18.2’s Structure Excludes Negligence-Based Indemnity and Precludes PREB’s Ultra Vires Expansion

LUMA’s attempt to defend PREB’s overreach by invoking the “prefatory language” of Section 18.2 misreads the OMA and distorts the structure of its indemnification scheme. The contract does not, as LUMA suggests, guarantee PREPA indemnification for any and all consumer suits, even those arising from LUMA’s own negligence. A proper reading of Section 18.2 demonstrates a narrow and deliberate allocation of risk. Subsection 18.2(a)(vi) addresses claims brought by transmission and distribution customers for direct damages, while subsection 18.2(a)(vii) pertains to claims by third parties for consequential or exemplary categories of harm—loss of profits, revenues, or other special damages. See Dkt. No. 29962-2 at p 151 of 337. Section 18.2(b) then establishes a global limitation, expressly providing that PREPA shall not indemnify for losses caused by LUMA’s negligence or willful misconduct, save for the limited consequential and punitive categories listed in 18.2(a)(vii) and for pre-existing environmental conditions under 18.2(a)(viii). Id.

Read together, these provisions mean that direct consumer claims for property damage or personal injury—precisely the claims DACO seeks to preserve—fall within subsection 18.2(a)(vi) and are excluded from indemnification whenever caused by LUMA’s negligence. Only the narrow consequential categories in subsection 18.2(a)(vii) remain insulated from the negligence bar, and even then, the OMA makes clear that those categories involve indirect or punitive losses, not the ordinary tort damages at issue in DACO’s petition. The contract further reinforces this allocation by designating negligence-based losses as “Disallowed Costs” under Section 7.6(a)(i), ensuring that such costs cannot be passed through to PREPA or to ratepayers. See Dkt. No. 29962-2 at p 104-105 of 337.

LUMA’s reliance on the “prefatory language” of Section 18.2 to claim an unrestricted right to indemnity ignores this integrated structure. The text, read as a whole, forecloses indemnification for the very liabilities that DACO’s action seeks to preserve—direct consumer claims arising from LUMA’s negligence. The prefatory language does not nullify the global limitation; it merely identifies the limited exceptions already enumerated in the subsections that follow. Nothing in Section 18.2, or anywhere else in the OMA, transforms PREB’s unlawful waiver into a source of absolute immunity or converts excluded liabilities into estate property. The text controls, and the text defeats LUMA’s theory.

D. LUMA Misconstrues Section 14.5(f) and the Concept of Regulatory Law

LUMA’s contention that DACO ignored Section 14.5(f) of the OMA is both misplaced and legally unfounded. Section 14.5(f) allows LUMA to terminate the agreement “in the event of a Change in Regulatory Law”. See Dkt. No. 29962-2 at p 134 of 337. However, LUMA’s reliance on this clause presumes the occurrence of a “Change in Regulatory Law” as defined in Section 1.1; namely, a legislative or regulatory act that alters the governing legal framework, modifies

statutory interpretation, or rescinds a valid regulatory action “in a manner materially adverse to the Operator”. DACO’s petition before the Puerto Rico Supreme Court does none of these things.

“Regulatory Law,” as defined by the OMA, refers to new or amended enactments, regulations, or administrative interpretations with the force of law that change the legal environment in which the operator functions. It contemplates external, normative modifications—such as a new statute, rule, or formal interpretation—that alter the rights or obligations established under the contract. DACO’s action does not fall within that definition. It does not seek to change, amend, or modify any law or regulation, nor does it request the adoption of a new rule. Rather, DACO’s declaratory petition seeks to enforce the law as written, ensuring that PREB, an administrative body of limited jurisdiction, acts within the authority delegated by the Legislature. DACO’s claim therefore enforces existing law; it does not constitute or precipitate a “Change in Regulatory Law.”

Contrary to LUMA’s portrayal, DACO’s proceeding is not a legislative or regulatory intervention that would trigger contractual termination rights. It is a judicial review designed to confirm the legality of a specific regulatory act: the 2021 PREB Resolution that granted LUMA a blanket immunity from consumer liability. That resolution was not a legislative act, nor a regulatory “law” within the meaning of the OMA; it was an administrative decision made without statutory authority. DACO’s request that the Puerto Rico Supreme Court declare the resolution *ultra vires* merely restores the *status quo ante*: the legal landscape that already existed under Puerto Rico law prior to PREB’s overreach. By definition, the nullification of an unlawful act cannot constitute a change in law; it reaffirms the governing law that was improperly displaced.

Indeed, PREB’s attempt to exempt LUMA from civil liability invaded the exclusive legislative domain of the Puerto Rico Legislature. PREB’s unilateral creation of a civil immunity

was a legislative act in disguise, wholly unsupported by its enabling statute. DACO's petition before the Puerto Rico Supreme Court thus seeks to vindicate a fundamental principle of Puerto Rico's civil law tradition: that administrative agencies may not, by regulatory *fiat*, modify the substantive rights established by the Legislature or the Civil Code.

LUMA's invocation of Section 14.5(f) attempts to conflate this legitimate judicial review with a substantive regulatory change. But the distinction is critical: *enforcing* the law is not *changing* it. DACO's action reaffirms the existing statutory framework governing consumer protection and administrative authority; it does not introduce new rules or impose new duties on LUMA. The OMA's termination clause was designed to protect LUMA from external legal shifts that fundamentally alter its regulatory environment—not from a court's determination that a preexisting administrative act was unlawful from its inception. To stretch Section 14.5(f) to cover judicial enforcement of existing law would render the term “Regulatory Law” meaningless and insulate all administrative acts, however unlawful, from judicial review.

E. DACO's Action Does Not Interfere With PREPA's Estate or The OMA

LUMA's contention that DACO's proceeding “attacks the OMA” is equally unfounded. DACO's declaratory action challenges a discrete regulatory act—the PREB's May 31, 2021 resolution—not the OMA itself. PREPA, in its own filings before the Puerto Rico Supreme Court, confirmed that the OMA remains fully operative and that invalidating PREB's resolution would not alter its contractual obligations. PREPA also acknowledged that the agreement's risk-allocation framework already assigns responsibility for negligence-based losses exclusively to LUMA.

Nothing in DACO's complaint seeks to rescind, modify, or enjoin performance under the OMA. Nor does it seek possession, control, or use of any property belonging to PREPA. It merely asks Puerto Rico's highest court to declare that a regulatory agency exceeded its statutory

authority—a quintessential act of public enforcement. Under long-standing precedent, such governmental proceedings do not constitute interference with estate property under § 362(a)(3). They vindicate public law, not private contract rights.

F. The OMA Itself Defeats LUMA’s Indemnity and Cost-Pass-Through Claims

LUMA’s warning that invalidating PREB’s waiver would create massive indemnification exposure is unsupported by the OMA’s own text. The agreement already bars PREPA from indemnifying LUMA for losses resulting from its own negligence or willful misconduct. Section 18.2(b) contains a clear carve-out denying indemnity for precisely those circumstances. See Dkt. No. 29962-2 at p 151 of 337. Section 7.6(a)(i) designates negligence-related losses as “Disallowed Costs,” which cannot be reimbursed by PREPA or passed through to ratepayers. See Dkt. No. 29962-2 at p 104-105 of 337. Section 18.3 further caps LUMA’s liability for ordinary negligence but never eliminates it. See Dkt. No. 29962-2 at p 152-153 of 337

The indemnification provision upon which LUMA relies (Section 18.2(a)(vii)) applies only to consequential or exemplary categories of damages and explicitly excludes ordinary tort claims by consumers. DACO’s declaratory action concerns precisely those direct injury claims—property loss and personal damage—that the OMA allocates to LUMA alone. The text of the contract, not LUMA’s rhetoric, governs. The agreement prevents the very fiscal exposure LUMA invokes to justify federal intervention.

G. The Puerto Rico Supreme Court’s Review Will Not Disrupt PREPA’s Restructuring

LUMA’s prediction that allowing the Puerto Rico Supreme Court to decide the validity of PREB’s resolution would “derail” PREPA’s restructuring is misplaced. DACO’s proceeding is purely declaratory and non-pecuniary. Even if the Supreme Court holds that PREB lacked authority to grant the waiver, the consequences remain confined within the OMA’s existing

allocation of risk. Negligence-based liabilities are expressly excluded from pass-through costs and indemnities. Nothing in the OMA or in DACO's requested relief alters PREPA's fiscal obligations or interferes with the Title III process.

LUMA's attempt to frame this narrow question of regulatory authority as a threat to the Commonwealth's fiscal plan exaggerates the issue and disregards both the contractual text and PROMESA's statutory limits on federal intrusion into Puerto Rico's political and governmental powers.

III. Conclusion

LUMA's Reply rests on conjecture and theories untethered to law, contract, or PROMESA. It seeks to convert a straightforward exercise of Commonwealth oversight into a political intrusion, to elevate a void administrative waiver into estate property, and to distort the OMA into a shield against regulation. Nothing in the record supports those claims. DACO's petition enforces existing statutes and confirms the limits of administrative power—limits grounded in Puerto Rico's civil law tradition and the Legislature's exclusive authority to define private rights and liabilities. Enforcing the law as written cannot, by definition, violate the automatic stay.

PROMESA was designed to facilitate fiscal restructuring, not to immunize private operators from lawful oversight. The police-power exception preserves the Commonwealth's right to protect consumers and ensure that its agencies act within statutory bounds. For these reasons, this Court should deny LUMA's Urgent Motion to Enforce the Automatic Stay in its entirety and reaffirm that Title III protects restructuring, not regulatory impunity.

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 16th day of October 2025.

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