

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

**CAMARA DE MERCADEO, INDUSTRIA Y
DISTRIBUCION DE ALIMENTOS, INC.
("MIDA")**

Plaintiffs,

vs.

DOMINGO EMANUELLI HERNÁNDEZ, in
his official capacity as Attorney General for the
Commonwealth of Puerto Rico and **JAIME A.
LAFUENTE GONZÁLEZ**, in his official
capacity as President of the Bureau of
Transportation and other Public Services of the
Commonwealth of Puerto Rico,

Defendants.

CIVIL NO. 21-cv-1156

Declaratory Judgment, Preliminary
and permanent Injunction

MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE COURT:

NOW COMES Plaintiff, CAMARA DE MERCADEO, INDUSTRIA Y
DISTRIBUCIÓN DE ALIMENTOS, INC. ("MIDA"), on behalf of its members, represented
by the undersigned attorneys, and respectfully **states, and prays:**

NATURE OF THE ACTION

1. This action is for the annulment and voiding of freight tariffs illegally promulgated as an NTSP Circular Letter imposing rates for all on-land cargo transported within the Commonwealth of Puerto Rico. These are in violation of the Puerto Rico Oversight Management and Economic Stability Act¹ ("PROMESA" or the "Act") because they have not

¹ 114 P.L. 187; 130 Stat. 549, June 30, 2016, 48 USC §§ 2101 *et seq.*

been previously submitted for review and approval by the Fiscal Oversight and Management Board (“FOMB” or the “Oversight Board”), and for being contrary to the Fiscal Plan for fiscal year 2020-2021 certified by the FOMB (“Fiscal Plan”).

2. Plaintiff seeks a declaration that NTSP Regulation 9156, *Code of Regulations of the NTSP*, promulgated on January 30, 2020 (“Regulation”) and the Circular Letter XXXV-2020 - *Adoption of Temporary Rates*, issued on December 23, 2020 (“Circular Letter”) are null, void, and unenforceable for being contrary to and in violation of PROMESA, which prevails over any general or specific law and/or regulation of the Commonwealth of Puerto Rico inconsistent therewith.

3. Congress established the FOMB to “provide a method for [Puerto Rico] to achieve fiscal responsibility and access to capital markets.” PROMESA § 101, 48 U.S.C. § 2121. As part of that mandate, PROMESA gives the Oversight Board authority to review and approve certain proposed governmental rules, regulations, and executive orders to ensure that these “are not inconsistent with the approved Fiscal Plan” and to, among other things, make the Puerto Rico Government “a facilitator and not a competitor to private enterprise, and to avoid creating any additional bureaucratic obstacles to efficient [regulations]” *Id.* §§ 204(b)(2)-(4), 48 U.S.C. § 2144(b)(2)-(4).

4. Defendants’ actions and/or omissions constitute violations of PROMESA that have immediate adverse consequences for the Commonwealth’s Fiscal Plan as well as for the Oversight Board’s efforts to achieve fiscal responsibility for the Commonwealth.”²

² Letter dated December 24, 2020 from the Oversight Board to AAFAF’s Executive Director, Complaint, Exhibit 1, copy of which is included for easy reference.

5. “The [Regulation and the Circular Letter] therefore implicate aspects of the certified Fiscal Plan for the Commonwealth of Puerto Rico, including Section 10.6 which requires, among other things: (i) the elimination of inefficient on-island freight regulation; and (ii) that the NTSP issue an administrative order eliminating the minimum land freight charge across Puerto Rico. [They] also threaten to harm business and economic growth by increasing transportation costs.”³

6. The FOMB has communicated to the NTSP, through its President, on numerous occasions, requesting that he submits the “Draft Regulations” for review and commit not to promulgate them absent the Oversight Board’s approval, and that failure to do so constitutes a violation of the October 2019 Policy. Verified Complaint, **Exhibit 1**, copy attached for easy reference.

7. The FOMB further stated in the letter that “[a]s such, the [Regulation and the Circular Letter] are subject to the Oversight Board’s Rules, Regulations and Orders Review Policy (“Policy”) established pursuant to Section 204(b)(4) of PROMESA. Yet, the NTSP has not submitted them to the Oversight Board for review and approval in accordance with the Policy.”

8. The NTSP, through its then President has effectively rejected the FOMB’s authority and statutory mandate to review the Regulations. *See* letter of March 31, 2021, Verified Complaint, **Exhibit 2**, copy attached for easy reference.

9. Codefendant Lafuente, NTSP’s actual President, has refused to halt the approval of an administrative order (the “Administrative Order”) eliminating the land freight tariffs adopted by the NTSP, as he understands he does not have to (and will not) comply with

³ *Id.*

the FOMB's request to submit the documents in question to the Oversight Board in compliance with the Policy. *See* Verified Complaint, **Exhibits 2** and **4**, copy of which are included for easy reference.

10. The NTSP's actions directly contradict the Fiscal Plan and the mandate to achieve fiscal responsibility and impair and defeat the purposes of PROMESA, as determined by the FOMB. The Fiscal Plan includes certain structural reforms, including improving the ease of doing business on the island. One of the specific measures to advance this reform is "an administrative order eliminating the minimum land freight charge across Puerto Rico." This measure is intended to improve the ease of doing business in the Commonwealth, thereby encouraging economic growth, broadening and deepening the tax base, and increasing corresponding tax revenues, thereby helping the Commonwealth "achieve fiscal responsibility." *See* PROMESA § 101(a), *supra*. By increasing the same tariffs the Fiscal Plan seeks to eliminate, the Regulation and the Circular Letter are directly inconsistent with the Fiscal Plan.

11. These impair or defeat PROMESA's purposes, especially by increasing transportation costs, contrary to the Fiscal Plan and contrary to the need to attract business for economic growth by lowering the cost of commerce and doing business.

12. Notwithstanding, on December 23, 2020, the NTSP adopted the Circular Letter increasing the tariffs for several categories of transportation, imposing new categories of administrative fines, and setting a minimum wage for Commercial Motor Vehicle operators.

13. In addition and in further defiance of the Oversight Board's authority under PROMESA, on March 9, 2021, Codefendant Lafuente signed Circular Letter V-2021 by means of which he asserted that the freight tariffs adopted in Circular Letter XXXV-2020 are

in full force and effect; and that pursuant to Chapter V of the Regulation a fine of \$10,000 is to be imposed for contracting or paying tariffs contrary to those authorized by the NTSP.

14. The NTSP is enforcing the new charges and has in fact fined MIDA's members for allegedly not paying their carriers under private contract those tariffs, infringing thereby their contractual rights under the impairment of contracts clause.

15. The unlawful Regulation and the Circular Letter have caused and will cause MIDA's members concrete economic and non-economic harm by requiring them either to arrange their affairs to comply with the unlawful tariffs, materially increasing their operating costs with the consequential loss of income, and/or be fined and sanctioned for failure to comply therewith.

16. Accordingly, MIDA seeks injunctive relief to prohibit Defendants from enforcing the Regulation and the Circular Letter, impose fines and/or any other sanction or penalty for MIDA's members failing to comply therewith, and from intervening with and/or infringing and/or impairing the contractual rights and obligations between MIDA's members and carriers by private contract.

BACKGROUND

17. Today, the appearing party has filed a Verified Complaint requesting that Regulation 9156 and Circular Letter XXXV-2020 issued by the NTSP be declared null, void, and unenforceable because they were not approved by the FOMB and are contrary to the Certified Fiscal Plan for the 2020-2021 fiscal year, in violation of PROMESA.

18. The FOMB has repeatedly informed the NTSP that both regulations have to be properly submitted to the Board for revision and approval, if not inconsistent with the Certified

Financial Plan. *See* Verified Complaint, **Exhibits 1, 3 and 4**, copy of which are attached for easy reference.

19. Notwithstanding, and in further defiance of the Oversight Board's requirements, showing no intention of abiding with PROMESA, on March 9, 2021, Codefendant Lafuente signed Circular Letter V-2021 by means of which he asserted that the freight tariffs adopted in Circular Letter XXXV-2020 are in full force and effect; and that pursuant to Chapter V of Regulation 9156 a fine of \$10,000 will be imposed for contracting or paying tariffs contrary to those authorized by the NTSP.

20. As with the Regulations and Circular Letter, Codefendant Lafuente issued Circular Letter V-2021 without prior Oversight Board review and approval in violation of the Policy and PROMESA

21. Furthermore, in response to Ms. Jaresko's letter of March 26, the President of the NTSP, codefendant Lafuente González asserted, contrary to the determination of the FOMB and the Certified Fiscal Plan that "that the public interest will not be well served if we simply discard the progress achieved through the regulatory process conducted in connection with the Proposed Regulations by terminating the process altogether." **Exhibit 3**, p. 2.

22. In further refusal to acknowledge and heed the authority and the requirements of the Oversight Board, Codefendant Lafuente, asserted that: "prima facie, the elimination of the on-island freight regulation and freight rates, as required by the Fiscal Plan, requires action by the Puerto Rico Legislature. Consequently, this matter is subject to public policy determinations and outside the scope and authority of the [NTSP]." *Id.*, pp 2-3.

23. Again, codefendant Lafuente, in his official capacity as President of the NTSP, refuses to even acknowledge the authority of the Oversight Board or PROMESA's pertinent

provision --§§ 4, 108 and 204, 48 U.S.C. §§ 2103, 2128 and 2144, respectively --, much less heed the instruction by the Board and comply with the Certified Fiscal Plan and deregulate the freight tariff for land transportation within the Island.

24. We have presented the relevant legal and factual background in the Verified Complaint which we incorporate by reference and made part hereof. *See* ECF 1, ¶¶ 32 to 68.

25. Under the Act it is the Board that certifies the Fiscal Plan, be it the one submitted by the Governor or the one prepared by the former. This absolute power has been recognized by the Federal Court of Appeals for the First Circuit in *Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. For P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 916 F.3d 98, 103 (1st Cir. 2019) (“PROMESA grants the Board exclusive authority to certify Fiscal Plans”). *Id.*, p.112. That authority is not subject to judicial review pursuant to § 106 (e) of the Act. That is, the courts do not have jurisdiction to do so. *Id.* The certification of the Fiscal Plan by the Board is final, firm and not reviewable.

26. Under PROMESA’s supremacy provision, not even the Constitution of the Commonwealth of Puerto Rico, much less any law or regulation, may limit or impede the power conferred on the Board to certify the Fiscal Plan.

27. The Act gives the Oversight Board authority to ensure compliance with the Fiscal Plan. For such purposes, the Board has the power to,

review certain rules, regulations, and executive orders. **The provisions of this paragraph shall apply with respect to a rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) ...** (Our emphasis.)

28. The Act expressly prohibits the Governor and the Legislature to, enact, implement, or **enforce** any statute, resolution, **policy, or rule** that would **impair or defeat the purposes of this Act, as determined by**

the Oversight Board. (Our emphasis.)

29. Under PROMESA before a rule or regulation is effective and becomes enforceable, the agency has to previously submit it to the Board for it to evaluate whether the rule or regulation is in compliance with the Fiscal Plan. If it were in compliance, the Board could approve it and then, and only after that, the regulatory provision would go into effect.

30. The Certified Fiscal Plans, for both 2019-2020 and 2020-2021, require the elimination of rates for intra-island cargo transportation. This determination is not judicially reviewable. Both Regulation 9156 and the rates adopted through Circular Letter XXV-2020 were not submitted to the Board for review and approval. In addition, the Board has expressed its rejection of such rates for being contrary to the Certified Fiscal Plan. Therefore, and by virtue of PROMESA's Sec. 108(b)(2), the NTSP is prevented from enforcing the Circular Letter tariffs.

31. Under PROMESA, "any action otherwise arising out of this Act, in whole or in part, shall be brought in a United States district court for the covered territory...". Article VI, Paragraph 2 of the U.S. Constitution establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. Therefore, the action would be under the United States Constitution, and the provisions of PROMESA, 48 USC §§ 2101 *et seq.*

32. In the context of the above-described background, Plaintiff hereby request the entry of a preliminary injunction enjoining defendants from enforcing the Regulation and the Circular letter, and ordering their compliance with PROMESA, the Certified Fiscal Plan and the demands by the Oversight Board and deregulate the freight tariffs.

33. In deciding whether to grant a preliminary injunction, the court considers four factors: "the movant's likelihood of success on the merits"; (2) "whether and to what

extent the movant will suffer irreparable harm’ in the absence of injunctive relief”; (3) “the balance of [relative] hardships,”; and (4) “the effect, if any, that an injunction [or the lack of one] may have on the public interest.” *CVS Pharmacy, Inc. v. Lavin*, 951 F.3d 50, 55 (1st Cir. 2020) (alterations in original) (quoting *Corp. Techs., Inc. v. Hartnett*, 731 F.3d 6, 9 (1st Cir. 2013)). Here, each factor weighs decisively in favor of enjoining defendants to enforce the unlawful Regulation and Circular Letter and ordering them to deregulate the charges for cargo transportation within Puerto Rico.

34. Where, as here, granting an injunction is the only means to ensure compliance with a statute, the injunction may issue without applying the traditional four-factor test for injunctive relief. Regardless, the test is satisfied.

A. Plaintiffs are likely to succeed on their preemption claims.

35. A plaintiff’s likelihood of success on the merits “weighs most heavily in the preliminary injunction analysis.” *CVS Pharmacy*, 951 F.3d at 55. As demonstrated in the Verified Complaint, ECF 1, plaintiff is substantially likely to succeed on the merits of its contention that PROMESA expressly (preempts) the Challenged Provisions, which presents a purely legal issue suitable for resolution without factual development. This weighs strongly in favor of preliminary injunctive relief. *Id.*

36. Across the board, the Regulation and the Circular Letter conflict with the Certified Fiscal Plan and have not been previously submitted to the Oversight Board or their review and approval before being effective and enforceable, if not inconsistent with the Certified Fiscal Plan or impair or defeat the purposes of PROMESA. Puerto Rico’s attempt to regulate freight charges in a manner that is inconsistent with federal standards cannot stand.

37. Because plaintiffs will likely succeed in establishing that the Regulation and the Circular Letter are contrary to the Certified Fiscal Plan, have not been approved by the Oversight

Board and would impair or defeat the purposes of PROMESA the Regulations in controversy, preliminary injunctive relief is warranted.

B. Plaintiffs will suffer irreparable harm absent preliminary relief.

38. In the present circumstances, preliminary injunctive relief is imperative because plaintiffs will suffer irreparable harm. “Irreparable harm exists when plaintiff’s legal remedies are inadequate.” *Siembra Finca Carmen, LLC v. Sec’y of Dep’t of Agric. of Puerto Rico*, 437 F. Supp. 3d 119, 136 (D.P.R. 2020). That is the case at bar.

39. To begin with, enforcement of Challenged Provisions will impose irreparable injury on MIDA’s members. To be sure, economic harms are not ordinary irreparable injury because they can typically be remedied by a later damages award. But that does not hold true when the defendant is the government, because “[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.” *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-771 (10th Cir. 2010); accord, e.g., *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (“[W]here, as here, the plaintiff in question cannot recover damages from the defendants due to the Commonwealth of Puerto Rico’s sovereign immunity, any loss of income suffered by a plaintiff is irreparable *per se*.”) (citations omitted). See *Jusino-Mercado v. Puerto Rico*, 214 F.3d 34, 37 (1st Cir. 2000) (holding that Puerto Rico enjoys sovereign immunity).

40. If MIDA’s members refuse to comply with the imposed freight tariffs, they will be fined at the tune of \$10,000.00 for each instance they fail to pay the charges in question, in addition to other sanctions. In that case, the government’s assessment of penalties would result in irreparable harm due to the significant financial penalties. These injuries are irreparable, as courts have found that “fac[ing] investigation and other

consequences” for violating a state law “demonstrate a likelihood of irreparable harm.” *See Chamber of Commerce*, 594 F.3d at 771; see also *Siembra Finca*, 437 F. Supp. 3d at 136-137 (imposing penalties and detaining plaintiff’s product “cause[d] general harm to [the plaintiff’s] goodwill and reputation” and was irreparable).

41. On top of that, violation of plaintiffs’ legal rights constitutes irreparable harm as matter of law. Enforcing the Challenged Provisions against MIDA’s members pursuant to regulations clearly contrary and in violation of federal law constitute irreparable harm warranting preliminary injunctive relief. *E.g.*, *Arcadian Health Plan, Inc. v. Korfman*, 2010 WL 5173624, at *8 (D. Me. 2010) (“A party may be irreparably injured in the face of the threatened enforcement of a preempted law”); *Georgia Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1268 (11th Cir. 2012) (holding that “threat of state prosecution for crimes that conflict with federal law” constituted irreparable injury).

42. Because MIDA’s members are very likely to suffer substantial irreparable harm absent preliminary injunctive relief, this factor tips decidedly in Plaintiff’s favor.

C. The balance of the hardships favors plaintiffs.

43. As this Court has recognized before, the government suffers no harm from an “inability to continue enforcing preempted laws.” *Siembra Finca*, 437 F. Supp. 3d at 137; see also *id.* (“[A]government has no legitimate interest in upholding an unconstitutional [law].” (alterations in original) (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring))). In addition, the Fiscal Plan has considered the impact of the deregulation and has not determined that the government would suffer any measurable harm from a deregulation of the freight charges. Accordingly, the balance of the hardships falls in plaintiffs’ favor.

D. The public interest favors preliminary injunctive relief.

44. Finally, the public interest also favors plaintiff. “Just as a government has no interest in enforcing an unconstitutional law, the public interest is harmed by the enforcement of laws repugnant to the United States Constitution.” *Siembra Finca*, 437 F. Supp. 3d at 137. Whatever defendants might argue is Puerto Rico’s interest (review and cite March 31 letter), “[w]here Congress has expressly preempted the tariff at issue, Congress has already determined that it is the preempting federal law that serves the public interest.” *Arcadian*, 2010 WL 5173624, at *9. Thus, the stronger public interest is “in ensuring that state laws and regulations preempted by federal law are not enforced, particularly at the expense of those regulated by the federal law in question.” *Id.*

45. More generally, allowing defendants to enforce the Challenged provisions also risks serious harm to the Puerto Rican consumer by the material increase in the prices they pay for all the products and services transported in the vehicles. The public interest thus favors plaintiffs.

CONCLUSION

The Court should enter a preliminary injunction barring the enforcement of unlawfully approved regulations and tariffs.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court.

- a. issue an injunction enjoining Defendants, or anyone acting under their authority or on behalf of Defendants, from enforcing or implementing NTSP’s Regulation 9156 and/or Circular Letter XXXV-2020;
- b. an award of attorney’s fees, costs, and expenses of all litigation; and
- c. such other and further relief as the Court deem proper and just.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of April 2021.

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& MUÑOZ NOYA**
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