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 THE COMMONWEALTH OF PUERTO RICO, Debtor.	PROMESA Title III No. 17 BK 3283-LTS
PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY, Debtor.	No. 17 BK 3567-LTS (This Filing Relates to These Debtors)
PEAJE INVESTMENTS LLC, Plaintiff, -against- PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY, HON. CARLOS CONTRERAS APONTE, THE COMMONWEALTH OF PUERTO RICO, HON. RICARDO ROSSELLÓ, HON. RAÚL MALDONADO GAUTIER, HON. JOSÉ IVÁN MARRERO ROSADO, PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, HON. GERARDO PORTELA FRANCO, Defendants.	Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS Adv. Proc. No. 17-152-LTS in 17 BK 3283-LTS

NOTICE OF APPEAL

TO THE HONORABLE COURT:

Notice is hereby given that Peaje Investments LLC ("Peaje"), the Plaintiff in the above-captioned adversary proceedings, hereby appeals to the United States Court of Appeals for the First Circuit from: the final *Opinion and Order Denying Motion for Preliminary Injunction and Motion for Relief From the Automatic Stay* entered in the United States District Court for the District of Puerto Rico on September 8, 2017 (*available at*: Case No. 17 BK 3567-LTS, [ECF No. 260]; Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS, [ECF No. 240]; Adv. Proc. No. 17-152-LTS in 17 BK 3282-LTS, [ECF No. 228]) (the "PI / Stay Relief Denial Order"), which denied Peaje's motion for a preliminary injunction and for relief from the stay, or, alternatively, adequate protection; and each and every part thereof or that is subsumed therein, including, without limitation, the *Memorandum Opinion and Order Granting Motion to Strike* entered in the United States District Court for the District of Puerto Rico on August 3, 2017 (*available at*: Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS, [ECF No. 185]; Adv. Proc. No. 17-152-LTS in 17 BK 3282-LTS, [ECF No. 177]) (the "Strike Order"), which granted Defendants' motion to strike portions of Peaje's reply brief submitted in connection with this matter.

For reference, as-filed copies of the PI / Stay Relief Denial Order and the Strike Order are attached hereto as **Exhibits A** and **B**, respectively.

The Defendants / Appellees in this matter and their respective attorneys are as follows:

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RESPECTFULLY SUBMITTED, this 12th day of September 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification to all counsel of record of such filing.

Dated: September 12, 2017

/s/ Brett Stone
By: Brett Stone
Title: Paralegal, Dechert LLP

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

In re:	PROMESA Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
as representative of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO, et al.,	(Jointly Administered)
Debtors.[1]	
PEAJE INVESTMENTS LLC,	
Plaintiff,	Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS
-v-	
PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY, et al.,	Adv. Proc. No. 17-152-LTS in 17 BK 3283-LTS
Defendants.	

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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LAURA TAYLOR SWAIN, United States District Judge

Before the Court is the *Motion of Peaje Investments LLC (A) for Temporary Restraining Order and Preliminary Injunction, and (B) for Relief from Stay or, Alternatively, Adequate Protection* (docket entry[2] no. 2 (the "Motion")).[3] An evidentiary hearing on the Motion took place before the undersigned on August 8, 2017 (the "August Hearing"), and the evidentiary record is now closed. The Court has considered carefully the submissions of both parties and the evidentiary record, including the argument and testimony presented at the August Hearing and the parties' subsequently-filed written closing arguments.

For the reasons that follow, the Motion is denied in its entirety. This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a)(2) and 65, made applicable in these adversary proceedings by Federal Rules of Bankruptcy Procedure 7052 and 7065.

I.

FINDINGS OF FACT

The Puerto Rico Highways and Transit Authority ("HTA") is a public corporation and instrumentality of the Commonwealth of Puerto Rico (the "Commonwealth"). 9 L.P.R.A. § 2002. (Docket entry no. 1, Adversary Complaint ("Compl.") ¶ 21; Docket entry no. 96, Memorandum of Law in Opposition ("Opp.") p. 7.) HTA was created by Act No. 74-1965 (the "HTA Enabling Act"). 9 L.P.R.A. § 2002. (Compl. ¶ 21; Opp. p. 10.)

The HTA Enabling Act empowers HTA to "borrow money for any of its corporate purposes, and to issue bonds of the [HTA] in evidence of such indebtedness and to

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[2] All docket entries refer to case no. 17 AP 151, unless otherwise specified.

[3] At a preliminary hearing on the Motion, the movants withdrew their request for a temporary restraining order.

secure payment of bonds and interest thereon by pledge of, or other lien on, all or any of its properties, revenues or other income." 9 L.P.R.A. § 2004(l). (Compl. ¶ 33.) The HTA Enabling Act also empowers HTA to "from time to time issue and sell its own bonds and have them outstanding for any of its corporate purposes." 9 L.P.R.A. § 2012(a).

The HTA Enabling Act further empowers HTA to promulgate resolutions authorizing the issuance of bonds, which resolutions "may contain provisions, which shall be a part of the contract with the holders of the bonds," including provisions relating to "the disposition of the entire gross or net revenues and present or future income or other funds of the [HTA], including the pledging of all or any part thereof to secure payment of the principal of and interest on the bonds to the extent permitted by the provisions of § 2004(l)." 9 L.P.R.A. § 2012(e)(1). Under the HTA Enabling Act, the "bonds of [HTA] bearing the signature of the officers of [HTA] in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of [HTA]." Id. § 2012(c).

HTA promulgated a resolution authorizing the issuance of bonds on June 13, 1968 (the "1968 Resolution"). (Compl. ¶ 34; Docket entry no. 99, Declaration of Bradley R. Bobroff, Ex. 3 (the 1968 Resolution).) The 1968 Resolution provides for the creation of certain funds and accounts, with the monies held in those funds and accounts "subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution." (1968 Resolution § 401; see Compl. ¶ 35.) HTA "covenant[ed]" in the 1968 Resolution to deposit certain defined "Revenues" in the accounts covered by this lien, including the "Toll Revenues" charged by HTA for the use of enumerated "Traffic Facilities." (1968 Resolution §§ 101, 401;

see Compl. ¶ 35.) The 1968 Resolution requires that the Revenues be deposited with a Fiscal Agent on a monthly basis. (1968 Resolution § 401; see Compl. ¶ 37.) Section 601 of the 1968 Resolution further provides that the 1968 Bonds "are payable solely from Revenues and from any funds received by [HTA] for that purpose from the Commonwealth which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified." (1968 Resolution § 601.)

The 1968 Resolution requires that HTA "not incur any indebtedness nor create or cause or suffer to be created any debt, lien, pledge, assignment, encumbrance or any other charge having a priority to or being on a parity with the lien on Revenues on the Bonds," except upon certain enumerated conditions. (1968 Resolution § 602; see Compl. ¶ 40.)

Peaje Investments LLC ("Peaje") is the beneficial owner of approximately $65 million in bonds issued pursuant to the 1968 Resolution (which series of bonds will be referred to as the "1968 Bonds," and the holders of those bonds, as the "1968 Bondholders"). (Compl. ¶ 20.) In connection with the instant adversary proceedings and motion practice, Peaje asserts that it has "lien rights" in connection with the 1968 Bonds that arise solely from the language of (1) the Enabling Act, and (2) the 1968 Resolution. (Compl. ¶ 78.)

In January 2015, the Commonwealth enacted Act 1-2015, which added Section 12A to the HTA Enabling Act. This new section provides, in relevant part, that after the occurrence of certain conditions precedent, "liens and pledges are hereby created and executed" on certain revenues, including for the benefit of the holders of 1968 Bonds. P.R. Act No. 1-2015 § 12A(b). These statutory conditions precedent have never been satisfied.

On April 6, 2016, the Commonwealth enacted the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, Act No. 21-2016 (the "Moratorium Act").

Pursuant to the Moratorium Act, then-Governor Alejandro García Padilla of Puerto Rico issued certain executive orders (the "Executive Orders") that suspended HTA's obligation to deposit Revenues with the Fiscal Agent (as these terms are defined in the 1968 Resolution) beginning in May 2016. (Compl. ¶¶ 45-48.) In January 2017, the Commonwealth enacted the Puerto Rico Financial Emergency and Fiscal Responsibility Act of 2017, Act No. 5-2017 (the "Financial Emergency Act"). The Financial Emergency Act provides, in relevant part, that executive orders issued under the Moratorium Act "shall continue in full force and effect until amended, rescinded or superseded." Financial Emergency Act § 208(e).

HTA has ceased depositing the Toll Revenues with the Fiscal Agent. (Compl. ¶ 60.) Defendants proffered unrebutted testimony that HTA is using the Toll Revenues, among other revenue streams, to maintain both the Traffic Facilities and other components of the Commonwealth's transportation infrastructure. (See Transcript of August Hearing ("Tr.") at 69:3-22, 86:5-15, 96:6-98:4.) Defendants also proffered the testimony of Sergio L. Gonzalez, the former Executive Director of HTA, who testified that HTA's retention of the Toll Revenues is necessary to ensure that the Traffic Facilities and other transportation infrastructure of the Commonwealth will remain in working order. (Ex. SSS ¶¶ 6, 33, 47-56.) Peaje did not tender credible evidence demonstrating that the Traffic Facilities, from which the Toll Revenues are drawn, could be maintained in working order absent this Toll Revenue funding, instead proffering only the testimony of Dr. Hildreth, who opined that there was a possibility that the necessary funds could be drawn from other sources. (See, e,g., Ex. 91 ¶¶ 15-17.) The Court does not find Dr. Hildreth's testimony credible on this point, as he acknowledged under cross-examination that he did not perform any independent analysis of the availability of the potential sources of funding he identified, nor did he have any independent knowledge about the

repercussions of drawing on such sources for transportation maintenance purposes. (Tr. at 184:3-190:17.)

Peaje presented the testimony of Thomas Stanford in support of its argument that the equity cushion (i.e., the value of the collateral in excess of the value of any allegedly secured claims) supporting the 1968 Bonds would be eroded by HTA's use of the Toll Revenues to fund its general expenses rather than depositing those funds with the Fiscal Agent. Stanford could not, however, testify with any certainty that Peaje actually had an equity cushion as of the date the Title III petition for HTA was filed, nor could he state with certainty that Peaje's equity cushion was actually likely to be depleted. Instead, Stanford's testimony presented 21 different hypothetical scenarios based on different assumptions. (See Tr. 58:14-59:6; Ex. 92 ¶¶ 3-4; Ex. 93 ¶¶ 4-12.) In one-third of those scenarios, the value of Peaje's equity cushion would not be fully depleted even if Defendants made no payments for two full years. (Ex. 93 ¶ 14.) The Court finds that Stanford's testimony does not provide a sufficient basis for a determination that any one of the 21 scenarios is necessarily likely to occur, nor for a conclusion that one of the scenarios showing elimination of Peaje's equity cushion is in fact the most likely to occur.

II.

CONCLUSIONS OF LAW

In determining a motion for a preliminary injunction, this Court considers: "(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing the injunction will burden the defendants less than denying an injunction would burden the plaintiffs and (4) the effect, if any, on the public interest." Sindicato Puertorriqueno de Trabajadores v. Fortuno, 699 F.3d 1, 10 (1st Cir. 2012)

(quoting Jean v. Mass. State Police, 492 F.3d 24, 26-27 (1st Cir. 2007)). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). In order to establish likelihood of success on the merits, "plaintiffs must show 'more than mere possibility' of success—rather, they must establish a 'strong likelihood' that they will ultimately prevail." Sindicato Puertorriqueno, 699 F.3d at 10 (quoting Respect Main PAC v. McKee, 622 F.3d 13, 15 (1st Cir. 2010)).

Peaje's motion for a preliminary injunction seeks an order directing HTA to resume depositing Toll Revenues with the Fiscal Agent, and prohibiting the Commonwealth from interfering with the execution of that order. For the reasons that follow, the Court concludes that Peaje has not demonstrated either (i) a likelihood of success on the merits of its underlying claim that the 1968 Bonds are secured by a statutory lien that is exempt, pursuant to 11 U.S.C. §§ 922(d) and 928, from the automatic stay imposed by 11 U.S.C. § 362, made applicable in these proceedings by 48 U.S.C. § 2161, or (ii) that the absence of preliminary injunctive relief would result in irreparable harm to Peaje. Accordingly, Peaje has not demonstrated—on this record—entitlement to preliminary injunctive relief.

Section 2161 of Title 48 of the United States Code makes certain provisions of Title 11 of the United States Code (the "Bankruptcy Code") applicable to these proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), including, as relevant to these proceedings, Sections 101, 362, 902, 922, and 928 of the Bankruptcy Code.

Section 362(a)(3) of the Bankruptcy Code, as applicable here, provides that the

filing of a PROMESA Title III case "operates as a stay" of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Section 922(d) of the Bankruptcy Code enumerates certain exceptions to this general injunction, including a provision that the filing of a PROMESA Title III petition "does not operate as a stay of application of pledged special revenues in a manner consistent with section [928][4] of [Title 11] to payment of indebtedness secured by such revenues." In turn, Section 928(a) provides, in relevant part, that "special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case."

Peaje contends that Section 922(d) mandates the "application" of such pledged special revenues to the payment of secured indebtedness and that, because the lien securing the revenues is statutory in nature, the gross Toll Revenues must be applied to service the 1968 Bonds. Peaje's ability to show a likelihood of success on the merits of its underlying claims in this action therefore requires an initial showing that the transfer of the Toll Revenues to the Fiscal Agent for payment to the 1968 Bondholders would be the "payment of indebtedness secured by [pledged special] revenues" under Section 922(d) that could be exempt from the automatic stay pursuant to Section 928(a). The Defendants have not contested that the Toll Revenues are "pledged special revenues" within the meaning of 11 U.S.C. § 902(2)(A), and accordingly the Court concludes that Peaje has demonstrated a likelihood of success on the merits of this first aspect of its claim. The Court therefore turns to the question of whether Peaje has established a likelihood of success on the merits of its argument that the 1968 Bonds are

[4] The reference in the text of Section 922(d) is to "section 927," which the parties and the Court agree appears to be a scrivener's error.

secured by a statutory lien.[5]

Peaje asserts that the 1968 Bonds are secured by a statutory lien arising from the HTA Enabling Act and the 1968 Resolution. The Court concludes that Peaje has not demonstrated a likelihood that it will succeed on the merits of establishing that either of these two documents created a statutory lien securing the 1968 Bonds.

"[T]here are two types of secured claims: (1) voluntary (or consensual) secured claims, each created by agreement between the debtor and the creditor and called a 'security interest' by the [Bankruptcy] Code, and (2) involuntary secured claims, such as a judicial or statutory lien, which are fixed by operation of law and do not require the consent of the debtor." U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989) (internal citations omitted); see also 11 U.S.C. § 101(53) (defining statutory lien as a lien "arising solely by force of a statute on specified circumstances or conditions"). In the context of this motion practice, Peaje relies solely on the claim that the 1968 Bonds are subject to an involuntary statutory lien, and that both the HTA Enabling Act and the 1968 Resolution are statutes that, by operation of law, give the 1968 Bondholders a secured claim on the Toll Revenues.

Peaje has not identified a lien that arises "solely" by force of the HTA Enabling Act "on specified circumstances or conditions" as required by Section 101(53). Rather, the HTA Enabling Act provides that HTA may issue bonds pursuant to resolutions, which resolutions "may" contain provisions "pledging" certain revenues to bondholders, which provisions "shall be a part of the contract with the holders of the bonds." HTA Enabling Act § 2012(e). No lien

[5] The Court does not opine or reach any conclusion here as to whether the 1968 Resolution gives rise to any other type of valid lien, as that question was not presented by the instant motion practice. (See docket entry no. 185 (Memorandum Opinion and Order Granting Motion to Strike).)

arises solely by force of this statutory provision. Rather, this provision permits HTA to enter into certain types of consensual liens—contracts between HTA and the bondholders. Peaje's invocation of the language in the HTA Enabling Act that provides that bonds are "valid and binding obligations" is similarly insufficient to establish a statutory lien. This phrase is drawn from Section 2012(c) of the HTA Enabling Act and, read in its full context, establishes only that HTA bonds are valid and binding "notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of the [HTA]." Id. § 2012(c). This provision does not operate independently to secure any claims but, rather, preserves the validity of consensual agreements between HTA and bondholders despite the turnover of HTA personnel.

The cited provisions of the HTA Enabling Act differ starkly from the statutes at issue in the cases cited by Peaje in which courts found the existence of statutory liens. For example, in In re Braxton, the statute at issue provided that certain "contributions and the interest and penalties thereon due and payable . . . *shall be a lien upon* the franchises and property . . . of the employer liable therefor *and shall attach thereto* from the date a lien for such contributions, interest and penalties is entered of record." 224 B.R. 564, 567 (Bankr. W.D. Pa. 1998) (quoting 43 P.S. § 788.1 (1991) (emphasis added)). Under the statute at issue in Braxton, no agreement was necessary for a lien to be created.

A similar statutory provision was at issue in Fonseca v. Government Employees Association (AEELA), 542 B.R. 628 (B.A.P. 1st Cir. 2015). In Fonseca, the court considered a statute that liquidated the monetary value of an employee's paid leave time when the employee retired, and provided for a lump sum payment to the employee, which lump sum "shall be subject to other deductions authorized by law." Id. at 637 (quoting 3 P.R. Laws Ann. § 703d).

The Fonseca Court held that because "the statute specifically provides that the lump sum payment for the liquidation of accumulated leave can be withheld . . . [those] sections give rise to a statutory lien." Id. As in Braxton, the statute in question defined with specificity the nature of the collateral and required no further discretionary action for a lien to come into force. It was, quite plainly, a lien "arising solely by force of a statute." 11 U.S.C. § 101(53).

Peaje correctly notes that the statutory liens in Braxton and Fonseca were created only on the performance of certain conditions (e.g., accrual of contribution liabilities; entering the lien on record), but the HTA Enabling Act creates no automatic lien even upon the performance of conditions. Rather, the HTA Enabling Act provides that a "contract" between HTA and a third party may contain a lien, which consensual lien would be enforceable assuming that it satisfied certain conditions. In this respect, the HTA Enabling Act is not meaningfully different from Article 9 of the Uniform Commercial Code, which is a model statutory provision that defines certain conditions under which a lien becomes enforceable. That a lien arising under Article 9 is enforceable because of statutory provisions does not, however, make that lien a statutory lien under Section 101(53) of the Bankruptcy Code; similarly, that HTA's liens trace their validity to the HTA Enabling Act's grant of authority to create liens does not make liens that HTA subsequently decided to create statutory in nature.

Peaje has similarly failed to demonstrate a likelihood of success on the merits of its argument that the 1968 Resolution created statutory liens. Simply put, the 1968 Resolution is not a statute. The Bankruptcy Code does not define "statute," and so the Court looks to relevant secondary sources for the definition of this term. Black's Law Dictionary (10th ed. 2014) defines a "statute" as "a law passed by a legislative body; specifically, legislation enacted by any lawmaking body, such as a legislature, administrative board, or municipal court." HTA, a public

corporation and instrumentality of the Commonwealth, is certainly not a legislature. Nor does Peaje cite any legal authority to support the proposition that a resolution of a public corporation is statutory in nature. Rather, the cases Peaje cites stand for the proposition that the administrative rulemaking of an executive body by regulation can, in certain circumstances, be statutory. See, e.g., Armstrong v. Ramos, 74 F. Supp. 2d 142, 149 (D.P.R. 1999) (holding that a particular regulation was "a legislative rule" and therefore "becomes part of the agency's enabling act and has the same legal status as a law passed by the legislature" because the regulation was "issued by an agency pursuant to a statutory delegation and implement[ed] the statute"). Peaje has not shown that the 1968 Resolution is, by its terms, an administrative regulation under Puerto Rican law or statutory in any other respect, and therefore has not shown that the 1968 Resolution gives rise to a statutory lien.

Accordingly, the Court concludes that Peaje has failed to establish a likelihood of success on the merits of its claim to a statutory lien that could provide a proper basis for injunctive relief.[6]

Peaje has also failed to establish that it will suffer irreparable harm absent preliminary injunctive relief. Peaje has not proffered credible evidence demonstrating that the value of its alleged collateral is diminishing due to Defendants' actions. Rather, Peaje tendered only speculative testimony by Stanford, which was based on unproven and unsubstantiated assumptions about macroeconomic conditions in the Commonwealth—and which testimony did not establish with any certainty that the value of Peaje's equity cushion is likely to be further

[6] Because the Court has concluded that Peaje has not demonstrated the existence of a valid lien, Peaje's arguments that Defendants' actions involve an unconstitutional taking of the value of its lien necessarily fail. Nor need the Court address Peaje's argument that Section 922(d) of the Bankruptcy Code mandates continued payments with respect to obligations secured by pledged special revenues.

depleted at all or in the near term. Indeed, Stanford's testimony indicated that there was an appreciable probability that Peaje would continue to have an equity cushion even if the Defendants failed to transfer any Toll Revenues to the Fiscal Agent for two full years, a time frame within which the issue of confirmation of a plan of adjustment for HTA could be resolved. The Court therefore concludes, having considered the totality of the record, that Peaje has not established that the lack of injunctive relief would result in irreparable harm, even were it able to demonstrate the existence of a lien.

Absent a likelihood of success on the merits or a demonstration of irreparable harm, Peaje is not entitled to preliminary injunctive relief, and that aspect of Peaje's motion is accordingly denied.

Peaje moves, in the alternative, for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). As an initial matter, Peaje's failure to establish, on this record, that it has a statutory lien means that it has similarly failed to establish an "interest in property" required to demonstrate cause to lift the stay.

Even were Peaje able to demonstrate such an interest, however, the Court concludes that the Defendants have established that Peaje's interests are adequately protected by Defendants' efforts to maintain the Commonwealth's toll roads in working condition to ensure that the Toll Revenues will be available in the future. The Court finds credible and persuasive the written and oral testimony of former HTA Executive Director Gonzalez, which demonstrated that removing the Toll Revenues from HTA's available resources would severely diminish HTA's ability to maintain the Commonwealth's toll roads—and the other Commonwealth roads necessary for vehicular access to the toll roads—in working order. The Commonwealth and HTA's efforts to maintain those roads preserves the future availability of the revenue stream that

Peaje argues secures the 1968 Bonds.

As noted above, the Court does not find the rebuttal testimony of Dr. Hildreth credible or persuasive, as Dr. Hildreth did not conduct any independent investigation into the actual availability of the sources of money he identified as potentially available to HTA. The Court concludes that the Defendants have met their burden of showing that Peaje's interest is adequately protected by HTA's use of the Toll Revenues to maintain the Commonwealth's toll road infrastructure to ensure that the Toll Revenue stream will continue to flow after the conclusion of the Title III proceedings.

Accordingly, the Court concludes that, insofar as Peaje may be entitled to adequate protection, Defendants have carried their burden of proving that the value of Peaje's alleged collateral is being adequately protected by HTA during the pendency of the automatic stay. Peaje's motion for relief from the stay is, accordingly, denied.

III.

CONCLUSION

For the foregoing reasons, the Motion is denied in its entirety.

This Opinion and Order resolves docket entry nos. 2 and 205 in 17 AP 151; nos. 2 and 196 in 17 AP 152; and no. 25 in 17 BK 3567.

SO ORDERED.

Dated: September 8, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

In re:	PROMESA Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
as representative of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO, et al.,	(Jointly Administered)
Debtors.[1]	
PEAJE INVESTMENTS LLC,	
Plaintiff,	Adv. Proc. No. 17-151-LTS in 17 BK 3567-LTS
-v-	
PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY, et al.,	Adv. Proc. No. 17-152-LTS in 17 BK 3283-LTS
Defendants.	

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO STRIKE

The Court has received and reviewed the parties' submissions in connection with the *Urgent Motion to Strike* (docket entry no. 155 (the "Motion to Strike"))[2] filed by the

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

[2] All docket entries referenced in this Memorandum Opinion and Order relate to adversary proceeding 17 AP 151 unless otherwise specified.

Financial Oversight and Management Board for Puerto Rico (the "FOMB") on behalf of the Commonwealth of Puerto Rico (the "Commonwealth") and the Puerto Rico Highways & Transportation Authority ("HTA" and, with the Commonwealth, the "Debtors"). The Motion to Strike requests that the Court strike (1) all material in the *Reply of Plaintiff Peaje Investments LLC* (docket entry no. 144 (the "Reply")) in further support of the motion of Plaintiff Peaje Investments LLC ("Peaje") for a preliminary injunction that relates to Peaje's argument that the HTA bonds at issue are secured by a consensual lien under Article 9 of the Uniform Commercial Code ("UCC"), and (2) all evidence submitted by Peaje in connection with this legal argument. The Court has considered carefully the submissions of both parties and, for the following reasons, the Motion to Strike is granted.

BACKGROUND

The Court assumes the parties' familiarity with the underlying litigation and proceedings relating to Peaje's motion for a preliminary injunction, and accordingly sets forth only the relevant procedural history.

On May 3, 2017, the FOMB filed a Title III petition under the Puerto Rico Oversight, Management, and Stability Act ("PROMESA"), 48 U.S.C. § 2161 et seq., for the Commonwealth, and on May 21, 2017, the FOMB filed a PROMESA Title III petition for HTA. On May 31, 2017, Peaje commenced the above-captioned adversary proceedings in the Commonwealth and HTA cases.

In its Verified Complaint (docket entry no. 1 ("Compl.")), Peaje alleged that it "is the holder of certain bonds secured by a valid, enforceable, first-priority lien on certain toll revenues that HTA collects in its operations (the "Toll Revenues")." (Compl. ¶ 2.) In describing

the relief requested as to this lien, Peaje stated that it sought an order from this Court "determining and declaring that neither Section 552(a) nor Section 928(b) of the Bankruptcy Code apply to Plaintiff's bonds because, among other things, those bonds are secured by a statutory lien on the Toll Revenues." (Compl. ¶ 4(e).) In describing with specificity the bonds at issue in these proceedings, Peaje limited its claims to a series of bonds (the "Bonds" or the "1968 Bonds") issued under an HTA resolution issued in 1968 (the "Resolution" or the "1968 Resolution"), and further limited its claims to the Toll Revenues that Peaje alleged secure the 1968 Bonds. (Compl. ¶ 19.) In describing this security interest, Peaje alleged that "[p]ursuant to the Enabling Act [Act No. 74-1965] and the 1968 Resolution, the 1968 Bonds are secured by a pledge of and lien on: (a) the Toll Revenues," and certain other revenue streams. (Compl. ¶ 35.) Peaje does not assert in the Verified Complaint that the 1968 Bonds are secured pursuant to any other document. (See generally Compl.) Nor does the Verified Complaint contain any assertion or claim that Peaje's rights under the 1968 Bonds arise under, or are governed in any way by, Article 9 of the UCC. Rather, Peaje asserted specifically that its "lien does not result from a security agreement" but rather "results from the Enabling Act that created HTA and the binding 1968 Resolution governing the Bonds, which makes that lien a 'statutory lien' within the meaning of Section 101(53) of the Bankruptcy Code." (Compl. ¶ 80.)

Simultaneously with the filing of its Verified Complaint, on May 31, 2017, Peaje filed a motion seeking, inter alia, a preliminary injunction against the Commonwealth and HTA. (Docket entry no. 2 (the "PI Motion").) In the PI Motion, Peaje made substantively identical arguments about the 1968 Bonds as were made in the Verified Complaint. In describing its lien, Peaje argued that "[u]nder the Enabling Act and the Resolution, the Bonds are secured by a pledge of and lien on the Toll Revenues, along with certain other revenues and funds in addition

to the Toll Revenues." (PI Motion, at p. 4.) Peaje further argued that its "lien rights arise by statute under the Enabling Act and the binding municipal resolution of HTA governing [the] Bonds—the 1968 Resolution." (Id. p. 34.) Accordingly, Peaje argued, its "lien on the Toll Revenues is unaffected by Section 928(b) [of the Bankruptcy Code] because that lien does not result from a security agreement within the meaning of the provision," but rather "is a 'statutory lien' within the meaning of Section 101(53) of the Bankruptcy Code." (Id. p. 18.) As in the Verified Complaint, nowhere in the PI Motion did Peaje assert that its lien rights arose from any other documents, nor did it make any arguments relating to a consensual lien or rights under Article 9 of the UCC (indeed, neither the words "consensual" nor "Article 9" appear in the PI Motion). (See generally PI Motion.)

On June 5, 2017, the Court held an initial hearing in connection with the PI Motion. At that hearing, Peaje's counsel argued that Peaje did not say "that [it has] a statutory lien or nothing" but only that "[it has] a lien." (June 5, 2017, Hearing Transcript ("Tr."), at 10:13-15.) Peaje's counsel went on to argue that "[t]here is not a voluntary security agreement like you would see under Article 9" because "this is a lien that is established pursuant to a municipal ordinance." (Tr. 10:21-11:3.) Peaje's counsel summarized its argument by saying:

> We say this is a lien, first and foremost. It is a lien that falls within the definition of a statutory lien. And there are certain consequences to that. One consequence being under Section 928 that the 928(b) [exception] doesn't even apply because 928 would apply to voluntary liens, Article 9 kinds of liens. This does not qualify.

(Tr. 11:9-14.) Following the FOMB's arguments, Peaje's counsel returned in rebuttal to argue that its lien arises "under the Enabling Act and the resolutions" and noted that the United States Court of Appeals for the First Circuit had previously addressed the secured status of the 1968 Bonds. (Tr. 48:1-10.) Peaje's counsel went on to argue that the lien on the 1968 Bonds is "something that would not be governed by Article 9." (Tr. 49:1.)

On July 14, 2017, the FOMB filed its opposition to the PI Motion. (Docket entry no. 96 (the "Opposition").) In the Opposition, the FOMB argued that Peaje had failed to demonstrate a likelihood of success on the merits of its claim that the 1968 Bonds are secured by a statutory lien. (See Opposition, at pp. 22-28.) The FOMB further argued that Peaje has "disavowed any claim that it has a consensual lien" based on Peaje's statements in the Verified Complaint, the PI Motion, and at the Hearing. (Id. pp. 29-30.)

Peaje began its Reply by arguing that the 1968 Bonds are secured by a statutory lien. (Id. pp. 4-8.) Peaje then went on to argue, in the alternative, that "Peaje has always preserved its right to a non-statutory lien" and that "[t]o the extent that Peaje's lien is not governed comprehensively by the Enabling Act and the [1968] Resolution, Article 9 fills the gap." (Id. pp. 8-9.) Peaje then recited the requirements of Article 9 for a security interest to be valid and enforceable (id. p. 9) and argued that the record demonstrated that all of Article 9's requirements were met in this case (id. p. 10.) Peaje then argued that the bases for its lien included:

> (i) the Enabling Act; (ii) the 68 Resolution; (iii) various official statements under which the Bonds were issued, including the official statements identified above; (iv) the filed and stamped UCC-1 financing statements; (v) HTA's audited financial statements; (vi) Defendants' prior, binding concessions that Peaje holds a lien on the Toll Revenues; and (vii) the decisions of this Court and the First Circuit holding that Peaje has such a lien.

(Id. pp. 10-11 (internal citations omitted).)

On July 31, 2017, the FOMB moved to strike all evidence and arguments submitted by Peaje in the Reply relating to Article 9.

DISCUSSION

Local Civil Rule 7(c) of the United States District Court for the District of Puerto Rico, made applicable in the Title III proceedings by Local Bankruptcy Rule 1001-1(b) of the United States Bankruptcy Court for the District of Puerto Rico, provides that a reply memorandum in further support of a motion "shall be strictly confined to replying to new matters raised in the objection or opposing memorandum." Prior opinions of this Court make clear that "a reply should only address new matters brought up in the opposition by the non-movant," though Rule 7(c) "does not inhibit a movant from referencing any admissible evidence in their reply, as long as it is necessary to respond to a new matter raised in the opposition." Garcia v. Sprint PCS Caribe, 841 F. Supp. 2d 538, 547 (D.P.R. 2012); see also Huongsten Prod. Imp. & Exp. Co. Ltd. v. Sanco Metals LLC, 810 F. Supp. 2d 418, 421 n.10 (D.P.R. 2011) (refraining from entertaining new arguments raised in a reply pursuant to Rule 7(c)).

The record before the Court makes plain that Peaje confined its opening arguments about the nature of its lien rights to the theory that the 1968 Bonds are secured by a statutory lien, and that the FOMB did not raise issues regarding Article 9 or other ways of establishing lien rights in its Opposition. At no point prior to the Reply did Peaje proffer and develop the alternative theory that the 1968 Bonds are secured by a consensual lien, nor even assert that the provisions of Article 9 have any application here. Indeed, at the Hearing, Peaje's counsel repeatedly stated that Article 9 had no application to these proceedings. (E.g., Tr. 10:20-11:14.) The FOMB reasonably read the PI Motion to be premised solely on the argument that Peaje's lien was a statutory lien, and Peaje's arguments in the Reply that its lien could alternatively be a consensual lien governed by Article 9 were improper under Rule 7(c).

The Court's conclusion here is a limited one. Peaje correctly notes that it has

always premised its arguments on possession of a lien in the generic sense, and nothing in this decision bars Peaje from arguing at an appropriate time and on appropriate notice to opposing parties that its lien is consensual and/or governed by Article 9. However, in connection with this motion practice, Peaje has consistently and exclusively argued—prior to the Reply—that its lien is a statutory lien as that term is defined in the Bankruptcy Code, an argument with considerable legal significance for the outcome of this preliminary injunction motion practice. Peaje's assertion that, by failing to explicitly disavow a consensual lien in its opening brief, it has preserved for itself the right to introduce new arguments relating to a consensual lien theory in its reply, is wholly unpersuasive and contrary both to the Local Rules and the interests of fairness and judicial efficiency. See, e.g., McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 n.7 (1st Cir. 1991) ("Courts are entitled to expect represented parties to incorporate all relevant arguments in the papers that directly address a pending motion."). There is no reason that Peaje could not have asserted its alternative consensual lien theory in the Verified Complaint or the PI Motion, neither of which references a consensual lien or the application of Article 9. Peaje's failure to do so precludes it from expanding the issues through reply papers filed after the close of expedited discovery and less than two weeks prior to the hearing, on a motion that has been pending for over two months.

CONCLUSION

Accordingly, the Motion to Strike material in the Reply relating to Article 9 and the theory that the 1968 Bonds are secured by a consensual lien is granted. Testimony and argument relating to these issues will be inadmissible at the hearing on the PI Motion on August 8, 2017. Should the Court determine that it needs to consider such issues to resolve this motion

practice, it will order separate additional briefing.

This Memorandum Opinion and Order resolves docket entry no. 166 in 17 AP 151 and no. 153 in 17 AP 152.

SO ORDERED.

Dated: August 3, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge