

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
FOR THE FIRST CIRCUIT**

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**BAP NO. PR 18-011**

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**Bankruptcy Case No. 18-00108-ESL**

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**CATHOLIC SCHOOL EMPLOYEES PENSION TRUST,  
a/k/a Fideicomiso Plan de Pension Para Empleados de Escuelas Catolicas,  
a/k/a Catholic Schools of the Archdioceses of San Juan Pension Plan,  
Debtor.**

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**CATHOLIC SCHOOL EMPLOYEES PENSION TRUST,  
Appellant,**

**v.**

**FRANCISCO A. ABREU, YALI ACEVEDO, and  
EDDA D. GONZÁLEZ-VIZQUEZ,  
Appellees.**

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**Feeney, U.S. Bankruptcy Appellate Panel Judge.**

**ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL**

Catholic School Employees Pension Trust (the “Pension Trust” or the “Trust”) appeals from the bankruptcy court’s March 6, 2018 Order and the March 13, 2018 Opinion and Order (collectively, the “Orders”) dismissing its bankruptcy petition pursuant to § 101(9)(A)(v).<sup>1</sup>

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<sup>1</sup> Unless expressly stated otherwise, all references to “Bankruptcy Code” or to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure, and all references to “Rule” are to the Federal Rules of Civil Procedure.

The Pension Trust filed a motion for a stay pending appeal with the bankruptcy court, which was denied. The Pension Trust then filed an Emergency Motion for Stay Pending Appeal with the Panel, which was denied without prejudice. On August 23, 2018, the Pension Trust filed a new Emergency Motion for Stay Pending Appeal. For the following reasons, the motion is **DENIED**.

## **BACKGROUND**<sup>2</sup>

### **I. Pre-Bankruptcy Events**

#### **A. The Establishment of the Pension Trust and the Pension Plan**

The Pension Trust was established on November 26, 1979 by a Deed of Trust. It was created by the Superintendent of the Catholic Schools of the Archdiocese of San Juan (the “Superintendent”) to administer, manage, and distribute assets received from employers participating in the Catholic Schools of the Archdiocese of San Juan Pension Plan (the “Pension Plan”).<sup>3</sup> The Superintendent is the settlor of the Pension Trust and the sponsor of the Pension Plan. The “Participating Employers” of the Pension Plan are religious schools and institutions under the supervision of the Superintendent which choose to participate in the Pension Plan. The “Participants” under the Pension Plan are employees of the Participating Employers (and their beneficiaries) who have or may acquire rights to pension benefits; they do not directly contribute to the Pension Plan. The assets of the Pension Trust are mainly contributions made by

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<sup>2</sup> The background set forth herein is gleaned from the submissions of the parties in this appeal, from the undisputed facts set forth in the bankruptcy court’s decision, and from the bankruptcy court’s docket. See U.S. Bank N.A. v. Blais (In re Blais), 512 B.R. 727, 730 n.2 (B.A.P. 1st Cir. 2014) (stating the Panel “may take judicial notice of the bankruptcy court’s docket and imaged papers”).

<sup>3</sup> The Pension Plan provides that it is to “be construed and administered in a manner consistent with the intent and requirements of the applicable provisions of the ‘Employees’ Retirement Income Security Act of 1974’, as amended (ERISA ’74) and the Income Tax Law of nineteen hundred and fifty-four (1954) of the Commonwealth of Puerto Rico, as amended . . . .” Pension Plan at 4.

Participating Employers, but also include income, interest, and dividends received from its investments.

### **1. The Board of Trustees**

The Pension Trust is administered by a Board of Trustees, which is tasked with “manag[ing], invest[ing] and reinvest[ing] the Trust” pursuant to its terms and “mak[ing] payments of benefits from the Trust . . . pursuant to the instructions of the Retirement Committee . . . appointed by the SETTLOR as provided in the Plan.” Deed of Trust at 2.

Article III of the Deed of Trust sets forth the “Powers of the Trustees” and provides that they will “discharge their duties” with respect to the Pension Trust “solely in the interests of the [P]articipants and their beneficiar[ies], “with care, prudence and diligence,” and “so as to minimize the risk of large losses.” Deed of Trust at 3-4. The Trustees are authorized:

To invest and reinvest the Trust Estate, to collect the income, rents, issues, profits and increase therefrom, to sell upon any terms, give options to purchase, assign, lease, exchange, convert, encumber, pledge, and mortgage; to alter and change the investment thereof from time to time in its discretion; to improve, manage, protect, subdivide, and partition any real estate forming part of the Trust; to dedicate to public use and vacate all or any part thereof; to compromise, adjust and settle all claims to or against the Trust . . . ; to grant options to lease and to lease for any term . . . ; to make leases upon such terms and conditions as may be deemed by it to be proper; to renew, cancel, amend and/or extend leases and consent to the assignment and modification of any lease . . . ; and to vote personally or by proxy an shares of stock which may at anytime be held by thereunder.

Deed of Trust at 9. The Deed of Trust prohibits, however, any sale, exchange or lease of “any property between [the] Trust and a ‘Disqualified Person,’” as defined therein, and provides that “at no time . . . shall any part of the Fund . . . be used for, or diverted to, purposes other than the exclusive benefit of the participants or their beneficiaries . . . .” Deed of Trust at 5-6, 13.

The Trustees are permitted to “become a party to any reorganization, consolidation, merger, or other capital readjustment of any corporation, the stocks or securities of which may at anytime be held as part of the Trust.” Deed of Trust at 10. However, neither the Deed of Trust nor the Pension Plan authorize the Trustees to commence a bankruptcy petition on behalf of the Pension Trust. The Deed of Trust also provides that the Trustees “shall have full power and authority by contract to bind the Trust Estate without making themselves individually liable, and to perform any and all other acts which it may deem proper to carry out the purpose of this instrument.” Deed of Trust at 11. The Deed of Trust further limits the Trustees’ liability in performing their duties under the Pension Trust by providing that they “shall not be liable here[ ] under except for their own negligence or willful misconduct.” Id. The Trustees are authorized to “employ such agents, broker, attorneys . . . and assistants as [they] may deem necessary or proper in the . . . execution of th[e] Trust and pay reasonable compensation for such services.” Deed of Trust at 11.

## **2. Nontransferability of Interests**

Both the Deed of Trust and the Pension Plan prohibit the transfer or assignment of any beneficial interests. The Deed of Trust provides: “No interest in this Trust or any share thereof shall be assignable in anticipation of payment either by voluntary or involuntary act or by operation of law or be liable in any way for debts or defaults of any participant or beneficiary of the pension plan . . . .” Deed of Trust at 20. Article 5(A) of the Pension Plan specifies:

With the exception of any amount that might be owed to the employer or to the trustee [neither] the participant[s] nor any of their beneficiaries shall be entitled to assign, transfer, encumber or in any way dispose of any benefit (either principal or interest) that they may be entitled to under this plan.

Pension Plan at 6.

### **3. Requirements upon Termination**

Both the Deed of Trust and the Pension Plan contain provisions regarding their termination. Article VII of the Deed of Trust sets forth the “Duration and Termination of Trust.” Deed of Trust at 18. It provides that the Pension Trust “may be terminated and discontinued for reasons beyond the control of the [Superintendent],” and that “[n]otice of such termination shall be given to the TRUSTEES . . . in writing.” Id. In the event of termination, the Trustees are required to “liquidate the [Pension] Trust as promptly as possible and [to] distribute the assets thereof remaining in the Trust Fund to or for the benefit of participants or beneficiaries of the [Pension] Plan.” Id.

Article 18(A) of the Pension Plan similarly provides that the Superintendent (as settlor of the Pension Trust) has the right to “terminate this [P]lan in its entirety, at any time, for any reason, or no reason at all, subject to the previous approval of the Secretary of Treasury, and/or the Pension Benefit Guarantee Corporation, as well as the majority of participating employers.” Pension Plan at 17. Such termination becomes “effective if the committee and the trustee receive a termination permit from the Secretary of the Treasury.” Pension Plan at 18. Article 18(D) specifies that, upon termination, the Trustees:

shall proceed to liquidate the trust fund and to apportion the assets in accordance with the priorities established by the regulations of Title IV of ERISA . . . . If the assets available for distribution are not sufficient to cover all claims within one of the established priorities, these funds will be prorated and distributed equitably.

Pension Plan at 18.

#### **B. The March 2016 Termination of the Pension Plan**

The Pension Trust contends that on March 14, 2016, the Board of Trustees informed all Participants that it was terminating the Pension Plan, it would cease making pension payments as

of June 30, 2016, and that the Pension Plan would be liquidated to prevent the depletion of the remaining assets. The last pension payments were made on June 30, 2016.

Thereafter, litigation ensued as some of the Participants commenced various proceedings against the Pension Trust in the Puerto Rico local and federal courts. According to the Pension Trust, in these Puerto Rico court proceedings, the plaintiffs seek to “attach” all of its assets, which will “irreparably deplete” those assets, harming the other beneficiaries of the Pension Trust. This compelled the Pension Trust to seek bankruptcy relief.

## **II. The Bankruptcy Proceedings**

On January 11, 2018, the Pension Trust filed a voluntary petition under chapter 11 of the Bankruptcy Code.

### **A. Motions to Dismiss**

On February 6, 2018, Ms. Yali Acevedo and Mr. Francisco Abreu, on their own and on behalf of other plaintiffs in cases before the Puerto Rico courts,<sup>4</sup> filed a motion to dismiss the petition, alleging the Pension Trust was ineligible to file a bankruptcy petition because it was not a “business trust” under § 101(9)(A)(v).<sup>5</sup> They maintained that the Pension Trust could not be considered a “business trust” as it has no ongoing income generating activities, does not engage

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<sup>4</sup> Ms. Acevedo and Mr. Abreu are pensioners, plan participants and beneficiaries of the Pension Trust. Ms. Acevedo filed the motion, on her own behalf and on behalf of 180 other plaintiffs in Case No. SJ2016cv00131 before the Court of First Instance, San Juan, Puerto Rico. Mr. Abreu filed the motion on his own behalf and on behalf of six other claimants in Case No. 1C201700317 before the Court of First Instance, Aguadilla, Puerto Rico.

<sup>5</sup> As discussed later, § 109(a) provides that “only a person . . . may be a debtor,” and § 101(41) provides that “[t]he term ‘person’ includes individual, partnership, and corporation . . .” 11 U.S.C. §§ 109(a), 101(41). Under the Bankruptcy Code, the term “corporation” includes, among other things, a “business trust.” 11 U.S.C. § 101(9)(A). Thus, if an entity is a “business trust,” it constitutes a “person” that it is eligible to file a bankruptcy petition.

in any business activities, and is a “wasting asset” declining in value. Rather, they alleged, the Pension Trust simply “holds and invests moneys contributed by plan sponsors, receives dividends and/or interest on the same and was supposed to pay the pensions to participants in pay status.” As the Pension Trust was not a “business trust,” they contended, it did not constitute a corporation under § 101(9)(A)(v), nor a “person” under § 109(a).

Edda D. González-Vázquez also filed a motion to dismiss the petition, challenging the Pension Trust’s eligibility to file a bankruptcy petition.<sup>6</sup> She alleged the Pension Trust could not be considered a “business trust” because it does not have the attributes of a corporation and was not formed primarily for a business purpose. According to Ms. González-Vázquez, the “basic distinction between a business trust and other trusts is that business trusts are created for the purpose of carrying on some kind of business, whereas the purpose of a non-business trust is to protect and preserve the *res*.” The Pension Trust, she contended, was not created for a business purpose but “for the exclusive benefit of the beneficiaries of the [P]ension [P]lan.” She also maintained that it had “no ongoing income generating activities besides holding moneys [sic] contributed by plan sponsors, receiving dividends and/or interest on the same and paying the pensions to participants[.]” She also pointed out that the Pension Trust expressly prohibited the transfer of its beneficial interests, a factor that some courts have considered when determining whether a trust is a business trust. Thus, she argued, the Pension Trust could not be characterized as a “business trust” eligible for bankruptcy relief.

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<sup>6</sup> Edda D. González-Vázquez is a creditor and plaintiff in Civil Case No. 16-2077 (GAG) before the U.S. District Court for the District of Puerto Rico. Ms. Acevedo, Mr. Abreu, and Ms. González-Vázquez are collective referred to herein as “the Appellees.”

**B. Pension Trust's Opposition**

On February 20, 2018, the Pension Trust filed a single opposition to both motions to dismiss, alleging that it is a “business trust” and squarely falls within the definition of a “corporation” set forth in § 101(9)(A)(v). The Pension Trust contended that it “has the attributes of a corporation” as the “Board of Trustees serves as the Board of Directors with powers to manage and take decisions that would impact the funds in favor of the investors (Participating Employers).” It also asserted that it undertakes commercial activities which include: (1) investing in capital markets, managing portfolios, and supervising investments; (2) maintaining a payroll for regular employees for its support and routine maintenance; (3) conducting business which require specific accounts with the Internal Revenue Service, Puerto Rico Treasury Department and the State Insurance Fund; (4) serving as an account receivable division to collect from Participating Employers; (5) invoicing on a regular monthly basis; and (6) managing and contracting with professionals such as attorneys, accountants, financial advisors, and money managers. According to the Pension Trust, based on these attributes, it could be characterized as a “business trust.”

The Pension Trust also discussed its financial difficulties and the factors contributing to its insolvency, such as the decrease in the number of participating employers, the fall of money markets in which the Trustees had invested its assets, and certain other factors which “caused the maintenance of the Pension Plan to become financially burdensome.” The Pension Trust maintained that, notwithstanding the express power in the trust documents to terminate the Pension Trust and the Pension Plan, various causes of action were filed against it which threatened to deplete its remaining assets. According to the Pension Trust: “The filing of the

Petition was triggered mostly due to the necessity of a breathing spell from the lengthy litigation for multiple causes of action against the Trust in the State Court and Federal District Court forums, which would have resulted in the attachment of the Trust's funds, for the sole benefit of only a certain group of beneficiaries; the attachment of the Trust's funds would have irremediably frustrated all liquidation efforts and possibilities.” (emphasis omitted).

### **C. The March 6, 2018 Hearing and the Dismissal Orders**

The bankruptcy court held an evidentiary hearing on March 6, 2018. The parties introduced the Deed of Trust and the Pension Plan as a joint exhibit, and Dr. Ramón A. Guzmán Rivera (“Dr. Guzmán”), President of the Board of Trustees (“Board”) testified.

At the conclusion of the hearing, the court issued a bench ruling concluding that the Pension Trust was not eligible to be a debtor as a business trust and dismissing the petition. The court's bench ruling was memorialized in an order dated March 6, 2018. Thereafter, on March 13, 2018, the bankruptcy court entered an Opinion and Order (together with the March 6, 2018 order, the “Dismissal Orders”) granting the motions to dismiss and dismissing the petition as the Pension Trust “does not meet the definition of a corporation in § 101(9)(A)(v).” See In re Catholic School Employees Pension Trust, 584 B.R. 82, 88 (Bankr. D.P.R. 2018).

In determining whether the Pension Trust is a business trust, the bankruptcy court considered the testimony of Dr. Guzmán, which it described as follows:

Dr. Guzmán was appointed as a member of the Board in 2011 by the Superintendent of Catholic Schools of San Juan Archdiocese, the Plan sponsor, and became its President in 2012, when the Board members elected him. He testified that his main duties and responsibilities were: preside over meetings, organize meetings and agendas, receive information from the Plan Director, communicate the information received from the Plan Director to the other Board members, recommend candidates to be members of the Board, and participate on Board determinations regarding the Pension Plan and its funds.

At the time Dr. Guzmán became President of the Board, the Pension Plan was undergoing difficult financial problems, particularly as to the investment of Pension Plan funds, as the fund was a limited fund which only received contributions from participating employers. Therefore, there was a need to make the fund grow.

During his tenure as President the fund had only two employees. A full-time plan administrator who controlled payments made to and by the Plan, and invoicing employer participants. The other employee is a part-time administrative assistant who is responsible for preparing and submitting all necessary forms.

On March 16, 2016, after a meeting with the participating employers, a determination to terminate the Pension Plan was made. As a result of the termination, payments under the plan ceased on July 1, 2016. Notwithstanding, collection efforts on contributions owed by employer participants continued.

Dr. Guzmán made reference of the power of trustees to invest and the trust deed due diligence provisions. He opined that the filing of a bankruptcy petition was the more equitable solution for all concerned parties in light of the existing difficulties.

Upon cross-examination by counsel for the movants, Dr. Guzmán candidly admitted to the following facts regarding the Pension Trust: the pension trust does not have an inventory of goods for sale, the trust has no machinery or equipment, has no real estate, and has no intellectual property. All that the trust has is the moneys [sic] contributed by the plan employers, and the interest and dividends generated by the same. The Pension Trust does not have outstanding loans from third parties, nor a line of credit. Dr. Guzmán also testified that the trust is a not for profit organization, that the only source of income is the employer contributions, and that the Board trustees are responsible for the administration of the trust funds. The main purpose of the trust is to preserve the funds in order to pay beneficiaries and operational expenses. The main obligation of the Board trustees is to receive the funds from participating employers, deliver the same to investment companies, and distribute the funds to beneficiaries. Thus, the trust's aim is to preserve the trust funds.

In re Catholic School Employees Pension Trust, 584 B.R. at 86.

The court then examined the applicable law and engaged “in a fact-specific analysis considering the totality of the circumstances based on the trust documents and the actual operations of the trust.” Id. at \*87 (citing In re Blanche Zwerdling Revocable Living Trust, 531

B.R. 537 (Bankr. D.N.J. 2015)). Citing Shawmut Bank Conn. N.A. v. First Fidelity Bank (In re Secured Equipment Trust of East Airlines, Inc.), 38 F.3d 86 (2d Cir. 1994), the court determined the relevant factors to be:

whether the trust was created for the purpose of carrying a business, as opposed to the preservation of the *res*, whether the trust has the attributes of a corporation, whether the trust engages in business-like activities, and whether the trust has a profit motive.

In re Catholic School Employees Pension Trust, 584 B.R. at 87 (other citations omitted).

According to the court, the second factor—that a trust must have the attributes of a corporation, especially the transferability of interests—“stems from” the following decisions: In re Gonic Realty Trust, 50 B.R. 710 (Bankr. D.N.H. 1985), In re Woodsville Realty Trust, 120 B.R. 2 (Bankr. D.N.H. 1990), and In re Parade Realty, Inc., Employees Retirement Pension Trust, 134 B.R. 7 (Bankr. D. Haw. 1991). In re Catholic School Employees Pension Trust, 584 B.R. at 87. It further stated: “A trust that is passive because ‘it is not engaged in active management of assets with a goal of increasing its profitability or value’—irrespective of whether it is involved in commercial transactions—is not a business trust eligible to file bankruptcy.” Id. (quoting Robert J. D’Agostino, The Business Trust and Bankruptcy Remoteness, 2011 Ann. Surv. of Bankr. Law 4, Vol. 2011 (September 2011)). The court noted that it had previously adopted this analysis in In re Gulfcoast Irrevocable Trust, No. 12-06338(ESL), 2012 WL 6005716 (Bankr. D.P.R. Nov. 30, 2012). In re Catholic School Employees Pension Trust, 584 B.R. at 87.

In applying the standard, the bankruptcy court first determined that the Pension Trust’s “[a]llegations and proffers concerning the economic reasons which prompted the filing of the

bankruptcy petition, as well as the effect that the filing had on pending actions before the Puerto Rico courts and the U.S. District Court for the District of Puerto Rico are not . . . relevant to the eligibility issue.” Id. at 83. According to the court, the Pension Trust’s allegations about its financial difficulties and the purpose for filing the petition—for the orderly liquidation of the Pension Trust in a chapter 11 scenario, and to prevent a certain group of beneficiaries from frustrating “all liquidating efforts and possibilities”—did not serve as a basis for determining the Pension Trust’s eligibility to file a bankruptcy petition. Id. at 85. To the contrary, the court concluded, the Pension Trust’s allegations raised the inference that it was not conducting a business activity but attempting to preserve the trust funds to allocate them to the beneficiaries upon termination. Id.

The bankruptcy court then ruled that the Pension Trust did not satisfy the factors required for a business trust, stating:

After due consideration of the pension trust documents, the Pension Plan, the uncontested facts as the parties presented the same to the court, and the applicable law, the court concludes that the Debtor Pension Trust is not a business trust. The trust was established to secure payment to beneficiaries. Therefore, its purpose was to preserve the principal of the contributions made by the employer participants and the interest generated by the principal. The purpose of the trust was not to generate income or profit.

The business activities referred to by the Debtor were not corroborated by the trust deed, the pension plan, nor the testimony of Dr. Guzmán. The actual Pension Trust activities are only incidental to the Board trustees’ responsibility of protecting and preserving the *corpus* or *res* of the trust.

Id. at 87-88. Consequently, the court ruled that the Pension Trust “is not a business trust, and, thus, is ineligible to file a bankruptcy petition.” Id. at 88.

### III. The Appeal

On March 19, 2018, the Pension Trust filed a notice of appeal of the Dismissal Orders. The Pension Trust then filed a motion for a stay pending appeal with the bankruptcy court. The bankruptcy court denied the motion, determining the Pension Trust had failed to demonstrate a likelihood of success on the merits of the appeal and that it would suffer irreparable harm in the absence of a stay. See In re Catholic School Employees Pension Trust, No. 18-00108 (ESL), 2018 WL 1577704 (Bankr. D.P.R. Mar. 28, 2018).

Thereafter, the Pension Trust filed an Emergency Motion for Stay Pending Appeal with the Panel (the “First Stay Motion”), asserting that certain creditors had initiated causes of action in the Puerto Rico local and federal courts to attach its assets, which would “irreparably deplete” those assets, harming the other beneficiaries of the trust and rendering this appeal moot. Thereafter, on April 8, 2018, the Panel entered an order (“Order to Supplement”) directing the Pension Trust to supplement the motion by “describing in detail precisely the matters pending in the various Puerto Rico court proceedings relating to the Appellant’s funds” and “explaining in detail the pending proceedings relating to the alleged ‘embargo’ of the Appellant’s funds.” In response, the Pension Trust informed the Panel that the local appellate court had entered an order staying all proceedings, rendering the request for a stay pending appeal moot. The Panel then entered an order denying the motion without prejudice.

On August 23, 2018, the Pension Trust filed with the Panel a new Emergency Motion for Stay Pending Appeal (the “Second Stay Motion”),<sup>7</sup> again seeking an immediate stay of the

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<sup>7</sup> Upon receipt of the Second Stay Motion, the Panel issued two preliminary orders: (1) an order shortening the Appellee’s response period; and (2) an Interim Order temporarily staying and enjoining the appellees from taking any actions to attach or foreclose the Pension Trust’s assets.

Dismissal Orders pending resolution of the instant appeal. The Pension Trust asserts that “the stay imposed by the Appellate Court [of Puerto Rico] was reversed and the attachment and embargo order [are] in full effect. To that effect, Appellees have resumed their strategy to attach on August 21, 2018, have requested the embargo and consignment to the Court.” According to the Pension Trust, absent a stay, “the creditors who sought dismissal of the [bankruptcy] case will proceed to attach and foreclose [its] main and most significant asset for the benefit of only a fraction of its creditors or beneficiaries.” Although the Pension Trust attached two motions filed by the Appellees in the local court seeking “consignment” of its assets, it provides no further information or explanation regarding the local court proceedings, or the alleged “attachment” or “embargo” of its assets. Moreover, the Pension Trust fails to provide sufficient information from which the Panel may form an understanding of: (1) the specific assets purportedly at risk; (2) the terms of the “embargo order”; and (3) the terms of the order issued by the Appellate Court of Puerto Rico purportedly reversing the stay of the embargo order. Indeed, the Second Stay Motion fails to identify the docket number of the local court appeal, thus forcing the Panel to comb the dockets of the local court in order to adequately apprise itself of the status of those proceedings.<sup>8</sup>

In their response to the Second Stay Motion, the Appellees assert that “[t]here are no orders of attachment” of the Trust’s assets and “no imminent action of such nature against” the Trust. The Appellees references two motions pending before the local court requesting to have

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<sup>8</sup> In its Order to Supplement, the Panel directed the Pension Trust to supplement its First Stay Motion with additional details regarding the local court proceedings which the Panel needed to make an assessment of the relief requested. The Pension Trust failed to provide that information in connection with the First Stay Motion and fares no better in the Second Stay Motion.

the Pension Trust “consign” with the courts “all or part of the trust funds.”<sup>9</sup> According to the Appellees, the Pension Trust’s cash has already been reduced by more than \$300,000 in less than eight months, which indicates that the Pension Trust is using its assets for purposes other than paying pension benefits. However, as there are no orders for attachment of the Pension Trust’s assets, the Appellees argue, the Second Stay Motion is “premature” and should be denied.

The Pension Trust filed a reply to the Appellees’ response in which it reasserts, among other things, that it has been “actively litigating against the embargoes and Appellees’ actions against the Trust” in various Puerto Rico court proceedings and that the “consignment and attached of the funds requested by the Appellees in the State Courts is undeserved[.]” It provides no further explanation as to the nature or status of those proceedings. Nor does the Pension Trust challenge the Appellees’ assertion that there are no orders of attachment of the Trust’s assets and no imminent attachment actions against the Trust.

## **DISCUSSION**

### **I. The Standard for Motion for Stay Pending Appeal**

Bankruptcy Rule 8007 governs requests for a stay pending appeal. See Fed. R. Bankr. P. 8007. It provides that a party may file a motion for “a stay of a judgment, order, or decree of the bankruptcy court pending appeal.” Fed. R. Bankr. P. 8007(a)(1). Ordinarily, the motion must first be filed with the bankruptcy court and, if the court denies the motion, the movant may then

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<sup>9</sup> P.R. Laws Ann. tit. 31, § 3182 provides, in pertinent part: “Consignation shall be made by depositing the things due at the disposal of the judicial authority before whom the tender shall be proven in a proper case and the notice of the consignation in other cases.” See P.R. Laws Ann. tit. 31, § 3182. Although the Appellees did not provide copies of the motions pending in the local courts, the Pension Trust attached two motions to its Stay Motion which appear to be the motions in question. In the motions, the Appellees seek orders directing the Pension Trust to deposit its funds with the local court to prevent the Pension Trust from depleting its assets while litigation is pending.

seek a stay from the court where the appeal is pending. Fed. R. Bankr. P. 8007(a)(1) and (b)(1).

A motion seeking a stay of an order on appeal must contain “the reasons for granting the relief requested and the facts relied upon,” “affidavits or other sworn statements supporting facts subject to dispute,” and “relevant parts of the record.” Fed. R. Bankr. P. 8007(b)(3).

In the First Circuit, the standard for a stay pending appeal of a bankruptcy court’s decision is that for a preliminary injunction. See In re Miraj & Sons, Inc., 201 B.R. 23, 26 (Bankr. D. Mass. 1996). Thus, to obtain a stay pending appeal, a movant bears the burden of demonstrating: (1) a likelihood of success on the merits; (2) the potential for irreparable harm in the absence of a stay; (3) whether issuing a stay will burden the creditors less than denying a stay will burden the debtor; and (4) the effect, if any, on the public interest. See Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012); Esso Standard Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006) (citations omitted); see also Acevedo-García v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002); Cantera Dorado, Inc. v. PR Asset Portfolio 2013-1 Int’l, LLC (In re Cantera Dorado, Inc.), 512 B.R. 126, 130 (D.P.R. 2014).

It is well settled that a court should only grant a stay of the order subject to appeal only if each of these elements is present. See Access Cardiosystems, Inc. v. Fincke (In re Access Cardiosystems, Inc.), 340 B.R. 656, 659-60 (Bankr. D. Mass. 2006); In re Handel, 242 B.R. 789, 791 (Bankr. D. Mass. 1999); Great Barrington Fair & Amusement, Inc., 53 B.R. 237, 239 (Bankr. D. Mass. 1985). Therefore, a movant’s failure to satisfy all four prongs of the standard for granting a stay pending appeal dooms the motion. See Eck v. Dodge Chem. Co. (In re Power Recovery Sys., Inc.), 950 F.2d 798, 804 (1st Cir. 1991) (citations omitted).

## II. The Standard Applied

As discussed below, the Panel concludes that the Pension Trust has failed to demonstrate at least two of the four prongs required for a stay pending appeal—irreparable harm and the balance of harms—and, therefore, that the Second Stay Motion must be denied. See id.

### A. Irreparable Harm in the Absence of a Stay

Irreparable harm most often exists where a party has no adequate remedy at law. Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004). “A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party’s unsubstantiated fears of what the future may have in store.” Id. Thus, to establish irreparable harm, a stay movant “must demonstrate an injury that is neither remote nor speculative, but actual and imminent.” Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 571 (3d Cir. 2015) (citing Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)); see also In re Bora Bora Inc., 424 B.R. 17, 26 (Bankr. D.P.R. 2010) (citations omitted). “An injury that may be fully remedied by monetary damages does not constitute irreparable harm.” In re 473 West End Realty Corp. 507 B.R. 496, 507 (Bankr. S.D.N.Y. 2014) (citing In re Atkinson, 2012 Bankr. LEXIS 5741, at \*10 (Bankr. E.D.N.Y. Dec 11, 2012)).

The Pension Trust argues that it will be irreparably harmed in the absence of a stay for two reasons: (1) because the Appellees “will proceed to attach and foreclose [its] main and most significant asset for the benefit of only a fraction of its creditors or beneficiaries”; and (2) if the Trust’s funds are “depleted,” the “appeal will become moot.”

First, the possibility that an appeal may become moot in the absence of a stay does not in and of itself constitute irreparable harm for purposes of obtaining a stay. See, e.g., Winters

Nursery LLC v. Color Spot Holdings, Inc. (In re Color Spot Holdings, Inc.), Civ. No. 18-1246 (UNA), 2018 U.S. Dist. LEXIS 141221 (D. Del. Aug. 21, 2018) (citation omitted); see also In re Int'l Home Prods., No. 12-02997- ESL, 2012 Bankr. LEXIS 5936, at \*24 (Bankr. D.P.R. Dec. 26, 2012) (citation omitted).

Second, the Pension Trust has not demonstrated that the allegedly irreparable harm is “actual and imminent.” In support of its request for a stay, the Pension Trust states that “the Creditors’ actions in the State Court cases are clear evidence that the funds will be immediately depleted . . . if they are turned over to the San Juan case Plaintiff.” Contrary to the Trust’s assertions, it is unclear what proceedings are actually pending in the local court cases. The Pension Trust has not submitted any local court orders demonstrating that the Trust’s assets are in imminent danger of attachment. Nor has it explained the pending proceedings, orders, hearings, and events relating to the alleged “embargo” of the Trust’s funds.<sup>10</sup> Rather, the only proffer made by the Pension Trust in support of its Stay Motion are two motions pending in the local courts in which the Appellees seek orders directing the Trust to consign its assets in the local court. Even if the local courts grant the motions, however, it appears the assets will be consigned (i.e. deposited) with the local courts, not immediately “attached” by the Appellees as the Pension Trust alleges. Thus, the irreparable harm alleged by the Pension Trust is merely speculative.

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<sup>10</sup> As the Panel has stated in other contexts: “It is not the reviewing court’s burden to comb the record to find support for the appellant’s argument. It is the appellant’s burden to ‘facilitate’ the court’s review, rather than make it more difficult by requiring the court to find needles in the haystack[.]” Jackson v. ING Bank (In re Jackson), BAP No. MB 16-046, 2017 Bankr. LEXIS 3141, at \*32 (B.A.P. 1st Cir. Aug. 23, 2017).

As such, the Pension Trust has not met its burden of demonstrating that it will suffer irreparable injury in the absence of a stay.

**B. Relative Harm of the Parties**

As the party seeking a stay pending appeal, the Pension Trust must also demonstrate that the potential harm to the Petition Trust in the absence of harm outweighs any potential harm to the Appellees if a stay is granted. As the Panel has concluded that the Petition Trust failed to demonstrate the potential for irreparable harm in the absence of a stay, it must also conclude that the balance of hardships to the parties does not warrant the imposition of the stay.

**CONCLUSION**

Because the Pension Trust has not made the requisite showing that it will be irreparably harmed in the absence of a stay pending appeal, or that the balance of harms weighs in its favor, a discussion of the remaining prongs—likelihood of success on the merits of the appeal and the public interest—is unnecessary. Thus, the Second Stay Motion is **DENIED** without prejudice to the filing of another motion for stay pending appeal supported by facts showing an entitlement to relief according to the well-established standards.

FOR THE PANEL:

Dated: August 28, 2018

By: /s/ Leslie C. Storm  
Leslie C. Storm, Clerk

[cc: Hon. Enrique S. Lamoutte; Clerk, U.S. Bankruptcy Court, District of Puerto Rico; and  
Javier Vilariño, Esq.; Ramón Dapena, Esq.; German Brau-Ramirez Esq.;  
Carlos López, Esq.; Francisco Amundaray-Rodriguez, Esq.; Monsita Lecaroz-Arribas, Esq.]