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

ASSURED GUARANTY CORP. and ASSURED GUARANTY MUNICIPAL CORP. Movants, v. COMMONWEALTH OF PUERTO RICO et al., Respondents.	CIVIL NO. 16-2384 (FAB)

OPPOSITION TO EMERGENCY MOTION OF ASSURED GUARANTY CORP. AND ASSURED GUARANTY MUNICIPAL CORP. FOR RELIEF FROM THE PROMESA STAY

TO THE HONORABLE COURT:

COME NOW, co-defendants the Commonwealth of Puerto Rico (the "Commonwealth"), Hon. Alejandro García Padilla and Hon. Juan C. Zaragoza Gómez, in their respective official capacities (collectively "respondents"), specially appearing and without submitting to the jurisdiction or venue of this Court,[1] and hereby state and pray as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

Movants and purported plaintiffs are the insurers of certain bondholders of the Puerto Rico Highway and Transportation Authority ("PRHTA"), a public corporation with independent capacity to sue and be sued. As insurers, their obligation to make payments under the relevant

[1] It is not self-evident that movants have taken the correct procedural approach to presenting this question to the Court. At a bare minimum, respondents must be timely served and given an opportunity to respond. See PROMESA § 405(e) (authorizing the lifting of a stay only after notice and a hearing). But because respondents were served with a copy of the motion by court order and that motion is meritless, respondents simply reserve their rights to contest in the future the appropriate procedure for attempting to lift the PROMESA interim stay. Respondents further reserve all their rights and defenses regarding the proposed complaint, should the court allow its filing.

policies is not activated unless and until there is a payment default on the relevant bonds. As of today, no such payment default has taken place.

Movants claim that through Public Act 21-2016, the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act ("Act 21"), as amended by Act 40-2016, and certain Executive Orders ("EOs") approved pursuant to it (specifically EO-2016-18, EO-2016-30 and EO-2016-31, collectively the "Executive Orders"), respondents have allegedly diverted certain PRHTA toll revenues (the "Toll Revenues") pledged to secure PRHTA's bonds in order to use these funds to pay for PRHTA's own operations and fund "essential services" of the Commonwealth.

Chapter 2 of Act 21 authorizes the Governor of Puerto Rico to declare a moratorium in the payment of certain obligations and stay creditor remedies with respect to obligations of the government entities covered by the moratorium. Docket 1-8 at 7. However, it also provides conditions on the government's use of a moratorium and provides protections for creditors, such as preserving security interests and collateral used to secure various obligations. Id.; see also Act 21 § 204.

Section 201(b) of Act 21 authorizes the Governor, through executive order, to declare any government entity to be in a state of emergency and identify in such order enumerated obligations and, if the executive order so provides, no payment on a covered obligation of such government entity shall be made, other than as provided in sections 202 or 204 of this Act, during the emergency period for such government entity. Docket No. 1-8 at 18. Act 21 defines the "emergency period" as the period beginning on the date designated by the Governor in an executive order and ending on the last day of the "covered period." Act 21, § 103(q). The "covered period" means "the period beginning immediately upon the effectiveness of this Act through and including January 31, 2017, which period may be extended by executive order of the Governor for no more than two months." Act 21, § 103(m).

Movants claim that EO-2016-18, issued pursuant to Act 21, ordered the suspension of all obligations of PRHTA to transfer Toll Revenues to the Fiscal Agent, as said term is defined under certain bond resolutions (the "Resolutions") adopted in 1968 and 1998, and authorized PRHTA to use these revenues for the provision of "essential services for the protection of the health, security and well-being of the residents of the Commonwealth," Docket No. 1 at 7. Movants also allege that through EO-2016-30, the Governor extended the "emergency period" for PRHTA through the entirety of the "covered period," that is, until January 31, 2017. Id. Movants admit that EO-2016-30 "suspends all debt obligations of PRHTA under the Resolutions that come due during the covered period, **except for payments that can be made from funds on deposit with the Fiscal Agent**." Id. (emphasis added). Movants also concede **that the funds currently on deposit with the Fiscal Agent are sufficient to pay in full the debt obligations that become due during the covered period**. Id. at 22. Finally, movants allege that through EO-2016-31 PRHTA may divert the Toll Revenues for allegedly unauthorized uses, including inter-government transfers. Id. at 7-8.

Movants claim that the net effect of Act 21 and the Executive Orders is to divert funds pledged for the payment of PRHTA bonds for other uses in violation of the Constitution and laws of the United States, including the recently enacted Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187 (2016) ("PROMESA"). Recognizing that their claims are temporarily stayed by section 405 of PROMESA, movants request the lifting of the stay pursuant to sections 405(e) and (g) of PROMESA.

This motion presents a simple issue of statutory interpretation. By its plain terms, PROMESA, which the President signed into law on June 30, 2016, automatically stays "the commencement or continuation ... of a judicial ... action or proceeding against the Government of Puerto Rico" "with respect to a Liability." PROMESA § 405(b)(1). That stay is part of PROMESA's comprehensive efforts to address Puerto Rico's fiscal crisis through the creation of an Oversight Board with the power to authorize the restructuring of Puerto Rico's public debt. And it is essential to give the Oversight Board an opportunity to become established and begin making decisions to restore the Commonwealth and its governmental entities to financial health. See id. § 405(n). Because the PROMESA stay may be lifted only "for cause shown," id. § 405(e)(2), and there is no dispute here that movants' proposed claims are covered by the stay, the key question is whether movant has shown cause to lift the stay for their proposed action challenging Act 21, on the ground that it unconstitutionally impairs movants' rights as insurers of PRHTA bonds.

Movants have not. Movants simply have no standing to file suit, given that as insurers they would not suffer an injury in fact unless they have to make a payment pursuant to the relevant policies, which admittedly will not happen during the emergency period provided by Act 21. Movants also cannot show irreparable harm to the bonds themselves, as Act 21 expressly protects the value of those bonds during any emergency period, and PROMESA makes clear that its interim stay also does not impair the value of such bonds. Nor can movants show irreparable harm from any alleged diversion of Toll Revenues pledged to the payment of such bonds: PROMESA provides a means by which creditors may recoup the value of security interests unlawfully transferred while an Oversight Board is in existence, and the Toll Revenues here are readily calculable for the purpose of any such recoupment effort.

Movants also have failed to show that lack of "adequate protection" is cause to lift the stay mandated by PROMESA. In any event, movants' interests are adequately protected for the duration of the stay, as payment on the relevant bonds will be kept current during the emergency period provided by Act 21.

Moreover, the equities tilt heavily in favor of continuing the stay. Lifting the stay would force the respondents to defend complex litigation at the time they should be focusing on putting their fiscal house in order, precisely the situation that Congress wanted to avoid by imposing an automatic stay. Worse, this litigation in particular seems aimed at preempting a review that PROMESA commits to the sound discretion of the Oversight Board, before that Board even becomes operational.

II. ARGUMENT

A. Movants properly recognize that their action is covered by PROMESA's automatic stay.

Congress enacted PROMESA in response to "a fiscal emergency in Puerto Rico." PROMESA § 405(m)(1). In particular, Congress determined that "[a] comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process." Id. § 405(m)(4). To that end, Congress found that "an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis." Id. § 405(m)(5) (emphasis added). It therefore automatically stayed, "with respect to a Liability," "the commencement ... of a judicial ... proceeding against the Government of Puerto Rico that ... could have been commenced before the enactment of this Act." Id. § 405(b)(1).

As Congress explained, "[t]he stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this Act to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay." Id. § 405(m)(5)(A). Further, "[t]he stay is limited in nature and narrowly tailored to achieve the purposes of this Act, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this Act." Id. § 405(m)(5)(B). The stay "allow[s] the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits." Id. § 405(n)(2).

Movants properly recognize that their proposed action is a "judicial ... proceeding against the Government of Puerto Rico that ... could have been commenced before the enactment of this Act" and is related to a "Liability" and therefore stayed by PROMESA. Id. § 405(b)(1).[2] Its proposed complaint challenges the constitutionality of Act 21, which was enacted before the enactment of PROMESA, and it names as defendants numerous Puerto Rico officials, PRHTA and the Government Development Bank of Puerto Rico ("GDB"). See Docket No. 1-2 at ¶¶ 5-15; see generally PROMESA §§ 5(11), (19). Further, it is brought based on movants' alleged status as insurers of approximately $1.2 billion of PRHTA bonds currently outstanding (Docket No. 1 at 4; Docket No. 1-2 at ¶23), bonds that fall squarely within the Act's definition of "Liability," PROMESA § 405(a)(1) (defining "Liability" to include "a bond … of which (A) the issuer,

[2] The term "Government of Puerto Rico," as defined in PROMESA, includes officers such as defendants, sued in their official capacity (§ 405(i)(1)), as well as government instrumentalities (§ 5(11)).

obligor, or guarantor is the Government of Puerto Rico; and (B) the date of issuance or incurrence precedes the date of enactment of this Act"). Because movants satisfy all of the criteria for the PROMESA stay outlined in § 405(B)(1), the stay clearly applies to their proposed complaint.

B. Movants lack standing to lift the PROMESA stay throughout the stay period.

There are two types of standing inquiries: Article III standing, which enforces the Constitution's case-or-controversy requirement, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-562 (1992); and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." Allen v. Wright, 468 U.S. 737, 751 (1984). To clear the Article III standing hurdle, the plaintiff must show that the conduct of which it complains has caused it to suffer an "injury in fact" that a favorable judgment will redress. See Lujan, 504 U.S. at 560-561. On the other hand, prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen, 468 U.S. at 751.

Article III standing is an "indispensable part" of any case that must be present at every stage of the case. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (noting that standing must be "supported ... at the successive stages of litigation"). "If a party lacks Article III standing to bring a matter before the court, the court lacks subject matter jurisdiction to decide the merits of the underlying case." Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (citation omitted).

As aptly summarized by the First Circuit Court of Appeals:

> To satisfy the constitutional component of standing, a plaintiff must have suffered an "injury in fact," i.e., an invasion of a legally protected interest. That injury must be "concrete and particularized"; the latter term means the injury must be personal to the plaintiff. It may be shared by many others, but may not be common to

> everyone. The injury must also be "actual or imminent, not conjectural or hypothetical," and it must be "distinct and palpable." The latter requirement may be satisfied by environmental or aesthetic injuries. The injury need not be "significant"; a "small" stake in the outcome will suffice, if it is "direct." In addition, the injury must be fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Id. (citations omitted).

On the other hand, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975).

Movants are allegedly insurers that guarantee scheduled payments of interest and principal as and when due on a bond or other obligation. Docket No. 1 at 1. Movants are not bondholders and are not directly owed any money by the relevant bond issuer, PRHTA. Movants are claiming constitutional violations on their own behalf because, allegedly, and pursuant to the relevant contract documents, they have stepped into the shoes of PRHTA's bondholders. Id. at 4. However, pursuant to the insurance policies included by movants themselves in support of their motion, payment by the insurers to bondholders of any outstanding amount of principal or interest on the bonds is due only in the event of nonpayment by the bond issuer. See Docket No. 1-5 at 1; Docket No. 1-6 at 1; Docket No. 1-7 at 1. In other words, unless and until movants are required to make a payment to bondholders, they are twice removed from any claim regarding an economic harm and have not suffered an injury in fact capable of being redressed at this time.

The "emergency period" established by Act 21 only lasts until January 31, 2017, unless it is extended through Executive Order, which extension may not exceed two months. Act 21 § 103(m). In other words, any alleged halt in the transfer of Toll Revenues to PRHTA during the "emergency period," at a maximum, could only last until March 31, 2017.

At present, even after the enactment of Act 21 and PROMESA, there has not been a payment default regarding the bonds insured by movants. Movants admit that the Executive Orders issued pursuant to the Act 21 do not preclude the payment to PRHTA bondholders from funds on deposit with the Fiscal Agent. Docket No. 1 at 7. They also admit that there are enough funds on deposit with the Fiscal Agent to satisfy the next installment of principal and interest due on the PRHTA bonds on January 1, 2017. Docket No. 1 at 22. What movants fail to tell the Court is that, after January of 2017, the next installment of principal and interest payments on the bonds they insure is not due until July 1,2017, **after** the conclusion of the "emergency period."[3] In other words, as conceded by movants, at no point during the "emergency period" will there be a payment default that will activate the terms of the relevant policies issued by movants. Hence, under no circumstance will movants suffer an injury in fact during the short "emergency period" provided under Act 21.

Movants argue that the funds in reserve with the Fiscal Agent are inadequate to pay the full outstanding principal amount of the PRHTA bonds. However, this full amount is not due during the emergency period, and PROMESA expressly provides that bondholders may not declare a default on the relevant bonds merely by reason of the issuer's financial condition for the duration of the PROMESA stay (PROMESA, § 405(j)), which, as in the case of the emergency period under Act 21, will likely expire before the next payment on the bonds is due. PROMESA § 405(d).[4]

It is undisputable that upon the expiration of the emergency period provided in Act 21, and in the absence of an intervening change in the law, Toll Revenues will be turned over to PRHTA

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[3] See http://www.bgfpr.com/investors_resources/puerto-rico-transportation-highway.html., PRHTA Official Statements for Series AA Bonds at 1; PRHTA Official Statements for Series L Bonds at 1; PRHTA Official Statements for Series N Bonds at 1.

[4] The stay under PROMESA lasts until the later of February 15, 2017 or six months after the establishment of an Oversight Board for Puerto Rico pursuant to section 101(b), unless otherwise extended for a short period of time (60-75 days) by the Board or the court in certain circumstances. PROMESA §405(d)(1).

for the benefit of PRHTA's bondholders. Movants' argument that in theory the Commonwealth could continue extending the "emergency period" is purely speculative and does not arise to the level of a case or controversy. The only way the length of the "emergency period" provided for in Act 21 could be extended is through legislation. To date such legislation does not exist and any determination of this Court regarding the potential extension of the emergency period past March 31, 2017 would constitute an advisory opinion.

C. Movant has not shown "cause" to lift the automatic stay.

Movant has not established cause to lift this stay. Its effort to evade the "cause" requirement founders on the plain text of PROMESA. And its minimal attempt to show "cause" establishes that none exists: Movant will not suffer any harm from the stay, and the equities favor continuation of the stay.

1. Standard and scope of review

Movants' request for the lifting of the PROMESA stay, after outlining the alleged facts, spends a number of pages rehashing the allegations of the proposed complaint regarding the constitutionality of Act 21 and the Executive Orders issued pursuant to that statute. However, the merits of movants' constitutional claims are not what is at stake at this stage of the proceedings.

As explained by the First Circuit Court of Appeals in the bankruptcy context, "a hearing on a motion for relief from stay is merely a summary proceeding of limited effect." Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir. 1994). "[A] court hearing a motion for relief from stay should seek only to determine whether the party seeking relief has a colorable claim to property of the estate. The statutory and procedural schemes, the legislative history, and the case law all direct that the hearing on a motion to lift the stay is not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims." Id.

Assuming arguendo that movants have standing and a colorable claim to property, they have failed to show cause to lift the stay mandated by PROMESA. Movants claim that "cause" exists to lift the stay under Section 405(e)(2) of PROMESA because the alleged diversion of toll revenues pursuant to the Executive Orders "will inevitably result in defaults on the PRHTA Bonds and claims on the insurance policies issued by Movants with respect to those bonds, which will in turn result in economic harm to movants." Docket No. 1 at 20. Movants also argue that cause exists due to an alleged lack of "adequate protection." Id. at 21. Finally, movants argue that emergency stay relief is warranted under Section 405(g) of the PROMESA because movants may suffer irreparable harm due to PRHTA's and/or the Commonwealth's financial distress or insolvency and inability to pay their debts. Id. at 23. As will be shown below, not only will movants not suffer any harm during the pendency of the PROMESA stay, but also any potential harm is outweighed by the harm that would be suffered by the Commonwealth and its instrumentalities as a result of the lifting of the stay.

2. Movants will not suffer any harm during the duration of the stay.

PROMESA authorizes this Court, after notice and a hearing, to "'grant relief from the stay provided under subsection (b) of this section'" only "'for cause shown.'" See PROMESA § 405(e)(2)). Otherwise, a court may grant relief from the stay only where "irreparable damage to the interest of an entity in property" will occur "before there is an opportunity for notice and a hearing." Id. § 405(g). Movant argues that "cause" exists because, if the Toll Revenues collected during the "emergency period" provided by Act 21 are not turned over to PRHTA for payment of the bonds during the emergency period, there could be a payment default that could activate movants' policies in favor of the bondholders. As previously mentioned, this alleged harm is twice removed and purely speculative.

Movants have shown no harm to the bonds they insure from the automatic stay, let alone irreparable harm. Act 21 protects the value of those bonds during any emergency period declared, requiring that they accrue interest at the contractual rate and, to the extent they come due during the emergency period, be paid at the end of that period. See Act 21, § 202. Act 21 also protects "the rights of a holder to any collateral, security interest or lien that secures" an obligation that "was otherwise due or became due before or during an emergency period" and "becomes payable at the end of the covered period as a result of this Act." Id., §204(a). PROMESA further provides that its interim stay "does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation." § 405(k). Movant thus can show no harm to its bonds during the interim stay.

Assuming arguendo that movant could show a security interest in the Toll Revenues discussed in its Motion, movant would not be able to establish any harm to that interest. PROMESA provides that "if any property of any territorial instrumentality…is transferred in violation of applicable law under which any creditor has a valid pledge of, security interest in, or lien on such property … then the transferee shall be liable for the value of such property." PROMESA § 407(a). Moreover, PROMESA allows creditors to enforce that right "by bringing an action in the U.S. District Court for the District of Puerto Rico after the expiration or lifting of the stay of section 405." Id. § 407(b). If movants are correct that the alleged diversion of pledged Toll Revenues violates section 407(a) of PROMESA, then movants will be entitled to seek the value of the Toll Revenues in a future such action. But because the Toll Revenues are just money, the delay in recouping such funds cannot be irreparable harm. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914 (1st Cir. 1989) ("[I]f money damages will fully alleviate harm, then the harm cannot be said to be irreparable.").

Movant argues that because of the insolvency of the Commonwealth and alleged transferees of toll revenues such as the GDB, the exercise of a remedy under section 407(a) of PROMESA after the expiration of the stay period would be inadequate and that an injunction to restrain any transfers is necessary and appropriate. This claim is tantamount to arguing that an alleged violation of section 407(a), by itself, is sufficient "cause" to lift the stay.

To the extent the Commonwealth and its instrumentalities are insolvent, such was also the case about a month and half ago, when Congress enacted PROMESA. Had Congress wanted to except actions under section 407(a) of PROMESA from the reach of the automatic stay, it could have easily done so. However, it expressly determined to create a remedy enforceable **after** the expiration or lifting of the stay. PROMESA, § 407(b) ("A creditor may enforce rights under this section by bringing an action in the United States District Court for the District of Puerto Rico after the expiration or lifting of the stay of section 405, unless a stay under title III is in effect.").[5] Evidently, the availability of an action under section 407(a) is not in itself "cause" to lift the stay.

As will be shown in further detail below, "insolvency" is not cause to lift the stay. To the contrary, the whole point of the PROMESA stay is to "allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits." PROMESA § 405(n)(2). If "insolvency" were a key to open the doors of the court during the stay period, then every creditor of the Commonwealth or any instrumentality covered by PROMESA would be able to seek and obtain relief from the stay, making section 405 of PROMESA meaningless. This conclusion is bolstered by the fact that in this case, regardless of the solvency of the relevant

[5] Title III governs a possible restructuring of Puerto Rico debts that could, at some point, be authorized by the Oversight Board. Any stay provisions that govern cases filed under such a restructuring regime have no bearing on the automatic stay provided for in Section 405.

entities or the use given to the Toll Revenues during the emergency period, PRHTA bondholders will be paid the totality of the installments that will become due during this period and their interests are, both colloquially and as a matter of law, "adequately protected."

3. An alleged lack of adequate protection is not "cause" to lift the PROMESA stay.

Movants, citing to section 362 of the Bankruptcy Code and not PROMESA, argue that "cause" for lifting the stay also includes "lack of adequate protection of an interest in property." Docket No. 1 at 21. That argument is premised on a misunderstanding of the statute. "Cause" under PROMESA is not satisfied by a mere showing of lack of adequate protection. And even then, such relief would not be appropriate if the equities weigh in favor of continuing the stay.

PROMESA imposes a standard of "cause," a standard given meaning by the statutory context and legislative history. The first and most important indicator of its meaning is the words Congress used: Although the automatic stay is self-evidently patterned off the automatic stay provision in bankruptcy, Congress did not copy the language for relief from that stay exactly. Instead of allowing a court to grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of such party in interest," 11 U.S.C. § 362(d)(1), Congress authorized a court to grant relief from the PROMESA stay only "for cause shown," PROMESA § 405(e)(2). That choice was meaningful, as Congress elsewhere carefully adopted standards from the Bankruptcy Code verbatim. See, e.g., PROMESA § 405(g) (relief from PROMESA § 405(b) stay is appropriate without hearing if necessary to prevent irreparable damage to property that would occur before opportunity for hearing), and 11 U.S.C. § 362(f) (identical language under Bankruptcy Code's automatic stay).

And the language Congress chose—"for cause shown"—was not simply plucked from thin air, but instead drawn from the language in the Bankruptcy Act and Rule 11-44, which governed before the addition of the adequate protection language in the Bankruptcy Reform Act of 1978 and employed a higher standard for "cause." See Matter of Anchorage Boat Sales, Inc., 4 B.R. 635, 641 (Bankr. E.D.N.Y. 1980) ("The court may, for cause shown, terminate, annul, modify or condition such stay.") (quoting Fed. R. Bankr. P. 11-44(d)) (emphasis added). Under that standard, a movant had an "initial burden to show irreparable harm" before he could obtain the lifting of the automatic bankruptcy stay. See id. at 641 & n.6 (citing Collier on Bankruptcy § 363.06 (15th ed. 1979) at 363-24 n.9). And even that showing could be defeated by a debtor's showing that "a tipping of the equities" favored continuation of the stay. See In re Rutter, 9 B.R. 878, 879 (Bankr. E.D. Pa. 1981) (internal quotation marks omitted). PROMESA's legislative history suggests that Congress intended to adopt this irreparable damage requirement. H.R. Rep. No. 114-602, pt. 1, at 51 (2016) ("If a party is determined to be subject to irreparable damage because of the imposition of the stay, the District Court is authorized to grant relief from the stay to such party."). Given its choice of language and that legislative history, there are strong indicia that the PROMESA standard for "cause" requires both an initial showing of irreparable harm and a conclusion of the Court that the balance of the equities[6] weighs in favor of the movant rather than the debtor. See In re Rutter, 9 B.R. at 879.[7] Movant manifestly cannot satisfy that standard. And even if lack of

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[6] The Bankruptcy Code, which PROMESA parallels in some respects, "does not define 'cause'; but, generally speaking, 'cause' is said to exist when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor or the debtor's estate if the stay is lifted." Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997); see also In re Opelika Mfg. Corp., 66 B.R. 444, 448 (Bankr. N.D. Ill. 1986) ("Cause to lift the stay exists when the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors."); see also, In re City of Detroit, Mich., 501 B.R. at 709 (applying a balancing test in denying a motion to lift the stay in the context of a Chapter 9 bankruptcy).

[7] This interpretation also makes sense in light of the express provision for relief from the stay where irreparable harm would result before opportunity for notice and a hearing. See PROMESA § 405(g). The movant still bears the initial burden to show irreparable damage, but the court is relieved from its ordinary obligation to weigh the harms, as it would not yet have had the opportunity to hear from the Commonwealth about those harms. Where the court has time to afford notice and a hearing, it makes sense to require both the showing of irreparable harm and an analysis of the equities.

adequate protection were sufficient to establish cause to lift the stay, movant's interests here are adequately protected.

4. Even if lack of adequate protection showed "cause," movants would not be able to satisfy that standard and their interests are adequately protected.

For much the same reason that movant cannot establish that any harm from continuation of the stay exceeds harm to the Commonwealth from lifting the stay, movant would not be able to establish a lack of adequate protection, even if that were sufficient to show "cause" under PROMESA. "Adequate protection" in the Bankruptcy Code has been interpreted to require a "trustee to make a cash payment or periodic cash payments … to the extent that the stay … results in a decrease in the value of such entity's interest in such property," to provide "an additional or replacement lien to the extent that such stay … results in a decrease in the value of such entity's interest in such property," or to grant "such other relief … as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 370 (1988). A lack of "adequate protection" is therefore keyed to a decrease in the value of a security interest "without taking account of [a creditor's] right to immediate possession of the collateral on default." Id. at 372. It cannot be satisfied merely by a showing that a creditor has been deprived the immediate possession of collateral. Id. Rather, it must be satisfied by showing an actual "decrease in the value" of the security interest during the stay.

Movant cannot meet that showing. Movant's alleged security interest is in a revenue stream from toll roads until its bonds are repaid. As an initial matter, it is hard to see a "decrease in value" of that interest by the temporary suspension of payments from that revenue stream. Because the toll road is operational and will continue to be operational for the foreseeable future, that revenue stream is different from a finite pool of money or assets that is being depleted. See, e.g., In re Williams 61 B.R. 567, 575 (Bankr. N.D. Tex. 1986) (applying special protections for cash collateral that can be "dissipated and spent" without ready identification because of "misuse through commingling and inadequate accounting"); Matter of Anchorage Boat Sales, Inc., 4 B.R. 635, 642 (E.D.N.Y. 1980) (finding a lack of adequate protection for "the risk of losing [] security in cash proceeds which have been commingled" where there was "no reasonable possibility of reorganization and no equity in the collateral"). Any particular toll revenue not allocated to the movants' bonds today could simply be made up for by toll revenues collected tomorrow. The temporary suspension of application of toll revenues to the bonds will not decrease the value of the revenue stream generally and will not even require a payment from movants to their insureds through the duration of the stay. Movants' position is thus not even remotely comparable to the position of the creditors in the cases it cites (Docket No. 1 at 23), where the holding regarding lack of adequate protection was based on the uncertainty that future payments would ever materialize.[8] In this case, the emergency period declared by Act 21 and the relevant Executive Orders currently lasts until January 31, 2017. At most, it can only be extended until March 31, 2017. Once the emergency period ends the relevant Tolling Revenues will be available for use by PRHTA in payment of the relevant bonds. Hence, in this case there is complete certainty about the availability of the revenue stream, its timing and scope.

Even if one were to broaden the concept of "adequate protection" to include any harm that a secured creditor suffers from delayed access to collateral during a stay—an interpretation that would give every secured creditor the right to lift the automatic stay in bankruptcy, see United Sav. Ass'n, 484 U.S. at 375—movant's interests still would be adequately protected by

[8] Notably, in one of the cases cited by movants, the stay was not fully lifted and at least one of the relevant loans remained subject to the stay, partly because "[d]ebtors have supplied adequate protection on this loan through regular monthly payments." In re Dye, 502 B.R. 47, 56 (Bankr. M.D. Pa. 2013).

PROMESA. As discussed above, PROMESA itself affords movant the right to seek to recoup the value of any secured property transferred in violation of applicable law during the stay. See PROMESA § 407(b). Movant cannot show a "lack of adequate protection" during the PROMESA stay based merely on a temporary delay in payment of a readily calculable sum of money that can be replenished by future toll revenue inflows.

In addition, movants interests are actually adequately protected because, at all points during the pendency of the stay, PRHTA bondholders will receive timely payment of principal and interest due on their bonds. Assuming the adequate protection requirement of section 362 of the Bankruptcy Code were applicable in the context of a PROMESA stay, adequate protection may be provided by "requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title... results in a decrease in the value of such entity's interest in such property." 11 U.S.C. 361(1); United Sav. Ass'n of Texas, 484 U.S. at 370.

As admitted by movants, although EO-2016-30 suspends payment of all debt obligations of PRHTA to bondholders that come due during the emergency period, it does not suspend payments that can be made from funds on deposit with the Fiscal Agent. Docket No. 1 at 7. Movants also admit that the funds on deposit with the Fiscal Agent are enough to cover the next and only payment due during the emergency period. Id. at 22. Even if the current emergency period (ending on January 31, 2017) is extended by two months as allowed by Act 21, the next installment due on the bonds will fall outside of the emergency period and it will have to be paid in due course, assuming no prior agreement has been reached between PRHTA and its bondholders through the involvement of the Oversight Board. In sum, since the cash payments available from the Fiscal Agent for payment of the bonds are sufficient to satisfy PRHTA's obligations throughout the emergency period, PRHTA bondholders, and in turn movants, will be adequately protected for the duration of the stay. See, for example, In re Shriver, 33 B.R. 176, 181-182 (Bankr. N.D. Ohio 1983) (Where equity was relatively small or even nonexistent, it was insufficient to adequately protect creditor but, when coupled with $2,000 per month payments which would be more than sufficient to give the bank current debt service under its contract, it did provide the bank with adequate protection.).

5. The insolvency or potential insolvency of the Commonwealth or its instrumentalities is not "cause" for lifting the PROMESA stay and does not constitute irreparable harm.

As previously mentioned, "if money damages will fully alleviate harm, then the harm cannot be said to be irreparable." K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914 (1st Cir. 1989). Movants only possible harm, if they ever have to cover any payment default on the PRHTA bonds, is purely economic and not irreparable. In addition, given that there are enough funds deposited with the Fiscal Agent to cover payments due during the emergency period, it is also speculative.

In spite of these inescapable conclusions, movants argue that due to the financial distress or outright insolvency of the Commonwealth and PRHTA, movants may never be able to recover or replace any toll revenues withheld or transferred by PRHTA. Docket No. 1 at 24. In other words, movants claim that the insolvency of their debtor (PRHTA) is not only sufficient cause to lift the PROMESA stay, but that it warrants emergency relief under section 405(g) of PROMESA due to an alleged irreparable harm. The contention that insolvency may be cause for lifting the stay is negated by analogous bankruptcy jurisprudence.

The very essence and purpose of bankruptcy law is to give insolvent debtors "breathing room" and to provide for an orderly liquidation or reorganization, for the benefit of all creditors. In re Soares, 107 F.3d 969, 975 (1st Cir. 1997); In re Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982)

("The purpose of the automatic stay is to preserve what remains of the debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors."). "Because the stay is a fundamental protection for **all parties affected** by the filing of a petition in bankruptcy, it should not be dismantled without good reason." In re Soares, 107 F.3d at 977 (emphasis added). The stay provisions of PROMESA mirror this fundamental purpose. See PROMESA §§ 405(m)(5)(B) and 405(n)(2).

While the solvency (not the insolvency) of a debtor has been used as grounds to lift the stay in bankruptcy, it has been held that solvency is not the sole factor to be considered by the courts. See In re Energy Future Holdings Corp., 527 B.R. 178, 198 (Bankr. D. Del. 2015), aff'd, CV 15-620 RGA, 2016 WL 627343 (D. Del. Feb. 16, 2016) (negating "the proposition that a debtor's **solvency** is, as a matter of law, cause to lift the automatic stay") (emphasis added). Movants have failed to cite a case where the insolvency of a debtor in bankruptcy has been considered "cause" to lift the automatic stay.

If insolvency in the bankruptcy context constituted irreparable harm for creditors and were a cause for lifting the stay, the protection afforded by the automatic stay would be dead letter, as any creditor could easily lift the stay at any stage of an insolvent debtor's bankruptcy. In this case, if the insurers of bondholders whose payments will be kept current during the "emergency period" and whose claims and liens securing them will not be modified or discharged, without their consent, at any time, can lift the stay based solely on the alleged insolvency of their debtor, then any bondholder whose payments may have been suspended during the emergency period by Act 21 and the Executive Orders—including, but not limited to payment on so-called General Obligation ("GO") bonds—would have equal grounds to lift the stay. This would make section 405 of PROMESA absolutely meaningless and would lead to a race to the courthouse, specifically the result PROMESA was designed to prevent. To allow such as result to materialize, especially just a month and a half after the enactment of PROMESA and before the members of the Oversight Board are even appointed, would be extremely prejudicial to the Commonwealth and all of its creditors, and would turn PROMESA on its head.

6. The harm to the Commonwealth of Puerto Rico and the public interest manifestly outweighs any harm allegedly suffered by movant as a result of the automatic stay.

PROMESA is an unprecedented federal statute designed to deal with a fiscal emergency affecting the Government of Puerto Rico and its instrumentalities. PROMESA § 405(m). The stay mandated by PROMESA "is essential to stabilize the region for the purposes of resolving this territorial crisis." Id. § 405(m)(5). Some of the express purposes of the stay are to: "(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis; (2) allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits; (3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring." Id. § 405(n). Ultimately, one of the main purposes of PROMESA is to "benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its long standing fiscal governance issues and return to economic growth." Id. § 405(n)(5). The lifting of the stay requested by movant would defeat these purposes.

The lifting of the stay would also fly in the face of the choices that Congress made in enacting PROMESA. Specifically, Congress chose to establish an Oversight Board for Puerto Rico and to vest that Oversight Board with the authority to approve Fiscal Plans (as defined in the Act) for the Commonwealth or its instrumentalities. See PROMESA §§ 101(b)(2), 201. It authorized the Board to provide recommendations relating to the effect of Puerto Rico laws and court orders on the operations of the government. Id. § 205(a)(7). And it authorized the Oversight Board, in its discretion, to exclude any instrumentality of the Government of Puerto Rico from the requirements of the Act. Id. § 101(d)(2). Rather than allow the Oversight Board to consider the application of PRHTA's revenue streams or approve a fiscal plan for PRHTA, movants essentially ask this Court to pretermit the Oversight Board's review and foist its own decision upon PRHTA. Far from showing "cause," this argument reveals the inappropriateness of movant's request.

Moreover, lifting of the stay in this case may lead other plaintiffs to also attempt to lift the stay of their claims involving a "Liability" under the Act. This would force the Commonwealth to litigate a multiplicity of actions, including constitutional claims, which could lead to inconsistent results. See, e.g., City of Detroit, 501 B.R. at 709 (stay provisions of Bankruptcy Code are "designed to consolidate into the bankruptcy case all proceedings that relate to and impact the case, so that the debtor, and, for that matter, all of the other parties, are not required to endure the expense and complexity of litigating multiple issues in multiple courts. Such duplicative litigation also creates the risk of inconsistent results."). At a minimum, it would force the Commonwealth to divert its attention from negotiating a voluntary resolution with its creditors to defending costly lawsuits, the exact opposite of what Congress intended. See PROMESA § 405(n).

Regardless of the merits of movant's claims and the virtues or defects of Act 21, at this juncture, just weeks after the approval of PROMESA and the establishment of an Oversight Board for Puerto Rico, the public interest mandates preserving the *status quo* and avoiding a rush to the courthouse or the premature dismantling of statutory provisions created to address the current fiscal emergency in Puerto Rico, without the benefit of the appointment of the members of the Oversight Board. Indeed, it must be noted that bondholders for other territorial instrumentalities have alleged that negotiations and settlements with other investors could lead to preferential transfers. See, e.g., Trigo v. García Padilla et al., Civil No. 16-2257 (FAB), Docket No. 1 at ¶ 51. Although respondents disagree with this contention, it underscores the need for a stay, in the interest of all stakeholders (PROMESA § 405(m)(5)(A)), to allow for an organized and coordinated process to take place pending the appointment of the members of the Oversight Board and after the Board makes certain decisions taking into consideration PROMESA's mandate and the current legal framework (including Act 21) applicable to movants' and other bondholder claims.

WHEREFORE, respondents respectfully request that the Court deny movants' motion at Docket No. 1.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 17th day of August, 2016.

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