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

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, Plaintiff, -against- ALEJANDRO GARCÍA PADILLA, JUAN C. ZARAGOZA GÓMEZ, and LUIS F. CRUZ BATISTA, Defendants.	Civil No. 16-cv-2101 **PLAINTIFF'S POST-HEARING BRIEF**

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TO THE HONORABLE COURT: COMES NOW Plaintiff National Public Finance Guarantee Corporation ("National"),[1] by and through its undersigned counsel, and respectfully states and prays as follows:

INTRODUCTION

The evidence in the Court's September 22-23, 2016 hearing (the "Hearing") on National's motion to lift the automatic stay imposed by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") established in no uncertain terms that "cause" exists to lift the stay imposed by PROMESA § 405(e)(2). It is now a matter of public record that the Commonwealth has asserted control over secured revenues pledged to bondholders in which the Commonwealth has no beneficial interest. Indeed, National showed at the Hearing that the Commonwealth has blocked $11 million in combined monthly PRHTA and University of Puerto Rico ("UPR") secured revenue streams (pledged for the payment of PRHTA and AFICA bonds) from reaching trust accounts maintained on behalf of PRHTA and AFICA bondholders.

In providing insurance for the PRHTA and AFICA bonds, National relied on the sanctity of the PRHTA and UPR revenue pledges. The Commonwealth has now absconded with that money, even though it never owned those funds. The undisputed record evidence established that the revenue bond structure agreed to by PRHTA and AFICA was designed precisely to prevent the revenues from being diverted on account of political exigencies, regardless of any purported governmental emergencies. The Commonwealth's unprecedented taking of secured interests completely eviscerates the purpose behind non-recourse revenue bond structures, and undermines creditors' faith in the Commonwealth and its instrumentalities.

[1] National is a monoline insurer that insures payments on bonds issued by the Puerto Rico Highways and Transportation Authority ("PRHTA") and the Puerto Rico Industrial, Tourist, Educational, Medical and Environmental Control Facilities Financial Authority ("AFICA").

Not only did National prove that the Commonwealth's taking of secured interests in dedicated bondholder revenue streams constitutes direct irreparable harm requiring lifting of the stay, National showed that: (i) the Commonwealth faces no actual harm from having this Court lift the stay to determine whether its actions are unconstitutional; (ii) this Court's determination as to lawful priority of liens is necessary to fulfill PROMESA's objectives; and (iii) without Court intervention, the Commonwealth's unprecedented taking of dedicated secured revenue streams will further erode the Commonwealth's ability to access capital markets. Faced with these facts, the Commonwealth offered the most paltry defense, which never addressed the loss of $11 million per month in collateral.

The Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (the "Moratorium Act") and the executive orders issued thereunder[2] are flagrantly unlawful. They violate the federal Constitution on multiple grounds, as described more fully in National's complaint. Contrary to the United States' September 21, 2016 Statement of Interest [Dkt. 60] (the "Statement" or "SOI"), the Court should determine the rules of the road now. Postponing the decision as to the Moratorium Act's constitutionality will only prolong uncertainty and keep parties away from the bargaining table. The Commonwealth's actions are harmful to Puerto Rico's long-term financial well-being and to restructuring efforts. National is not seeking monetary damages in its lawsuit. It simply wants the Commonwealth to play by the rules and cease using the PROMESA stay as a sword instead of a shield. Only this Court can ensure that

[2] On May 17, 2016, the Governor issued Administrative Bulletin No. OE-2016-018 ("EO-18"), ordering the suspension of all obligations of PRHTA to transfer toll revenues pledged by PRHTA for payment on the bonds to a fiscal agent. On June 30, 2016, the Governor issued Administrative Bulletin No. EO-2016-31 ("EO-31"), which continued the suspension of the transfer of secured creditor revenues dedicated to payment of PRHTA debt and declared UPR's obligation to make certain lease payments securing AFICA bonds a "covered obligation" under the Moratorium Act.

the parties' conduct conforms to the Constitution and laws of the United States. The nascent Oversight Board cannot fulfill that duty. Nor can the United States executive branch.

ARGUMENT

The PROMESA stay is modeled on the automatic stay of the Bankruptcy Code, which likewise provides that the stay can be lifted "for cause." 11 U.S.C. § 362(a), (d). Though PROMESA does not define "cause," lifting the automatic stay in the analogous bankruptcy context rests with the court's discretion. *See In re Chesnut*, 422 F.3d 298, 303-304 (5th Cir. 2005) (bankruptcy courts have "broad discretion to lift stays" and "flexibility to address specific exigencies on a case-by-case basis"). Courts consider a variety of factors in deciding whether to lift the automatic stay, including "the impact of the stay on the parties" and "the balance of hurt." *See, e.g., C&A, S.E. v. P.R. Solid Waste Mgmt. Auth.*, 369 B.R. 87, 94-95 (D.P.R. 2007). It is particularly appropriate to grant relief from the stay where, as here, a creditor lacks adequate protection from the deterioration of property at issue. *See In re Unanue-Casal*, 159 B.R. 90, 95 (D.P.R. 1993) ("The most express guidance is that cause [to lift a stay] can include the lack of adequate protection of an interest in property."), *aff'd*, 23 F.3d 395 (1st Cir. 1994); 11 U.S.C. § 362(d) ("lack of adequate protection of an interest in property" is cause for relief from stay).[3]

I. The Hearing Testimony Established That The Stay Should Be Lifted

The stay should be lifted because National continues to suffer harm each day the stay remains, given the Commonwealth's unconstitutional misappropriation of over $11 million in

[3] The Commonwealth argues that lack of adequate protection does not constitute cause under § 405(e). *See* 9/22 Tr. at 58:14-19. This argument is misplaced. First, as Mr. Lamb testified, the government is not just failing to provide adequate protection to a secured creditor, it is actually taking money that it never had the right to in the first place. *See id.* at 79:12-15. In layman's terms, it is stealing money that belongs to bondholders. Moreover, had Congress wanted to insulate the Commonwealth if the Commonwealth could not offer adequate protection, Congress could have done so with an affirmative statement that the stay could not be lifted even in the absence of adequate protection. Instead, PROMESA only provides that the stay may be lifted "for cause shown."

secured monthly revenue streams in which the Commonwealth has no legal or beneficial interest or entitlement. Through the Commonwealth's actions, National has lost the benefit of pledged revenues that serve as collateral for the repayment of non-recourse bonds that National insures.

A. National Continues To Be Harmed By The Diversion Of Revenues Pledged To The Repayment Of Insured Bonds

During the Hearing, the Court heard from Robert Lamb, a recognized leader in municipal finance. Mr. Lamb's unrebutted testimony conclusively established that the Moratorium Act and executive orders issued thereunder have rendered secured interests and covenants meaningless, and significantly damaged National's financial interests. Mr. Lamb testified:

- Because the bonds are non-recourse, bondholders and insurers look only to "revenues that are pledged, . . . for repayment of the debt." 9/22 Tr. at 74:13-15, 76:6-9.
- The bond resolutions are structured such that the Commonwealth Treasury never has access to the pledged revenues—rather the funds are to flow directly to the fiscal agent or trustee who will hold the funds "in trust." Thus, pledged revenues "belong to the bondholders" and "don't belong to the Commonwealth." *Id.* at 79:12-15, 88:8-12 (testifying that the PRHTA toll revenues are never supposed to hit the Commonwealth Treasury); 98:3-4 (testifying that funds held in trust by trustee is "basically bondholder money").
- The PRHTA toll revenues and the UPR revenues are "subject to a lien" in favor of the bondholders until the bonds are paid. *See* NAT EX 12, PRHTA Bond Resolution No. 68-18, § 401; NAT EX 2, AFICA Trust Agreement § 701 ("The Bonds shall be secured by a lien on and pledge of such revenues . . . as provided in this Trust Agreement.").
- These secured interests are protected by a "covenant stack" designed to "make[] the bonds credible and credit-rating worthy in the capital markets." 9/22 Tr. at 78:18-20.
- The Commonwealth's statutory non-impairment obligations constitute "a promise by the sovereign Government not to interfere with the rights of bondholders," and "a very important provision for revenue bond buyers to know that they don't have to worry about the Commonwealth . . . interfering with their rights to the money." *Id.* at 86:7-14*; see also* NAT EX 11, 9 L.P.R.A. § 2019; NAT EX 10, 12 L.P.R.A. § 1267. The non-impairment covenant protects revenues pledged to non-recourse bonds from political "interference from the state or from, in this case, the Commonwealth." 9/22 Tr. at 78:23-79:2.

As Mr. Lamb explained, the revenue pledge and covenant stack protecting the structure of PRHTA and AFICA revenue bonds follows an industry standard relied upon by investors.[4] If the covenant stack is violated, the issuers "are going to lose all kinds of credibility in the marketplace" and "won't be able to issue this kind of debt in the future." *Id.* at 79:23-80:4. None of the Commonwealth's witnesses contested the importance of those protections. Yet, the Governor's actions under the Moratorium Act have wiped them out.

Mr. Lamb further testified that PRHTA's secured creditors are losing $10.6 million dollars each month in toll revenue collateral. *Id.* at 102:16-20. AFICA's secured bondholders are losing approximately "$500,000 a month" in UPR lease payment collateral. *Id.* at 100:3-6. By depriving secured creditors of their sole collateral, Mr. Lamb testified that the executive orders turn the PRHTA and AFICA secured bonds "into unsecured bonds." *Id.* at 140:14-15. The Commonwealth's witnesses offered no contrary evidence. Accordingly, National established irreparable harm[5] as a matter of law. *See In re Wynn Homes, Inc.*, 14 B.R. 520, 522-23 (Bankr. D. Mass. 1981) ("Normally, the creditor shows irreparable injury by demonstrating that the value of his security has decreased or is decreasing below that value existing at the time of [the bankruptcy petition], and that no protection is available in the proceeding which will

[4] *See* 9/22 Tr. 79:17-20 (pledge and trust "absolutely important to the bondholders" because "if they don't have that . . . they don't have any security"); *id.* at 85:11-19 (a statutory or contractual pledge of revenues "is one of the bedrock things in the covenant stack that we look for to make sure that . . . we actually get the money"); *id.* at 99:1-10 (as the revenue pledge is "something that is vitally important to a revenue bond buyer," the covenant stack makes it "a hundred percent clear in every which way" that the money generated is "being set aside and held for the bondholders").

[5] The "irreparable harm" standard does not apply to the PROMESA stay. The Commonwealth's argument that "irreparable harm" must be shown to lift the stay is based on a tortured reading of § 405(e), which of course does not reference "irreparable harm." If Congress had intended an irreparable harm standard to apply under § 405(e), it would have said so, as it did in § 405(g), which governs *ex parte* relief. It is the *sine qua non* of statutory interpretation that interpretations that render superfluous another provision are impermissible. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (where Congress includes language in one section of a statute but omits it in another, it is generally presumed Congress acted intentionally). In any event, National established irreparable harm here.

adequately protect such existing value."); *In re Rutter*, 9 B.R. 878, 879 (Bankr. E.D. Pa. 1981) ("an erosion of the value of the security" constitutes "irreparable damage") (quoting *In re Overmyer Co.*, 2 Bankr. Ct. Dec. 992, 993 (S.D.N.Y. 1976)).[6]

The Commonwealth does not dispute that its diversion of pledged bond revenues is, as Mr. Lamb testified, "totally without precedent," 9/22 Tr. at 103:9-10. Mr. Lamb remarked that "in the municipal bond market, a repudiation of a debt is so rare that we hardly ever see it." *Id.* at 106:16-18. If the repudiation is left to stand, bondholders cannot be expected "to come back again to support the Commonwealth's debt program." *Id.* at 106:19-21.

Moreover, this loss of collateral has negative financial consequences for bond insurers like National. As Mr. Lamb explained, the diversion of pledged revenues means that bond insurers "have to reexamine the level of reserves that they've taken for the risks in connection with the bond issues," and face "a higher capital charge by the rating agencies in order to maintain their rating when things like debt service reserve fund draws and rating downgrades occur." *Id.* at 139:17-19, 20-24.

None of the Commonwealth's witnesses refuted Mr. Lamb's expert testimony regarding creditors' (including National's) reliance on the structure of non-recourse revenue bonds, the unprecedented nature of the Commonwealth's decision to redirect revenues that the Puerto Rico Treasury never had an interest in, or the actual harm suffered by National. Yaimé Rullán testified solely as to the impact that lifting the stay might have on the Commonwealth. 9/23 Tr. at 87:10-89:8 (describing the impact of invalidating executive orders issued pursuant to the Moratorium Act). As for Elizabeth Abrams, her attorneys made clear that her testimony had

[6] *See also In re Builders Grp. & Dev. Corp.*, 502 B.R. 95, 122 (Bankr. D.P.R. 2013) ("where there is a specific assignment of rents given as security, a diversion of any portion of the rents to a party other than the secured party is clearly a diminution of the secured party's interest").

nothing to do with revenue bonds.[7] And Jonathan Arnold testified on whether National suffered "irreparable harm" as a "matter of economics" (but not as a "matter of law"). *Id.* at 196:10-16.

Dr. Arnold's testimony that National had not been harmed by the automatic stay because its stock price did not go down is simply not credible.[8] Dr. Arnold testified that the executive orders' effect on National would be reflected in its parent company's stock price, and that "MBIA stock price *rose* in response to the passage of PROMESA and the executive orders that were issued one day later under the Moratorium Act." *Id.* at 213:24-214:1 (emphasis added). According to Dr. Arnold, this meant National would not suffer "irreparable harm from a continuation of the stay." *Id.* at 202:10-12. But Dr. Arnold made no effort to disaggregate the effects of PROMESA's enactment from the effects of the close-in-time executive orders. And unlike the Moratorium Act and executive orders, PROMESA *helps* creditors in many respects, as Dr. Arnold acknowledged.[9] In fact, PROMESA expressly preempts "unlawful" executive orders, like those in this case, which may explain in part why MBIA's stock price rose on the dates Dr. Arnold examined. Importantly, Dr. Arnold never disputed Mr. Lamb's testimony that the Commonwealth effectively took, and continues to take, $11 million per month in collateral from bondholders that would otherwise flow to a trustee to pay for bonds insured by National.

II. Lifting The Stay Will Not Unduly Harm The Respondents

The Commonwealth's suggestion that lifting the stay would cause serious harm to the Commonwealth and the "PROMESA process" (*see* 9/22 Tr. at 36:24-37:1) ignores the narrow

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[7] 9/23 Tr. at 176:9-12 ("Objection, Your Honor. This is beyond the scope of her direct examination. She didn't discuss revenue bonds at all, whether or not they are helpful for municipal financing . . . .").

[8] In arguing that the stay does not harm National, Dr. Arnold also pointed to a passage in MBIA's Form 10-Q stating that based on its "legal and contractual rights," National would "ultimately be substantially repaid." *Id.* at 214:17-22. But the statement only speaks to substantial repayment, which is not at issue in this case, and does not address other types of harms that National is suffering from its loss of collateral.

[9] *See id.* at 215-20-22 (Dr. Arnold quoting a market report stating that PROMESA "would remove the potential for a chaotic debt restructuring that would add significant uncertainty").

issue before the Court and runs contrary to the weight of the evidence. The most significant effect to the Commonwealth from lifting the stay would occur only if the Governor's actions are ultimately declared unconstitutional and the Commonwealth and its instrumentalities must cease diverting funds to which they were never entitled. But a finding that the Commonwealth has no rights to the funds it has effectively stolen from creditors cannot possibly constitute cognizable harm. *See In re Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1339 (D.P.R. 1979) (automatic stay meant to "rehabilitate the debtor" but "such rehabilitation must be done *within the law*" (emphasis added)).

A. Lifting The Stay Would Not Harm The Commonwealth

Defendants' argument that the Commonwealth would be harmed by lifting the stay is premised on the assumptions that: 1) "payments to bond and noteholders will ultimately divert funds from essential services," *id.* at 222:22-23; and 2) "additional litigation will surely ensue if the stay is lifted," *id.* at 222:18-19, thereby causing Commonwealth employees to "be distracted from the real work," *id.* at 138:22-25. These arguments have no merit.

First, lifting the stay will not damage Defendants because National is only seeking prospective, non-monetary relief declaring the Commonwealth's actions unconstitutional. Indeed, if the stay is lifted to allow National's constitutional claims to go forward, the Commonwealth will still enjoy PROMESA's full protections for the duration of the stay, including protection from a liability claim for the non-payment of principal or interest.

Second, Mr. Lamb's uncontroverted testimony establishes that the Commonwealth has no legal or beneficial right to the diverted funds. Because PRHTA toll revenues are held in trust for the beneficial interest of the bondholders, and because PRHTA is contractually obligated not to impair or diminish bondholders' rights, the Commonwealth has **no beneficial interest** in such funds. 9/22 Tr. 88:6-7 (Mr. Lamb testifying that revenues pledged and held in trust pursuant to

the PRHTA bond resolution are the bondholders' money). Similarly, AFICA bonds are structured so that UPR lease payments constitute pledged revenues for the university to pay its debt service, and that money never belonged to the Commonwealth. *Id.* at 93:19-24. Accordingly, lifting the stay would not harm the Commonwealth because the Commonwealth **never** had a right to the funds it has diverted and continues to divert.[10]

Third, the Commonwealth's well-worn statement that it needs the money to provide for "essential services," *see, e.g.*, 9/23 Tr. at 86:3-7, was directly refuted by Carlos Colón de Armas' expert testimony. *Id.* at 28:11-13 ("[T]he Government of Puerto Rico has the revenues to cover essential services and pay its debt commitments."). Dr. Colón testified that despite a reduction in the 2017 budget of $1.2 billion in debt service, operational expenses **increased** by $400 million over 2016. *Id.* at 30:16-20. He went on to note the significant waste in the budget:

> [T]here is the good name of Puerto Rico involved here. There are significant wastes, and that's the right word for it, wastes in the budget. I strongly believe that the fundamental flaw of the Government's strategy is that it has used debt restructuring as plan A. There comes a time in every organization when there may be a need for debt restructuring. There may be a time in organizations when there may be a need for bankruptcy. If that wouldn't be the case, those tools wouldn't exist, and they do exist. But the Government of Puerto Rico has not done a good faith effort to restructure the other 84 percent of the budget; the spending side. And in the process they have damaged the credibility and the good name of Puerto Rico with legalese. That is not correct in my opinion.

Id. at 62:10-25. The Commonwealth offered no credible evidence to the contrary.[11] And, even if the Commonwealth's statement regarding the need to provide essential services were credited, it would not excuse the Commonwealth's conduct. As Mr. Lamb testified, the very purpose of the

[10] As such, Dr. Arnold's statement that the Commonwealth would be harmed if the stay were lifted because disbursements to creditors would "necessarily mean that money would have to come out of expenditures that the Government is making for services" is plainly false. *See* 9/23 Tr. at 224:18-225:18. PRHTA's toll revenues and AFICA's lease payments were never part of the Commonwealth's budget.

[11] Dr. Arnold's testimony (even if credited) that Puerto Rico has a lean budget because it would rank 40th in expenditures per capita if it were a state, *see id.* at 226:7-11, fails to qualitatively account for expenditures that are clearly not essential services, *see id.* at 31:15-19 (Dr. Colón noting the Commonwealth "invest[s] $15 million in political parties" and "keep[s] subsidizing . . . TV stations").

"covenant stack" and protections offered by revenue bonds are "not there for when everybody is having a good time. It's for when people are struggling." 9/22 Tr. at 126:19-22. The Commonwealth's fiscal problems do not allow it to evade the rule of law.

Finally, lifting the stay to decide the narrow issue before the Court would not, as Defendants suggest, somehow open the litigation floodgates. In fact, lifting the stay and ruling on the constitutionality of the Governor's actions would conclusively settle the issue and foreclose subsequent, related litigation. Conversely, delaying a ruling on the constitutionality of the Governor's actions could lead to similar suits. And prolonging the uncertainty about the Act's constitutionality makes it harder for the parties to reach agreement at the bargaining table.

III. Lifting The Stay In This Case Is Necessary To Fulfill PROMESA's Purposes

Defendants incorrectly claim that lifting the stay would harm the "PROMESA process" and preempt the Oversight Board. 9/22 Tr. at 37:1; 9/23 Tr. at 139:12-14. On the contrary, stay relief will further the public interest and advance the purposes of PROMESA, including an orderly restructuring process governed by the rule of law. *See In re Medina*, No. 14-06368, 2015 WL 2378975, at *4 (Bankr. D.P.R. May 13, 2015) (modifying stay to promote "judicial economy, equitability and the twin goals of the Bankruptcy Code of benefitting both parties").

"As soon as practicable," the Oversight Board must develop a "Fiscal Plan" to "achieve fiscal responsibility and access to the capital markets." PROMESA §§ 201(a), (b)(1). The contents of that Fiscal Plan will depend on questions that this Court alone can resolve, including the constitutionality of certain provisions of the Moratorium Act. To comply with PROMESA, the Fiscal Plan must "respect the relative *lawful* priorities or *lawful* liens . . . in effect prior to [PROMESA's] enactment." *Id.* § 201(b)(1)(N) (emphasis added). But the Moratorium Act overrides preexisting liens and reshuffles payment priorities. The Oversight Board cannot fulfill its obligations unless and until this Court determines which priorities and liens are "lawful."

Neither the Commonwealth nor the Oversight Board can determine which obligations are lawful. As Defendants' witness Ms. Abrams testified, "[t]he Oversight Board does not have a judicial function. They don't make decisions about the Puerto Rican Constitution," and it is up to the Court, not the Oversight Board, to decide if the Moratorium Act is constitutional. 9/23 Tr. at 154:16-19; *id.* at 151:12-23.

As the Court also noted, the Oversight Board is expected to help Puerto Rico achieve fiscal responsibility and access capital markets. 9/22 Tr. at 38:17-21. Defendants conceded that access to the capital markets is necessary for Puerto Rico to overcome its financial crisis. *Id.* at 38:24-25. It is undisputed that Puerto Rico is currently shut out of capital markets, but lifting the stay to rule on the constitutionality of the Commonwealth's actions would help provide the certainty necessary to rebuild trust with creditors.[12] A ruling from this Court that Defendants are illegally diverting revenue streams will signal to the capital markets that the Commonwealth is not above the rule of law. Indeed, as Ms. Abrams explained, "knowing what the rules are gives the creditors the ability to sort of have faith in the negotiations and ultimately reach an agreement." 9/23 Tr. at 131:7-9; 9/22 Tr. at 181:11-14 (testimony of Bradley Meyer); 9/23 Tr. at 131:1-5 (Ms. Abrams testifying "[m]ore certainty is better than less when you are trying to reach resolution with your creditors"). The Commonwealth's attempt to hide behind the stay to avoid a reckoning on the constitutionality of its unilateral stripping of liens and diversion of assets has created legal uncertainty. *See* 9/22 Tr. at 114:7-11 (testimony of Mr. Lamb regarding taking of PRHTA and AFICA liens); *id.* at 181:4-19 (testimony of Mr. Meyer regarding the "tremendous amount of legal uncertainty"). This uncertainty hampers negotiated resolutions. *See id.* at

[12] *See, e.g., id.* at 107:8-10, 75:1-8 (Mr. Lamb testifying that "it's going to be a long time before people are going to be willing to take the risk on the Commonwealth keeping its promises," and if an issuer like the Commonwealth or its instrumentalities do not fulfill the bond covenants, it is "going to lose all kinds of credibility in the marketplace," will not "be able to issue this kind of debt in the future," and will suffer "a big blemish in terms of [its] ability to issue [its] own GO debt as well").

181:4-19 (Mr. Meyer stating that certainty is "exceptionally important in terms of stabilizing the entire Commonwealth going forward"). To negotiate effectively, parties must know whether their interests are secure, and this requires a ruling on the Moratorium Act's constitutionality.

Nevertheless, the Commonwealth contends this Court should wait because the Oversight Board can approve a Fiscal Plan that "structure[s] around uncertainties," such as what priorities are lawful. 9/23 Tr. at 158:14-159:6 (Ms. Abrams stating that "if the priority of creditors were X, this [is] how it would look; and if they are Y, which would result from a ruling on the constitutionality of Act 40, then, you know, the deal would look like that"). But Ms. Abrams agreed that structuring around uncertainties was worse than having certainty in the form of a "ruling from the Court right now." *Id.* at 158:6-13. The Commonwealth cannot deny the benefits of certainty and knowing the "rules of the road."[13] Yet it argues that the Court should delay ruling until next year, while its unconstitutional conduct continues. The Court should lift the stay and provide that certainty now, so that all creditors can negotiate on an equal footing. Indeed, the Commonwealth cannot credibly maintain the best course of action is to negotiate *two* deals—with increased time, burden, and expense—when it is already unlikely that the Oversight Board will complete its tasks prior to the extended deadline of March 31, 2017. 9/22 Tr. at 41:10-16 ("I don't think they are going to be able to do that by February 15 . . . Or May 1st.").

IV. The Statement Of Interest Ignores The Court's Constitutional Duties

The United States urges the Court to "narrowly construe" PROMESA's stay provision and, absent "irreparable damage,"[14] to "postpone granting any relief from the automatic stay."

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[13] S*ee also* 9/23 Tr. at 131:1-9 (Abrams testifying that "More certainty is better than less when you are trying to reach resolution with your creditors. In many restructuring situations, you don't have perfect certainty. But knowing what the rules are gives the creditors the ability to sort of have faith in the negotiations and ultimately reach an agreement.").

[14] The Statement's suggestion that an "irreparable damage" standard applies (SOI at 8) is based on a tortured reading of § 405(e), which of course does not reference "irreparable damage." *See supra* note 5.

SOI at 1. Of course, postponing relief from the stay is tantamount to denying relief, and the United States provides no reason for the Court to do so. *See Vazquez-Burgos v. Rodriguez-Perez*, 111 F. Supp. 3d 135, 141 (D.P.R. 2015) ("justice delayed is justice denied"). The Statement misinterprets PROMESA and forgets the Court's unique and essential role in fulfilling its objectives—errors the Court rightly recognized as "shocking." 9/22 Tr. at 39:15-40:2.

PROMESA sets the rules of the road for the Commonwealth to emerge from its debt crisis. The Moratorium Act plainly violates those rules. Among other things, PROMESA expressly preempts "unlawful executive orders," like the ones here, "that alter, amend, or modify [creditors'] rights . . . or that divert funds from one territorial instrumentality to another or to the territory." PROMESA § 303(3). Only this Court is empowered by Article III of the Constitution to interpret and apply the Constitution and federal statutes, including PROMESA.

Yet the Statement suggests the Court should sit idly until the Oversight Board chooses to act. The United States observes, for example, that the "Oversight Board *may* very well approve fiscal plans that supplant the executive orders issued under the Moratorium Act," or "*may* review and rescind certain fund transfers undertaken by the Puerto Rico Government after enactment of PROMESA." SOI at 7 (emphases added). But the Board is in its infancy; as of this filing, it still has no executive director, general counsel, or staff members. As the Court noted, there is no assurance whatsoever as to *when* the Oversight Board will act, let alone whether it *may* take certain steps to protect creditors down the road.[15] Meanwhile, the Commonwealth and its

[15] *See* 9/22 Tr. at 46:6-17 (Court questioning when the Oversight Board will start developing a fiscal plan in the absence of audited financials, and why the Oversight Board could not proceed if the Court declares the Moratorium Act unconstitutional); *id.* at 208:23-209:9 (Mr. Meyer testifying it will take at least six months to start creditor negotiations with the Oversight Board). On the date of this filing, the Oversight filed a motion requesting 14 days to formulate its position on whether to intervene in pending litigation, although it acknowledged that it may lack the authority to intervene in National's case [Dkt. 71 at 3 n.1].

instrumentalities rely on a blatantly unconstitutional statute to unilaterally rewrite debt obligations. Congress never meant to provide cover for such unlawful behavior.

The United States' argument that lifting the stay in this case would have a "cascading effect" for other creditors (SOI at 6) is simply not true, and would not justify a stay even if it were. As this Court recognized, ruling on the Moratorium Act's constitutionality would answer that question for all parties. *See* 9/22 Tr. at 42:25-43:6.[16] Moreover, the United States cannot seriously maintain that because the Commonwealth's unlawful actions harmed many creditors it should be allowed to *continue* its unlawful actions unabated. Finally, the Statement is particularly troubling in light of unrebutted evidence of the Commonwealth's constitutional violations. In sum, this Court is the only body that can decide if the Moratorium Act or the actions taken under color of the Moratorium Act violate the Constitution or are preempted by federal law. National respectfully submits that the time for the Court to so decide is now.

V. The Hearing Record Establishes That The Moratorium Act And Executive Orders Prescribe A Composition Of The Debt Insured By National

This Court recently determined that the clawback provisions of Puerto Rico law did not constitute a "composition of indebteness" because they did "not dispense of or reduce any Commonwealth obligation pursuant to the bonds." *Assured Guar. Corp. v. Garcia-Padilla*, Nos. 16-1037, 16-1095, 2016 WL 5794715, at *8-9 (D.P.R. Oct. 4, 2016). Adopting the distinction between "composition" and "extension" made in *Ropico, Inc. v. City of New York*, 425 F. Supp. 970, 978-82 (E.D.N.Y. 1976), the Court therefore held that the clawback provisions are not preempted by the federal Bankruptcy Code.

Besides establishing why and how the stay harms National, the unrebutted evidence at the Hearing also demonstrates that the facts here are fundamentally different from those at issue in

[16] As the Commonwealth's own witness conceded, even if the Court does not lift the stay in this case, other litigants could still move to lift the stay in other cases. 9/23 Tr. at 142:18-21.

Assured and *Ropico*, and why the Court's holding there regarding preemption is distinguishable. Here, the record shows the Commonwealth has indeed dispensed of and reduced obligations under the bonds. National insured revenue bonds, secured by dedicated revenue streams in which the Commonwealth had no legal or beneficial interest. As National established, the Commonwealth has now converted those secured bonds into unsecured bonds by taking the liens and stripping the collateral pledged to PRHTA and AFICA bondholders—a situation "without precedent." *See* 9/22 Tr. at 103:9-10, 140:14-15 (Mr. Lamb's testimony). The Commonwealth has not merely postponed payment of principal and interest under the bonds. It has restructured the bonds into different instruments that National never agreed to insure. That is a composition of indebtedness. Neither *Ropico* nor *Assured* involved the unprecedented restructuring of secured interests, which both the Bankruptcy Code and PROMESA expressly protect. *See* 11 U.S.C. § 361 (adequate protection); PROMESA § 201(b)(1)(N). *Ropico* dealt with unsecured creditors complaining about a moratorium on debt payments. 425 F. Supp. at 983. But the harm to National is not a mere "proposal . . . to postpone payment." *Assured*, 2016 WL 5794715, at 7 (quoting *Ropico*, 425 F. Supp. at 982). The Commonwealth has fundamentally altered the debt in a manner that neither PROMESA nor the Bankruptcy Code permit.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth at the Hearing, National respectfully requests that the Court lift the stay for cause shown.

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 7th day of October, 2016.

WE HEREBY CERTIFY that on this same date the foregoing motion was filed with the Clerk of Court using the CM/ECF system, which will provide notice to all counsel of record.

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