Exhibit A

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 (FAB)

PLAINTIFF'S RESPONSE TO FINANCIAL OVERSIGHT AND MANAGEMENT BOARD'S OPPOSITION TO MOTION TO LIFT STAY

TO THE HONORABLE COURT:

COMES NOW Plaintiff National Public Finance Guarantee Corporation ("National"), by and through its undersigned counsel, and respectfully states and prays as follows:

ARGUMENT

National does not oppose—and in fact welcomes—the Oversight Board's intervention in this action. Under PROMESA, the Oversight Board has an important role to play in redressing the fiscal affairs of the Commonwealth and bringing issuers and creditors to the negotiating table. Indeed, National fully supports the Oversight Board's proposed information requirements, including (but not limited to) requiring the Commonwealth to account for the diverted funds, provide immediate and unfettered access to the Commonwealth's financial officials and advisors, and submit its payment guidelines and procedures. These measures are necessary in light of the grave lack of transparency exhibited by the Puerto Rico government and its instrumentalities.

National, however, respectfully disagrees with the Oversight Board's opposition to the lifting of the stay—a position that is premised on a misbalancing of relative harms—and with the

request that the Court delay its decision for another 30 days. The Court's decision has already been delayed by the Oversight Board's intervention, and only this Court—not the Oversight Board—can decide whether the Commonwealth's manipulation and mishandling of secured interests is constitutional. And only this Court can determine what lawful liens and priorities the Oversight Board must respect when it approves a fiscal plan under PROMESA. As such, the Oversight Board's suggestion that the stay continue while a fiscal plan is developed and negotiated with creditors ignores that by lifting the stay and determining lawful liens and priorities, the Court will help fulfill the spirit and purposes of PROMESA and provide a level playing field for all creditors. Moreover, the Commonwealth of Puerto Rico's self-inflicted harm based on "disruption" arising from litigation does not outweigh the irreparable harm to creditors whose constitutionally protected security interests have been illegally taken, and the Oversight Board has not cited any independent harm to itself.

I. ONLY THIS COURT CAN DETERMINE THE RIGHTS OF NONRECOURSE CREDITORS LIKE NATIONAL

A. Deciding the Constitutionality of the Commonwealth's Acts Is the Province of the Judiciary

By requesting the Court to deny lifting the stay so as not to "divert the attention of the Oversight Board and the Commonwealth away from the fiscal plan negotiation and certification process" (Dkt. No. 89, Ex. A, at 11), the Oversight Board effectively takes the position that the Constitution and laws of the United States can be suspended while the Commonwealth continues diverting the property of others in violation of the Constitution. *See id.* at 13 (siding with the Commonwealth's view that "even ***without resolution of the constitutional issues***, negotiations are possible" (emphasis added)). Although PROMESA provides a "breathing spell" for the Oversight Board and the Commonwealth to lay the groundwork for a fiscal plan and consensual

restructuring negotiations with creditors (*id.* at 12), it does not and cannot shield the Commonwealth's unconstitutional acts from judicial scrutiny.

Far from immunizing the Commonwealth, the framework enacted by Congress under PROMESA can only work if all stakeholders, including the Oversight Board, know what the law is. *See, e.g.*, PROMESA § 303(3) (expressly preempting "***unlawful*** executive orders" (emphasis added)). In fact, the Commonwealth conceded at the lift-stay hearing that creditors need to know the rules of the road before they can productively engage in restructuring negotiations under the auspices of the Oversight Board. *See* 9/23 Tr. at 131:1-9 (Commonwealth witness Elizabeth Abrams testifying that "knowing what the rules are gives the creditors the ability to sort of have faith in the negotiations and ultimately reach an agreement"). As such, continuation of the stay will not "help[] the Oversight Board begin its monumental tasks of negotiating fiscal plans and ensuring that Puerto Rico regains access to capital markets" (Dkt. No. 89, Ex. A, at 12) for the simple reason that creditors cannot "negotiat[e] fiscal plans" if they do not know what their rights are.

B. This Court Must Determine the Validity of Lawful Liens and Priorities in Order for the Oversight Board to Fulfill Its Role

More fundamentally, the Oversight Board's position overlooks PROMESA's requirement that any fiscal plan proposed by the Commonwealth and approved by the Oversight Board "respect the relative ***lawful*** priorities or ***lawful*** liens . . . in effect prior to [PROMESA's] enactment." PROMESA § 201(b)(1)(N) (emphases added). The Oversight Board must ensure that such fiscal plan complies with this directive. *See id.* § 201(c)(3) (providing that the Board "shall review any proposed Fiscal Plan to determine whether it satisfies the requirements set forth in subsection (b)" and "shall approve the proposed Fiscal Plan" that "satisfies such requirements"). Identifying which priorities and liens are "lawful"—the priorities and liens

under the relevant bond documents or the reshuffled priorities and lien stripping resulting from the Moratorium Act and the executive orders—is ***essential*** to the PROMESA process and, indeed, to the negotiation process. Only this Court can make that determination, and it cannot do so until the stay is lifted.

II. THE OVERSIGHT BOARD MISAPPREHENDS THE BALANCE OF THE HARMS

A. National's Harm Cannot Be Compensated After the Stay Ends

National's harm—the loss of pledged revenues securing the Puerto Rico Highways and Transportation Authority ("PRHTA") and the Puerto Rico Industrial, Tourist, Educational, Medical and Environmental Control Facilities Financial Authority ("AFICA") bonds it insures—cannot be compensated once the stay expires. The Oversight Board's contention that National is not suffering "irreparable or even material harm during the pendency of the stay" because "whatever damages [National] incur[s] would be quantifiable and could be dealt with as part of the negotiation process or in future restructuring proceedings under PROMESA" (Dkt. No. 89, Ex. A, at 1) is simply not true as a matter of the undisputed record and applicable law.

First, the diverted revenues are collateral for ***non***recourse bonds. Once the revenues are taken, bondholders have ***no recourse*** against PRHTA or AFICA for the loss of collateral. Even if they did, by the time the stay expires, the diverted funds will have been spent and will be forever lost to bondholders. In any event, given the dire state of the Commonwealth's finances, one cannot reasonably expect that the Commonwealth will find revenues to replace what it has diverted and spent. *See Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, No. 15-cv-3018, 2016 WL 1183091, at *3 (D.P.R. Mar. 28, 2016) (finding that the ability to seek a tax refund from "an insolvent government" was "worthless").

Second, the Commonwealth has no property interest in the diverted revenues. As National's expert, Robert Lamb, testified at the lift-stay hearing, the pledged revenues that secure

payment of the PRHTA and AFICA bonds "belong to the bondholders" and "don't belong to the Commonwealth." 9/22 Tr. at 79:12-15, 88:8-12. By diverting the PRHTA and AFICA pledged revenues, ***each month*** the Commonwealth is taking $11 million in funds that belong to others. *Id.* at 100:3-6, 102:16-20; *see Wal-Mart P.R.*, 2016 WL 1183091, at *1 ("[W]e agree wholeheartedly with the conclusion reached by one of the expert witnesses at the hearing we held: '[A]t the end of the day, the Commonwealth should not rely on revenue that it's not entitled to, to try to pay for essential services.'").

Third, the Oversight Board does not dispute that the failure to provide adequate protection constitutes irreparable harm requiring lifting of the stay. *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 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)); *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).

B. The Oversight Board Overstates the Commonwealth's Harms

Having minimized National's harms—and not identifying any harm that the Oversight Board itself might suffer from lifting the stay—the Oversight Board appears to adopt the Commonwealth's position that lifting the stay would cause "significant expense to the Commonwealth and a burdensome distraction to the Governor and other public officials." Dkt. No. 89, Ex. A, at 1-2. While the Board recognizes that such predictions may just be hot air, *see*

id. at 2 (noting that "it is possible that the dire consequences predicted by the Commonwealth if the stay were lifted and the Moratorium Act and Executive Order were struck down might not materialize"), the Oversight Board still concludes, without much elaboration, that "the uncertainty and the magnitude of the potential disruption" favor a continuation of the stay. *Id.* But the only testimony submitted at the lift-stay hearing on this topic confirms that the Board is right to question whether the "dire consequences" will ever materialize. *See* 9/23 Tr. at 28:11-13 (Dr. Carlos Colón de Armas testifying that the Commonwealth "has the revenues to cover essential services and pay its debt commitments"). And any such "disruption" would completely disappear if the Commonwealth simply ended its illegal conduct. Given the limited consequences to the Commonwealth, and the self-inflicted nature of the purported disruption, the Court should find that the balance of harms favors lifting the stay.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Plaintiff's Post-Hearing Brief (Dkt. No. 75), National respectfully requests that the Court lift the stay for cause shown.

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 28th day of October, 2016.

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

ADSUAR MUÑIZ GOYCO
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