IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

U.S. Bank Trust National Association, as Trustee, Plaintiff, v. The Commonwealth of Puerto Rico, *et al.*, Defendants.	:	Civil No. 16-2510 (FAB)

PLAINTIFF'S POST-HEARING MEMORANDUM OF LAW

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Preliminary Statement

As the Court observed during opening statements (9/22 Tr. 24), U.S. Bank's case is "a little bit different" from the three other consolidated cases.[1] Two differences are crucial:

- U.S. Bank (the "Trustee") faces harm more imminent and severe than that faced by any other creditor: the diversion and dissipation, over the four months that remain before the PROMESA stay expires, of substantially all of its collateral for the fiscal year.

- The Trustee's borrower, the University of Puerto Rico, would suffer no genuine harm from the limited relief the Trustee seeks: an order lifting the stay and requiring UPR to transfer to the Trustee tuition and fees amounting to 2% of UPR's budget, as required by the Trust Agreement.

The evidence at the hearing established the facts that require lifting the stay in favor of the Trustee.

UPR has taken, and over the next four months will take, substantially all of the hard collateral – tuition and fees – pledged to the Trustee for this academic and fiscal year. This will deplete the Trustee's Reserve Account to less than $12 million by June 1 and to zero by December 1, 2017.

None of the after-the-fact remedies provided by the Moratorium Act or PROMESA are sufficient.

UPR has sufficient resources to pay the amounts in question without impairing its ability to provide essential services or, indeed, to satisfy its financial obligations in full.

Defendants dispute none of these facts. Their sole response is: "You have a reserve fund – use it."

[1] Capitalized terms not defined herein have the meanings given them in the Trustee's initial memorandum of law, dated August 19, 2016 [ECF No. 3] ("Moving Br."), in support of its motion [ECF No. 2] (the "Motion").

This response cannot stand. The only competent evidence in the record is testimony that the Reserve Account is an integral part of the Trustee's bargain with UPR, and its depletion irreparably harms UPR Bondholders. To avert this harm, both relief from the stay and a preliminary injunction directing transfer of pledged revenues to the Trustee are needed. Deferring injunctive relief to a second hearing would only allow Defendants to continue their unlawful expropriation of the Trustee's collateral until they have taken all tuition and fees for the current academic year.

Finally, Defendants do not contest the Trustee's request for ancillary stay relief to disburse the funds it is holding in the Reserve Account as permitted by the Trust Agreement and the Moratorium Act – indeed, Defendants' argument ("use your reserve fund") assumes the Trustee will disburse these funds. This relief should be granted as well.

ARGUMENT

I. Cause Exists to Lift the PROMESA Stay to Permit Entry of a Preliminary Injunction

A. The Governing Legal Standard

The standard for relief from the stay is "cause." PROMESA § 405(e). Defendants' expropriation of its collateral without adequate protection constitutes "cause" under the statute and, indeed, under the Fifth Amendment.

Defendants have argued that the Court "shouldn't consider lack of adequate protection" in determining whether cause exists to grant relief from the PROMESA stay, 9/22 Tr. 58, because PROMESA § 405(e), unlike Bankruptcy Code § 362, does not expressly state that "cause" includes lack of adequate protection. This argument is devoid of merit.

Most fundamentally, the Trustee's interest in collateral is protected by the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40, 48 (1960). The Fifth Amendment needs

no reference to "adequate protection" to apply. If expropriation of the Trustee's collateral in violation of the Fifth Amendment did not constitute "cause" for relief from the stay, PROMESA § 405 itself would be unconstitutional. *See United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

It matters not that PROMESA § 405(e) contains no explicit reference to "adequate protection." The concept of adequate protection is in the Bankruptcy Code not as a gift from Congress but as a reflection of Fifth Amendment rights. *In re Timbers of Inwood Forest Associates, Ltd.*, 793 F.2d 1380, 1390 (5th Cir. 1986), *aff'd*, 484 U.S. 365 (1988); *see also* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 339 (1977) (the concept of adequate protection "is derived from the Fifth Amendment protection of property interests"), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6295. Thus PROMESA § 405(e)'s simple standard of "cause" must include adequate protection.

This is confirmed by the express language of PROMESA § 405(g), which provides:

> Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (b) as is necessary to prevent *irreparable damage* to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (e) or (f).

PROMESA § 405(g) (emphasis added.)

Depriving a secured creditor of its collateral without adequate protection, such as a court order requiring replacement collateral, has long been held to constitute irreparable damage. *See, e.g.*, *In re Oakdale Assocs*., No. 78 B 2461, 1979 Bankr. LEXIS 726, at *15-16 (Bankr. E.D.N.Y Nov. 28, 1979) (lifting Bankruptcy Act stay on ground that decrease in collateral would "irreparably harm[] [secured creditor] if the stay is not vacated"); *see also* Moving Br. 11-12 (collecting Bankruptcy Code cases).

If irreparable damage from the taking of collateral requires stay relief even without notice and a hearing under PROMESA § 405(g), it follows that the taking of collateral warrants stay relief after notice and a hearing under PROMESA § 405(e). The House Report for PROMESA recognizes this point: "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." H.R. Rep. No. 114-602, 114th Cong., 2d Sess. at 51 (2016).

Notably, the United States Department of Justice, in its recently-filed brief in these cases, argues generally for a narrow construction of "cause" under PROMESA § 405, but at the same time recognizes that "irreparable damage" constitutes cause to lift the PROMESA stay. DOJ Br. 1, 8 (citing PROMESA § 405(g)).

Finally, even without "irreparable damage," the manifest illegality of Defendants' diversion of collateral would constitute "cause." As the Court observed, PROMESA "preempts unlawful executive orders that alter, amend or modify the [rights of] holders of debt, or that divert funds from one instrumentality to another or to the territory." 9/22 Tr. 39, quoting DOJ Br. at 7; *see also* PROMESA § 303(3). The need to remedy such unlawful acts constitutes "cause" under Section 405(e).

B. A Continuation of the Stay Would Irreparably Harm the Trustee and the UPR Bondholders, Leaving Them with No Effective Remedy for the Taking of Their Collateral

The evidence establishing each of the following facts is uncontroverted:

- The UPR Bonds are secured by UPR revenues, including student tuition and fees. UPR is required to transfer all such Pledged Revenues to the Trustee to hold as collateral for the UPR Bonds. USB Exhibit 5 (Trust Agreement) §§ 101, 503.

- Since June 2016, UPR has not transferred any Pledged Revenues to the Trustee. As a consequence, the Bond Service Account currently has a

balance of zero – $32 million less than its current required balance. 9/22 Tr. 147-48.

- UPR receives a large portion of its annual tuition and fee revenues in September and October, and most of the rest in January and February. Consequently, by February 2017 UPR will have diverted and expropriated substantially all this fiscal year's tuition and fees. *See* Moving Br. at 7 (citing to published UPR tuition due dates). This will deplete the Trustee's Reserve Account to less than $12 million by June 1 and to zero by December 1, 2017. 9/22 Tr. 149-50.

- Once the Trustee's collateral has been diverted, it is gone forever. The after-the-fact relief offered by the Moratorium Act – an unsecured second-priority claim against the Commonwealth under Moratorium Act § 201(b) – is grossly inadequate, given the Commonwealth's asserted and adjudged inability to pay even its first-priority general obligation bonds.[2]

Defendants do not dispute any of these facts, which collectively demonstrate cause to lift the stay. Instead, Defendants have responded with three arguments:

- "Use your reserve account";
- "You have remedies under PROMESA"; and
- "Post-June 30 bond prices show you're not damaged."

None of these arguments have merit.

1. Defendants' depletion of the Reserve Account irreparably harms UPR Bondholders

Defendants contend that the Trustee and the UPR Bondholders do not face irreparable harm because the Reserve Account for the UPR Bonds holds funds sufficient to pay the bonds' debt service through December 2017.

But a payment default is not the only type of irreparable harm a secured creditor can suffer. The taking of a secured creditor's collateral – here, the funds that should have been

[2] *See* P.R. Const. art. VI, § 8; USB Exhibit 1 (Executive Order OE-2016-030) at 1 (Commonwealth "will have insufficient funds to make the total debt service payments on the Public Debt . . . due on July 1, 2016"); *see also Wal-Mart P.R. Inc. v. Zaragoza-Gómez*, No. 15-CV-03018, 2016 WL 1183091, at *1 (D.P.R. Mar. 28, 2016) ("*Wal-Mart*") (finding that the Commonwealth is already "insolvent"), *aff'd*, 2016 WL 4447261 (1st Cir. Aug. 24, 2016).

transferred into the Bond Service Account (which now has a zero balance) and those that, because of UPR's breaches, will have to be paid out of the Reserve Account – also constitutes irreparable harm, unless adequate protection is provided. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) (creditors secured by valid liens on property are entitled to adequate protection if their interests in property are diminished or impaired in any way). As noted above, this right is constitutional as well as statutory. *In re Timbers of Inwood Forest Associates, Ltd.*, 793 F.2d at 1390.[3]

Defendants suggest that UPR will resume transferring Pledged Revenues to the Trustee when the stay expires, but Defendants offer no assurance – such as a stipulated order of this Court, as would be entered in a bankruptcy case,[4] and as the Fifth Amendment-based concept of "adequate protection" requires – that this will in fact happen.

The reality, not denied by Defendants, is that their expropriation of pledged tuition and fees will deplete the Trustee's Reserve Account – an account that, as Robert Lamb testified, is an integral part of the Trustee's bargain with UPR. *See* 9/22 Tr. 109-10 (reserve funds enhance the marketability of revenue bonds, such as the UPR Bonds); *id.* at 111-13 (depletion of such funds harms bondholders).[5]

[3] At bottom, Defendants ignore that any use of the Trustee's collateral "results in a dollar-for-dollar reduction in the value of that collateral." *In re Putnal*, 483 B.R. 799, 805 (Bankr. M.D. Ga. 2012) , *aff'd*, 489 B.R. 285 (M.D. Ga. 2013); *see also In re Builders Grp. & Dev. Corp.*, 502 B.R. 95, 122 (Bankr. D.P.R. 2013). As the Jefferson County bankruptcy court recognized, a lien on revenues is not adequately protected from the debtor's use of such revenues by a lien on future revenues, when the lender is already entitled to future revenues. *In re Jefferson Cty*., 474 B.R. 228, 272 (Bankr. N.D. Ala. 2012), *aff'd*, No. 11-05736, 2012 WL 3775758 (N.D. Ala. Aug. 28, 2012).

[4] *See* Bankruptcy Code § 363(c)(2) & (e); *see also Comerica Bank v. Noble Int'l Ltd.*, 424 B.R. 760, 765 (E.D. Mich. 2010) (Bankruptcy Code forbids non-consensual use of cash collateral without adequate protection).

[5] Indeed, Mr. Lamb testified, Defendants' repudiation of their promises to secured bondholders will impair the ability of the Commonwealth and its instrumentalities to raise capital, 9/22 Tr. at 106-07, and will "probably affect[] [the] greater municipal market," *id*. at 106.

2. PROMESA's after-the-fact remedies provide little protection for the taking of the Trustee's collateral

Defendants argue that relief from the stay is unnecessary because PROMESA's other remedies would adequately protect the Trustee's rights. 9/22 Tr. 59-60. In fact, those after-the-fact remedies provide little if any protection.

Section 405(k) provides that the Trustee's claim and lien will be preserved rather than discharged. But preservation of the Trustee's lien means nothing if Defendants are allowed to divert collateral from the lien and dissipate it.

Section 407 gives the Trustee a potential damages claim against recipients of unlawfully transferred collateral, but this is nothing more than a lawsuit. "[A] lawsuit is too speculative in nature to offer adequate protection" to creditors. *Rocco v. J.P. Morgan Chase Bank*, 255 F. App'x 638, 641 (3d Cir. 2007); *see also In re Turner*, 326 B.R. 563, 577-78 (Bankr. W.D. Pa. 2005) ("[L]itigation is highly speculative. It is uncertain when and at what pace the litigation will proceed and what the outcome will be."). This is particularly true when, as here, the collateral in question is *cash* (i.e., tuition and fees):

> The use of [the secured creditor's] cash collateral . . . expose[s the creditor] to a decrease in the value of its interests and a present risk of impairment of its ability to realize on the value of its collateral package. To compel a secured creditor to accept such risks on the basis of rights to pursue a [lawsuit against a] guarantor, is to shift the hazards and the cost of the rehabilitation effort from the debtor to the secured creditor. Such a proposition is not within the contours of the concept of adequate protection embodied in the [Bankruptcy] Code.

In re Kenny Kar Leasing, Inc., 5 B.R. 304, 309 (Bankr. C.D. Cal. 1980).

The Oversight Board's power under PROMESA § 204(c)(3) to "rescind" unlawful actions of the Commonwealth and its instrumentalities similarly fails to provide adequate protection for the diversion of the Trustee's collateral. At bottom, the power to rescind is nothing more than the power to bring a lawsuit against a transferee of diverted assets.

3. Dr. Arnold's deeply flawed trading prices analysis does not negate harm to the UPR Bonds

Defendants presented the opinion of Dr. Jonathan Arnold, a professional expert witness, that, "as a matter of economics," the UPR Bondholders "aren't suffering short term irreparable harm because of the PROMESA stay." 9/23 Tr. 204-05. He based this opinion solely on his review of the UPR Bonds' trading prices – in particular, that they dropped sharply right after the Governor's June 29, 2015 announcement that the Commonwealth's debts were unpayable but thereafter remained at roughly the same level up to the present. *Id.* at 204-09.

Dr. Arnold's testimony was a surprise, in violation of the Court's order (pursuant to Local Rule 16(d)(7)) directing the parties to disclose the subject matter of their witnesses' testimony. Plaintiffs objected to Dr. Arnold's testimony on this ground, which deprived them of the ability to respond. *See* 9/23 Tr. 193-96. Apart from the lack of notice, Dr. Arnold's testimony was substantively defective for multiple reasons.

Most fundamentally, bond trading prices are not competent evidence to refute proof of actual harm to bondholder rights, such as the taking of their collateral. Otherwise, a bondholder's constitutionally-protected right to adequate protection could be defeated based on market movements. This would make no sense. For one thing, trading prices reflect the market's judgment as to whether the Trustee will win or lose its suit to remedy the harm; consequently, trading prices will not drop if the market expects the court to remedy defendant's misconduct.[6] To our knowledge, no court has ever determined secured bondholders' right to adequate protection based on the trading prices of the bonds themselves.

[6] *Cf. In re Johnson*, 90 B.R. 973, 978-79 & n. 2 (Bankr. D. Minn. 1988) (bank's motion to force sale of pledged stock itself depressed price of the stock and therefore would not be considered as evidence in favor of the bank).

In any event, even on its own terms, Dr. Arnold's trading price analysis was woefully deficient. Most obviously, the failure of UPR Bonds to decline after June 2016 means nothing because, as Dr. Arnold himself observed, the UPR Bonds' price had already plummeted in response to the Governor's June 2015 announcement that Puerto Rico would not be able to make full payment on its bond obligations. 9/23 Tr. 206, 210.[7] The bonds' failure to decline even further when Defendants fulfilled their threats is of no probative value. *See FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011) ("Confirmatory information – or information already known by the market – will not cause a change in the stock price . . . because the market has already digested that information and incorporated it into the price."). Having depressed the trading value of the UPR Bonds by the *threat* of default, Defendants cannot defend their *actual* default on the ground that it failed to drive trading prices lower still.

Moreover, the Executive Orders were not the only event of June 30, 2016 that affected bond prices. Another event – more important than the Executive Orders – was the simultaneous

[7] Reports of the Governor's announcement, as well as the Commonwealth's public filing the next day, made clear that the government intended to seek to restructure the debts of the instrumentalities, as well as those of the Commonwealth itself. *See, e.g.*, Michael Corkery & Mary Williams Walsh, Puerto Rico's Governor Says Island's Debts Are 'Not Payable,' N.Y. Times, June 29, 2015, at A1 (Governor Padilla said that "[t]he debt is not payable" and that he and his advisors "would probably seek significant concessions from as many as *all of the island's creditors*") (emphasis added), *available at* http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html; *see also* Electronic Municipal Market Access ("EMMA"), Commonwealth of Puerto Rico, Government Development Bank for Puerto Rico, Commonwealth of Puerto Rico Supplement Dated June 30, 2015 to Quarterly Report Dated May 7, 2015 (Puerto Rico Fiscal and Economic Recovery Working Group directed to "require the adjustment of the aggregate debt load of the Commonwealth *and its instrumentalities* so that such debt can be repaid in sustainable terms") (emphasis added), *available at* http://emma.msrb.org/ContinuingDisclosureView/ContinuingDisclosureDetails.aspx?submissionId=ER716305.

Immediately following these announcements, Standard & Poors downgraded the UPR Bonds. *See* EMMA, Commonwealth of Puerto Rico, Government Development Bank for Puerto Rico, Rating Change: University of Puerto Rico, June 30, 2015 (informing UPR bondholders of S&P's downgrade of UPR Bonds to CCC-), *available at* http://emma.msrb.org/ER900784-ER704202-ER1105859.pdf.

Concurrently with the filing of this brief, the Trustee is filing a motion for leave to reopen the record of the hearing for the sole purpose of presenting the documents cited in this footnote, plus evidence of the UPR Bonds' trading volume as discussed below, in response to Dr. Arnold's surprise trading price testimony. The documents just cited are annexed as Exhibits A-C to the declaration of Philip Bentley, dated October 7, 2016 ("Bentley Decl."), filed in connection with the motion for leave to reopen the record.

passage of PROMESA, which promised fair treatment of bondholders. As a result, the behavior of bond prices after June 30 reflects not so much the market's reaction to any particular Commonwealth action as the market's judgment as to how likely this Court (or the Oversight Board) is to enforce bondholder rights under the superior federal statute. If the market believes the Court will remedy the unlawful diversion of collateral, then this diversion should not depress bond prices even if it temporarily harms bondholders.

Finally, Dr. Arnold failed to provide necessary foundation for his opinion. He assumed that the market for UPR bonds is efficient, and hence that market prices are probative evidence of harm to bondholders. But he did not consider, let alone establish, *any* of the factors necessary to prove the market's efficiency, including "a substantial average weekly trading volume." *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989); *see also Keeffe v. Citizens & N. Bank*, 808 F.2d 246, 250 (3d Cir. 1986) ("market value should not be taken into account when the stock in question is too thinly traded, or where the market for the stock is not dependable") (citations omitted).[8]

A bond market is presumed to be efficient if weekly trading volume exceeds 1% of the outstanding bonds. *In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 366 (S.D.N.Y. 2016); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 634 (N.D. Ala. 2009). Had Dr. Arnold reviewed the UPR Bonds' weekly trading volume, he would have found that, from June 30, 2016 to the

[8] Other factors considered by courts to determine market efficiency include (1) a significant number of securities analysts who follow and report on a company's stock, (2) the existence of numerous market makers for the stock, and (3) the company's entitlement to file an S–3 Registration Statement in connection with its public offerings. *Cammer*, 711 F. Supp. at 1286-87. Dr. Arnold did not even mention these factors, let alone attempt to apply them to the market for UPR Bonds.

Nor did Dr. Arnold take into account UPR's failure to file timely audited financial statements (*see* USB Exh. 10, UPR's six-months-late 2015 financial statements). If UPR were a private sector issuer, this failure would render it ineligible to file an S-3 Registration Statement (factor # 3). *See* Form S-3, General Instr. I.A.3(b).

present, it has averaged *0.2%* – one-fifth the minimum volume required to support a presumption of market efficiency.[9]

Separately, Dr. Arnold offered brief testimony purporting to show that Plaintiffs will suffer no "long term economic harm" from the stay. 9/23 Tr. at 216-22. However, he based his unsupported and (somewhat odd) opinion entirely on the *Commonwealth*'s financial condition;[10] he offered no opinion as to *UPR*'s finances. 9/23 Tr. at 248-50.

For each of these reasons, Dr. Arnold's opinion is not entitled to any weight.

C. The Requested Relief Will Not Harm UPR

As the Motion made clear, the relief requested by the Trustee is narrowly crafted: a lift-stay order and injunction requiring UPR to transfer tuition and fees amounting to only 2% of UPR's budget to the Trustee as required by the Trust Agreement. *See* 9/22 Tr. 146-48 (Bond Service Account is underfunded by $32 million); USB Exhibit 12 at 4 (annual expenditures under UPR's Approved Fiscal Budget 2016-2017 total $1.408 billion).

Defendants have not argued, let alone presented any evidence, that UPR's payment of these modest amounts will impair its ability to pay for essential services, or indeed to satisfy its financial obligations in full. Defendants do not contend that UPR is currently unable to pay its debts as they come due, nor do they anticipate that UPR will be unable to pay its debts at any

[9] Because it is Dr. Arnold's burden to establish the efficiency of the market for UPR Bonds, his failure to consider the relevant factors renders his opinion worthless, and the Trustee need not present any evidence in response. Nevertheless, as noted in fn. 7 above, the Trustee is concurrently filing a motion to reopen the record of the hearing to present limited documentary evidence in response to Dr. Arnold's testimony on this topic. As evidence of the UPR Bonds' trading volume, we ask leave to present Bloomberg trading data for the period June 30, 2016 through September 30, 2016, plus a summary of this data pursuant to Fed. R. Evid. 1006. *See* Bentley Decl., Exhs. D & E. This data shows that the UPR bonds had an average weekly trading volume of approximately $875,230 during this 13-week period, *see id.*, which comprises 0.2% of the $431,790,000 in outstanding UPR Bonds, *see* 9/22 Tr. 149.

[10] Dr. Arnold's sole basis for his opinion on long-term harm is his reading of the Treasury Secretary's June 30, 2016 letter to the Governor (Defs. Exh. 15) – which he interpreted (oddly) as showing that the Commonwealth's pre-debt service 2017 budget is "roughly in balance." 9/23 Tr. at 248-50. In his view, this justified delaying payment to bondholders. According to Dr. Arnold, the healthier the Commonwealth's budget and the greater its ability to pay, the less cause bondholders would have to require payment.

point during this fiscal year. 9/23 Tr. 162-63. Defendants' restructuring advisor, Elizabeth Abrams of Millstein & Co., testified, "I think UPR has . . . reserves. So its debts are going to continue to be paid out of the reserves in any case." *Id*. at 163.[11]

Consequently, the concern expressed by Defendants and by the Department of Justice for continued funding of "essential services for the health, safety, and welfare of the inhabitants of Puerto Rico" (DOJ Br. 6) has no application to this case. It is undisputed that UPR has more than enough cash to pay for all budgeted services for the balance of the fiscal year.[12] Moreover, UPR is disbursing cash to parties other than its bondholders as if it has money to burn.[13]

Defendants contend that an order lifting the stay in favor of any party will only invite further lift stay requests and further litigation. 9/22 Tr. 65. However, the stay itself expires in February, only four months from now.[14] Only those plaintiffs – such as the Trustee – who can prove harm from so short a stay will have cause to litigate. This Court can manage any further

[11] On cross-examination, when reminded of Ms. Abrams' testimony on this point, Dr. Arnold admitted he has no basis to opine that UPR would suffer any financial harm from an order requiring it to transfer pledged collateral to the Trustee as required by the Trust Agreement. 9/23 Tr. 258-60.

[12] Defendants have not contended – and should not be heard to contend – that, even though UPR's budget is fully funded, the Court should allow UPR to take the Trustee's collateral to enable the Commonwealth to reduce its funding to UPR by a corresponding amount. Defendants have presented no evidence that any such potential funding cuts are under consideration. 9/23 Tr. 162.

[13] UPR has access to more than $100 million of assets in its medical school's "top hat" retirement plan. *See* USB Exhibit 10 (UPR financial statements for the year ended 6/30/15, issued Sept. 9, 2016) at 32, 67. As UPR's financial statements disclose, those assets belong to UPR and, upon UPR's insolvency, are available to pay its creditors – yet UPR is currently attempting to terminate that plan and distribute the entire $100 million in assets to its most highly compensated employees, hardly the conduct of a cash-strapped institution. *Id.*; *see also* 9/23 Tr. 163-69; Complaint, *Voya Institutional Trust Co. v. Univ. of P.R., et al*., No. 16-cv-2519 (FAB) (D.P.R. Aug. 22, 2016) ECF No. 1; Plaintiff's Mem. in Opp. to Defs.' Motions to Dismiss, *Voya*, No. 16-cv-2519 (FAB) (Sept. 26, 2016) ECF No. 18.

[14] PROMESA § 405(d)(1) provides that the stay expires on February 15, 2017 unless UPR has commenced a Title VI restructuring case. But a Title VI case (unlike one under Title III) is premised on creditor consent; consequently, such a case – and the resulting stay extension – will only happen if a supermajority of the UPR Bonds has agreed. PROMESA § 601(j). In addition, a Title VI case would require a determination by the Oversight Board (which only last week retained a search firm to identify candidates for executive director and general counsel) that the amount of debt to be borne by UPR is sustainable. PROMESA § 405(d)(1). Neither condition to commencement of a Title VI case is likely to be fulfilled by February 15, 2017.

stay litigation so that those facing immediate harm can obtain the relief promised by Section 405(e) and those who do not can wait until the stay expires.

Defendants should not be permitted to use PROMESA to shield their own unlawful conduct from judicial review. PROMESA made this Court the umpire to call balls and strikes. The restructuring process – and the rule of law – will benefit from this Court fulfilling the role that Congress asked it to play.

II. Defendants Do Not Oppose Stay Relief to Permit the Application of Funds in the Trustee's Possession

As the Trustee's moving brief noted, the Moratorium Act permits the Trustee to disburse the funds it is holding in the Reserve Account in accordance with the Trust Agreement. Moving Br. 23-24.[15] Neither the Commonwealth nor UPR has objected to the Trustee's request for such stay relief; to the contrary, Defendants' "use your reserve fund" argument *assumes* the Trustee will disburse these funds. Accordingly, the Trustee respectfully requests entry of an order lifting the stay to permit the Trustee to disburse these funds.

III. The Factual Record Establishing Cause to Lift the Stay Also Supports the Prompt Issuance of a Preliminary Injunction

As shown in the Trustee's moving brief, the same facts that warrant a lifting of the stay also show the need for a preliminary injunction requiring Defendants to transfer pledged tuition and fees to the Trustee during the pendency of this case. *See* Moving Br. 14-22. Adjudication of the Trustee's preliminary injunction application therefore does not require a duplicative and unnecessary second hearing. Such a hearing would only allow Defendants to continue the expropriation of collateral that justified relief from the stay, further prejudicing the Trustee.

[15] The Trust Agreement provides for the Trustee to disburse funds in the Sinking Fund (comprised of the Reserve Account and Bond Service Account), first, to pay the Trustee's expenses, including legal fees, and second, to pay interest and principal on the UPR Bonds. *See* USB Exhibit 5 at §§ 503, 902, 905.

The Trustee therefore requests that, if the Court finds that the facts and law warrant such relief, the Court enter a preliminary injunction, as requested in the Motion, in addition to an order granting relief from the PROMESA stay.

Conclusion

Executive Order 31's diversion and confiscation of revenues pledged to the Trustee is the clearest type of Fifth Amendment violation:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure.

Armstrong v. United States, 364 U.S. 40, 48 (1960).

No justification is advanced, and none would be sufficient:

> [The] Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation.

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935).

The Trustee therefore requests entry of an order, in the form attached to the Motion and re-attached hereto, (i) granting relief from the PROMESA stay to permit entry of a preliminary injunction; (ii) requiring the Defendants to transfer pledged tuition and revenues to the Trustee, to the extent necessary to satisfy the Bond Service Account Requirement and the Reserve Account Requirement, subject to reversion to the extent required by any final judgment in this case; and (iii) lifting the stay to permit the Trustee to disburse the funds it is holding in the Reserve Account in accordance with the Trust Agreement.

Should the Court determine that a subsequent hearing is necessary on the Trustee's request for a preliminary injunction, we respectfully request that the Court schedule such a hearing promptly to minimize further prejudice the Trustee.

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 notify the attorneys of record.

RESPECTFULLY SUBMITTED,
In San Juan, Puerto Rico, today October 7, 2016.

INDIANO & WILLIAMS, P.S.C.

/s/ David C. Indiano
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