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

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, Debtor.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY, Debtor.	PROMESA Title III No. 17 BK 3567-LTS

URGENT MOTION FOR BRIDGE ORDER, AND MOTION FOR APPOINTMENT AS TRUSTEES UNDER 11 U.S.C. § 926, OF AMBAC ASSURANCE CORPORATION, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., FINANCIAL GUARANTY INSURANCE COMPANY, AND NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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Ambac Assurance Corporation ("Ambac"), Assured Guaranty Corp., Assured Guaranty Municipal Corp. (together, "Assured"), Financial Guaranty Insurance Company ("FGIC"), and National Public Finance Guarantee Corporation ("National") (collectively, "Movants"), secured creditors of the Puerto Rico Highways and Transportation Authority ("HTA") through their insurance of secured revenue bonds (the "HTA Bonds"), respectfully move the Court for entry of an order, substantially in the form attached as Exhibit B (the "Proposed Order"), appointing them as trustees under Section 926 of Title 11 of the United States Code (the "Bankruptcy Code") to pursue the claims attached in Exhibit C (the "Proposed Complaint") on behalf of HTA against the Commonwealth of Puerto Rico (the "Commonwealth") (the "HTA 926 Motion").

While the HTA 926 Motion is pending, Movants also respectfully request, on an urgent basis, the entry of a bridge order substantially in the form attached as Exhibit A ("Proposed Bridge Order").[2] The Government Parties have indicated they will oppose this urgent relief.

PRELIMINARY STATEMENT

1. Debtor HTA, a public corporation distinct from the Commonwealth, was established to provide the people of Puerto Rico with roads and means of transportation, improve movement of traffic, and clear roadways of hazards. To finance this critical infrastructure, HTA was assigned its own streams of revenues, including Toll Revenues and Excise Taxes (as defined below), which HTA then pledged as security so that it could issue the HTA Bonds. Now, however, an ongoing scheme by the Commonwealth government and the Financial Oversight and Management Board for Puerto Rico ("FOMB") has devastated HTA's finances. Through unlawful Commonwealth legislation and executive orders that are expressly preempted by Section 303 of

[2] With the exceptions of Exhibit A (the Proposed Bridge Order), Exhibit B (the Proposed Order), and Exhibit C (the Proposed Complaint), which are attached to this Motion, all other references to Exhibits refer to those attached to the *Declaration of William J. Natbony in Support of Motion for Appointment as Trustees under 11 U.S.C. § 926 of Ambac Assurance Corporation, Assured Guaranty Corp., Assured Guaranty Municipal Corp., Financial Guaranty Insurance Company, and National Public Finance Guarantee Corporation* ("Mot. Decl."), filed contemporaneously.

the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), as well as various purported fiscal plans and budgets that likewise violate PROMESA and other binding law, FOMB and the Commonwealth have destroyed HTA's financial health. These efforts to strip HTA of its property and divert HTA's revenues to Commonwealth coffers have rendered the corporation little more than an insolvent, empty shell—unable to pay its debt service, maintain the island's infrastructure, or even fund its own operations in the absence of future largesse from the Commonwealth that may never come.

2. No responsible steward of a public corporation would ever allow the destruction and divestment that has befallen HTA, whose operations have been crippled and whose access to the capital markets may never recover. Yet FOMB, as HTA's representative, has done just that, overseeing the unlawful diversion of HTA's resources *to the Commonwealth, which FOMB also represents*. This Motion aims to remove that untenable conflict of interest and restore HTA's property, for the benefit of HTA's Bondholders and all who rely on the highways and infrastructure that HTA builds and maintains.

3. Specifically, Movants respectfully ask the Court to appoint them as co-trustees under 11 U.S.C. § 926 to pursue avoidance claims on behalf of HTA against the Commonwealth under 11 U.S.C. §§ 548, 549 and 544. To the extent this Court's recent ruling on the HTA lift-stay motion found that the lift-stay movants failed to establish in that context HTA's ownership of Excise Taxes that were diverted to the Commonwealth,[3] Movants disagree with that ruling and are hopeful it will be reversed on appeal. Movants thus submit this HTA 926 Motion now to preserve their rights under Section 926; waiting for a reversal would risk running afoul of (i) this Court's deadline to file Section 926 motions, and (ii) the statute of limitations for HTA avoidance actions.

[3] *Opinion and Order in Connection with Preliminary Hearing* 27–28, ECF No. 13541 ("[T]he HTA Movants have not demonstrated a legal basis for their assertion that Fund 278 monies are actually owned by HTA.").

4. Indeed, as matters stand, the statute of limitations for HTA to bring avoidance actions will expire on or around August 14, 2020. See infra ¶ 30. To maintain the status quo and prevent irreparable harm to HTA and its Bondholders in the likely event this Motion and any related appeals cannot be finally resolved before that date, Movants respectfully request that the Court immediately grant the following emergency relief (the "Emergency Relief"): Movants shall be preliminarily appointed as co-trustees for HTA and authorized to file a complaint substantially in the form of the Proposed Complaint commencing an avoidance action (the "HTA Avoidance Action") on HTA's behalf on or before August 14, 2020, but under the conditions that (i) the HTA Avoidance Action shall be immediately stayed pending the appointment of Movants as co-trustees on a permanent basis, including following any successful appeal of an order of this Court denying the HTA 926 Motion; and (ii) alternatively, in the event any order of this Court denying the HTA 926 Motion becomes final and un-appealable, including following any grant or denial of a request for a writ of certiorari to the United States Supreme Court, the HTA Avoidance Action shall automatically be dismissed with prejudice. See Ex. A (Proposed Bridge Order). A grant of this Emergency Relief is eminently equitable, because it will preserve the status quo while the HTA 926 Motion is finally resolved and, in the meantime, will not require any parties to expend resources on prosecuting or defending the HTA Avoidance Action. To further conserve legal and judicial resources, the merits of this HTA 926 Motion could then be heard at the September 23, 2020 hearing on FOMB's motion for partial summary judgment that is pending in Adversary Proceeding No. 20-00005 (the "HTA Summary Judgment Motion").[4]

5. Resolution of the merits is necessary to address FOMB and the Commonwealth's ongoing scheme to strip HTA of its property. Pointedly, FOMB, notwithstanding its fiduciary

[4] *Motion of the Commonwealth of Puerto Rico, by and through the Financial Oversight and Management Board, Pursuant to Bankruptcy Rule 7056 for Partial Summary Judgment,* Adv. Proc. No. 20-00005-LTS, ECF No. 55.

obligations to HTA, has refused to support on HTA's behalf the reversal of the Court's lift-stay ruling in regards to HTA's property interest, or bring on HTA's behalf the avoidance claims against the Commonwealth that would be necessary to preserve HTA's property interests. This comes as no surprise, given that the pursuit of such claims would not only require that FOMB reveal the misappropriation of HTA's funds that has continued to take place on its watch, but also lay bare FOMB's inability to overcome the intractable conflict in which it operates, given its simultaneous representation of both HTA and the Commonwealth in these Title III cases.

6. Where, as here, a conflict of interest disables the debtor or its representative from faithfully representing the estate by pursuing claims on its behalf, Section 926 of the Bankruptcy Code provides a remedy. From events that have already transpired in these cases, FOMB clearly understands the importance of each individual debtor's having independent representation when the Commonwealth and its instrumentalities possess adverse interests. When in the throes of an irreconcilable dispute between the Puerto Rico Sales Tax Financing Corporation ("COFINA") and the Commonwealth—both of which were Title III Debtors represented by FOMB—FOMB ultimately requested the appointment of an independent representative for each of COFINA (Bettina M. Whyte, who was selected by COFINA creditors) and the Commonwealth (the official committee of unsecured creditors) so that each independent Title III Debtor would have loyal representatives and advisors. See Adv. Proc. No. 17-03283-LTS, ECF No. 996. The establishment of that governance structure set COFINA up for (thus far) the only successful exit from these Title III proceedings. FOMB's refusal to chart a similar course here is perplexing but in any event cannot be defended given the similar conflict issues between the Commonwealth and HTA.

7. In its effort to rehabilitate the Commonwealth from its crisis through PROMESA, the U.S. Congress provided a means to remedy abuses such as these. First, by incorporating the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a)(3), PROMESA § 301(a) prohibits the

Commonwealth's postpetition efforts to retain possession of and exercise control over HTA's property. Second, PROMESA allows a debtor to avoid and recover the value of an unauthorized or fraudulent transfer of property. See PROMESA § 301(a) (incorporating 11 U.S.C. §§ 544, 549(a), 548(a), 550 into PROMESA). The relevant provisions allow HTA to recoup the property unlawfully diverted to (and by) the Commonwealth and/or the value of such property. Third, PROMESA allows a Title III court, on request of a creditor, to appoint a trustee to pursue such avoidance claims where the debtor has refused to do so. 11 U.S.C. § 926(a). That appointment power was designed precisely for situations like this, where FOMB, based on its conflict of interest, has unreasonably refused to sue the Commonwealth on behalf of HTA.

8. Movants have attached hereto a Proposed Complaint setting forth certain of HTA's claims against the Commonwealth. See Ex. C. Movants have asked FOMB to pursue these claims, but FOMB has refused to take action. See Mot. Decl. Ex. 1; Mot. Decl. Ex. 2. The Court therefore should allow Movants to pursue these claims as trustees, so that HTA's property can be restored for the benefit of its Bondholders and its own financial future.[5] By respecting valid security interests and repaying a meaningful portion of its debts, HTA can regain access to the financial markets as PROMESA envisioned. But none of PROMESA's goals would be served by allowing FOMB and the Commonwealth to continue pillaging a public corporation whose healthy operation is critical to Puerto Rico's well-being. For all these reasons and those set forth below, the Motion should be granted.

[5] The Proposed Complaint is in draft form and subject to revision. If appointed as trustees, Movants intend to meet and confer with one another and with the DRA Parties before filing their complaint. Movants further reserve their rights to bring claims related to those set forth in the Proposed Complaint, such as claims under Section 545 and Section 547, which allow for the avoidance of statutory liens or preference payments made to other creditors or insiders. See 11 U.S.C. §§ 545, 547. In turn, Section 550 would operate to ensure that any value recovered through the commencement of claims brought under Sections 544, 545, 547, 548 or 549 is recovered for the benefit of the estate. See 11 U.S.C. § 550(a) ("to the extent that a transfer is avoided under section 544, 545, 547, 548, 549 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . ."). Accordingly, Section 550 is a remedy for such avoided transfers, as set forth in the Proposed Complaint's prayer for relief.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1331 and PROMESA § 306(a). Venue is proper pursuant to 28 U.S.C. § 1391(b) and PROMESA § 307(a).

FACTUAL BACKGROUND

I. Movants Insure HTA Bonds.

10. Movants insure approximately $2.9 billion gross par of HTA Bonds currently outstanding. Under their insurance agreements and/or insurance policies, Movants are deemed to be the sole holders of the HTA Bonds that they insure for purposes of, or otherwise have control rights over, consents and other HTA Bondholder actions, including exercising rights and remedies of HTA Bondholders. See, e.g., Mot. Decl. Exs. 3–12. Under the HTA Resolutions and/or their insurance agreements or policies, Movants are also recognized as third-party beneficiaries. Movants are fully subrogated to the rights of the HTA Bondholders for claims they have paid. Mot. Decl. Exs. 3–12.

II. HTA Was Established As A Corporate Entity Distinct From The Commonwealth And Has Issued Its Own Bonds.

11. In 1965, HTA was created as a public corporation responsible for constructing highways and other transportation systems in Puerto Rico. See Act No. 74-1965 (the "Enabling Act"). The Enabling Act identifies HTA as a "body corporate and politic . . . consisting of a public corporation," meaning that HTA is a corporate entity with a separate corporate existence from the Commonwealth. See 9 L.P.R.A. § 2002. Pursuant to the Enabling Act, HTA has issued HTA Bonds secured by a gross lien consisting of a perfected security interest in pledged revenues, including (i) revenues derived from HTA's toll facilities (the "Toll Revenues"); (ii) special excise taxes consisting, among other things, of taxes on gasoline, diesel, crude oil, cigarettes, and other special excise taxes collected by the Commonwealth (the "Tax Revenues"); and (iii) special excise

taxes consisting of motor vehicle license fees collected by the Commonwealth (the "Vehicle Fees"; together with the Tax Revenues, the "Excise Taxes"; and together with the Toll Revenues and the Tax Revenues, the "Pledged Revenues").

12. The Commonwealth's Secretary of Treasury acts as a collection agent on behalf of HTA and the HTA Bondholders with respect to the Excise Taxes. Upon collection, the Secretary of Treasury is not permitted to deposit the Excise Taxes into the Commonwealth's General Fund. See, e.g., 13 L.P.R.A. § 31751(a) (Mot. Decl. Ex. 13). Instead, the statutes governing ownership and use of the Excise Taxes require the Secretary of Treasury to hold the Excise Taxes in a "special deposit in the name and for the benefit of [HTA]." 13 L.P.R.A. § 31751(a)(1)(D) (Mot. Decl. Ex. 13); 9 L.P.R.A. § 5681; see also 9 L.P.R.A. § 2021 ("The total proceeds of the fifteen-dollar ($15) increase in the fees to be paid for public and private automobile licenses shall be covered into a Special Deposit in behalf and for the benefit of the Highways and Transportation Authority of Puerto Rico."). Once collected, the Excise Taxes constitute trust funds that are property of HTA and held in trust for HTA and the HTA Bondholders. See, e.g., 13 L.P.R.A. § 31751(a)(1); 9 L.P.R.A. §§ 2013(a)(2), 2021, 5681 (collectively, and including any related statutes, the "Excise Tax Statutes"). The Excise Tax Statutes mandate that, up to the amount necessary to pay principal and interest on the HTA Bonds, the Excise Taxes may not be used for any other purpose. The Toll Revenues also constitute property of HTA held in trust for the benefit of the HTA Bondholders. See 9 L.P.R.A. § 2013(a)(2).

III. The Commonwealth Begins To Raid And Divert The Pledged Revenues.

13. In 2015, the Commonwealth began a series of actions that deprived HTA of the ability to use the Pledged Revenues to pay the HTA Bonds.

14. First, on November 30, 2015, former Governor García Padilla issued Administrative Bulletin No. EO-2015-46 (the "Clawback Order," Mot. Decl. Ex. 14), which

directed the Secretary of the Treasury to withhold the Excise Taxes, purportedly for application to the public debt, instead of for application to the HTA Bonds as required by the Excise Tax Statutes.

15. Next, on April 6, 2016, the Commonwealth enacted a moratorium law (Act No. 21-2016, the "First Moratorium Law," Mot. Decl. Ex. 15) that purported to authorize the Governor to declare states of emergency with respect to a number of public entities, including HTA, and to prohibit the payment of principal or interest by HTA on the HTA Bonds, including by suspending the obligation to transfer the Excise Taxes to the Fiscal Agent. See Mot. Decl. Ex. 15 § 201(d)(ii).

16. Beginning on April 30, 2016, pursuant to the First Moratorium Law, the Governor issued a series of orders (including any subsequent orders issued under any moratorium law, the "Moratorium Orders")[6] that prohibited payments of principal and interest on the HTA Bonds, including by diverting the Pledged Revenues from the payment of the HTA Bonds to other, unauthorized purposes. Since the codification of the First Moratorium Law and the issuance of these initial Moratorium Orders, the Commonwealth has enacted additional moratorium laws (collectively, including the First Moratorium Law and any additional moratorium laws that the Commonwealth may purport to enact in the future, the "Moratorium Laws"),[7] and Governors have issued additional Moratorium Orders, which have continued in effect the prohibition of payment of principal and interest on the HTA Bonds, including by diverting the Pledged Revenues from the payment of the HTA Bonds and dissipating the Pledged Revenues for unauthorized purposes.

IV. Congress Enacts PROMESA, And FOMB Begins Representing The Commonwealth And HTA While The Commonwealth Continues To Raid The Pledged Revenues.

17. On June 30, 2016, President Obama signed PROMESA into law. PROMESA, among other things, sought to remedy what Congress viewed as the abuses of creditor rights

[6] The relevant Moratorium Orders include those included in Mot. Decl. Ex. 16.

[7] The Moratorium Laws include those included in Mot. Decl. Ex. 17.

committed by the Commonwealth prior to PROMESA's enactment, including the First Moratorium Law, the Moratorium Orders, and the Clawback Order. For that reason, PROMESA expressly preempted (i) any moratorium law (including the Moratorium Laws) and (ii) any "unlawful executive orders" (including the Clawback Order and the Moratorium Orders) that alter the rights of holders of any debt of a territorial instrumentality or divert funds from one instrumentality to another or to the Commonwealth. PROMESA § 303(1), (3). PROMESA also incorporated the Bankruptcy Code's automatic stay provision to protect a debtor filing for Title III protection from "any act to obtain possession of property of the [debtor] or of property from the [debtor] or to exercise control over property of the [debtor]." 11 U.S.C. § 362(a)(3); PROMESA § 301(a) (incorporating § 362 into PROMESA).

18. In addition, PROMESA (i) created FOMB; (ii) required FOMB to develop or approve fiscal plans governing the finances and budgets of the Commonwealth and its public corporations, including HTA; and (iii) authorized, but did not require, FOMB to file a petition on behalf of the Commonwealth or its public corporations, including HTA, to commence a court-supervised debt adjustment proceeding, provided that certain statutory prerequisites had been satisfied (Title III). PROMESA §§ 101, 201(c), 201(e), 304(f).

19. Beginning in March 2017, FOMB developed a series of fiscal plans for the Commonwealth and HTA. PROMESA requires a fiscal plan to "ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory." PROMESA § 201(b)(1)(M). PROMESA also requires a fiscal plan to "respect the relative lawful priorities or lawful liens, as may be applicable, in . . . laws . . . or agreements of a covered territory or covered territorial instrumentality." PROMESA § 201(b)(1)(N).

20. However, the fiscal plans developed by FOMB to date fail to comply with these

provisions. For one thing, each purports to divert the Excise Taxes from HTA to the Commonwealth. See, e.g., Decl. Exs. 18, 19, 23, 25, 27. Purportedly in an effort to comply with these unlawful fiscal plans, the Commonwealth, on or about April 29, 2017, enacted a "Fiscal Plan Compliance Law" (Act No. 26-2017, including, as amended or superseded, the "Compliance Law", Mot. Decl. Ex. 20). Chapter 4 of the Compliance Law provides for the Commonwealth to expropriate property, in the form of "surplus" revenues, from its public corporations (e.g., HTA) and their bondholders. Accordingly, Chapter 4 permits the Commonwealth to expropriate the Pledged Revenues, and makes no provision for payment by HTA of its secured debt.

21. Chapter 6 of the Compliance Law provides that "any special State fund and any other income of the agencies and public corporations [including HTA] shall be deposited entirely in the State Treasury, under the custody of the Secretary of the Treasury or the banking entity it deems appropriate." Mot. Decl. Ex. 20 at 91. Funds held in special funds in the Commonwealth Treasury include the Excise Taxes. See, e.g., 13 L.P.R.A. § 31751; 9 L.P.R.A. §§ 2021, 5681. Chapter 6 also requires that the Excise Taxes be used "in accordance with . . . the Fiscal Plan." 2017 P.R. Laws 26 (Chapter 6). Chapter 6 therefore authorizes the continued diversion and dissipation of Pledged Revenues to the extent provided for in a fiscal plan or budget.

22. Accordingly, the Commonwealth's diversion of HTA's funds has been accomplished under color of legislation, executive orders, and fiscal plans and budgets that are preempted by PROMESA, violate PROMESA, and violate the legislation and contractual agreements that give rise to the HTA Bondholders' rights to the Pledged Revenues.

23. Furthermore, the Commonwealth continued to retain possession of and exercise control over HTA's property after HTA filed its Title III petition even though PROMESA prohibits "any act to obtain possession of property of [HTA] or of property from [HTA] or to exercise control over property of [HTA]." 11 U.S.C. § 362(a)(3); PROMESA § 301(a) (incorporating

§ 362). The Commonwealth's postpetition acts to obtain possession and control of HTA's property violate the automatic stay and thus are "not authorized" under Title III. See 11 U.S.C. § 549(a)(2)(B) (providing for avoidance of transfers that are "not authorized under [Title III]").

V. The Commonwealth's Unlawful Diversion of HTA's Revenues Has Devastated HTA's Finances, Threatening Its Ability to Access the Capital Markets and to Maintain Critical Infrastructure for the People of Puerto Rico

24. The Commonwealth's misconduct has been extremely detrimental to HTA and has effectively rendered it insolvent. Before the Commonwealth's misconduct, there had been sufficient Excise Taxes to satisfy HTA's periodic payments and other obligations to bondholders. For example, HTA received $531.8 million in Excise Tax revenues in FY 2014 and $554.2 million in FY 2015. See Mot. Decl. Ex. 29 (Audited Financial Statements, Puerto Rico Highways and Transportation Authority, Year Ended June 30, 2015), at 12–13. This revenue exceeded HTA's debt service by over $130 million in FY 2015 and $200 million in FY 2014, see id. at 12–13, thus enabling HTA to satisfy its obligations to bondholders while providing additional liquidity to support its operations. But since HTA's Title III was filed, the Commonwealth has transferred over $1 billion in Excise Taxes from HTA to itself.[8] The Commonwealth continues to siphon approximately $30 to 50 million in Excise Taxes from HTA each month, a rate at which over $400 million will be diverted annually. Mot. Decl. Ex 30 (HTA_STAY0000001).

25. The Government Parties are well aware of the havoc these transfers wreak on HTA's finances. For example, HTA's 2016 audited financial statements expressly acknowledge that the diversion of the Pledged Revenues, beginning with the Clawback Order, "diminished" HTA's ability to pay its debts, stating: "[The Clawback Order] had a significant negative effect on

[8] See Mot. Decl. Ex 30 (HTA_STAY0000001, a spreadsheet showing diversion of Excise Tax Revenues amounting to $27,695,000 in June 2017, $378,921,000 in FY 2018, $408,059,000 in FY 2019, and $212,151,000 as of November in FY 2020); see also Audited Financial Statements, Puerto Rico Highways and Transportation Authority, Year Ended June 30, 2018 at 34 ("During the fiscal year ended June 30, 2018, the Authority did not receive taxes amounting to approximately $299.3 million.").

[HTA's] liquidity . . . . [W]ithout the taxes and other revenues allocated by the Commonwealth . . . , [HTA] is unable to deposit additional monies in the bond payment reserve accounts and without additional deposits ***the ability to continue making the schedule payments on the bonds issued is diminished."*** Mot. Decl. Ex. 24 at 28-29 (emphasis added). FOMB similarly acknowledged in HTA's April 28, 2017 fiscal plan (Mot. Decl. Ex. 25) that HTA's fiscal situation "was recently aggravated" by the diversion of the Excise Taxes, calling into question HTA's ability to repay the HTA Bonds. See Ex. 25 at 16. HTA's most recent audited financial statements, from fiscal year 2018 (the "2018 Financial Statements", Mot. Decl. Ex. 26) similarly admit that HTA "does not have sufficient funds available to fully repay its various obligations as they come due" and expressed "substantial doubt about [HTA's] ability to continue as a going concern." Mot. Decl. Ex. 26 at 3. The 2018 Financial Statements also admit that "the [First Moratorium Law], the related executive orders, and subsequent to the enactment of PROMESA certain developments in connection with actions of the Oversight Board . . . have had a significant negative effect on [HTA's] liquidity . . . . There is no indication that the conditional allocation of gasoline, oil, diesel, and petroleum taxes to [HTA] will resume . . . . Without the taxes and other revenues conditionally allocated by the Commonwealth . . . , [HTA] has been unable to make the scheduled payments on its outstanding bonds and fund its reserve accounts accordingly." Id. at 34.

26. The 2020 HTA Fiscal Plan likewise lays bare the devastating impact of the Commonwealth's misappropriation of HTA's assets going forward. The Commonwealth will collect hundreds of millions in HTA's Excise Taxes, and yet the Fiscal Plan forecasts the continued misappropriation of the lion's share of HTA's revenues. As a direct result, the Fiscal Plan anticipates that HTA as it currently operates will be hopelessly insolvent over the next thirty years to the tune of $6.4 *billion.* Mot. Decl. Ex. 31 (2020 HTA Fiscal Plan) at 33–34. FOMB hopes to

address this shortfall through a series of "fiscal measures," primarily by increasing fares, fine collections, and reassessing contracts for Tren Urbano, the heavy rail system in San Juan that has been foisted onto HTA's balance sheet. *Id.* 43–44. But there is no guarantee these measures will yield the revenue increases and cost reductions that FOMB claims, and even FOMB's own untested projections would close the deficit by only $4.7 billion, leaving HTA insolvent by a $1.7 billion deficit over FY 2021 through FY 2049. *Id.* And, critically, by stripping HTA of its Excise Taxes, the Fiscal Plan leaves it with little or nothing to repay its debts and thus regain access to the capital markets. Indeed, as the Fiscal Plan shows, without receiving its Excise Taxes, HTA cannot remain solvent and still make the $11.9 billion in capital expenditures the Fiscal Plan posits are necessary to maintain its infrastructure over the next thirty years. *Id.* at 41–42. Thus, under FOMB's supervision, HTA has no credible way of regaining access to the capital markets to finance these expenditures as required by Commonwealth law and as contemplated by PROMESA.

PROCEDURAL HISTORY

27. Avoidance actions under Bankruptcy Code Sections 549, 544 and 548 must be brought within certain specified time periods. The statute of limitations for an action or proceeding under Section 549 is "two years after the date of the transfer sought to be avoided." 11 U.S.C. § 549(d). The statute of limitations for an action under Sections 548 or 544 is within two years of the commencement of the Title III case. 11 U.S.C. § 546(a) ("2 years after the entry of the order for relief"); id. § 301(b) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief. . . ."). HTA filed for Title III protection on May 21, 2017. As a result, any claims under §§ 548 or 544 were originally set to expire no later than May 21, 2019.

28. However, on April 26, 2019, the Court approved a tolling stipulation (ECF No. 6531, the "First Tolling Stipulation", Mot. Decl. Ex. 21) under which FOMB, on behalf of the

Commonwealth, and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), on behalf of HTA, agreed that the statutory deadline for avoidance actions "shall expire two hundred seventy (270) days from and after the date on which the Statutory Deadlines would have expired in the absence of this Stipulation." Mot. Decl. Ex. 21 ¶ 1. Accordingly, per the First Tolling Stipulation, the statute of limitations would have expired on February 15, 2020.

29. Anticipating this February 15 expiration of the statute of limitations, certain Movants, on January 15, 2020, sent a letter (the "Demand Letter", Mot. Decl. Ex. 1) to FOMB demanding that FOMB pursue avoidance actions on behalf of HTA against the Commonwealth resulting from the unlawful diversion of Excise Taxes. On January 29, 2020, FOMB sent a letter responding to the Demand Letter (the "Demand Letter Response", Mot. Decl. Ex. 2) in which FOMB refused to pursue such actions, erroneously reasoning that "they are not actions to recover HTA's property. They are actions to collect property you think the Commonwealth must transfer to HTA pursuant to a pre-PROMESA statute providing for such appropriations."

30. FOMB and AAFAF subsequently moved for—and this Court approved—entry of a second tolling stipulation (ECF No. 9722, the "Second Tolling Stipulation", Mot. Decl. Ex. 22) that extended the statutory deadlines by an additional one hundred eighty-one (181) days beyond the period set forth in the First Tolling Stipulation, i.e. until approximately August 14, 2020.

31. Following entry of the Second Tolling Stipulation, the Mediation Team filed an amended report (ECF No. 10756, the "Amended Report") in which it recommended that this Court "set a schedule for the filing of, and determination of, any motion seeking relief addressing alleged continuing conflicts of interest of the FOMB and the Government of Puerto Rico acting for both the Commonwealth and HTA." Amended Report at 13.

32. Movants objected to this aspect of the Amended Report on the basis that (i) there is no statutory deadline to move for appointment of a trustee under Section 926 of the Bankruptcy

Code; and (ii) Movants would not know whether relief under Section 926 could be pursued until their then-pending motion to lift the automatic stay (ECF No. 10102, the "HTA Lift Stay Motion") had been fully adjudicated. See ECF No. 11493 (the "Amended Report Objection") § II.

33. Nevertheless, the Court adopted this aspect of the Amended Report and ordered that conflict motions, including Section 926 motions, be filed by "15 days after the Court's ruling in connection with the preliminary hearing on the HTA Lift Stay Motion." ECF No. 12186 ¶ 3.

34. The Court entered its ruling in connection with the preliminary hearing on July 2, 2020. ECF No. 13541. On July 10, Movants filed an urgent motion to adjourn the 15-day deadline, except as to Section 926 motions. ECF No. 13606. On July 13, the Court entered a bridge order extending that deadline until seven (7) days after the urgent motion is resolved. ECF No. 13612.

ARGUMENT

I. Movants Should Be Appointed Co-Trustees Under Bankruptcy Code § 926.

35. FOMB has declined to prosecute HTA's claims against the Commonwealth. This is unsurprising. Given its simultaneous representation of the Commonwealth and HTA, these claims present a conflict of interest because they would require the Commonwealth to remedy its own wrongdoing. FOMB's refusal jeopardizes HTA's financial future and frustrates the fiduciary duty owed by HTA to its Bondholders, depriving them of their bargained-for rights. See, e.g., Ambac Assurance Corp. v. HTA, No. 16-1893, 2016 WL 2930924, at *2 (D.P.R. May 19, 2016) (recognizing HTA's "fiduciary duties" to HTA Bondholders). But this Court can cure FOMB's inaction. By incorporating Section 926 of the Bankruptcy Code, PROMESA authorizes the Court to appoint a trustee to prosecute certain types of avoidance actions the debtor has refused to pursue. Movants' Proposed Complaint identifies at least four causes of action under the Bankruptcy Code—one under Section 549, one under Section 544, and two under Section 548. FOMB should

have asserted at least these claims against the Commonwealth based on the Commonwealth's transfer of HTA's assets to itself under color of the Moratorium Laws, Moratorium Orders, Clawback Order, Compliance Law, and fiscal plans. A trustee appointed by this Court under Section 926 would be able to avoid those transfers and recover their value for HTA and its creditors. Accordingly, this Court should appoint Movants as co-trustees under Section 926.

A. Section 926 Permits A Title III Court To Appoint A Trustee To Pursue Avoidance Actions On Behalf Of The Debtor.

36. Section 926 provides that "[i]f the debtor refuses to pursue a cause of action under section 544, 545, 547, 548, 549(a), or 550 of [the Bankruptcy Code], then on request of a creditor, the court may appoint a trustee to pursue such cause of action." 11 U.S.C. § 926(a); see PROMESA § 301(a) (incorporating § 926(a) into PROMESA). As relevant here, Sections 548, 549 and 544 allow the debtor to avoid unlawful transfers, and Section 550(a) allows the debtor to recover the transfers or their value from the transferee.

37. The existence of a conflict of interest is sufficient reason to appoint a trustee. See generally 6 Collier on Bankruptcy ¶ 926.02 (16th ed. rev. 2018) ("The reason for Section 926(a) derives from the possible reluctance of a debtor to bring an action . . . during the course of a chapter 9 case" because "the debtor actually favors the transfer rather than opposes it."). "Section 926 explicitly anticipates and is intended to address those scenarios in which the debtor does not consent to the pursuit of a cause of action." In re N.Y. City Off-Track Betting Corp., No. 09-17121, 2011 WL 309594, at *6 (Bankr. S.D.N.Y. Jan. 25, 2011). As courts have recognized in the analogous context of derivative standing, a debtor abuses its discretion and acts unjustifiably where it "acts under the influence of conflicts of interest." In re Gibson Grp., Inc., 66 F.3d 1436, 1441 (6th Cir. 1995). And where appointment of a trustee is warranted, "the court is given unfettered discretion in determining whom to appoint as trustee." 6 Collier, supra, ¶ 926.02[3].

B. HTA Has Claims Against The Commonwealth Under Sections 549, 544 And 548 That FOMB Has Unjustifiably Refused to Pursue.

38. As co-trustees under Section 926, Movants could pursue viable claims by HTA against the Commonwealth under 11 U.S.C. §§ 549, 544, and 548. These claims are summarized below and set forth in greater detail in the Proposed Complaint, which is incorporated herein by reference and attached as Exhibit C.

1. A Trustee Could Avoid Postpetition Transfers Under § 549.

39. Under Section 549 of the Bankruptcy Code, a "trustee may avoid a transfer of property . . . that occurs after the commencement of the case; and . . . that is not authorized under [Title III of PROMESA] or by the court." 11 U.S.C. § 549(a).[9] PROMESA makes this power available to a trustee appointed under Bankruptcy Code § 926. See id. § 926(a) (trustee may pursue action under § 549(a)); PROMESA § 301(a) (incorporating §§ 549(a) and 926 into PROMESA).

40. To establish a § 549(a) claim, the trustee must allege that (1) property of the debtor existed, (2) such property was transferred, (3) such transfer occurred after commencement of the case, and (4) the transfer was not authorized by Title III or the court. See In re Tougas, 338 B.R. 164, 177-78 (Bankr. D. Mass. 2006); accord In re Marrero, 382 B.R. 861, 865-66 (B.A.P. 1st Cir. 2008). The burden of proof then shifts to the "entity asserting the validity of [the] transfer." Fed. R. Bankr. P. 6001.

41. Here, since the commencement of the Title III cases, the Commonwealth has collected the Excise Taxes as HTA's agent, and then, in violation of Title III and without approval of this Court, has transferred the Excise Taxes for its own use—including, for example, by depositing such property in the Commonwealth's general fund, using it to fund government

[9] See also PROMESA § 301(d) ("Solely for purposes of [Title III of PROMESA], a reference to 'this title', 'this chapter', or words of similar import in a section of [the Bankruptcy Code], made applicable in a case under [Title III of PROMESA] by [section 301(a) of PROMESA] . . . shall be deemed to be a reference to [Title III of PROMESA].").

expenses, or purporting to use it for payment of debts other than the HTA Bonds. See Proposed Complaint ¶¶ 99, 104, 107. Although the Commonwealth may purport to have made these transfers under color of the Moratorium Laws, Moratorium Orders, fiscal plans, budgets and Compliance law, the transfers were not authorized by Title III or by this Court, and indeed, those laws and executive orders were unauthorized.

42. Specifically, PROMESA preempts (i) any moratorium law (including the Moratorium Laws, Moratorium Orders, fiscal plans, budgets, and Compliance Law) and (ii) any "unlawful executive orders" (including the Moratorium Orders) that alter the rights of holders of any debt of a territorial instrumentality or divert funds from one instrumentality to another or to the Commonwealth. PROMESA § 303(1), (3). In any event, Title III itself contains no authorization for such transfers, and the automatic stay forbids them. Accordingly, all postpetition transfers of HTA property to the Commonwealth constitute "transfer[s] of property of [HTA] . . . not authorized under [Title III of PROMESA]." 11 U.S.C. § 549(a).

43. Furthermore, the fiscal plans, budgets and the Compliance Law violate PROMESA. Specifically, section 201(b)(1)(M) of PROMESA requires a fiscal plan to "ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory." Section 201(b)(1)(N) of PROMESA requires a fiscal plan to "respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of [PROMESA]." FOMB's fiscal plans to date (i) purport to *mandate*, rather than prevent, the types of inter-debtor transfers that are prohibited under section 201(b)(1)(M), and (ii) give no consideration whatsoever to priorities and liens under Commonwealth law. Budgets must be compliant with PROMESA, including the foregoing provisions. See, e.g., Section 202(c)(1). For

the same reason, the Compliance Law, which seeks to enforce the fiscal plans, also violates PROMESA.

44. In any event, any postpetition transfers of HTA property to the Commonwealth—whether purportedly made under color of the Moratorium Laws, Moratorium Orders, fiscal plans and Compliance Law or not—violate the automatic stay, which bars the Commonwealth from engaging in "any act to obtain possession of property of [HTA] or of property from [HTA] or to exercise control over property of [HTA]." 11 U.S.C. § 362(a)(3); PROMESA § 301(a) (incorporating § 362 into PROMESA). The Moratorium Laws, Moratorium Orders, fiscal plans and Compliance Law do not somehow override the automatic stay, and the Commonwealth's efforts to obtain possession of HTA's property for its own benefit constitute automatic stay violations.

45. As such, a trustee would have authority to avoid the transfers under Section 549 because the laws through which the Commonwealth diverted HTA's funds were "unauthorized," not only under Title III (which is all that section 549(a) requires), but also under PROMESA more generally. 11 U.S.C. § 549(a).

2. A Trustee Could Avoid Transfers Under Section 544.

46. Section 544(b)(1) of the Bankruptcy Code provides that a "trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an [allowable] unsecured claim." PROMESA makes this power available to a trustee appointed under Bankruptcy Code § 926. See 11 U.S.C. § 926(a) (trustee may pursue action under § 544(b)); PROMESA § 301(a) (incorporating §§ 544(b) and 926 into PROMESA).

47. Here, the applicable law is Puerto Rico fraudulent transfer law, as set forth in the Civil Code of Puerto Rico. 31 L.P.R.A. §§ 3492, 3498. Specifically, a transaction that is executed in "fraud of creditors, when the latter cannot recover . . . what is due them" may be rescinded. 31

L.P.R.A. § 3492. Puerto Rico law further provides that "contracts by virtue of which the debtor alienates property, without monetary consideration, are presumed to be executed in fraud of creditors." 31 L.P.R.A. § 3498.[10]

48. In considering whether a transfer is fraudulent, the debtor need not have "intended to harm his creditors;" it is enough "that he knew of the results of his action." In re Sepulveda Figueras, 193 B.R. 118, 120-21 (Bankr. D.P.R. 1996); see also De Jesus Diaz v. Carrero, 12 P.R. Offic. Trans. 786, 796, 112 D.P.R. 631, 638 (1982) ("fraud does not require evidence of the purpose or aim of the debtor to harm his creditors, it suffices to show that he knew about the results produced"). Courts also consider whether the transfer was for inadequate consideration or made in haste, the debtor's insolvency, the relationship between the debtor and the transferee, and the state of the business of the debtor and of the judicial claims against him. See id. at 795; In re El Mundo Corp., 208 B.R. 781, 782-83 (D.P.R. 1997)).

49. Consistent with this framework, the diversion from HTA to the Commonwealth of funds to which the HTA Bondholders and HTA are legally entitled constitutes a fraudulent transfer under Puerto Rico law and, consequently, under Bankruptcy Code § 544(b). First, HTA received no consideration; the property was merely diverted. Second, the transfers were made to the Commonwealth, an insider of HTA. Third, the Commonwealth's unlawful diversion of funds has left HTA without the resources to pay what is due to its creditors. Indeed, the most recent HTA Fiscal Plan projects that HTA will have a total cash of flow of only $860 million during the entire five-year period from Fiscal Years 2021-2025, and over that same period HTA has or will incur $1.272 billion in operating expenses. See Mot. Ex. 23 at 35, 38. But even if the full $860 million

[10] The English translation of 31 L.P.R.A. § 3498 on Westlaw mistakenly translates the statute as "Contracts by virtue of which the debtor alienates property, for a good consideration, are presumed to be executed in fraud of creditors." However, the Spanish phrase translated as "for a good consideration" on Westlaw is "a título gratuito," which actually means without monetary consideration. See Mot. Decl. Ex. 32 (certified translation)

were diverted to service HTA's debt, it would be grossly insufficient to pay the approximately $1.812 billion in debt service coming due on the HTA Bonds during this period. See Mot. Decl. Ex. 23. Thus, the Commonwealth's transfers of the Excise Taxes are fraudulent transfers under Puerto Rico law, and a trustee would have authority to avoid them under Section 544.

3. A Trustee Could Avoid Transfers Under Section 548.

50. Section 548 of the Bankruptcy Code provides a mechanism to recover a debtor's dissipation of assets where such dissipation constitutes an intentional or constructive fraudulent transfer. 11 U.S.C. § 548(a). An intentional fraudulent transfer is "one in which there [is] 'actual intent to hinder, delay, or defraud' a creditor," and a constructive fraudulent transfer is "a transfer for less than reasonably equivalent value made when the debtor was insolvent or was rendered so by the transfer." In re Tribune Co. Fraudulent Conveyance Litig., 946 F.3d 66, 73 (2d Cir. 2019). PROMESA makes the power to avoid such fraudulent transfers available to a trustee appointed under Bankruptcy Code § 926. See 11 U.S.C. § 926(a) (trustee may pursue action under § 548); PROMESA § 301(a) (incorporating §§ 548 and 926 into PROMESA).

a. A Trustee Could Avoid Transfers As Intentional Fraudulent Transfers Under § 548(a)(1)(A).

51. As explained above, a trustee can avoid a transaction as an intentional fraudulent transfer where the trustee demonstrates "actual intent to hinder, delay or defraud any entity to which the debtor was or became . . . indebted." In re Lyondell Chem. Co., 554 B.R. 635, 650 (S.D.N.Y. 2016). "The debtor's actual intent to defraud 'need not target any particular entity or individual as long as the intent is generally directed toward present or future creditors of the debtor.'" Id. "The debtor must have had an intent to interfere with creditors' normal collection processes or with other affiliated creditor rights for personal or malign ends." Id. Additionally, "where actual intent to defraud creditors is proven, the conveyance will be set aside regardless of

the adequacy of consideration given." United States v. McCombs, 30 F.3d 310, 328 (2d Cir. 1994). Here, the diversion of HTA's funds has permitted HTA to avoid debt service on its outstanding obligations and caused diminution in the Pledged Revenues' value by at least $1 billion since HTA filed for Title III protection. See supra ¶¶ 24–25.

52. Furthermore, because "it is often impracticable, on direct evidence, to demonstrate an actual intent to hinder, delay or defraud creditors," courts "frequently infer fraudulent intent from the circumstances surrounding the transfer." Max Sugarman Funeral Home, Inc. v. A.D.B. Inv'rs, 926 F.2d 1248, 1254 (1st Cir. 1991). Among the "badges of fraud" are: (i) actual or threatened litigation against the debtor; (ii) a transfer of all or substantially all of the debtor's property; (iii) insolvency or other unmanageable indebtedness on the part of the debtor; and (iv) a special relationship between the debtor and the transferee. Id. In evaluating whether a special relationship exists, courts consider whether the transferee is an insider.[11] While "the presence of a single badge of fraud may spur mere suspicion, the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose." Id. at 1254-55 (citation omitted).

53. These "badges of fraud" exist here. First, HTA's unlawful diversion of funds was initiated towards the end of 2015, at which time Puerto Rico was not entitled to any form of relief under the Bankruptcy Code. At that time, HTA and its creditors were attempting to negotiate a consensual restructuring of HTA's debt, with the understanding that litigation would likely ensue if such a consensual restructuring could not be achieved. As a bargaining chip in these

[11] In re Luciani, 584 B.R. 449, 462 (Bankr. D. Mass. 2018) (explaining that "transactions involving insiders are subject to greater scrutiny than those at arms length" in the context of a cause of action under § 548(a)(1)); In re Catco Recycling, LLC, No. 14–11021, 2016 WL 556173, at *10 (Bankr. D.N.H. Feb. 10, 2016) (explaining that badges of fraud existed where "[the transferee] was an 'insider' within the meaning of the Bankruptcy Code, [due to her status as] a relative of . . . the person in control of the Debtor."); In re Zenox, Inc., 173 B.R. 46, 50 (Bankr. D.N.H. 1994) (explaining that where the transfer "was made to a corporate insider," the badges of fraud were sufficient "to sustain the cause of action under § 548(a)(1)").

negotiations, and against the backdrop of potential litigation, the Commonwealth and HTA threatened to initiate "clawbacks" if creditors did not accede to their demands. When no agreement with HTA's creditors was reached, the Commonwealth carried through on this threat by issuing the Clawback Order, which transferred substantially all of HTA's tax revenues, rendering HTA unable to service its debt. Following HTA's Title III filing, the Commonwealth diverted more than $1 billion of the Excises Taxes and continues to divert more. See supra ¶ 24. HTA became insolvent or otherwise unable to manage its debts as a result of these transfers. See supra ¶¶ 25–26. Furthermore, the existence of a "special relationship" cannot be disputed – the Excise Taxes have been transferred to the Commonwealth, an HTA insider. Additionally, parties to the transfer were aware of HTA's obligations to the HTA Bondholders, the harm that the diversion of HTA's funds would cause the HTA Bondholders, and the various laws and agreements that gave rise to the HTA Bondholders' lawful rights to the Pledged Revenues. There are abundant indicia of fraud in these circumstances, and a trustee would therefore be authorized to avoid the transfers as intentional fraudulent transfers under Bankruptcy Code section 548(a)(1)(A).

b. A Trustee Could Avoid Transfers As Constructive Fraudulent Transfers Under Section 548(a)(1)(B).

54. Additionally, a trustee can avoid a transaction as a constructive fraudulent transfer where the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation" and "became insolvent as a result of such transfer or obligation." 11 U.S.C. § 548(a)(1)(B). Courts measure the value of what was given and received in the transaction. In re Duke & Benedict, Inc., 265 B.R. 524, 532 (Bankr. S.D.N.Y. 2001) (explaining the under section 548, a trustee must prove that the debtor received less than fair consideration or reasonably equivalent value at the time of the transaction). In determining whether a debtor was rendered insolvent as a result of the challenged transfer, a court must "examine the ability of the debtor to

generate enough cash from operations and sales of assets to pay its debts and remain financially stable after a transfer." In re Jackson, 459 F.3d 117, 123 (1st Cir. 2006) (internal quotation marks omitted). There need not be a finding of post-transfer insolvency; instead, "difficulties which are short of insolvency in any sense but [] likely to lead to insolvency at some time in the future" are sufficient. Id. at 124.

55. Here, HTA received no consideration in exchange for the transfer of the Excise Taxes to the Commonwealth. The funds were just taken. Additionally, HTA and FOMB have effectively conceded that HTA's insolvency was to some degree related to the transfer of the Excise Taxes to the Commonwealth. See supra ¶ 25–26. Given these circumstances, a trustee would have the authority to avoid the transfers of funds to the Commonwealth as a constructive fraudulent transfer.

C. Movants' Interests Are Aligned With Those Of HTA And Other HTA Bondholders.

56. Movants are well-positioned to fulfill the role of Section 926 trustees because, like other HTA Bondholders, they are creditors of HTA, seek payment from HTA and are thus motivated to pursue this litigation. Moreover, Movants insure both HTA Bonds issued under HTA's 1968 bond resolution and HTA Bonds issued under HTA's 1998 bond resolution, meaning that Movants' interests are aligned with those of both 1968 and 1998 HTA Bondholders. Movants' interests are also aligned with those of HTA itself, which has an interest in recovering the funds necessary to pay its existing debts so that it can regain solvency and once again "achieve . . . access to the capital markets." PROMESA § 101(a).

II. FOMB's Refusal To Bring Claims Under Sections 549, 544 And 548 Lacks Merit.

57. Movants respectfully believe that the First Circuit will not affirm the Court's preliminary lift-stay ruling regarding property interests. See supra ¶ 3. Indeed, HTA, not the

Commonwealth, is the true beneficial owner of the Excise Taxes. See Proposed Complaint § I. Moreover, FOMB is not in a position to objectively assess or diligently defend HTA's interests, or even consider the chance of success on appeal, because FOMB simultaneously represents not only HTA, but also the Commonwealth, and FOMB has consistently (and inexcusably) favored the Commonwealth's interests over those of HTA. In view of FOMB's conflict of interest, the decision on whether to pursue HTA's avoidance claims against the Commonwealth cannot be left to FOMB. Instead, a trustee should be appointed under Section 926 for that purpose.

A. FOMB Suffers From An Unresolvable Conflict Of Interest Because It Currently Represents Parties With Opposing Interests In The Same Case And Is Disregarding The Best Interests Of HTA And HTA's Creditors.

58. FOMB's role in diverting HTA's funds to the Commonwealth demonstrates its refusal to recognize HTA's separate corporate existence under Puerto Rico law. See, e.g. 9 L.P.R.A. § 2002 (establishing HTA as a "body corporate and politic . . . consisting of a public corporation"); 13 L.P.R.A. § 31751(a) (establishing that the Commonwealth's Secretary of the Treasury cannot deposit Excise Taxes in the Commonwealth's general fund and instead must hold them in a special deposit in the name and for the benefit of HTA and its bondholders); see also 9 L.P.R.A. § 5681; 9 L.P.R.A. § 2021. PROMESA, like Puerto Rico law, also recognizes HTA's status as an independent debtor. For example, fiscal plans under PROMESA are expressly required to ensure that "assets, funds, or resources" of HTA are not "transferred to, or otherwise used for the benefit of" the Commonwealth. PROMESA § 201(b)(1)(M). Similarly, PROMESA provides a cause of action to protect creditors from inter-debtor transfers. See PROMESA § 407. Indeed, PROMESA provides that "nothing in [Title III] shall be construed as authorizing substantive consolidation of the cases of affiliated debtors." PROMESA § 304(f). The diversion of HTA's funds to the Commonwealth disregards HTA's status and, when combined with FOMB's conflicts of interest, operates to collapse HTA and the Commonwealth into a single entity, thereby

effecting the very *de facto* substantive consolidation prohibited by PROMESA.

59. Movants have every reason to believe that FOMB will refuse to bring an avoidance action on HTA's behalf even if, through a First Circuit appeal of the lift-stay decision or otherwise, it is determined that HTA owns the Excise Taxes. Beyond having its own interests, HTA owes fiduciary duties to its creditors, including the HTA Bondholders. FOMB, as HTA's representative, has those same duties. See, e.g., Ambac Assurance Corp. v. HTA, No. 16-1893, 2016 WL 2930924, at *2 (D.P.R. May 19, 2016) (recognizing HTA's "fiduciary duties" to HTA Bondholders).[12] But HTA and FOMB cannot fulfill those duties if they are simultaneously beholden to the Commonwealth's conflicting interests.[13] And PROMESA's prohibition of substantive consolidation is especially relevant here, where the HTA Bondholders' decision to lend HTA money contemplated no recourse against the general credit of the Commonwealth. See In re Sarner, No. 10-17487-JNF, 2010 WL 3282589, at *4 (Bankr. D. Mass. Aug. 19, 2010) (explaining that courts consider "whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit" when determining whether substantive consolidation is permissible); In re Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988) (explaining that substantive consolidation requires consideration of "whether creditors dealt with the entities as a single economic unit and 'did not rely on their separate identity in

[12] See also, e.g., Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985) ("[I]f a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession."); In re WHET, Inc., 750 F.2d 149, 149 (1st Cir. 1984) (*per curiam*) (trustee "owes a fiduciary duty to debtor and creditors alike to act fairly and protect their interests").

[13] See, e.g., Woods v. City Nat'l Bank & Tr. Co. of Chi., 312 U.S. 262, 269 (1941) ("A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that trodden by the crowd.'"); In re WM Distribution, Inc., 571 B.R. 866, 872 (Bankr. D.N.M. 2017) ("Simultaneous representation of two related debtors presents a potential for an actual conflict of interest . . . Courts often find such dual representation a disqualifying actual conflict.").

extending credit'").

B. Timely Appointment Of A Trustee Is Necessary To Preserve HTA's And HTA Bondholders' Rights.

60. As noted above, avoidance actions under Sections 549, 544 and 548 must be brought within certain specified time periods. See supra ¶ 27. Notwithstanding the urgency created by these time limitations, FOMB has expressed no interest in pursuing these claims and, more recently, has flatly refused to take any action—including to extend the statute of limitations to permit the First Circuit to review the Court's lift-stay rulings regarding property interests. See Demand Letter Response, Mot. Decl. Ex. 2. Movants seek appointment by this Court to preserve the right to pursue the claims set forth in the Proposed Complaint and any other similar claims in advance of the looming August 14, 2020 deadline for bringing claims under Sections 544 and 548. At minimum, the Court should grant the Proposed Bridge Order to preserve existing rights.

III. The First Circuit's *Andalusian* Decision Supports Appointment of a Section 926 Trustee For HTA.

61. On November 19, 2019, a group of ERS bondholders (the "ERS Bondholders") sought the appointment of a trustee for ERS under Section 926 (ECF No. 9260, the "ERS 926 Motion"). This Court denied the ERS 926 Motion, and the First Circuit affirmed. See In re The Financial Oversight and Management Board for Puerto Rico, 432 F. Supp. 3d 25 (D.P.R. 2020), aff'd sub. nom. Andalusian Glob. Designated Activity Company, et al. v. FOMB, 954 F.3d 1 (1st Cir. 2020) ("Andalusian"). Although the ERS 926 Motion was denied, the underlying principles articulated by the First Circuit actually support granting the HTA 926 Motion here. The First Circuit focused on (i) the purposes of PROMESA, which here support granting the HTA 926 Motion; (ii) the need to respect Puerto Rico law, which here supports authorizing HTA to take action to remedy the Commonwealth's *violations* of that law; and (iii) the inappropriateness of the ERS Bondholders' efforts to "proliferate" duplicative actions, which is not a concern here.

62. Moreover, permitting the Commonwealth to confiscate HTA's property here would amount to a substantive consolidation prohibited under PROMESA § 304(f), further justifying appointment of a Section 926 trustee. Unlike in Andalusian, where the First Circuit concluded that the Commonwealth's transfer of ERS property aligned with ERS's own interest in achieving efficiency in the Commonwealth government, here HTA can have no interest in forfeiting its own funds to pay Commonwealth expenses that are unrelated to HTA's corporate purpose. Rather, the assets of one Debtor (HTA) are simply being taken to pay the creditors of a different affiliated Debtor (the Commonwealth). That is substantive consolidation, and PROMESA prohibits it.

A. Granting The HTA 926 Motion Serves The Purposes Of PROMESA.

63. As an initial matter, the First Circuit in Andalusian indicated that the decision whether to grant a Section 926 motion should be guided by the "purpose" of the applicable statute, be it chapter 9 or PROMESA. Andalusian, 954 F.3d at 8. In the case of PROMESA, Congress made that "purpose" explicit. The *express* purpose of PROMESA is to "**provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.**" PROMESA § 101(a) (emphasis added); see also PROMESA §§ 201(b)(1), 209.[14] Each of the two goals of

[14] In addition, PROMESA § 405(m) states 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." Congress's reference to a *fair* and orderly process indicates that the Court is to consider the interests of HTA and its creditors rather than only the interests of the Commonwealth government, because otherwise the process would not be "fair." Moreover, PROMESA § 405(m) indicates that FOMB's primary tasks are supposed to be to (i) remedy "fiscal, management, and structural problems" in the Commonwealth government and (ii) make "adjustments" to spending that "exempt[] no part of the Government of Puerto Rico." But FOMB has failed in these two primary tasks assigned to it by Congress. See, e.g., Mot. Decl. Ex. 27 at 10 (2020 Commonwealth fiscal plan providing for increased government spending and acknowledging that "the Government has still failed to achieve meaningful economic growth through structural reforms or drive operational change that would deliver greater responsiveness and efficiency of government services"). Instead of completing the tasks assigned to it by Congress, FOMB has sought to offload the costs of its own failure onto disfavored creditors (like Movants) and disfavored instrumentalities (like HTA) by pursuing debt adjustments with respect to such creditors and instrumentalities to the exclusion of the other, more fundamental tasks assigned to it by Congress. Neither Movants nor HTA should be forced to subsidize FOMB's failure to carry out its Congressional mandate, and appointing a trustee to pursue HTA's claims against the Commonwealth could help to refocus FOMB on the real goals of PROMESA, which are fiscal responsibility, access to capital markets, and corresponding structural reform.

PROMESA identified by Congress weighs in favor of granting the HTA 926 Motion.

64. *First*, by achieving "fiscal responsibility," Congress clearly meant that Puerto Rico needed to reduce unnecessary government spending. See, e.g., PROMESA § 203(d) (authorizing FOMB to "make appropriate reductions in nondebt expenditures.").[15] Congress certainly did *not* intend for Puerto Rico to continue funding any *non-essential* government operations (cf. PROMESA § 201(b)(1)(B), authorizing fiscal plans to fund only "essential public services"), nor did Congress intend to permit the Commonwealth under any circumstances to pillage the assets of its instrumentalities, like HTA, and especially not for the purpose of funding non-essential operations. See PROMESA § 201(b)(1)(M);[16] see also, e.g., PROMESA §§ 303(3), 407.

65. *Second*, by prioritizing "access to the capital markets," Congress clearly intended for Puerto Rico and its instrumentalities to maintain or improve their standing in the capital markets by paying their existing debts to the maximum extent possible, consistent only with maintaining "*essential* public services" (PROMESA § 201(b)(1)(B) (emphasis added)). See, e.g., PROMESA § 201(b)(1)(N) (requiring fiscal plans to "respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of [PROMESA]").[17] HTA is by dint of Commonwealth law responsible for constructing, maintaining

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[15] See also, e.g., Brief of Congressman Rob Bishop, Chairman of the House Committee on Natural Resources, as *Amicus Curiae in Support of Neither Party*, Ambac Assurance Corp. v. Commonwealth of Puerto Rico, Case No. 18-1214 (1st Cir. June 29, 2018) (the "Bishop Brief"), Mot. Decl. Ex. 28 at 8 (noting that PROMESA was enacted in part to remedy Puerto Rico's practice of "spending in excess of appropriated amounts").

[16] "A Fiscal Plan developed under this section shall . . . provide a method to achieve fiscal responsibility and access to the capital markets, and . . . (M) **ensure that assets, funds, or resources of a territorial instrumentality [e.g. HTA] are not loaned to, transferred to, or otherwise used for the benefit of a covered territory [i.e. the Commonwealth]** . . . , unless permitted by the constitution of the territory, an approved plan of adjustment under title III, or a Qualifying Modification approved under title VI." PROMESA § 201(b)(1)(M) (emphasis added).

[17] See also, e.g., Bishop Brief, Mot. Decl. Ex. 28 at 2 ("Congress also required the Commonwealth to deal fairly with its existing creditors and respect their rights, to enable conditions by which Puerto Rico could reach access to credit at reasonable rates of interest in the capital markets."); id. at 4 ("the Committee [on Natural Resources] included protections for creditors' rights before, during and after a Title III case to ensure any nonconsensual restructuring

and operating its system of highways. 9 L.P.R.A. §§ 2002, 2004. It must regain access to the capital markets to fulfill its mission. To do so requires adequate financial resources, which the Excise Tax Statutes were intended to provide and *would* provide, but for the wrongful transfers.

66. Congress's express purposes in enacting PROMESA will therefore be served by permitting HTA to recover its property from the Commonwealth so that HTA can regain financial health, pay its existing debts and regain access to the capital markets. Even assuming the Commonwealth were required to reduce funding for some small portion of non-essential services or operations as a result of HTA's recovery of its assets from the Commonwealth, that too would be in full accord with Congress's goal of "fiscal responsibility."[18]

B. The Need To Respect Puerto Rico Law Weighs In Favor Of Granting The HTA 926 Motion.

67. The First Circuit in Andalusian also held that this Court did not abuse its discretion by considering the deference to Puerto Rico law displayed in Sections 303 and 305, and elsewhere in PROMESA, because "the 2017 [ERS] transfer [at issue in Andalusian] was made pursuant to the Legislature's enactment of a Puerto Rico joint resolution and statute." Andalusian, 954 F.3d at 9. The First Circuit therefore concluded that denial of the ERS 926 Motion was justified in part because the legislation authorizing the challenged ERS transfer constituted a valid exercise of the Commonwealth's legislative powers and was therefore valid Puerto Rico law.

68. The facts of Andalusian stand in stark contrast to the facts here, where the Enabling Act and Excise Tax Statutes prohibit the Commonwealth's confiscation of HTA's assets, and the

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would not be adverse to Puerto Rico's future access to capital markets."); id. at 16 ("The Oversight Board and the fiscal plans must ensure that any debt restructuring—in Title III or otherwise—restores fiscal discipline and respects creditor interests as PROMESA requires, so that Puerto Rico can return to the capital markets.").

[18] In denying the ERS 926 Motion, both this Court and the First Circuit cited case law indicating the "principle [*sic*] purpose of *chapter 9*," as opposed to PROMESA, "is to allow municipal debtors the opportunity to continue operations while adjusting or refinancing their creditor obligations." Andalusian, 954 F.3d at 8. To the extent these chapter 9 precedents have any application at all to PROMESA, they at minimum cannot be read to override Congress's express, statutory codifications of PROMESA's purposes.

purported justification for violating these laws run afoul of the Contract Clause of the United States Constitution. The Commonwealth's and FOMB's actions diverting the HTA revenues were *not* valid exercises of Puerto Rico law, but rather consisted entirely of (i) "moratorium laws" that are expressly preempted by PROMESA § 303(1) (see Proposed Complaint ¶¶ 123–128); (ii) "unlawful executive orders" that are expressly preempted by PROMESA § 303(3) (see Proposed Complaint ¶¶ 129–133); and (iii) *ultra vires* fiscal plans and budgets that exceeded FOMB's statutory authority under PROMESA and that do not even qualify as "Fiscal Plans" or "Budgets" as defined in PROMESA (see Proposed Complaint ¶¶ 101–121). The First Circuit's endorsement of reliance on Section 303 in deciding a 926 motion therefore weighs in favor of granting the HTA 926 Motion here, where the challenged laws are expressly *preempted* by Section 303, meaning that denying HTA the ability to challenge those laws would *subvert* rather than further the goals of Section 303. Indeed, given that the Commonwealth's confiscation of HTA's assets violates and "interferes" with valid Puerto Rico law, including the Excise Tax Statutes and the Puerto Rico Constitution, the policies underlying Sections 303 and 305 weigh in favor of permitting HTA to vindicate Puerto Rico law by bringing avoidance actions to counteract the Commonwealth's unlawful seizure of its assets.

C. The HTA 926 Motion Does Not Raise The Same "Proliferation of Actions" Concerns As The ERS 926 Motion.

69. Both this Court's denial of the ERS 926 Motion and the First Circuit's affirmation of that denial focused on the fact that the ERS Bondholders had "brought other Title III court actions [in addition to the ERS 926 Motion], which the [ERS] Bondholders concede seek the same relief as would be sought in the proposed avoidance actions." Andalusian, 954 F.3d at 10; see also In re Financial Oversight and Management Board, 432 F. Supp. 3d at 31 ("The [ERS] Bondholders have vigorously sought to protect their financial interests and have challenged the

Commonwealth's Pay-Go Legislation on multiple fronts and on a wide range of theories. Those proceedings will continue in due course."). Thus, a primary rationale for both this Court's and the First Circuit's decisions was the desire "to seek to avoid a proliferation of actions seeking essentially the same remedy," because "[e]ach such proceeding potentially drains assets which could be put to other uses." Andalusian, 954 F.3d at 11.

70. These concerns regarding the potential "proliferation of actions" that undergirded the denial of the ERS 926 Motion weigh differently here, where Movants have taken all reasonable steps to avoid pursuing avoidance actions as trustees while their other actions remain pending. As noted above, Court-imposed deadlines (which Movants opposed), together with FOMB's refusal to toll the statute of limitations any further, leave Movants no choice but to preserve their rights by filing the HTA 926 Motion now. See supra ¶¶ 27–34. While Movants are committed to avoiding any needless "proliferation of actions," Movants cannot reasonably be expected to simply forfeit their Section 926 rights through the passage of time, nor should they be prejudiced or penalized for following the schedules imposed on them and where, unlike in the case of the ERS Bondholders, the timing of their 926 motion was not of their choosing. The concerns about the "proliferation of actions" that were central to this Court's and the First Circuit's denial of the ERS 926 Motion should therefore play no role in the Court's decision with respect to the HTA 926 Motion before it now. Moreover, to the extent the Court wishes to minimize duplication and conserve resources, it could grant the Proposed Bridge Order and set the HTA 926 Motion to be heard, as noted above, in conjunction with the pending HTA Summary Judgment Motion covering related issues. See supra ¶ 4.

D. Failure To Grant The HTA 926 Motion Would Result In A Substantive Consolidation Prohibited By PROMESA § 304(f).

71. Section 304(f) of PROMESA provides that nothing in Title III may be construed as

authorizing "substantive consolidation of the cases of affiliated debtors." This means that in evaluating FOMB's refusal to bring avoidance actions on behalf of HTA, the Court must consider the different juridical identities and distinct interests of the different Title III Debtors that FOMB represents. In Andalusian, the First Circuit concluded that there was no impermissible substantive consolidation because the disputed legislation advanced ERS's own interest in achieving economy and efficiency in the Commonwealth government. Here, in contrast, HTA has no interest in handing over its own funds to the Commonwealth to pay expenses unrelated to HTA's mission or governmental purposes. The assets belonging to one Debtor are simply being taken and used to pay the creditors of a different affiliated Debtor. That is the essence of substantive consolidation.[19]

72. In the ERS 926 Motion, the ERS Bondholders sought appointment as trustee to pursue avoidance actions to recover (i) employer contributions that the Commonwealth was obligated to pay to ERS and (ii) property that ERS had sold to the Commonwealth and conveyed to the General Fund without adequate compensation. See ERS 926 Motion. This transfer of funds was integral to the Commonwealth's efforts to restructure its pension system to implement a "pay as you go" pension system. See Preamble, H.R. Joint Res. 188, 18th Leg. Assem., June 6, 2017. In denying the ERS 926 Motion, the Court found it was "not unreasonable" for FOMB to decline

[19] Substantive consolidation "is a process by which the assets and liabilities of different entities are consolidated and treated as a single entity." J. Stephen Gilbert, Substantive Consolidation in Bankruptcy: A Primer, 43 Vand. L. Rev. 207, 209 (1990) (citing 5 Collier On Bankruptcy ¶ 1100.06[1], at 1100-31 to -32 (L. King 15th ed. 1979)); see also In re Hemingway Transp., Inc., 954 F.2d 1, 11-12 (1st Cir. 1992) (". . [s]ubstantive consolidation merges the assets and liabilities of the debtor entities into a unitary debtor estate."). Substantive consolidation, "in almost all instances, threatens to prejudice the rights of creditors . . . because separate debtors will almost always have different ratios of assets to liabilities[;] [t]hus, the creditors of a debtor whose asset-to-liability ratio is higher than that of its affiliated debtor must lose to the extent that the asset-to-liability ratio of the merged estates will be lower." In re Snider Bros., 18 B.R. 230, 234 (Bankr. D. Mass. 1982); see also Hemingway Transp., 954 F.2d at 12 (noting that "[substantive] consolidation can cause disproportionate prejudice among claimants required to *share* the debtors' pooled assets") (emphasis in original); In re Owens Corning, 419 F.3d 195, 206 (3d Cir. 2005) ("The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution."). For these reasons, even absent the express prohibition of substantive consolidation in PROMESA § 304(f), a proposed substantive consolidation can render a proposed plan un-confirmable. See In re GSC, Inc., 453 B.R. 132, 165 (Bankr. S.D.N.Y. 2011) (finding that debtor's proposed plan "was unlikely to be confirmed in the near future" due to, *inter alia*, disputes among the parties regarding "the proposed substantive consolidation of some but not all of the Debtors").

to cause ERS to challenge the Commonwealth's authority to "enact legislation restructuring and reforming its pension system." In re Financial Oversight and Management Board, 432 F.Supp.3d at 30. The First Circuit affirmed, explaining that "the interests of [ERS] itself" include governance of the Commonwealth: the ERS Enabling Act specified that "[t]he funds of the System . . . shall be used and applied . . . for the payment of retirement and disability annuities . . . *in order to achieve economy and efficiency in the administration of the Government of the Commonwealth of Puerto Rico*." Andalusian, 954 F.3d at 8 (emphasis in original).

73. In other words, ERS's interests under Commonwealth law were not different from the Commonwealth's interests. The Commonwealth established ERS to provide retirement benefits to Commonwealth employees. See Act 447 of 1951 § 1. The employer contributions to ERS came from Commonwealth funds. See id. § 21(f) ("The contributions by each employer shall be budgeted and appropriated each year concurrently with the appropriations made for the salaries of compensations of the employees."). And the Commonwealth established ERS as a trust responsible for collecting, investing, and distributing the employer contributions it received. Id. § 15. As trustee, ERS did not own the property it held. Once the Commonwealth implemented the "pay as you go" system, ERS's role and mission under Commonwealth law were supplanted, and the challenged transfers were in service of Commonwealth legislation. Thus the First Circuit concluded that consideration of governance interests of the Commonwealth did not amount to "substantive consolidation" in violation of PROMESA § 304(f).

74. This reasoning does not extend to HTA. In contrast to ERS, Puerto Rico law treats HTA and the Commonwealth as distinct corporate entities with separate rights and interests. HTA was established to provide the people of Puerto Rico with roads and means of transportation, improve movement of traffic, and clear roadways of hazards. 9 L.P.R.A. § 2002. To allow HTA to finance this work, the Commonwealth enacted the Excise Tax Statutes that assigned a special

stream of revenues to HTA. HTA owns these revenues and is entitled to deploy the funds for its "corporate purposes"—including, as mandated by statute, for the payment of the HTA Bonds. See 13 L.P.R.A. § 31751; 9 L.P.R.A. §§ 2021, 5681. Thus, FOMB and this Court cannot regard HTA's and the Commonwealth's interests as one. Indeed, FOMB filed distinct Title III petitions in this Court for HTA and the Commonwealth.

75. From HTA's perspective, FOMB's refusal to bring an avoidance action is plainly unjustified. The Commonwealth's refusal to transfer Excise Taxes to HTA—which by statute are HTA property—directly undercuts HTA's mission under Puerto Rico law in multiple respects. Since the early 2000s, HTA received well over $300 million a year for its corporate purposes under the Excise Tax Statutes prior to the Commonwealth's retention of funds. See HTA Audited Financial Statements, June 30, 2001, HTA_STAY0045485; HTA, Independent Auditors' Report, June 30, 2016, at 9–10. HTA requires these transfers to satisfy its obligations to HTA Bondholders, which in turn will enable HTA to return to the capital markets and carry out its mission of developing, maintaining, and improving roadways for the people of Puerto Rico.

CONCLUSION

76. For the foregoing reasons, Movants respectfully request that the Court: (i) on an urgent basis, enter a bridge order substantially in the form of Exhibit A; (ii) enter an order substantially in the form of Exhibit B appointing Movants as co-trustees to pursue the claims set forth in the Proposed Complaint (Exhibit C) and any similar or related claims under Sections 544, 545, 547, 548, 549(a), or 550 of the Bankruptcy Code on behalf of HTA against the Commonwealth; and (iii) grant any further relief the Court may deem proper.

Certification of Compliance with
Local Rule 9013-1 and Tenth Amended Case Management Procedures

Pursuant to Local Rule 9013-1 and ¶ I.H of the *Tenth Amended Notice, Case Management and Administrative Procedures*, the undersigned counsel hereby certify that they have (a) carefully examined the matter and concluded that there is a true need for an urgent decision; (b) not created the urgency through any lack of due diligence; and (c) made reasonable, good-faith communications in an effort to resolve or narrow the issues that are being brought to the Court.

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Dated: July 17, 2020
San Juan, Puerto Rico

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the District of Puerto Rico by using the CM/ECF system, which sent notification of such filing to all CM/ECF participants.

New York, New York

July 17, 2020

By: */s/ Robert Berezin*
Robert Berezin*
* Admitted *pro hac vice*

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, Debtor.[20]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY ("HTA"), Debtor.	PROMESA Title III No. 17 BK 3567-LTS

[PROPOSED] BRIDGE ORDER GRANTING URGENT MOTION BY AMBAC ASSURANCE CORPORATION, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., FINANCIAL GUARANTY INSURANCE COMPANY, AND NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION

[20] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17- BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5233-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

THIS MATTER is before the Court on the Urgent Motion for a Bridge Order filed by Ambac Assurance Corporation ("Ambac"), Assured Guaranty Corp., Assured Guaranty Municipal Corp. (together, "Assured"), Financial Guaranty Insurance Company ("FGIC"), and National Public Finance Guarantee Corporation ("National") (collectively, "Movants").

UPON CONSIDERATION of the Urgent Motion, the relevant portions of the docket, and being otherwise fully advised in the matter, it is hereby **ORDERED** that:

1. The Urgent Motion is **GRANTED** as set forth herein.

2. Pursuant to Section 926 of title 11 of the United States Code, Movants are hereby preliminarily appointed as co-trustees for Puerto Rico Highways and Transportation Authority ("HTA") and authorized to file a complaint substantially in the form of the Proposed Complaint, attached as Exhibit C to the Motion, commencing an avoidance action (the "HTA Avoidance Action") on HTA's behalf against the Commonwealth of Puerto Rico (the "Commonwealth") on or before August 14, 2020.

3. The HTA Avoidance Action shall be immediately stayed pending the appointment of Movants as co-trustees on a permanent basis, including following any successful appeal of an order of this Court denying the HTA 926 Motion.

4. Alternatively, in the event any order of this Court denying the HTA 926 Motion becomes final and un-appealable, including following any grant or denial of a request for a writ of certiorari to the United States Supreme Court, the HTA Avoidance Action shall automatically be dismissed with prejudice.

Dated: _____, 2020

SO ORDERED:

_____
Honorable Laura Taylor Swain
United States District Court Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, Debtor.[21]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY ("HTA"), Debtor.	PROMESA Title III No. 17 BK 3567-LTS

[PROPOSED] ORDER GRANTING MOTION FOR APPOINTMENT AS TRUSTEES UNDER 11 U.S.C. § 926 OF AMBAC ASSURANCE CORPORATION, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., FINANCIAL GUARANTY INSURANCE COMPANY, AND NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION

[21] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17- BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5233-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

THIS MATTER is before the Court on the Motion filed by Ambac Assurance Corporation ("Ambac"), Assured Guaranty Corp., Assured Guaranty Municipal Corp. (together, "Assured"), Financial Guaranty Insurance Company ("FGIC"), and National Public Finance Guarantee Corporation ("National") (collectively, "Movants") for an order appointing them as trustees, pursuant to Section 926 of title 11 of the United States Code, to pursue on behalf of the Puerto Rico Highways and Transportation Authority ("HTA") against the Commonwealth of Puerto Rico (the "Commonwealth") the claims set forth in the Proposed Complaint attached as Exhibit C to the Motion, and any similar or related claims under section 544, 545, 547, 548, 549(a), or 550 of the Bankruptcy Code.

The Court having reviewed the Motion and the relevant portions of the docket; the Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 48 U.S.C. § 2166(a); the Court determining that venue of this proceeding and the Motion in this district is proper under 28 U.S.C. § 1391(b) and 48 U.S.C. § 2167(a); notice of the Motion being adequate and proper under the circumstances; upon the record of the hearing on the Motion; and after due deliberation and sufficient cause appearing; therefore, and being otherwise fully advised in the matter, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. Ambac, Assured, FGIC, and National (collectively, the "Co-Trustees") are hereby appointed as co-trustees for HTA to pursue the claims set forth in the Proposed Complaint attached as Exhibit C to the Motion and any similar or related claims under section 544, 545, 547, 548, 549(a), or 550 of the Bankruptcy Code.
3. The Co-Trustees are authorized to file one or more complaints asserting the claims set forth in the Proposed Complaint attached as Exhibit C to the Motion

and any similar or related claims under section 544, 545, 547, 548, 549(a), or 550 of the Bankruptcy Code.

4. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this order.

Dated: _____, 2020 SO ORDERED:

_____
Honorable Laura Taylor Swain
United States District Court Judge

EXHIBIT C

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

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, Debtor.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY, through Ambac Assurance Corporation, Assured Guaranty Corp., Assured Guaranty Municipal Corp., Financial Guaranty Insurance Company, and National Public Finance Guarantee Corporation in their capacity as co-trustees under 11 U.S.C. § 926, Plaintiff, -against- THE COMMONWEALTH OF PUERTO RICO, THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, THE PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, HON. WANDA VAZQUEZ GARCED, in her official capacity as the Governor of the Commonwealth of Puerto Rico, OMAR MARRERO, in his official capacity as the Executive Director of the Puerto Rico Fiscal Agency and Financial Advisory Authority, and HON. FRANCISCO PARES ALICEA, in	Adversary No. _____ **[PROPOSED] ADVERSARY COMPLAINT**

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

his official capacity as the Secretary of Treasury of the Commonwealth of Puerto Rico,

Defendants.

[PROPOSED] ADVERSARY COMPLAINT

TO THE HONORABLE COURT:

NOW COMES Plaintiff the Puerto Rico Highways and Transportation Authority ("HTA"), through Ambac Assurance Corporation, Assured Guaranty Corp., Assured Guaranty Municipal Corp., Financial Guaranty Insurance Company, and National Public Finance Guarantee Corporation (together, the "Co-Trustees") as court-appointed trustees under 11 U.S.C. § 926(a), and respectfully states, alleges, and prays as follows:

NATURE OF THIS ADVERSARY PROCEEDING

1. Beginning in 2015, the Commonwealth of Puerto Rico (the "Commonwealth") has engaged in a series of actions that transferred HTA's assets to the Commonwealth for its own benefit, in the process rendering HTA insolvent. First, the Commonwealth issued Administrative Bulletin No. EO-2015-46 (the "Clawback Order"), which directed the Commonwealth's Secretary of Treasury to withhold certain excise taxes rather than apply them to the payment of bonds issued by HTA ("HTA Bonds") as required by 13 L.P.R.A. § 31751(a)(1); 9 L.P.R.A. §§ 2013(a)(2), 2021, and 5681 (collectively, and including any similar or related statutes, "The Excise Tax Statutes"). Second, it enacted a 2016 moratorium law (Act No. 21-2016, the "First Moratorium Law,") authorizing the Governor of the Commonwealth to declare states of emergency for Puerto Rico public entities, including HTA, and prohibiting the payment of principal or interest by such entities, including through the suspension of the Commonwealth's obligation to transfer excise tax revenues to HTA's bank accounts and/or the suspension of HTA's obligations to transfer excise tax revenues to the fiscal agent (the "Fiscal Agent") for the HTA Bonds. Third, the Commonwealth enacted additional moratorium laws (collectively, including the First Moratorium

Law and any additional moratorium laws that the Commonwealth may enact in the future, the "Moratorium Laws") and issued various orders under the Moratorium Laws (including any order issued under any moratorium law, the "Moratorium Orders") prohibiting payments of principal and interest on the HTA Bonds, including by transferring the HTA revenues pledged as collateral for the payment of the HTA Bonds to the Commonwealth for other, unauthorized purposes.

2. The Commonwealth, including the Financial Oversight and Management Board for Puerto Rico ("FOMB"), has also transferred HTA's funds pursuant to a series of *ultra vires* fiscal plans (including any amended or superseding fiscal plan, the "Fiscal Plans") that (i) purport to require the transfer of HTA's assets, funds, and resources to the Commonwealth and for the Commonwealth's benefit notwithstanding that Section 201(b)(1)(M) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") requires a fiscal plan to "ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory," and (ii) violate priorities and liens under Puerto Rico law, notwithstanding that Section 201(b)(1)(N) of PROMESA requires a fiscal plan to "respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of [PROMESA]."

3. In furtherance of these unlawful and *ultra vires* Fiscal Plans, and purportedly to enforce compliance with them, the Commonwealth also enacted a "Fiscal Plan Compliance Law." Act No. 26-2017 (including as amended or superseded, the "Compliance Law"). The Compliance Law disregards HTA's separate corporate existence and HTA's property rights. Specifically, chapter 4 of the Compliance Law purports to authorize the Commonwealth to expropriate property, in the form of "surplus" revenues, from HTA and the HTA Bondholders. Therefore,

chapter 4 authorizes the expropriation of revenues that secure the HTA Bonds while making no provision for payment by HTA of its secured debt. Additionally, chapter 6 of the Compliance Law provides that "any special State fund and any other income of the agencies and public corporations [including HTA] shall be deposited entirely in the State Treasury, under the custody of the Secretary of the Treasury or the banking entity it deems appropriate." Among the funds held in such special funds are excise taxes that constitute property of HTA pledged to secure the HTA Bonds and held in trust by the Secretary of Treasury "in the name and for the benefit of [HTA]." See, e.g., 13 L.P.R.A. § 31751; 9 L.P.R.A. § 5681; see also 9 L.P.R.A. § 2021. Chapter 6 also conditions the use of the Excise Taxes on such use being "in accordance . . . with the Fiscal Plan." Chapter 6 of the Compliance Law therefore purports to authorize continued diversion of funds that constitute property of HTA and that secure the HTA Bonds.

4. The Commonwealth provided HTA with no consideration in exchange for this unauthorized siphoning of HTA's funds, thereby aggravating HTA's financial distress and rendering it insolvent and unable to pay its debts.

5. On ____, 2020, the Court entered an order appointing the Co-Trustees as trustees to pursue the claims set forth herein on behalf of HTA and against the Commonwealth. See ECF No. __. Accordingly, Plaintiff HTA, through the Co-Trustees, seeks a judgment for avoidance of transfers, and recovery of the funds transferred, from HTA to the Commonwealth pursuant to §§ 544(b), 549(a), 548(a) and 550 of title 11 of the United States Code (the "Bankruptcy Code").

THE PARTIES

6. Plaintiff HTA is a public corporation created by Act No. 74-1965 (the "Enabling Act") to assume responsibility for the construction of highways and other transportation systems in Puerto Rico.

7. Co-Trustee Assured Guaranty Corp., or "AGC", is a Maryland insurance company with its principal place of business at 1633 Broadway, New York, New York 10019.

8. Co-Trustee Assured Guaranty Municipal Corp., or "AGM", is a New York insurance company with its principal place of business at 1633 Broadway, New York, New York 10019.

9. Co-Trustee National Public Finance Corporation, or "National," is a New York insurance company with its principal place of business at 1 Manhattanville Road, Purchase, NY 10577.

10. Co-Trustee Ambac Assurance Corporation, or "Ambac," is a Wisconsin-domiciled stock insurance corporation with its principal place of business at One World Trade Center, 41st Floor, New York, New York 10007.

11. Co-Trustee Financial Guaranty Insurance Company, or "FGIC," is a stock insurance company organized under the laws of New York, with its principal office located at 125 Park Avenue, New York, New York 10017.

12. Defendant the Commonwealth is a United States territory subject to the laws of the United States.

13. Defendant FOMB is an entity established under Title I of PROMESA to provide a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets.

14. Defendant the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") is an entity created pursuant to the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, P.R. Act No. 21-2016.

15. Defendant Wanda Vazquez Garced ("Governor Vazquez" and, including, as applicable, any predecessor or successor holding the office of Governor of the Commonwealth,

the "Governor") is the Governor of the Commonwealth. Plaintiff sues the Governor, and any successors thereto, in her official capacity.

16. Defendant Omar Marrero (including, as applicable, any predecessor or successor holding the office of Executive Director of AAFAF, the "AAFAF Executive Director") is the Executive Director of AAFAF and in that capacity is empowered to implement the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, and the Compliance Law. Plaintiff sues the AAFAF Executive Director, and any successors thereto, in his official capacity.

17. Defendant Hon. Francisco Parés Alicia (including, as applicable, any predecessor or successor holding the office of Secretary of Treasury of the Commonwealth, the "Secretary of Treasury") is the Secretary of Treasury of the Commonwealth and in that capacity is empowered to implement the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, and the Compliance Law. Plaintiff sues the Secretary of Treasury, and any successors thereto, in his official capacity.

JURISDICTION AND VENUE

18. This action seeks avoidance of transfers pursuant to §§ 549, 544 and 548 of the Bankruptcy Code and to recover the value of those transfers pursuant to § 550.

19. This Court has jurisdiction over all claims and causes of action in this adversary proceeding pursuant to PROMESA § 306(a)(2) because they arise in or are "related to" the above-captioned Title III cases. This Court has personal jurisdiction over all of the Defendants pursuant to PROMESA § 306(c).

20. This is an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure and Section 310 of PROMESA, which provides "[t]he Federal Rules of Bankruptcy Procedure shall apply to a case under [Title III of PROMESA] and to all civil proceedings arising in or related to cases under [Title III of PROMESA]." PROMESA § 310; Fed. R. Bankr. P. 7001.

21. Venue is proper under PROMESA § 307 because this adversary proceeding is brought in a Title III case.

FACTUAL ALLEGATIONS

I. HTA And The HTA Bonds

22. Plaintiff HTA is a public corporation created by the Enabling Act to assume responsibility for the construction of highways and other transportation systems in Puerto Rico. The Enabling Act specifically identifies HTA as a "body corporate and politic . . . consisting of a public corporation," meaning that HTA has a distinct corporate existence from the Commonwealth. See 9 L.P.R.A. § 2002. Pursuant to the Enabling Act, HTA issued the HTA Bonds under general bond resolutions (the "Resolutions") adopted in 1968 (the "1968 Resolution") and 1998 (the "1998 Resolution").

23. Under the Resolutions, the HTA Bonds are secured by a gross lien consisting of a perfected security interest in pledged revenues, including (i) revenues derived from HTA's toll facilities (the "Toll Revenues"); (ii) special excise taxes consisting of, among other things, taxes on gasoline, diesel, crude oil, cigarettes, and other special excise taxes collected by the Commonwealth (the "Tax Revenues"); and (iii) special excise taxes consisting of motor vehicle license fees collected by the Commonwealth (the "Vehicle Fees"; together with the Tax Revenues, the "Excise Taxes"; and together with the Toll Revenues and the Tax Revenues, the "Pledged Revenues"). Each Resolution constitutes a contract between HTA and the HTA Bondholders as well as a "security agreement," including as defined in section 101(50) of title 11 (the "Bankruptcy Code") of the United States Code. 11 U.S.C. § 101(50). Therefore, the pledges of the Pledged Revenues to the HTA Bondholders under the 1968 and 1998 Resolutions constitute "security interests," including as defined in section 101(51) of the Bankruptcy Code. 11 U.S.C. § 101(51).

24. Furthermore, on February 7, 2002, HTA entered into a security agreement (the "2002 Security Agreement") with Co-Trustees and other holders of HTA Bonds issued under the 1998 Resolution, under which such HTA Bondholders were granted "a security interest in the Puerto Rico Highway and Transportation Authority Transportation Revenue Bonds Interest and Sinking Fund (and all accounts therein), maintained under the [1998] Resolution, ***and all amounts required to be on deposit therein by the terms of the [1998] Resolution***, including all proceeds and after-acquired property, subject to application as permitted by the [1998] Resolution."

25. The Secretary of Treasury acts as a collection agent on behalf of HTA and the HTA Bondholders with respect to the Excise Taxes. Upon collection, the Secretary of Treasury is required by statute to hold the Excise Taxes in a "special deposit in the name and for the benefit of [HTA]," separate and distinct from the Commonwealth's General Fund. 13 L.P.R.A. § 31751(a)(1)(D) (Ex. E, ECF No. 10107); 9 L.P.R.A. § 5681; *see also* 9 L.P.R.A. § 2021.

26. The Commonwealth's financial statements define "special deposit fund" as a fund with respect to which the Commonwealth acts in a fiduciary capacity, and the term includes revenue and agency accounts for which the Commonwealth acts in an agent's capacity. A special deposit is used to account for funds held by the Commonwealth in a trustee capacity, or as an agent for others, including other governmental units. Special deposits fall into the broader category of "Special Revenue Funds." The Commonwealth defines "Special Revenue Funds" as "Commonwealth governmental funds *separate from the General Fund* that are created by law, *are not subject to annual appropriation* and have specific uses established by their respective enabling legislation. *Special Revenue Funds are funded from*, among other things, revenues from federal programs, tax revenues *assigned by law to public corporations* and other third parties, fees and charges for services by agencies, dividends from public corporations and financing proceeds." TSA Cash Flow for October & November FY2018, CW_STAY0000229-242 at 231; 2020 TSA

Cash Flow for the month of January FY20, CW_STAY0000914-933 at 916; TSA Cash Flow as of March 8, 2019.

27. The Excise Taxes are—at all times—required to be designated for the benefit of HTA and its Bondholders and are *not* to be considered as part of the General Fund. Moreover, joint resolutions itemizing appropriations to be charged to the Commonwealth's General Fund contain no line items for contributions to HTA on account of the Excise Taxes, yet these same resolutions do contain line item contributions for other public corporations such as the Employee Retirement System.

28. The Commonwealth's longstanding practices in implementing the Excise Tax Statutes show that it has treated the Excise Taxes as HTA's money, not the Commonwealth's. For example, through governmental fund accounting, the Commonwealth tracks financial resources (i.e., monies) by segregating them into "funds"—including a "general fund" and "special revenue funds"—that record revenues and expenditures in accordance with various legal requirements.

29. As relevant here, the Commonwealth uses a special fund to implement Treasury's obligation under the Excise Tax Statutes to cover the Excise Taxes into a "special deposit" for the benefit of HTA. In Treasury's accounting system, that special fund is known as Fund 278 (and its various tax-specific account designations), and it records all Excise Taxes as soon as they are collected by Treasury. Fund 278 meets all the requirements of the Commonwealth's definition of a special revenue fund as set forth above. The Commonwealth's accounting system separately identifies the General Fund as Fund 111, which is mutually exclusive of Fund 278; indeed, the Excise Taxes are never credited to the General Fund at collection.

30. The Commonwealth placed the Excise Taxes in Fund 278 and designated the revenue streams generated by the Excise Taxes as held by HTA to ensure their traceability while in the custody of Treasury. The Excise Taxes were consistently recorded as part of Fund 278, a

fund that, by definition, is not subject to annual appropriations. For example, when the Excise Taxes are collected by the Treasury and deposited into the Treasury's collections bank account, the Treasury records an increase in Fund 278 in those amounts. Historically, the Excise Taxes did not appear in the Commonwealth's General Fund budgets.

31. Amounts from Fund 278 have been withdrawn at the direction of HTA, and no evidence suggests that Treasury exercised independent control over revenues deposited into Fund 278, for example by rejecting or blocking any withdrawals from Fund 278 directed by HTA. Transfer authorization forms and Treasury documentation show that the authority to approve Excise Tax withdrawal transactions from Fund 278 was delegated to HTA. See, e.g., Treasury Circular Letter 1300-01-99 (listing Form SC 735 payment vouchers as "[d]ocuments for which data entry and approval have been delegated to the agencies"). The Treasury Circular Letter provides HTA with the power to transfer amounts from Fund 278 because HTA fits the Circular Letter definition of an "agency" whose funds are within the custody of the Treasury Secretary.

32. Pursuant to the Excise Tax Statutes, the Excise Taxes, up to the amount necessary to pay principal and interest on the HTA Bonds, may not be used for any other purpose. See, e.g., 13 L.P.R.A. § 31751(a)(1); 9 L.P.R.A. § 2021, 5681. Further, the Excise Tax Statutes give rise to statutory liens in favor of the HTA Bondholders on the Excise Taxes. See 11 U.S.C. § 101(53). The Commonwealth has explicitly acknowledged in legislation that the Excise Taxes are imposed to finance highway, traffic, and transportation facilities and systems. The Toll Revenues likewise constitute trust funds collected and held by HTA on behalf of the HTA Bondholders and are property of HTA and the HTA Bondholders—not of the Commonwealth. See 9 L.P.R.A. § 2013(a)(2).

33. Any time the Commonwealth is in possession of Pledged Revenues, it holds such Pledged Revenues for the benefit of HTA and the HTA Bondholders. Any time HTA is in

possession of Pledged Revenues, HTA holds possession of such Pledged Revenues for the benefit of the HTA Bondholders.

34. The Excise Tax Statutes grant HTA and the HTA Bondholders the most senior possible interests in the Excise Taxes consistent with Section 8, Article VI of the Commonwealth Constitution ("Article VI, Section 8").[2] To this end, the Excise Tax Statutes grant HTA and the HTA Bondholders full beneficial ownership of the Excise Taxes, subject only to the conditions that, in a fiscal year in which Article VI, Section 8 is in effect, the Commonwealth may "claw back" the Excise Taxes (i) to be used *solely* to pay the public debt, but (ii) *only if the public debt remains unpaid after a first application of all other available resources to the payment of public debt*. See Assured Guar. Corp. v. García-Padilla, 214 F. Supp. 3d 117, 121 (D.P.R. 2016) ("The funds from these taxes and tax liens may be used to pay the public debt if no other Commonwealth resources are available."). The preconditions to a "clawback" of the Excise Taxes under Article VI, Section 8 have never been satisfied, because the Commonwealth has at all relevant times had sufficient available resources to pay the public debt on a first-priority basis in accordance with Article VI, Section 8.[3] In any event, the Commonwealth ceased paying the public debt as of July 1, 2016, and no valid "clawback" can exist during any period in which the public debt is not being paid.

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[2] Article VI, Section 8 provides: "In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law." P.R. Const. art. VI, § 8.

[3] For example, the Commonwealth's general fund budgets for fiscal years 2017, 2018, 2019, and 2020 contemplated that the Commonwealth would make total expenditures of $8.78 billion (see, e.g., Reorg Research, "Puerto Rico Legislature Passes $8.78B Fiscal 2017 General Fund Budget" (July 1, 2016)), $9.562 billion (see FOMB, "FY18 Budget" (June 30, 2017)), $8.757 billion (See FOMB, "Press Release: Oversight Board Submits FY19 Commonwealth Compliant Budget Certified by Unanimous Written Consent" (June 30, 2018), and $9.1 billion (see FOMB, "FY20 Certified Budget for the Commonwealth of Puerto Rico" (June 30, 2019), respectively, in these fiscal years. Meanwhile, total debt service on the public debt in each of these fiscal years was anticipated as only $1.128 billion, $1.065 billion, $1.090 billion, and $1.118 billion, respectively.

35. The HTA Bondholders have perfected their liens on the Pledged Revenues, including by filing financing statements.

36. Through the Enabling Act, the Commonwealth covenanted with the HTA Bondholders that it would "not limit or restrict the rights or powers . . . vested in [HTA by the Enabling Act] until all such bonds at any time issued, together with the interest thereon, are fully met and discharged." 9 L.P.R.A. § 2019.

37. But for the diversion of collateral securing the HTA Bonds pursuant to the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, and the Compliance Law, HTA would be solvent and could pay its debts in full. For example, before FOMB and the Commonwealth took those actions, HTA received $531.8 million in Excise Tax revenues in FY 2014 and $554.2 million in FY 2015. *See* Audited Financial Statements, Puerto Rico Highways and Transportation Authority, Year Ended June 30, 2015), at 12–13. That revenue exceeded HTA's debt service by over $130 million in FY 2014 and $200 million in FY 2015, *see id* at 13, thus enabling HTA to satisfy its obligations to bondholders while providing additional liquidity to support its operations.

38. As described below, however, the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, and the Compliance Law have since caused HTA to default on debt service payments due on the HTA Bonds on or around July 1, 2016; January 1, 2017; July 3, 2017; January 1, 2018; July 1, 2019, and January 1, 2020, and July 1, 2020.

II. The Commonwealth Begins To Divert HTA's Funds Prior To PROMESA's Enactment.

39. Beginning in 2015, the Commonwealth has engaged in a series of actions that diverted the Pledged Revenues from the payment of the HTA Bonds and destroyed the value of these revenues to HTA and the HTA Bondholders. During the period in which the Commonwealth and HTA initiated this diversion of Pledged Revenues from the payment of the HTA Bonds, the

Commonwealth and HTA were involved in discussions with HTA Bondholders regarding a possible restructuring of HTA's finances. On information and belief, a primary purpose of HTA and the Commonwealth's diversion of Pledged Revenues from the payment of the HTA Bonds was, and continues to be, to hinder HTA Bondholders' ability to collect on the HTA Bonds, including as a means of providing HTA and the Commonwealth with "leverage" vis-à-vis HTA Bondholders in restructuring negotiations. The Commonwealth, HTA, and their officers therefore implemented the various diversions of the Pledged Revenues, including pursuant to the Claw Back Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, and Compliance Law, with actual intent to hinder, delay, and defraud HTA Bondholders.

40. Commonwealth finances confirm that the primary purpose of this diversion was to hinder, delay, and defraud HTA Bondholders. Apparently, the Commonwealth has no need or use for the Excise Taxes it has been diverting, and instead has simply been allowing the cash balance of the Commonwealth's "Treasury Single Account" to build up over the period in which the Commonwealth has been diverting the Excise Taxes. For example, in December 2017, FOMB and AAFAF disclosed that the Treasury Single Account ("TSA") balance was $1.542 billion, the first time FOMB and AAFAF had made such a disclosure. Since then, the balance of the TSA alone has risen to approximately $9 billion, which balance includes, on information and belief, Excise Taxes covered into Fund 278 but not subsequently transferred to HTA Bondholders as required under the Excise Tax Statutes and the Resolutions. Given (i) the large and increasing balance of the TSA and (ii) the abundance of monies in the TSA, other than Excise Taxes, from which the Commonwealth could fund its expenditures, the Commonwealth clearly has no

particular need or use for the Excise Taxes (other than to hinder, delay, and defraud HTA's creditors).[4]

A. The Clawback Order

41. On November 30, 2015, former Governor García Padilla issued the Clawback Order, which directed the Secretary of Treasury to withhold the Excise Taxes, purportedly for application to the public debt, instead of applying the Excise Taxes to the payment of the HTA Bonds as required by the Excise Tax Statutes. The Clawback Order did not constitute a valid exercise of authority under Article VI, Section 8, because, among other things, Article VI, Section 8 requires the public debt to be paid "first," and requires all other expenses to be subordinated to the payment of the public debt. The Clawback Order, however, expressly provided for other expenses to be paid "at the same time" ("a su vez") as the public debt, and not on a subordinate basis, thereby violating or failing to implement Article VI, Section 8. The Clawback Order also violated Article VI, Section 8 and the Excise Tax Statutes, because they permit the Commonwealth to "claw back" the Excise Taxes only (i) to pay the public debt and (ii) only if no other "available resources" are available for this purpose. However, (i) funds diverted by the Commonwealth pursuant to the Clawback Order were *not* used to pay the public debt, and (ii) "resources" other than the Excise Taxes were demonstrably "available" from which the public debt could have been

[4] The actual intent of FOMB, HTA, and the Commonwealth, to hinder, delay, and defraud HTA Bondholders was confirmed through remarks by FOMB's counsel during oral argument before the First Circuit in Ambac Assurance Corp. v. Commonwealth, Case No. 18-1214 (1st Cir.) on January 15, 2019. At that hearing, a member of the First Circuit panel asked FOMB's counsel to explain the purpose of a June 20, 2017 letter (the "AAFAF Letter") sent by AAFAF's counsel to the HTA Fiscal Agent, instructing the Fiscal Agent not to apply funds held in the Fiscal Agent's HTA reserve accounts to HTA Bond payments. The First Circuit panel member asked FOMB's counsel, "I still am puzzled when you say there's nothing keeping HTA from paying over those funds now, then why aren't they paying them? . . . What about the funds in these segregated [reserve] accounts?" FOMB's counsel conceded, "If they're not being used for any other purpose they could go to [Ambac-insured HTA] bondholders." The panel member then asked, "So why aren't they?" FOMB's counsel replied, "**It's probably because there are mediations in place and discussions and it's all part of one package.**" The member of the First Circuit panel accurately observed, "**What I just heard you say, literally, is there's no law keeping them from doing it but they're doing it to gain leverage in negotiations.**"

paid. Indeed, the "Whereas" clauses in the Clawback Order indicated that the Commonwealth was continuing to fund "expenses" ("los gastos") *other* than payments on the public debt. The public debt therefore could have been paid using the resources used to fund these other "expenses" rather than by using the Excise Taxes.

42. In January 2016, Assured filed a lawsuit[5] challenging the Clawback Order, among other things, on the grounds that it was not authorized under Article VI, Section 8. In response to Assured's claims, the Commonwealth defendants filed a motion to dismiss based *solely* on sovereign immunity.[6] On October 4, 2016, the Court denied the Commonwealth defendants' motion to dismiss.[7] On October 14, 2016, rather than attempting to defend the merits of the Clawback Order in further litigation, the Commonwealth announced that it had allowed the Clawback Order to expire at the end of Fiscal Year 2016.[8]

43. To date, the Commonwealth has not used approximately $147 million of the funds that it confiscated under the Clawback Order, and instead continues to hold those funds. The fact that the Commonwealth government has not used these funds demonstrates that the Clawback Order—like the Moratorium Laws, Moratorium Orders, Fiscal Plans, and Compliance Law that followed—was not primarily a response to a real or immediate liquidity crisis, but instead constituted a tactic to gain leverage in restructuring negotiations by hindering, delaying, and defrauding HTA's creditors.

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[5] See Assured Guar. Corp. v. García-Padilla, No. 16-cv-1037 (D.P.R. Jan. 7, 2016), ECF No. 1; Fin. Guar. Ins. Co. v. García Padilla, No. 16-cv-1095 (D.P.R. Jan. 19, 2016), ECF No. 1.

[6] See Assured Guar., No. 16-cv-1037, ECF No. 25; Fin. Guar., No. 16-cv-1095, ECF No. 37.

[7] See Assured Guar., 214 F. Supp. 3d at 120, 130 (denying defendants' motion to dismiss as to plaintiff Assured; granting in part and denying in part defendants' motion to dismiss as to plaintiff Financial Guaranty).

[8] See Assured Guar., No. 16-cv-1037, ECF No. 59.

B. The Moratorium Laws And Orders.

44. On April 6, 2016, the Commonwealth enacted the First Moratorium Law, which authorized the Governor to declare states of emergency with respect to a number of Puerto Rico public entities, including HTA, and to prohibit the payment of principal or interest by such entities, including by suspending the obligations of such entities to transfer funds to the relevant bond trustees or fiscal agents. See § 201(d)(ii).

45. Beginning on April 30, 2016, pursuant to the First Moratorium Law, the Governor issued a series of Moratorium Orders that prohibited payments of principal and interest on the HTA Bonds, including by diverting the Pledged Revenues from the payment of the HTA Bonds to other, unauthorized purposes. Since the enactment of the First Moratorium Law and the issuance of these initial Moratorium Orders, the Commonwealth has enacted additional Moratorium Laws and Governors have issued additional Moratorium Orders, thereby continuing the prohibition of payment on the HTA Bonds, including by diverting the Pledged Revenues for unauthorized purposes.

III. The Commonwealth Continues To Divert HTA's Funds Following PROMESA's Enactment, Including Through *Ultra Vires* Fiscal Plans And Budgets.

46. On June 30, 2016, President Obama signed PROMESA into law. The stated purpose of PROMESA is to "establish [FOMB] to assist the Government of Puerto Rico, including instrumentalities, in managing its public finances, and for other purposes." H.R. 5278, 114th Cong. (2016) (preamble). The stated purpose of FOMB is to "provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." PROMESA § 101(a).

47. Among other things, PROMESA (i) requires FOMB to develop and/or approve fiscal plans governing the future finances and budgets of the Commonwealth and its public corporations, including HTA (Title II); (ii) provides a mechanism for adjusting the Commonwealth's bond debt or the bond debt of the Commonwealth's public corporations on a

largely consensual basis (Title VI); and (iii) following "good-faith efforts to reach a consensual restructuring with creditors" and the satisfaction of certain other requirements, authorizes, but does not require, FOMB to file a petition on behalf of the Commonwealth or its public corporations, including HTA, to commence a court-supervised debt adjustment proceeding (Title III). PROMESA §§ 101, 201(c), 201(e), 206(a)(1), 304(f).

48. Sections 201(a)-(d) of PROMESA establish procedures for the development and/or approval of fiscal plans. Generally speaking, FOMB may approve a fiscal plan in the form proposed by the Governor if the proposed fiscal plan complies with the requirements of PROMESA. PROMESA § 201(c)(3)(A). Alternatively, FOMB may develop its own fiscal plan in the event the Governor fails to submit a fiscal plan that complies with PROMESA by the deadline set by FOMB. PROMESA § 201(d)(2).

49. More specifically, Section 201(a) of PROMESA requires FOMB, as soon as practicable following appointment of all of its members and its chair, to provide the Governor with a schedule for the development and submission of a Commonwealth fiscal plan. PROMESA § 201(a).

50. Section 201(c)(2) of PROMESA then requires the Governor to develop a "proposed Fiscal Plan" for submission to FOMB. PROMESA § 201(c)(2). Section 201(c)(3) next requires FOMB to review the Governor's proposed fiscal plan "to determine whether it satisfies the requirements set forth in [Section 201(b)]." Id. § 201(c)(3). Finally, Section 201(c)(3) requires FOMB *either* (i) to "approve the [Governor's] proposed Fiscal Plan" if it "satisfies" the requirements of Section 201(b), *or* (ii) to provide the Governor with (a) a "notice of violation" that includes recommendations for revisions and (b) an opportunity to correct the applicable violations of Section 201(b). Id. § 201(c)(3)(A), (B).

51. In the event FOMB issues a "notice of violation," Section 201(d)(1) of PROMESA requires the Governor to submit a revised proposed fiscal plan in accordance with the schedule established by FOMB. PROMESA § 201(d)(1).

52. Alternatively, in the event that the Governor fails to submit a proposed fiscal plan that satisfies the requirements of Section 201(b) of PROMESA before the deadline established by FOMB, Section 201(d)(2) requires FOMB to "develop and submit to the Governor and the Legislature a Fiscal Plan **that satisfies** the requirements set forth in [Section 201(b)]." PROMESA § 201(d)(2) (emphasis added).

53. Notably, while PROMESA purports to authorize FOMB to approve or reject a fiscal plan proposed by the Governor under Section 201(c)(2) or 201(d)(1) in FOMB's "sole discretion," PROMESA does *not* confer any discretion on FOMB in developing its own fiscal plan under Section 201(d)(2). Section 201(d)(2) states categorically that a fiscal plan developed under Section 201(d)(2) must "satisf[y] the requirements" set forth in Section 201(b). See PROMESA § 201(d)(2).

A. The Original Fiscal Plan

54. On October 14, 2016, Governor Padilla submitted a proposed fiscal plan for the Commonwealth (the "First Proposed Fiscal Plan"). On November 23, 2016, FOMB issued a notice of violation (the "First Violation Notice"), identifying areas in which the First Proposed Fiscal Plan failed to comply with PROMESA. The First Violation Notice also established a deadline of January 31, 2017 for Governor Padilla to submit a revised proposed fiscal plan.

55. Following the inauguration of Governor Rosselló on January 2, 2017, FOMB sent Governor Rosselló a supplemental notice of violation on January 18, 2017 (the "Second Violation Notice"), which provided additional recommendations for revisions to the First Proposed Fiscal Plan.

56. At a public meeting on January 28, 2017, FOMB extended Governor Rosselló's deadline to submit a revised proposed fiscal plan from January 31, 2017, to February 28, 2017. On February 28, 2017, Governor Rosselló submitted a revised proposed fiscal plan (the "Second Proposed Fiscal Plan") to FOMB.

57. On March 9, 2017, FOMB sent Governor Rosselló a notice of violation (the "Third Violation Notice") stating that the Second Proposed Fiscal Plan did not "comply with the requirements set forth in PROMESA." Among other deficiencies, the Third Violation Notice noted that the Second Proposed Fiscal Plan failed to "provide sufficient data to determine whether [the Second Proposed Fiscal Plan] satisfies PROMESA § 201(b)(1)(M) [prohibiting misappropriation of pledged revenues] and (N) [requiring respect for lawful priorities and liens][.]." The Third Violation Notice also set a deadline of March 11, 2017 for Governor Rosselló to submit a further revised proposed fiscal plan.

58. On or around March 11, 2017, Governor Rosselló submitted another revised proposed fiscal plan (the "Third Proposed Fiscal Plan"), which ultimately formed the basis for the first fiscal plan developed and purportedly certified by FOMB (the "Original Fiscal Plan"). Like the Second Proposed Fiscal Plan, the Third Proposed Fiscal Plan failed to provide data demonstrating compliance with Sections 201(b)(1)(N) and 201(b)(1)(M) of PROMESA, which was one of the areas of non-compliance with PROMESA identified in the Third Violation Notice.

59. On March 13, 2017, FOMB purported to certify the Original Fiscal Plan, which was based on the Third Proposed Fiscal Plan, but which included two amendments by FOMB. Neither of the amendments made by FOMB addressed or remedied the Original Fiscal Plan's non-compliance with 201(b)(1)(N) and (M) as identified in the Third Violation Notice. No subsequent Fiscal Plan developed by FOMB has ever remedied or addressed the deficiencies with respect to Sections 201(b)(1)(N) and (M) identified in the Third Violation Notice.

60. The Original Fiscal Plan included a list of "Legal & contractual issues not determined by the Fiscal Plan." The "issues not determined by the Fiscal Plan" included "What is an essential service," a determination necessary for satisfying the Section 201(b)(1)(B) requirement that a fiscal plan "ensure[s] the funding of essential public services." FOMB's subsequent fiscal plans likewise did not determine what services are "essential."

61. On April 7, 2017, two members of the United States Senate, Hon. Thom Tillis and Hon. Tom Cotton, sent a letter to FOMB chair José B. Carrión III expressing concern that the Original Fiscal Plan did not comply with PROMESA because it (i) failed to comply with lawful priorities and liens established by Puerto Rico's constitution, (ii) failed to differentiate between non-essential and essential spending, (iii) elevated all non-debt spending above debt service, and (iv) used unexplained economic assumptions. The Senators requested that FOMB "promptly supply our staffs with a compliance certification for the Fiscal Plan and set forth in detail how each requirement of Section 201(b)(1) of PROMESA has been satisfied."

62. FOMB's April 25, 2017 response to the Senators essentially conceding that the Original Fiscal Plan did not comply with lawful priorities and liens. FOMB claimed that the word "respect" in Section 201(b)(1)(N) of PROMESA means something other than "comply with," which in FOMB's view gave the Original Fiscal Plan the "flexibility" violate lawful priorities and liens. FOMB failed to provide the Senators with the requested compliance certification setting forth in detail how each requirement of Section 201(b)(1) was purportedly satisfied. FOMB could not provide any such certification because the Original Fiscal Plan did not satisfy each subsection of 201(b)(1), particularly Sections 201(b)(1)(N) and 201(b)(1)(M).

63. Senator Cotton replied to FOMB on June 13, 2017, stating, "I must be frank: I found your answers vague and unresponsive." The Senator continued, "[FOMB] claims that Congress, in using the word 'respect,' actually gave the board 'flexibility' to decide which legal obligations

to meet—which, in my book, is the exact opposite of what the word 'respect' means. According to the Wall Street Journal, retail investors in mutual funds nationwide stand to lose $5.4 billion as a result of [FOMB's] bizarre interpretation. If this is what 'respecting' legal obligations means, what would 'disrespecting' them look like?" The Senator also "point[ed] out that [FOMB's] letter didn't address why the Fiscal Plan fails to distinguish between essential expenses and non-essential ones."

64. On May 3, 2017, FOMB commenced a proceeding under Title III of PROMESA on behalf of the Commonwealth.

65. On May 21, 2017, FOMB commenced a proceeding under Title III of PROMESA on behalf of HTA.

B. The May 2018 And June 2018 Fiscal Plans

66. In September 2017, Hurricanes Irma and Maria reached Puerto Rico. Following the hurricanes, FOMB announced that it planned to revise the Original Fiscal Plan. After several deadline extensions, on January 24, 2018, the Commonwealth government submitted an initial draft revised fiscal plan (the "Fourth Proposed Fiscal Plan"). On February 5, 2018, FOMB issued a notice of violation (the "Fourth Violation Notice"), stating that the Fourth Proposed Fiscal Plan failed to comply with PROMESA and establishing a deadline of February 12, 2018 for the Commonwealth government to submit a further revised draft of the fiscal plan.

67. On February 12, 2018, the Commonwealth government submitted a further revised draft fiscal plan (the "Fifth Proposed Fiscal Plan").

68. On February 16, 2018, FOMB issued a press release stating that it intended to certify a revised fiscal plan by March 30, 2018.

69. On March 23, 2018, FOMB issued a press release postponing the certification of the revised fiscal plan, and stating that it intended to "announce a new certification date as soon as practicable."

70. On March 23, 2018, the Commonwealth submitted a further revised draft fiscal plan (the "Sixth Proposed Fiscal Plan").

71. On March 28, 2018, FOMB issued a notice of violation (the "Fifth Violation Notice"), stating that the Sixth Proposed Fiscal Plan failed to comply with PROMESA and establishing a deadline of April 5, 2018 for the Commonwealth government to submit a further revised draft of the fiscal plan.

72. On March 29, 2018, Congressman Rob Bishop, Chairman of the House Committee on Natural Resources (the "Natural Resources Committee") and one of the principal drafters of PROMESA, sent a letter to FOMB chair José B. Carrión III, expressing concern that the Sixth Proposed Fiscal Plan did not comply with PROMESA. Chairman Bishop stated that "the draft plans released by Governor Rosselló circumvent the stated purpose of [PROMESA]." Chairman Bishop explained: "[I]t is imperative you adhere to the tenets and Congressional mandate of PROMESA, while providing an avenue for Puerto Ricans to recover from the storms. This careful balance requires you to transparently assess the economic impact of the hurricanes and 'respect the relative lawful priorities or lawful liens' of debt issued, while working cooperatively with creditors on holistic solutions to revitalize the local economy and stabilize Puerto Rico's finances.'" Chairman Bishop noted that "[a] good start would be to determine what constitutes 'essential public services,' clearly defining where governmental cuts should occur. Furthermore, the recognition of existing debt is paramount to Puerto Rico's recovery, and will require much greater degrees of transparency, accountability, goodwill and cooperation on the part of the Puerto Rican government and [FOMB]." Chairman Bishop concluded by stating, "[t]o date, the [Natural

Resources Committee] has been unsatisfied with the implementation of PROMESA, and the lack of respect for the Congressional requirements of the Fiscal Plan. And now, due to intentional misinterpretations of the statute, the promise we made to Puerto Rico may take decades to fulfill. I ask that you adhere to the mandates of PROMESA and work closely with creditors and the Puerto Rican government as you finalize and certify the Fiscal Plans[.]"

73. On April 5, 2018, the Commonwealth submitted a further revised draft fiscal plan (the "Seventh Proposed Fiscal Plan").

74. Rather than approve the Seventh Proposed Fiscal Plan as proposed by Governor Rosselló, FOMB developed its own fiscal plan (the "April 2018 Fiscal Plan") under Section 201(d)(2) of PROMESA. FOMB released the April 2018 Fiscal Plan publicly on April 18, 2018. At a public meeting on April 19, 2018, FOMB purported to reject the Seventh Proposed Fiscal Plan and certify the April 2018 Fiscal Plan.

75. FOMB subsequently revised and purportedly re-certified the April 2018 Fiscal Plan on May 30, 2018 (the "May 2018 Fiscal Plan") and on June 29, 2018 (the "June 2018 Fiscal Plan"). The April 2018 Fiscal Plan was not developed or revised in a manner designed to address Congressman Bishop's criticisms of FOMB's implementation of the fiscal plan process, nor was any subsequent Fiscal Plan developed or revised in a way to address Congressman Bishop's criticisms.

C. The October 2018 Fiscal Plan

76. On August 1, 2018, FOMB announced that it was initiating the process of revising the June 2018 Fiscal Plan to incorporate material new information. FOMB initially set a deadline of August 17, 2018 for the Commonwealth to submit a proposed revised Commonwealth fiscal plan, but subsequently extended that deadline to August 20, 2018.

77. On or around August 20, 2018, AAFAF published a proposed revised fiscal plan (the "Eighth Proposed Fiscal Plan").

78. On August 30, 2018, FOMB issued a notice of violation (the "Sixth Violation Notice"), stating that the Eighth Proposed Fiscal Plan failed to comply with PROMESA and establishing a deadline of September 7, 2018 for the Commonwealth government to submit a further revised draft of the fiscal plan.

79. On or around September 7, 2018, AAFAF published a further proposed revised fiscal plan (the "Ninth Proposed Fiscal Plan").

80. Rather than approve the Ninth Proposed Fiscal Plan as proposed by Governor Rosselló, FOMB developed its own fiscal plan (the "October 2018 Fiscal Plan") under Section 201(d)(2) of PROMESA. FOMB released the October 2018 Fiscal Plan publicly on October 22, 2018. At a public meeting on October 23, 2018, FOMB purported to reject the Ninth Proposed Fiscal Plan and certify the October 2018 Fiscal Plan.

D. The May 2019 Fiscal Plan

81. On January 18, 2019, FOMB announced that it was initiating the process of developing yet another new fiscal plan. FOMB initially set a deadline of February 22, 2019 for the Commonwealth to submit a proposed Commonwealth fiscal plan. The Commonwealth subsequently received an extension until March 18 to submit a proposed fiscal plan.

82. On or around March 11, 2019, AAFAF published a further proposed revised fiscal plan (the "Tenth Proposed Fiscal Plan").

83. On March 15, 2015, FOMB issued a notice of violation (the "Seventh Violation Notice"), stating that the Tenth Proposed Fiscal Plan failed to comply with PROMESA and establishing a deadline of March 22, 2019 for the Commonwealth government to submit a further

revised draft of the fiscal plan. In a letter dated March 23, 2018, FOMB subsequently extended the deadline for the Commonwealth to submit a further revised fiscal plan to March 27, 2019.

84. On or around March 28, 2019, AAFAF published a further proposed revised fiscal plan (the "Eleventh Proposed Fiscal Plan").

85. Rather than approve the Eleventh Proposed Fiscal Plan as proposed by Governor Rosselló, FOMB developed its own fiscal plan (the "May 2019 Fiscal Plan") under Section 201(d)(2) of PROMESA. FOMB released the May 2019 Fiscal Plan publicly on May 9, 2019. At a public meeting on May 9, 2019, FOMB purported to reject the Eleventh Proposed Fiscal Plan and certify the May 2019 Fiscal Plan.

E. The May 2020 Fiscal Plan

86. On May 26, 2020, FOMB released a new fiscal plan that it had developed under Section 201(d)(2) (the "May 2020 Fiscal Plan"). FOMB purported to certify the May 2020 Fiscal Plan during a public meeting on May 27, 2020. As of the filing of this Complaint, the May 2020 Fiscal Plan remains the most recent Fiscal Plan developed by FOMB.

F. Fiscal Plan and Budget Requirements

87. To qualify as a "Fiscal Plan" as defined in PROMESA, a fiscal plan must satisfy a series of substantive requirements set forth in Section 201(b)(1) of PROMESA. Specifically, Section 5(10) of PROMESA defines a "Fiscal Plan" as "**a Territory Fiscal Plan** or an Instrumentality Fiscal Plan." PROMESA § 5(10) (emphasis added). Section 5(22) of PROMESA in turn defines "Territory Fiscal Plan" as "a fiscal plan for a territorial government submitted, approved, and certified **in accordance with section 201.**" Id. § 5(22) (emphasis added).

88. The Fiscal Plans developed by FOMB to date are not "in accordance with Section 201[(b)]," and therefore fail to qualify as "Fiscal Plans" as defined in PROMESA.

89. Similarly, to qualify as a "Budget" as defined in PROMESA, a budget must be "in accordance with" a fiscal plan that satisfies the substantive requirements set forth in Section 201(b)(1) of PROMESA. Specifically, Section 5(4) of PROMESA defines a "Budget" as "the **Territory Budget** or an Instrumentality Budget, as applicable." PROMESA § 5(4) (emphasis added). Section 5(21) of PROMESA in turn defines "Territory Budget" as "a budget for a territorial government submitted, approved, and certified **in accordance with section 202 [of PROMESA].**" Id. § 5(21) (emphasis added).

90. Any budgets based on the Fiscal Plans (any such budget based on a Fiscal Plan, a "Budget") are not "in accordance with section 202 [of PROMESA]," because Section 202 authorizes FOMB to submit to the Governor and the Legislature only a "compliant budget." See, e.g., PROMESA § 202(e)(3). PROMESA defines a "compliant budget" as "a budget that is prepared **in accordance with . . . the applicable Fiscal Plan**." See PROMESA § 5(6) (emphasis added). Because the Fiscal Plans do not qualify as "Fiscal Plans" as defined in PROMESA, and because the Budgets were prepared in accordance with the Fiscal Plans rather than in accordance with a fiscal plan meeting PROMESA's definition of a "Fiscal Plan," the Budgets are not "compliant budgets" as defined in PROMESA and do not qualify as "Budgets" as defined in PROMESA.

91. Furthermore, under PROMESA, FOMB had no authority to develop the Fiscal Plans, because on their face, the Fiscal Plans violate Section 201(b) of PROMESA. FOMB developed the Fiscal Plans under Section 201(d)(2) of PROMESA, and Section 201(d)(2), by its terms, did not grant FOMB any discretion in developing the Fiscal Plans. Rather, under Section

201(d)(2), FOMB had authority only to develop a fiscal plan that strictly "satisfies the requirements set forth in [Section 201(b)]," and the Fiscal Plans do *not* satisfy these requirements.[9]

92. Similarly, FOMB had no authority to develop the Fiscal Plans because FOMB refused to make numerous determinations necessary to determine whether the Fiscal Plans complied with Section 201(b) of PROMESA, including determinations as to (i) what lawful priorities and liens exist under Puerto Rico law (Section 201(b)(1)(N)); (ii) which government entities are entitled to the assets, funds, and resources governed by the Fiscal Plans and whether any transfers of funds from one entity to another mandated under the Fiscal Plans are illegal (Section 201(b)(1)(M)); and (iii) which government services qualify as "essential public services" and whether the Fiscal Plans adequately fund such essential public services (Section 201(b)(1)(B)). In purporting to develop the Fiscal Plans, FOMB failed even to consider any of these requirements, much less reach determinations with respect to them.

93. Therefore, FOMB's purported development and certification of the Fiscal Plans exceeded FOMB's statutory authority and was *ultra vires* and invalid, and FOMB has never made a "certification determination" with respect to any Fiscal Plan as such term is used in PROMESA.

94. Furthermore, because the Budgets were based on Fiscal Plans that were *ultra vires*, invalid, and exceeded FOMB's statutory authority, and because FOMB's purported development and certification of Budgets based on those Fiscal Plans likewise exceeded FOMB's statutory authority, the Budgets were themselves *ultra vires* and invalid, and FOMB has never made a "certification determination" with respect to any Budget as such term is used in PROMESA.

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[9] In the event Defendants assert that FOMB developed any of the Fiscal Plans under Section 201(f) of PROMESA, this makes no difference, because Section 201(f) similarly grants FOMB no discretion. Rather, Section 201(f) merely authorizes FOMB and the Governor to jointly develop a fiscal plan that "**meets** the requirements [of Section 201(b)]," meaning that a fiscal plan developed under Section 201(f) must strictly "meet" the Section 201(b) requirements. PROMESA § 201(f).

IV. The Compliance Law Helps Implement The Commonwealth's Diversion Of HTA's Funds Pursuant To The *Ultra Vires* Fiscal Plans

95. On or about April 29, 2017, the Commonwealth enacted the Compliance Law, which purports to act as an enforcement mechanism for the *ultra vires* Fiscal Plans.

96. Chapter 4 of the Compliance Law provides for the Commonwealth to expropriate property in the form of "surplus" revenues from its public corporations (including HTA) and their bondholders. Chapter 4 contains no provision for payment to the HTA Bondholders of their secured debt. Instead, through Chapter 4, the Commonwealth has unilaterally authorized itself to sweep the Pledged Revenues from HTA in exchange for no consideration.

97. Chapter 6 of the Compliance Law provides as follows:

> [Article 6.02]
>
> [A]s of July 1st, 2017, any special State fund and any other income of the agencies and public corporations shall be deposited entirely in the State Treasury, under the custody of the Secretary of the Treasury or the banking entity it deems appropriate[.]
>
> * * *
>
> As of July 1st, 2017, any special State funds created by law for specific purposes shall continue to be used for the purposes for which they were allocated by law, in accordance with the Recommended Budget of the Office of Management and Budget and the Fiscal Plan. . . . **Should there be any inconsistency between the law and the use of the funds with the Fiscal Plan, the purpose provided for in the Fiscal Plan approved in accordance with PROMESA shall prevail.**

98. Funds held in "special funds" in the Commonwealth Treasury include Excise Taxes constituting trust funds held by the Secretary of Treasury in the name and for the benefit of HTA. See, e.g., 13 L.P.R.A. § 31751(a)(1); 9 L.P.R.A. § 2021, 5681. By conditioning the uses of these special funds on such uses being "in accordance . . . with the Fiscal Plan," Chapter 6 fails to treat HTA as a distinct corporate entity and also fails to preserve the segregation of the Pledged Revenues for the benefit of HTA and its bondholders. Furthermore, by requiring that the Excise

Taxes be deposited in the Commonwealth Treasury rather than transferred to HTA and the HTA Bondholders, Chapter 6 mandates the transfer of the Excise Taxes from HTA to the Commonwealth for no consideration and without authorization under Title III or by the Court.

V. The Commonwealth Continues to Divert HTA's Funds Through Joint Resolutions

99. On or about July 2, 2018, the Legislative Assembly of the Commonwealth (the "Legislative Assembly") passed a Joint Resolution (the "Joint Resolution") repurposing the Excise Taxes on crude oil. Specifically, the Legislative Assembly authorized the use of $239,850,000 of the crude oil Excise Taxes for the payment of payroll and related expenses to the Department of Education and Police Bureau of the Department of Public Safety during the fiscal year ending on June 30, 2019. The Legislative Assembly later increased this amount to $299,444,000 through a subsequent Joint Resolution. These funds were similarly repurposed for payroll of the Department of Education and Police Bureau of the Department of Public Safety.

100. The supposed authority for the unlawful diversion of the Excise Taxes, which constituted HTA property pledged to the HTA Bondholders as collateral, was the Government of Puerto Rico's police powers. The police powers do not authorize such unlawful diversions. Accordingly, the repurposing of nearly $300,000,000 of the crude oil Excise Taxes to pay for public services administered by public corporations other than HTA is an egregious violation of the Excise Tax Statutes.

VI. The Fiscal Plans And The Compliance Law Do Not Authorize Transfers Of HTA Property To The Commonwealth Because The Fiscal Plans And The Compliance Law Violate PROMESA And Are *Ultra Vires*.

A. The Fiscal Plans And The Compliance Law Fail To Respect Lawful Priorities And Liens In Violation Of PROMESA § 201(b)(1)(N).

101. Section 201(b)(1)(N) of PROMESA requires a fiscal plan to "respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements

of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of [PROMESA]."[10] The Fiscal Plans and the Compliance Law, on their face, violate Section 201(b)(1)(N) because they give no consideration to priorities and liens under Commonwealth law and do not even reference or identify any such priorities or liens.

102. A fiscal plan cannot "respect" priorities and liens that it does not even acknowledge. At a bare minimum, to determine whether the Fiscal Plans respected priorities and liens, FOMB would have needed to determine what priorities and liens exist under Puerto Rico law. FOMB, however, has refused to make this determination required by PROMESA. FOMB had no authority to develop the Fiscal Plans without first making the determinations required by Section 201(b)(1)(N) of PROMESA.

103. The Fiscal Plans assume that the expenses of the Commonwealth will be paid first, including from HTA's funds, and leave only residual revenues to public corporations like HTA and to their bondholders, including HTA Bondholders. Thus, the Fiscal Plans favor one set of creditors—Commonwealth creditors with run-of-the-mill unsecured claims for the operating expenses of government—over all other creditors, including those holding secured HTA Bonds.

104. The Fiscal Plans and the Compliance Law also violate the lawful liens in effect prior to the enactment of PROMESA because they purport to require the Commonwealth to unlawfully pool the Pledged Revenues, which are HTA's and the HTA Bondholders' property and on which the HTA Bondholders have contractual and statutory liens, with the Commonwealth's unencumbered revenues. The Fiscal Plans and the Compliance Law purport to pool all resources, including Pledged Revenues, into a single pot and use them to fund any and all Commonwealth

[10] The stated purpose of Sections 201(b)(1)(N) and 201(b)(1)(M) of PROMESA is to "ensure fiscal plans keep intact the structural hierarchy of prioritized debt." Committee on Natural Resources, Markup Memorandum at 3 (May 23, 2016).

expenses at the expense of public corporations (like HTA) and their bondholders. This pooling of the Pledged Revenues rests on the incorrect assumption that the stream of Pledged Revenues belong to the Commonwealth and that HTA is a mere recipient of appropriations from the Commonwealth, as reflected in Exhibit 15 and Chapter 22.1 of the current May 2020 Fiscal Plan.

105. Similarly, the Fiscal Plans and the Compliance Law fail to first use the Commonwealth's unencumbered available resources to pay public debt, as required by Article VI, Section 8 and the Excise Tax Statutes. In fact, the current May 2020 Fiscal Plan *includes* HTA Excise Taxes in the Commonwealth's projected revenue streams and surplus calculations. Additionally, the Fiscal Plans also fail to use the Excise Taxes for the payment of the HTA Bonds or of the public debt, which are the only two purposes for which the Excise Taxes may be used.

B. The Fiscal Plans And The Compliance Law Mandate The Misappropriation Of Pledged Revenues In Violation Of PROMESA § 201(b)(1)(M).

106. The Fiscal Plans and the Compliance Law, on their face, also violate Section 201(b)(1)(M) of PROMESA, which requires a compliant fiscal plan and a "compliant budget" to "ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless permitted by the constitution of the territory, an approved plan of adjustment under [T]itle III, or a Qualifying Modification approved under [T]itle VI[.]" PROMESA § 201(b)(1)(M). By its plain terms, this section of PROMESA prohibits illegal transfers of Pledged Revenues to the Commonwealth or for the Commonwealth's benefit. The Fiscal Plans and the Compliance Law actually *require* such illegal transfers by mandating that the

Commonwealth misappropriate, for its own general use, Pledged Revenues that constitute assets, funds, or resources of HTA and its bondholders.[11]

107. Specifically, the Fiscal Plans simply pool the Pledged Revenues with the Commonwealth's general revenues.

108. However, the Pledged Revenues are either generated directly by HTA (in the case of the Toll Revenues) or are assigned to HTA by statute for the benefit of bondholders[12] (in the case of the Excise Taxes). As such, the Pledged Revenues constitute "assets, funds, [and] resources" of the relevant "territorial instrumentality" (i.e., HTA) that cannot legally be loaned to, transferred to, or otherwise used for the benefit of the Commonwealth.

109. FOMB did not even consider Section 201(b)(1)(M) in purporting to develop the Fiscal Plans. Specifically, in order to determine whether the Fiscal Plans comply with Section 201(b)(1)(M), FOMB would first have needed to determine which "assets, funds, or resources" governed by the Fiscal Plans belong to which government entities and whether any transfers mandated by the Fiscal Plans from one entity to another are lawful or unlawful. FOMB has refused, however, to make these determinations required by PROMESA. FOMB has no authority to purport to develop a fiscal plan without first making the determinations required by Section 201(b)(1)(M).

110. Furthermore, FOMB conceded in the Third Violation Notice that the Second Proposed Fiscal Plan did "not provide sufficient data to determine whether it satisfies PROMESA § 201(b)(1)(M) and (N)." Yet the Fiscal Plans subsequently developed by FOMB provide no more relevant data than did the Second Proposed Fiscal Plan. If, as FOMB has admitted, it was

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[11] For these same reasons, the Fiscal Plans and Compliance Law also violate section 928(a) of the Bankruptcy Code, made applicable to these proceedings by Section 301(a) of PROMESA.

[12] See 13 L.P.R.A. § 31751(a)(1) (governing Excise Taxes assigned to HTA); 9 L.P.R.A. §§ 2021, 5681 (governing Vehicle Fees assigned to HTA).

impossible for FOMB to determine whether the Second Proposed Fiscal Plan complied with Sections 201(b)(1)(M) and (N), then it was equally impossible for FOMB to make such a determination with respect to subsequent Fiscal Plans, and FOMB in fact made no such determination.

C. The Fiscal Plans And The Compliance Law Fail To Ensure The Funding Of Essential Public Services In Violation Of PROMESA § 201(b)(1)(B).

111. Because the Fiscal Plans fail to differentiate between essential and non-essential services, the Fiscal Plans, on their face, also violate Section 201(b)(1)(B) of PROMESA, which requires a fiscal plan to ensure the funding of "*essential* public services." PROMESA § 201(b)(1)(B) (emphasis added). Clearly, Congress intended the use of the word "essential" to be a limitation on the services to be funded; otherwise it would have simply required a fiscal plan to fund all government services. Because the Fiscal Plans do not even identity which services are essential, it is impossible to determine whether all of the services funded under the Fiscal Plans qualify as "essential," and by funding all government services, essential or not, the Fiscal Plans breach Congress's funding limitation.

112. Notably, on June 16, 2017—some three months *after* the Original Fiscal Plan issued—FOMB sent Governor Rosselló a letter "reiterat[ing] [its] earlier requests urging [Governor Rosselló's] administration to make and communicate as soon as possible the necessary public policy determinations with respect to what it understands constitute 'essential services' in the context of PROMESA." FOMB stated, "[a]s you know, in light of Puerto Rico's fiscal situation, a PROMESA-compliant budget needs to reflect appropriate allocations for the adequate funding of essential services, pension benefits, investments to spur growth and other PROMESA priorities. We can no longer afford business as usual."

113. On November 28, 2017, the Co-Trustees and certain other parties in interest filed a motion (the "2004 Motion") seeking authorization to conduct an examination of the Commonwealth and of FOMB under Rule 2004 of the Federal Rules of Bankruptcy Procedure (Case No. 17-03283-LTS, ECF No. 1870). The 2004 Motion requested, among other things, "Materials reflecting the definition of 'essential services,' and any supporting workbook or schedule analyzing the cost of the same." Id. at 13.

114. On December 14, 2017, Judge Judith Gail Dein conducted a hearing on the 2004 Motion. At the hearing, counsel to AAFAF admitted that absolutely no documents defining "essential services" had been provided to FOMB or used in the development of the Fiscal Plans. See Dec. 14, 2017 H'rg. Tr. at 47.

115. The fact that no documents defining "essential services" exist demonstrates that FOMB made no determination as to whether the Fiscal Plans satisfied Section 201(b)(1)(B) of PROMESA and gave no consideration to that issue.

116. In any event FOMB, through its officers, has admitted many times in public that it has never even attempted to define "essential public services."

117. For example, during a press conference on October 23, 2018, FOMB's executive director, Natalie Jaresko, stated, "[FOMB] does not take the position that we need to define 'essential services.' We see the law as requiring that we ensure that the essential services are funded and that through this budget and the collaboration with the Governor we have funded the services that are necessary for the people of Puerto Rico. But it doesn't require us to define essential services."[13]

[13] Financial Oversight & Management Board, *Press Conference – Oversight Board's 15th Public Meeting* at 38:43, VIMEO LIVESTREAM (Oct. 23, 2018), https://oversightboard.pr.gov/videos/#e3NdbLgxAGM.

118. On May 2, 2019, at a hearing before the Natural Resources Committee on the status of PROMESA, Congressman Garcia asked FOMB's executive director, Natalie Jaresko, "Would you define what essential public services are?" See Natural Resources Committee, "Hearing on the Status of the Puerto Rico Oversight, Management, and Economic Stability Act," May 2 2019. Jaresko responded, "We have not made a strict decision or definition of public services." Id. Jaresko added that "Part of the reason for not defining [essential public services] is that there are many things that occur that you could argue are not essential services necessarily but are needed. And some of them for example are funding for NGOs some of the folks who are sitting at this table which are incredibly valuable but may not fit a traditional definition of essential services." Id.

119. Similarly, at FOMB's sixteenth public meeting held on May 9, 2019, FOMB's General Counsel, Jamie El Koury, stated: "On the essential services point **we have not defined essential services** because PROMESA itself sets forth a structure whereby we have to actually consider 14 factors when we come up with our fiscal plan. Essential services is just one of those factors what we have tried to do is balance the 14 factors rather than just defining essential services and coming up with a strict nomenclature for that."[14]

120. Thus, at the time it purported to develop the Original Fiscal Plan, FOMB had no definition of "essential services" and was unable to determine whether the Original Fiscal Plan reflected appropriate allocations for the adequate funding of essential services. Moreover, no definition of "essential services" has emerged in the subsequent years, and at no point has FOMB made or been able to make the determination required by Section 201(b)(1)(B) with respect to any Fiscal Plan.

[14] Financial Oversight & Management Board, *16th Public Meeting* at 57:16, YOUTUBE (May 9, 2019), https://www.youtube.com/watch?v=-NGZhrjVDuE.

121. Indeed, as Jaresko's May 2, 2019 testimony to the Natural Resources Committee shows, FOMB refused to define "essential public services" primarily to allow it to authorize expenses that are not, in fact, "essential public services," and fund these non-essential items while flouting other requirements of Section 201, such as the requirement to respect priorities and liens. Contrary to Mr. El Koury's statements, therefore, FOMB's Fiscal Plans are not the product of a "balancing" of the various requirements of Section 201. They are not an application of Section 201 at all. Instead, FOMB's Fiscal Plans are the product of FOMB's disregard for Section 201 in favor of a set of funding priorities that are neither guided by, nor compliant with, Section 201.

VII. The Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, And Compliance Law Do Not Authorize Transfers Of HTA Property To The Commonwealth, Because Section 303 Of PROMESA Prohibits And Preempts Each Law, Plan and Budget.

122. PROMESA further protects HTA and its creditors against the types of abuses perpetrated by the Commonwealth under the Clawback Order, Moratorium Laws, and Moratorium Orders in the pre-PROMESA period by (i) preempting Commonwealth legislation and executive orders that unlawfully alter or impair the rights of bondholders, and (ii) prohibiting the illegal transfer of funds between government entities. PROMESA §§ 303(1), (3). Specifically, Congress designed Section 303 of PROMESA to preempt the Moratorium Laws and Moratorium Orders, and Section 303 also preempts and prohibits the Fiscal Plans and the Compliance Law.

A. Section 303(1) of PROMESA Preempts the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, the Budgets, and the Compliance Law.

123. One of Congress's objectives in enacting PROMESA was to overturn the Clawback Order and various moratorium laws, including the First Moratorium Law, and the Moratorium Orders. Specifically, the legislative history of PROMESA indicates that Congress recognized that "Puerto Rico's local politicians [had] . . . accelerated the [alleged] fiscal crisis on the island through the passage of harmful legislation, including the recent debt moratorium [i.e., the First

Moratorium Law]."[15] In order to undo the First Moratorium Law and any similar "harmful legislation," Congress enacted Section 303(1) of PROMESA, which expressly preempts "moratorium laws"—such as the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, and the Compliance Law—that impose a non-consensual moratorium on creditors:

> [A] moratorium law, but solely to the extent that it prohibits the payment of principal or interest by an entity not described in section 109(b)(2) of [T]itle 11 [of the] United States Code, may not bind any creditor of a covered territory or any covered territorial instrumentality thereof that does not consent to the . . . moratorium[.]

PROMESA § 303(1).

124. While Section 303(1) was generally modeled on section 903 of the Bankruptcy Code, its scope is different, and broader, than the scope of section 903. Specifically, section 903 does not contain Section 303(1)'s references to a "moratorium law" and "moratorium." These terms were added to Section 303 specifically in reference to the First Moratorium Law and to the Moratorium Orders that were in effect at the time PROMESA was enacted, and specifically for the purpose of invalidating the First Moratorium Law, the related Moratorium Orders, and any similar moratorium legislation that the Commonwealth subsequently might enact.

125. Generally, a "moratorium" is defined as "a ***temporary*** prohibition of an activity."[16] The Moratorium Laws and Moratorium Orders constitute moratorium laws, because they impose a temporary prohibition on various activities, including payment of principal and interest on the HTA Bonds. The Fiscal Plans and the Compliance Law similarly prohibit payments of principal and interest on the HTA Bonds, including by requiring the Commonwealth and HTA to divert the Pledged Revenues from which the HTA Bonds must be paid to other purposes and by requiring

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[15] See H.R. Rep. No. 114-602 at 40.

[16] See Oxford Living Dictionary: English, https://en.oxforddictionaries.com/definition/moratorium.

the Commonwealth and HTA to enact Budgets and other laws that will not provide for the full payment of principal and interest on the HTA Bonds.

126. Similarly, Black's Law Dictionary defines a "moratorium" as "[a]n authorized **postponement**, usu[ally] a lengthy one, in the deadline for paying a debt or performing an obligation." Black's Law Dictionary 1101 (9th ed. 2009) (emphasis added). As Black's definition shows, the term "moratorium" refers to a prohibition or postponement that is *temporary*. The Moratorium Laws, the Moratorium Orders, the Fiscal Plans, the Budgets, or the Compliance Law need not impose a permanent prohibition on the payment of principal and interest to fall within the scope of Section 303(1) of PROMESA.

127. Section 303(1) of PROMESA contains an exception from preemption solely to the extent that a moratorium law restricts debt payments by an "entity . . . described in section 109(b)(2)" of the Bankruptcy Code. PROMESA § 303(1). The types of entities described in section 109(b)(2) of the Bankruptcy Code include "bank[s]," and this exception was specifically created so that the First Moratorium Law would not be preempted to the extent it imposed a moratorium on debt payments by the Government Development Bank for Puerto Rico ("GDB"). This exception does not apply to HTA and the Commonwealth because, unlike GDB, they are not "entit[ies] . . . described in section 109(b)(2)" of the Bankruptcy Code.

128. Therefore, the Moratorium Laws, the Moratorium Orders, the Fiscal Plans, the Budgets, and the Compliance Law are expressly preempted by Section 303(1) of PROMESA and are invalid, null and void.

B. Section 303(3) of PROMESA Preempts the Moratorium Orders

129. One of Congress's main concerns in drafting and enacting PROMESA was to stop the illegal diversions and misappropriations of funds (including HTA funds) that the

Commonwealth had implemented under the Clawback Order, the First Moratorium Law, and the Moratorium Orders.

130. Specifically, in response to criticisms that the automatic stays under PROMESA could "give Puerto Rico's government an opportunity to shuffle money around" in a manner detrimental to particular government entities or to creditors, Congress included multiple sections of PROMESA that prohibit the transfer of funds between debtors and provide creditors with a right to sue if any such unlawful transfers do occur. These sections were expressly intended to preempt the Moratorium Laws and Moratorium Orders even while an automatic stay was in effect, and the automatic stays under PROMESA were in no way intended to shield the Moratorium Laws or Moratorium Orders from preemption. Among these sections of PROMESA specifically designed to prevent illegal transfers under the Clawback Order, the First Moratorium Law, and the Moratorium Orders was Section 303(3) of PROMESA, which expressly preempts "unlawful executive orders," such as the Clawback Order and Moratorium Orders, as follows:

> [U]nlawful executive orders that alter, amend, or modify rights of holders of any debt of the territory or territorial instrumentality, or that divert funds from one territorial instrumentality to another or to the territory, shall be preempted by this Act.

PROMESA § 303(3).

131. The Moratorium Orders are "executive orders" that (i) "divert funds" from a "territorial instrumentality" (i.e., HTA) to "the territory" (i.e., the Commonwealth), and that (ii) unlawfully "alter, amend, [and] modify" the rights of the HTA Bondholders. More specifically, the Moratorium Orders are "unlawful" because they violate the Excise Tax Statutes by authorizing the use of Excise Taxes for purposes other than payment of the HTA Bonds.

132. Similarly, the Moratorium Orders are "unlawful" because they violate the Commonwealth's statutory covenants with the HTA Bondholders not to limit HTA's rights and

powers under the Enabling Acts until the HTA Bonds have been paid in full. See 9 L.P.R.A. § 2019.

133. The Moratorium Orders also violate numerous other provisions of Commonwealth law, including (i) the Enabling Act's provision authorizing HTA to determine the use of Toll Revenues (9 L.P.R.A. § 2012(e)(2)); (ii) the Enabling Act's provision authorizing HTA to pledge Toll Revenues to payment of the HTA Bonds (9 L.P.R.A. § 2004(l)); and (iii) the Resolutions pledging Toll Revenues to payment of the HTA Bonds.

VIII. Postpetition Transfers Of HTA Property To The Commonwealth Violate The Automatic Stay.

134. PROMESA incorporates the Bankruptcy Code's automatic stay provision to protect a debtor filing for Title III protection from "any act to obtain possession of property of the [debtor] or of property from the [debtor] or to exercise control over property of the [debtor]." 11 U.S.C. § 362(a)(3); PROMESA § 301(a) (incorporating § 362 into PROMESA).

135. Notwithstanding the imposition of the automatic stay following HTA's Title III filing on May 21, 2017, the Commonwealth continued to confiscate HTA's property for itself unabated during the postpetition period. All such postpetition transfers of HTA property to the Commonwealth—including any such transfers purportedly made under color of the Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, or Compliance Law—violated the automatic stay, including because they constituted acts "to obtain possession of property of [HTA] or of property from [HTA] or to exercise control over property of [HTA]." 11 U.S.C. § 362(a)(3); PROMESA § 301(a) (incorporating § 362 into PROMESA). Even if the Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law were valid (which they are not), they do not override the automatic stay. The Commonwealth's postpetition efforts to obtain

possession of and exercise control over HTA's property for its own benefit are textbook automatic stay violations.

136. The Commonwealth's postpetition acts to obtain possession of and to exercise control over HTA's property cannot be "authorized under [Title III]," because the automatic stay expressly prohibits such acts. 11 U.S.C. §§ 362(a)(3), 549(a)(2)(B); PROMESA § 301(a) (incorporating §§ 362 and 549 into PROMESA). These postpetition acts by the Commonwealth to obtain possession of and control over HTA's property are therefore avoidable under section 549.

FIRST CLAIM FOR RELIEF

Request For Avoidance Of Unauthorized Postpetition Transfers Under 11 U.S.C. § 549

137. Plaintiffs reallege and incorporate by reference all of the allegations set forth in paragraphs 1 through 136 above.

138. Section 549 of the Bankruptcy Code provides that a "trustee may avoid a transfer of property . . . that occurs after the commencement of the case; and . . . that is not authorized under [Title III] or by the court." 11 U.S.C. § 549(a)(1), (2)(B).

139. The Excise Taxes are property of HTA and the HTA Bondholders.

140. Under the Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, Compliance Law, and/or Joint Resolution, the Excise Taxes were transferred to the Commonwealth.

141. On information and belief, the Commonwealth has transferred over $300 million in Excise Taxes to itself annually since the Commonwealth and HTA filed their Title III Cases.

142. Any postpetition transfers of the Excise Taxes to the Commonwealth or for the Commonwealth's benefit, including under color of the Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, Compliance Law, or Joint Resolution, were not authorized under Title III or by the Court.

143. Accordingly, any postpetition transfers of the Excise Taxes to the Commonwealth or for the Commonwealth's benefit should be avoided pursuant to § 549(a) of the Bankruptcy Code.

144. HTA is also entitled to the value of the transfers under § 550 of the Bankruptcy Code.

SECOND CLAIM FOR RELIEF

Request For Avoidance Of Transfers Under 11 U.S.C. § 544

145. Plaintiffs reallege and incorporate by reference all of the allegations set forth in paragraphs 1 through 144 above.

146. Section 544(b) of the Bankruptcy Code provides that a "trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an [allowable] unsecured claim."

147. The Civil Code of Puerto Rico allows rescission of a transaction that is executed "in fraud of creditors, when the latter cannot recover . . . what is due them." 31 L.P.R.A. § 3492.

148. The Civil Code of Puerto Rico further provides that "[c]ontracts by virtue of which the debtor alienates property, without monetary consideration, are presumed to be executed in fraud of creditors." 31 L.P.R.A. § 3498.[17]

149. Any transfers of the Excise Taxes from HTA to the Commonwealth or for the Commonwealth's benefit are voidable under Puerto Rico law as fraudulent transfers.

150. The transfers were made to defraud HTA's creditors.

[17] The English translation of 31 L.P.R.A. § 3498 on Westlaw mistakenly translates the statute as "Contracts by virtue of which the debtor alienates property, for a good consideration, are presumed to be executed in fraud of creditors."

151. HTA received no or inadequate consideration for the transfers. Through the diversion of funds, the Commonwealth emptied HTA's coffers without assuming HTA's obligations—including those owed to the HTA Bondholders.

152. Upon information and belief, at the time of the transfers, the Commonwealth and HTA were aware of HTA's obligations to the HTA Bondholders, as well as the harm that the HTA Bondholders would suffer as a result of the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law, and issued or enacted the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law as a means to evade HTA's obligations under the HTA Bonds and instead use HTA's assets for other, unauthorized purposes.

153. Upon information and belief, the transfers effectuated by the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law rendered HTA insolvent and unable to pay the HTA Bonds.

154. HTA's insolvency is related to transfer of the Excise Taxes to the Commonwealth. For example, HTA's 2016 audited financial statements expressly acknowledge that the diversion of the Pledged Revenues, beginning with the Clawback Order, "diminished" HTA's ability to pay its debts, stating: "[The Clawback Order] had a significant negative effect on [HTA's] liquidity . . . [W]ithout the taxes and other revenues allocated by the Commonwealth . . . , [HTA] is unable to deposit additional monies in the bond payment reserve accounts and without additional deposits ***the ability to continue making the scheduled payments on the bonds issued is diminished.***"

155. FOMB has acknowledged in HTA's April 28, 2017 fiscal plan that HTA's fiscal situation "was recently aggravated" by the diversion of the Excise Taxes, calling into question HTA's ability to repay the HTA Bonds.

156. HTA's most recent audited financial statements, from fiscal year 2018 (the "2018 Financial Statements") similarly admit that HTA "does not have sufficient funds available to fully repay its various obligations as they come due" and expressed "substantial doubt about [HTA's] ability to continue as a going concern." The 2018 Financial Statements also note that "the [First Moratorium Law], the related executive orders, and subsequent to the enactment of PROMESA certain developments in connection with actions of the Oversight Board . . . have had a significant negative effect on [HTA's] liquidity . . . There is no indication that the conditional allocation of gasoline, oil, diesel, and petroleum taxes to [HTA] will resume . . . Without the taxes and other revenues conditionally allocated by the Commonwealth . . . , [HTA] has been unable to make the scheduled payments on its outstanding bonds and fund its reserve accounts accordingly."

157. The 2020 HTA Fiscal Plan likewise lays bare the devastating impact of the Commonwealth's misappropriation of HTA's assets going forward. The Commonwealth will collect hundreds of millions in HTA's Excise Taxes, but the Fiscal Plan forecasts the continued misappropriation of the lion's share of HTA's revenues by the Commonwealth. As a result, the Fiscal Plan anticipates that HTA as it currently operates will be hopelessly insolvent over the next thirty years to the tune of $6.4 *billion*. FOMB hopes to address this shortfall through a series of "fiscal measures," primarily by increasing fare revenues, fine collections, and reassessing contracts for Tren Urbano, the heavy rail system in San Juan that has been foisted onto HTA's balance sheet. But there is no guarantee these measures will yield the revenue increases and cost reductions that FOMB claims, and even FOMB's own untested projections would close the deficit by only $4.7 billion, leaving HTA insolvent by a $1.7 billion deficit over FY 2021 through FY 2049. By stripping HTA of its Excise Taxes, the Fiscal Plan leaves HTA with little or nothing to repay its debts.

158. The transfers effected by the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law should be avoided pursuant to § 544(b) of the Bankruptcy Code as fraudulent transfers under Puerto Rico law.

159. HTA is also entitled to the value of the transfers under § 550 of the Bankruptcy Code.

THIRD CLAIM FOR RELIEF

Request For Avoidance Of Transfers Under 11 U.S.C. § 548(a)(1)(A)

160. Plaintiffs reallege and incorporate by reference all of the allegations set forth in paragraphs 1 through 159 above.

161. Section 548(a)(1)(A) of the Bankruptcy Code allows a trustee to avoid any transfer made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted."

162. At the time of the transfers of HTA's funds, the Commonwealth and HTA were aware of HTA's obligations to the HTA Bondholders, of the harm diversion of HTA's funds would cause to the HTA Bondholders, and of the relevant provisions of the Excise Tax Statutes, the Resolutions, the 2002 Security Agreement, and PROMESA giving rise to the HTA Bondholders' rights.

163. The transfers effectuated pursuant to the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law were made with actual intent to hinder, delay, and defraud the HTA Bondholders.

164. The following badges of fraud indicate that the Commonwealth made the transfers with actual intent to hinder, delay, and defraud the HTA Bondholders: (a) the transfers rendered HTA insolvent and unable to pay the HTA Bonds; (b) as an instrumentality of the Commonwealth,

HTA has a special relationship with the transferee; and (c) HTA received no consideration for the transferred property.

165. The transfers effected by the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law should be avoided pursuant to § 548(a)(1)(A) of the Bankruptcy Code as actual fraudulent transfers.

166. HTA is also entitled to the value of the transfers under § 550 of the Bankruptcy Code.

FOURTH CLAIM FOR RELIEF

Request For Avoidance Of Transfers Under 11 U.S.C. § 548(a)(1)(B)

167. Plaintiffs reallege and incorporate by reference all of the allegations set forth in paragraphs 1 through 166 above.

168. In exchange for the transfer of the Excise Taxes to the Commonwealth or for the Commonwealth's benefit pursuant to the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law, HTA received less than reasonably equivalent value or no value at all.

169. The transfers of HTA's funds pursuant to the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law rendered HTA insolvent and unable to pay the HTA Bonds.

170. The transfers effected by the Clawback Order, Moratorium Laws, Moratorium Orders, Fiscal Plans, Budgets, and Compliance Law should be avoided pursuant to § 548(a)(1)(B) of the Bankruptcy Code as constructive fraudulent transfers.

171. HTA is also entitled to the value of the transfers under § 550 of the Bankruptcy Code.

PRAYER FOR RELIEF

WHEREFORE, based on the above and foregoing, Plaintiff HTA and the Co-Trustees pray that the Court enter an order:

a. Avoiding all postpetition transfers of the Excise Taxes to the Commonwealth pursuant to § 549(a) of the Bankruptcy Code;

b. Avoiding all transfers of the Excise Taxes to the Commonwealth pursuant to § 544(b) of the Bankruptcy Code and Puerto Rico law;

c. Avoiding all transfers of the Excise Taxes to the Commonwealth pursuant to § 548(a)(1)(A)-(B) of the Bankruptcy Code; and/or

d. Recovering the value of all Excise Taxes transferred to the Commonwealth pursuant to § 550 of the Bankruptcy Code.

Dated: ____, 2020
San Juan, Puerto Rico

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