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

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, Applicant	PROMESA Title VI CASE NO. 18-1561

GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO AND PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY'S REPLY TO SIEMENS TRANSPORTATION PARTNERSHIP PUERTO RICO, S.E.'S SUPPLEMENTAL OBJECTION TO PROPOSED QUALIFYING MODIFICATION

COMES NOW the Government Development Bank for Puerto Rico ("GDB") and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") through its undersigned counsel, and very respectfully submit this Reply to Siemens Transportation Partnership Puerto Rico, S.E.'s ("Siemens") Supplemental Objection to the Proposed Qualifying Modification (the "Supplemental Objection") (Docket No. 192).

I. PRELIMINARY STATEMENT

Siemens' entire Supplemental Objection rests on a false premise: that a Puerto Rico government entity may be contractually bound to a specific obligation in the absence of a written contract that establishes such obligation. In this manner, Siemens ignores the existence of a firmly established legal principle in Puerto Rico: absent a **written** contract, a government entity cannot assume legally binding obligations as to any private party. Vicar Builders Dev., Inc. v. ELA, 192 D.P.R. 256, 264 (P.R. 2015) (translation at **Exhibit A**); Rodríguez Ramos v. ELA, 190 D.P.R. 448, 459 (P.R. 2014) (translation at **Exhibit B**). This tenet has been strictly and repeatedly enforced for years. Vicar Builders, 192 D.P.R. at 263 (citing cases). In its Supplemental Objection, Siemens sidesteps myriad binding statutory and case law, by citing law that is inapplicable to the circumstances at bar. In essence, Siemens would have the Court turn a blind eye to binding law.

It is beyond cavil that no written escrow agreement was executed between GDB and Siemens designating the latter as a beneficiary and requiring that $13 Million be segregated from the bank's deposits and available at any time pursuant to Siemens' request. Siemens did not execute any written contract with GDB and the Puerto Rico Highways and Transportation Authority (the "HTA"), and GDB has not assumed any written, legally binding obligation towards Siemens to segregate the funds at issue from the bank's liquidity for the benefit of

Siemens, or to comply with any of the conditions Siemens now purports to add. In the absence of such legally binding obligation, the funds at issue were lawfully held in a deposit account at GDB in HTA's name, as evidenced by the account-related documents. Moreover, because the account with the funds at issue at GDB was held in the name of HTA (not Siemens), HTA (not Siemens) is the only party that can assert whether the funds in the account were kept under the agreed-upon conditions. GDB's relationship regarding the account is with its depositor, HTA. Thus, Siemens' argument does not support its claim to the funds at issue.

Further, while Siemens invokes equity principles to enforce a non-existent agreement, Puerto Rico law is likewise clear that equity cannot apply against a Puerto Rico government entity, especially when doing so would violate the law and public policy of Puerto Rico. Las Marías Reference Lab. Corp. v. Municipio de San Juan, 159 D.P.R. 868, 875–76 (P.R. 2003) (2003 TSPR 121, P.R. Offic. Trans.). If the Court were to invoke its equity powers in this case, Siemens would essentially be allowed to circumvent the fundamental rule that contracts with Puerto Rico government entities be in writing, **without exception,** contrary to firmly-established Puerto Rico public policy to prevent fraud, corruption, and promote the good administration of public funds. Simply put, allowing Siemens' objection — finding that, in the absence of a written agreement, GDB is legally bound to Siemens to segregate and hold monies in escrow — would be illegal under Puerto Rico law. And, it would be especially egregious when Siemens failed to state its claim in a timely fashion or mitigate its losses. With full knowledge of the existence of Puerto Rico legislation enacted to address the fiscal crisis of the Government of Puerto Rico and, specifically of GDB, Siemens never caused HTA to apply for disbursement of the funds through the appropriate channels required by such legislation after the month of April 2016.

Siemens' claim that the funds are not "Bonds" that can be restructured under Title VI of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") fails under the same principle. Without a written agreement, the funds are held as general deposits. Well-settled Puerto Rico law establishes that bank deposits are loans, and therefore, the funds fall within PROMESA's broad definition of "Bond," which includes loans. See PROMESA § 5(2), 48 U.S.C. § 2104(2). Pursuant to PROMESA, all Bond Claims against GDB are encompassed in the Title VI debt restructuring process.

In sum, Siemens' claims are without merit and inconsistent with Puerto Rico law; Siemens merely seeks to disrupt the proposed debt modification that is a critical part of the response to Puerto Rico's fiscal crisis.

II. BACKGROUND

On May 28, 2010, HTA entered into a Settlement Agreement with Siemens and other contractors — Alternate Concepts, Inc. and J.R. Requena & Associates — to resolve certain disputes arising out of the construction, operation, and maintenance work, and payment thereof, of the train line known as "Tren Urbano" (the "Settlement Agreement"). Docket No. 192-1. Pursuant to the Settlement Agreement, HTA agreed to pay Siemens and others the total amount of $52 million (the "Settlement Amount") in five separate payments upon completion of certain "Open Action Items." Id. ¶¶ 1–2. HTA agreed to deposit the final payment of $13 million (the "Completion Payment") into "an escrow account" on or before July 15, 2012. Id. ¶ 2(e).

Notably, GDB was not a party to the Settlement Agreement and the contract did not establish the specific conditions for such escrow, nor did it state where the escrow account would be established. Furthermore, at the time, HTA maintained accounts at several financial

institutions, including private banking institutions. See Deposition of Mr. Javier Hernández Carreras at 23:4-10, **Exhibit C**.

On May 19, 2010, GDB's Board of Directors approved a non-revolving line of credit of $63 million for HTA so it could fund, among other things, the settlement contemplated in the Settlement Agreement. See Docket No. 192-4. On July 13, 2010, the HTA and GDB entered into the corresponding Loan Agreement and Promissory Note for $63 million with maturity date of August 30, 2012 ("Loan Agreement"). See Docket No. 192-6. On June 28, 2012, HTA made a Notice of Drawing under the Loan Agreement to GDB for disbursement in the amount of $13,000,000 "representing the agreement between [HTA] and [Siemens]." See Docket No. 192-10. On July 2, 2012, the $13 million were transferred by GDB to an account labeled "Escrow-ACT." See Docket No. 192-11. Notwithstanding the foregoing, Siemens never executed an escrow agreement with GDB and HTA, nor was any such escrow agreement ever executed by GDB. In the absence of a duly executed escrow agreement, GDB held the Completion Payment tendered by HTA as a deposit in the name of HTA. See Docket No. 192-16, Standard Form Confirm Account Balance Information with Financial Institutions (referring to HTA's account as a deposit account).

GDB also executed a Guaranty Agreement whereby it guaranteed the punctual payment when due of all amounts required to be paid by HTA under the Settlement Agreement. See Docket No. 192-7. The Guaranty Agreement speaks of GDB's obligation to pay pursuant to a guaranty, but does not mention whether such payment would be made from funds held in escrow of from deposits held at GDB, much less does it include an obligation for GDB to act as escrow agent pursuant to specified conditions. Moreover, it applies to **all** payments made under the Settlement Agreement, including those installments that precede the Completion Payment.

Consistent with the fact that the parties to the Settlement Agreement — HTA and Siemens — had not agreed to specific terms and conditions for the "escrow," when Siemens first wrote to HTA requesting that the Completion Payment be submitted into an "escrow account," it did not reference any particular banking institution or conditions for the escrow. See Letter dated June 13, 2012, at Docket No. 192-8. Instead, it asked HTA to provide the "escrow account details." Id. Several months later, on September 24, 2012, Siemens again asked HTA for the "escrow account details." See Letter dated September 24, 2012 (GDB-Siemens-12), **Exhibit D**. Two years later, Siemens again wrote to HTA asking for the "Escrow Account details." See Letter dated October 14, 2014 (GDB-Siemens-13), **Exhibit E**. In none of those communications did Siemens refer to any escrow agreement or any other document setting forth the conditions that would govern such escrow because none exist.

On December 15, 2014, and at HTA's request, GDB confirmed that it held funds in the amount of $13 million in account number XXXXX-XXX-XXXX-004-06 (the "Account") in a **deposit account in the name of its client, HTA**. See Standard Form Confirm Account Balance Information with Financial Institutions at Docket No. 192-16. In fact, such certification, which Siemens received over three years ago, clearly conveys that the account is an HTA **deposit** account. The text from the formal confirmation provides:

> Our client Autoridad de Carreteras y Transportación has asked us to provide information as December 15, 2014, regarding **its deposit accounts**. We confirm the accuracy of the information included. Any exceptions with respect to the **deposit** will be disclosed in the appropriate space below.
>
> (Informing deposit balance of $13 million immediately below the quoted text.)

See id. (emphasis added).

On June 5, 2017, HTA and Siemens entered into a Second Amendment to the Settlement Agreement (the "Second Amendment"). See Docket No. 192-20. In the Second

Amendment, HTA agreed to accept as completed certain "Open Action Items" Siemens had agreed to complete in 2010 in order to receive the Completion Payment under the Settlement Agreement and, in exchange, Siemens reduced the Completion Payment due under the Settlement Agreement to $12 million ("Reduced Completion Payment"). GDB was not a party to, nor did it execute, the Second Amendment.

Sometime later, and after GDB had repeatedly informed Siemens that the funds in the Account were subject, first, to certain restrictions pursuant to Puerto Rico law, and to the Restructuring Support Agreement between GDB, AAFAF, and a majority of GDB's bondholders (the "RSA"), Siemens attempted to seek relief against GDB and others through HTA's Title III case. The Court allowed Siemens to conduct limited discovery in relation to the funds purportedly held in escrow. On March 26, 2018, Siemens filed a complaint against GDB, AAFAF, HTA, and the Financial Oversight and Management Board for Puerto Rico ("FOMB") seeking a declaratory judgment that the Completion Payment was Siemens' property and was due and payable to Siemens (the "Adversary Complaint"). See Adv. Proc. No. 18-000300-LTS, Docket No. 1. The defendants filed their respective motions to dismiss, see id. at 29, 31, 34, and the parties engaged in replies and sur-replies. Ultimately, the Court stayed the Adversary Proceeding so Siemens' claim could be heard in this Title VI proceeding. See id. at 70.

Siemens now asks the Court to determine that (1) it is the owner of the funds in the Account; (2) those funds are not "Bonds" within the meaning of PROMESA or, in the alternative, that Siemens is entitled to payment priority as to those funds; and (3) it is entitled to disbursement of the totality of the funds. For the reasons set forth below, the Court should deny the relief requested by Siemens and approve the Qualifying Modification.

III. DISCUSSION

A. The Funds in the Account Are Not Held in Escrow and Fall Within the Scope of the Qualifying Modification.

As a matter of well-established law in Puerto Rico, a government entity cannot assume a legally binding obligation as to a private party absent a written contract between such parties that specifically creates such obligation. Vicar Builders, 192 D.P.R. at 264. As explicitly stated by the Puerto Rico Supreme Court, this provision does not allow for exceptions. Rodríguez Ramos, 190 D.P.R. at 459. In this case, GDB never executed a contract whereby it became bound to establish an escrow account naming Siemens as its beneficiary and segregating from the bank's deposits the sum of $13 million. See, e.g., Siemens' 30(b)(6) deposition of Mr. Josué Menéndez Agosto at 39:6–25, 40:1–19, **Exhibit F**; Deposition of Mr. Jesús García at 35:14-22, **Exhibit G**; Deposition of Mr. José Santiago at 27:14-17, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**; Jesús García's Unsworn Declaration Under Penalty of Perjury, **Exhibit 2**. Therefore, Siemens cannot now legally compel GDB to conditions that were never agreed to in writing or assumed, as required under Puerto Rico law. Consequently, the funds were not held in escrow and segregated from GDB's liquidity. Rather, they were held in a deposit account commingled with GDB's other deposits, which, under clearly established law, constitutes a loan to GDB. Accordingly, the funds at issue are a "Bond" and a claim for them is a "Bond Claim" within the meaning of PROMESA and are subject to the Qualifying Modification.

1. No written agreement to hold the funds in a segregated escrow account exists between GDB and Siemens, and Puerto Rico governmental entities are only bound by contractual obligations that are in writing.

Siemens' entire Supplemental Objection ignores a crucial and well-settled tenet in Puerto Rico law: a contractual obligation by a government entity is valid, binding, and enforceable only

when it is established through a written contract. See Vicar Builders, 192 D.P.R. at 264 ("With regard to the [requirement that the contract be in writing,] we have established that its compliance is **indispensable so that the contract will have a binding effect** between the parties.") (emphasis added); Rodríguez Ramos, 190 D.P.R. at 459 ("On our part we have reiterated that **for a contract between a private entity and the State to have binding effect between the parties is must be in writing**.") (emphasis added); Quest Diagnostics of P.R. v. Municipio de San Juan, 175 D.P.R. 994, 1000 (P.R. 2009) ("[I]t still is necessary and essential for the validity of the contract for it to be perfected and be in writing.") (translation at **Exhibit I**). This principle applies to all Puerto Rico government entities, including public corporations like GDB and HTA. See Rodríguez Ramos, 190 D.P.R. at 466 (applying the rule with respect to the HTA). Moreover, it displaces general theories of contracts, which are not applicable in determining the validity of contracts with governmental entities. See Quest Diagnostics, 175 D.P.R. at 1000.

This rule is indispensable because "it has an unavoidable dimension of good public administration, because it allows to safeguard the interest of the contracting parties in the face of breach, [and] allows the organized use of [public] funds." JAAP Corp. v. Departamento de Estado, 187 D.P.R. 730, 741–42 (P.R. 2013) (translation at **Exhibit J**).[1] The Puerto Rico legislature enacted Law No. 230 of July 23, 1974, as amended, known as the Puerto Rico Government Accounting Act, 3 P.R. Laws Ann. §§ 283 *et seq.*, to achieve and impose fiscal controls and of governmental contracting so that there can be good administration of public funds. JAAP Corp., 187 D.P.R. at 739. Article 3(k) of that law defines the notion of "obligation" as a "compromise contracted that is represented by a purchase order, contract or

[1] As opposed to what has been suggested by Siemens, the funds at issue here are public funds which were loaned by GDB to HTA to fund the payment of the settlement of disputes arising out of the construction, operation, and maintenance work of a public project.

similar document, pending payment, **signed by competent authority** to encumber the assignments, and that can turn into payable debt in the future." Id. at 740–41 (citing 3 P.R. Laws Ann. § 283b(k)). The Puerto Rico Supreme Court has thus concluded that a governmental entity may disburse public funds only when it is authorized by law. See, e.g., Rodríguez Ramos, 190 D.P.R. at 456–57 ("[A] contract between a private party and the State that does not obey these laws shall be null and inexistent."); JAAP Corp., 187 D.P.R. at 741 ("From the aforementioned provisions of law it is deduced that the faculty of the State to disburse public funds is limited by the procedures and precepts established in the laws.").

In Vicar Builders, the Puerto Rico Supreme Court reiterated the formal requirements for all government contracts, that: (1) the agreement be in writing; (2) the governmental entity maintain a registry of its existence; (3) a copy of the agreement be filed with the Puerto Rico Comptroller's Office; and (4) the agreement be executed fifteen (15) days prior to it being filed at the Comptroller's Office. 192 D.P.R. at 264. The requirement that government contracts be reduced to writing **admits no exceptions**. Rodríguez Ramos, 190 D.P.R. at 459; see also JAAP Corp., 187 D.P.R. at 748 ("The State cannot make a disbursement of public funds in contravention to the law and the interpretative case law of the **strict requirements** that apply to the governmental contracting.") (emphasis added); Fernández & Gutiérrez, Inc. v. Municipio de San Juan, 147 D.P.R. 824, 832 (P.R. 1999) ("The requirement to put what was agreed in a written contract was necessary and . . . has to be complied with '**without any exception**' for what was agreed to be binding.") (emphasis added) (translation at **Exhibit K**). Compliance with these requirements applies even in a state of emergency declared by the head of State. Las Marías Reference Lab., 159 D.P.R. at 876 ("[W]e have stressed that **strict compliance** with the mentioned formal requirements apply even when the Mayor or Governor of Puerto Rico has

declared a "real state of emergency.") (emphasis added); Caribbean Broad. Suppliers, Inc. v. Cordial Int'l, Inc., Civ. No. KCD2006-0584 (906), 2011 WL 4001357, at *3 (P.R. App. Ct. June 29, 2011) (dismissing claim due to private entity's carelessness when it accepted a compromise of guarantee that didn't meet the rigors of the law) (translation at **Exhibit L**). Meeting such formal requirements is essential to "prevent the squandering, corruption and favoritism in governmental contracting and thus promote a good and upright administration." Rodríguez Ramos, 190 D.P.R. at 462.

Indeed, the Puerto Rico Supreme Court has found that private parties who contract with government entities without meeting those requirements "risk assuming the responsibility for their losses." Rodríguez Ramos, 190 D.P.R. at 459. That is because when public funds are involved, courts are called to protect the public interest and not that of the contracting parties. See Quest Diagnostics, 175 D.P.R. at 1002. Even in cases that may seem to be egregious, the Puerto Rico Supreme Court has upheld compliance with the requirement that a government contract be in writing. For example, in Alco Corp. v. Municipio de Toa Alta, a contractor undisputedly provided his services without yet having a written contract, and it was not until two weeks after such work was completed that the parties executed a written contract. 183 D.P.R. 530, 542 (P.R. 2011) (translation at **Exhibit M**). When the case reached the Puerto Rico Supreme Court on the contractor's attempt to collect the monies allegedly owed, the Court rejected the validation of a governmental verbal contract through the written execution of a formal retroactive contract, concluding that it violated the governmental contracting rules. Id. at 532–33, 543. Moreover, it imposed upon the private party a higher bar when contracting with government entities, including having an active role in making sure they complied with the

requirements for government contracts. Id. at 550 (reiterating that the private contractor should have insisted on a written contract before compromising its resources and completing the work).

Siemens cannot point to any written contract or agreement to which GDB is a party and in which GDB binds itself as to Siemens to segregate the funds in the Account from GDB's general deposits, or to exclusively reserve the Account for Siemens and hold those funds separately and available at Siemens' request — the conditions Siemens now purports to impose upon GDB and enforce. See Deposition of Mr. Josué Menéndez Agosto at 39:6–25, 40:1–19, **Exhibit F**; Deposition of Mr. Jesús García at 35:14-22, **Exhibit G**; Deposition of Mr. José Santiago at 27:14-17, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**; Jesús García's Unsworn Declaration Under Penalty of Perjury, **Exhibit 2**. Similarly, nowhere did GDB assume the obligation as an escrow agent. As set forth above, for these obligations to exist under Puerto Rico law, GDB and Siemens had to execute a written contract specifying those conditions. In fact, GDB's only relationship regarding the Account was with HTA, as the Account was held under its name, having loaned the funds to HTA and not Siemens.

It is irrelevant whether such a contract were titled "Escrow Agreement" or anything else, as the rule, and consequently GDB's argument, is not based on the title of a certain document but rather on the existence of a **written** agreement between the contracting parties creating the obligation whose enforcement is subsequently sought. Any obligation by GDB, or any other government entity, arises "only when there is a contract pursuant to a legally valid commitment," namely, a written contract between the contracting parties. Vicar Builders, 192 D.P.R. at 266.

The law in Puerto Rico is pellucid — in the absence of such written contract, this Court cannot make GDB comply with whatever Siemens claims ought to have been the terms of the

inexistent contract for an escrow. See id. at 264; Rodríguez Ramos, 190 D.P.R. at 459; Alco Corp., 183 D.P.R. at 532–33; Quest Diagnostics, 175 D.P.R. at 1000. Because no written contract establishing that the funds at issue would be segregated from GDB's deposits and held exclusively for Siemens' benefit and at its disposal when it so required, GDB cannot be bound by what Siemens now contends should have been the agreement. See JAAP Corp., 187 D.P.R. at 748 ("The State cannot make a disbursement of public funds in contravention to the law and the interpretative case law of the strict requirements that apply to the governmental contracting.").

Siemens, a highly sophisticated and resourceful part of a global conglomerate of companies, was aided by attorneys during the settlement transaction and throughout the years leading to this point, including the establishment of an escrow account as part of the Settlement Agreement with HTA. See Emails dated May 21, 2010 (Siemens 1471–1472), **Exhibit N**; Email dated June 27, 2012, from Rebeca Rojas Colón at Docket No. 192-9. Siemens consulted with Puerto Rico counsel precisely on the issue of the requirements to set up an escrow account in Puerto Rico, which shows that it knew, or should have known, it had to comply with the laws in Puerto Rico regarding the establishment of that account with a government entity. See **Exhibit N**. It had the resources necessary to make sure it complied with requirements for contracting with a government entity. Nevertheless, Siemens did not even seek to execute a written agreement for the establishment of an escrow account at GDB, having full knowledge of the consequences of failing to do so. Siemens must thus assume the responsibility for the losses it claims to have today, 10 years after the execution of the Settlement Agreement. See Rodríguez Ramos, 190 D.P.R. at 459 (finding that private parties who contract with government entities "risk assuming the responsibility for their losses").

Siemens' argument that certain documents read together, in addition to communications between the parties' employees, demonstrate an agreement between Siemens, HTA, and GDB is equally unavailing. See Docket No. 192 at 14. Siemens again forgets that the general theories of contracts do not apply to government contracting. The requirement that government contracts be reduced to writing entails strict compliance and does not admit any exceptions. Rodríguez Ramos, 190 D.P.R. at 459; JAAP Corp., 187 D.P.R. at 748; Las Marías Reference Lab., 159 D.P.R. at 876; Fernández & Gutiérrez, Inc., 147 D.P.R. at 832. It cannot be avoided by merely referencing an assortment of documents, such as emails and letters, to create a contract and impose an obligation. Quest Diagnostics, 175 D.P.R. at 1005–06 (concluding that letters "cannot be considered a contract between [the] parties, because they do not meet the requirements of law to constitute a written contract that is binding" on a government entity); see also Las Marías Reference Lab., 159 D.P.R. at 878 (declaring contracts null for resting on written letters to renew contractual relationships with the government entity). A mere bundle of documents is simply not tantamount to a legal obligation, properly established through the necessary written agreement, signed and approved by the competent authority.

Siemens incorrectly suggests that because GDB accepted the terms and payment schedule of the Settlement Agreement, GDB bound itself to establish an escrow account. See Docket 192 at 14. However, through Resolution 9296, GDB's Board of Directors merely authorized **HTA** to enter into the Settlement Agreement, authorized the Executive Vice President of Financing and Treasury to negotiate the financial terms and payment schedule, and approved the line of credit of $63 million for HTA so it could fund the settlement. See Resolution 9296 at Docket No. 192-4. A letter sent by GDB's general counsel, see Docket No. 192-5, confirmed the above and additionally accepted the terms and schedule set forth in the Settlement Agreement.

Nevertheless, the Settlement Agreement did not establish the specific conditions for an escrow account, nor did it state that the escrow account had to be established at GDB, or that GDB would be the escrow agent subject to specific terms and conditions. Indeed, no person with authority at GDB executed any document binding GDB to the terms and conditions that Siemens now seeks to impose — that the $13 million be held in an account segregated from GDB's general liquidity rather than in a deposit account.

The contracts involved in the transaction at issue — the Settlement Agreement, the Guaranty Agreement, and the Loan Agreement — all contain entirety clauses, see Docket Nos. 192-1 ¶ 20, 192-7 ¶ 9, 192-6 ¶ 14, which foreclose Siemens' attempts to impose conditions and obligations that were not expressly set forth in those contracts. See Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10, 16 (1st Cir. 1996). Notably, the Loan Agreement's incorporation of the payment schedule does not mention any escrow for $13 million, and the last payment listed is one for $19 million. See Docket No. 192-6 ¶ 3. Furthermore, the Settlement Agreement and the Loan Agreement simply emphasize that GDB's obligation was limited to executing the Guaranty Agreement, which GDB did. See Docket Nos. 192-1 ¶¶ 1, 3, 13; 192-6 ¶¶ 5, 6. None of these contracts provides for the creation of the escrow account Siemens now demands. If any obligation arises from them, it was that of paying the settlement sum in several installments.

Siemens relies on the mention of the word "escrow" by GDB employees in communications with other GDB employees and with HTA and Siemens' officials. However, aside from what was already established that retroactive governmental contracting is contrary to governmental contracting principles, see JAAP Corp., 187 D.P.R. at 734, and that the rules require strict compliance, Siemens' premise disregards that, absent a written contract, GDB

employees are not authorized to commit or bind GDB. See Quest Diagnostics, 175 D.P.R. at 1005 (noting that municipal employees cannot legally commit the Municipality); see also Fernández & Gutiérrez, Inc., 147 D.P.R. at 831–32 (finding that statements by officials who do not have the faculty to make compromises that are binding on the government entity do not constitute a binding compromise). GDB employees could only act according to GDB's Board of Director's resolutions, which would include the guidelines of specific transactions. See Deposition of Mr. Jesús García at 37:23-25, 38:1-25, **Exhibit G**; Jesús García's Unsworn Declaration Under Penalty of Perjury, **Exhibit 2**. Therefore, a GDB employee could not establish an escrow agreement or agree to have GDB act as an escrow agent subject to particular terms and conditions unless so authorized by a board resolution. Here, there was no resolution by the GDB Board of Directors authorizing the establishment of an escrow account that would maintain the funds segregated from GDB's deposits or exclusively reserved for Siemens. Accordingly, no obligation can arise from these references to the "escrow account" or any such communications, and what Siemens qualifies as confirmations are irrelevant to determining whether GDB has assumed any obligations.

In fact, if these communications show anything, it is Siemens' dissatisfaction with the evidence of the existence of an escrow account at GDB. Siemens kept asking its representative, Mr. Josué Menéndez Agosto, to confirm the existence of the Account. While Mr. Menéndez indicated that he felt "happy" and "satisfied" that the escrow account had been created, see Deposition of Josué Menéndez Agosto at 73:15-25, 74:1-3, 77:20-25, 78:1-2 (**Exhibit F**), he also stated that there was no response to certain of his requests for confirmation, see id. at 87:1-20. It is inexplicable how he could be satisfied with documentation while at the same noting that his requests went unanswered. And, his colleague, Kim Swain, stated in no uncertain terms that

Siemens had not obtained satisfactory evidence of the escrow account, noting that all efforts to that end had been futile. See Letter dated November 5, 2014 (Siemens 647), at **Exhibit O**. Additionally, and further underscoring that Siemens knew that no legally binding agreement existed between GDB and Siemens, at the eleventh hour, it introduced the words "Escrow Agreement" in the Second Amendment to the Settlement Agreement, see **Exhibit P**, when a draft circulated on April 7, 2017, lacked those words, see Exhibit 31 to Mr. Ménedez's Deposition ¶ 6 (**Exhibit Q**), and all previous communications by Siemens concerning the alleged "escrow account" failed to reference any such Escrow Agreement or any agreement other than the Settlement Agreement by and between HTA and Siemens, not GDB. See Deposition of Mr. Josué Menéndez Agosto at 39:6–25, 40:1–19 **Exhibit F**; Deposition of Mr. Jesús García at 35:14-22, **Exhibit G**; Deposition of Mr. José Santiago at 27:14-17, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**; Jesús García's Unsworn Declaration Under Penalty of Perjury, **Exhibit 2**; Docket No. 192-8, 192-13, 192-15. This addition came after Puerto Rico's fiscal concerns came to light, and falsely attempts to suggest the existence of an "Escrow Agreement" where there is none. See Deposition of Mr. José Santiago at 27:14-17, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**.

Contrary to Siemens' contention, GDB is not trying to "redefine a well-accepted, common, and clearly defined banking term." See Docket No. 192 at 2. GDB is merely asserting what "escrow account" means at GDB — a deposit account which contains funds that are earmarked for a specific purpose, typically as a result of the funds being deposited as part of a loan by GDB. See Deposition of Jesús García at 35:14-25, 36:1-25, 37:1-13, **Exhibit G**; Deposition of Mr. José Santiago at 26:2-6, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**; Jesús García's Unsworn Declaration Under Penalty of

Perjury, **Exhibit 2**. There is absolutely no indicia — other than Siemens' unsubstantiated arguments — that GDB's use of the term "escrow account" meant anything else for the GDB representatives that used it.

Importantly, **under Puerto Rico law, there is no general definition for "escrow account." The GDB enabling statute does not include a definition or requirements for escrow accounts, nor does the general banking statute (which in any event does not apply to GDB).** See Act No. 3 of April 26, 1957, as amended, 7 P.R. Laws Ann. §§ 551 *et seq.*; Puerto Rico Banking Law, 7 P.R. Laws Ann. §§ 1 *et seq.* There are but a few statutes that refer to such accounts, but in a different context than the one at issue in this case, and the account's restrictions and purposes vary. See, e.g., 31 P.R. Laws Ann. §1256c (requiring vacation club managing entities to establish escrow or trust accounts subject to conditions specified in the law, *i.e.*, with an escrow agent or trustee that is not an affiliate of the developer, conditioning release of escrowed funds on the release of an *affidavit* specifying purpose of disbursement requested and making reference to authority for such disbursement, subjecting escrow agent or trustee to fiduciary duties to the vacation club managing entity and owners of accommodations, requiring that such escrow or trust account be maintained subject to generally accepted accounting principles, among other conditions and requirements); 24 P.R. Laws Ann. §15001 (defining "qualified escrow fund" under the Act to Regulate Tobacco Product Manufacturers' Responsibilities to the Government of Puerto Rico as an "escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least $1,000,000,000 where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco . . . manufacturer placing the funds into escrow from using, accessing, or directing the

use of the funds . . ."); 23 P.R. Laws Ann. §6951g (requiring that for special escrow accounts pursuant to the law the amounts of money held in such accounts "be kept separate from all other operating funds of the vacation home developer"); 20 P.R. Laws Ann. §3044 (requiring real estate brokers or companies to keep escrow accounts "separate from the business operating account or his/her personal account" for keeping deposits, down payments, and other fiduciary deposits "until the transaction for which they were deposited is performed or completed," subject to record-keeping requirements set forth in the statute); Regulation 3282 of the Commissioner for Financial Institutions (**Exhibit R**) (OCIF, per its Spanish acronym) (Escrow Account Regulation, regulation applicable to commercial banks, mortgage institutions, and other financial institutions with a loan portfolio in excess of $100,000.00, which maintain, possess, and administer mortgage loans as part of their own portfolio or for investors; the Regulation requires that for escrow accounts — accounts established for the purpose of protecting insurance premium payments, property taxes, and other charges that could result in a lien over the property — the servicer deposit the escrowed funds in a special deposit account in an insured institution, for use only in accordance with the purposes for which they were established, and further prohibits that the escrowed funds be commingled with the institution's general or operational funds).

Thus, escrow accounts which fall under the purview of the Puerto Rico Timeshare and Vacation Club Act, 31 P.R. Laws Ann. §1256c, or the Act to Regulate Tobacco Product Manufacturers' Responsibilities to the Government, 24 P.R. Laws Ann. §15001, require that escrow accounts be deposited with escrow agents or institutions having no affiliation with the original depositor. The laws concerning real estate brokers and vacation home developers require that the "escrow" accounts be separate and segregated from other funds of the depositor,

see 20 P.R. Laws Ann. §3044 and 23 P.R. Laws Ann. §6951g. Only the law regarding real estate brokers imposes particular record-keeping requirements subject to review and monitoring by a state agency, 20 P.R. Laws Ann. §3044, whereas only the law regarding vacation clubs references particular fiduciary duties owed by the escrow agent or trustee, or "generally accepted accounting principles." And, notably, only OFIC's regulation for mortgage servicers requires that escrow accounts for paying insurance/property taxes/other charges that could result in liens on the property be held segregated (not commingled) from the institution's general or operational funds. Regulation 3282, at **Exhibit R**.

As there is no general definition of what is an escrow, the requirements of an escrow will necessarily depend on the special law, if it provides anything on that point, and/or the particular escrow agreement or arrangement that the parties may reach. In sum, the requirement under Puerto Rico law that government contracts be reduced to writing is controlling and trumps Siemens' objections. Because a written contract between GDB and Siemens specifying the conditions Siemens purports to impose does not exist, GDB has not obligated itself to comply with what Siemens now demands.

This case is the perfect example why the rule that government contracts be in writing is necessary and has been consistently reaffirmed. Siemens and GDB both have different understandings of what the term "escrow" means and entails, and there was never an overlap or meeting of the minds as to its requirements. Had GDB and Siemens executed a written contract and clarified the conditions that were to be attached to the Account, this litigation could have been entirely avoided.

In any event, if GDB assumed any obligation towards Siemens, it would be under the Guaranty Agreement, which at best amounts to an unsecured claim against GDB. Under the

Guaranty Agreement, GDB guaranteed the punctual payment when due of all amounts required to be paid by HTA under the Settlement Agreement. See Docket No. 192-7. The Guaranty Agreement does not specify whether the payment must be made from funds held in escrow or from deposits at GDB, and applies to all payments under the Settlement Agreement, including those that precede the final installment which were to be deposited into an escrow account. Had GDB assumed a contractual responsibility to establish an account where the funds would be segregated from GDB's liquidity, the Guaranty Agreement needed to specify it. Moreover, the existence of a Guaranty Agreement by GDB belies any obligation by it to act as escrow agent. Had GDB established an escrow with the conditions Siemens claims, such that GDB was bound to segregate the funds from its other deposits, no Guaranty Agreement would have been necessary because such an agreement guarantees the performance of **another person's** obligation in the case of default. See Atlas Roofing Contractors, Inc. v. Sistema Universitario Ana G. Méndez, KLAN200901883, 2011 WL 2117552 at *8 (P.R. App. Ct. March 31, 2011) (translation at **Exhibit S**).

2. Because no written contract exists between GDB and Siemens, the funds in the Account are deposits, which are deemed loans subject to the Qualifying Modification under Title VI of PROMESA.

Siemens contends that Puerto Rico law recognizes escrow deposits as "special deposits," which gives rise to "a fiduciary duty requiring the funds to be held in trust." See Docket No. 192 at 17. Furthermore, it suggests that because the funds are special deposits, they are segregated from GDB's other general deposits and do not fall within the definition of Bond under Title VI of PROMESA. See id. at 18–19.

Siemens' argument once again disregards that it did not execute a written contract with GDB where GDB assumed any legally binding obligation as to Siemens regarding the funds in

the Account, including holding the funds in a special deposit account, as required under Puerto Rico law. While it is true that in the case of special deposits there is no transfer of title to the bank because the bank "does not even have a limited ownership on the amount deposited," Tesorero de Puerto Rico v. Banco Comercial de Puerto Rico, 46 D.P.R. 308, 46 P.R.R. 298, 306–07 (P.R. 1934), the Puerto Rico Supreme Court also unequivocally held that deposits "are considered to be general unless the contrary has been **agreed**," id. at 306 (emphasis added). Accordingly, because no written contract exists establishing that the funds were to be held in a special deposit account, no such obligation arises and the funds did not have to be segregated. Rather, the funds were held in a deposit account, as was confirmed to HTA. See Standard Form Confirm Account Balance Information with Financial Institutions dated December 15, 2014, Docket No. 192-16. In any event, even if this were a special deposit account, Puerto Rico law provides that "the title remains in the depositor." Tesorero de Puerto Rico, 46 P.R.R. at 305. Here, the depositor is not Siemens but HTA. The account at GDB belonged to HTA and, thus, it (not Siemens) would be the proper party to assert whether the account was kept according to the agreed-upon terms and conditions. GDB's only contractual relationship with respect to the funds in the Account is with HTA as its depositor and HTA has not made any claims with respect to the funds in the Account.

Under well-established Puerto Rico law, deposits constitute loans to the bank. See Tesorero de Puerto Rico, 46 P.R.R. at 305 ("The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, who may do with it as it pleases. The banker is not guilty of a breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy."). In Portilla v. Banco Popular de Puerto Rico, the Puerto Rico Supreme Court held that "our Civil Code defines the contract used to establish a checking account as a loan

contract, nor merely a deposit account, since the depository bank has, in addition to its obligation to keep and return the money deposited, or its value, the authority to use the thing deposited." 75 D.P.R. 100, 113 (P.R. 1953) (translation at **Exhibit T**). This principle was reaffirmed in Santos de García v. Banco Popular de Puerto Rico, 172 D.P.R. 759 (P.R. 2007). The Puerto Rico Supreme Court there held that "the creditor-debtor relationship between a bank and a depositor is a **loan agreement** that is governed by the provisions of the Civil Code." Id. at 774 (emphasis added) (translation at **Exhibit U**). Consequently, because deposits are loans, the funds in the Account fall within PROMESA's broad definition of "Bond," which includes any

> bond, **loan**, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law, in any case, related to such a bond, **loan**, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness . . . .

PROMESA § 5(2), 48 U.S.C. § 2104(2) (emphasis added). Notably, the Puerto Rico Court of First Instance already found that GDB deposits are loans, holding that the automatic stay provision of Section 405 of PROMESA applies to claims against GDB for failure to disburse customer deposits because deposits in GDB are "loans" under PROMESA. Ass'n Emps. Commonwealth of P.R. v. García Padilla and Others, Civil No. K AC2016-1248, Judgment issued April 21, 2017 (translation at **Exhibit V**). Accordingly, Siemens' claims qualify as "Bond Claims" under PROMESA, see PROMESA § 5(3), 48 U.S. § 2104(3), and are eligible for modification under Title VI, see PROMESA §601(g), 48 U.S.C. § 2231(g).

B. Equitable Remedies May Not Be Invoked Against a Government Entity When a Written Contract Does Not Exist.

Siemens argues, in the alternative, that even if an escrow account were not formed, it is entitled to the funds in the Account (immediately and in full) under principles in equity and

demands that a constructive trust be imposed. See Docket No. 192 at 21. Further, Siemens avers that GDB acted with unclean hands and therefore should not benefit from the Qualifying Modification. See id. at 23. Through the invocation of equity[2], Siemens attempts to ratify a non-existent contract and again circumvent the strict requirements of government contracting.

The Puerto Rico Supreme Court has consistently rejected arguments of equity as a means to validate agreements with government entities that fail to meet the strict requirements applicable to government contracts. Rodríguez Ramos v. ELA, 190 D.P.R. at 466 (holding that because parties that contract with governmental entities without meeting the requirements of governmental contracting risk assuming the responsibility for their losses, remedies in equity do not apply); see also Las Marías, 159 D.P.R. at 875–76 (finding that equitable doctrines will not be applied to authorize payment from a government entity when no written contract exists, as those remedies in this context are contrary to Puerto Rico public policy); Alco Corp., 183 D.P.R. at 541 (same).

In Vicar Builders, the Puerto Rico Supreme Court resolved that

> [T]he nature of the figure of tacit renewal is not compatible with the laws nor with the jurisprudence that regulate governmental contracts. When the tacit renewal operates[,] there arises a new contract through a tacit agreement between the parties that arise from the behavior of both the lessor and the lessee. The implicit agreement is what characterizes this obligation. Nevertheless, so that a contract executed with the State can bind the parties, it has to be stated in writing. This requirement of form is unavoidable in this type of contract. Therefore, a contract in which the State is a party cannot arise from a tacit agreement nor from the action of the parties.

192 D.P.R. at 267–68 (internal citations omitted).

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[2] The doctrine of unclean hands sounds in equity. See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 880 (1st Cir. 1995) ("It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted in bad faith or with unclean hands."); K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 910–12 (1st Cir. 1989) (discussing unclean hands doctrine in relation to the equitable maxim that "he who seeks equity must do equity").

Similarly, in this case, granting Siemens the equitable remedies it seeks would contravene Puerto Rico public policy and law, as GDB and Siemens never executed a written contract for GDB to hold monies in Siemens' name separated from GDB's other monies and not subject to the rules applicable to normal deposit accounts. Moreover, it would grant Siemens a way to evade compliance with requirements that allow no exception and that have been strictly applied throughout the years, and which the Puerto Rico Supreme Court and legislature have recognized as necessary for the good administration of public funds.

Allowing these remedies would be especially egregious in this case, where Siemens has not mitigated its losses. Siemens, a sophisticated party assisted by counsel, failed to even request that an escrow agreement be reduced to writing with GDB in order to establish the terms and conditions of what it expected should apply to the Completion Payment. See Deposition of Mr. Josué Menéndez Agosto at 39:6–25, 40:1–19 **Exhibit F**; Deposition of Mr. Jesús García at 35:14-22, **Exhibit G**; Deposition of Mr. José Santiago at 27:14-17, **Exhibit H**; José Santiago's Unsworn Declaration Under Penalty of Perjury, **Exhibit 1**; Jesús García's Unsworn Declaration Under Penalty of Perjury, **Exhibit 2**; Docket Nos. 192-8, 192-13, 192-15; Emails dated May 21, 2010 (Siemens 1471–1472), **Exhibit N**. Evidently, it also had doubts about the proper establishment of the escrow and consistently sought confirmations HTA and GDB. See, e.g., Docket 192-17. Additionally, it knew about the precarious financial situation in Puerto Rico, including the fiscal crisis of GDB. Nevertheless, Siemens never attempted to have HTA apply for the disbursement of funds through the appropriate channels under the moratorium law, see Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, Act 21 of April 6, 2016 (hereinafter, "Act 21-2016"), under which GDB's disbursements, including payments of funds deposited at GDB, were restricted and subject to a particular application process and to GDB's

liquidity, even though they had been informed about such requirements. See Deposition of Mr. Josué Menéndez Agosto at 143:14-25, 144:1-4, **Exhibit F**; Letter dated October 20, 2016 by Carmen Villar Prados, **Exhibit W**.[3] Now, Siemens attempts not only to circumvent Puerto Rico law, but also the channels that all depositors seeking disbursement from GDB had to follow in light of the Puerto Rico fiscal crisis.

In any event, a constructive trust is not a viable remedy under Puerto Rico law since the enactment of Act 219 of 2012 (the "Trusts Act"), see 32 L.P.R.A. § 3351 *et seq*.[4] And even if the establishment of a constructive trust were a viable remedy, Siemens cannot establish the necessary elements. First, Siemens cannot show "the existence and legal source of a trust relationship." Conn. Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 618 (1st Cir. 1988). As already established, the funds were deposited in a general deposit account in the name of HTA and there is no agreement that creates a trust relationship as to Siemens. Again, it is well-established under Puerto Rico law that deposit accounts do not create a trust relationship and that a bank may use the funds in those accounts for any purpose. See Portilla, 75 D.P.R. at 113 ("our Civil Code defines the contract used to establish a checking account as a loan contract . . . since the depository bank has . . . the authority to use the thing deposited"). If there were a trust relationship here, which GDB denies, it would be as to HTA and not Siemens, because the account belonged to HTA, who was the depositor.

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[3] In early 2017, the Puerto Rico Financial Emergency and Fiscal Responsibility Act ("Act 5-2017") was enacted, setting restrictions on disbursements by GDB, "unless authorized by the Governor." See Act 5-2017, § 204(c)(i). Those restrictions were originally placed on GDB under Executive Orders 2016-10 and 2016-14, which Act 5-2017 specifically maintained in place and in full force and effect. See Executive Order 2016-10 ¶¶ 3, 6, and 11, **Exhibit X**, and Act 5-2017 § 208(e). Pursuant to Executive Order 2016-10, GDB is prevented from disbursing funds in deposit unless disbursement is requested by certification, the funds are necessary to provide essential services, and GDB's liquidity permits the requested disbursement.

[4] Prior to the Trusts Act, the Puerto Rico Civil Code provided that trusts should be created by public deed. See 31 L.P.R.A. § 2543. Under the Trusts Act, trusts can be created *only* through public deed or a last will and testament, see 32 L.P.R.A. § 3352, and "[e]very trust constituted in Puerto Rico must be recorded in the Special Trust Registry under penalty of nullity," id. § 3351d. Accordingly, no Puerto Rico court has established a constructive trust under the Trusts Act.

Second, Siemens cannot trace the Completion Payment to specific funds existing at GDB today. See Conn. Gen., 838 F.2d at 618 ("[T]he claimant must identify the trust fund or property and, where the trust fund has been commingled with general property of the bankrupt, sufficiently trace the property or funds—the res."); see also Sunflower Bank, N.A. v. FDIC, 2010 U.S. Dist. LEXIS 103738, at *23 (D. Kan. Sept. 30, 2010) ("To claim a preference over general creditors in the distribution of the assets of an insolvent national bank, a claimant had to show: 1) the existence of a trust relationship instead of a debtor-creditor relationship; and 2) the assets of the bank were augmented by the transaction, and 3) had to trace and identify the trust res to some identifiable thing of value in the receiver's hands."). While the Account shows a book balance of $13 million, see Docket No. 192-15, those funds were not and are currently not segregated from GDB's liquidity. See Lamb v. Townsend, 71 F.2d 590, 592 (4th Cir. 1934) ("The assets involved are assets of the insolvent state bank. The bankruptcy funds deposited with that bank, whether rightly or wrongly, were deposited as a general deposit and became mingled with the general assets of the bank. The question, then, is whether the bankruptcy court, without tracing into assets which have come into the hands of the receiver the bankruptcy funds deposited, can summarily order the receiver, out of the general assets in his hands, to pay to the trustee an amount equal to the bankruptcy deposits, to the prejudice of other creditors of the bank having an interest in such assets. It is clear, we think that this question must be answered in the negative."); Rosenberg v. Collins, 624 F.2d 659, 663 (5th Cir. 1980) ("Under the present circumstances, none of the customers of the bankrupt could successfully trace his or her funds so as to sustain a claim for reclamation in the bankruptcy on a constructive trust theory because all of the funds from the 900 customers of the bankrupt were co-mingled in a single bank account[.]"). Accordingly, Siemens' constructive trust argument necessarily fails.

C. In Any Event, GDB's Disbursements are Restricted as a Matter of Law.

Beginning in 2016, and due to the fiscal situation of GDB, an Emergency Period was declared for GDB during which GDB's disbursements, including payments of funds deposited at GDB, were restricted and subject to a particular application process and to GDB's liquidity. See Act 21-2016, Section 203, and Executive Order 2016-10 of April 8, 2016 and Executive Order 2016-14 of April 30, 2016, enacted under the authority granted in Act 21-2016, Section 203(b).[5] See **Exhibit X**.

On January 29, 2017, the Puerto Rico Financial Emergency and Fiscal Responsibility Act ("Act 5-2017") was enacted, specifically allowing the Governor to issue new Executive Orders and expressly maintaining in full force the prior Executive Orders issued pursuant to Act 21-2016, until amended, rescinded, or superseded. See Act 5-2017 §§ 204(b) and 208(e). Act 5-2017 also set a new Emergency Period. See Act 5-2017 § 103(q). That Emergency Period was extended until December 31, 2017, by Act 46 of July 19, 2017 at Section 7, and again until June 30, 2018 by Executive Order 2017-076 of December 28, 2017. See Executive Order 2017-076 at **Exhibit Y**. Executive Order 2018-023 further extended the period until December 31, 2018. See Executive Order 2018-023 at **Exhibit Z**.

Act 5-2017 also provides that if any restriction is placed on disbursements by GDB, then "the Bank shall not disburse any loans or credit facility unless authorized by the Governor." See Act 5-2017, § 204(c)(i). Those restrictions were placed on GDB under Executive Orders 2016-10 and 2016-14, which Act 5-2017 specifically maintained in place and in full force and effect.

[5] Pursuant to Executive Order 2016-10, GDB is prevented from disbursing funds in deposit unless disbursement is requested by certification, the funds are necessary to provide essential services, and GDB's liquidity permits the requested disbursement. See **Exhibit X**. HTA has not established, and Siemens has not caused HTA to establish, pursuant to the necessary procedures required of all depositors for disbursement from their accounts, that disbursement from this Account is necessary to pay for essential services. Indeed, as set forth in Carmen Villar's letter, **Exhibit W**, this requirement cannot be met here.

See Executive Order 2016-10 ¶¶ 3, 6, and 11, at **Exhibit X**, and Act 5-2017 § 208(e). Furthermore, on September August 2017, the GDB Board of Directors issued a Resolution suspending withdrawals, payments, and transferences of deposits of GDB. See **Exhibit AA**, Certification of GDB Board of Directors Resolution 11210. Accordingly, as a matter of law, GDB is restricted from disbursing any funds in any of its accounts, including the Account. For this additional reason, Siemens' claims to the funds in the Account fail.

D. Siemens' Takings and Contracts Clause Arguments are Facially Insufficient and Should be Deemed Waived.

In a cursory manner, Siemens posits that any Qualifying Modification pertaining to its alleged funds held in escrow constitutes a Taking and a violation of due process rights under the Fifth Amendment of the United States Constitution. In doing so, Siemens merely cites a slew of case law pertaining to the Takings Clause without actually developing an argument that would lead this Court to entertain the idea that a taking has taken place. The First Circuit has consistently stated that arguments alluded to in a perfunctory manner, bereft of any clear arguments, are deemed waived. Rodriguez v. Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990); Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988); Márquez-Ramos v. Puerto Rico, No. Civ. 11-1547 SEC, 2012 WL 1414302, at *10 (D.P.R. Apr. 2, 2012) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work. . . . In light of the foregoing deficiencies, the Court refuses to entertain defendants' undeveloped arguments at this time.").

Siemens' streak of undeveloped arguments continues, under the guise of a Fifth Amendment due process violation, as it contends that the application of PROMESA entails a

Contracts Clause violation. This argument is unavailing for two reasons. First, the argument is presented in a footnote. Circuit and district courts have repeatedly overlooked arguments raised in that form. See Smithkline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting, albeit in an appellate brief, that "arguments raised in footnotes are not preserved."); Cox v. Vill. Of Pleasantville, 271 F.Supp. 3, 591, 606–07 (S.D.N.Y. 2017) (stating that substantive arguments raised in footnotes do not constitute proper practice and imply weakness in content); In re Crude Oil Commodity Litig., No. 06-CV-6677, 2007 WL 2589482, at *3 (S.D.N.Y. Sept. 8 2007) (maintaining that arguments included in footnotes should be considered waived). Second, the inapplicability of the Contracts Clause to federal law is well established. The United States Constitution leaves no room for error when it states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Because PROMESA is a federal law, any attempts by Siemens to construct an argument alleging a Contracts Clause violation is patently misplaced.

Notwithstanding the aforesaid, in the event that Siemens' arguments are considered to have been properly raised, they are meritless. PROMESA has been deemed a "bankruptcy-like" statute. See Guadalupe-Baez v. Pesquera, 269 F.Supp. 3d 1, 2 (D.P.R. 2017), appeal dismissed, No. 17-2117, 2018 WL 2328442, at *1 (1st Cir. Feb. 7, 2018); Vazquez-Carmona v. Dep't of Educ. of Puerto Rico, 255 F. Supp. 3d 298, 299 (D.P.R. 2017); Peaje Invs. LLC v. García Padilla, 845 F.3d 505, 509 (1st Cir. 2017). In Continental Illinois National Bank & Trust Co. v Chicago, Rock Island & Pacific Railway Co., the Supreme Court upheld a reorganization act under the umbrella of the Bankruptcy Clause and rejected allegations as to Fifth Amendment due process violations, because it understood that such claims diminished the purpose and supremacy

of the Bankruptcy Clause. 294 U.S. 648, 680-685 (1935). Given its "bankruptcy-like" nature, the same must hold true under PROMESA.

Moreover, the Supreme Court has noted that "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). This precisely encompasses the spirit of PROMESA, as it was enacted with the intent "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets." PROMESA § 101(a), 48 U.S.C. § 2121(a). Thus, constitutional claims directed at PROMESA must satisfy a heavy burden to establish a due process violation.[6] Siemens undoubtedly failed to meet this burden from both procedural and substantive standpoints.

IV. CONCLUSION

Siemens' claims in this case can be resolved as a matter of law. Siemens and GDB never executed a written contract whereby GDB bound itself or assumed the obligation of holding the Completion Payment funds in an account that was to be segregated or reserved exclusively for Siemens. Puerto Rico law is clear that a written agreement is indispensable when contracting with government entities and the rule admits no exceptions, which makes equitable remedies inapplicable. Moreover, as a matter of law, GDB is restricted from disbursing funds in deposit at GDB. Accordingly, the Court should deny the relief requested by Siemens and instead approve the Qualifying Modification.

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[6] PROMESA-related litigation has deemed most — if not all — Takings Clause violation claims not yet ripe because the party alleging the violation fails the following two-prong test: (1) that "he or she received a final decision from the state on the use of his [or her] property, and (2) sought compensation through the procedures the State has provided for doing so." See In re Financial Oversight and Management Board for Puerto Rico, 297 F. Supp. 3d 269, 281 (D.P.R. 2018) (quoting García-Rubiera v. Calderón, 570 F.3d 443, 452 (1st Cir. 2009)).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 31st day of October, 2018.

I HEREBY CERTIFY: That on this date a true and exact copy of the foregoing document has been filed with the Clerk of the Court using the CM/ECF system, which automatically serves notification of the filing to all attorneys of record.

Respectfully submitted,

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