Hearing Date: TBD

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, *et al.*, Debtors.[1]	PROMESA Title III Case No. 17-BK-3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as a representative of PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	PROMESA Title III Case No. 17-BK-4780-LTS (This court filing relates only to Case No. 17-BK-4780-LTS)

REPLY IN SUPPORT OF PREPA BONDHOLDERS' MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM

[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 following: (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (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 (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority (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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The PREPA Bondholders and Trustee respectfully submit this reply in support of their *Motion and Memorandum of Law For Allowance of Administrative Expense Claim* (ECF No. 5599, "Motion")[2] and in opposition to the Responses,[3] and respectfully state as follows:

PRELIMINARY STATEMENT

1. The Board's bottom-line position—that a debtor protected by the automatic stay may, over the objection of its secured creditors, consume those creditors' collateral without providing any form of compensation—has been rejected by every court in which it has been advanced. That is because Congress in the Bankruptcy Code provided secured creditors with the right to stay relief in the absence of adequate protection and the right to an administrative expense claim for the taking and conversion of their property. This statutory system was no gift to secured creditors; it was compelled by the Constitution because without such safeguards, a debtor's ability to consume a secured creditor's collateral under the shelter of the stay would amount to an unconstitutional taking. The Board asks this Court to give PREPA license to divert billions of dollars of the Bondholders' collateral with impunity, but Congress's statutory system—and the Fifth Amendment—preclude that outcome. Indeed, the Board has conceded this in the Supreme Court: "the bankruptcy power is subject to the Fifth Amendment" and "cannot be exercised in a

[2] "ECF No." refers to documents filed in Case No. 17-4780-LTS, unless otherwise noted. Movants respectfully request that the Court take judicial notice of the exhibits attached to the Declaration of William J. Natbony (the "Natbony Decl."), sworn to on May 16, 2025 and filed contemporaneously herewith.

[3] "Responses" collectively refers to the *Debtor's Objection to PREPA Bondholders' Motion for Allowance of Administrative Expense Claim* [ECF No. 5621-2]; *ICSE's Motion Joining Debtor's Objection* [ECF No. 5638]; *El Puente's Motion Joining Debtor's Objection* [ECF No. 5639]; *CAAPR's Motion Joining Debtor's Objection* [ECF No. 5640]; *ACUP's Motion Joining Debtor's Objection* [ECF No. 5641]; *Motion of the Liga de Ciudades de Puerto Rico Joining Debtor's Objection* [ECF No. 5642]; *CUD's Motion Joining Debtor's Objection* [ECF No. 5643]; *Raquel González's Motion Joining Debtor's Objection* [ECF No. 5644]; *Motion of Coalición Nueva Visión de Salud Joining Debtor's Objection* [ECF No. 5645]; *Limited Joinder of Sistema de Retiro de los Empleados de la Autoridad de Energía Electrica to Debtor's Objection* [ECF No. 5646]; *JAP's Motion Joining Debtor's Objection* [ECF No. 5647]; *Motion of the Colegio de Profesionales del Trabajo Social Joining Debtor's Objection* [ECF No. 5648]; *Supplemental Brief and Joinder of Official Committee of Unsecured Creditors Objecting to PREPA Bondholders' Motion and Memorandum of Law for Allowance of Administrative Expense Claim* [ECF No. 5649]; *AAFAF's Joinder to Debtor's Objection* [ECF No. 5650]; and *Motion Joining Debtor's Objection* [ECF No. 5651].

manner that takes a secured interest in property during a bankruptcy case unless just compensation is provided." Pet. 3, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 22-367, 2022 WL 15525732 (U.S. Oct. 17, 2022) ("Board Supreme Ct. Br.").

2. To escape responsibility for its consumption of the Bondholders' collateral, the Board advances two principal arguments, each of which fails. First, the Board claims that, because PREPA's revenue bonds provide limited recourse, the Bondholders can have no administrative expense claim. That is wrong. Administrative expense claims are governed by Sections 503(b) and 922(c), not any pre-petition agreement among the parties. The Trust Agreement's limitations on recourse have no bearing on the Bondholders' administrative expense claim, and the Board's constant refrain that the Bondholders seek to obtain general recourse "against PREPA's other assets" is erroneous. The Bondholders do not seek to execute against any assets. They simply stand on their right to object to a plan of adjustment that does not satisfy all requirements, including the requirement to pay allowed administrative expense claims.

3. The Board's other primary contention is that it actually spent *none* of the Bondholders' collateral because all of PREPA's expenditures since 2017 were used "to maintain itself." But the question is not whether PREPA used the Bondholders' collateral "to maintain itself." Rather, the question is whether PREPA may use the Bondholders' collateral "to maintain itself" *without compensating the Bondholders*. The answer is no. And PREPA's conclusory argument that there are no Net Revenues and that it could take Net Revenues to pay for capital expenditures is wrong and disproven by decades of admissions and performance. In any event, it cannot be disputed that the Board's bald assertion that there have been no Net Revenues in eight years is contested, and that by itself compels denial of the Board's request that the Motion "be denied without an evidentiary hearing and discovery." Board Br. 8–10, 13–14.

4. The Board's grab-bag of remaining arguments all lack merit. The Board claims that Section 502(b)(1) bars the administrative expense claim here. But that provision applies only to pre-petition claims on the underlying indebtedness; the Bondholders' administrative expense claim, by contrast, arises from PREPA's post-petition actions. And the Board's suggestion that the Bondholders' claim is barred by delay and waiver is unsupported and frivolous. The Motion is more than timely, and PREPA has not been prejudiced in any way.

5. As the Motion explained, any administrative expense claim must be paid in full in cash upon the debtor's emergence from bankruptcy. If PREPA is unwilling or unable to satisfy that requirement, it should seek dismissal of this nearly decade-long case, which would nullify the Bondholders' administrative expense claim and restore their pre-petition rights and ability to appoint a receiver. Alternatively, the Board may pursue a consensual resolution that provides PREPA with necessary funding for capital expenditures and access to the capital markets. The Bondholders have made clear that this is their preferred outcome and what they believe would be best for the people of Puerto Rico. But it appears that until this Court makes this straightforward application of the Code clear to the Board, no resolution will be possible.

ARGUMENT

I. PREPA HAS CONSUMED BILLIONS OF DOLLARS OF THE BONDHOLDERS' COLLATERAL DURING THE TITLE III CASE.

A. The Bondholders Have Established Their *Prima Facie* Case That PREPA Has Consumed Their Collateral.

6. PREPA's Monthly Operating Reports ("Monthly Reports" or "MORs") establish that, between the Petition Date and June 2023, PREPA produced $3.7 billion in Net Revenues. *See* Mot. 10–15, 22; Chakraborty Decl. ¶¶ 12, 16. PREPA's Monthly Reports likewise reported that billions of dollars of Net Revenues had been "accrued but not transferred" to the Sinking Fund. Mot. 12. PREPA was consistent and transparent in its financial reporting until February 2022,

when PREPA's Monthly Reports stopped reporting the Sinking Fund appropriations that were accrued but not transferred. Then, in July 2023, PREPA stopped issuing the reports altogether, an action that the Board does not even attempt to justify.

7. The Board tries to escape these Monthly Reports, but the reports are admissions and establish PREPA's course of performance, which is binding on the parties and informs the proper interpretation of the Trust Agreement. *See* Mot. 24–26. There is no basis for the Board to disavow PREPA's course of performance in calculating Net Revenues over two decades.

8. The Board does not dispute that (1) Section 710 of the Trust Agreement requires PREPA to issue its Monthly Reports, (2) PREPA did so under Section 710, and (3) Bondholders received the Monthly Reports and acquiesced in PREPA's performance of its reporting of Net Revenues without objection. But the Board contends that this undisputed course of performance is irrelevant because Puerto Rico has not enacted the provisions of the Uniform Commercial Code (UCC) that incorporate a party's course of performance into its contractual undertaking. *See* Board Br. 46–47. That is wrong. Puerto Rico has enacted UCC Section 1-201, which provides that an "agreement" "[m]eans the bargain of the parties in fact as found in their language or by implication from other circumstances including … course of performance." 19 L.P.R.A. § 451(3). Puerto Rico's version of Section 1-303 does not define "course of performance," 19 L.P.R.A. § 455, but numerous provisions of Article 9 use undefined terms, *see, e.g.*, Section 9-610(c). Under Puerto Rico law, the meaning of the term is properly determined by looking to other decisions under the UCC, and not, as the Board suggests, the Restatement. *Xynergy Healthcare Capital II LLC v. Municipality of San Juan*, 516 F. Supp. 3d 137, 152 (D.P.R. 2021) ("Because the text of the [Puerto Rico] Commercial Transactions Act comes from the [UCC], the court has looked to equivalent statutes in other jurisdictions."); *St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Savings & Loan*

Ass'n of P.R., 21 P.R. Offic. Trans. 743, 750 (P.R. 1988) ("general rule of construction … presumes that when a Puerto Rican lawmaker adopts a statute from another jurisdiction he also adopts the construction of the same made by the highest court of said jurisdiction"). And the decisions show that a course of performance is binding if it constitutes repeated performance without objection, *Primarque Prods. Co., Inc. v. Williams West & Witts Prods. Co*., 988 F.3d 26, 34–35 (1st Cir. 2021), which happened here each month for twenty years.

9. The Monthly Reports cannot be disregarded as "extrinsic evidence." Rather, as part of PREPA's course of performance, the Monthly Reports form part of the parties' "bargain in fact" and, thus, are themselves binding on PREPA. UCC § 1-201; *see Bayer Chems. Corp. v. Albermarle Corp*., 171 F. App'x 392, 399–400 (3d Cir. 2006) (resolving contractual dispute using parties' course of performance). Indeed, the Monthly Reports utilize the Trust Agreement's definitions and payment structure and thus provide contemporaneous evidence of the correct interpretation of key terms. *See* Chakraborty Decl. App. C at 20–21 (setting forth "Statement of Revenues and Expenses for Revenue Fund Purposes Per Trust Agreement").[4]

10. Thus, the Monthly Reports establish that PREPA has generated at least $3.7 billion in Net Revenues since the filing of the petition. Those funds constitute the Bondholders' collateral. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 121 F.4th 280, 291 (1st Cir. 2024) ("*First Circuit Lien Ruling*"). The Board acknowledges that PREPA spent that money. That is sufficient to establish a *prima faci*e case for an administrative expense claim.

[4] The Monthly Reports also are binding on PREPA under the *actos propios* doctrine, which prohibits a party from disavowing its own course of conduct. *See Berríos Pagan v. Univ. of P.R.*, 116 P.R. Dec. 88, 98–99 (1985); *Law of Evidence of March 9, 1905*, Art. 101(3); *Meléndez Piñero v. Levitt & Sons of P.R., Inc.*, 129 P.R. Dec. 521, 555 (1991) ("to apply the doctrine of one's own acts in our jurisdiction, it is necessary: (a) that the individual displays a certain conduct, (b) that he has created a situation at odds with reality, that is, an apparent situation, and has through such situation possibly influenced the conduct of others, and (c) that it is the basis for the trust of another party who has acted in good faith and has therefore acted in a manner which would prejudice him if his trust were defrauded").

B. The Board Fails To Rebut The Bondholders' *Prima Facie* Case.

11. When, as here, a *prima facie* case for an administrative expense claim is established, the burden shifts to the objecting party to produce evidence to negate the claim. *See In re SemCrude, L.P.*, 416 B.R. 399, 404 (Bankr. D. Del. 2009) (Shannon, J.) (*prima facie* evidence of validity of administrative expense claim "places the burden on [respondent] to object to the … [c]laim with evidence sufficient to rebut the *prima facie* case."). The Board has utterly failed to do so; its opposition simply asserts that the Monthly Reports are factually wrong, claiming that each Monthly Report is based on interim data "subject to material change," and that PREPA's later-produced audited financial statements show "radical departures" from the Monthly Reports' information. Board Br. 45–46. But the Board does not identify a single "radical departure," much less explain how the more recent litigation-focused documents can overcome decades of PREPA's own records prepared in the ordinary course of business. *See Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1086 (1st Cir. 1989) (rejecting appellant's "obvious post hoc" interpretation of contract). And, in fact, contrary to the Board's unsupported assertions, the revenue figures of the Monthly Reports had long been consistent with the audited financial statements.[5]

12. To shore up its farfetched claim that the Monthly Reports do not mean what they

[5] *Compare* June 2009 MOR at 15 ($4 billion of revenues) [Natbony Decl. Ex. 1] *with* 2009 Audited Financial Statement at 16 (same) [Natbony Decl. Ex. 8]; June 2011 MOR at 17 ($4.4 billion of revenues) [Natbony Decl. Ex. 2] *with* 2011 Audited Financial Statements at 18 (same) [Natbony Decl. Ex. 9]; *compare* June 2012 MOR at 17 ($5.04 billion of revenues) [Natbony Decl. Ex. 3] *with* 2012 Audited Financial Statements at 18 (same) [Natbony Decl. Ex. 10]; *compare* June 2013 MOR at 17 ($4.8 billion of revenues) [Natbony Decl. Ex. 4] *with* 2013 Audited Financial Statements at 19 (same) [Natbony Decl. Ex. 11]; *compare* June 2016 MOR at 17 ($3.2 billion of revenues) [Natbony Decl. Ex. 5] *with* 2016 Audited Financial Statements at 6 (over $3 billion of revenues) [Natbony Decl. Ex. 11]; *compare* June 2017 MOR at 19 ($3.4 billion of revenues) [Natbony Decl. Ex. 6] *with* 2017 Audited Financial Statements at 16 ($3.3 billion of revenues) [Natbony Decl. Ex. 12]; *compare* June 2019 MOR at 17 ($3.5 billion of revenues) [Chakraborty Decl, App. D] *with* 2019 Audited Financial Statements at 25 ($3.6 billion of revenues) [Natbony Decl. Ex. 13]; *compare* June 2020 MOR at 17 ($3.3 billion of revenues) [Chakraborty Decl., App. E] *with* 2020 Audited Financial Statements at 25 (same) [Natbony Decl. Ex. 14]; *compare* June 2022 MOR at 9 ($4.3 billion of revenues) [Chakraborty Decl., App. G] *with* 2022 Audited Financial Statements at 26 (same) [Natbony Decl. Ex. 15]. The revenue figures cited herein include both operating and non-operating revenues, which PREPA historically listed prior to any operating expense line items.

say, the Board attempts to recast all manner of expenditures as "Current Expenses," particularly Improvements, disaster repair, and CILT. But the Trust Agreement is not so easily rewritten.

13. *Improvements*: The Trust Agreement is unambiguous that "Improvements" are excluded from "Current Expenses," as PREPA admitted for years in the Monthly Reports and Annual Budgets. Mot. 3–4, 8–22. The Board turns this contractual language inside-out, contending that, because the Trust Agreement's definition of Improvements mandates that they be financed "from the proceeds of bonds issued under" the Trust Agreement or from funds deposited to the Subordinate Funds, the fact that PREPA's post-petition capital expenditures were paid from the General Fund demonstrates that they are Current Expenses rather than Improvements. Board Br. 7–8, 43–44. In other words, PREPA's misappropriation of Net Revenues demonstrates that the Net Revenues were not misappropriated. But it is the *nature of the expense*, not the *source of funding*, that dictates whether an expense is an Improvement or a Current Expense. And the Trust Agreement requires that Improvements, "extraordinary maintenance or repairs," and "maintenance or repairs not recurring annually and renewals and replacements" be financed only from designated funds precisely because moneys can be deposited in those funds *only after debt service*. *See First Circuit Lien Ruling*, 121 F.4th at 291; Trust Agr. §§ 507, 512, 512B. That PREPA improperly financed Improvements with Net Revenues does not change the terms of the Trust Agreement. Capital expenditures are not Current Expenses and cannot be funded with Net Revenues. That does not mean PREPA cannot make capital expenditures; like other utilities, PREPA may finance capital expenditures—and the Bondholders have offered to provide financing. But the Board cannot take the Bondholders' collateral for capital expenditures and then refuse to pay for it.

14. *"Disaster-Repair" Expenses*: Uninsured disaster-related expenses may be paid only from PREPA's Self-insurance Fund, not from Revenues required to pay Current Expenses.

See Trust Agr. § 512A. The Self-insurance Fund is funded only *after* PREPA services its debts, *see id.* § 507(g), demonstrating that those expenses cannot qualify as Current Expenses. Prior to bankruptcy, PREPA did *not* include disaster repairs as Operations & Maintenance expense line items, even when Puerto Rico was struck by hurricanes, tropical storms, and earthquakes. *See* 2012 Audited Financial Statements at 18, 78 [Natbony Decl. Ex. 10]; 2011 Audited Financial Statements at 10 [Natbony Decl. Ex. 9]. It was only post-petition that PREPA started reporting disaster-related expenses as operating expenses. *See* 2022 Audited Financial Statements at 26 [Natbony Decl. Ex. 15].

15. *CILT*: Prior to this proceeding, PREPA included Contributions in Lieu of Taxes (CILT) in its calculation of Revenues and Net Revenues, and then deducted it as an expense *after* debt service—*see* June 2011 MOR at 19 [Natbony Decl. Ex. 2]—just as it told investors it would, Mot. 13–14. Only after the Title III case began did PREPA start reporting CILT as an operating expense. *Compare* 2011 Audited Financial Statements at 19 [Natbony Decl. Ex. 9] *with* 2020 Audited Financial Statements at 25 [Natbony Decl. Ex. 14]. The Board claims that classifying CILT as an operating expense does not reduce Net Revenues, Board Br. 46 n.27, but that is false: as PREPA long understood, CILT is a subordinate expense. Elevating it to a Current Expense thus necessarily reduces Net Revenues dollar-for-dollar.

16. The Board further contends that PREPA's misappropriation of Net Revenues was harmless because it supposedly funded the generation of more Net Revenues. Board Br. 2, 14. This argument also arrives without evidence and is especially remarkable given the Board's position that there are no Net Revenues. *Id.* at 47. In any event, the Bondholders have made a *prima facie* showing that PREPA has taken at least $3.7 billion of Net Revenues and will prove the precise number following discovery. *See In re Elmira Litho, Inc.*, 174 B.R. 892, 903 (Bankr.

S.D.N.Y. 1994) ("[A] secured creditor can adduce evidence of declining value through proof of the marginal or periodic rate of decline during the post-petition period, without regard to the absolute values at the beginning of the case and the present time."). If the Board intends to argue that it needed to spend Net Revenues to produce Net Revenues (while also arguing that it produced *no* Net Revenues) then it has the burden of proving the matter. Ultimately, whether any particular use of Net Revenues generated more Net Revenues is a complex factual issue that can be addressed only after discovery; it is no basis for dismissal. It certainly is not true *as a matter of law* that any expenditure of money by PREPA *ipso facto* enhances its ability to generate revenue.

17. Nor is the Board adequately protecting the Bondholders' collateral by spending it on expenses that are not Current Expenses or necessary operating expenses. Whether *PREPA* is in a better condition today—and the Board elsewhere claims it is *not*, *see* Fiscal Plan at 25—is irrelevant to whether the Bondholders' *collateral* has been adequately protected, which it manifestly has not been: PREPA has steadily consumed that collateral for eight years, the Bondholders have not been paid a dime, and the Board now asserts that the collateral is worthless. Likewise, the Board repeatedly argues that PREPA used Net Revenues "to maintain" itself. But the issue is not whether Net Revenues "maintained" PREPA; the issue is what PREPA is entitled to use "to maintain" itself. The Trust Agreement allows PREPA to pay Current Expenses from Revenues. What is left are the Net Revenues that constitute the Bondholders' collateral and cannot be consumed without reimbursement. Even if the Board's assertion that the collateral was spent to "maintain" *PREPA* were proven with evidence, *PREPA still would be required to pay for the use of the Bondholders' collateral*. As for the Board's cited cases, they all addressed spending that either *maintained* or *enhanced* the value of that collateral throughout the bankruptcy.[6]

[6] *See In re Las Vegas Monorail Co.*, 429 B.R. 317, 341 (Bankr. D. Nev. 2010) (debtor's use of collateral "increase[d], or at least maintain[ed], the collateral's value"); *In re 499 W. Warren St. Assocs.*, 142 B.R. 53, 56–57 (Bankr. N.D.N.Y. 1992) (debtor's application of rents to maintain property "enhance[d] the value of the property" and "contribute[d] to

18. Finally, the Board makes the meritless argument that the Bondholders failed to plead diminution in the value of their collateral because the Bondholders' position is that their collateral is sufficient to pay their claims plus post-petition interest. Board Br. 23–24. The evidence does demonstrate that PREPA will and certainly could produce sufficient Net Revenues to pay the Bonds in full, but the Bondholders' position is only that—a position—unless it is adopted in a plan of adjustment. It is the Board's Amended Plan that is on the table, and that proposed plan provides that there are zero Net Revenues and, in the best-case scenario, PREPA will provide only a nominal recovery to the Bondholders. It cannot seriously be disputed that the Bondholders have alleged—indeed, established on a prima facie basis—that PREPA consumed billions of Net Revenues. The Board cannot propose a plan that impairs the Bondholders, and then defeat an administrative expense claim motion on the ground that the Bondholders are oversecured.[7]

1. Section 928(b) Does Not Permit The Diversion of Net Revenues.

19. The Board also argues that Section 928(b)'s reference to "necessary operating expenses" includes capital expenditures, even though they do not constitute "Current Expenses" under the Trust Agreement. Board Br. 48. The Board's argument that Section 928(b) is broader than the Trust Agreement's definition, however, is wrong for four reasons.

20. *First*, the First Circuit has already held that the Trust Agreement's "Current

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the generation of additional rents upon which th[e] creditor's security interest subsequently attach[ed]"); *In re Mt. Olive Hospitality, LLC*, 2014 WL 1309953, at *1, 4 (D.N.H. Mar. 31, 2014) (use of cash collateral "enhance[d] the secured creditor's position through the generation of additional value").

[7] Nor are the Bondholders required to prove the presence or absence of an "equity cushion." The Bankruptcy Code places the burden to prove the existence of an equity cushion on the *debtor*. *See* 11 U.S.C. § 362(g)(2); *Elmira Litho*, 174 B.R. at 904 ("[I]f the debtor raises the existence of an equity cushion to demonstrate adequate protection, the debtor—not the secured creditor—must prove it."). The Committee cites the First Circuit's *Peaje* decision to argue that the Bondholders are required to prove lack of an equity cushion (UCC Br. ¶ 19), but *Peaje* says exactly the opposite. *Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 513 (1st Cir. 2017) (Bankruptcy Code Section 362(g) places the burden to prove equity cushion on the debtor). Given that the Board has contended there will be no future Net Revenues, it cannot carry this burden and, indeed, this argument is disingenuous.

Expenses" definition—which excludes "extraordinary repairs or capital improvements"—and Section 928(b) "end up in the same place." *First Circuit Lien Ruling*, 121 F.4th at 291, 298. The Board's contention that "the First Circuit did not have § 928(b) before it and made no pronouncements about that section's construction," Board Br. 48, is incorrect. The First Circuit not only examined and opined on Section 928(b) but also denied the Committee's rehearing request seeking to limit the decision to exclude the ruling as to Section 928 and necessary expenses. *See* Order, No. 23-2036, *In re Fin. Oversight & Mgmt. Bd. for P.R.* (1st Cir. Nov. 13, 2024); Committee Pet. at 13–15 (June 26, 2024) (urging that the court "[c]larif[y] that the Panel [d]id [n]ot [i]ssue a [r]uling as to the [s]cope of 'Necessary Operating Expense' under Section 928(b)").

21. *Second*, consistent with the First Circuit's conclusion, Section 928(b) by its plain terms does not include the cost of extraordinary, non-recurring replacements and upgrades that are not strictly necessary to keep PREPA operating. 11 U.S.C. § 928(b). It is rather designed to keep a utility "in good, not perfect, condition," *In re Jefferson Cnty.* ("*Jefferson Cnty. II*"), 503 B.R. 849, 900 (Bankr. N.D. Ala. 2013), and as such does not cover "improvements or enhancements," *In re Jefferson Cnty.* ("*Jefferson Cnty. I*"), 482 B.R. 404, 437 (Bankr. N.D. Ala. 2012). The legislative history likewise confirms that Section 928(b) was enacted so "that the project or system can be maintained in good condition *to generate the revenue to repay bondholders*." H. Rep. No. 100-1011 (1988) at 8 (emphasis added). The Board relies on a stray quote from a floor speech in the legislative history, Board Br. 49, but *Jefferson County I* specifically noted that very quote had been "excluded from both the Senate Report and the House Report" and accordingly "no significance should be accorded" to it. 482 B.R. at 439. The court thus rejected the idea that "operating expenses" should be construed to include capital expenses. *Id.*

22. *Third*, the parties' business judgment about what is needed to maintain PREPA's

operations likewise cuts against the Board. A court assessing whether the Section 928(b) standard is met "should defer to the agreed to pledge and distributive design representing the business judgments of the parties that is expressed in the contract between them." *Jefferson Cnty. I*, 482 B.R. at 44. That is particularly true here, where no lender would allow a borrower to avoid debt service by diverting Net Revenues at will by classifying them as "necessary" expenses to operate under Section 928(b) regardless of the parties' agreement. *See First Circuit Lien Decision*, 121 F.4th at 303 (rejecting commercially unreasonable interpretation suggesting "that the bondholders paid billions in return for a pledge of Net Revenues that applied only to the small amount of Net Revenues already received and retained the day the Trust Agreement was executed.").

23. The suggestion that the *Jefferson County* court later retreated from those principles, *see* Board Br. 49, is false. While *Jefferson County II* held that certain professional fees fell within Section 928(b) because they were necessary for restructuring, 503 B.R. at 903, *Jefferson County II* reaffirmed that bankruptcy courts should defer to the parties' agreement absent clear evidence of a conflict with Section 928(b), *id.* at 900–01, and reiterated that "improvements or enhancements" fall *outside* of Section 928(b), *id.* at 897, 900.

24. This is why the Board's chief rebuttal is that *Jefferson County*'s reasoning "should not be adopted." Board Br. 50. But the Board provides no argument in support, claiming it will respond "[a]t an evidentiary hearing," *id.*—one which, paradoxically, the Board separately contends should never occur, *id.* at 8. By "fail[ing] to present any developed argument," the Board has "forfeited" any contention that the business-judgment rule should not apply. *United States v. Calderon-Pacheco*, 564 F.3d 55, 58 (1st Cir. 2009).

25. *Fourth*, construing Section 928(b) to stretch beyond the definition of "Current Expenses" would violate the Fifth Amendment. The Board claims that, absent Section 928, the

Bondholders' "liens would have been cut off by § 552(a) on PREPA's petition date," and thus Section 928(b) does not impose, but relieves, a burden on the Bondholders. Board Br. 50. The Board's chronology is wrong. The vast majority of the bonds were issued when PREPA had no ability to enter into bankruptcy, and thus there was no risk that Section 552(a) (or any other Code provision) would cut off their lien. PROMESA now purports to make Section 928(b) applicable to the Bondholders' lien, but retroactive impairment of the Bondholders' lien beyond the terms of the Trust Agreement would violate their Fifth Amendment rights. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594 (1935). Whatever the viability of a Tucker Act claim, *cf.* Board Br. 50, the Court should follow bedrock constitutional-avoidance principles and construe Section 928(b) so as not to violate the Bondholders' constitutional rights. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982).

26. In sum, the Bondholders have demonstrated that the value of the revenue stream constituting their collateral was diminished by at least the $3.7 billion that PREPA consumed, and the Board has presented *no evidence* to rebut that showing.

II. THE BONDHOLDERS HAVE STATED A CLAIM FOR RELIEF.

27. This misappropriation of at least $3.7 billion of the Bondholders' collateral entitles the Bondholders to an administrative expense claim on three mutually reinforcing grounds: Section 503(b), the *Reading* doctrine, and Section 922(c). The Board's responses lack merit.

A. The Bondholders Are Entitled To An Administrative Expense Claim Under Section 503(b) For PREPA's Consumption Of Their Collateral.

28. The Bondholders are entitled to an administrative expense claim under Section 503(b) for the dollar-for-dollar benefits PREPA has gained throughout this case by misappropriating the Bondholders' collateral. To resist this straightforward application of the Code, the Board argues that (1) the Bondholders "never entered into a postpetition transaction"

with PREPA supporting an administrative expense claim; and (2) Section 503(b) is categorically unavailable to remedy a diminution in collateral. Board Br. 23, 25–26. Each argument fails.

29. The Board's contention that PREPA and the Bondholders "entered" into no post-petition "transaction" is wrong. PREPA's post-petition misappropriation of the Bondholders' collateral itself constitutes a "transaction" for purposes of Section 503(b); there is no requirement of an express post-petition agreement permitting the debtor to use the creditor's collateral. A "§ 503(b) administrative expense can be created by a debtor's postpetition use (against the secured creditor's wishes) of collateral which the debtor has also used before going bankrupt." *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 867 n.7 (4th Cir. 1994); *see id.* ("[A] creditor extends postpetition credit" when the creditor is "forced to allow the debtor's continued use of collateral after the debtor slides into bankruptcy."); *In re Two Bros. XI Inc.*, 2013 WL 1856332, at *3 (Bankr. D. Ariz. May 2, 2013) ("A claim is based on a post-petition transaction when the debtor-in-possession's actions give rise to legal liability for the associated claim." (citing *In re Mammoth Mart*, 536 F.2d 950, 955 (1st Cir. 1976)). Thus, PREPA's use of the Bondholders' collateral alone satisfies this element.

30. The Board's fallback argument that Section 503(b) cannot remedy consumption of collateral likewise fails. In the first place, the Bondholders' collateral has not merely "diminished" over time. Rather, PREPA has *used* that collateral during this bankruptcy case for its own operations and to facilitate its efforts to reorganize. Numerous cases recognize that Section 503(b) provides for an administrative expense claim in those circumstances. *See Dobbins*, 35 F.3d at 867 n.7; *Tidewater Fin. Co. v. Henson*, 272 B.R. 135, 139 (D. Md. 2001) (administrative expenses include "the claims of prepetition creditors when their collateral is used either in the operation or reorganization of a debtor's business"); *In re JFK Acquisitions Grp.*, 166 B.R. 207, 212 (Bankr.

E.D.N.Y. 1994) ("The use of the collateral was an actual and necessary cost of preserving the estate. Therefore, the claim … is allowable as an administrative claim under Section 503(b)."). Indeed, Section 507(b) of the Bankruptcy Code itself applies only where a secured creditor *already* "has a claim allowable under [Section 507(a)(2)]," meaning an "administrative expens[e] allowed under section 503(b)." *See* 11 U.S.C. §§ 507(b), 507(a)(2). The Bankruptcy Code itself therefore recognizes that a debtor's post-petition consumption of a secured creditor's collateral gives rise to an "administrative expens[e] allowed under section 503(b)." *Id.* § 507(a)(2).

31. By contrast, the Board's cases denying use of Section 503(b) to remedy diminution in collateral either (1) are inapposite on the facts, or (2) merely establish that a creditor cannot use a Section 503(b) claim to bypass the requirement of having previously requested adequate protection. Several such cases denied administrative expense claims because other basic preconditions were not met. *See In re Blankenship*, 610 B.R. 831, 851 (Bankr. W.D. Tenn. 2019) (no post-petition transaction where *ex parte* agreement related to equity cushion that preceded the bankruptcy filing); *In re Williams*, 246 B.R. 591, 594 (8th Cir. B.A.P. 1999) (no evidence that (1) debtor took post-petition actions that caused diminution in creditor's collateral or (2) missed post-petition mortgage payment was an actual and necessary cost of preserving the estate); *In re Gasel Transp. Lines*, 326 B.R. 683, 688 (6th Cir. B.A.P. 2005) (post-petition transaction "occurred *after* the time for which [the claimant] sought an administrative expense claim"); *In re Provincetown-Boston Airline, Inc.*, 66 B.R. 632, 634 (M.D. Fla. 1986) (denying administrative expense claim but recognizing that claim could be appropriate if "the creditor can show that postpetition retention and use of the collateral will impair the creditor's adequate protection").

32. The other cases merely establish that a creditor cannot belatedly assert an administrative expense claim without having previously attempted to exercise other remedies. In

In re Advisory Information and Management Systems, Inc., 50 B.R. 627, 629–31 (Bankr. M.D. Tenn. 1985), for example, the creditor "never sought adequate protection" and "did not take advantage of existing Code remedies," and thus could not use an administrative expense claim as a "back door." Further, the creditor waited more than a year to file a motion for relief from stay. *Id.* So too with *In re Briggs Transp. Co.*, 47 B.R. 6, 8 (Bankr. D. Minn. 1984), which held that a secured creditor may not choose to "do nothing" and then belatedly assert an administrative expense claim. Likewise, the *Tidewater* court expressly affirmed the availability of a Section 503(b) claim to rectify a diminution in collateral, 272 B.R. at 179, but it denied a claim because the creditor "could have requested adequate protection" yet "did nothing, allowing the collateral to diminish in value for over a year," *id*. at 140.

33. These cases are plainly inapposite; the Bondholders sought relief 17 days into this case and have repeatedly attempted to lift the automatic stay and secure adequate protection. *See* ECF Nos. 74, 1235, 3913. Any suggestion that the Bondholders were "sitting back" as PREPA consumed their collateral, *In re Advisory & Mgmt. Sys., Inc.*, 50 B.R. at 630, defies reality. Unlike the creditors in the cases the Board cites, the Bondholders have never slept on their rights. The Board itself admits that the Bondholders have been "active and aggressive litigants." Board Br. 29. Thus, even if a Section 503(b) claim is not appropriate "in most cases," *Tidewater*, 272 B.R. at 139, it is here: Having been thwarted in their attempts to seek adequate protection and relief from the automatic stay, the Bondholders have an administrative expense claim as a statutorily guaranteed avenue to remedy PREPA's unlawful misappropriation of their collateral.

B. The Bondholders Are Entitled To An Administrative Expense Claim Under *Reading* For PREPA's Taking And Conversion Of Their Collateral.

34. The Bondholders are also independently entitled to an administrative expense claim under *Reading v. Brown*, 391 U.S. 471 (1968), under which tort claims and other "intentional act[s]

which violat[e] the law," *In re Charlesbank Laundry*, 755 F.2d 200, 203 (1st Cir. 1985), are treated "as actual and necessary expenses" of the bankruptcy, *Reading*, 391 U.S. at 482.

35. As the Board has conceded to the Supreme Court, "the bankruptcy power is subject to the Fifth Amendment," and that "power cannot be exercised in a manner that takes a secured interest in property during a bankruptcy case unless just compensation is provided." Board Supreme Ct. Br. 3; *see also id.* at 19 ("[T]he Taking[s] Clause … constrains the bankruptcy power from effectuating a deprivation of secured interests in specific property during bankruptcy."). Therefore, as the Board correctly stated to the First Circuit, if "the government takes" property in which "a litigant has an ownership interest" during a bankruptcy case, then "the Fifth Amendment would require full payment of just compensation," and "the debtor's liability for full payment would be an allowable administrative expense under *Reading v. Brown*." Brief for Debtors Appellees/Cross-Appellants at 31, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 22-1119, 2022 WL 1032007, at *31 (1st Cir. Apr. 1, 2022). The *First Circuit Lien Ruling* establishes that PREPA granted the Bondholders a property interest in its past, present, and future Net Revenues. 121 F.4th at 291. PREPA misappropriated those Net Revenues, so a taking occurred. *See Armstrong*, 364 U.S. at 48 (impairment of "value of … liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'"). That taking is compensable via an administrative expense claim, which is the vehicle for providing the Bondholders the just compensation to which they are entitled under the Fifth Amendment. As the First Circuit stated, even under PROMESA, "the denial of adequate (read: just) compensation for a taking is itself constitutionally prohibited." *In re Fin. Oversight & Mgmt. Bd.*, 41 F.4th 29, 45 (1st Cir. 2022).

36. The Board entirely ignores its prior concessions and offers a conflicting position. The Board acknowledges that the Supreme Court's *Radford* decision invalidated a Depression-era

bankruptcy statute that similarly destroyed lien rights, *see* 295 U.S. at 594, yet claims that *Radford*'s holding was "corrected" and abandoned "by subsequent case law" from the New Deal era. Board Br. 43. That is wrong, as shown by *Security Industrial Bank*, 459 U.S. at 78–79, which treated *Radford* as a binding exposition of the Fifth Amendment and held that a bankruptcy statute would be unconstitutional if it destroyed lien rights in contravention of *Radford*. The Board's argument also is refuted by *Armstrong v. United States*, 364 U.S. 40, 44, 48 (1960), which likewise applied *Radford* and found that uncompensated destruction of liens violated the Fifth Amendment. The Board tellingly ignores both *Security Industrial Bank* and *Armstrong*, though both cases were cited in the Bondholders' Motion.

37. Under the Board's logic, the Bondholders have no remedy for PREPA's misappropriation of their Net Revenues *because* PREPA misappropriated them, reducing the Bondholders' collateral to "zero." But "the total destruction by the Government of all value of … liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'" *Armstrong*, 364 U.S. at 48. *Security Industrial Bank*, too, makes plain that "bankruptcy proceedings to avoid liens on certain property" do not implicate the mere impairment of a contract, but would "defeat traditional property interests" in violation of "the Fifth Amendment's prohibition against taking private property without compensation." 459 U.S. at 71, 75.

38. The Board's alternative argument to avoid *Radford* "even if it applies" (Board Br. 40) relies on inapposite cases in which no post-petition taking took place. The Board cites *In re Hemingway*, but in that case, the First Circuit deemed the claim "not within the ambit" of *Reading* because the administrative expense claim was grounded solely on the claimant's "*prepetition* ownership" of the affected property, which did not "caus[e] or contribut[e]" to the claim and "which had nothing whatever to do with any *postpetition* operation of the [debtor's] business."

954 F.2d 1, 6–7 (1st Cir. 1992). Here, by contrast, the Bondholders' administrative expense claim arises from PREPA's *post-petition* misappropriation of their collateral throughout its Title III case.

39. So too with *In re FBI Distribution Corp.*, 330 F.3d 36, 48 (1st Cir. 2003)—which supports the *Bondholders*, not the Board. There, an employee argued that she was entitled to the full severance payment described in her pre-petition employment contract because she continued to perform some work for the debtor post-petition. The First Circuit rejected that broad claim, finding that the full severance payment had no necessary relationship to the value of those post-petition services. *Id.* at 47. But, as relevant here, the First Circuit also recognized that the employee *was* "entitled to receive the reasonable value of the beneficial services rendered during the reorganization." *Id.* at 48. That precisely describes the Bondholders' claim: the Bondholders are not seeking liquidated damages from a pre-petition contract; they seek compensation for the benefit—their collateral—that PREPA has received and spent for its own purposes during the case.

40. With no sound argument around the *Radford* principle, the Board alternatively suggests that the Bondholders' takings claim "arise[s] from the alleged loss of a remedy Movants never had," Board Br. 42, *i.e.*, recourse to assets beyond PREPA's Net Revenues. That is wrong. The taking here is established by PREPA's consumption of Net Revenues, as to which the Bondholders do have remedies. Moreover, the Bondholders are not seeking general recourse; they are standing on their right to object to PREPA's failure to satisfy its confirmation requirements. That the means of redressing that taking—just compensation as required by the Fifth Amendment—might reach beyond Net Revenues does nothing to diminish the fact that PREPA consumed Net Revenues. And the Trust Agreement cannot and does not limit the remedies that are provided under the Code and the Constitution. If the Board were correct that PREPA can take the Bondholders' property without remedy or consequence, that would only underscore that the

Bondholders have not received just compensation for PREPA's taking—in plain violation of the Fifth Amendment. The Court should construe PROMESA and the Code to avoid that result.

41. Finally, the Board broadly suggests that *Reading* is inapplicable to Chapter 9 cases and that the Court should not "extend" *Reading* to this context. The Board's sole authority for that stark proposition is an oral ruling by the *Jefferson County* bankruptcy court finding that Norfolk Southern failed to establish its entitlement to an administrative expense claim. Board Br. 40. The Board identifies nothing in *Reading* itself rendering the decision inapplicable to Chapter 9, and the Board's contention that *Jefferson County* is the "only other court" to have analyzed the issue is wrong. *See In re City of San Bernardino*, 558 B.R. 321, 329–30 (C.D. Cal. 2016) ("[I]nsofar as [the claimant] seeks damages or fees from the City for the alleged constitutional violation, they can file a claim for administrative expenses." (citing *Reading*, 391 U.S. at 477)). As the Board recognized before this Motion, a *Reading* claim lies here for the Board's uncompensated taking.

42. The Board's arguments about conversion are similarly meritless. At the outset, the Board contends that Puerto Rico does not recognize the tort of conversion, citing dicta from *Federal Insurance Co. I.C. v. Banco de Ponce*, 751 F.2d 38, 41 (1st Cir. 1984). Board Br. 39. But the First Circuit has more recently recognized in *Barretto Peat, Inc. v. Luis Ayala Colon*, 896 F.2d 656, 657–58 (1st Cir. 1990), that conversion is codified into Article 1802 of Puerto Rico's Civil Code, *see* 31 L.P.R.A. § 5141. Courts have repeatedly recognized conversion under Puerto Rico law. *See United States v. GZ Construction St., Inc.*, 155 F. Supp. 3d 147, 152 (D.P.R. 2015); *R&G Eng'g, Inc. v. Transcontainer Transp., Inc.*, 213 F. Supp. 2d 72, 77–78 (D.P.R. 2002).

43. The Board's argument that no conversion claim lies because the Bondholders assert merely a breach of a pre-petition contract is similarly off the mark. Board Br. 39. The Bondholders' administrative expense claim does not merely concern PREPA's failure to deposit

Net Revenues to the Sinking Fund—a standalone breach. Rather, the Bondholders' claim arises from PREPA's post-petition conversion of Net Revenues for its own benefit through PREPA's expenditure of those Net Revenues for improper purposes. That post-petition conversion is an independent wrong that is plainly actionable under Puerto Rico law. As the Supreme Court of Puerto Rico explained, "a claim for noncontractual damages resulting from the breach of a contract lies if the act that caused the damage constitutes a breach of the general duty not to injure anyone and, at the same time, a breach of contract." *Ramos Lozada v. Orientalist Rattan Furniture Inc.*, 130 D.P.R. 712 (P.R. 1992); *see Barretto Peat, Inc.*, 896 F.2d at 658 (defendant's failure to deliver amount due under contract "could give rise to a finding of conversion" under Section 5141).

44. The Board also cites a magistrate judge's opinion, *TLS Management*, but that case simply recites the holding of *Ramos Lozada*. The Board misleadingly quotes the opinion to suggest that it is "established law" that a party cannot sue for conversion when the claim merely concerns "non-compliance with [a] pre-existing contract." Board Br. 39 (quoting *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, 2018 WL 1626100, at *13 (D.P.R. Mar. 30, 2018), *rev'd and remanded*, 966 F.3d 46 (1st Cir. 2020)). But the full quote is that "a party cannot support a conversion claim when 'damages suffered arise as a consequence of non-compliance with [a] pre-existing contract' *and plaintiff cannot demonstrate that 'damages also arose from a general (non-contractual) duty not to cause harm*.'" *TLS Mgmt.*, 2018 WL 1626100, at *1 (citing *Ramos Lozada*, 130 D.P.R. at 724–28 (emphasis added)). Here, damages *did* arise from PREPA's violation of its duty not to cause harm through its post-petition expenditures and conversion of the Bondholders' collateral—*after* it violated the Trust Agreement by refusing to make required deposits to the Sinking Fund.

45. Finally, the Bondholders' claim for conversion is not time-barred. Because

PREPA's conversion constitutes a continuing tort, "the cause of action continually renews itself, for the statute of limitation purposes, until the tortfeasor ceases his harmful conduct." *McMillan v. Rodríguez-Negrón*, 511 F. Supp. 3d 75, 83 (D.P.R. 2020).[8]

C. The Bondholders Are Also Entitled To An Administrative Expense Claim Under Section 922(c) For PREPA's Failure To Provide Adequate Protection.

1. PREPA's Failure To Provide Adequate Protection Gives Rise To An Administrative Expense Claim.

46. Section 922(c) entitles secured creditors to an administrative expense claim when "there has been a diminution in the value of a creditor's secured collateral" by reason of the automatic stay. *Grundy Nat. Bank v. Rife*, 876 F.2d 361, 363 (4th Cir. 1989). And although Section 922(c) mentions claims arising when adequate protection has been insufficient, courts have held that secured creditors can have administrative expense claims when debtors have declined to provide adequate protection. *See In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1451 (9th Cir. 1985); *In re Gall*, 12 Mont. B.R. 133, 139 (Bankr. D. Mont. 1993); *In re Prime, Inc.*, 35 B.R. 697, 699 (Bankr. W.D. Mo. 1984). To ensure that a debtor cannot evade the Bankruptcy Code, courts have premised the availability of an administrative expense claim on whether the secured creditor requests adequate protection. *See* Mot. 32–33. The Bondholders made that request here, filing a lift-stay motion a mere 17 days after the petition. *See* ECF No. 74 at 29. The Bondholders have reiterated that request in the intervening eight years. *See* ECF No. 3913 ¶¶ 23–27; *see also* ECF No. 975.

47. The Board unsuccessfully attempts to undermine the Bondholders' cases as reflecting a minority approach. But the Board's leading case involves Section 1110, not Sections

[8] *Torres v. Hosp. San Cristobal*, 831 F. Supp. 2d 540, 544 (D.P.R. 2011) ("[U]nder Puerto Rico law, a continuous tort arises from ongoing unlawful conduct, rather than a continuing harmful effect. … In other words, for there to be a continuous tort, a defendant must engage in continuous negligent conduct that causes further harm to the plaintiff." (citing *M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc.*, 31 F. Supp. 2d 226, 240 (D.P.R. 1998)).

507 or 922. *See In re Airlift Int'l, Inc.*, 761 F.2d 1503, 1512 (11th Cir. 1985). *In re Campbell*, meanwhile, involves Section 1326(c). 205 B.R. 288, 289–90 (Bankr. D. Colo. 1997). And the Board entirely disregards the reasoning in the Bondholders' cases. For example, the Board suggests that the Ninth Circuit in *Center Wholesale* did not determine that Section 507(b) applied in the absence of any protection but merely "suggested" Section 507(b) applied "given the due process issues" in the case. Board Br. 29. To the contrary, the Ninth Circuit's decision actually determined that Section 507(b) applied because the debtor "never provided protection in the first place," not just because of due process issues. 759 F.2d at 1451 n.23. *In re Gall* adopted that reasoning wholesale, *see* 12 Mont. B.R. at 139, and thus is likewise not limited to its facts. *Contra* Board Br. 29–30.

48. Similarly, the Board misconstrues *Prime*'s reasoning. There, the debtor argued that because "there was no provision of adequate protection," Section 507(b) did not apply. 35 B.R. at 699. The court expressly rejected that argument as inconsistent with the statute. Adequate protection "is bottomed on the notion that … the creditor always has what is bargained for." *Id.* Thus, "if all the collateral is not returned … the creditor is entitled to a priority claim." *Id.* When the debtor provides no protection, the collateral decreases, the value of the creditor's interest dissipates, and "a creditor who gets less than all its collateral returned is entitled to the protection contemplated in the statutory scheme which begins with Section 507(b)." *Id*. Sections 507(b) and 922(c) exist to ensure that "the value of the creditor's interest is not dissipated." *Id.*

49. The Board further argues that moving for stay relief, "and having that stay relief considered by a court, is not enough to invoke §§ 507(b) or 922(c)," citing *In re Five Star Partners, L.P.*, 193 B.R. 603 (Bankr. N.D. Ga. 1996). Board Br. 31–32. But in *Five Star*, the movant's first motion "introduced no evidence to support [his] position," and his second motion was denied

because he had not proven the existence of an agreement between him and a potential buyer. 193 B.R. at 611. Here, the Bondholders have consistently introduced evidence to support their requests to lift the stay, and the Board at every turn has blocked their attempts to prove their entitlement to relief from the automatic stay. Moreover, the Bondholders' request has yet to be denied, unlike in *Five Star Partners*. In any event, the Board's justification for its use of the Bondholders' collateral presumes that the Bondholders were provided with adequate protection, so the Board has conceded that this element of Section 922(c) is satisfied. Board Br. 14 ("the use of cash collateral to operate the business is itself adequate protection.").[9]

2. The Claim "Arises From" The Automatic Stay.

50. The Board incorrectly asserts that the Bondholders' claim is not one "arising from" the automatic stay, as required by Section 922(c). 11 U.S.C. § 922(c); *see* Board Br. 37–38. The Bondholders' claim is for the "depletion of [their] collateral," Mot. 1, a depletion that the Bondholders or a receiver could have stopped but for the imposition of the automatic stay. Indeed, the Bondholders have filed multiple motions to lift the stay in order to seek a receiver (and other relief) to conserve their collateral. *See* ECF Nos. 74, 2973, 3913. Those motions have been either denied or held in abeyance. But for the automatic stay, the Bondholders would have been able to

[9] The 2019 RSA and the breach of that agreement independently give rise to a Section 922(c) administrative expense claim. *See* Mot. 15–17, 34–35. The RSA provided for adequate-protection payments, and those payments compensated for diminution in the value of Movants' collateral and would be made if, by the time of confirmation, PREPA had not implemented the Increased Settlement Charge that would be needed to ensure that sufficient collateral was available to pay the agreed recovery on the Bondholders' bonds. *See* ECF No. 1235-1 at 45. The Board quibbles that the payments "were not calculated by reference to any diminution in the value of the bondholders' collateral," Board Br. 33, but the payments were a backstop to a charge that was designed to ensure the Bondholders received their agreed recovery on their secured bonds. The breach of that agreement gives the Bondholders a claim. *See Grundy*, 876 F.2d at 364. The Board incorrectly contends that there was no breach because the 2019 RSA "was terminated in accordance with its terms before any 9019 Order was entered." Board Br. 34. The Governor of Puerto Rico terminated the RSA under its Section 9(d)(iii), which allowed termination only "after consultation" with the Consulting Parties if the 9019 Order had not yet been entered. But the Governor did not consult with anyone prior to termination, so the adequate-protection agreement was never validly terminated. The Board also cites the failure to enact legislation as a basis to terminate the RSA, but failure to enact legislation would result in a "Securitization Termination," which would not terminate the Board's obligation to make adequate-protection payments or to provide the bondholders with their stipulated treatment. *See* 2019 RSA § 9(b).

appoint a receiver, and the receiver would have had to turn over the Net Revenues. Their claim based on depletion of that value thus plainly arises from the automatic stay.

51. The Board suggests that the Bondholders' claim arises "as a result of the budgets certified by the Oversight Board under PROMESA, not the stay," Board Br. 6, but that is false. It is the automatic stay that bars creditors from bringing challenges to budgets under the Constitution or Section 303 of PROMESA, and from obtaining a receivership. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 927 F.3d 597, 602–03 (1st Cir. 2019) (absent stay relief, the "text of section 305 [of PROMESA] bars the Title III court" from granting relief with respect to budgets, but Title III court can "gran[t] a reprieve from the automatic stay under 11 U.S.C. § 362 to allow another court, pursuant to Commonwealth law, to place a Commonwealth entity into receivership" or grant other relief); *see also* 48 U.S.C. § 2165. The budgets themselves did not harm the Bondholders because PROMESA does not empower the Board to compel PREPA to take Net Revenues,[10] nor does it immunize PREPA for taking the Bondholders' property. If it did, PROMESA would be unconstitutional as applied here. It is the automatic stay that has prevented the Bondholders or a receiver from seeking relief for PREPA's mismanagement of their collateral.

D. PROMESA Does Not Allow A Debtor To Consume Collateral With Impunity.

52. In opposing the Bondholders' administrative expense claim, the Board relies on the mistaken belief that, by failing to provide adequate protection and opposing stay relief, PREPA can destroy the Bondholders' collateral with impunity. That is not how PROMESA works.

53. Lienholders enjoy property rights in their collateral protected by the Fifth

[10] As this Court has recognized, responsibility for budget compliance "rests in the first instance with the territorial government," and the Board can only "make budget *reductions*" under PROMESA. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 583 B.R. 626, 633 (D.P.R. 2017). The Board cannot direct budget *increases* that cause PREPA to improperly spend the Bondholders' collateral. *See id.* at 632–33 ("[N]othing in the fiscal plan, budgeting, and enforcement provisions of PROMESA sections 201, 202, 203, and 204 suggests that the FOMB is the principal body empowered to manage PREPA's day-to-day functions. … [T]hey do not imply that the FOMB's role includes detailed operational planning or direct executive authority over the implementation of those plans and budgets.").

Amendment. To protect those constitutional rights, the Code ensures "that a secured creditor's interest may only be diminished to the extent that the secured creditor waives its right to the protections afforded by the Code." *In re Blackwood Assocs., L.P.*, 153 F.3d 61, 68 (2d Cir. 1998). Relying on the First Circuit's holding in *Assured Guaranty Corp. v. Carrion*, 919 F.3d 121, 130–31 (1st Cir. 2019), the Board claims that because a debtor is not required to apply special revenues to debt service during the imposition of the automatic stay, "PREPA was entitled to use any Net Revenues" during the Title III case without consequence. Board Br. 15. The Board's position has no basis in First Circuit precedent, PROMESA, or in any other bankruptcy principle. The First Circuit never held that the automatic stay allows a debtor to take a secured party's collateral and provide no compensation. Rather, while the debtor has some discretion about how to use special revenues during the case, if the debtor abuses the automatic stay "to divert its revenues" and "impair the security created by such liens," the secured creditor can "seek and obtain relief from the stay to protect its interests." *Assured Guar. Corp. v. Carrion*, 931 F.3d 111, 117 (1st Cir. 2019) (opinion of Kayatta, J., joined by Howard, Torruella, and Thompson, J.J.). The court may lift the stay in the absence of adequate protection—as the Bondholders requested it do here. And if those efforts are thwarted and the creditor suffers a consumption of its collateral—as likewise occurred here—the creditor can pursue its statutory right to an administrative expense claim. *See In re Scopac*, 624 F.3d 274, 282 (5th Cir. 2010) ("[A]dequate protection of a secured creditor's collateral and its fallback administrative priority claim are tradeoffs for the automatic stay that prevents foreclosure on debtors' assets: the debtor receives 'breathing room' to reorganize, while the present value of a creditor's interests is protected throughout the reorganization."). Thus, contrary to the Board's contention, PROMESA cannot be interpreted to allow secured creditors' rights to be trampled. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 899 F.3d 13, 20 (1st Cir. 2018) (rejecting interpretation of PROMESA that would result in secured creditor "left to stand by helplessly as the debtor spent the creditor's collateral, leaving the debt entirely unsecured").[11]

III. THE BOARD'S OTHER ARGUMENTS CHALLENGING THE ADMINISTRATIVE EXPENSE CLAIM ARE MERITLESS.

A. It Is Irrelevant That The Bondholders' Recourse For Claims Arising Under The Trust Agreement Is Limited To Net Revenues.

54. The Board's argument that it can misappropriate the Bondholders' collateral without consequence because the bonds are limited recourse is meritless.

55. *First*, as the Board concedes, the Bondholders have recourse in "all past, current, and future Net Revenues." Board Br. 19. The Bondholders have introduced evidence that PREPA reported at least $3.7 billion of Net Revenues during the Title III case. The Board's only response is to assert, without evidence, that Net Revenues are nonexistent or insubstantial. Board Br. 47–48. But there is evidence that PREPA bank accounts hold at least $1.5 billion, and, as the Bondholders noted—and the Board never denies—even under the Board's theory, the Bondholders are entitled to satisfy their administrative expense claim with Net Revenues identified during discovery. *See* Mot. 38–39. The Board's conclusory arguments cannot defeat the administrative expense claim, and they only underscore the importance of meaningful discovery here.

56. *Second*, whether the Bondholders have general recourse under the Trust Agreement is irrelevant to the issue here—whether the Bondholders have an administrative expense claim

[11] The Board incorrectly argues that because Section 363 was not incorporated into PROMESA, PREPA has unfettered power under PROMESA Sections 303 and 305 to "use cash collateral without court approval or bondholder consent." Board Br. 15. The Board ignores the First Circuit's 2018 decision *in this case* reinforcing PROMESA's guardrails to PREPA's power over its property and revenues. *In re Fin. Oversight & Mgmt. Bd.*, 899 F.3d at 13. The First Circuit rejected the Board's argument, holding: "We agree with the bondholders that Section 305 does not tie the Title III court's hands quite so much." *Id.* at 19. Because PROMESA incorporated Section 362(d)(1), PROMESA Section 305 did not bar this Court from lifting the automatic stay to appoint a receiver under Section 362(d)(1). The First Circuit stated it would "doubt the constitutionality" of a rule that would allow PREPA to take the creditors' collateral, which would constitute a "marked change in the status quo ante undercutting creditor rights." *Id.* at 20. Similarly, because PROMESA incorporates Section 503(b), such provision is also available to the Bondholders and provides that the Court "shall" allow an administrative expense claim where the requirements are met.

under the *Bankruptcy Code*. The Board refers to a "recourse administrative expense claim," Board Br. 7, but there is no such thing. Research has not uncovered a single authority that has ever used that phrase, or remotely suggested that recourse is a requirement for an administrative expense claim, and it is not. The statutory requirements for administrative expense claims are set forth in the Bankruptcy Code, and they do not include recourse. For this reason, the Board's arguments about non-recourse provisions in breach-of-contract claims (Board Br. 21) have nothing to do with the Bondholders' administrative expense claim, which is based on a consumption of the Bondholders' collateral, not a breach of the Trust Agreement, Mot. 39–42.

57. The Board incorrectly argues that recourse is required for administrative expense claims because Section 502(b)(1) disallows claims "to the extent they are 'unenforceable against the debtor.'" Board Br. 21. Section 502(b)(1) applies only to *pre-petition* claims on the underlying debt, not to *post-petition* administrative expense claims, which are governed by Section 503; and even Section 1305—which provides in a Chapter 13 case that certain post-petition obligations may be treated as pre-petition claims—circumscribes the post-petition claims that are subject to Section 502, and administrative expense claims are conspicuously absent. *See* 11 U.S.C. § 1305.[12] In fact, "administrative expense claims are claims that are entitled to distinct treatment separate and apart from pre-petition, or deemed pre-petition, creditor claims." *In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 429 (2d Cir. 2009); *see In re Goody's Family Clothing Inc.*, 610 F.3d 812, 817 (3d Cir. 2010) (distinguishing a "pre-petition obligation" from "post-petition obligations under § 503(b)(1)"). Thus, any recourse limitation on a pre-petition claim for breach of the Trust Agreement under Section 502 is irrelevant to the Bondholders' separate administrative expense claim. *See In re*

[12] The Board asserts that Section 503(b) "does not create any claim." Board Br. 20–21. None of the cases cited supports that proposition. Indeed, one case the Board relies on noted that an administrative expense claim is "based on some violation of a legal duty imposed by the bankruptcy code." *In re Sheridan*, 174 B.R. 763, 767 (Bankr. N.D. Ill. 1994).

Carpet Ctr. Leasing Co., 991 F.2d 682, 685 (11th Cir. 1993) ("A claim for administrative expenses under 11 U.S.C. § 507(b) is not a claim for a deficiency on the underlying obligation."). The question whether the Bondholders "could pursue a deficiency claim" is likewise "irrelevant" to whether they are "entitled to recover administrative expenses." *Id.* at 685–86.[13]

58. The Board's reliance on Sections 804 and 805 of the Trust Agreement is also misplaced. Board Br. 3. Those sections explicitly apply only to actions "to enforce payment of the Revenue Bonds," not statutory rights available under the Bankruptcy Code based on PREPA's use of the Bondholders' collateral. Similarly, Section 804 applies only to "the enforcement of any remedy *under this Agreement*." Trust Agr. § 804 (emphasis added). The Bondholders' administrative expense claim is not a remedy "under" the Trust Agreement, but rather a "unique creature" created by statute that stands entirely separate from a pre-petition claim on the underlying contractual obligation. *In re CM Holdings, Inc.*, 264 B.R. 141, 158–59 (Bankr. D. Del. 2000). The limitations on remedies for a breach of the Trust Agreement have no bearing on the limits of statutory or constitutional remedies available to the Bondholders for the consumption of PREPA's Net Revenues. Section 503(b), the doctrine of fundamental fairness articulated in *Reading*, and Section 922(c) each affords the Bondholders an administrative expense claim for the consumption of their collateral. PROMESA incorporates those statutory Sections and requires an administrative expense claim to be paid in full in cash for a plan of adjustment to be confirmed, except as the holder of the claim may agree otherwise. *See* 48 U.S.C. § 2174(b)(4); Mot. 40.

59. The Board emphasizes the remedies in the Trust Agreement, but it ignores that those

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[13] The Board relies on *Duluth Lighthouse for the Blind v. C.G. Bretting Manufacturing Co.*, 2001 WL 1640079 (D. Minn. Sept. 25, 2001), but that case only undermines the Board's position, as it explained that "nonrecourse language … applies only to the underlying indebtedness, not to the contractual and legal obligations regarding the servicing and collection of the loan." *Id.* at *5. The Board also relies on *U.S. Bank National Association v. Triaxx Asset Management LLC*, 2021 WL 1227052 (S.D.N.Y. Mar. 31, 2021), but that case does not address the Bankruptcy Code at all, much less an administrative expense claim.

remedies would have prevented PREPA from dissipating the collateral in the first place, had the Board not opposed the Bondholders' numerous attempts to adequately protect their collateral. The Board should thus be estopped from invoking the limited-recourse provisions. *See Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) ("Equitable estoppel precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations"). The Bondholders raised this key point in their Opening Brief (Mot. 46–47), and the Board provided no response, thereby forfeiting the point.

60. *Third*, recourse is irrelevant for an additional reason: the Bondholders are not trying to execute against any of PREPA's physical property; they are merely standing on their rights, requiring PREPA to comply with all Bankruptcy Code requirements. Thus, contrary to the Board's suggestion, there is no "cataclysmic possibility" of shutting down the system. Board Br. 23.

61. *Fourth*, the Board's argument that PREPA has allegedly consumed the Net Revenues so it supposedly cannot pay the administrative expense claim is also irrelevant. As courts have recognized, "[t]he fact that the [super-priority] claim has no recourse does not mean that the claim does not exist." *In re Sanchez Energy Corp.*, 2022 WL 2912076, at *7 n.7 (Bankr. S.D. Tex. July 22, 2022). Thus, courts have recognized administrative expense claims even when there were no readily identifiable assets to pay the claim. *See In re Molycorp, Inc.*, 562 B.R. 67, 77–78 (Bankr. D. Del. 2017) ("[A] plan cannot be confirmed without full payment of [administrative expense] claims even if there are no estate assets to pay them."); *accord In re Scott Cable Commc'ns, Inc.*, 227 B.R. 596, 600 (Bankr. D. Conn. 1998). The Board's contention that administrative expense claims for the consumption of collateral can be paid only from the same collateral also makes no sense. It is impossible to compensate a secured creditor for the

consumption of collateral—a recognized claim—from that same collateral. *See* Mot. 39–40.[14]

62. *Fifth*, the Board claims that the First Circuit "already held" that the Bondholders are not entitled to an administrative expense claim based on consumption of their collateral. Board Br. 21–22. But the First Circuit never considered, much less ruled on, administrative expense claims. The Bondholders had not previously filed an administrative expense claim, this Court did not rule on any such claim, no appeal was taken, no briefing or argument was presented to the First Circuit on such claim, and the First Circuit did not address any such claim or any of the relevant authorities. There is nothing in the First Circuit's decision that even remotely suggests that PREPA can emerge without satisfying each of its confirmation requirements, including the requirement to pay administrative expense claims in cash.

63. The Board nevertheless advances a convoluted theory to manufacture an appellate holding on administrative expense claims. It notes that: (1) the First Circuit deemed the accounting counterclaim subject to the Trust Agreement's recourse limitations; (2) that counterclaim included a boilerplate statement that "repeat[ed] and incorporate[d] by reference" all prior "allegation[s]," Adv. Proc. No. 19-00391, ECF No. 47 at 60; and (3) several prior paragraphs in the counterclaim complaint discussed takings issues. From these premises, the Board concludes that the First Circuit ruled *sub silentio* that an administrative expense claim predicated on PREPA's destruction of collateral must be limited-recourse as well. That argument is baseless.

64. "[I]ssues that were not decided by the appellate court" are "outside the scope of the

[14] Similarly, in the context of adequate protection, courts have awarded limited-recourse creditors adequate protection, even when those claims were payable solely from their collateral. *See, e.g.*, *In re 975 Walton Bronx LLC*, 2023 WL 6467627, at *4–5 (Bankr. E.D.N.Y. Oct. 3, 2023) (undersecured limited-recourse creditor entitled to receive and retain adequate protection payments); *In re Club Candlewood Assocs. LP*, 106 B.R. 752, 756 (Bankr. N.D. Ga. 1989) (dismissing case where debtor did not offer adequate protection to limited-recourse creditor); *In re Union Meeting Partners*, 160 B.R. 757, 762, 766–67 (Bankr. E.D. Pa. 1993) (limited-recourse creditor entitled to receive adequate protection payments); *In re SM 104 Ltd.*, 160 B.R. 202, 210 (Bankr. S.D. Fla. 1993) (same); *In re Dunes Hotel Assocs.*, 188 B.R. 162, 172–73 (Bankr. D.S.C. 1995) (same).

mandate [and] are not affected by the mandate." *De Jesus-Mangual v. Rodriguez*, 383 F.3d 1, 6 (1st Cir. 2004). The basis for the First Circuit's ruling that the equitable accounting claim is limited recourse was the Puerto Rico statute governing the accounting action, which provides that the accounting claim "is subject to the terms of the Trust Agreement." *First Circuit Lien Ruling*, 121 F.4th at 315 (citing 22 L.P.R.A. § 208(a)). Sections 503 and 922 of the Bankruptcy Code contain no such limitations, so this holding has no relevance to the administrative expense claim.

65. The Board's own case, *Ms. S. v. Regional School Unit 72*, 916 F.3d 41 (1st Cir. 2019), underscores the flaws in the Board's approach. There, the district court erroneously believed that a prior appellate decision foreclosed litigation of a particular issue. *Id.* at 44. But the First Circuit rejected that contention: the prior decision "did not reach the issues involved" in the subsequent appeal, and the "parties did not dispute and did not brief" that limitations issue in the prior appeal. *Id*. at 47. Accordingly, "the law of the case doctrine d[id] not bar consideration" of the issue on remand. *Id*. at 48. So too here. The *First Circuit Lien Ruling* "did not reach" administrative expense claims, and the "parties did not dispute and did not brief" the issue.

66. Further, the Board—without citation—contends that "[n]one of" the Bondholders' counterclaims other than the one for accounting "were reinstated" by the First Circuit, which would mean that the counterclaim "asserting unconstitutional impairment and taking" is out of the case. Board Br. 3. That is incorrect. The Bondholders asserted seven counterclaims in the adversary proceeding, and the accounting claim was part of Counterclaim IV alone. *See* Adv. Proc. No. 19-00391, ECF No. 41 ¶¶ 94–98. This Court dismissed the takings counterclaim—Counterclaim VII—based on its conclusion that the Bondholders did not have a security interest in PREPA's Net Revenues. *See* Adv. Proc. No. 19-00391, ECF No. 361 at 55–56. The Bondholders appealed "each and every part" of that ruling. ECF No. 386 at 3; *see also* ECF Nos. 363 at 2–3, 365 at 3,

369 at 3. And the First Circuit reversed the security-interest ruling, holding that the "lien granted by the Trust Agreement covers PREPA's present and future Net Revenues and that the Bondholders' lien is not avoidable." *First Circuit Lien Ruling*, 121 F.4th at 309. It then "affirmed in part and reversed in part," *id.* at 316, and "remanded for further proceedings consistent with the opinion," Adv. Proc. No. 19-00391, ECF No. 400. Thus, this Court's dismissal of the takings counterclaim has been reversed, and that counterclaim has been reinstated.

67. *Finally*, the fact that the bonds are limited recourse does not affect the Bondholders' entitlement to an administrative expense claim based on PREPA's post-petition torts. Mot. 29-30. The Board has no response, nor can it; whether creditors have contractual recourse on an underlying debt has nothing to do with an unconstitutional taking or the tort of conversion. The Board ignores that the Takings Clause of the Fifth Amendment is "quite different" from "the contractual right of a secured creditor to obtain repayment of his debt." *Sec. Indus. Bank*, 459 U.S. at 75; *see Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cnty.*, 57 F.3d 505, 510 (7th Cir. 1995) ("[T]he property right of a secured party to collateral is 'quite different in legal contemplation' from the creditor's contract right to repayment of the debt.").

B. The Bondholders Did Not Waive Their Administrative Expense Claim.

68. As the Bondholders' explained, there is a heavy presumption against the waiver of Bankruptcy Code remedies, requiring an express and unambiguous waiver. Mot. 44–46. Section 804 reflects no such "intentional relinquishment" of administrative expense claims, *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 10 (1st Cir. 2007), nor could it, given that nearly all the bonds were issued before PROMESA made PREPA eligible for bankruptcy. The Bondholders explained this anachronism in their opening brief (at 45), but the Board ignored it.

69. The Board and Committee now raise the new argument that the Bondholders supposedly "waived" the right to assert an administrative expense claim by failing to raise it before

now. Board Br. 44. That contention is wrong. "Neither the Bankruptcy Code nor the Bankruptcy Rules set forth a specific limitation period for the filing of administrative expense claims while a case is pending." 4 Collier on Bankruptcy § 503.02 (16th ed.); *accord Collins v. J&N Rest. Assocs.*, 676 F. App'x 18, 20 (2d Cir. 2017) ("§ 503 sets no clear timeline for the submission of administrative-expense requests."). Bankruptcy courts may "set and enforce bar dates" for "postpetition administrative expense claims," *Ellis v. Westinghouse Elec. Co., LLC*, 11 F.4th 221, 232 (3d Cir. 2021), but here, no bar date was set for administrative expense claims. The Court did set a deadline for the Bondholders to file this Motion, and the Bondholders filed by that deadline. *See Vargas-Alicea v. Cont'l Cas. Co.*, 2020 WL 3470325, at *1 n.2 (D.P.R. June 25, 2020) ("by meeting the [court-set] deadline, defendants cannot be considered to have waived the opportunity to challenge the expert's report"). Additionally, it was previously determined that the Bondholders had no security interest in the Net Revenues, so they could not pursue their administrative expense claim until the First Circuit confirmed the scope of their lien. The Bondholders filed an administrative expense motion at the earliest possible time after their rights were first established.

70. In support of its waiver argument, the Board cites an unpublished case that did not even involve administrative expense claims and involved parties that repeatedly missed court-ordered deadlines, unlike here. Board Br. 44 (citing *In re Hartigan*, 2014 WL 702391 (Bankr. S.D. Fla. Feb. 24, 2014)). The Board also suggests that permitting an administrative expense claim would be "inequitable," but identifies no legal support. To the contrary, it would be "inequitable" to allow the Board to misappropriate the Bondholders' collateral without consequence.

71. The Board's contention that it has been prejudiced by the Bondholders' failure to object to PREPA's budgets is baseless. Board Br. 44. First, the Board confuses concepts by alleging that Bondholders should have objected to PREPA's budgets when they were issued. But

unlike the Monthly Reports, PREPA's fiscal plans and budgets do not identify Current Expenses, so there was nothing to object to. Second, the Bondholders were never presented with PREPA's Fiscal Plan prior to its finalization, so there was no opportunity to object.

72. The Bondholders repeatedly objected to the Board's inflated expenses in connection with the Board's 2024 plan of adjustment, including by introducing evidence and eliciting testimony. The Bondholders also diligently and repeatedly moved for relief from the automatic stay to protect their interests in their collateral, ECF Nos. 74, 975, 2973, 3913, 4689, and raised the misappropriation of Net Revenues calculated in the Monthly Reports, including through expenses that are not Current Expenses, *see* ECF No. 4869 at 4 (noting PREPA had misappropriated Net Revenues "to pay for things that do not constitute Current Expenses"); ECF No. 188 at 10–11; ECF No. 975 n.138. In fact, the Board previously conceded that the Bondholders have raised these issues and that they remained open in the Title III case. *See* ECF No. 1235 ¶ 35. Further litigation efforts were precluded by the litigation stays that have been in place for the past three years. The Board could not have believed that the Bondholders had acquiesced in the Board's view that it can adopt a ludicrously broad view of "Current Expenses," unsupported by the Trust Agreement, and consume the Bondholders' collateral with impunity.

73. Additionally, the Board was not prejudiced because it did not change positions based on a belief that the Bondholders were not asserting their rights. Even now, months after it was determined that Net Revenues are the Bondholders' collateral, the Board continues to consume Net Revenues over the Bondholders' objection, and intends to continue consuming that collateral.

CONCLUSION

74. The Bondholders' motion for an administrative expense claim should be granted.

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San Juan, Puerto Rico

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all parties of record in the captioned case.

At New York, New York, the 16th day of May, 2025.

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