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

GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO Applicant.	PROMESA Title VI No. 18-1561

SIEMENS TRANSPORTATION PARTNERSHIP PUERTO RICO, S.E.'S
SUPPLEMENTAL OBJECTION TO PROPOSED QUALIFYING MODIFICATION

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Siemens Transportation Partnership Puerto Rico, S.E. ("Siemens"), by and through its undersigned counsel, submits this Support of its Supplemental Objection to the Proposed Qualifying Modification and states as follows:

I. PRELIMINARY STATEMENT

Siemens is entitled to funds held in escrow by the Government Development Bank for Puerto Rico ("GDB") for Siemens' sole benefit (the "Escrowed Funds"). The Escrowed Funds were deposited by the Puerto Rico Highways and Transportation Authority ("HTA"), pursuant to an agreement approved and guaranteed by GDB, and are held by GDB in a specific account (the "Escrow Account").[1] Despite the fact that the Escrowed Funds are held by GDB as escrow agent, GDB nonetheless takes the erroneous position that it can unilaterally modify Siemens' rights with respect to the Escrowed Funds through its proposed Qualifying Modification as defined in Section 601 of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) ("PROMESA"). 48 U.S.C. § 2231. GDB's proposed treatment of the Escrow Account in its proposed Qualifying Modification (the "Proposed Qualifying Modification") is improper and illegal for several reasons.

First and foremost, the right to receive the Escrowed Funds is not a "Bond Claim" subject to modification under Title VI. The undisputed facts clearly demonstrate that Siemens, HTA and GDB intended for HTA to fund the escrow account and for GDB to hold the funds in escrow. This all occurred years ago, and the funds constitute a "special deposit" under Puerto Rico law.

Notwithstanding GDB's incorrect arguments to the contrary, the parties' intent—and not any particular form of agreement—determines whether a valid escrow was created. Where, as here, the parties' intent is clear, an escrow is formed. Upon formation of an escrow, the escrow

[1] In the event that GDB moved the funds from account number 2XXXX-XXX-XXX-XXX-06 to some other account at GDB, such funds are nevertheless escrowed funds that are earmarked for Siemens and Siemens alone.

agent acts as a fiduciary over the funds entrusted to it. GDB accepted the escrow terms, and the denominated Escrowed Funds which were clearly and knowingly earmarked for Siemens. Upon acceptance, GDB held these funds as a fiduciary holding a special deposit. Thus, the Escrowed Funds simply cannot meet the statutory definition of a "Bond" under PROMESA and Siemens' rights to the Escrowed Funds cannot be modified by a Qualifying Modification to which it does not consent.

Even if it were true that GDB breached its obligations and representations and deposited the Escrowed Funds into a demand deposit account (as GDB now claims), the parties clearly and unequivocally intended for the funds be earmarked, escrowed, and readily available for disbursement to Siemens upon the occurrence of certain conditions precedent. Therefore, GDB's obligation to deliver the Escrowed Funds to Siemens cannot be modified. Indeed, GDB's own personnel concede that the Escrowed Funds were consistently maintained in an escrow account from July 2012 through May 2017.[2]

In a telling effort to escape years of GDB's own representations that the funds were in escrow, one former GDB official, Jesus Garcia Rivera, now takes the position that while the account is an "escrow account," GDB simply defines "escrow account" differently than anyone else in the banking and legal worlds.[3] This nonsensical statement essentially means that GDB considers itself unilaterally free to redefine a well-accepted, common, and clearly defined banking term when it suits GDB's needs to everyone else's detriment. It also means that GDB – a major financial institution – believes a demand deposit account cannot also be an escrow account. None of this makes sense, and is simply untrue.

[2] Presumably GDB believes that a demand deposit account cannot also be an escrow account. This is simply untrue.
[3] *See* Dep. of Jesus Garcia, attached as **Ex. E**, at 35:7-37:9.

Moreover, the Escrow Account was funded by HTA using the proceeds of a loan made by GDB. GDB is attempting to deny HTA access to the loan proceeds, and at the same time is charging HTA interest on the loan. GDB asserted a claim in HTA's Title III case seeking repayment *with interest* of the very loan proceeds that have been misappropriated by GDB. This type of conduct justifies the imposition of an equitable trust.

Finally, if approved in its current form, the Proposed Qualifying Modification would permit GDB to unjustly and improperly benefit from its unclean hands by improperly modifying Siemens' rights under a post-hoc law and would constitute an improper taking under the constitutions of both the United States and the Commonwealth of Puerto Rico.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Tren Urbano, Settlement Agreement, and Guaranty

In 1996, HTA engaged Siemens and other third-party contractors (together with Siemens, the "Consortium"), to build, operate, and maintain a train line known as the "Tren Urbano" (hereinafter described as "Tren Urbano"). During the Tren Urbano construction, disputes between the Consortium and HTA culminated in a lawsuit against HTA. To resolve the dispute, the Consortium and HTA entered into a settlement agreement effective as of May 28, 2010 (the "Settlement Agreement" [GDB 430-41][4], attached as **Ex. A)**.

The Settlement Agreement required HTA to pay Siemens a total of $52 million in five installments. Four payments were due on specific dates. The final payment was to be made upon Siemens' completion of certain "Open Action Items." (Ex. A § 2). The Settlement Agreement required HTA to place the fifth and final "Completion Payment" of $13 million into an escrow account for Siemens' benefit. (*Id.* §2(e).) Specifically, Section 2(e) provides:

[4] The Bates Labels for documents provided by GDB are labeled as "GDB-Siemens" but are referenced herein only as "GDB" to avoid confusion.

> On or before July 15, 2012, the Authority shall pay or cause to be paid the sum of Thirteen Million Dollars ("Completion Payment") ***into an escrow account***. On completion of all Open Action Items and their corresponding Scope of Work under the terms of paragraph 3 herein, the Completion Payment shall be released to Siemens.

Id. The Settlement Agreement further provided that upon Siemens' completion of the open action items, HTA would sign an "Amendment to the Certificate of Final Acceptance" as a formal acknowledgment of Siemens' successful completion of all required work. (*Id.* § 7.)

Although HTA and Siemens signed the Settlement Agreement, GDB was intimately involved in the settlement process. In fact, the Settlement Agreement would not have been possible without GDB's financial backing and approval. (*See* HTA 30(b)(6) Dep. attached as **Ex. B** at 52:2-8.) GDB's involvement is confirmed in both formal and informal communications. In March 2010, HTA and the Consortium signed a Memorandum of Understanding (the "MOU," [GDB 1405-11] attached as **Ex. C**) outlining the general terms of settlement. The payment terms under the MOU were not contingent on any completion obligation. The MOU further provides that "[a] *final settlement is expressly contingent on approval by the [GDB] of the financial terms and payment schedule* and providing an acceptable payment guarantee." (*Id.* ¶ 3 (emphasis added).) Additional negotiations ensued among HTA, GDB, and Siemens. Ultimately, the payment terms were modified to require placement of the final payment in an escrow account, as reflected in the Settlement Agreement.

At a May 19, 2010 meeting of GDB's Board of Directors, the Board adopted a resolution authorizing GDB to loan up to $63 million to HTA to fund payments due to Siemens under the Settlement Agreement and any changes in terms approved by GDB's President or Executive Vice President of Financing and Treasury. (*See* Res. 9296 [GDB 393-96] attached as **Ex. D**.) On the day the Settlement Agreement closed, GDB's general counsel sent a letter (the

"Acknowledgement Letter" [GDB 87-88], attached as **Ex. F**) to Siemens confirming the same and ratifying the payment terms under the Settlement Agreement:

> We hereby confirm that pursuant to Resolution 9296, in a meeting held on May 19, 2010, the Board of Directors of GDB authorized the PRHTA to enter into a final settlement agreement with the Consortium and authorized GDB's Executive Vice President of Financing and Treasury to negotiate the financial terms and payment schedule of such final settlement. *We hereby confirm GDB's acceptance of the financial terms and payment schedule, as set forth in Section 2 of the Settlement Agreement.*

(Ex. C ¶ 1 (emphasis added).)

Consistent with Res. 9296, GDB loaned HTA $63 million (the "Loan") for the express purpose of funding payments under the Settlement Agreement (*see* Loan Agreement attached as **Ex. G.)** To draw under the Loan, HTA was specifically required to confirm compliance with the Settlement Agreement (*see id.* at Ex. I thereto ("Notice of Drawing")). Further, authorized draw amounts (*id.* ¶ 3) matched the payments due under the Settlement Agreement for each date.

GDB also executed a guaranty in favor of Siemens (the "Guaranty," attached as **Ex. H**), agreeing to "absolutely, unconditionally and irrevocably guarantee[], jointly and severally…with the [HTA], the punctual payment when due of all amounts required to be paid by HTA under Section 2 of the Settlement Agreement[.]" The Guaranty was signed by GDB Executive Vice President Fernando Batlle (*id.* at GDB 38), the same executive authorized by Res. 9296 to negotiate payment terms on GDB's behalf. (*See* Ex. E ¶1; Ex. E. 40:21-25; 68:2-20.)

B. GDB Opens an Escrow Account for Siemens' Benefit

The Settlement Agreement expressly provided for two payments by July 15, 2012, with (i) an immediate $6 million payment (Ex. A ¶ 2(d)), and (ii) a second of $13 million placed into an escrow account (*id.* ¶ 2(e)). On June 13, 2012, Siemens sent a letter to HTA formally requesting that the $13 million Completion Payment be placed into an escrow account. (See June 13, 2012 Letter [GDB 1], attached as **Ex. I**.)

On June 27 2012, HTA and GDB began discussing the establishment of the escrow account. In an email, GDB's Denisse Rodriguez requested information from HTA's in-house counsel Rebeca Rojas. (*See* June 27-28 Emails [GDB 659] attached as **Ex. J**.) Rodriguez wrote, "Miriam [GDB employee] tells me that they have to pay $19 million according to a court order. But Silvino [HTA employee] tells me that he is waiting for a letter from you because that full amount is not going to be paid but rather *that part goes into escrow*." (*Id.* (emphasis added)). Rojas responded: "The payment on July 15 is for $6MM. The remainder of $13MM *should be deposited in an escrow account* until the work that Siemens is performing on the Train are [sic] finished[.]" (*Id.* (emphasis added)) Rodriguez confirmed Rojas' clarifications. (*Id.*)

The next day, HTA sent GDB a Notice of Drawing requesting that GDB "make a disbursement in the amount of $13,000,000 for the purposes set forth in the Loan Agreement…." (*See* Notice of Drawing [GDB 2-4] attached as **Ex. K**.) The Notice of Drawing included a certification confirming that the funding was in compliance with the Settlement Agreement and contained the words "Escrow Account from GDB." (*Id.*)

Thereafter, GDB opened the Escrow Account. On July 2, 2012, GDB signed a "Funds Transfer Order" (*See* GDB 368, attached as **Ex. L**) instructing that $13,000,000 be debited from the account holding the Loan proceeds and placed in an account labeled "Escrow HTA." By August 1, 2012, the Completion Payment was fully funded, separated and deposited into an Escrow Account. (*See* July 31-Aug. 1, 2012 Emails [GDB 270-74, 246-48], attached as **Ex. M**.)

C. GDB repeatedly acknowledges that the Completion Payment is Held in Escrow

Siemens worked in good faith to perform its obligations under the Settlement Agreement in reliance on its eventual receipt of the Completion Payment. In an abundance of caution, Siemens periodically requested representations from GDB and HTA that the Completion Payment remained in escrow in an account at GDB, and that the funds were earmarked for

Siemens' benefit. (*See* **Ex. N**.) Time after time, GDB represented to Siemens and HTA through account statements that the Completion Payment was in escrow and that Escrow Account existed and was fully funded. Siemens believed that the Escrow Account existed and was fully funded.

By way of example, on November 14, 2014, GDB analyst Brenda Gonzalez sent HTA treasurer Silvino Cepeda an email attaching screenshots from GDB's "BankMate" system and copies of the Funds Transfer Order and the Settlement Agreement. (*See* Ex. **O**.) She wrote:

> I'm including the documents needed for you to answer the Siemens letter. The first two pages are evidence of the escrow where the $13MM is located. *The third is the transfer that was generated in July 2012 separating what was to go to that escrow.* Then you have the agreement where on page 3 of the same you can find the completion payment where it indicates that the account should be created for the payment of Siemens."

(*Id.*) On November 18, 2014, Cepeda sent Siemens a BankMate photo showing account detail for Account Number 2XXXX-XXX-XXX-XXX-06, described the account as "Escrow Agencies and Corporations" and evidenced a balance of $13 million as of October 20, 2014. (*See* Ex. **P**.)

On December 16, 2014, in response to a request from HTA on behalf of Siemens, GDB Senior Account Executive Arnaldo Maestre specifically confirmed:

> The Settlement Agreement between the Puerto Rico Highways and Transportation Authority and the Consortium of Siemens Transportation Partnership Puerto Rico, S.E. . . . executed on May 29, 2010, states that a Completion Payment of $13,000,000 should be paid on or before July 15, 2012 into an escrow account.
>
> *The escrow account number 2XXXXX-XXX-XXX-XXX-06 was created for such purpose*, and its balance as of December 15, 2014 is $13,000,000.

(*See* Ex. **Q**.) Confirmatory correspondence from GDB continued until early 2017. Notably, these included continued confirmations from Carlos Vizcarrondo, Auxiliary Manager of Finances, who made the following representations about the Escrow Account from August 2016 to May 2017:

- "The escrow is open and has the 13MM" (August 12, 2016)
- "Yes, it is open and has its funds." (September 8, 2016)
- "Correct, there were no changes." (November 1, 2016)
- "Correct, there were no changes." (January 11, 2017)
- Vizcarrondo enclosed a BankMate screenshot detailing $13,000,000 Escrow Funding as of May 16, 2017 (May 16, 2017)

- "The money is still there." (June 8, 2017)

(**Ex**. **R**.)

During this time, internal communications between GDB employees also confirm that the Completion Payment was held as an escrow, including the following (*see* **Ex. S)**:

- On August 29, 2012, a GDB analyst stated: "the actual escrow was opened for $13MM to pay Siemens, as soon as they fulfill the conditions established found on page 3 section 2(e) of the Settlement Agreement" (*id*. at GDB 1400);
- On May 8, 2013, in an email chain between GDB employees, Rodriguez asks Pascual if the $13MM is still in the escrow account. Pascual responded: "at the moment HTA has not demanded it to pay Siemens." Rodriguez then asked, "Then the money is in an escrow account at GDB?," to which Pasucal replied "Yes." (*id.* at GDB 1553-56);
- On November 6, 2014, GDB Senior Account Executive, wrote: Escrow Account #2XXXX-XXX-XXX-XXX-06 has $13MM available for the payment to Siemens for the legal agreement with the Highway and Transportation Authority. These funds come from line of credit #2XXXX-XXX-XXX-XXX-06 for $63MM, originated to cover a legal agreement with Siemens . . . ." (*id.* at GDB 265-69)

D. Siemens Completes its Work on the Tren Urbano, Enters into the Second Amendment with HTA, and Requests Disbursement of the Completion Payment and GDB Refuses Same

1. Assurances From GDB Continued Well Into 2017

During a March 2017 meeting with Siemens, GDB's CFO Jose Santiago stated he would perform due diligence regarding the existence of the Escrow Account. (*See* Santiago Dep. attached as Ex. Z at 11:14-13:15).) In subsequent communications in May 2017, GDB confirmed to HTA the existence of the Escrow Account and requested the status of Siemens' work. (*See* Ex. T.) On May 8, 2017, GDB's Maestre wrote: "We need the status of the Siemens project because of the commitment to pay $13MM that we have in escrow. We should get that information as soon as possible, early this morning, if possible. I include the legal documents of the financing in which the Settlement Agreement is included." (*Id.*)

2. The Second Amendment to the Settlement Agreement

On June 5, 2017, HTA and Siemens executed a Second Amendment to the Settlement Agreement (the "Second Amendment") whereby HTA agreed to "perform all acts required by the Escrow Agreement to have the final payment released to Siemens in the amount set forth in Paragraph 1 to Siemens." (*See* Second Amendment at Ex. **U**.) HTA confirmed that only the

Certificate of Acceptance and an invoice were needed to release the funds. (Ex. B, 74:18-77:8.) That same day, HTA signed an "Amendment to Certificate of Final Acceptance" acknowledging Siemens had successfully completed all work contemplated by the Settlement Agreement. (**Ex. U** at Ex. F-1.) HTA thus acknowledged the existence of an escrow agreement and Siemens' entitlement to payment, while obviously knowing at the same time that it was essentially insolvent and would likely not be able to uphold its end of the bargain.[5]

In a June 9, 2017 letter to HTA, Siemens requested payment of the Completion Payment and enclosed an invoice. (Ex. **V**.) An internal HTA memorandum dated June 15, 2017 recognizes that payment was due to Siemens. (**Ex. W** (translation forthcoming).) In June 23 and July 10, 2017 letters to GDB's President, Siemens requested disbursement of the Completion Payment pursuant to the Guaranty. (Ex. **X**.) GDB did not respond to Siemens' formal requests. Because of a lack of responses from GDB, Siemens requested a meeting with AAFAF (who was supervising GDB) to compel disbursement of the Escrowed Funds, and a meeting was held on July 31, 2017. Before the meeting, on July 28, 2017, GDB provided AAFAF a summary of the creation of the escrow account in favor of Siemens. (Ex. **Y**.) The summary stated, in relevant part:

> ***In compliance with the GDB's Guaranty Agreement in favor of Siemens . . . on July 2, 2012 an escrow account for $13MM was created for purposes of covering the last payment to Siemens***, as soon as it complied with its part of the MOU. Time transpired without fulfillment of the MOU agreements, until on May 8, 2017, Juan Maldonado, legal advisor for the HTA, sent us an email indicating that after conducting the appropriate inspections and technical evaluations regarding the pending matters . . . they reached an agreement to reduce the amount from $13MM to $12MM.
>
> Today, July 28, 2017, in a conversation with Atty. Maldonado, he mentioned that the HTA had agreed to disburse the $12 MM in favor of Siemens.

(*Id.*) (emphasis added).

[5] Because Siemens believes that it was duped into entering into the Second Amendment, it is not prepared to concede that the amount due to Siemens under the Settlement Agreement is currently $12 million rather than $13 million.

E. Siemens Commences Litigation in HTA's Title III Case; Case is Transferred to Title VI Docket

Despite GDB's internal and external representations and acknowledgments of the Escrow Account, GDB advised Siemens in late July 2017 that it deemed the Escrowed Funds subject to a Restructuring Support Agreement dated May 15, 2017 among GDB, AAFAF and a majority of GDB's bondholder creditors (together with amendments, the "RSA"). The RSA is the document that served as a basis for the Title VI Proposed Qualifying Modification.

Concerned about the status of the Escrowed Funds, Siemens sought relief in HTA's PROMESA Title III action.[6] The Court granted Siemens' motion, permitting Siemens to conduct an examination of GDB related to the Escrowed Funds. (Case No. 17-03567, Dkt. No. 338). On January 30, 2018, Siemens deposed Santiago as GDB's 30(b)(6) designee.

During his deposition, Santiago confirmed that there was and continues to be an escrow account containing $13 million earmarked for Siemens' benefit. (**Ex. Z** at 26:4-6.) However, Santiago claimed that GDB was unable to disburse the Escrowed Funds because in his view (without legal support) the Escrow Account was "subject to" both (1) the unfiled and non-public RSA; and (2) Executive Orders OE-2016-10 and OE-2016-14. (*See, e.g.*, *id.* at 16:8-11; 29:11-16; 30:20-22; 31:3-5; 72:16-20; 88:6-9.)

Because of GDB's improper refusal to pay over the Escrowed Funds and violations of its obligations as Escrow Agent, on March 26, 2018, Siemens filed a complaint (the "Adversary Complaint") against GDB, HTA, AAFAF and FOMB, wherein Siemens sought declaratory relief that the Completion Payment located at GDB is Siemens' property and is due and payable to Siemens. (Adv. P. No. 18-0030-LTS, Dkt. No. 1.) Each defendant filed a motion to dismiss (*id.* at 29, 31, 34, 39) (the "Motions to Dismiss"); Siemens filed an omnibus response (*id.* at 49) (the

[6] Siemens concern was justified because the RSA included the Escrow Account and the Escrowed Funds among the assets that would be subject to the division of assets provided for therein.

"Omnibus Response"); FOMB, HTA, and GDB filed replies (*id.* at 57, 58) (the "Replies"); and Siemens filed a surreply (*id.* at 62) (the "Surreply.") The Adversary Complaint, the Omnibus Response and the Surreply are incorporated herein by reference. (*See* Dkt. Nos. 11-1, 11-2, 11-3 (Adversary Complaint); **Ex. AA** (Omnibus Response); **Ex. BB** (Surreply).)

Siemens agreed to have its claim and right to the Escrowed Funds adjudicated in this Title VI proceeding, and the Court entered an order staying the Adversary Proceeding in order to resolve Siemens' claims in this Title VI proceeding. (Adv. P. No. 18-00030, Dkt. No. 70.)[7]

III. OBJECTIONS

A. GDB Holds the Completion Payment in Escrow for Siemens' Benefit and Escrowed Funds are Not Subject to the Qualifying Modification

GDB implicitly recognizes that escrowed funds and escrow accounts are not and cannot be modified as part of a Qualifying Modification under Title VI. For that reason, GDB attempts to re-characterize the Escrowed Funds that it maintained for Siemens' sole benefit for the past 6 years by arguing that the Escrow Account is neither an escrow nor an escrow account.

GDB's argument is two-fold. First, GDB argues that an escrow was never formed because it is not supported by a tri-party written agreement. Alternatively, GDB argues that even if an escrow agreement exists, GDB disregarded its obligation to hold the Escrowed Funds in escrow and instead maintained the Escrowed Funds in a simple deposit account. GDB's arguments are specious. GDB agreed to serve as and accepted the Escrowed Funds as an escrow agent, deposited such funds in an escrow account and repeatedly represented that the Escrowed Funds were maintained in an Escrow Account. GDB cannot simply reverse its earlier position in an effort to modify Siemens' rights.

[7] Siemens timely filed both a Notice of Intent to Object (Docket No. 11) and a Preliminary Objection (Docket No. 132) in the above-captioned Title VI case, and the parties engaged in a period of limited discovery.

For a Qualifying Modification to be approved under section 601(m)(1)(D) of PROMESA, the Court must find that "the requirements of [PROMESA section 601] have been satisfied." *See* 48 U.S.C. § 2231(m)(1)(D). GDB, as the party applying for a Qualifying Modification under Title VI of PROMESA, must prove to the Court by a preponderance of the evidence that the Qualifying Modification satisfies the requirements of section 601 of PROMESA. (*See* Docket No. 158-1 (Proposed Approval Order), ¶ 21 ("GDB and AAFAF, as proponents of the Qualifying Modification, have met their burden of proving the elements of section 601 of PROMESA by a preponderance of the evidence, the applicable evidentiary standard for Approval.")).

Under Title VI of PROMESA, only "Bond" obligations can be modified by a "Qualifying Modification." *See generally* 48 U.S.C. § 2231. The definition of "Bond" includes a "bond, loan, letter of credit, other borrowing title, obligation of insurance, [and] other financial indebtedness for borrowed money …." 48 U.S.C. § 2014(2). To the extent that a claim is not a "Bond" claim, it cannot be modified under Title VI. 48 U.S.C. § 2231(m)(1)(D). Simply put, the Escrowed Funds do not satisfy the definition of "Bond" and, as a result, GDB cannot meet its burden of establishing by a preponderance of the evidence that the Escrowed Funds can be modified under Title VI.

1. The Lack of a Document Titled Escrow Agreement is Irrelevant to the Formation of an Escrow

GDB argues that an escrow was never created because GDB is not a party to a document entitled "escrow agreement." Puerto Rico law does not support GDB's position as there is no requirement under Puerto Rico law that contracts be in writing. Although commercial contracts involving more than $300 require something more than oral testimony to prove the existence of

the agreement, there is no explicit requirement that the additional (non-testimonial) evidence be in a formal and integrated writing. 10 L.P.R.A. § 1302.[8] The statute states in relevant part:

> Commercial contracts shall be valid and shall cause obligations and causes of action *whatever may be the form and language in which they are executed* . . . . However, the testimony of witnesses shall not in of itself be sufficient to prove the existence of a contract the amount which exceeds three hundred dollars ($300), unless such testimony occurs with other evidence.

Id. (emphasis added).

The Commerce Code further supports the conclusion that commercial contracts can be evidenced by multiple documents or writings. As the relevant section recognizes, a contract can arise from correspondence alone:

> Contracts executed through correspondence shall be perfected from the time an answer is made accepting the proposition or the conditions by which the latter may be modified.

10 L.P.R.A. § 1305.

Case law permits the use of and reliance on multiple documents to prove the existence of a valid contract. An example of such a contract is illustrated in *MMB Development Group, Ltd. v. Westernbank Puerto Rico*, 762 F. Supp. 2d 356, 366-68 (D.P.R. Dec. 2, 2010). In *Westernbank*, the court found that, pursuant to 10 L.P.R.A. § 1302, plaintiff was not required to present a writing to survive a motion to dismiss on its breach of contract claim as to an oral modification of a commercial loan agreement. *Id.* at 367 ("[A] party who asserts the existence of a contract need not present a writing to bring forth his claim.") Rather, the court found that existence of a

[8] Because of the commercial nature of the contract, the Puerto Rico Commercial Code, rather than the Puerto Rico Civil Code, applies. *See* 10 L.P.R.A. § 1002 (broadly defining commercial transactions as "those enumerated in this Code and any others of similar character."); *Westernbank*, 762 F. Supp. 2d at 366 ("Whether a transaction is commercial in nature is a question to be determined on a case by case basis."). Deposits at GDB fall under the Commerce Code. *See* 10 L.P.R.A. § 1621 ("In order that a deposit may be considered commercial, it is necessary: (1) that the depositor, at least, be a merchant; (2) that the wares deposited be commercial objects; and (3) that the deposit constitute in itself a commercial transaction, or be made by reason of commercial transactions."). The deposit of the Escrowed Funds at GDB meets these requirements: both Siemens and HTA are merchants under the Commerce Code because they are commercial and/or industrial companies (*see* 10 L.P.R.A. § 1001(2)); and the Escrowed Funds are commercial objects and the deposit of the Escrowed Funds was made by commercial transaction as evidenced by the Settlement Agreement and the work to be performed on the Tren Urbano.

contract was sufficiently alleged through plaintiff who alluded to the existence of documents and conversations memorialized in electronic exchanges that would prove the contract was real.

Here, the facts clearly establish an escrow agreement among Siemens, HTA and GTB. It is undisputed that the following documents were properly executed and delivered and are in force: (1) the Settlement Agreement (which GDB was involved in negotiating and approved) [Ex. A]; (2) the Acknowledgment Letter (in which GDB affirmed to Siemens that it approved the financial terms and payment schedule of the Settlement Agreement) [Ex. F]; (3) the Guaranty (pursuant to which GDB specifically guaranteed all obligations in section 2 of the Settlement Agreement) [Ex. H]; and (4) the Loan Agreement (pursuant to which GDB specifically provided funding to HTA to, among other things, fund the escrow account under the Settlement Agreement). [Ex. G.] These documents, when read together as the transaction contemplates, provide indisputable evidence of the agreement among Siemens, HTA and GDB to fund the Completion Payment.[9] These documents also evidence the agreement and intention in May 2010 to establish an escrow account to hold the Completion Payment in escrow to be payable as provided for in the Settlement Agreement.

That agreement was reaffirmed, ratified and implemented by communications among the parties, pursuant to which, (1) Siemens directed that the escrow be established as provided for in the Settlement Agreement [Ex. I], (2) HTA took steps in order to establish and fund the Escrow Account for Siemens' exclusive benefit [*see* Exs. J, K], and (3) GDB specifically confirmed the establishment of the account at GDB and its purposes and assumed the role of escrow agent [*see* Ex. L, M.] All of these steps occurred by August 1, 2012. Accordingly, the aforementioned

[9] GDB's position that the contract must also be separately recorded – despite being incorrect (as detailed in Section IV(B) of Siemens' Omnibus Response to the Motions to Dismiss filed in the Adversary Proceeding) – is also appropriately satisfied since the Settlement Agreement, Guaranty and the Loan Agreement all satisfy that requirement separately and collectively.

communications evidencing these events are not after-the-fact communications that GDB claims (in its Motion to Dismiss) could not fulfill the requirement of a written contract (*see* Adv. P. 18-0030, Docket No. 29 at p. 8 (claiming that "[a] valid, existing, and binding obligation by a government entity can only be established through a written contract *before* the obligation is incurred.")). Rather, these communications are contemporaneous writings that all contributed to evidencing the fulfillment of obligations under the Settlement Agreement and Guaranty.

Upon those steps being taken, by law, GDB unequivocally undertook an obligation to hold and maintain the escrow. GDB understood this obligation, and in fact specifically, routinely and systematically confirmed for more than four and a half (4 ½) years that it had established an escrow account, that the Escrowed Funds in the amount of $13,000,000 were in the account, and the Escrowed Funds were earmarked for Siemens as the Completion Payment [*See, e.g.*, Exs. M, O, Q, R]. Siemens did, as expected, rely upon GDB's numerous representations to this effect.

The escrow's existence was acknowledged yet again by GDB's CFO in early 2018 when, under oath, he confirmed that an escrow account existed and that the funds were earmarked for Siemens. (Ex. Z at 26:4-6). HTA also understood and believed that the escrow at GDB existed for Siemens' benefit, and continues to maintain this position today. (*See* Ex. B at 74:15-16.)

GDB's argument that an escrow agreement was not executed ignores (i) the plain and clear agreements beginning in 2010 which required establishment of an escrow (and which GDB negotiated, acknowledged, guaranteed and committed to fund), and (ii) the specific directives and undertakings in July 2012 whereby GDB actually formed and funded the escrow.

2. As an Escrow Agent, GDB is Duty Bound to Release the Escrowed Funds to Siemens

Recognizing that its formalistic contract argument is not sufficient to avoid the escrow obligations it undertook, GDB next argues that despite its contractual obligations and numerous

representations since 2012, GDB never established the Escrow Account. Rather, GDB asserts that it created a simple demand deposit account. Therefore, according to GDB, regardless of its misconduct and misrepresentations regarding the nature of the account in which the Escrowed Funds were held, the account is tantamount to a Bond and thus subject to the Proposed Qualifying Modification. Again, GDB is wrong.

The nature of the account is not determinative of the obligations attached to the account. Rather the parties' intent defines whether the deposit is "general" or "special." *E.g. Treasurer v. Banco Comercial de Puerto Rico*, 46 P.R.R. 298, 305-06 (P.R. 1934) (Official Translation attached to Ex. AA.) ("[W]hether a deposit in a bank is general or special depends on the contract resulting from the mutual understanding and intention of the parties, or on circumstances sufficient to create a trust relation."); *Branciforti v. 98th Realty Co.*, No. 14418, 1935 WL 1843, at *3 (Oh. Ct. App. July 6, 1935) ("The mere fact that the trust company [a bank] made a change in its bookkeeping and entered the deposit in a different account would not change the terms of the contract on which the deposit was made."); *cf. Fine v. Lasater*, 161 S.W. 1147, 1148-49 (Ark. 1913) (whether a deed is held in escrow "will generally depend . . . on the words and purposes expressed [rather] than upon on the name which the parties give to the instrument.").[10] Upon accepting the obligation to hold the funds in escrow, GDB was required to

[10] GDB's position that case law from the mainland United States should be disregarded is legally incorrect. Modern Puerto Rico jurisprudence recognizes Puerto Rico as a "mixed-law" jurisdiction. Where the Puerto Rico Civil Code is on point, the court need not look any further; however, when the statute is not clear, courts look to civil and American common law for guidance. *See Metlife Capital Corp. v. Westchester Fire Ins. Co.*, 224 F. Supp. 2d 374, 379 (D.P.R. 2002) ("In the absence of applicable Puerto Rico law, the practice of the Puerto Rico Supreme Court has been to use the most advanced rules in North American law and civil law." (citations and internal quotation marks omitted)); *Burgos-Lopez v. County Plaza*, 193 D.P.R. 1 (P.R. 2015) ("Puerto Rico has a mixed legal system. This is the product of the century-old interaction of legal principles, casuistry, laws and codes stemming from both Spanish civil law and customary law (common law) in the United States. For this reason, in cases where we have had before our consideration controversies related to figures that originate and develop in the American common law and on which we lack "precedents that specifically address the controversy before us" we have not hesitated to resort to the jurisprudence of that system."). Because there are no Puerto Rico statutes explicitly on point on issues before the Court, the Court should rely upon case law both from Puerto Rico and the United States generally.

do so. *See* 10 L.P.R.A. § 1624 (a depositary is "obliged to preserve the article deposited in the manner he receives it, and return it … when the depositor request[s] it of him.").

As described below, Puerto Rico law recognizes escrow deposits as "special deposits" giving rise to a fiduciary duty requiring the funds to be held in trust. Special deposits are not treated as general deposits, which are subject to a creditor-debtor relationship with the depositary. *Treasurer*, 46 P.R.R. at 306-07. Thus, upon assuming the obligations to hold the escrow, GDB became a fiduciary with the obligation to deliver the escrow to the escrow owner upon the satisfaction of the escrow conditions. As the Puerto Rico Supreme Court has held:

> ***[W]hen a bank accepts a special deposit it becomes a trustee of the depositor, and holds the money subject to the trust***. The receipt itself affords strong, if not conclusive, evidence of a special deposit. It shows that the money was placed in the bank for a special purpose. . . . It follows, therefore, that ***the bank holds the money, not as a general debtor but in a fiduciary capacity***.

Treasurer, 46 P.R.R. at 317 (emphasis added). Similarly, applying Puerto Rico law, the First Circuit held that the escrow agent "received the [escrowed funds] in trust and … ***assumed the fiduciary duty of holding them intact***" – i.e. separate from the depositary's other property. *Gulf Petroleum, S.A. v. Collazo*, 316 F.2d 257, 261 (1st Cir. 1963) (emphasis added). *See also Mercurius Inv. Holding, Ltd. v. Aranha,* 247 F.3d 328, 331 (1st Cir. 2001) (depositary as fiduciary of both parties to the escrow transaction); *Fábrica de Muebles J.J. Alvarez, Inc. v. Westernbank de Puerto Rico*, Case No. 09-1558 (GAG), 2009 WL 4730776, at *10 (D.P.R. Dec. 4, 2009) (holding that, pursuant to oral agreement, depositary bank was a fiduciary with respect to alleged escrow fund); *id.* (citing 28 Am. Jur. 2d Escrow § 26 (2009) (recognizing that a "[f]iduciary relationship is created by and inherent in nature of an escrow agreement")); *Perez Rodríguez v. Sonia E. Rodríguez h/n/c Tropic Isle Properties*, Case No. 100016700, 2003 WL 21368954 (TCA), at *4 (P.R. App. Feb. 27, 2003) (real estate broker "became the contractual

depositary" of escrowed funds to be held in "a special escrow account" in depositary's capacity "as voluntary fiduciary" toward the parties to the escrow transaction) (translation forthcoming).

Puerto Rico law makes it clear that funds in an escrow or special deposit cannot be disbursed by the depositary or used for anything other than the express purpose for which they are on deposit. "When the bank assumes the obligation of dedicating the funds to the intended purpose, there can be no transfer of title, for the bank lacks authority to dispose of the funds. ***A transfer of title is equivalent to a transfer of ownership, and if the bank is bound to dedicate the money to the purpose specified by the depositor, it is plain that it does not even have a limited ownership on the amount deposited***." *Treasurer*, 46 P.R.R. at 306-07 (emphasis added). *See also In re K.D. Builders, Inc*., 382 B.R. 1, 5 (Bankr. D. Mass. 2008) ("Where a depositor pays funds to a bank with an expressed purpose that the funds shall be used for a particular purpose, then the funds may be deemed to be held in trust.").[11]

The Escrowed Funds were clearly delivered to GDB to hold as such. GDB accepted them and acknowledged them as earmarked funds. Pursuant to the requirements of an escrow, the Escrowed Funds must be remitted to the appropriate party upon the satisfaction of the escrow conditions. *See* 10 L.P.R.A. § 1624; *Camposanto PR Inc. v. Sheils Title Co., Inc.,* Case No. KAC1998-1115, 2006 WL 2589796, at *2 n.1 (P.R. Cir. July 12, 2006) (An escrow account is "a sum of money… delivered to a third party for it, as agent, to keep it until it is necessary for said party to disburse it or deliver it to satisfy an obligations that is specifically acknowledged by the depositor."). It is without dispute that the conditions for the establishment of the escrow were satisfied. Whether GDB – as escrow agent and to whom the escrow was entrusted – placed those

[11] Moreover, comingling or conversion of a special deposit by the fiduciary will not alter the fact that escrowed funds were intended to be held as a special deposit. *Branciforti v. 98th Realty Co.*, 1935 WL 1843 (Oh. Ct. App. July 6, 1935)**.** Instead, the owner of the funds is entitled to a return of the escrowed funds in full, or such lesser amount as remains in the depositary's possession or traceable to the funds in question. *Gulf Petroleum, S.A. v. Collazo*, 316 F.2d 257, 261 (1st Cir. 1963).

funds in an escrow account, demand deposit account or simply in bills in the bank's vault is irrelevant. It does not alter the obligation that GDB assumed when accepting the funds. It must deliver the earmarked Escrowed Funds to the rightful party (Siemens) when required. That is the fundamental fiduciary obligation of the escrow holder. *See* 10 L.P.R.A. § 1624.

Under Puerto Rico law, special account holders are not general creditors of a depositary bank. Therefore they are entitled to preference in payment over general depositors. *See Treasurer*, 46 P.R.R. at 314. When a depositary bank is subject to insolvency proceedings or receivership, special account holders are entitled to payment in full of the amount deposited before general depositors. *See Burket v. Bank of Hollywood,* 69 P.2d 421, 422 (Cal. 1937) ("[T]he money on deposit in the escrow account … was not part of the general assets, but had been intrusted [sic] to it for distribution in accordance with an escrow agreement. Under such circumstances it was a special deposit, title to which did not pass to the bank. … Being a special deposit, the owners are entitled to it in preference to the bank's general creditors and the original claims filed with the superintendent of banks are a sufficient basis for recovery." (internal citations omitted)); *Branciforti,* 1935 WL 1843, at **3-4 (holding that plaintiffs were entitled to funds in trust despite comingling: "where a bank mingles trust money with its own funds, money paid out from such funds for its own purposes will be presumed to have been paid from its own money and not from the trust fund, in a situation where the mingled fund has not been reduced at any time below the amount of the trust fund." (citations and internal quotation marks omitted)).

As a special account, the Escrow Account and Escrowed Funds do not fall within the definition of Bond contained in Title VI of PROMESA. *See generally* 48 U.S.C. §§ 2014(2), 2231. The Escrowed Funds are clearly earmarked and acknowledged by GDB to be used for no purpose other than their designated purpose. *E.g. Treasurer*, 46 P.R.R. at 306-07 ("When the

bank assumes the obligation of dedicating the funds to the intended purpose, there can be no transfer of title, for the bank lacks authority to dispose of the funds."). From the inception of the escrow, the Escrowed Funds were earmarked for the Completion Payment and were simply entrusted to GDB for safekeeping. GDB is not entitled to "borrow" these funds as it may an ordinary deposit that is not contained within a special account and is not earmarked for a specific purpose. *Compare Treasurer,* 46 P.R.R. at 306-07 ("[I]f the bank is bound to dedicate the money to the purpose specified by the depositor, it is plain that *it does not even have a limited ownership on the amount deposited*.") (emphasis added) *with Ass'n of Empls. of the Cmlth. of Puerto Rico v. Hon. Alejandro Garcia Padilla*, No. AC2016-1248 (San Juan Super. Div. Apr. 21, 2017) (citing Puerto Rico cases supporting principle that a *generic* bank deposit agreement establishes a creditor-debtor relationship bearing hallmarks of a loan) (translation at Adv. P. No. 18-0030-LTS, Dkt. No. 45).

Here, HTA and Siemens intended to establish an escrow for Siemens' benefit, GDB accepted the funds on these terms *and* GDB repeatedly acknowledged the existence and maintenance of the escrow and Escrowed Funds. Under Puerto Rico law, the funds were never available for general use. As such, a creditor-debtor relationship "akin to a loan" was never established and the Escrowed Funds do not constitute "Bond" claims. Their inclusion in the Proposed Qualifying Modification by GDB is tantamount to conversion.

GDB, as escrow agent, is obliged to deliver the Escrowed Funds to Siemens upon the satisfaction of the escrow conditions. There is no dispute that the escrow conditions were satisfied. Whether GDB—as escrow agent and to whom the escrow was entrusted—attempted to misappropriate those funds by not placing them in an escrow account does not alter GDB's

fundamental obligation as an escrow holder to deliver the escrowed and earmarked funds to their rightful owner when required. *See* 10 L.P.R.A. § 1624.

B. Even if an Escrow Were not Formed, a Constructive Trust Should be Imposed

Even putting aside the fact that the Escrowed Funds cannot be modified under Title VI, under Puerto Rico law, Siemens is also entitled to the Completion Payment under equitable principles. Because the Escrowed Funds are earmarked, failure to term them over at a minimum requires imposition of a constructive trust over such funds. *See* 31 L.P.R.A. § 7 ("When there is no statute applicable to the case at issue, the court shall decide in accordance with equity."); *Puerto Rico Tourism Co. v. Priceline.com, Inc.*, No. 3:14-CV-01318 JAF, 2015 WL 5098488, at *7 (D.P.R. Aug. 31, 2015) ("constructive trust, under the right circumstances, is authorized under P.R. Laws Ann. tit. 31, § 7"). "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." The Restatement First, Restitution § 160 (Constructive Trust). Constructive Trusts are "not a conventional formal trust established with a named trustee, named beneficiary and a specific object…[but] a court-imposed device, essentially remedial in purpose, to achieve equitable restitution…" *Zimmermann v. Epstein Becker & Green, P.C.*, 657 F.3d 80, 83 (1st Cir. 2011) (citations omitted). As explained by the First Circuit, "[t]he central objective [of constructive trusts] is to prevent unjust enrichment … commonly if not invariably based on the possessor's improper acquisition of the claimant property." *Id.*

While GDB may argue that Act 219-201 (the "Trust Act") abolished constructive trusts under Puerto Rico law, that is simply not true. The Trust Act was enacted to replace articles of the Civil Code concerning the formation of *express* trusts and did not alter the article of the Civil Code serving as the basis of the constructive trust remedy under Puerto Rico law. *See* §

71 of Act 219-2012. Since enactment of the Trust Act, courts continue to find that constructive trust claims are actionable. *See Puerto Rico Tourism Co.*, 2015 WL 5098488, at *7 (decision rendered after enactment of Trust Act noting that constructive trusts are authorized under Puerto Rico law). Indeed, Puerto Rico courts have a long history of recognizing constructive trusts as a means of protecting a party's interests where there was no protection under statutory law. *See, e.g., In re Garcia*, 484 B.R. 1, 16-17 (Bankr. D.P.R. 2012), *rev'd*, 507 B.R. 32 (B.A.P. 1st Cir. 2014) (noting the Supreme Court of Puerto Rico "circumscribed the use of constructive trusts to 'situations not foreseen by strict law'" and "[p]ursuant to Puerto Rican jurisprudence, a constructive trust doctrine is only applicable to 'situations not foreseen by strict law'"); *Corporacion Insular de Seguros v. Reyes-Munoz*, 849 F. Supp. 126, 135 (D.P.R. 1994) (writing that imposition of constructive trust is an appropriate remedy for unjust enrichment "because it protects the true property owner's interest," and noting that "Puerto Rico also recognizes the creation of constructive trusts").

As set forth above, the parties' writings and agreements make clear the parties' intention that the Escrowed Funds be set aside and preserved by GDB for the sole purpose of paying the Completion Payment to Siemens. By insisting on an escrow, Siemens did exactly what it needed to do to protect its economic agreement with HTA and GDB. Relying on the numerous statements by HTA and GDB, Siemens made substantial expenditures to complete the prerequisites to the Completion Payment. GDB, on the other hand, was never an intended beneficiary or owner of the Escrowed Funds. Nevertheless, in the Proposed Qualifying Modification, GDB "contributes" the Escrowed Funds (which are Siemens' property) to its estate in order to increase the "pot" available to GDB's other creditors. The imposition of a constructive trust over the Escrowed Funds will prevent unjust enrichment to these other

creditors and will protect Siemens' interest in its property. Thus, the Escrowed Funds must be excluded from the Qualifying Modification. *See Reyes-Munoz*, 849 F. Supp. at 135.

C. GDB Should Not Be Permitted to Benefit from its Unclean Hands

In addition to the foregoing, GDB's attempt to improperly and illegally use Siemens' Escrowed Funds to effectuate the Qualifying Modification – thereby attempting to modify Siemens' property rights – should be barred in light of GDB's unclean hands. Without Siemens' consent, GDB proposes to use the contents of the Escrow Account to fund the Proposed Qualifying Modification. To add insult to injury, GDB takes the position in HTA's Title III case that it loaned HTA the money from which the Escrowed Funds derived and HTA must repay GDB *with interest*. (*See* Case No. 17-bk-03567, Claim No. 29533). In other words, GDB is denying HTA the loan proceeds used to fund the Escrowed Funds by attempting to recapture the escrow money to fund its Proposed Qualifying Modification, all while simultaneously continuing to charge HTA interest on the loan. This behavior should not be condoned.

D. The Proposed Qualifying Modification Would Effectuate a Taking of Siemens' Property Without Just Compensation

Approval of any Qualifying Modification that utilizes Siemens' Escrowed Funds and modifies Siemens' rights to its property would violate the Takings Clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation" and is applicable to states and commonwealths of the United States pursuant to the Fourteenth Amendment. The Constitution of the Commonwealth of Puerto Rico contains an equivalent provision in Article II, § 9. Simply put, "[t]he Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012)

(internal quotation omitted); *see also First Eng. Evangelical Lutheran Ch. of Glendale* v. *Cty. of Los Angeles*, 482 U.S. 304, 318-319 (1987); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978). A taking occurs when there is an actual taking of private property for which the person did not receive just compensation. *Wash. Legal Found.* v. *Mass. Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993) (quoting *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Siemens alone is the rightful owner of the Escrowed Funds. The Proposed Qualifying Modification proposes to take the Escrowed Funds without Siemens' consent and without affording Siemens just compensation for the taking of such funds. To the extent that the Qualifying Modification modifies Siemens' rights to its Escrowed Funds, Siemens reserves and preserves all of its rights and remedies under the Takings Clause.[12]

IV. RESERVATION OF RIGHTS

Siemens reserves the right to raise additional objections to the Proposed Qualifying Modification before or at any scheduled hearing to consider approval of the Proposed Qualifying Modification. Siemens further reserves the right to join in and adopt any objections to the approval of the Proposed Qualifying Modification of any other interested party before or at any scheduled hearing to consider approval of the Proposed Qualifying Modification. To the extent GDB revises the Proposed Qualifying Modification in any way before or after any hearing to

[12] Additionally, PROMESA was enacted many years after HTA, Siemens, and GDB entered into an escrow agreement, but is now being used retroactively to impair Siemens' contractual rights. Such impairment is a violation of Siemens' due process rights under the Fifth Amendment to the United States Constitution. U.S. CONST. amend. V. To the extent PROMESA converts Siemens' rights to the Escrowed Funds into a "Bond" claim capable of modification, such interpretation unequivocally alters the contractual and property rights and obligations between Siemens, HTA, and GDB. The modification of Siemens' rights is not insignificant because millions of dollars due and owing to Siemens (for work it has already performed) are at stake. As argued above, the plain meaning of a "Bond" capable of modification by PROMESA implicates creditor-debtor relationships only, which does not include escrowed funds under Puerto Rico law. Accordingly, it would be an arbitrary and irrational application of PROMESA to modify contractual rights to escrowed funds which did not arise from a creditor-debtor relationship.

consider approval of the Proposed Qualifying Modification, Siemens reserves the right to review, comment upon, or otherwise raise additional objections to any such revisions.[13]

V. CONCLUSION

For the reasons set forth above, this Court should enter an order determining that (i) Siemens is the owner of the Escrowed Funds, (ii) the Escrowed Funds are not a Bond within the meaning of PROMESA, or in the alternative, that Siemens' is entitled to payment priority with respect to the Escrowed funds, and (iii) Siemens is entitled to immediate disbursement of the Escrowed Funds.

Dated: October 17, 2018

Respectfully submitted,

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[13] As set forth at length above, Siemens does not hold a Bond claim that is capable of being modified pursuant to a Qualifying Modification. Accordingly, Siemens cannot be bound by any release, discharges or injunctions issued under Title VI. *See* 48 U.S.C. § 601(m)(2) ("[N]o claim or right that may be asserted by any party in a capacity other than holder of a Bond affected by the Qualifying Modification shall be satisfied, released, discharged, or enjoined by this provision."). To the extent that Siemens does hold a Bond claim within the meaning of PROMESA, Siemens opted out of the third party releases contained in the Proposed Qualifying Modification. In its Proposed Approval Order, GDB acknowledges that it is not attempting to bind parties that elected to opt out of the third party releases. *See* Proposed Approval Order ¶ 24(ii) ("Any holder of a Participating Bond Claim can opt out of the Mutual Releases."). Accordingly, the third party releases within the Proposed Qualifying Modification cannot apply to Siemens.

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

GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO Applicant.	PROMESA Title VI No. 18-1561

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Siemens Partnership Transportation Puerto Rico, S.E.'s Preliminary Objection to Proposed Qualifying Modification were served on this 17 day of October, 2018 upon the following parties and counsel by email and/or hand delivery:

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