

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

FINANCIAL GUARANTY INSURANCE
COMPANY,

Plaintiff,

-against-

ALEJANDRO GARCÍA PADILLA, JUAN C.
ZARAGOZA GÓMEZ, INGRID RIVERA
ROCAFORT, MELBA ACOSTA FEBO, LUIS F.
CRUZ BATISTA, VÍCTOR A. SUÁREZ
MELÉNDEZ, CÉSAR A. MIRANDA
RODRÍGUEZ, JUAN FLORES GALARZA, and
JOHN DOES 1-40,

Defendants.

No. 16-cv-1095 (JAF)

**MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF MELBA
ACOSTA FEBO AS GDB PRESIDENT TO DISMISS UNDER FED. R. CIV. P. 12 (B)(6)**

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Plaintiff, Financial Guaranty Insurance Company (“*Plaintiff*”), submits this Memorandum of Law in Opposition to Defendant Hon. Melba Acosta Febo’s Motion to Dismiss (Dkt. No. 41) (the “*GDB President’s Motion to Dismiss*” or “*GDB Pres. Mot.*”).

INTRODUCTION

By this action, Plaintiff first challenges on the basis of express, conflict and field preemption the constitutionality of Section 8 of Article VI of the Constitution of the Commonwealth of Puerto Rico (the “*Constitutional Debt Priority Provision*”), the Management and Budget Office Organic Act, Act No. 147 of June 18, 1980 (the “*OMB Act*”), and two executive orders (the “*Executive Orders*”) issued on November 30, 2015 and December 8, 2015 by The Honorable Governor of the Commonwealth of Puerto Rico (the “*Commonwealth*”) by which the Governor purports to divert funds pledged as collateral to bondholders of certain Puerto Rico public corporations.

Plaintiff second challenges the two Executive Orders on multiple federal constitutional grounds. Specifically, Plaintiff alleges that the two Executive Orders violate the following controlling provisions of the United States Constitution: the Contracts Clause set forth in Article I, Section 10, Clause 1, the Takings Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments.

Defendant Hon. Melba Acosta Febo (“*Acosta*”) is the President of the Government Development Bank for Puerto Rico (the “*GDB*”), and Acosta in her capacity as President of the GDB, the “*GDB President*”) and a member of the Working Group For The Fiscal and Economic Restoration of Puerto Rico (the “*Working Group*”). Compl. ¶ 14. The Complaint for Declaratory and Injunctive Relief (Dkt. No. 1) (the “*Complaint*”) names Acosta as a Defendant

both in her official capacity as the GDB President and in her official capacity as a member of the Working Group. *Id.*

On February 10, 2016, Acosta filed the GDB President's Motion to Dismiss *solely in her capacity as GDB President* seeking dismissal of the Complaint.

On that same day, Acosta, along with a number of other Defendants, but *solely in her capacity as a member of the Working Group*, also filed a separate motion to dismiss under Fed. R. Civ. P. 12(b)(1) seeking dismissal of certain constitutional claims on the ground of lack of subject matter jurisdiction, and under Fed. R. Civ. P. 12(b)(6) seeking dismissal of the preemption claims for failure to state a claim upon which relief can be granted (Dkt. No. 37) ("*Defendants' Motion to Dismiss*"). The GDB President's Motion to Dismiss joins and incorporates Defendants' Motion to Dismiss and thus, in part, advances substantially identical arguments for dismissal.

Because many of Acosta's arguments in her individual motion brought in her capacity as GDB President are substantially the same as those previously advanced by Acosta in her capacity as a member of the Working Group, Plaintiff hereby adopts by reference in response to this motion the arguments set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, filed on February 29, 2016. Here, Plaintiff addresses only the GDB President's remaining individual arguments under Fed. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND

Plaintiff is a monoline insurer who insures approximately \$1.2 billion of the debt of the Commonwealth and its public corporations. Compl. ¶¶ 5, 9. Defendants are the Governor of Puerto Rico and various government officials who act at his direction. *Id.* ¶¶ 11-28. The dispute arises out of Defendants' unconstitutional diversion of funds pledged to repay bonds (the

“*Authority Bonds*”) issued by three Puerto Rico public corporations—the Puerto Rico Highways and Transportation Authority (“*PRHTA*”), the Puerto Rico Convention Center District Authority (“*PRCCDA*”), and the Puerto Rico Infrastructure Financing Authority (“*PRIFA*,” and together with PRHTA and PRCCDA, the “*Authorities*”). *Id.* ¶¶ 1-7. The Authority Bonds are secured by certain tax payments and other revenues (the “*Pledged Funds*”). *Id.* ¶¶ 4, 36, 39, 42. Plaintiffs have insured the payment of principal and interest on the Authority Bonds. *Id.* ¶¶ 5, 37, 40, 43.

The contracts governing the Authority Bonds incorporate among their terms various statutory provisions containing protections conferred by the Commonwealth’s Legislative Assembly in the enabling acts under which the Authority Bonds were issued and related Commonwealth statutes (hereinafter, the “*Enabling Acts*”). *Id.* ¶¶ 94-98. The Enabling Acts provide that certain of the Pledged Funds may to be used, or “clawed back,” to pay the Commonwealth’s public debt in a fiscal year in which available revenues are insufficient to meet appropriations (“*Clawback*”), *but* expressly provide that Clawback of the Pledged Funds may occur *only* when *all other* available resources for the relevant fiscal year are insufficient to pay the public debt. *Id.* ¶ 95. The Enabling Acts also provide that Pledged Funds that are clawed back may be used *only* to pay the public debt, and may *not* be used to pay other expenses. *Id.* ¶ 96.

On November 30, 2015, the Governor issued an executive order (the “*First Executive Order*”) requiring Clawback of certain of the Pledged Funds. *Id.* ¶ 103. The First Executive Order claimed that Clawback was necessary to make payments on the public debt, but provided that the Commonwealth would continue to make payments on general expenses lower in the statutory order of priorities. *Id.* ¶¶ 104-105. In so doing, the Governor eliminated the protections of the Enabling Acts (which are integral terms of the Authority Bonds) and the OMB

Act spending priorities, and unlawfully impaired the Authority Bonds and Plaintiff's property rights. *Id.* ¶ 106.

On December 8, 2015, the Governor issued a second executive order (the "***Second Executive Order***") intended to implement the First Executive Order. *Id.* ¶ 107. The Second Executive Order set in motion a number of procedures that further modified the protections of the Authority Bonds established by the Enabling Acts and the OMB Act, and unlawfully impaired the Authority Bonds and Plaintiff's property rights. *Id.* ¶¶ 110-112.

This lawsuit followed. Plaintiff asserts six claims – one seeking an order, pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, declaring that the Constitutional Debt Priority Provision, the OMB Act, and the Executive Orders are unconstitutional on the basis of express, conflict and field preemption (Compl. ¶¶ 142-145), two seeking an order, pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, declaring that the Executive Orders are unconstitutional because they violate the Contracts Clause, Takings Clause, the Equal Protection Clause of the Fourteenth Amendment, and Due Process Clauses of the United States Constitution (*id.* ¶¶ 152-155, 162-165), and three seeking prospective injunctive relief to prevent further violation of Plaintiffs' constitutional rights by barring Defendants from enforcing the Executive Orders (*id.* ¶¶ 146-151, 156-161, 166-170).

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure must be denied where the complaint "satisfies [Federal] Rule 8(a)(2)'s requirement of 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 11-12 (1st Cir. 2011) (*quoting* Fed. R. Civ. P. 8(a)(2)). Plaintiff needs only include "enough detail to provide a defendant with 'fair

notice of what the claim is and the grounds upon which it rests.” *Id.* at 12 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (other citations omitted). In making such a determination, the Court must accept all non-conclusory factual allegations as true. *Id.* at 11-12. “If that factual content, so taken, ‘allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,’ the claim has facial plausibility” and the motion to dismiss should be denied. *Id.* at 12 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider the complaint and any documents attached thereto. *See, e.g., Parker v. Hurley*, 514 F.3d 87, 90 n.1 (1st Cir. 2008); *see also* Fed. R. Civ. P. 10(c) (stating that “[a] copy of any written instrument which is an exhibit to a pleading is a part of the pleading for all purposes”). In addition, in deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider “‘documents the authenticity of which are not disputed by the parties; . . . official public records; . . . documents central to plaintiffs’ claim; or . . . documents sufficiently referred to in the complaint.’” *Miss. Pub. Emps.’ Ret. Sys. v. Boston Sci. Corp.*, 523 F.3d 75, 86 (1st Cir. 2008) (*quoting Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993)); *see also P.R. Tel. Co. v. San Juan Cable, LLC*, 885 F. Supp. 2d 534, 538 n.2 (D.P.R. 2012).

ARGUMENT

I. THE GDB PRESIDENT’S MOTION TO DISMISS FAILS TO ADDRESS PLAINTIFF’S ALLEGATION THAT THE GDB PRESIDENT IS “EMPOWERED TO IMPLEMENT THE EXECUTIVE ORDERS”

The premise of the GDB President’s argument under Fed. R. Civ. P. 12(b)(6) is that “the **sole** mention of Acosta as President of the GDB occurs at ¶ 14 of the Complaint, and **all that is said in that in that regard is that Acosta is the President of the GDB.**” **GDB Pres. Mot. at 5** (emphasis in original). The GDB President’s characterization of the Complaint is not accurate,

because paragraph 14 of the Complaint in fact clearly alleges that Acosta, in her capacity as the GDB President, is “**empowered to implement the Executive Orders.**” Compl. ¶ 14 (emphasis added). The GDB President simply ignores this relevant factual allegation.

The allegation that the GDB President is “empowered to implement the Executive Orders” must be understood in the context of the relief sought in the Complaint, namely an injunction barring implementation of unconstitutional Executive Orders. *Id.* ¶¶ 146-151; 156-161; 166-170. Given the nature of the relief sought, the Complaint names as defendants all officials who, by virtue of their office, play a role in the implementation of the Executive Orders (to the extent Plaintiff is able to identify such officials at this stage of the proceedings), because all such parties must be covered by the requested injunction. *Id.* ¶¶ 11-28. Accordingly, if the allegation that the GDB President is “empowered to implement the Executive Orders” is true, as the Court must assume that it is for purposes of a motion under Fed. R. Civ. P. 12(b)(6), then the GDB President is clearly a proper defendant in the context of Plaintiff’s request for prospective injunctive relief.

II. SUFFICIENT FACTS SUPPORT PLAINTIFF’S ALLEGATION THAT THE GDB PRESIDENT IS “EMPOWERED TO IMPLEMENT THE EXECUTIVE ORDERS”

Because the GDB President fails to address the allegation that the GDB President is “empowered to implement the Executive Orders,” she does not expressly attempt to argue that this allegation should be disregarded as “conclusory” or factually deficient. To the extent the GDB President’s Motion to Dismiss suggests that this allegation should be disregarded as “conclusory,” however, there are many additional facts that the Court may consider at the motion to dismiss stage that add detail to the allegation that the GDB President “is empowered to

implement the Executive Orders” and that demonstrate that the GDB President has, in fact, already taken actions to implement the Executive Orders.¹

A. The Second Executive Order And The Circular Letter Apply To The GDB President

To begin with, Exhibit C to the Complaint² is the Second Executive Order, which, among other things, requires “all heads of governmental agencies” or “heads of governmental entities” (“*todos los jefes de entidades gubernamentales*”) to prioritize spending in their entities according to (i) the unconstitutional Budgetary Adjustments established by the OMB Director and (ii) the unconstitutional Working Group Guidelines. *See* Compl., Ex. C at 3.

The GDB President is clearly the “head of a governmental entity,” and as such an addressee of the Second Executive Order. She acknowledges as much in the GDB President’s Motion to Dismiss by (i) citing case law that expressly refers to the GDB as a “government entity;”³ (ii) citing, as relevant to the GDB, other case law applicable only to “government entit[ies];”⁴ and (iii) insisting that the GDB is an “arm of the [Commonwealth].” GDB Pres. Mot. at 4.

Indeed, there is ample authority for the proposition that the GDB is a “governmental entity.” For example, the statute creating the GDB describes the GDB as “a governmental

¹ Although there is already sufficient factual material before the Court to require denial of the GDB President’s Motion to Dismiss, Plaintiff is also willing to amend its Complaint to add additional factual allegations if deemed necessary by the Court.

² In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court may consider the Complaint and any documents attached thereto. *See, e.g., Parker*, 514 F.3d at 90 n.1; *see also* Fed. R. Civ. P. 10(c).

³ *See* GDB Pres. Mot. at 4, *citing Velez Rivera v. Agosto-Alicea*, 334 F. Supp. 2d 72, 83 (D.P.R. 2004), *aff’d*, 437 F.3d 145 (1st Cir. 2006), which refers to the GDB as “a government entity”; *see also id.*, *citing Reyes-Garay v. Integrand Assur. Co.*, 818 F. Supp. 2d 414, 428 (D.P.R. 2011), which refers to the GDB as a “state entity”.

⁴ *See* GDB Pres. Mot. at 4, *quoting Ky. v. Graham*, 473 U.S. 159, 165-66 (1985), for the proposition that “[a]s long as the **government entity** receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity” (emphasis added).

instrumentality of the Commonwealth Government.” *See* 7 L.P.R.A. § 551. Similarly, a Commonwealth statute providing for the issuance of tax-exempt debt by the GDB states that “the purpose for which the [GDB] is created is to aid the Commonwealth Government . . . more effectively to carry out its **government responsibility** to develop the economy of Puerto Rico . . . and is a **public purpose** in all respects for the benefit of the Commonwealth of Puerto Rico.” *See* 7 L.P.R.A. § 553 (emphasis added). Moreover, the GDB is governed by a board of directors comprised of members appointed by the Governor. *See* 7 L.P.R.A. § 552.

Furthermore, Exhibit D to the Complaint is a circular letter (the “Circular Letter”) issued on December 17, 2015 by Defendant Flores Galarza, the Sub-Secretary of the Treasury of the Commonwealth, setting forth the unconstitutional Working Group Guidelines. The Circular Letter applies specifically to the GDB President to the extent that (i) any of GDB’s funds are under the custody of the Department of Treasury, or (ii) the GDB President orders disbursements to be made charged to the General Fund managed by the Secretary of Treasury. Compl., Ex. D at 2-3. The Circular Letter also has guidelines applicable to agencies that operate a system of accounting separate from the Department of Treasury’s system, which Plaintiff submits is the case for the GDB. *Id.* at 3-4.

Accordingly, as an addressee of both the Second Executive Order and the Circular Letter, the GDB President is clearly empowered and required to implement the unconstitutional Executive Orders and is thus a proper Defendant.

B. As The Commonwealth’s “Financial Advisory And Reporting Agency,” The GDB Has Acted To Implement The Executive Orders

Under the GDB Charter, the GDB acts as “fiscal agent,” “paying agent,” and “financial advisory and reporting agency” (i) to the Governor, who issued the Executive Orders; (ii) to the Secretary of Treasury, who plays a central role in the implementation of the Executive Orders;

and (iii) to the Authorities, whose funds were “clawed back” pursuant to the Executive Orders.

See 7 L.P.R.A. § 552. Specifically, the GDB Charter provides:

The purposes for which the [GDB] is formed and the business or objects to be carried on and promoted by it are as follows: . . . **To act as fiscal agent and as paying agent and as a financial advisory and reporting agency of the Commonwealth Government and of the agencies, instrumentalities, commissions, authorities, municipalities and political subdivisions of Puerto Rico, the Governor of Puerto Rico, the Council of Secretaries of Puerto Rico and the Secretary of the Treasury of Puerto Rico.**

Id. (emphasis added).

As head of an institution that acts, among other things, as fiscal agent, financial advisor, and financial reporting agency to the Governor, the Secretary of Treasury, and the Authorities (along with other agencies bound by the Executive Orders), the GDB President is necessarily involved in the implementation of the Executive Orders. For example, on December 8, 2015, PRHTA issued an “Event Notice” (the “Clawback Notice”) announcing that, pursuant to the First Executive Order, the Secretary of Treasury had started to “claw back” funds pledged to the payment of Authority Bonds issued by PRHTA. (A true and accurate copy of the December 8, 2015, Clawback Notice is attached hereto as Exhibit “1”.⁵) Significantly, the Clawback Notice *is printed on GDB letterhead*, demonstrating that the GDB played a role in issuing the Clawback Notice. *Id.* The Clawback Notice thus clearly demonstrates that the GDB, under the leadership of the GDB President, is directly involved in the implementation of the unconstitutional Executive Orders and the resulting unconstitutional “clawback.”

⁵ As a public document, the Court should treat the Clawback Notice “as part of the pleadings.” *Watterson*, 987 F.2d at 4; *see also id.* at 3 (finding it was appropriate for the District Court to take “into account certain facts set out in public documents plaintiffs attached to an opposition they filed to the motion to dismiss”).

III. PLAINTIFF IS ENTITLED TO LATITUDE IN MEETING PLEADING STANDARDS BECAUSE MATERIAL INFORMATION REGARDING THE GDB PRESIDENT’S IMPLEMENTATION OF THE EXECUTIVE ORDERS IS UNDER THE GDB PRESIDENT’S CONTROL

The First Circuit has held that, in assessing whether allegations in a complaint are sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), ““some latitude may be appropriate”” where a plausible claim is indicated based on what is known, but ““some of the information needed may be in the control of the defendants.”” *García-Catalán v. U.S.*, 734 F.3d 100, 104 (1st Cir. 2013) (*quoting Menard v. CSX Transp., Inc.*, 698 F.3d 40, 45 (1st Cir. 2012)); *see also Pruell v. Caritas Christi*, 678 F.3d 10, 15 (1st Cir. 2012). Although, as indicated above, ample factual material establishes the basis for Plaintiff’s claims against the GDB President, much of the information concerning the exact details of the GDB’s involvement in the implementation of the Executive Orders is under the control of the GDB President and inaccessible to Plaintiff. In view of the GDB President’s control over much of the information most relevant to Plaintiff’s allegations against the GDB President, Plaintiff should be accorded some latitude in satisfying the pleading standards under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For these reasons, the GDB President’s motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be denied.

Dated: San Juan, Puerto Rico
February 29, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on February 29, 2016, I electronically filed the foregoing pleading with the Clerk for the United States District Court for the District of Puerto Rico using the Court's CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

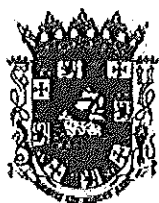
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Respectfully submitted,

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Exhibit “1”

EXHIBIT 1



COMMONWEALTH OF
PUERTO RICO

Government Development Bank
for Puerto Rico

**Municipal Secondary Market Disclosure Information Cover Sheet
Municipal Securities Rulemaking Board (MSRB)
Electronic Municipal Market Access System (EMMA)**

Additional / Voluntary Event-Based Disclosure

THIS FILING RELATES TO ALL OR SEVERAL SECURITIES ISSUED BY THE ISSUER, OR ALL OR SEVERAL SECURITIES OF A SPECIFIC CREDIT OR ISSUED UNDER A SINGLE INDENTURE:

Issuer's Name: Puerto Rico Highways and Transportation Authority ("HTA")

Other Obligated Person's Name (if any): _____
(Exactly as it appears on the Official Statement Cover)

Base CUSIP* number(s): Highway Revenue Bonds, Series Y (745181); Highway Revenue Ref. Bonds, Series Z (745181); Highway Revenue Ref. Bonds, Series AA (745181); Highway Revenue Ref. Bonds, Series BB (745181); Highway Revenue Ref. Bonds, Series CC (745181); Transportation Revenue Bonds, Series A (745190); Transportation Revenue Bonds, Series D (745190); Transportation Revenue Ref. Bonds, Series E (745190); Transportation Revenue Bonds, Series G (745190); Transportation Revenue Ref. Bonds, Series H (745190); Transportation Revenue Ref. Bonds, Series I (745190); Transportation Revenue Bonds, Series J (745190); Transportation Revenue Bonds, Series K (745190); Transportation Revenue Ref. Bonds, Series L (745190); Transportation Revenue Bonds, Series M (745190); Transportation Revenue Ref. Bonds, Series N (745190); Sub. Transportation Revenue Bonds, Series 1998 (745190); Sub. Transportation Revenue Bonds, Series 2003 (745190); 2003 Series A Teodoro Moscoso Bridge (745185).

TYPE OF INFORMATION PROVIDED:

Other Event-Based Disclosure: HTA Public Disclosure dated December 8, 2015

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Jorge A. Clivillés Díaz
Executive Vice President

Dated: December 9, 2015

PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY

EVENT NOTICE

Dated: December 8, 2015

The Puerto Rico Highways and Transportation Authority (the “**Authority**”) hereby gives notice as follows:

The Authority has previously issued senior and subordinate bonds (the “**1998 Resolution Bonds**”) pursuant to its Resolution No. 98-06, adopted by the Authority on February 26, 1998, as amended (the “**1998 Resolution**”) and bonds (the “**1968 Resolution Bonds**”) pursuant to its Resolution No. 68-18, adopted by the Authority on June 13, 1968, as amended (the “**1968 Resolution**”, and together with the 1998 Resolution, the “**Authority Resolutions**”).

Pursuant to Executive Order No. OE-2015-046 (the “**Executive Order**”) signed by the Governor of Puerto Rico on November 30, 2015, the Governor has implemented Article VI, section 8, of the Puerto Rico Constitution and authorized the Secretary of the Treasury to apply available resources to the payment of interest on the public debt and the amortization thereof.

The proceeds of (i) the gasoline tax, the gas oil and diesel oil tax, and the petroleum products tax allocated to the Authority by the Puerto Rico Internal Revenue Code and (ii) the motor vehicle license fees allocated to the Authority by Act 9 of the Legislature of Puerto Rico, approved August 12, 1982 (collectively, “**Clawback Revenues**”), are available resources of the Commonwealth of Puerto Rico under the Puerto Rico Constitution.

Accordingly, as authorized by the Executive Order, the Secretary of the Treasury has begun to withhold the Clawback Revenues pursuant to Article VI, section 8 of the Puerto Rico Constitution. As a result, the Clawback Revenues are not available to pay principal of or interest on the 1998 Resolution Bonds or interest on the 1968 Resolution Bonds due on January 1, 2016. The Authority expects that principal of and interest on the 1998 Resolution Bonds due on January 1, 2016 will be paid in full from funds on deposit in the senior reserve account and the subordinate reserve account established under the 1998 Resolution. The Authority expects that interest on the 1968 Resolution Bonds due on January 1, 2016 will be paid in full from funds on deposit in the bond reserve account established under the 1968 Resolution.

Dated as of the date and year written above.

PUERTO RICO HIGHWAYS AND
TRANSPORTATION AUTHORITY