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 representative of THE PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	PROMESA Title III Case No. 17-BK-4780 (LTS)
UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC., ÁNGEL FIGUEROA-JARAMILLO, as President of UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC., FREDDYSON MARTÍNEZ-ESTEVEZ, Vice President of UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC, RALPHIE DOMINICCI-RIVERA, WALDO ROLÓN, and RONALD VÁZQUEZ, as Vice President of the Retirees Chapter of UNIÓN DE TRABAJADORES DE LA	Adv. Proc. No. 21-41 (LTS)

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

INDUSTRIA ELÉCTRICA Y RIEGO, INC.,

Plaintiffs,

-v-

PEDRO R. PIERLUISI-URRUTIA, in his official capacity as Governor of the Commonwealth of Puerto Rico, COMMONWEALTH OF PUERTO RICO, PUERTO RICO ELECTRIC POWER AUTHORITY, THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO ELECTRIC POWER AUTHORITY, RALPH A. KREIL-RIVERA, in his official capacity as the President of the Governing Board of the PUERTO RICO ELECTRIC POWER AUTHORITY, EFRAN PAREDES-MAYSONET, in his official capacity as Executive Director of PUERTO RICO ELECTRIC POWER AUTHORITY, PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY, FERMÍN FONTÁNES-GÓMEZ, in his official capacity as Executive Director of PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY, PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, OMAR J. MARRERO-DÍAZ, in his official capacity as Executive Director of PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, LUMA ENERGY, LLC, LUMA ENERGY, SERVCO, LLC, and WAYNE STENSBY, in his official capacity as President and CEO of LUMA ENERGY, LLC and LUMA ENERGY SERVCO, LLC.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN THE EXECUTION OF THE O&M AGREEMENT

APPEARANCES:

BUFETE EMMANUELLI C.S.P.

By: Rolando Emmanuelli-Jiménez
Jessica Méndez-Colberg
472 Tito Castro Ave.
Marvesa Building, Suite 106
Ponce, Puerto Rico 00176

MARINI PIETRANTONI MUÑIZ LLC

By: Luis C. Marini-Biaggi
250 Ponce de León Avenue, Suite 900
San Juan, Puerto Rico 00918

Counsel for UTIER, Ángel Figueroa-Jaramillo, Freddyson Martínez-Estevez, Ralphie Dominicci-Rivera, Waldo Rolón, and Ronald Vázquez

Co-Counsel for Hon. PEDRO R. PIERLUISIURRUTIA, in his official capacity as Governor of the Commonwealth of Puerto Rico; COMMONWEALTH OF PUERTO RICO; PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY; FERMÍN FONTANÉS GÓMEZ, in his official capacity as Executive Director of PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; and OMAR J. MARRERODÍAZ, in his official capacity as Executive Director of PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY

DÍAZ & VÁZQUEZ LAW FIRM, P.S.C.

By: Katiuska Bolaños
290 Jesús T. Piñero Ave.
Oriental Tower, Suite 803
San Juan, PR 00918

PUERTO RICO ELECTRIC POWER AUTHORITY; RALPH A. KREIL-RIVERA, in his official capacity as the President of the Governing Board of the PUERTO RICO ELECTRIC POWER AUTHORITY; and EFRAN PAREDES-MAYSONET, in his official capacity as Executive Director of PUERTO RICO ELECTRIC POWER AUTHORITY

O'MELVENY & MYERS LLP
By: John J. Rapisardo
Peter Friedman
Maria J. DiConza
7 Times Square
New York, New York 10036

and

Elizabeth L. McKeen
610 Newport Center Drive, 17th Floor

Newport Beach, CA 92660

and

Madhu Pocha
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067

Counsel for Hon. PEDRO R. PIERLUISIURRUTIA, in his official capacity as Governor of the Commonwealth of Puerto Rico; COMMONWEALTH OF PUERTO RICO; PUERTO RICO ELECTRIC POWER AUTHORITY; RALPH A. KREIL-RIVERA, in his official capacity as the President of the Governing Board of the PUERTO RICO ELECTRIC POWER AUTHORITY; EFRAN PAREDES-MAYSONET, in his official capacity as Executive Director of PUERTO RICO ELECTRIC POWER AUTHORITY; PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY; FERMÍN FONTANÉS GÓMEZ, in his official capacity as Executive Director of PUERTO RICO PUBLIC PRIVATE PARTNERSHIP AUTHORITY; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; and OMAR J. MARRERO DÍAZ, in his official capacity as Executive Director of PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY

O'NEILL & BORGES LLC
By: Herman D. Bauer
250 Muñoz Rivera Ave., Suite 800
San Juan, PR 00918-1813
Attorneys for the Financial Oversight and Management Board as representative for PREPA

PROSKAUER ROSE LLP
By: Martin J. Bienenstock
Paul V. Possinger
Ehud Barak

Margaret A. Dale
Jonathan E. Richman

Eleven Times Square
New York, NY 10036

and

Timothy W. Mungovan
Laura E. Stafford
Elliot R. Stevens
One International Place
Boston, MA 02110

and

Jennifer L. Jones
2029 Century Park East
Suite 2400
Los Angeles, CA 90067-3010

Attorneys for the Financial Oversight and Management Board as representative for the Commonwealth and PREPA

DLA PIPER LLP (US)
By: Brett Ingerman
The Marbury Building, 6225 Smith Ave.
Baltimore, MD 21209-3600

and

Tomasita Sherer
1251 Ave. of the Americas, 27th Fl.
New York, NY 10020-1104

and

Mariana Muñiz Lara
Calle de la Tanca #500, Suite 401
San Juan, PR 00901-1969

Counsel for LUMA ENERGY, LLC; LUMA ENERGY, SERVCO, LLC; and WAYNE STENSBY

LAURA TAYLOR SWAIN, United States District Judge

This matter is before the Court on the *Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement* (Docket Entry No. 8 in Adv. Proc. 21-41, the "Motion")[2] filed by Unión de Trabajadores de La Industria Eléctrica y Riego ("UTIER"), Ángel Figueroa-Jaramillo, Freddyson Martínez-Estevez, Ralphie Dominicci-Rivera, Waldo Rolón, and Ronald Vázquez (collectively, "Plaintiffs"). In the Motion, Plaintiffs seek an order enjoining the implementation of the Operation and Management Agreement (the "O&M Agreement," Docket Entry No. 1-1) between the Puerto Rico Electric Power Authority ("PREPA") and LUMA Energy, LLC and LUMA Energy ServCo, LLC ("LUMA Energy" or "LUMA"). Under the terms of the O&M Agreement, LUMA Energy is scheduled to take over operation of PREPA's Transmission and Distribution System (the "T&D System") on June 1, 2021. In the Motion, Plaintiffs seek to enjoin the enforcement of the O&M Agreement, alleging, inter alia, that it is null and void under Puerto Rico and federal law (the First Claim for Relief), that it is null and void because it is a leonine contract (the Second Claim for Relief), that the O&M Agreement is a contract in prejudice of a third party (the Third Claim for Relief), that the O&M Agreement is a tortious interference with Plaintiffs' collective bargaining rights (the Fourth Claim for Relief), and that the O&M Agreement violates the Contracts Clause of the Constitution of the United States (U.S. Const. art. I, § 10, cl. 1, the "Contracts Clause") (the Fifth Claim for Relief).[3] Plaintiffs' claims are brought against the Commonwealth of Puerto Rico, PREPA, the Oversight

[2] Unless otherwise specified, all docket entry references in the remainder of this Memorandum Opinion and Order are to entries in Adv. Proc. No. 21-41.

[3] While the Amended Complaint asserts other causes of action, the Motion did not rely on or address those claims.

Board, the Puerto Rico Fiscal Agency and Financial Advisory Authority, the Puerto Rico Public-Private Partnership Authority ("P3"), LUMA Energy, Governor Pierluisi, Ralph A. Kreil-Rivera, Efran Paredes-Maysonet, Fermín Fontánes-Gómez, Omar J. Marrero-Díaz and Wayne Stensby (collectively, "Defendants").

The Court heard oral argument on the Motion on May 18, 2021, and has considered thoroughly all of the written submissions[4] of the parties and the Court now makes the

[4] The written submissions comprise the following: the *Complaint* (the "Complaint," Docket Entry No. 1); the *First Amended Adversary Complaint* (the "Amended Complaint," Docket Entry No. 7); the *Declaration of Mr. Héctor Rosario-Hernández in Support of UTIER's Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement* (Docket Entry No. 8-3); the *Declaration of Mr. Ángel R. Figueroa-Jaramillo in Support of UTIER's Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement* (Docket Entry No. 8-4); the *Declaration of Mr. Tom Sanzillo in Support of UTIER's Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement* (Docket Entry No. 8-5); *Defendants' Joint Opposition to Preliminary Injunction Motion* (Docket Entry No. 19, the "Opposition"); the *Declaration of Ellen S. Smith in Support of Defendants' Joint Opposition to Preliminary Injunction Motion* (Docket Entry No. 20) the *Declaration of Natalie A. Jaresko in Support of Defendants' Joint Opposition to "Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement"* (Docket Entry No. 21); Plaintiffs' *Motion Submitting Documents* (Docket Entry No. 24); *Defendants' Motion Submitting Certified Translations* (Docket Entry No. 26); the *Reply in Support of Plaintiff's Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement* (Docket Entry No. 30, the "Reply"); the *Supplemental Declaration of Mr. Ángel R. Figueroa-Jaramillo in Support of UTIER's Reply to Defendants' Joint Opposition to Preliminary Injunction* (Docket Entry No. 31-1); *Defendants' Motion Submitting Translations* (Docket Entry No. 35); Plaintiffs' *Motion Submitting Exhibits* (Docket Entry No. 36); the *Motion* in Limine *to Exclude the Declaration of Ellen S. Smith in Support of Defendants' Joint Opposition to Preliminary Injunction Motion (ECF No. 20)* (Docket Entry No. 37); the *Motion* in Limine *to Exclude the Declaration of Natalie A. Jaresko in Support of Defendants' Joint Opposition to "Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement" (ECF No. 21)* (Docket Entry No. 38); *Defendants' Evidentiary Objections to the Declarations Offered by UTIER in Support of its Preliminary Injunction Motion* (Docket Entry No. 39); the *Reply to Defendants' Evidentiary Objections to the Declarations Offered by UTIER in Support of Its Preliminary Injunction Motion* (Docket Entry No. 41); *Defendants' Opposition to Plaintiffs' Motion* in Limine *to Exclude the Declaration of Natalie A. Jaresko in Support of Defendants' Joint Opposition to "Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement" (ECF No. 21)* (Docket Entry No. 42); *Defendants' Response to Plaintiffs' Motion* in Limine *to*

following findings of fact and conclusions of law in accordance with Federal Rules of Bankruptcy Procedure 7052 and 7065.[5]

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

The following facts, which are drawn from the parties' submissions, are undisputed. In 2018, the Puerto Rico Legislature passed the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018 ("Act 120"), codified at 22 L.P.R.A. § 1111 et seq., which authorized and established the legal framework for the sale, disposition, and/or transfer of the assets, operations, and services of PREPA through a public-private partnership, in accordance with the Public-Private Partnership Act, Act No. 29-2009, 27 L.P.R.A. § 2601 et seq. ("Act 29"). (See Mot. ¶ 13; Opp. ¶ 15.)

On June 22, 2020, the P3, the Puerto Rico Energy Bureau ("PREB"), the PREPA Governing Board, and the Governor of Puerto Rico approved the O&M Agreement among PREPA, LUMA Energy, and P3. (See O&M Agreement at Art. 2.) The O&M Agreement provides for LUMA Energy to assume operation and management of PREPA's T&D System, while PREPA retains ownership of the T&D assets. (See id. at Art. 3.) Under Act 120, current employees of PREPA's T&D System will have the option to (i) apply for employment with

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Exclude the Declaration of Ellen S. Smith (Docket Entry No. 43); *Defendants' Objections to Plaintiffs' Motion Submitting Exhibits* (Docket Entry No. 44); and the *Motion to Strike Defendants' Objections to Plaintiffs Motion Submitting Documents* (Docket Entry No. 45).

[5] The Federal Rules of Bankruptcy Procedure are made applicable to the above-captioned adversary proceeding by section 310 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2170. Any conclusions of law labeled as findings of fact shall be deemed conclusions of law, and any findings of fact labeled as conclusions of law shall be deemed findings of fact.

LUMA Energy, (ii) remain at PREPA if a position is available, or (iii) transfer to another government agency. (See 22 L.P.R.A. § 1121.)

> Act 120 further provides the following:
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> > Employees who, as a result of this chapter, are transferred under the concept of mobility to another government entity shall keep all of their vested rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable thereto, as well as the privileges, obligations, and status with respect to any existing pension or retirement plan[.] No regular PREPA employee shall be left unemployed nor lose benefits as a result of any PREPA transactions.

(Id.) The O&M Agreement requires LUMA Energy to comply with Act 120 and all other "applicable law." (See O&M Agreement, at §§ 9.1, 9.9.) Defendants represent that LUMA Energy is required to provide the vested rights as part of its obligation to comply with Law 120. (See Opp. ¶ 44.)

UTIER is a union that represents PREPA employees. UTIER is party to a collective bargaining agreement (the "CBA") with PREPA, which provides for certain employment terms, conditions, and benefits for UTIER's members who are employed by PREPA. (See CBA, Docket Entry No. 1-2.) Plaintiffs do not allege that PREPA would not continue to recognize the CBA with respect to employees who remain at PREPA.

Under the O&M Agreement, LUMA Energy will not, however, assume PREPA's obligations under the CBA with respect to PREPA employees who apply for and are accepted to work at LUMA Energy. (See O&M Agreement § 1.1 (excluding "collective bargaining agreement with union labor" from definition of "System Contracts" entered into by PREPA and which will remain in effect after Service Commencement Date).) Thus, UTIER members who are hired by LUMA Energy will not be represented by UTIER in connection with their LUMA employment, and the O&M Agreement makes no other provision for union representation of the

LUMA employees. UTIER members who do not obtain LUMA employment and are transferred to another government agency will likely have to learn new skills, since LUMA employees will be performing the T&D System functions. Defendants do not challenge UTIER's assertion that it stands to lose a significant portion of its membership due to the O&M Agreement because many employees will be transferred to LUMA Energy or reassigned to other government agencies. (See Reply ¶ 16; May 18, 2021, Hr'g Tr. at 17:19-24.)

By virtue of the transfer of PREPA employees to LUMA Energy, the O&M Agreement will also cause certain changes to the Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica (the "SREAEE"), the retirement plan currently in place for PREPA's employees. Act 29, which authorizes the creation of public-private partnerships and provides the framework for execution of the O&M Agreement, states that PREPA employees who are hired by LUMA Energy, and who have accumulated ten or more years of service with PREPA, have the right to either continue participation in SREAEE while employed by LUMA Energy, whereby LUMA Energy will make employer contributions to SREAEE, or else such employees can transfer their SREAEE balance to LUMA Energy's 401(k) plan. (See 27 L.P.R.A. § 2609(g).) Thus, employees who are hired by LUMA Energy and who have ten or more years of service with PREPA have three options with respect to their retirement benefits, namely: (1) discontinue their future contributions to SREAEE but continue participating in SREAEE based on past contributions, (2) discontinue all participation in SREAEE and transfer all prior contributions to LUMA Energy's 401(k) plan, or (3) continue participating in SREAEE while employed by LUMA Energy. PREPA employees who are hired by LUMA Energy but have fewer than ten years of service with PREPA must withdraw from SREAEE. (Mot. ¶¶ 24, 25; Opp. ¶ 100.)

Act 29 further specifies that any PREPA employee "who has ten (10) years or more of service accumulated and is [hired by a public-private partnership created pursuant to Act 29, such as LUMA], shall maintain the vested rights under said system and may continue to make his/her individual contribution to the retirement System, and his/her new employer shall make its employer contribution" upon transfer to LUMA Energy. 27 L.P.R.A. § 2609(g). The O&M Agreement provides that LUMA Energy will not assume PREPA's obligations to SREAEE, but "shall, pursuant to Act 29, make any employer contributions it is permitted to make under Applicable Law to [SREAEE] with respect to any Hired Former Employee of [PREPA] that elects to continue participating in [SREAEE.]" (O&M Agreement at § 5.8(a).) The Defendants represent that LUMA Energy will comply with its obligations under Act 120, and Plaintiffs have failed to offer any evidence to the contrary. (See Opp. ¶ 44.)

On April 20, 2021, Plaintiffs commenced this lawsuit against Defendants. (See Compl., Docket Entry No. 1.) On April 26, 2021, Plaintiffs filed an Amended Complaint (Am. Compl., Docket Entry No. 7) and the Motion.

CONCLUSIONS OF LAW

Defendants contend that the Motion must be denied because Plaintiffs lack standing to bring their claims in this lawsuit. Defendants further argue that, even if Plaintiffs have standing, they are not entitled to injunctive relief because they have not demonstrated that they are likely to succeed on the merits of their claims or that they will suffer irreparable harm in the absence of injunctive relief.

A. Standing to Sue

This Court's jurisdiction is limited by Article III of the Constitution of the United States to the adjudication of "Cases" and "Controversies." See Lyman v. Baker, 954 F.3d 351,

360 (1st Cir. 2020) (citing Hochendoner v. Genzyme Corp., 823 F.3d 724, 731 (1st Cir. 2016) (quoting U.S. Const. art. III, § 2, cl. 1)). "The heartland of constitutional standing is composed of the familiar amalgam of injury in fact, causation, and redressability." Id. (quoting Hochendoner, 823 F.3d at 731). As the United States Court of Appeals for the First Circuit has explained:

> An injury-in-fact is the invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical." Lujan [v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)] (internal quotation marks omitted). Concreteness and particularity are two separate requirements. See Spokeo, Inc. v. Robins, [136 S. Ct. 1540, 1545 (2016)]. To be concrete, an injury must "actually exist"; it cannot be "abstract." Id. at 1548. For an injury to be "particularized," it must go beyond a "generalized grievance[ ]," DaimlerChrysler Corp. v. Cuno, [547 U.S. 332, 344, 348 (2006)] (citation omitted), to manifestly "affect the plaintiff in a personal and individual way," Lujan, [504 U.S. at 560 n.1]. Injuries that are too "widely shared" or are "comparable to the common concern for obedience to law" may fall into the category of generalized grievances about the conduct of government. Becker v. Fed. Election Comm'n., 230 F.3d 381, 390 (1st Cir. 2000); see Lance v. Coffman, [549 U.S. 437, 442 (2007)].
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> Causation is established by demonstrating a causal connection "between the injury and the conduct complained of," where the injury is "fairly . . . trace[able] to the challenged action of the defendant[,] and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, [504 U.S. at 560-61] (alterations in original) (quoting Simon v. E. Ky. Welfare Rights Org., [426 U.S. 26, 41-42 (1976)]). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. [at 561] (quoting Simon, [426 U.S. at 38, 43]).

Lyman, 954 F.3d at 360-61. See also Spokeo, 136 S. Ct. at 1547 (stating that, to demonstrate constitutional standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision).

"In addition to these Article III prerequisites, prudential concerns ordinarily require a plaintiff to show that his claim is premised on his own legal rights (as opposed to those of a third party), that his claim is not merely a generalized grievance, and that it falls within the zone of interests protected by the law invoked." Pagan v. Calderon, 448 F.3d 16, 27 (1st Cir. 2006). A plaintiff's invocation of public policy interests, absent more, is not sufficiently particularized, but instead constitutes a "generalized grievance." A "generalized grievance" that alleges an injury "which is 'shared in substantially equal measure by all or a large class of citizens,' does not justify the exercise of the court's jurisdiction." Nogueras Cartagena v. Maria Calderon, 150 F. Supp. 2d. 338, 343 (D.P.R. 2001) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Injuries that are too "widely shared" or are "comparable to the common concern for obedience to law" may fall into the category of generalized grievances about the conduct of government. Becker, 230 F.3d at 390 (internal quotation omitted). Such prudential considerations are "not as inexorable as their Article III counterparts," Pagan, 448 F.3d at 27, but they can, as here, help in discerning whether an alleged injury properly falls within the sweep of Article III.

Moreover, "[t]he standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012) (citation omitted). Thus, the Court will assess Plaintiffs' standing to bring each claim asserted.

UTIER argues that it has standing by virtue of the imminent loss of two thirds of its membership, and Defendants do not dispute that UTIER will lose members as many PREPA employees are hired by LUMA Energy or are transferred to other government agencies. (See Reply ¶ 16; May 18, 2021, Hr'g Tr. at 17:19-24.) Nor do Defendants deny the individual

plaintiffs – each of whom is an employee of PREPA – have alleged an Article III injury to the extent they claim that they will not be able to continue in their PREPA jobs because of the O&M Agreement and that "vested" rights under the CBA or SREAEE that are protected by Act 120 will not be preserved following LUMA's takeover of the T&D System. (See May 18, 2021, Hr'g Tr. at 29:11-14.) These alleged injuries are concrete and particularized and satisfy the requirements of Article III standing to challenge the loss of particular rights allegedly recognized by law. Thus, the Court finds that Plaintiffs have Article III standing to assert the following claims that are based on UTIER's loss of membership, or Plaintiffs' alleged loss of "vested" rights that are required to be protected by Act 120: violations of the Employee Benefit Income Security Act ("ERISA") and of section 201 of PROMESA (First Claim for Relief),[6] violations of the Contracts Clause (the Fifth and Eighth Claims for Relief), Tortious Interference with Contract (the First, Fourth, and Seventh Claims for Relief), and Contract in Prejudice of Third Party (the Third Claim for Relief).[7]

In the First Claim for Relief, however, Plaintiffs also seek a broad declaration that the O&M Agreement is null and void as violative of Puerto Rico and federal law. (See Am. Compl. ¶¶ 271-75.) This aspect of Plaintiffs' claim rests on more than Plaintiffs' claims of loss of membership or contractual rights: Plaintiffs challenge the validity of the O&M agreement based on broad legal and public policy principles and argue that it should not have been approved and should not be implemented. They assert that the O&M Agreement is illegal

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6 PROMESA is codified at 48 U.S.C. § 2101 et seq.

7 While Plaintiffs have alleged an Article III injury with respect to their pension rights, they lack statutory standing to assert ERISA claims in connection with the LUMA transaction, as explained infra.

because (i) it is an improper delegation of legislative authority to LUMA Energy under the Puerto Rico Energy Public Policy Act, Act 17-2019, 22 L.P.R.A. § 1141 ("Act 17") (see Mot. ¶ 47; Puerto Rico Energy Policy Act, 2019 P.R. Laws Act 17 (S.B. 1121) (Apr. 11, 2019) at § 1.5(c))), (ii) it creates a private vertical monopoly in violation of Act 120 and Act 17[8] by "transfer[ing] all of PREPA's functions to [LUMA] Energy" (see Mot. ¶ 50), (iii) it is a leonine contract "contrary to public order" because of the "fifty-three (53) agreements [in the O&M Agreement]; forty-one (41) benefit LUMA Energy, eight (8) benefit [the P3, tasked with negotiating the PREPA transformation], four (4) are neutral, and none benefit PREPA" (see Mot. ¶¶ 54, 56), and (iv) its execution violated the Puerto Rico Energy Transformation and RELIEF Act, Act 57-2014, 22 L.P.R.A. § 1051 et seq., ("Act 57")[9] and Puerto Rico Energy Board regulation No. 8542[10] due to a conflict of interest (see Mot. ¶¶ 41-44). Each of these allegations concerns disagreement with the Legislature's decisions with respect to Puerto Rico's energy policy, or harms that are widely shared by the people of Puerto Rico generally rather than to any of the Plaintiffs specifically. Such policy disagreements and broad allegations of societal harm due to government noncompliance with law are insufficient to support Article III standing. See

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8 Act 17 sets out Puerto Rico's energy public policy and includes principles to ensure civic participation in certain energy public policy issues. Plaintiffs contend that the O&M Agreement violates Act 17 by privatizing certain issues which Act 17 requires be kept public. (See Mot. ¶ 47; Am. Compl. ¶¶ 155-57.)

9 Act 57 created PREB, and provides that PREB is an "independent regulatory entity in charge of regulating, overseeing, and ensuring compliance with the public policy on energy of the Commonwealth of Puerto Rico." 22 L.P.R.A. §1054(a).

10 PREB Regulation No. 8542, titled Regulation on the Standards of Ethical Conduct for Employees of the Puerto Rico Energy Commission and the Principles that should Govern the Commissioners Actions as Representatives of the Commission, requires Commissioners to act impartially and refrain from situations that pose a real or apparent conflict of interest. (See Am. Compl. ¶ 137.)

Lujan, 504 U.S. at 575-76 (explaining that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (internal quotation and citation omitted)). Accordingly, Plaintiffs have not demonstrated that they have standing to pursue their claims that the O&M Agreement is void or unenforceable due to violation of legal provisions and public policy principles.

B. PROMESA Section 305

Section 305 of PROMESA provides that, "notwithstanding any power of the court, unless the Oversight Board consents or the plan so provides, the court may not, by any stay, order, or decree . . . interfere with -- (1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the use or enjoyment by the debtor of any income-producing property." 48 U.S.C.A. § 2165 (Westlaw through P.L. 117-12 with the exception of P.L. 116-283) (emphasis added).

In its written submissions in this motion practice, the Oversight Board expressly took the position that it was not consenting under section 305 to the Court's exercise of jurisdiction to adjudicate the substantive issues raised in the Motion, and argued at length that section 305 precluded the Court from granting any of the relief sought on the Motion. (See Opp. ¶ 9 ("To be clear, the Oversight Board does not consent to the Court interfering with PREPA's use of its resources and continued performance under the O&M Agreement. That should end the case."); Opp. ¶ 64 ("Section 305(2) prohibits the Court from issuing any order enjoining the further implementation of the O&M Agreement" and "Plaintiffs' request for an order directing

PREPA to pay pension contributions to SREAEE and damages to Plaintiffs is similarly barred by Section 305."); Opp. ¶ 65 ("Plaintiffs' request for declaratory relief, which seeks to invalidate the O&M Agreement, is similarly barred by Section 305."); Opp. ¶ 66 ("[A] judgment declaring the O&M Agreement is null and void would both impermissibly interfere with PREPA's autonomy and property under Section 305(2), and impute to this Court authority it does not have to approve contracts of the Title III debtor."); Opp. ¶ 67 ("The relief requested by Plaintiffs would similarly constitute an impermissible interference with the 'political or governmental powers of the debtor,' in violation of Section 305(1)," "[t]he decision of whether, when, and how to transform PREPA rests with the governmental and political powers of Puerto Rico," and "PROMESA § 305 prohibits the Court from interfering with that exercise of governmental judgment.").)

At the conclusion of the May 18, 2021, oral argument, however, the Oversight Board surprisingly and inartfully reversed its position on this important issue and stated that it would, in fact, consent to the Court's adjudication of the merits of the claims raised in the Motion. (See May 18, 2021, Hr'g Tr. at 43:11-19.) Accordingly, the Court turns to the question of whether Plaintiffs have demonstrated their entitlement to injunctive relief in connection with the claims that they have constitutional standing to pursue.

C. Preliminary Injunction Standards

"To obtain a preliminary injunction, the plaintiffs bear the burden of demonstrating (1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest." Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 120 (1st Cir. 2003) (citing McGuire v. Reilly, 260 F.3d 36, 42 (1st Cir. 2001)). "The movant's likelihood of success on the merits weighs most heavily in the

preliminary injunction calculus. . . . If the movant cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Ryan v. United States Immigration and Customs Enforcement, 974 F.3d 9, 18 (1st Cir. 2020) (internal quotation and citations omitted).

With respect to each remaining claim upon which Plaintiffs seek relief through the Motion, the Court finds that Plaintiffs have failed to demonstrate that they are likely to succeed on the merits. Accordingly, for the jurisdictional reasons explained above and for the following reasons, the Court denies the Motion in its entirety.

1. Plaintiffs' Likelihood of Success

a. ERISA (First Claim for Relief)

Plaintiffs assert that the O&M transaction must be enjoined as violative of ERISA. First, they allege that the O&M Agreement violates ERISA by creating "two hybrid[] system[s] that are not uniform since it allows employees to either stay in SREAEE or transfer to [LUMA] Energy's 401(k) Retirement Plan." (Mot. ¶ 51.) Plaintiffs contend that this hybrid system harms SREAEE because there is no requirement for LUMA Energy to assume PREPA's obligations to SREAEE, and that it further "encourage[es] employees to withdraw their past and future contributions from the SREAEE[.]" (Mot. ¶ 75.) Plaintiffs cite no specific ERISA provisions in advancing these claims; rather, they refer to the statute generally.

Plaintiffs' invocation of ERISA is unavailing. ERISA generally provides that only the Secretary of Labor, and the participants, beneficiaries, and fiduciaries of ERISA-governed plans may bring suit to enforce its provisions. 29 U.S.C. § 1132(a). See also City of Hope Nat'l Med. Ctr. v. HealthPlus, Inc., 156 F.3d 223, 226 (1st Cir. 1998) ("ERISA specifically enumerates the parties with standing to sue to enforce ERISA's provisions: participants,

beneficiaries, fiduciaries and the Secretary of Labor."). ERISA further provides that it "shall not apply to any employee benefit plan if . . . such plan is a governmental plan," which is defined as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C.A. §§ 1003(b)(1), 1002(32) (Westlaw through P.L. 117-12 with the exception of P.L. 116-283).

None of the Plaintiffs is permitted to bring suit under ERISA. The statute makes no provisions for enforcement suits by unions, and the individual plaintiffs are not participants, beneficiaries, or fiduciaries of an ERISA-governed plan. Their relationship is with SREAEE (see Reply ¶ 31), which is a "governmental plan" and, as such, is exempt from ERISA coverage. Thus, Plaintiffs cannot establish a likelihood of success on their claims that the O&M Agreement violates ERISA. See Pietrangelo v. Sununu, Case No. 21-cv-124-PB, 2021 WL 1254560, at *5 (D.N.H. Apr. 5, 2021), appeal docketed, No. 21-1366 (1st Cir. May 7, 2021) ("[A]n 'affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court's reaching the merits, which in turn depends on a likelihood that plaintiff has standing[,]' [and thus,] '[a] party who fails to show a "substantial likelihood" of standing is not entitled to a preliminary injunction.'" (quoting Waskul v. Washtenaw Cnty. Cmty. Mental Health, 900 F.3d 250, 256 n.4 (6th Cir. 2018); Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 913 (D.C. Cir. 2015)) (emphasis in original)).

Plaintiffs also argue that ERISA preempts the O&M Agreement and Act 29 (presumably precluding enforcement of the contract and the statute). (See Mot. ¶ 52, Am. Compl. ¶ 304.) ERISA's preemption provision provides that ERISA preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section

1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C.A. § 1144(a) (Westlaw through P.L. 117-12 with the exception of P.L. 116-283). Section 1003(a) defines the universe of employee benefit plans to which ERISA applies and 1003(b) specifically excludes any "governmental plan" from ERISA's coverage. 29 U.S.C.A. § 1003 (Westlaw through P.L. 117-12 with the exception of P.L. 116-283). The O&M Agreement is a contract, not a state law, and SREAEE is not governed by ERISA. Thus, ERISA cannot preempt the O&M Agreement or Act 29 insofar as it relates to SREAEE, and Plaintiffs are not likely to prevail on the merits of their claim.

b. PROMESA Section 201 (First Claim for Relief)

Section 201(b)(1) of PROMESA provides, in pertinent part, as follows:

> A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and . . . (B) ensure the funding of essential public services; (C) provide adequate funding for public pension systems; . . . and (N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to June 30, 2016.

48 U.S.C.A. §§ 2141(b)(1)(B), (C), (N) (Westlaw through P.L. 117-12 with the exception of P.L. 116-283). Plaintiffs argue that the O&M Agreement violates section 201(b)—or precludes the Oversight Board from complying with section 201(b)—because it allegedly deprives PREPA and SREAEE of adequate funding and would prioritize obligations to LUMA Energy over obligations to SREAEE. (Mot. ¶ 79; Reply ¶ 33.)

Plaintiffs have not demonstrated a likelihood of success on the merits with respect to their arguments concerning section 201(b) of PROMESA. Section 201(b) sets out certain requirements for the development of fiscal plans, and the O&M Agreement is not itself a fiscal

plan. Thus, Plaintiffs do not have a cogent basis for an argument that the O&M Agreement violates section 201(b); rather, Plaintiffs' argument can only be that the O&M Agreement makes it difficult or impossible to develop a fiscal plan that could be certified by the Oversight Board in a manner consistent with the requirements of section 201(b). (See Reply ¶ 33 (asserting that the O&M Agreement "hinder[s] the [Oversight Board]'s possibility of complying with Section 201 of PROMESA.").)

PROMESA does not, however, provide Plaintiffs with authority to challenge the Oversight Board's certification determinations. Section 201(c)(3) of PROMESA, 48 U.S.C. § 2141(c)(3), provides the Oversight Board with "sole discretion" to determine whether a fiscal plan complies with section 201(b)'s requirements, and section 106(e) of PROMESA, 48 U.S.C. § 2126(e), makes the Oversight Board's fiscal plan certification determination unreviewable by this Court. As recognized by the First Circuit, PROMESA "grants the [Oversight] Board exclusive authority to certify Fiscal Plans and Territory Budgets for Puerto Rico. It then insulates those certification decisions from judicial review." See Ambac Assurance Corp. v. Commonwealth of P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 927 F.3d 597, 602 (1st Cir. 2019) (quoting Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 916 F.3d 98, 112 (1st Cir. 2019)), cert. denied, 140 S. Ct. 856 (2020). While Plaintiffs contend that the Court has authority to review Oversight Board decisions to ensure that the Board is acting within the scope of its duties (Reply ¶ 34), any Court authority to do so is necessarily subject to the limitations imposed by PROMESA.

c. Contracts Clause (Fifth Claim for Relief)

Article I, section 10 of the United States Constitution provides in pertinent part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Here, the O&M Agreement is obviously not a law, which is the most basic requisite of Contracts Clause applicability. Moreover, the mere fact that Plaintiffs allege that Defendants' actions were in breach of contractual obligations under the CBA is insufficient to support a viable Contracts Clause claim. Redondo Constr. Corp. v. Izquierdo, 662 F.3d 42, 48 (1st Cir. 2011) ("If a state breaches a contract but does not impair the counterparty's right to recover damages for the breach," in the event those damages would be owed, "the state has not impaired the obligation of the contract."). See also Longo En-Tech Puerto Rico, Inc. v. United States Envtl. Prot. Agency, Civil No. 16-3151 (DRD), 2017 WL 878442, at *6 (D.P.R. Mar. 6, 2017).

Moreover, far from challenging Act 120, Plaintiffs expressly rely upon it in their Motion. (See, e.g., Mot. ¶¶ 8, 36 & n.6, 66.) Their challenge is to the O&M Agreement. Accordingly, Plaintiffs are not likely to succeed on the merits of their Contracts Clause claim. (Am. Compl. ¶¶ 280-89.)

d. Interference with Contractual Relations (Fourth Claim for Relief)

Under Puerto Rico law, a claim for tortious interference with contractual relations must satisfy four elements. "To establish a tortious interference claim, plaintiffs need to show: 1) the existence of a contract; 2) that the interfering party acted with intent and knowledge of the existence of a contract; 3) that plaintiff suffered damages; and 4) that there exists a causal link between the injury and the interfering party's actions." Alpha Biomedical and Diagnostic Corp. v. Philips Med. Sys. Netherland BV, 828 F. Supp. 2d 425, 430 (D.P.R. 2011) (citing New Comm Wireless Servs. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)). Significantly, a party cannot be liable for tortious interference with its own contract. See Kunelius v. Town of Stow, Civil

Action No. 05-11697-GAO, 2008 WL 4372752, at *5 (D. Mass. Sept. 23, 2008), aff'd, 588 F.3d 1 (1st Cir. 2009).

Here, Plaintiffs are unlikely to succeed on a claim for tortious interference with contractual relations. As an initial matter, PREPA is a party to the CBA, and thus cannot be liable for interfering with the CBA. See Kunelius, 2008 WL 4372752, at *5.

More fundamentally, with respect to the third and fourth factors of their tortious interference claim, Plaintiffs have not shown the impairment of any legally protected right through implementation of the O&M Agreement. Act 120 preserves PREPA employees' "vested rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable thereto, as well as the privileges, obligations, and status with respect to any existing pension or retirement plan[.]" 22 L.P.R.A. § 1121. Act 29 further specifies that employees with ten or more years of service at PREPA have "vested" retirement benefits that must be preserved. 27 L.P.R.A. § 2609(g). The O&M Agreement promises to comply with these laws (while providing additional options for some employees with vested rights to participate in the LUMA Energy 401(k) plan). (See O&M Agreement at §§ 5.8(a), 9.1, 9.9.) Plaintiffs have made no showing of a violation of PREPA's obligations under the CBA and, to the extent Plaintiffs have raised a question as to whether they face damage by reason of deprivation of "vested" rights, they have failed to provide any authority for the proposition that particular terms and conditions of their employment are vested.[11] There is no contractual right to perpetual employment by

[11] At oral argument, counsel for Plaintiffs argued that the "vested rights" referred to in Act 120 "should be all the provisions of the Collective Bargaining Agreement, because that was negotiated with the . . . employer." (See May 18, 2021, Hr'g Tr. at 11:4-9.) Counsel argued that the Contracts Clause of the Puerto Rico Constitution and the Contracts Clause of the U.S. Constitution guarantee the right to contract, and therefore all rights contained in the CBA should be considered "vested" and protected by law. (See May 18, 2021, Hr'g Tr. at 10:9-12:18.) The Court finds Plaintiffs' reading of "vested" unpersuasive.

PREPA. Thus, Plaintiffs cannot show a likelihood of success on the merits of their claim that they have been legally damaged by an interference with the CBA.[12]

e. Contracts in Prejudice of Third Parties (Third Claim for Relief)

Similarly, Plaintiffs assert that Defendants entered into the O&M Agreement "in prejudice of a third party." This tort requires the Plaintiff to show (1) that a third person has been affected, (2) that said third person has sustained injury, (3) a causal nexus exists between the injury and the contract, and (4) that there is intent to cause injury, either by both contracting parties or by only one of them. Dennis and Metro Invs. v. City Fed. Savs. and Loan Ass'n., 121 D.P.R. 197, 201-02 (1988) (see Docket Entry No. 35-1). Thus, the tort is an "exception[] to the general principle of the relative efficacy of contracts and is one of the assumptions wherein a contract would affect third persons [not party to the contract]." Id., 121 D.P.R. at 200-01.

Plaintiffs allege P3, PREPA, and LUMA Energy entered into the O&M Agreement in prejudice of UTIER's members' rights "as active participants and beneficiaries of the SREAEE[.]" (Am. Compl. ¶¶ 270-73; see also Mot. ¶ 60.) Plaintiffs' claim fails, however,

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The Puerto Rico Legislature could simply have used "all rights" in Act 120 rather than "vested rights" if it had intended to refer to all of the benefits of any given contract. See, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013) ("Congress' choice of words is presumed to be deliberate . . . ."); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) ("[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." (internal quotation and citation omitted)). Under Plaintiffs' reading of the statute, the word "vested" would be superfluous, and "it is a time-honored tenet that [a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous." Lopez-Soto v. Hawayek, 175 F.3d 170, 173 (1st Cir. 1999) (internal quotation omitted)).

[12] Given the Plaintiffs' failure to show the existence of a vested right that is not protected by the O&M Agreement, Plaintiffs also cannot satisfy the irreparable harm requirement for obtaining injunctive relief.

for the same reasons Plaintiffs cannot show a tortious interference with contractual relations. Plaintiffs have not identified legally cognizable interests that were infringed through implementation of the O&M Agreement. The O&M Agreement provides that it shall comply with the legal requirements contained in Act 120 and Act 29, and that it will recognize all "vested" rights of PREPA employees. Furthermore, Plaintiffs have not identified any provision or principle of law that will be violated by SREAEE's loss of some participants as PREPA employees are hired by LUMA Energy.

2. Remaining Preliminary Injunction Factors and Party Arguments

Given the Court's ruling that Plaintiffs cannot succeed on the merits of any of the claims for which they have standing, the Court need not address the remaining factors of the preliminary injunction standard, or the parties' additional arguments.

D. Evidentiary Disputes

The Court has also reviewed the motions in limine, the evidentiary objections, and the motion to strike submitted by the parties (Docket Entry Nos. 37, 38, 39, 44, and 45, the "Evidentiary Motions"). The Court hereby denies the Evidentiary Motions as moot in light of the fact that none of the evidentiary disputes is material to the disposition of the Motion.

CONCLUSION

For the foregoing reasons, the Motion is denied. The *Motion* in Limine *to Exclude the Declaration of Ellen S. Smith in Support of Defendants' Joint Opposition to Preliminary Injunction Motion (ECF No. 20)* (Docket Entry No. 37); the *Motion* in Limine *to Exclude the Declaration of Natalie A. Jaresko in Support of Defendants' Joint Opposition to "Motion for Preliminary Injunction to Enjoin the Execution of the O&M Agreement" (ECF No. 21)* (Docket Entry No. 38); *Defendants' Evidentiary Objections to the Declarations Offered by*

UTIER in Support of its Preliminary Injunction Motion (Docket Entry No. 39); *Defendants' Objections to Plaintiffs' Motion Submitting Exhibits* (Docket Entry No. 44); and the *Motion to Strike Defendants' Objections to Plaintiffs Motion Submitting Documents* (Docket Entry No. 45) are denied. This Order resolves Docket Entry Nos. 8, 37, 38, 39, 44 and 45.

This case remains referred to Magistrate Judge Dein for general pretrial management.

SO ORDERED.

Dated: May 21, 2021

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge