

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:
THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO
as representative of
PUERTO RICO ELECTRIC POWER AUTHORITY,
Debtor.¹

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
INDUSTRIA ELÉCTRICA Y RIEGO, INC.

PROMESA
Title III
Adv. Proc. No. _____
FOR INJUNCTION,
DECLARATORY RELIEF, D
AMAGES

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

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 (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); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747)(Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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.

COMPLAINT

TABLE OF CONTENTS

PRELIMINARY STATEMENT 4

THE PARTIES..... 6

JURISDICTION AND VENUE 10

THE FACTS 10

I. APPROVAL OF THE O&M AGREEMENT 10

II. THE O&M AGREEMENT TERMS AND CONDITIONS 12

III. UTIER’S COLLECTIVE BARGAINING AGREEMENT IMPAIRMENT..... 16

IV. UTIER’S MEMBER RIGHTS UNDER THE CBA AND SREAEE 20

V. SREAEE’S CURRENT FINANCIAL SITUATION 27

VI. O&M AGREEMENT INJURY TO SREAEE 27

VII. THE O&M AGREEMENT’S INJURY TO UTIER’S MEMBERS 33

VIII. LUMA’S PRIORITY AS AN ADMINISTRATIVE EXPENSE IS CURRENTLY HARMING SREAEE AS A CURRENT EXPENSE 37

IX. PLAINTIFFS AS INTENDED THIRD-PARTY BENEFICIARIES OF THE TRUST AGREEMENT 38

X. THE O&M AGREEMENT IS NULL AND VOID 41

XI. THE O&M AGREEMENT CONSTITUTES A TORTIOUS INTERFERENCE 62

XII. THE O&M AGREEMENT VIOLATES THE CONTRACT CLAUSE 63

XIII. ACT NO. 29-2009 IS UNCONSTITUTIONAL 70

XIV. BY VIRTUE OF LAW PREPA HAS TO PAY ITS CURRENT EMPLOYER CONTRIBUTION DEBT 75

FIRST CLAIM FOR RELIEF 77

SECOND CLAIM FOR RELIEF 78
THIRD CLAIM FOR RELIEF 78
FOURTH CLAIM FOR RELIEF 79
FIFTH CLAIM FOR RELIEF 80
SIXTH CLAIM FOR RELIEF 82
SEVENTH CLAIM FOR RELIEF 82
EIGHTH CLAIM FOR RELIEF 84
NINTH CLAIM FOR RELIEF 85
TENTH CLAIM FOR RELIEF 86
ELEVENTH CLAIM FOR RELIEF 86
PRAYER FOR RELIEF 86

TO THE HONORABLE COURT:

COME NOW *Unión de Trabajadores de La Industria Eléctrica y Riego* (“UTIER” for its Spanish acronym), Ángel Figueroa-Jaramillo, Freddyson Martínez-Estevez, Ralphie Dominicci-Rivera, Waldo Rolón, and Ronald Vázquez, as Plaintiffs in the above styled Adversary Proceeding, by and through the undersigned attorneys, and respectfully state, allege and pray:

PRELIMINARY STATEMENT

The present adversary complaint is the latest in a long list of efforts that UTIER has been forced to perform on behalf of its members which are employees of the Puerto Rico Electric Power Authority (“PREPA”). Now, UTIER is presented with a new challenge, which is the execution of the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with Luma Energy* (“O&M Agreement”) on June 22, 2020, meaning the privatization of PREPA’s functions. **Exhibit 1: O&M Agreement.** The O&M Agreement is a contract signed by PREPA, the Public-Private Partnerships Authority (“P3”), and LUMA Energy, LLC and LUMA Energy ServCo, LLC (together as “Luma Energy”), that was first approved by Financial, Oversight, and Management Board for Puerto Rico (“FOMB”).

Under the O&M Agreement, Luma Energy will assume full control of all functions of PREPA except for generation. The O&M Agreement substantially impairs UTIER’s members, since it dismantles PREPA and does not recognize UTIER’s Collective Bargaining Agreement (“CBA”) with PREPA, and its members’ acquired rights and benefits accordingly. **Exhibit 1: O&M Agreement.** The execution of the O&M Agreement results in the displacement of PREPA’s workforce, and it does not acknowledge the employees’ position in PREPA. Also, under the O&M

Agreement, Luma Energy will not assume the responsibilities of PREPA as to Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica (“SREAEE”). The O&M Agreement guts the SREAEE and will accelerate its insolvency. UTIER’s members are comprised of PREPA’s active employees and retirees. Therefore, UTIER’s members, as active participants and beneficiaries of the SREAEE will be affected by Luma Energy’s abandonment of the SREAEE. If allowed to continue, this contract will deprive more than 10,162 people of their pension benefits and future sustenance. Also, 5,542 active participants who are current PREPA’s employees, will be deprived of their future benefits because the pension system will not survive additional strain and will likely become insolvent in the next couple of years. This amounts to 15,704 retirees and active participants that are affected by the O&M Agreement.²

Moreover, the O&M Agreement is an illegal transaction which does not pass muster under Puerto Rico nor federal law. To begin with, the O&M Agreement contains clauses and general transactions which are contrary to law and public order. These clauses and transactions make the contract null and void, which makes it non-existent. Additionally, the O&M Agreement is a tortious transaction and interference which affects third parties impermissibly and illegally. Likewise, the O&M Agreement violates Section 201(b) of PROMESA since it does not provide adequate funding for public pensions, nor ensures the adequate funding of energy which is an essential public service. Lastly, the O&M Agreement is susceptible to constitutional attack under the Contract Clause. Thus, the O&M Agreement is invalid, and Plaintiffs have standing to seek a declaratory and injunctive relief to that effect.

² Considering the household of each member and retirees, the actual number of persons affected by these measures are approximately 60,000.

THE PARTIES

1. Plaintiff, UTIER, was founded in the early 1940's and it is one of four labor unions that represent PREPA's employees and retirees. Its members are responsible for the operation and conservation aspect of PREPA, and for the repairs, renovations, and improvements of PREPA's property. UTIER's job is to protect and defend PREPA's workers, as well as negotiate collective bargaining agreements on their behalf. UTIER also represents the branch of its retirees. UTIER is an unsecured creditor in PREPA's restructuring under Title III of PROMESA.
2. UTIER's latest CBA is for the 2008-2012 period. **Exhibit 2: UTIER's CBA.** Even though the CBA was enacted with a lifespan lasting from August 2008 through August 2012, it has a provision that establishes that it will continue dictating the labor relations between PREPA and UTIER until a new collective bargaining agreement is negotiated and comes in effect. Since no new collective agreement has been negotiated and established, the CBA is still valid and binding.
3. This CBA was entered upon by both PREPA and UTIER, on behalf of its members. As such, it is a binding contract between both parties that dictates the labor relations that shall exist amongst them.
4. Such an agreement is extremely important to the well-being of the UTIER members, and as a result, of PREPA. These employees perform high risk jobs that require them to be continually exposed to danger, and as such need assurance that in case any fateful event might happen, they will be covered and taken care of, and that neither they nor their families will have to incur in losses. This CBA is what keeps these employees feeling secure, motivated, and with the desire to do their job and do it well.

5. Plaintiff, Ángel Figueroa-Jaramillo, is the President of UTIER, an employee in the transmission and distribution area of PREPA, and an active participant of SREAEE.
6. Plaintiff, Freddyson Martínez-Estevez, is the Vice President of UTIER, an employee in the transmission and distribution area of PREPA, and an active participant of SREAEE.
7. Plaintiff, Ralphie Dominicci-Rivera, is an employee in the generation area of PREPA, member of UTIER, and an active participant o SREAEE.
8. Plaintiff, Waldo Rolón, is a Powerline Technician in PREPA, member of UTIER, and active participant of SREAEE.
9. Plaintiff, Ronald Vázquez, is a retiree of PREPA and Vicepresident of UTIER's Retirees' Chapter.
10. Defendant, Hon. Pedro Pierluisi-Urrutia, ("Governor Pierluisi"), is the Governor of the Commonwealth of Puerto Rico. Pursuant to Section 10(a) of Act 120-2018, 22 L.P.R.A. § 1120, and Section 9 of Act 29-2009, 27 L.P.R.A. § 2608, Governor Pierluisi authorized the O&M Agreement.³ Plaintiffs sue Governor Pierluisi in his official capacity.
11. Defendant, the Commonwealth of Puerto Rico, (the "Commonwealth"), is a territory of the United States.
12. Defendant PREPA is a public corporation and instrumentality of the Commonwealth, created pursuant to Act No. 83-1941. It is the sole electric utility in Puerto Rico and provides energy to approximately 1.5 million customers, which makes it one of the largest public utilities in the United States. Under the O&M Agreement, PREPA is the "Owner".

³ The O&M Agreement was authorized by former Governor of Puerto Rico, Hon. Wanda Vázquez-Garced. However, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Pedro R. Pierluisi-Urrutia is automatically substituted as a party in this complaint in his official capacity.

13. PREPA oversees the distribution of energy in all of Puerto Rico and most of its production. PREPA has been defined by the Puerto Rico Legislature as “a vertically integrated monopolistic structure.” Statement of Motives, Puerto Rico Energy Public Policy Act, Act No. 17-2019. This is precisely because it controls every facet of the electric system from generation to distribution.
14. Defendant, the Financial Oversight and Management Board for Puerto Rico (“FOMB”) is the financial oversight board imposed on Puerto Rico pursuant to the Puerto Rico Oversight Management and Economic Stability Act (“PROMESA”). The FOMB has been included in this adversary complaint as representative of PREPA in its Title III proceeding pursuant to Section 315(b) of PROMESA. Under Section 201(b) of PROMESA, the FOMB has a duty to provide adequate funding for a covered instrumentality’s pension system in its fiscal plans, as well as ensure funding of essential services. Also, it has the duty to comply with Section 201(b)(1)(N) of PROMESA that establishes that the fiscal plans must respect the lawful priorities that were in effect prior to the enactment of PROMESA.
15. Defendant Ralph A. Kreil-Rivera is the President of the Governing Board of PREPA, and in that capacity has the authority to implement the O&M Agreement. Plaintiffs sue Ralph Kreil-Rivera in his official capacity.
16. Defendant Efran Paredes-Maysonet is the Executive Director of PREPA, and in that capacity has the authority to implement the O&M Agreement. Plaintiffs sue Efran Paredes-Maysonet in his official capacity.
17. Defendant the Puerto Rico Public-Private Partnership Authority (“P3”) is a government-owned corporation of Puerto Rico created to regulate public-private partnerships in

Puerto Rico, pursuant to Act No. 29-2009. Under Act 120-2018, P3 is the only government entity authorized to implement the Puerto Rico public policy for PREPA Transactions.⁴ Under the O&M Agreement, P3 is the “Administrator”.

18. Defendant Fermín Fontánes-Gómez is the Executive Director of P3. In that capacity, Fermín Fontánes-Gómez has the authority to implement the O&M Agreement. Plaintiffs sue Fermín Fontánes-Gómez in his official capacity.

19. Defendant the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF” for its Spanish acronym) is an independent public corporation and governmental instrumentality with separate legal existence, fiscal and administrative autonomy. Its main responsibility is to act as fiscal agent, financial advisor and reporting agent of the Commonwealth, its agencies, instrumentalities, subdivisions, public corporations, and municipalities. Pursuant to Act 2-2017 AAFAF is the government entity responsible for the collaboration, communication, and cooperation between the Government of Puerto Rico and the FOMB, created under PROMESA. Also, its duty is to supervise, execute, and administer the fiscal plans developed and certified according to PROMESA. PREPA’s Fiscal Plan for 2020 includes the O&M Agreement’s terms and conditions.

20. Defendant Omar J. Marrero-Díaz, is the Executive Director of AAFAF. In this capacity, he is empowered to implement and enforce PREPA’s Fiscal Plan for 2020, which includes the O&M Agreement. Also, he participated in the Partnership Committee established for the process of creating the public-private corporation that would take over PREPA’s operations. Additionally, Omar J. Marrero-Díaz is an *ex-officio* member of the FOMB. Omar J. Marrero-Díaz is sued in his official capacity.

⁴ “PREPA Transactions” refers to any transaction that PREPA makes pursuant to Act 120-2018.

21. Defendants LUMA Energy, LLC⁵ and LUMA Energy ServCo, LLC⁶ (together “Luma Energy”) are a private consortium founded by ATCO, Ltd. And Quanta Services, Inc. Luma Energy was incorporated on January 17, 2020, as a domestic limited liability company under the laws of the Commonwealth of Puerto Rico. According to the O&M Agreement, Luma Energy is tasked to manage and operate PREPA’s transmission, distribution system, and dispatch of the energy. Also, it has been endowed with all PREPA’s public powers such as making determinations of public policy. Under the O&M Agreement, Luma Energy is the “Operator”, composed of ServCo and ManagementCo,⁷ and will become the sole distributor of energy in Puerto Rico, displacing and dismantling PREPA.
22. Defendant Wayne Stensby is the President and CEO of Luma Energy. Wayne Stensby is sued in his official capacity.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction pursuant to 48 U.S.C. § 2166(a)(2) and 28 U.S.C. § 1331 because this action is a civil proceeding arising in or related to cases under PROMESA and arises under the U.S. Constitution. Moreover, the relief pursued herein arises under federal law, specifically 28 U.S.C. §§ 2201-2202. Venue is proper in this District pursuant to 48 U.S.C. § 2167(a). This is an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, made applicable to PROMESA by 48 U.S.C. § 2170.

THE FACTS

I. APPROVAL OF THE O&M AGREEMENT

⁵ Registry number before the Department of State of Puerto Rico: 439372. LUMA Energy, LLC’s original name was LUMA Energy ManageCo, LLC. However, further, it changed to LUMA Energy.

⁶ Registry number before the Department of State of Puerto Rico: 439373.

⁷ On June 12, 2020 LUMA Energy ManageCo, LLC changed its name to LUMA Energy, LLC.

24. In 2018, the Puerto Rico Legislature passed the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018, 22 LPRC §§ 1111 *et seq.* The purpose of this law was to create the framework for selling or transferring PREPA's assets and functions to public-private partnerships, following the general framework of the Public-Private Partnership Act, Act No 29-2009, 27 LPRC §§ 2601 *et seq.* Pursuant to this objective, a project emerged to transform PREPA's Transmission and Distribution System ("T&D") and **dismantle** PREPA. See Notice of Prepa's Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with Luma Energy, filed by the FOMB on behalf of PREPA, on July 7, 2020, at 12.⁸ [Dkt# 2053]. This project consisted of creating a public-private partnership through an Operation and Management Agreement. This entails that a private corporation would take over PREPA's operations.

25. On August 1, 2018, P3 established a "Partnership Committee" of five members. This Committee oversaw the process of creating a public-private corporation that would take over PREPA's operations. The Partnership Committee was responsible for reviewing bids and scoring them according to various technical, operational, and financial criteria. The final scores were used to select the winning bidder.

26. By January 11, 2020, Luma Energy had been selected by the Partnership Committee. **Exhibit 3: Partnership Committee Report, at 49.** Notwithstanding, Luma Energy was incorporated on January 17, 2020. **Exhibit 4: Luma Energy Corporation Registration.**

⁸ "The transition of control over PREPA's T&D System to LUMA Energy is the crucial first step in the overall transformation of Puerto Rico's energy sector and will lead to a wholesale change of this sector by **dismantling** and reorganizing the current vertically integrated corporation – and the historic challenges that it has faced." (emphasis added).

27. FTI Consulting, Inc. was hired by P3 to evaluate the bidders and score them. In thirty-seven of the thirty-eight categories, four of the five members of the Partnership Committee arrived at identical numerical scores as FTI Consulting, Inc. Also, three members even made the same numerical error in adding their scores. **Exhibit 5: Partnership Committee Proposal Evaluations: IEEFA Summary, Partnership Committee Members' Evaluations Scorecards, and FTI Consulting, Inc. Operations and Financial Assessment.**

28. With these scores P3 recommended the Partnership Committee to vote in favor of Luma Energy as the winning bidder. Also, without any meeting, these scores were the sole basis for the Partnership Committee to vote in favor of Luma Energy as the preferred proponent. **Exhibit 6: E-mails regarding the T&D Project – Preferred Bidder Selection Vote.** Therefore, the Partnership Committee members did not select Luma Energy as the winning bidder based on their own independent judgment. Their scores and assessment of the bidders should have represented their own views, unimpaired by any outside third party.

29. . On May 15, 2020, the Partnership Committee voted to officially recommend that Luma Energy be selected to execute the O&M Agreement for this project. **Exhibit 3: Partnership Committee Report, at 49.**

30. On June 22, 2020, P3, PREPA and Luma Energy signed the O&M Agreement, under which P3 is the Administrator; PREPA is the Owner; and Luma Energy is the Operator. This is the effective date of the O&M Agreement from which the terms of the contract begin to accrue.

II. THE O&M AGREEMENT TERMS AND CONDITIONS

31. It is well-known that PREPA is the public monopoly of energy provision in Puerto Rico. See Statement of Motives, Act No. 17-2019. PREPA is a public utility that manages the generation, procurement, and distribution of energy. It encompasses every aspect of the electric industry in Puerto Rico.
32. Although the O&M Agreement has been labeled as only transferring the operation of the T&D System to Luma Energy, the practical effect of the transaction is that Luma Energy is taking over all PREPA's functions except for its generation assets. **Exhibit 1: O&M Agreement at Article 5.**⁹ However, the O&M Agreement establishes that Luma Energy will control the dispatch of energy at the Energy Control Center. Thus, it is a privatization of the public utility and the constitution of a new private monopoly illegally.
33. The O&M Agreement contains a precedent condition that PREPA be dismantled. **Exhibit 1: O&M Agreement at Section 4.5(q).**¹⁰ According to the terms of the O&M Agreement, Luma Energy will take over the T&D System Operations and all the incidental functions, such as public policy compliance, customer service, generation procurement, etc. However, the O&M Agreement also requires that PREPA transfer its ownership rights

⁹“Commencing on the Service Commencement Date, and in exchange for Owner’s payment to Operator of all amounts owing to Operator under this Agreement, Operator shall (i) provide management, operation, maintenance, repair, restoration and replacement and other related services for the T&D System, in each case that are customary and appropriate for a utility transmission and distribution system service provider, including the services set forth in this Article 5 (*O&M Services*) (excluding the GenCo Shared Services) and Annex I (*Scope of Services*), and (ii) establish policies, programs and procedures with respect thereto (all such services, the “O&M Services”), in each case, in accordance with the Contract Standards. It is the Parties’ intent that except for the rights and responsibilities reserved to Owner and Administrator as set forth in Article 6 (*Rights and Responsibilities of Owner and Administrator*) or as may otherwise be expressly provided in this Agreement, Operator shall (A) be entitled to exercise all of the rights and perform the responsibilities of Owner in providing the O&M Services, and (B) have the autonomy and responsibility to operate and maintain the T&D System and establish the related plans, policies, procedures and programs with respect thereto as provided in this Agreement. The Parties acknowledge that Operator’s obligations to provide O&M Services under this Agreement are subject to the System Remediation Plan.” Section 5.1 of O&M Agreement.

¹⁰ “A final plan for the reorganization of PREPA into GenCo and GridCo shall have been approved by the applicable Governmental Bodies, and the GridCo-GenCo PPOA shall have become effective.” Section 4.5 of O&M Agreement.

over the T&D System and Generation Assets to two other corporations, denominated GridCo and GenCo. **Exhibit 1: O&M Agreement**, at 16-17.¹¹

34. Moreover, under the O&M Agreement, PREPA's funds and cash flow are funneled through Luma Energy's service accounts and used for Luma Energy's operations. **Exhibit 3: Partnership Committee Report, at 308-309; Exhibit 1: O&M Agreement at Section 4.7, 7.5.**¹² The O&M Agreement does not require Luma Energy to provide any capital nor invest in PREPA or the T&D System in any monetary way. On the contrary, the O&M Agreement makes PREPA solely responsible for providing Luma Energy with the necessary funds by replenishing the service accounts. **Exhibit 3: Partnership Committee Report, at 305-06.**¹³ Any required capital improvements will be funded by the federal funds destined for the rehabilitation of Puerto Rico's electric system. Moreover, Luma Energy does not have to perform its obligations if PREPA for any reason fails to replenish the accounts and Luma Energy will be the only beneficiary of the rates paid by Puerto Rico's ratepayers. PREPA will have no income and Luma Energy will have no monetary or capital obligations. The O&M Agreement provides Luma Energy with fixed fees for its services, while PREPA pays for all its operational expenses.

¹¹ "'GenCo' means the entity, which may be directly or indirectly owned by Owner or an Affiliate of Owner, that acquires or obtains ownership of the Legacy Generation Assets after the reorganization of PREPA. [. . .] 'GridCo' means the entity, which may be directly or indirectly owned by Owner or an Affiliate of Owner, that acquires or obtains ownership of the T&D System after the reorganization of PREPA."

¹² "Notwithstanding anything to the contrary in the O&M Agreement, Owner shall establish each Service Account other than the Contingency Reserve Account, and shall fund each such Service Account other than the Contingency Reserve Account, in the full amount required by the O&M Agreement to be in place as of the Service Commencement Date, in each case not less than ten (10) Business Days prior to the Interim Period Service Commencement Date." Section 4.7(b) of the O&M Agreement.

¹³ "Operator shall be reimbursed for (i) the costs and expenses (without markup for profit) incurred by Operator in the course of providing the O&M Services, excluding Disallowed Costs (the "**T&D Pass-Through Expenditures**") and (ii) the costs and expenses (without markup for profit) incurred by Owner in the course of providing Power and Electricity, including the costs and expenses under the GridCo-GenCo PPOA and Generation Supply Contracts (the "**Generation Pass-Through Expenditures**")." (bold in the original).

Exhibit 3: Partnership Committee Report, at 305 (summary);¹⁴ **Exhibit 1: O&M Agreement at Article 7.**

35. Additionally, the O&M Agreement delegates Puerto Rico’s public policy to Luma Energy, without providing public participation. Under the O&M Agreement, Luma Energy takes on the responsibilities of PREPA in the Integrated Resource Plan proceedings, including the renewable energy goals. Yet, the O&M Agreement does not provide any mechanisms for public oversight nor accountability measures with respect to the formulation of these public policy issues in hands of a private operator. See, for example, **Exhibit 1: O&M Agreement at Section 5.6, 5.18 and 5.19.**

36. Likewise, it displaces PREPA’s workforce, guts the pension system and removes any liability for PREPA’s pension system’s obligations from Luma Energy while dismantling PREPA. Under the O&M Agreement, Luma Energy does not bind itself to employ PREPA’s employees, forcing them to be transferred to other governmental agencies or retire. Moreover, the O&M Agreement explicitly rejects the collective bargaining agreements and will not assume the pension system actuarial debt. **Exhibit 1: O&M Agreement**, at 29,¹⁵ 47,¹⁶ and 69. Additionally, it provides a 401(k) Retirement Plan, which contrary to SREAEE, it does not consist of a defined benefit plan.¹⁷ This 401(k)

¹⁴ “Owner shall pay Operator a management service fee consisting of (i) the Fixed Fee and (ii) an Incentive Fee based on Operator’s ability to timely achieve or exceed the Performance Metrics (collectively, the “**Service Fee**”).” (bold in the original).

¹⁵ “For the avoidance of doubt, System Contracts shall not include . . . collective bargaining agreements with union labor . . .”

¹⁶ “ManagementCo shall use commercially reasonable efforts to interview and evaluate as candidates for employment at ServCo, effective as of the Service Commencement Date, the regular employees of Owner and its Affiliates”

¹⁷ “The funding of the PREPA plan for past accruals is PREPA’s responsibility. PREPA is addressing the funding of the PREPA retirement plan as part of PREPA’s Title III process. **All questions regarding PREPA’s retirement plan should be directed to PREPA. The LUMA 401(k) plan**, our retirement plan, offers a competitive benefit that allows employees to have certainty in their retirement planning. It provides employees with substantial opportunity to retire comfortably with the assurance that the money will be there when needed.” FAQ, LUMA, <https://lumapr.com/faqs/?lang=en> (emphasis added).

Retirement Plan competes with SREAEE and decapitalizes it by promoting members to transfer their assets to Luma's 401 (k) plan, accelerating SREAEE's insolvency.

37. The O&M Agreement intentionally dismantles PREPA and converts it into an empty shell corporation with no real income, as it is responsible for funding Luma Energy through the pass-through expense mechanism.

38. Moreover, the O&M Agreement has a total of fifty-three (53) agreements. Forty-one (41) of them benefit Luma Energy, eight (8) benefit P3, four (4) are neutral, and none benefit PREPA. As a matter of fact, forty-nine (49) of the agreements harm PREPA. **Exhibit 7: Luma Energy O&M Agreement Evaluation.**

39. The Agreement will not assume UTIER's Collective Bargaining Agreement ("CBA") in which UTIER members, as active participants and beneficiaries of the SREAEE, will become affected because certain rights and benefits will not be recognized under the new Agreement.

40. Luma Energy is scheduled to take over PREPA's operations on June 1, 2021.

III. UTIER'S COLLECTIVE BARGAINING AGREEMENT IMPAIRMENT

41. The CBA is a contract that governs the employment rights and benefits of UTIER and PREPA. The CBA serves the unequivocally important purpose of maintaining and creating a peaceful work environment. Some of the major areas covered by the CBA are vacation and illness accrual and pay, employee classifications, job reclassifications, fringe benefits, job stabilization and dispute resolution procedures, among others. Also, the CBA establishes that PREPA will make its employer contribution to the SREAEE for the benefit of its active participants and beneficiaries, among other things.

42. In total disregard of PREPA's employees and retirees' acquired benefits under the CBA, Luma Energy explicitly rejected collective bargaining agreements and will not assume the SREAEE's obligations. **Exhibit 1: O&M Agreement, at 29 and 69.**

43. This is a clear violation of Act 120-2018, since according to Section 15:

Employees who, as a result of this Act, are transferred under the concept of mobility to another government entity or who become employees of a PREPA Transaction Contractor shall keep all of their vested rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable to them, as well as the privileges, obligations, and status with respect to any existing pension or retirement plan, or savings and loan fund established by law in which such employees were enrolled before the approval of this Act and that are compatible with the provisions of Act No. 26-2017, known as the 'Fiscal Plan Compliance Act.' No regular PREPA employee shall be left unemployed nor lose benefits as a result of any PREPA Transactions." (emphasis added).

44. Notwithstanding the clear text of Act 120-2018, Luma Energy's employment offer letter, ("Luma's Employment Letter"), recognized substantially less labor rights for its employees in comparison to UTIER's CBA. **Exhibit 8: Luma's Employment Letter.**¹⁸

45. Unlike Luma's Employment Letter, UTIER's CBA provides a more comprehensive and specific employment rights and benefits that PREPA's employees will enjoy.¹⁹

46. For instance, under UTIER's CBA, employees working regular hours are entitled to accumulate sick leave at the rate of one point fifty-eight (1.58) working days for each month of employment up to a maximum of nineteen (19) working days per year, which shall be accumulated without limitation. **Exhibit 2: CBA at 66.** In comparison, Luma's Employment Letter, states that the employee will accrue a total of 12 sick days (96 hours) per year. Nevertheless, Luma Energy is permitted to modify the sick leave policy at any

¹⁸ This document is in Spanish. Notwithstanding, Plaintiffs filed together with this Adversary Complaint, a Motion for Leave to File Documents in Spanish and Extension to file Certified Translation.

¹⁹ For the complete list of the rights and benefits enjoyed by UTIER members according to the CBA, see Exhibit 2.

time. This means it could be modified to lesser sick leave days. **Exhibit 8: Luma's Employment Letter at 3.**

47. Regarding vacation leave for regular workers, Article XII of UTIER's CBA states that they shall be entitled to enjoy an annual vacation leave with full pay for thirty (30) working days per year which shall be accumulated at the rate of 2 ½ working days for each month of employment. **Exhibit 2: CBA at 61.** In comparison, Luma's Employment Letter, states that the employee will accrue fifteen (15) vacation days (120 hours) per year, and it reserves the right to modify any vacation leave off policy. This means it could be modified to lesser vacation leave days. **Exhibit 8: Luma's Employment Letter at 3.**
48. Additionally, UTIER's CBA encompasses a thorough list of rights and benefits that its members enjoy, which were not addressed by Luma Energy. For example, Luma's Employment Letter is silent regarding their employees' right for family funerals leave. On the other hand, Article XX of UTIER's CBA states that regular workers will receive three (3) consecutive days with pay and no charge, and temporary employees are entitled to two consecutive days with pay and no charge of funeral leave. **Exhibit 2: CBA at 73.**
49. Moreover, Article XXIII of UTIER's CBA lists the specific dates in which holidays will be granted with pay to regular and temporary employees. **Exhibit 2: CBA at 75.** In contrast, Luma's Employment Letter makes no reference to paid holidays.
50. Furthermore, Article IX, Section 1 of UTIER's CBA, establishes that the regular employees that have seniority with PREPA considering their years of service, can apply for exams and applicable training if they are interested in applying for higher positions or available vacancies. **Exhibit 2: CBA at 47.** Luma's Employment Letter does not

indicate whether an employee has the right to apply for exams and trainings if such worker is interested in competing for higher positions or vacancies.

51. Article XIX of UTIER's CBA states that when regular employees need to be absent from work due to a work-related accident and on the advice of a doctor, PREPA will pay such employee's full salary for the time that is absent since the work-related accident occurred.

Exhibit 2: CBA at 72. On the other hand, Luma's Employment Letter does not even address what would happen if an employee had a work-related accident, despite that these are high risk jobs.

52. Article XXXIII of UTIER's CBA guarantees a Christmas bonus of \$600 to applicable regular and temporary employees. **Exhibit 2: CBA at 95.** In contrast, Luma's Employment Letter makes no reference to a Christmas bonus.

53. Also, Article XXXV of UTIER's CBA provides that the fixed allowances for reimbursable meals and lodging expenses that regular, non-regular, and special regular employees incur, will be covered by such agreement, when the employees are required to work outside their job area or site or out of their regular schedule. Nonetheless, Luma's Employment Letter does not address whether Luma will provide employees with fixed allowances in such circumstances. **Exhibit 9: Article XXXV of UTIER's CBA.**²⁰

54. Another benefit of UTIER's CBA that was not addressed by Luma Energy is the leave for emergency work after midnight for regular and temporary employees. Article XXI of the CBA provides for a resting period during the employees' regular hours immediately following the performance of emergency work outside their regular schedule. **Exhibit 2: CBA at 73-74.**

²⁰ This document is in Spanish. Notwithstanding, Plaintiffs filed together with this Adversary Complaint, a Motion for Leave to File Documents in Spanish and Extension to file Certified Translation.

55. Additionally, Article XXXVI of UTIER's CBA on "Payment of Transfer Expenses," states that PREPA shall reimburse a fixed amount of twenty-five dollars (\$225.00) for regular workers that are permanently transferred from one municipality to another. **Exhibit 2: CBA at 106.** Luma Energy did not address if they will reimburse for transfer expenses.
56. In sum, UTIER's CBA provides for a total of around 31 rights and benefits that PREPA's employees currently enjoy. In contrast, in Luma's Employment Letter there are a total of ten (10) terms and conditions. Also, in the little content that could be classified as a "right" or "benefit" within the terms and conditions contained in Luma's Employment Letter, it is specified that Luma Energy reserves the right to modify the terms or make amendments.
57. Lastly, Luma Energy does not recognize the direct and indirect rights that emanate from union representation. These rights allow the employee to have assistance to face disciplinary processes, complaints, grievances, promotions, changes in occupational classification, illicit practices, dismissals, replacements, in short, all the eventualities that may occur in labor matters in a public instrumentality. One of the most important rights is the right to reinstatement in the event of a wrongful termination. This is not contemplated in Puerto Rico Labor Law for private entities, which is applicable to Luma Energy. Thus, Luma Energy does not have to reinstate employees that successfully claimed wrongful termination. **Exhibit 2: UTIER's CBA at 2, 64, 66, 116, 123.**

IV. UTIER'S MEMBER RIGHTS UNDER THE CBA AND SREAEE

58. Article XXXVIII of UTIER's CBA states that PREPA shall make employer contributions to the SREAEE, according to the calculated actuarial valuation, for the benefit of regular

employees, special regular employees, and regular with special appointments employees.

Exhibit 2: CBA at 107-08.

59. Moreover, UTIER members consist of employees that will be pensioners in the future and has a retirees chapter. Therefore, UTIER members, as active participants and beneficiaries of the SREAEE, are directly affected by the O&M Agreement's harm to the SREAEE.

60. The SREAEE is a public pension system and trust that was originally created through UTIER's CBA.

61. The Board of Directors of PREPA's predecessor issued Resolution No. 200 of June 25, 1945, in which it approved and adopted the Retirement System as of July 1, 1945. **Exhibit 10: Resolution No. 200.** The trust is administrated by the Board of Trustees on behalf and for the benefit of active members, retired members, and beneficiaries. **Exhibit 11: SREAEE By-laws, at 100.**

62. SREAEE has been recognized as a *de facto* trust with an independent and full legal personality that its property that belongs to its members. SREAEE's nature was expressly defined by Puerto Rico's Court of First Instance in an action filed by UTIER requesting declaratory judgment stablishing that SREAEE has always been a trust. The Court granted the request, and it is now final and unappealable. Puerto Rico's Court of First Instance also decided that SREAEE has a separate identity and independent legal personality from PREPA and any other public pension system. **Exhibits 12 & 13: UTIER v. PREPA, Civil Case No. SJ2015CV001000.** See, also, Exhibit 14: Statement of Motives, Act No. 34-2005. SREAEE's nature as an independent *de facto* trust is *res judicata*.

63. SREAE is an independent entity separate from PREPA that is administered through its own Board of Trustees and belongs solely to PREPA's employees and retirees. **Exhibits 12 & 13: UTIER v. PREPA, Civil Case No. SJ2015CV001000.** This distinction is based on the legal definition of a "trust" which is an autonomous patrimony as the result of the trustor's transfer of assets to be administered by the fiduciary. 32 LPRA § 3351. The law establishes that when funds are placed in a trust, it constitutes a fully autonomous estate separate from the trustor, fiduciary, and trustee. Id. § 3351a. Thus, while PREPA is the trustor and transfers the public funds to the trust, it is the Board of Trustees that administers it and has the corresponding fiduciary duties. Nonetheless, this distinction does not deprive its characterization as a public pension system because the funds are public, and all the members and retirees are public employees. When PREPA transfers what it owes to the trust, it is complying with its public pension obligations.

64. Moreover, under the Trust Agreement between PREPA and the U.S. Bank National Association, SREAE is entitled to priority payment among PREPA's obligations.

Exhibit 15: Trust Agreement. The Trust Agreement had the purpose of

fixing, charging and collecting by the Authority of reasonable rates and charges for the use of the services and facilities furnished by the System sufficient to provide for the payment of the expenses of [PREPA] incurred in the conservation, repair, maintenance and Operation of the System and for the payment of the principal of and the interest in the 1947 Indenture Bonds and the bonds as the same become due and payable, including reserves for such purpose. **Exhibit 15: Trust Agreement, at 5.**

65. The priority established by the Trust Agreement is protected by Section 201(b)(1)(N) of PROMESA which establishes that the fiscal plans must respect lawful priorities that were in effect prior to the enactment of PROMESA. Furthermore, the Trust Agreement was willingly and freely entered by both, PREPA and U.S. Bank. According to its provisions,

the Trust Agreement is a legal, valid, and binding trust agreement that dictates, among other things, PREPA's issuance of bonds by providing specific and detailed provisions governing the use of PREPA's bonds proceeds and revenues. **Exhibit 15: Trust Agreement, at 12.** Despite the existing legal obligation of upholding such Trust Agreement, PREPA, AAFAF, the FOMB and the Commonwealth are undermining it. *See Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica v. The Financial, Oversight, and Management Board for Puerto Rico*, Adv. Proc. 19-405-LTS.

66. Moreover, the Trust Agreement limits the way in which it can be modified or altered, establishing that “**Modifications or alterations of the Agreement** or of any agreement supplemental thereto **may be made by the authority and the Trustee** only to the extent and the circumstances permitted by the Agreement”. **Exhibit 15: Trust Agreement, at 6.** (emphasis added).

67. The Trust Agreement establishes the terms and conditions for the emission of Revenue Bonds. According to the provisions of the Trust Agreement, bondholders are entitled only to payment of “Net Revenues” because the Bondholders’ right to payment is subordinated to the payment of Current Expenses. The Trust Agreement established that Net Revenues “shall mean the amount of the excess of the Revenues for such period over the Current expenses for such period.” **Exhibit 15: Trust Agreement, at 18.**

68. The term “Revenues” is defined by the Trust Agreement as:

all moneys received by the Authority in connection with or as a result of its ownership or operation of the System, including the income derived by the Authority from the sale of electricity generated or distributed by the System, any proceeds of use and occupancy insurance on the System or any part thereof and income from investments made under the provisions of the 1947 Indenture and this Agreement, except income from the investment of moneys in the 1947 Construction Fund, the Construction Fund, the Capital Improvement Fund, the Subordinate Obligations Fund to the extent such income has been derived from the investment

of moneys in such Fund to be used to pay Subordinate Obligations incurred to pay the cost of any work or properties which have not been included by the Authority as part of the System as provided in Section 516 hereof and the Reserve Maintenance Fund which shall be deemed to be a part of said Funds, respectively. **Exhibit 15: Trust Agreement, at 24.**²¹

69. Article V of the Trust Agreement established the way these Revenues are applied to the payment of PREPA's bonds. Section 503 provides that; all Revenues are to be deposited to the credit of the General Fund:

[t]he Authority covenants that, after the outstanding 1947 Indenture Bonds have been paid or provision has been made for their payment and the release of the 1947 Indenture, **all Revenues, other than income from investments made under the provisions of this Agreement, will be deposited** as received in the name of the Authority with a qualified depository or depositories **to the credit of the General Fund** and applied in accordance with the provisions of this Article. **Exhibit 15: Trust Agreement, at § 503.**

70. Moreover, Section 505 states that the money deposited in the General Fund **“will be used first for the payment of the Current Expenses** of the System.” **Exhibit 15: Trust Agreement, at § 505** (emphasis added). Current Expenses are defined as those “reasonable and necessary” for **“maintaining, repairing, and operating** the System and **shall include**, without limiting the generality of the foregoing [...] **any payment to pension or retirement funds [...].” Exhibit 15: Trust Agreement, at 15.** (definition of “Current Expenses”) (emphasis added).

71. Therefore, SREAEE is an intended beneficiary of the Trust Agreement, which has a priority as a current expense. As a result, UTIER members, which are PREPA's employees and retirees, are third-party beneficiaries as well since they rely on the PREPA's ERS financial health to receive their pensions and benefits.

²¹ When the Trust Agreement refers to “Authority” it means PREPA.

72. Similarly, PREPA's employees are intended beneficiaries of the Trust Agreement because it establishes that current expenses are those for **maintaining, repairing and operating the system**. This certainly includes PREPA's employees' payroll. Thus, UTIER, as a representative of PREPA's employees and retirees, is an intended third-party beneficiary of the Trust Agreement.

73. The Trust Agreement established that PREPA has "the power to determine the character of and necessity for all its expenditures and the manner in which they shall be incurred, allowed and paid [...] and such determination shall be final and conclusive upon all officers of the Commonwealth Government [...]." **Exhibit 15: Trust Agreement, at 1.**

74. Furthermore, with regards to rates, Section 502 established that:

[t]he Authority further covenants that it will at all times fix, charge and collect reasonable rates and charges for the use of the services and facilities furnished by the System and that from time to time, and as often as it shall appear necessary, it will adjust such rates and charges so **that the revenues** will at all times be sufficient to . . . pay the Current Expenses of the System . . . **Exhibit 15: Trust Agreement, at § 502.** (emphasis added).

75. The Trust Agreement provisions, show that the Revenues must be applied first to the credit of the General Fund, from which Current Expenses should be covered. The remaining Revenues, after covering the Current Expenses, should be transferred to the Revenue Fund, the Sinking Fund, and the Subordinate Funds. **Exhibit 15: Trust Agreement, at §§ 506, 507.** Thus, the payments of the Bonds must be issued after paying the Currents Expenses.

76. Moreover, referring to the Sinking Fund, the Trust Agreement unequivocally states that

[t]his bond shall not be deemed to constitute a debt or obligation of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth of Puerto Rico nor any such municipalities or other political subdivisions are liable for the payment of this bond or the interest hereon, **but this bond shall be payable as to both principal and**

interest solely from the special fund provided therefor as hereinafter set forth. Exhibit 15: Trust Agreement, at 3. (emphasis supplied).

77. There is no doubt that the only source for the bondholder's payments is the Sinking Fund.

Therefore, is limited and contingent to the payment of current expenses.

78. Further, Section 701 of the Trust Agreement provides that "[r]evenues are hereby pledged to the payment [of the bonds] thereof in the manner and to the extent hereinabove particularly specified." **Exhibit 15: Trust Agreement, at § 701.**

79. In addition, the Trust Agreement provides that PREPA must keep the System in good repair establishing that PREPA will:

enforce reasonable rules and regulations governing the use of the System and the operation thereof, **that all compensation, salaries, fees and wages paid by it in connection with the maintenance, repair and operation of the System will be reasonable, . . . that it will operate the System in an efficient and economical manner**, that it will at all times maintain the System in good repair and in sound operating condition and will make all necessary repairs, renewals and replacements, **and that it will comply with all valid acts, rules, regulations, orders and directions of any legislative, executive, administrative or judicial body applicable to the System. Exhibit 15: Trust Agreement, at § 702.** (emphasis added).

80. UTIER members, as PREPA's employees, and active participants and beneficiaries of the SREAEE, are intended third party beneficiaries of the Trust Agreement. Moreover, UTIER's CBA, SREAEE's By-laws, and the Trust Agreement are binding upon PREPA because they have the force of law. Consequently, PREPA cannot violate them even if it is ongoing a debt restructuring process under Title III of PROMESA. According to the Trust Agreement, the SREAEE and the salaries of PREPA's employees are current expenses of PREPA that are entitled to legal priority under PROMESA. Thus, PREPA must treat the SREAEE and Plaintiffs accordingly and the O&M Agreement should not override those rights and priority.

V. SREAEE's CURRENT FINANCIAL SITUATION

81. As of March 21, 2021, PREPA owes \$603,421,154.05 to SREAEE. **Exhibit 16: Report on PREPA's Debt with the SREAEE.**²² This corresponds to PREPA's employer contributions owed to SREAEE since 2013.
82. Moreover, SREAEE's unfunded liability was projected to be \$2,951,733,780 as of June 30, 2019. **Exhibit 17: Report in the Seventy-Fourth Actuarial Valuation of SREAEE, prepared by Cavanaugh Macdonald Consulting, LLC at 3.**
83. Therefore, any action that harms or further impairs SREAEE financially, will accelerate its insolvency and as a result, UTIER members, as active participants of the SREAEE, and as retirees, will be injured.

VI. O&M AGREEMENT INJURY TO SREAEE

84. The O&M Agreement's terms and conditions will accelerate SREAEE's insolvency. This will further injure UTIER's retirees' chapter and employees since their pensions and benefits will be impaired.
85. The O&M Agreement has already placed PREPA in a budgetary deficit of over \$125 million.²³ This budgetary deficit further cripples PREPA and hinders its ability to repay its operational expenses and its pensions obligations.

²² This document is in Spanish. Notwithstanding, Plaintiffs filed together with this Adversary Complaint, a Motion for Leave to File Documents in Spanish and Extension to file Certified Translation.

²³ PUERTO RICO ELECTRIC POWER AUTHORITY FISCAL YEAR 2021 CERTIFIED BUDGET, <https://drive.google.com/file/d/1yIV664F009bi3UeE9WBHi3J6U6r42tFQ/view> at 3; 2020 FISCAL PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY as certified by the Financial Oversight and Management Board for Puerto Rico on June 29, 2020, <https://drive.google.com/file/d/1paRgy0dJBkUH4-5eev7z2SuR0diil8g9/view?fbclid=IwAR1ztJuq1z1gs9qP7JhZi1AxKync2ZO3kzXYLmIPOsGrzR-kH0L0tvbqIKw> at 10.

86. Furthermore, to comply with the O&M Agreement, PREPA needs a loan of \$894 million from the Central Government that should be repaid with interest.²⁴ This will make it even more difficult for PREPA to comply with its obligations regarding SREAEE, which affects UTIER's members.

87. This precarious economic situation is worsened when considering that the obligations in favor of Luma Energy have been or will be awarded an administrative priority that will force PREPA to pay Luma Energy with priority, preventing it from fulfilling its obligations with SREAEE.²⁵

88. In light of the execution of the O&M Agreement, SREAEE commissioned a special study to Cavanaugh Macdonald Consulting, LLC ("Cavanaugh") to analyze the impact that such agreement would have upon SREAEE's ability to comply with its obligations.

Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study.

89. Cavanaugh performed a 40-year actuarial projection of what will happen to SREAEE in the case that PREPA's employees are hired by Luma Energy, and in the case that they withdraw their assets from SREAEE to Luma Energy's 401(k) Retirement Plan or retire.²⁶

Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study at 1.

90. Its study consists in a baseline projection with no changes to SREAEE benefits and assumes that PREPA will not pay its employer contribution of \$603,421,154.05 to SREAEE and will continue to fund just 34.54% of its employer contribution, instead of

²⁴ Creditor Mediation Cash Support Materials, December 17, 2020, at page 24. Available at: <https://emma.msrb.org/P11535399.pdf> (last visit: April 1st, 2021).

²⁵ See *Memorandum Opinion Granting in Part and Denying in Part PREPA's Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with Luma Energy*, [Dkt. #2258] and *Government Parties' Motion for Order Allowing Administrative Expense Claim for Amounts to be paid to Luma Energy by PREPA during Interim Period Under Supplemental Agreement and the T&D Contract* on March 26, 2021. [Dkt # 2417].

²⁶ Cavanaugh's study assumes that all of PREPA's Employees that are hired by Luma Energy will transfer their assets to Luma's 401(k) Retirement Plan, upon SREAEE's imminent risk of insolvency.

the actuarial determined contributions in the future. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 1.** Under this baseline projection SREAEE will become insolvent by 2024.

91. Furthermore, with this baseline, Cavanaugh provided four scenarios. The first one consists in 1,125 of PREPA employees being hired by Luma Energy and transferring their assets to Luma's 401(k) Retirement Plan or retiring. The second consists in 2,250 of PREPA employees being hired by Luma Energy and transferring their assets to Luma's 401(k) Retirement Plan or retiring. The third one consists in 3,375 of PREPA employees being hired by Luma Energy and transferring their assets to Luma's 401(k) Retirement Plan or retiring. Finally, the last and most prejudicial would be if all 4,500 of PREPA's employees that work in the T&D System are hired by Luma Energy and transfer their assets to Luma's 401(k) Retirement Plan or retire. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 1-2.**

92. In the first scenario, in 2021 SREAEE will have only 13.14% of the funds that needs to pay future pensions and benefits. Meanwhile, in 2022 it will have 8.45%, and in 2023 it will have 0.00%. In such moment, PREPA's contribution will change to a pay-as-you go system, and its employer benefits payment would be \$273.1 million, which is more than 3.47 times of PREPA's current contribution. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 6.**

93. In the second scenario, in 2021, SREAEE will have only 11.02% of the funds that needs to pay future pensions and benefits. Meanwhile, in 2022 it will have 5.47% and in 2023 will have 0.00%. In this moment, PREPA's contribution will change to a pay-as-you go system, and its employer benefits payment would be \$276.5 million, which is 3.51 times

more of PREPA's current contribution. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 6.**

94. In the third scenario, in 2021 SREAEE will have only 8.70% of the funds it needs to pay future pensions and benefits. While in 2022 it will have 0.0%. In this moment, PREPA's contribution will change to a pay-as-you go system, and its employer benefits payment would be \$282.6 million, which is 3.59 times more of PREPA's current contribution. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 6.**

95. Lastly, in the fourth scenario, in 2021 SREAEE will have only 6.17% of the funds it needs to pay future pensions and benefits. While in 2022 it will have 0.0%. In this moment, PREPA's contribution will change to a pay-as-you go system, and its employer benefits payment would be \$286.6 million, which is 3.64 times more than PREPA's current contribution.²⁷ **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 6.**

96. Therefore, the O&M Agreement accelerates SREAEE's insolvency for next year (2022) in the case that 3,3175 or 4,500 of PREPA's employees are hired by Luma Energy and transfer their assets to Luma's 401(k) Retirement Plan or retire. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 2.** "Once the System becomes insolvent, the System will become pay-as-you go. This means that [...] [PREPA] contribution will be equal to the annual benefit obligation due to retirees and beneficiaries." *Id.*

²⁷ Likewise, in the scenario that 4,500 of PREPA's Employees are hired by Luma Energy or retire, Cavanaugh concluded that SREAEE "active population will be reduced by roughly 80%." **Exhibit 12: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 1.** This means that the ultimate number of employees that will remain with PREPA is 1,042, which corresponds to the employees in the generation component of PREPA. *Id.*

97. Thus, it is imminent that the O&M Agreement will cripple PREPA's SREAEE, affecting its capacity of paying pensions and benefits to PREPA's future and current retirees, which are UTIER's members.

98. On the other hand, if PREPA pays its current debt of the nearly \$603 million to SREAEE and funds the actuarial determined contributions in the future, SREAEE would not be insolvent. For instance, if PREPA's employees stay in PREPA and thus, its pension system, by 2024 SREAEE would have 37.15% of the funds it needs to pay the corresponding pensions and benefits, and by 2040, it would have 100.54%. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 7.**

99. And even in the worst scenario that 4,500 of PREPA employees are hired by Luma Energy and transfer their assets to Luma's 401(k) Retirement plan, or retire, in 2024, SREAEE would have 26.73% of the funds it needs to pay future pensions and benefits. This percentage is more than enough to fully fund the trust by 2040, since it would have 100.51% of the funds that it needs to pay the corresponding pensions and benefits. **Exhibit 18: Cavanaugh Macdonald Consulting, LLC, LUMA Study, at 7.**

100. Consequently, it is evident that SREAEE's financial situation could be remedied if PREPA makes the appropriate measures. Particularly, if it pays its current debt and if it makes its employer contributions according to the actuarial reports. Therefore, it is urgent for the solvency of the Retirement System that PREPA treats it as a current expense and gives its lawful priority according to the Trust Agreement and SREAEE's By-laws. Thus, PREPA **must** pay the Retirement System its employer contribution debt of nearly \$603 million.

101. If PREPA fails to pay its current debt and does not make its employer contribution according to the actuarial reports, SREAEE will be insolvent by 2024 even if PREPA's employees remain with PREPA and its pension system.
102. In the current situation where PREPA is not paying its total employer contribution, the O&M Agreement accelerates to next year (2022) SREAEE's insolvency.
103. In addition to the previous facts, the O&M Agreement expressly states that Luma Energy will not be bound to the collective bargaining agreements nor to PREPA's pension system. This means that the nearly \$603 million that PREPA owed SREAEE by June 30, 2020 will not be Luma Energy's responsibility.
104. SREAEE currently has an actuarial deficit that has hindered its ability to pay current and future pensions. This deficit is the result of PREPA's continuous failure to pay what it is bound to. As of today, PREPA has not been complying with its obligations as to the SREAEE since on or around the year 2013. However, this actuarial deficit should have been remedied through the Title III proceedings and other PROMESA oversight operations. Since at least 2018, the FOMB has been working on possible pension reforms for PREPA. As of today, the Fiscal Plan for PREPA still contemplates pension reforms and nothing has happened. This is part of the mandate of PROMESA. See 48 U.S.C. § 2141(b).
105. On the contrary, the transfer of PREPA's operations to Luma Energy and its administrative expense priority worsens these projections and accelerates the deterioration of the trust, because of the damage it does to PREPA, its finances and its ability to reorganize, and the uncertainty surrounding PREPA's future as a corporation.

106. SREAEE currently has over 15,704 members, both active and retired, while PREPA has lost over 40% of its workforce since 2008 due to austerity measures taken by the Legislative Assembly. Moreover, in 2014, SREAEE suffered a massive wave of retirements caused by Act 66-2014 which reduced public employees' fringe benefits. Hundreds of PREPA's workers ended up retiring before this law came into effect to avoid losing their benefits. As a result of this wave of retirements in 2014, SREAEE had to pay \$2.2 million in additional benefits per month. This trend will certainly repeat itself upon the implementation of the contract and the displacement of PREPA's workforce because of the O&M Agreement. See, **Exhibit 3: Partnership Committee Report at 264 (PREPA Management Presentation: Recent Headcount Decline)**.

107. These instances individually and collectively cause an injury to UTIER because as active participants and beneficiaries of SREAEE, it will result in further decapitalization of the pension system and eventually the dissolution of the trust. These pensions are legally acquired benefits which PREPA's retirees and employees depend on for their economic stability and overall survival.²⁸ Nonetheless, with the execution of the O&M Agreement, SREAEE's deficit and insolvency will accelerate, and therefore its active participants and beneficiaries will be significantly harmed.

VII. THE O&M AGREEMENT'S INJURY TO UTIER'S MEMBERS

108. In total disregard of SREAEE's independence from PREPA and its nature as a trust that it is solely administered by its Board of Trustees, on March 5, 2021, PREPA sent a letter to its employees informing about the O&M Agreement's effect upon SREAEE.

²⁸ AMPR, *Educamos v. SRM I*, 190 DPR 854 (2014) and AMPR *Educamos v. SRM II*, 193 DPR 395 (2015) (declaring unconstitutional Act 160-2013 since it substantially impaired unreasonably and unnecessarily, the contractual rights of the active participants and beneficiaries of the Retirement System for Teachers under their pension plan, according to the terms and conditions to a previous law).

Exhibit 19: Transition to LUMA Energy and Participation in the Retirement System of the Employees of the Puerto Rico Electric Power Authority (“PREPA’s Letter”).²⁹

The assumptions and determinations made for PREPA’s employees informed in this letter were not consulted with SREAEE’s Board of Trustees.

109. Regarding its pensions, PREPA’s Letter informed that employees that have worked for 10 years or more have three options: (1) Discontinue future contributions to the SREAEE but continue participating in SREAEE based on past contributions. This means that the employee will participate in Luma Energy’s 401(k) Retirement Plan, as of the date that it starts employment with Luma Energy but will continue participating in SREAEE based on prior contributions. Moreover, unless otherwise provided, all of the employee’s contributions after starting employment with Luma Energy will be made into Luma Energy’s 401(k) Retirement Plan. Also, it is indicated that, contrary to SREAEE, the Luma Energy’s 401(k) Plan will not be subject to reforms according to the Title III proceedings of PROMESA; (2) Discontinue all participation in the SREAEE and transfer prior and future contributions to Luma Energy’s 401(k) Retirement Plan. This option requires the employee to terminate its participation in the SREAEE upon the start of its employment with Luma Energy; (3) Continue participating in the SREAEE. If the employee selects this option, Luma Energy, rather than PREPA, will be making the contributions to the SREAEE as calculated under the PREPA Pension Plan.³⁰ Also, PREPA informed that the employee that selects this option will be at risk since the

²⁹ The first page of this document is in Spanish. Notwithstanding, Plaintiffs filed together with this Adversary Complaint, a Motion for Leave to File Documents in Spanish and Extension to file Certified Translation.

³⁰ According to SREAEE’s By-laws, the employer contribution that is required included actuarial and current debt.

SREAEE is subject to reform under PREPA's bankruptcy proceedings. **Exhibit 19: PREPA's Letter at 5.**

110. It should be noted that this third option contradicts the O&M Agreement, which establishes that Luma Energy will not assume any obligation or debts of PREPA as to SREAEE. **Exhibit 1: O&M Agreement.** at 69.³¹ However, SREAEE's By-laws, require that the employer contribution be comprised of current and actuarial debt.

111. For PREPA's employees with less than 10 years of service, PREPA's Letter informed that the only option that they have is to withdraw from the SREAEE and either have its contributions paid or roll them into Luma Energy's 401(k) Retirement Plan, which also ends up injuring UTIER, as the aforementioned are SREAEE's beneficiaries. The employee will be allowed to roll its accumulated contributions at an annual rate of 5% of interest into the Luma 401(k) Retirement Plan in a nontaxable transaction. The amount attributable to 5% interest could be subject to taxes and withholding. **Exhibit 19: PREPA's Letter at 6.**

112. The contributions of PREPA's employees that have less than 10 years of service under SREAEE and do not roll over their assets to Luma Energy 401(k) Retirement Plan, will be distributed to them. However, taxes and withholding may apply. **Exhibit 19: PREPA's Letter at 6.**

113. PREPA's employees with ten (10) years or more of service that withdraw and/or discontinue its contributions to SREAEE, or the employees with less than ten (10) years

³¹ "Operator shall not assume nor shall it be responsible for any obligations or debts of Owner under Owner's retirement plans. ServCo shall, pursuant to Act 29, make any employer contributions it is permitted to make under Applicable Law to Owner's retirement plan with respect to any Hired Former Employee of Owner that elects to continue participating in Owner's defined benefit retirement plan." It should be noted that these employer contributions under Act No. 29-2009 only apply to employees that have served for at least ten years. See P.R. Laws ann. tit. 27 § 2609(g).

of service that withdraw their contributions from the SREAEE, will lose important benefits such as the right to a pension for the employee's spouse if the employee dies, the right to a pension for disabilities, and the benefits for death during active service or after retirement. **Exhibit 11: SREAEE's By-laws, at 39, 44, 65, and 89.**

114. Some of SREAEE's members have loans with the SREAEE. In the letter, PREPA directed its employees to contact the SREAEE's Administration and the regulations established by PREPA's Pension Plan regarding all matters to their loans. **Exhibit 19: PREPA's Letter at 7.**

115. To protect the funds of the retirement system and the rights and benefits of those employees that stay in the SREAEE, it could be necessary for SREAEE to accelerate the collection of the debts of the loans, and to retain the accumulated contributions of a member that decides to withdraw or transfer its assets.

116. These loans have PREPA's salaries and accumulated contributions as collateral. But, if PREPA's employees withdraw their contributions or if they stopped accruing salaries in PREPA, this collateral would cease to exist. This means that the employee and the SREAEE will have to enter into a new repayment agreement for these loans. **Exhibit 11: SREAEE's By-laws, at 51, 68-70, and 72-74.**

117. Additionally, to secure the payment of any balance, the SREAEE could request the seizure of assets, including up to 25% of those salaries that a participant generates as compensation for its work in Luma Energy.

118. Meanwhile, those employees that remain with PREPA, but outside from the T&D System, will continue to participate in the SREAEE. **Exhibit 19: PREPA's Letter at 6-7.** However, it is unclear who will pay the employer contributions.

119. Employees that are transferred to other agencies will have to consult the mobility plan implemented by the Government of Puerto Rico Human Resources Administration and Transformation under Section 15 of Act 120-2018. **Exhibit 19: PREPA’s Letter at 6-7.**³²

120. As a result of the O&M Agreement’s execution, UTIER’s members, as active participants and beneficiaries of the SREAEE, will suffer an imminent injury to their accrued rights, pensions, and defined benefits under the SREAEE’s By-Laws and the CBA.

VIII. LUMA’S PRIORITY AS AN ADMINISTRATIVE EXPENSE IS CURRENTLY HARMING SREAEE AS A CURRENT EXPENSE

121. Another injury to UTIER as active participants and beneficiaries of the SREAEE is that the pension system’s priority and treatment as a current expense according to the Trust Agreement will be affected. The O&M Agreement contains multiple administrative expense priority provisions. For example, Luma Energy has already been granted administrative expense priority for any payments due for its Front-End Transition period. This priority was partially granted on the threat of Luma Energy invoking a termination clause. *Memorandum Opinion Granting in Part and Denying in Part PREPA’s Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with Luma Energy*, [Dkt. #2258], at 14.³³

³² Notwithstanding, this office does not have jurisdiction upon public corporations. Also, it should be noted that transferring to other governmental agencies is an impractical solution because the FOMB has implemented a hiring freeze on the Government of Puerto Rico. *See* 2020 FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY, <https://drive.google.com/file/d/1ayjLxr74cKpFo4B2sAToSj-OeJOYvFO5/view> at 151 (last visit: March 18, 2021).

³³ “PREPA, moreover, would be harmed if the Motion were not adjudicated now, because such delay would trigger LUMA Energy’s right to terminate the T&D Contract, which, if exercised, would indisputably hinder the transformation

Thus, we can expect that any other administrative expense priority it requests from the Oversight Board it will be granted.

122. The FOMB filed the *Government Parties' Motion for Order Allowing Administrative Expense Claim for Amounts to be paid to Luma Energy by PREPA during Interim Period Under Supplemental Agreement and the T&D Contract* on March 26, 2021. [Dkt # 2417].

123. Through this motion, the FOMB seeks an order from this Court “granting administrative expense treatment for amounts required to be paid by PREPA under the Supplemental Agreement and the O&M Agreement during the Interim Period.” *Id.* at 3. The interim period refers to the period after Interim Service Commencement and before PREPA’s exit from Title III. *Id.* Therefore, if granted, the violation of the Trust Agreement is even more significant, and the harm suffered by SREAEE would be greater, since its priority treatment as a current expense will be further impaired. This constitutes a violation to PROMESA’s protection to lawful priorities.³⁴ Also, PREPA will not have sufficient funds to pay the actuarial debt it owes to SREAEE in further violation of PROMESA³⁵. As a consequence, the SREAEE will not have the necessary funds to pay full pensions and benefits. This will directly affect UTIER’s members as active participants and beneficiaries of the SREAEE.

IX. PLAINTIFFS AS INTENDED THIRD-PARTY BENEFICIARIES OF THE TRUST AGREEMENT

of PREPA’s T&D System—a transformation process that is mandated by Commonwealth law.” This priority is currently being challenged by UTIER and SREAEE in the Court of Appeals for the First Circuit. No. 20-2041.

³⁴ Section 201(b)(1)(N).

³⁵ Section 201(b).

124. According to article 1209 of Puerto Rico’s Civil Code, as a general rule, contracts only affect the parties involved. 21 LPRA § 3374.³⁶ However, contracts are not absolutely indifferent to third parties. The aforementioned article also provides that **contracts may have stipulations in favor of third parties**. Specifically, the precited section states that if the contract contains any stipulation in favor of a third person, **that person may demand its fulfilment**, provided there was prior notice of acceptance. Id.

125. The Supreme Court of Puerto Rico has emphasized that “contracts in favor of third parties are those that, **directly or indirectly**, attribute a right to a third party **that has not participated in the perfection of the contract and is not bound by it.**” Bco. Central Corp. v. Yauco Homes, Inc., 135 D.P.R. 858, 864 (1994) (emphasis added). That is why the Supreme Court of Puerto Rico specified that “in relation to contracts in favor of a third party, **it is not necessary for the third parties to accept the stipulation in their favor because they acquired that right before the acceptance.**” Id. at 865 (emphasis added).

126. However, this acceptance by the third party is relevant insofar as **it subsequently prevents the stipulation that favors the third party from being revoked.** Id. It is a repeated rule that **such acceptance may be express or tacit.** Id.

127. As to the third-party beneficiary doctrine, **first**, it is required that the third party was not a party to the contract and, therefore, is not bound by it. Plaintiffs did not participate in the negotiations and creation of the Trust Agreement. However, in the Trust

³⁶ This article corresponds to the Civil Code of Puerto Rico of 1930, as amended, which was the one in force when the CBA, the Trust Agreement, and the O&M Agreements were executed. Article 338 of the 2020 Civil Code of Puerto Rico is the equivalent to Article 1209 of the former Civil Code of Puerto Rico. Article 9 of the 2020 Civil Code of Puerto Rico establishes that the Law does not have retroactive effects, except when it is expressly stated. Also, that the retroactive effects of a law cannot affect rights acquired pursuant to a previous law. *See* the Civil Code of Puerto Rico, Law 55, approved on June 1, 2020.

Agreement, the bondholders voluntarily agreed to subordinate their payments in the order and manner stated in the Trust Agreement, which prioritizes pension payments and operational expenses.

128. **Second**, the doctrine asks if the stipulation was intended, **directly or indirectly**, to be in favor of third parties. As discussed, PREPA has bound itself to pay its obligations to SREAEE before other obligations and it has also bound itself to make periodic payments to the trust. As active participants and beneficiaries of the SREAEE, UTIER's members are third-party beneficiaries of the Trust Agreement.

129. Specifically, the Trust Agreement is recognized by SREAEE's Bylaws and UTIER's CBA. Article 5, section (2)(a) of SREAEE's By-laws states that:

On a monthly basis, or as frequently as agreed to by the Board of Trustees, the **Authority shall contribute to the Fund created by these Regulations**, a percentage of the compensation of all members which shall be referred to as a regular contribution, and until determined in accordance with Section (2), the Authority shall make another contribution which shall be referred to as accrued obligations contribution. **Exhibit 11: SREAEE By-laws at 96** (emphasis added).

130. Furthermore, under the current CBA between PREPA and UTIER, PREPA is required to periodically contribute to the public pension system. Specifically, UTIER's CBA includes an article titled "Pension System" which specifically concerns PREPA's obligations with the pension system. Under the CBA, PREPA "shall contribute to a special fund in the [SREAEE], during the term of this agreement the necessary amount actuarially calculated to pay a benefit to the [PREPA's retirees]." **Exhibit 2: CBA at 108.**

131. Additionally, under the Trust Agreement, "Current Expenses" are defined as those "reasonable and necessary" for "**maintaining, repairing, and operating the System** [...]." **Exhibit 15: Trust Agreement, at 15.** (definition of "Current Expenses")

(emphasis added). PREPA's employees' salaries are evidently part of the reasonable and necessary expenses for maintaining, repairing, and operating the System. Therefore, the Trust Agreement was intended for the benefit of PREPA's employees, which UTIER represent.

132. The **third** element of the doctrine is if the stipulations in favor of SREAEE and accordingly, its active participants and beneficiaries, was accepted by them as third-party beneficiaries before any revocation occurred. Because PREPA has never revoked these stipulations, it is unnecessary to discuss this issue. However, for the avoidance of doubt, it should be noted that SREAEE has accepted its priority for years. After the agreement was signed, PREPA started paying the contributions to SREAEE according to the Trust Agreement and SREAEE's By-laws. SREAEE accepted them and since then it has been administrating those funds for the benefit of the pensioners and employees, who include Plaintiffs.

133. Under the preceding legal framework, Plaintiffs, as active participants and beneficiaries of the SREAEE, are intended third-party beneficiaries who are entitled to require PREPA to comply with the relevant stipulations. Also, as intended third-party beneficiaries that have demonstrated their acceptance, **the stipulations in favor of SREAEE and Plaintiffs cannot be revoked.** Therefore, Plaintiffs are entitled to enforce such provisions of the Trust Agreement.

134. Thus, UTIER has constitutional standing to pursue the remedies sought in this Complaint.

X. THE O&M AGREEMENT IS NULL AND VOID

A. The O&M Agreement is null and void for Violating Puerto Rico Law and for Constituting a Leonine Agreement

135. Article 1207 of Puerto Rico’s Civil Code established that contracts are null and void if they violate the law and public order. 31 LPRA § 3372.³⁷ While violating the law is a straightforward concept, “public order” is a concept better defined by Puerto Rico jurisprudence.

136. “Public order” is defined as a set of values for the general welfare of a society, the moral and ethical norms that permeate the legal order whether or not they are expressed in any law. See, De Jesús González v. Autoridad de Carreteras, 148 DPR 255, 263-69 (1999). **For that reason, leonine or abusive contracts are contrary to public order and, therefore, null and void.** Id. at 267. Public order is meant to achieve a balance between autonomy and the public welfare. Demeter Int’l v. Secretario de Hacienda, 199 DPR 706, 728 (2018). Nonetheless, **a leonine contract is one where there is no reciprocity, only one of the parties benefits from its clauses**, making it inherently unfair. Additionally, a contract is leonine when the parties do not share **the risks or liabilities** under the contract. See, Id.

137. While the state is generally considered on the same terms as a private contractor for these purposes, “[t]he concept of ‘public order’ set forth in Article 1207 of the Civil Code includes in its content not only the prohibition against unconscionable or unfair contract terms discussed above, but also the public policy set forth in the Constitution which praises the conscientious utilization of public funds.” De Jesús González, 148 DPR. at 269 (citations omitted) (translation supplied). See, also, Demeter Int’l, 199 DPR. at 729.

138. Void contracts are considered never to have existed and, therefore, have no legal effect on the parties. See, Municipality of Ponce v. Vikaret, 65 DPR 370, 381 (1945)

³⁷ The 2020 Civil Code of Puerto Rico has its equivalent in Article 1232.

(“Nullity is a declaration that the contract **never existed** because in the execution thereof one of the essential requisites was lacking. Both rescission and nullity set aside a contract; but rescission does so for equitable reasons which do not really affect its validity. **Nullity does so for reasons which affect its very existence.**” (emphasis added)). Thus, when a contract is declared null and void, the parties must return whatever concessions were given pursuant to the contract.

139. Furthermore, as previously mentioned, if a contract is null, it never existed. Therefore, unlike a voidable contract, **one does not need to be a party to the contract to enforce nullity. One only needs to demonstrate that one has suffered an injury because of the contract.** See, for example, Velco v. Indus. Serv. Apparel, 143 DPR 243, 252 (1997) (“[T]he third party has standing to enforce the nullity of the contract, as long as it shows that the contract injures it or puts its interests in danger.” (translation supplied)).

140. The O&M Agreement violates Act No. 29-2009 which requires that partnership contracts, such as this one, provide for “[t]he **distribution of expenses** between the selected Proponent and the Partnering Government entity.” 27 LPR § 2609(b) (emphasis added). This law states that it is the public policy of Puerto Rico “to **apportion** between the Commonwealth and the Contractor **the risk** entailed by the development, operation, or maintenance of such projects [...]” Id. § 2602 (emphasis added).

141. It also violates Act No. 120-2018 which requires that PREPA Transactions meet the regulatory framework of energy policy.³⁸ See, 22 LPR § 1115(f). For example, this includes that (1) meet certain public policy requirements, (2) protect PREPA’s workers rights and pensions according to their CBA’s, and (3) prevent vertically integrated

³⁸ Puerto Rico’s energy public policy can be found in both Act No. 120-2018 and Act No. 17-2019.

monopolies. The O&M Agreement does not meet these requirements and therefore violates Act No. 120-2018.

142. The O&M Agreement does not meet these requirements because (1) it delegates Puerto Rico's public policy to Luma Energy, without providing public participation, (2) it displaces PREPA's workforce, guts the pension system and removes any liability for PREPA's pension system from Luma Energy while dismantling PREPA and SREAEE; and (3) it creates a vertically integrated private monopoly over energy distribution.

143. To begin with, under the O&M Agreement, Luma Energy takes on the responsibilities of PREPA in the Integrated Resource Plan proceedings, including the renewable energy goals. Yet, the O&M Agreement does not provide any mechanisms for public oversight nor accountability measures with respect to these public policy issues that would be submitted at the sole discretion of Luma Energy.

144. Under Act No. 17-2019, the Integrated Resource Plan is defined as follows:

Shall mean a plan that considers all reasonable resources to satisfy the demand for electric power services during a specific period of time, including those related to energy supply, whether existing, traditional, and/or new resources, and those related to energy demand, such as energy conservation and efficiency, demand response, and distributed generation by industrial, commercial, or residential customers. Every integrated resource plan (IRP) shall be subject to the provisions of this Act and the rules established by the Bureau which shall approve the same. **Every plan shall be devised with broad participation from citizens and all interested groups.** Section 1.2(p) of Act No. 17-2019 (emphasis added).

145. Section 1.9 of Act 17-2019 contemplates that the Integral Resource Plan consists of two stages: devising it by the energy company responsible for of the operation electric system and further, approval by the PREB. 29 LPRA § 1141h. The O&M Agreement does not contemplate public participation of the devising of the Integral Resource Plan. Thus,

the Integral Resource Plan could be amended by Luma Energy without public participation of citizens and the interested groups, in violation of Act 17-2019.

146. Moreover, Section 1.5(10)(c) of Act No. 17-2019 states that part of the energy public policy is “[t]o promote transparency and citizen participation in **every process related to electric power service in Puerto Rico.**” 29 LPRA § 1141d. It also amends Act No. 57-2014 to require government agencies to “promote transparency and citizen participation in energy service-related processes.” Section 5.1 of Act no. 14-2019. As we can see, public participation is an important pillar of this public policy.

147. Yet, the transfer of such public policy processes to Luma Energy eliminates much of the public participation and scrutiny that these laws promote and require. This is especially true at the formulation stage of the Integrated Resource Plan. Whereas PREPA has elected consumer representation by law through at least one member of PREPA’s Governing Board, Luma Energy will not be subject to any such requirement. Thus, the entire formulation process will be shrouded in corporate secrecy rather than the transparency required of public entities.

148. The O&M Agreement takes away that prerogative and eliminates all public influence over the formulation of the Integrated Resource Plan, as well as any other regulation or decision that Luma Energy may make, and which affects the public. The formulation and implementation of Puerto Rico’s energy policy will be in Luma Energy’s hands, but the public will not be a party to the process.

149. Furthermore, Act No. 120-2018 provides that:

Section 15.- Provisions on the Employees of the Electric Power Authority

PREPA's personnel have been critical in restoring the electric power service in the wake of hurricane Maria. Their knowledge of the system is essential to ensure the success of its transformation.

The provisions of this Act and of any Partnership or privatization Contract entered into in connection with PREPA pursuant to this Act, shall not be used by the Government of Puerto Rico as grounds for the dismissal of any regular employee. Any PREPA personnel who opt to remain in the Government of Puerto Rico shall be assigned according to the statutes, regulations, and administrative rules applicable thereto. Likewise, PREPA and the Government of Puerto Rico may devise and offer transition or incentivized voluntary resignation plans.

All regulations adopted shall strictly comply with the provisions of Section 5.2 of Act No. 8-2017, as amended, known as the 'Government of Puerto Rico Human Resources Administration and Transformation Act.' Moreover, the concept of mobility and the mechanism established by the Government of Puerto Rico Human Resources Administration and Transformation Office (HRA TO) to implement the movement of public employees, as established in Act No. 8-2017, shall apply to PREPA in accordance with said Act. Regular PREPA employees who are not selected to work for the Contractors shall retain their positions or be transferred to another position within PREPA or other Government Entities. To such effect, and in conjunction with HRATO, PREPA shall conduct a study to identify the positions that are compatible with the training of PREPA's employees or, in lieu thereof, shall establish retraining plans in order to assign employees who are not selected to work for the Contractors pursuant to the provisions of Act No. 8-2017.

Employees who, as a result of this Act, are transferred under the concept of mobility to another government entity or who become employees of a PREPA Transaction Contractor shall keep all of their vested rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable to them, as well as the privileges, obligations, and status with respect to any existing pension or retirement plan, or savings and loan fund established by law in which such employees were enrolled before the approval of this Act and that are compatible with the provisions of Act No. 26-2017, known as the 'Fiscal Plan Compliance Act.' No regular PREPA employee shall be left unemployed nor lose benefits as a result of any PREPA Transactions." (emphasis added).

150. Despite the clear language of the statute, under the O&M Agreement, Luma Energy does not bind itself to employ any of PREPA's employees, it explicitly rejects the collective bargaining agreements and will not assume the pension system. Therefore, with Luma Energy, all of UTIER's members acquired rights and benefits according to the CBA

will be vanished. Also, as SREAEE's active participants and beneficiaries, Plaintiffs will be affected by the O&M Agreement. This entails a clear violation of Act 120-2018

151. As explained, under the O&M Agreement, PREPA employees with ten (10) years or less of service that are hired by Luma Energy cannot continue participating in the SREAEE. Therefore, these employees will lose their vested right to retire and receive the pensions and benefits as stipulated in UTIER's CBA and the SREAEE's By-laws, in violation of Act 120-2018.

152. Also, the employees that have the option of deciding whether to switch to Luma Energy 401(k) Retirement Plan or stay in the SREAEE will suffer as well since the SREAEE offers more benefits and protection to the retirees, than Luma Energy 401(k) Retirement Plan. SREAEE provides a defined benefit plan while Luma's 401(k) is a define contribution plan. Moreover, the employees that decide to stay in the SREAEE will suffer harm too because they have been told that the SREAEE will be subject to reform under Title III of PROMESA. However, such reform is not necessary if PREPA pays what it owes to the SREAEE.

153. Additionally, UTIER's members that withdraw their contributions and discontinue their participation in the SREAEE that have loans with the Retirement System will be affected too. To balance its deficit, the SREAEE will have to accelerate the collection of the debts of its members and can request a seizure of up to 25% of the salary of a former employee of PREPA that works for Luma Energy.

154. Likewise, Act 17-2019 establishes that the Partnership Contract (the O&M Agreement in this case) has to provide for capital investments in the transmission and distribution network to modernize and/or maintain in optimum conditions, the Island's electric power

grid. Section 1.8(b) of Act 17-2019. The O&M Agreement does not compel Luma Energy to make capital investments in the transmission and distribution network of PREPA. Thus, it is another reason why the O&M Agreement is illegal.

155. Moreover, Act No. 17-2019, which is the basis for the energy public policy of Puerto Rico, states that there cannot be a monopoly over electricity unless it is PREPA that has it: “Puerto Rico’s Electrical System **shall not be a vertical monopoly. A horizontal monopoly** with regards to power generation **may not be established either.**” Section 1.8(a) of Act No. 17-2019. Vertical integration occurs when one company acquires control over the steps in production in the supply chain. Now, while not all vertical integration is necessarily an antitrust violation, a vertically integrated monopolistic structure would be. Of course, this does not apply to state run corporations or public monopolies, only to private monopolies, which is why PREPA’s vertically integrated monopoly is not illicit.

156. As mentioned, according to Act No 17-2019 itself, PREPA is currently a vertically integrated monopoly. Moreover, the O&M Agreement transfers all PREPA’s functions to a private entity, without distinction, thus, creating a **private** vertically integrated monopolistic structure. According to the O&M Agreement, Luma Energy is tasked to manage and operate PREPA’s transmission, distribution system, and dispatch of the energy at the Energy Control Center.³⁹ The dispatch of energy is one of the most

³⁹ The O&M Agreement established that:

Operator shall serve the role of T&D System operator, including (1) **managing control center operations, including generation scheduling and economic/reliable T&D System dispatch**; (2) balancing the supply and demand of electricity, including reacting to changes in demand in real time, adjusting generation dispatch to be in balance with demand and maintaining the T&D System at safe operating levels in accordance with Prudent Utility Practices and System Operation Principles; (3) conduct T&D System planning activities; (4) develop and implement reliability standards appropriate for the conditions in Puerto Rico; and (5) manage a transparent, equitable and open generator interconnection process. **Exhibit 1: O&M Agreement at Annex I, I-C.**

important aspects of generation because at the Energy Control Center it is determined who generates energy and when to use it. Therefore, the O&M Agreement creates an illegal vertically integrated monopoly for a private corporation.

157. Also, by transferring the operation of the Energy Control Center, the O&M Agreement violates Section 4B of the Puerto Rico Electric Power Authority Act, Law 83-1941, as amended, which states that the Energy Control Center must remain independent and autonomous from the entity that operates the generation system. 22 LPRA §195a.⁴⁰

158. Additionally, the O&M Agreement establish that the parties shall develop a “shared services agreement” that shall provide and conditions pursuant to which Luma Energy, as agent of PREPA, “shall provide the GenCo Shared Services to GenCo until the Legacy Generation Assets are retired or until certain of GenCo's operations, including the operating, administrative and/or maintenance functions related to the Legacy Generation Assets, are transferred to one or more private partners.” **Exhibit 1: O&M Agreement at § 4.5.** This violates Section 8(g) of Act 120-2018 that states: “A Contractor under a Partnership or Sales Contract executed in connection with the concession or operation of the Electric Grid [...] may not be a Contractor under a Partnership or Sales Contract executed in connection with PREPA Facilities devoted to electric power generation.” 22 LPRA §1118. According to Law 120-2018, “facilities” includes electric power generation and metering systems. Moreover, Act No. 29-2009 elaborates that “facilities” include “energy production, transmission, or distribution systems.” 27 LPRA 2601(g).

159. Under Act No. 29-2009, when a public-private partnership is established, public policy requires that the public entity and the private partner share the risks of their joint

⁴⁰ Section 27 of Law 83-1941, as amended establish that in the case that any other law approved by the Legislature of Puerto Rico that is in conflict with Law 83-1941, as amended, the latter will prevail.

venture and foster economic development. 27 LPRA § 2602. Moreover, as shown above, the “public order” limitations on contracts forbids one-sided leonine contracts. Nevertheless, the O&M Agreement entered between P3, PREPA and Luma Energy is a leonine and abusive contract where Luma Energy is the only beneficiary and does not share the risks of the transaction.

160. While PREPA is footing the bill for its operations, Luma Energy needs only to perform to receive its fixed fee. Many of the expenses and fees that PREPA must incur to pay Luma Energy will come from local public funds. On the contrary, Luma Energy does not have to incur any costs before the Service Commencement date. To this date, Luma Energy has already billed around \$100 million in public funds just to set shop without it officially starting any performance that benefits PREPA.

161. PREPA's role in the decision-making has been totally impaired. If PREPA and P3 have a disagreement that could generate any conflict for PREPA in the long run, P3 will be the entity in charge of the decision-making and the administration of the Agreements on behalf of PREPA. PREPA is also the public corporation responsible for almost all the risks and problems in any of Luma's services concerning the system. Also, it is responsible for any breach of obligations by P3 and Luma Energy.

162. Moreover, Luma Energy can unilaterally terminate the contract at any time with only a 120-day notice, leaving Puerto Rico with a dismantled PREPA and no other options. In the case of a "force majeure" PREPA will have to incur "extra" expenses because if Luma Energy decides to terminate the contract and leave, it may do so and charge PREPA for all services fees and penalties accrued. PREPA does not derive any benefits from the

O&M Agreement. The O&M agreement provides no benefits for PREPA and even requires that PREPA be dismantled.

163. The agreement is not beneficial to PREPA because it is not cost-efficient, and it does not consider what is in the "best interest of the employees." Instead, the situation regarding PREPA's employees is unknown because, under the contract, Luma Energy decides how many employees it will hire from PREPA. Likewise, there are no vacancies at the time, which will double the costs that PREPA and the Commonwealth will have to incur.

164. Additionally, the O&M Agreement is executed while PREPA is in a grave financial and operational state that is not remedied or considered in the execution. The O&M Agreement deprives PREPA of the means to pay its bondholders and make the necessary employer contributions to the pension system.

165. In addition to these facts, the O&M Agreement grants Luma Energy many other benefits and controls that far outweigh the conveniences that PREPA allegedly gains. Luma Energy will have complete flexibility to reallocate, accelerate or postpone funds and expenses without the prior approval of the corresponding Government entities up to five percent of the budget. It will have the ability to formulate and request changes to the Integrated Resource Plan and will act in PREPA's place in all further proceedings before the PREB. This includes rate proceedings where Luma Energy can, and will, request increases in electricity rates to set-off the budgetary deficit caused by the O&M Agreement. This, specifically, conflicts with Puerto Rico's public policy on reasonable rates.

166. There is an illegal disparity between the obligations, responsibilities, and benefits of the parties in the O&M Agreement. This is shown in **Exhibit 7: Luma Energy O&M Agreement Evaluation**, which is a table that analyzed the content of the different agreements in the O&M Agreement to determine which party is favored and which one is injured. The O&M Agreement is leonine since it benefits in its entirety Luma Energy and it is prejudicial for PREPA. The O&M Agreement has a total of fifty-three (53) agreements; forty-one (41) benefit Luma Energy, eight (8) benefit P3, four (4) are neutral, and none benefit PREPA. **Exhibit 7: Luma Energy O&M Agreement Evaluation.**

167. Therefore, the O&M Agreement is null and should be declared as such. Because UTIER is directly affected by the O&M Agreement, it has standing to raise nullity. Consequently, the Court should declare that the O&M Agreement is null and void, upon which it would cease to exist retroactively and the parties to it would be forced to return their concessions, leaving them in the same conditions as they began. See Article 1255 of Civil Code of Puerto Rico, 31 LPRA §3514.⁴¹ It should be noted that, if the O&M Agreement is null, none of its provisions can be enforced, including the termination clauses.

B. The O&M Agreement violates ERISA

168. The *Employee Retirement Income Security Act* (“ERISA”) is a federal law enacted in 1974 that applies to Puerto Rico. See 29 U.S.C. §1002(10). “Congress enacted ERISA to **protect [...] the interests of participants in employee benefit plans and their beneficiaries** by setting out substantive regulatory requirements for employee benefit

⁴¹ Article 1255 of the Civil Code of Puerto Rico established that “[w]hen the nullity of an obligation has been declared, the contracting parties shall restore to each other the things which have been the object of the contract with their fruits, and the value with its interest, without prejudice to the provisions contained in the following sections.” 31 LPRA §3514.

plans and to provide for appropriate remedies, sanctions, and ready access to the Federal Courts.” Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (citations and quotations omitted) (emphasis added).

169. Moreover, ERISA’s purpose “**is to provide a uniform regulatory regime over employee benefit plans**. To this end, ERISA includes expansive preemption provisions, which are intended to ensure that employee benefit plan regulation be exclusively a federal concern.” Id. (citations omitted) (emphasis added).

170. ERISA was enacted “to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance employee benefits.” McMahon v. Digital Equip. Corp., 162 F.3d 28, 35-36 (1st Cir.1998) (citations omitted) (emphasis added). Additionally, ERISA seeks to protect employers “by eliminating the threat of conflicting **or inconsistent State and local regulation of employee benefit plans.**” Id. (citations omitted) (emphasis added).

171. ERISA established that “[...] the provisions of this subchapter and subchapter III shall **supersede any and 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. §1144(a).

172. Furthermore, ERISA preempts State law that regulates any employee benefit plan if it is maintained or established: “(1) by any employer engaged in commerce or in any industry or activity affecting commerce; (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.” 29 U.S.C. §1003(a). Likewise, ERISA does not

apply to a benefit plan if: (1) such plan is a governmental plan;⁴² (2) is a church plan with respect to which no election has been made under section 410(d) of title 26; (3) is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; (4) is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or (5) is an excess benefit plan and is unfunded. 29 U.S.C. §1003(b).

173. Under ERISA, “State law” “includes all laws, decisions, rules, regulations, **or other State action** having the effect of law, of any State [...]” 29 U.S.C. §1144(c)(1) (emphasis added). Therefore, any state disposition that has direct or indirect effects upon a benefits plan covered by ERISA, such as State laws that affect the structure and administration of the participants’ benefits, is preempted by ERISA. See, Rosario–Cordero v. Crowley Towing & Transp. Co., 46 F.3d 120, 123 (1st Cir.1995).

174. To determine if a State law is preempted by ERISA, it must be addressed (1) “whether the plan at issue is an employee benefit plan”; y (2) “whether the cause of action ‘relates to’ this employee benefits plan” McMahon, 162 F.3d at 36.

⁴² The term “governmental plan” means 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. The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C. 288 et seq.]. The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function). 29 USC §1002(32).

175. Under ERISA, an “employee benefit plan” is “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” 29 U.S.C. § 1002(3).
176. Additionally, a state law ‘relates to an employee benefit plan if it has a connection with or reference to such a plan. Rosario–Cordero v. Crowley Towing & Transp. Co., 46 F.3d 120, 122 (1st Cir.1995). Also, if a State law provides alternative enforcement mechanisms to ERISA’s enforcement regime, such law is preempted. Moreover, ERISA preempts a State law even if such law “is not specifically designed to affect such plan, and even if its effect is indirect.” Id. at 123. As a matter of fact, “a state law with even an indirect effect on an ERISA-covered benefit plan is preempted, even though ERISA by its terms may not necessarily address the topic covered by the state law.” Id.
177. “By preventing states from imposing divergent obligations, **ERISA allows each employer to create its own uniform plan**, complying with only one set of rules (those of ERISA) and capable of applying uniformly in all jurisdictions where the employer might operate.” Id. (emphasis added).
178. According to PREPA’s Letter to its employees regarding the SREAEE, there would be four (4) different retirement systems:
- a. Those employees that decide to discontinue their contributions to SREAEE but continue participating in it as to past contributions. This encompasses a hybrid system where a private employee (that works for Luma Energy), continue participating in and contributes to the SREAEE, which is a public pension system.

- b. Those that decide to discontinue every participation in the SREAEE and transfer all of their past and future contributions to Luma's 401(k) Retirement Plan.
- c. Those that decide to continue participating in the SREAEE. This encompasses a hybrid system where a private employee (that works for Luma Energy), continue participating in and contributes to the SREAEE, which is a public pension system.
- d. Those that decide or have no option other than abandoning the SREAEE and request for the payment of their contributions or to transfer them to Luma's 401(k) Retirement Plan.

179. This means that Luma Energy will have employees under its 401(k) Retirement Plan and other employees related or bound to the SREAEE. Therefore, there would be no uniformity in Luma's 401(k) Retirement Plan, since employees would have different rules depending on their relationship with the SREAEE.

180. For instance, under Luma's 401(k) Retirement Plan, Luma Energy will make an employer contribution of 5%, but it would have to make a different contribution regarding its employees in the SREAEE. In fact, there is uncertainty as to how much would Luma Energy will contribute to the SREAEE, since the O&M Agreement establishes that Luma Energy will not assume PREPA's current debt of \$603 million nor the actuarial debt.

181. This can cause that Luma Energy's contribution to the SREAEE be insufficient for an employee to retire which ends up injuring UTIER's members, as active participants of the SREAEE. Also, in the case that Luma Energy does not make its full contribution, the employee participant in the SREAEE would have to contribute from its peculium to make

up for the difference. Additionally, the rules of Luma's 401(k) Retirement Plan and the SREAEE are different.

182. Therefore, the O&M Agreement violates ERISA since it does not establish a uniform regulatory pension system for Luma Energy's employees, creates the possibility of conflicting or inconsistent regulations regarding the benefit plans of the employees, and cause divergent obligations.

183. Also, the O&M Agreement, which constitutes state action, regulates aspects that are preempted by ERISA. For example, an employee for Luma Energy that continues participating in the SREAEE does not have an assurance that Luma Energy will contribute the full amount, which implies that such employee would have to save the difference from its own assets. This affects the benefits of Luma Energy's employees that continue participating in the SREAEE. Therefore, the O&M Agreement has an effect upon the regulation of ERISA, since it restricts the option of a benefit plan regarding its administration, structure or benefits.

184. In sum, the O&M Agreement established a private retirement plan with a duplicity of rules and benefits that conflict with the uniformity purposes of ERISA, and Congress' interest of protecting employees' benefits regulated by ERISA.

185. Therefore, UTIER members, as active participants and beneficiaries of the SREAEE, will be affected by the enforcement of the O&M Agreement in violation of ERISA, since there is no uniformity in Luma's 401(k) Retirement Plan. Also, the O&M Agreement dispositions regarding the pension systems are preempted by ERISA, because it affects the structure and administration of the employees' benefits, which are a federal concern.

186. Thus, the O&M Agreement is unconstitutional since it violates principles of federalism and the Supremacy Clause of the U.S. Constitution, which prohibit States from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government.

187. For this reason, the O&M Agreement is null and void because it contradicts ERISA.

188. Consequently, UTIER's members, which are under the scope of protection of ERISA, are harmed by the O&M Agreement and thus, have constitutional standing to bring this claim.

C. The O&M Agreement violates PROMESA

189. Section 201(b)(1)(B) and (C) provide: "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 [...]." 48 U.S.C. § 2141(b).

190. Moreover, Section 201(b)(1)(N) of PROMESA establishes that the fiscal plans must protect the lawful priorities that were in effect before the enactment of PROMESA.

191. Despite that the O&M Agreement is not a fiscal plan *per se*, it was approved by the FOMB, P3, and the PREB. Also, its provision and effects are comprised in the current certified Fiscal Plan for PREPA. The O&M Agreement takes control over the T&D System of an essential public service, which is energy. Also, the O&M Agreement creates a private monopoly of the transmission and distribution of energy in Puerto Rico. Therefore, it must comply with Sections 201(b)(1)(B) and (C) of PROMESA and provide

funding for PREPA's public pension system and ensure the funding for this essential service.

192. Although the O&M Agreement has been labeled as only transferring the operation of the T&D System to Luma Energy, the practical effect of the transaction is that Luma Energy is taking over all PREPA's functions including the dispatch of energy at the Energy Control Center. **Exhibit 1: O&M Agreement at Article 5 and 62.** Thus, it is a privatization of the public utility and the constitution of a new private monopoly.

193. Likewise, it displaces PREPA's workforce, guts the pension system and removes any liability for PREPA's pension system's obligations from Luma Energy while dismantling PREPA. Under the O&M Agreement, **Luma Energy explicitly rejects the collective bargaining agreements and will not assume the public pension system of PREPA. Exhibit 1: O&M Agreement, at 29 and 69.** Furthermore, the O&M Agreement established that Luma Energy will not assume any obligation or debts of PREPA as to SREAEE. **Exhibit 1: O&M Agreement, at 69.** Therefore, the O&M Agreement violates PROMESA as it does not provide adequate funding for PREPA's public pension system.

194. Additionally, Luma Energy was granted administrative expense priority for any payments due for its Front-End Transition. This priority was partially granted on the threat of Luma Energy invoking a termination clause. *Memorandum Opinion Granting in Part and Denying in Part PREPA's Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with Luma Energy*, [Dkt. #2258]. Thus, SREAEE's treatment as a current expense and priority

under the Trust Agreement has been impaired in violation of Section 201(b)(1)(N) of PROMESA.

195. Currently, this Honorable Court has before it the *Government Parties' Motion for Order Allowing Administrative Expense Claim for Amounts to be paid to Luma Energy by PREPA during Interim Period Under Supplemental Agreement and the T&D Contract on March 26, 2021*. [Dkt # 2417]. Through this motion, the FOMB on behalf of PREPA, seeks an order from this Court “granting administrative expense treatment for amounts required to be paid by PREPA under the Supplemental Agreement and the O&M Agreement during the Interim Period.” *Id.* at 3. The interim period refers to the period after Interim Service Commencement and before PREPA’s exit from Title III. *Id.* Therefore, if granted, the violation of the Trust Agreement is even more significant, and the harm suffered by SREAEE would be greater, since its treatment as a current expense will be further impaired. PREPA’s will not have sufficient funds to pay the actuarial debt it owes to SREAEE. Consequently, PREPA’s retirees and employees will suffer since SREAEE will not have the necessary funds to pay pensions and benefits.

196. Thus, the O&M Agreement violates PROMESA, and it must be declared null and void accordingly.

D. Contract in Prejudice to Third Party

197. Under Puerto Rico law, it is unlawful to execute a contract that prejudices a third party, being incompatible with an existing legal obligation. Thus, **if a party knowingly does so**, that contract may be declared null and void. See Dennis v. City Federal Savings and Loan Ass’n, 121 DPR 197 (1988); 31 LPRA § 5141.

198. This cause of action requires (1) that a third party be affected; (2) that the third party suffers an injury; (3) that a causal nexus exists; and (4) that there is intent to cause the injury. Id. at 212. To prove intent, it is enough for the injured third party to demonstrate that the contracting parties acted with knowledge of its position. Dennis v. City Federal Savings and Loan Ass'n, 121 DPR 197, 215 (1988).

199. The consequence of a contract being in prejudice of a third party is that the same is null and void, but the injured party may also be entitled to damages. Id. 216-18. Void contracts are considered never to have existed and, therefore, have no legal effect on the parties. See Vikaret, 65 P.R. Dec. at 381.

200. As explained, in the civil and damages context, “intention” means acting with knowledge that such action will cause an injury. See Dennis v. City Federal Savings and Loan Ass'n, 121 DPR 197, 215 (1988). In the present case, P3, PREPA, and Luma Energy executed the O&M Agreement with knowledge that this would directly affect, PREPA’s employees and the SREAEE. All three parties to the O&M Agreement acted with knowledge of the effect the O&M Agreement would have on Plaintiffs, even including stipulations to that effect. For instance, the O&M Agreement explicitly rejects collective bargaining agreements. The parties to the O&M Agreement acted intentionally because they knew that Plaintiffs would be substantially affected by this transaction, since UTIER’s CBA, with all its rights and benefits, will be rejected by Luma Energy.

201. Moreover, the O&M Agreements is incompatible with PREPA’s obligations with SREAEE because under the O&M Agreement Luma Energy has no liability for pension obligations and PREPA is dismantled. Without PREPA’s workforce and contributions, the trust will be completely decapitalized and there will be no way for PREPA to make

up its delinquent payments. As SREAEE's active participants and beneficiaries, UTIER members will be deprived of their vested rights according to the SREAEE's By-laws and the CBA.

202. As a result, and consequence of these actions, UTIER has suffered injury. PREPA will be dismantled and the SREAEE is on the brink of collapse due to the decapitalization of pensions and the displacement of PREPA's workforce which feeds into the trust. Also, Luma Energy will not assume any debt that PREPA had with the SREAEE.

XI. THE O&M AGREEMENT CONSTITUTES A TORTIOUS INTERFERENCE

203. Under Puerto Rico law, it is unlawful to interfere with the obligations of other. Thus, if a third party knowingly interferes in an obligation it is not a party to and causes injury, that party is liable for the damages. See General Office Prods. Corp. v. A.M. Capen's Sons, 115 DPR 553, 558 (1984). This cause of action requires (1) that there is a contract in which a third party interferes; (2) that fault is present; (3) that the plaintiff suffers an injury and (4) that said injury is a consequence of the tortious acts of the third party. See Dolphin Int'l of PR v. Ryder Truck Lines, 127 DPR 869, 879 (1991).

204. Additionally, Puerto Rico law recognizes that contracts may have third-party beneficiaries with the right to enforce the contract provisions. See Banco Central Corp. v. Yauco Homes, Inc., 135 P.R. Dec. 858, 863-65 (1994).

205. In the present case, UTIER is evidently a party to the CBA, and an intended third-party beneficiary of the Trust Agreement. The Commonwealth, P3 and Luma Energy interfered with those contractual and legal obligations with fault through the terms of the O&M Agreement. As a result, and consequence of these actions, UTIER has suffered injury since the O&M Agreement explicitly rejects collective bargaining agreements and

will not assume PREPA's pension obligations as to the SREAEE. Therefore, UTIER members will be deprived of their acquired rights and benefits accordingly.

206. Thus, the O&M Agreement constitutes a tortious interference with UTIER's CBA and the Trust Agreement and Plaintiffs rights under both contracts.

XII. THE O&M AGREEMENT VIOLATES THE CONTRACT CLAUSE

207. The U.S. Constitution states that the State will not pass laws that impair contractual obligations. U.S. Const. art. I § 10 cl. 1.

To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance a significant and legitimate public purpose. Sveen v. Melin, 138 S. Ct. 1815, 1821-22 (2018) (citations and quotation marks omitted).

208. The initial "inquiry is broken down into three separate elements: (1) whether there is a contractual relationship, (2) whether a change in law impairs that contractual relationship, and (3) whether the impairment is substantial." UAW Int'l Union v. Fortuño, 645 F. Supp. 2d 56, 60 (D.P.R. 2009).

209. To begin with the first element, whether a contractual relationship exists is a state law issue. In Puerto Rico, a contract exists from the moment that the parties agree to be bound by it and the elements for such a contract are met. See 31 LPRA § 3371, 3391.

210. The next element is whether a change of law substantially impairs that contractual obligation. First, it should be noted that the Contract Clause "applies to **every form in which the legislative power of a State is exerted** [including an] order of other instrumentality of the State **exercising delegated legislative authority.**" Arraiga v.

Members of Board of Regents, 825 F. Supp. 1, 9 (D. Mass. 1992) (emphasis added). See, also, Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632, 638-39 (1912) (“This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from **a subsequent exertion of the legislative power of the State** [...]. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented.”(citations omitted)(emphasis added)); Grand T. W. R. Co. v. Railroad, 221 U.S. 400, 403 (1911)(“Observing first, that the order is a legislative act by an instrumentality of the State exercising delegated authority, is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution [...].”(citations omitted)).

211. Therefore, whether there is a change in state law is a broader question than whether there is a statute. The question is whether there is an exercise or exertion of legislative power. For example, in Arraiga v. Members of Board of Regents, the District Court of Massachusetts found that a raise in university tuition resulted “from a subsequent exertion of legislative power of the State[,]” 825 F. Supp. at 10, pursuant to the requirements of the Contracts Clause, because “but for the legislation the non-resident tuition increases would not have been implemented.” Id. at 11. “Thus, it can fairly be said that if a contract has been impaired, it has been impaired by an exertion of legislative power.” Id.

212. Moreover, “[w]hether an impairment is substantial requires the Court to consider the expectations of the parties to the alleged contract.” Me. Educ. Ass’n Benefits Tr. v. Cioppa, 842 F. Supp. 2d 373, 383 (D. Me. 2012) (citations and quotation marks omitted).

This “requires a court to consider the parties’ reasonable expectations to the alleged contract.” Universal Ins. Co. v. DOJ, 866 F. Supp. 2d 49, 67 (D.P.R. 2012) (citations omitted). The “severity of the impairment measures the height of the hurdle the state legislation must clear [...]. If there is severe impairment, however, then there must be a careful examination of the nature and purpose of the state legislation.” Id. at 68 (citations and quotation marks omitted).

213. If these elements are met, the following inquiry is on the reasonableness of the impairment. “[T]he First Circuit held that ‘even a state law that creates a substantial impairment does not transgress the Contract Clause as long as it is appropriate for, and necessary to, the accomplishment of a legitimate public purpose.’” UAW Int’l Union v. Fortuño, 645 F. Supp. 2d 56, 61 (D.P.R. 2009) (citing Houlton Citizens’ Coalition v. Town of Houlton, 175 F.3d 178, 191 (1st Cir. 1999)).

[T]he reasonableness inquiry asks whether the law is 'reasonable in light of the surrounding circumstances, and the necessity inquiry focuses on whether Puerto Rico imposed a drastic impairment when an evident and more moderate course would serve its purposes equally well. Some factors to consider in analyzing these questions include: whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency. UAW Int’l Union v. Fortuño, 633 F.3d 37, 45-46 (1st Cir. 2011)(citations, quotation marks and brackets omitted).

214. Because the Commonwealth, PREPA and P3 are public entities acting pursuant to delegated legislative authority, they are subject to the Contracts Clause. In fact, the execution of the O&M Agreement is an exertion of state legislative power to the extent that it exerts the delegated legislative authority of Act No. 120-2018 and is the result of a joint administrative effort. In summary, but for the legislative delegation in Act No. 120-2018, the O&M Agreement would not exist, and it is, therefore, a direct result and

governmental expression of Act No. 120-2018, which expressly authorizes PREPA and P3 to execute regulations and PREPA Transactions and which lays out the statutory requirements and limits.

215. In the present case, there are two contractual obligations that are impaired by the O&M Agreement: (1) the CBA and (2) the Trust Agreement. As described above, these are contractual obligations that PREPA entered into before the execution of the O&M Agreement.

216. First, the O&M Agreement explicitly rejects collective bargaining agreements. Thus, this by its own consequence, involves a substantial impairment to UTIER's CBA, since it will be non-existent.

217. Additionally, as explained, Luma's Employment Letter offers contains ten (10) terms and conditions that dictate the work relationship between Luma Energy and their employees. Such terms and conditions encompass just a few rights and benefits that Luma Energy's employees will enjoy. In contrast, under UTIER's CBA, its members have around thirty-one (31) rights and benefits that encompass a wide variety of areas such as vacation and sick leave and pay, job classifications, maternity leave, considerations as to high-risk jobs that PREPA's employees must engage in, trainings for vacancies or higher positions within PREPA, transfer expenses among others. See Section III of this Complaint for a thorough explanation and comparison of UTIER's CBA and Luma's Employment Letter. Thus, UTIER's members rights and benefits under the CBA have been substantially impaired by the O&M Agreement.

218. On the other hand, the Trust Agreement specifically gives pension benefits, along with other current expenses such as operational expenses, a priority status which is

impaired by Luma Energy's newly acquired administrative expense priorities. As already explained in the "Parties" section of this complaint, the Trust Agreement established that the SREAEE and PREPA's employees are a current expense of PREPA. This means that they should be paid with priority among other creditors and bondholders.

219. Thus, there has been a substantial impairment of the Trust Agreement as well. The next prong requires to analyze whether the O&M Agreement has a legitimate public purpose. As explained, the O&M Agreement violates Act 120-2018, Act 17-2019, Act 29-2009, Act 83-1941, 57-2014, ERISA and PROMESA. Therefore, it does not have a legitimate public purpose.

220. Additionally, there is an illegal disparity between the obligations, responsibilities, and benefits of the parties in the O&M Agreement. This is shown in **Exhibit 7: Luma Energy O&M Agreement Evaluation**, which is a table that analyzed the content of the different agreements in the O&M Agreement to determine which party is favored and which one is injured. The O&M Agreement is leonine since it benefits in its entirety Luma Energy and it is prejudicial for PREPA. The O&M Agreement has a total of fifty-three (53) agreements; forty-one (41) benefit Luma Energy, eight (8) benefit P3, four (4) are neutral, and none benefit PREPA. **Exhibit 7: Luma Energy O&M Agreement Evaluation**. Consequently, the O&M Agreement lacks a legitimate public purpose. See, Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 412 ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, **rather than providing a benefit to special interests**") (emphasis added).

221. Even if the O&M Agreement has an important public purpose, the impairment is not reasonable and necessary to serve such purpose. The O&M Agreement is an exertion of

legislative power meant to transform the T&D System and modernize the electric system, which is contained in Act No. 120-2018. However, the same law embodies the interest of protecting PREPA's employees and retirees. Yet, the O&M Agreement impairs PREPA's obligations under the CBA and the Trust Agreement.

222. Moreover, since it is a contract, the O&M Agreement could have been framed as a public-private partnership for the administration of PREPA by Luma Energy. Also, it could have been agreed to preserve the administrative and operational structure of PREPA, maintaining the workforce, labor rights per the collective agreements, and the administrative manuals applicable to management, with clear definitions of Luma Energy's managerial prerogatives. All of these could have been accomplished without impairing PREPA's decision-making power over public policy matters, federal funds, network reconstruction, renewable energy, and tariffs.

223. Therefore, it is evident that an alternate course could be taken to advance the state interest of the O&M Agreement without impairing the CBA and the Trust Agreement, thereby causing drastic injury to UTIER's members and the countless people that will be affected, including their families.

224. The O&M Agreement did not need to reject collective bargaining agreements to promote the modernization of the electric system in Puerto Rico. Neither did it need to deprive SREAEE of its funding in order to promote the modernization of the electric system, since Act 120-2018 unequivocally established that the vested rights of PREPA's employees and pension benefits have to be recognized and protected by the private company, that in this case is Luma Energy. Also, the O&M Agreement should be

redesigned to preserve the administrative and operational structure of PREPA, which includes maintaining UTIER's CBA.

225. Thus, the impairment of these obligations does not serve a legitimate state interest. It does not even have a reasonable relationship with the interests of the O&M Agreement or Act No. 120-2018. There is no correlation to be found between impairing the CBA or the Trust Agreement and those interests.

226. The O&M Agreement could have been executed without impairing or interfering with the Plaintiffs acquired rights and benefits. The O&M unnecessarily eliminates these benefits and removes CBA and the SREAEE from Luma Energy's obligations while dismantling PREPA in a way that it will be unable to meet those obligations. The O&M Agreement could have provided clauses that protect the collective bargaining agreement and the pension system in compliance with Act 120-2018. See **Exhibit 7: Luma Energy O&M Agreement Evaluation** for a detailed explanation of each agreement, and the alternatives that the Government had to transform and modernize the electrical system without impairing the contractual obligations of PREPA and UTIER.

227. Likewise, since the O&M Agreement is a contract, it was negotiated. Therefore, it is evident that the parties could have establish other terms to transform the electric system in Puerto Rico.

228. Moreover, since Act No. 120-2018 protects PREPA's employees and retirees, the O&M Agreement was bound by it and was barred from impairing UTIER's CBA, affecting PREPA's employees and retirees.

229. Furthermore, the public interest is not served by the impairment of the pension system.

There is no rational relationship between the interest and the impairment, which is a grave one that affects other public interests directly.

230. As a result, and consequence of these actions, Plaintiffs, as employees, and active participants and beneficiaries of the SREAEE have suffered an injury. UTIER's existence will be vanished by the OM Agreement and the SREAEE is on the brink of collapse due to the decapitalization of pensions and the displacement of PREPA's workforce which feeds into the trust. Thus, UTIER have constitutional standing for this action and the O&M Agreement is unconstitutional.

XIII. ACT NO. 29-2009 IS UNCONSTITUTIONAL

A. Act No. 29-2009 violates the Appointment Clause of the Constitution of Puerto Rico.

231. The Constitution of Puerto Rico states that the Governor:

shall appoint, in the manner prescribed by this Constitution or by law, all officers whose appointment he is authorized to make. He shall have the power to make appointments while the Legislative Assembly is not in session. Any such appointments that require the advice and consent of the Senate or of both houses shall expire at the end of the next regular session. P.R. Const. Art. IV, §4.

232. Moreover, Article V of the Constitution of Puerto Rico provides that "for the purpose of exercising executive power, the Governor shall be assisted by Secretaries whom he shall appoint with the advice and consent of the Senate." P.R. Const. Art. V. Thus, the process for appointing an officer of Puerto Rico is through the Governor's appointment **with** the advice and consent of the Senate.

233. The U.S. Constitution has its equals in Article II, § 2, cl. 2-3. The Supreme Court of the U.S. elaborated on the Appointments Clause purpose in Ryder v. U.S., 515 U.S. 177 (1995). It established that "the [Appointment] Clause is a bulwark against one branch

aggrandizing its power at the expense of another branch, but it is more: it “preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.” *Id.* at 182. Therefore, the Appointments Clause impedes a violation of the Separation of Power, which is the base of the United States’ tripartite system.

234. However, regarding the appointment of the Board of Directors of P3, Article 5(b) of Act No. 29-2009 states that:

The duties and powers of the Authority⁴³ shall be discharged by a Board of Directors, which shall establish the public policy of the Authority, in order to fulfill the objectives of this Act. The Board shall be constituted by five members, to wit: the President of the Bank; the Secretary of the Treasury; the President of the Planning Board; and two (2) persons in representation of the public interest. **To select public interest representatives, each Presiding Officer of the Legislative Bodies shall submit a short list of three candidates to the Governor. The Governor, in his/her sole discretion, shall evaluate the recommendation made by the aforesaid and shall choose one (1) person from each short list.** If the Governor were to reject the persons recommended to represent the public interest, the Presiding Officers of the Legislative Bodies shall then submit another short list of three candidates. However, as long as all members that compose the Board are not chosen, it shall be deemed that the Board has not been constituted and the same shall be unable to make any agreements. None of the members of the Board may be public or elected officials. Public interest representatives may be removed from the Board by the Governor. If any vacancy were to be created in the Board by a public interest representative, such vacancy shall be filled by using the same appointment procedure established in this Section. Public interest representatives shall hold office for a four (4)-year term. The President of the Bank, the Secretary of the Department of the Treasury and the President of the Planning Board shall hold office for the duration of their term of appointment. 27 LPRA §2604(b). (emphasis added).

235. As shown, Act No. 29-2009 provides that the P3’s Board of Directors shall be constituted of five (5) members, two of which shall represent the public interest and must be appointed by the Governor of Puerto Rico. However, even though P3 is an agency of

⁴³ “Authority” means “P3” within the text of Act No. 29-2009.

the Executive Branch of Puerto Rico, is did not provided that such board members that represent the public interest must be appointed with the advice and consent of the Senate.

236. Thus, Article 5(b) of Act No. 29-2009 is unconstitutional for violating the Appointment Clause of the U.S. Constitution. This means that the P3 Board of Directors was appointed illegally. Thus, all of the P3' Board of Directors' members' actions taken pursuant to the powers delegated to them by virtue of Act No. 29-2009, including the selection of Luma Energy and the execution of the O&M Agreement, should be declare null and void *ab initio*.

B. Act No. 29-2009 violates the Supremacy Clause of the U.S. Constitution.

237. The Supremacy Clause of the U.S. Constitution states that:

The Constitution, and the laws of the United States which shall be made un pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. U.S. Const. Art. VI, cl. 2.

238. Moreover, under the Supremacy Clause, the U.S. Supreme Court has interpreted that all federal laws that preempt state regulation on other material, shall be superior and must prevail. In the present case, Act No. 29-2009 regulate the same matter as ERISA, regarding private pension systems. As explained in this Complaint, ERISA's purpose "is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive preemption provisions, which are intended to ensure that employee benefit plan regulation be exclusively a federal concern." Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (citations and quotations omitted) (emphasis added).

239. Accordingly, ERISA established that "[...] the provisions of this subchapter and subchapter III shall **supersede any and 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. §1144(a).

240. Furthermore, ERISA preempts State law that regulates any employee benefit plan if it is maintained or established: “(1) by any employer engaged in commerce or in any industry or activity affecting commerce; (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.” 29 U.S.C. §1003(a). ERISA does not apply to public-pension systems.

241. To determine if a State law is preempted by ERISA, it must be addressed (1) “whether the plan at issue is an employee benefit plan”; y (2) “whether the cause of action ‘relates to’ this employee benefits plan.” McMahon, 162 F.3d at 36.

242. Under ERISA, an “employee benefit plan” is “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” 29 U.S.C. § 1002(3).

243. Additionally, a state law ‘relates to an employee benefit plan if it has a connection with or reference to such a plan. Rosario–Cordero v. Crowley Towing & Transp. Co., 46 F.3d 120, 122 (1st Cir.1995). “By preventing states from imposing divergent obligations, ERISA allows each employer to create its own uniform plan, complying with only one set of rules (those of ERISA) and capable of applying uniformly in all jurisdictions where the employer might operate.” Id. (emphasis added).

244. However, Section 10(g) of Act 29-2009 establishes that PREPA’s employees that participate in the SREAEE “who ha[ve] ten (10) years or more of service accumulated and [are] part of a Partnership, shall maintain the vested rights under said system and

may continue to make [their] individual contribution to the retirement System, and [their] new employer shall make its employer contribution.” This means that the private-public partnership between PREPA and Luma Energy will cause that PREPA’s employees transfer to Luma Energy and at the same time, stay as participants in the SREAEE. This will result in the SREAEE losing its exemption of ERISA, because it will no longer be a solely public pension system.

245. The fact that PREPA’s employees can be transferred to Luma Energy and keep participating in the SREAEE converts the latter into a **private-public** system, and therefore it has a direct effect upon the benefit plans covered by ERISA. Nonetheless, ERISA preempted Article 10(g) of Act No. 29-2009 and therefore, the latter is unconstitutional under the Supremacy Clause. Thus, Article 10(g) of Act No. 29-2009 is unconstitutional, and accordingly, must be declared null and void *ab initio*.

C. Act No. 29-2009 violates the Contract Clause of the U.S. Constitution

246. As explained earlier in this Complaint, the Contract Clause of the U.S. Constitution provides that States are prohibited from impairing the obligations of contracts, unless it has a legitimate and important purpose, and the impairment is reasonable and necessary to achieve such governmental purpose. United Auto v. Fortuño, 633 F.3d 37 (2011); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). When a public contract has been impaired, less deference must be given to the legislative assessment of reasonableness and necessity of the impairment because the State’s self-interest is at stake. Fortuño, 633 F.3d at 41-42.

247. In this case, UTIER’s members are active participants and beneficiaries of the SREAEE. Accordingly, pursuant to the SREAEE’s By-laws, Plaintiffs have acquired

benefits and rights that would be substantially impaired by Act No. 29-2009's preemption by ERISA. See, AMPR, Educamos v. SRM I, 190 DPR 854 (2014); and AMPR Educamos v. SRM II, 193 DPR 395 (2015) (declaring unconstitutional Act 160-2013 since it substantially impaired, unreasonably and unnecessarily, the contractual rights of the active participants and beneficiaries of the Retirement System for Teachers under their pension plan, according to the terms and conditions of a previous law).

248. This impairment would be unreasonable since there is no rational link between impairing and depriving UTIER's members of their acquired rights and benefits as to the pension plan and modernizing and repairing the electrical grid in Puerto Rico.

249. Additionally, the measures in Act No. 29-2009 are not necessary because the legislature had other alternatives to achieve its purpose. For example, it could have maintained the SREAEE as a public pension system, instead of converting it into a hybrid system subject to ERISA.

250. Therefore, Section 10(g) of Act No. 29-2009 violates the Contract Clause of the U.S. Constitution. Consequently, Section 10(g) of Act No. 29-2009 is null and void *ab initio*.

XIV. BY VIRTUE OF LAW PREPA HAS TO PAY ITS CURRENT EMPLOYER CONTRIBUTION DEBT

251. As explained, the Trust Agreement established that the SREAEE is a current expense for PREPA. Consequently, SREAEE is entitled to priority payment among PREPA's obligations, and UTIER's members, as active participants and beneficiaries of the SREAEE, have standing to ensure that PREPA pays its employer contribution debt.

252. According to its provisions, the Trust Agreement is a legal, valid, and binding obligation for PREPA. The Trust Agreement is a contract that has the force of law between the parties. López v. Camara, 155 DPR 713 (2001). Thus, by virtue of law,

PREPA has to pay its employer contribution debt, which has been accumulated since 2013.

253. Moreover, it consists in a lawful priority that was in effect before the enactment of PROMESA. Therefore, this priority must be respected by Defendants.

254. Also, the SREAEE's By-laws establish that PREPA must pay its employer contribution according to the actuarial valuations for each year. **Exhibit 11: SREAEE's By-Laws, at 93-99.** Specifically, the SREAEE's By-Laws state that PREPA "shall contribute to the Fund created by these Regulations, a percentage of the compensation of all members which shall be referred to as a regular contribution, and until determined in accordance with Section (2), the Authority shall make another contribution which shall be referred to as accrued obligations contribution." *Id.* Additionally, the SREAEE's By-laws indicate that "[t]he total amount to be paid annually by [PREPA] shall *not* be lower than the sum of the percentages of the compensation of all members known by the percentage of regular contribution and the percentage of accrued obligations contribution [...]." *Id.*

255. Payment by PREPA of its current obligations with SREAEE is vital to maintain its solvency and protection of the rights and benefits of participants and retirees. Payment also complies with the obligations of PROMESA that required adequate funding to the public pension systems.

256. The SREAEE's By-laws constitute internal regulations of PREPA that have the force of law, and therefore, are binding for PREPA and the retirement system. Thus, PREPA has to comply with it and any violation to the By-Laws consists in a breach of its legal obligations. See Section 5(c)(4) of the Puerto Rico Electric Power Authority Act, Act No.

83 of May 12, 1941, as amended. 22 LPRA §191 et seq. As a consequence, PREPA's failure to pay its full employer contribution is a violation of the Trust Agreement and SREAEE's By-laws which have the force of law and thus, are binding to PREPA.

257. The bankruptcy process does not allow a debtor to violate the law to be able to restructure its debts. Moreover, the "honest debtor" concept requires PREPA to act lawfully. In Lockerby v. Sierra, 535 F.3d 1038, 1042 (9th Cir. 2008) the Ninth Circuit established that conflating a tortious conduct with intent to injure conflicts with the fundamental policy of bankruptcy law of relieving an "honest debtor" from the weight of oppressive indebtedness.

258. As a consequence, PREPA is not an "honest debtor" because the O&M Agreement is a contract that was entered into by PREPA with the knowledge and intention of causing injury to UTIER's members in violation of the Trust Agreement and SREAEE's By-laws. Thus, by virtue of the Trust Agreement and the SREAEE's By-Laws it **must** pay its debt to the SREAEE.

FIRST CLAIM FOR RELIEF

The O&M Agreement is null and void for Violating Puerto Rico and Federal Law

259. The allegations in paragraphs 1 to 258 are incorporated by reference.

260. Under Puerto Rico law, contracts are null and void if they violate the law and public order. When a contract is declared null and void, the parties must return whatever concessions were given pursuant to the contract.

261. That said, the O&M Agreement violates Act No. 120-2018, Act No. 17-2019, Act No. 29-2009, Act 83-1941, ERISA, and PROMESA.

262. Consequently, this Court should issue a declaratory judgment decreeing that the O&M Agreement is null and void, upon which it would cease to exist retroactively and the parties to it would be forced to return their concessions, leaving them in the same conditions as they began.

263. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

SECOND CLAIM FOR RELIEF

The O&M Agreement is null and void because it constitutes a leonine obligation.

264. The allegations in paragraph 1 to 263 are incorporated by reference.

265. Leonine or abusive contracts are contrary to public order and, therefore, null and void.

266. Moreover, the O&M Agreement is a leonine and abusive contract where Luma Energy is the only beneficiary and does not share the risks of the transaction.

267. Therefore, the O&M Agreement is null. Consequently, the Court should issue a declaratory judgment decreeing that the O&M Agreement is null and void, upon which it would cease to exist retroactively and the parties to it would be forced to return their concessions, leaving them in the same conditions as they began.

268. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

THIRD CLAIM FOR RELIEF

Contract in Prejudice to Third Party

269. The allegations in paragraphs 1 to 268 are incorporated by reference.

270. Under Puerto Rico law, it is unlawful to execute a contract that prejudices a third party. The consequence of a contract being in prejudice of a third party is that the same is null and void, but the injured party may also be entitled to damages.
271. In the present case, the Commonwealth, P3, PREPA and Luma Energy executed the O&M Agreement with knowledge that this would directly affect UTIER's members, as active participants and beneficiaries of the SREAEE which are PREPA's employees and retirees. UTIER's members, as active participants and beneficiaries of the SREAEE have suffered injury as a result. This is a contract in prejudice to a third party.
272. Consequently, the Court should issue a declaratory judgment decreeing that the O&M Agreement is null and void, upon which it would cease to exist retroactively and the parties to it would be forced to return their concessions, leaving them in the same conditions as they began.
273. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

FOURTH CLAIM FOR RELIEF

Tortious Interference

274. The allegations in paragraphs 1 to 273 are incorporated by reference.
275. Under Puerto Rico law, it is unlawful to interfere with the obligations of other. Thus, if a third party knowingly interferes in an obligation it is not a party to and causes injury, that party is liable for the damages. Additionally, Puerto Rico law recognizes that contracts may have third-party beneficiaries with the right to enforce the contract provisions.

276. In the present case, there is a contract between PREPA and UTIER, which is the CBA. The Commonwealth, P3 and Luma Energy intentionally interfered with the CBA with fault through the terms of the O&M Agreement. As a result, and consequence of these actions, UTIER's members, as active participants and beneficiaries of the SREAEE have suffered injury.
277. Additionally, the Commonwealth, P3 and Luma Energy interfered with the Trust Agreement. The Trust Agreement establishes that the current expenses of PREPA include those to maintain, operate, and repair the electrical system. Thus, PREPA's employees' salaries are current expenses of PREPA. The O&M Agreement dismantles PREPA, and therefore its employees will not have the Trust Agreement's protection that their salaries will be paid with priority among bondholders.
278. Consequently, this Court should award damages to UTIER for their suffering as a result of Defendants' tortious interference with UTIER's CBA and the Trust Agreement.
279. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

FIFTH CLAIM FOR RELIEF

Contracts Clause Violation

280. The allegations in paragraphs 1 to 279 are incorporated by reference.
281. In the alternative that this Court considers that the Contracts are not null, then they are unconstitutional.
282. The U.S. Constitution states that the State will not pass laws that impair contractual obligations.
283. In the present case, there are two contractual obligations that are impaired by the O&M Agreement: (1) the CBA and (2) the Trust Agreement. UTIER is a party to the

CBA, and together with its members are intended third-party beneficiaries of the Trust Agreement.

284. The CBA and the Trust Agreement have been substantially and severely impaired by the O&M Agreement. The Trust Agreement establishes that the current expenses of PREPA include those to maintain, operate, and repair the electrical system. Thus, PREPA's employees' salaries are current expenses of PREPA. The O&M Agreement dismantles PREPA, and therefore its employees will not have the Trust Agreement's protection that their salaries will be paid with priority among bondholders.

285. Likewise, the O&M Agreement and Luma Energy's Letter do not recognize UTIER's CBA and its members acquired rights and benefits under it. Therefore, UTIER's CBA is useless. The O&M Agreement lacks a legitimate public purpose since it violates Act 120-2018, Act 17-2019, Act 29-2009, Act 83-1941, 57-2014, ERISA and PROMESA. Moreover, it is leonine since it benefits Luma Energy and there are no agreements in favor of PREPA. Thus, for this reason, also, it does not have a legitimate public purpose or lacks justification, nor is it reasonable.

286. Even if it had, the O&M Agreement could recognize UTIER's CBA with PREPA, in concordance with Act 120-2018. It did not need to reject UTIER's CBA in order to promote the transformation of the electric system. There is no correlation to be found between impairing the CBA or the Trust Agreement and those interests.

287. As a result, and consequence of these actions, UTIER's members, as active participants and beneficiaries of the SREAEE have suffered injury. Thus, UTIER's members, as active participants and beneficiaries of the SREAEE have constitutional standing for this action and the O&M Agreement is unconstitutional.

288. Consequently, the Court should issue a declaratory judgment decreeing that the O&M Agreement is unconstitutional for violating the Contract Clause, since it unreasonably and unconstitutionally, substantially impaired UTIER's CBA.

289. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

SIXTH CLAIM FOR RELIEF

O&M Agreement's priority is null and void.

290. The allegations in paragraphs 1 to 289 are incorporated by reference.

291. To the extent that the O&M Agreement is null and void, it does not exist. Therefore, the priority given to it in PREPA's bankruptcy is equally null and void, and thus, non-existent.

292. Thus, this Court should issue a declaratory judgment decreeing that Luma Energy's priority is null and void.

293. Also, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

SEVENTH CLAIM FOR RELIEF

PREPA must pay the nearly \$603 million it owes to SREAEE

294. The allegations in paragraphs 1 to 293 are incorporated by reference.

295. PREPA's debt corresponds to PREPA's employer contribution owed to SREAEE since 2013, which is not less than \$603 million. This employer contribution, along with the operations of the electrical system, are current expenses of PREPA.

296. If PREPA does not pay its debt, the SREAEE will be at imminent risk of becoming insolvent by next year, 2022, in the case that 4,500 employees of PREPA are employed by Luma Energy and transfer their pension benefits to Luma's 401(k) Retirement Plan.
297. UTIER's members, as active participants and beneficiaries of the SREAEE, will be directly affected if the SREAEE becomes insolvent. Also, UTIER has a retiree's chapter, which are at imminent risk of having their pensions and benefits affected by PREPA's employer contribution debt, which has caused an actuarial deficit within the SREAEE.
298. However, if PREPA pays its employer contribution debt to SREAEE, SREAEE will not become insolvent by 2024, even in the worst scenario that 4,500 employees of PREPA are employed by Luma Energy and transfer their pension benefits to Luma's 401(k) Retirement Plan. This will mean that PREPA's employees and retirees will not be affected.
299. PREPA is bound by its internal regulations that have force of law and order it to pay its employer contribution debt to the SREAEE according to the actuarial valuation.
300. Also, since SREAEE constitutes a current expense for PREPA, this Court should **order** PREPA to pay its employer contribution debt according to the priority of the Trust Agreement.
301. Thus, this Court should issue a declaratory judgment decreeing that the SREAEE is a current expense of PREPA and must be treated accordingly.
302. Lastly, this Court should issue injunctive relief ordering PREPA to pay its current employer contribution debt to the SREAEE.

EIGHTH CLAIM FOR RELIEF

Act 29-2009 is unconstitutional under the Supremacy and Contract Clause of the U.S. Constitution.

303. The allegations in paragraphs 1 to 302 are incorporated by reference.
304. Act 29-2009 will force SREAEE to become a hybrid system with different sets of regulations and benefits that will not be considered a full public pension system. As for Luma Energy, it will be a private company with two sets of retirement plans for its employees subject to different regulations and benefits as well. The regulation of benefit plans is a federal concern, that was addressed by Congress through ERISA. As federal statute, ERISA preempted any State law on matters regarding benefit plans of employees, except for public pension systems. Thus, Act 29-2009 is unconstitutional under the Supremacy Clause since ERISA, preempts any regulation regarding private retirement systems.
305. Additionally, Act 29-2009 is unconstitutional under the Contract Clause because it impaired the acquired rights and benefits of PREPA's employees and retirees under SREAEE's By-laws and UTIER's CBA, as such law creates a hybrid pension system that will no longer be exempted from ERISA. Therefore, by constituting a private-public pension system, SREAEE will have to comply with ERISA, and Plaintiffs acquired rights and benefits as to the **public** pension system will be impaired.
306. Consequently, this Court should issue a declaratory judgment decreeing that the Act 29-2009 violates the Supremacy Clause of the U.S. Constitution and the Contract Clause of the U.S. Constitution.
307. Accordingly, this Court should issue injunctive relief enjoining the enforcement of the O&M Agreement.

NINTH CLAIM FOR RELIEF

Act 29-2009 is unconstitutional because it violates the Separation of Powers Doctrine under the Constitution of Puerto Rico

308. The allegations in paragraphs 1 to 307 are incorporated by reference.
309. P3 is an agency under the Executive Branch of Puerto Rico with ample powers of entering into governmental contractual obligations. Article 5(b) of Act 29-2009 establish that P3's powers and duties shall be exerted by its Board of Directors, which shall be composed of AAFAF's Executive Director, the Secretary of the Department of Treasury, the President of the Planification Board, and two persons in representation of the public interest appointed by the legislatives chambers.
310. Regarding the two persons in representation of the public interest, Act 29-2009 establish that they must be selected by the Governor of Puerto Rico, from a short list provided by the Presidents of both Legislatives Bodies. Moreover, it does not require that after these selections, they must be submitted to the advice and consent of the Senate of Puerto Rico. Therefore, Article 5(b) violates the Appointment Clause of the Commonwealth constitution. See Const. PR Art. IV, §4.
311. Thus, this Court should issue a declaratory judgment decreeing that Article 5(b) of Act 29-2009 is unconstitutional under the Appointments Clause of the Commonwealth's Constitution.
312. Accordingly, it should issue a declaratory judgment decreeing that all the actions taken by P3's Board of Directors, including the execution of the O&M agreement are null and void *ab initio*.

313. Lastly, this Court should grant injunctive relief enjoining P3's Board of Directors from exerting any power delegated to them through Act 29-2009, including the execution of the O&M Agreement.

TENTH CLAIM FOR RELIEF

Preliminary Injunction enjoining the enforcement of the O&M Agreement

314. The allegations in paragraphs 1 to 313 are incorporated by reference.

315. The O&M Agreement will cause imminent irreparable harm to UTIER since it does not recognize the CBA and accordingly, its members' acquired rights and benefits.

316. Luma Energy is scheduled to take over PREPA's operations on June 1, 2021.

317. Therefore, pursuant to Bankruptcy Rule 7065 and Fed. R. Civ. Proc. 65, it is urgent that this Court issue a preliminary injunction enjoining the Commonwealth, PREPA, P3, and Luma Energy from enforcing the O&M Agreement.

ELEVENTH CLAIM FOR RELIEF

Damages

294. For the above stated reasons, this Court should award damages in amount of not less than \$15,000,000.

PRAYER FOR RELIEF

WHEREFORE, SREAEE respectfully prays for relief as follows:

(1) A declaratory judgment decreeing that:

- a. The O&M Agreement is null and void for constituting a leonine contract that favors only Luma Energy.
- b. The O&M Agreement is null and void for violating Puerto Rico Law and Public Order, and Federal Law, upon which it would cease to exist retroactively and the

parties to it would be forced to return their concessions, leaving them in the same conditions as they began.

- c. The O&M Agreement is null and void for constituting a tortious interference and for prejudicing third parties, upon which it would cease to exist retroactively and the parties to it would be forced to return their concessions, leaving them in the same conditions as they began, and granting damages.
- d. The O&M Agreement violates the Contract Clause of the U.S. Constitution;
- e. That the SREAEE is a current expense of PREPA and must be treated accordingly;
- f. Luma Energy's administrative expense priority treatment in the Title III proceeding as null and void, and therefore, non-existent;
- g. Act 29-2009 is unconstitutional under the Supremacy Clause and the Contract Clause of the U.S. Constitution;
- h. Act 29-2009 is unconstitutional because it violates the Separation of Powers Doctrine under the Constitution of Puerto Rico.

(2) An Order for Injunctive Relief:

- a. Directing the Defendants to cease performance of the O&M Agreement and return any funds provided by PREPA;
- b. Since SREAEE is a current expense of PREPA, an Order requiring PREPA to pay its current debt with the retirement system of no less than \$603 million;
- c. Damages valued in \$15,000,000.
- d. Any other remedy that the law allows.

Dated, April 20, 2021.

Respectfully submitted,

WE HEREBY CERTIFY that on this same date we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all participants and Standard Parties.



472 Tito Castro Ave.
Marvesa Building, Suite 106
Ponce, Puerto Rico 00716
Tel: (787) 848-0666
Fax: (787) 841-1435
notificaciones@bufete-emmanuelli.com

/s/Rolando Emmanuelli-Jiménez
Rolando Emmanuelli-Jiménez
1st Cir. #7707
USDC: 214105
rolando@bufete-emmanuelli.com

/s/Jessica Méndez-Colberg
Jessica Méndez-Colberg
1st Cir. # 1185272
USDC: 302108
jessica@bufete-emmanuelli.com

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