UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO et al., Debtors.[1]	PROMESA Title III No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	No. 17 BK 4780-LTS
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of PUERTO RICO POWER ELECTRIC AUTHORITY, Plaintiff/Counterclaim-Defendant,	Adv. Proc. No. 19-00391-LTS

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

PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS, CORTLAND CAPITAL MARKET SERVICES, SOLA LTD., SOLUS OPPORTUNITIES FUND 5 LP, ULTRA MASTER LTD, ULTRA NB LLC, UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC., AND SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA,

Intervenor-Plaintiffs,

-v-

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Defendant/Counterclaim-Plaintiff,

THE AD HOC GROUP OF PREPA BONDHOLDERS, ASSURED GUARANTY CORP., ASSURED GUARANTY MUNICIPAL CORP., NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, AND SYNCORA GUARANTEE, INC.,

Intervenor-Defendants/Counterclaim-Plaintiffs.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S MOTION FOR SUMMARY JUDGMENT AND THE DEFENDANT'S AND INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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LAURA TAYLOR SWAIN, United States District Judge

Before the Court are cross-motions for summary judgment under Federal Rule of Bankruptcy Procedure 7056.[2] The *Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 62 in Adv. Proc. No. 19-00391),[3] with its accompanying memorandum of law (the "FOMB Motion"), *Memorandum of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 63) (the "FOMB Memorandum"), was filed by the Puerto Rico Electric Power Authority ("PREPA") by and through the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"). The *Memorandum in Support of Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment Against Plaintiffs/Counterclaim-Defendants* (Docket Entry No. 67) (the "Defendants' Memorandum"),[4] was filed by U.S. Bank National Association as Trustee (the

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[2] The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") are made applicable in these Title III cases by section 310 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. § 2170. PROMESA is codified at 48 U.S.C. section 2101 et seq. References herein to "PROMESA" section numbers are to the uncodified version of the legislation. References herein to the provisions of Title 11 of the United States Code (the "Bankruptcy Code") are to sections made applicable in these cases by section 301 of PROMESA. 48 U.S.C. § 2161.

[3] Unless otherwise noted, all references herein to Docket Entry Nos. are references to Adversary Proceeding No. 19-00391.

[4] The pleading comprises the functional motion for summary judgment in addition to the memorandum of law in support thereof. (Defs. Mem. at 1 (the "Defendants' Motion").) The Defendants' Answer and Counterclaim Complaint was filed along with the *Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary*

"Trustee"), the Ad Hoc Group of PREPA Bondholders (the "Ad Hoc Group" or the "AHG"), Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured"), National Public Finance Guarantee Corporation ("National"), and Syncora Guarantee Inc. ("Syncora," and together with the Trustee, Ad Hoc Group, Assured, and National, the "Bondholders" or the "Defendants").[5] In their respective cross-motions, the Oversight Board and the Defendants seek summary judgment with respect to Counts I-VII of the Oversight Board's *First Amended Complaint Objecting to Defendant's Claims and Seeking Related Relief* (Docket Entry No. 26) (the "FAC"), and Counts I & II of the counterclaim complaint included in the *Defendant's and Intervenor-Defendants' Answer, Affirmative Defenses, and Counterclaims* (Docket Entry No. 47) (the "Defendants' Answer and Counterclaim Complaint").

The Court heard oral argument with respect to the cross-motions at the February 1, 2023 omnibus hearing. *Feb. 1, 2023 Omnibus Hr'g Tr.* (Docket Entry No. 140) (the "Omni Hearing Transcript"). The Court has considered carefully all the parties' submissions, and the arguments made in connection with the cross-motions.[6] The Court has subject matter

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Judgment (Docket Entry No. 67-1 (the "Defendants' SUMF")), and the *Declaration of Matthew M. Madden* (Docket Entry No. 67-2 (the "Madden Declaration")).

[5] Assured, Syncora, and National are all monoline insurers of insured Bonds.

[6] The Court has also received and reviewed, inter alia, the following pleadings: *The Financial Oversight and Management Board for Puerto Rico's, as Title III Representative of the Puerto Rico Electric Power Authority, Statement of Undisputed Material Facts in Support of Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 64) (the "FOMB SUMF"); *Declaration of Margaret A. Dale in Respect of the Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056 of the Financial Oversight and Management Board of Puerto Rico as Title III Representative of the Puerto Rico Electric Power Authority* (Docket Entry No. 65) (the "Dale Declaration"); *Declaration of Nelson Morales in Respect of the Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056 of the Financial Oversight and Management Board of Puerto Rico as Title III Representative of the Puerto Rico Electric Power Authority* (Docket Entry No. 66) (the "Morales Declaration"); *SREAEE's Memorandum in Support of the Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico*

Electric Power Authority, for Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment (Docket Entry No. 74) (the "SREAEE Memorandum"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Oversight Board's Motion for Summary Judgment (*Docket Entry No. 76) (the "UCC Memorandum"), filed by the Official Committee of Unsecured Creditors (the "UCC" or the "Committee"); *UTIER's Joinder to SREAEE's Memorandum in Support of the Notice of Motion and Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 77) (the "UTIER Joinder"); *Response of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Summary Judgment Motion of Defendant-Counterclaim Plaintiff* (Docket Entry No. 89) (the "FOMB Response"); *Response of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment* (Docket Entry No. 90) (the "FOMB SUMF Response"); *Memorandum in Response to the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment and Intervenor-Plaintiffs' Supplemental Briefs* (Docket Entry No. 91) (the "Defendants' Response"); *Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Response to Plaintiff/Counterclaim-Defendant's Statement of Undisputed Material Facts* (Docket Entry No. 91-1) (the "Defendants' SUMF Response"); *Declaration of William J. Natbony Pursuant To Fed. R. Civ. P. 56(d) in Support of Defendants/Counterclaim-Plaintiffs' Opposition to the Motion of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 90-2) (the "Natbony Declaration"); *Joinder of the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Financial Oversight and Management Board for Puerto Rico's Responses to (I) Summary Judgment Motion of Defendant-Counterclaim Plaintiff, and to (II) Defendant/Counterclaim-Plaintiffs' and Intervenor-Defendants/Counterclaim-Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment* (Docket Entry No. 92) (the "AAFAF Joinder"); *Response and Opposition of Fuel Line Lenders to Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment* (Docket Entry No. 93) (the "FLL Response"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Response of Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Summary Judgment Motion of Defendant-Counterclaim Plaintiff [Adv. Proc. Docket No. 67]* (Docket Entry No. 94) (the "UCC Response"); *Objection of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendants' Fed. R. Civ. P. 56(d) Application* (Docket Entry No. 97) (the "FOMB Rule 56(d) Objection"); *Defendants' Response to Objection of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Defendants' Fed. R. Civ. P. 56(d) Application*

jurisdiction of this action pursuant to section 306(a) of PROMESA. 48 U.S.C. § 2166(a).

In brief, The Oversight Board and the Defendants have cross-moved for summary judgment with respect to the allowance or disallowance of Proof of Claim No. 18449, which was filed by the Trustee as a fully secured claim in the amount of $8,477,156,729.56, consisting of principal in the aggregate amount of $8,258,614,158.00, and accrued and unpaid interest in the

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(Docket Entry No. 101) (the "Defendants' Rule 56(d) Response"); *Reply of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, in Support of Summary Judgment Motion [ECF No. 63]* (Docket Entry No. 104) (the "FOMB Reply"); *Reply in Support of Defendant/Counterclaim-Plaintiff's and Intervenor-Defendants/Counterclaim-Plaintiffs' Motion for Summary Judgment Against Plaintiffs/Counterclaim-Defendants* (Docket Entry No. 105) (the "Defendants' Reply"); *Notice of Motion and Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 106) (the "FOMB Rule 702 Motion"); *Memorandum of Law in Support of Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 107) (the "FOMB Rule 702 Memorandum"); *Joinder of the Puerto Rico Fiscal Agency and Financial Advisory Authority to the Reply of the Financial Oversight and Management Board for Puerto Rico in Support of Summary Judgment Motion [ECF No. 63]* (Docket Entry No. 110) (the "AAFAF Reply Joinder"); *Supplemental Brief and Joinder of Intervenor-Plaintiff Official Committee of Unsecured Creditors in Support of Reply of Financial Oversight and Management Board of Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, in Support of Summary Judgment [ECF No. 63]* (Docket Entry No. 111) (the "UCC Reply"); *Objection by the Ad Hoc Group of PREPA Bondholders, Assured Guaranty Corp., Assured Guaranty Municipal Corp., Syncora Guarantee, and U.S. Bank National Association, as Trustee to the Motion of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 114) (the "Defendants' Rule 702 Objection"); and the *Reply of the Financial Oversight and Management Board of Puerto Rico, as Title III Representative of Puerto Rico Electric Power Authority, in Support of Motion to Exclude Expert Declaration of Robert A. Lamb* (Docket Entry No. 117) (the "FOMB Rule 702 Reply"); *Supplemental Brief of the Financial Oversight and Management Board for Puerto Rico, as Title III Representative of the Puerto Rico Electric Power Authority, with Respect to Defendants' New Arguments Raised at Oral Argument* (Docket Entry No. 137 Ex. B) (the "FOMB Supplemental Brief"); *The Trustee's and PREPA Bondholders' Brief in Response to the Post-Argument Supplemental Brief of the Financial Oversight and Management Board of Puerto Rico* (Docket Entry No. 141) (the "Defendants' Supplemental Response").

aggregate amount of $218,542,581.56 (plus additional amounts accruing postpetition) (the "Master PREPA Bond Claim"),[7] asserting a secured claim on behalf of all PREPA bondholders for amounts due pursuant to that certain trust agreement between PREPA and the Trustee (as successor trustee), dated as of January 1, 1974, as amended and supplemented (the "Trust Agreement" or "TA").[8] The Oversight Board has requested disallowance of the Master PREPA Bond Claim to the extent it purports to be secured by any PREPA property aside from certain moneys currently deposited to the "Sinking Fund," which is a fund created by the Trust Agreement and subjected to a lien and charge for payment on the Bonds, and a limited number of certain other funds explicitly made subject to liens by the terms of the Trust Agreement, subject

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7 The Bondholders also state that their claim is secured by: "(ii) certain intangibles provided for in the Trust Agreement and Resolutions or provided for in the Authority Act, including, without limitation, certain covenants, obligations and undertakings; and (iii) moneys and investments to the extent provided in the Trust Agreement, the Resolutions and the Authority Act, including all monies and investments held in trust or required to be held in trust by the Authority at Depositories or otherwise in special accounts or funds under the Trust Agreement including, without limitation, in the General Fund, the Construction Fund, the Reserve Maintenance Fund, and the Capital Improvement Fund, all of which are subject to the rights of the Trustee and the Bondholders to the extent provided in the Trust Agreement, Resolutions, and the Authority Act." (Master PREPA Bond Claim Ex. A ¶ 6.)

8 The original 1974 Trust Agreement is attached as Exhibit A to the Morales Declaration. (Morales Decl. Ex. A (the "Original Trust Agreement" or "Original TA").) The nineteen supplemental agreements amending the Original Trust Agreement are attached thereafter. (Morales Decl. Exs. B-U.) The Defendants attached a "Conformed Trust Agreement" purporting to incorporate all amendments to the Trust Agreement as Exhibit 1 to the Madden Declaration. (Madden Decl. Ex. 1.) In the FLL Response, the Fuel Line Lenders (as defined therein) identified reasonable concerns with the accuracy of the document. (FLL Resp. ¶ 12 n.6.) In response to the Court's *Order Concerning PREPA Trust Agreement* (Docket Entry No. 115), the Oversight Board and the Defendants filed an agreed-upon conformed trust agreement as Exhibit A to their *Joint Informative Motion Submitting Conformed Trust Agreement in Response to January 5, 2023 Order Concerning PREPA Trust Agreement [ECF No. 115]* (Docket Entry No. 118 Ex. A) (the "Joint Conformed Trust Agreement"). For ease of reference, unless noted as "Original Trust Agreement" or "Original TA," references to the "Trust Agreement" or "TA" herein are to the Joint Conformed Trust Agreement.

to perfection of those liens (the "Specified Funds," as defined below). (See, e.g., FOMB Reply ¶ 112.) The Oversight Board also argues that the Sinking Fund and the Specified Funds are the only sources to which Bondholders can ever look for payment in respect of the Bonds and that the Bondholders' allowable claim is thus limited to their collateral, which the Oversight Board contends is in turn limited to the moneys currently in the Sinking Fund and the Specified Funds, and that the Bondholders therefore cannot have an unsecured claim for any amounts owed to them beyond the moneys currently on deposit in the liened Funds. (See, e.g., FOMB Mem. ¶ 139.) The Bondholders, in turn, contend that they have a claim for the face amount of the bonds that is secured by all of PREPA's current and future revenues, to which they can look for payment in perpetuity. (See, e.g., Defs. Resp. ¶ 17.)

For the following reasons, the Court holds that (a) the Trust Agreement granted the Bondholders security interests only in moneys actually deposited to the Sinking Fund, Self-insurance Fund, Capital Improvement Fund, Reserve Maintenance Fund, and Construction Fund (as defined in the Trust Agreement); (b) the Bondholders have perfected their liens in the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund, over which the Trustee has established control (as discussed below);[9] (c) the Bondholders have no security interest in the covenants and remedies provided for by the Trust Agreement; but (d) based on PREPA's payment and equitable relief covenants in the Trust Agreement, the Bondholders have an unsecured claim (within the meaning of 11 U.S.C. § 101(5)(B)) to be liquidated by reference to the value of future Net Revenues (as defined in the Trust Agreement) that would, under the

[9] The Court declines to address at this juncture the Bondholders' possible perfection of their liens on the Capital Improvement Fund and Construction Fund, because the record before the Court provides no evidence from either party as to the form of the assets comprising those Funds and their custodial status, and means of perfection may vary with the form of the asset in question.

waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds (the "Unsecured Net Revenue Claim").

I.

BACKGROUND

A. PREPA

PREPA is a public corporation created under the Puerto Rico Electric Power Authority Act, Act No. 83-1941, codified at 22 L.P.R.A. §§ 191-240 (as amended, the "Authority Act"),[10] to supply substantially all of the electricity consumed in the Commonwealth. (FOMB SUMF ¶ 2.)[11] The Authority Act authorizes PREPA to issue bonds. 22 L.P.R.A. § 206. Between the years 1974 and 2016, PREPA made several bond issuances pursuant to the Trust Agreement, totaling approximately $8.3 billion of bonds (the "Bonds"). (FOMB SUMF ¶ 6.)

B. The PROMESA Title III Proceeding and Procedural Posture[12]

On July 2, 2017 (the "Petition Date"), the Oversight Board filed a petition

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10 Until 1979, PREPA's name was the Puerto Rico Water Resources Authority.

11 Facts presented or recited as undisputed in this Opinion and Order are identified as such in the Oversight Board's or Bondholders' statements pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Oversight Board's Local Civil Rule 56(b) statement ("FOMB SUMF") or to the Bondholders' Local Civil Rule 56(b) statement ("Defs. SUMF") incorporate by reference citations to the respective underlying evidentiary submissions.

12 Additional detail can be found in, inter alia, the Disclosure Statement, as well as the Urgent Motion (as defined below), the Court's order denying the Urgent Motion, and the RSA Termination Notice (as defined below).

pursuant to Title III of PROMESA, commencing a debt adjustment proceeding for PREPA under that statute. (Docket Entry No. 1 in Case No. 17-4780.)

On May 3, 2019, the Oversight Board, the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), PREPA (together the "Government Parties"), along with the Ad Hoc Group and Assured (followed soon thereafter by Syncora and National), entered into a restructuring support agreement intended to resolve claims related to the Bonds by granting certain treatment in exchange for support of a corresponding plan of adjustment (the "2019 RSA"). The 2019 RSA contemplated, and according to the Oversight Board was dependent upon, passage by the Commonwealth of legislation authorizing its several transactions. Such legislation was never passed.

This adversary proceeding was commenced on July 1, 2019. (Docket Entry No. 1.)

In April 2020, after numerous adjournments of hearings on a motion to approve the settlements embodied in the 2019 RSA, as well as numerous extensions of time due to earthquakes and the COVID-19 pandemic, the Court stayed the deadlines applicable to the settlement motion. (Docket Entry No. 1954 in Case No. 17-4780.) The Government Parties filed periodic status updates. (See, e.g., Docket Entry Nos. 1992, 2691 in Case No. 17-4780.)

On January 18, 2022, the Court confirmed the *Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al.* (Docket Entry No. 19784 in Case No. Case No. 17-3283 (the "Commonwealth Plan"). (Docket Entry No. 19813 in Case No. 17-3283.)

On February 18, 2022, the Ad Hoc Group filed an urgent motion (the "Urgent Motion") asking the Court to appoint a mediator and set PREPA plan submission and

confirmation deadlines. (Docket Entry No. 2718 in Case No. 17-4780.)

On March 8, 2022, citing concerns regarding lack of implementing legislation and a comprehensive settlement of PREPA's legacy obligations, along with concerns regarding the affordability of the cost of electricity and the sustainability of the electric system as a result of rising inflation and significant surges in the price of crude oil, AAFAF exercised its unilateral right to terminate the 2019 RSA. (See Docket Entry No. 2747 Ex. B in Case No. 17-4780 (the "RSA Termination Notice").)

On March 8, 2022, the Court denied the Urgent Motion's specific requests, but entered an order requiring the Oversight Board, by a certain deadline (the "Path Forward Deadline"), to file one of the following:

> i. A proposed plan of adjustment, disclosure statement, and proposed deadlines in connection with consideration of the disclosure statement, plan-related discovery, solicitation and tabulation of votes, objection period in connection with the confirmation hearing, and proposed confirmation hearing schedule for the PREPA Title III case; **or**
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> ii. A detailed term sheet for a plan of adjustment, with a proposed timetable for the filing of the plan, consideration and approval of a disclosure statement, voting and confirmation of the plan; **or**
>
> iii. A proposed schedule for the litigation of significant disputed issues in PREPA's Title III case, including, without limitation, the motion for stay relief to seek appointment of a receiver, the UCC's claim objection (including, if appropriate, litigation of antecedent questions of standing), and the issues raised in Adv. Proc. Nos. 19-396 and 19-405; **or**
>
> iv. A declaration and memorandum of law showing cause as to why the court should not consider dismissal of PREPA's Title III case for failure to demonstrate that a confirmable plan of adjustment can be formulated and filed within a time period consistent with the best interests of PREPA, the parties-in-interest and the people of Puerto Rico.

(See Docket Entry No. 2748 in Case No. 17-4780 ¶ 3(b) (emphasis in original).)

On April 8, 2022, this Court entered orders appointing the Mediation Team (as defined therein) and establishing terms and conditions to govern mediation, including an initial mediation termination date (the "Termination Date"). (Docket Entry No. 2772 in Case No. 17-4780 (the "Appointment Order"); Docket Entry No. 2773 in Case No. 17-4780 (the "Terms and Condition Order").)

The Path Forward Deadline and Termination Date were extended several times. (See, e.g., Docket Entry No. 2949 in Case No. 17-4780.) In mid-September, the Mediation Team declined to extend the deadlines any further, at which time the Bondholders (without the Trustee) filed a motion to dismiss PREPA's Title III Case or for relief from the automatic stay in order to enforce their contractual right to a receiver. (See Docket Entry No. 2973 in Case No. 17-4780.)[13]

On September 29, 2022, this Court entered an order staying the motion to dismiss the case or for relief from the automatic stay, establishing a deadline to file a plan of adjustment, and establishing a litigation schedule for this adversary proceeding. (See Docket Entry No. 3013 in Case No. 17-4780 (the "Litigation Scheduling Order").) In the Litigation Scheduling Order, the Court declined to set a briefing schedule with respect to Cortland Capital Markets Services LLC v. Fin. Oversight and Mgmt. Bd. of P.R. (In re Fin. Oversight and Mgmt. Bd. of P.R.), Adv. Proc. No. 19-396-LTS (the "Current Expense Litigation"), a concurrent adversary proceeding

[13] On July 7, 2017, certain PREPA bondholders and monoline insurers filed a motion seeking to lift the automatic stay under PROMESA to pursue the appointment of a receiver in a non-Title III court. (Docket Entry No. 74 in Case No. 17-4780.) Following the denial of the motion by this Court, a partial reversal by the Court of Appeals for the First Circuit, and a renewed motion, the briefing schedule for the motion was extended several times and was not ultimately resolved before the parties' entry into the 2019 RSA. (See Docket Entry Nos. 299, 1176, 1204.) See Fin. Oversight & Mgmt. Bd. for P.R. v. Ad Hoc Grp. of PREPA Bondholders (In re Fin. Oversight & Mgmt. Bd. for P.R.), 899 F.3d 13 (1st Cir. 2018).

regarding what comprise "Current Expenses" under the Trust Agreement, intending to limit the scope of the current litigation to the scope of liens and extent of recourse granted by the Trust Agreement. (Litigation Scheduling Order ¶ 3.) However, as will be addressed below, this Opinion and Order includes certain rulings pertaining to the Current Expense motion, which were unavoidable in the course of interpreting the Trust Agreement, and in light of certain statements made by the parties at oral argument.

On October 3, 2022, the Oversight Board filed the FAC. (Docket Entry No. 26.) The Court granted numerous other parties the right to intervene and file responsive and supplemental pleadings, including: the Committee; Cortland Capital Market Services LLC, as Administrative Agent and SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master TLD and Ultra NB LLC (together, the "Fuel Line Lenders" or "FLLs"); Sistema de Retiro de los Empleados de la Autoridad de Energia Eléctrica ("SREAEE"); and the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"). (See, e.g., Docket Entry Nos. 34-36.) After the Court granted various motions to intervene, the monoline insurers and AHG joined the Trustee and filed the Defendants' Answer and Counterclaim Complaint on October 17, 2022. (Docket Entry No. 47.)

The Oversight Board's Motion and the Defendants' Motion were both filed on October 24, 2022. (Docket Entry Nos. 62, 67.)

C. The PREPA Plan and Disclosure Statement

On March 1, 2023, the Oversight Board, on behalf of PREPA, filed the *Modified Second Amended Title III Plan of Adjustment of the Puerto Rico Electrical Power Authority* (Docket Entry No. 3296 in Case No. 17-4780) (along with any subsequent amendments or modifications, the "PREPA Plan").

On March 3, 2023, the Court approved the *Disclosure Statement for Modified Second Amended Title III Plan of Adjustment of the Puerto Rico Electrical Power Authority* (Docket Entry No. 3297 in Case No. 17-4780) (the "Disclosure Statement"). (Docket Entry No. 3304 in Case No. 17-4780 (the "DS Order").)[14]

D. Counts of the First Amended Complaint and the Defendants' Answer and Counterclaim Complaint

The Oversight Board has moved for summary judgment with respect to the following counts of the FAC, and the Defendants have cross-moved for summary judgment in their favor with respect to these same counts:

> **Count I -** Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Revenues Beyond Those Deposited to the Credit of the Sinking Fund and Self-Insurance Fund (11 U.S.C. § 502)
>
> **Count II -** Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Moneys Received by PREPA in Connection with or as a Result of its Ownership or Operation of the System Other than the Revenues Deposited to the Credit of the Sinking Fund and Self-Insurance Fund and Avoiding and Preserving for the Benefit of PREPA Any Such Security Interests Pursuant to Bankruptcy Code Sections 544 and 551 (19 L.P.R.A. §§ 2212(a)(52), 2267(a)(2); 11 U.S.C. §§ 502, 544(a),

[14] On February 2, 2023, the Oversight Board, on behalf of itself and as the sole Title III representative of PREPA, and National entered into the PREPA Plan Support Agreement (the "PREPA PSA") regarding the treatment of the Bonds in the PREPA Plan. As a result of the PREPA PSA, on March 20, 2023, the Oversight Board and National filed the *Urgent Joint Motion to Stay Certain Contested Matters and Adversary Proceedings related to Bonds Issued by the Puerto Rico Electric Power Authority ("PREPA") with respect to National Public Finance Guarantee Corporation* (Docket Entry No. 144) (the "Urgent National Motion"). The Urgent National Motion requests a stay of, inter alia, this adversary proceeding, solely with respect to National, "subject to a further order of the Court, and without prejudice to all rights, arguments, claims, and defenses of the parties as they currently exist in such matters[.]" (Urgent National Motion ¶ 4.) Pending decision on the Urgent National Motion, for the sake of convenience, the Court will continue to refer to the Defendants as the "Bondholders," which term will be deemed to except National to the extent of any such further order.

551; 48 U.S.C. § 2161)

Count III - Judgment Disallowing the Master PREPA Bond Claim to the Extent it Asserts Priority, Perfected Security Interests Against Moneys Received by PREPA in Connection with or as a Result of its Ownership or Operation of the System Other than the Revenues Deposited to the Credit of the Sinking Fund and Self-Insurance Fund and Subordinating the Trustee's Security Interest to PREPA's Interest in Such Property (48 U.S.C. § 2161; 19 L.P.R.A. §§ 2260, 2267, 2322)

Count IV - Judgment Disallowing the Master PREPA Bond Claim Asserting Security Interests in the Covenants and Remedies, which are Not PREPA's Property thus Not Collateral Capable of Being Pledged by PREPA (11 U.S.C. §§ 502, 506; 19 L.P.R.A. § 2233(b)(2); 22 L.P.R.A. § 196(o))

Count V - Judgment Disallowing Master PREPA Bond Claim Asserting Security Interests Against the Covenants and Remedies and Avoiding and Preserving for the Benefit of PREPA Any Such Security Interests Pursuant to Bankruptcy Code Sections 544 and 551 (19 L.P.R.A. §§ 2212(a)(52), 2267(a)(2); 11 U.S.C. §§ 502, 544(a), 551; 48 U.S.C. § 2161)

Count VI - Judgment Disallowing the Master PREPA Bond Claim to the Extent it Asserts Priority, Perfected Security Interests Against the Covenants and Remedies and Subordinating the Trustee's Security Interest to PREPA's Interest in Such Property (48 U.S.C. § 2161; 19 L.P.R.A. §§ 2260, 2267, 2322)

Count VII - Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund (11 U.S.C. §§ 502, 506, 927)

The Bondholders have moved for summary judgment with respect to the following counts of the Defendants' Answer and Counterclaim Complaint, and the Oversight Board has cross-moved for summary judgment in its favor with respect to the same counts:

Counterclaim Count I - Declaratory Judgment that Under the Trust Agreement the Trustee Has Recourse to the Sinking Fund and the Right to Obtain Specific Performance of Covenants to Fund the Sinking Fund, and in the Event of Default Has Recourse to All PREPA Revenues and Other Moneys (28 U.S.C. § 2201; 11 U.S.C. §§ 502, 506, 927; Fed. R. Bankr. P. 7001(2), (9))

Counterclaim Count II - Declaratory Judgment that the Trustee Possesses Valid, Perfected, and Priority Security Interests in All PREPA Revenues and that Those Security Interests are Not Subject to Avoidance or Subordination (28 U.S.C. § 2201; 11 U.S.C. §§ 502, 506, 544; 19 L.P.R.A. § 2267; Fed. R. Bankr. P. 7002(2), (9))[15]

II.

DISCUSSION

A. Ripeness

The Bondholders contend that this dispute is not ripe for decision, and that, therefore, this Court lacks subject matter jurisdiction to decide the summary judgment motions. (Defs. Mem. ¶ 136.) Ripeness "has roots in both the Article III case or controversy requirements and in prudential considerations." Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks and citations omitted). The doctrine "seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (quoting Texas v. United States, 523 U.S. 296, 300 (1998) (additional citations omitted).) The Bondholders argue that future potential events may eliminate the need for the Court to resolve the pending summary judgment motions. Because the Court can only adjudicate cases of which it has jurisdiction, the Court will consider this issue before reaching the merits of the summary judgment claims. See Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149-50 (1st Cir. 2002) ("After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest."). As explained below, the Bondholders' arguments are not persuasive.

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[15] The Defendants' Answer and Counterclaim Complaint also asserts numerous affirmative defenses.

In this adversary proceeding, the Oversight Board has requested the disallowance of the Master PREPA Bond Claim "to the extent that it purports to be secured by any PREPA property aside from Revenues deposited to the Sinking Fund and Self-[i]nsurance fund."[16] (FAC ¶ 5; see also FOMB Mem. ¶ 108.) In contrast, the Bondholders argue, as detailed below, that their claim is secured by all past, present and future revenues of PREPA. (See, e.g., Defs. Resp. ¶ 17.) Both the Oversight Board and the Bondholders have moved for summary judgment, arguing that the extent, if any, of the secured status of the Bondholders' Claim can be determined by the Court's interpretation of the clear and unambiguous language of, inter alia, the Trust Agreement, although they each advocate for different interpretations. The resolution of this issue is of utmost importance to PREPA's prospects of emerging from Title III and to Puerto Rico's financial stability.

Under Bankruptcy Rule 7001(2), "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" is a proper subject of an adversary proceeding. (See, e.g., FOMB Reply ¶ 112.) A court may, before the plan confirmation process begins, determine the validity, priority or extent of a lien or other interest in property by way of a motion for summary judgment in an adversary proceeding. See Ferry Rd. Props., LLC v. RL BB ACO II-TN, LLC, (In re Ferry Rd. Props., LLC), Adv. Proc. No. 12-5022, 2012 WL 3888201, at *8 (Bank. E.D. Tenn. Sept. 7, 2012). Similarly, an objection to a claim in bankruptcy may be lodged at any time during the pendency of a case. See, e.g., In re Presque Isle Apartments, L.P., 118 B.R. 331, 332 (W.D. Pa. 1990). Section 502 of the Bankruptcy Code mandates that a court

[16] The Sinking Fund and Self-insurance Fund are, respectively, the principal fund charged with payment on the Bonds and another fund subject to a lien in favor of the Bondholders. Both of these funds are held by the Trustee, as explained below.

resolve objections to a claim and determine the amount of the claim after notice and a hearing.[17] 11 U.S.C.A. § 502 (Westlaw through P.L. 117-262). Thus, the present posture of the case—cross-motions for summary judgment in an adversary proceeding—is an appropriate way for the Court to address and resolve the issues raised by the summary judgment motions, including whether the Master PREPA Bond Claim is secured by any PREPA property aside from Revenues currently deposited to the Sinking Fund and the Self-Insurance Fund.

The Bondholders argue that the instant proceeding is not ripe for adjudication, however, because the Court may never have to resolve the issue of the scope of their secured status. (Defs. Mem. ¶ 136.) Outside of a Title III proceeding, or if the Court were to lift the automatic stay, the argument goes, the Trustee could obligate PREPA to raise rates and collect revenues in the Sinking Fund sufficient to pay the Bondholders in full, allegedly in accordance with its covenants in the Trust Agreement. (Defs. Mem. ¶ 137 ("If the stay were lifted, the Trustee may be able to access future revenues credited to the Sinking Fund to repay bondholders in full, in which case there would be no need to adjudicate whether the Trustee or bondholders have recourse to or a lien on any moneys beyond those in the Sinking Fund.").) However, the outcome of any lift stay motion, and the Trustee's authority to compel PREPA to increase rates to a level to pay the Bondholders in full, is not clear. Those questions raise issues as complex as those presently before the Court. The Court has before it a concrete, fully-briefed dispute, the

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[17] In addition to the Oversight Board's objection to the Bondholders' claim the Master PREPA Bond Claim was also the subject of an unresolved claim objection filed by the Committee of Unsecured Creditors on October 30, 2019. (See *Objection of Committee to Proof of Claim No. 1849 Filed by U.S. Bank National Association, in its Capacity as Trustee for Non-recourse PREPA Bonds* (Docket Entry No. 1691 in Case No. 17-4780) (the "UCC Claim Objection").) The Court terminated the Committee's claim objection without prejudice and without resolution at that time. (Docket Entry No. 1855 in Case No. 17-4780.)

outcome of which is of significant importance to this Title III proceedings. The potential outcome of hypothetical litigation outside of these proceedings designed to obligate PREPA to perform under, and consistent with, the Bondholders' interpretation of the Trust Agreement does not render the summary judgment issues (which require the Court to interpret the Trust Agreement, among other things) unripe for adjudication.

Texas v. United States, on which the Bondholders rely, fully supports this conclusion. 523 U.S. 296 (1998). In that case, the Supreme Court held that the question of whether a statute would apply to a hypothetical set of facts was not ripe for adjudication. Id. at 300. As the Court held, "determination of the scope of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Id. (internal punctuation and citation omitted). In contrast, in the instant case, the Court has before it a concrete dispute with specific, potential, consequences. There is no reason to await the speculative outcome of other potential litigation.

The Bondholders also argue that the present motions are not ripe because it is only at confirmation that the Court can decide if PREPA can permanently repudiate its alleged obligation to fund the Sinking Fund with sufficient revenues to pay the Bondholders in full. (Defs. Mem. ¶¶ 142-43.) According to the Bondholders, the issue whether PREPA was obligated to fund the Sinking Fund beyond the extent to which it did will arise at the confirmation hearing in the context of determining whether the plan of adjustment violates PROMESA section 314(b)'s bar against having a plan that either violates Puerto Rico law or sees Bondholders receive less than they would receive from enforcement of their available remedies outside of bankruptcy. (Defs. Mem. ¶ 142.)

Even assuming, without deciding, that the issue of PREPA's obligation to put

revenues in the Sinking Fund will be decided at confirmation, that prospect does not deprive the Court of authority to resolve the existing cross-motions for summary judgment. At this point in time, a plan of adjustment has been filed, the disclosure statement has been approved, and hearings for plan confirmation have been scheduled. If the Bondholders are right in that they have a security interest in all PREPA revenues, past, present and future, the Court may not need to address whether the Sinking Fund was adequately funded at confirmation. Again, the potential outcome of complex issues at confirmation do not render the instant motions for summary judgment unripe for resolution.

Finally, the Bondholders argue that, if the Court does not adopt their interpretation of the Trust Agreement, they require discovery before the Court can resolve the motions for summary judgment. (Defs. Mem. ¶ 41 n.11; Natbony Decl. ¶ 3.) The need for discovery, if any, will be addressed by the Court in connection with its ruling on the merits of the summary judgment motions. It is not grounds for the Court to avoid addressing the issues raised in the motions for summary judgment.

In sum, the Bondholders have not established that the motions for summary judgment are not ripe for adjudication. Therefore, the Court has subject matter jurisdiction and will reach the merits of the cross-motions for summary judgment.

B. Standard of Review Under Fed. R. Civ. P. 56

Under Federal Rule of Civil Procedure 56(a),[18] summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that

[18] Federal Rule of Civil Procedure 56 is made applicable in this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7056. See 48 U.S.C. § 2170.

"possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and . . . must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841-42 (1st Cir. 1993). The Court declines to address assertions proffered by the parties that are immaterial and conclusory statements of law which the parties proffer as facts.

Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to summary judgment, "the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). A party seeking denial or deferral of a motion for summary judgment under Rule 56(d) must "(i) 'show good cause for the failure to have discovered the facts sooner'; (ii) 'set forth a plausible basis for believing that specific facts . . . probably exist'; and (iii) 'indicate how the emergent facts . . . will influence the outcome of the pending summary judgment motion.'" In re PHC Inc. S'holder Litig., 762 F.3d 138, 143 (1st Cir. 2014) (quoting Resolution Tr. Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994)). Stated

differently, a nonmovant seeking discovery under Rule 56(d) must meet the requirements of "authoritativeness, timeliness, good cause, utility, and materiality." Id. at 144 (quoting Resolution Tr. Corp., 22 F.3d at 1203).

C. Relevant Sections of the Trust Agreement

The Bondholders' principal contention is that the Trust Agreement, despite containing specific limited grants of liens in sections 401, 507, and 513, gives them currently enforceable liens on all present and future revenues of PREPA, including revenues not yet collected for electricity not yet generated. (See, e.g., Defs. Resp. ¶ 17.) The basis for their argument is a passage in the Trust Agreement's opening recitals (to which the Bondholders refer to as the "Granting Clause" and the Oversight Board refers to as the "Words of Agreement Clause," and which the Court will refer to as the "Preamble") that the Bondholders contend controls absolutely the scope of the security interest granted by the Trust Agreement, to the exclusion of any more specific operative terms within the remainder of the document. For reasons explained at length below, the Court finds the Bondholders' expansive view of their lien rights inconsistent with the clear and unambiguous terms of the Trust Agreement. The Court next reviews the provisions and terms of the Trust Agreement that are most relevant to the determination of the scope of any liens granted thereunder.

1. Preamble

The passage in question reads as follows, in relevant part:

> Now, THEREFORE, THIS AGREEMENT WITNESSETH, that . . . in order to secure the performance and observance of all the covenants, agreements and conditions . . . herein contained, **the Authority has executed and delivered this Agreement and has pledged and does hereby pledge to the Trustee the revenues of the System**, subject to the pledge of such revenues to the payment of the principal of and the interest on the 1947 Indenture Bonds (hereinafter mentioned), **and other moneys to the extent provided**

> **in this Agreement** as security for the payment of the bonds and the interest and the redemption premium, if any, thereon and as security for the satisfaction of any other obligation assumed by it in connection with such bonds, and **it is mutually agreed and covenanted by and between the parties hereto**, for the equal and proportionate benefit and security of all and singular the present and future holders of the bonds issued and to be issued under this Agreement, without preference, priority or distinction as to lien or otherwise, except as otherwise hereinafter provided, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof or otherwise, **as follows:**

(TA at 13 (emphasis added).)[19] The sequentially-numbered Articles and Sections of the Trust Agreement are set forth immediately after the Preamble. The left-hand margins of the Original Trust Agreement include brief notations describing generally the contents of each section, which have been retained in the Joint Conformed Trust Agreement; the Trust Agreement provides that the notations are not intended to affect the "meaning, construction or effect" of any texts or articles of the document. (TA § 1301.) The Preamble is described informally in the margin as the "Pledge of revenues of the System[.]" (TA at 13.)

2. Section 701

The language of the Preamble, both the pledge and the subsequent reference to a covenant, parallel the language of section 701 of the Trust Agreement, which provides in pertinent part:

> **The Authority covenants that it will promptly pay the principal of and the interest on each and every bond issued under the provisions of this Agreement at the places, on the dates and in the manner specified herein** and in said bonds and in the coupons, if any, appertaining thereto, and any premium required for the retirement of said bonds by purchase or redemption, according to the true intent and meaning thereof. Until the 1947 Indenture Bonds

[19] The "1947 Indenture" and bonds related thereto are not at issue, and the passages in the Trust Agreement that make reference to payment of those bonds are only relevant insofar as they affect the interpretation of the contract with respect to the subsequently issued Bonds.

> have been paid or provision has been made for their payment and the release of the 1947 Indenture, such principal, interest and premium are payable solely from moneys in the Renewal and Replacement Fund and said moneys are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified. After the 1947 Indenture Bonds have been paid or provision has been made for their payment and the release of the 1947 Indenture, **such principal, interest and premium will be payable solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified**.

(TA § 701 (emphasis added).) The margin beside section 701 informally describes the second part of this passage as "Pledge of revenues."

3. Section 101 - Definitions

a. Revenues

"Revenues" are defined in section 101 of the Trust Agreement as, in relevant part:

> **[A]ll 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 . . . .

(TA § 101 (emphasis added).)

b. System

"System" is defined in section 101 of the Trust Agreement as:

> [A]ll the properties presently owned and operated by the Authority as a single integrated system, together with all works and properties which may be hereafter acquired or constructed by the Authority in connection with the production, distribution or sale of electric energy and the acquisition or construction of which shall be financed in whole or in part from the proceeds of bonds issued under the provisions of the 1947 Indenture or this Agreement or from moneys deposited to the credit of the 1947 Construction Fund, the Construction Fund, the Capital Improvement Fund or the Renewal and Replacement Fund or from Subordinate Obligations to the extent such works and properties have been included by the

> Authority as part of the System . . . .

(TA § 101.)

c. Opinion of Counsel

"Opinion of Counsel" is defined in section 101 of the Trust Agreement as, in relevant part:

> [A] written opinion of counsel who may (except as otherwise expressly provided in this Agreement) be counsel for the Authority. Every opinion of counsel required to be filed with the Trustee in connection with an application to the Trustee to authenticate bonds under this Agreement shall contain the following statements: . . . **(ii) this Agreement creates a legally valid and effective pledge of the Net Revenues**, subject only to the lien of the 1947 Indenture, **and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement** . . . .

(TA § 101 (emphasis added).)

d. Net Revenues

Section 101 of the Trust Agreement defines "Net Revenues" as: "the amount of the excess of the Revenues for such period over the Current Expenses for such period."

e. Current Expenses

Section 101 of the Trust Agreement defines "Current Expenses" as, in relevant part: "the Authority's reasonable and necessary current expenses of maintaining, repairing and operating the System . . . ."

4. Section 401

Section 401 of the Trust Agreement provides, in relevant part:

> A special fund is hereby created and designated "Puerto Rico Electric Power Authority Power System Construction Fund" (herein sometimes called the "Construction Fund"), to the credit of which such deposits shall be made as are required by the provisions of Section 208 of this Agreement. There shall also be deposited to the

> credit of the Construction Fund any moneys received from any other source for paying any portion of the cost of any Improvements. One or more separate accounts may be created in the Construction Fund for use for specified projects.
>
> **The moneys in the Construction Fund** shall be held by the Authority in trust, separate and apart from all other funds of the Authority, and **shall be applied to the payment of the cost of any Improvements and**, except for any moneys in separate accounts in the Construction Fund received from the United States Government or any agency thereof or from the Commonwealth of Puerto Rico or any agency thereof, **pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Agreement and for the further security of such holders until paid out or transferred as herein provided.**

(TA § 401 (emphasis added).)

5. Section 503

Section 503 of the Trust Agreement provides, in relevant part:

> A special fund is hereby created and designated the "Puerto Rico Electric Power Authority General Fund" (herein sometimes called the "General Fund"). **The Authority covenants that . . . 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 depositary or depositaries to the credit of the General Fund and applied in accordance with the provisions of this Article**.

(TA § 503 (emphasis added).)

6. Section 505

Section 505 of the Trust Agreement provides, in relevant part, that: "The Authority covenants that **moneys in the General Fund will be used first for the payment of the Current Expenses of the System** . . . ." (TA § 505 (emphasis added).)

7. Section 506

Under section 506 of the Trust Agreement, Revenues after payment of Current Expenses, or "Net Revenues," are to be transferred from the General Fund to a Revenue Fund,

providing, in relevant part:

> A special fund is hereby created and designated the "Puerto Rico Electric Power Authority Power Revenue Fund" (herein sometimes called the "Revenue Fund"). . . . **[T]he Treasurer shall transfer**, on or before the 15th day of each month, **from the General Fund to the credit of the Revenue Fund** an amount equal to the amount of **all moneys held for the credit of the General Fund on the last day of the preceding month less such amount to be held as a reserve for Current Expenses** . . . . **The Authority covenants that all moneys to the credit of the Revenue Fund will be applied to the purposes and in the order set forth in this Article.**

(TA § 506 (emphasis added).)

8. Section 507

a. Section 507

The first paragraph of section 507 of the Trust Agreement provides, in relevant part:

> **A special fund is hereby created and designated the "Puerto Rico Electric Power Authority Power Revenue Bonds Interest and Sinking Fund" (herein sometimes called the "Sinking Fund"). There are hereby created three separate accounts in the Sinking Fund** designated "**Bond Service Account**", "**Reserve Account**" and "**Redemption Account**", respectively. **Another special fund is hereby created and designated** "Puerto Rico Electric Power Authority Reserve Maintenance Fund" (herein sometimes called the "**Reserve Maintenance Fund**"). **Two other special funds are hereby created and designated** "Puerto Rico Electric Power Authority Self-insurance Fund" (herein some times called the "**Self-insurance Fund**") and "Puerto Rico Electric Power Authority Capital Improvement Fund" (herein sometimes called the "**Capital Improvement Fund**"). . . . .

(TA § 507 (emphasis added).)

b. Section 507(a)

Section 507(a) provides that moneys on deposit in the Revenue Fund (i.e., Revenues after the payment of Current Expenses, or "Net Revenues") are generally to be

transferred first:

> (a) to the credit of the Bond Service Account, such amount thereof (or the entire sum so withdrawn if less than the required amount) as may be required to make the total amount then to the credit of the Bond Service Account equal to the sum of
>
> > (i) the Interest Accrual on all the outstanding bonds to and including the first day of the next calendar month, and
> >
> > (ii) the Principal Accrual on the outstanding serial bonds to and including the first day of the next calendar month;

(TA § 507(a).)

c. Section 507(b)-(h)

Subsections (b)-(h) of section 507 of the Trust Agreement provide that, after deposit into the Bond Service Account in the Sinking Fund, deposits of Net Revenues are to be made—if moneys are sufficient—into the Redemption Account and Reserve Account of the Sinking Fund, and then into the Reserve Maintenance Fund, Self-insurance Fund, and Capital Improvements Fund. (TA § 507(b)-(h).)

d. Section 507(h)

Section 507(h) of the Trust Agreement additionally subjects the Net Revenues in the Sinking Fund and the Specified Funds to a lien and charge in favor of the Bondholders, providing, in relevant part:

> (h) . . . . **The moneys in the Sinking Fund shall be held by the Trustee in trust, and the moneys in the Reserve Maintenance Fund, the Self-insurance Fund and the Capital Improvement Fund shall be held by the Authority in trust, separate and apart from all other funds of the Authority, and shall be applied as hereinafter provided with respect to such Funds and, pending such application, shall be subject to a lien and a charge in favor of the holders of the bonds issued and outstanding under this Agreement and for the further security of such holders until paid out or transferred as herein provided**.

(TA § 507(h) (emphasis added).)

9. Section 513

Section 513 of the Trust Agreement charges the Sinking Fund with payment of the Bonds, providing, in relevant part:

> **Subject to the terms and conditions set forth in this Agreement, moneys held for the credit of the Bond Service Account, the Reserve Account and the Redemption Account shall be held in trust** and disbursed by the Trustee for (a) the payment of interest on the bonds issued hereunder as such interest becomes due and payable, or (b) the payment of the principal of such bonds at their respective maturities, or (c) the payment of the purchase or redemption price of such bonds before their respective maturities, **and such moneys are hereby pledged to and charged with the payments mentioned in this Section**.
>
> Whenever the total of the moneys held for the credit of the Bond Service Account, the Reserve Account and the Redemption Account shall be sufficient for paying the principal of and the redemption premium, if any, and the interest accrued on all bonds then outstanding under the provisions of this Agreement, such moneys shall be applied by the Trustee to the payment, purchase or redemption of such bonds.

(TA § 513 (emphasis added).)

D. FAC Count I - The Trust Agreement Grants the Bondholders Security Interests Only in Moneys Actually Received and Deposited into the Sinking Fund and the Specified Funds

In Count I of the FAC, the Oversight Board seeks disallowance, pursuant to 11 U.S.C. section 502, of the Master PREPA Bond Claim to the extent it asserts a claim secured by security interests in revenues beyond those deposited to the credit of the Sinking Fund and Self-insurance Fund. Section 502 of the Bankruptcy Code provides, in relevant part, that:

> (b) . . . if . . . objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> > (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable

> law for a reason other than because such claim is contingent or unmatured . . . .

11 U.S.C.A. § 502 (Westlaw through P.L. 117-262).

Section 506 of the Bankruptcy Code governs the determination of the value of the secured portion of a claim. It provides in relevant part:

> (a)(1) **An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the [debtor's] interest in such property,** or to the extent of the amount subject to setoff, as the case may be, **and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.** Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C.A. § 506 (Westlaw through P.L. 117-262).

Under general rules of contract interpretation, as well as the laws of Puerto Rico (TA § 1301), a contract must be read as a unified whole. 31 L.P.R.A. § 3475 ("The stipulations of a contract should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together."). A court must also interpret a contract so as to give effect to each provision of the contract and avoid a reading that would render other provisions of the contract superfluous. See, e.g., N. New England Tel. Ops. LLC v. Local 2327, Int'l Brotherhood of Elec. Workers, AFL-CIO, 735 F.3d 15, 22 (1st Cir. 2013).

As noted above, the Bondholders contend that they have security interests, a term defined by the Bankruptcy Code as "lien[s] created by an agreement,"[20] in all present and future

[20] 11 U.S.C.A. § 101(50) (Westlaw through P.L. 117-262).

revenues of the Authority. The Bondholders also contend that the Preamble creates and defines the scope of the security interests granted by the Trust Agreement, notwithstanding the existence of more specific operative terms within the remainder of the document. (See, e.g., Defs. Mem. ¶ 36.) The Trust Agreement supports neither proposition.

Here, reading the Trust Agreement as a whole, it unambiguously embodies a pledge (i.e., a promise) to pay the amounts owing on the Bonds from Net Revenues, that is partially secured by a lien on the moneys received by PREPA attaching at the time they are ultimately deposited into the Sinking Fund, as well as liens on moneys the provisions of the Trust Agreement make "available" for transfer to supplement the Sinking Fund in the event of a shortfall that attach at the time they are deposited into the "Specified Funds" (the Reserve Maintenance Fund, Self-insurance Fund, Capital Improvement Fund, and Construction Fund).[21]

While the term "pledge" is used in the Preamble of the Trust Agreement with respect to "revenues" and "other moneys[,]" the Preamble contains no reference to any grant of a lien or charge, but instead states that the pledge is "**mutually agreed and covenanted by and between the parties hereto**[.]" (TA at 13 (emphasis added).) As the Court held when interpreting very similar agreements regarding the Puerto Rico Highways and Transportation Authority, a pledge that lacks "references to a lien or charge or other language indicating" that it is meant to expand the scope of specific lien grants results in a mere "unsecured promise[] to deposit Revenues in the manner required by the" agreement. In re Fin. Oversight & Mgmt. Bd. of P.R., 618 B.R. 619, 639 n.19 (D.P.R. 2020) ("HTA"). The Preamble does not grant the Bondholders any security interests.

Sections 401, 507, and 513 of the Trust Agreement are the only provisions that

[21] The Oversight Board uses the term "Subordinate Funds" to refer to the Specified Funds.

confer specific grants of liens, and only do so with respect to "moneys" deposited into the Sinking Fund and the Specified Funds. Section 401 creates the Construction Fund and grants a "lien and charge" in favor of the Bondholders on Revenues deposited therein as well as bond proceeds and moneys received from any other source for "Improvements" (as defined in the TA) that have been deposited into the Fund (other than moneys received from the United States or Commonwealth governments or their agencies) pending and subject to application to the costs of System Improvements. (TA § 401.) Section 507 creates the Sinking Fund and the Specified Funds and subjects moneys received and deposited into those funds to a "charge" in favor of the Bondholders. (TA § 507.) Cf. 11 U.S.C.A. § 101(37) (Westlaw through P.L. 117-262) ("The term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation."). Sections 512, 512A, and 512B specify how moneys are to be transferred to the Sinking Fund from the Specified Funds in the event of a shortfall. (TA §§ 512, 512A, 512B.) Moneys in the Specified Funds are not uniformly automatically available for transfer to the Sinking Fund in the event of a shortfall; for example, section 512A requires that certain Consulting Engineers approve any transfer from the Self-insurance Fund into the Sinking Fund in writing after the Authority has made the determination that the moneys are not needed for their ordinary purpose. (TA § 512A.) Section 513, by contrast, specifies that the moneys in the Sinking Fund are specifically "pledged to and charged with" payment in full of principal and interest on and redemption of the Bonds. (TA § 513.) If a security interest had been granted in all current and future income of the authority by the language in the Preamble, the Preamble would render the later specific limited lien grants in sections 401, 507, and 513 superfluous. Such a reading would not only be illogical, it would contravene the basic principle that contracts are to be read in a manner that gives each provision meaning and renders none superfluous.

The Preamble is not a self-effectuating granting clause that confers interests without regard to the scope of all other covenant and lien provisions of the Trust Agreement. That the Preamble is merely a prefatory clause indicating that the scope of the pledge is mapped by more specific terms to come in subsequent sections is clear because the Preamble ends with the phrase "**as follows:**"—indicating that the pledge is defined by further provisions in the body of the agreement. (TA at 13 (emphasis added).) To the extent the Preamble points to the specific pledges contained later in the Trust Agreement, it has the same effect as a "whereas" clause: "Although a statement in a 'whereas' clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document." Abraham Zion Corp. v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985) (internal quotation omitted); Restatement (Second) of Contracts § 203(c) ("specific terms and exact terms are given greater weight than general language").

The Trust Agreement section that speaks most directly to the contours of the pledge of "revenues of the System" is section 701, which embodies a covenant to pay interest and principal "**solely from the Revenues and said Revenues are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified**[.]" (TA § 701 (emphasis added).) In HTA, this Court interpreted a phrase substantially identical to that found in section 701, regarding bonds "payable solely from Revenues . . . which Revenues and funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified[.]" 618 B.R. at 639. There, the Court held the clause "logically imports the scope of the pledge, mechanics, and detailed limitations contained elsewhere in the" agreement. Id. Nothing in the PREPA Trust Agreement supports a different interpretation. Here, the two phrases are bookends, "as follows:" in the Preamble, and "in the manner and to the

extent hereinabove particularly specified" in section 701, which, like the Preamble, nowhere mentions liens.

Section 701 of the Trust Agreement narrows the scope of the pledge, which is not denominated by section 701 or the Preamble as associated with any lien or charge, from all "revenues," to the defined term "Revenues" (defined to mean only "moneys received" from System operations or financing) pledged "in the manner and to the extent hereinabove specified"—that is, subject to the payment terms contained in the preceding sections of the body of the Trust Agreement.

The provisions that fall between the Preamble and section 701 provide for a payment waterfall beginning with a General Fund created by section 503 of the Trust Agreement, where "all Revenues, other than income from investments" are first deposited. (TA § 503.) The Revenues in the General Fund are "used first for the payment of the Current Expenses of the System[.]" (TA § 505.) The question of what constitutes a "Current Expense[] of the System" is a subject of the Current Expense Litigation.[22] After payment of Current Expenses, but holding back a reserve for Current Expenses as they come due, the moneys are transferred to the "Revenue Fund" created by section 506. (TA § 506.) Under the Trust Agreement, excess Revenues remaining after payment of Current Expenses are "Net Revenues." (See TA § 101.) These are the moneys—all of which consist of Revenues—that are required to be transferred to the Revenue Fund and then finally rendered collateral upon transfer to the

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[22] The Bondholders have described the Current Expense Litigation as involving the claim of "certain fuel line lenders to PREPA . . . that the Trust Agreement requires PREPA to pay all Current Expenses before the bonds[.]" (Defs. Mem. ¶ 33 n.7).)

At oral argument on these cross-motions for summary judgment, the AHG conceded that the Bondholders stand in line behind Current Expenses whether the Bondholders have a gross revenue pledge or only a Net Revenue pledge. (Omni Hr'g Tr. 136:18-137:12.)

liened Sinking Fund and Specified Funds. (TA §§ 506, 507; see also Defs. Mem. ¶ 56.)

The scope of the general pledge of the Trust Agreement is best summarized in the section 101 definition of "Opinion of Counsel," which prescribes the following description to be provided to prospective bondholders: "this Agreement creates a legally valid and effective pledge of the Net Revenues, subject only to the lien of the 1947 Indenture, and of the moneys, securities and funds held or set aside under this Agreement as security for the bonds, subject to the application thereof to the purposes and on the conditions permitted by this Agreement[.]"

Accordingly, and without regard to the question of lien perfection,[23] the Bondholders have been pledged payment on the Bonds from the Net Revenues of the System, but their claim is only partially secured by a lien and charge on moneys actually received and deposited into the Sinking Fund and other Specified Funds (plus certain other bond revenues and "any moneys received from any other source for paying any portion of the cost of any Improvements" deposited into the Construction Fund). (TA § 401.)[24]

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[23] Count I of the FAC and Count II of the Defendants' Answer and Counterclaim Complaint can only be resolved after examining lien perfection.

[24] To briefly address another Bondholder contention: the Bondholders argue that the clause in sections 401 and 507 stating that the Sinking Fund and the Specified Funds are subject to a lien and charge "for the further security of such holders" grants liens directly to Bondholders in addition to liens granted to the Trustee in all of the "revenues of the System." (See, e.g., Defs. Mem. ¶¶ 30-33, 40, 43-44.) However, if a creditor has been granted blanket security, it does not require "further security." The Oversight Board is correct that the phrases simply point to one another: the lien in section 401 is in further security of the liens in section 507, and vice versa. The lien grants are also "further security," in the informal sense of the word, for the Trust Agreement's unsecured covenants. (See FOMB Mem. ¶ 41 n.17; FOMB Reply ¶ 28.)

More importantly, a distinction the Bondholders seek to draw between security interests granted to the Trustee and those granted to the Bondholders is unavailing. The Trustee holds its security interests only for the benefit of the Bondholders, and, as the Oversight Board noted at oral argument, any distinction would be one without a difference because the Trustee and the Bondholders are together limited to the same remedies under

E. FAC Count I - The Bondholders Do Not Have a Security Interest in Future Revenues Not Yet Received for Energy Not Yet Generated

1. The Trust Agreement

The Bondholders contend that the Trust Agreement grants them an enforceable security interest in future income, derived from the sale of energy that PREPA has not yet generated, which PREPA has not yet received. (See generally, e.g., Defs. Suppl. Resp.) The Bondholders note, accurately, that the Authority Act gives PREPA the ability "to secure payment of its bonds and of any and all other obligations by pledging or placing a lien on all or any of its contracts, revenues, and income" (22 L.P.R.A. § 196(o)) and provides that "[a]ny resolution . . . authorizing any bonds **may** contain provisions, which shall be part of the contract with the holders of the bonds . . . (1) as to the disposition of the entire gross or net revenues and present or **future income** of the Authority, including the pledging of all or any part thereof to secure payment of the bonds" (22 L.P.R.A. § 206(e)(1) (emphasis added)). The Bondholders argue that, if they have a security interest in all of the revenues (small "r" denoting a broader definition) it necessarily includes a presently enforceable security interest on revenues not yet acquired. (Defs. Suppl. Resp. ¶ 14 n.9.) U.C.C. § 9-204; 19 L.P.R.A. § 2234.

There is no evidence, however, that PREPA used the authority to grant a security interest in future revenues when it issued the bonds on which the Bondholders base their claim. As explained above, the only assets subjected to a lien and charge by the terms of the Trust

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section 808 of the Trust Agreement, informally referred to as the "No Action Clause." (Defs. Mem. ¶ 107; TA § 808; Omni Hr'g Tr. 117:18-118:4.)

Further, the Bondholders fail throughout the briefing to distinguish PREPA's circumstances meaningfully from those considered by the Court in HTA, a decision that addressed agreements very similar to, and at points identical to, the Trust Agreement; in particular, the Court finds it to be of no significance that the bond resolutions in HTA involved a "Fiscal Agent" rather than a "Trustee." (Defs. Mem. ¶ 111.) See 618 B.R. at 626.

Agreement are moneys already received and deposited in the Sinking Fund and the Specified Funds. (TA §§ 401, 507, 513.)

The "future revenues" in which the Bondholders claim a security interest are a "mere expectancy" until they are rendered collateral, i.e., received and deposited into the liened Funds. Puerto Rico's law does not recognize such an expectancy as property in which an entity is capable of granting a creditor a security interest. See Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Designated Activity Co. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 948 F.3d 457, 468 n.8 (1st Cir. 2020) ("Andalusian") (the First Circuit, applying a general tenet of Puerto Rican law, held that "Puerto Rico law recognizes that the mere expectancy of property is not itself a property interest."). (See, e.g., FOMB Reply ¶ 16.)[25]

Accordingly, the Bondholders have no currently enforceable security interest (indeed, they have no interest at all) in future revenues the Authority has not yet received and deposited into the Sinking Fund or other Funds in which the Trust Agreement specifically grants them interests.

2. Bankruptcy Code Section 928

The Bondholders argue: "the Oversight Board's disallowance claims should be denied *even if it were right* that the Trustee and bondholders have a perfected lien only on moneys that are first credited to the Sinking Fund. That indisputably valid and perfected lien continues post-petition, under Bankruptcy Code Section 928(a), and covers all *future* special revenues credited to the Sinking Fund." (Defs. Mem. ¶ 79 (emphasis in original).)

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[25] For this, among other reasons, the Bondholders' asserted theories under the Takings Clause of the Fifth Amendment of the Constitution of the United States fail. (See, e.g., Defs. Mem. ¶ 88.) U.S. Const. amend. V. Under Puerto Rico law, as stated in Andalusian, the Bondholders have no present property right in the mere expectancy of future revenues.

Section 928 of the Bankruptcy Code provides, in pertinent part:

> (a) . . . subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

11 U.S.C.A. § 928 (Westlaw through P.L. 117-262.)

"Special Revenues" are defined by section 902(2)(A) of the Bankruptcy Code, in relevant part, as: "receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems[.]" 11 U.S.C.A. § 902(2)(A) (Westlaw through P.L. 117-262).

As stated above, by the plain language of the Trust Agreement, the only moneys that become subject to a lien and charge under the terms of the Trust Agreement are moneys that have already been deposited in the Sinking Fund and the Specified Funds. (TA §§ 401, 507, 513.) The language of section 928 of the Bankruptcy Code similarly refers only to "revenues acquired"— in the past-tense—and does not support the Bondholders' interpretation of that statute to the extent the Bondholders claim that it currently captures revenues not yet received by PREPA and deposited into the Funds. The Oversight Board and the Committee do not contest that the Bondholders' liens persist post-petition in that they attach to any moneys that are or have been deposited to the Sinking Fund and the Specified Funds after the commencement of the case. (See, e.g., UCC Resp. ¶ 9; FOMB Resp. ¶ 32.) The Oversight Board merely argues that section 928 does not apply to revenues that PREPA has not acquired yet, and that any claim

increasing due to the accretion of liened moneys in the liened Funds can be satisfied through confirmation and discharge via a plan of adjustment, as with any non-executory contract. (See, e.g., Omni Hr'g Tr. 103:16-104:24; FOMB Resp. ¶ 32.)

The Bondholders cite section 1201 of the Trust Agreement for the proposition that the Trust Agreement, and the liens granted thereunder, must persist until the Bonds are paid in full. (TA § 1201.) The Bondholders' arguments do not provide support for their contention that their continuing liens will persist beyond the satisfaction of their claim during the course of the Title III Case, assuming the confirmation of a plan of adjustment. See, e.g., In re Hawker Beechcraft, Inc., 486 B.R. 264, 277 (Bankr. S.D.N.Y. 2013) (if "the contract is not executory and the debtor chooses not to perform, the non-debtor party gets [a] pre-petition claim for breach of contract.").

Accordingly, the Bondholders' liens persist on special revenues, if any, deposited into the Funds after the commencement of PREPA's Title III case. However, their security interests do not, by virtue of section 928 of the Bankruptcy Code, extend to future revenues prior to receipt. Nor does section 928 make the obligations from which such future liens, arising from a Trust Agreement that is a non-executory contract, nondischargeable. The Bondholders' security interest is limited to the amounts on deposit in the liened Funds, to the extent such liens are perfected. Section 928 of the Bankruptcy Code will continue to operate to render any special revenues in the Funds subject to the Bondholders' liens until such time as a plan of adjustment is confirmed that cuts off accretions of the security interest.

F. FAC Counts IV-VI - The Bondholders Do Not Have a Security Interest in the Covenants of the Trust Agreement

The Oversight Board seeks summary judgment with respect to Counts IV-VI of the FAC, disallowing the Master PREPA Bond Claim to the extent it asserts security interests in

the covenants and remedies provisions of the Trust Agreement. Counts IV-VI parallel Counts I-III but only address any purported security interests granted by the Trust Agreement in the covenants and remedies therein. (See Master PREPA Bond Claim Ex. A ¶ 6 (asserting security interests in, inter alia, the "covenants, obligations and undertakings" of the Trust Agreement).) The Oversight Board argues that the covenants and remedies were never the property of PREPA and therefore PREPA could not have granted security interests in them. (See, e.g., FOMB Reply ¶ 43.)

The Bankruptcy Code defines a "security interest" as a "lien created by an agreement." 11 U.S.C.A. § 101(50) (Westlaw through P.L. 117-262). For a claim secured by a security interest to be allowed under the Bankruptcy Code, the creditor must have a "lien on property in which the debtor has an interest." 11 U.S.C.A. § 506(a) (Westlaw through P.L. 117-262). The Bondholders' argument that the Trust Agreement grants them a lien on the covenants, or that the remedies in the Trust Agreement create liens or are liens, is entirely without merit. The covenants and remedies in the Trust Agreement, being merely promises and means of seeking the fulfillment of promises, are not property in which PREPA has and can grant an interest.

Indeed, in their response to the Oversight Board's motion, the Bondholders have abandoned their claim to have liens on the covenants of the Trust Agreement. (Defs. Resp. ¶ 72.)[26] Accordingly, the Oversight Board is entitled as a matter of law to summary judgment

[26] When a party fails to oppose arguments set forth in a motion for summary judgment, courts may treat such arguments as conceded. See Tutor Perini Corp. v. Banc of Am. Sec. LLC, 120 F. Supp. 3d 22, 32 (D. Mass. 2015); Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175, 227 (D.D.C. 2014) (acknowledging that where a defendant does not address a plaintiff's argument in its reply brief to a motion for summary judgment, a party can be held to have conceded).

with respect to Counts IV-VI and the Master PREPA Bond Claim is disallowed to the extent it asserts a secured claim based on the covenants and remedies provisions of the Trust Agreement. The Bondholders' cross-motion for summary judgment as to Counts IV-VI is denied in its entirety.

G. FAC Count II - The Bondholders Have Perfected Liens in the Sinking Fund and the Specified Funds to the Extent that the Deposit Accounts Comprising the Funds are in the Control of the Trustee

The Court next turns to the question of the extent to which the Bondholders' security interests have been perfected.

1. Perfection By Control

Sections 401, 507, and 513 of the Trust Agreement grant the Bondholders liens only in "moneys" actually received and deposited into the accounts comprising the Sinking Fund and the Specified Funds, and section 513 provides that the Bonds are payable solely from the Sinking Fund. (TA §§ 401, 507, 513.)

The Commonwealth has adopted revised Article 9 of the Uniform Commercial Code (the "U.C.C."), which governs the creation, perfection and priority of security interests. See 19 L.P.R.A. §§ 2211-2409 (hereinafter, revised Article 9 is referred to as "Article 9"). Article 9 thus governs the existence, validity and perfection of security interests in PREPA's property. See 19 L.P.R.A. § 2251; U.C.C. § 9-301. The Oversight Board proffers in its brief, but does not proffer evidence, that the Sinking Fund and all of the Specified Funds comprise "deposit accounts" as that term is defined under the U.C.C. (FOMB Mem. ¶ 61.) 19 L.P.R.A. § 2212(a)(29); U.C.C. § 9-102(a)(29).

Under Article 9, the only relevant way to perfect a security interest in a deposit account is by "control" of the deposit account; a UCC-1 financing statement is not sufficient. 19 L.P.R.A. § 2262(b)(1); U.C.C. § 9-312(b)(1)) ("a security interest in a deposit account may be

perfected only by control . . . ."); see also 19 L.P.R.A. § 2264(a) ("A security interest in . . . deposit accounts . . . may be perfected by control of the collateral under § 2214 . . . ."); U.C.C. § 9-314(a).[27] Under Article 9, a secured party has "control" of a deposit account only if: (a) the secured party is the bank with which the deposit account is maintained; (b) the secured party is the customer of the bank where the deposit account is maintained (and the holder of the deposit account); or (c) the debtor, the secured party and the bank have executed a "deposit account control agreement" or "DACA" that gives the secured party requisite "control" of the deposit account (by providing that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor). See 19 L.P.R.A. § 2214(a)(1)-(3); U.C.C. § 9-104(a)(1)-(3). No DACA exists between the Trustee and the holders of any of PREPA's other depositary banks. (FOMB SUMF ¶ 83.)[28]

The Trust Agreement explicitly commits the Sinking Fund to the custody of the Trustee. (TA § 507(h).) The Oversight Board has proffered a declaration that the Self-insurance Fund is also held by the Trustee. (See, e.g., Morales Decl. ¶¶ 32-33; FOMB Mem. ¶ 59.) At oral argument, the Oversight Board's counsel stated that the Trustee holds the Reserve Maintenance

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[27] The Bondholders argue that, "Under the UCC, 'a security interest attaches to any identifiable proceeds of collateral,' and '[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected[,]" and that therefore, because they have a lien on future revenues before they are acquired, they also have a lien on any proceeds of those revenues, i.e., the moneys deposited into the General Fund. (Defs. Mem. ¶ 127 (quoting 19 L.P.R.A. §§ 2265(a)(2), (c); U.C.C. § 9-315(a)(2), (c)).) The Bondholders' position is without merit and is in any event irrelevant because, as explained above, the Bondholders' liens do not extend to future revenues or to any assets beyond the content of the Sinking Fund and the Specified Funds.

[28] The Oversight Board included this allegation in the FAC. (FAC ¶ 64.) In their response to the Oversight Board's Statement of Undisputed Material Facts, the Defendants admitted to the facts of this statement. (Defs. SUMF Resp. ¶ 83.)

Fund as well, but that the Trustee does not hold the Construction Fund.[29] (Omni Hr'g Tr. 34:6-8.) The Oversight Board's counsel did not address the Capital Improvement Fund; accordingly, its status is unknown. From these statements, the Court concludes that the Oversight Board does not dispute the existence of perfected security interests in the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund.

Accordingly, the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund are under the control of the Trustee, and the Bondholders therefore have perfected security interests in them. The only remaining question with respect to lien perfection is whether the Oversight Board can avoid the Bondholders' liens on the moneys in the Construction Account and the Capital Improvement Account.

2. Under Section 544 of the Bankruptcy Code, the Oversight Board Can Avoid any Unperfected Security Interests of the Bondholders

The Oversight Board moves for summary judgment on Count II of the FAC, seeking, pursuant to Bankruptcy Code sections 544, 550, and 551, to avoid and preserve for the benefit of PREPA any security interests in moneys received by PREPA in connection with or as a result of its ownership or operation of the system other than the revenues deposited to the credit of the Sinking Fund and Self-insurance Fund. Because, as noted above, the Oversight Board has proffered that the Reserve Maintenance Fund is also under the control of the Trustee and the Bondholders' security interest in that Fund is therefore perfected, the Court must deny the motion with respect to Count II insofar as it relates to the Bondholders' interest in the Reserve Maintenance Fund. In light of the Court's earlier conclusion that the Bondholders' security interest does not extend beyond the Sinking Fund and the Specified Funds, the Court construes

[29] Counsel's statement that the Trustee holds the Subordinate Obligations Fund is not relevant to the Bondholders' claim. (Omni Hr'g Tr. 34:6-8.)

the relevant aspect of Count II as seeking to avoid security interests in the Capital Improvement Fund and the Construction Fund.

Section 544(a) provides:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .

11 U.S.C.A. § 544(a) (Westlaw through P.L. 117-262). Under section 301(c)(7) of PROMESA, the term "trustee" in applicable Bankruptcy Code provisions means the Oversight Board. 48 U.S.C.A. § 2161(c)(7) (Westlaw through P.L. 117-262) ("The term 'trustee', when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means the Oversight Board, except as provided in section 926 of title 11, United States Code."). Under sections 550 and 551 of the Bankruptcy Code (and section 301(c)(5) of PROMESA, which provides that the term "property of the estate" in this instance means "property of the debtor") any transfer of property of the debtor avoided under section 544 may be recovered by the trustee (Oversight Board) and must be preserved for the benefit of the debtor. 11 U.S.C. §§ 550, 551; 48 U.S.C. § 2161(c)(5).

Under section 544 of the Bankruptcy Code, the Oversight Board may avoid unperfected security interests by standing in the shoes of a hypothetical lien creditor and a creditor with an unsatisfied execution, whether or not such a creditor exists. 11 U.S.C. § 544. Under section 9-317(a)(2) of the U.C.C., a lien creditor has priority over unperfected security interests. 19 L.P.R.A. § 2267(a)(2). As explained above, according to the parties, the only

liened Funds over which the Trustee does not have established control, and therefore a perfected security interest, are the Capital Improvement Fund and the Construction Fund.

The Bondholders argue that no PREPA creditor could have obtained a judicial lien against PREPA as of the commencement of this Title III Case. (Defs. Mem. ¶ 132.) In the First Circuit, the burden of establishing the rights of a hypothetical lien creditor under applicable non-bankruptcy law is placed on the bankruptcy trustee, and the Oversight Board therefore bears that burden in these Title III Cases. See, e.g., Ford v. Fed. Home Loan Mortg. Corp. (In re Bishop), Adv. Proc. No. 09-1034-MWV, 2009 WL 2231197, at *2 (Bankr. D.N.H. July 24, 2009) (stating that, "[t]o assert a cause of action pursuant to § 544(a)(1) or § 544(a)(3), the [trustee] must provide adequate grounds for an inference that a transfer of property of the debtor is avoidable by a hypothetical lien creditor or bona fide purchaser."); see also 48 U.S.C. § 2161(c)(7). Here, the Oversight Board points to section 705 of the Trust Agreement, which specifically recognizes that, "if PREPA's debts go unpaid, unpaid creditors may obtain a lien (presumably a judicial lien) 'upon the System or any part thereof or the Revenues.'" (FOMB Resp. ¶ 103 (quoting TA § 705).)[30] Because, as the AHG acknowledged at oral argument, Current Expenses are paid before the Bondholders' claim on the pledged Net Revenues,[31] judicial liens on Current Expenses would be superior to the Bondholders' interests. The Oversight Board also notes that the Trust Agreement permits junior subordinate liens on the Bonds. (FOMB Resp. ¶ 103.) Based on these clear provisions of the Trust Agreement, the Court concurs in the conclusion that PREPA's assets can be subjected to judicial liens under applicable

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[30] Section 705 of the Trust Agreement requires PREPA to "satisfy and discharge . . . all lawful claims and demands for labor, materials, supplies or other objects" within sixty days of accrual if they might otherwise become a lien on the System or any part of the Revenues[.]" (TA § 705.)

[31] See supra note 22.

non-bankruptcy law.

Furthermore, jurisprudence from Puerto Rico confirms that the assets of a Puerto Rico governmental entity may be subject to attachment and seizure where the legislature has conferred sufficient operational powers upon the governmental entity to render it subject to "judicial process as any private enterprise would be under like circumstances . . . ."[32] Arraiza v. Reyes; León, Interventor, 70 D.P.R. 614, 616 (P.R. 1949), quoted in Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 942 (1st Cir. 1993). The Puerto Rico Supreme Court has identified various powers and attributes that should be considered in determining whether a governmental entity was intended to be amenable to judicial process in a manner similar to a private business. See generally Arraiza, 70 D.P.R. at 617. Upon consideration of the factors enumerated in Arraiza—which include the abilities to be sued as a corporation, enter into contracts, borrow money, and issue bonds that will not be a liability of the Commonwealth—the Court concludes that PREPA is an entity that is sufficiently structured like a private business that its assets may be subject to provisional remedies, including liens.[33]

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[32] A court may bar direct attachment of funds of such a public entity only where the attachment would interfere with the entity's "performance of its [governmental] functions." Librotex, Inc. v. Autoridad de Acueductos y Alcantarillados de P.R., 138 D.P.R. 938, 941-42 (P.R. 1995) (citing Arraiza, 70 D.P.R. at 618), available in English translation at Docket Entry No. 123-1 in Adv. Proc. No. 17-00155-LTS ("the Legislature granted the [Puerto Rico Aqueduct and Sewer] Authority sufficient operational powers to consider it 'as subject to legal proceedings as any private entity would be in similar circumstances, so long as it does not interfere with the performance of its [governmental] functions'").

[33] The Authority Act for PREPA provides that the "corporation" may, inter alia, "govern the manner in which its general business may be conducted"; "have full control over and intervene in any venture undertaken or acquired"; "enter into contracts and execute any instruments as are necessary or convenient in the exercise of any of its powers"; "sue and be sued in all courts of justice"; collect fees for electrical power services; and "borrow money, make and issue bonds[.]" 22 L.P.R.A. § 196. Further, bonds of the Authority "shall not be a debt of the Commonwealth[.]" 22 L.P.R.A. § 210; cf. Arraiza, 70 D.P.R. at 617. Moreover, the Authority Act established a Governing Board for PREPA,

Moreover, the Puerto Rico Court of Appeals recently held that PREPA "is a corporation and public division that acts and does business as a private company." Villanueva v. Autoridad de Energía Eléctrica [PREPA], No. KLCE202100646, 2021 WL 3701742 (TCA), at *9 (P.R. Cir. July 14, 2021) available in English translation at Docket Entry No. 215-3 in Adv. Proc. No. 19-00388-LTS.

Further, Puerto Rico's Rules of Civil Procedure generally empower courts to order the attachment of a lien to secure a judgment creditor's claim. See 32A L.P.R.A. app. V, Rule 56.1. Accordingly, a court would have been empowered to issue any provisional order it deemed necessary and appropriate to secure satisfaction of the judgment pursuant to Puerto Rico Rule of Civil Procedure 56.1. Specifically, and as relevant here, a court could have ordered the attachment of a lien against property of PREPA as of the commencement of this Title III Case; thus, the Oversight Board has hypothetical lien creditor power as of the commencement of the case.

Thus, to the extent the moneys subject to the Bondholders' liens (in the Sinking Fund and the Specified Funds) are held in deposit accounts that are within the control of the Trustee, the Bondholders have valid and perfected liens in those moneys. By the same reasoning, to the extent the liened moneys are in deposit accounts not within the control of the Trustee, the Oversight Board has the right to avoid the Bondholders' liens and recover and/or preserve the collateral for the benefit of PREPA pursuant to Bankruptcy Code sections 544, 550,

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consisting of members of differing mandated backgrounds, similar to the governing structure of a private entity. See 22 L.P.R.A. § 194.

Accordingly, PREPA is inherently capable of functioning for financial and litigation purposes as a private business or enterprise, exhibiting characteristics similar to those of the Puerto Rico Aqueduct and Sewer Authority, against which an order of attachment was upheld in Arraiza.

and/or 551.[34] However, if the moneys could be held in a securities account or a special account, it is possible that the Bondholders could have perfected their liens by a means other than control, including by way of a UCC-1 financing statement. 19 L.P.R.A. § 2262(b)(1); U.C.C. § 9-312(b)(1) ("A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing."). Because neither party has proffered evidence sufficient to establish that they have perfected liens on the Construction Fund or Capital Improvement Fund, a material issue of fact exists and summary judgment cannot be granted in favor of either party with respect to those Funds.

H. FAC Counts I through VI and Counterclaim Count II - Conclusions with Respect to the Secured Portion of the Master PREPA Bond Claim

Therefore, the Oversight Board's motion for summary judgment as to Count I of the FAC, seeking a "Judgment Disallowing Master PREPA Bond Claim Asserting Claim Secured by Security Interests in Revenues Beyond Those Deposited to the Credit of the Sinking Fund and Self-Insurance Fund," is granted in part, the Defendants' cross-motion on Count I is denied in part, and the Master PREPA Bond Claim is disallowed to the extent it asserts any security interest, perfected or otherwise, in moneys beyond those actually deposited into the Sinking Fund and the Specified Funds as of the time of discharge, if and when the PREPA Plan of Adjustment is confirmed.

The Oversight Board's motion for summary judgment as to Count I of the FAC is further denied with respect to the moneys in the Reserve Maintenance Fund because the Trustee has established control of the Fund and perfected its liens thereon, accordingly the Defendants'

[34] The Court's decision regarding section 544 of the Bankruptcy Code renders any decision with respect to Count III of the FAC unnecessary at this juncture. Accordingly, summary judgment with respect to Count III is denied.

cross-motion thereon is granted to the same extent. Finally, the Oversight Board's motion for summary judgment as to Count I of the FAC is denied at this juncture as to the Construction Fund and Capital Improvement Fund because the Oversight Board has not proffered any competent evidence to establish that the Defendants have not perfected their liens on those Funds, and that, therefore, the liens are subject to avoidance under sections 544, 550, and/or 551 of the Bankruptcy Code. Accordingly, the Court will not disallow the Master PREPA Bond Claim's assertion of perfected security interests in those Funds at this time, and the Defendants' cross-motion thereon is also denied because the Defendants have not established that they have perfected their liens on those Funds and that, therefore, the liens are not subject to avoidance under sections 544, 550, and/or 551 of the Bankruptcy Code.

The Oversight Board's motion for summary judgment as to Count II of the FAC, asserted to permit the Oversight Board to avoid security interests in moneys other than those deposited to the Sinking Funds and Self-insurance Fund, is denied at this juncture. In light of the conclusions set forth above in connection with Count I of the FAC, the parties' motions with respect to Count II of the FAC are denied as moot with respect to any security interests asserted by the Defendants beyond those in moneys actually deposited into the Sinking Fund and the Specified Funds. Having established as a matter of law that the Oversight Board can avoid the Defendants' security interests in the Capital Improvement Fund and Construction Fund if the Defendants have not perfected their liens therein, the Court declines to address the Defendants' possible perfection of their liens on those Funds, because the record before the Court provides no evidence as to the form of the assets comprising the Funds or their custodial status. Accordingly, the Oversight Board's motion for summary judgment as to Count II of the FAC is denied with respect to the Capital Improvement Fund and Construction Fund pending further proceedings,

and the Defendants' cross-motion thereon is denied for substantially the same reasons. Finally, the Oversight Board's motion for summary judgment as to Count II of the FAC is denied with respect to moneys in the Reserve Maintenance Fund because the Trustee has control over the Fund and so has perfected its lien thereon, and the Defendants' cross-motion for summary judgment thereon is granted with respect to the Reserve Maintenance Fund for substantially the same reasons.

The Defendants' motion for summary judgment as to Count II of the Defendants' Answer and Counterclaim Complaint is, accordingly, granted with respect to the Sinking Fund, Self-insurance Fund, and Reserve Maintenance Fund in which the Defendants have valid and perfected liens, and the Oversight Board's cross-motion is denied to the extent it seeks to avoid the Bondholders' security interest in the Reserve Maintenance Fund. The Oversight Board did not seek to avoid the Bondholders' security interests in the Sinking Fund and Self-insurance Fund. The Defendants' motion for summary judgment as to Count II of the Defendants' Answer and Counterclaim is denied with respect the Capital Improvement Fund and Construction Fund for the same reasons stated above with respect to Count II of the FAC—because the Defendants have not proffered evidence sufficient to establish that they have perfected liens on those Funds, and the Oversight Board's cross-motion is denied as to those Funds for substantially the same reasons. Finally, as with Count II of the FAC, in light of the conclusions set forth above in connection with Count I of the FAC, the parties' motions with respect to Count II of the Defendants' Answer and Counterclaim Complaint are denied as moot with respect to any security interests asserted by the Defendants beyond those in moneys actually deposited into the Sinking Fund and the Specified Funds.

The Oversight Board's motion for summary judgment is denied, and the

Defendants' cross-motion is denied, as to Count III of the FAC for the reasons stated above.[35]

Finally, the Oversight Board's motion for summary judgment is granted, and the Defendants' cross-motion is denied, as to Counts IV-VI of the FAC for the reasons stated above.[36]

I. Counterclaim Count I and FAC Count VII - The Bondholders Have an Unsecured Net Revenue Claim Arising from the Covenants of the Trust Agreement

In Count I of the Defendants' Answer and Counterclaim Complaint, the Bondholders seek a declaratory judgment that, under the Trust Agreement, the Trustee has recourse to the Sinking Fund and the right to obtain specific performance of covenants to fund the Sinking Fund, and in the event of default has recourse to all PREPA revenues and other moneys. (E.g., Defs. Mem. ¶¶ 49-52.)

In Count VII of the FAC, the Oversight Board seeks judgment disallowing the Master PREPA Bond Claim to the extent it claims any right to payment beyond moneys credited to the deposit of the Sinking Fund and Self-Insurance Fund, arguing that section 927 of the Bankruptcy Code precludes any Bondholder entitlement to an unsecured "deficiency" claim. (See, e.g., FOMB Reply ¶ 52 & n.36.)

As the Court explains below, the Bondholders have an Unsecured Net Revenue Claim in the form of a general unsecured claim against PREPA based on PREPA's promise, set forth in the Trust Agreement, to pay Bond principal and interest from pledged Net Revenues of the System—which is partially secured by the moneys in the Sinking Fund and the Specified Funds, and is otherwise unsecured—and the remedies provisions of the Trust Agreement provide the Bondholders with the ability to obtain relief against PREPA.

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35 See supra note 34.

36 See supra section II.F.

1. The Equitable Remedies in the Trust Agreement Provide the Bondholders with Recourse and, Reduced to Claims, Give Rise to a General Unsecured Claim

The Bondholders' argument that they have recourse to all revenues of PREPA and other moneys—and therefore can have a general unsecured claim—is based upon the remedies provided in sections 804 and 805 of the Trust Agreement, which provide, in relevant part, that the Trustee may (or, in some instances, shall):

> [P]rotect and enforce its rights and the rights of the bondholders under applicable laws or under this Agreement by such suits, actions or special proceedings . . . either for **the appointment of a receiver as authorized by the Authority Act or for the specific performance of any covenant or agreement contained herein** or in aid or execution of any power herein granted or for the enforcement of any proper, legal or equitable remedy . . . .
>
> In the enforcement of any remedy under this Agreement **the Trustee shall be entitled to sue for, enforce payment of and receive any and all amounts then or during any default becoming, and at any time remaining, due from the Authority for principal, interest or otherwise under any of the provisions of this Agreement or of the bonds** and unpaid, with interest on overdue payments of principal at the rate or rates of interest specified in such bonds, together with any and all costs and expenses of collection and of all proceedings hereunder and under such bonds, **without prejudice to any other right or remedy of the Trustee or of the bondholders**, **and to recover and enforce any judgment or decree against the Authority, but solely as provided herein** and in such bonds, for any portion of such amounts remaining unpaid and interest, costs and expenses as above provided, **and to collect (but solely from moneys in the Sinking Fund and any other moneys available for such purpose) in any manner provided by law, the moneys adjudged or decreed to be payable**.

(TA § 804 (emphasis added).)

Section 805 of the Trust Agreement provides, in relevant part, that:

> **Anything in this Agreement to the contrary notwithstanding, if at any time the moneys in the Sinking Fund shall not be sufficient** to pay the interest on or the principal of the bonds as the same shall become due and payable (either by their terms or by acceleration of maturities under the provisions of Section 803 of this

> Article), **such moneys, together with any moneys then available or thereafter becoming available for such purpose, whether through the exercise of the remedies provided for in this Article or otherwise**, shall be applied: [pro rata to pay the Bondholders after payment of the Trustee's fees and expenses] . . . .

(TA § 805 (emphasis added).)

The Bondholders' argument of entitlement to recourse to all of PREPA's revenues and "other moneys" is based, in addition to the Preamble, primarily upon the clause "and to collect (but solely from moneys in the Sinking Fund and **any other moneys available for such purpose**) in any manner provided by law, the moneys adjudged or decreed to be payable." (TA § 804 (emphasis added).) Additionally, the Bondholders argue that section 805 contemplates additional moneys "becoming available" from outside the Sinking Fund and the Specified Funds as a result of the exercise of their equitable remedies. (Defs. Mem. ¶ 66.)

In summary, the Bondholders' argument is that, when read together in conjunction with the Trust Agreement as a whole, the remedies in sections 804 and 805[37] provide them with recourse against PREPA outside of the Sinking Fund because the Bondholders may obtain either judgments requiring PREPA to apply Net Revenue-derived assets from outside of the Sinking Fund to payments through the Fund, or—through specific performance of the right to appoint a receiver—to effectively increase Net Revenues through efforts to raise rates pursuant to the Authority Act and the covenants of the Trust Agreement. (See, e.g., Defs. Mem. ¶¶ 44, 46-47, 49, 51-52.)

Finally, the Bondholders argue that their equitable remedies determine the amount of their claim, because under section 101(5)(b) of the Bankruptcy Code, "a 'right to an equitable

[37] In conjunction with remedies provided by the Authority Act. See 22 L.P.R.A. §§ 207-208.

remedy for breach of performance' is a 'claim,' under the Bankruptcy Code, if 'such breach gives rise to a right to payment.'" (Defs. Mem. ¶ 63 (citing In re Fin. Oversight & Mgmt. Bd. for P.R., 485 F. Supp. 3d 351, 361 (D.P.R. 2020) ("Equitable causes of action are thus 'claims' under the Bankruptcy Code—and therefore are subject to resolution through the Title III claims resolution process—if payment could be substituted for the equitable remedy.").) See also generally Ohio v. Kovacs, 469 U.S. 274 (1985) (receivership obligation reduced to a claim).

The Bondholders' argument is correct, except in one particular: the Bondholders argue that the "rights and remedies resulting from PREPA's many breaches of its Trust Agreement covenants can be resolved by this Title III process if—*but only if*—they give rise to a right to the payment of damages in the full amount of the [Master PREPA Bond Claim]." (Defs. Mem. ¶ 63.) By operation of the remedies of the Trust Agreement, providing the means to potentially generate moneys from outside of the liened Funds by a judgment for specific performance, and by virtue of section 101(5)(b) of the Bankruptcy Code, the Bondholders are entitled to a general unsecured claim.[38] However, the Court cannot simply value the Unsecured

[38] The Oversight Board argues that section 701 of the Trust Agreement prevents the personal liability of PREPA, providing that, "neither the Commonwealth of Puerto Rico nor any such municipalities or other political subdivisions shall be liable for the payment of the principal of or the interest on the bonds." (FOMB Mem. ¶ 140 (citing TA § 701; 22 L.P.R.A. § 193(a)); FOMB Reply ¶ 52.) The Oversight Board's argument fails because there is no explicit exception for PREPA and it has not established that PREPA is a "political subdivision" of the Commonwealth. Nor does the Authority Act provide any explicit liability exception for PREPA, and indeed it contemplates that bonds will be payable out of PREPA's funds: "The bonds and other obligations issued by the Authority shall not be a debt 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 shall be liable thereon, **nor shall such bonds or other obligations be payable out of any funds other than those of the Authority**." 22 L.P.R.A. § 210 (emphasis added).

Net Revenue Claim at the full amount of the Master PREPA Bond Claim.[39]

In the event that the Bondholders obtained specific performance and a receiver raised rates to satisfy payment of the Bonds, the Revenues received would not be paid ahead of Current Expenses,[40] and the receiver would not have the freedom to charge rates that are not "reasonable"[41] or be completely untethered from the Trust Agreement—any such remedies and Revenues would still be subject to the payment restrictions and priorities of the Trust Agreement. (E.g., TA §§ 503, 506-507.) Any equitable claim reduced to payment arising from the Trust Agreement must have no greater value than the value that could be achieved through the application of the equitable remedies to fulfill the Trust Agreement's unsecured covenant to pay the Bonds from the Net Revenues of the System.

Here, the Trust Agreement pledges the Net Revenues of PREPA via section 701 and the preceding payment provisions. (TA § 701.) The pledge extends beyond the lien grants of sections 401, 507, and 513—embodying a partially secured obligation to pay the Bonds in full from Net Revenues: "The Authority covenants that it will promptly pay the principal of and the interest on each and every bond issued under the provisions of this Agreement at the places, on

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39 The Court's analysis of the Unsecured Net Revenue Claim and the provisions of sections 804 and 805 do not affect the scope of the liens granted by the Trust Agreement. Under the terms of the Trust Agreement, and as explained in the Court's discussion of entitlement to future revenues above, a mere pledge, covenant, or remedy cannot be utilized to expand the scope of the Bondholders' security interest to encompass moneys beyond the amounts described above that are on deposit in the Sinking Fund and the Specified Funds, or acquired during the course of the case and deposited to the Sinking Fund or other Specified Fund in which the Trustee has perfected its liens, notwithstanding section 928 of the Bankruptcy Code (as discussed above). See supra Section II.E.

40 As noted above, there is currently pending litigation regarding what constitute "Current Expenses."

41 (TA § 502.) 22 L.P.R.A. § 196(l).

the dates and in the manner specified herein[.]" (TA § 701.)

Under the terms of the Trust Agreement, as corroborated by the definition of "Opinion of Counsel" in section 101, PREPA did not pledge payment out of gross revenues or an unlimited "all revenues," but instead covenanted to pay the Bonds out of the "Net Revenues" of PREPA "in the manner and to the extent hereinabove particularly specified"—in other words, subject to all of the payment provisions and limitations of liability contained within the previous sections of the Trust Agreement. (TA §§ 101, 701.) As discussed above, in HTA this Court held that precisely the same phrase "logically imports the scope of the pledge, mechanics, and detailed limitations contained elsewhere in the" agreement. 618 B.R. at 639.

The value of the Unsecured Net Revenue Claim must be determined with reference to the value of Net Revenues that would, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds. Valuing the Unsecured Net Revenue Claim may also require accounting for the likelihood of payment of the Bondholders' claim in relation to claims higher up the Trust Agreement's payment waterfall. Cf. In re Hemingway Transp., Inc., 993 F.2d 915, 923 (1st Cir. 1993) (to value a contingent claim, the court discounts the claim's value to "reflect the uncertainty of the contingency").[42] In its reply, the Committee articulated a potential measure of the Bondholders' Unsecured Net Revenue Claim as "a right to payment in an amount equal to the present value of the future ***net*** revenues that PREPA may generate" or "what someone would pay now for the

[42] For this reason, among others, the Bondholders do not prevail on their arguments that, if the full amount of the Master PREPA Bond Claim is not satisfied, their equitable remedies cannot be reduced to claims and are therefore nondischargeable. (See, e.g., Defs. Mem. ¶ 64.).

right to potentially receive net revenue payments from PREPA in the future, taking into account the enormous difficulties and legion of uncertainties affecting, and limiting, PREPA's ability to generate any such net revenues." (UCC Reply ¶ 24 (emphasis in original).) That said, the Court will not predetermine the method of valuation or the appropriate time at which valuation should be gauged before all parties can be heard from on the matter.

Accordingly, the unsecured portion of the Master PREPA Bond Claim is a general unsecured claim, the value of which must be determined hereafter, either consensually or through proceedings under section 502 of the Bankruptcy Code.

2. Section 927 of the Bankruptcy Code is Inapplicable to the Master PREPA Bond Claim

Count VII of the FAC seeks a "Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund."

Section 1111(b)(1)(A) of the Bankruptcy Code, provides: "A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse . . . ." 11 U.S.C.A. § 1111(b)(1)(A) (Westlaw through P.L. 117-262).

Section 927 of the Bankruptcy Code provides: "The holder of a claim payable solely from special revenues of the debtor under applicable nonbankruptcy law shall not be treated as having recourse against the debtor on account of such claim pursuant to section 1111(b) of this title." 11 U.S.C.A. § 927 (Westlaw through P.L. 117-262) (emphasis added).) "Special Revenues" are defined by section 902(2)(A) of the Bankruptcy Code, in relevant part, as: "receipts derived from the ownership, operation, or disposition of projects or

systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems[.]" 11 U.S.C.A. § 902(2)(A) (Westlaw through P.L. 117-262).

Section 927 of the Bankruptcy Code provides a special exception for undersecured non-recourse loans, i.e., loans payable only from designated assets of the debtor ("collateral") in which the creditors have security interest, where (i) the security is not sufficient to satisfy the outstanding liability—the creditor is "undersecured," and (ii) the governing instruments prohibit recourse to assets other than the collateral. Ordinarily, under section 1111(b) of the Bankruptcy Code, creditors in that situation are presented with the choice whether to (i) receive an unsecured recourse ("deficiency") claim—permitting the creditor to vote their claim and receive payment pro rata with general unsecured claims, or (ii) to elect to have the undersecured claim treated and satisfied under a plan as a fully secured claim—and potentially benefit from any appreciation in the value of the collateral. See generally Collier on Bankruptcy ¶ 1111.03 (16th ed. 2023).[43]

In a Title III Case under PROMESA, section 927 of the Bankruptcy Code confines the creditor's recovery to its collateral if (i) the agreement is non-recourse, and (ii) the claim is payable solely from "special revenues" which include receipts derived from the operation of a utility system. See 11 U.S.C. § 902(2)(A). The Oversight Board argues that section 927 applies here and precludes the Bondholders from seeking payment of outstanding

[43] For example, for a creditor with an otherwise allowable secured claim for $1,000,000, secured only by a house worth only $600,000, section 1111(b) would grant the undersecured creditor the option to receive a $400,000 unsecured "deficiency" claim, treated as a general unsecured claim for voting and distribution purposes. If the creditor takes the general unsecured claim, they can vote its value and perhaps deny confirmation of a plan it opposes. If the creditor takes the $1,000,000 secured claim, they can benefit if the house increases in value.

amounts from any assets other than those currently in the Sinking Fund and the Specified Funds. Were the Oversight Board correct, the Bondholders' claim would be restricted to their collateral, consisting of the moneys that happen to be in the liened Funds in which the Trustee has perfected its interest as of the time of discharge, if and when the PREPA Plan is confirmed.

The Oversight Board's position is contradicted by the unambiguous terms of the Trust Agreement, which channel Revenues through a payment waterfall until they reach the Sinking Fund and the Specified Funds on which the Bondholders have been granted liens, but also include equitable remedy provisions that permit the Bondholders either to obtain judgments requiring PREPA to apply Net Revenue-derived assets <u>from outside of the Sinking Fund</u> to payments through the Fund, or—through specific performance of the right to appoint a receiver—to effectively increase Net Revenues through efforts to raise rates pursuant to the covenants of the Trust Agreement and the Authority Act.

Accordingly, the particular combination of provisions embodied in the Trust Agreement renders the Bonds recourse instruments, and section 927 of the Bankruptcy Code is inapplicable.

J. <u>Counterclaim Count I and FAC Count VII - Conclusions with Respect to the Unsecured Portion of the Master PREPA Bond Claim</u>

In conclusion, the portion of the claim constituting the Defendants' general unsecured claim—the Unsecured Net Revenue Claim—is not precluded by the Trust Agreement, or by section 927 of the Bankruptcy Code, which is inapplicable here. The value of the Unsecured Net Revenue Claim must be determined with reference to the value of Net Revenues that would likely, under the waterfall provisions of the Trust Agreement and applicable nonbankruptcy law, have become collateral in the future upon being deposited in the specified funds and payable to the Bondholders over the remainder of the term of the Bonds.

As discussed above, because of certain contingencies, the Unsecured Net Revenue Claim cannot be valued on this record, and the Court will not predetermine the method of valuation or the appropriate time as of which valuation should be gauged before all parties can be heard from on the matter. Accordingly, the value of the Unsecured Net Revenue Claim must be determined consensually or through proceedings under section 502 of the Bankruptcy Code. The parties are directed to meet and confer to discuss the necessity and nature of further proceedings to resolve this point.

Therefore, the Oversight Board's motion for summary judgment with respect to Count VII of the FAC, seeking a "Judgment Disallowing the Master PREPA Bond Claim Pursuant to Bankruptcy Code § 927 to the Extent it Claims a Right to Payment Beyond Moneys Credited to the Deposit of the Sinking Fund and Self-Insurance Fund[,]" is denied because section 927 of the Bankruptcy Code is inapplicable when, as here, the relevant agreement unambiguously provides for recourse. Accordingly, the Defendants' unsecured portion of their claim is a general unsecured claim—subject to valuation—and summary judgment with respect to Count VII is denied. The Defendants' cross-motion for summary judgment as to Count VII of the FAC is granted for the same reasons.

Summary judgment with respect to Count I of the Defendants' Answer and Counterclaim Complaint, seeking a "Declaratory Judgment that Under the Trust Agreement the Trustee Has Recourse to the Sinking Fund and the Right to Obtain Specific Performance of Covenants to Fund the Sinking Fund, and in the Event of Default Has Recourse to All PREPA Revenues and Other Moneys[,]" is granted to the extent that the Court hereby declares that (i) the Defendants have recourse to the Sinking Fund, in which the Trustee has a valid, perfected lien, and (ii) the Defendants have recourse as to any deficiency in the form of a general unsecured

claim under section 101(5)(b) of the Bankruptcy Code arising from liquidation of the value of the Trust Agreement's equitable remedies related to specific performance, and is denied in all other respects, without prejudice to proceedings to determine the amount of the unsecured claim. The Oversight Board's cross-motion for summary judgment as to Count I of the Defendants' Answer and Counterclaim Complaint is denied, without prejudice to the Oversight Board's position regarding the valuation of the Net Unsecured Claim.

K. The Oversight Board's Rule 702 Motion

In the Oversight Board's Rule 702 Motion, the Oversight Board seeks exclusion of the declaration of Robert A. Lamb (Docket Entry No. 91-4) (the "Lamb Declaration"), which is proffered by the Bondholders as expert testimony, arguing that the testimony must be excluded as inadmissible extrinsic evidence because it relates to the interpretation of the Trust Agreement, the relevant portions of which the Oversight Board argues are unambiguous. The Oversight Board further argues that the Lamb Declaration fails to meet the criteria established by Rule 702 of the Federal Rules of Evidence for the admission of expert testimony. (FOMB Rule 702 Mot. ¶¶ 2, 4.)

"Rule 702 of the Federal Rules of Evidence governs the admission of expert testimony." Bradley v. Sugarbaker, 809 F.3d 8, 16 (1st Cir. 2015) (citing Fed. R. Evid. 702). "Rule 702 requires that the 'testimony be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) that the witness apply "the principles and methods reliably to the facts of the case."'" Id. (quoting Pagés-Ramírez v. Ramírez-Gonzalez, 605 F.3d 109, 113 (1st Cir. 2010)). "When faced with a proffer of expert testimony, the district court must determine whether the expert witness is qualified and has specialized knowledge that will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" Bogosian

v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 476 (1st Cir. 1997) (quoting Fed. R. Evid. 702); see also United States v. Sepulveda, 15 F.3d 1161, 1183 (1st Cir. 1993) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993)). In this regard, the trial court is given wide discretion to admit or exclude expert testimony. See United States ex rel. Jones v. Brigham & Women's Hosp., 678 F.3d 72, 83 (1st Cir. 2012) (quoting Alt. Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 31-32 (1st Cir. 2004) ("Evidentiary rulings have the potential to shape and winnow the scope of the summary judgment inquiry, and a trial court should have as much leeway in dealing with those matters at the summary judgment stage as at trial.")).

Here, the Oversight Board challenges the admissibility of Robert A. Lamb's testimony on the grounds that (i) his testimony will not assist the Court in interpreting contractual terms and drawing legal conclusions as to the meaning of the Trust Agreement, and (ii) he is not qualified to opine on market conditions before 1984. (FOMB Rule 702 Mot. ¶¶ 2, 4.) In response, the Bondholders argue that Mr. Lamb's testimony is admissible insofar as Mr. Lamb "explains that the Oversight Board's proposed reading of the Trust Agreement is directly at odds with longstanding custom and practice in the municipal bond market." (Defs. Rule 702 Obj. ¶ 4.) The Bondholders insist that the terms of the Trust Agreement are ambiguous and that testimony related to the recourse and lien issues must focus on using industry custom and practices to elucidate the meaning of certain Trust Agreement terms, including "explanations of how, in Lamb's experience, participants in the municipal bond market (which included the drafters of the Trust Agreement and its amendments) would understand the liens and recourse in revenue bonds to work." (Defs. Rule 702 Obj. ¶¶ 6, 8 (citing Temple v. McCall, 720 F.3d 301, 305 (5th Cir. 2013) ("The use of expert testimony is appropriate where, for example, a phrase in

a contract is ambiguous and a court seeks to determine whether there is a received usage in the trade which would shed light on its meaning.")).)

"The question of whether a contract is ambiguous—presents a question of law for the judge. If the court finds no ambiguity, it should proceed to interpret the contract—and it may do so at the summary judgment stage." Torres Vargas v. Santiago Cummings, 149 F.3d 29, 33 (1st Cir. 1998) (citing United States Liab. Ins. Co. v. Selman, 70 F.3d 684, 687 (1st Cir. 1995); In re Newport Plaza Assocs., 985 F.2d 640, 644 (1st Cir. 1993)).

As explained above, the material terms of the Trust Agreement are, when read as a whole, unambiguous. Resorting to extrinsic evidence is only appropriate in circumstances where a court determines that a relevant contractual ambiguity exists. See Torres Vargas, 149 F.3d at 33. Here, the Court concludes there is no ambiguity in the Trust Agreement warranting consideration of the extrinsic evidence proffered in the Lamb Declaration. Consequently, exclusion of the Lamb Declaration is appropriate, and the Court need not address Mr. Lamb's qualifications to proffer the expert testimony. Accordingly, the Oversight Board's Rule 702 Motion is granted.[44]

L. The Bondholders' Rule 56(d) Motion

The Bondholders have requested that the Court defer ruling on the Oversight Board's motion for summary judgment pending further discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. (See generally Natbony Decl.) The Bondholders argue that, "while the Court should grant Defendants' motion and deny the Board's motion as a matter of

[44] This Court rejected similar efforts in HTA: "[T]he Court rejects the HTA Movants' arguments that are founded in accounting terminology and principles rather than in law; such arguments are insufficient to demonstrate that the Bondholders have been granted a lien or other property right in Revenues beyond those provided by the plain terms of the Bond Resolutions." 618 B.R. at 637.

law, if it does not do so, then it should afford Defendants an opportunity to take discovery concerning the material disputed facts raised by the [Oversight] Board." (Natbony Decl. ¶ 3.) The Bondholders seek discovery on eight categories of issues related to Counts I-VII of the FAC. (See Natbony Decl. ¶¶ 17-39.)

The Bondholders have not demonstrated a lack of access to evidence concerning any genuinely disputed material fact that is necessary to oppose the Oversight Board's motion for summary judgment, such that deferral of a ruling on the pending motions to allow the parties to conduct discovery would be appropriate. See In re PHC, 762 F.3d at 143. Accordingly, the Rule 56(d) Motion is denied.

III.

CONCLUSION

In conclusion, and for the foregoing reasons, the Oversight Board's motion for summary judgment is (i) granted in part and denied in part with respect to Count I of the FAC and therefore granted in part and denied in part as to the Defendants' cross-motion thereon (see supra pages 53-54), (ii) denied with respect to Count II of the FAC but granted in part and denied in part as to the Defendants' cross-motion thereon (see supra pages 54-55); (iii) denied with respect to Count III of the FAC and also as to the Defendants' cross-motion thereon (see supra page 53 n.34), (iv) granted with respect to Counts IV, V, and VI, and denied as to the Defendants' cross-motion thereon (see supra pages 45-46), and (v) denied with respect to Count VII of the FAC, and therefore granted as to the Defendants' cross-motion thereon (see supra page 65).

The Defendants' motion for summary judgment is granted in part and denied in part with respect to Counts I and II of the Defendants' Answer and Counterclaim Complaint;

and, accordingly, the Oversight Board's cross-motions as to Counts I and II of the Defendants' Answer and Counterclaim Complaint are similarly granted in part and denied in part (see supra pages 65-66 (Counterclaim Count I) and 55 (Counterclaim Count II).[45]

The parties are directed to meet and confer and file a joint report no later than seven (7) days from the date of entry of this Opinion and Order stating their positions on the nature, scope, and scheduling of further proceedings that they may believe are necessary in connection with the further resolution of this adversary proceeding. The joint report shall identify what discovery issues, if any, remain to be resolved in light of this Opinion and Order. They are further directed to commence working with the Mediation Team immediately in good faith efforts to resolve consensually the outstanding disputes concerning the proposed Plan of Adjustment.

This Opinion and Order resolves Docket Entry Nos. 62, 67, 97, and 106 in Adv. Proc. No. 19-00391.

SO ORDERED.

Dated: March 22, 2023

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

[45] For substantially the reasons stated by the Oversight Board in its reply, the Defendants' affirmative defenses do not preclude the grant of partial judgment. (FOMB Reply ¶¶ 64-66.) The Court has addressed certain of the Defendants' affirmative defenses as briefed and as necessary to resolve the relevant issues herein.