UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	PROMESA
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	Title III
as representative of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO et al.,	(Jointly Administered)
Debtors.[1]	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
Plaintiff,	Adv. Proc. No. 22-00063-LTS
-v-	
HON. PEDRO R. PIERLUISI URRUTIA in his official capacity as Governor of Puerto Rico,	
Defendant.	

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING IN PART THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO BANKRUPTCY RULE 7056

[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).

APPEARANCES:

O'NEILL & BORGES LLC
By: Hermann D. Bauer
250 Muñoz Rivera Avenue, Suite 800
San Juan, PR 00918-1813

PROSKAUER ROSE LLP
By: Martin J. Bienenstock
Timothy W. Mungovan
Julia D. Alonzo
Eleven Times Square
New York, NY 10036

and

Guy Brenner
1001 Pennsylvania Ave., NW
Suite 600 South
Washington, DC 20004

Attorneys for the Financial Oversight and Management Board in its own right and as representative of the Commonwealth of Puerto Rico

MARINI PIETRANTONI MUÑIZ LLC
P.S.C.
By: Luis C. Marini-Biaggi
Carolina Velaz-Rivero
250 Ponce de León Ave., Suite 900
San Juan, Puerto Rico 00918

O'MELVENY & MYERS LLP

By: John J. Rapisardi
William J. Sushon
7 Times Square
New York, New York 10036

and

By: Peter Friedman
1625 Eye Street, NW
Washington, D.C. 20006

Attorneys for Governor Pedro Pierluisi Urrutia

M.L. & R.E. Law Firm
By: Jorge Martinez Luciano
Emil Rodriguez Escudero
Cobian's Plaza, Suite 404
1607 Ponce De León Ave.
San Juan, Puerto Rico 00909

Attorneys for Hon. Rafael Hernández-Montañez

CAPO LAW OFFICE
By: Jorge L. Capó Matos
Metro Office Park
Metro Park 7
Street #1, Suite 204
Guaynabo, Puerto Rico 00968

MORELL CARTAGENA & DAPENA
By: Raymond E. Morales
Cobian's Plaza, Suite 404
1607 Ponce De León Ave.
San Juan, Puerto Rico 00909

Attorneys for The Puerto Rico Retailers Association et al.

LAURA TAYLOR SWAIN, United States District Judge

The Financial Oversight and Management Board for Puerto Rico (the "Oversight Board" or "Plaintiff") initiated the above-captioned adversary proceeding (the "Adversary Proceeding") on September 1, 2022, contending that the elected government of the Commonwealth of Puerto Rico (the "Commonwealth") could not lawfully implement Act 41-2022 ("Act 41") because Act 41 was enacted in violation of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") and that the labor reform policies embodied in Act 41 are inconsistent with the Commonwealth's certified fiscal plan. In the *Financial Oversight and Management Board for Puerto Rico's Complaint in Respect of Act 41-2022 Against the Governor of Puerto Rico* (Docket Entry No. 1 in Adv. Proc. No. 22-00063)[2] (the "Complaint"), the Oversight Board seeks entry of an order nullifying Act 41 based on its contentions that Governor Pedro Pierluisi Urrutia, in his official capacity as Governor of Puerto Rico (the "Governor"), violated sections 108(a) and 204(a) of PROMESA in connection with the enactment and implementation of Act 41.

Now before the Court is *Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 28) (the "Rule 12(c) Motion"), in which the Governor contends that this Court lacks jurisdiction to entertain the Oversight Board's' challenge of Act 41, and the *Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 30) (the "Summary Judgment Motion" or "MSJ" and, together with the Rule 12(c) Motion, the "Motions"), in which the Oversight Board seeks an order invalidating and enjoining the implementation of Act 41. The Court has

[2] All docket entry references herein are to entries in Adversary Proceeding No. 22-00063, unless otherwise specified.

considered carefully all of the parties' submissions.[3] The Court has subject matter jurisdiction of this action pursuant to section 306(a) of PROMESA, 48 U.S.C. § 2166(a), and 28 U.S.C. § 1367(a). For the reasons that follow, the Rule 12(c) Motion is denied in its entirety and the Summary Judgment Motion is granted with respect to Count II of the Complaint and denied with respect to Count I of the Complaint. As explained below, and in accordance with the *Order to*

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[3] The written submissions comprise the *Statement of Uncontested Material Facts in Support of Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment* (Docket Entry No. 31) ("Plaintiff's 56(b)"), filed by the Oversight Board; the *Motion to Join the Governor's Motion for Judgment on the Pleadings* (Docket Entry No. 44) (the "Speaker's Joinder"), filed by the Hon. Rafael Hernández-Montañez, in his official capacity as Speaker of the Puerto Rico House of Representatives (the "Speaker"); *Motion to Strike from the Summary Judgment Record, any and all References to the Expert Opinions of Dr. Robert Triest* (Docket Entry No. 45) (the "Motion to Strike"), filed by the Speaker; the *Financial Oversight and Management Board for Puerto Rico's Opposition to Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 50) (the "Rule 12(c) Objection"), filed by the Oversight Board; the *Opposition to Plaintiff's Motion for Summary Judgment* (Docket Entry No. 55), filed by the Speaker (the "Speaker's Opposition"), the *Memorandum of Law in Opposition to Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment and Request for Relief under Fed. R. Civ. P. 56(d)* (Docket Entry No. 57) ("Governor's Opposition"), filed by the Governor; *The Governor's Response to Statement of Allegedly Uncontested Material Facts in Support of the Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment* (Docket Entry No. 58), filed by the Governor; the *Reply to Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings* (Docket Entry No. 72), filed by the Speaker; the *Amici Curiae Brief for the Puerto Rico Retailers Association, et. al.* (Docket Entry No. 74), jointly filed by the Puerto Rico Retailers Association, Restaurants Association of Puerto Rico, the Puerto Rico Marketing, Industry and Food Distribution Chamber, Puerto Rico Hotel & Tourism Association, Puerto Rico Hospital Association, the Puerto Rico Association of Automobile Distributors and Dealers, Asociación Hecho en Puerto Rico, Inc., the Puerto Rico Chamber of Commerce, the Puerto Rico Manufacturers Association, and the Puerto Rico Builders Association; *Defendant's Reply in Further Support of His Motion for Judgment on the Pleadings* (Docket Entry No. 75) (the "Governor's Reply"), filed by the Governor; *The Financial Oversight and Management Board for Puerto Rico's (I) Reply to Speaker's Opposition to Oversight Board's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056, and (II) Opposition to Speaker's Motion to Strike from the Summary Judgment Record, any and all References to the Expert Opinions of Dr. Robert Triest* (Docket Entry No. 78), filed by the Oversight Board; and the *Reply to Governor's Opposition to Financial Oversight and Management Board for Puerto Rico's Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056* (Docket Entry No. 79), filed by the Oversight Board.

Show Cause Regarding Dismissal of Remaining Claim that is being entered contemporaneously with this Opinion and Order, the parties are directed to show cause as to why, in light of the analysis and conclusions, the remaining claim should not be dismissed as moot.

I.

BACKGROUND

The following facts are undisputed, except as otherwise indicated.[4]

PROMESA was enacted on June 30, 2016, to address the fiscal emergency in Puerto Rico created by a "combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing." 48 U.S.C.A. § 2194(m)(1) (Westlaw through P.L. 117-262).[5] PROMESA "empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets, review new legislative acts,

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[4] In evaluating the Rule 12(c) aspect of this motion practice, the Court views the relevant well-pleaded factual allegations of the Complaint in the light most favorable to the Plaintiff. For purposes of the Court's summary judgment analysis, facts characterized as undisputed are identified as such in the Oversight Board's statement 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 (see Pl.'s 56(b)) incorporate by reference the Oversight Board's citations to underlying evidentiary submissions. Citations to the "Brenner Declaration" and the "Skeel Declaration" (and exhibits thereto) reference the Oversight Board's underlying evidentiary submissions (see Docket Entry Nos. 32, the "Brenner Decl." and 33, the "Skeel Decl.") and references to the "Sushon Declaration" (and exhibits thereto) reference the declaration of William J. Sushon (see Docket Entry No. 59, the "Sushon Decl."). The Court declines to address assertions proffered by the parties that are immaterial and conclusory statements of law which the parties proffer as facts.

[5] PROMESA is codified at 48 U.S.C. § 2101 et seq. References to "PROMESA" section numbers in the remainder of this Opinion and Order are to the uncodified version of the legislation.

and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities." Fin. Oversight & Mgmt. Bd. for P.R. v. Hon. Wanda Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 403 F. Supp. 3d 1, 5 (D.P.R. 2019) (citing 48 U.S.C. §§ 2141-2152, 2175(a)). The Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA on May 3, 2017. (See Docket Entry No. 1 in Case No. 17-3283.)

A. Commonwealth Fiscal Plans and Labor Reform Measures

Dating back to the first certified Commonwealth fiscal plan, each Commonwealth fiscal plan certified by the Oversight Board has included various recommended measures addressing human capital, welfare, and labor reform. (Pl.'s 56(b) ¶¶ 5-8.) On January 26, 2017, the Commonwealth enacted Act 4-2017, which was titled the "Labor Transformation and Flexibility Act" (the "LTFA"). (Skeel Ex. 10.) The "Statement of Purpose" for the LTFA states that the law was intended to "modify [Puerto Rico's] labor laws and adapt them to the demands of the global markets so that [Puerto Rico is] able to promote [its] economic development and become more competitive." (Skeel Ex. 10 at 6; Pl.'s 56(b) ¶ 9.) The Oversight Board and the Governor agree that the LTFA created benefits for the Commonwealth's economy, although the Oversight Board contends that the law did not go far enough in enhancing Puerto Rico's economic growth and improving its labor force participation rate. (Pl.'s 56(b) ¶ 10.) Consequently, the Commonwealth fiscal plans certified by the Oversight Board following enactment of the LTFA included provisions directing further labor reforms with the stated purposes of enhancing the Commonwealth's labor force participation rate and economic growth by reducing mandatory employer-provided benefits such as paid leave and Christmas bonuses. (Pl.'s 56(b) ¶¶ 11-16.) Although the Commonwealth enacted certain of the reforms on which the

Oversight Board premised the fiscal plans, it did not adopt all of them, and the Oversight Board contends that the failure to do so has been detrimental to Puerto Rico's economy and its labor force participation rate. (Pl.'s 56(b) ¶¶ 20-25.)

On April 23, 2021, the Oversight Board certified a fiscal plan for the Commonwealth (Skeel Ex. 8) (the "2021 Fiscal Plan") that, like prior certified fiscal plans, included directions to the Commonwealth's Government to implement certain labor market reforms that were, according to the Oversight Board, important for Puerto Rico's economic growth. (Pl.'s 56(b) ¶¶ 27-28; Skeel Ex. 8 at 75-76.) The 2021 Fiscal Plan stated that the LTFA "did not go nearly as far as needed" in restricting employees' rights, and directed the Government not to repeal it. (Skeel Ex. 8 at 79 ("Its repeal would discourage new hiring and reduce the labor market flexibility, thus limiting the effectiveness of the EITC expansion in promoting labor force participation, economic growth, and the revenues associated with that growth. Therefore, the Government must refrain from repealing Act 4-2017 or enacting new legislation that negatively impacts labor market flexibility.").)

On January 27, 2022, the Oversight Board certified another Commonwealth fiscal plan (the "2022 Fiscal Plan"). (Skeel Ex. 9.) Like the 2021 Fiscal Plan, the 2022 Fiscal Plan directed the adoption of further labor market reforms and stated that the Government "must refrain from repealing [the LFTA] or enacting new legislation that negatively impacts labor market flexibility." (Pl.'s 56(b) ¶¶ 28-30.)

B. Act 41

On March 10, 2022, the Puerto Rico House of Representatives passed the bill that would eventually become Act 41, House Bill 1244-2022 ("HB 1244"). (Pl.'s 56(b) ¶ 37.) In a resolution issued on March 18, 2022, the Oversight Board cited a June 24, 2021 Oversight Board

communication to the Government in which it had taken the position that a prior version of the legislation sought to repeal reforms that the fiscal plan "expressly directed not be undone and thus would be significantly inconsistent with the Fiscal Plan and would impair and defeat PROMESA's purposes," and stated that HB 1244 "seeks to create new labor restrictions, proposes to repeal portions of the LTFA and reestablish many of the burdensome labor restrictions that existed prior to the passage of the LTFA, and proposes to impose additional labor restrictions." (Skeel Ex. 12 at 2.) The Oversight Board's resolution directed the Senate not to pass, the Governor not to enact, and the Government not to implement HB 1244, "advise[d]" the Legislative Assembly and the Governor that they were "barred by PROMESA section 108(a)(2) from enacting, implementing, and enforcing HB 1244," and approved legal action pursuant to the Oversight Board's authority under PROMESA to seek to nullify and bar enforcement of HB 1244. (Pl.'s 56(b) ¶ 38; Skeel Ex. 12.)[6] The Oversight Board expressed similar sentiments in a status report to the Court on March 22, 2022. (Pl.'s 56(b) ¶¶ 39-40.)

HB 1244 was amended in the legislative assembly, and ultimately passed the House and the Senate on June 7, 2022. (Pl.'s 56(b) ¶ 41.) Following consultation with its retained advisor, Robert K. Triest, PhD, Chair of the Economics Department at Northeastern University, the Oversight Board passed a resolution on June 10, 2022, in which the Oversight Board again stated that the amended HB 1244 would impair or defeat PROMESA's purposes. (Skeel Ex. 13.) The Oversight Board's resolution declared that HB 1244, as amended, would

> discourag[e] new hiring and reduc[e] labor market flexibility in direct contravention of the Fiscal Plan, which in turn will (1) negatively impact Puerto Rico's dismal labor force participation

[6] Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may . . . enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board." 48 U.S.C.A. § 2128(a)(2) (Westlaw through P.L. 117-262).

> rate; (2) reduce economic growth and market competition; (3) deprive the Commonwealth of the revenues associated with such revenue growth (including by reducing the effectiveness of the Earned Income Tax Credit); and (4) increase the Commonwealth's public assistance burden . . . .

(Skeel Ex. 13; see Pl.'s 56(b) ¶¶ 44-45.) The resolution directed the Governor not to enact, implement or enforce HB 1244 and advised the Government that it was barred by section 108(a)(2) of PROMESA from enacting, implementing and enforcing the legislation. (Skeel Ex. 13 at 2-3.) Three days later, the Oversight Board sent a letter to the Governor describing various provisions of HB 1244 and reiterating and explaining further the Oversight Board's determination that HB 1244 was inconsistent with the 2022 Fiscal Plan and with PROMESA. (Skeel Ex. 14; Pl.'s 56(b) ¶ 46.) The June 13, 2022 letter also described certain of the "labor restrictions" to which the Oversight Board objected and asserted that providing the rights and benefits for workers contemplated by HB 1244 would

> (1) deter new investments in Puerto Rico and the jobs the new investments would create; (2) negatively impact Puerto Rico's dismal labor force participation rate; (3) reduce economic growth and market competition; (4) deprive the Commonwealth of the revenues associated with such revenue growth (including by reducing the effectiveness of the Earned Income Tax Credit); and (5) increase the Commonwealth's public assistance burden. Indeed, the Bill renders Puerto Rico less attractive to new investors wanting to create new businesses and more jobs because it increases labor costs and litigation rather than allowing the free market to determine employee compensation. Thus, the Bill hinders and diminishes the economic growth PROMESA promotes, and the Government should want to encourage.

(Skeel Ex. 14.) The Oversight Board's letter further stated that, if the Governor were to sign HB 1244 into law, the Governor would "be required to submit a formal estimate and certification pursuant to PROMESA Section 204(a) within seven (7) business days of enacting the law" [7] and

[7] Section 204(a)(1) of PROMESA requires the Governor to submit all newly enacted laws to the Oversight Board. 48 U.S.C § 2144(a)(1). Section 204(a)(2) requires that all such

warned the Governor that any such estimate would have to "address the full economic impact of the issues raised in this letter, including how the Bill's impact on labor force participation will affect revenues." (Skeel Ex. 14.)

On June 20, 2022, the Governor signed HB 1244 into law as Act 41-2022. (Pl.'s 56(b) ¶ 47.) Nine days later, the Puerto Rico Fiscal Agency and Financial Authority ("AAFAF"), acting on behalf of the Governor, submitted a document titled "Section 204(a) Certification" (Skeel Ex. 15) and three attachments to the Oversight Board. (Pl.'s 56(b) ¶ 53.) The three attachments consisted of (i) a "Fiscal Impact Certification" (the "OMB Certification") by the Office of Management and Budget ("OMB") and a certification (the "DOL Certification") by the Department of Labor and Human Resources ("DOL") (Brenner Ex. 5) , (ii) a certification by the Department of the Treasury (the "Treasury Certification") (Brenner Ex. 5), and (iii) a

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submissions must be accompanied by a "formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues," a certification as to whether the law is or is not "significantly inconsistent with the Fiscal Plan for the fiscal year," and, if the entity has found the law to be significantly inconsistent with the fiscal plan, "the entity's reasons for such finding." 48 U.S.C.A. § 2144(a)(2) (Westlaw through P.L. 117-262). Subsections (a)(3) and (4) of section 204 permit the Oversight Board to notify the Governor and Legislature if the submission lacks the required estimate or certification or if the certification concluded that the law was significantly inconsistent with the fiscal plan, and to direct the Governor to fix the deficiency (by providing the missing submission or by changing the law to remedy the inconsistency) or to "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." 48 U.S.C.A. § 2144(a)(2), (3) (Westlaw through P.L. 117-262). If the government does not comply with such instructions, section 204(a)(5) permits the Oversight Board to "take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law." 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262).

report prepared by consulting firm DevTech Systems, Inc. (the "DevTech Report") (Skeel Ex. 15A).[8]

AAFAF's Section 204(a) Certification described, in general terms, various provisions of Act 41 and included a "high-level summary" of certain provisions of the LTFA that were or were not amended by Act 41. (Skeel Ex. 15 at 3-7.) The Section 204(a) Certification asserted that Act 41's provisions "do not impact payroll expenditures for the Government of Puerto Rico" and that its "impact . . . should be evaluated in light of the marginal effects that the Act 41 Modifications will have on the economic behavior of private sector employers." (Skeel Ex. 15 at 6.) The Section 204(a) Certification conceded that "an argument can be made that Act 41 'negatively impacts labor market flexibility'" but argued that, because Act 41 modified "only 13 of the 72 substantive sections of Act 4-2017," the law "continues to largely preserve Act 4-2017's structural reforms." (Skeel Ex. 15 at 6-7.) It provided no financial computations or estimates of the fiscal impact of the legislation on the Commonwealth's revenues or expenses, and it asserted that "the ultimate economic impact of Act 41 will need to be evaluated while considering broader and competing macroeconomic factors affecting the Puerto Rico economy." (Skeel Ex. 15 at 9.)

On June 23, 2022, AAFAF responded to the Oversight Board's June 13, 2022 letter. AAFAF's letter stated that it "presume[d] that the [Oversight] Board must have conducted

[8] Section 204(a)(2)(A) requires that a formal estimate be "prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 117-262). The Section 204(a) Certification annexed the DevTech Report—a report prepared by a private consulting firm—as Attachment C. (Skeel Ex. 15A at 1.) The Governor concedes that the DevTech Report was not intended to constitute the formal estimate required by section 204(a). (See Pl.'s 56(b) ¶ 53 n.5 (citing Skeel Ex. 17).)

its own analysis of HB 1244's effect on the Commonwealth's revenues [and] expenses," and it "request[ed] that the Board provide the Governor with a copy of any and all Oversight Board-conducted economic and financial analyses regarding HB1244's effect on the Commonwealth's revenues and expenses so that we can fully evaluate all available information." (Sushon Ex. 6 at 2.)

On July 19, 2022, the Oversight Board notified the Governor, the legislature, and AAFAF by letter that it viewed the Section 204(a) Certification as deficient (the "Deficiency Letter"), contending that (i) the DOL Certification, the only document containing a calculation, did not "purport to estimate the impact of the law on the Commonwealth's revenues and expenditures" and thus failed to comply with section 204(a) of PROMESA; (ii) the DOL is not an "appropriate entity" to provide an estimate pursuant to § 204(a); (iii) the DOL Certification did not provide an assessment of the legislation's impact over the entire "five year duration of the Fiscal Plan"; and (iv) the documents provided only conclusory statements regarding the Act's fiscal impact. (Skeel Ex. 16.) The Oversight Board, citing the 2022 Fiscal Plan's direction to refrain from repealing the LFTA, stated that Act 41 was "plainly" "significantly inconsistent"' with the 2022 Fiscal Plan and requested that the Governor "provide the missing formal estimate and certification" by July 22, 2022. (Skeel Ex. 16 at 2, 6, 8, 9.)

On July 22, 2022, AAFAF responded to the Deficiency Letter, noting that the Governor "strongly disagree[d] with the assertion that the PROMESA Section 204 Certification for Act 41 is non-compliant with PROMESA Section 204(a)'s requirements." (Skeel Ex. 17 at 1.) AAFAF asserted that conducting a formal estimate of the impact of Act 41 would be "an ambitious and expansive undertaking." (Skeel Ex. 17 at 1-2.) AAFAF provided an updated certification from the DOL (the "Section 204(a) Certification Supplement") (Brenner Exs. 6-8),

which contained a reduced cost assessment in relation to the "fiscal year 2021-2022" budget and stated that it reflected Act 41's cost of "implementation . . . on the Agency: Department of Labor and Human Resources." (Brenner Ex. 8 at 1.) The Section 204(a) Certification Supplement also included a letter from the Office of Management and Budget (Brenner Ex. 7) in which Juan Carlos Blanco Urrutia, the director of the Office of Management and Budget, explained that the expenditure reported by the DOL represented the actual cost to publish "three . . . regulations." (Ex. 7 at 1.) The letter asserted that "the Department [of Labor and Human Resources] does not identify any other incremental expense in its operation with the implementation of this Act; therefore, we conclude that the budgets for the next five years will not be affected." (Ex. 7 at 1.) AAFAF also reiterated its request for the Oversight Board's own underlying analytical material and additional time to comply with the estimate and certification requirements. (Brenner Ex. 6 at 3.)

On July 30, 2022, the Oversight Board (i) notified AAFAF that the Section 204(a) Certification Supplement did not remedy the deficiencies articulated in the Deficiency Letter, (ii) requested supplemental information, and (iii) requested that the Governor "suspend Act 41" while discussions continued. (Skeel Ex. 19 at 2.) AAFAF responded to the Oversight Board's letter on August 4, 2022, declining to suspend Act 41 and maintaining that the Section 204(a) Certification and Section 204(a) Certification Supplement complied with section 204(a). (Skeel Ex. 20 at 2.) AAFAF again repeated its request for the analytical materials supporting the Oversight Board's conclusions, and further requested an opportunity to review those materials and to discuss them with the Oversight Board's economic advisor. (Skeel Ex. 20 at 4.) The Oversight Board sent a final letter on August 23, 2022, notifying AAFAF that the deficiencies

outlined in the Deficiency Letter had not been remedied by the Section 204(a) Certification Supplement or the subsequent August 4, 2022 letter. (Skeel Ex. 23 at 1.)

C. Procedural Background

The Oversight Board filed the Complaint on September 1, 2022, pleading two counts. (Compl. ¶¶ 102, 110.) In Count I, the Oversight Board seeks an order pursuant to sections 104(k) and 108(a)(2) of PROMESA determining that Act 41 is nullified because the Oversight Board has determined that it impairs and/or defeats the purposes of PROMESA. (Compl. ¶¶ 102-104.) In Count II, the Oversight Board requests an order pursuant to section 204(a) of PROMESA determining that Act 41 is nullified because the Governor (i) has not submitted a formal estimate and certification as required by section 204(a)(2) of PROMESA and (ii) has failed to comply with direction given by the Oversight Board under section 204(a)(4)(B) of PROMESA. (Compl. ¶¶ 110-14.)

On September 14, 2022, the Court granted Plaintiff's motion to set an expedited schedule for pretrial dispositive motion practice for this Adversary Proceeding. (See Docket Entry No. 18.) On September 15, 2022, the Governor answered the Complaint. (See Docket Entry No. 20.) The Governor filed the Rule 12(c) Motion on September 29, 2022, arguing that the "Court lacks subject matter jurisdiction over the Complaint." (Rule 12(c) Mot. at 1.) On the same day, the Oversight Board filed the Motion for Summary Judgment, arguing that there are no genuine issues of material fact with respect to Count I and Count II of the Complaint and that the Oversight Board is entitled to judgment as a matter of law on both Counts. (See MSJ at 22-23, 40-41.)

II.

DISCUSSION

The Governor's Rule 12(c) Motion seeks dismissal of this Adversary Proceeding for lack of subject matter jurisdiction, while the Oversight Board's Summary Judgment Motion addresses the merits of the claims asserted in the Complaint. A court must address arguments concerning its jurisdiction before addressing the merits of a dispute, so the Court will first consider the Rule 12(c) Motion. See Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002).

I. The Rule 12(c) Motion

A. The Court's Jurisdiction

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure,[9] "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard for resolution of a motion under Rule 12(c) is the same as that applicable to a motion under Rule 12(b)(1) (for lack of subject matter jurisdiction) or 12(b)(6) (for failure to state a claim upon which relief can be granted). See Doe v. Brown Univ., 896 F.3d 127, 130 (1st Cir. 2018); Cruz v. AAA Carting & Rubbish Removal, Inc., 116 F. Supp. 3d 232, 239 (S.D.N.Y. 2015). Accordingly, a court "consider[s] 'documents the authenticity of which are not disputed by the parties,' 'documents central to plaintiffs' claim,' and 'documents sufficiently referred to in the complaint,'" Claudio-De Leon v. Sistema

[9] Federal Rule of Civil Procedure 12 is made applicable in this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7012. See 48 U.S.C. § 2170 ("The Federal Rules of Bankruptcy Procedure shall apply to a case under this subchapter and to all civil proceedings arising in or related to cases under this subchapter.").

Universitario Ana G. Mendez, 775 F.3d 41, 46 (1st Cir. 2014) (quoting Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001)), and determines whether the pleadings demonstrate the existence of jurisdiction by viewing "the well-pleaded facts and the reasonable inferences therefrom in the light most favorable to the nonmovant." Doe v. Brown Univ., 896 F.3d at 130 (quoting Kando v. R. I. State Bd. of Elections, 880 F.3d 53, 58 (1st Cir. 2018)); see Lyman v. Baker, 954 F.3d 351, 359-60 (1st Cir. 2020) (stating that the same "burden of proof at the pleading stage[] and posture towards the facts alleged in the complaint" apply to motions under Rule 12(b)(1) as motions under Rule 12(b)(6)"). A court therefore "disregard[s] all conclusory allegations that merely parrot the relevant legal standard." Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 231 (1st Cir. 2013).

The Rule 12(c) Motion is principally concerned with the question of whether the Court[10] has jurisdiction to adjudicate the Adversary Proceeding under section 306(a)(2) of PROMESA. (See Rule 12(c) Mot. at 6-16.) The Governor argues that the Complaint must be dismissed because the Oversight Board's claims fall outside the jurisdictional ambit of section 306(a)(2) of PROMESA, which confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under [Title III of PROMESA], or arising in or related to cases under [Title III of PROMESA]." 48 U.S.C.A. § 2166(a)(2) (Westlaw through P.L. 117-262). In short, the Governor—joined by the Speaker—contends that the Adversary Proceeding lacks a sufficient nexus to the Commonwealth's Title III Case to support jurisdiction under section 306(a)(2) of PROMESA and, as a result, the "Title III Court"—the term used by the Governor

[10] References to the "Court" in the following jurisdictional analysis are to the undersigned in her capacity as a United States District Judge sitting by designation pursuant to 28 U.S.C. § 292(d) and 48 U.S.C. § 2168(a) in the United States District Court for the District of Puerto Rico (the "District of Puerto Rico").

and the Speaker to denote the Court sitting pursuant to section 308(a) of PROMESA, 48 U.S.C. § 2168(a), by designation of the Chief Justice of the United States—lacks subject matter jurisdiction to preside over the Adversary Proceeding. (Rule 12(c) Mot. at 3-4; Speaker Joinder at 2.) The Speaker and the Governor fail to sufficiently recognize, however, that the "Title III Court" sits within the Article III judiciary as part of the United States District Court for the District of Puerto Rico and that section 106(a) of PROMESA grants the district court, "[e]xcept as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and [Title] III (relating to adjustments of debts), [jurisdiction of] any action against the Oversight Board, and any action otherwise arising out of [PROMESA]." 48 U.S.C.A. § 2126 (Westlaw through P.L. 117-262).

In light of section 106(a) and the general federal question jurisdiction granted to the district court by 28 U.S.C. § 1331, the Governor's jurisdictional argument plainly fails, whether or not section 306(a) of PROMESA's specific Title III jurisdictional grant encompasses the Oversight Board's claims. Section 106(a) of PROMESA authorizes the District of Puerto Rico to exercise jurisdiction of certain disputes, including, most pertinently, disputes "arising out of" PROMESA. (See Rule 12(c) Mot. at 3, 16.) The undersigned is a United States District Judge, sitting by designation in the District of Puerto Rico pursuant to section 292(d) of title 28 of the United States Code, see Letter from Anna McKenna to Ruby Krajick and Maria Antongiorgi (May 6, 2022), https://promesa.prd.uscourts.gov/sites/default/files/LTS-Intercirc-Design-20220527-20221126_0.pdf, as well as by designation of the Chief Justice of the United States pursuant to section 308 of PROMESA and, as such, there is no question that the Court has subject matter jurisdiction of the instant dispute. The Adversary Proceeding clearly arises out of PROMESA because it seeks judicial enforcement of powers and obligations established by the

statute. (See Compl. ¶ 104 (seeking relief under sections 104(k) and 108(a)(2) of PROMESA), ¶ 114 (seeking relief under sections 104(k) and 204(a)(5) of PROMESA).)

Accordingly, the Court may properly exercise subject matter jurisdiction of the Adversary Proceeding, and the Governor's Rule 12(c) motion is denied. The Court's analysis next turns to whether it is proper to treat the Adversary Proceeding as an adversary proceeding within the Title III Cases over which the undersigned presides, or, alternatively, whether it is entirely outside the scope of section 308(a) of PROMESA and must be adjudicated as a civil matter outside of the Commonwealth's Title III case.

B. Section 308(a) of PROMESA

Section 308(a) of PROMESA provides for the designation of a district judge to conduct the Title III case of a territory. 48 U.S.C. § 2168(a); see also 48 U.S.C. 2164(g) (permitting the joint administration of affiliated Title III cases). On May 5, 2017, the undersigned was designated to be the presiding judge in the Commonwealth's Title III Case (see Docket Entry No. 4 in Case No. 17-3283), and disputes filed as adversary proceedings (or removed to the District of Puerto Rico as adversary proceedings in connection with the Title III cases) are directed to the undersigned for resolution.

Although not directly stated in PROMESA, the designation of a judge to conduct a Title III case implies that, where a dispute does not fit within the jurisdictional parameters of Title III, or where the judge conducting a Title III case abstains from hearing a particular dispute, see 48 U.S.C.A. § 2169, it should not be entertained as an adversary proceeding overseen by the judge designated to conduct the Title III case, but rather be treated as a civil matter in the district court and assigned pursuant to the district's ordinary practices. While the Court has subject

matter jurisdiction to preside over such disputes, the adjudication of such disputes would seem to be outside of the normal scope of the duties contemplated by section 308(a) of PROMESA. See 48 U.S.C.A. § 2168(a) (Westlaw through P.L. 117-262) ("For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation *to conduct the case*." (emphasis added)).

Thus, the Court next addresses whether the Adversary Proceeding falls within the jurisdictional bounds of section 306(a)(2) of PROMESA, which confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under [Title III of PROMESA], or arising in or related to cases under [Title III of PROMESA]." 48 U.S.C.A. § 2166(a)(2) (West 117-262.) The jurisdictional language of section 306(a)(2) is analogous to that of the bankruptcy jurisdiction statute, 28 U.S.C. § 1334(b), and the Court has previously looked to case law applying the bankruptcy jurisdiction statute for guidance in interpreting and applying section 306(a)(2). See Asociación de Salud Primaria de P.R., Inc. v. Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), 330 F. Supp. 3d 667, 680 (D.P.R. 2018) ("[T]he First Circuit's interpretation of 28 U.S.C. § 1334 is instructive."); see also Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431, 437 (1st Cir. 1983) (holding that two statutes' common purpose and matching language supported conclusion that Congress intended the construction of one to follow the other).

Proceedings that "arise under" Title III are those in which the cause of action is created by Title III. See In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002). Proceedings that "arise in" a Title III case are those which have "no existence outside of the bankruptcy." Gupta v. Quincy Med. Ctr., 858 F.3d 657, 664-65 (1st Cir. 2017) (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)). "Arising in" jurisdiction is not determined by reference

to a "but for" test but, rather, "the fundamental question is whether the proceeding by its nature, not its particular factual circumstance, could arise only in the context of a bankruptcy case." Gupta, 858 F.3d at 664-65 (citing In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002)). Prior to confirmation of a plan of adjustment, proceedings that are "related to" a Title III case are those which "potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate."[11] In re Middlesex Power Equip. & Marine, Inc., 292 F.3d 61, 68 (1st Cir. 2002) (quoting Smith v. Commercial Banking Corp. (In re Smith), 866 F.2d 576, 580 (3d Cir. 1989)). However, following confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code, many courts apply a stricter test, assessing whether the proceeding bears a "close nexus" to the bankruptcy proceeding or the confirmed plan. See In re Enivid, Inc., 364 B.R. 139, 147 (Bankr. D. Mass. 2007) ("Courts may exercise post-confirmation jurisdiction when 'there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement.'") (quoting In re Resorts Int'l, Inc., 372 F.3d 154, 167-68 (3d Cir. 2004)); see also Bos. Reg'l Med. Ctr., Inc. v. Reynolds (In re Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 107 (1st Cir. 2005) (noting that "there will be situations in which the fact that particular litigation arises after confirmation of a reorganization plan will defeat an attempted exercise of bankruptcy jurisdiction," but declining to apply "close nexus" test to liquidating chapter 11 plan) (citing In re

[11] This standard is drawn from the seminal case Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), and the Court will therefore refer to it as the Pacor standard.

Resorts Int'l, 372 F.3d at 166-68).[12]

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[12] The Oversight Board contends that the Court should not apply the "close nexus" framework, but should instead continue to apply the Pacor test because "there is no concern that post-confirmation bankruptcy jurisdiction will unduly extend federal jurisdiction," "[t]he Commonwealth is not a business debtor reentering the marketplace, and federal jurisdiction already exists over this action." (Rule 12(c) Obj. at 3.) Although the Oversight Board is correct that, as explained above, subject matter jurisdiction of the disputes framed by the Adversary Proceeding exists regardless of the scope of section 306(a)(2), the question at this juncture is whether the adversary proceeding should, like pre-confirmation disputes implicating Commonwealth fiscal matters that could conceivably have effects on the handling and administration of the debtor's property, be treated as a proceeding within the Title III case and handled by the undersigned rather than assigned pursuant to the regular procedures of District of Puerto Rico.

The First Circuit has not expressly adopted the "close nexus" test in the chapter 11 context or any other context, but it has endorsed the premise that "once confirmation has occurred, fewer proceedings are actually related to the underlying bankruptcy case." In re Bos. Reg'l Med. Ctr., Inc., 410 F.3d 100, 106 (1st Cir. 2005) ("That makes good sense: as the corporation moves on, the connection attenuates."). The Court therefore believes that the First Circuit would adopt a jurisdictional test substantially narrower than the Pacor standard with respect to post-confirmation litigation concerning the Title III Debtors. That would place it firmly in the majority of circuits that have adopted jurisdictional tests that have recognized courts' narrowed post-confirmation jurisdiction. See In re Indicon, Inc., 645 F. App'x 39, 40 n.1 (2d Cir. 2016) (noting that "our circuit . . . has applied [the close nexus test], in two summary orders, to both core and non-core post-confirmation proceedings"); In re Resorts Int'l, Inc., 372 F.3d at 167-68; Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831, 837 (4th Cir. 2007) (endorsing the close nexus test and noting the lack of any "conceivable bankruptcy administration purpose in providing a forum for" a dispute that would not affect creditor recoveries); In re Craig's Stores of Texas, Inc., 266 F.3d 388, 390 (5th Cir. 2001) ("After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan."); Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court"); In re Fairfield Communities, Inc., 142 F.3d 1093, 1095 (8th Cir. 1998) (recognizing bankruptcy courts' authority to retain jurisdiction over matters relating to plan administration and interpretation); Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Courtyard), 729 F.3d 1279, 1289 (9th Cir. 2013) (recognizing adoption of "close nexus" test); see also In re Gen. Media, Inc., 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) (noting prevalence of view that, "once confirmation occurs, the bankruptcy court's jurisdiction shrinks").

The First Circuit has held that litigation involving a liquidating debtor "relates much more directly to a proceeding under title 11." In re Bos. Reg'l Med. Ctr., 410 F.3d at 106. Here,

Here, the Oversight Board argues that section 306(a)(2) applies to the Complaint because its claims implicate the Court's enforcement of its own orders (referencing, in particular, paragraphs 25(c) and 79 of the Confirmation Order) in the face of conduct by the Governor (1) that is "reasonably likely, directly or indirectly, to impair the carrying out of the Commonwealth Plan's payment provisions, covenants, and other obligations" (Rule 12(c) Obj. at 9 (quoting Confirmation Order ¶ 79); see also Confirmation Order ¶ 25(c)(i)), or (2) that violates the 2022 Fiscal Plan and has been determined by the Oversight Board to impair or defeat PROMESA's purposes. (See Rule 12(c) Obj. at 9 (citing Confirmation Order ¶ 25(c)(ii)).)[13] While the Complaint does not sufficiently allege that the Governor's conduct would "impair the Plan's payment provisions, covenants and other obligations," the allegations are sufficient to establish that this action involves the Oversight Board's determination that the Governor's actions are inconsistent with the Fiscal Plan and thus would "impair or defeat PROMESA's purposes" so as to come within the prohibition set forth in paragraph 25(c)(ii) of the Confirmation Order.

The Court's review of the Complaint does not find support for the Oversight Board's contention that the Complaint plausibly alleges jurisdiction arising from impairment of performance under the Commonwealth Plan. Rather, the Complaint conclusorily asserts that Act 41 "impairs the Commonwealth's ability to meet its obligations pursuant to the Plan" (Compl. ¶ 16), providing no concrete allegations of how Act 41 would impair performance of any

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the Commonwealth is more like "a reorganized debtor [that] is attempting to make a go of its business." Id.

[13] Although the Oversight Board also cites various provisions of the Commonwealth Plan and Confirmation order retaining jurisdiction over certain matters (see, e.g., Compl. ¶ 16; Rule 12(c) Obj. at 9), a court "may not 'retain' jurisdiction it never had—i.e., over matters that do not fall within" its relevant statutory grant of jurisdiction. Gupta., 858 F.3d at 663.

particular provision of the Commonwealth Plan. Although paragraph 98 of the Complaint alleges that certain economic consequences might result from implementation of Act 41, it does not tie those economic consequences to the Commonwealth's ability to comply with any specific obligation under the Commonwealth Plan. (See Compl. ¶ 98 ("In addition, the provisions of Act 41, which increase the costs and risks of hiring and firing employees, can only discourage hiring, thereby reducing labor force participation, economic growth and Commonwealth revenues, contrary to the 2022 Fiscal Plan and the Plan of Adjustment.").) Rather, paragraph 98 only alleges that Act 41 may upset the Oversight Board's expectations as to the economic consequences that would flow from the Commonwealth Plan.[14] At most, the Complaint plausibly alleges that Act 41 would have negative effects on the economy of Puerto Rico and on the Commonwealth's revenues, but, even taking those pleaded facts as true, there is no basis in the Complaint to conclude that those economic consequences will interfere with the payment of debts contemplated by the Commonwealth Plan. Accordingly, the Court's authority to enforce the Commonwealth Plan, including its authority to enforce the provision of the Confirmation Order prohibiting actions that "imped[e], financially or otherwise, consummation and implementation of the transactions contemplated by the Plan," does not situate the Adversary Proceeding within the scope of section 306(a)(2) of PROMESA. (See Confirmation Order

[14] Although the Oversight Board argues that there is additional "discussion of the [Commonwealth] Plan of Adjustment in the report of the Oversight Board's economic adviser" (Rule 12(c) Obj. at 18 n.14 (citing Compl. Ex. 29)), that discussion is similarly conclusory. Although the report discusses economic costs that might be incurred as a result of Act 41, it does not allege that those economic costs would violate or hinder compliance with any particular obligation established by the terms of the Commonwealth Plan. Rather, the report asserts in a general manner that those costs are inconsistent with unspecified "requirements and objectives of the . . . Plan of Adjustment" (Ex. 29 at 2; see also Ex. 29 at 8, 12) or with "[t]he success of the Fiscal Plan and the Plan of Adjustment" (Ex. 29 at 8).

¶ 25(c)(i).)

The Complaint does, however, plausibly allege that Act 41 is inconsistent with the 2022 Fiscal Plan and that the Oversight Board has determined that such inconsistency impairs or defeats the purposes of PROMESA. (See, e.g., Compl. ¶¶ 37-40, 56-57.) This claim clearly is one that, at a minimum, relates to the Commonwealth's Title III case under PROMESA, and it therefore falls within the Court's jurisdiction under section 306(a)(2). Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may . . . enact, implement, or enforce any statute, resolution policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board." This prohibition was incorporated into paragraph 25(c)(ii) of the Confirmation Order, which provides that, "pursuant to section 108(a)(2) of PROMESA, no person or entity shall enact, adopt or implement any law or policy "that . . . creates an[] inconsistency in any manner, amount or event between the terms and provisions of . . . a Fiscal Plan certified by the Oversight Board, . . . which action[] has been determined by the Oversight Board to impair or defeat the purposes of PROMESA." (Confirmation Order ¶ 25(c)(ii)).) See Gupta v. Quincy Med. Ctr., 858 F.3d at 663 ("Bankruptcy courts—like all federal courts—may retain jurisdiction to interpret and enforce their prior orders.") (citing Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009)); In re Motors Liquidation Co., 829 F.3d 135, 153 (2d Cir. 2016) ("A bankruptcy court's decision to interpret and enforce a prior sale order falls under this formulation of 'arising in' jurisdiction. An order consummating a debtor's sale of property would not exist but for the Code, see 11 U.S.C. § 363(b), and the Code charges the bankruptcy court with carrying out its orders." (citing 11 U.S.C. § 105(a)); see also In re Petrie Retail, Inc., 304 F.3d 223, 230 (2d Cir. 2002) (noting bankruptcy court's jurisdiction to enforce an "injunction issued as part of the bankruptcy court's sale order and confirmation

order").

The replies filed by the Governor and the Speaker, asserting that the Oversight Board's claim is grounded substantively in section 108(a)(2) of PROMESA rather than the Confirmation Order, dispute the pertinence of the Court's ability to enforce the Confirmation Order. Regardless of the ultimate source of the law that will be applied in adjudicating the Adversary Proceeding, the inclusion of language implementing and contemplating the enforcement of section 108(a)(2) in the Confirmation Order grounds the instant dispute in the Confirmation Order and, more generally, the Title III process.[15] The Confirmation Order recognized that section 108(a)(2) barred certain conduct under certain circumstances following confirmation of the Commonwealth Plan, no one—including the Governor or the Speaker—objected to the inclusion of the cited provisions of the Confirmation Order, and the Court retains

[15] Count II of the Complaint concerns enforcement of section 204(a) of PROMESA. This claim focuses on the failure of the Commonwealth to comply with section 204(a) in implementing Act 41, which allegedly repeals material aspects of the LFTA in violation of the 2022 Fiscal Plan. In light of the Confirmation Order's requirement of fealty to fiscal plans, Count II is plausibly within the scope of section 306(a)(2) of PROMESA. Even if it were not, the Court could exercise jurisdiction supplemental to its authority under Title III pursuant to section 1367(a) of title 28 of the U.S. Code. The scope of supplemental jurisdiction is, at the very least, "somewhat broader than the transaction-or-occurrence test." Glob. NAPs, Inc. v. Verizon New England Inc., 603 F.3d 71, 88 (1st Cir. 2010). Here, Count I and Count II each allege that the enactment and implementation of Act 41 was unlawful principally due to Act 41's alleged inconsistency with the 2022 Fiscal Plan, and that the statute must therefore be declared to be null and void. Each of the two counts addresses the process leading up to the enactment of Act 41, including the communications between the Oversight Board and the government and the determinations that the Oversight Board made prior to the passage and implementation of Act 41. They therefore "overlap in theory [and] chronology." Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R., 144 F.3d 7, 13 (1st Cir. 1998). Additionally, because Count I and Count II each seek to remedy the alleged economic consequences arising from the continued effectiveness of Act 41, there is a meaningful overlap in the "nature of the injury" between both claims. Apparel Art Int'l, Inc. v. Amertex Enterprises Ltd., 48 F.3d 576, 584 (1st Cir. 1995). The Court's authority to conduct the Title III Cases therefore also embraces authority to address Count II of the Complaint.

jurisdiction to enforce it. Cf. U.S. Brass Corp. v. Travelers Ins. Grp., Inc. (In re U.S. Brass Corp.), 301 F.3d 296, 306 (5th Cir. 2002) (holding that dispute concerning implementation of plan satisfied "arising in" jurisdiction because of bankruptcy court's statutory authority to enforce unperformed terms of plan). Accordingly, the Court has authority under section 306(a)(2) of PROMESA to adjudicate disputes that concern such conduct. The Court need not determine at this juncture whether paragraph 25(c)(ii) of the Confirmation Order has any substantive impact incremental to section 108(a)(2) of PROMESA because the Oversight Board has not made any specific request for relief under that provision of the Confirmation Order that is different from its requests that are grounded in provisions of the statute. The Confirmation Order is cited as a basis for jurisdiction and, in the context of the factual allegations of the Complaint, it is properly such on its face.

C. Abstention

Having determined that the Court has jurisdiction of the Adversary Proceeding (supra section I.A), and that the Court may preside over the Adversary Proceeding consistent with section 308(a) of PROMESA (supra section I.B), the Court notes that no party has addressed whether the Court should decline to exercise jurisdiction of the Adversary Proceeding.

The Court has considered that question and determined that it is in the interests of justice, efficiency, and judicial economy for the Court to resolve the merits of this Adversary Proceeding. The matter has already been fully briefed by the parties, the Court is familiar with the issues (both in the context of adversary proceedings resolved prior to confirmation of the Commonwealth Plan and from its review of the issues in the instant motion practice), and the briefing and review of arguments concerning discretionary abstention would delay further the

adjudication of the merits of the Oversight Board's claims.

The Court advises the parties, however, that, prior to filing future post-confirmation lawsuits focused on issues arising under Title I or Title II of PROMESA as adversary proceedings arising in or relating to the Title III Cases, they should consider carefully, and address if such an action is commenced, whether the Court should find it appropriate to exercise its discretion to address such issues post-confirmation. In such a case, if a party makes an appropriate motion, the Court will address whether abstention in favor of adjudication outside of the Title III Case is appropriate. Cf. In re Motors Liquidation Co., 457 B.R. 276, 279 (Bankr. S.D.N.Y. 2011) (abstaining from proceeding that fell within scope of exclusive jurisdiction retained by court where dispute did not implicate "construction of any of [the court's] earlier orders" or "any particular knowledge or expertise warranting [the court's] exercise of the jurisdiction [it] retained, such as knowing what [the court] intended to accomplish when [it] issued the [order]"); In re Old Carco LLC, 636 B.R. 347, 360 (Bankr. S.D.N.Y. 2022) (abstaining from adjudication of proceeding where, among other things, non-bankruptcy issues predominated over bankruptcy issues); Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 n.1 (9th Cir. 2005) ("[W]e are not persuaded by the Appellees' argument that jurisdiction lies because the action could conceivably increase the recovery to the creditors. As the other circuits have noted, such a rationale could endlessly stretch a bankruptcy court's jurisdiction."). At a minimum, any plaintiff would be well-advised to proffer at the outset a clear theory as to the significance of the dispute to the Title III Cases.

Having determined that the Court can and should adjudicate the Adversary Proceeding, the Court next turns to the merits of the Oversight Board's Motion for Summary Judgment. For the reasons that follow, the Motion for Summary Judgment is granted in part and

denied in part. The Oversight Board is entitled to judgment as a matter of law with respect to Count II of the Complaint. The Motion for Summary Judgment is denied with respect to Count I of the Complaint.

II. The Summary Judgment Motion

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

Under Federal Rule of Civil Procedure 56(a),[16] 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 "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) (quoting First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 (1968)). 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).

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[16] 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.

The Government Parties previously requested that the Court allow Defendants to conduct expedited discovery pursuant to Federal Rule of Civil Procedure 26. (See generally *Defendants' Urgent Motion for Limited Expedited Discovery*, Docket Entry No. 51) (the "Discovery Motion"). Defendants sought documents from the Oversight Board and a deposition of Dr. Robert K. Triest. (Discovery Mot. at 12.) The Court denied the Defendants' motion without prejudice. (See *Order Denying Motions Related to Governor's Request for Discovery*, Docket Entry No. 64.)

In the Governor's Opposition, the Governor argues that summary judgment in favor of the Oversight Board would be improper under Federal Rule of Civil Procedure 56(d) because, as asserted in the Discovery Motion, the Governor contends that discovery on certain issues is necessary to assess and defend against the Oversight Board's determination that Act 41 is inconsistent with PROMESA. (See Gov. Opp. at 46-50.)

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 Trust 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 Trust Corp., 22 F.3d at 1203).

The Oversight Board seeks summary judgment in its favor on Count I and Count II of the Complaint. In Count I, the Oversight Board requests a declaration pursuant to sections 104(k) and 108(a)(2) of PROMESA that Act 41 is nullified based on the Oversight Board's determination that Act 41 impaired and/or defeated the purposes of PROMESA, and a permanent injunction prohibiting the Governor from taking any steps to help private parties implement Act 41. (See Compl. ¶¶ 102-104 and Prayer for Relief.) In Count II, the Oversight Board requests a declaration pursuant to section 204(a) of PROMESA that Act 41 is nullified because the Governor has failed to comply with the requirements of section 204(a) and a permanent injunction prohibiting the Governor from taking any steps to help private parties implement Act 41. (See Compl. ¶¶ 110-14 and Prayer for Relief.) The Court will first address the merits of Count II.

B. Count II: Section 204(a) of PROMESA

Section 204(a) of PROMESA establishes a sequential process for the submission of new legislative enactments to the Oversight Board and for related Oversight Board action under certain circumstances. Section 204(a)(1) generally requires the Governor to submit laws to the Oversight Board within seven business days of their enactment.[17] With each such

[17] Section 204(a)(1) provides as follows:

> Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal

submission, section 204(a)(2) generally requires the Governor to provide the Oversight Board with documentation addressing two issues. The Governor must deliver a "formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues." 48 U.S.C.A. § 2144(a)(2)(A) (Westlaw through P.L. 117-262). The Governor must also provide a certification by an "appropriate entity" that the submitted law "is not significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(B) (emphasis added), or that the submitted law is "significantly inconsistent with the Fiscal Plan for the fiscal year," id. § 2144(a)(2)(C).

Pursuant to section 204(a)(3) of PROMESA,[18] the Oversight Board "shall send a notification to the Governor and the Legislature" if the Governor fails to submit an estimate, fails to submit a certification, or submits a certification that a law is significantly inconsistent with the

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> year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

48 U.S.C.A. § 2144(a)(1) (Westlaw through P.L. 117-262).

[18] Section 204(a)(3) provides, in full, that:

> The Oversight Board shall send a notification to the Governor and the Legislature if--
>
> (A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);
>
> (B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or
>
> (C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

48 U.S.C.A. § 2144(a)(3) (Westlaw through P.L. 117-262).

fiscal plan. Id. § 2144(a)(3). If the Governor fails to submit an estimate or certification, section 204(a)(4)(A) empowers the Oversight Board to direct the Governor to supply the missing submission. See id. § 2144(a)(4)(A). If the Governor submits a certification that the law is significantly inconsistent with the governing fiscal plan, section 204(a)(4)(B) empowers the Oversight Board to direct the territorial government to "correct the law to eliminate the inconsistency" or to "provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate." Id. § 2144(a)(4)(B). Section 204(a)(5) provides that, if the territorial government fails to comply with the Oversight Board's direction pursuant to section 204(a)(4), "the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the fiscal plan, including preventing the enforcement or application of the law." Id. § 2144(a)(5).

1. Formal Estimate Requirement (Section 204(a)(2)(A))

It is undisputed that no estimate, formal or otherwise, of the impact on Commonwealth revenues and expenditures over the period of the 2022 Fiscal Plan has ever been provided for Act 41 despite requests and directions by the Oversight Board pursuant to section 204(a)(2)(A) of PROMESA to do so. In a July 22, 2022 letter, AAFAF asserted that it would be "an ambitious and expansive undertaking" to estimate the indirect impact of Act 41 on the basis of information that is currently available. (Skeel Ex. 17 at 2; Brenner Ex. 6 at 2.) The Governor's submissions provided no context or analysis to support the certifications' assertion of consistency with the fiscal plan as required by section 204(a) of PROMESA. (See Skeel Exs. 15, 15A; and Brenner Ex. 5-8.) The DOL Certification stated that the fiscal assessment underlying the certification was based on "fiscal year 2021-2022" and limited to the "impact on the Agency:

Department of Labor and Human Resources." (Brenner Ex. 5 at 1-2.) The Treasury Certification does not contain any numerical values underlying the conclusion that Act 41 "entails no fiscal impact." (Brenner Ex. 5 at 5.) Rather, the Treasury Certification is based on "fiscal year 2021-2022" and is limited to "impact on the Agency: Department of Treasury." (Id.) Thus, the submissions by the Governor plainly fall short of facial compliance with the formal estimate requirement.

This Court has previously explained that "a 'formal estimate' under section 204(a) means a complete and accurate estimate 'covering revenue and expenditure effects of new legislation' over the entire period of the fiscal plan." Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 37 F.4th 746, 752 (1st Cir. 2022) ("Five Laws Appeal") (quoting Fin. Oversight & Mgmt. Bd. for P.R. v. Vásquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 403 F. Supp. 3d 1, 13 (D.P.R. 2019) ("Law 29 I")). Thus, for example, in the Five Laws Appeal, the First Circuit found that the Commonwealth failed to provide a formal estimate for Act 82 when its certification included "a conclusory and unsupported estimate" that failed to explain revenue and expenditure effects of the new legislation. Id. at 764. Similarly, the First Circuit concluded that Commonwealth failed to provide a formal estimate for Act 138 when its certification included a conclusory statement asserting "no impact on expenditures and revenues" without "some analysis or data to back up that assertion." Id.; see also Law 29 I, 403 F. Supp. 3d at 12-13; Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for P.R.), 616 B.R. 238, 248 (D.P.R. 2020) ("Law 29 II"); Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d 90, 97 (D.P.R. 2020), aff'd sub nom. Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 37 F.4th 746 (1st Cir. 2022).

This Court has held that section 204(a)(2)(A) requires that a "formal estimate" cover "revenue and expenditure effects of new legislation," in enough detail to estimate the law's impact over the full duration of the relevant fiscal plan. Law 29 I, 403 F. Supp. 3d at 13-14. The Section 204(a) Certification and the Section 204(a) Certification Supplement contain no methodological or computational detail to support the limited certifications that are proffered, which are facially insufficient in any event to meet the clear requirements of the statute and the Oversight Board's directions. (Skeel Ex. 15; Brenner Exs. 5-8.) As this Court has held, the "formality" requirement for an estimate is not satisfied by the mere presentation of a figure on official letterhead. Law 29 I, 403 F. Supp. 3d at 12-13. The Section 204(a) Certification and Section 204(a) Certification Supplement do not provide even a narrative explanation of how the estimates by the DOL and Treasury were derived.

Additionally, the Oversight Board issued several letters, including the July 30, 2022 letter that attached a presentation concerning the economic impact of Act 41, which provided the Governor with several opportunities to cure the perceived deficiencies prior to enactment of the statute and to provide more concrete data and analysis underpinning the DOL Certification and the Treasury Certification. Nonetheless, the Governor declined to provide documentation beyond the Section 204(a) Certification Supplement. Thus, the Governor has failed to show that the "formal" estimate requirement of section 204(a)(2)(A) has been satisfied.

2. Certification of Consistency with the Fiscal Plan (Section 204(a)(2)(B)-(C))

It is undisputed that the Governor has never provided the Oversight Board with a certification that Act 41, which was enacted on June 20, 2022, is or is not consistent with the entire period of the 2022 Fiscal Plan. Instead, the Governor has provided purported certifications by the Office of Management and Budget, Department of Labor and Human Resources, and

Department of Treasury regarding effects on expenditures and revenues of those governmental units for 2021-2022, the year preceding the enactment of Act 41. The Section 204(a) Certification asserts that Act 41 "do[es] not impact payroll expenditures of the Government of Puerto Rico" and that its "impact should be evaluated in light of the marginal effects that the Act 41 Modifications will have on the economic behavior of private sector employers." (Skeel Ex. 15 at 6.) AAFAF acknowledged that "an argument can be made that Act 41 'negatively impacts labor market flexibility,'" but asserted that Act 41 "largely preserve[s]" Act 4-2017's structural reforms because it only modified certain sections of the earlier Act. (Skeel Ex. 15 at 7.) The Section 204(a) Certification Supplement also included a letter from the Office of Management and Budget (Brenner Ex. 7 at 1), which further explained that the expenditure reported in the DOL Certificate ($1,248.12) represented the actual cost to publish "three . . . regulations." (Ex. 7 at 1.) The conclusions of that letter were expressly based upon the DOL's certification (see Brenner Ex. 7 at 1 ("[T]he Department [of Labor and Human Resources] does not identify any other incremental expense in its operation with the implementation of [Act 41]; therefore, we conclude that the budgets for the next five years will not be affected.")), which did not purport to come to any conclusions concerning revenues and expenses of the government generally nor address any period outside of "fiscal year 2021-2022." (Brenner Ex. 8 at 1.)

None of the Governor's arguments in defense of the certification submissions is availing. His plea that the submissions are not noncompliant because the statute does not define "formal estimate" is contrary to prior decisions of the First Circuit and this Court in this Title III case. The Governor's contention that "indirect" impacts on the Commonwealth's finances of regulation of the private labor market need not be assessed in order to comply with Section 204(a) finds no basis in the statutory language.

Neither the Governor nor the Speaker has identified any factual issue material to Count II that warrants discovery prior to adjudication of the Oversight Board's request for relief on the Section 204(a) compliance issue, or that precludes judgment in the Oversight Board's favor on Count II.[19]

The Governor's argument that the required fiscal impact assessment is impossible and his suggestion that the law remain in place while the Oversight Board and the Government take a "wait and see" approach to assessing its impact fall far short of the requirements of PROMESA, and are unavailing. Nor is there any merit in the contention that the failure can be laid at the feet of the Oversight Board because the Oversight Board did not lay out complete details and underlying data in support of its conclusion that Act 4-2017 labor reforms should stay in place. As this Court has previously held, "[t]he Oversight Board is not required to prove to the Court that [a law] is significantly inconsistent with the fiscal plan" to show that the Government failed to comply with its obligation under section 204(a)(1) of PROMESA. Law 29 II, 616 B.R. at 248. Section 204(a) provides no exception to the certification and formal estimate requirements for difficulty of analysis. It provides that, where the Governor fails to fulfill his statutory duty to provide the requisite meaningful documentation, the Oversight Board may act to "ensure that the enactment or enforcement of the law will not adversely affect the [Commonwealth's] compliance with the Fiscal Plan, including preventing the enforcement or application of the law" in question. 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262).

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[19] The Governor renews the discovery requests originally sought in the Discovery Motion. (Gov. Opp. at 44-50.) Neither the Governor nor the Speaker has demonstrated that he lacks access to documents necessary to oppose the Oversight Board's Motion for Summary Judgment as to Count II, such that discovery under Rule 56(d) of the Federal Rules of Civil Procedure would be appropriate. See In re PHC, 762 F.3d at 143. Accordingly, the Government Parties' request for discovery is denied insofar as it relates to Count II.

Here, the Governor has failed to comply with section 204(a). Act 41, which eliminates certain reforms imposed by the LTFA concerning the accrual of sick and vacation days and restored the pre-LTFA employee probation period, Christmas bonus eligibility, the presumption that any dismissal of an employee is not justified, and extended the statute of limitation for employees to commence an action against an employer, is plainly violative of the 2022 Fiscal Plan's direction that the Government refrain from repealing the LTFA or enacting new legislation that would negatively affect Puerto Rico's labor market flexibility. (See Brenner Ex. 4; see also Skeel Decl. ¶ 58.) The Oversight Board is therefore entitled as a matter of law to relief pursuant to sections 104(k) and 204(a)(5) of PROMESA "to ensure that the enactment or enforcement of [Act 41] will not adversely affect the territorial government's compliance with the Fiscal Plan." 48 U.S.C.A. § 2144(a)(5) (Westlaw through P.L. 117-262). The only way to prevent the enforcement and application of the law, which regulates the private sector and provides for private civil enforcement remedies, is to nullify it ab initio. Accordingly, the Court hereby declares that Act 41, and any actions that have been taken to implement it, are null and void ab initio. The Court further permanently prohibits and enjoins the Governor or other persons who are in active concert or participation with the Governor from taking any acts to help private parties implement or enforce Act 41.

C. Count I: Sections 104(k) and 108(a)(2) of PROMESA

Section 108(a)(2) of PROMESA provides that "[n]either the Governor nor the Legislature may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of [PROMESA], as determined by the Oversight

Board." 48 U.S.C.A. § 2128(a) (Westlaw through P.L. 117-262). The Oversight Board is authorized, under section 104(k) of PROMESA, to "seek judicial enforcement of its authority to carry out its responsibilities under this Act." Id. § 2124(k).

In Count I, the Oversight Board seeks a declaration that Act 41 is nullified because the Oversight Board has determined that the legislation impairs and/or defeats the purposes of PROMESA. (Compl. ¶¶ 102-104.) Having nullified and enjoined the enforcement of Act 41 based on the Governor's noncompliance with section 204(a), the Court need not address Count I of the Complaint. The accompanying *Order to Show Cause Regarding Dismissal of Remaining Claim* requires the parties to show cause, in writing, as to why Count I should not be dismissed as moot in light of the disposition of Count II.

D. Speaker's Motion to Strike

The Speaker filed a motion to strike from Plaintiffs' summary judgment briefing any mention of Dr. Robert K. Triest. (Mot. to Strike at 2-3, 7.) The Speaker characterizes certain references to Dr. Triest's work with the Oversight Board as unsworn testimony in violation of Federal Rule of Civil Procedure 56(c)(2) and Federal Rule of Civil Procedure 56(c)(4). Having made its determination as to the validity of Act 41 based on section 204(a) and without reference to the substance of Dr. Triest's work or the Oversight Board's reliance thereon, the Court need not resolve the issue of admissibility of the challenged facts or references pertaining to Dr. Triest. Accordingly, the Motion to Strike is denied as moot.

III.

CONCLUSION

For the foregoing reasons, the Oversight Board's Motion for Summary Judgment is granted with respect to Count II of the Complaint, and it is denied with respect to Count I of the Complaint. Act 41, and any actions that have been taken to implement it, are null and void ab initio. The Court further permanently prohibits and enjoins the Governor or other persons who are in active concert or participation with the Governor from taking any acts to help private parties implement or enforce Act 41.

The accompanying *Order to Show Cause Regarding Dismissal of Remaining Claim* directs the parties to show cause as to why, in light of the foregoing analysis and decision, the remaining counts and counterclaims should not be dismissed as moot.

This Opinion and Order resolves Docket Entry Nos. 28, 29, 44, and 45 in Adversary Proceeding No. 22-00063. This adversary proceeding remains referred to Magistrate Judge Dein for general pretrial management.

SO ORDERED.

Dated: March 3, 2023

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