

**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.

Debtors¹

PROMESA

Title III

Case No. 17-BK-3283 (LTS)

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO

as representative of

PUERTO RICO ELECTRIC POWER
AUTHORITY (“PREPA”),

Debtor.

PROMESA

Title III

Case No. 17-BK-4780 (LTS)

COURT FILING RELATES ONLY TO
PREPA AND SHALL ONLY BE FILED
IN CASE NO. 17-BK-4780 (LTS)

NOTICE OF APPEAL

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283- LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (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-5233-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

TO THE HONORABLE COURT:

NOTICE IS HEREBY GIVEN that movant FOREMAN ELECTRIC SERVICES INC. (“Foreman”) appeals to the United States Court of Appeals for the First Circuit from the *Memorandum Order Denying Verified Motion of Foreman Electric Services Inc. for Allowance of Administrative Expense Claim*, dated May 4, 2022 (ECF No. 2793 in Case No. 17-04780-LTS) (the “Administrative Expense Order”) and from all underlying and associated orders. A copy of the Administrative Expense Order is attached hereto.

The parties to this matter and the names and addresses of their respective attorneys are as follows:

Movant: Foreman

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RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 3rd day of June, 2022.

WE HEREBY CERTIFY that on this same date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case. We further certify that, on this same date, we served the foregoing upon all the Standard Parties as identified and defined in the Court's *Sixteenth Amended Notice, Case Management and Administrative Procedures Order* [Dkt. No. 20190-1] (the "CMP Order"), as well as upon all of the parties identified in the Master Service List maintained at <https://cases.primeclerk.com/puertorico/>.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

<p>In re:</p> <p>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,</p> <p>as representative of</p> <p>THE COMMONWEALTH OF PUERTO RICO <u>et</u> <u>al.</u>,</p> <p>Debtors.¹</p>	<p>PROMESA Title III</p> <p>No. 17 BK 3283-LTS</p> <p>(Jointly Administered)</p>
<p>In re:</p> <p>THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,</p> <p>as representative of</p> <p>PUERTO RICO ELECTRIC POWER AUTHORITY,</p> <p>Debtor.</p>	<p>PROMESA Title III</p> <p>No. 17 BK 4780-LTS</p>

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).

MEMORANDUM ORDER DENYING VERIFIED MOTION OF
FOREMAN ELECTRIC SERVICES INC. FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM

Movant Foreman Electric Services Inc. (the “Movant” or “Foreman”) has filed the *Verified Motion of Foreman Electric Services Inc. for Allowance of Administrative Expense Claim* (Docket Entry No. 2498 in Case No. 17-4780)² (the “Motion”), seeking an order to treat, as an administrative expense of the Puerto Rico Electric Power Authority (“PREPA”), Movant’s claim for \$8,362,866.49 in unpaid, post-petition costs and expenses allegedly incurred by Movant to mobilize and demobilize resources, and otherwise stand ready for performing work under a contract awarded for the restoration of Puerto Rico’s electric grid in the wake of Hurricane María (“Expenses”). The Expenses were allegedly incurred by Movant from April 2018 to December 2019, well after PREPA filed its petition under section 304(a) of the Puerto Rico Oversight, Management, and Economic Stability Act (the “Title III Petition” and “PROMESA,” respectively).³ The Court has considered all of the parties’ submissions carefully. As explained more fully below, the Motion is denied because it fails to establish that Foreman has an allowable administrative expense claim.

BACKGROUND

A. PREPA’s Request for Proposals

Except as otherwise indicated, the following undisputed facts are alleged in the Motion or drawn from the contract documentation appended to PREPA’s opposition papers.⁴ On

² All docket entries referenced herein are to entries in Case No. 17-4780.

³ PROMESA is codified at 48 U.S.C. § 2101 et seq. Unless otherwise specified, all references to PROMESA are to the uncodified version of the legislation.

⁴ References to the *Puerto Rico Electric Power Authority Master Service Agreement [with] Foreman Electric Services Inc.* (Docket Entry No. 2558 at 16-95) (the “Contract” or “MSA”) are to the version attached to *PREPA’s Opposition to Verified Motion of Foreman Electric Services Inc. for Allowance of Administrative Expense Claim* (Docket Entry No. 2558) (the “Opposition”), “the authenticity of which [is] not disputed by the

September 20, 2017, two months after PREPA’s Title III Petition was filed, Hurricane María ravaged the island of Puerto Rico and devastated its power grid. (Mot. ¶ 3.) In response, PREPA issued a Request for Proposals 77844 (the “RFP”) in February 2018 to procure the transmission and distribution services of one or more contractors to restore PREPA’s power system and, after considering multiple contractors, PREPA selected three companies, including Foreman, by March 2018 for contract awards. (Id. ¶¶ 5, 10-11.)

Foreman alleges that the RFP required awardees to “be available to start working at the beginning of Phase 2: March 5, 2018,” and stated that “PREPA intends to pay Standby Pay as soon as the contractor is notified that their assistance is required for a specific storm.” (Id. ¶ 6.) Foreman alleges that, in responding to its request for clarification about the start date, PREPA stated that the “start date will be two weeks after contract is awarded,” and that crews were to be mobilized and ready to begin work two weeks after the contract award date. (Id. ¶ 7.) Foreman further alleges that the Scope of Services portion of the RFP stipulated that any awarded contract would “consist of PREPA’s Contract together with the RFP Documents, including, but not limited to, the executed Proposal Documents, which shall be collectively referred to as the Contract Documents.” (Id. ¶ 8.) Foreman represents that the proposal it submitted stated that PREPA would pay for both mobilization and demobilization. (Id. ¶ 9.)⁵

Movant mobilized in anticipation of performing contractual work on April 12, 2018. (Mot. ¶ 10.) Foreman and PREPA did not, however, formalize and execute their Master Service Agreement (the “MSA”) until January 29, 2019. (Id. ¶ 15. See generally Docket Entry

parties.” Claudio-De Leon v. Sistema Universitario Ana G. Mendez, 775 F.3d 41, 46 (1st Cir. 2014) (quoting Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001)).

⁵ Foreman has not proffered the RFP itself, nor has Foreman provided a copy of its proposal.

No. 2558 at 16-95 (the “MSA”).) It was thereafter amended twice. (Docket Entry No. 2558 at 97-100 (“Amendment No. 1”); Docket Entry No. 2558 at 102-103 (“Amendment No. 2”).) Movant alleges, and PREPA does not dispute, that PREPA relied on other contractors in 2018 and 2019 to perform work to the exclusion of Foreman. (Mot. ¶¶ 11-14.) Citing certain criminal prosecution proceedings, Foreman alleges that work was directed to one of the contractors as part of a corrupt arrangement. (Id. ¶¶ 12-14.)

B. PREPA’s Contract with Foreman

The MSA, as amended,⁶ defines the term “Contract” as referring to the MSA,⁷ the Contractor Proposal(s), the Performance and Payment Bond, “and all supplementary documents thereto that are incorporated by reference,” and further provides that, “[i]n the event of a conflict between any such documents, the following shall constitute the order of priority governing the interpretation of the Contract: a. Contract[;] b. Contractor’s Proposals (Contractor Proposal)[;] c. Performance and Payment Bond as approved by PREPA’s Risk Manager and Treasurer.” (MSA § 2.3.) The relationship between the terms of the MSA and the Contractor’s Proposal is also addressed specifically in a separate sentence of the definitional section, as follows: “In case of any difference between the terms and conditions of this Contract and the terms of Contractor’s Proposals, the terms and conditions of this Contract shall govern.”⁸ (Id.) The MSA further provides that “[t]his document, together with all attachments referred to herein, constitutes the entire agreement between the parties as to this subject matter and supersedes all

⁶ The parties do not dispute that the relevant law applicable to the interpretation of the MSA is that of Puerto Rico. The “Choice of Law” provision of the MSA states that “[t]his Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Puerto Rico.” (MSA art. 26.)

⁷ The MSA consistently refers to itself as “this Contract.” (See, e.g., MSA arts. 1-3.)

⁸ See the preceding footnote.

communications, negotiations, and agreements of the Parties, whether written or oral, other than these, made prior to the signing of this Contract. In case of conflict the terms and conditions of this Contract, as signed by the parties, shall prevail.” (Id. art. 41.) The MSA does not enumerate the RFP as a document constituting the Contract.

The MSA and amendments thereto include provisions specifically addressing PREPA’s payment obligations. First, the “Scope of Work, Contract Value, and Term of Contract” provision states that “[a]ll activations and requests of any service, equipment, and/or personnel located in Appendix A must come by official written Notice to Proceed by PREPA. Contractor will not proceed, or incur any financial burden, without a formal written Notice to Proceed. Such Notice to Proceed will become financially binding on the part of PREPA.” (Id. art. 1.) Appendix A enumerates the scope of work to be performed by Foreman, including the provision of all necessary equipment and logistics. (Docket Entry No. 2558 at 66-67.)

No Notice to Proceed was issued, before or after the execution of the MSA. On March 7, 2019, the parties executed “Amendment No. 1” to the MSA, providing that:

All activations and requests of any service, equipment, and/or personnel located in Appendix A must come by official written Notice to Proceed by PREPA. Contractor will not proceed, or incur any financial burden, without a formal written Notice to Proceed. Such Notice to Proceed will become financially binding on the part of PREPA. No later than five (5) business days after the issuance of the first Notice to Proceed under this Contract, signed by the Chief Executive Officer of PREPA and authorizing the Contractor to mobilize its resources for deployment to Puerto Rico, PREPA shall pay to the Contractor \$5,500,000 as a lump-sum deposit towards the Contractor’s mobilization costs[.]

(MSA, Am. No. 1 § A.)

On June 20, 2019, the effective date of the contract was further extended until December 31, 2019, “to ensure that PREPA has an emergency services contractor in place for

the 2019 hurricane season[.]” (MSA, Am. No. 2.) As noted above, no Notice to Proceed was ever issued.

C. Foreman’s Motion

On May 28, 2021, Foreman filed the instant Motion, asserting that, because PREPA had communicated an expectation that selected contractors’ equipment and personnel would be ready and available as early as March 2018, and such communications are incorporated as part of the Contract materials, Foreman should be awarded \$8,362,866.49 for the Expenses it incurred, primarily in mobilizing and demobilizing for Contract performance, even though Foreman never received a Notice to Proceed from PREPA. (Mot. ¶¶ 20-24, 39-40.) Foreman argues that such Expenses should be allowed and paid as administrative expenses under section 503 of title 11 of the United States Code (the “Bankruptcy Code”), and therefore accorded payment priority under section 507(a)(2) of the Bankruptcy Code, as made applicable by section 301 of PROMESA, 48 U.S.C. § 2161(a). (Mot. ¶¶ 24-33.) Alternatively, Movant argues, the Expenses should be accorded priority administrative expense treatment on the basis of the “fundamental fairness” doctrine originating from the Supreme Court’s decision in Reading Co. v. Brown, 391 U.S. 471 (1968). (Mot. ¶¶ 34-41.)

On July 16, 2021, the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”) filed its Opposition to the Motion, arguing principally that (1) in the absence of any Notice to Proceed from PREPA to Foreman, Movant cannot establish that it has any right to payment under the Contract, which is governed by Puerto Rico law (Opp. at 5-11; MSA art. 26); (2) requiring a government entity like PREPA to compensate an entity like Foreman for the performance of any services without written authorization would run afoul of Puerto Rico government contracting principles (Opp. at 11); (3) Foreman cannot show that “the

mere mobilization and availability of resources was beneficial to the estate” of PREPA (id. at 11); and (4) the “fundamental fairness” doctrine is inapplicable where, as here, “the parties entered into a binding contract and [one of them] chose not to comply with the contract,” resulting in self-inflicted damages to Foreman, which assumed the risk of mobilizing without a Notice to Proceed (id. at 12-14).

Movant filed a reply on August 31, 2020 (Docket Entry No. 2609) (the “Reply”), arguing for the first time that, because Foreman was induced to mobilize early by correspondence from PREPA which was appended to the RFP (which it argues forms a part of the Contract documents),⁹ a right to payment stems from PREPA’s breach of contract as well as a breach of the general requirement of good faith under Puerto Rico law, and that therefore Movant should be paid for the harms it suffered. (Reply at 3-11.) In the alternative, Foreman argues, the doctrine of fundamental fairness still applies because its claim arises from post-petition actions that deliberately violate applicable law, including the implied covenant of good faith, and damaged Movant as a result. (Id. at 11-14.) For the reasons that follow, Foreman’s Motion is denied.

DISCUSSION

A. Administrative Expense Status

The allowance of administrative expense claims is governed by section 503 of Bankruptcy Code, which is made applicable in this case by section 301 of PROMESA. See 11 U.S.C. § 503; 48 U.S.C. § 2161(a). Section 503 of the Bankruptcy Code provides, in relevant part, that:

⁹ Foreman makes no evidentiary proffer of the documentation nor, as noted above, does the MSA expressly incorporate the RFP or any related correspondence into the terms of the Contract.

- (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
- (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
 - (1)(A) the actual, necessary costs and expenses of preserving the estate

11 U.S.C.A. § 503 (Westlaw through P.L. 117-102). In Woburn Associates v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1 (1st Cir. 1992), the First Circuit set forth the general criteria that should be considered to determine whether to allow an administrative expense claim. The court explained that a request for priority payment of an administrative expense under section 503(a) of the Bankruptcy Code “may qualify if (1) the right to payment arose from a postpetition transaction with the debtor estate, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the right to payment was beneficial to the estate of the debtor.” In re Hemingway Transp., Inc., 954 F.2d at 5. The party asserting the administrative claim bears the burden of demonstrating the entitlement of its claim to such treatment. Id.

Foreman’s Motion for administrative expense treatment fails because Foreman has not demonstrated that it has a contractual right to reimbursement of the Expenses, nor has it demonstrated that the Reading doctrine applies to warrant administrative expense treatment of its unilateral mobilization and demobilization expenditures.

The parties do not dispute that the alleged right to payment emerges from a set of entirely postpetition events—the RFP, the Contract award and execution, and the Expenses all post-date PREPA’s Title III Petition—but Movant fails to identify a contractual right to payment for the Expenses it alleges it incurred. Despite Foreman’s observation that the “Contract”

includes Movant’s proposal “and all supplementary documents thereto that are incorporated by reference” (Mot. ¶ 20 (quoting MSA § 2.3)), Foreman has proffered no evidence of any undertaking by PREPA to pay the Expenses, and the MSA, which governs when there is any inconsistency between it and other documents comprising the Contract, specifically conditions PREPA’s liability for Movant’s expenses on the issuance of a Notice to Proceed. (MSA § 2.3. See also MSA art. 41; MSA, Am. No. 1 § A.) Thus, to the extent anything in Foreman’s proposal or the RFP includes statements indicating that PREPA would pay for Foreman’s services and resources that may have been made available prior to the Contract’s execution on January 29, 2019 (see Mot. ¶¶ 6-9, 15, 21-22), such provisions are contradicted and superseded by the plain terms of the Contract, which provides that “[a]ll activations and requests of any service, equipment, and/or personnel . . . must come by official written Notice to Proceed by PREPA,” and that “Contractor will not proceed, or incur any financial burden, without a formal written Notice to Proceed.” (MSA art. 1.)

The first amendment to the Contract, dated March 7, 2019, and bearing the signature of Foreman’s Chief Executive Officer, adds that, “[n]o later than five (5) business days after the issuance of the first Notice to Proceed under this Contract, signed by the Chief Executive Officer of PREPA and authorizing the Contractor to mobilize its resources for deployment to Puerto Rico, PREPA shall pay to the Contractor \$5,500,000 as a lump-sum deposit towards the Contractor’s mobilization costs[.]” (MSA, Am. No. 1 § A.) In other words, not only was a Notice to Proceed already a precondition to payment under the Contract, but Foreman specifically agreed to a Contract amendment that conditioned payment for mobilization and deployment Expenses on the issuance of a Notice to Proceed. (Id.) That amendment was signed well after April 2018, when Foreman alleges it had begun mobilizing and deploying

resources. (Mot. ¶ 10.) Thus, Foreman specifically agreed to condition repayment for Expenses it had already begun to incur on a Notice to Proceed that had not been issued. (Id. ¶ 38.) No Notice to Proceed was ever issued. Accordingly, Foreman fails to establish a contractual right to payment that could be treated as an administrative expense.

Movant’s alternative theory of breach of a duty of good faith contract performance, which was untimely raised for the first time in the Reply, fares no better: to the extent Movant’s argument depends on asserting a contractual breach, that argument fails because the Contract’s terms clearly disclaim any liability of PREPA for work or expenses incurred in the absence of a Notice to Proceed. To the extent Movant’s argument is that PREPA failed to observe its general duty of good faith over the course of the contractual relationship by not issuing a Notice to Proceed, it is unavailing because Movant has identified no contractual provision requiring PREPA to issue a Notice to Proceed. (See Reply at 6-14.) Nor does the Reply describe anything, beyond the non-payment of Expenses that Foreman incurred in the absence of a Notice to Proceed, as constituting “acts contrary to [PREPA’s] contractual obligations with Foreman[.]” (Id. at 9.) Foreman’s request for payment of its Expenses in the absence of a Notice to Proceed is inconsistent with the terms of the Contract that are before the Court; Movant has thus failed to establish that PREPA’s conduct was contrary to PREPA’s contractual obligations.

Thus, the instant Motion fails to carry Foreman’s burden of demonstrating that it has a valid contractual basis for its administrative expense claim under section 503 of the

Bankruptcy Code.

B. The Fundamental Fairness Doctrine

Movant also argues an alternative basis upon which administrative expense claims that are not explicitly contemplated by the Bankruptcy Code have been allowed. The “fundamental fairness” doctrine, which has its origins in Reading Co. v. Brown, 391 U.S. 471 (1968), has been interpreted within the First Circuit to support administrative expense claim priority for two categories of claims that do not otherwise come within the plain language of section 503 of the Bankruptcy Code: “the ‘fundamental fairness’ exception is recognized when the debtor’s postpetition operations occasion tortious injuries to third parties (Reading), or when the claim arises from postpetition actions that deliberately violate applicable law and damage others (Charlesbank).” See In re Healthco Int’l Inc., 272 B.R. 510, 513 (B.A.P. 1st Cir. 2002) (emphasis in original) (citing Reading, 391 U.S. 471, 477; Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.), 755 F.2d 200, 203 (1st Cir. 1985)), aff’d, 310 F.3d 9 (1st Cir. 2002).

Foreman asserts that the Reading doctrine applies because, in its view, its claim arises from postpetition violations of Puerto Rico law, that resulted in harm to Foreman. (Mot. ¶ 37 (discussing In re Healthco Int’l Inc., 272 B.R. 510); Reply at 12-14.) To the extent that Foreman finds such legal violations in PREPA’s failure to issue a Notice to Proceed the claim is unavailing because, as explained above, the Contract does not obligate PREPA to pay for Expenses accrued outside of, or in the absence of, a Notice to Proceed. Foreman failed to secure a contract that provided a means of compensation for Expenses it accrued without a Notice to Proceed. Moreover, by agreeing to an amendment that explicitly renders repayment for mobilization Expenses on the issuance of a Notice to Proceed, Foreman assumed the risk of not

obtaining repayment in the absence of a Notice to Proceed. (MSA, Am. No. 1 § A.) Movant’s contention that PREPA breached a general duty of “good faith inherent in contractual relationships” also fails, as explained above. (Reply at 12.)

Thus, the Reading doctrine is inapt because Movant proffers no legal or factual basis for finding that PREPA’s strict compliance with the terms of the Contract was otherwise illegal, or even that it was carried out in a manner inconsistent with the provisions of Puerto Rico law. Movant’s speculative assertions that work was allocated to another contractor that would, absent corrupt dealings, have gone to Foreman, are likewise insufficient to establish that administrative priority treatment of Foreman’s Expenses is warranted under the Reading doctrine. Movant has therefore failed to establish any entitlement to an administrative expense claim.¹⁰

CONCLUSION

For the foregoing reasons, the Motion is denied. This Memorandum Order resolves Docket Entry No. 2498 in Case No. 17-4780.

SO ORDERED.

Dated: May 4, 2022

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

¹⁰ In the absence of a legal violation by PREPA or a legal obligation for repayment of Movant’s Expenses, moreover, no equitable relief is available. See Rodríguez-Ramos v. ELA, 190 D.P.R. 448 (2014) (“The courts have . . . rejected the applicability of any remedy in equity such as unfair enrichment, to validate such public commitment without a written contract, and to so indemnify damages suffered by a private party upon stated requirements not being complied with.”). (See Docket Entry No. 2601 at 124.)