IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, et al., Debtors.	PROMESA Title III Case No. 17-BK-3283-LTS
IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	PROMESA Title III Case No. 17-BK-4780-LTS
THE SPECIAL CLAIMS COMMITTEE OF THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ACTING BY AND THROUGH ITS MEMBERS, et al., Plaintiffs v. INSPECTORATE AMERICA CORP., et al., Defendants.	Case No. 19-AP-388-LTS

VITOL'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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Defendants Vitol Inc. and Vitol S.A. (together, "Vitol") file this reply in support of their motion to dismiss (ECF 161) the Second Amended Complaint ("Complaint") (ECF 139).

PRELIMINARY STATEMENT

Vitol's motion raised two independent grounds for dismissal: (1) the Committees' claims against Vitol are time-barred as a matter of law; and (2) the Complaint does not adequately plead the claims against Vitol. The Committees' response does not defeat either ground.

First, the Committees failed to overcome the time-bar on their claims against Vitol. On the breach of contract claim, Vitol established this claim is time-barred because it alleges a hidden defect, and such claims are subject to a specific six-month limitations period, not the general fifteen-year prescription period under Puerto Rico law. And Vitol's final deliveries to PREPA were in 2009, nearly ten-years before this suit was filed. In their response, the Committees argue the general fifteen-year prescription period applies because they do not allege a hidden defect claim, but rather a claim that Vitol breached its contracts by delivering a "specific thing different than the one agreed upon," a doctrine known in Puerto Rico case law as *aliud pro alio*. But that doctrine does not apply as a matter of law, and the Committee's argument is foreclosed by controlling precedent. Indeed, the principal First Circuit case cited in the Committee's response, *Jorge Rivera Surillo & Co. v. Falconer Glass Indus.*, 37 F.3d 25 (1st Cir. 1994), rejected application of the *aliud pro alio* doctrine and held that a claim for breach of contract for delivering glass that did not comply with contractual specifications—a claim exactly like the Committee's claim here for delivering fuel oil that allegedly did not meet contractual specifications—should be treated as one for hidden defect, and thus subject to the six-month limitations period.

The Committees' response also failed to overcome the time-bar on their avoidance claims. Vitol's motion showed that, under each of the statutes the Committees attempt to use to avoid the transfers between Vitol and PREPA, the Committees' claims are untimely. The Committees do not specifically address any of Vitol's arguments. Instead, they respond only by incorporating their arguments in their opposition to the Omnibus Motion to Dismiss. By lumping Vitol together with the rest of the defendants, the Committees ignore dispositive legal defects specific to their claims against Vitol and obscure that Vitol (unlike other parties) ceased doing any business with PREPA in 2009 (nearly a decade before this lawsuit was filed).

Second, the Committees' response confirms that the claims against Vitol were not adequately pleaded: The Committees offer no valid defense of their impermissible group pleading against Vitol and the four unrelated "Supplier defendants," ECF 161 at 13–15, and do not meaningfully address the case law Vitol cited in support of its argument that the Complaint did not plausibly allege facts sufficient to state a claim for either breach of contract or avoidance. The Committees did not cite any case finding sufficient the kind of barebones, conclusory allegations of breach or transfers for less than reasonably equivalent value in the Complaint here.

The claims against Vitol should be dismissed.

ARGUMENT

I. All Claims Against Vitol Are Time-Barred

Vitol's motion established that all the Committees' claims against Vitol are time-barred under the applicable limitations periods. The Committees' attempts in response to enlarge the limitations periods for their breach of contract and their avoidance claims fail as a matter of law.

A. PREPA's Breach of Contract Claim Is a Time-Barred Hidden Defect Claim

As Vitol established in its motion, the Committees' breach of contract claim (Claim 1) is time-barred because it alleges a hidden defect claim. ECF 161 at 5–8. Section 3847 of the Puerto Rico Civil Code specifies that such claims are subject to a six-month statute of limitations, not the general fifteen-year prescription period of Section 5294. *Id*. at 5–6. Vitol's final deliveries to PREPA were in 2009, and the Committees' claims are thus nearly ten-years too late. *Id*. at 8.

In their response, the Committees argue the general fifteen-year prescription period in Civil Code § 5294 applies because they do not allege a hidden defect claim, but rather a claim that Vitol breached its contracts by delivering a "specific thing different than the one agreed upon," a doctrine known in Puerto Rico case law as *aliud pro alio*. ECF 193 at 3–7.

That argument is meritless, and the principal First Circuit case relied on by the Committees contradicts their argument and supports Vitol's. In *Jorge Rivera Surillo & Co. v. Falconer Glass Indus.*, 37 F.3d 25 (1st Cir. 1994), the First Circuit refused to apply *aliud pro alio* when the defendant allegedly delivered glass that failed to meet the contracted-for requirements for light transmission. *Id.* at 26. The contract included "requirements that the glass provide 39% visible light transmission and .005% ultraviolet light transmission." *Id.* But after the buyer installed the glass, the panes were "stained with rainbow-like marks" that "did not show when the glass was taken out of its packaging, but rather appeared two or three days thereafter" and "[l]aboratory tests performed at the request of JRS showed that the glass did not meet the Navy's requirements for visible light transmission." *Id.*

The First Circuit held the doctrine of *aliud pro alio* did not apply because "JRS has not claimed that defendants failed to deliver the glass" but "[r]ather, they claim that the glass delivered was inadequate for its intended use." *Id.* at 28. Accordingly, the court concluded that the "claims fall squarely into the definition of 'inherent' or 'hidden' defect" and were time-barred under the six-month limitations period for such claims. *Id*. at 28.

Jorge Rivera confirms that the Complaint alleges a hidden defect claim, not one of *aliud pro alio*. The Committees allege that Vitol delivered fuel oil that did not comply with the specifications required by Vitol's contracts with PREPA. *See* ECF 139 ¶ 121, 137. This allegation is materially identical to the allegation in *Jorge Rivera* that the glass did not meet the visibility standards required by the contract. Under binding First Circuit precedent, the Committees' claims are time-barred under the six-month limitations period for hidden defect claims.

Similarly, the main Puerto Rico Supreme Court case that *Jorge Rivera* cited also confirms the inapplicability of *aliud pro alio*. In *Julsrud v. Peche de P.R., Inc.*, 15 P.R. Offic. Trans. 23 (1983), the defendants allegedly delivered lobster that had already begun decomposing before it was frozen. *Id.* at 27. Needless to say, the lobster did not comply with the terms of the contract—the lobster was intended for culinary use. *Id.* at 26. The Court discussed the difference between hidden defect and *aliud pro alio* claims and concluded that "[t]he case at bar deals with the delivery of a defective thing" and hence applied the shorter limitations period. *See id.* at 29.

The only other federal-court case relied on by the Committees, *GPS Distributor, Inc. v. PowerMax Battery (U.S.A.), Inc.*, 2016 WL 5376232 (D.P.R. 2016), likewise supports Vitol. The court in *GPS* rejected the buyer's attempt to invoke the doctrine of *aliud pro alio* because "GPS ordered batteries from Powermax and acknowledges that it received those batteries from Powermax." *Id.* at *12. Relying on the First Circuit's decision in *Jorge Rivera*, the court ruled that the six-month "limitations period prescribed by Section 260 governed GPS's claim that the batteries were expired, defective, and did not serve their intended use due to a hidden defect." *Id.*

The Committees also fail to distinguish the First Circuit's controlling decision in *Kali Seafood, Inc. v. Howe Corp.*, 887 F.2d 7 (1st Cir. 1989), which held that a plaintiff cannot evade the special six-month limitations period for product sales merely by alleging a generic breach of contract claim. In *Kali Seafood*, as here, the complaint alleged the product did not comply with contractual specifications. The icemaker was purchased for the purpose of making ice at sea, and the contract specified that the icemaker would produce "at least one ton of salt water ice per day." *Id.* at 8. Yet the delivered ice machine allegedly "would make salt-water ice only infrequently," not each day. *Id*. Hence, the claim was that the machine "was defective." *Id*.

The Committees argue that "[u]nlike the icemaker in *Kali Seafood*, the Complaint does not allege that the Vitol Defendants delivered defective fuel oil with a hidden defect that rendered it unfit for some reason" because "there is no allegation that the Vitol Defendants provided fuel oil that failed to combust fuel." ECF 193 at 7. Instead, per the Committees, "the Vitol Defendants delivered oil that was inconsistent with contractual specifications, delivering a different thing entirely." ECF 193 at 7. That is nonsense. If anything, *Kali Seafood* was a closer case for applying *aliud pro alio*—the icemaker's hidden defects were so pronounced that it did not perform as it was supposed to. Here, Vitol's fuel oil was, by the Committees' own admission, perfectly useful for its contracted-for purpose (combustion to generate electricity), despite the alleged non-compliance with certain contractual specifications. If the defective icemaker in *Kali Seafood* was not "a different thing entirely," Vitol's fuel oil plainly was not either.

The Committees also imply that *Kali Seafood* is no longer good law, saying "[i]n the more than three decades since the First Circuit's decision in *Kali Seafood*, the Puerto Rico Supreme Court (and numerous Puerto Rico appellate courts) has clarified the *aliud pro alio* doctrine." ECF 193 at 6. But the Committees do not cite a single First Circuit or District of Puerto Rico case even questioning *Kali Seafood*'s continued validity, let alone overturning it. Nor do the Committees identify any intervening change in Puerto Rico case law that would permit this Court to disregard *Kali Seafood*'s binding construction of Puerto Rico law.

To the contrary, the only Puerto Rico Supreme Court case the Committees cite, *S.M.C. Construction Inc. v. Master Concrete Corp.*, supports Vitol. In that decision, the Puerto Rico Supreme Court set out a three-part test for *aliud pro alio*: (1) the product delivered has "elements ***diametrically different*** from those that the object of the transaction should have had;" (2) "the thing acquired ***does not serve the purpose*** intended for by the buyer;" and (3) an objective buyer would be dissatisfied by "the ***uselessness*** of the object." 143 D.P.R. 221, 240–41 (1997).

The Committees' *aliud pro alio* argument fails that test. The Committees do not allege any of the three circumstances outlined by *Master Concrete*, let alone all three. Nowhere does the Complaint allege Vitol delivered fuel oil that was diametrically different from what was contracted for. Instead, it alleges that Vitol delivered fuel oil—the same product that PREPA contracted for—but that some (unspecified) deliveries of fuel oil did not meet some (unspecified) specifications in the contract. *See* ECF 139 ¶¶ 2, 62–65, 67–68, 121, 126–27. The Committees also do not allege that the fuel oil that Vitol delivered was useless for the contracted-for purpose. PREPA bought the fuel oil for the purpose of combusting fuel to generate power, and the Committees admit that they made "no allegation that the Vitol Defendants provided fuel oil that failed to combust fuel." ECF 193 at 7. Further, there is no allegation the fuel oil was objectively useless—PREPA burned the fuel oil Vitol delivered to generate electricity, precisely as intended.

The *Master Concrete* test also makes it easy to distinguish the two unpublished (and thus non-precedential) Puerto Rico appellate court cases the Committees rely on: in both, the delivered products were allegedly useless for the contracted-for purpose. In *Mio Plastics, Ltd. v. Mencacci*, 2003 WL 21369038 (P.R. Cir. 2003), the plastic bags were intended for carrying heavy groceries. *Id.* at *2. So, the thin plastic of the delivered bags "render[ed] them unsuitable for their intended use." *Id*. at *5. Similarly, in *Sanjurjo Rosario v. Sucesion J. Serralles Second, Inc*., 2015 WL 1305132 (P.R. Cir. 2015), the plaintiffs intended to use the contracted-for grass as turf on a baseball field. *Id.* at *2. Because the grass delivered did not grow correctly, the court determined it was useless for that intended purpose. *Id*. at *1.

As demonstrated in Vitol's motion, the Committees' breach of contract claim against Vitol is time-barred as a matter of law by the six-month statute of limitations for hidden defect claims.

B. The Committees' Avoidance Claims Are Also Time Barred

Vitol's motion established that the Committees' avoidance claims (Count 2 and Count 3) are also time-barred. ECF 161 at 8–12. The statutes the Committees rely on to assert that they can step into the shoes of the IRS and undo any transfers between PREPA and Vitol either have a six-year statute of limitations from the time of transfer (28 U.S.C. § 3304), a four-year statute of limitations from the execution of the contract (31 P.R. Laws Ann. §§ 3492(3), 3492(5), and 3493), or a ***forward-looking*** ten-year period starting at the time a tax is assessed (26 U.S.C. § 6502(a)). *Id*. The last transfers between Vitol and PREPA were in 2009, the last contracts between Vitol and PREPA were executed even before that, and the IRS's tax assessments did not occur until 2014, five years ***after*** PREPA's last transfer to Vitol. *Id.* The avoidance claims are thus untimely.

The Committees do not specifically address any of Vitol's arguments. Instead, they respond only by incorporating their arguments in their opposition to the Omnibus Motion to Dismiss.[1] By lumping Vitol together with the rest of the defendants, the Committees ignore dispositive legal defects specific to their claims against Vitol.

28 U.S.C. § 3304. To start, the Committees acknowledge that 28 U.S.C. § 3304 has a six-year statute of limitations. ECF 193 at 28. But the Committees ignore the fact that Vitol's last delivery to PREPA occurred in 2009. ECF 139 Ex. A–D. Thus, they concede that any avoidance claims against Vitol under § 3304 expired in 2015, six years after Vitol's last transfer to PREPA.

Puerto Rico Law Avoidance Claims (31 P.R. Laws Ann. §§ 3492(3)&(5), 3493). As Vitol established in its motion, "the Committees' recission claims under Sections 3492 and 3493 expired long ago" because "[t]he statute of limitations applicable to rescission claims under Puerto Rico

[1] The Committees spend most of the response arguing they can step into the shoes of the IRS. These arguments fail for the reasons stated in the Omnibus Reply, which Vitol joins and incorporates by reference.

law is four years." ECF 161 at 10. That limitations period "is computed from the date of execution of the contract," and "the last contract between Vitol and PREPA was 'entered into on or about . . . July 3, 2007'" according to the Complaint. *Id.* (quoting ECF 139 ¶ 18(d)). The Committees ignore this argument completely, and thus dismissal of these claims is proper as well.

IRS Limitations Period (26 U.S.C. § 6502(a)). As a result of these concessions, the Committees' avoidance claims turn entirely on their theory that, under 26 U.S.C. § 6502, they are permitted to stand in the shoes of the IRS and reach back to undo any transfers during the ten years before PREPA filed its Title III petition. But as Vitol demonstrated, the ten-year period under that statute is a ***forward-looking*** period for collecting a tax, not a reach-back period. ECF 161 at 8–12.

The Committees' response on that point is meritless. The Committees acknowledge disagreement among courts as to whether the ten-year period under the statute is a reach-back or a forward-looking period. But they ignore the substantial authority Vitol cited in its motion demonstrating that the well-established (and well-reasoned) majority view among those decisions is that § 6502(a)'s ten-year limit is forward-looking. *See* ECF 161 at 11 (collecting cases).

Rather than engage with that authority, the Committees fall back to a novel (and baseless) argument that § 6502 has *no* statute of limitations at all and is instead subject to an *unlimited* reach-back period. The Committees' argument is facially absurd—if ExxonMobil went bankrupt (and the IRS were a creditor), the Committees' theory would allow creditors to undo transfers back to the breakup of the Standard Oil trust in the 1910s. The Committees' argument also contravenes the plain language of the statute—the IRS can only collect a tax "if the levy is made or the proceeding begun . . . ***within ten years after the assessment of the tax***." Unsurprisingly, then, the Committees do not point to a single case that has held such an unlimited look-back period exists. The one case they cite "did not decide, ***but recognized[] the potential for*** an unlimited look-back period." ECF 193 at 33 (citing *Hillen v. City of Many Trees, LLC.* (*In re CVAH*), 570 B.R. 816, 835–38 (Bankr. D. Idaho 2017)). And the only case *In re CVAH* cited in considering "the potential for an unlimited look-back period" rejected that position. *Id.* at 838 (citing *Ebner v. Kaiser* (*In re Kaiser*), 525 B.R. 697, 710 (Bankr. N.D. Ill. 2014)). Cases the Committees rely on elsewhere in their brief rejected it, too. *See, e.g., In re Smith*, 2022 WL 1814415, at *7 (Bankr. D. Kan. 2022).

The Committees' unlimited look-back theory is also premised, at least partly, on their claim that the IRS does not need to assess a tax in order to file a collection action. ECF 193 at 32. Again, this argument relies only on *In re CVAH*. Yet when discussing if an assessment is a precondition, *In re CVAH* was not analyzing § 6502(a); it was analyzing a different statute, § 6901. 570 B.R. at 836. That statute is inapplicable here, and (unlike § 6901) the plain text of § 6502(a) requires an assessment. ("Where ***the assessment*** of any tax imposed by this title ***has been made*** . . .").

The Committees argue as a secondary matter that the ten-year period is a look-back period, but they base this argument on two unpublished opinions that did not even squarely address the issue. *See* ECF 192 at 34. The principal case they rely on, *In re Smith*, did not hold that § 6502(a)'s ten-year limit is a look-back period ***rather than*** a forward-looking period. The court only applied a look-back period in ***rejecting*** the very argument the Committees make here: that an unlimited look-back period applies. 2022 WL 1814415 at *6–8. Similarly, the court in *Maxus Liquidating Tr. v. YPF S.A.*, 2022 WL 2240122 (Bankr. D. Del. 2022), only cited cases that apply § 6502(a)'s ten-year limitations period instead of ***state law*** statutes of limitations. *Id*. at *48 n. 260–61. *Maxus* did not address the issue of whether that ten-year period is forward- or backward-looking.

As Vitol's motion established, the ten-year period during which the IRS can levy a tax is a forward-looking period that starts at the time the tax is assessed. Because the Committees allege the IRS assessments here occurred, at the earliest, in 2014—five years ***after*** the last transfer between Vitol and PREPA—the Committees have no valid avoidance claim under § 6502(a).

II. The Complaint Fails to State a Claim Against Vitol

The Court should also dismiss the Complaint because it does not adequately plead claims against Vitol. The Committees' response on this point is long on words but short on substance. There simply are no well-pleaded facts to support the claims against Vitol, only empty conclusions, and the Committees cannot obscure the absence of well-pleaded allegations *against Vitol* by relying on allegations against defendants *generally*.

A. The Committees Have No Legal Support for their Extensive Group Pleading

As the motion explains, the Complaint fails because its principal allegations, including the foundational allegations of a purported "scheme," are lodged against a group of "Supplier Defendants," a term used to lump Vitol together with four completely unaffiliated companies, each of which had separate relationships with PREPA at different points in time. ECF 161 at 13–15. Group pleading like this is insufficient—a complaint must make allegations "as to each defendant." *See id*. at 13–14 (collecting cases).

In response, the Committees do not challenge the substantial caselaw prohibiting this kind of group pleading. Instead, the Committees cherry-pick quotes from cases establishing the rule against group pleading: they assert that group pleading leads to dismissal only "where it is 'entirely implausible' or impossible for the grouped defendants to have acted as alleged," ECF 193 at 16–17 (quoting *Zond, Inc. v. Fujitsu Semiconductor Ltd*., 990 F. Supp. 2d 50, 53 (D. Mass. 2014), and *Adobe Sys. Inc. v. Blue Source Grp.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015)), and that "a complaint involving multiple defendants need only provide 'fair notice to each defendant'" of the claims against them and the bases of those claims, *id*. at 17 (citing *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996); *Reich v. Lopez*, 38 F. Supp. 3d 436, 462 (S.D.N.Y. 2014)).

But these general statements cannot obscure the actual holdings of these cases—which demonstrate the inadequacy of the pleading here. In *Gen-Probe*, 926 F. Supp. at 960–61, for example, the complaint asserted claims against multiple defendants without specifying which defendant was alleged to have done what, and the court thus dismissed the claims. In *Adobe*, 125 F. Supp. at 965, by contrast, although the complaint occasionally referred to the defendants collectively, it alleged particular illegal conduct by each defendant. The pleading here does not specify how any specific defendant allegedly breached its contracts with PREPA—it does not even allege *which* contract Vitol allegedly breached, which terms, how, when, or any other salient facts.

The Committees also misplace reliance on *Zond* and *Reich*. Group pleading was allowed in those cases only because defendants were members of the *same corporate family* or had an agency relationship. *See Zond*, 990 F. Supp. at 53 (complaint against defendants Fujitsu Ltd. and subsidiary Fujitsu USA was sufficient); *Reich*, 38 F. Supp. at 462 (plaintiffs alleged defendant was a "de facto principal" of the two other defendants, so allegations against "Defendants" were permissible). But that rationale has no application here: there is no corporate or agency relationship between Vitol and any of the other fuel-supplier defendants (and none is alleged).

B. The Response Does Not Establish That Any Claim Was Adequately Pleaded

Vitol's motion also showed that the precious few allegations against Vitol in the Complaint are too general and conclusory to satisfy federal pleading standards. In response, the Committees fail to address the pleading cases cited in Vitol's motion, do not cite any cases finding similarly lacking pleadings sufficient, and do nothing to cure the clear pleading deficiencies on their claims.

i. The Committees Failed to Sufficiently Plead Breach of Contract

The Committees and Vitol agree on the three elements of a breach of contract claim: (1) a valid contract, (2) breach, and (3) damages. The Committees rightly assert that the Complaint alleges the first element. But merely listing contracts between Vitol and PREPA—even if they include "the invoice number, delivery date, location of delivery, quantity of oil delivered, price per unit, and amount paid by Vitol," ECF 193 at 10—does nothing to satisfy the *breach* element.

Contrary to the Committees' suggestion, *Lincoln Road Prods. v. Reign Entmt. Grp.*, 2014 WL 6893663 (D.P.R. 2014), does not show otherwise. In that case, the allegations involved only *one* contract and the manner of breach was alleged specifically: nonpayment. *Id*. at *7. Here, in contrast, the Complaint lists *six* contracts between Vitol and PREPA and alleges in conclusory fashion that Vitol breached an unspecified number of them by delivering fuel oil in an unspecified number of 700+ transfers that was noncompliant in some unspecified manner at unspecified points in time over a more-than-seven-year-long commercial relationship. *See, e.g.*, ECF 139 ¶ 121. This is insufficient "to provide notice to the defendants sufficient to mount a defense," ECF 193 at 10, because it does not allege any *facts* from which it can be determined *which* of the six contracts were allegedly breached, *which* terms or specifications were allegedly not complied with, *which* deliveries were allegedly non-compliant, or *how* any fuel was allegedly non-compliant.

The Complaint thus does not have even the "minimal facts as to who did what to whom, when, where, and why," *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 68 (1st Cir. 2004), and falls squarely on the latter (and deficient) side of the distinction "between well-pleaded facts, on the one hand, and 'bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like,' on the other hand." *LaChapelle*, 142 F.3d at 508 (quoting *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (applying this standard in a breach of contract case)).

ii. The Committees Failed to Plead an Avoidance Claim Under § 3304

Vitol's motion also established that the Complaint did not sufficiently plead that PREPA made a transfer "without receiving a reasonably equivalent value," an element of the avoidance claim under 28 U.S.C. § 3304. *See* ECF 161 at 15–17. That is because the only allegations relevant to this element are that "PREPA received less than reasonably equivalent value in exchange for the Ten-Year" Vitol transfers, ECF 139 ¶¶ 133, 144, "because the price PREPA paid for fuel oil was directly linked to the quality, specifications, and lack of pollutants of fuel oil" in the contract, *id*. ¶ 68, and that Vitol (along with the other Supplier Defendants) engaged in a "fuel oil scheme" by delivering noncompliant fuel. *See* ECF 193 at 12 (citing ECF 139 ¶¶ 40, 41–49, 57–60, 61–80).

In response, the Committees argue that these conclusory allegations are sufficient because reasonably equivalent value is a "question[] of fact that may not be resolved through a Motion to dismiss," and thus "need not be supported with 'specific facts'" in the complaint. ECF at 11. That is incorrect. Federal pleading standards apply to avoidance claims just like any other—and there are no *facts* alleged on this element, only a conclusion. The complaint must supply *some factual allegations* to support the legal conclusion of no reasonably equivalent value. It does not.[2]

C. The Committees Abandoned Their Claim Under 31 L.P.R.A. § 3492(3)

Vitol's motion challenged the sufficiency of the Complaint's allegations on the fraud element required for claims under 31 L.P.R.A. § 3492(3). ECF 161 at 16–17, 19–20. In response, the Committees effectively concede they have no avoidance claim against Vitol pursuant to that statute. The response only says the Complaint sufficiently alleged claims for ***4-Year Transfers***. *See* ECF 193 at 13–14 (arguing the Committees "need only allege that PREPA was aware that the

[2] All the Committee's cases involve pleadings that—unlike the Complaint here—contained factual allegations on the absence of reasonably equivalent value. In most, the plaintiff alleged the debtor received *nothing* of value in exchange for the transfers. *See Picard v. Madoff*, 458 B.R. 87, 113 (Bankr. S.D.N.Y. 2011) (plaintiff alleged defendants engaged in a Ponzi scheme and the debtor received nothing in return for its payment); *Mervyn's, LLC v. Lubert-Adler Grp. IV, LLC*, 426 B.R. 488, 493, 488 (Bankr. D. Del 2018)) (plaintiff alleged the "Debtor received no residual interest in its own real estate" when the debtor sold its land to defendant and the defendant re-leased the land "back to debtor at a 'substantially increased rate'"); *In re Pennysaver USA Publ'g, LLC*, 587 B.R. 445, 453, 458 (Bankr. D. Del. 2018) (pleading alleged "that not one of the Defendants performed any material services nor provided any material value to the Debtors in exchange for the salaries they received"); *Armstrong v. Collins*, 2010 WL 1141158, at *30 (S.D.N.Y. 2010) (payment for prostitution was not reasonably equivalent value because consideration was illegal); *In re Oakwood Homes Corp*., 340 B.R. 510, 525, 516–17 (Bankr. D Del 2006) (complaint alleged the debtors did not receive reasonably equivalent value because the defendant securities underwriter pushed debtor into transactions that led the debtors to financial trouble and gave defendants overwhelming control over debtor's business); *Gray & Assocs. v. Speltz & Weis LLC*, 880 N.Y.S.2d 223, at *13–14, *1 (Sup. Ct. 2009) (complaint alleged transfers to financial advisors were not for reasonably equivalent value because defendants engaged in self-dealing, lied, and advised debtor to make decisions that led to its bankruptcy).

4-Year Transfers would impair the ability of the creditors to collect what is owned to them" and citing no allegation within the counts against Vitol)); *id*. at 14 (asserting plaintiffs need only allege certain "badges of fraud" and citing supposed examples related to the ***4-Year Transfers***); *id*. at 14–15 (claiming Rule 9(b)'s heightened pleading standard does not apply to the fraud element of this statute,[3] but claiming allegations as to the ***4-Year Transfers*** are sufficient regardless).

But those arguments are beside the point as to Vitol. There are no 4-Year Transfer claims against Vitol. None. *See* ECF 139 at 27, 29. And that is because there are no transfers from PREPA to Vitol during the four years before suit was filed. *Id.* Ex. A–D. It is thus no wonder "[t]he Vitol Defendants d[id] not challenge the Four-Year Transfer Claims," ECF 193 at 20, as the Committees bizarrely emphasize in their response. The Committees have no such claims against Vitol.

III. The Committees Should Not Be Given Leave to Amend

The Committees alternatively request leave to amend if the Court agrees that dismissal is warranted. That request is procedurally improper and should be denied on that basis alone. *See Zell v. Ricci*, 957 F.3d 1, 18 (1st Cir. 2020) ("We've said before that requesting amendment as a fallback position, without more, is not sufficient to constitute a motion to amend.").

The Committees' request is also meritless. The Committees have had multiple opportunities—three complaints over three years—to plead legally valid and factually supported claims against Vitol. In each instance, the Committees failed to do so.

The Committees' original complaint alleged only avoidance claims against Vitol. But those claims depended on a verifiably false factual allegation in the original complaint—the Committees wrongly alleged that PREPA paid Vitol for fuel "during the period 2005 ***to 2013***." ECF 1 ¶ 32

[3] The Committees are wrong on this point—the very case they cite makes clear that P.R. Civil Procedure Rule 7.2, the equivalent of FRCP 9, applies to claims under § 3942(3). *Merck Sharp & Dohme (I.A.) LLC v. Wholesalers Grp.*, 2020 WL 8173584, at *10 (P.R. Cir. 2020).

(emphasis added). Vitol served a Rule 11 motion challenging that allegation, because Vitol transacted no business with PREPA after 2009 and that fact would (and should) have been revealed by even the most cursory pre-suit investigation. The Committees conceded their error and requested additional time to correct it through an amended complaint.

The Committees' second complaint dropped all their original claims against Vitol, and instead alleged claims for breach of contract under Puerto Rico law and avoidance under § 6502—an attempt to claim longer limitations periods to challenge Vitol's more-than-a-decade-old deliveries. Vitol filed a Rule 12(c) motion asserting the same grounds as this motion.

Rather than respond to Vitol's motion, the Committees requested leave to file yet another amended complaint—their third in this action. As explained above, that amendment failed to cure the deficiencies in the prior pleading and does not allege any legally viable claims against Vitol. *See Fire & Police Pension Ass'n of Colo. v. Abiomed, Inc.*, 778 F.3d 228, 247 (1st Cir. 2015) ("In any event, it is far too late; plaintiffs were put on notice of the deficiencies in the complaint by the motion to dismiss. If they had something relevant to add, they should have moved to add it then.").

The Committees should not be given a fourth chance, particularly because they provided no indication of the nature of any such amendment—*e.g.*, how it would overcome the time-bar or what additional factual allegations it would include. *Aponte-Torres v. U.P.R.*, 445 F.3d 50, 58 (1st Cir. 2006) ("In their opposition to the defendants' dispositive motion, the plaintiffs made no attempt to supplement their bare request for leave to amend, nor did they preview what additional facts or legal claims might be included in a second amended complaint (should one be allowed).").

CONCLUSION

The Court should dismiss the Committees' claims against Vitol with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 25, 2022, all counsel of record were served a copy of the foregoing document through the Court's CM/ECF service, and the U.S. Trustee for Region 21 was served a copy of this document by United States Priority Mail at the address below.

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