APPENDIX A

United States Court of Appeals
For the First Circuit

No. 18-2087

DANTZLER, INC.; NORTHWESTERN SELECTA, INC.; ALBERIC COLÓN AUTO SALES, INC.; ALBERIC COLÓN DODGE CHRYSLER JEEP, INC.; ALBERIC COLÓN FORD, INC.; ALBERIC COLÓN MITSUBISHI, INC.; SACHS CHEMICAL, INC.; MAYS CHEMICAL COMPANY OF PUERTO RICO, INC.; MADERAS ALPHA, INC.; CELTA EXPORT CORPORATION; COUGAR PLASTICS CORPORATION; CARIBBEAN PRODUCE EXCHANGE, LLC; MADEARTE FURNITURE IMPORTS & DISTRIBUTORS, INC.; MADERAS 3C, INC.; MARJOR & SONS, INC.; M.M. FASHION & DESIGN, INC.; PAPELERA DEL PLATA, INC.; THE PAPERHOUSE CORP.; PLAVICA, INC.; EMPRESAS BERRÍOS, INC.; JOSÉ SANTIAGO, INC.; CORREA TIRE DISTRIBUTOR, INC.; EUGENIO SERAFIN, INC., d/b/a Est Hardware,

Plaintiffs, Appellees,

v.

EMPRESAS BERRÍOS INVENTORY AND OPERATIONS, INC.; CORREA TIRE,

Plaintiffs,

v.

S2 SERVICES PUERTO RICO, LLC;
RAPISCAN SYSTEMS, INC.,

Defendants, Appellants,

PUERTO RICO PORTS AUTHORITY, JOHN DOE;
JANE DOE; ABC CORP., XYZ CORP.;
UNKNOWN INSURANCE COMPANIES,

Defendants.

No. 18-2089

DANTZLER, INC.; NORTHWESTERN SELECTA, INC.; ALBERIC COLÓN AUTO SALES, INC.; ALBERIC COLÓN DODGE CHRYSLER JEEP, INC.; ALBERIC COLÓN FORD, INC.; ALBERIC COLÓN MITSUBISHI, INC.; SACHS CHEMICAL, INC.; MAYS CHEMICAL COMPANY OF PUERTO RICO, INC.; MADERAS ALPHA, INC.; CELTA EXPORT CORPORATION; COUGAR PLASTICS CORPORATION; CARIBBEAN PRODUCE EXCHANGE, LLC; MADEARTE FURNITURE IMPORTS & DISTRIBUTORS, INC.; MADERAS 3C, INC.; MARJOR & SONS, INC.; M.M. FASHION & DESIGN, INC.; PAPELERA DEL PLATA, INC.; THE PAPERHOUSE CORP.; PLAVICA, INC.; EMPRESAS BERRÍOS, INC.; JOSÉ SANTIAGO, INC.; CORREA TIRE DISTRIBUTOR, INC.; EUGENIO SERAFIN, INC., d/b/a Est Hardware,

Plaintiffs, Appellees,

v.

EMPRESAS BERRIOS INVENTORY AND OPERATIONS, INC.; CORREA TIRE,

Plaintiffs,

v.

PUERTO RICO PORTS AUTHORITY,

Defendant, Appellant,

S2 SERVICES PUERTO RICO, LLC; RAPISCAN SYSTEMS, INC., JANE DOE; ABC CORP., XYZ CORP.; and UNKNOWN INSURANCE COMPANIES,

Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, U.S. District Judge]

Before

Torruella, Dyk,* and Thompson,
Circuit Judges.

Eyck O. Lugo-Rivera, with whom María Teresa Figueroa-Colón, Edge Legal Strategies, PSC, Mark C. Campbell, Matt Light, and Shook, Hardy & Bacon L.L.P. were on brief, for appellants S2 Services Puerto Rico, LLC and Rapiscan Systems, Inc.

Heriberto López-Guzmán, with whom H. López Law, LLC, Thomas Trebilcock-Horan, and Trebilcock & Rovira, LLC were on brief, for appellant Puerto Rico Ports Authority.

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* Of the Federal Circuit, sitting by designation.

Elwood C. Stevens, Jr., with whom James P. Roy, Domengeaux Wright Roy & Edwards LLC, Manuel Sosa-Báez, Luis N. Saldaña, Ian P. Carvajal, Saldaña, Carvajal & Vélez-Rivé, PSC, Alberto J. Castañer, Castañer & Cia P.S.C., Deborah C. Waters, and Walters Law Firm, PC were on brief, for appellees.

May 1, 2020

TORRUELLA, Circuit Judge. These appeals concern a suit brought by a putative class of shippers (collectively, "Dantzler") who use the services of ocean freight carriers to import goods into Puerto Rico through the maritime port of San Juan. Their claims stem from a cargo scanning program implemented by the Puerto Rico Ports Authority ("PRPA") in an effort to improve the safety of the port. Pursuant to that program, PRPA contracted with Rapiscan Systems, Inc. ("Rapiscan")—which later assigned its rights and obligations to its wholly-owned subsidiary S2 Services Puerto Rico LLC ("S2")—to provide the technology and services needed to scan all containerized inbound cargo. To offset the costs of the program, PRPA charged the ocean freight carriers a fee for their use of the scanning facilities in the Port of San Juan. Dantzler alleges that, in response to that fee, ocean freight carriers were "forced" to be "collection agents" that collected fees from the shipper entities. Consequently, Dantzler brought a Section 1983 lawsuit against PRPA, Rapiscan, and S2 together, seeking money

damages and requesting that the United States District Court for the District of Puerto Rico declare and enjoin the collection of the additional fee as violative of the United States Constitution and Puerto Rico law. The defendants filed motions to dismiss the complaint, which the district court granted in part and denied in part. They now appeal the partial denial of those motions.

In the end, their appeals reduce to a question of standing over which we have jurisdiction in these appeals from the denial of immunity. See Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 20 n.22 (1st Cir. 2007). For the following reasons, we find that Dantzler has failed to establish its constitutional standing to sue PRPA, Rapiscan, and S2, and thus we vacate the district court's order and remand for dismissal on jurisdictional grounds.

I. Background

Because these appeals follow from a decision on motions to dismiss, we draw the facts from Dantzler's amended complaint and any documents incorporated by reference therein. See Katz v. Pershing, LLC, 672 F.3d 64, 69 (1st Cir. 2012).

A. Factual Background

On February 18, 2008, the Puerto Rico legislature enacted Act No. 12 of 2008 ("Act 12"), which called for

improved safety procedures in Puerto Rico's ports. P.R. Laws Ann. tit. 23, §§ 3221-3223. Prior to this law, port security "was predominantly limited to random and manual searches of cargo." Industria y Distribucion de Alimentos v. Trailer Bridge, 797 F.3d 141, 143 (1st Cir. 2015).

As a result of Act 12, on December 17, 2009, PRPA contracted Rapiscan to provide cargo scanning services for the scanning of containerized inbound cargo at the Port of San Juan on behalf of PRPA. On August 6, 2010, with PRPA's consent, Rapiscan assigned its rights and obligations under the contract to its wholly-owned subsidiary, S2.

On February 16, 2011, PRPA and the Puerto Rico Treasury Department executed a "Memorandum of Understanding" ("MOU") in which PRPA acknowledged that "it [was] not the government instrumentality with the proper legal jurisdiction and authority to intervene as of right" in the "well known" practice of concealing items in cargo containers "to avoid—among other reasons—paying the applicable excise or other related taxes." The authority to inspect cargo containers upon their arrival in Puerto Rico inhered in the Puerto Rico Treasury Department "as one of its powers in furtherance of its goal to collect taxes." However, the MOU recalled that on August 2, 2007, PRPA and the Treasury Department had signed a multi-party agreement with other Puerto Rico agencies and instrumentalities whereby they "agreed to cooperate in

order to implement Puerto Rico's tax laws."[1] Because of "the important public policy interest involved and in the spirit of interagency cooperation," PRPA and the Puerto Rico Treasury Department agreed that PRPA, via S2, would assist in the scanning of cargo that arrived at the Port of San Juan.

Subsequently, on September 2, 2011, PRPA approved Regulation 8067,[2] which enabled PRPA to "implement a fast[-]track method of inspecting inbound [c]argo [c]ontainers which will detect undisclosed taxable goods, as well as increase port security in the Port of San Juan, while preserving a free flow of commerce and the efficient movement of cargo." To recover the heightened costs associated with the scanning program incurred by PRPA, Regulation 8067 established a system of "Enhanced Security Fees" ("ESFs"), which were assessed by PRPA on ocean freight carriers or their agents arriving and unloading cargo in the Port of San Juan (in addition to existing fees already charged for use of the port).[3] Dantzler alleges, without any substantiation, that the

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[1] Act 12 adopted the purpose, findings, and policy objectives of the August 2007 multi-party agreement. See P.R. Laws Ann. tit. 23, §§ 3221-3223.

[2] Regulation 8067 is titled "Regulation for Implementing the Necessary Means to Guarantee an Efficient Flow of Commercial Traffic in the Scanning of Inbound Cargo Containers, to Improve Security and Safety at the Port Facilities, and/or to Otherwise Implement the Public Policy of the Commonwealth of Puerto Rico Delegated upon the Ports Authority."

[3] The amount of the ESF varied based on the weight and type of cargo.

defendants "forced ocean carriers . . . into becoming [d]efendants' [ESF] collection agents" that "collected [ESFs] from shippers like [Dantzler]."

On October 16, 2013, a federal court found the ESFs unconstitutional "as applied to shipping operators that neither use nor have the privilege of using PRPA scanning facilities," because the imposition of such fees on those entities violated the Commerce Clause. Cámara de Mercadeo, Industria, y Distribución de Alímentos v. Vázquez, No. 11-1978, 2013 WL 5652076, at *12, *14 (D.P.R. Oct. 16, 2013). The court also enjoined PRPA from collecting ESFs from "shipping operators [whose cargo is] not being scanned pursuant to Regulation No. 8067." Id. at *15.[4] We upheld these rulings as well as the constitutionality of PRPA's scanning program as applied to shipping operators who have access to the scanning service. See Trailer Bridge, 797 F.3d at 143, 145. PRPA, through S2 and Rapiscan, allegedly continued to assess ESFs on shippers that imported cargo that was not containerized, on shippers which did not have access to scanning stations, and on shippers whose cargo was not scanned at all.

Pursuant to Regulation 8067, the authorization for using the scanning program would end on June 30, 2014, "unless [the] term was extended, modified[,] or amended prior [to] its expiration." Although PRPA

[4] The court found that "[o]nly three shipping operators' terminals [were] . . . equipped with PRPA scanning facilities," and that bulk cargo was not scanned. Vázquez, No. 11-1978, 2013 WL 5652076, at *5.

never modified, extended, or amended such term prior to June 30, 2014, it nevertheless "continued to implement the cargo scanning program despite and beyond its expiration." On October 28, 2016, the Puerto Rico Court of Appeals issued a judgment ordering PRPA to cease and desist from continuing to implement the program because Regulation 8067 had expired. See Cámara de Mercadeo, Industria y Distribución de Alimentos v. Autoridad de los Puertos, No. 2015-002, 2016 WL 7046805, at *8 (P.R. Ct. App. Oct. 28, 2016). Nevertheless, PRPA, Rapiscan, and S2 allegedly continued to assess and collect ESFs in connection with the scanning program.

PRPA, Rapiscan, and S2 have jointly "collected and derived economic benefit from the [ESFs]," which has caused Dantzler to "sustain[] substantial and continuing economic losses in total amounts . . . reasonably believed to be in excess of $150,000,000.00."

B. Procedural History

On April 5, 2017, Dantzler sued PRPA, Rapiscan, and S2 in the United States District Court for the District of Puerto Rico "seeking disgorgement of unlawfully collected scanning fees on shipments imported through the maritime port of San Juan." Subsequently, on August 30, 2017, it amended its complaint, seeking relief pursuant to 42 U.S.C. § 1983 for PRPA, Rapiscan, and S2's alleged violation of Dantzler's constitutional rights under the Fifth and

Fourteenth Amendments and the Commerce Clause of the United States Constitution. Dantzler alleged that the fees it and other similarly-situated shipper entities paid for the scanning of cargo imported through the Port of San Juan "were illegally collected by Defendants under color of law and authority." The amended complaint also asserted causes of action for unjust enrichment and restitution against all three defendants pursuant to Articles 7 and 1795 of the Puerto Rico Civil Code, respectively. Additionally, Dantzler sought a declaration that S2 was the alter ego of Rapiscan, an injunction of PRPA, Rapiscan, and S2's "unlawful conduct," and the reimbursement "for any monies paid pursuant to [that] unlawful conduct."

On December 19, 2017, Rapiscan and S2 filed a motion to dismiss the amended complaint for lack of subject-matter jurisdiction and failure to state a claim under Fed. R. Civ. P. 12(b)(1) and (12)(b)(6). They argued that (1) Dantzler lacked standing to challenge the ESFs because it was the ocean freight carriers who paid those fees, not Dantzler; (2) the amended complaint failed to state a claim under 42 U.S.C. § 1983 "because it [did] not allege that Rapiscan or S2 individually caused any violation of [Dantzler's] alleged constitutional rights"; (3) Rapiscan and S2 were entitled to qualified immunity "as a former and current government contractor"; and (4) the amended complaint "fail[ed] to state claims for unjust enrichment and undue collection under Puerto Rico law because it d[id] not allege that Rapiscan or S2 received compensation for their services without cause."

On May 23, 2018, PRPA also moved to dismiss the amended complaint for lack of subject-matter jurisdiction, failure to state a claim, and failure to join a required party under Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7), respectively. PRPA, like Rapiscan and S2, asserted that Dantzler lacked constitutional standing to bring its claims because they were "improperly anchored on [the] [ocean freight] carrier's independent decisions to charge operating fees." PRPA also maintained that, in any event, (1) it was "cloaked with sovereign immunity" because it was "an arm of the state for purposes of the cargo scanning program"; (2) Dantzler's Section 1983 claims were mostly time barred; (3) the amended complaint failed to state a cause of action for unjust enrichment or undue collection; (4) Dantzler's claims grounded on PRPA's alleged ultra vires conduct were inapposite; and (5) Dantzler failed to include the ocean freight carriers, "who [were] indispensable to any litigation challenging the collection of ESFs."

On September 26, 2018, the district court partially granted Rapiscan, S2, and PRPA's motions to dismiss. Dantzler, Inc. v. P.R. Ports Auth., 335 F. Supp. 3d 226 (D.P.R. 2018). It dismissed Dantzler's Fifth and Fourteenth Amendment claims brought under Section 1983, but it denied the motions as to the Commerce Clause and Puerto Rico law claims. Id. at 239. We recount the court's rationale regarding the issues relevant on appeal.

First, the district court rejected PRPA, Rapiscan, and S2's standing argument, concluding that Dantzler

had successfully established that it met the constitutional requirements for standing. Id. at 242. Specifically, the court found that, while the ESFs were imposed on ocean freight carriers, the carriers "collected those fees" from Dantzler, and thus, Dantzler was, "[a]t [a] minimum, . . . allegedly injured indirectly by the government regulation," and that injury was "fairly traceable" to PRPA, Rapiscan, and S2. Id. at 241-42.

Next, the district court also found that PRPA was not entitled to sovereign immunity because it was not "an arm of the state." Id. at 243. It concluded that, although the structural indicators used to determine whether Puerto Rico intended PRPA to be an arm of the state "point[ed] in different directions," id., because PRPA failed to demonstrate that Puerto Rico "would be liable for a judgment against PRPA in this case," or that "the Puerto Rico Department of Treasury would pay for the damages in this action," id. at 244, PRPA was not entitled to immunity, id. at 245.

Finally, the district court determined that Rapiscan and S2 were not entitled to qualified immunity because they were "not individual people, and therefore [were] not government 'officials'" for purposes of the qualified immunity analysis. Id. at 253. In making its determination, the court adopted the Sixth Circuit Court of Appeals's position that "private corporations are not public officials" and cannot be entitled to qualified immunity. Id. at 252 (citing Hammons v. Norfolk S. Corp., 156 F.3d 701, 706 n.9 (6th Cir. 1998)).

On October 19, 2018, Rapiscan and S2 timely appealed the partial denial of their motion to dismiss based on standing and qualified immunity. PRPA similarly filed a notice of appeal seeking review of the district court's denial based on standing and sovereign immunity.

II. Discussion

PRPA, Rapiscan, and S2 have a threshold argument in common: they assert that Dantzler's claims must be dismissed for lack of subject matter jurisdiction because Dantzler fails to satisfy the standing requirements of Article III of the United States Constitution to challenge the ESFs. "[B]ecause standing is a prerequisite to a federal court's subject matter jurisdiction," Hochendoner v. Genzyme Corp., 823 F.3d 724, 730 (1st Cir. 2016), and we must "assure ourselves of our jurisdiction under the federal Constitution" before we proceed to the merits of a case, Pérez-Kudzma v. United States, 940 F.3d 142, 144 (1st Cir. 2019), we begin (and end) by addressing the appellants' standing arguments.

A. Article III Standing Principles

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Massachusetts v. U.S. Dep't of Health & Human Servs., 923 F.3d 209, 221 (1st Cir. 2019) (alteration in original)

(quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006)). To "assure[] respect" for this limitation, Hochendoner, 823 F.3d at 731, "plaintiffs must 'establish that they have standing to sue,'" U.S. Dep't of Health & Human Servs., 923 F.3d at 221 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

"The existence vel non of standing is a legal question and, therefore, engenders de novo review." Me. People's All. & Nat. Res. Def. Council v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006); see also ITyX Solutions AG v. Kodak Alaris, Inc., 952 F.3d 1, 9 (1st Cir. 2020). PRPA, Rapiscan, and S2's challenge of Dantzler's standing arises in the pleading stage, so this Court takes all well-pleaded facts in the complaint as true and "indulge[s] all reasonable inferences" in Dantzler's favor to determine whether it plausibly pleaded facts necessary to demonstrate standing to bring the action. Hochendoner, 823 F.3d at 730; see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation."). Conclusory assertions or unfounded speculation will not suffice. See Hochendoner, 823 F.3d at 731.

Furthermore, the "irreducible constitutional minimum" of standing entails three elements. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); Pérez-Kudzma, 940 F.3d at 144-45. A plaintiff must establish "(1) an injury in fact which is 'concrete and particularized' and

'actual or imminent, not conjectural or hypothetical,' (2) that the injury is 'fairly traceable to the challenged action,' and (3) that it is 'likely . . . that the injury will be redressed by a favorable decision.'" U.S. Dep't of Health & Human Servs., 923 F.3d at 221-22 (quoting Lujan, 504 U.S. at 560).

An injury is "concrete" if it is real, and not abstract. Spokeo, Inc., 136 S. Ct. at 1548. To be particularized, the plaintiff must have been affected "'in a personal and individual way' by the injurious conduct," Hochendoner, 823 F.3d at 731 (quoting Spokeo, Inc., 136 S. Ct. at 1548), and must allege "that he, himself, is among the persons injured by that conduct," id. at 732. The injury must either have happened or there must be a sufficient threat of it occurring to be actual or imminent. Katz, 672 F.3d at 71.

The "traceability" or causation element "requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm." Id. That connection "cannot be overly attenuated." Id. (quoting Donahue v. City of Bos., 304 F.3d 110, 115 (1st Cir. 2002)). "[C]ausation is absent if the injury stems from the independent action of a third party," id. at 71-72, so long as the injury is not the product of that third party's "coercive effect," Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 45 (1st Cir. 2005) (quoting Bennett v. Spear, 520 U.S. 154, 169 (1997)).

Finally, the redressability element of standing requires that the plaintiff allege "that a favorable resolution of [its] claim would likely redress the professed injury." Katz, 672 F.3d at 72. This means that it cannot be merely speculative that, if a court grants the requested relief, the injury will be redressed. See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-43 (1976).

Against this background, we now consider whether Dantzler has standing to bring its claims against PRPA, Rapiscan, and S2.

B. Article III Standing for Claims Against PRPA

Dantzler posits that it has constitutional standing because it was among the "class of clearly foreseeable shippers" who were "harmed in their individual capacities by improper charges" and it satisfies all the requirements for standing. Specifically, Dantzler argues that (1) its injury does not deal with the regulation of ocean freight carriers but instead with the direct losses it suffered as a result of paying the ESFs, which caused an economic harm of approximately $150 million; (2) it has shown that PRPA's conduct "was a substantial factor in producing" its injury, and even an attenuated causal chain may satisfy Article III's standing requirements; and (3) its injury is redressable through a monetary award.

We are unconvinced by Dantzler's argument and instead agree with PRPA that Dantzler has failed to

set forth allegations in its complaint that are sufficient to establish its Article III standing.

Dantzler's amended complaint alleges that PRPA's "negligent, reckless[,] and illegal act[]" of collecting ESFs in connection with the cargo scanning program has caused it and "other similarly situated shippers" to "sustain[] substantial and continuing economic losses in total amounts which are unknown at this time, but reasonably believed to be in excess of $150,000,000.00." While PRPA disputes the accuracy of these allegations, we must take them as true at this stage and determine whether they are sufficient to allege an injury-in-fact. See Hochendoner, 823 F.3d at 730. "It is a bedrock proposition that 'a relatively small economic loss—even an "identifiable trifle"—is enough to confer standing.'" Katz, 672 F.3d at 76 (quoting Adams v. Watson, 10 F.3d 915, 924 (1st Cir. 1993)). Thus, Dantzler's allegation of economic harm satisfies the injury-in-fact requirement. See id. Nevertheless, it stumbles over the remaining two requirements of Article III standing—causation and redressability.

Dantzler fails to plausibly allege that PRPA's assessment and collection of ESFs from third parties not before the court—i.e., the ocean freight carriers—directly caused its injury. See id. at 77-78. The Supreme Court has cautioned against courts finding that a plaintiff's injury is fairly traceable to a defendant's conduct where the plaintiff alleges a causal chain dependent on actions of third parties. See Allen v. Wright, 468 U.S. 737, 757-59 (1984) (finding the "links in the chain of causation" between

the challenged conduct and the alleged injury "far too weak for the chain as a whole to sustain . . . standing" where the chain involved "numerous third parties" whose independent actions had an uncertain and speculative effect); Simon, 426 U.S. at 42-45 (finding that decisions by a third party were too uncertain, which broke the chain of causation between the injury and the challenged actions). The injury Dantzler alleges it suffered depended on the actions of the ocean freight carriers, the entities that were required to pay the ESFs to PRPA. Dantzler did not directly pay the ESFs to PRPA, nor did PRPA assess the ESFs on Dantzler; rather, Dantzler alleges, without elaboration, that the ocean freight carriers collected ESFs from their customers—i.e., the shipper entities like Dantzler. As the injury here is indirect, Dantzler has a much more difficult job proving a causal chain. See Lujan, 504 U.S. at 562; Simon, 426 U.S. at 44-45.

Dantzler alleged in its amended complaint the following:

> According to Regulation 8067, the ocean carriers or their agents[ ] must pay PRPA the [ESFs] to recover the costs incurred by PRPA in the scanning program. Ocean carriers and their agents, in turn, collected [ESFs] from shippers like named Plaintiffs and putative class members who import cargo through the maritime ports of San Juan. Thus, in furtherance of their scheme, Defendants, Rapiscan, S2 Services and [ ] PRPA purposely forced ocean carriers and their agents into

> becoming Defendants' [ESF] collection agents.

But Dantzler's allegation "is nothing more than a bare hypothesis that [ocean freight carriers] possibly might push this aspect of [their] operational costs onto [Dantzler]." Katz, 672 F.3d at 77. Under the regulation, ocean freight carriers had to pay PRPA the ESFs, but neither the regulation nor PRPA controlled the ocean freight carriers' relationships with their customers, such as Dantzler. Dantzler does not otherwise plausibly allege that ocean freight carriers were forced by PRPA (or Rapiscan and S2) to collect the ESFs from Dantzler (or anyone else). See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Nor does Dantzler plausibly allege that PRPA coerced the ocean freight carriers to collect the ESFs from Dantzler. See Wine & Spirits Retailers, Inc., 418 F.3d at 45.

The complaint does not describe Dantzler's injury "in terms specific enough to indicate that it will result from" PRPA's imposition of ESFs on ocean freight carriers rather than from a "multitude of other factors." Pérez-Kudzma, 940 F.3d at 145. As a result, Dantzler fails to demonstrate how PRPA imposing ESFs on a third party caused the injury of which it complains. This case is therefore very similar to Ammex, Inc. v. United States, 367 F.3d 530 (6th Cir. 2004), which held that a gas station did not have standing to challenge gas taxes paid by suppliers from which the station purchased gasoline. Id. at 534. Moreover, Dantzler has not provided sufficient "factual matter," Iqbal, 556 U.S. at 677, in its complaint to

support its theory that the ocean freight carriers were "forced" into being the defendants' "collection agent." Dantzler thus fails to satisfy the causation requirement for Article III standing.

While this is dispositive of Dantzler's standing argument, we also address the redressability requirement, as these two elements "hinge on the response" of the ocean freight carriers—the party charged the ESFs. See Lujan, 504 U.S. at 562 (finding that "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction").

For much the same reason there is no causation, Dantzler fails to successfully allege redressability. Although Dantzler need not demonstrate that its entire injury will be redressed by a favorable judgment, it must show that the court can fashion a remedy that will at least lessen its injury. Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 318 (1st Cir. 2012); see also Simon, 426 U.S. at 43-46 (requiring that plaintiffs show it is likely, rather than speculative, that their injury will be redressed). The complaint in this case seeks predominantly injunctive and declaratory relief. Because redressing Dantzler's injury depends in large part, if not in total, on the conduct of the ocean freight carriers—namely, what they decide to charge (disguised as ESF-related costs or otherwise) to their customers—it is far from certain that enjoining PRPA from collecting ESFs from the ocean freight carriers, or declaring ESFs unconstitutional, will guarantee that those carriers lower the costs they charge Dantzler.

See Lujan, 504 U.S. at 568; Simon, 426 U.S. at 45-46. The ocean freight carriers, who were not made parties to the case, would not be bound to treat Dantzler differently in the event of an injunction or declaration of unconstitutionality. Thus, Dantzler has not demonstrated that its injury would be alleviated by the relief the district court could have provided in this case[5] and has thus failed to show redressability.

Accordingly, Dantzler has failed to satisfy the constitutional standing requirements with respect to its Commerce Clause and Puerto Rico law claims against PRPA.[6]

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[5] We acknowledge that Dantzler satisfies the redressability requirement insofar as it seeks money damages to redress its economic injury. See Donahue v. City of Bos., 304 F.3d 110, 116 (1st Cir. 2002) (requiring that courts examine whether a plaintiff has standing for each form of relief sought). However, as we already explained, it still fails to establish causation, which is fatal to the standing inquiry.

[6] While our conclusion makes it unnecessary to reach PRPA's argument that it is entitled to sovereign immunity, we note that given the analytical framework set forth in Grajales v. P.R. Ports Auth., 831 F.3d 11 (1st Cir. 2016), combined with the fact that the cargo scanning program was implemented to further the governmental purposes of improving national security and ensuring proper tax collection, we find it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature. See id. at 20 n.9; see also Thacker v. Tenn. Valley Auth., 139 S. Ct. 1435 (2019). We view this, thus, as an alternative ground supporting our ultimate conclusion vacating and remanding the district court's order and partial judgment.

C. Article III Standing for Claims Against Rapiscan and S2

For substantially the same reasons as we find that Dantzler lacked standing to assert its claims against PRPA, we hold that Dantzler similarly fails to set forth allegations in its complaint that are sufficient to establish its constitutional standing to sue Rapiscan and S2. Additionally, we emphasize the limited role that Rapiscan and S2 play in the alleged scheme. Rapiscan and S2 simply provide the scanning services for containerized cargo that arrives at the Port of San Juan pursuant to a contract with PRPA. Rapiscan and S2 are not involved in the assessment or collection of the ESFs. Indeed, the complaint alleges that ocean freight carriers paid those fees exclusively to PRPA.

Consequently, Dantzler does not plausibly allege that its injury resulted from Rapiscan and S2's actual scanning of cargo or from accepting payment from PRPA for its scanning services, which to some extent was derived from PRPA's collection of ESFs from the ocean freight carriers. It follows, thus, that the causal chain in this scenario is even more attenuated (if not completely broken) than it is in the scenario above with respect to PRPA, as Rapiscan and S2 were not engaged in either the assessment or collection of the ESFs that allegedly injured Dantzler. Therefore, neither the assessment nor the collection of the ESFs is "fairly traceable" to Rapiscan and S2. Pérez-Kudzma, 940 F3d at 145; see Katz, 672 F.3d at 71 (finding that "the opposing party must be the source of the harm").

Likewise, with respect to Dantzler's claims against Rapiscan and S2, redressability not only depends on the conduct of the ocean freight carriers who are not parties to this case, but the injunctive and declaratory relief Dantzler seeks, if granted against Rapiscan and S2, would have absolutely no effect to remedy the alleged injury because it is PRPA who imposes the fees Dantzler alleges are being collected from it.[7] And since "a federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," Dantzler has not met the redressability requirement as to its claim for damages. See Simon, 426 U.S. at 41-42. Thus, Dantzler has not demonstrated that its injury would be lessened by the relief it requests from the court with respect to Rapiscan and S2, and thus fails to show redressability. Accordingly, Dantzler lacks Article III standing to assert its claims against Rapiscan and S2.

We need not go further. We agree with PRPA, Rapiscan, and S2 that Dantzler has failed to set forth allegations in its complaint that are sufficient to establish its Article III standing. We therefore conclude that Dantzler cannot assert its claims against the defendants.

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[7] We do not interpret Dantzler's claims to challenge the actual scanning service performed by Rapiscan and S2 but the assessment of ESFs by PRPA as a consequence of the costs incurred by the scanning program.

III. Conclusion

For the foregoing reasons, we vacate the district court's order and partial judgment and remand for dismissal on jurisdictional grounds. The parties shall bear their own costs.

Vacated and Remanded.

APPENDIX B

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

DANTZLER, INC., *et al.,* **Plaintiffs,** **v.** PUERTO RICO PORTS AUTHORITY, *et al.,* **Defendants.**	**Civil No.** 17-1447 (FAB) (Filed Sep. 26, 2018)

OPINION AND ORDER[1]

BESOSA, District Judge.

Defendants S2 Services Puerto Rico, LLC ("S2") and Rapiscan Systems, Inc. ("Rapiscan") move to dismiss the plaintiffs' amended complaint pursuant to Federal Rule of Civil of Procedure 12(b)(1) ("Rule 12(b)(1)") and Federal Rule Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). (Docket No. 55.) Defendant Puerto Rico Ports Authority ("PRPA") also moves to dismiss the plaintiffs' amended complaint pursuant to Rule 12(b)(1), Rule 12(b)(6), and Federal Rule of Civil Procedure 12(b)(7) ("Rule 12(b)(7)"). (Docket No. 85.) For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** S2, Rapiscan, and PRPA (collectively, "defendants")'s motions to dismiss

[1] Jeremy S. Rosner, a third-year student at Emory University School of Law, assisted in the preparation of this Opinion and Order.

(Docket Nos. 55 and 85.) The defendants' motion to stay discovery pending the ruling on these motions is moot (Docket No. 89.)

I. Factual Background

The Court construes the following facts from the amended complaint "in the light most favorable to the plaintiffs" and "resolve[s] any ambiguities" in the plaintiffs' favor. See Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 17 (1st Cir. 2011) (discussing the Rule 12(b)(6) standard of review); see Viqueira v. First Bank, 140 F.3d 12, 15 (1st Cir. 1998) (discussing the Rule 12(b)(1) standard of review).

On December 17, 2009, PRPA and Rapiscan signed an agreement allowing Rapiscan "to conduct all services of non-intrusive scanning of shipping containers entering Puerto Rico through the port of San Juan," although PRPA "had not been expressly delegated legal authority or police powers to inspect cargo." (Docket No. 19 at pp. 9–10.) About eight months later, Rapiscan "assigned all of its purported rights and obligations under its agreement with PRPA to [S2], its wholly owned subsidiary." Id. at p. 10.

In February 2011, PRPA conceded that "it is not the government instrumentality with the proper legal jurisdiction and authority to intervene as of right in [the inspection of cargo containers]" in a "Memorandum of Understanding" executed by PRPA and the Puerto Rico Department of Treasury. See Docket No. 19 at pp. 10–11 (alteration in original). PRPA,

nonetheless, approved Regulation 8067, which required "the ocean carriers or their agents" to "pay PRPA the Enhanced Security Fee to recover the costs incurred by PRPA in the scanning program." Id. at p. 11.[2] "Ocean carriers and their agents, in turn, collected Enhanced Security Fees from shippers like named Plaintiffs . . . who import cargo through the maritime ports of San Juan." Id. (internal quotation marks omitted).

On October 16, 2013, the Court enjoined Puerto Rico "from collecting enhanced security fees from shipping operators that are not being scanned pursuant to Regulation [ ] 8067." Cámara de Mercadeo, Industria y Distribución de Alimentos v. Vázquez, 2013 WL 5652076, at *15 (D.P.R. Oct. 16, 2013) (McGiverin, Mag. J.), aff'd on other grounds, Industria y Distribución de Alimentos v. Trailer Bridge, 797 F.3d 141 (1st Cir. 2015). The Court found that the "enhanced security fee is unconstitutional as applied to shipping operators without scanning facilities because it (1) does not fairly approximate their use or privilege of using port scanning facilities, and (2) is excessive relative to the benefits conferred." Id. at *12.

Regulation 8067 was set to expire in June 30, 2014, "unless such term was extended, modified or amended *prior* [to] its expiration." (Docket No. 19 at p.

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[2] Regulation 8067 is titled, "Regulation for Implementing the Necessary Means to Guarantee an Efficient Flow of Commercial Traffic in the Scanning of Inbound Cargo Containers, to Improve Security and Safety at the Port Facilities, and/or to Otherwise Implement the Public Policy of the Commonwealth of Puerto Rico Delegated upon the Ports Authority." (Docket No. 19 at p. 11.)

12.) PRPA did not extend, modify, or amend Regulation 8067, "but continued to implement the cargo scanning program despite and beyond its expiration." Id.

In October 2016, the Puerto Rico Court of Appeals ordered PRPA "to immediately cease and desist from carrying out any procedure under [Regulation 8067]" because Regulation 8067 "was not in force." Cámara de Mercadeo, Industria y Distribucion de Alimentos v. Autoridad de los Puertos, 2016 WL 7046805, at *8 (P.R. Ct. App. Oct. 28, 2016) (official translation at Docket No. 73 at p. 9). Regulation 8067 required "the extension of the established term of validity" to "be done during its term," and because Regulation 8067 was not extended prior to its expiration, the Puerto Rico Court of Appeals held that the "decree had no effect." Id. at *7 (official translation at Docket No. 73 at p. 8).

The defendants, nevertheless, have "acted and/or continued to act in collecting [] Enhanced Security Fees in connection with the cargo scanning program." (Docket No. 19 at p. 13.) The defendants have also continued to collect enhanced security fees from the plaintiffs for "non-containerized cargo such as cars, ISO tanks, cargo on platforms, and other types of cargo which are imported without using shipping containers," as well as "cargo entering the Port of San Juan, through some marine terminals which do not have access to scanning stations," and "cargo . . . that [is] not being scanned at all," Docket No. 19 at pp. 13–15, despite the Court's ruling that the defendants cannot collect such fees from "shipping operators that are not being scanned pursuant to Regulation [] 8067."

Vázquez, 2013 WL 5652076, at *15. The defendants have "collected and derived economic benefit from the Enhanced Security Fees," and the plaintiffs have sustained "substantial and continuing economic losses" in amounts "believed to be in excess of $150,000,000.00" because of the defendants' actions. (Docket No. 19 at p. 15.)

II. Procedural History

The plaintiffs commenced this action on April 5, 2017 "as entities that paid fees for the scanning cargo imported into Puerto Rico through the maritime port of San Juan that were illegally collected by Defendants" in violation of federal and Puerto Rico law. (Docket No. 1 at p. 2; Docket No. 19 at pp. 2–3.) They filed an amended complaint approximately five months later seeking relief pursuant to 42 U.S.C. section 1983 ("section 1983"), based on the Fifth Amendment, the Fourteenth Amendment, and the Commerce Clause, and pursuant to Puerto Rico civil code, articles 7, 200, and 1795. Docket No. 19 at pp. 21–30; see 42 U.S.C. § 1983; P.R. Laws Ann. tit. 3, §§ 7, 901, 5121.

On December 19, 2017, S2 and Rapiscan moved to dismiss the amended complaint. (Docket No. 55.) According to S2 and Rapiscan, the plaintiffs "lack standing to challenge the Enhanced Security Fees at issue because they did not pay them—the fees were imposed on ocean freight carriers who independently decided whether, and in what amount, to pass their

own costs onto merchants such as Plaintiffs." Id. at p. 1. S2 and Rapiscan argue that the amended complaint "fails to state cognizable claims against Rapiscan and S2 under 42 U.S.C. § 1983 because it does not allege that Rapiscan or S2 individually caused any violation of Plaintiffs' alleged constitutional rights." Id. In the alternative, S2 and Rapiscan contend that they are "entitled to qualified immunity from suit under § 1983 as a former and current government contractor, respectively, sued solely on the basis of their contracted services." Id. S2 and Rapiscan also maintain that the amended complaint "fails to state claims for unjust enrichment and undue collection under Puerto Rico law because it does not allege that Rapiscan or S2 received compensation for their services without cause." Id.

On May 23, 2018, PRPA moved to dismiss the amended complaint. (Docket No. 85.) Like S2 and Rapiscan, PRPA asserts that the plaintiffs' claims are "improperly anchored on their carriers' independent decisions to charge operating fees" and thus do "not satisfy the constitutional standing requirements." Id. at p. 1. In the alternative, PRPA argues that it "is an arm of the state cloaked with sovereign immunity," which "shields it from legal actions that precisely target its governmental functions." Id. at p. 2. PRPA also contends that:

> (1) Plaintiffs' Section 1983 claims are mostly time barred; (2) Plaintiffs have failed to include the Ocean Freight Carriers, who are indispensable to any litigation challenging

> the collection of [enhanced security fees]; (3) the [] amended complaint fails to state a cause of action for unjust enrichment or undue collection; (4) Plaintiff's regulatory takings claim is flawed, inasmuch as it is incorrectly based on PRPA's alleged *ultra vires* acts; and (5) Plaintiffs' claim regarding PRPA's alleged *ultra vires* conduct are inapposite.

Id. While the Court disagrees with the defendants' arguments regarding standing and immunity, the Court agrees that the plaintiffs fail to establish takings, procedural due process, and substantive due process claims pursuant to section 1983. The Court, nevertheless, finds that the plaintiffs state a valid Commerce Clause claim pursuant to section 1983, as well as Puerto Rico law claims.

III. Standards of Review

Rule 12(b) permits a party to assert defenses against claims for relief. Fed. R. Civ. P. 12. A court, nonetheless, "must construe the complaint liberally," Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996), and a complaint that adequately states a claim may still proceed even if "recovery is very remote and unlikely." Ocasio-Hernández, 640 F.3d at 13 (internal quotation marks and citations omitted); see Katz v. Pershing, LLC, 672 F.3d 64, 70 (1st Cir. 2012) ("In considering the pre-discovery grant of a motion to dismiss for lack of standing, [courts] accept as true all well-pleaded factual averments in the plaintiff's . . .

complaint and indulge all reasonable inferences therefrom in his favor.") (internal citation omitted).

Rule 12(b)(1) allows a court to dismiss a complaint when a plaintiff fails to establish subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction has the burden of demonstrating the existence of federal jurisdiction. See Droz-Serrano v. Caribbean Records Inc., 270 F. Supp. 2d 217, 217 (D.P.R. 2003) (Garcia-Gregory, J.) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)). "As courts of limited jurisdiction, federal courts have the duty to construe their jurisdictional grants narrowly." Fina Air, Inc. v. United States, 555 F. Supp. 2d 321, 323 (D.P.R. 2008) (Besosa, J.) (citing Alicea-Rivera v. SIMED, 12 F. Supp. 2d 243, 245 (D.P.R. 1998) (Fusté, J.)).

A defendant may move to dismiss an action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A court must decide whether the complaint alleges sufficient facts to "raise a right to relief above the speculative level." Id. at 555.

A party may move for dismissal of an action for failure to join a necessary party pursuant to Federal Rule of Civil Procedure 19 ("Rule 19"). Fed. R. Civ. P. 12(b)(7). Courts employ a two-step approach to establish whether an action should be dismissed

pursuant to Rule 12(b)(7). See United States v. San Juan Bay Marina, 239 F.3d 400, 405 (1st Cir. 2009); Fed. R. Civ. P. 19. First, a court examines "whether the [party] fits the definition of those who should 'be joined if feasible' under [R]ule 19(a)." Cruz-Gascot v. HIMA-San Pablo Hosp. Bayamón, 728 F. Supp. 2d. 14, 26 (D.P.R. 2010) (Besosa, J.). Second, a court ascertains whether joinder is feasible. Id. at 27.

IV. Standing

The defendants argue that the plaintiffs do not have standing to raise their claims in federal court. (Docket No. 55 at pp. 14–16; Docket No. 85 at pp. 16–22.) The defendants invoke Rule 12(b)(1) to dismiss the amended complaint for lack of jurisdiction. Id.

A. Legal Standard

"The Constitution limits the judicial power of the federal courts to actual cases and controversies." Katz, 672 F.3d at 71 (citing U.S. Const. art. III, § 2, cl. 1). "A case or controversy exists only when the party soliciting federal court jurisdiction . . . demonstrates 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). A "personal stake" in the outcome of the case or controversy is otherwise known as "standing." See id. "If a plaintiff lacks standing to bring a matter before a court, the court lacks jurisdiction to decide the merits of the

underlying case." Libertad v. Welch, 53 F.3d 428, 436 (1st Cir. 1995) (citation omitted).

To establish standing, a plaintiff must demonstrate three elements: "[f]irst, the plaintiff must have suffered an injury in fact," "[s]econd, there must be a causal connection between the injury and the conduct complained of," and "[t]hird, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id.[3]

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[3] "Injury in fact" is an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted). "A particularized injury is one that 'affect[s] the plaintiff in a personal and individual way." Pagán v. Calderón, 448 F.3d 16, 27 (1st Cir. 2006) (alteration in original) (quoting Lujan, 504 U.S. at 560 n.1). The injury "may be shared by many others, but may not be common to everyone." Dubois v. United States Dept of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (citing Warth v. Seldin, 422 U.S. 490, 499 (1975); see United States v. Students Challenging Reg. Agency Procs., 412 U.S. 669, 687–88 (1973)). "[T]he redressability element of standing requires that the requested relief directly redress the injury alleged." Mass. Indep. Certification, Inc. v. Johanns, 486 F. Supp. 2d 105, 116 (D. Mass. 2007) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105–09 (1998)). A "[p]laintiff must establish that it is 'likely,' as opposed to merely 'speculative,' that its claimed

A plaintiff must demonstrate a "sufficiently direct causal connection between the challenged action and the identified harm." Katz, 672 F.3d at 71 (citing Lujan, 504 U.S. at 560). While "this causal connection cannot be overly attenuated," Donahue v. City of Boston, 304 F.3d 110, 115 (1st Cir. 2002) (citation omitted), "a plaintiff need not allege that the defendant's conduct was the proximate cause of the plaintiff's injuries." Connor B. ex rel. Vigurs v. Patrick, 771 F. Supp. 2d 142, 152 (D. Mass. 2011) (citations omitted). A plaintiff must "merely [show] that the injury was 'fairly traceable' to the challenged action of the defendant." Vigurs, 771 F. Supp. 2d at 152 (quoting Lujan, 504 U.S. at 590); see Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003) ("[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes."). When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*. . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." Lujan, 504 U.S. at 562 (alterations in original). A sufficient causal connection may thus be established even if a plaintiff

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injuries will be redressed by a favorable decision." Id. (quoting Lujan, 504 U.S. at 560). A complaint that "prays for monetary damages as a means of ameliorating the asserted wrong" is sufficient to establish redressability. Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 290 (1st Cir. 2013).

is not "the object of the government action or inaction." Id. (citations omitted).

B. Discussion

The plaintiffs establish an adequate "casual connection between the challenged action and the identified harm" because the enhanced security fees paid by the plaintiffs are "fairly traceable" to the defendants. See Katz, 672 F.3d at 71 (citing Lujan, 504 U.S. at 560); Vigurs, 771 F. Supp. 2d at 152. The defendants argue that the plaintiffs have not demonstrated the causal connection required to establish the plaintiffs' standing because the plaintiffs' alleged injuries are "not fairly traceable to Defendants." Docket No. 55 at p. 15; see Docket No. 85 at pp. 17–22.[4] The defendants, however, imposed enhanced security fees on ocean freight carriers, and the ocean freight carriers collected those fees from the plaintiffs. (Docket No. 19 at p. 11.) Causality may be established when a plaintiff is not the direct "object of the government action," Lujan, 504 U.S. at 562 (citations omitted),

[4] While PRPA also argues that the plaintiffs' "conclusory allegations do not show a particularized grievance," PRPA fails to support this contention. (Docket No. 85 at p. 20.) The plaintiffs allege past and continuing illicit charges of enhanced security fees through the scanning program. (Docket No. 1 at p. 13.) The estimated charges amount to more than $150,000,000.00. Id. The alleged injury is concrete, particularized, and actual. See Lujan, 504 U.S. at 560. The alleged injury is also "likely" to be redressed by the Court through a monetary award. See Johanns, 486 F. Supp. 2d at 116. S2 and Rapiscan do not dispute the plaintiffs' injury in fact or the redressability of the plaintiffs' claims. (Docket No. 55 at p. 15.)

because "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." Focus on the Family, 344 F.3d at 1273. At minimum, the plaintiffs were allegedly injured indirectly by the government regulation. The plaintiffs' alleged injuries are "fairly traceable" to the defendants. See id.; Warth v. Seldin, 422 U.S. 490, 510 (1975) ("[E]nforcement of the challenged [governmental] restriction against the [vendor] would result indirectly in the violation of third parties' rights."); In re Pharm. Indus. Average Wholesale Price Litig. v. Abbott Labs., 339 F. Supp. 2d 165, 172 (D. Mass. 2004) (finding that plaintiffs had standing because they were "indirectly harmed" by the government regulations); see also Sprint Commc'n Co. v. APCC Servs., Inc., 554 U.S. 269, 290 (2008) ("[T]he payphone operators assigned to the aggregators all rights, title and interest in claims based on those injuries. . . . The aggregators, in other words, are asserting first-party, not third-party, legal rights.").

Because the plaintiffs' alleged injuries are concrete, particularized, and actual, see Lujan, 504 U.S. at 560, "fairly traceable" to the defendants, see Vigurs, 771 F. Supp. 2d at 152, and "likely" to be redressed by the Court through monetary award, see Johanns, 486 F. Supp. 2d at 116, the plaintiffs have standing to bring this action.

V. Absolute Sovereign Immunity

PRPA contends that it is entitled to absolute sovereign immunity from this action pursuant to the Eleventh Amendment of the United States Constitution. (Docket No. 85 at pp. 6–16.)

A. Legal Standard

Sovereign immunity "bars" private parties from "adjudicating claims . . . against a nonconsenting State." Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 760 (2002). The Eleventh Amendment provides sovereign immunity for "the states themselves and entities that are determined to be arms of a state." Pastrana-Torres v. Corporación de P.R. para la Difusión Públicia, 460 F.3d 124, 126 (1st Cir. 2006) (citation omitted).[5] An entity that invokes sovereign immunity "bears the burden of showing that it is an

[5] Sovereign immunity has applied to the Commonwealth of Puerto Rico for over a century. See Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913); see also Jusino-Mercado v. Puerto Rico, 214 F.3d 34, 38–39 (1st Cir. 2000) ([W]e consistently have held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity.") (citing cases). The plaintiffs, however, argue that, "in light of recent Supreme Court and First Circuit case law, Puerto Rico is not a State-like sovereign entitled to such immunity." See Docket No. 90 at pp. 2–4 (citing Puerto Rico v. Sánchez-Valle, 136 S. Ct. 1863 (2016); Franklin Cal. Tax-Free Tr. V. Puerto Rico, 805 F.3d 322 (1st Cir. 2015), aff'd, 136 S. Ct. 1938 (2016)). Because PRPA fails to establish that it is an arm of the state, this Court declines to address whether sovereign immunity continues to apply to Puerto Rico in light of Sánchez-Valle, 136 S. Ct. 1863, and Franklin Cal. Tax-Free Tr., 805 F.3d 322.

arm of the state." Wojcik v. Mass. St. Lottery Comm'n, 300 F.3d 92, 99 (1st Cir. 2002) (citation omitted).

The First Circuit Court of Appeals applies a two-step inquiry to determine whether an entity is an arm of the state. Grajales v. P.R. Ports Auth., 831 F.3d 11, 17 (1st Cir. 2016) (citing Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 65 (1st Cir. 2003)). The first step "'pays deference to the state's dignitary interest in extending or withholding Eleventh Amendment immunity from an entity' by examining 'how the state has structured the entity.'" Id. (quoting Fresenius, 322 F.3d at 65). A court considers a "broad range of structural indicators," such as "how state law characterizes the entity, the nature of the functions performed by the entity, the entity's overall fiscal relationship to the [state]," and "how much control the state exercises over the operations of the entity." Id. at 17–18 (internal citations omitted). "[I]f the analysis of these structural indicators reveals that 'the state clearly structured the entity to share its sovereignty,' then the entity is an arm of the state and the analysis is at an end." Id. at 18 (quoting Fresenius, 322 F.3d at 68).

"[I]f the structural indicators 'point in different directions,'" however, a court proceeds to the second step of the analysis concerning "the risk that the damages will be paid from the public treasury." Grajales, 831 F.3d at 18 (quoting Fresenius, 322 F.3d at 68). "At the second step . . . '[the] analysis focuses on whether the state has legally or practically obligated

itself to pay the entity's indebtedness' in the pending action." Id. (quoting Fresenius, 322 F.3d at 68). "If the state is so obligated, then the entity may claim the state's immunity." Id. (citing Fresenius, 322 F.3d at 65, 68).

B. Discussion

PRPA fails to demonstrate that it is an arm of the state, and is not entitled to immunity from this action.

i. Puerto Rico's Intent in Structuring PRPA

The structural indicators "point in different directions" and do not indicate whether Puerto Rico "clearly structured" PRPA to be its arm. See Grajales, 831 F.3d at 18 (quoting Fresenius, 322 F.3d at 68). PRPA's enabling act "does not by its terms structure [PRPA] to be an arm of the state." See Fresenius, 322 F.3d at 68; see also Grajales, 831 F.3d at 21–22. According to PRPA's enabling act, PRPA is a "public corporation" with a "legal existence and personality *separate and apart from those of the Government* and any officials thereof." P.R. Laws Ann. tit. 23, § 333(a)-(b) (emphasis added). This language strongly suggests that PRPA is not an arm of the state. See Grajales, 831 F.3d at 21–22. "[W]hen Puerto Rico has chosen to make an entity an arm of the state, it has used other language." Fresenius, 322 F.3d at 68. For example, the Medical Services Administration, a "health care entity created by the Commonwealth, was 'created as an

instrumentality of the Government of the Commonwealth of Puerto Rico, attached to the Commonwealth Department of Health . . . under the direction and supervision of the Secretary of Health.'" Id. at 69–70 (quoting P.R. Laws Ann. tit 24, § 342(b)); see Rodríguez-Díaz v. Sierra-Martínez, 717 F. Supp. 27, 29–31 (D.P.R. 1989) (Pieras, J.).[6]

PRPA's overall fiscal relationship with Puerto Rico displays a high degree of separation between the entity and the state, suggesting that PRPA is not an arm of the state. See Grajales, 831 F.3d at 25. Pursuant to PRPA's enabling act, PRPA's debts and obligations are "deemed to be those of [PRPA], and *not* those of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 23, § 333(b) (emphasis added). Puerto Rico law requires PRPA to "develop strategies and take steps for financing and/or defraying any costs related to [port security]," and "the credit or power to levy taxes of the Commonwealth of Puerto Rico or of any of its political subdivisions shall not be pledged nor made liable for the payment of the principal of any loans, guarantees or bonds issued by any entity." P.R. Laws Ann. tit. 23, § 3223(a)-(b). PRPA thus "has the funding power to enable it to satisfy judgments without direct state participation or guarantees." See Grajales, 831 F.3d at

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[6] The Court does not address the second structural indicator involving PRPA's functions because the "nature of the functions" performed by PRPA "does not advance the inquiry into PRPA's status" due to PRPA's "mix of functions of which some are characteristic of arms and others are not." Grajales, 831 F.3d at 24 (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 45 and n.17 (1994).

24 (internal quotation marks and citation omitted). Puerto Rico "generally has immunized itself from responsibility for [PRPA]'s acts or omissions, and the Commonwealth generally bears no legal liability for [PRPA]'s debts." Grajales, 831 F.3d at 25 (internal citations omitted).

"[T]he extent to which [Puerto Rico] exerts control over PRPA", however, weighs "rather strongly in favor of concluding that PRPA is an arm of the [state]." Grajales, 831 F.3d at 28. Puerto Rico "exercises a meaningful degree of control and supervision over PRPA." Id. (citing Royal Caribbean Corp. v. P.R. Ports Auth., 973 F.2d 8, 11–12 (1st Cir. 1992)). "The governor retains formal control over PRPA through his power to appoint and remove a majority of PRPA's board members," and the state "appears to exert a great deal of control over PRPA in practice." Id. (citing Fed. Mar. Comm'n, 531 F.3d at 877–78).

Because the structural indicators "point in different directions," the Court proceeds to the second step of the analysis. See Grajales, 831 F.3d at 18 (quoting Fresenius, 322 F.3d at 68).

ii. Puerto Rico's Financial Obligation to PRPA

PRPA fails to demonstrate that this action poses any financial risk to the Commonwealth. PRPA does not contend that the Commonwealth would be liable

for a judgment against PRPA in this case,[7] nor is there any basis for the Court to conclude that the Puerto Rico Department of Treasury would pay for the damages in this action. See P.R. Laws Ann. tit. 23, § 333(b); Grajales, 831 F.3d at 29. "PRPA [was designed] to raise enough revenue to shoulder its own costs, including its litigation costs, and to bear its own debts, including (generally) any judgments against it." Grajales, 831 F.3d at 29 (alteration in original). Pursuant to the "Memorandum of Understanding" between PRPA and the Puerto Rico Department of Treasury:

> Each of the parties waives its right to recover from the other, fully and irrevocably releasing the other . . . from any and all claims, causes of action, loss, liability, of any nature whatsoever . . . in connection with the either party alleged negligent performance of its obligations under this Memorandum of Understanding and Agreement.

(Docket No. 19 at pp. 95–96.)

Because the Commonwealth would not be liable for a judgment against PRPA in this action, PRPA is not entitled to immunity from this case. Consequently, the Court **DENIES** PRPA's absolute immunity defense (Docket No. 85).

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[7] Indeed, PRPA fails to address this step of the analysis in its briefing. See Docket No. 85 at pp. 6–16.

VI. Section 1983 Claims

The plaintiffs assert four claims pursuant to section 1983. (Docket No. 19 at pp. 21–22.) The plaintiffs allege Commerce Clause, takings, procedural due process, and substantive due process violations. Id. The defendants move to dismiss the plaintiffs' section 1983 claims pursuant to Rule 12(b)(6). (Docket No. 55 at pp. 16–17, 21; Docket No. 85 at pp. 22–26.)

A. Legal Standard

Section 1983 is not itself a source of substantive rights, but rather it "renders persons acting under color of state law liable for constitutional and federal-law violations." Costas-Elena v. Municipality of San Juan, 677 F.3d 1, 6 (1st Cir. 2012); see Graham v. Connor, 490 U.S. 386, 393 (1989).[8] In order to establish a section 1983 claim, a plaintiff must adequately allege that he or she was deprived of a federally secured right and that the challenged conduct transpired "under color of state law." See Santiago v. Puerto Rico, 655 F.3d 61, 68 (1st Cir. 2011).

"In distinguishing private action from state action, the general inquiry is whether 'a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or . . . is such that the actor could not have behaved in that way but for the authority of his office.'" Zambrana-Marrero v. Suárez-Cruz, 172

[8] "For purposes of § 1983, Puerto Rico 'is deemed equivalent to a state.'" Costas-Elena, 677 F.3d at 6 n.5 (quoting Déniz v. Municipality of Guaynabo 285 F.3d 142, 146 (1st Cir. 2002)).

F.3d 122, 125 (1st Cir. 1999) (citation omitted). A private entity may be deemed a state actor for the purpose of section 1983 if it:

> assumes a traditional public function when performing the challenged conduct; or if the challenged conduct is coerced or significantly encouraged by the state; or if the state has "so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity]."

Santiago v. Puerto Rico, 655 F.3d 61, 68 (1st Cir. 2011) (alterations in original) (quoting Estades-Negroni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 5 (1st Cir. 2005)).

A plaintiff must "plausibly plead . . . a causal connection between the actor and the deprivation." Torres-López v. García-Padilla, 209 F. Supp. 3d 448, 455 (D.P.R. 2016) (Pérez-Giménez, J.) (citing Sánchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009); 42 U.S.C. § 1983). A plaintiff must "establish the link between each particular defendant and the alleged violation of federal rights." Id. (citing González-Piña v. Rodríguez, 407 F.3d 425, 432 (1st Cir. 2005)). "A plaintiff may do so by indicating any 'personal action or inaction [by the defendants] within the scope of [their] responsibilities that would make [them] personally answerable in damages under Section 1983." Id. (alterations in original) (citing Pinto v. Nettleship, 737 F.2d 130, 133 (1st Cir. 1984)).

B. Fifth Amendment Takings Claim

i. Applicable Law

The Takings Clause of the Fifth Amendment "expressly requires compensation where [the] government takes private property 'for public use.'" Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (quoting U.S. Const. amend. V). A plaintiff must demonstrate a "protected property interest" to establish a takings claim. See Santiago-Ramos v. Autoridad de Energía Eléctrica de P.R., 834 F.3d 103, 106 (1st Cir. 2016).

"The Supreme Court has recognized two types of takings: physical takings and regulatory takings." Asociación de Subscripción Conjunta del Seguro Responabilidad Obligatorio v. Flores-Galarza, 484 F.3d 1, 28–29 (1st Cir. 2007) (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003)). "A physical taking occurs either when there is a condemnation or a physical appropriation of property." Philip Morris, Inc. v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002). "A regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which 'justice and fairness' require that compensation be given." Id. (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

"[T]he Supreme Court has identified 'two categories of regulatory action that generally will be deemed per se takings.'" Franklin Mem. Hosp. v. Harvey, 575 F.3d 121, 125 (1st Cir. 2009) (quoting Lingle, 544 U.S. at 538). "First, where [the] government requires an owner to suffer a permanent physical

invasion of her property—however minor—it must provide just compensation." Lingle, 544 U.S. at 538. Second, "where the 'regulations completely deprive an owner of *all* economically beneficial us[e] of her property.'" Franklin Mem. Hosp., 575 F.3d at 125 (quoting Lingle, 544 U.S. at 538) (alterations in original).

ii. Discussion

The plaintiffs fail to establish a Fifth Amendment takings claim. The plaintiffs contend that the defendants, "under color of law and authority, . . . depriv[ed] Plaintiffs . . . of their property in violation of their constitutional rights." (Docket No. 19 at pp. 15 and 23.) The plaintiffs, however, do not assert a "protected property interest." See Santiago-Ramos, 834 F.3d at 106. The plaintiffs forfeited their interest in the funds by voluntarily paying the enhanced security fees to the defendants. See id. at 107; see also Manistee Apartments, LLC v. City of Chicago, 844 F.3d 630, 633 (7th Cir. 2016) ("It is, of course, indisputable that the plaintiff had a cognizable property in the entirety of the amount it paid to the City of Chicago. . . . But, . . . Manistee *voluntarily* paid this amount to the City, and voluntary payment is not a property deprivation."). "It is beyond dispute that . . . user fees . . . are not 'takings.'" Koontz v. St. Johns River Water Mgmt.

Dist., 570 U.S. 595, 615 (2013) (internal quotation marks) (citing cases).[9]

The plaintiffs also provide no information to support their takings claim. They do not allege "a condemnation or a physical appropriation of property," see Philip Morris, 312 F.3d at 33, nor do they claim that a government regulation "require[d] [them] to suffer a permanent physical invasion of [their] property," see Lingle, 544 U.S. at 538, or that a government regulation "completely deprive[d] [them] of *all* economically beneficial us[e] of [their] property.'" See Franklin Mem. Hosp., 575 F.3d at 125. Indeed, there is no mention of "takings" in the amended complaint. See Docket No. 19.

Because the plaintiffs fail to plead sufficient factual matter to state a section 1983 Fifth Amendment takings claim, the Court **GRANTS** the defendants' motions to dismiss (Docket Nos. 55 and 85) with respect to the plaintiffs' takings claim. See Santiago, 655 F.3d at 68; Twombly, 550 U.S. at 570.

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[9] A user fee is a "charge assessed for the use of a governmental facility or service," like the enhanced security fee charged by the defendants in this case. See Trailer Bridge, 797 F.3d at 145.

C. Fourteenth Amendment Due Process Claim

i. Applicable Law

Pursuant to the Fourteenth Amendment, a "[s]tate [shall not] deprive any person of life, liberty, or property, without due process of law." Fournier v. Reardon, 160 F.3d 754, 757 (1st Cir. 1998) (internal quotation marks omitted) (citing U.S. Const. amend. XIV). "Due process claims may take either of two forms: procedural due process or substantive due process." Id. (internal quotation marks and citation omitted).

Procedural due process requires "fair procedure." Zinermon v. Burch, 494 U.S. 113, 125 (1990). "This right assures individuals who are threatened with the deprivation of a significant liberty or property interest by the state notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Ford v. Bender, 768 F.3d 15, 24 (1st Cir. 2014) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). To establish a procedural due process claim pursuant to section 1983, a plaintiff must "(1) allege facts that show that the plaintiff has a property interest, as defined by state law, and (2) that the conduct complained of, committed under color of state law, has deprived the plaintiff of that property interest without constitutionally adequate procedures." Vélez-Herrero v. Guzman, 330 F. Supp. 2d 62, 71 (D.P.R. 2004) (Fusté, J.) (citing PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 30 (1st Cir. 1991)). "[T]he adequacy of the due process provided by the state is assessed by means of a

balancing test that weighs the government's interest against the private interest affected, the risk of an erroneous deprivation, and the value of additional safeguards." Morales-Torres v. Santiago-Diaz, 338 F. Supp. 2d 283, 292 (D.P.R. 2004) (Fusté, J.) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

"Substantive due process . . . imposes limits on what a state may do regardless of what procedural protection is provided." Fournier, 160 F.3d at 757 (citations omitted). Substantive due process "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Michael H. v. Gerald D., 491 U.S. 110, 109 (1989) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). "Not every property interest is entitled to the protection of substantive due process." Coyne v. City of Somerville, 770 F. Supp. 740, 747 (D. Mass. 1991); see Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). A successful substantive due process claim must have "significant resemblance to those interests previously viewed as fundamental by the Constitution," and not be "a right weaved from the cloth of state law." Id.

"While a property interest created under state law will receive the protections of procedural due process, only those property rights derived under the Constitution receive the protections of substantive due process." Coyne, 770 F. Supp. at 747 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). Substantive due process does not protect "indirect state action having only an

incidental effect" on one's protected liberty or property interest. Pittsley v. Warish, 927 F.2d 3, 8 (1st Cir. 1991), abrogated on other grounds, Martínez v. Cui, 608 F.3d 54 (1st Cir. 2010). Nor does substantive due process protect "the failure of the government and its officials to abide by their contract[s]." Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990).

ii. Discussion

The plaintiffs fail to assert sufficient factual allegations to state procedural or substantive due process claims pursuant to section 1983. See Santiago-Ramos, 834 F.3d at 107; Velez-Herrero, 330 F. Supp. 2d at 71 (citing PFZ Props., Inc., 928 F.2d at 30); Twombly, 550 U.S. at 570; Ocasio-Hernandez, 640 F.3d at 13. The demonstration of a protected property interest is fundamental to procedural and substantive due process claims. See Ford, 768 F.3d at 24; Coyne, 770 F. Supp. at 747. The plaintiffs do not establish a valid property interest.[10] Accordingly, the Court **GRANTS** the defendants' motions to dismiss (Docket Nos. 55 and 85) with respect to the plaintiffs' procedural and substantive due process claims.

[10] For a discussion regarding the plaintiffs' failure to establish a valid property interest, see supra Section VII(B)(ii).

D. Commerce Clause Claim

i. Applicable Law

The Commerce Clause "precludes States 'from discriminat[ing] between transactions on the basis of some interstate element [] and inhibits 'economic protectionism' between the states." Trailer Bridge, 797 F.3d at 144 (citing Comptroller of Treasury of Md. V. Wynne, 135 S. Ct. 1787, 1794 (2015); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)). User fees are constitutional if they are: (1) "based on some fair approximation of use of the facilities," (2) "not excessive in relation to the benefits conferred," and (3) "do[] not discriminate against interstate commerce." Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 369 (1994) (citing Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716–17 (1972)). "Those challenging the government action carry the burden of persuasion." Trailer Bridge, 797 F.3d at 145 (citation omitted).

First, to determine whether a user fee "is based on some fair approximation of use of the facilities," a court asks "whether the government is charging each individual entity a fee that is reasonably proportional to the entity's use, and whether the government has reasonably drawn a line between those it is charging and those it is not." Trailer Bridge, 797 F.3d at 145 (citing Northwest Airlines, 510 U.S. at 368–69). Second, a court compares the fee with the "costs incurred in connection with . . . [the] facilities" to determine whether the fee is "excessive in relation to

the benefits conferred." Id. at 146 (citing Northwest Airlines, 510 U.S. at 369); Am. Airlines, Inc. v. Mass. Port Auth., 560 F.2d 1036, 1038 (1st Cir. 1977). "A fee is unconstitutional only insofar as it is 'excessive in relation to the *costs* incurred by the taxing authorities.'" Trailer Bridge, 797 F.3d at 146 (quoting Evansville, 405 U.S. at 719).

Finally, a court considers "whether the regulation discriminates against interstate commerce." Trailer Bridge, 797 F.3d at 145 (citing Evansville, 405 U.S. at 719). "Where we have a facially neutral regulation, . . . the law 'will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). "[A] party cannot satisfy its burden simply by showing that a government action affects an out-of-state company or manufacturer." Id. (citing Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 (1978)). "Instead, the evidence must illustrate that the government action interferes with interstate commerce by, for example, dissuading competition from out-of-state corporations." Id. (citing Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 10–11 (1st Cir. 2010)).

ii. Discussion

The plaintiffs assert sufficient factual matter to state a Commerce Clause claim that is plausible on its face. See Northwest Airlines, 510 U.S. at 369 (citing Evansville, 405 U.S. at 716–17); Twombly, 550 U.S. at

570. The plaintiffs contend that the enhanced security fees are unconstitutional user fees. (Docket No. 19 at p. 22.) According to the plaintiffs, the defendants collect enhanced security fees for "non-containerized cargo such as cars, ISO tanks, cargo on platforms, and other types of cargo which are imported without using shipping containers," as well as "cargo entering the Port of San Juan, through some marine terminals which do not have access to scanning stations," and "cargo . . . that [is] not being scanned at all." Id. at pp. 13–15. Construing these allegations "liberally" and "indulg[ing] all reasonable inferences" in the plaintiffs' favor, see Katz, 672 F.3d at 70, it is plausible that the fees are "excessive in relation to the benefits conferred," "discriminat[ory] against interstate commerce," and not "based on some fair approximation of use of the facilities." See Northwest Airlines, 510 U.S. at 369 (citing Evansville, 405 U.S. at 716–17).

The plaintiffs also allege that the defendants violate the Commerce Clause "under color of state law." Docket No. 19 at p. 21–22; see Santiago, 655 F.3d at 68. According to the plaintiffs, "PRPA . . . purported to act under color of state law," and S2 and Rapiscan "were agents of PRPA and willful participants in a joint activity with PRPA and acted in concert pursuant to a custom or usage that had the appearance of the force of law." (Docket No. 19 at pp. 21–22.) No party disputes that the defendants are state actors for the purpose of section 1983.

S2 and Rapiscan's argument that the plaintiffs fail to allege a causal connection between S2, Rapiscan,

and the Commerce Clause violation is unpersuasive. See Docket No. 55 at pp. 16–18. S2 and Rapiscan contend that the amended complaint "fails to allege that Rapiscan or S2 individually caused the ocean carriers to pass on their own [enhanced security fee] costs to shippers like Plaintiffs." Id. at p. 17. They argue that the amended complaint is "devoid of any factual allegations that Rapiscan or S2 individually imposed on or even collected any [enhanced security fees] from ocean carriers, let alone for cargo not scanned by them." Id.

The plaintiffs' allegations, however, are sufficient to "establish the link" between S2, Rapiscan, "and the alleged violation of federal rights." See Torres-López, 209 F. Supp. 3d at 455 (citing González-Piña, 407 F.3d at 432). The plaintiffs assert that Rapiscan agreed to "conduct all services of non-intrusive scanning of shipping containers entering Puerto Rico through the port of San Juan" and that "Rapiscan assigned all of its purported rights" pursuant to the agreement "to its wholly owned subsidiary and alter ego, S2." (Docket No. 19 at pp. 9–10.) According to the plaintiffs, S2 and Rapiscan "purposely forced ocean carriers and their agents into becoming the Defendants' Enhanced Security Fee [] collection agents" and "acted and/or continue to act *ultra vires* in collecting [] Enhanced Security Fees in connection with the cargo scanning program." Id. at pp. 11–13. The plaintiffs allege that S2 and Rapiscan "collected and derived economic benefit from the Enhanced Security Fees under color of law and authority, there by [sic] depriving Plaintiffs . . . of

their property in violation of their constitutional rights." Id. at p. 15. The plaintiffs thus indicate "action or inaction" by S2 and Rapiscan "within the scope of [their] responsibilities that would make [them] personally answerable in damages under Section 1983." Torres-López, 209 F. Supp. 3d at 455 (alterations in original) (citing Pinto, 737 F.2d at 133).

Because the plaintiffs adequately allege that the defendants violated the Commerce Clause, a federally secured right, and that the challenged conduct transpired "under color of state law," the plaintiffs assert a plausible claim pursuant to section 1983. See Docket No. 19 at pp. 21–23; Santiago, 655 F.3d at 68. Accordingly, the Court **DENIES** the defendants' motions to dismiss (Docket Nos. 55 and 85) with respect to the plaintiffs' section 1983 Commerce Clause claim.

VII. Statute of Limitations

PRPA raises an affirmative defense that the plaintiffs are time-barred from their section 1983 claims. (Docket No. 85 at pp. 22–23.)

A. Applicable Law

"Affirmative defenses, such as the statute of limitations, may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), provided that 'the facts establishing the defense [are] clear 'on the face of the plaintiff's pleadings.'" Trans-Spec Truck

Serv., Inc. v. Caterpillar, Inc., 524 F.3d 315, 320 (1st Cir. 2008) (alteration in original) (citation omitted). Dismissal is appropriate "[w]here the dates included in the complaint show that the limitations period has been exceeded and the complaint fails to 'sketch a factual predicate' that would warrant the application of either a different statute of limitations period or equitable estoppel." Id. (citation omitted).

Courts apply a one-year statute of limitations for section 1983 claims. González-García v. P.R. Elec. Power Auth., 214 F. Supp. 2d 194, 200 (D.P.R. 2002) (Fusté, J.) (citing Rivera-Ramos v. Román, 156 F.3d 276, 282 (1st Cir. 1998)).[11] The one-year statute of limitations "begins running one day after the date of accrual, which is the date plaintiff knew or had reason to know of the injury." Benítez-Pons v. Puerto Rico, 136 F.3d 54, 59 (1st Cir. 1998); see Serrano-Nova v. Banco Popular de P.R., Inc., 254 F. Supp. 2d 251, 260 (D.P.R. 2003) (Dominguéz, J.) ("A knowing plaintiff has an obligation to file promptly or lose his claim.").[12] The

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[11] Because section 1983 "lacks an accompanying federal statute of limitations," courts "adopt relevant provisions from the analogous statute of limitations of the forum state." González-García, 214 F. Supp. 2d at 199–200 (citing 42 U.S.C. § 1983; Wilson v. García, 471 U.S. 261, 266–80 (1985)). "For section 1983, the most appropriate provision is the statute of limitations for personal injury cases." Id. at 200 (citing Owens v. Okure, 488 U.S. 235, 236 (1989)). "In Puerto Rico, a one-year statute of limitations governs personal injury actions." Id. (citing P.R. Laws tit. 31, § 5298(2)). Accordingly, the Court applies a one-year statute of limitations to the plaintiffs' section 1983 claims.

[12] "For section 1983 actions, federal law governs the date on which a cause of action accrues (i.e., when the statute begins to

date of accrual is determined by "identify[ing] the actual injury of which the plaintiff complains." Guzmán-Rivera v. Rivera-Cruz, 29 F.3d 3, 5 (1st Cir. 1994).

An exception to the one-year statute of limitations for section 1983 claims is the continuing violation doctrine. See González-García, 214 F. Supp. 2d at 201–02 (citing Provencher v. CVS Pharmacy, 145 F.3d 5, 13 (1st Cir. 1998)).[13] To establish that a continuing violation occurred, a plaintiff must first show that the "conduct [ ] [took] place 'over a series of days or perhaps years.'" Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130

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run) while the length of the period and tolling doctrine are taken from local law." Rivera-Ramos, 156 F.3d at 282.

[13] "The continuing violation doctrine creates an equitable exception to the statute of limitations when unlawful behavior is alleged to be ongoing." González-García, 214 F. Supp. 2d at 201–02 (citing Provencher, 145 F.3d at 13). "Continuing violations are of two types: serial or systemic." Id. at 202 (citing Kassaye v. Bryant Coll., 999 F.2d 603, 606 (1st Cir. 1993)). "Systemic violations refer to the general practices and policies of an employer, such as systems of hiring, training, and promotion." Id. (citing Provencher, 145 F.3d at 14). Systemic violations "need not involve an identifiable, discrete act of discrimination transpiring within the limitation[s] period." Jensen v. Frank, 912 F.2d 517, 523 (1st Cir. 1990). "To establish a [systematic] continuing violation, the plaintiff 'must allege that a discriminatory act occurred or that a discriminatory policy or practice existed' within the statutory period." Centro Médico del Turabo, Inc. v. Feliciano de Melecio, 321 F. Supp. 2d 285, 291 (D.P.R. 2004) (Casellas, J.) (quoting Johnson v. Gen. Elec., 840 F.2d 132, 137 (1st Cir. 1988)). In contrast, a serial violation "refers to a number of discriminatory acts emanating from the same discriminatory animus, where each act constitutes a separate actionable wrong." Id. (quoting Jensen, 912 F.2d at 522).

(1st Cir. 2009) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)). A plaintiff must then demonstrate "that an unlawful act occurred or that an illegal policy existed within the period prescribed by the statute [of limitations]." Ruiz-Casillas v. Camacho-Morales, No. 02-2640, 2004 WL 3622480, at *5 (D.P.R. Apr. 27, 2004) (Fusté, J.) (citing Johnson, 840 F.2d at 137), aff'd, 415 F.3d 127 (1st Cir. 2005).[14]

B. Discussion

The plaintiffs' remaining section 1983 claim survives the defendants' statute of limitations defense because the continuing violation doctrine applies to the plaintiffs' action. See González-García, 214 F. Supp. 2d at 201–02. The plaintiffs allege that the defendants' unlawful conduct has "take[n] place 'over a series of . . . years.'" See Tobin, 553 F.3d at 130 (quoting Morgan, 536 U.S. at 117); Docket No. 19 at pp. 13–14 ("Defendants acted and/or continued to act *ultra vires* in collecting [] []Enhanced Security Fees[] in connection with the cargo scanning program: [s]ince at least 2009."). The plaintiffs also allege that the "unlawful act occurred or that an illegal policy existed within the period prescribed by the statute [of limitations]." See Ruiz-Casillas, 2004 WL 3622480, at

[14] "[I]f one of the discriminatory acts standing alone is of 'sufficient permanence' that it should trigger an 'awareness of the need to assert one's rights,' then the [continuing] violation exception does not apply." Phillips v. City of Methuen, 818 F. Supp. 2d 325, 330 (D. Mass. 2011) (citing O'Rourke v. City of Providence, 235 F.3d 713, 731 (1st Cir. 2001)).

*5 (citing Johnson, 840 F.2d at 137); Docket No. 19 at pp. 13–14. According to the plaintiffs, they "have sustained substantial and continuing economic losses" due to the defendants' conduct beginning from the scanning program's inception because the defendants have continued to collect enhanced security fees from the plaintiffs. (Docket No. 19 at pp. 14–15.) Because the plaintiffs' section 1983 claims involve a continuing violation and the unlawful conduct occurred within the period prescribed by the section 1983 statute of limitations, the plaintiffs' section 1983 claims are not time-barred. The Court **DENIES** PRPA's defense that this action is time-barred.

VIII. Qualified Sovereign Immunity

S2 and Rapiscan argue that they are entitled to qualified sovereign immunity from the plaintiffs' action. (Docket No. 55 at pp. 18–20.)

A. Legal Standard

"Qualified immunity shields government officials performing discretionary functions from civil liability for money damages when their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." Nereida-González v. Tirado-Delgado, 990 F.2d 701, 704 (1st Cir. 1993) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The primary purpose of providing officials with qualified immunity is to ensure that fear of personal liability will not unduly influence

or inhibit their performance of public duties." Id. at 704–05 (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow, 457 U.S. at 814; Carlson v. Green, 446 U.S. 14, 21 n.7 (1980)). Qualified immunity thus "confers immunity only from individual-capacity suits . . . against government actors." Id. at 705.

B. Discussion

S2 and Rapiscan's argument that they are entitled to qualified immunity is unavailing because they are not "government officials." See Nereida-González, 990 F.2d at 704. S2 is a "limited liability company created and organized under the laws of the Commonwealth of Puerto Rico." (Docket No. 19 at pp. 8–9.) Rapiscan is a "corporation created and organized under the laws of the State of California." Id. at p. 9. Although the First Circuit Court of Appeals has not determined whether private limited liability companies and corporations are "government officials" for the purpose of qualified immunity, this Court adopts the Sixth Circuit Court of Appeals' position that "private corporations are not public officials; and thus, not entitled to qualified immunity." See Hammons v. Norfolk S. Corp., 156 F.3d 701, 706 n.9 (6th Cir. 1998) (citation omitted), abrogated on other grounds, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).[15]

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[15] Although the Tenth Circuit Court of Appeals has held that "there is no bar against a private corporation claiming qualified immunity," the Sixth Circuit Court of Appeals' approach more accurately reflects this Court's understanding of qualified immunity. See Rosewood Servs., Inc. v. Sunflower Diversified

Qualified immunity is available to government agents and officers in their individual capacities to provide assurance that "they will not be held *personally* liable as long as their actions are reasonable in light of current American law." See Anderson, 483 U.S. at 646 (emphasis added). The law affords this protection to individual people, inquiring what a "reasonable *person*" in the defendant's position "would have known" about statutory and constitutional rights. Nereida-González, 990 F.2d at 704 (emphasis added) (citing Harlow, 457 U.S. at 818); see Anderson, 483 U.S. at 638–39. S2 and Rapiscan are not individual people, and therefore not government "officials," for the purpose of this analysis. Cf. Nereida-González, 990 F.2d at 704. Because S2 and Rapiscan are not "government officials," they are not entitled to qualified immunity. Consequently, the Court **DENIES** S2 and Rapiscan's qualified immunity defense (Docket No. 55).

IX. Necessary Joinder

PRPA moves to dismiss the plaintiffs' claims pursuant to Rule 12(b)(7) for failure to join a necessary party pursuant Rule 19. (Docket No. 85 at pp. 29–32.)

Servs., Inc., 413 F.3d 1163 (10th Cir. 2005); but see Manis v. Corr. Corp. of Am., 859 F. Supp. 302, 305–06 (M.D. Tenn. 1994) ("Affording the shield of qualified immunity to a private corporation and its employees . . . would directly contradict the policy behind qualified immunity.").

A. Legal Standard

"Rule 19 addresses situations where a lawsuit is proceeding without a party whose interests are central to the suit." Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 9 (1st Cir. 2013) (citing Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008)). "The Rule provides joinder of required parties when feasible, and for dismissal of suits when joinder of a required party is not feasible and that party is indispensable." Id. (citing Fed. R. Civ. P. 19(a)-(b)). "The Rule calls for courts to make pragmatic, practical judgments that are heavily influenced by the facts of each case." Id. (citing Picciotto, 512 F.3d at 14–15). "In a Rule 19 analysis, a court must first determine if an absent party is a 'required party' under Rule 19(a)." Id. at 10 (citing Picciotto, 512 F.3d at 16). A party is "required" if:

> in that person's absence, the court cannot accord complete relief among existing parties; or [] that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

If joinder of a required party "is not feasible," but the party is "so indispensable that the suit must not be

litigated without them," the case should be dismissed pursuant to Rule 19(b). Picciotto, 512 F.3d at 15 (internal quotation marks omitted) (citing Fed. R. Civ. P. 19(b)). To determine whether a case should be dismissed for the failure to join an indispensable party, a court evaluates:

> the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; [] the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; [] whether a judgment rendered in the person's absence would be adequate; and [] whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). A court also considers the policies underlying Rule 19, "including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the interest of absentees in avoiding the possible prejudicial effect of deciding the case without them." Picciotto, 512 F.3d at 15–16 (internal quotation marks and citations omitted).

B. Discussion

PRPA's argument that the ocean carriers are indispensable parties is unavailing. See Docket No. 85 at 29–32. PRPA contends that "the essence of Plaintiffs'

complaint is to recover the amounts of [enhanced security fees] allegedly paid by them." Id. at p. 30. PRPA argues that the plaintiffs paid the ocean carriers, who "[u]nder Plaintiffs' theory . . . presumably[] pass[ed] on an operating/administrative charge . . . to PRPA." Id. "Yet, any amounts paid by Plaintiffs to the Ocean Carriers are exclusively part of contractual negotiations between them." Id. PRPA claims that "PRPA cannot return Plaintiffs any money it did not collect from them in the first place." Id.

The plaintiffs, however, allege that they "have sustained substantial and continuing economic losses. reasonably believed to be in excess of $150,000,000.00" in enhanced security fees and that the defendants "collected and derived economic benefit from the Enhanced Security Fees." (Docket No. 19 at p. 15.) There is no reason why the Court cannot "accord complete relief" among the existing parties in the absence of the ocean carriers. See Bacardí, 719 F.3d at 10 (quoting Fed. R. Civ. P. 19(a)). Nor do the ocean carriers "claim[] an interest relating to the subject of the action." See id. Because complete relief can be afforded between the existing parties and the ocean carriers do not claim an interest in the case, the Court rejects PRPA's contentions regarding necessary joinder.

X. Puerto Rico Law Claims

The defendants contest the plaintiffs' Puerto Rico law claims for unjust enrichment and undue collection.

(Docket No. 55 at pp. 25–26; Docket No. 85 at pp. 26–29.)

A. Unjust Enrichment

The plaintiffs assert an unjust enrichment claim against the defendants. (Docket No. 19 at pp. 23–25.) Pursuant to Puerto Rico law:

> When there is no statute applicable to the case at issue, the court shall decide in accordance with equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration.

P.R. Laws Ann. tit. 31, § 7; see also P.R. Laws Ann. tit. 31, § 2992 ("Obligations are created by law, by contracts, by quasi contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs."). A Puerto Rico claim for unjust enrichment consists of five elements: "(1) existence of enrichment; (2) a correlative loss; (3) nexus between loss and enrichment; (4) lack of cause for enrichment; and (5) absence of a legal precept excluding application of enrichment without cause." Montalvo v. LT's Benjamin Records, Inc., 56 F. Supp. 3d 121, 136 (D.P.R. 2014) (Gelpí, J.) (quoting Hatton v. Municipality of Ponce, 134 D.P.R. 1001 (P.R. 1994)). "[I]t is well-settled under Puerto Rico law that the undue enrichment doctrine is not applicable where . . . there is a legal precept (e.g., a binding agreement) that excludes the

application of such doctrine." P.R. Tel. Co. v. Sprintcom, Inc., 662 F.3d 74, 97 (1st Cir. 2011) (alteration in original).

The plaintiffs allege sufficient factual matter to establish an unjust enrichment claim pursuant to Puerto Rico law. See Montalvo, 56 F. Supp. 3d at 136–37. The plaintiffs claim:

> (1) Defendants have enriched themselves by collecting Enhanced Security Fees from Plaintiffs, (2) Plaintiffs . . . have lost money by paying the fees collected by Defendants, (3) there is a direct relation between Plaintiffs' economic losses and Defendants' enrichment, (4) there is no valid cause for the enrichment due to the illegality of the Enhanced Security Fee since it first started, or in the alternative, since July 1, 2014, when regulation 8067 expired; or in the alternative for cargo that was not scanned or in the further alternative for cargo that was imported through a terminal that did not have scanning facilities[,] and (5) there is no legal precept that would exclude the application of enrichment without cause.

(Docket No. 19 at pp. 24–25.) Construed liberally, the amended complaint alleges adequate facts to "raise a right to relief above the speculative level" against the defendants. See Twombly, 550 U.S. at 555; Aversa, 99 F.3d at 1210; see also Ocasio-Hernández, 640 F.3d at 13 (holding that a claim may still proceed even if "recovery is very remote and unlikely"). Accordingly, the Court **DENIES** the defendants' motions to dismiss

(Docket Nos. 55 and 85) with respect to the plaintiffs' unjust enrichment claim.

B. Undue Collection

The plaintiffs assert an undue collection claim against the defendants. (Docket No. 19 at pp. 25–27.) Pursuant to Article 1795, "[i]f a thing is received when there was no right to claim it and which, through an error, has been unduly delivered, there arises an obligation to restore the same." P.R. Laws Ann. tit. 31, § 5121.[16] The plaintiffs allege that they "paid the Enhanced Security Fees with the intent of extinguishing the obligation imposed by Defendants." (Docket No. 19 at p. 26.) According to the plaintiffs,

> Because PRPA had no delegated legal authority to inspect cargo and enter the

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[16] The parties agree that "[f]or a claim of undue collection to proceed, three elements must be present" pursuant to Puerto Rico law:

> (1) a payment was made with the intention of extinguishing an obligation, (2) the payment made does not have just consideration or cause, in other words, that there is no legal obligation between the one who makes the payment and the one who collects it, and (3) the payment was made by error and not by mere liberality or any other concept.

Docket No. 85 at p. 28 (citing Estado Libre Asociado de P.R. v. Crespo-Torres, 180 D.P.R. 776, 794–95 (P.R. 2011)); see Docket No. 19 at p. 26 (citing same). All parties, however, fail to submit a certified translation of Crespo-Torres, 180 D.P.R. 776, or any translated case law supporting this assertion. Accordingly, the Court relies exclusively on the official translation of Article 1795 for the purpose of this Opinion and Order.

> PRPA/Rapiscan Agreement, and/or because the PRPA/Rapiscan Agreement was annulled when assigned to S2 [], and/or because Regulation 8067 expired on June 30, 2014, and/or because fees were charged for cargo that was not scanned and/or for cargo imported through terminals that had no scanning facility; Plaintiffs aver that they made those payments by error because they [were] wrongfully induced to believe that these Defendants were lawfully collecting the challenged fees.

Id. at p. 26. The plaintiffs allege sufficient facts to "raise a right to relief above the speculative level" against the defendants for undue collection. See Twombly, 550 U.S. at 555; Aversa, 99 F.3d at 1210; see also Ocasio-Hernández, 640 F.3d at 13 (holding that a claim may still proceed even if "recovery is very remote and unlikely"). Accordingly, the Court **DENIES** the defendants' motions to dismiss (Docket Nos. 55 and 85) with respect to the plaintiffs' undue collection claim.

XI. Conclusion

For the reasons set forth above, the defendants' motions to dismiss are **GRANTED in part** and **DENIED in part.** They are **GRANTED** with respect to the plaintiffs' Fifth Amendment and Fourteenth Amendment section 1983 claims, and **DENIED** regarding the plaintiffs' Commerce Clause section 1983 claim and Puerto Rico law claims (Docket Nos. 55 and 85). Consequently, the plaintiffs' takings,

procedural due process, and substantive due process claims pursuant to section 1983 are **DISMISSED WITH PREJUDICE** (Docket No. 19). There being no just reason for delay, partial judgment shall be entered accordingly. The defendants' motion to stay discovery pending the ruling on these motions is **MOOT** (Docket No. 89).

IT IS SO ORDERED.

San Juan, Puerto Rico, September 26, 2018.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 18-2087

DANTZLER, INC.; NORTHWESTERN SELECTA, INC; ALBERIC COLON AUTO SALES, INC.; ALBERIC COLON DODGE CHRYSLER JEEP, INC.; ALBERIC COLON FORD, INC.; ALBERIC COLON MITSUBISHI, INC.; SACHS CHEMICAL, INC.; MAYS CHEMICAL COMPANY OF PUERTO RICO, INC.; MADERAS ALPHA, INC.; CELTA EXPORT CORPORATION; COUGAR PLASTICS CORPORATION; CARIBBEAN PRODUCE EXCHANGE, LLC; MADEARTE FURNITURE IMPORTS & DISTRIBUTORS, INC.; MADERAS 3C, INC.; MARJOR & SONS, INC.; M.M. FASHION & DESIGN, INC.; PAPELERA DEL PLATA, INC.; THE PAPERHOUSE CORP.; PLAVICA, INC.; EMPRESAS BERRIOS, INC.; JOSE SANTIAGO, INC.; CORREA TIRE DISTRIBUTOR, INC.; EUGENIO SERAFIN, INC., d/b/a Est Hardware

Plaintiffs - Appellees

EMPRESAS BERRIOS INVENTORY AND OPERATIONS, INC.; CORREA TIRE

Plaintiffs

v.

S2 SERVICES PUERTO RICO, LLC;
RAPISCAN SYSTEMS, INC.

Defendants - Appellants

PUERTO RICO PORTS AUTHORITY; JOHN DOE;
JANE DOE; ABC CORP.; XYZ CORP.;
UNKNOWN INSURANCE COMPANIES

Defendants

No. 18-2089

DANTZLER, INC.; NORTHWESTERN SELECTA, INC.; ALBERIC COLON AUTO SALES, INC.; ALBERIC COLON DODGE CHRYSLER JEEP, INC.; ALBERIC COLON FORD, INC.; ALBERIC COLON MITSUBISHI, INC.; SACHS CHEMICAL, INC.; MAYS CHEMICAL COMPANY OF PUERTO RICO, INC.; MADERAS ALPHA, INC.; CELTA EXPORT CORPORATION; COUGAR PLASTICS CORPORATION; CARIBBEAN PRODUCE EXCHANGE, LLC; MADEARTE FURNITURE IMPORTS & DISTRIBUTORS, INC.; MADERAS 3C, INC.; MARJOR & SONS, INC.; M.M. FASHION & DESIGN, INC.; PAPELERA DEL PLATA, INC.; PAPERHOUSE CORP.; PLAVICA, INC.; EMPRESAS BERRIOS, INC.; JOSE SANTIAGO, INC.; CORREA TIRE DISTRIBUTOR, INC.; EUGENIO SERAFIN, INC., d/b/a Est Hardware

Plaintiffs - Appellees

EMPRESAS BERRIOS INVENTORY AND OPERATIONS, INC.; CORREA TIRE

Plaintiffs

v.

PUERTO RICO PORTS AUTHORITY

Defendant - Appellant

S2 SERVICES PUERTO RICO, LLC; RAPISCAN SYSTEMS, INC.; JOHN DOE; JANE DOE; ABC CORP.; XYZ CORP.; UNKNOWN INSURANCE COMPANIES

Defendants

Before

Howard, Chief Judge, Torruella, Lynch, Dyk,* Thompson, Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: September 2, 2020

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

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* Of the Federal Circuit, sitting by designation.

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