UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LETICIA COLON DE MEJIAS, ET AL.,	:	CIVIL ACTION NO.
	:	
Plaintiffs,	:	3:18 CV 00817 (JCH)
v.	:	
	:	
DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut, ET AL.,	:	
	:	
Defendants.	:	JULY 20, 2018

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, and L. Civ. R. 7 and 56, the Plaintiffs respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment as to Count I (Declaratory Judgment – Contracts Clause, U.S. Const. Art. 1, § 10), Count II (Declaratory Judgment – Equal Protection Clause, U.S. Const. Am. 14, § 1), Count V (Promissory Estoppel), and Count VII (42 U.S.C. § 1983) of their Complaint dated May 15, 2018. The Plaintiffs hereby adopt and incorporate by reference ¶¶ 1 through 86 of the parties' Local Rule 56(a)1 Stipulated and Agreed Statement of Undisputed Facts (hereafter referred to as "Stip. Facts").

RELEVANT BACKGROUND

The Plaintiffs

The Plaintiffs (all electric utility customers or ratepayers of Eversource and UI) brought this lawsuit against the Defendants, having suffered harm (Stip. Facts ¶ 85) as a result of the unconstitutional sweeps of substantial funds from the Energy Efficiency Fund[1] and the Clean Energy Fund, which supports the Connecticut Green Bank. (*Id*. ¶¶ 1-15, 30).

[1] P.A. 98-28, § 33, codified at General Statutes § 16-245m(a)(1). As explained more fully below, the Energy Efficiency Fund, referred to in the Complaint as the Connecticut Energy Efficiency Fund or "CEEF" is the same fund referred to herein as the C&LM Fund.

The Energy Efficiency Fund And The Green Bank

P.A. 98-28 required the state agency now known as the Public Utilities Regulatory Authority ("PURA") to "assess or cause to be assessed a charge of three mills per kilowatt hour of electricity sold to each" customer of an electric distribution company to implement conservation and load management programs. P.A. 98-28, § 33, is codified at Conn. Gen. Stat. § 16-245m(a)(1).[2] *Id*. ¶ 20. Conn. Gen. Stat. § 16-245m(b) further required the EDCs to create the C&LM Fund for the funds collected. *Id*. ¶ 21. PURA authorizes disbursements from the C&LM Fund by the EDCs to carry out the plan approved by the commissioner under Conn. Gen. Stat. § 16-245m(d). The current statutory authority for the C&LM Fund is set forth in Conn. Gen. Stat. § 16-245m. *Id*. ¶ 22.

The C&LM Fund supports a variety of programs which provide financial incentives to help Connecticut consumers reduce the amount of energy used in their homes and businesses. *Id* ¶¶ 23-24. The C&LM Fund programs are reviewed by the Energy Efficiency Board ("EEB"), a group of advisors who utilize their experience and expertise with energy issues to evaluate and consult with Connecticut's electric and natural gas utility companies on how programs should best be structured for and delivered to Connecticut consumers. *Id*. ¶ 25.

Many, but not all, Connecticut ratepayers are EDC customers—those customers who fund the C&LM Fund by payment of a surcharge on their electricity bills from the Electric Utilities. These surcharges on EDC Customers collect approximately $156 million per year from EDC Customers. *Id*. ¶ 26. Customers of the Municipal Utilities do not contribute to the C&LM Fund.

[2] In the parlance of electric utility industry restructuring pursuant to P.A. 98-28, Eversource and UI became known as electric distribution companies, as defined in Conn. Gen. Stat. § 16-1(23) and are referred to collectively throughout this Memorandum of Law as "EDCs" or "Electric Utilities." Under P.A. 98-28, the EDCs are no longer vertically integrated, sold off their wholesale power plants, and focus on the business of transmitting and distributing power to end use customers.

Id. ¶ 27. Since Customers of Municipal Utilities do not contribute to the C&LM Fund, they are not otherwise entitled to use C&LM Fund programs. *Id* ¶ 28.

P.A. 98-28 also created the Renewable Energy Investment Fund, to be administered by Connecticut Innovations, Inc., which is also funded in part by EDC Customers. The administration of the Renewable Energy Investment Fund was spun off subsequently into an entity later renamed the Connecticut Green Bank ("Green Bank") (now codified at Conn. Gen. Stat. § 16-245n).[3] *Id*. ¶ 29. Conn. Gen. Stat. § 16-245n(b) requires PURA to assess or cause to be assessed a charge of not less than one mill per kilowatt hour charged to EDC customers, which shall be deposited into the Clean Energy Fund ("CEF"). *Id*. ¶ 30. These funds may be used by the Green Bank for approved expenditures that promote investment in clean energy. *Id*. As the nation's first state "green bank," the Connecticut Green Bank leverages public and private funds to accelerate the growth of green energy in Connecticut. *Id*. ¶ 31.

Conn. Gen. Stat. § 16-245m(d)(1) requires the EDCs, as well as the Natural Gas Utilities, to develop a Conservation and Load Management Plan (the "Plan") every three years. *Id*. ¶ 33. Pursuant to § 16-245m(d)(1), the purpose of the Plan is to "implement cost-effective energy conservation programs and market transformation initiatives." *Id*. The EEB works with the EDCs to develop the Plan. *Id*. ¶¶ 34-37.

Through its authority under Conn. Gen. Stat. § 16-245m(d)(1), PURA has approved tariffs filed by the EDCs that include rate schedules that assess a Conservation & Load Management charge of three mills per kilowatt hour charged on all Eversource and UI ratepayers and an

[3] The Connecticut Green Bank is "a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function. The Connecticut Green Bank shall not be construed to be a department, institution or agency of the state." Conn. Gen. Stat. § 16-245n(d)(1)(A).

additional CAM charge of three mills per kilowatt hour of electricity sold to each customer, each to be deposited into the C&LM Fund. *Id.* ¶ 38. Between the CAM and the three mills charged on EDC customers, EDC customers pay six mills into the C&LM Fund on all electric deliveries to EDC customers, or approximately $156 million per year. *Id.* ¶ 39. All customers also pay one mill to fund the CEF. *Id.* ¶¶ 30, 56.

All electric utility customers of the EDCs in Connecticut, including each of the Plaintiffs and the State of Connecticut, pay the 3 mills C&LM assessment and the 3 mills CAM assessment. *Id.* ¶ 44. In addition to the 3 mills C&LM assessment and the 3 mills CAM assessment, the Plan is also funded by other additional revenue sources that are also deposited into the C&LM Fund, including RGGI Funds. *Id.* ¶ 40. The EDCs aggregate these revenue streams in the C&LM Fund, which is commonly referred to as the "Connecticut Energy Efficiency Fund" or "C&LM Fund." The C&LM Fund thereby provides all of the funding for the Plan. *Id.* ¶¶ 40-43.

PURA And Rate Making

PURA is established pursuant to Conn. Gen. Stat. § 16-2 and statutorily charged with regulating the rates and services of the EDCs. *Id.* ¶ 45. Each EDC operates pursuant to a tariff, which is approved by PURA. *Id.* ¶ 46. Tariffs include rate schedules but also include terms of service, rules and regulations of service, and standard template agreements the EDCs use in operating their electric distribution systems. *Id.* A tariff is "a public document setting forth the services being offered by a utility, the rates and charges for the services, and the governing rules, regulations, and practices relating to those services." 73B C.J.S. PUBLIC UTILITIES § 7. The approved tariffs for the EDCs include PURA-approved Eversource Terms and UI Terms (collectively, the "EDC Terms"). *Id.* ¶ 47. The EDCs must furnish their services in accordance with the tariffs, including the EDC Terms. *Id.* ¶ 48. The approved tariffs and terms and conditions

of service apply to every entity furnished electric delivery service by the EDCs. *Id*. Tariffs, which include rate schedules, and are generally applicable to all EDC customers, may be revised, amended, supplemented or changed from time to time by PURA either upon accepting a filing by the EDCs or upon PURA's direction to the EDCs, with which the EDCs comply by filing updated tariffs. Tariffs are generally applicable to all EDC customers. *Id*. ¶ 49.

The tariff rate schedules approved by PURA for Eversource and UI, and paid by Plaintiffs, include the charges required by Conn. Gen. Stat. §§ 16-245m and 16-245n. *Id*. ¶ 50. The terms and conditions of service in the tariff impose two primary obligations on customers. In exchange for taking service from the EDCs, customers must pay their bills upon receipt and must provide the EDCs access to electric meters. Many other obligations are contained in each tariff. *Id*. ¶ 51. EDCs may discontinue service if customers fail to comply with the obligations of the tariff. *Id*. ¶ 52. Plaintiffs pay tariff rates and thereby have accepted those rates as well as the approved EDC Terms. *Id*. ¶ 53.

The approved tariffs, including the EDC Terms, represent the entire written agreements between customers, including Plaintiffs and the State, and the EDCs. *Id*. ¶ 54. EDCs may not charge rates in excess of the rates approved by PURA and set forth in the rate schedules in their tariffs and those rate schedules are required to remain in effect until new rate schedules are approved by PURA. *See* Conn. Gen. Stat. § 16-19(a). *Id*. ¶ 55.

PURA has approved three charges that are at issue in this case. Two of those charges support the C&LM Fund: (1) three mills assessed pursuant to Conn. Gen. Stat. § 16-245m(a); and (2) three mills per kilowatt hour assessed pursuant to Conn. Gen. Stat. § 16-245m(d). *Id*. ¶ 56. The third charge at issue in this case is the one mill per kilowatt hour assessed pursuant to Conn. Gen. Stat. § 16-245n(b) (referred to herein as the "Clean Energy Fund" or "CEF"). *Id*. The CEF

receives approximately $10 per year from the average Connecticut household and, prior to the Sweeps, provided approximately $27 million a year for investments in clean energy projects. *Id*. ¶ 57. For all Eversource customers, these three charges are labeled on their bills as the "Conservation Charge," "Conservation Adjustment Mechanism" and "Renewable Energy." *Id*. ¶ 58. For all UI customers, the three charges listed above are not broken out separately on their bills. Rather, they are combined with another charge not at issue in this case called the systems benefit charge. *Id*. ¶ 59.

In 2003, in response to a legislative effort to sweep the C&LM Fund and the CEF unless PURA authorized the issuance of new securitization bonds to sustain the funding of the C&LM Fund and the CEF, PURA issued a decision determining that avoiding the sweeps of the C&LM Fund and the CEF to the General Fund was in the public interest because:

> If legislation had been passed to unconditionally divert all [C&LM Fund] and [CEF] funding over approximately a two-year period, a total of $225 million would be available to provide budget relief. However, diversion of all C&LM and Renewables funding would eliminate both programs' activities. . . . [Eversource] indicates that over the lifetime of the energy conservation measures already installed by these programs, customers will save hundreds of millions of dollars in energy costs – many times their original investment from paying the C&LM charge. Further, the C&LM and Renewables programs have proven highly effective in reducing energy consumption, provide significant cost savings, reduce air pollution, and promote economic development and energy security for Connecticut residents and businesses. The C&LM and Renewables programs benefit all customer classes, including large and small businesses, homeowners and renters, state and local governments, customers with low incomes, educational institutions, and non-profit organizations. [PURA] . . . realizes that complete discontinuance of these programs for any extended period would erode C&LM and Renewables vendor confidence and could jeopardize any future success these programs might provide to Connecticut customers. Therefore, the [PURA] agrees with the [EDCs] and the other Parties to this proceeding that the continuance of C&LM and Renewables funding, as provided for by the issuance of this Financing Order, is in the public interest.

Id. ¶¶ 61-62. A smaller sweep of the CL&M Fund in the amount of $12 million occurred in 2005. *Id*. ¶ 63.

Sweeps At Issue In This Litigation

In a 2017 Special Session on October 27, 2017, the General Assembly passed and the Governor signed P.A. 17-2, *An Act Concerning the State Budget for the Biennium Ending June 30, 2019, Making Appropriations Therefore, Authorizing and Adjusting Bonds of the State and Implementing Provision of the Budget* ("P.A. 17-2"). *Id*. ¶¶ 64-67. When Defendant Malloy signed P.A. 17-2 into law, he stated that "these sweeps (referred herein as "Sweeps" or "transfers") all require the state to take and deplete ratepayer funds intended to lower energy costs overall through investments in efficiency and conservation, and instead, use them to fill the General Fund coffers." *Id*. ¶ 68. On May 15, 2018, shortly after this action was filed, Defendant Malloy issued a press release restating his opposition to the Sweeps. *Id*. ¶ 69.

During the legislative debate in the Connecticut House of Representatives on P.A. 17-2's impact on the C&LM Fund, Representative Sampson (R-80th), stated as follows:

> I want to mention just one other quick thing, and that is the Energy Efficiency Fund. . . . This is money that is collected in your electric bill that goes into a fund that is used for the purpose of helping people find ways to save on their energy costs. But this is not money that is collected on behalf of the state. It's not a tax. It's not our money. It's their money. And for us to go in there and sweep $64 million dollars per year, to me is the equivalent of theft. It just is. We are taking their money and we have no real reason or right to do so. And simply saying we need that money to balance the budget is not adequate for me. I would have preferred a legitimate tax, because at least it would've been honest.

Id. ¶ 70.

During the legislative debate in the Connecticut Senate on the impact of P.A. 17-2, Senator Len Suzio (R-13th) stated:

> I believe there's a hidden tax. . . . I have in my possession, letters from the Department of Environmental -- Energy and Environmental Protection, from Eversource and from the Green Bank, and they're saying that these fees, these $128 million dollars in fees that were paid by Connecticut utility customers, not only are they gonna get nothing for it, but there are contracts that have been engaged in with the approval of the Department of Energy and Environmental Protection, and the

> cancellation of those contracts is going to result in penalties. And those penalties are gonna be passed on to the rate users at the rate of about a buck and a half for every dollar they've already - - that we're gonna sweep. So basically, for sweeping $128 million dollars, that means another $180 million dollars - $180 million dollars that they're gonna have to pay to the utilities because the utilities are gonna have to pay a penalty on the funds that have been swept. Because they won't be able to fulfill the contracts under the conditions with the resources that they thought they had. . . . It's not gonna show up in our budget as any kind of a tax or even a nickel of cost. But the cost is gonna be very real to Connecticut consumers. And, you know what? It's the worst kind of tax. It's $300 million dollars for nothing. They're gonna pay a penalty for our decision. I think that is not only unfortunate, I really think it's a betrayal of many Connecticut families who have paid this money and now will get nothing for it and will have to pay the penalty for it.

Id. ¶ 71.

By letter dated December 15, 2017, Ben Barnes, Secretary of the Connecticut Office of Policy & Management, wrote to Rob Klee, Commissioner of DEEP concerning the Sweeps, indicating that:

> I understand the difficulty of these fund transfers, especially given the nature of operations for these energy programs to make future commitments against revenues, fund existing contracts, and given that efficiency achievements are factored into the ISO New England Forward Capacity Market. Recognizing that existing contracts and commitments will need to be curtailed, it is the Connecticut Office of Policy & Management's intention to delay the fund transfers until the last month of each fiscal year.

Id. ¶ 72.

The State of Connecticut's fiscal year begins on July 1 of a calendar year and ends on June 30 of the following calendar year. *Id*. ¶ 73. The transfers pursuant to P.A. 17-2 occurred on or about June 25, 2018 for the 2018 fiscal year. *Id*. ¶ 74. The next transfers pursuant to P.A. 17-2 and P.A. 18-81 are scheduled to occur on or about June 25, 2019 for the 2019 fiscal year. *Id*.

On May 1, 2018 Defendant Lembo issued a press release indicating that while the State's 2017-2018 fiscal year was operating at a deficit, recent revenue collections through the state's

income tax revenue far exceeded the Comptroller's expectations, and added more than $1.7 billion to the Budget Reserve Fund ("BRF"), essentially the state's savings account. *Id*. ¶ 75.

In a letter Senate Republican President Leonard A. Fasano sent on March 16, 2018 to the Connecticut Green Bank's President and CEO, Bryan Garcia, he stated:

> Although some may argue that the money you receive is 'ratepayer dollars,' I would argue those funds are taxpayer dollars. The payment you receive from ratepayers, like a tax, is compulsory. Therefore, I believe many taxpayers would like to know more about how their tax dollars are being used by your agency. . . . I look forward to your response and garnering a better understanding the rational [Sic] for this use of taxpayer dollars.

Id. ¶ 77.

After this action was filed on May 15, 2018, Senator Fasano stated:

> These funds were shifted in the bipartisan budget passed last year as a necessary measure to fund the core functions of government during an extremely challenging financial time. Before we increase taxes on the already overtaxed residents of our state, the legislature had an obligation to look at all the taxpayer dollars the state already had collected and prioritize those dollars to ensure areas such as transportation, education, and care for those with disabilities remained safe and operating.

The Greenwich Time, May 15, 2018 (available at: https://m.greenwichtime.com/news/article/Connecticut-environment-groups-file-federal-12916340.php) (last viewed on May 28, 2018). *Id*. ¶ 78.

As a result of the Sweeps, the EDCs and Natural Gas Utilities filed revisions to the 2018 Plan update on March 1, 2018, entitled the "Revised 2018 Update." The revisions reflect a reduction overall of about 35.4% in the budget for the Plan's 2018 implementation. *Id*. ¶ 79.

In a letter responding to the Revised 2018 Update, DEEP Deputy Commissioner Mary Sotos wrote:

> We understand that the effects of the diversions totaling $127 million from the diverted 3 mill charge and millions from re-directed RGGI proceeds are already reverberating across our communities, causing significant disruption to economic investments. The diversions will result in lasting impacts to our homes, businesses, schools, clean energy workforce, and our electric grid. We acknowledge that this legislative diversion has effectively taxed all electric ratepayers, including non-

> profits and government entities, with a regressive effect on low-income households. The diversion increases Connecticut's businesses' and residents' utility bills by millions in unrealized savings.

Id. ¶ 80. Deputy Commissioner Sotos went on to note that the Sweeps trigger the legislative diversion of two-thirds of the three mill monthly charge on electric bills and that "the Home Energy Solutions budget could be depleted by the third quarter of calendar year 2018, if not sooner." *Id.*; Exhibit 16.

According to the Connecticut Statewide Energy Efficiency Dashboard, for calendar year 2017, the EDCs budgeted $31,750,000 to the "State Diversion of Funds" in response to Public Act 17-2, while $151,584,944 was spent on C&LM Fund programs. *Id.* ¶ 81. In 2018, the EDCs budgeted $63,499,996 to "State Diversion of Funds" in response to Public Act 17-2, while $120,377,834 will be spent on C&LM Fund programs. *Id.* ¶ 82. According to Table 1-4 of the Plan in Exhibit 17, in 2019, the EDCs have budgeted $31.8 million for transfer in response to Public Act 17-2, while approximately $159 million will be spent on C&LM Fund programs. *Id.* ¶ 83.

According to Conn. Gen. Stat. §§ 16-245m and 16-245n, the monies collected by the C&LM Fund and CEF may be used to reduce the state's peak demand for electricity, lower energy costs, lower carbon emissions through the implementation of the state's Plan energy demand reduction and the state's Comprehensive Energy Strategy ("CES"), stabilize the energy grid, support low cost implementation of cost effective energy efficiency improvements in homes and residences and low cost financing of clean energy programs, such as solar photovoltaic installations, and projects backed by the Connecticut Green Bank. These funds support thousands of local energy efficiency and renewable energy jobs and millions of dollars invested annually in Connecticut's energy efficiency and clean energy economy. *Id.* ¶ 84.

Many of the businesses which rely upon the C&LM Fund to compensate them for rendering energy efficiency services to Connecticut ratepayers, including Plaintiffs Colon, EEC, Best Home Performance, New England Smart Energy Group, CT Weatherproof Insulation, Steven Osuch, Energy ESC, Jonathan Casiano and Bright Solutions, have all received budget cuts as a result of passage of P.A. 17-2. The passage of P.A. 17-2 has resulted in these named Plaintiffs losing revenues and implementing layoffs. *Id*. ¶ 85.

On June 25, 2018, the Defendants swept $78.3 million from the EDCs and $14 million from the Connecticut Green Bank. *Id*. ¶¶ 86; Ex. 18A and 18B.

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 56(a), summary judgment is appropriate only "when there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law." *S/N1 REO Ltd. Liab. Co. v. City of New London*, 127 F. Supp. 2d 287, 289 (D. Conn. 2000) (Hall, J.). "The burden of showing that no genuine factual dispute exists rests upon the moving party, and in assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought." *Id*. at 289-90. However, the non-moving party may not rely upon conclusory allegations, "but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." *Id*. at 290. Plaintiffs and Defendants, working together, have jointly filed a Local Rule 56(a)1 Stipulated and Agreed Statement of Undisputed Facts. There are no material facts in dispute in this case and, accordingly, summary judgment is appropriate.

I. THE SWEEPS REQUIRED BY P.A. 17-2, AS MODIFIED BY P.A. 18-81, VIOLATE THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

The Contract Clause of the United States Constitution provides that no state shall pass any law "impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. "The occasion and general

purpose of the Contract Clause are summed up in the terse statement of Chief Justice Marshall in *Ogden v. Saunders*, 25 U.S. 213 (1827)." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934).

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

Id.

Although the plain language of the Contract Clause proscribes "any" impairment, "the prohibition is not an absolute one, and is not to be read with literal exactness like a mathematical formula. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 33 (1977). Rather, "we must attempt to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power, necessarily reserved by the States to safeguard the welfare of their citizens." *Id*. at 33-34.

In the Second Circuit, the courts have developed a three-prong test to ascertain whether a law impermissibly encroaches upon contract rights: (1) is the contractual impairment substantial, and, if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, and (3) are the means chosen to accomplish this purpose reasonable and necessary. *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362,

367 (2d Cir. 2006); *see Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 44 (D. Conn. 2013) (Hall, J.).

A. The Relationship Between Ratepayers And The Utilities Is Contractual.

To begin, the EDCs and their customers or ratepayers, including the Plaintiffs, have a contractual relationship. (Stip. Facts ¶¶ 3, 6, 7, 10, 11, 12, 16, 47-55; Exhibit 5, Exhibit 7). The Utilities and each of their customers have freely entered into a contract for the provision of electric service and, in exchange, their customers agree to be bound by the terms of service and to pay charges incurred pursuant to the rate schedules, as approved by PURA. If customers do not wish to accept the EDC Terms, they can cancel service. As recently as 2016, the Connecticut Supreme Court acknowledged the contractual relationship between a utility company and its customers. *Connecticut Light & Power Co. v. Proctor*, 324 Conn. 245, 247 (2016) (finding that a customer's part-time employee, who arranged for electric service to a poultry farm, established an implied in fact contract subjecting employee to liability for electric service provided to farm.)

The Utilities' tariff documents establish the terms and conditions of the contract between the utility and the customer:

> . . . these Terms and Conditions shall be deemed to be a part of ***every contract for service*** entered into by the Company, and shall govern all classes of service where applicable, unless specifically modified by a provision or provisions contained in a particular rate or special written contract with a customer…. [i]f an application for service is accepted by the Company's duly authorized agent, or if service is supplied according to the provisions of such application or pursuant to contract either without modification or with supplemental agreement, it ***shall constitute an agreement between the customer and the Company for the supply of service.***

Eversource Terms (Exhibit 5) at p. 8, ¶ 5E, entitled "Acceptance of Application or Contract"; UI Terms (Exhibit 7) at p. 3.[4] (Stip. Facts ¶ 47).[5]

Each page of the tariff contains a reference to the PURA docket number and date in which each tariff page was last approved through the ratemaking process. (*See* e.g., the EDC Terms at Exhibits 5 and 7). The EDC Terms govern service for each customer at the customers' applicable rate schedule—that is, the amount charged per unit of electricity delivered, including ancillary charges. (Stip. Facts ¶¶ 3, 6-7, 10-12). For each customer, the Utilities charge rates pursuant to a separate "Rate Schedule" applicable to that customer's rate classification. (*Id*. ¶¶ 3,6-7, 10-12).

B. <u>The Act Substantially Impairs the Contractual Rights of Ratepayers.</u>

"The primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recyc. Indus. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997); *see Donohue v. Paterson*, 715 F. Supp. 2d 306, 319 (N.D. N.Y. 2010) ("what is most significant in determining the substantiality of an impairment is the extent to which the disadvantaged party reasonably relied on the terms of the agreement and ordered its affairs based upon those terms.") "Total destruction or repudiation of the contract is not necessary for an impairment to be substantial." *Donohue*, 715 F. Supp. 2d at 318. "Thus, impairments that go to the heart of the contract, that affect terms upon which the parties have reasonably relied, or that significantly alter the duties of the parties under the contract are substantial." *Id*.

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[4] UI's Terms and Conditions state at the outset that "[t]he following Terms and Conditions are a part of all rates, where not inconsistent with such rates, and observance of them by the Customer is a condition necessary for initial and continuing supply of electricity by The United Illuminating Company."

[5] Each Utility's tariff is also provided on its webpage. *See* www.eversource.com; www.uinet.com *See* Plaintiffs' individual contract terms, which includes the relevant EDC Terms and the applicable rate schedule, at Stip. Facts ¶¶ 3, 6-7, 10-12 and associated exhibits.

Moreover, "impairment is greatest where the challenged government legislation was wholly unexpected." *Sanitation & Recyc. Indus.*, 107 F.3d at 993; *see Alliance of Auto. Mfrs.*, 984 F. Supp. 2d at 45 ("If the plaintiff could anticipate, expect, or foresee the governmental action at the time of contract execution, the plaintiff will ordinarily not be able to prevail.") "When an industry is heavily regulated, regulation of contracts may be foreseeable; thus, when a party purchases a company in an industry that is already regulated in the particular to which he now objects, that party normally cannot prevail on a Contract Clause challenge." *Sanitation & Recyc. Indus.*, 107 F.3d at 993. "Also relevant to the determination of the degree of impairment is the extent to which the challenged provision provides for gradual applicability or grace periods." *Id*.

1. <u>Seizing Ratepayer Funds Paid to Fund Clean Energy Programs Substantially Impairs Plaintiffs' Contracts with the Utilities.</u>

Here, the Sweeps of the C&LM Fund (Energy Efficiency Fund) and the CEF (Green Bank) substantially disrupt the Plaintiffs' reasonable expectations pursuant to their contracts with the utilities. Specifically, the Plaintiffs' contracts with the utility make clear that the Plaintiffs are required to pay surcharges on their electric bill in exchange *for contributions to the C&LM Fund and CEF*. (Stip. Facts ¶¶ 26, 30, 38, 44, 56-59). Each Plaintiff's respective Rate Schedule *clearly and conspicuously* states that Plaintiffs pay energy efficiency and clean energy surcharges *in addition to* payments for electric distribution service (both transmission and distribution). (*Id*. ¶¶ 58-59). In addition, Plaintiffs' electric utility bills provide information regarding the specific charges earmarked for the C&LM Fund and CEF. (*See* e.g., Exhibits 2 and 3).

Thus, the Plaintiffs pay their electric bills with the reasonable expectation that they will receive the utility programs maintained by the C&LM and CEF. Indeed, for at least the 20 years since the enactment of P.A. 98-28, it has been public policy of Connecticut that ratepayers pay into these funds and, in exchange, these funds are to be used for their stated purpose. (*Id*. ¶¶ 19-20, 25,

29). As customers paying into the funds, each Plaintiff is contractually entitled to participate in their Utility's conservation programs. (*Id.* ¶ 26). This fundamental understanding—that customers pay into C&LM Fund and CEF to gain access to the Clean Energy Programs—is manifest in the tariff. (*Id.* ¶¶ 53, 54, 58-59). Anything less is a breach of their contractual expectations.

However, P.A. 17-2, as modified by P.A. 18-81, substantially impairs the Plaintiffs' reasonable expectations under their contracts with the Utilities because it authorizes the State to sweep $117 million from the C&LM Fund, and $28 million from the Green Bank, and transfer these funds to the General Fund of the State of Connecticut. (*Id.* ¶¶ 65-67, 75). Specifically, the Sweeps deplete the 2018 implementation budget for the entire Plan funded by the C&LM by more than 35%. (*Id.* ¶ 79). In fact, the total cost to Connecticut ratepayers of the Sweeps may potentially be many millions more than the dollar amount of the swept funds. One State Senator testified during the legislative process that in sweeping $128 million,[6] ratepayers could be responsible for paying another $180 million dollars when the expected energy efficiency benefits fail to deliver in the wholesale energy marketplace. (*Id.* ¶ 71).

While the total cost of the Sweeps is unknown at this time, the impairment to ratepayer-funded programs is substantial and Plaintiffs have suffered significant harm. According to Ben Barnes, the Secretary of the Connecticut Office of Policy and Management, shortly after the enactment of P.A. 17-2:

> I understand the difficulty of these fund transfers, especially given the nature of operations for these energy programs to make future commitments against revenues, fund existing contracts, and given that efficiency achievements are factored into the ISO New England Forward Capacity Market. Recognizing that existing contracts and commitments will need to be curtailed, it is the Connecticut Office of Policy & Management's intention to delay the fund transfers until the last month of each fiscal year.

[6] Sen. Suzio's quoted reference to $128 million was probably the result of rounding and should have been to $127 million ($63.5 million per year), but in any event the actual amount to be swept from the C&LM Fund per the law is $117 million with the enactment of P.A. 18-81, § 12.

(*Id*. ¶ 72). Despite the short delay in actually transferring the funds (*Id*. ¶ 85), many of the businesses that rely on the C&LM Fund to compensate them for rendering energy efficiency services to Connecticut ratepayers, including Plaintiffs Colon, EEC, Best Home Performance, New England Smart Energy Group, CT Weatherproof Insulation, Steven Osuch, Energy ESC, Jonathan Casiano and Bright Solutions, have all received budget cuts that resulted in these named Plaintiffs losing revenues and implementing layoffs. (*Id*. ¶¶ 84-85).

As set forth above, during the legislative debate of Public Act 17-2, several lawmakers also recognized that the Sweeps will substantially disrupt the ratepayers' reasonable expectations pursuant to the tariffs. (*Id*. ¶¶ 70-71). (*See* Governor Malloy's comment on the Sweeps at *id.* ¶ 69).

In summary, the undisputed record reflects that the Sweeps gut the fundamental understanding between the Plaintiffs and the Utilities regarding the payment of surcharges to the C&LM Fund and CEF. As a result of the Sweeps, Plaintiffs—in essence—no longer get what they paid for. While the Plaintiffs will continue to pay surcharges to fund the C&LM Fund and CEF, the Plaintiffs will no longer receive the benefits of their payments. Or they will receive a fraction of the benefits to which they were previously entitled. Accordingly, this Court should find that P.A. 17-2, as modified by P.A. 18-81, §12, operates as a substantial, if not total impairment, of the relevant contractual relationships. *Donahue v. Mangano*, 886 F. Supp. 2d 126, 157 (E.D. N.Y. 2012). "While total destruction of contractual expectations is not necessary for a finding of substantial impairment, that is precisely what this case entails." *See id*.

In addition, the extent to which the challenged regulation provides for "gradual applicability or grace periods" is relevant to the determination of the degree of impairment. *See Sanitation & Recyc. Indus*., 107 F.3d at 993. Here, the Sweeps are not gradual, and there is no

grace period; rather, Sections 683 and 685 required that the Sweeps occurred, as they did, on June 25, 2018 for the 2018 fiscal year, and they are scheduled to occur again on or about June 25, 2019 of the following calendar year.[7] (Stip. Facts ¶¶ 74, 86). For this reason as well, this Court should conclude that the legislative sweeps required by P.A. 17-2, as modified by P.A. 18-81, substantially impair the ratepayers' contracts with the Utilities. *See Buffalo Teachers Fed'n*, 464 F.3d at 368 ("we may safely state the wage freeze so disrupts the reasonable expectations of Buffalo's municipal school workers that the freeze substantially impairs the workers' contracts with the City.")

The Defendants will likely argue that Plaintiffs cannot demonstrate substantial impairment because the legislative sweep of the C&LM Fund and CEF pursuant to P.A. 17-2 was not "wholly unexpected." *See Sanitation & Recycling Indus*., 107 F.3d at 993 ("Impairment is greatest where the challenged government regulation was wholly unexpected.") Indeed, the General Assembly has enacted sweeps of one of these funds on at least two occasions in the past 15 years, in 2003 and 2005. (Stip. Facts ¶¶ 60-63). But these prior "sweeps" were limited in nature and, in the case of the 2003 sweeps, included a securitization measure to protect the substantial public interest at stake. (*Id*. ¶¶ 60-62). Furthermore, in these prior situations the money was either returned or used for the same purposes as originally collected from ratepayers—renewable energy and energy efficiency measures.

In pointing to these prior sweeps, Defendants are essentially arguing that "we did it before,

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[7] In 2003, the General Assembly passed P.A. 03-2 § 20, which provided that the PURA divert $30 million from the CLM Fund to the General Fund *over a 30-month period*. (Stip. Facts ¶ 60-62). Likewise, in 2005, the General Assembly passed P.A. 05-251, which requires the PURA to divert $12 million from the CLM fund to the General Fund *over a twelve month period*. (*Id*. ¶ 63). In each prior case, therefore, the legislature provided for a very gradual application of the sweeps, on a monthly basis over a one year period or more. Here, by contrast, the General Assembly sweeps a much larger amount from the C&LM Fund and Clean Energy Fund on a single day each year for two years.

we got away with it before, so therefore we should get away with it this time" and that Plaintiffs should have expected that the State would seize their ratepayer funds for General Fund purposes again and eviscerate ratepayer-funded programs. But a few prior acts of petty theft do not justify grand larceny. Given the magnitude and brazen nature of the Sweeps, recognized and acknowledged by Legislators, it should come as no surprise that this time Defendants got caught with their hand in the till. As the floor debates make clear, the Legislature knew it was stretching the bounds of its authority. It knew it was doing something the likes of which it had never done before. (*Id*. ¶¶ 70, 71).

Moreover, as explained in *Sanitation & Recycling Industries v. City of New York*, the foreseeability of a government action is only relevant to the Contract Clause analysis in cases where a party has actual or constructive knowledge that a government entity may enact a statute in a well-regulated industry, but nevertheless decides to invest in such an industry:

> Impairment is greatest where the challenged government regulation was wholly unexpected. When an industry is heavily regulated, regulation of contracts may be foreseeable; thus, when a party purchases a company in an industry that is already regulated in the particular to which he now objects, that party normally cannot prevail on a Contract Clause challenge.

Sanitation & Recyc. Indus., 107 F.3d at 993. In other words, if the challenged governmental action is foreseeable in a well-regulated industry, *and a party nevertheless elects to enter such an industry* with actual or constructive knowledge that such an action is likely, then such a party likely cannot prevail in a Contracts Clause case. *Id*.

This, however, is not such a case. Indeed, although the Connecticut General Assembly has raided the C&LM Funds and CEF twice in the past (albeit in much smaller amounts with limited impact), ratepayers did not have any choice regarding whether to enter into contracts with the Utilities if they wanted to receive electric service. Quite to the contrary, the ratepayers were

required by law to pay: (1) three mills per kilowatt hour assessed pursuant to Conn. Gen. Stat. § 16-245m(a); (2) three mills pursuant to Conn. Gen. Stat. § 16-245m(d); and one mill pursuant to Conn. Gen. Stat. § 16-245n(b). (Stip. Facts ¶ 56). In the case of the CEF alone, each Connecticut household is required to pay approximately $10 per year toward the Clean Energy Fund; in the aggregate, these funds constitute approximately $26 million per year for investments in clean energy projects. (*Id*. ¶ 57). Clearly, this is not a case where "a party purchase[d] a company in an industry that is already regulated in the particular to which he now objects." *Id*. In addition, the last time the General Assembly attempted to raid the C&LM Fund was in 2005, more than twelve years ago, and that raid only involved $1 million per month over 12 months. (*Id*. ¶ 63). For all of these reasons, this court should conclude that the Plaintiffs have established substantial impairment of contracts. *See Sanitation & Recyc. Indus.*, 107 F.3d at 993.

2. <u>The Defendants Have Substantially Impaired the Plaintiffs' Contract Interests with the Utilities Under the Filed-Rate Doctrine.</u>

In addition, the Sweeps have substantially impaired the Plaintiffs' contract interests with the Utilities under the filed-rate doctrine. The filed-rate doctrine is a common-law rule that precludes actions that attempt to alter the terms and conditions contained in a tariff. A tariff is construed according to the same rules as contracts. *See Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 343 (Iowa 2005). "Under the doctrine, filed tariffs govern a utility's relationship with its customers and have the force and effect of law until suspended or set aside." *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002).[8] Under the filed-rate doctrine, regulated utilities cannot vary a tariff's terms with individual customers, discriminate in

[8] In the more common application of the filed-rate doctrine, a customer attempts to sue a utility for damages resulting from a service failure, such as a power outage or a power surge, but the utility defends itself from negligence claims based on the filed-rate doctrine. The utility's terms and conditions often contain limitation of liability clauses protecting against liability resulting from such claims. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d at 217. Courts generally hold that such tariff provisions are reasonable and enforceable. *Id.*

providing services, or charge rates other than those properly filed with the appropriate regulatory authority. *Id.*, citing *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

Once the tariff and rate schedules are set, the filed-rate doctrine protects the economic expectations of both utility investors and customers, and binds a utility to charge the government-approved rates and obliges the customers to pay those charges, until rates are superseded and replaced by new lawful, duly-authorized rates on file. No utility or customer has a vested right in the continuation of a particular rate (here, the C&LM and CEF) for electric service, however, every utility customer does have an expectation that concluded financial agreements will not be altered retroactively by government action (e.g. the contracts Plaintiffs entered into in reliance on the C&LM Fund or that the Green Bank has entered into to deploy the funds for clean energy projects with the CEF). Under the filed-rate doctrine, the government does not have the authority to impair settled rights retroactively. *See Cent. Power & Light Co. v. P.U.C. of Tex.*, 36 S.W. 3d 547, 554 (Tex. Ct. App. 2001) ("Ratemaking has been likened to a legislative activity…[t]herefore, the constitutional prohibition on *ex post facto* or retroactive laws applies.").

The Legislature cannot reach back in time and impair the "regulatory contract" by reducing the parties' expectancies assured by the implied contract of the filed tariffs: Specifically, that the C&LM Fund and CEF will be used to support the programs authorized in the Plan. *See* Conn. Gen. Stat. §§ 16-245m and 16-245n. The Legislature is constitutionally prohibited from reassigning a charge that it earmarked for a specific purpose under the "regulatory contract." *See e.g., Gearhart v. Pub. Util. Com'n. of Oregon*, 299 P.3d 533, 543 (Or. Ct. App. 2013) ("The filed-rate doctrine holds, generally, that any rate filed with and approved by the relevant ratemaking agency represents a contract between a utility and the customer and is conclusively lawful until a new rate is approved.") There are limits on legislative power in general and there are constitutional

mandates that certain private expectancies and rights are protected from retroactive disruption by the government.

In this case, when the General Assembly created the C&LM and CEF pursuant to Conn. Gen. Stat. §§ 16-245m and 16-245n, it required PURA to approve the three charges that are at issue in this case, which PURA did. Each Utility's tariff includes the rate schedules assessing these charges along with the Eversource Terms and UI Terms, respectively, such that the approved tariffs of the EDCs include the contract language and surcharges that support the C&LM Fund and the Clean Energy Fund. (Stip. Facts ¶¶ 53-58; Exhibits 5, 7) Under the filed-rate doctrine, these tariffs and rate schedules are sacrosanct.

Furthermore, Connecticut has codified the filed-rate doctrine in Conn. Gen. Stat. § 16-19(a), which provides in relevant part:

> No public service company may charge rates in excess of those previously approved by the Public Utilities Control Authority or the Public Utilities Regulatory Authority, except that any rate approved by the Public Utilities Commission, the Public Utilities Control Authority or the Public Utilities Regulatory Authority shall be permitted until amended by the Public Utilities Regulatory Authority . . . .

In other words, Connecticut's statutory requirements are the same as the filed-rate doctrine – a utility cannot change rates until filed and approved and approved rates remain in effect until amended by PURA, the regulatory authority.[9]

Plaintiffs acknowledge that this case involves a novel application of the filed-rate doctrine. While utilities typically invoke the filed-rate doctrine as a defense to liability, *Sw. Elec. Power Co.*, 73 S.W.3d at 217, there is no legal reason why ratepayers should not be able to enforce the

[9] The term "rate" in the filed-rate doctrine refers to the entire tariff, not just the rate schedules. A regulatory agency's rate-making authority authorizes it to approve a tariff's provision limiting liability, for example, because a limitation on liability is an inherent part of the rate the utility charges for its services. *Sw. Elec. Power Co.*, 73 S.W.3d at 217. Both the filed-rate doctrine and Conn. Gen. Stat. § 16-19(a) therefore apply to the non-rate portions of a utility's tariff.

same filed-rate expectations and contract language as the utilities.[10] Tariffs and rate schedules are enforceable and the State in this case should not have the power to eviscerate the reasonable and legitimate expectations of both the Plaintiffs and the Utilities set forth in the approved tariffs.

C. <u>The State Did Not Have A Legitimate Public Purpose in Enacting the Sweeps.</u>

As to the second prong of the Contract Clause test, the state must show a legitimate public purpose behind the challenged law. *See Buffalo Teachers Fed'n*, 464 F.3d at 368. "Legislation which substantially impairs contractual rights runs afoul of the Contract Clause, and is impermissible, if a legitimate public purpose is not served by its enactment." *Donohue*, 715 F. Supp. 2d at 319. "A legitimate public purpose is one aimed at remedying an important general or social economic problem rather than providing a benefit to special interests. And . . . the purpose may not be simply the financial benefit of the sovereign." *Buffalo Teachers Fed'n*, 464 F.3d at 368.

Here, the Defendants will likely argue that the Connecticut General Assembly had a legitimate public purpose in passing the Act that authorized the Sweeps because, at the time it passed the Act, the State was suffering a financial crisis. *See id*. In *Buffalo Teachers Federation*, for example, the Second Circuit recognized that the courts in this jurisdiction "have often held that the legislative interest in addressing a fiscal emergency is a legitimate public interest." *Id*. at 369. However, this case is distinguishable from *Buffalo Teachers Federation* because the purported fiscal crisis identified by the State legislature was very short-lived. In a press release dated May 1, 2018, Defendant Lembo announced that recent revenue collections through the State's income tax revenue had far exceeded the Comptroller's expectations, and added more than $1.7 billion to

[10] Conspicuously absent from participating in this litigation are the EDCs, which are also parties to the contracts invaded by the Sweeps and the Defendants' actions in enforcing the intent of the General Assembly in P.A. 17-2, as modified by 18-81. The EDCs are not harmed, however, by the Sweeps as whatever costs and losses result from the Sweeps will be passed through to the ratepayers. (See Stip. Facts ¶ 71).

the Budget Reserve Fund ("BRF"), essentially the State's savings account, because of a new State revenue volatility law that required that new revenue collections above a threshold amount be captured and transferred to the BRF if the General Assembly chooses not to use it for deficit mitigation. (Stip. Facts ¶ 75).

Thus, while courts have routinely held that a fiscal emergency can constitute a legitimate public purpose, none of those cases have addressed circumstances where, as here, the purported emergency was illusory. Nor have any such cases addressed a situation where, as here, the amount saved by the abridgement of contract would have been realized even if the General Assembly did nothing, given that it was the beneficiary of a substantial budget surplus in the very next fiscal year. Under the particular circumstances of this case, therefore, this Court should hold that an illusory and/or short-lived fiscal crisis is insufficient to demonstrate a legitimate public purpose. *See Buffalo Teachers Fed'n*, 464 F.3d at 368.

D. The Means Chosen By The General Assembly Are Not Reasonable And Necessary.

1. Two Levels Of Deference.

The third prong of the Contract Clause test requires that "the impairment must also be one where the means chosen are reasonable and necessary to meet the stated public purpose." *Buffalo Teachers Fed'n*, 464 F.3d at 369. However, the courts apply a more deferential standard of review when analyzing *private contracts* than in cases where, as here, the courts must assess the infringement of a *public contract*:

> When the law impairs a private contract, substantial deference is accorded to the legislature's judgments as to the necessity and reasonableness of a particular measure. Public contracts are examined through a more discerning lens. When the state itself is a party to the contract, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. When a state's legislation is self-serving and impairs the obligations of

> its own contracts, courts are less deferential to the state's assessment of reasonableness and necessity.

Id.

However, "the presence or absence of a state as a party to the contract is not determinative of the deference issue." *Id*. at 370. Rather, "the better rule . . . calls for focusing on whether the contract-impairing law is self-serving, where existence of a state contract is some indicia of self-interest, but the absence of a state contract does not lead to the converse conclusion." *Id*. In other words, a law is self-serving where "the state legislature 'welches' on its obligations as a matter of 'political expediency.' " *Id*.

Here, this Court should apply the less-deferential test because the State is a party to the contract and has plainly acted in its own self-interest. The State, like the Plaintiffs, also pays the C&LM and Clean Energy Fund surcharges on its utility bills for State property. (Stip. Facts ¶¶ 44, 54). Indeed, the State is one of Connecticut's largest ratepayers and largest contributors to the C&LM and Clean Energy Fund. (*Id*. ¶ 16). By virtue of the Sweeps, therefore, the State has essentially funneled a substantial portion of its electric bill back to itself, and self-dealt itself a massive break on its utility bills. *See* P.A. 17-2, §§ 663, 665, as amended by P.A. 18-81, § 12. This break comes at the expense of all other, non-governmental electric ratepayers who must continue to pay the surcharges to fund the C&LM and Clean Energy Fund, now rerouted to State coffers. Thus, in the most literal sense, the General Assembly's legislation is "self-serving and impairs the obligations of its own contracts," and thus is entitled to the less-deferential standard of review. *See Buffalo Teachers Fed'n*, 464 F.3d at 369.

In addition, the tariffs are a public contract, in that the tariffs are established and governed by statute. Specifically, the ratepayers have paid charges that were included in the tariffs approved by PURA pursuant to Conn. Gen. Stat. § 16-19 *et seq*. All ratepayers of Eversource and UI,

including the State of Connecticut, are customers and parties to contracts with the utilities pursuant to the tariffs approved by PURA.

In the alternative, this Court should conclude that the less deferential standard applies because the legislature has "welched on its obligations" pursuant to the tariffs applicable to the State itself as ratepayers and the requirements of statutes, Conn. Gen. Stat. §§ 16-19(a), 16-245m and 16-245n, and the filed rate doctrine, as a matter of political expediency. *See Buffalo Teachers Fed'n*, 464 F.3d at 370. Specifically, Conn. Gen. Stat. §§ 16-245m and 16-245n require PURA to assess the charges to fund the C&LM and CEF, as PURA did. However, by enacting P.A. 17-2, §§ 663, 665, as amended by P.A. 18-81, § 12, the General Assembly has reneged on its obligation to ensure that the tariffs used to fund the C&LM Fund and Clean Energy Fund will be used for the purpose of funding energy efficiency, conservation and clean energy programs and lowering the ratepayers' energy costs through investment into efficiency and conservation. *See id*.

Moreover, the legislation enacting the Sweeps recklessly disregarded Conn. Gen. Stat. § 16-245n(h), which states, in pertinent part, that the State "does hereby pledge to and agree with any person with whom the Connecticut Green Bank may enter into contracts pursuant to the provisions of this section that the State will not limit or alter the rights hereby vested in said bank until such contracts and the obligations vested thereunder are fully met and performed on the part of said bank ...."

2. **Under The Less Deferential Standard, The Contractual Impairment Is Neither Reasonable Nor Necessary.**

Under the less deferential standard, for impairment to be reasonable and necessary, "it must be shown that the state did not (1) consider impairing the contracts on par with other policy alternatives or (2) impose a drastic impairment when an evident and more moderate course would

serve its purpose reasonably well, nor (3) act unreasonably in light of surrounding circumstances." *See Buffalo Teachers Fed'n*, 464 F.3d at 371.

"Some factors to be considered under this inquiry include: whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." *Donohue*, 886 F. Supp. 2d at 160. In addition, the extent of the impairment "is certainly a factor in determining its reasonableness." *United States Trust Co.*, 431 U.S. at 44; *see Buffalo Teachers Fed'n*, 464 F.3d at 371 ("The temporary and prospective nature of the wage freeze underscores further its reasonableness.")

Here, the Defendants cannot establish that the contractual impairment is reasonable or necessary for a variety of reasons. First, there is no evidence that the General Assembly seriously considered any specific policy alternatives to the Sweeps required by P.A. 17-2. *See Donahue*, 715 F. Supp. 2d at 322. Indeed, the Defendants cannot point to specific policy alternatives that were actually considered and compared by the General Assembly during its debate. In fact, the legislative debate at times reflects scant consideration of policy alternatives. During the June 2017 Senate debate, Senator Suzio opined: "Literally, the paper is still warm for the documents that were just printed moments before we convened to discuss this. To me, this sets a terrible image for the Legislature. The people watch us debating the people's business on this very complex subject and we've had no time to really read the documents except in the most superficial way." June 2017 Senate Debate at 32-33. Where, as here, the Defendants cannot point to "a substantial record of considered alternatives, the reasonableness and necessity of the challenged provisions are cast in serious doubt." *Donohue*, 715 F. Supp. 2d at 322.

Instead, the State's only apparent justification for its decision to sweep the funds from the C&LM Fund and Clean Energy Fund is that the State perceived that it faced a budgetary shortfall at the time it acted. However, this apparent justification does not survive the Plaintiffs' Contract Clause challenge. *See Donahue*, 715 F. Supp. at 323. For instance, in *Donahue v. Patterson*, the trial court found that an emergency appropriations bill which enacted unpaid furloughs, a wage freeze, and a benefits freeze on certain groups of state employees was unreasonable under the Contracts Clause analysis:

> That the State has made choices about funding and that a fiscal crisis remains today surely cannot, without much more, be sufficient justification for a drastic impairment of contracts to which the State is a party. Without any showing of a substantial record of considered alternatives the reasonableness and necessity of the challenged provisions are cast in serious doubt.

715 F. Supp. 2d at 322. The court further held:

> Defendants' argument, once again, is limited to emphasizing the State's fiscal difficulties; Defendants fail to articulate why the particular provisions were selected, and they appear to expect the Court to accept that the measures are reasonable and necessary solely because of the State's fiscal difficulties. Broad reference to an economic problem simply does not speak to the policy consideration and tailoring that is required to pass scrutiny under Plaintiffs' Contract Clause challenge. Defendants cannot rest such a substantial impairment of its contracts on such a minute basis.

Id. at 323.

Second, the Defendants cannot demonstrate that they did not impose a drastic impairment when an evident and more moderate course was available. *See id*. at 322. In this case, the Defendants' argument is limited to generalities. "Most importantly, the Court cannot ignore the conspicuous absence of a record showing that options were actually considered and compared, and that the conclusion was then reached that only the enacted provisions would suffice to fulfill a specified public purpose." *Id*. at 323.

In addition, the Defendants cannot show that the Sweeps were tailored appropriately to its purpose, or that it was limited to the duration of the purported emergency. *Donohue*, 886 F. Supp. 2d at 160. Indeed, the plain language of P.A. 17-2, §§ 663, 665, as amended by P.A. 18-81, § 12 reflects that the Sweeps are not limited to the duration of the emergency. *See id*. Specifically, the statute required that the Defendants transfer the sum of $63.5 million from the C&LM Fund to the General Fund by the fiscal year ending June 30, 2018 and requires another $53.5 million be transferred by June 30, 2019. P.A. 17-2, § 683, as amended by P.A. 18-81, § 12. The statute also requires that $14 million a year be transferred from the Green Bank to the General Fund over the same two-year period. *Id*. § 685. The transfers were without regard to the unexpectedly large tax revenue collection surplus.

Moreover, subsequent events reflect that the Defendants have no intention of narrowly tailoring the contractual infringement to meet a specified public purpose. Specifically, on or about May 1, 2018, Defendant Lembo announced that the State had received an unexpected windfall of revenue collections which *added more than $1.7 billion* to the BRF. (Stip. Facts ¶ 75). Obviously, this sum far exceeds the amount of fiscal savings realized by sweeping $117 million from the C&LM Fund and $28 million from the Green Bank over two years.

Although the General Assembly is now in a position to reimburse the funds swept from the C&LM Fund and Clean Energy Fund, it has not done so and apparently has no present intention to do so. Instead, the General Assembly recently passed and Defendant Malloy signed into law P.A. 81-81, which in § 12 restored only $10 million of the sweep from the 2019 conversion from the C&LM Fund. (*Id*. ¶ 76). Public Act 18-81 also did not address the then planned 2018 sweeps, nor did it address the 2019 sweep of the CEF. *Id*. Despite the positive economic turn in the State, after this litigation was filed, Senator Fasano brazenly defended the Sweeps in the press, making

clear he had no intention of changing the course set by the Sweeps legislation. After this action was filed on May 15, 2018, he stated: "These funds were shifted in the bipartisan budget passed last year as a necessary measure to fund the core functions of government during an extremely challenging financial time." *Id*. ¶ 78.

Thus, even though more reasonable and moderate options are now available that would allow the State to mitigate its interference with the Plaintiffs' contract rights, the State has not taken sufficient action to do so. *See Donohue*, 886 F. Supp. 2d at 160 (more moderate course was available to raise funds as alternative to contract infringement where the County had the option to "sell, lease, or otherwise dispose of any and all real and personal property owned by the County including, but not limited to, vehicles, buildings, land, computers, and heavy machinery."); *Buffalo Teachers Fed'n*, 464 F.3d at 371 ("We read this to mean the wage freeze must have been a last resort measure. Indeed the Board imposed the freeze only after other alternatives had been considered and tried."); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 897 (9th Cir. 2003) ("When a state or city impairs its own agreements by imposing additional financial burdens on a private party, obvious more moderate alternatives include raising revenues through higher taxes or preserving funds through budget restrictions."); *Univ. of Hawaii Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) ("although perhaps politically more difficult, numerous other alternatives exist which would more effectively and equitably raise revenues. [. . .] Defendants have not explained why it is reasonable and necessary that the brunt of Hawaii's budgetary problems be borne by its employees.")

Third, the Defendants cannot show that the Connecticut General Assembly acted reasonably in light of surrounding circumstances. *See id*. Indeed, the Governor's own signing

statement reveals that the Sweeps were nothing more than a rifle-shot, Band-Aid effort to remedy the State's fiscal shortfall:

> It is my firm belief that these sweeps will increase Connecticut residents' and businesses' energy costs, will curtail hundreds of millions of dollars of private investment in Connecticut, will hamstring a growing alternative energy and energy efficiency industry that employs thousands of Connecticut residents, and will eliminate a crucial set of tools for helping businesses in the state with cost-saving energy investments.

(Complaint, Exhibit A). Therefore, this Court should conclude that the means chosen by the General Assembly are not reasonable and necessary. *Donohue*, 886 F. Supp. 2d at 162 (where county law sought to create $40 million in savings in budget by furloughing union employees and freezing wages for county employees, the plaintiffs demonstrated a likelihood of success as to whether there is a substantial impairment to their contract rights, and that the impairment is neither reasonable nor necessary). For the foregoing reasons, the Plaintiffs have established that the Sweeps violate the Contract Clause of the United States Constitution.

II. THE LEGISLATIVE SWEEPS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." However, the equal protection clause does not prevent the states from making reasonable classifications among persons. *W.& S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656-57 (1981). "Where taxation is concerned and no specific federal right, other than equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 354-55 (1973).

In general, "statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1997); *see W.& S. Life Ins. Co.*, 451 U.S. at 657 (tax should be sustained "if we find that its classification is rationally related to achievement of a legitimate state purpose."). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Regan*, 461 U.S. at 547-48.

Here, the Sweeps required by P.A. 17-2, §§ 683 and 685, as amended by P.A. 18-81, § 12, constitutes a tax on each of the EDCs' ratepayers. Specifically, the Act requires the Defendants to sweep funds paid by citizens of the State from funds earmarked for energy efficiency, conservation and clean energy as surcharges on each ratepayer's electric utility bill, and transfer those funds for use in the General Fund of the State of Connecticut. (Stip. Facts ¶¶ 64-68). Indeed, many legislators from both sides of the aisle expressly stated that the Sweeps constitute a tax on the EDC ratepayers. For instance, in a March 16, 2018 letter from Sen. Len Fasano to Bryan Garcia, the President and Chief Executive Officer ("CEO") of the Green Bank, Sen. Fasano states: "Although some may argue that the money you receive is 'ratepayers dollars,' I would argue those funds are taxpayer dollars. The payment you receive from ratepayers, like a tax, is compulsory. Therefore, I believe many taxpayers would like to know more about how their tax dollars are being used by your agency. [. . .] I look forward to your response and garnering a better understanding the rational [*sic*] for this use of taxpayer dollars." (*Id*. ¶ 77).

In addition, during the June 2017 debate on Public Act 17-2, Senator Suzio stated:

> **I believe there's a hidden tax. And the hidden tax is in the form of the raid that we're going to put on the energy funds**. We are now -- the last I saw, and again this was a number that was changing quite a bit, the number I saw that was mentioned actually in our caucus shortly before *we* came in here, is that we're talking about $64 million dollars per year in each of the two years for the Energy Efficiency fund. That's $128 million dollars. **It's not gonna show up in our**

> **budget as any kind of a tax or even a nickel of cost. But the cost is gonna be very real to Connecticut consumers. And, you know what? It's the worst kind of tax. It's $300 million dollars for nothing**. They're gonna pay a penalty for our decision. I think that is not only unfortunate, I really think it's a betrayal of many Connecticut families who have paid this money and now will get nothing for it and will have to pay the penalty for it.

June 2017 debate, p. 35-36. (*Id*. ¶ 71)

In so doing, the State is and will be effectively making the EDCs' ratepayers, including each of the Plaintiffs, contribute a tax to the General Fund in a manner it does not otherwise require of those citizens who are customers of the Municipal Utilities. (*Id*. ¶¶ 26-28). Indeed, many but not all Connecticut ratepayers are EDC customers—those ratepayers who fund the C&LM Fund and CEF by payment of surcharges on their electric utility bills from the Electric Utilities. *Id*. By contrast, customers of the Municipal Utilities do not contribute to C&LM Fund. (*Id*. ¶ 27).

Accordingly, through passage of P.A. 17-2, §§ 683 and 685, as amended by P.A. 18-81, § 12, and the direction for the Defendants to implement the Sweeps, Defendants have assessed a tax upon the Plaintiffs and on other EDC ratepayers that it has not assessed upon customers of the Municipal Utilities. (*Id*. ¶¶ 17, 26-28). Critically, the EDC ratepayers are not different from the Municipal Ratepayers in any relevant respect. Both the EDC ratepayers and the Municipal Ratepayers are citizens of the State of Connecticut who receive services from electric Utilities in their homes and businesses; however, only the EDC ratepayers are required to pay the tax to the General Fund. *See id*. So a resident of East Norwalk is a Municipal Ratepayer and does not contribute to the tax (*Id*. ¶ 17) whereas a neighboring electric customer in Westport pays the tax. The *de facto* classification of EDC ratepayers and Municipal Ratepayers does not rationally further any legitimate State interest. *See Regan*, 461 U.S. at 547.

III. THE DEFENDANTS SHOULD BE ESTOPPED FROM SWEEPING MONIES FROM THE CEF PURSUANT TO PUBLIC ACT 17-2

"[A]s a general rule, estoppel may not be invoked against a public agency in the exercise of its governmental functions. Nevertheless, we noted that an exception to this general rule is made where the party claiming estoppel would be subjected to a substantial loss if the public agency were permitted to negate the acts of its agents." *Kimberly-Clark Corp. v. Dubno*, 204 Conn. 137, 147 (1987). The Connecticut Supreme Court has held that the doctrine of estoppel applies to agencies of the State of Connecticut, such as the Department of Revenue Services. *See id*.; *Fadner v. Comm'r of Rev. Servs.*, 281 Conn. 719, 726 (2007).

"Under our well-established law, any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act upon that belief; and the other party must change its position in reliance upon those facts, thereby incurring some injury." *Kimberly-Clark Corp.*, 204 Conn. at 148. "In addition, estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency." *Id*.; *see Zotta v. Burns*, 8 Conn. App. 169, 175 (1986) ("Estoppel against a governmental agency may be invoked only in limited circumstances and with great caution.") Finally, "it is the burden of the person claiming the estoppel to show that he exercised due diligence to ascertain the truth and that he not only lacked knowledge of the true state of things but had no convenient means of acquiring that knowledge." *Id*.

Here, the Plaintiffs can easily establish the elements of estoppel. To begin, General Statutes § 16-245n(h) states, in pertinent part, that the State of Connecticut "*does hereby pledge to*

and agree with any person with whom the Connecticut Green Bank may enter contracts pursuant to the provisions of this section that the State will not limit or alter the rights hereby vested in said bank until such contracts and the obligations thereunder are fully met and performed on the part of said bank ...." By means of this statutory language, the General Assembly and Defendant Malloy made a clear and definite promise that "the State will not limit or alter the rights hereby vested in said bank until such contracts and the obligations thereunder are fully met and performed by the bank ...." Conn. Gen. Stat. § 16-245n(h). *See also*, § 16-245m.

In addition, the State's promise was made to induce private parties to build clean energy businesses in this State, and enter into financial relationships with the Green Bank in reliance upon the General Assembly's promise that the Green Bank will satisfy all of its obligations. *See Kimberly-Clark Corp.*, 204 Conn. at 148. Stip. Facts ¶¶ 24, 29-33. Ex. 8 at 22. Many private business owners,[11] reasonably relied upon the promise set forth in Conn. Gen. Stat. §§ 16-245m and 16-245n(h), in that they built clean energy businesses in this State, and entered into financial relationships with the Green Bank, in reliance upon the General Assembly's promise that the Green Bank will fully satisfy all of its obligations. *See id*. As a direct result of the General Assembly's broken promise, the business owners, including Plaintiff Energy ESC, have suffered substantial damage. Stip. Facts ¶ 85.

The Sweeps hobbled the Green Bank itself, the nation's first green bank and innovator of programs to leverage the Clean Energy Fund to support expanded renewable energy investments, forcing the quasi-state entity to slash employment, curtail spending on "unprofitable" programs and restructure its core business of clean energy finance. Stip. Facts ¶¶ 31, 72, 80; Exhibit 8 at

[11] Stip. Facts ¶ 11; Exhibit 8 at 141.

141; Exhibit 11, p 23.[12] While the Sweeps transferred $14 million per fiscal year from the Green Bank-administered Clean Energy Fund, or 52% of its annual revenues from the Clean Energy Fund, the Green Bank also lost revenues as a result of the Sweeps of $10 million per year from RGGI Funds. Stip. Facts ¶ 66; Exhibit 11 at 20.[13]

Perhaps the strongest evidence of the broken promises embedded in the impact of the Sweeps on the Green Bank can be gleaned from the General Assembly's own attempt at damage control, enacted in the face of this litigation. Section 10 of Public Act 18-50, which was signed into law on May 24, 2018, nine days after this litigation was filed, provides as follows:[14]

Sec. 10. Subsection (h) of section 16-245n of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(h) (1) The state of Connecticut does hereby pledge to and agree with any person with whom the Connecticut Green Bank may enter into contracts pursuant to the provisions of this section that the state will not limit or alter the rights hereby vested in said bank until such contracts and the obligations thereunder are fully met and performed on the part of said bank, provided nothing herein contained shall preclude such limitation or alteration if adequate provision shall be made by law for the protection of such persons entering into contracts with said bank. The **pledge provided by this subsection shall be interpreted and applied broadly** to effectuate and maintain the bank's financial capacity to perform its essential public and governmental function.

(2) The **contracts and obligations thereunder of said bank shall be obligatory upon the bank**, and the bank may appropriate in each year during the term of such contracts an amount of money that, together with other funds of the bank available for such purposes, shall be sufficient to pay such contracts and obligations or meet any contractual covenants or warranties.

Public Act 18-50, § 10.

[12] Exhibit 11 is an excerpt from a set of meeting materials for the Green Bank Board of Directors meeting of December 15, 2017, hence the pagination of the document from pp. 19-32.

[13] As indicated on p. 20 of Exhibit 11, the Green Bank normally receives 23% or $2.3 million of proceeds from RGGI Funds.

[14] Newly-enacted text, as in the original Public Act, is shown as underlined text. Bold text supplied for emphasis.

Clearly, the General Assembly's intent in enacting this revision to Conn. Gen. Stat. § 16-245n(h) was to restore public confidence in the contracts and commitments of the Green Bank after they were shattered by the Sweeps.

Another dimension of promissory estoppel resulting from the Sweeps is present in this case in that the State encouraged the Electric Utilities and Natural Gas utilities to use the C&LM Fund to induce contractors such as most of the Plaintiffs to enter into contracts to perform energy efficiency, clean energy and other services in reliance on the funds. *See e.g.*, the Plan, Ex. 8 at 22: "Connecticut's residential and C&I programs are national leaders in the transition to move rebate models upstream for efficient lighting, HVAC, and domestic hot water ("DHW") equipment. In an upstream model, incentives (rebates) are directed toward trade allies, such as contractors, distributors, and manufacturers (upstream), rather than directly given to customers as traditional rebates (downstream)." *See also*, Stip. Facts ¶ 80; Exhibit 16 ("[T]he Home Energy Solutions budget could be depleted by the third quarter of calendar year 2018, if not sooner."). Plaintiffs Colon, EEC, Best Home Performance, New England Smart Energy Group, CT Weatherproof Insulation, Steven Osuch, Energy ESC, Jonathan Casiano and Bright Solutions, have all received budget cuts as a result of the Sweeps. Stip. Facts ¶ 85.

The Plaintiffs, as Connecticut energy efficiency businesses, reasonably relied on the State's promise in Conn. Gen. Stat. § 16-245m, as implemented in the Plan,[15] that induced these private parties to build clean energy businesses in this State, and enter into financial relationships with the Electric Utilities and Natural Gas Utilities. *Id*. In exchange, the Plaintiffs reasonably expected that the resources of the C&LM Fund would be available to satisfy the obligations of the Plan. *See Kimberly-Clark Corp.*, 204 Conn. at 148.

[15] Stip. Facts ¶¶ 21, 34; Ex. 8.

IV. DEFENDANTS' VIOLATION OF THE CONTRACT CLAUSE IS ACTIONABLE UNDER 42 U.S.C. § 1983.

To state a cause of action under section 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) challenged conduct by a person acting under color of law, and (2) challenged conduct that deprived the plaintiff of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). To prevail under 42 U.S.C. § 1983, the plaintiff must prove that the defendant's unconstitutional action was the "cause in fact" of the plaintiff's injury. *Carey v. Piphus*, 435 U.S. 247, 263 (1978).

A. Challenged Conduct By A Person Acting Under Color of Law.

A plaintiff claiming a violation of constitutional rights under 42 U.S.C. 1983 is required to show state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment."); *United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991) ("Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes 'state action.'"). Here, Defendants' actions—as state officials implementing the Sweeps—amount to state action, violating the Plaintiffs rights under "color of law."

B. Such Action Deprives the Plaintiffs of Their Constitutional Rights.

While the Second Circuit has yet to determine whether 42 U.S.C. § 1983 claims may be brought under the Contract Clause, other courts have addressed this issue. Indeed, the Ninth Circuit has ruled that Contract Clause violations are actionable under § 1983, indicating that economic harm claims involving the Contract Clause will support a § 1983 finding. "The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give

rise to a cause of action under section 1983." *S. Cal. Gas Co.*, 336 F.3d at 887 (city adopted an ordinance requiring advanced payments in order to perform trench or excavation work. The utility argued that, under the ordinance, it was "doublecharge[d]" for the right to do trench or excavation work because it already possessed this right under the franchise agreement). Similarly, the Supreme Court has ruled that 42 U.S.C. § 1983 claims can be brought under the Commerce Clause for similar economic harms as experienced under the Contract Clause. *See Dennis v. Higgins,* 498 U.S. 439, 441 (1991).

Similarly, in *Prof'l Firefighters Ass'n, Local 385 v. City of Omaha*, 2011 U.S. Dist. Lexis 61392, at *9 (D. Neb. 2011) the court held: "*Higgins* holds that a broad construction of § 1983 is required when constitutional rights are alleged. Plaintiffs clearly filed a § 1983 action which included valid constitutional claims for wrongful taking and claims under the contract clause of the United States Constitution through the Fourteenth Amendment."

C. Plaintiffs Are Entitled To Attorney's Fees Pursuant To 42 U.S.C. §1988(b).

Under 42 U.S.C. §1988(b), a "prevailing party" is entitled to "a reasonable attorney's fee as part of the costs" in any action "to enforce a provision of [42 U.S.C. § 1983]." *Id*. at *11.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment as to Count I (Declaratory Judgment – Contracts Clause, U.S. Const. Art. 1, § 10), Count II (Declaratory Judgment – Equal Protection Clause, U.S. Const. Am. 14, § 1), Count V (Promissory Estoppel), and Count VII (42 U.S.C. § 1983) of their Complaint dated May 15, 2018.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served *via* Notice of Electronic Filing for parties or counsel who are registered to received electronic filings (as set forth below), and, served *via* First Class U.S. Mail, postage prepaid, to all other parties exempt from electronic filing, on this **20th** day of ***July***, ***2018***.

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