

2023-2100

United States Court of Appeals for the Federal Circuit

JOHNATHAN H. DINH, DWIGHT D. JERECZEK, SANDY CHUAN-DINH,
DEBORAH JERECZEK, STAN ELLIOT, RYAN TRAN, THANH NGA TRAN,
WALTER NAHM, LAUREN NAHM, PAMELA PAYSON

Plaintiffs/Appellants

vs.

United States

Defendant/Appellee

On Appeal from the US Court of Federal Claims in *No. 1:22-cv-00725-EGB*

Honorable Eric G. Bruggink, Senior Judge

AMICUS BRIEF OF ARTHUR SAMODOVITZ

UNDER FEDERAL RULE 29 OF APPELLATE PROCEDURE

IN SUPPORT OF APPELLANTS

AND REVERSAL OF DISMISSAL OF CLASS ACTION

IN US Court of Federal Claims *No. 1:22-cv-00725-EGB*

(A) I/Movant/Amicus Curiae, Arthur Samodovitz, am an individual not a corporation so no disclosure statement is required under Rule 26.1.

(B) Table of Contents

<u>Section Title</u>	<u>Page</u>
Argument	5

(C) Table of Authorities

<u>Cases</u>	<u>Pages</u>
<i>Cienega Gardens v. US</i> , 331 F.3d 1319 (Fed. Cir. 2003)	10, 12
<i>TrinCo Inv. Co. v. US</i> , 722 F.3d 1375, 1380 (Fed. Cir. 2013)	11
<i>US Trust Co. vs. NJ</i> , 431 US 1 (1977)	9,10, 12

<u>Statutes</u>	<u>Pages</u>
Emergency Low-Income Housing and Preservation Act-ELIHPA	10
Low-Income Housing Preservation and Resident Homeownership-LIHPRHA	10

Puerto Rico Oversight, Management, and

Economic Stability Act-PROMESA

3,4,5,8,9,11,12,13

Other Authorities

None

(D) Concise Statement of the Identity of the Amicus Curiae, its interest in the case, and the source of its authority to file;

I, Arthur Samodovitz, am the Amicus Curiae. I purchased about \$1.6 Million Par value of subordinate COFINA bonds (the “Bonds”) before the US enacted PROMESA on 6/30/2016, and held these Bonds until confirmation of the Plan of Adjustment (“Plan”) on or about 2/5/2019. I also purchased about \$600,000 Par value of Bonds after enactment of PROMESA and held them until Plan confirmation. I voted *against* the Plan for all of my Bonds. I qualify as a member of the Class with a right to participate in this Class Action. If the Dismissal is reversed by this Court, I can then be added as a named Plaintiff.

I have authority under Federal Rule 29 of Appellate Procedure to file this Amicus Brief in support of Appellants and Reversal of the Dismissal of the Class Action in US Court of Federal Claims (“CFC”) *No. 1:22-cv-00725-EGB*. My interest is

recovery of the loss in the value of my Bonds due to enactment of PROMESA which abrogated/took the valuable contractual right to full payment of interest and principal when due, the valuable contractual lien on the sales tax revenue pledged for payment of the Bonds, and the protection from bankruptcy. My interest is also recovery of damages due to actions taken by COFINA, the FOMB and Puerto Rico after enactment of PROMESA under authority of PROMESA in the actual taking of some interest and principal of the Bonds, the Bonds themselves and some of the pledged sales tax revenue.

(E) I authored the Motion for Leave and Amicus Brief myself, pro se, without legal representation, although I am a member of the Bar of the State of Connecticut and the Bar of the District of Connecticut. I am not acting as an attorney in this Class Action and do not represent anyone else. No one contributed money to the preparation of this Motion for Leave or Amicus Brief. Appellants' Attorneys do not represent me in filing this Motion for Leave and Amicus Brief.

(F) Argument

This Amicus Brief adopts the Appeal Brief, including the argument that enactment of PROMESA was a “per se” taking of property/contract rights, except this Amicus Brief clearly and directly asserts that the owners of the subordinate COFINA Bonds (“Bonds”) on the date of enactment of PROMESA were damaged by enactment by the United States (“US”) of PROMESA because PROMESA abrogated/took valuable contract rights of these bondholders. Therefore, the owners of the Bonds on the date of enactment of PROMESA suffered damage from the “taking”, and this damage is compensable to them under the Fifth Amendment. (Upon Information and Belief, one or more of the named Plaintiffs in Class Action *No. 1:22-cv-00725-EGB* also owned subordinate COFINA bonds on the date that PROMESA was enacted.)

The Second Amended Complaint alleged the following:

“as a direct and intended result of Congress’s enactment of PROMESA, COFINA Bondholders lost a significant portion of the principal and interest each COFINA Bondholder was entitled to, the fair market value of the pledged revenues, their security interests, and liens on the COFINA

Dedicated Sales Tax Fund, and other compensable property rights.”

Joint Appendix Page 81. (emphasis added)

“at all material times, COFINA Bondholders and all members of the class they represent were **owners of property rights compensable under the Fifth Amendment** to the United States Constitution. These property rights included COFINA bonds, **the right to repayment of all principal and interest as stated in the Sales Tax Revenue Bond Resolution**, as amended and restated on June 10, 2009, **and a security interest in (1) the Dedicated Sales Tax Fund, (2) all COFINA Revenues, as defined in the Bond Resolution, (3) all right, title and interest of COFINA in and to COFINA Revenues, and all rights to receive the same, and (4) funds, deposits, accounts, and subaccounts held by the Trustee under the Bond Resolution.”** Joint Appendix Page 82. (emphasis added)

“Congress specifically targeted bonds as part of its Puerto Rico debt restructuring law, including COFINA bonds, **by adding a unique definition of the term “Bond Claim” to include all rights to payment under a Bond, including the “right to an equitable remedy for breach of performance.”** The Act’s inclusion of equitable contractual remedies as

part of a Bond Claim denied the COFINA Bondholders actual equitable relief, replacing such relief with a claim for damages. This removal of equitable contractual remedies, in conjunction with the Act’s automatic stay—which suspended contractual and legal remedies while the stay was in place—effectively removed COFINA Bondholders’ contractually bargained for, legal, and equitable rights of recourse in the event of COFINA’s default.” Joint Appendix Page 78.

“Congress further provided that, upon the filing of a petition under Title III of the Act, an automatic stay went into effect. ... During the period of an automatic stay, creditors are prevented from starting or continuing a judicial or other action against the entity filing the Title III petition. Additionally, such creditors cannot enforce a judgment, act to take property, enforce a lien, or collect on a claim against the entity filing the Title III petition. The automatic stay includes actions with respect to bonds, loans, letters of credit, insurance obligations, and obligations arising from contracts.” Joint Appendix Pages 77-78 (emphasis added)

“Under the authority of the Act, on April 29, 2017, Puerto Rico enacted Act No. 246, allowing Pledged Property—including COFINA’s Sales Tax

Secured Fund—to be clawed back to the general treasury, where it could be used to pay Puerto Rico’s general debts. Within days, on May 3, 2017, COFINA defaulted on its obligations to COFINA Bondholders. However, **due to the Act stay provisions, COFINA Bondholders had neither a contractual nor judicial remedy for COFINA’s default and no way to enforce their security interest in the Sales Tax Secured Fund.”** Joint Appendix Page 82.

Under PROMESA, COFINA could petition for Title III bankruptcy protection virtually at will, **without cause or even a requirement of insolvency**, with approval of the FOMB. The Supreme Court previously held that the FOMB is a Puerto Rico entity in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1662 (2020). So, the FOMB would naturally approve a Title III bankruptcy petition by COFINA and there were no criteria in PROMESA to deny it. The Title III bankruptcy process under PROMESA would enable COFINA to stop paying interest and principal (of maturing Bonds) and deny the bondholders the pledged sales tax revenue for which they had rights, pursuant to PROMESA. (This occurred later in May 2017.) COFINA and the FOMB could keep COFINA in bankruptcy until the bondholders accepted the restructuring terms that COFINA and the FOMB required, and there was no legal recourse by the bondholders or other way to exit the bankruptcy. Therefore, the bondholders lost their *rights* to

full payment of interest and principal when due, the pledged sales tax revenue and the protection from bankruptcy upon enactment of PROMESA. Bankruptcy was not permitted for the US Territories, including Puerto Rico, prior to enactment of PROMESA, and this protected the bondholders. (The US Bankruptcy code excluded the Territories.) Even though the entry into the bankruptcy and confirmation of the Plan occurred later when actual money was denied to or taken from the bondholders, the bondholder's *rights* to full payment of interest and principal when due, the pledged sales tax revenue and the protection from bankruptcy were taken/lost upon enactment of PROMESA because COFINA and the FOMB could enter Title III bankruptcy and legally stop payment of the Bonds at any time after enactment of PROMESA by simply petitioning for bankruptcy for which there was no substantive impediment.

Similar taking of rights occurred in *US Trust Co. vs. NJ*, 431 US 1 (1977), where a 1974 NJ statute took from Port Authority bondholders a prior contractual protection of the bond's reserve fund under a 1962 NJ statute so the reserve fund could not be diverted for other uses. The Supreme Court stated (in dicta) that the 1974 NJ Statute constituted a taking of a compensable contract *right* of the bondholders.

“This case presents a challenge to a New Jersey statute, 1974 N.J. Laws, c 25, as violative of the Contract Clause of the United States Constitution. That statute, together with a concurrent and parallel New York statute, 1974 N.Y. Laws, c. 993, repealed a statutory covenant made by the two States in 1962 that had limited the ability of The Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves.” *US Trust Co. vs. NJ*, 431 US at 3.

“Contract *rights* are a form of property, and, as such, may be taken for a public purpose provided that just compensation is paid.” *US Trust Co. v. NJ*, 431 U.S. 1 Footnote 16. (emphasis added)

Note that the protected property in *US Trust Co. vs. NJ* was a contract *right* of the bondholders, so there was no requirement that any money actually be taken from the bond’s reserve fund to trigger just compensation.

Similarly, in *Cienega Gardens v. US*, 331 F.3d 1319 (Fed. Cir. 2003), the Federal Circuit found a compensable taking of contract *rights*, stating,

“Here the [Housing] Owners had unequivocal contractual *rights* after twenty years to prepay their mortgages; thus they had a *property interest in those rights* — both in the subject matter of the contract (the real property rights)

and *in the contract itself*.” “When Congress enacted ELIHPA and LIHPRHA, it intentionally deferred the Owners' ability to exit the housing programs and make more profitable use of their land from twenty years to forty years (or whenever in between those dates HUD consented). ... We conclude, as matter of law, that the government's actions in *enacting* ELIHPA and LIHPRHA, insofar as they abrogated the Model Plaintiffs' contractual *rights* to prepay their mortgages and thereby exit the housing programs, had a character that supports a holding of a compensable taking.”
(emphasis added)

Once again, the court held that a contract *right* is property protected by the Fifth Amendment and no money or physical property needs to be taken to trigger just compensation.

Therefore, the contract *rights* of the owners of the (COFINA) Bonds to full payment of interest and principal when due, the existing and future, pledged sales tax revenue and the protection from bankruptcy were protected under the Fifth Amendment. The abrogation/taking of these contract *rights* alone, by enactment of PROMESA, damaged the bondholders who owned the bonds on the date of enactment of PROMESA and required just compensation to them, even before any money was denied to or taken from the bondholders.

When reviewing a dismissal under RCFC 12(b)(6), “the court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the claimant’s favor.” *TrinCo Inv. Co. v. US*, 722 F.3d 1375, 1380 (Fed. Cir. 2013). Clearly, the allegations in the Second Amended Complaint that enactment of PROMESA took valuable contract rights from the bondholders leads to a reasonable inference that enactment of PROMESA damaged the owners of the Bonds.

Regardless, the courts in *US Trust Co. vs. NJ*, and *Cienega Gardens v. US*, both held that just compensation under the Fifth Amendment is required as a matter of law when valuable contract rights are taken, and PROMESA took valuable contract rights. (The amount of damage need not be proven to overcome the Dismissal.)

Nevertheless, I do not assert that all the taking and damage to the Bonds occurred upon enactment of PROMESA. I do not challenge that some amount of taking and damage also occurred due to the actions of COFINA, the FOMB and Puerto Rico after enactment of PROMESA under authority of PROMESA, and that the US is

liable for this taking and damage by *authorizing* COFINA, the FOMB and Puerto Rico to take these actions, as argued in the Appeal Brief.

In conclusion, I move this Court to reverse the Dismissal of the Class Action for the owners of the Bonds on the date of enactment of PROMESA, i.e., 6/30/2016 (and at least one day thereafter) for damage they sustained to their Bonds by PROMESA's taking of their contract rights. I also move this Court to reverse the Dismissal of the Class Action for the purchasers of the Bonds after the date of enactment of PROMESA for damage sustained to their Bonds that was not compensable to the owners of their Bonds on the date of enactment of PROMESA.

Truly,

 Sept 1, 2023
Arthur Samodovitz, Amicus Curiae

213 Tioga St. Unit 486

Ithaca, NY 14851

904-878-4026 ArthurSsails@gmail.com

(G) Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. *Rule 32(a)(7)(B)* because, excluding the parts of the document exempted by Fed. R.

App. P. 32(f):

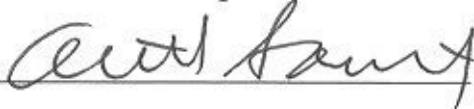
this document contains **1751** words, or

this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

this document has been prepared in a proportionally spaced typeface using **Microsoft Office 365 in Times New Roman Font Size**, or

this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s) 

Arthur Samodovitz, Amicus Curiae Dated: September 1, 2023