

Litigators of the Week: Susman Godfrey Fends Off Long-Pending \$3.89B Suit from Puerto Rico's Electric Utility for Vitol

By Ross Todd
October 1, 2021

This week's Litigators of the Week, **Alex Kaplan**, **Neal Manne** and **Weston O'Black** of **Susman Godfrey**, have been working since 2013 to get their client Vitol out from under \$3.89 billion in claims from the Puerto Rico Electric Power Authority.

In a suit originally filed in Puerto Rico in 2009, PREPA claimed Vitol violated Puerto Rico's public-contracting law and misrepresented an affiliate's involvement in a kickback scheme surrounding the UN Oil-for-Food Programme in Iraq and follow-on investigations. PREPA was seeking to rescind six fuel supply contracts with Vitol and get every penny it paid the company back.

But this week, in a [42-page opinion](#), U.S. District Judge Laura Taylor Swain in Manhattan rejected PREPA's claims citing "the absence of any legal basis for invalidating any of the contracts at issue."

Lit Daily: Who is your client and what was at stake?

Alex Kaplan: We represent two companies within the Vitol Group, an energy and commodities trading firm. The litigation centered on six contracts to supply fuel oil to PREPA, the public utility in Puerto Rico, between 2005 and 2009. There was no dispute that Vitol fully performed under those contracts – indeed, PREPA admitted Vitol was its "best supplier" and had been the low bidder on each of the contracts – but PREPA claimed that the contracts should be retroactively declared void based on an alleged reporting violation under Puerto Rico public contracting law and certain alleged misrepresentations. PREPA claimed it was entitled to a return of



Courtesy photos

(L-R) Alex Kaplan, Neal Manne and Weston O'Black of Susman Godfrey.

all payments it made over the life of the six contracts at issue, a total of \$3.89 billion.

Who all was on your team and how did you divide the work?

Weston O'Black: The original team, dating back to 2013, was the three of us: Neal as the lead lawyer, Alex as the young partner and me as the associate. **Michael Kelso** joined the team in 2015 during his first week as an SG associate, and his work has been stellar. He played a central role in developing and briefing the jurisdictional and merits issues and argued at the summary judgment hearing earlier this year. **Florence Chen** joined the team as a second-year associate in 2020 and helped brief summary judgment. She provided a fresh perspective and refined a key argument. Neal, as always, provided brilliant strategy and leadership. And from start to finish, we relied most heavily on Alex's judgment and skill. He helped craft our arguments, prepared briefs, deposed key witnesses and argued successfully at major hearings over the years, including on removal and summary judgment. But here's how long this case lasted: I was a young associate when SG was hired,

and now I've been a partner for almost 5 years. At all stages of the case, young associates were given huge responsibilities and they delivered, which is how our firm works. We also worked closely with great co-counsel in Puerto Rico: **Eduardo A. Zayas-Marxuach**, of **McConnel Valdéz LLC**, and **Andrés López**, who has his own firm.

This case dates back to a lawsuit initially filed by PREPA in Puerto Rico in 2009. Walk me through the procedural history here.

Kaplan: It's more of a long hike than a walk. Yes, this case started with a lawsuit PREPA filed against Vitol in 2009 in Commonwealth Court in San Juan. PREPA filed a second suit in 2012. Those cases were removed to federal court and consolidated. When our firm was retained in March 2013, the federal court had recently denied without prejudice PREPA's motion to remand and set an expedited schedule for all discovery, summary judgment and trial. But the case ultimately stalled in late 2013, when summary judgment and pretrial motions were fully briefed, and the trial date was continued. Eventually, in 2015, PREPA filed a motion to recuse the judge, which led to a new judicial assignment. PREPA then renewed its earlier remand motion, which was granted in March 2016. After an appeal to the First Circuit (and certiorari practice in the Supreme Court), the case went back to the Commonwealth Court.

In the meantime, Congress passed PROMESA, which created a federal judicial restructuring process for Puerto Rico similar to the bankruptcy code, and Puerto Rico filed its restructuring petition in July 2017. We removed the case to federal court based on jurisdiction under PROMESA, and PREPA later filed a motion to remand on equitable grounds. That motion was granted in February 2019, and we began to litigate the cases in the Commonwealth Courts. But in November 2019, the Federal Oversight Management Board (on behalf of PREPA) filed a separate adversary case against a group of former PREPA fuel suppliers, including Vitol, and we removed this case promptly thereafter. PREPA moved to remand the case again, but we defeated that motion after full

briefing and argument in March 2020, with the court concluding that it had diversity jurisdiction as well as jurisdiction under PROMESA. With all discovery completed back in 2013, the parties set a schedule for cross-motions for summary judgment, and we had oral argument in April 2021.

When and why was Susman brought on to handle the matter?

Manne: The case was nearing a trial date in 2013 and not much had been done. The then-GC of Vitol's U.S. business wanted to bring in trial counsel. When he asked his Puerto Rico lawyers for suggestions, one of them recommended me. I had opposed this lawyer on a huge case in San Juan years earlier. Vitol's U.S. GC, who was based in Houston, was very surprised that the Puerto Rico lawyers had recommended a Houston lawyer, but I have been handling major litigation in Puerto Rico since 1996 and know many of the great lawyers there. It pays to be nice to one's adversaries. Even while this case was pending, I tried and won an unrelated complex constitutional case in Puerto Rico against the government itself. We have deep experience handling cases in San Juan, which is a fantastic city and a great venue for trials.

What sort of fight did you have on your hands on the issue of jurisdiction?

Kaplan: There is diversity jurisdiction in this case, and there has never been a dispute about that. The jurisdictional fight focused, originally, on whether the cases were properly removable. That turned on whether forum selection clauses in the fuel-supply contracts providing for certain suits to be heard in the Commonwealth Courts applied to PREPA's claims and, if so, whether they prevented one defendant in the case (a party to the contracts) from consenting to removal by the other defendant (not a party). Over time, and with Puerto Rico's restructuring petition, the issues expanded to questions about jurisdiction under PROMESA. And most recently, the jurisdictional questions related both to PROMESA and whether PREPA had waived the contractual forum selection clauses.

What strategic steps have you taken since coming aboard that led to this week's outcome?

Manne: Our team had to master multiple, complex Puerto Rico statutory schemes, including an entirely new Civil Code that was adopted years into the litigation, and a body of case law (all in Spanish). That allowed us to present a compelling set of arguments that attacked PREPA's claims in every material respect. There were many twists and turns along the way in this case, but we were ultimately able to secure jurisdiction in federal court and prevail on the merits. And we were able to persevere because of our client: Despite the size of the claim and some setbacks along the way, Vitol had the fortitude to see this through. The court's decision is a vindication of Vitol's commitment to defend this case on the merits rather than succumb to the pressures of litigation.

Kaplan: The win on summary judgment comes from crafting the right arguments and developing the evidentiary record necessary to prevail on them. At the same time, we made sure in our advocacy not to let our sustained focus on the technical factual and legal issues obscure the larger image of what this case was (and was not) really about. It was never an effort to remedy any actual breach or damages to PREPA or the public fisc. Vitol fully performed and PREPA admitted it had no actual damages. This was simply lottery-ticket litigation, an effort to leverage a strained and ultimately meritless liability theory to obtain a massive financial windfall.

What element did the ongoing restructuring of Puerto Rico and its public entities play in this litigation?

Kaplan: Puerto Rico's restructuring petition and related adversary proceedings helped cement federal jurisdiction in this case. After what the court referred to as the "volley of removals and remands," the Federal Oversight Management Board, acting on behalf of PREPA, filed certain claims against Vitol

in the bankruptcy case, seeking to enforce the same contracts that PREPA claimed in this case were null and void. We argued that waived the contractual forum selection clauses, which for years PREPA had asserted as a bar to removal. The court agreed with our waiver argument and denied PREPA's motion to remand. That cleared the way for the case to proceed to a decision on the merits in federal court.

With PREPA currently in bankruptcy proceedings in Puerto Rico, what avenues does your client have to collect on its counterclaims?

Kaplan: We are fortunate to be working with excellent bankruptcy co-counsel at **Skadden**, and we will see how the restructuring process plays out.

What will you remember most about this litigation?

Manne: Tostones and Barrilito rum. And watching Susman Godfrey associates younger than my own children run circles around the lawyers on the other side.

Kaplan: There will be plenty of time to reflect on this one, but what I most want to be able to remember is this litigation being over once and for all, which hopefully we are now, finally, close to achieving for Vitol. I will say, though, that I was struck by how fast my heart was racing when we received the court's opinion on Monday at 9:45 am. When you've been litigating a case of this magnitude for nearly a decade, reading the opinion was surprisingly like listening to a verdict being read. It was quite a way to start a Monday morning.

O'Black: The first six months after we were hired. We were facing a trial date in 6 months and there had been no discovery. We ramped up quickly, did all the discovery – including depositions in Houston, San Juan and London – briefed summary judgment and got the case fully ready for trial. Trial was postponed shortly before our setting, but by then I had learned so much in such a very short time.