

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

BERLANTI CONSTRUCTION COMPANY, INC.
and
ILONA GERO RIEGER

Claim No. CU -0871
Claim No. CU-0657

Decision No. CU - 5880

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimants:

A. Allen Saunders, Esq.

PROPOSED DECISION

These claims against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the aggregate amount of \$2,696,817.43, were presented by BERLANTI CONSTRUCTION COMPANY, INC. and ILONA GERO RIEGER based upon asserted losses arising out of the asserted breach of a contract by Cuba. It appears that BERLANTI CONSTRUCTION COMPANY, INC., organized under the laws of Delaware, is a national of the United States. ILONA GERO RIEGER has been a national of the United States since January 28, 1957.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 983 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Claimants assert the following losses:

Claim No. CU-0871

Loss of profit	\$1,500,000.00
Premiums for bonds	17,416.13
Loss of collateral	67,414.38
Disbursements after breach	79,486.92
Legal fees	<u>200,000.00</u>

Total	<u>\$1,864,317.43</u>
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Claim No. CU-0657

Loss of profit (37.5% interest)	\$ 825,000.00
Shares of stock in Cuban corporation	<u>7,500.00</u>

Total	<u>\$ 832,500.00</u>
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The record shows that Angel Pagliuca, a stockholder of BERLANII CONSTRUCTION COMPANY, INC. (hereafter called claimant), who has filed a claim on his own behalf (CU-0632), had been negotiating with the National Housing Commission of Cuba (NHC) concerning a contract to build a low-cost housing development in Cuba. By letter dated November 8, 1958 (Exhibit A), NHC advised Mr. Pagliuca that it would agree to have claimant, which had not yet been organized, construct the development in Cuba.

Pursuant to that arrangement, an agreement was concluded on November 11, 1958 (Exhibit B) between Mr. Pagliuca, ILONA GERO RIEGER, the other claimant herein, and Louis Berlanti to form the claimant corporation. Claimant was duly organized under the laws of Delaware on November 13, 1958 (Exhibit C), and the stock interests therein were distributed as follows: Mr. Berlanti - 25%, Mr. Pagliuca and Mrs. Rieger - 37.5% each (Exhibit D).

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It further appears that NHC had agreed to enter into a contract for an amount not in excess of \$10 million as the cost of the housing development and to pay interest and finance charges in an amount not to exceed 7.5% of the basic contract cost (letters from NHC of November 10, 1958 and November 18, 1958 to Mr. Berlanti). The understanding with NHC was that the three stockholders of claimant, particularly Mr. Berlanti and Mr. Pagliuca, were to find a concern that was willing to loan \$10 million to Cuba on account of the development; that the funds were to be deposited in the Bank of Nova Scotia, New York Branch; that the funds were to be loaned to BANDES, a banking agency of the Government of Cuba, for a five-year period at 5% interest per year; and that BANDES was to make the funds available to NHC (letter of November 18, 1958 from NHC). Subsequently, NHC authorized claimant to subcontract any or all of the basic contract (letter of November 28, 1958).

Accordingly, claimant's stockholders agreed to pay a finder's fee of \$100,000.00 to a firm which ultimately procured the loan of \$10 million (Exhibits E and F). Claimant signed promissory notes covering the finder's fee of \$100,000.00, payments to begin on February 18, 1959 and continue for five consecutive months thereafter (Exhibits H and L).

On November 20, 1958, a contract was concluded between NHC and claimant for the construction of a housing development in Cuba (Exhibit A attached to original claim). It was agreed that claimant would construct the development for an amount not in excess of \$10 million with the proviso that the specific details as to the units involved would be "fixed in successive contracts according to unit groups and by provinces." The agreement was made on a "cost-plus contract" basis (Exhibit B attached to original claim).

On or about November 27, 1958, BANDES received the \$10 million (Exhibit D attached to original claim). Surety bonds were obtained in connection with the loan (Exhibit GG), and claimant was obligated to pay the premiums.

A day after the basic contract was concluded, claimant executed a subcontract with Constructora Guanahani, S.A. (Guanahani), which was assertedly

wholly-owned by Mr. Pagliuca. (See Claim CU-0632.) According to that sub-contract, dated January 21, 1958, Guanahani agreed to construct the housing development for \$8-1/2 million (Exhibit SS).

On November 28, 1958, the three stockholders of claimant caused Compania Constructora Berlanti, S.A. (Berlanti, S.A.) to be organized as a corporation under the laws of Cuba (Exhibit II). The stockholders' interests therein were the same as their interests in claimant (CU-0871); namely, Mr. Berlanti - 25%, Mr. Pagliuca and Mrs. Rieger - 37.5% each.

NHC ordered construction to begin about December 1, 1958. The record shows that construction had actually begun by Guanahani as indicated by a letter of December 24, 1958 from NHC to claimant. It further appears from the minutes of a stockholders' meeting of Berlanti, S.A., that claimant (CU-0871) assigned all its rights and interests in the construction agreement to Berlanti, S.A. on December 26, 1958 (Exhibit JJ).

On January 27, 1959, Cuban authorities ordered a halt to the construction of the development, and no further work was performed thereafter (Exhibit I attached to original claim). It is asserted by claimants that this action on the part of the Government of Cuba gave rise to the losses asserted herein.

Claimant notified the finder, to whom it was indebted in the amount of \$100,000.00, under date of February 13, 1959 that it would be unable to pay the first note due on February 18, 1959 (Exhibit HH). The evidence includes a copy of a judgment entered in a court of New York on January 3, 1961 against claimant in favor of the finder in the amount of \$90,904.46. It does not appear from the record that claimant made any payment on account of the judgment. Moreover, it does not appear that any such payment could be compelled by legal action since claimant apparently owned only one asset, the contract with NHC which it had assigned to Berlanti, S.A.

Claimant instituted an action against the Government of Cuba in the courts of Florida and obtained a default judgment on July 26, 1961 in the amount of \$6,190,382.16 (Exhibit J attached to original claim). Pertinent

files of the Department of State disclose that upon action by the Czechoslovak Socialist Republic on behalf of the Government of Cuba pleading sovereign immunity, the judgment was vacated on December 27, 1961.

Loss of Profit

Claimant asserts a loss of profit of \$1.5 million, representing the difference between the underlying basic contract and the subcontract. Mrs. Rieger asserts a loss of profit of \$825,000.00, representing her 37.5% share of \$6,190,382.16, the amount of the judgment that was vacated. In effect, Mrs. Rieger is claiming a loss as a stockholder of claimant, a national of the United States.

Section 505(a) of the Act provides as follows:

A claim under section 503(a) of this title based upon an ownership interest in any corporation, association, or other entity which is a national of the United States shall not be considered. . . .

Inasmuch as Mrs. Rieger's claim (CU-0657) in this respect is barred by the express provisions of Section 505(a) of the Act, it must be and hereby is denied. (See Claim of Mary F. Sonnenberg, Claim No. CU-0014, 25 FCSC Semiann. Rep. 48 [July-Dec. 1966].)

With respect to claimant, the record clearly shows that claimant had assigned to Berlanti, S.A. all its rights and interests under the construction contract on December 26, 1958, prior to January 27, 1959, the asserted date of loss when Cuban authorities halted all construction then in progress. In view of the foregoing, the Commission inquired as to the basis of the claim filed by claimant, the assignor before the date of loss. Counsel's response of May 1, 1970 was as follows:

The individual stockholders comprising the claimant are the same stockholders comprising the Cuban corporation, and was organized for the purpose of complying with Cuban law that only Cuban corporations could conduct and transact business in Cuba. However all transactions for the construction contract were had with the Delaware corporation claimant. As far as the claimant corporation is concerned it furnished everything necessary to the Cuban corporation to function, and actually the Cuban corporation was the alter ego of the Delaware corporation for all purposes. All contracts were entered into by and with the Delaware corporation, and the Cuban corporation never acted.

Upon consideration of this matter, the Commission finds that as of December 26, 1958 claimant no longer owned any interest in the construction contract or in any profits that could be derived thereunder despite the fact that claimant asserted Cuban losses as a deduction in its Federal tax returns for the fiscal year, November 1, 1963 to October 31, 1964. A copy of claimant's tax returns submitted in support of this portion of its claim indicates that claimant asserted a tax deduction of \$202,716.88 based upon "Preliminary costs and expenses on construction job - project abandoned." However, that tax return shows that claimant earned no profit during that fiscal year. Accordingly, there was no necessity for the Internal Revenue Service to audit the returns. The Commission therefore concludes that the record does not establish that claimant owned the claim on January 27, 1959 when it arose. For the foregoing reasons, the portion of claimant's claim for the asserted loss of profit of \$1.5 million is denied.

When this portion of the claim is considered on behalf of the stockholders of Berlanti, S.A., the same result is reached.

Since Berlanti, S.A. was organized under the laws of Cuba, it does not qualify as a corporate "national of the United States" defined under Section 502(1)(B) of the Act as a corporation or other legal entity organized under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, whose ownership is vested to the extent of 50 per centum or more in natural persons who are citizens of the United States. In this type of situation, it has been held that an American stockholder is entitled to file a claim for the value of his ownership interest. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann. Rep. 33.)

The record indicates that Berlanti, S.A. owned only one asset - the assigned construction contract. According to counsel's letter of May 1, 1970, this Cuban corporation "never acted." It further appears from a copy of a letter of January 19, 1959 from Guanahani, the subcontracting Cuban corporation, that it had expended \$256,000.00 in initial construction work.

with respect to eleven buildings. Since Mr. Pagliuca's claim (CU-0632) is based, in part, on his asserted 100% stock interest in Guanahani, these expenditures by Guanahani will be considered in the course of determining Claim No. CU-0632.

Moreover, the Commission finds no valid basis for concluding that had the "cost-plus" contracts been fully executed Berlanti, S.A. would have earned a profit of \$1.5 million. As already noted, it was a "cost-plus" contract in an amount not to exceed \$10 million. It could not therefore be concluded with any degree of certainty what the final cost would be. By the same token, the subcontract was likewise subject to the same conditions, and was not to exceed \$8.5 million. Inasmuch as construction was halted shortly after it commenced, any conclusion that an amount certain would be earned as profit would be purely speculative and without foundation. (See Claim of Robert L. Cheaney and Marjorie L. Cheaney, Claim No. CU-0915, involving the denial of a claim for estimated future profits; Claim of Ford Motor Company, Claim No. CU-3072, in which claim for loss of profits and contingent losses was denied; Claim of Cuban Electric Company, Claim No. CU-2578, in which claim for indirect losses was denied.)

The Commission finds that the evidence of record does not establish that Berlanti, S.A. sustained any loss within the meaning of Title V of the Act as a result of the termination of the construction contract. Considering claimant's assertions in this respect to be on behalf of its stockholders, this portion of the claim is denied. Mrs. Rieger, having based a portion of her claim on her stock interest in Berlanti, S.A., this portion of her claim is denied. Mr. Pagliuca's claim in this respect will be considered on its own merits in CU-0632.

Accordingly, as indicated above, Claim No. CU-0657 is denied in its entirety.

Balance of Claim No. CU-0871

The balance of this claim of claimant is based upon certain disbursements and obligations it assertedly incurred on account of the construction contract. The following losses are claimed:

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1. Insurance premiums for surety and appeal bonds	\$ 17,416.13
2. Miscellaneous expenses	96,395.90
3. Collateral pledged as security for the issuance of the bonds	67,414.38
4. Payments made by the surety company in connection with the surety bonds	143,715.33
5. Disbursements by Mrs. Rieger	147,972.88
6. Attorneys' fees	<u>200,000.00</u>
Total	<u>\$672,914.62</u>

It is noted from the record that items (1), (2) and (3) above represent expenses incurred by the Berlanti Construction Company, Inc. of New York, assertedly on behalf of claimant. The Commission inquired about these asserted losses since they appeared to have been sustained by a New York corporation on behalf of claimant, a Delaware corporation with a similar name. The Commission called attention to the fact that claims based on debts of American corporations are not allowable pursuant to Section 505(a) of the Act unless the debts were charges on property taken by the Government of Cuba. (See Claim of Anaconda American Brass Co., Claim No. CU-0112, 1967 FCSC Ann. Rep. 60.) It does not appear from the evidence of record that any of these asserted debts due from claimant were charges on property taken by Cuba. And no claim for these losses has been filed by or on behalf of the Berlanti Construction Company, Inc. of New York. Under these circumstances if such a claim had been filed, it would have to be denied.

Counsel's response of February 17, 1970 was that the claim for profit of \$1.5 million included the asserted losses under item (4) above. He added that Berlanti of New York and Louis Berlanti had contracted to advance certain moneys for the use and benefit of claimant in furthering the construction contract; and that Berlanti of New York and claimant were neither owned by the same stockholders, nor was either a wholly-owned subsidiary of the other.

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On the basis of the entire record, the Commission finds that the losses asserted under items (1), (2) and (3) above assertedly were sustained by a New York corporation on behalf of claimant.

Inasmuch as the record does not establish that these debts due from claimant, an American corporation, were charges on property taken by Cuba, the portion of the claim based on such asserted losses is denied.

Inasmuch as item (4) is essentially a part of the portion of the claim for profit of \$1.5 million which has already been denied, that portion of the claim is also denied.

The portion of the claim for disbursements in the aggregate amount of \$79,486.92 apparently is included in part under items (2) and (5) above. Since item (2) has already been denied, the applicable part of the claim in this respect is also denied. Item (5) above relates to expenses incurred by Mrs. Rieger assertedly in furtherance of the contract between claimant and NHC. An examination of the list indicates that it includes hotel, travel and related expenses assertedly paid by Mrs. Rieger in 1957, 1958 and 1959, both before the contract with NHC was concluded and after the assignment of the contract by claimant to Berlanti, S.A. The Commission finds no valid basis for concluding that these expenses constitute losses within the meaning of Title V of the Act. If it were established that these expenses were made on behalf of claimant, this portion of the claim would have to be denied because the construction contract which assertedly gave rise to these claims was assigned to a

Cuban corporation before the date of loss. If it were established that these expenses were made by Mrs. Rieger on behalf of Berlanti, S.A., in which she owned a stock interest, so that it constituted a debt of the Cuban corporation, this portion of the claim would have to be denied because the Cuban corporation, Berlanti, S.A., owned no assets with which to pay such a debt. The loss in such event would not be attributable to any action on the part of the Government of Cuba. (See Claim of PepsiCo., Inc., Claim No. CU-3596.)

The final portion of the claim of claimant is based on attorneys' fees in the aggregate amount of \$200,000.00. The first part thereof in the amount of \$100,000.00 represents services rendered in negotiating the original contracts, setting up the corporate structures in Delaware and Cuba, and in vain attempts to reinstate the contracts and defend the actions assertedly resulting from the breach of the contracts by the Government of Cuba. The second part thereof, also in the amount of \$100,000.00, involved expenses incurred in actions against the Government of Cuba to recover for the taking of property, in which the judgment in favor of claimant was vacated.

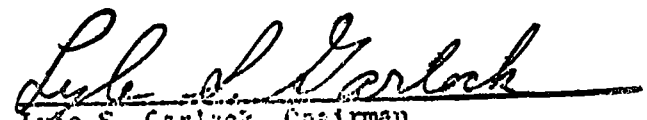
The Commission has held that claims for attorneys' fees and expenses incurred in appealing from an order of Cuba taking that claimant's property does not constitute a claim for a loss of property within the purview of Title V of the Act. (See Claim of E. R. Squibb & Sons Inter-American Corporation, Claim No. CU-2469; Claim of Mathieson Pan-American Chemical Corporation, Claim No. CU-2470.)

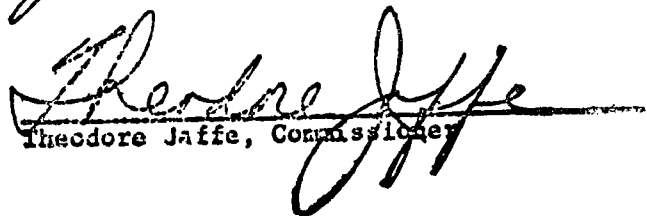
The Commission finds no valid basis for distinguishing the two portions of the claim for attorneys' fees aggregating \$200,000.00. Accordingly, these two portions of the claim are denied.

Therefore, as indicated above, Claim No. CU-0871 is denied in its entirety.

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission

OCT 7 1970


Lyle S. Garlock, Chairman


Theodore Jaffe, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g) as amended, 32 Fed. Reg. 412-13 (1967).)

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