2015-5100

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in No. 14-CV-00691, Judge Lydia Kay Griggsby

BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel states that no appeals in or from this action were previously before this Court or any other court. Undersigned counsel is not aware of any pending cases that will directly affect or be directly affected by the Court's decision in this appeal.

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BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

STATEMENT OF THE ISSUES

1. Whether the United States Court of Federal Claims (Court of Federal Claims or trial court) correctly determined that plaintiff-appellant Anthony Piszel's complaint failed to state a plausible takings claim because in the highly regulated context in which Mr. Piszel contracted, the "golden parachute" provision of his employment contract with the Federal Home Loan Mortgage Corporation (Freddie Mac) is not a cognizable property interest for purposes of the Takings Clause.

2. Whether the Court of Federal Claims correctly determined that, even if Mr. Piszel possessed a cognizable property interest, his complaint still failed to state a claim for a taking because (1) the Government had neither physically occupied, nor taken title, to his property and (2) he could have no reasonable investment-backed expectation in a "golden parachute" given that, at all relevant times, Freddie Mac was subject to pervasive Government regulation.

3. Whether the Court of Federal Claims correctly determined that Mr. Piszel's complaint failed to state a plausible claim for an illegal exaction where Mr. Piszel conceded that he had not paid any money over to the government directly or in effect.

STATEMENT OF THE CASE

I. Nature Of The Case

This is an appeal from a final decision of the Court of Federal Claims dismissing Mr. Piszel's complaint. In his complaint, Mr. Piszel, a former Chief Financial Officer of Freddie Mac whose employment was terminated in the wake of the Government's rescue of that enterprise, alleged that the Government effected an illegal exaction or a Fifth Amendment taking of his property when, pursuant to a provision of the Housing and Economic Recovery Act of 2008 (HERA), it directed that Freddie Mac not pay him certain "golden parachute" severance benefits, as

provided in his employment contract. Accepting Mr. Piszel's factual allegations as true, the trial court concluded that Mr. Piszel had not plausibly alleged an illegal exaction or a Fifth Amendment taking.

II. Course Of Proceedings And Disposition Below

On August 1, 2014, Mr. Piszel filed a complaint against the United States. In his complaint, Mr. Piszel alleges that he left his former employer in 2006 to take a position as Chief Financial Officer at Freddie Mac, at which time he entered into an employment contract with Freddie Mac providing, among other things, certain severance benefits if he was terminated "without cause." A24, 28, 55-56. Mr. Piszel further alleges that in September 2008, shortly after the Government placed into conservatorship, Freddie Mac terminated his employment at FHFA's direction, and that, pursuant to HERA, he did not receive contractual severance benefits. A35-36. Mr. Piszel's complaint contains a single count, asserting: (1) FHFA effected an illegal exaction of severance benefits that were to be paid by Freddie Mac; and (2) HERA, as applied by FHFA, effected a taking of the severance benefits in his employment contract. A38-40.

The United States moved to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. The trial court granted

the motion, ruling that Mr. Piszel "failed to state a valid takings claim" and "fail[ed] to state a plausible illegal exaction claim." A1, 9, 10, 18.

As to the takings claim, the trial court explained that Mr. Piszel possessed no cognizable property interest in his employment agreement, because a "plaintiff's private contractual rights stand on more fragile footing than tangible property interests under the takings analysis and because [Mr. Piszel] voluntarily entered into his employment agreement with the understanding that he would be working in a highly-regulated industry." A12. In addition, the trial court noted that even if Mr. Piszel "could show a cognizable property interest in the severance compensation under his employment contract – which he cannot – his taking claim would fail under applicable takings precedent" governing physical, categorical, and regulatory takings claims. A15-16 (finding no categorical taking because Mr. Piszel was not deprived of all benefits conferred by his employment contract, no physical taking because the Government "neither physically occupied, nor [took] title to, plaintiff's property," and no regulatory taking because Mr. Piszel had no reasonable investment-backed expectation regarding severance compensation "[g]iven the regulatory scheme governing Freddie Mac").

As to the illegal exaction claim, the trial court noted that such a claim arises only "where a plaintiff has paid over money to the government, directly or in effect,

and seeks return of all or part of that sum that was improperly paid, exacted, or taken" contrary to law. A9. The trial court explained that Mr. Piszel "concede[d] that he ha[d] not paid any money over to the government directly" and pled neither of the "two distinct situations" where an exaction can potentially occur "in effect." A9.

This appeal followed.

STATEMENT OF FACTS

I. Background

Freddie Mac is a corporation chartered by Congress to stabilize the United States home mortgage market and to promote access to mortgage credit. *See* Federal Home Loan Mortgage Corporation Act, Pub L. 91-351, 84 Stat. 450 (July 24, 1970), *codified as subsequently amended* at 12 U.S.C. § 1451 *et seq*. From its inception, Freddie Mac has been subject to Federal regulation and oversight, as well as the possibility that Congress might at any time amend its charter statute. Congress initially chartered Freddie Mac in 1970 as an entity owned by the Federal Home Loan Bank Board, then in 1989 reestablished it as a shareholder-owned corporation subject to the general regulatory oversight by the Department of Housing and Urban Development. *See* U.S. Government Accountability Office, *Fannie Mae and Freddie Mac: Analysis of Options for Revising the Housing*

Enterprises' Long-term Structures, at 12-14 (Sept. 2009), http://www.gao.gov/new.items/d09782.pdf (GAO-09-782).[1]

In 1992, Congress enacted the Federal Housing Enterprises Safety and Soundness Act (the Safety and Soundness Act), Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3941-4012, legislation that revised regulation of Freddie Mac and established the Office of Federal Housing Enterprise Oversight (OFHEO). GAO-09-782 at 15-16. The Safety and Soundness Act vested OFHEO with conservatorship authority over Freddie Mac. 12 U.S.C. § 4513(b)(1). OFHEO also had the statutory authority to supervise and limit executive compensation. *See* 12 U.S.C. § 4518(a)(2006) ("The Director shall prohibit the enterprises from providing compensation to any executive officer of the enterprise that is not reasonable and comparable with compensation for employment in other similar businesses . . . involving similar duties and responsibilities.").

By 2005, legislation to buttress the existing statutory scheme was pending in Congress. *See* A179 (H. R. Rep. No. 109-171, pt. 1, at 13 (2005)). The legislation included proposals for enhanced oversight of executive compensation, including a provision that would have specifically authorized Freddie Mac's regulator to disallow contractual severance payments to senior executives, even if

[1] The Court may properly take notice of this publically available Government report. *See e.g.*, *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 435 n. 27 (S.D.N.Y. 2014).

the regulator had previously approved the contracts. *See id.* In its year-end "Annual Information Statement," referencing this legislation, Freddie Mac cautioned that there was an "uncertain regulatory environment:"

> On October 26, 2005, the House of Representatives passed a bill concerning [Government Sponsored Enterprise] regulatory oversight. The Senate Committee on Banking, Housing, and Urban Affairs passed a bill concerning GSE regulatory oversight on July 28, 2005. The bills . . . differ in various respects, although each in its current form would result in significant changes in the existing GSE oversight structure.

A171.

When the United States' housing market and mortgage banking industry began to decline sharply in value and suffer significant losses, in 2007 and 2008, Freddie Mac began to experience increasing losses in its holdings in subprime mortgages and other mortgage-backed securities. GAO-09-782 at 7. At the same time, it faced a severe reduction in the value of its assets and a critical decline in its ability to raise capital. *Id.*

In July 2008, as a nationwide housing crisis grew and Freddie Mac's financial situation deteriorated, Congress passed HERA. Pub. L. No. 110-289, 122 Stat. 2654. Through HERA, Congress transitioned regulatory oversight of Freddie Mac from OFHEO to its newly-organized successor, the Federal Housing

Finance Agency (FHFA). As part of this transition, Congress transferred conservatorship authority to FHFA.

On September 6, 2008, FHFA placed Freddie Mac into a conservatorship, pursuant to 12 U.S.C. § 4617. The United States thereafter provided more than $70 billion in funds to enable Freddie Mac to maintain a non-negative net worth. A163-64.

HERA grants FHFA specific authority, by regulation or order, to prohibit or limit golden parachute payments to Enterprise executives. *See* 12 U.S.C. § 4518(e)(1) ("The Director may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment."). On September 16, 2008, FHFA issued a regulation to implement HERA's golden parachute provisions. *See* A33 (citing 12 C.F.R. part 1231). That regulation provides that a golden parachute payment is a payment that is "contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the regulated entity; and is received on or after the date on which . . . [a] conservator or receiver is appointed for such regulated entity." 12 C.F.R. § 1231.2. Excluded from the definition of a golden parachute are "[a]ny payment[s] made pursuant to a bona fide deferred compensation plan." *Id.*

II. Mr. Piszel's Allegations

Mr. Piszel alleges that to induce him to leave his former employer and become Freddie Mac's Chief Financial Officer, Freddie Mac agreed to provide him with severance benefits in the event that he was terminated without cause during the first four years of his employment. *See* A28-29. Specifically, Mr. Piszel alleges that Freddie Mac agreed to provide him in that event with a lump sum payment and continued vesting of certain restricted stock unit awards, and that OFHEO approved these contractual terms. *See* A24-25, 28-29. Mr. Piszel became Freddie Mac's Chief Financial Officer in November 2006. A26.

On September 28, 2008, shortly after FHFA placed the Freddie Mac into conservatorship, Mr. Piszel was terminated from his employment at Freddie Mac. *See* A25. Mr. Piszel alleges that, at that time, the CEO of Freddie Mac received a letter from FHFA Director Lockhart stating that Mr. Piszel should be terminated without cause, that "providing Mr. Piszel with severance payment should not occur," and that this "directive specifically applie[d] to any salary beyond the cessation of Mr. Piszel's employment, any annual bonus for 2008 and any further vesting of stock grants." A35-36. Upon Mr. Piszel's termination, Freddie Mac did not pay him the severance compensation provided for under his employment agreement. A36.

SUMMARY OF ARGUMENT

Mr. Piszel left his job as Chief Financial Officer of a healthcare company for what he perceived as greener pastures at Freddie Mac. As a sophisticated senior executive, Mr. Piszel knew, or should have known, that Freddie Mac was a highly-regulated, Federally-chartered entity. Federal regulations – at all times – included limitations and oversight of executive compensation. When Mr. Piszel joined Freddie Mac, the law prohibited executive compensation if it was not "reasonable" or was not "comparable" to the compensation of executive officers "in other similar businesses." *See* 12 U.S.C. § 4518(a) (2006). Even more significantly, legislation to buttress these existing regulations was pending before Congress. *See* A177-79. Freddie Mac itself noted the pending legislation, and the "uncertain regulatory environment" it created, in its "Annual Information Statement" the year *before* Mr. Piszel came on board. *See* A171.

In September 2008, nearly two years into Mr. Piszel's tenure as Chief Financial Officer, Freddie Mac's dire financial circumstances led the Federal Housing Finance Agency (FHFA) to place it into conservatorship, the rough equivalent of a reorganization in bankruptcy for a regulated financial institution. *See* A34. A few days later, Mr. Piszel, along with much of Freddie Mac's senior management, was fired. *See* A35. FHFA invoked its statutory authority to

prevent Mr. Piszel from collecting golden parachute payments. A25, 35. At about the same time, "the Government eliminated Freddie Mac's dividends on common and preferred shares, halted the company's lobbying and political activities, [and] began a review of the company's charitable activities." A25. Even with these cost-saving measures in place, taxpayers had to infuse more than $70 billion into Freddie Mac simply to keep it solvent. A164.

Mr. Piszel now contends that a "taking" of the golden parachute severance benefits in his employment contract occurred because restrictions being considered when he joined Freddie Mac became a reality. Mr. Piszel spends much his brief arguing that the Safety and Soundness Act – the statute buttressed by HERA – did not authorize Freddie Mac's regulator to reconsider at the time of separation whether contractual severance payments were reasonable. *See* Applnt. Br. 28-33. This argument misses the point. HERA, the statute in place when FHFA acted, indisputably authorized the agency to disallow contracted-for golden parachute payments. And a private contract, however express, cannot freeze existing regulations or fetter Congress's unquestionable authority to eliminate loopholes in an existing regulatory structure. *See, e.g., Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986). Mr. Piszel

chose to enter a pervasively regulated field – one where oversight of executive compensation was already in place and legislation strengthening that oversight was pending. No taking occurred, therefore, when HERA was enacted and implemented.[2]

The Court should affirm the dismissal of Mr. Piszel's takings claim for several independent reasons. *First*, because the pervasive federal regulation of Freddie Mac – including its executive compensation – was always subject to legislative refinement, Mr. Piszel had no cognizable property interest in the terms of his employment agreement with Freddie Mac. *Second*, Mr. Piszel does not (and cannot) allege that the Government's action actually appropriated his contract – which is necessary to establish a Fifth Amendment taking – as opposed to merely frustrating his contractual expectations. *Third*, Mr. Piszel lacked a reasonable investment-backed expectation that the Government would take no action to buttress existing regulations or to eliminate loopholes in the existing regulatory

[2] Indeed, a line of decisions arising from a prior legislative overhaul of financial institutions regulation – the Financial Institutions Reform, Recovery and Enforcement Act of 1989 – confirms that Federal financial-institution regulators' use of later-enacted statutory authority does not effect a taking of pre-existing contract and shareholder rights. *See, e.g.*, *Cal. Housing Securities, Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613-14, 619 (D.C. Cir. 1992); *Meriden Trust and Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 455 (2d Cir. 1995); *Andrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 19 (1st Cir. 1993); *North Arkansas Medical Center v. Barrett*, 962 F.2d 780, 789-90 (8th Cir. 1992).

structure, meaning that his takings claim would fail if analyzed under *Penn Central Transp. Co v. City of New York*, 438 U.S. 104 (1978). *Fourth*, Mr. Piszel cannot establish a *per se* taking because the narrow exceptions to *Penn Central* carved out for physical and categorical takings are inapplicable.

Mr. Piszel's illegal exaction claim is likewise meritless. Mr. Piszel does not (and cannot) allege the most basic element of such a claim, namely, that he paid over money to the Government, either directly or in effect. *See* A9-10. Consequently, the dismissal of his illegal exaction claim should also be affirmed.

ARGUMENT

I. Standard Of Review

This court reviews legal conclusions by the Court of Federal Claims *de novo*. *Estate of Hage v. United States*, 687 F.3d 1281, 1285 (Fed. Cir. 2012). The existence of a compensable property interest in a takings case is a question of law that is subject to *de novo* review. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013).

II. Mr. Piszel's Takings Claim Fails As A Matter Of Law

Mr. Piszel decided to take a position at Freddie Mac – one of the most highly-regulated companies in the United States economy. Executive compensation at Freddie Mac was regulated for reasonableness when Mr. Piszel

joined and legislation to strengthen the existing regulatory structure was then pending in Congress. It has long been the law that contracts in a highly-regulated field are not immune to changes in the law; indeed regulations that buttress an existing regulatory structure are to be expected. *See, e.g., Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 226-27. Mr. Piszel employment contract is therefore no shield to regulatory change – particularly changes that he could and should have anticipated.[3]

Mr. Piszel's takings claim is unsound as a matter of law. As we explain below, Mr. Piszel lacked a cognizable property interest on which a takings claim could be based. Further, Mr. Piszel's contract was not appropriated by the Government; its performance was merely frustrated, which, under *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), is legally insufficient to effect a taking. And Mr. Piszel has not alleged a plausible physical, categorical, or regulatory takings theory. Accordingly, the Court should affirm the dismissal of this action.

[3] The circumstances of this claim are particularly troubling. Mr. Piszel was terminated by Freddie Mac, at FHFA's directive, when Freddie Mac's dire financial condition caused it to be placed into conservatorship. Yet, Mr. Piszel now demands payment of his golden parachute – a payment that Congress prohibited in HERA as unreasonable – despite the fact Federal taxpayers were called upon to contribute billions of dollars simply to keep his former company afloat.

A. Mr. Piszel's Claim Lacks A Threshold Element For Any Takings Claim – A Protected Property Interest

In evaluating whether governmental action constitutes a taking for Fifth Amendment purposes, the Court must first "determine[] whether the claimant has identified a cognizable Fifth Amendment property interest[4] that is asserted to be the subject of the taking." *Acceptance Insurance*, 583 F.3d at 854. Only then does it matter whether that interest has been taken. *See id.* In other words, as a threshold matter, where the claimant fails to demonstrate the existence of a protected property interest, "the court's task is at an end" and the action is to be dismissed. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

Mr. Piszel asserts that the statute in place at the time he contracted did not authorize disallowance of severance payments,[5] and argues that the "new powers the Government acquired under HERA neither divested Mr. Piszel of his property

[4] The existence of a compensable property interest is determined by the legal framework under which the right is acquired. *See, e.g.*, *Acceptance Insurance*, 583 F.3d at 857. The "existing rules and understandings" and "background principles" of law embodied by that framework "define the citizen's relation to the physical thing" and set the "dimensions of the requisite property right for purposes of establishing a cognizable taking." *Id.* (internal quotation marks and citations omitted). Here, as we explain, at the time Mr. Piszel contracted with Freddie Mac, Freddie Mac's executive compensation was already subject to regulation, and legislation to strengthen that regulation by conferring substantially the same authority FHFA ultimately exercised was already pending.

[5] That assertion is debatable, *see* pp. 6-7, but the issue is not germane here as Mr. Piszel lacked a cognizable property interest regardless.

interest in his termination benefits, nor salvage the lower court's decision." Applnt. Br. 33. Mr. Piszel's premise that he ever had a cognizable "property interest in his termination benefits" is incorrect. As we explain, because Freddie Mac has always been subject to pervasive regulation – including regulation of its executive compensation – Mr. Piszel *never acquired* a property interest in his severance package that could insulate it from subsequent legislation.

1. The Pervasive Federal Regulation Of Every Aspect Of Freddie Mac's Operations Precludes The Existence Of A Protected Property Interest

It is undisputed that Freddie Mac – a federally-chartered financial entity – was at all times subject to pervasive Government regulation. *See, e.g.*, 12 U.S.C. § 4501 *et seq.* (1992). Significantly, this Government regulation included the subject area of executive compensation. *See* 12 U.S.C. § 4518(a).

Property subject to pervasive regulation is not protected by the Takings Clause. *See, e.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) ("Where a citizen voluntarily enters into an area which from the start is subject to pervasive Government control, a property interest is likely lacking."). As this Court has explained, "enforceable rights sufficient to support a taking[s] claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control."

Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993). As the Eighth Circuit has reiterated, "[p]roperty ownership is not without inherent limitation[,]" and "in highly regulated markets" one such limitation is "the possibility that new regulation might render [personal] property economically worthless." *Minneapolis Taxi Owners Coalition v. City of Minneapolis*, 572 F.3d 502, 508-09 (8th Cir. 2009) (holding that taxicab licenses did not embody a property interest that protected against change in the municipal code that eliminated substantially all of their economic value) (citing *Mitchell Arms*).

Federally-chartered financial institutions, such as Freddie Mac, operate in just such a highly regulated environment, which Mr. Piszel voluntarily entered when he decided to become Freddie Mac's Chief Financial Officer. *See Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994); *Cal. Housing Securities, Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992); *Transohio Sav. Bank v. Office of Thrift Supervision*, 967 F.2d 598, 613-14, 619 (D.C. Cir. 1992).

Cases extending back more than 100 years establish that it makes no difference if FHFA was exercising a statutory power that Congress provided *after* Mr. Piszel contracted with Freddie Mac;[6] no taking occurs where Congress acts to

[6] The United States disputes the premise of Mr. Piszel's argument, namely, that FHFA's predecessor could do nothing about unreasonable compensation that it initially accepted. *See* Applnt. Br. 28-33. The plain language of SASA does not

bolster restrictions or eliminate loopholes in an existing regulatory regime. For instance, in *Concrete Pipe*, 508 U.S. 602, the Supreme Court rejected the claim that *changes* to governing regulations effected a taking where, the subject area – pensions – was already regulated. "At the time Concrete Pipe . . . began its contributions . . . , pension plans had long been subject to federal regulation, and '[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Id*. at 645 (quoting *Federal Housing Admin. v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). "Because 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts,' *Turner Elkhorn*, 428 U.S., at 16, 96 S.Ct., at 2882, Concrete Pipe's reliance on ERISA's original limitation of contingent liability . . . [was] misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted." *Concrete Pipe*, 508 U.S. at 645.

Similarly, in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), the Supreme Court rejected the argument that regulatory changes effected a taking because they interfered with existing contract rights:

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compel such a conclusion. *See* 12 U.S.C. § 4518. However, as we explain, the issue is not material to the outcome of this appeal.

> Appellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. . . . Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, *when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity*. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

Id. at 224, 226-27 (quoting *Norman v. Balt. & O. R. Co.*, 294 U.S. 240, 307-08 (1935)) (emphasis added). In rejecting the claimants takings claim, the Supreme Court reaffirmed the bedrock principle that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 227 (quoting *The Darlington*, 358 U.S. at 91).

Concrete Pipe and *Connolly* are simply the most recent in a long line of the Supreme Court decisions rejecting the notion that a private party, who contracts in a regulated field, can demand compensation if Congress changes or strengthens the statutory scheme. "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not

condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by 'prophetic discernment.'" *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *accord Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482 (1911).

Indeed, the Supreme Court has specifically recognized "the power of the Congress to *invalidate the provisions of existing contracts* which interfere with the exercise of its constitutional authority" without incurring takings liability. *See Norman v. Balt. & O. R. Co.*, 294 U.S. 240, 302 (1935) (emphasis added). "There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt."[7] *Id.* at 309-10 ("To subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic

[7] The uniformly-recognized contract-law tenet that a party's performance will be excused when Government action renders the performance of a contractual duty impossible, reaffirms this underlying principle. *See, e.g.*, Restatement (Second) of Contracts §264 (1981); *Housing Auth. v. E. Tenn. Light & Power Co.*, 183 Va. 64, 71-72 (1944) (describing the "defense of impossibility of performance" as "an established principle of law").

discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation.").

In two analogous cases involving heavily regulated financial institutions placed into receivership by the Federal Deposit Insurance Corporation and Resolution Trust Corporation, this Court concluded that the shareholders of these institutions lacked the requisite property interests to support a takings claim.[8] *See Golden Pac. Bancorp*, 15 F.3d 1066; *Cal. Housing*, 959 F.2d 955. In these cases, this Court concluded that holders of economic interests in an enterprise long subject to significant Government intervention lack "the fundamental right to exclude the government from [their] property," and maintain "less than the full bundle of property rights." *Golden Pac. Bancorp*, 15 F.3d at 1073-74 (internal quotation omitted). The holders of economic interests in entities that a regulator may place into conservatorship or receivership, such as banks or Freddie Mac, "d[o] not possess th[is] most valued property in the bundle of property rights," *Cal. Housing*,

[8] When analyzing HERA's provisions, courts have frequently turned to precedent interpreting the analogous conservatorship and receivership authority of the FDIC and RTC. *See, e.g., In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("the Court is persuaded by decisions that have reached the same conclusion when interpreting [FIRREA], whose provisions regarding the powers of federal bank receivers and conservators are substantially identical to those of HERA."), *aff'd sub nom. Louisiana Mun. Police Retirement Sys. v. Fed. Housing Fin. Agency*, 434 Fed. App'x. 188 (4th Cir. 2011).

959 F.2d at 958, and are therefore "unable to establish a compensable taking." *Golden Pac. Bancorp*, 15 F.3d at 1073.[9]

The D.C. Circuit reached the same conclusion in a case in which the plaintiff argued that enforcement of a newly-enacted statute (FIRREA) effected a taking of contract rights grounded in the prior regulatory structure. *Transohio Sav. Bank v. Office of Thrift Supervision*, 967 F.2d 598, 613-14 (D.C. Cir. 1992). The court explained that the plaintiff (a savings bank subject to minimum capital requirements) "*has no property interest that could be unconstitutionally taken*" by legislation disavowing a contractual regulatory capital forbearance because "[t]he thrift industry is pervasively regulated." *Id.* (emphasis added).

Similarly, in a recent case, the District Court of the District of Columbia relied on *Golden Pacific* and *California Housing* to reject a takings claim against FHFA and the Department of the Treasury stemming from an amendment to the Senior Preferred Stock Purchase Agreements entered into between Treasury and the Conservator on behalf of Fannie Mae and Freddie Mac (collectively, GSEs). *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208, 241-42 (D.D.C. 2014), *appeal docketed*, No.14-5243 (D.C. Cir. 2015). The court explained that the "plaintiffs

[9] The fact that the *California Housing* and *Golden Pacific* cases were brought by shareholders, rather than the counterparty to an express contract, is irrelevant because, among other things, shareholder interests are themselves contractual in nature.

fail to plead a cognizable property interest, for takings purposes, because the GSEs – and, therefore, the plaintiff shareholders – lack the right to exclude the Government from their property." *Id*. at 241. The court further explained:

> *Golden Pacific* and *California Housing* stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership. Whether the defendants executed the Third Amendment to generate profits for taxpayers or to escape a downward spiral of the GSEs seeking funding in order to pay owed dividends back to Treasury, *it does not change the fact that it was executed during a period of conservatorship and, thus, after the plaintiffs' property interests–whatever they may have been prior to the Third Amendment–were extinguished*. Unless the plaintiffs can demonstrate that FHFA could not legally impose a conservatorship upon the GSEs at the time of the Third Amendment, allegations of mischievous intentions during a conservatorship do not revive already eliminated cognizable property interests.

Perry Capital, 70 F. Supp. 3d at 242 (emphasis added) (internal citations and quotations omitted).[10]

The reasoning underlying the Federal Circuit's holdings in *Golden Pacific* and *California Housing*, which other courts embraced in *Transohio* and *Perry Capital*, applies equally to senior officers at heavily regulated institutions like

[10] The *amicus* brief filed in connection with this action focuses primarily on *Perry*. The discussion in that brief does not affect this analysis and, indeed, the *amici* specifically state that they take no position as to whether Mr. Piszel possesses a cognizable property interest.

Freddie Mac. Such executives, including Mr. Piszel, accept their positions with eyes open and are presumed know as much (if not more) than prospective shareholders about the terms of their employment contracts and the nature of the business and regulatory landscape facing their company.

Long before Mr. Piszel accepted the job as Freddie Mac's Chief Financial Officer, Freddie Mac had been subject to extensive Federal oversight and regulation. As explained by the district court in *Perry Capital*, "[s]ince 1992, when Congress established FHFA's predecessor, [OFHEO], the GSEs have been subject to regulatory oversight, including the specter of conservatorship or receivership under which the regulatory agency succeeds to 'all rights' of the GSEs and shareholders." 70 F. Supp. 3d at 240; *see also* A31 (acknowledging the conservatorship authority that existed when Mr. Piszel entered into the employment agreement).

Moreover, Congress granted both OFHEO and FHFA statutory authority to limit executive compensation. *See* 12 U.S.C. § 4518(a). Indeed, Mr. Piszel implicitly acknowledges that his employment agreement and its compensation-related provisions were at all times subject to FHFA's oversight. *See* A29-30. Similarly, the statutes empowering FHFA (and its predecessor) to limit executive compensation and preclude golden parachute payments provide the

"background principles" of Federal law that inform – and limit – any property rights Mr. Piszel could otherwise have obtained through his employment agreement. *See Perry Capital*, 70 F. Supp. 3d at 241 ("This enduring regulatory scheme governing the GSEs at the time the class plaintiffs purchased their shares represents the 'background principle' that inheres in the stock certificates.").

2. Mr. Piszel's Cases Do Not Immunize His Employment Contract From Regulatory Change Or Establish A Right To Compensation

Mr. Piszel relies on lower court cases that, as he construes them, conflict with Supreme Court precedent, discussed above.[11] *See* Applnt. Br. 33. This Court is, of course, bound to follow Supreme Court decisions. *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 880 (Fed. Cir. 2011). Furthermore, the cases Mr. Piszel cites do not concern a pervasively regulated industry, or do not involve contract expectancies, or both, meaning that they are readily distinguishable from this action. *See, e.g.*, Applnt. Br. 33 (citing *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154

[11] Mr. Piszel also cites, but does not discuss, *Eastern Enterps. v. Apfel*, 524 U.S. 498 (1998), and *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). Neither case concerns an alleged taking of contract rights. *Pewee Coal* arose when, by Executive Order, the United States "possessed and operated" plaintiff's mines, and thus addresses a physical taking of real property. 341 U.S. at 115; *see also id.* at 116 (referring to "the seizure of the mines"). In *Eastern Enterprises*, in a splintered opinion, a majority of the Court rejected the contention that Eastern possessed a protected property right, and, accordingly, rejected Eastern's takings claim. 524 U.S. at 540, 554; *see also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("we are bound to follow the five-four vote *against* the takings claim in *Eastern*") (emphasis added).

(Fed. Cir. 2014), which concerned automobile franchise agreements that had *not* been subject to pervasive Federal regulation).

Mr. Piszel urges the Court to focus on *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), a case that he describes as "directly on point." *See* Applnt. Br. 34. Mr. Piszel ignores that this Court, in subsequent decision by a seven-judge panel (that included all judges on the earlier *Cienega Gardens* panel) limited the 2003 *Cienega Gardens* holding, giving it no precedential value even as to other plaintiffs in the very same case. *See Cienega Gardens v. United States*, 503 F.3d 1266, 1291 (Fed. Cir. 2007) (*Cienega Gardens II*). But even if that subsequent development is ignored, the housing programs in *Cienega Gardens* did not arise in a highly-regulated field. *See* 331 F.3d at 1350 (contrasting the "housing programs involved here" with the banking industry, and finding "no evidence" that housing was highly-regulated). Moreover, the effect of regulatory restrictions on *real property* was the crux of the takings claims in *Cienega Gardens*. 331 F.3d at 1328 (the regulations at issue "defeated the [plaintiffs'] real property rights"). As this Court explained in *Chancellor Manor*, a companion case about the same regulatory restriction decided on the same day as *Cienega Gardens*, "the 'contract' right Appellants assert was taken is, in fact, a right grounded *in real property, and not in contract*." *Chancellor Manor v. United States*, 331 F.3d 891,

903 (Fed. Cir. 2003) (emphasis added). Because this case does not involve a contract "that affects . . . underlying [real] property rights," *Cienega Gardens* is inapposite. *Palmyra Pacific Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1369 (Fed. Cir. 2009).

Mr. Piszel urges this Court to find a taking nevertheless, arguing that his "employment agreement did not give Congress the right to modify the contract, mention the likelihood of Congress doing so, or allocate the risk of modification to Mr. Piszel." Applnt. Br. 36. He thus seeks to use his private contract as a shield to immunize him from changes in the law. *See id.* This is the very argument that the Supreme Court has repeatedly rejected. *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 224, 226-27, *The Darlington*, 358 U.S. at 91; *Fleming*, 331 U.S. at 107; *Norman*, 294 U.S. at 309-10; *Louisville & Nashville*, 219 U.S. at 482; *see also Hearts Bluff*, 669 F.3d at 1330. Mr. Piszel lacked a cognizable property interest to serve as the predicate for a takings claim because he entered a pervasively regulated area, *see id.*, indeed one in which legislation to strength existing limitations on executive compensation was pending when he entered it, *see* A177-79, and his claim should be dismissed for that reason.

B. The Government Did Not Take Mr. Piszel's Contract Rights In Any Event

1. Supreme Court And Federal Circuit Precedent Establishes That The Mere Frustration Of A Contractual Expectancy Is Insufficient To Establish A Taking

Congress does not "take" a contract in the Fifth Amendment sense if, by statute, Congress prohibits, invalidates, or frustrates the contract. A taking of contract rights occurs only if the Federal Government *appropriates* the contract for its own use by substituting itself for the contracting party. This proposition, rooted in Supreme Court precedent, renders Mr. Piszel's takings claim invalid as a matter of law.

The decisions in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and *Norman* are illustrative. In *Omnia*, the plaintiff Omnia Commercial had a valuable contract to purchase steel from the Allegheny Steel Company at a price under the market. *See Omnia*, 261 U.S. at 507. The Government requisitioned Allegheny's entire production of steel for the year "and directed that company not to comply with the terms of [Omnia's] contract, declaring that if an attempt was made to do so the entire plant of the steel company would be taken over and operated for the public use." *Id.* The Supreme Court rejected Omnia's contention that this action by the Government was a taking of Omnia's contract. The Court reasoned that Omnia's contract "was not appropriated, but ended." *Id.*

at 511. Although Mr. Piszel cites *Omnia* for the proposition that the Government *can* take contracts, he conspicuously ignores *Omnia*'s holding that, unlike direct appropriation, frustration of a private contract *does not* effect a taking. Applnt. Br. 27

The Supreme Court reiterated that distinction in *Norman*, where it upheld a Federal statute that nullified provisions in private contracts requiring payment in gold. "There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt." *Norman*, 294 U.S. at 309-10. In other words, unless the Government assumes the rights and obligations of the plaintiff's contract – to the exclusion of the plaintiff – there is no taking.

Mr. Piszel's takings claim fails because he does not allege that the Government appropriated his contract or succeeded to his contractual rights. Mr. Piszel alleges instead that the Government directed a third party, Freddie Mac, not to perform, thereby frustrating Mr. Piszel's contractual expectancy in severance benefits. *See* A36. The frustration of Mr. Piszel's employment contract is insufficient to establish a taking of that contract by the United States. *See Omnia*, 261 U.S. at 507; *see also Palmyra Pacific*, 561 F.3d at 1365 (The Government

"does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights."); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1379, 1380 (Fed. Cir. 2008) (Because Huntleigh "conceded that the government did not actually assume its contracts" it failed to state a claim "predicated upon a taking of the contracts."); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005) (Air Pegasus alleged "that the FAA, by regulating helicopters owned by third parties, frustrated its business expectations," but, "like the appellant in *Omnia*, Air Pegasus, while no doubt injured by reason of the government's actions, has not alleged a taking."); *767 Third Ave. Assocs. v. United State*s, 48 F.3d 1575, 1582 (Fed. Cir. 1995) ("no interest is taken when a contract is merely frustrated by a regulation directed toward a third party").

2. ***A&D* Is Not To The Contrary And Does Not Apply Here**

Mr. Piszel disregards *Omnia* and its progeny in his opening brief. However, before the trial court, Mr. Piszel – citing this Court's decision in *A&D* – argued that Government action was "directed" at him, and for that reason, *Omnia* notwithstanding, the frustration of his contract constituted a taking. *See* A114 (citing *A&D*). This argument is unsound. As this Court has acknowledged, such

a "'targeting' argument runs afoul of well-settled case law." *Palmyra Pacific*, 561 F.3d at 1369 (citing *Omnia*).

In *A&D*, the Court held that where the Government allegedly exercised "coercive" influence over a third party in an arena that had not been subject to pervasive Federal regulation, if attributable to the Government, the third party's action could potentially effect a taking. *A&D*, 748 F.3d at 1154. It was in this specific context that the Court distinguished between Government restrictions that predated the plaintiff's acquisition of the property in question, and those that post-dated the acquisition, holding that post-acquisition restrictions "cannot be said to 'inhere' in the plaintiff's title." *See id* at 1152. *A&D* does not purport to address the abundant precedent confirming that in a highly regulated environment, Government action that frustrates contract rights does not effect a compensable taking – the decision mentions neither *Connolly*, nor *Concrete Pipe* (nor, for that matter, *Golden Pacific*, *California Housing*, *Mitchell Arms*, or *Hearts Bluff*).

A&D does not trump *Omnia* – a case where the Government's directive could hardly have been more targeted at the steel purchaser's contract. *See TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 880 (Fed. Cir. 2011) ("We are … bound by Supreme Court precedent"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of th[e] [Supreme] Court has direct application in a

case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions."). Further, the discussion of "targeting" in *A&D* cannot plausibly be extended to contexts that *do* involve pervasive Federal regulation without creating a conflict with *Concrete Pipe* and *Connolly*. As a result, *A&D* should apply only in cases where, like the situation in *A&D*, but unlike the situation here, the contract at issue did not arise in an area of pervasive Federal regulation.[12]

3. Mr. Piszel Cannot State A Viable Regulatory Takings Claim Under *Penn Central*

Mr. Piszel lacked a reasonable investment-backed expectation that the Government would take no action to buttress existing regulations or eliminate loopholes in the existing regulatory structure, meaning that his takings claim fails if analyzed under *Penn Central*.

The *Penn Central* test has three components: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of

[12] Furthermore, "[p]anels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*." *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2013). A broad application of *A&D* would be inconsistent this Court's decisions in *Palmyra*, *Huntleigh*, *Air Pegasus*, *767 Third Ave,* and *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1996).

the government action." *Penn Central*, 438 U.S. at 124. The Supreme Court has refused to find a taking when even one of those components is not satisfied. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (no taking where plaintiff lacked a reasonable investment-backed expectation); *see also Norman v. United States*, 429 F.3d 1081, 1094 (Fed. Cir. 2005) ("[W]e note that on those occasions when this court and the Supreme Court have found a single factor dispositive of the takings issue, it has been the absence of that factor – not its presence – that proved dispositive.").

Here, the trial court explained that Mr. Piszel had no reasonable investment-backed expectation to support his takings claim:

> "In determining whether a reasonable investment-backed expectation exists, one relevant consideration is the extent of government regulation within an industry." *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 885 F. Supp. 2d 156, 195 (D.D.C. 2012) (collecting cases); *see also Monsanto*, 467 U.S. at 1005 ("[T]he force of [the reasonable investment-backed expectations] factor [here] is so overwhelming . . . that it disposes of the takings question . . . ."). Given the regulatory scheme governing Freddie Mac, plaintiff simply could not have had a reasonable investment-backed expectation to receive the severance compensation under his employment agreement. *See* 12 U.S.C. § 4518(a).

A17. This conclusion is plainly correct and Mr. Piszel's regulatory takings claim therefore fails.

Under the principles set out by the Supreme Court in *Norman*, *Concrete Pipe*, *Connolly*, it is inherently unreasonable for private parties to expect that their contracts will not be affected by subsequent legislation. "[W]hen contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity." *Norman*, 294 U.S. at 307-08. "[C]ontracts must be understood as having been made in reference to the possible exercise of the rightful authority of the government," and "no obligation of a contract can extend to the defeat of that authority." *Id*. at 305 (quotation marks and citation omitted).

The case law is replete with courts holding that participants in the highly-regulated banking, insurance, and finance industries lack a reasonable expectation that regulations will remain frozen, that regulatory evolution in these industries is the norm, and that such evolution does not work a taking. *See, e.g.*, *Golden Pac. Bancorp.*, 15 F.3d at 1074 (finding that "the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation" "[g]iven the highly regulated nature of the banking industry") (internal quotation marks and citations omitted); *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 154-55 (1st Cir. 2012) ("As a baseline proposition, the Trust's expectations are substantially diminished by the highly regulated nature of the industry in which it operates . . . [g]iven the historically heavy and continuous

regulation of insurance in Maine" and "ought to at least be aware of the heightened possibility that new insurance regulations might" affect it; "[t]his is particularly true where, as here, the extensive regulatory framework in place prior to the passage of the challenged legislation has consistently regulated the type of property interest for which the claimant seeks constitutional protection" and legislation had been proposed to "close [a] perceived loophole").

Indeed, in the aftermath of the savings-and-loan crisis of the 1980s, numerous Courts of Appeals ruled that regulatory changes Congress enacted in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) – changes that adversely affected existing contracts and investments – did not work a taking because of the highly regulated nature of the industry.

- In *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1996), this Court rejected the argument that enforcement of a newly enacted FIRREA cross-guarantee provision worked a taking of the rights of shareholders who had invested at a time when no such obligation existed; the Court explained that "[t]he . . . point in *Connolly* and *Concrete Pipe*—that reasonable investment-backed expectations are greatly reduced in a highly regulated field—applies with special force to rules governing" federally chartered financial institutions "[i]n light of the historical practices in the bank regulatory field";

- In *Cal. Housing Securities, Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992) this Court rejected a takings claim based on application of FIRREA's revised conservatorship/receivership provisions, explaining that "the laws governing savings and loan associations have not been static; each of the three statutes involved has been repeatedly amended by Congress since its enactment more

than fifty years ago. Given this long history of government regulation of savings and loan associations, [plaintiffs] were certainly on notice that [their S&L] might be subjected to different regulatory burdens over time."

- In *Meriden Trust and Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 455 (2d Cir. 1995) the Second Circuit similarly rejected the argument that the same newly-enacted cross-guarantee provision at issue in *Branch* worked an uncompensated taking, explaining that the new "provision did not significantly disrupt any reasonable investment-backed expectations, as 'those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end'";

- In *Andrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 19 (1st Cir. 1993), the First Circuit held that a FIRREA provision precluding a landlord from enforcing a clause allowing it to terminate its lease upon a bank tenant's failure did not effect a taking of the landlord's contract right "considering the pervasive regulation that has long characterized the banking industry";

- In *North Arkansas Medical Center v. Barrett*, 962 F.2d 780, 789-90 (8th Cir. 1992), the Eighth Circuit rejected a takings claim based upon the retroactive application of a FIRREA provision expanding the common-law *D'Oench, Duhme* doctrine; the court concluded that "although the application of section 1823(e) results in an economic impact on the Medical Center, the Center was dealing in an area that was generally regulated by federal law at the time it made its 'investment' and formed its 'expectations.' As did the plaintiff in *Connolly*, the party claiming a Fifth Amendment violation in this case has more than sufficient notice that the business of enforcing claims against a failed thrift would be subject to federal regulation."

As shown by these cases, "when an investment is made in . . . a highly regulated industry, to be reasonable, [investment-backed] expectations must be based not only

on the then-existing federal regulations but also on the recognition that there may well be related changes . . . in the future." *Am. Cont'l Corp. v. United States*, 22 Cl. Ct. 692, 697 (1991).

Mr. Piszel attempts to sidestep these decisions by arguing that HERA embodied an unforeseeable "sea change" that did "far more than merely buttress or readjust SASA." Applnt. Br. 40. But that would not distinguish cases about FIRREA, which this Court and numerous other courts have described in similar terms. *See, e.g.*, *1st Home Liquidating Trust v. United States*, 581 F.3d 1350, 1352 (Fed. Cir. 2009) ("Trying to correct a myriad of issues, Congress adopted FIRREA in 1989, completely restructuring federal thrift regulation."); *Dougherty v. Carver Fed. Sav. Bank*, 112 F.3d 613, 616 (1997) (similar); *Far West Federal Bank, S.B., v. Office of Thrift Supervision—Director*, 119 F.3d 1358, 1362 (9th Cir. 2002) (similar); *Burke v. Bd. of Governors of Fed. Reserve Sys.*, 940 F.2d 1360, 1363 n.1 (10th Cir. 1991) (similar). In any event, when Mr. Piszel contracted with Freddie Mac, a reasonable person in his position would not only have expected, but *known* that future legislation could augment the Government's power to regulate executive compensation, limiting his ability to obtain a golden parachute.

When Mr. Piszel accepted his position at Freddie Mac, the existing statutory scheme required the Director of FHFA's predecessor to "prohibit [Freddie Mac]

from providing compensation to any executive officer that is not reasonable." 12 U.S.C. § 4518(a) (2006). Mr. Piszel argues that the statute, as it then existed, did not empower the Government to direct Freddie Mac to withhold contractual severance payments. But even accepting that proposition *arguendo*, legislation to establish FHFA and to *expand* its regulatory authority was already pending in Congress when Mr. Piszel negotiated his contract and became Freddie Mac's CFO in 2006. In a year-end 2005 "Annual Information Statement," Freddie Mac noted the "uncertain regulatory environment in light of legislative reforms currently being considered in Congress," and explained that:

> On October 26, 2005, the House of Representatives passed a bill concerning GSE regulatory oversight. The Senate Committee on Banking, Housing, and Urban Affairs passed a bill concerning GSE regulatory oversight on July 28, 2005. The bills . . . differ in various respects, although each in its current form would result in significant changes in the existing GSE oversight structure.

A171 (Freddie Mac Information Statement).[13] Under the circumstances, it would have been unreasonable for a candidate for a senior executive position at Freddie Mac *not* to have anticipated the possibility of significant changes in the regulatory

[13] Courts may "take judicial notice of filings made with the SEC" and similar corporate reports. *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 82 Fed. Cl. 757, 764 n. 11 (2008) (citation omitted). Judicial notice of proposed legislation is also proper. *See Yeboah v. United States Dep't of Justice*, 345 F.3d 216, 222 n. 3 (3d Cir. 2003).

structure. *See Connolly*, 475 U.S. at 226 (finding no reasonable investment-backed expectations where the property interest at issue had been the "object[] of legislative concern long before the passage of" the challenged legislation).

Nor can Mr. Piszel plausibly argue that, although he might have anticipated *some* changes to the overall regulatory structure, he could not reasonably have anticipated that Congress would include a provision granting FHFA the authority to rescind "golden parachute" payments. To the contrary, the House bill mentioned in Freddie Mac's "Annual Information Statement" would have expressly authorized FHFA to direct Freddie Mac to withhold *any* form of executive compensation based on *any* factors the agency director deemed relevant, and to do so even if the regulator had *already approved* the compensation arrangement. A179 (H. R. Rep. No. 109-171, pt. 1, at 13 (2005)). The bill provided that the approval of an agreement or contract pursuant to 12 U.S.C. § 1452(h)(2) (which addresses regulatory approval of severance payments for Freddie Mac's executive officers)[14]

[14] 12 U.S.C. § 1452(h)(2) (2006) is the provision underlying Mr. Piszel's allegation that Freddie Mac's regulator "approved" his golden parachute. *See* A29. In his brief, Mr. Piszel mischaracterizes that regulatory approval as an agreement. *See*, *e.g.*, Applnt. Br. 3 ("the Government agreed" to the payment); *id.* at 5 ("the Government had previously agreed [the golden parachute payments] 'will' and 'shall' be paid to him"). Mr. Piszel did not, however, assert any claim that the Government contracted with him, and such a claim would fail as a matter of law in any event – mere regulatory approval does not establish a contractual

"*shall not preclude the Director from making any subsequent determination*" to withhold compensation. *Id.* (emphasis added). Thus, whatever Mr. Piszel's *subjective* expectations may have been at the time he contracted with Freddie Mac, *reasonable* expectations would have acknowledged that Freddie Mac's regulator could withhold contractual severance payments in the future. This is sufficient to defeat the claim. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 n.5 (Fed. Cir. 2004) (the "plaintiff's subjective expectations are irrelevant to the[ir] reasonableness").

Mr. Piszel suggests that his regulatory claim remains viable under *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436 (Fed. Cir. 1990). *See* Applnt. Br. 43. Mr. Piszel's reliance on *Cienega Gardens* is misplaced. As explained above – and as cases like *Norman*, *Connolly*, and *Concrete Pipe* emphasize – contract interests are not treated like real property interests for takings purposes. Although the interests at stake in *Cienega Gardens* related to a contract, the Federal Circuit emphasized that those interests "were based on the interaction of *both* real property rights and contractual rights" and that the Government "intentionally defeated the [plaintiffs'] real property

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arrangement. *See, e.g., D & N Bank v. United States*, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003).

rights." *Cienega Gardens*, 331 F.3d at 1328; *see also Chancellor Manor v United States*, 331 F.3d 891, 903 (Fed. Cir. 2003) ("the 'contract' right Appellants assert was taken is, in fact, a right grounded in real property, and not in contract"). Underscoring this point, the Federal Circuit has since held that *Cienega Gardens* does not control where plaintiffs do "not allege[] that the government . . . altered their contract rights in a way that affects their underlying [real] property rights, as in . . . *Cienega Gardens*." *Palmyra Pacific*, 561 F.3d at 1369. Here, there are no "underlying [real] property rights" at stake that could bring this case within *Cienega Gardens*. *Cienega Gardens* therefore lends no support to Mr. Piszel's claim.

Nor can Mr. Piszel properly invoke the *Eastern Enterprises* decision, which he mischaracterizes as finding "reasonable investment-backed expectations where a new statute operated 'retroactively' to divest plaintiff of its contractual property interest.'" Applnt. Br. 43 (citing 524 U.S. at 532-34). In fact, in that splintered decision, five of nine justices found no taking because Eastern had no cognizable property interest. *See* 524 U.S. at 540, 554. As the four-judge plurality saw it, *Eastern Enterprises* involved a long-enough reach back that reasonable expectations at the time of contracting could not have anticipated the imposition of liability. In *Eastern Enterprises*, the relevant contractual relationships concluded "*30 to 50 years*" before Congress amended the statute, whereas, here, Mr. Piszel's

contract was still in place at the time of every Government act he alleges could constitute a taking. *See Eastern Enterprises*, 524 U.S. at 532 (emphasis added). Moreover, at the time Ms. Piszel contracted to become a senior Freddie Mac executive, the statutory authority he complains about was already the subject of pending legislation that Freddie Mac had described in its public filings. A171, 177-79. Under the circumstances present here, even the plurality opinion in *Eastern Enterprises* provides no support for finding a reasonable investment-backed expectation that Congress would not bolster its regulation of Freddie Mac.

Lastly, Mr. Piszel points to this Court's decision in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). As in *Cienega Gardens*, *United Nuclear* concerns real property – not contract – interests. *See United Nuclear*, 912 F.3d at 1433 (mining on Indian land). Moreover, Mr. Piszel's own description of the decision demonstrates that *United Nuclear* lends no support to his claim. According to Mr. Piszel, this Court found "reasonable investment-backed expectations in mining rights where the plaintiff "had *no indication or even suggestion* that tribunal approval of the mining plan would be required.'" Applnt. Br. 34 (quoting *United Nuclear*, 912 F.2d at 1436) (emphasis added). The situation here – where legislation proposing additional restrictions on executive compensation was pending and Freddie Mac itself warned of an uncertain

regulatory environment, *see* A171, 177-79 – could hardly be more different. Mr. Piszel had far more than an "indication" or "suggestion," when he joined the company in 2006, that the compensation of senior executives at Freddie Mac would be regulated.

In a different section of his brief, Mr. Piszel cites *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52 (D.D.C. 2004), and *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56 (D.D.C. 2004), which are similarly irrelevant. *See* Applnt. Br. 31. Those cases involve the question of whether the *prior* statute (the Safety and Soundness Act) authorized the *prior* regulator (OFHEO) to re-review previously approved termination benefits. However, they do not speak to whether the new regulator's (FHFA's) application of a later-enacted statute (HERA) expressly conferring that authority would effect a taking. Moreover, the contracts at issue in *Brendsel* and *Clarke* predate the legislative proposal that was pending in 2006 when Mr. Piszel contracted with Freddie Mac. Accordingly, these decisions cannot undermine the conclusion that Mr. Piszel's reasonable expectations must have incorporated the possibility that the Government could revisit his termination package, thereby negating any regulatory takings claim – a conclusion amply supported by numerous decisions presented above, such as

California Housing, *Transohio*, *Branch*, *Meriden*, *Golden Pacific*, and *North Arkansas Medical*.

4. Mr. Piszel Does Not Possess A Viable *Per Se* Takings Claim

Only "two relatively narrow categories" of regulatory action are "deemed *per se* takings for Fifth Amendment purposes." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first is where the Government "requires an owner to suffer a permanent physical occupation" of her property. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second is where regulations "completely deprive an owner of '*all* economically beneficial use' of her property." *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). The alleged frustration of contractual expectancies in Mr. Piszel's employment agreement with Freddie Mac does not fall into either category. Consequently, this Court should reject Mr. Piszel's *per se* takings claims.

a. Mr. Piszel Does Not, And Cannot, Allege A Permanent Physical Invasion Of His Contractual Severance Benefits

A physical taking can occurs only where the Government takes physical possession of personal property or physically occupies real property. *See Horne v. Dept. of Agriculture*, 135 S. Ct. 2419, 2428 (2015); *Loretto*, 458 U.S. at 426. A

physical act – either a seizure or permanent physical intrusion – must be alleged and proved. *St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008) (No physical taking occurs unless the Government has "authorized physical occupation of, or taken title to, the property."); *see also United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (rejecting as "artificial" and "an extravagant extension of *Loretto*" the claim that "deductions of a percentage of a monetary award [could constitute] physical appropriations of property").

Mr. Piszel does not explain how HERA, a statute restructuring the regulation of financial entities, could effect a *physical occupation* of his employment contract, which itself is an *intangible* property interest. It did not. *See St. Christopher Assocs.*, 511 F.3d at 1385; *see also Loretto*, 458 U.S. at 430 (noting "the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property"). Absent a direct condemnation, which did not occur here, *see* Section II.B.1., there can be no "physical taking" of an intangible property interest.

Mr. Piszel points out that the physical occupation in *Loretto* – the installation of cable boxes – was authorized by the Government. Applnt. Br. 44 (arguing "the Government itself does not have to [physically] occupy the property."). To be sure, in certain circumstances, the Government will be chargeable for a physical

intrusion that it expressly authorizes. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) (*Loretto's* "quite narrow" holding applies "to permanent physical occupations either by the government or by a third party acting under government authority"). Mr. Piszel, however, misunderstands the defect in his physical takings claim. It makes no difference whether the Government's action was performed directly or by an authorized third party if the action itself was not a permanent physical occupation. *See Loretto*, 458 U.S. at 428. Here, Mr. Piszel's physical takings claim fails because there was not – nor could there have been – a physical occupation of his contractual expectancy in severance payments.

Mr. Piszel likens his case to *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). Although the *Brown* Court noted that a state's direct appropriation of interest accruing on funds deposited in lawyers' trust accounts is akin to a physical taking, the Court's analysis was based on the proposition that interest "is the 'private property' of the owner of the principal." *Id.* at 235. Whatever validity that proposition might have in the context of trust accounts or other deposit arrangements, Mr. Piszel did not deposit any funds into a Freddie Mac

account.[15] Instead, he alleges that FHFA directed Freddie Mac not to transfer some of *its* funds to him under his employment contract. *Brown* is therefore inapposite.[16] *Cf. Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1055 (11th Cir. 2008) (the takings clause "does not operate as a substantive limit on the government's power" and does not concern "a mere obligation to pay money").

b. Mr. Piszel's Categorical Takings Claim Is Untenable And Was Correctly Rejected

A categorical taking occurs only "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The Supreme Court in *Lucas* expressly limited its holding to claims concerning real property: "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Lucas*, 505 U.S. at 1027-28 (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979)). Subsequent decisions have likewise limited

[15] Freddie Mac is not a deposit-taking institution such as a bank; rather, it operates in the secondary market. *See generally* 12 U.S.C. § 1451 *et seq.* (Freddie Mac charter).

[16] Mr. Piszel also cites a preliminary, non-binding decision of the Court of Federal Claims in *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012). *See* Applnt. Br. 46. "[T]he Government did not physically take Plaintiffs' common shares" in *Starr*. *Id.* at 72. Nor did the court address any claim concerning a physical taking of "collateral." *See id.* at 75-76. Therefore, the decision in *Starr* does not inform the physical takings analysis here.

Lucas to alleged takings of land. *See, e.g., Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) ("[I]t appears that Lucas protects real property only."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) ("[T]he categorical approach has only been used in real property cases."); *see also 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 264 (2d Cir. 2014) (*Lucas* refers to "regulation that deprives '*land*' (not 'property') of all beneficial use") (emphasis in original). To our knowledge, no court has extended *Lucas* to alleged takings of intangible property. *See A&D*, 748 F.3d at 1151 (declining to address the reach of *Lucas*). This Court, however, *has* held that "the government does not 'take' a party's contract rights simply because its regulatory activity renders those contract rights valueless." *Palmyra Pacific*, 561 F.3d at 1366. Because this action concerns the alleged frustration of contract expectancies – not a regulation that renders land or other tangible property worthless – Mr. Piszel's categorical takings claim should fail as a matter of law.

In any event, Mr. Piszel's admission that the Government did not take his entire contract – he received more than $1 million in salary and a substantial portion of the restricted stock Freddie Mac had promised him, *see* A29, 36 – is also fatal to a categorical claim. *See, e.g., Cooley v. United States*, 324 F.3d 1297, 1304 (Fed. Cir. 2003). Mr. Piszel argues that the trial court erred by not separately

considering his "termination benefits," contending that any contractual benefits that "vested or were otherwise paid to Mr. Piszel before he was terminated" should have been disregarded. Applnt. Br. 48. However, in *Concrete Pipe*, the Supreme Court rejected this approach in evaluating the alleged taking of contractual expectancies, such as Mr. Piszel's interest in receiving a golden parachute payment.

The plaintiff in *Concrete Pipe* asserted that "the appropriate analytical framework" for a claim based on the alleged taking of contractual rights "is the one employed in our cases dealing with . . . destruction of the economically beneficial use of real property." *Concrete Pipe*, 508 U.S. at 643. Like Mr. Piszel, the *Concrete Pipe* plaintiff "trie[d] to shoehorn its claim into this analysis by asserting that '[t]he property of [plaintiff] which is taken, is taken in its entirety.'" *Id*. (bracketed term altered). The Supreme Court expressly rejected this approach, holding that for takings purposes, property "could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Id*. (citing *Penn Central*, 438 U.S. at 130-31); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002) (observing that "defining the property interest taken in terms of the very regulation being challenged is circular" and noting the Court has "consistently rejected such an approach" because it would

make every restriction categorical). Accordingly, Mr. Piszel's admission that he was not completely deprived of all contractual benefits is determinative, and his categorical takings claim therefore fails.

III. Mr. Piszel's Illegal Exaction Claim Fails As A Matter Of Law

In his complaint, Mr. Piszel fails to allege the most basic element of an illegal exaction claim – that he paid over money to the Government either directly or in effect – and his illegal exaction claim was therefore properly dismissed.

Illegal exaction claims concern the "recovery of monies that the government has required *to be paid* contrary to law." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996) (emphasis added). An illegal exaction claim thus requires allegations that a plaintiff has "paid over to the Government" money, and that he "seeks return of all or part of that sum." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (illegal exaction claims are those in which "the Government has the citizen's money in its pocket"). A viable illegal exaction claim also requires that the exaction violated a provision of "the Constitution, a statute, or a regulation." *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005); *see also Andres v. United States*, No. 03-2654, 2005 WL 6112616, at *4 (Fed. Cl. July 28, 2005). To be sure, claims for indirect exactions – where a plaintiff has "paid money over to the Government . . . in effect," rather

than directly – appear to fall within the outer limits of the trial court's jurisprudence. The Court of Federal Claims has recognized such claims where: (1) the Government has unlawfully "required a plaintiff to pay money to a third party," or (2) the Government has "taken a plaintiff's property and converted that property into money, preventing the return of the illegally-taken property." *Id.* at *3. Neither circumstance is alleged here.

The trial court found – and the complaint confirms – that Mr. Piszel does not allege that "he has paid any money to the government directly or 'in effect'" that he now seeks the Government to return. A10, 39-40. Instead, his illegal exaction claim is premised on the theory that Freddie Mac, at FHFA's direction, allegedly "refus[ed] to provide him with . . . benefits to which he was contractually entitled." A36; *see also* A37. But "[t]he doctrine of illegal exaction requires compensation for actual payments of money [by a plaintiff] and has never . . . been applied to compensate a plaintiff for lost opportunities to make money." *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 153 (2002). As a matter of law, no illegal exaction occurs when money is "prevented from coming into [a plaintiff's] account as a result of defendant's conduct." *Id; see also Andres*, 2005 WL 6112616, at *3 ("what distinguishes an illegal exaction from a back pay or breach of contract claim, is that in an illegal exaction case the claimant has paid money over to the

Government that he once had in his pocket, and in a back pay or breach of contract claim the claimant is seeking payment of money the claimant has never received"). Mr. Piszel acknowledges he did not – and cannot – allege that he paid money to the Government either directly or in effect. *See* Applnt. Br. 49-50. For this reason, the trial court correctly dismissed Mr. Piszel's illegal exaction claim.

Nor can Mr. Piszel establish that FHFA's directive to Freddie Mac was illegal, as would be necessary to state a claim. FHFA's regulation implementing HERA provides that a golden parachute payment is a payment "contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the regulated entity; and is received on or after the date on which . . . [a] conservator or receiver is appointed for such regulated entity." 12 C.F.R. § 1231.2. Mr. Piszel's severance benefits fall squarely within this definition. According to Mr. Piszel, his benefits were "to be made pursuant a 'bona fide deferred compensation plan'" and were therefore excluded from the regulatory definition. Applnt. Br. 53-54. But that allegation fails as a matter of law – for an arrangement to be deemed a bona fide deferred compensation plan, FHFA must expressly recognize as such it "by regulation or order." *See* 12 C.F.R. 1231.2(f)(2)(ii) (2008). Mr. Piszel does not alleges that FHFA did so. Because

FHFA's directive complied with HERA, it cannot serve as the predicate for an illegal exaction claim.[17]

Mr. Piszel seeks to resurrect his lawsuit using the theory that HERA itself is a money-mandating statute. *See* Applnt. Br. 50. Mr. Piszel failed to plead such a claim, however. *See* A38-40. The sole count in the complaint alleges "a taking in violation of the Fifth Amendment" and "an unlawful exaction in violation of HERA and the Due Process Clause." A39; *see also* A38 (describing the count as a "taking and/or exaction in violation of the United States Constitution and HERA") (section title).

To attempt to paper over this deficiency, Mr. Piszel contends that claims premised on a money-mandating regulation, statute, or constitutional provision are a second type of illegal exaction. *See* Applnt. Br. 50. This is not the law. *See, e.g.*, *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004) (distinguishing illegal exaction claims and "claims brought under a

[17] Mr. Piszel also argues that the FHFA Director's failure to consider factors set forth in HERA led to an incorrect decision. *See* Applnt. Br. 53. That argument – that FHFA erroneously applied HERA and reached an arbitrary or capricious decision – would appear to be an Administrative Procedure Act challenge outside the Court of Federal Claim's limited jurisdiction. *See Lawrence v. United States*, 69 Fed. Cl. 550, 554 (2006). In any event, the statute and its implementing regulations enumerate the factors the director "may" – not "must" – consider, and expressly allow the Director to take into account "[a]ny other factor the Director determines relevant to the facts and circumstances." 12 U.S.C. § 4518(e)(2); 12 C.F.R. § 1231.3(b)(2).

'money-mandating' statute" – "exaction claims" being those where "the Government has the citizen's money in its pocket"). Mr. Piszel should not be heard to complain that the trial court "disregarded" a claim he did not plead and never sought to add to his complaint.

Furthermore, even now, Mr. Piszel fails to identify a money-mandating provision in HERA on which a viable claim could be premised. Mr. Piszel's only reference is to 12 U.S.C. § 4617(d)(3)(A). *See* Applnt. Br. 51. Section 4617 concerns the appointment and authority of a "conservator or receiver" for financially-distressed GSEs, such as Freddie Mac. *See* 12 U.S.C. § 4617. This action, however, concerns actions allegedly taken by FHFA as Freddie Mac's regulator – not as its conservator. *See* Applnt. Br. 38 n.10 ("[T]he Government was *not* acting as conservator when it [allegedly] took Mr. Piszel's property; it was acting as Freddie Mac's regulator.") (emphasis in original); A35 ("Mr. Lockhart, acting in his capacity and under his authority as the FHFA's Director of the FHFA and Freddie Mac's regulator . . . ."); A39 ("FHFA's actions, taken by Mr. Lockhart in his capacity and under his authority as the FHFA's Director and Freddie Mac's regulator . . . ."). Accordingly, section 4617 is inapposite.

In addition, no payment is mandated by section 4617(d)(3)(A), which states, in pertinent part, that "the liability of the conservator or receiver for the

disaffirmance or repudiation of any contract [determined to be burdensome or necessary to promote the orderly administration of affairs] shall be . . . limited to actual direct compensatory damages." 12 U.S.C. § 4617(d)(3)(A). Rather than requiring a monetary payment by the Government, section 4617(d)(3)(A) establishes a limitation on the potential liability of the GSE's conservator. This contrasts starkly with statutes that are indeed money-mandating. *See, e.g.*, *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004) (identifying the Military Pay Act, 37 U.S.C. § 204, which provides that "member[s] of a uniformed service" are entitled to "basic pay," as a money-mandating statute).

Mr. Piszel's claim for an illegal exaction was properly dismissed because, as he now appears to concede, he paid over no money to the Government, either directly or in effect. Mr. Piszel's belated attempt to assert a money-mandating theory of recovery comes too late and is meritless in any event. The dismissal of this action should therefore be affirmed.

CONCLUSION

For these reasons, the United States respectfully requests that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 20th day of November, 2015, a copy of the foregoing "BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES" was filed electronically.

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s/ David A. Harrington

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To the following address:

CERTIFICATE PURSUANT TO RULE 32(A)(7)(C)

I, David A. Harrington, an attorney in the Department of Justice, Civil Division, Commercial Litigation Branch, certify that this brief, which used Times New Roman font with 14 point type, contains 12,736 words (relying upon the word count feature of the word processing program used to prepare this brief) and complies with the type-volume limitation contained in Rule 32(a)(7)(B).

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