No. 15-5100

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES
COURT OF FEDERAL CLAIMS
CASE NO. 1:14-CV-00691
JUDGE LYDIA KAY GRIGGSBY

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT ANTHONY PISZEL

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Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Anthony Piszel v. United States

No. 2015-5100

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Anthony Piszel certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Anthony Piszel

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

James K. Goldfarb, Muprhy & McGonigle, P.C.
Michael V. Rella, Murphy & McGonigle, P.C.

July 6, 2015
Date

William E. Donnelly
Signature of counsel

William E.Donnelly
Printed name of counsel

Please Note: All questions must be answered
cc: David A. Harrington, Esq.

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In further support of Plaintiff-Appellant Anthony Piszel's appeal of the lower court's decision dismissing his Complaint, and in response to the Court's Order, dated April 7, 2016 (Dkt. 49), Mr. Piszel respectfully submits this supplemental brief addressing the three questions set forth in the April 7 Order.

1. *Does the fact that the golden parachute provision, 12 U.S.C. § 4518(e), did not eliminate breach of contract claims preclude a takings action against the government?*

No. A plaintiff that has a breach of contract claim against a *private party* is not precluded from pursuing a takings claim against the *Government*. On this the case law is decidedly one-sided; and the cases the Government relies on readily distinguishable. Thus, Mr. Piszel's ability to sue a *private party* (Freddie Mac) for breach of contract does not preclude his Fifth Amendment takings claim against the *Government*.

This Court's recent decision in *A&D* is squarely on point. *See A&D Auto Sales, Inc. v. U.S.*, 748 F.3d 1142 (Fed. Cir. 2014).[1] In *A&D*, the plaintiffs were car dealers whose franchise agreements with GM and Chrysler were terminated in connection with the automakers' bankruptcies. They brought Fifth Amendment takings claims against the Government, who directed the automakers to terminate the agreements. They could have sued Chrysler and GM for breach of

[1] Unless stated otherwise, internal quotations and citations are omitted, and emphasis is added.

contract or asserted a claim against the companies' bankruptcy estates.[2] Instead, they sued the Government for a Fifth Amendment taking. *Id.* at 1147. In denying the Government's motion to dismiss the takings claim, this Court held that "[t]here is no per se rule either precluding or imposing liability when the government instigates action by a third-party", which in turn causes the third-party to breach a contact with the plaintiff. *Id.* at 1153. Likewise, no rule precludes Mr. Piszel from pursuing his takings claims against the Government, despite his having a contract claim against Freddie Mac for its refusal to pay his contractual termination benefits at the Government's direction. No case is to the contrary.

To be sure, as the Government argued below, some courts have held that a plaintiff may bring a contract, but not a takings, claim against the Government *when the Government itself* contracts with the plaintiff and breaches that contract. But the reason for that rule only highlights why it does not apply here. As this Court explained in *A&D*, when the Government contracts with private parties, it acts in its commercial or proprietary capacity, not its sovereign capacity, and it is "usually subject to contractual remedies that make takings liability redundant." *Id.* at 1156; *accord Hughes Comm'ns. Galaxy, Inc. v. U.S.*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (when the Government contracts with private

[2] *See A&D*, 748 F.3d at 1149 ("To the extent the franchises were terminated by action of the bankruptcy estate, the affected dealers received unsecured claims against the estates").

parties and breaches the contract, the "remedies arise from the contracts themselves, rather than from the constitutional protection"). In contrast, when "the government [does] not bargain or contract with the plaintiffs, [] the plaintiffs have no ordinary commercial remedy against the government." *A&D*, 748 F.3d at 1156. Here, as in A&D, Mr. Piszel indisputably did not contract with the Government, and the Government indisputably acted as sovereign in directing Freddie Mac not to pay Mr. Piszel's termination benefits. Therefore, Mr. Piszel has no "ordinary commercial remedy against the government" and should not be precluded from pursuing his takings claim.

The distinct basis for the two rules might explain why, for nearly a century, the Supreme Court has consistently addressed takings claims on the merits even though the plaintiffs had available (and in some cases, actually asserted) breach of contract claims against private parties. *See, e.g.*, *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 507, 510-511 (1923) (private party contracted to deliver steel to plaintiff, but refused to perform after the Government requisitioned the steel); *Norman v. B. & O. R. Co.*, 294 U.S. 240, 292-294, 305, 316 (1935) (private parties refused to make payments to plaintiffs in gold, as agreed, because a subsequent Congressional resolution prohibited the payments); *Armstrong v. U.S.*, 364 U.S. 40, 41-42, 44-49 (1960) (general contractor refused to pay plaintiff for building materials on which plaintiff had a lien, and transferred the materials to the

Government instead); *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 605, 641-646 (1993) (relying on a new ERISA amendment, a multi-employer pension plan charged plaintiff with liability that exceeded plaintiff's contractual liability under the plan). If the availability of contract claims against private parties precluded takings claims against the Government, the Supreme Court could have disposed of the takings claims in these cases on that threshold ground. But the Court did not do so, and never has.

This Court also consistently addresses takings claims on the merits where, as here, plaintiffs have available breach of contract claims against private parties. *See, e.g., A&D*, 748 F.3d at 1152-54 (addressed above); *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1323, 1328 (Fed. Cir. 2003) (owners of federally-subsidized housing projects alleged that subsequent legislation nullified their contractual rights to pre-pay their mortgages); *Chancellor Manor v. U.S.*, 331 F.3d 891, 893, 901-907 (Fed. Cir. 2003) (same).[3] In *Cienega Gardens* and *Chancellor*, as in *A&D*, the plaintiffs could have pursued breach of contract claims against their

[3] *See also Palmyra Pac. Seafoods, LLC v. U.S.*, 561 F.3d 1361, 1363-64 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010) (fishing company lessee alleged that subsequent legislation nullified its license to engage in commercial fishing around an island); *Air Pegasus of D.C., Inc. v. U.S.*, 424 F.3d 1206, 1208-09 (Fed. Cir. 2005) (helicopter operator lessee alleged that subsequent legislation nullified its lease to fly in space above the heliport). The plaintiffs in each case could have sued their lessors for breach of contract, but sued the Government instead for a taking, and this Court considered the takings claims on the merits.

lenders for failing to allow prepayment. Instead, they sued the Government for a Fifth Amendment taking. This Court reversed the dismissal of plaintiffs' takings claim in *Chancellor*, and granted judgment in plaintiffs' favor in *Cienega Gardens*, holding that the Government violated the Fifth Amendment by taking plaintiffs' contractual rights. *Chancellor*, 331 F.3d at 893; *Cienega Gardens*, 331 F.3d at 1353.[4]

The D.C. District Court also recently considered a takings claim on the merits when the plaintiffs did exactly what the Government argues Mr. Piszel should have done here – *they sued Freddie Mac for breach of contract. Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 233-239 (D.D.C. 2014). The court did not hold – and it does not appear the Government argued – that the breach claims against Freddie Mac precluded the takings claim against the Government. The same is true here – Mr. Piszel's breach claim against Freddie Mac does not preclude his takings claim against the Government.

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[4] The Government cited several cases below where plaintiffs "based their takings claims on a *contractual* relationship that they had with the regulated entity." *See* Gov't Mov. Br., *Piszel v. U.S.*, No. 14-691C (Ct. Cl. Nov. 25, 2014) at 19, Dkt. 11 (citing *Golden Pac. Bancorp v. U.S.*, 15 F.3d 1066 (Fed. Cir. 1994); *Cal. Hous. Sec., Inc. v. U.S.*, 959 F.2d 955 (Fed. Cir. 1992); and *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014)). As in *A&D*, *Cienega Gardens*, and *Chancellor*, the plaintiffs could have sued the private regulated entities for breach of contract – as the plaintiffs did in *Perry* – but they sued the Government for a taking instead, and this Court considered the takings claims on the merits in *Golden Pacific* and *California Housing*. *Golden Pacific*, 15 F.3d at 1071-1076; *Cal. Hous.*, 959 F.2d at 957-960.

In its motion to dismiss, the Government ignored this on-point precedent and instead relied on inapposite cases in which the *Government itself* contracted with a private party, and therefore, the plaintiffs had the ability to sue the *Government* directly in its commercial capacity for the *Government's own* breach of contract. *See Bailey v. U.S.*, 341 F.3d 1342, 1347 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004) (no taking because the plaintiff "was not deprived of a contractual remedy for *the government's* breach"); *Castle v. U.S.*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) ("even assuming the enactment and enforcement of FIRREA breached *a contract the government had with [plaintiffs]*, it did not constitute a taking of the contract."); *Westfed Holdings, Inc. v. U.S.*, 52 Fed. Cl. 135, 152 (2002) ("the Federal Circuit and this court have repeatedly held that the government's deprivation of a property right created by *a contract with the government* is a breach of contract rather than a taking").[5] As explained above, in

[5] *See also ConocoPhillips v. U.S.*, 73 Fed. Cl. 46, 48, 55 (2006) (finding no taking because plaintiff had a breach of contract action against the *Government*); *Ace Property & Cas. Ins. Co. v. U.S.*, 60 Fed. Cl. 175, 176, 182 n.7 (2004), *aff'd*, 138 Fed. Appx. 308 (Fed. Cir. 2005) (same). Two other cases cite by the Government are not takings cases. *See At. Mech., Inc. v. Resolution Trust Corp.*, 953 F.2d 637 (4th Cir. 1992); *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U.S. 462 (1911). Finally, and contrary to the Government's argument, the Supreme Court did not hold in *U.S. v. Sherwood*, 312 U.S. 584, 588-589 (1941), that private breach of contract remedies preclude takings claims against the Government. It held that the Court of Federal Claims had no jurisdiction over the dispute between private parties (a judgment creditor and debtor), a distinction noted by the lower court here (A11).

those circumstances, the outcome is controlled by a different rule, in which the Government, as a contracting party, is answerable in its commercial capacity only for breach of contract, and not in its sovereign capacity for a taking. That rule has no application where, as here, Mr. Piszel did not contract with the Government, and the Government indisputably acted only as a sovereign.[6]

In *Klamath*, the lower court spotlighted this precise distinction. *See Klamath Irrigation Dist. v. U.S.*, 67 Fed. Cl. 504 (2005), *rev'd on other grounds*, 635 F.3d 505 (Fed. Cir. 2011).[7] It held that the rule precluding takings actions when plaintiffs have available breach of contract claims "applies to the [plaintiffs] *only to the extent that they actually have contract claims against the United States*." *Id.* at 532. The court distinguished the cases cited by Mr. Piszel – including *Cienega Gardens* and *Chancellor* – that permitted takings claims to

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[6] Moreover, the rule the Government advances here – private breach actions preclude takings actions – would immunize the Government from liability for its own actions. But in the cases on which the Government relied below, the Government was not immunized from liability; instead, it was subject to liability in its commercial capacity for its own breach of contract.

[7] The Government *itself* has drawn the same distinction. *See Integrated Logistics Support Sys. Intern. v. U.S.*, 42 Fed. Cl. 30, 34 (1998) (arguing that the "existence of an express contract obviates plaintiff's taking claim", but *only* when the "contract *directly obligat[es] the United States*"); David W. Spohr, *(When) Does a Contract Claim Trump a Takings Claim? Lessons from the Water Wars*, 2 Wash. J. Envtl. L. & Pol'y 125, 163 (2012) ("the 'limited application' [of] the Takings Clause discussed above *is only for parties in contract (or in privity of contract with) the government*"; "if a claimant is not in privity of contract, he or she can (indeed, can only) proceed under a takings theory.").

proceed even though plaintiffs could have pursued or did pursue breach of contract claims against *private parties*, from the cases cited by the Government that precluded takings claims because the plaintiffs could have pursued breach of contract claims against *the Government*. *Id.*; *see also Century Exploration New Orleans, Inc. v. U.S.*, 103 Fed. Cl. 70, 80 n.12 (2012) (distinguishing *Cienega Gardens* and *Chancellor* because "the plaintiffs in those cases were not in privity of contract with the government and therefore could not have raised a breach claim.").

The only non-government contracts case on which the Government relied below to support its argument is also inapposite. *See 767 Third Ave. Assocs. v. U.S.*, 48 F.3d 1575 (Fed. Cir. 1995). In *Third Avenue Associates*, a plaintiff who leased office space in the U.S. to the Yugoslavian government sued the U.S. Government for a taking when the U.S. Government ordered the closure of Yugoslavian operations in the U.S. *Id.* at 1577. This Court affirmed the dismissal of the suit. But not because the plaintiff had a contract claim that precluded its taking claim, as the Government argued here. Instead, this Court held that the plaintiff "had no reasonable investment-backed expectation to be free from government interference with its leases" (*id.* at 1580), and that "no taking occur[red]" because the Government "merely frustrated" plaintiff's contract (*id.* at 1581 (citing *Omnia*, 261 U.S. 502 (1923)).

The reasoning in *Third Avenue Associates* highlights another distinction between that case and this one. Observing that the Government "did not take action against [the plaintiff]", this Court explained that "no interest is taken when a contract expectation is merely frustrated by regulation directed toward a different party or property interest." *Id.* at 1582. That is not the situation here, where the Government took direct action against – and intentionally targeted – Mr. Piszel by directing Freddie Mac to terminate him and to not pay him his termination benefits. (*See* Reply Br. at 18-20, Dkt. 37). Stated another way, the Government did not target Freddie Mac's revenues or order Freddie Mac to close, either of which would have merely frustrated Mr. Piszel's ability to receive his contractual termination benefits. Instead, the Government told the FHFA to deprive Mr. Piszel of his contractual termination benefits. In *A&D*, this Court's most recent decision addressing *Omnia*, the Court held that *Omnia* did not apply under circumstances substantively identical to those here because the taking was "the direct and intended result of the government's actions". 748 F.3d at 1154 ("in the cases relied on by the government [including *Omnia*], the effect of the government action upon the plaintiff was merely collateral or unintended or the action affected a general class").[8]

[8] *See also see also Love Terminal Partners v. U.S.*, 97 Fed. Cl. 355, 398 (2011) ("plaintiffs have removed themselves from the circumstances presented in *Omnia Commercial Co.* and its progeny because they allege that the government

Even in cases involving Government contracts – which is not the case here – courts have not uniformly dismissed takings claims when plaintiffs had available (or actually asserted) breach of contract claims against the Government. In *Stockton East Water District*, this Court held that "the fact that a cause of action was pled under a contract theory [against the Government] did *not* preclude a separate count for a cause of action based on a taking." *Stockton E. Water Dist. v. U.S.*, 583 F.3d 1344, 1369 (Fed. Cir. 2009); *see also Prudential Ins. Co. of Am. v. U.S.*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (holding that a plaintiff suing the Government for breach of contract "may have an alternate avenue of relief under the Takings Clause of the Fifth Amendment"). Similarly, in *Cienega Gardens* and *Chancellor*, where the plaintiffs alleged both takings and breach of contract claims against the Government, this Court affirmed the dismissal of the breach claims, but allowed the takings claims to move forward. *Cienega Gardens*, 331 F.3d at 1324, 1353; *Chancellor*, 331 F.3d at 893. Accordingly, regardless of whether Mr. Piszel had a breach of contract claim against the Government (and he did not), his takings claim is not precluded.

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specifically targeted and took their contractual rights"); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 246 n.58 (D.D.C. 2014) (holding that "the Court is wary" of applying *Omnia* because *Omnia* was decided "many decades before the Supreme Court began actively developing its regulatory takings jurisprudence").

2. *Would recovery for such a breach of contract claim be limited by the doctrine of impossibility or the sovereign acts doctrine and would the limitations on damages for breach of contract claims in HERA, 12 U.S.C. § 4617(d)(3)(A), preclude or limit recovery of breach of contract damages?*

Yes. The doctrine of impossibility would preclude Mr. Piszel's recovery for a breach of contract claim against Freddie Mac.

"[T]he doctrine of impossibility of performance excuses delay or non-performance of a contract where the agreed upon performance has been rendered commercially impracticable by an unforeseen supervening event not within the contemplation of the parties at the time the contract was formed." *Gulf Group Gen. Enterp. Co. W.L.L. v. U.S.*, 114 Fed. Cl. 258, 406 (2013). When a private party asserts the defense based on a government order or directive, "the nonoccurrence of the act in question must have been a basic assumption of the contract, and the government must not have assumed the risk that such an act would not occur." *Id.* at 406.[9]

Courts consistently apply the doctrine of impossibility to excuse a private party's contractual breach when subsequent legislative action or governmental orders preclude the private party from performing under the contract. *See, e.g., City Line Joint Venture v. U.S.*, 48 Fed. Cl. 837, 840 (2001) (doctrine

[9] *See* Rest. (Second) Contracts § 264 (1981) ("If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.")

applied when defendant's contractual performance was precluded by new legislation); *Organizacion JD LTDA v. U.S. Dep't of Justice*, 18 F.3d 91 (2d Cir. 1994) (doctrine applied when the Government ordered defendants not to perform certain electronic fund transfers); *Int'l Minerals and Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (doctrine applied when plaintiff breached a contract to comply with a new Government regulation).

Freddie Mac would have a viable impossibility defense on the facts pleaded here. As a result of the Government's explicit directive, Freddie Mac refused to pay the contractual termination benefits to Mr. Piszel. The non-occurrence of the Government's directive indisputably was a basic assumption of the contract; Mr. Piszel was induced to enter into the contract by the contractual assurance that he would receive his termination benefits, and the Government expressly reviewed and approved those benefits. Consequently, Freddie Mac could avail itself of the doctrine of impossibility, which would preclude Mr. Piszel's recovery in a breach of contract action against Freddie Mac.[10]

[10] The sovereign acts doctrine would not limit Mr. Piszel's recovery for a breach of contract claim against Freddie Mac because that doctrine only excuses the *Government's* performance of a contract. *See U.S. v. Winstar,* 518 U.S. 839, 904-05 (1996) (the doctrine "simply relieves *the Government as contractor*" from a breach of contract claim). Similarly, the limitations on damages for breach of contract claims in HERA, 12 U.S.C. § 4617(d)(3)(A), would not limit Mr. Piszel's recovery for a breach of contract claim against *Freddie Mac* because the provision

The D.C. District Court reached the same result in two cases materially identical to Mr. Piszel's case. *See Brendsel v. OFHEO*, 339 F. Supp. 2d 52 (D.D.C. 2004); *Clarke v. OFHEO*, 355 F. Supp. 2d 56 (D.D.C. 2004). In *Brendsel*, the Government (through FHFA's predecessor, OFHEO) ordered Freddie Mac not to pay contractual termination benefits to Freddie Mac's former CEO, Brendsel. *Brendsel*, 339 F. Supp. 2d at 55. Brendsel sued the Government for declaratory and injunctive relief, and moved to enjoin the Government from preventing payment; he did not sue Freddie Mac. *See id.* The court granted Brendsel's motion, holding that without equitable relief against the Government, he would be irreparably harmed because he "will be unable to sue to recover any monetary damages against either Freddie Mac or OFHEO". *Id.* at 66. The court explained that while "Brendsel might seek to sue Freddie Mac on a breach of contract theory, Freddie Mac would likely present the defense that it was acting pursuant to OFHEO's order", which the court held was a "potentially valid [defense] even though the orders themselves may be illegal." *Id.*; *see also Clarke*,

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limits liability only when a contract is repudiated by "the *conservator or receiver*". *Id.* Unlike in the cases cited in the Court's April 16 Order, the Government here indisputably was *not* acting as Freddie Mac's conservator or receiver when it directed Freddie Mac to terminate Mr. Piszel without paying his contractual benefits; it was acting as Freddie Mac's regulator in its sovereign capacity. (*See* A35 ¶¶ 52, 54, 69).

355 F. Supp. 2d at 66 ("Freddie Mac's compliance with OFHEO's orders may not be actionable.").

3. *If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?*

Freddie Mac's complete defense (impossibility) to a breach of contract action by Mr. Piszel supports the conclusion that he may sue the Government for a Fifth Amendment taking. In *Brendsel* and *Clarke*, the D.C. District Court relied in part on Freddie Mac's former CFO's and CEO's inability to recover on breach of contract claims against Freddie Mac in enjoining the Government from precluding payment of their termination benefits. *Brendsel*, 339 F. Supp. 2d at 66; *Clarke v. OFHEO*, 355 F. Supp. 2d at 66. Similarly, this Court has held that when the Government is found not liable for certain breaches of contract, the plaintiffs are "free to pursue their takings claim if they so choose". *Stockton*, 583 F.3d at 1369; *see also Cienega Gardens*, 331 F.3d at 1324 (considering takings claims against the Government after plaintiffs' breach of contract claims were dismissed); *Chancellor*, 331 F.3d at 893 (same).[11]

[11] Because we know of no case holding that a plaintiff may not sue the Government for a taking if it could also sue a private party for breach of contract, we also know of no case discussing how limitations on a plaintiff's recovery against private parties for breach claims would impact the plaintiff's takings claims against the Government. Accordingly, we rely, by analogy, on this Court's decisions in *Stockton*, *Cienega Gardens*, and *Chancellor*, cases that concerned plaintiffs' breach of contract claims against the *Government*.

If Mr. Piszel is unable to assert a viable takings claim against the Government, he could not obtain relief from any party for Freddie Mac's refusal (on the Government's order) to pay him more than $8 million in contractual termination benefits that the Government reviewed and approved. Moreover, despite well-settled authority holding that contracts are property rights for takings purposes, no plaintiff could ever plead a takings claim based on a contractual right; the plaintiff instead would be limited to a breach of contract claim. No case or policy rationale supports that position, and nearly a century's worth of Supreme Court precedent cuts against it.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Piszel's opening and reply briefs, Mr. Piszel respectfully requests that the Court reverse the lower court's order dismissing Mr. Piszel's complaint.

Dated: April 29, 2016
Washington, D.C.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I electronically filed with the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit this Supplemental Brief of Anthony Piszel, and further certify that the parties' counsel will be notified of, and receive, this filing through the Notice of Docket Activity generated by this electronic filing.

/s/ William E. Donnelly