Appeal No. 2015-5100

United States Court of Appeals
for the
Federal Circuit

ANTHONY PISZEL,

Plaintiff-Appellant,

– v. –

UNITED STATES,

Defendant-Appellee.

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

SUPPLEMENTAL BRIEF ON BEHALF OF AMICUS CURIAE NATIONAL BLACK CHAMBER OF COMMERCE IN SUPPORT OF NEITHER PARTY

Rebecca S. LeGrand
KAISER, LEGRAND & DILLON, PLLC
1401 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 640-2850

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Anthony Piszel **v.** United States

Case No. 15-5100

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

National Black Chamber of Commerce

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
National Black Chamber of Commerce	National Black Chamber of Commerce	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 (**and who have not or will not enter an appearance in this case**) are:

None

Apr 29, 2016
Date

/s/ Rebecca S. LeGrand
Signature of counsel

Please Note: All questions must be answered

Rebecca S. LeGrand
Printed name of counsel

cc: Donnelly, Goldfarb, Rella, Harrington

Reset Fields

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTEREST OF THE AMICUS

Amicus Curiae the National Black Chamber of Commerce ("NBCC") is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, the NBCC represents nearly 100,000 African-American owned businesses in the United States. The NBCC has more than 190 affiliated chapters located throughout the nation, as well as international affiliates in, among other countries, the Bahamas, Brazil, Colombia, Jamaica, and France, and a partnership with the Pan-African Chamber of Commerce that includes national chambers in 34 African nations.

As the representative of tens of thousands of businesses throughout the United States, the NBCC has a strong interest in the protection of property rights and in seeking to ensure that just compensation is available to those whose property rights are taken by the government. The supplemental questions posed by the Court bear directly on these interests, as the Court's answer to those questions could impact the rights of individuals and businesses whose contractual rights are affected by government action.[1]

[1] This brief is filed pursuant to a motion under FED. R. APP. P. 29(b). A party's counsel has not authored this brief in whole or in part, a party or party's counsel has not contributed money that was intended to fund preparing or submitting the brief, and no person other than the amicus, its members, or its counsel has contributed such money.

ARGUMENT

In its order for supplemental briefing, this Court has asked the parties to address three questions:

> 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?
>
> 2. Would a 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?
>
> 3. If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?

Order at 2 (Apr. 7, 2016), Doc. 49 (citations omitted).

The answers to these questions—particularly the first question—could have consequences for takings claims based on governmental interference with private contract rights. Because of the importance of these questions, the NBCC respectfully submits that the Court should only address them if it has to—and it may not have to here, given the nature of Mr. Piszel's asserted property rights. To the extent the Court does address these questions, it should hold that the elimination of contract remedies is not a necessary prerequisite to a takings claim based on the destruction of private contract rights. While the availability of contract remedies *against the government* has been held to restrict the government's takings liability in cases involving *government contracts*, the same is

not true for cases like this one involving contracts with private parties.

I. The Court Need Not Reach Any of the Questions It Has Raised in the Order for Supplemental Briefing.

Before it considers the preclusive effect of any potential breach of contract remedy, the Court should decide whether Mr. Piszel has stated a takings claim to begin with. In particular, the Court should address the effect of the statutes and regulations governing executive compensation at the Federal Home Loan Mortgage Corp. ("Freddie Mac") that were in effect or pending when Mr. Piszel negotiated his severance benefits. The court below decided that pervasive federal regulation of executive compensation deprived Mr. Piszel of both a cognizable property interest in the terms of his employment agreement and a reasonable investment-backed expectation that the government would take no action affecting those terms. A12, 16–17. As the court reasoned, "[g]iven the regulatory environment at the time he entered into his employment agreement, *and the authority that federal regulators had to prohibit executive compensation*, plaintiff simply could not have had a cognizable property interest in the severance compensation package called for under his employment agreement." A15 (emphasis added). In other words, the point is not simply that Freddie Mac operates in a highly regulated environment—that alone would not be enough to eliminate any and all property rights relating to Freddie Mac—but rather that the specific issue of executive compensation at Freddie Mac is and has been subject to

extensive regulation. If valid, this case-specific reasoning would provide independent grounds on which to affirm the judgment dismissing Mr. Piszel's takings claim. The Court should address this issue before addressing, only if necessary, the issues raised by the supplemental briefing order.

II. The Availability of a Breach of Contract Claim Against Freddie Mac Does Not Affect the Availability of a Takings Claim Against the Government.

To the extent the Court reaches the supplemental questions it has raised, it should hold that the mere fact that Mr. Piszel could have pursued a breach of contract claim against Freddie Mac does not preclude his takings claim against the United States. Freddie Mac is a private party, not the United States. The cases holding that the availability of contract remedies precludes takings liability involve government contracts, not private contracts. A separate line of cases, stemming from the Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), addresses whether takings liability is available for interference with private contract rights. Whether Mr. Piszel may satisfy the requirements for a takings claim under *Omnia* and its progeny will turn on the particular facts and circumstances of this case, but the simple fact that he could have pursued contract remedies against Freddie Mac is not dispositive. The questions this Court raised in its order for supplemental briefing pertain to a principle that has no application where, as here, the contract right alleged to have

been taken arises from a contract between private parties.

A. There can be no dispute that contract rights are property protected by the Takings Clause. *See, e.g.*, *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014). And while this is true for contracts with the United States as well as contracts between private parties, *see Lynch v. United States*, 292 U.S. 571, 579 (1934), this Court (and its predecessor) have established special rules and doctrines to govern takings claims arising from government contracts. Of particular relevance here, this Court's predecessor has held that interference with the performance of government contracts "generally gives rise to a breach claim not a taking claim." *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). Thus, when parties to government contracts have "retained the full range of remedies associated with any contractual property right they possessed," this Court has held government breaches do "not constitute a taking of the contract." *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002).

This Court has advanced a number of rationales for its holdings in this area, including avoiding turning "nearly all Government contract breaches" into constitutional cases, *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001), respecting the unique considerations involved when the government decides to enter contracts with private parties, *id.*, and eliminating

"redundant" claims against the government, *A & D Auto Sales*, 748 F.3d at 1156. These rationales do not apply when "the government [does] not bargain or contract with the plaintiffs, and the plaintiffs have no ordinary commercial remedy against the government." *Id*. Thus, the doctrines these rationales support are not "directly relevant to a takings claim" based on a property right in a *private* contract, *id.*, and this Court has permitted takings claims to go forward when contract remedies against the government were not available, *see, e.g.*, *Cienega Gardens v. United States* (*Cienega Gardens I*), 331 F.3d 1319, 1353 (Fed. Cir. 2003); *Chancellor Manor v. United States*, 331 F.3d 891, 907 (Fed. Cir. 2003); *see also Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 532 (2005) (explaining that this Court has permitted takings claims when plaintiffs "were not in privity with the Government" and "no contract claim against the Government was available").[2]

[2] The Government argues that *Cienega Gardens I* was stripped of its precedential value in a subsequent decision by this Court, *Cienega Gardens v. United States* (*Cienega Gardens II*), 503 F.3d 1266 (Fed. Cir. 2007). Br. of the Defendant-Appellee the United States at 26 (Nov. 20, 2015), Doc. 33 ("Appellee Br."). But that is not true: while the Court indicated that certain of its holdings in *Cienega Gardens I* "were unique to the four model plaintiffs and based on the particular arguments that the government made" in that case, it also acknowledged that it had "decided several issues that are equally applicable to all parties in these cases" and, therefore, of continuing precedential value. *Cienega Gardens II*, 503 F.3d at 1275–76. Indeed, the Court reiterated that one of the reasons the takings claims continued to be litigated was that the government "did not incur liability to the owners for breach of contract because HUD was not a party to the" contracts in question. *Id*. at 1274.

In *Chancellor Manor*, the Government is correct that the Court concluded that the asserted contract right was grounded in real property, 331 F.3d at 903. *See*

B. Mr. Piszel's contract with Freddie Mac was not a contract with the United States, and, while he may have been able to pursue a breach of contract action against Freddie Mac, there has been no suggestion that he could have pursued such an action against the United States. Thus, as explained above, the limitations on takings claims involving government contracts established and applied by cases such as *Sun Oil* and *Castle* have no application to this case.

The proper framework for cases in which the government is alleged to have taken *private* contract rights flows from the Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). In that case, a party to a contract to purchase steel plate from the Allegheny Steel Company at a favorable price had its rights frustrated when the government requisitioned the steel company's entire production of steel plate for a certain year. *Id*. at 507. The Supreme Court held that this frustration of contract rights did not amount to a taking because the injury to the plaintiff's contract rights was merely the "consequential" and "indirect" result of the government's otherwise lawful action. *Id*. at 510. The government had not, for example, "appropriated" the plaintiff's contract rights for itself. *Id*. at 511.

Following *Omnia*, this Court has held that a takings claim based on

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Appellee Br. 26–27. The case nevertheless remains an example of an instance in which the existence of private contract rights did not foreclose a takings claim.

interference with private contract rights may succeed if such interference was "the direct and intended result of the government's actions." *A & D Auto Sales*, 748 F.3d at 1154. Thus, to the extent the Court determines that Mr. Piszel had a protectable property right in his severance pay, this is the analysis that should apply, not the analysis from the *Sun Oil* and *Castle* line of cases.[3]

April 29, 2016

Respectfully submitted,

/s/ Rebecca S. LeGrand
Rebecca S. LeGrand
KAISER, LEGRAND & DILLON, PLLC
1401 K Street, N.W.
Suite 600
Washington, D.C. 20005
202-640-2850

Counsel for Amicus Curiae

[3] Of course, to the extent the Court concludes that Mr. Piszel *did not* have a protectable property interest, his takings claim would fail for that reason regardless of whether the government directly targeted him. *See Palmyra Pac. Seafoods, LLC v. United States*, 561 F.3d 1361, 1370 (Fed. Cir. 2009).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on April 29, 2016. I certify that service will be accomplished by the appellate CM/ECF system on all parties or their counsel.

William E. Donnelly
Murphy & McGonigle, P.C.
555 13th Street, N.W.
Suite 410 West
Washington, DC 20004

James K. Goldfarb
Michael V. Rella
Murphy & McGonigle, P.C.
1185 Avenue of the Americas
21st Floor
New York, NY 10036

Attorneys for Plaintiff-Appellant

David A. Harrington, Esquire
Department of Justice
Commercial Litigation Branch
Civil Division
P.O. Box 480
Ben Franklin Station
Washington, DC 20044

Attorneys for Defendant-Appellee

Gregory P. Joseph
Mara Leventhal
Sandra M. Lipsman
Christopher J. Stanley
Gregory O. Tuttle
Joseph Hague Aaronson LLC
485 Lexington Avenue, 30th Floor
New York, NY 10017

Attorneys for Amici Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, LP

April 29, 2016

/s/ Rebecca S. LeGrand
Rebecca S. LeGrand

Counsel for Amicus Curiae