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

RESPONSE OF DEFENDANT-APPELLEE, THE UNITED STATES, TO PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

JOYCE R. BRANDA
Acting Assistant Attorney
General

ROBERT E. KIRSHMAN, JR.
Director

FRANKLIN E. WHITE, JR.
Assistant Director
Commercial Litigation Branch
Civil Division

DAVID A. HARRINGTON
Assistant Chief
Natural Resources Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0244
Attorneys for the United States

January 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Regulations:

2015-5100

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

RESPONSE OF DEFENDANT-APPELLEE, THE UNITED STATES, TO PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

Pursuant to the Court's November 22, 2016 order, defendant-appellee, the United States, respectfully submits this response to Plaintiff-Appellant's Petition for Rehearing *En Banc*.

INTRODUCTION

This action concerns an alleged taking of private contract rights resulting from a statute and regulations that barred payment of so-called "golden parachute" payments upon an employee's termination by the Federal Home Loan Mortgage Corporation ("Freddie Mac"), a private corporation. The trial court dismissed the action for failure to state a claim and this Court affirmed.

The Panel held that the Government action identified in the complaint – a

Government instruction that Freddie Mac not make severance payments to Anthony Piszel following his termination – did not effect a taking. The Panel based its holding on the well-established and uncontroversial principle that "the only duty a contract imposes is to perform or pay damages." A17 (quoting *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) (citing Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881))).[1] The Government's instruction, the Panel explained, "did not take anything from Mr. Piszel because, even after the government's action, Mr. Piszel was left with the right to enforce his contract against Freddie Mac in a breach of contract action." A17. This conclusion and the resulting dismissal of Mr. Piszel's taking claim are consistent with Supreme Court and circuit precedent.

Mr. Piszel acknowledges that he could have filed suit to seek breach damages directly from his contracting partner, Freddie Mac. *See* A18. He did not. Having failed to do so, on appeal, Mr. Piszel contends that such a claim would have been subject to a state-law impossibility defense, making it futile. *See* A20 (taking this position "in his briefs, but not in his complaint"). The Panel considered and rejected this argument on several independent grounds. *See* A20-25. More significantly for present purposes, the parameters of an impossibility

[1] The United States cites Plaintiff-Appellant Anthony Piszel's Petition for Rehearing *En Banc* as "Pet. __," the Addendum to the petition as "A__," and the Joint Appendix submitted with the parties' appellate briefs as "Appx. __."

defense under Virginia law is not a "question of exceptional importance" that warrants *en banc* review by this Court. Fed. R. App. P. 35(a)(2). Accordingly, Mr. Piszel's request for rehearing *en banc* should be denied.

BACKGROUND

I. Statutory And Regulatory Background

Mr. Piszel is a former employee of Freddie Mac. Mr. Piszel alleges in his complaint that he began working at Freddie Mac as chief financial officer ("CFO") in 2006. A3. According to his employment agreement, in the event of his termination without cause, Mr. Piszel was to receive a lump-sum cash payment and the continued vesting of certain restricted stock units. *Id.* Such severance benefits are frequently referred to as a "golden parachute." *Id.*

Freddie Mac is a government sponsored enterprise, meaning that it is a federally-chartered, private corporation. A3 (citing 12 U.S.C. § 1452). Under its charter, Freddie Mac's purpose is to stabilize the United States' home mortgage market and to promote access to mortgage credit. *Id*; *see also* 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 creation, Freddie Mac has been subject to pervasive governmental regulation and oversight, as well as the possibility that Congress might at any time amend its charter statute.

When Mr. Piszel first 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). Legislation to clarify and buttress existing regulations was pending before Congress. *See* H.R. Rep. No. 109-171, pt. 1, at 13 (2005). This included 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 the regulator had previously approved the contracts. *See id.* Freddie Mac noted this legislation, and the "uncertain regulatory environment" it created, in its "Annual Information Statement" the year *before* Mr. Piszel joined the corporation. *See* Appx. 171.

On July 30, 2008, facing great turmoil in the national housing market and the potential collapse of Freddie Mac, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"). Pub. L. No. 11-289, 122 Stat. 2654 (2010) (codified at 12 U.S.C. § 4511 *et seq.*). HERA significantly restructured the regulatory framework of Freddie Mac, establishing the Federal Housing Finance Agency ("FHFA") as successor to the previous Federal regulator (the Office of Federal Housing Oversight), and clarifying and expanding the powers of FHFA to act as a conservator or receiver for Freddie Mac. A4. Among other things, as conservator, FHFA was given authority to "disaffirm or repudiate any contract," after which the counterparty to the contract could prosecute a claim for "actual

direct compensatory damages." 12 U.S.C. § 4617(d)(1), (3)(A)(i).

In addition, HERA authorized the FHFA Director to "prohibit or limit, by regulation or order, any golden parachute payment." *Id.* § 4518(e)(1). The statute defined the term "golden parachute payment" and exempted from that definition "any payment made pursuant to a bona fide deferred compensation plan or arrangement." *Id.* § 4518(e)(4)(C)(ii).

FHFA issued regulations implementing HERA on September 16, 2008. *See* Golden Parachute & Indemnification Payments, 73 Fed. Reg. 53356-01 (Sept. 16, 2008) (codified at 12 C.F.R. pt. 1231). The regulations generally prohibited golden parachute payments falling within the statutory definition, but identified scenarios in which such a payment could be made, including, for instance, when a regulated entity requested authorization to make a payment and the person to receive the payment had not committed any wrongdoing. 12 C.F.R. § 1231.3(b).

II. Procedural History

The United States announced on September 7, 2008, that Freddie Mac had been placed into conservatorship. A7. Mr. Piszel alleges in his complaint that about two weeks later, the Director of FHFA, acting in his capacity as Freddie Mac's regulator, sent a letter to Freddie Mac stating that Mr. Piszel should be terminated without cause. *Id.* The letter further provided that Freddie Mac should not make severance payments to Mr. Piszel. *Id.* The stated basis for this directive

was the newly-enacted "golden parachute" provisions in HERA and their implementing regulations. *Id.*

On August 1, 2014, "nearly six years after he was fired from his job as CFO of Freddie Mac," Mr. Piszel filed suit against the United States. A7-8. Mr. Piszel contended in his complaint that FHFA's instruction to Freddie Mac effected a Fifth Amendment taking of the severance benefits component of his employment contract. A8. At the same time, Mr. Piszel alleged that his severance benefits were part of a "bona fide deferred compensation plan" and, thus, were not barred by HERA. A21; *see also* 12 C.F.R. § 1231.2. Mr. Piszel never brought any action to recover breach of contract damages directly from Freddie Mac. A8.

The United States moved to dismiss Mr. Piszel's complaint. Mr. Piszel did not move to amend the complaint, but rather defended the complaint as originally filed. A9. In granting the United States' motion, the trial court found that Mr. Piszel's taking claim "failed under applicable takings precedent" governing physical, categorical, and regulatory takings claims. *Piszel v. United States*, 121 Fed. Cl. 793, 805-06 (2015) (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 possessed no reasonable investment-backed expectation regarding severance compensation

"[g]iven the regulatory scheme governing Freddie Mac").

Mr. Piszel appealed. Following oral argument, the Panel ordered supplemental briefing to address three questions: (1) whether the fact that the golden parachute provision of HERA did not eliminate breach of contract claims precludes a takings action against the Government; (2) whether recovery for breach damages would be affected by the impossibility or the sovereign acts doctrines; and (3) if so, what effect would that have on the existence of a takings claim. A10.

On August 18, 2016, the Panel issued a decision affirming the dismissal of this action for failure to state a claim. *See* A1-28. Mr. Piszel subsequently petitioned for rehearing *en banc* and the United States has been invited to respond.

ARGUMENT

I. The Panel's Takings Analysis Is Based On Long-Established Principles Of Contract Law And Is Consistent With Existing Precedent

Mr. Piszel asserts that the Panel decision "conflicts" with Supreme Court and Federal Circuit precedent. Mr. Piszel, however, merely points to cases where a court "addressed" a contract-based taking claim on the merits "notwithstanding the availability of private contract damages." *See* Pet. 10-12. Mr. Piszel identifies no language in any judicial decision – much less a holding – that is contrary to the Panel decision. *See id.* Put simply, no conflict exists and *en banc* review is unwarranted.

Mr. Piszel's overstated arguments disregard or misconstrue the Panel's

analysis. *See* Pet. 6, 7, 10, 12 (contending that the Panel decision created "a new threshold burden," represents a "profound change" in the law, and has "effectively abolishe[d] takings claims arising from a private contract"). The Panel expressly rejected a bright line approach, declining to find "that Mr. Piszel had to pursue a breach of contract claim against Freddie Mac before bringing a takings claim" in the Court of Federal Claims. A16. Instead, the Panel held that "the existence of a remedy for breach of contract is *highly relevant* to the takings analysis *in this case*." A16 (emphasis added). This is unquestionably correct.

The first question in analyzing any takings claim is always "what was taken." *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995). Here, the property right for which Mr. Piszel seeks compensation is *contractual* in nature. *See* A8. For over 100 years, it has been established law that the "duty a contract imposes is to perform or pay damages." A17 (citing Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881)); *accord United States v. Winstar Corp.*, 518 U.S. 839, 919 (1996) (Scalia, J., concurring) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."); *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996) (Posner, J.) ("The essence . . . of a breach of contract is that it triggers a duty to pay damages for the reasonably foreseeable consequences of the breach. If the duty is unimpaired, the obligation of the contract cannot be said to

have been impaired."). It therefore follows that, standing alone, the prevention of contract performance by the Government does not effect a taking. Rather, as the Panel correctly found, "to effect a taking of a contractual right when performance has been prevented, the government must substantially take away the right to damages in the event of a breach." A17. This is because, where a plaintiff retains a contract-based claim, his "expectations with regard to [his] property interest have not been contravened and the value of those interests ha[s] not been diminished." *Castle v. United States*, 48 Fed. Cl. 187, 218 (Fed. Cl. 2000), *aff'd in relevant part*, 301 F.3d 1328 (Fed. Cir. 2002); *see also ConocoPhillips v. United States*, 73 Fed. Cl. 46, 55 (2006) (A party "to whom a contract remedy is available . . . has not been deprived of the rights conferred on him by contract" and a claim for the taking of such contract rights "therefore must fail."), *aff'd*, 501 F.3d 1374 (Fed. Cir 2007); *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014) (a viable takings claim does not exist where no economic impact is shown).

Mr. Piszel attempts to make something of the fact that the contract at issue – and the resulting breach claim – was not with the Government. *See* Pet. 7-9. But the logic of the Panel's analysis applies equally to public and private contracts. In either case, a contract constitutes a promise of performance or damages for non-performance. And it makes no difference whether a plaintiff's recourse is from a private party or a public entity: an avenue to obtain damages for nonperformance

is available in either event.

This Court has rejected Mr. Piszel's proposed distinction between Government and private contracts. In *767 Third Avenue Associates v. United States*, a plaintiff-landlord contracted with foreign organizations for the rental of offices in New York. When the Government froze the organizations' assets, they defaulted on their leases. The plaintiff sued for a taking, claiming the Government caused the default, thereby depriving the plaintiff of the benefits of its contract. *See* 48 F.3d 1575, 1577 (Fed. Cir. 1995). This Court rejected the claim, reasoning that:

> [T]he leases specifically provided damages remedies that [plaintiff] *could have attempted to enforce* in its district court suit [but did not]. The government's actions in this case thus did not take [plaintiff's] interest in the leases.

Id. at 1582-83 (emphasis added). Mr. Piszel's situation is no different: he "could have attempted to enforce" his contract rights directly, but chose not to; as in *767 Third Avenue Associates*, therefore, the Government "did not take" his property.

The cases cited by Mr. Piszel do not hold otherwise. Mr. Piszel points to several cases dealing with the interplay of government contracts and takings law. *See* Pet. 7-9. These cases, which authorize Government contractors to plead breach of contract and taking claims in the alternative, *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009), caution that the concept of a taking "has limited application" where the parties' rights vis-à-vis one another are

created by contract, *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001), and hold that the availability of contract remedies is significant in evaluating any takings claim, *Castle*, 301 F.3d at 1342. None suggest that the availability of breach damages is irrelevant to an alleged taking of private contract rights.

The landmark Supreme Court decision addressing the alleged taking of contract rights is *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). In *Omnia*, plaintiff Omnia Commercial had a valuable contract to purchase steel from the Allegheny Steel Company at a price under the market. *Id.* 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. *Omnia* thus holds that, unlike a direct appropriation, frustration of a private contract *does not* effect a taking.

To be sure, the Supreme Court in *Omnia* did not first address whether Omnia could recover from Allegheny for breach. But answering that predicate question was unnecessary, because, given that the Government had not directly

appropriated Omnia's contract, Omnia's claim failed.

Mr. Piszel claims to have identified cases where the Supreme Court "actually found a taking" in spite of the availability of private contract damages. Pet. 11. Although Mr. Piszel does not identify which specific cases "actually found" a taking, the cases apparently are: *United States v. General Motors Corp.* 323 U.S. 373, 374 (1945) (addressing "the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant"); and *United States v. Petty Motor Co.*, 327 U.S. 372, 373 (1946) (addressing the just compensation owed for "a petition for condemnation of the temporary use for public purposes of a building").[2] *See* Pet. 10. These decisions, however, concern the Government's direct appropriation of private property (leasehold interests) by eminent domain. There is no question that compensation under the Fifth Amendment is due where the Government exercises the power of eminent domain; the question before the Supreme Court in both cases concerned the proper measure of just compensation. Consequently, neither *General Motors*

[2] Mr. Piszel also cites *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See* Pet. 10. *Mahon* is a significant early takings decision because, prior to the decision, "it was generally thought that the Takings Clause reached only a 'direct appropriation of property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citation omitted). However, the Supreme Court has likewise recognized that the "decision in *Mahon* offer[s] little insight into when, and under what circumstances, a given regulation" effects a taking. *Id.* at 1015.

nor *Petty Motor* has any bearing on the issues before the Court in this appeal.[3]

II. The Court Should Not Grant *En Banc* Review To Revisit The Panel's Ruling On The Availability Of An Impossibility Defense Under Virginia Law

Mr. Piszel acknowledges that he could have filed suit to seek breach damages directly from Freddie Mac, but did not. *See* A18. Before this Court he argued for the first time that such a suit would be futile because Freddie Mac could have asserted a state-law impossibility defense. The Panel appropriately rejected that argument, *see* A20-25, which Mr. Piszel now recycles as a ground for seeking *en banc* review.

The Panel stated that it "is unclear" whether a Government action that creates a state law impossibility defense would support a taking claim. A20 (citing *Omnia*, 261 U.S. at 511). "But even assuming without deciding that the indirect

[3] Mr. Piszel also fails to identify any contrary circuit precedent. His attempt to bring this case within the holding of *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (2014), is unsound. *A&D* and the Panel decision were both written by the same judge, Judge Dyk, who expressly distinguished *A&D* in the Panel decision, *see* A26 n.9 (noting that "the government conceded" that no breach damages could have been obtained in *A&D*), and who found no taking in *A&D;* rather, the *A&D* court remanded for further factual development about the circumstances of Government's automobile industry rescue. 748 F.3d at 1147. Here, it is unknown what defenses Freddie Mac might have asserted, and the United States does not concede that any claim or defense would or would not have succeeded. The decisions in *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003), and *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), are equally inapposite because "the 'contract' right Appellants assert was taken [was], in fact, a right grounded in real property, and not in contract." *Chancellor Manor*, 331 F.3d at 903.

creation of an impossibility defense could support a takings claim," the Panel found several reasons why Mr. Piszel's breach claim could have survived such a defense and noted that "his complaint does not allege otherwise." *See* A20-25.

The Panel did not need to go even that far. Here, there was no appropriation of Mr. Piszel's employment contract by the United States. Like the steel producer in *Omnia*, Mr. Piszel merely alleges that his contractual severance benefits were frustrated by a Government directive. *See* 261 U.S. at 511. Consequently, *Omnia* is fatal to Mr. Piszel's taking claim.[4]

But even if that were not the case, the Panel correctly found that (1) "Mr. Piszel could have sought to prove [in a breach of contract action,] and does in fact allege in his complaint, that termination of his payments was not authorized by the statute;" (2) Mr. Piszel could have alleged that Freddie Mac's failure to seek an exception to the golden parachute prohibition, as authorized by HERA, was a breach of his employment contract; and (3) "it is not clear" that an "impossibility defense would apply at all" because an "impossibility defense could be defeated by showing that the contracting party assumed the risk. . . ." A20-25. Mr. Piszel offers no meaningful response to these shortcomings in his case,

[4] Tucker Act jurisdiction to rule definitively on the impossibility issue does not exist because a defense to Mr. Piszel's hypothetical breach-of-contract claim is a purely private dispute with Freddie Mac. *United States v. Sherwood*, 312 U.S. 584, 588 (1941) (dismissing where "maintenance [of a claim] against private parties is prerequisite to prosecution of the suit against the United States").

arguing only that he might be able to develop a response if afforded discovery. *See* Pet. 14-15. More significantly, the Panel decision does not conflict with binding precedent and the availability of an impossibility defense under Virginia law is not a "question of exceptional importance" that warrants *en banc* review.

III. Mr. Piszel's Taking Claim Fails In Any Event For Lack of Reasonable Investment-Backed Expectations

The Panel did not reach the trial court's ruling that Mr. Piszel had failed to allege a plausible claim under established taking precedent because he possessed no reasonable investment-backed expectation with respect to a golden parachute payment. *See Piszel*, 121 Fed. Cl. at 805-06. The trial court explained that Mr. Piszel contracted in a pervasively regulated field, that executive compensation was regulated when Mr. Piszel first joined Freddie Mac, and that Mr. Piszel "voluntarily entered into his employment agreement within this regulatory environment." *See id.* (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.")). Mr. Piszel neglects to acknowledge this additional hurdle. It is yet another reason his claim fails and that *en banc* review is unwarranted.

CONCLUSION

For these reasons, the United States respectfully requests that Court deny Mr. Piszel's petition for *en banc* review.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

ROBERT E. KIRSHMAN, JR.
Director

FRANKLIN E. WHITE, JR.
Assistant Director
Commercial Litigation Branch
Civil Division

s/ David A. Harrington

DAVID A. HARRINGTON
Assistant Chief
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0244

Attorneys for the United States

January 24, 2017