APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 16-2276

LOVE TERMINAL PARTNERS, L.P.,
VIRGINIA AEROSPACE, LLC,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims, No. 1:08-cv-00536-MMS

Decided: May 7, 2018

Before: Prost, *Chief Judge*, Clevenger and Dyk, *Circuit Judges*.

OPINION

Dyk, *Circuit Judge.*

Plaintiffs Love Terminal Partners, L.P. ("LTP") and Virginia Aerospace, LLC ("VA") leased a portion of Love Field airport from the City of Dallas, Texas ("Dallas"), and constructed a six-gate airline terminal on the property. Plaintiffs claim that the Wright Amendment Reform Act of 2006 ("WARA"), Pub. L.

No. 109-352, 120 Stat. 2011, effected a regulatory taking of their leases and a physical taking of the terminal because, in their view, the statute codified a private agreement in which Dallas agreed (1) to bar use of plaintiffs' gates for commercial air transit and (2) to acquire and demolish plaintiffs' terminal.

The Court of Federal Claims ("Claims Court") agreed and found that the enactment of WARA constituted a per se regulatory taking of plaintiffs' leaseholds under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and a regulatory taking of the leaseholds under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), as well as a physical taking of the terminal itself.

We conclude that WARA did not constitute a regulatory or physical taking. We therefore reverse.

BACKGROUND

This case is about the development of Love Field, an airport located in and owned by Dallas. Since the airport's founding, most air traffic has been accommodated by a main terminal owned and operated by the city. In 2000, plaintiffs constructed a smaller terminal (the "Lemmon Avenue Terminal") on a portion of Love Field that they had leased from the city. This case concerns an alleged taking of the Lemmon Avenue Terminal and plaintiffs' underlying leaseholds.

I

The genesis of the present dispute goes back several decades. In 1955, Dallas entered into a long-term lease with Braniff Airways, Inc. (the "Master Lease"), granting Braniff the exclusive use of a 36-acre

portion of Love Field (subsequently reduced to 26.8 acres) located northeast of the two runways, near Lemmon Avenue. The Master Lease guaranteed Braniff non-exclusive access to the runways, taxiways, and other aviation-related facilities at Love Field, and stated that the leased premises must be used for "purposes related or incidental to the primary aviation-related business conducted by Lessee." J.A. 2256.

The use of Love Field for commercial air passenger service has been restricted under federal law since 1980, when Congress passed the Wright Amendment in an effort to promote growth of nearby Dallas/Fort Worth International Airport. The Wright Amendment limited use of Love Field to servicing final destinations within Texas and its four contiguous neighboring states. Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). Its restrictions applied to commercial flights on planes designed to hold over 56 passengers. *Id.* Over the next 25 years, federal legislation was enacted that added four additional states to the list of permissible destinations, and allowed unrestricted flights on larger planes that had been retrofitted to hold fewer than 56 passengers. Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997); Pub. L. No. 109-115, § 181, 119 Stat. 2396, 2430 (2005). Nonetheless, commercial air passenger service from Love Field was significantly limited by the Wright Amendment's provisions for most of the airport's modern history.

In 1999, LTP, one the plaintiffs in this case, was assigned an existing sublease for a 9.3-acre portion of the Master Leasehold (the "sublease"). LTP's goal was to offer Wright Amendment-compliant air passenger

service out of Love Field in cooperation with Legend Airlines ("Legend"). LTP would construct a six-gate Lemmon Avenue Terminal and a parking garage on its 9.3-acre parcel, and would license the six gates to Legend.

LTP completed construction of the Lemmon Avenue Terminal by early 2000, and Legend began offering scheduled passenger service from the terminal later that year. The operations were not profitable. After eight months, in December 2000, Legend stopped flying and entered bankruptcy proceedings. Another airline, Atlantic Southeast Airlines, offered scheduled passenger service from the Lemmon Avenue Terminal between July 2000 and May 2001, but ultimately moved its operations to the 26-gate main terminal owned and operated by Dallas. LTP attempted to market its gates to other potential users, but no commercial airline was interested in leasing the gates.

In 2003, plaintiff VA, an entity having common ownership with LTP, invested $6.5 million to acquire the entire 26.8-acre Master Lease. LTP and VA continued their efforts to attract another airline to use the Lemmon Avenue Terminal. They were able to earn some income (though not enough to cover the monthly payments on the Master Lease) through rentals of the parking garage and other portions of their property to an aviation freight company, a limousine company, two automobile dealerships, an aviation reservation service, and several wireless telecommunications companies. But, as before, no airline was willing to lease the gates at the Lemmon Avenue Terminal.

Throughout this period, Southwest Airlines and other airlines offered Wright Amendment-compliant passenger service out of the main terminal. Love Field had been a Southwest hub since the airline's founding, and Southwest had long lobbied Congress to loosen restrictions on Love Field—ideally by repealing the Wright Amendment. In 2004, Southwest resumed its efforts with a campaign entitled "Wright is Wrong." In 2005, Congress responded by adding Missouri to the list of permitted destinations, but otherwise left the restrictions on Love Field in place.

In March 2006, members of Congress, recognizing "decades of litigation and contentious debate among local communities, airports and airlines over the establishment and development of [Dallas/Fort Worth International Airport], the subsequent use of Love Field, and proposed legislative changes to the Wright Amendment," recommended that Dallas and Fort Worth jointly propose a solution. H.R. Rep. No. 109-600, pt. 1, at 3. On July 11, 2006, Dallas and Fort Worth, along with Southwest Airlines, American Airlines (an airline with a hub at Dallas/Fort Worth International Airport), and the Dallas- Fort Worth Airport Authority, responded by entering into an agreement (the "Five-Party Agreement" or "Agreement") setting out their "local solution."

The Five-Party Agreement stated that the parties would petition Congress for immediate allowance of through-ticketing from Love Field (*i.e.*, permitting airlines to sell tickets from Love Field to any other destination, so long as the flight first stopped at a destination authorized by the Wright Amendment) and for total repeal of the Wright Amendment after

eight years. It also stated that the parties would redevelop Love Field consistent with a revised "Love Field Master Plan," which would, among other things, reduce the total number of gates to 20 from the current total of 32 (26 in the main terminal and six in the Lemmon Avenue Terminal), and required that Love Field "thereafter be limited permanently to a maximum of 20 gates." J.A. 3091. The parties also agreed to an allocation of those 20 gates among the three airlines currently flying out of Love Field (all based out of the main terminal). *Id*. And the City of Dallas agreed to acquire and demolish the Lemmon Avenue Terminal, so as to consolidate the 20 gates in the main terminal, as shown in the revised Master Plan. The Agreement provided that:

> [T]he City agrees that it will acquire all or a portion of the lease on the Lemmon Avenue facility, up to and including condemnation, necessary to fulfill its obligations under this Contract. The City of Dallas further agrees to the demolition of the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease to ensure that that facility can never again be used for passenger service.

J.A. 3092. The Agreement made clear that the costs for the acquisition and demolition of the Lemmon Avenue gates were to be recovered from "airport users." *Id*. Finally, it stated that "[i]f the U.S. Congress does not enact legislation by December 31, 2006, that would allow the Parties to implement the terms and spirit of this Contract, including, but not limited to, the 20 gate restriction at Love Field, then

this Contract is null and void unless all parties agree to extend this Contract." J.A. 3095.

In October 2006, Congress enacted WARA, which immediately allowed through-ticketing to and from Love Field and provided for the total repeal of the Wright Amendment in eight years. WARA § 2. WARA also instructed Dallas to reduce the total number of gates available for passenger air service at Love Field to no more than 20. *Id.* § 5(a). It further stated that no federal funds could be used to remove gates at the Lemmon Avenue Terminal. *Id.* § 5(b). The legislation provided that:

> (a) IN GENERAL.—The city of Dallas, Texas, shall reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates. Thereafter, the number of gates available for such service shall not exceed a maximum of 20 gates. The city of Dallas . . . shall determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006. To accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases.
>
> (b) REMOVAL OF GATES AT LOVE FIELD.—No Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in

> reducing the number of gates as required under this Act . . . .

Id. § 5(a)-(b). Finally, WARA included a provision that prohibited the Secretary of Transportation and the Administrator of the Federal Aviation Administration from taking actions inconsistent with the Five-Party Agreement. *Id.* § 5(d)(1)(A)-(B).

In April 2008, VA stopped paying rent to Dallas on the Master Lease. Dallas instituted eviction proceedings and regained possession of the 26.8 acres of leased property later that year. Between July and September 2009, Dallas demolished the Lemmon Avenue Terminal.

II

In 2008, LTP and VA filed this suit in the Claims Court, alleging that WARA effected regulatory takings of the Master Lease and the sublease, and a physical taking of the Lemmon Avenue Terminal. On February 11, 2011, the Claims Court held on summary judgment that WARA incorporated the entire Five-Party Agreement into federal law, including the portions reducing the number of gates and committing Dallas to acquire and demolish the Lem- mon Avenue gates. *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 424 (2011) ("*Love Terminal Partners I*"). Because the Claims Court concluded that WARA required Dallas to acquire and demolish the gates, it held that WARA effected a physical taking of the Lemmon Avenue Terminal. *Id.* at 424-25.

After fact and expert discovery, a seven-day trial was held to address the remaining issues concerning regulatory takings of the Master Lease and sublease. On April 19, 2016, the Claims Court resolved the

regulatory-takings issues by holding that WARA limited plaintiffs' use of their leasehold in such a way as to render it without economic value, creating liability for a taking of plaintiffs' leasehold under both the categorical theory set forth in *Lucas v. South Carolina Coastal*, 505 U.S. 1003 (1992), and a taking under the analysis in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 424, 430 (2016) ("*Love Terminal Partners II*"). The Claims Court awarded plaintiffs $133.5 million in just compensation for the regulatory and physical takings of their property, plus interest compounded annually starting on the date WARA was enacted into law. *Id.* at 440.

On April 22, 2016, the Claims Court entered judgement in favor of plaintiffs pursuant to Rule 54(b) of the Rules of the Court of Federal Claims. J.A. 161.

The United States appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

As a threshold matter, "the existence of a valid property interest is necessary in all takings claims." *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001). Here, it is undisputed that the property interests allegedly taken by WARA are cognizable property interests for purposes of the Fifth Amendment. After identifying a valid property interest, the court must determine whether the governmental action at issue amounts to a compensable taking of that property interest. *First English Evangelical Lutheran Church of Glendale v.*

Los Angeles County, California, 482 U.S. 304, 315 (1987).

This case alleges both physical takings and regulatory takings. A physical taking is the "paradigmatic taking" and occurs by "a direct government appropriation or [a] physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). A regulatory taking occurs "when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Whether a taking has occurred is a question of law based on factual underpinnings. *Wyatt*, 271 F.3d at 1096. We review the Claims Court's legal conclusions de novo, while reviewing its factual findings for clear error. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1266 (Fed. Cir. 2009).

I

We first consider the regulatory-takings issue. The Supreme Court has recognized that a "categorical" regulatory taking occurs in the "extraordinary circumstance" where governmental action deprives a property owner of "all economically beneficial uses" of his property. *Lucas*, 505 U.S. at 1017-18. Outside of this situation—that is, where the property is not rendered totally valueless—the Supreme Court has "generally eschewed any set formula" for identifying the presence of a regulatory taking, "instead preferring to engage in essentially ad hoc, factual inquiries." *Id.* at 1015. In *Penn Central*, the Supreme Court recognized three factors of "particular significance" to this ad hoc analysis: (i) the

"economic impact of the regulation on the claimant," (ii) the "extent to which the regulation has interfered with distinct investment-backed expectations," and (iii) "the character of the governmental action." 438 U.S. at 124.

Plaintiffs' regulatory-takings theory is that they had a right under the leases to use their property for commercial air passenger service. While plaintiffs acknowledge that they had no right to construct or use any particular number of gates, the only way to use the property for commercial air passenger service was to erect gates and lease those gates to airlines.

WARA required Dallas to reduce the total number of gates at Love Field from 32 to 20. Plaintiffs argue that their gates were not among those to be retained. This was so because WARA incorporated portions of the Five-Party Agreement in which the city agreed to demolish plaintiffs' existing gates and to redevelop Love Field "consistent with a revised Love Field Master Plan." *Love Terminal Partners I*, 97 Fed. Cl. at 412; *see also* J.A. 3091; WARA § 5(a). Under the Master Plan, all gates were to be located in the main terminal. J.A. 3091. WARA also directed Dallas to "manage Love Field" and "determine the allocation of leased gates" in accordance with "contractual rights and obligations existing as of the effective date of this Act for certificated air carriers." WARA § 5(a). One of these "rights and obligations" was a provision in the Five- Party Agreement that guaranteed Southwest, American, and ExpressJet Airlines the continued use of gates under their existing leases—all of which were located in the main terminal. *Love Terminal Partners I*, 97 Fed. Cl. at 409-11; J.A. 3091. Finally, the

Agreement required acquisition and demolition of the Lemmon Avenue Terminal. J.A. 3092.

We assume, without deciding, that plaintiffs' theory as to the effect of the 2006 legislation is correct and that the legislation effectively barred plaintiffs from using the Lemmon Avenue Terminal for commercial air passenger service. Nevertheless, we conclude that there was no regulatory taking.

Before beginning our regulatory-takings analysis, we must first identify "the precise action that [plaintiff] contends constituted conduct the government could not engage in without paying compensation." *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009). Here, plaintiffs' regulatory-takings theory rests at the confluence of at least three separate government actions, each of which we must examine separately. *See Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (rejecting the plaintiff's characterization of an alleged taking as "too broad" when it involved several distinct government actions and failed to "pinpoint what step in the sequence of events" constituted a taking for which compensation was due).

Notably, plaintiffs have not alleged that enactment of the Wright Amendment itself constituted a taking. To be sure, a takings claim could, in theory, rest on the Wright Amendment's restrictions, which limited the allowable uses of the Master Leasehold when the statute was enacted in 1980. But any Wright Amendment-based claim would have accrued at the time of the statute's enactment and would therefore be barred by the Tucker Act's sixyear statute of limitations. *See* 28 U.S.C. § 2501*; see*

also Fallini v. United States, 56 F.3d 1378, 1380-82 (Fed. Cir. 1995) (explaining that a taking accomplished by legislation accrues at the time the legislation is enacted); *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558 (Fed. Cir. 1985) (same). Moreover, it is likely that any such claim would be unavailable to plaintiffs, who acquired their leaseholds in 1999 and 2003 and thus had no valid property interest at the time the Wright Amendment was enacted into law. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003) (explaining that "the complaining party must show it owned a distinct property interest at the time [the property interest] was allegedly taken, even for regulatory takings"). In any event, plaintiffs do not argue that the enactment of the Wright Amendment constituted a taking.

Instead of relying on enactment of the Wright Amendment, plaintiffs' regulatory takings claim seems to be premised on three distinct government actions and inactions. The first of these is Congress' failure to repeal the Wright Amendment. But it is clear that this kind of government inaction cannot be the basis for takings liability. In *United States v. Sponenbarger*, 308 U.S. 256 (1939), for instance, the Supreme Court found that there was no taking when the government built a floodprotection system but failed to include features that would protect Sponenbarger's property. *Id.* at 265. Similarly, *Georgia Power Co. v. United States*, 633 F.2d 554 (Ct. Cl. 1980), held that there was no taking based on the government's decision not to regulate sailboat heights in a public reservoir. *Id.* at 557. This same principle underlies our recent decision in *St. Bernard Parish*

Government v. United States, in which we held that "[o]n a takings theory, the government cannot be liable for failure to act, but only for affirmative acts." No. 16-2301, slip op. at 9 (Fed. Cir. Apr. 20, 2018). The principle that government inaction cannot be a basis for takings liability is equally relevant in the regulatory-takings context. Indeed, every situation in which the Supreme Court has identified a regulatory taking has involved some kind of affirmative government action.[1] And we are aware of no case that has imposed regulatory takings liability based on the government's failure to repeal an existing statute.

Second, Plaintiffs suggest that a taking occurred because WARA provided a benefit to Dallas by

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[1] Early examples of government action resulting in regulatory takings liability include: enactment of a state statute that limited the extent to which coal can be mined under homes, *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922), and enactment of a federal statute that eliminated certain rights of mortgagees in property held as security, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). More recently, the Supreme Court has found regulatory takings based on an order by the Army Corps of Engineers that the public be allowed access to an exclusive private marina, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); a federal statute giving the government title to lands that had been set aside for the Sioux Nation in a previous treaty, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); a state statute which appropriated the interest on a court-held interpleader fund, *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155 (1980); a federal statute that required public disclosure of trade secret data, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); a federal statute declaring that small interests in allotted Indian land may not descend by intestacy or devise, but rather must escheat to the tribe, *Hodel v. Irving*, 481 U.S. 704 (1987); and a state statute that barred erection of permanent habitable structures on vacant beachfront lots, *Lucas*, 505 U.S. at 1007.

liberalizing the Wright Amendment without providing plaintiffs with the same benefit. Here again, plaintiffs' theory rests on government inaction. In any event, takings liability does not arise simply because government action helps some parties but not others. In *Sponenbarger*, for instance, the Supreme Court held that the government did not effect a physical taking when it implemented a flood-control program that only protected certain property owners. 308 U.S. at 265. The same approach governs in the regulatory-takings context, where the Supreme Court has noted that "the Takings Clause [is] . . . more than a particularized restatement of the Equal Protection Clause." *Lucas*, 505 U.S. at 1027 n.14; *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3 (1987) (distinguishing between takings claims based on regulation of property and equal-protection claims based on regulation of property). Indeed, Plaintiffs concede that "Congress may . . . favor one party over another legislatively." Appellee Br. 54. Congress' failure to extend the benefits of WARA to these plaintiffs is government inaction that cannot support a takings claim.

Finally, plaintiffs argue that WARA constituted a regulatory taking because it prevented use of their property for commercial air passenger service—as had been permitted under the pre-WARA regulatory regime. This is the kind of government action that, in theory, might amount to a regulatory taking, but to establish regulatory- takings liability, a plaintiff must show that a particular government action significantly diminished the value of its property. There cannot be a regulatory taking in the absence of economic injury. *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142,

1157 (Fed. Cir. 2014); *Cienega Gardens*, 331 F.3d at 1340.

Under both the *Penn Central* framework, which looks for the presence of "serious" financial loss, *Cienega Gardens*, 331 F.3d at 1340, and the *Lucas* framework, which asks whether the property has been left without any "economically beneficial use", 505 U.S. at 1017-19, there is no regulatory taking unless the government action has caused a decline in the value of the property. Importantly, both the *Penn Central* and *Lucas* frameworks require the economic injury to be caused by the government action at issue, not by some other factor. *A & D Auto Sales*, 748 F.3d at 1157. To assess the severity of a regulation's economic impact, the court must compare the value of the property immediately before the governmental action that is alleged to cause the taking with the value of the same property immediately after that governmental action. *Id.*; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-97 (1987); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999). This economic impact inquiry relates not to the amount of compensation, but to whether a taking has occurred at all.

Proving economic loss requires a plaintiff to "show what use or value its property would have but for the government action." *A & D Auto Sales*, 748 F.3d at 1157. Thus, a showing that property is valueless *after* a government action only suggests that a taking has occurred if there is evidence showing that the property would have had value *absent* the government action. This was the issue in *A & D Auto Sales*, where we

found that General Motors Corporation and Chrysler LLC dealers had failed to state a regulatory-takings claim based on the impact of a federal program that aimed to keep failing automakers afloat using government funds. The program offered federal assistance to automakers on the condition that they took certain steps to improve financial viability, including termination of plaintiffs' franchise agreements. We held that the dealers failed to state a regulatory-takings claim because they did not allege that their franchises would have had value if the government had not intervened at all. "Absent an allegation that GM and Chrysler would have avoided bankruptcy but for the government's intervention and that the franchises would have had value in that scenario, or that such bankruptcies would have preserved some value for the plaintiffs' franchises," we explained, "the terminations actually had no net negative economic impact on the plaintiffs because their franchises would have lost all value regardless of the government action." *Id.* at 1158.

Here there can be no regulatory taking because plaintiffs have not demonstrated, or even attempted to demonstrate, that their ability to use their property for commercial air passenger service under the pre-WARA regulatory regime had any value.

The Claims Court's determination that WARA destroyed all economically beneficial use and value of plaintiffs' property was entirely based on testimony from plaintiffs' experts that the property had value, not under the regulatory regime that existed before WARA, but under a regime in which the Wright

Amendment was repealed or modified.[2] *Love Terminal Partners II,* 126 Fed. Cl. at 415, 425, 433. None of plaintiffs' experts assessed the use or value of plaintiffs' leaseholds with the Wright Amendment in effect—despite the fact that the Wright Amendment was the governing law at the time of the alleged taking and had been for over a quarter century before then.

In summary, plaintiffs must show that their property had value in the regulatory environment that existed before the government action, and that this value was diminished by the government action that prevented them from operating under the existing regime. They presented no such testimony. Nor is there any indication that they could have done so. Plaintiffs' historical financial performance suggests that their property was *not* valuable for air passenger service with the Wright Amendment in place. Legend, the tenant for which the Lemmon Avenue Terminal was designed, went bankrupt in December 2000, eight months after beginning operations. Atlantic Southeast Airlines, the terminal's only other airline tenant,

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[2] Mr. Robert Massey, whose testimony the Claims Court relied on in its economic impact analysis, assessed the property's pre-WARA value based on the assumption that Congress was expected to repeal the Wright Amendment after eight years without restricting plaintiffs' ability to use their property for air passenger service. *Love Terminal Partners II,* 126 Fed. Cl. at 415 n.20. Plaintiffs' other experts, whose opinions informed the Claims Court's just compensation decision, calculated the pre-WARA value of plaintiffs' property based on an even more aggressive version of Mr. Massey's assumption: that the Wright Amendment would be totally and immediately repealed on October 13, 2006, thereby allowing plaintiffs to construct a 16-gate terminal that could offer nationwide flights on large planes by mid-2008. *Id.* at 433, 437.

moved its operations to Love Field's main terminal a few months later. Plaintiffs tried to market their property to other airlines, but never received an actual offer, so by the time of WARA's enactment no airline had used the Lemmon Avenue Terminal or paid any rent to plaintiffs for more than five years. Indeed, between their acquisition of the sublease in 1999 and the enactment of WARA in 2006, plaintiffs suffered a net income loss of roughly $13 million. And at no point during that time, including during the period when Legend was operational, did revenue exceed plaintiffs' carrying costs so as to meet plaintiffs' expert's definition for an "economically beneficial use." Since there was no adverse economic impact, there can be no taking.

Instead of analyzing the government's actions and inactions individually, as we have done above, the Claims Court conflated the three, treating them as a single government action. But even under that approach, plaintiffs have failed to demonstrate a taking.

In its *Penn Central* analysis, the Claims Court found that plaintiffs, at the time they acquired the leases in 1999 and 2003, had a reasonable, investment-backed expectation in the outright repeal of the Wright Amendment.[3] *Love Terminal Partners*

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[3] Plaintiffs' reasonable investment-backed expectations are judged as of the time they acquired the leases. *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007) ("[T]he burden is on the [plaintiff] to establish a reasonable investment-backed expectation in the property at the time it made the investment."); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

II, 126 Fed. Cl. at 428-29. As a factual matter, we question the Claims Court's finding that plaintiffs had such an expectation at the time they acquired the leases,[4] and we also question the Claims Court's determination that an expectation of complete Wright Amendment repeal would have been reasonable.[5] But in any event, the Claims Court's approach is unsound.

The reasonable, investment-backed expectation analysis is designed to account for property owners'

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[4] Indeed, plaintiffs' business plan, which was sent to investors, indicated that they specifically intended to operate within—and even take advantage of—the Wright Amendment's plane size and destination restrictions. An accompanying memorandum, which the leader of plaintiffs' due diligence team testified to be "a very good summary of all the things that we considered . . . both the risks and the positives", J.A. 396, affirmatively characterized Love Field's "complex legal and regulatory status" as an asset because it would "significantly limit competition for the real estate . . . and the airline," J.A. 2649.

[5] Any expectation of Wright Amendment repeal in 1999 or 2003 was speculative. The Wright Amendment had been in effect for two decades and, during that time, the only legislative movement towards total repeal was a bill, first introduced by Congressman Dan Glickman of Kansas in 1989 and reintroduced in 1991, on which no action was ever taken. *See Love Terminal Partners II,* 126 Fed. Cl. at 426 n.34. Plaintiffs also point to a 1992 Dep artment of Transportation study, which found that repeal of the Wright Amendment would benefit consumers without harming Dallas/Fort Worth International Airport. But this study came seven years before plaintiffs' investment and in no way suggested that repeal was imminent. The only regulatory movement in the intervening period was the Shelby Amendment, which relaxed the Wright Amendment's restrictions but fell far short of the kind of deregulation that would allow plaintiffs to operate a terminal with nationwide flights on large planes. And concrete proposals to modify the Wright Amendment did not become significant until 2004, after plaintiffs had acquired the property.

expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted. As we said in *Cienega Gardens*, "[t]he purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" 331 F.3d at 1346.

This expectations analysis is not designed to protect private predictions of regulatory change. To the contrary, what is "relevant and important in judging reasonable expectations" is "the regulatory environment at the time of the acquisition of the property." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (en banc). Neither the Claims Court nor the plaintiffs have cited any cases that find a reasonable, investment-backed expectation in any beneficial future regulatory change, and the Supreme Court has rejected the theory that there can be reasonable, investment-backed expectations in the absence of a current regulatory regime. In *Ruckelshaus*, for instance, the Supreme Court concluded that plaintiffs only had a reasonable expectation in the confidentiality of trade secrets disclosed to the EPA in pesticide registration applications to the extent that the relevant statute explicitly guaranteed confidentiality at the time of submission. 467 U.S. at 1005-06. The Court explained that plaintiffs could not have had a reasonable expectation of trade secret confidentiality prior to 1972, when the statute was silent as to how the EPA could use and disclose data, or after 1978, when the

statute explicitly allowed disclosure of all data after ten years. *Id.* at 1006-10. Only between the 1972 and 1978 amendments did the statute "explicitly guarantee[] . . . an extensive measure of confidentiality" for any data designated as a trade secret at the time of submission, and only during that period could the plaintiffs have reasonable expectations of confidentiality. *Id.* at 1011.

LTP and VA's reasonable, investment-backed expectations are similarly limited by the regulatory regime in place at the time they acquired the leases, which included the Wright Amendment. The failure to establish "reasonable, investment-backed expectations," at least under the *Penn Central* analysis, "defeats [a regulatory] takings claim as a matter of law." *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999); *see also Ruckelshaus*, 467 U.S. at 1005.[6]

On appeal, plaintiffs largely abandon the Claims Court's theory of reasonable investment-backed

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[6] We note that there appears to be conflict between circuits as to whether reasonable, investment-backed expectations are relevant to the *Lucas* analysis. *Compare Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (holding that, if a land use restriction amounts to a categorical taking under *Lucas*, the property owner is entitled to a recovery "without regard to the nature of the owner's initial investment-backed expectations."), *with Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (holding that "to resolve the question of whether the landowner has been denied all or substantially all economically viable use of his property, the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations.").

expectations, and argue instead that, under *Lucas*, a showing of reasonable, investment-backed expectations is not required, and that, under *Penn Central*, a mere expectation that they could use the property for air passenger service is sufficient. Plaintiffs' problem, as described above, is that, under both the *Penn Central* and *Lucas* analyses, a showing of economic harm is essential. Plaintiffs argue that anticipated legal changes should be taken into account in valuing the property, citing a number of condemnation cases which suggest that "reasonably probable" zoning changes can be considered when assessing a property's fair market value if the landowner can demonstrate that "just prior to the time of taking, a knowledgeable buyer would have taken into account the reasonable probability that the land in question would be rezoned." *H & R Corp. v. District of Columbia*, 351 F.2d 740, 742 (D.C. Cir. 1965); *see also Bd. of Cty. Supervisors of Prince William Cty., VA v. United States*, 276 F.3d 1359, 1365-66 (Fed. Cir. 2002); *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1300, 1313 (11th Cir. 2009); *United States v. 320.0 Acres of Land, More or Less in Monroe Cty., State of Fla.*, 605 F.2d 762, 818 (5th Cir. 1979); *Gov't of Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785, 786 (3d Cir. 1969).

It is undoubtedly true that, when assessing the economic impact of a particular government action alleged to constitute a taking, a court can consider the extent to which other, unrelated, reasonably probable zoning or regulatory changes may have influenced the property's fair market value. But this principle does not remotely authorize the economic impact analysis undertaken here by the Claims Court. To the contrary,

the cases plaintiffs cite in support of their valuation theory emphasize that plaintiffs cannot seek compensation for economic value attributable to the project for which the property was taken.

This principle, known as the "scope of the project" rule, was announced in *United States v. Miller*, 317 U.S. 369, 370 (1943), a case involving a federal reservoir project that flooded an existing railroad right-of-way, thereby making it necessary for the government to acquire additional land to relocate the railroad tracks. In implementing the reservoir project, the government designated Miller's property for condemnation for track relocation. But before Miller's property was condemned, the reservoir project itself prompted development in the area, making Miller's property more valuable. *Id.* at 371. Miller argued that he was entitled to the fair market value of his land—including the increase in value attributable to the reservoir project. The government argued that just compensation should not include any enhanced value attributable to the federal project for which the land was taken, and the Supreme Court agreed. *Id.* at 376-77; *see also 480.00 Acres of Land*, 557 F.3d at 1307 ("[W]hen deciding the market value of [a] property the fact-finding body does not consider the positive or the negative impact of any decision the Government makes within the scope of the project which prompted the taking."); *320.0 Acres of Land*, 605 F.2d at 784; 3-8A *Nichols on Eminent Domain* § 8A.01 (rev. 3d ed. 2006).

We have also found that the *Miller* rule applies to the question of whether property has been taken in the first place. *John B. Hardwicke Co. v. United States*,

467 F.2d 488, 490-91 (Ct. Cl. 1972) (finding that "plaintiffs cannot base a taking claim on the hypothesis that they can garner the benefit conferred by [one part of the Rio Grande water-control program], without deduction for the probable detriment when [another part of the Rio Grande water-control program] comes into being too").

Here, the government action that allegedly effected a taking, WARA, is the same action that liberalized the Wright Amendment. Plaintiffs, like Miller, argue that they deserve compensation because WARA's deregulatory aspects would have made their property more valuable—if only it had not restricted use of the property for commercial air passenger service. The Supreme Court rejected this reasoning in *Miller*, explaining that "owners were not entitled, if [their lands] were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable." 317 U.S. at 379.

In short, the plaintiffs have not shown a decrease in the value of their property as a result of government regulation. Even assuming that WARA barred the use of plaintiffs' property for air passenger service, there is still no regulatory taking under the *Penn Central* or *Lucas* analyses because plaintiffs failed to demonstrate that their property would have had value (with the Wright Amendment in effect) that was adversely affected by government action. As the Supreme Court said in *Brown v. Legal Foundation of Washington*, "just compensation for a net loss of zero is zero." 538 U.S. 216, 240 n.11 (2003); *see also A & D*

Auto Sales, 748 F.3d at 1157; *Cienega Gardens*, 331 F.3d at 1340.

II

The Claims Court also held that WARA effected a physical taking of plaintiffs' terminal because, by incorporating the entire Five-Party Agreement, it required Dallas to demolish plaintiffs' gates. *Love Terminal Partners I*, 97 Fed. Cl. at 424. It is well established that the government may incur takings liability based on the actions of a third party when that third party is acting pursuant to a federal mandate—as plaintiffs allege Dallas was here. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996); *see also A & D Auto Sales,* 748 F.3d at 1153-56. We find, however, that WARA did not codify the Five-Party Agreement in its entirety and specifically did not codify the portions of the Agreement in which Dallas agreed to acquire and demolish plaintiffs' gates.

The Claims Court's determination that WARA incorporated the entire Five-Party Agreement was based largely on the fact that the statute mirrors many of the Agreement's key provisions, and on the fact that WARA's language "borrows from or is virtually identical to language" in the Agreement itself.[7] *Love Terminal Partners I*, 97 Fed. Cl. at 404.

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[7] In further support of the incorporation theory, both Plaintiffs and the Claims Court point to cases brought in other jurisdictions on antitrust and state-law claims. *City of Dallas v. Delta Air Lines Inc.*, 847 F.3d 279, 282 (5th Cir. 2017); *Love Terminal Partners v. City of Dallas*, 256 S.W.3d 893, 896 (Tex. App. 2008); *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d

The Claims Court pointed out, for instance, that § 5(d)(1) of WARA explicitly referenced the Five-Party Agreement. That section provides that the Secretary of Transportation and the Administrator of the Federal Aviation Administration may not take actions "inconsistent with the contract dated July 11, 2006 entered into by the city of Dallas, the city of Fort Worth, the DFW International Airport Board, and others regarding the resolution of the Wright Amendment issues" or "that challenge the legality of any provision of such contract." The Claims Court determined that "the explicit references to the Contract in the language of the statute demonstrate Congress's intent to incorporate the Contract into []WARA." *Love Terminal Partners I*, 97 Fed. Cl. at 406.

It is true that WARA incorporates portions of the Agreement, makes a number of specific changes to federal law contemplated in the Agreement, and directly references the Agreement. But we think that the Claims Court misread the statute. WARA does not incorporate Dallas' commitment to "demoli[sh] the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease to ensure that the facility can never again be used for passenger service." J.A. 3092. Indeed, the requirement that federal funds not be used for removal of Lemmon Avenue gates explicitly distances the federal government from Dallas' intended action.

Even if WARA had codified the portion of the Five-Party Agreement in which Dallas agreed to "acquire

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538, 547, 560 (N.D. Tex. 2007). Most of these cases concluded that WARA incorporated only some of the Five- Party Agreement. And, in any event, they are not controlling here.

all or a portion of the lease on the Lemmon Avenue facility, up to and including condemnation" and to then "demoli[sh] the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease," *id.*, it still would not constitute a physical taking. Incorporation of these provisions, at most, required Dallas to negotiate with plaintiffs and then, if negotiation proved unsuccessful, bring a condemnation proceeding pursuant to which plaintiffs would receive just compensation. *See* Tex. Prop. Code § 21.0113 (requiring the government to negotiate before filing a condemnation suit).

Acquisition of plaintiffs' property through negotiation could not constitute a taking because any property transfer would be voluntary. A physical taking only occurs where the government "*requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation.").

So too, the requirement that Dallas acquire plaintiffs' property through the exercise of eminent domain would not be a taking by the United States. Plaintiffs could have chosen to retain their leases, thereby compelling Dallas to take the property through a condemnation proceeding. It is axiomatic that property is not taken without just compensation in violation of the Fifth Amendment when the act that allegedly effects a taking incorporates a provision to receive just compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985) ("If the

government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."). Because WARA, at most, directs Dallas to acquire plaintiffs' gates through negotiation or eminent domain, it could not constitute a taking without just compensation.

Ultimately, of course, Dallas gained possession of plaintiffs' leasehold through an eviction proceeding, which was brought after plaintiffs stopped paying rent. This is a course of action that Dallas was entitled to pursue as a lessor and for which no just compensation is due, even if directed by the United States.

CONCLUSION

We find that there was no regulatory taking under either *Penn Central*'s three-factor analysis or the categorical approach described in *Lucas*. There was no physical taking because WARA did not "codify" the relevant portions of the Five-Party Agreement or otherwise require destruction of the Lemmon Avenue gates without compensation. We therefore reverse.

REVERSED

Appendix B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 16-2276

LOVE TERMINAL PARTNERS, L.P.,
VIRGINIA AEROSPACE, LLC,
Plaintiffs-Appellees,
v.
UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims, No. 1:08-cv-00536-MMS

Filed: September 12, 2018

Before: Prost, *Chief Judge*, Newman, Lourie, Clevenger[*], Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, and Stoll, *Circuit Judges*.[**]

ORDER

Appellees Love Terminal Partners, L.P. and Virginia Aerospace, LLC filed a combined petition for

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[*] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

[**] Circuit Judge Hughes did not participate.

panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by appellant United States. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on September 19, 2018.

For the Court

September 12, 2018	/s/Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

Appendix C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-536L

LOVE TERMINAL PARTNERS, L.P., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Filed: April 19, 2016

OPINION AND ORDER

SWEENEY, Judge

Plaintiffs Love Terminal Partners, L.P. ("Love Terminal Partners") and Virginia Aerospace, LLC ("Virginia Aerospace") are leaseholders of property at Dallas Love Field Airport ("Love Field"), located in Dallas, Texas. In their complaint, filed in the United States Court of Federal Claims ("Court of Federal Claims") on July 23, 2008, plaintiffs allege that the federal government, through the enactment of the Wright Amendment Reform Act of 2006 ("WARA"), prohibited the use of their property, thereby destroying all economic value or benefit of their leasehold and effecting a taking without just compensation, in contravention of the Fifth Amendment to the United States Constitution.

Plaintiffs seek compensation for the taking as well as interest from the date of the taking, attorneys' fees, appraiser and expert witness fees, and the costs and expenses of litigation.

In a prior decision issued on February 11, 2011, the court denied defendant's motion to dismiss and granted plaintiffs' motion for partial summary judgment. In its opinion, the court held the following:

> Based upon its analysis of the WARA, the court holds that the statute incorporated the Contract [among local government entities and two air carriers] into federal law, thereby mandating that Dallas fulfill the obligations to which it agreed on July 11, 2006, including acquisition and demolition of the Lemmon Avenue Terminal. This federal mandate imposed upon Dallas enabled it to satisfy, in part, its obligation to reduce the number of gates at Love Field for passenger air service and to manage the airport in accordance with the rights and obligations set forth in the Contract. Although Dallas was required to act by the authority of the federal government, it is the latter party that is responsible for any taking that stems from Dallas's conduct.

Love Terminal Partners, L.P. v. United States, 97 Fed. Cl. 355, 424 (2011). The court further concluded that through the enactment of the WARA, defendant was responsible for the demolition of the six-gate Lemmon Avenue terminal, resulting in a physical taking of Love Terminal Partners' property:

> Although the WARA designated Dallas as the party responsible for acquiring and

> demolishing the Lemmon Avenue Terminal gates as part of a broader commitment to modernize Love Field and to facilitate the end of the Wright Amendment, the federal government sanctioned such actions. Accordingly, the court concludes that the WARA effected a per se, physical taking of plaintiffs' property for which the government is liable to pay just compensation, and plaintiffs are entitled to partial summary judgment based upon their physical taking theory.

Id. at 424-25. The court left for trial the following two issues: (1) whether the federal government took the remainder of the leasehold without paying just compensation, and if so, what amount was due; and (2) the amount of just compensation plaintiffs were due for the per se physical taking of the six-gate Lemmon Avenue terminal.

In October 2012, the court conducted a seven-day trial. Plaintiffs offered the following six fact witnesses: (1) Trusten A. McArtor; (2) Donald J. McNamara; (3) Alan R. Naul; (4) Thomas G. Plaskett; (5) Kurt C. Read; and (6) William T. Cavanaugh, as well as the following five expert witnesses: (1) David E. Anderson; (2) Allen E. Cullum;[1] (3) Robert A. Hazel; (4) Michael W. Massey; and (5) Deborah Meehan. Defendant offered the following seven fact witnesses: (1) Grant S. Grayson; (2) Neal Sleeper; (3) Diana Moog; (4) Thomas P. Poole; (5) Kenneth Gwyn; (6) Robert W. Montgomery; and (7) Michael Anastas, as well as the

[1] Mr. Cullum also testified as a fact witness.

following four expert witnesses: (1) Daniel Wetzel; (2) Rodney Clark; (3) William T. Reed; and (4) Winthrop Perkins.

After the conclusion of trial, and due to highly unusual and unforeseen circumstances involving Mr. Anderson, the court reopened the record to allow plaintiffs to submit the supplemental expert testimony of James F. Miller. Since Mr. Miller was brought in to review Mr. Anderson's report, neither Mr. Anderson's report nor his trial testimony was stricken from the record. After receiving Mr. Miller's testimony, the court again closed the record, directed the parties to submit posttrial briefs, and heard closing arguments.

Upon consideration of the testimony and evidence adduced at trial and the parties' posttrial memoranda, the court concludes that there was a categorical taking of the entire leasehold, and that plaintiffs are entitled to just compensation in the amount of $133,500,000. With respect to the separate value of the six-gate Lemmon Avenue terminal physically taken by the government, the court renders no opinion. Rather, because plaintiffs' expert testified as to the value of the terminal as well as the adjacent parking garage, the court concludes that the separate value of the 9.3-acre property amounts to $21,165,000.

Due to the length of this opinion, the court provides the following table of contents:

…

The following section contains the court's findings of fact as required by Rule 52 of the Rules of this

court.[2] Other findings of fact required by the rule are found in the section containing the court's analysis of the government's takings liability.

BACKGROUND

I. Plaintiffs: Corporate Structure

Love Terminal Partners "is a limited partnership organized under the laws of the state of Delaware with its principal place of business in Dallas, Texas." Jt. Stip. ¶ 1. Virginia Aerospace "is a limited liability corporation organized under the laws of the Commonwealth of Virginia with its principal place of business in Dallas, Texas." *Id.* ¶ 2. Both plaintiffs are controlled by entities wholly owned by the Hampstead Group ("Hampstead"). *Id.* ¶ 3. Specifically, both plaintiffs are wholly owned by Love Equity Group, which, in turn, is owned by Love Equity Partners II and Love Equity Partners III. *Id.* Love Equity Partners II is owned by a group of institutional investors through Hampstead Investment Partners II Funding Corporation. *Id.* Love Equity Partners III is owned by Hampstead Investment Partners III, L.P. *Id.*

II. Love Field: An Overview

A. Pre-1979

In 1917, the City of Dallas ("Dallas") Chamber of Commerce purchased the land that now constitutes

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[2] Citations in the "BACKGROUND" section are to information in the parties' September 25, 2012 Joint Stipulation of Facts ("Jt. Stip.") and evidence from the trial, to include both exhibits and testimony. Sources of information previously cited to in the court's February 11, 2011 opinion have not been identified herein unless to denote the source of a direct quote.

Love Field and developed it to support the aviation industry. Following World War I, the Dallas Chamber of Commerce developed Love Field into an aviation-oriented industrial park and, in 1927, sold Love Field to Dallas. Love Field then began servicing Dallas as its municipal airport.

During the 1950s and early 1960s, the cities of Dallas and Fort Worth, which are separated by approximately thirty miles, operated competing airports. In 1964, the Civil Aeronautics Board ("CAB"), the predecessor to the United States Department of Transportation ("DOT"), determined that the competition between the two cities' airports was harmful and ordered Dallas and Fort Worth to reach an agreement designating one airport through which CAB-regulated carriers would serve both communities. The cities were unable to designate one of the existing airports to serve the region. Instead, they agreed to construct a new airport, Dallas/Fort Worth International Airport ("DFW"), which would be located halfway between Dallas and Fort Worth. In 1968, the cities adopted a Regional Airport Concurrent Bond Ordinance ("1968 Bond Ordinance"), which provided that both cities would take all necessary steps to provide for the orderly and efficient phase-out of operations at Love Field and the transfer of services to DFW.

At the time, eight air carriers that serviced the Dallas and Fort Worth communities agreed to transfer their operations to DFW.[3] Southwest Airlines

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[3] The eight air carriers were: (1) American Airlines, Inc. ("American"); (2) Braniff Airways, Inc. ("Braniff"); (3) Continental Airlines, Inc.; (4) Delta Air Lines, Inc. ("Delta"); (5) Eastern Air

Company ("Southwest"), however, chose to remain at Love Field. Southwest's refusal to transfer its operations to DFW spawned litigation between Southwest and the cities; the cities argued that permitting Southwest to operate at Love Field would financially threaten DFW. In 1973, the United States District Court for the Northern District of Texas ruled that Dallas and Fort Worth could not lawfully exclude Southwest from Love Field. As a result, Dallas, Fort Worth, and the DFW Board could not consolidate passenger service at DFW as envisioned by the 1968 Bond Ordinance. Nevertheless, in 1974, DFW opened for commercial air service.

In the meantime, Love Field continued to be fully operational. Commercial airlines operated out of a main terminal owned by Dallas. Adjacent to the main terminal was automobile parking. In addition, the airport also allowed general aviation flights for private pilots, charter flights, and helicopters.

B. 1979: The Wright Amendment

In 1978, in an attempt to foster competition, Congress enacted the Airline Deregulation Act of 1978. However, the controversy over Love Field remained. Therefore, to end the "continuous disagreement, frequent litigation, and constant uncertainty" associated with Love Field, Congress proposed an amendment to the International Air Transportation Competition Act of 1979. The

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Lines, Inc.; (6) Frontier Airlines, Inc.; (7) Ozark Air Lines, Inc.; and (8) Texas International Airlines, Inc. Each air carrier signed a letter agreement and then executed a use agreement with the DFW Airport Board ("DFW Board") in which it agreed to relocate its services to DFW in conformity with the 1968 Bond Ordinance.

legislation, which had the backing of Dallas and Fort Worth, was intended to protect the economic vitality of DFW by prohibiting interstate commercial air service from Love Field. Ultimately, a compromise agreement was reached; the Wright Amendment, enacted as section 29 of the International Air Transportation Competition Act of 1979, authorized flights from Love Field to locations within Texas and the four contiguous states (Arkansas, Louisiana, New Mexico, and Oklahoma); and limited interstate air transportation provided by commuter airlines to aircraft with a capacity of fifty-six or fewer passengers.

C. 1997: The Shelby Amendment

In 1996, Legend Airlines, Inc. ("Legend") sought to provide long-haul air service to and from Love Field using airplanes configured to comply with the Wright Amendment's fifty-six-seat limitation. The DOT's Office of General Counsel, however, determined that the Wright Amendment's fifty-six-seat exception applied only to airplanes that could hold no more than fifty-six passengers, and not to larger airplanes, which in their normal configuration might seat more than fifty-six passengers. In 1997, Congress responded to this determination by enacting the Shelby Amendment as part of the Department of Transportation and Related Agencies Appropriations Act of 1998, which clarified that the phrase "passenger capacity of 56 passengers or less" included any aircraft of any size, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate fifty-six or fewer passengers. In other words, the Shelby Amendment permitted longer-haul

flights on larger airplanes so long as the airplanes were configured to accommodate fifty-six or fewer passengers. The Shelby Amendment also added Alabama, Kansas, and Mississippi to the list of states that airlines could serve directly from Love Field.

After the enactment of the Shelby Amendment, Southwest began offering flights from Love Field to Mississippi and Alabama, and Legend announced plans to offer long-haul service to states outside of the Love Field service area using reconfigured aircraft. Shortly thereafter, however, Fort Worth and American sought to enjoin air service pursuant to the provisions of the Shelby Amendment. As a result of ensuing litigation, Legend was precluded from offering service from Love Field until 1999.

D. 2006: The WARA

In late 2004, Southwest initiated a campaign to repeal the Wright Amendment: the "Wright is Wrong" campaign. In response, the Senate Committee on Commerce, Science, and Transportation conducted a hearing, after which Missouri Senator Kit Bond lobbied for through-ticketing to states outside of the Love Field service area. Ultimately, Congress added only Missouri to the list of Wright Amendment-exempted states. Shortly thereafter, American opened additional ticket counters and gates at Love Field.

Two years later, several bills were introduced in Congress to repeal or modify the Wright Amendment. While Southwest advocated for a complete repeal of the Wright Amendment, American lobbied for a continuation of the Wright Amendment restrictions. Resolution of the issue was reached in 2006 with the enactment of the WARA, which codified the so-called

"Five-Party Agreement," an agreement among Dallas, Fort Worth, the DFW Airport Authority, American, and Southwest to restrict flight operations at Love Field. The signatories to the agreement described its terms in a joint statement issued on June 16, 2006, which this court summarized in its previous opinion:

> Among other provisions, the Joint Statement indicated that the signatories agreed that international commercial passenger service would be limited exclusively to DFW, and "[t]hrough ticketing to or from a destination beyond the 50 United States and the District of Columbia [would] be prohibited from Dallas Love Field." The Joint Statement signatories sought "to eliminate all the remaining restrictions on service from [Love Field] after eight years from the enactment of legislation," and to reduce "as soon as practicable" the number of gates available for passenger air service at Love Field from thirty-two to twenty. Dallas agreed to acquire "the portions of the lease on the Lemmon Avenue facility[,] up to and including condemnation, necessary to fulfill the obligations under this agreement" and to "demoli[sh] . . . the Legend gates immediately upon acquisition of the lease to ensure the facility can never again be used for passenger service." The signatories also agreed that the Joint Statement was predicated on Congress enacting legislation to implement the terms of the agreement.

Love Terminal Partners, L.P., 97 Fed. Cl. at 366-67 (citations omitted); *see also* Tr. 2044-45 (Montgomery).

Enacted on October 13, 2006, the WARA expanded service at Love Field by permitting domestic and foreign air carriers to "offer for sale and provide through service and ticketing to or from Love Field, Texas, and any United States or foreign destination through any point within Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama." Pub. L. No. 109-352, § 2(a), 120 Stat. 2011, 2011 (2006). The WARA also provided for the complete repeal of the Wright Amendment after a period of eight years.

In addition, the WARA specifically addressed the future of the gates at Love Field:

> (a) IN GENERAL.—The city of Dallas, Texas, shall reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates. Thereafter, the number of gates available for such service shall not exceed a maximum of 20 gates. The city of Dallas, pursuant to its authority to operate and regulate the airport as granted under chapter 22 of the Texas Transportation Code and this Act, shall determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006. To accommodate new entrant air carriers, the city of Dallas shall honor the

> scarce resource provision of the existing Love Field leases.
>
> (b) REMOVAL OF GATES AT LOVE FIELD. —No Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act, but Federal funds or passenger facility charges may be used for other airport facilities under chapter 471 of title 49, United States Code.[4]

Id. § 5, 120 Stat. at 2012 (footnote added).

Finally, the WARA addressed general aviation flights from Love Field:

> Nothing in this Act shall affect . . . flights to or from Love Field by general aviation aircraft for air taxi service, private or sport flying, aerial photography, crop dusting, corporate aviation, medical evacuation, flight training, police or fire fighting, and similar general aviation purposes, or by aircraft operated by any agency of the Federal Government or by any air carrier under contract to any agency of the Federal Government.

Id., § 5(c), 120 Stat. at 2012.

Following the enactment of the WARA, Dallas began a major renovation of the main midfield terminal at Love Field, to include the addition of four

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[4] Chapter 471 of title 49 of the United States Code governs airport development. *See* 49 U.S.C. §§ 47101-47175 (2006).

new gates. Tr. 2040 (Montgomery). The budget for this renovation project, which was ongoing at the time of trial, was $519 million. *Id.* at 2044. Southwest, which was headquartered at Love Field, *id.* at 2008, oversaw the project, *id.* at 2040-41. To support the cost of expanding the terminal, Southwest issued $350 million in revenue bonds. *Id.* By 2007, passenger demand at Love Field had risen by twenty percent. *Id.* at 2191 (Reed).

III. The Leasehold: An Overview of the Master Lease and Sublease

A. The Master Lease

On June 10, 1955, Dallas executed a long-term Master Lease with Braniff, granting Braniff the exclusive use of approximately thirty-six acres at Love Field, together with the nonexclusive right to use runways, taxiways, and other airport facilities. Jt. Stip. ¶ 4. The Master Lease was amended and supplemented five times: (1) August 1956, (2) July 1996, (3) November 1983, (4) March 1992, and (5) September 1993. *Id.* ¶ 5. The area covered by the Master Lease was eventually reduced to 26.8 acres. *Id.* ¶ 6.

Article VIII of the Master Lease, as amended in November 1983, governs the lessee's permissive uses of the property:

> ARTICLE VIII
>
> LESSEE'S USE OF PREMISES AND AIRPORT
>
> Lessor hereby grants Lessee the exclusive use of the Premises and the non-exclusive use of

the Airport for any lawful purpose, subject to the following:

* * *

(2) The rights hereinafter granted Lessee for the installation of facilities for fuel and communications on any location other than the Premises shall be subject to the prior approval of Lessor's City Manager of the plans and specifications therefor, and shall be at a reasonable rate of ground rental for any tract or tracts of ground in addition to the Premises on which such equipment or facilities may be installed. Lessee's rights shall not include the right to any exclusive space within any terminal or passenger station building which Lessor may in the future construct to serve the Airport unless Lessee by supplemental agreement with Lessor agrees to become a tenant and to pay such reasonable rental rates for such building tenancy as maybe established by mutual agreement. Lessee shall in its use of the Airport observe any reasonable safety regulations promulgated by Lessor.

* * *

(3) Lessee's primary business will be aviation-related and include broad relationships and contracts with the Government, other airlines and the general public, such as the lease, interchange, storage, sale and joint use of equipment, parts, facilities and functions, the consolidation of activities, and the like.

Permitted activities shall include, without limitation, the following:

(a) On the Premises, the overhaul, repair, modification, manufacture, assembly, testing, fueling, use, and transit and permanent storage of engines, parts, accessories, electronic and other equipment and aircraft and such similar or related activities for which Lessee's equipment or facilities might otherwise be suitable or appropriate: operation of corporate headquarters and of hangar, reservation center, office, shop and employee facilities for the Lessee and its affiliates, including the parking of automobiles and equipment; the operation of restaurant, cafeteria, club and general recreational facilities for Lessee's employees and guests; and the operation of inflight food preparation facilities. However, Lessee shall not use the Premises as a passenger terminal area for regularly scheduled air carriers employing aircraft with capacity in excess of fifty passengers per aircraft.

(b) On the Airport, the operation of a transportation system by aircraft for the carriage of persons, property, cargo and mail, including the landing, taking-off, parking, loading and unloading of aircraft and other equipment and the routine repairing, conditions, servicing, parking and storing thereof.

> (c) On both the Airport and the Premises, training and education in all phases of aeronautics; full right to install adequate storage facilities for gasoline, fuel, lubricating oil, greases, food and other materials and supplies, together with necessary pipes, pumps, motors, filters and other appurtenances incidental to the use thereof; the installation, maintenance, and operation of radio, communications, meteorological and aerial navigation equipment and facilities; the sale, disposal or exchange of Lessee's aircraft, engines, accessories, gasoline, oil, greases, lubricants and other fuel, materials, supplies and equipment (limited to articles and goods used by or bought for use by Lessee); the purchase at the Airport or elsewhere, from any person or company of Lessee's choice, of requirements of gasoline, fuel, lubricating oil, greases, food, and all other materials and supplies, together with the related services by lessee and its suppliers of aircraft and other equipment by truck or otherwise.

JX 1 (LTP-000828-29).

After Braniff went bankrupt, Dalfort Corporation ("Dalfort") acquired the Master Lease. Jt. Stip. ¶ 7. On March 30, 1992, Dallas and Dalfort executed the "Fourth Supplement to Lease and Agreement" ("Fourth Supplement"), amending the terms of the Master Lease:

> Lessor leases the Premises, including the Base Facilities, to Lessee for a primary term

> of twenty five years beginning on October 1, 1998 and ending on September 30, 2023, expressly conditioned upon the performance by Lessee of the conditions, terms and provisions in the Lease. Lessee has no options to extend the Primary Term of the Lease; the Lease and leasehold estate shall expire on September 30, 2023 unless sooner terminated in accordance with the terms of the Lease. Nothing in this Paragraph shall preclude Lessee and Lessor from entering into a new lease covering the Premises and Base Facilities at Love Field, following expiration of the Lease.

JX 1 (LTP-000785). The Fourth Supplement also included a provision that governed the sharing of revenue from subleases:

> If at any time following execution of the Fourth Supplement, Lessee subleases in whole or in part, the Premises or Base Facilities, Lessee shall pay to Lessor a sum equal to fifty percent (50%) of the rental collection by Lessee from Sublessee in excess of the rental paid by Lessee to Lessor for said subleased Premises or Base Facilities, in addition to the monthly rental owed Lessor by lessee for the Premises or Base Facilities subleased. Should Lessee sublease the Premises or Base Facilities for less than it pays in monthly rental to Lessor, Lessee's rental shall not be reduced or abated and lessee shall continue to pay Lessor the full rental set forth in the Lease.

Id. (LTP-000793).

On December 31, 1993, Dalfort assigned the Master Lease to Astrea Aviation Services, Inc. ("Astrea"). Jt. Stip. ¶ 7. On December 30, 1997, Astrea assigned the Master Lease to Dalfort Aerospace, L.P. ("Dalfort Aerospace"). *Id.* On December 12, 2003, Dalfort Aerospace assigned the Master Lease to Virginia Aerospace. *Id.* ¶ 9.

B. The Sublease

On December 30, 1997, while Dalfort Aerospace was still a signatory to the Master Lease, it subleased 9.3 acres to the Asworth Corporation ("Asworth"). *Id.* ¶ 8. In March 1998, Asworth subleased the same 9.3 acres to Legend. *Id.* On August 11, 1999, Legend, in turn, assigned the Sublease to Love Terminal Partners. *Id.* In March 2000, Asworth assigned its interest in the Sublease to Love Terminal Partners. *Id.*

IV. Hampstead

As noted above, both plaintiffs are controlled by entities wholly owned by Hampstead. Thus, this court's review of plaintiffs' acquisition of the leases necessarily involves a discussion of Hampstead's involvement in the development and management of Love Field, prefaced by a description of Hampstead's business activities.

A. Hampstead's Business Activities Generally

In August 1988, Mr. McNamara founded Hampstead. Tr. 50 (McNamara). As a private equity firm, Hampstead made investments in real estate with funds raised from different sources, including the

endowments of Yale, Princeton, and Stanford Universities. *Id.* at 51-54. Notably, these investments had a business or operating component to them. *Id.* at 57. In other words, Hampstead's investments often included the option of owning part of the operating company. *Id.* at 57-58.

The majority of Hampstead's investments were in lodging and senior housing. *Id.* at 184 (Read). Hampstead also invested in real estate financing and commercial office space. *Id.* at 185. Before making any such investments, Hampstead undertook substantial due diligence efforts, which could take weeks or months. *Id.* at 60-61 (McNamara). Mr. Read, a Hampstead partner, was responsible for leading the teams that performed the due diligence. *Id.* at 142 (Read). That due diligence included, for example, determining the location of the property and determining whether the property was zoned for the intended use. *Id.* at 143.

By in large, Hampstead's investments were successful. *Id.* at 63-64 (McNamara) (noting that one investment from 1990 took ten years to become profitable and is likely the company's most profitable investment). However, Hampstead also made some unsuccessful investments. *Id.* at 185-87 (Read) (noting Hampstead's failed investments in Malibu Entertainment and Houlihan Restaurants).

B. Hampstead's Investment in Legend

In 1999, Hampstead became interested in Love Field. Tr. 65 (McNamara). To gain entry to Love Field, Hampstead developed a plan to fund the construction of a terminal for Legend. *Id.* Hampstead anticipated that it would be a leasehold investment as to the land

and real estate. *Id.* at 65-66. Hampstead's investment plan for Love Field also called for a direct investment in Legend. *Id.* at 72.

Much of Hampstead's initial due diligence efforts with regard to Love Field and Legend were led by Mr. Read. *Id.* at 148 (Read). First, he and his team examined real estate issues. *Id.* Second, he and his team examined legal issues surrounding Love Field, focusing on the Wright Amendment, the Shelby Amendment, and the DOT's rulings. *Id.* Third, Mr. Read analyzed whether flights could profitably be operated from Love Field. *Id.* at 149. According to Mr. Read, the team found a 1992 DOT study, captioned "Analysis of the Impact of Changes to the Wright Amendment," ("DOT study") to be particularly helpful:

> Q And did you rely on [the DOT study], among all of the other documents that you came across in your due diligence?
>
> A I did. You know, one of the things that we needed to be brought up to speed on when we first looked at and understood what the premise of the investment was was what where the demand characteristics at Love Field, and this was a particularly helpful document that talked about the potential for a significant increase of demand at Love Field.
>
> Q Yes. Could you expand just a little bit on in what way you found this document helpful?
>
> A Well, the Wright Amendment basically restricted airline traffic out of Love Field to Southwest and a couple of very—you know, two small, residual gates, and this report sort

> of reiterated to us and particularly found it interesting from the government's perspective that Love Field had a number of unique characteristics that they thought would cause demand should the Wright amendment ever be modified or lifted, would cause demand to jump dramatically because of the location of Love Field in Dallas and also because of the location of Dallas-Fort Worth as a highly desirable, central location for airlines to fly to attractive destinations. And so I found this document to be very interesting and helpful.

Id. at 159-60; *see also* PX 9.

Mr. Read and his team also relied upon assessments performed by various external parties. For example, Hampstead hired the Seabury Group, an outside aviation consulting firm, to evaluate Legend's proposed terminal gate rental rates. Tr. 150 (Read). In addition, Hampstead hired an outside aviation industry analyst, to evaluate the demand for 56-seat aircraft and to inform Mr. Read's team about airline business models generally and regional jet models specifically. *Id.* at 151.

Finally, Hampstead reviewed Legend's due diligence efforts. This included reviewing documents Legend had prepared, to include a study prepared for Legend by the Campbell-Hill Aviation Group regarding the fair value of the annual rentals for Legend gates, as well as an August 1998 investment summary prepared for Legend by Jones Lang Wootton, a real estate service company, wherein the Legend terminal was valued at $23 million. *Id.* at 154-

55 (Read); *see also* JX 7. This also included speaking with experts Legend had previously consulted. Tr. 152-53 (Read).

Internal due diligence was also performed by Mr. McNamara; he spoke with several individuals within the commercial airline world, as well as with Legend's management team. *Id.* at 66-74 (McNamara). Furthermore, he reviewed real estate issues, regulatory issues, and airline operations. *Id.* at 74.

In addition to the due diligence performed by Messrs. Read and McNamara, Mr. Cavanaugh, Hampstead's outside counsel, reviewed the terms of the Master Lease. *Id.* at 842-43 (Cavanaugh). Upon concluding his review, Mr. Cavanaugh advised Hampstead that it was not bound by the rent-sharing provision of the Master Lease because it never planned to sublease the property and because it never intended to surrender control over any aspect of the property. *Id.* at 843-44. In other words, Mr. Cavanaugh believed that Hampstead could enter into licensing agreements for use of the premises without invoking the Master Lease's rent-sharing provision:

> Q Okay. Did you have occasion to review that rent sharing provision either as outside counsel or as general counsel for Hampstead?
>
> A Yes.
>
> Q Now, to your knowledge, did either Love Terminal Partners or Virginia Aerospace ever pay any sum to the City of Dallas under that rent sharing provision?
>
> A No.
>
> Q And why not?

A When we originally looked at this - - and as you can imagine, this was a provision we focused on - - we thought several things, at least three. One was a fairly common provision in a real estate lease where a landlord will provide - - they don't want the tenant to make money off of the premises from subleasing the premises to another tenant without sharing in the rental in some way, so this provision had been inserted.

It only applied to a sublease that Dalfort as lessee would have subleased to another party, so in this case, Love Terminal Partners was not required to pay Dalfort any more in rent than a proportionate share of what Dalfort owed to the city under the primary lease. This provision did not purport to reach down any farther into rentals or compensation that a subtenant would have received from - -

Q Okay.

A So that was point 1.

Q Okay. In addition to Point 1, was there another rationale?

A Yes. Point 2 was we felt like at Love Terminal Partners from our business plan we weren't going to sublease the premises to anybody. We were going to run an operating business. And so, in thinking about what an airline terminal was, we're not signing leases with airlines that give or anybody else frankly that would give them the exclusive right to operate and control and use a space in the way that a real estate tenant would. We

> had gate license agreements that provided as I recall nonexclusive rights to use gates to Delta and Legend. We had management agreements and parking agreements and other things, but effectively we felt like we were running an operating business, not subleasing the premises to anybody, so the provision wouldn't require a sharing of the rent.

Id. at 842-44. Ultimately, no such payments were ever made. *Id.*; *see also id.* at 560 (Naul).

Following the completion of its due diligence efforts, Hampstead presented its findings to its investors at a one-day meeting. *Id.* at 169-70 (Read); JX 10, JX 11; *see also* Tr. 433-34 (McArtor); JX 9. Present at that meeting was David Swensen, head of the Yale Endowment Fund. Tr. 170 (Read). Known as "the Warren Buffett of institutional investing," Mr. Swensen approved of the investment. *Id.* at 52-53 (McNamara).

Ultimately, Hampstead invested between $60 and $70 million in Legend and the proposed terminal. *Id.* at 187-88 (Read). That investment was memorialized in a May 27, 1999 agreement, to which Love Terminal Partners was a party. *See* JX 9. Several months later, on August 11, 1999, Legend assigned its interest in the Sublease to Love Terminal Partners. Jt. Stip. ¶ 8. That same day, Love Terminal Partners entered into a Gate License Agreement with Legend for the same 9.3 acres covered by the Sublease. *Id.*

As noted above, although Hampstead's investment in Legend was based on its interest in Love Field, when it made its investment in 1999, there

was still litigation regarding whether Legend could fly. Tr. 74 (McNamara). In fact, Hampstead did not learn that Legend would be able to operate out of Love Field until after it had begun construction on the proposed terminal. Id. Such a fact was irrelevant to Hampstead because Hampstead's investment plan was broadly focused on using the real estate to build and then expand an airline terminal, irrespective of Legend's success or failure as an airline. *Id.* at 74, 556-59 (Naul); *see also* DX 51. In December 2000, shortly after Hampstead's acquisition of Legend, Legend filed for bankruptcy. Tr. 231 (Plaskett).

C. Hampstead's Construction of the Lemmon Avenue Terminal and the Master Plan

Initially, Hampstead hired the McClier Corporation to design and build the proposed Lemmon Avenue terminal. Tr. 993 (Cullum). However, following concerns that the project was falling behind schedule and was over budget, Hampstead hired Mr. Cullum, an outside manager, to oversee the project. *Id.* When Mr. Cullum assumed control, construction of the terminal was already in progress and construction of the parking garage was about to begin. *Id.* at 994. In 2000, the Lemmon Avenue terminal, with its six gates and adjacent parking garage, was completed. *Id.* at 1004. The total cost to build the terminal was $17,377,883. *Id.* at 1000.

That same year, Dallas and numerous other parties (including, inter alia, Hampstead, Legend, Southwest, American, other airport tenants, neighborhood organizations, and local businesses) met to develop a plan for Love Field ("Master Plan"). *Id.* at

457-58 (Naul); 1435-38 (Sleeper); JX 17 at 811-12. The process was overseen by Mr. Gwyn, Dallas's director of aviation. Tr. 1823 (Gwyn). Mr. Sleeper, the president of Love Terminal Partners from late 1999 to early 2006, served as Hampstead's representative at Master Plan meetings. *Id.* at 1432-38 (Sleeper).

The resulting Master Plan envisioned Love Field as a thirty-two gate airport. *Id.* at 1823-24 (Gwyn). The preferred allocation of the thirty-two gates was twenty-six gates at the main terminal and six gates at the Lemmon Avenue terminal. *Id.* at 1825; see also id. at 2128-29 (Clark). According to Mr. Naul, a principle with Hampstead, the Master Plan was extremely beneficial to Hampstead's marketing plan because it specifically referenced the Lemmon Avenue terminal and allowed for the possibility of ten additional gates. *Id.* at 459-61 (Naul). However, following the events of September 11, 2001 ("9/11"),[5] Hampstead suspended all marketing efforts for the Lemmon Avenue terminal. *Id.* at 461-62.

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[5] Pursuant to Rule 201 of the Federal Rules of Evidence, the court takes judicial notice of the events that occurred on September 11, 2001: "On September 11, 2001, 19 militants associated with the Islamic extremist group al-Qaeda hijacked four airliners and carried out suicide attacks against targets in the United States. Two of the planes were flown into the towers of the World Trade Center in New York City, a third plane hit the Pentagon just outside Washington, D.C., and the fourth plane crashed in a field in Pennsylvania." History, http://www.history.com/topics/9-11-attacks (last visited Feb. 2, 2016).

D. Legend's Bankruptcy and Hampstead's Subsequent Management of Operations at Love Field

From April until December 2000, Legend was actively engaged in providing scheduled commercial air passenger service from the Lemmon Avenue terminal. Jt. Stip. ¶ 14. However, although Legend was popular with the flying public, it was unable to raise necessary capital and on December 3, 2000, was forced to file for bankruptcy. *Id.* ¶ 16; Tr. 417-19 (McArtor). On April 24, 2001, Legend converted its Chapter 11 bankruptcy filing to a Chapter 7 filing.[6] *Id.*

After Legend filed for bankruptcy, Mr. Naul began to oversee Hampstead's real estate assets and to act as an asset manager for the terminal. Tr. 450-51 (Naul). In this capacity, he led Hampstead's efforts to find additional users for the terminal and to devise a strategy for going forward. *Id.* at 451. To that end, Hampstead retained the Seabury Group. *Id.* at 452. It recommended, and Hampstead agreed, to maintain a flexible strategy for using the property and to offer the property to as many potential users as possible. *Id.* In May 2002, as part of this marketing strategy, Hampstead commissioned a series of sketches showing possible alternative layouts and expansions

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[6] Chapter 11 bankruptcy filings are "rehabilitation cases" whereby "creditors look to future earnings of the debtor, not to the property of the debtor at the time of the initiation of the bankruptcy proceeding, to satisfy their claims," whereas chapter 7 bankruptcy filings are "liquidation cases" whereby "the trustee collects the non-exempt property of the debtor, converts that property to cash, and distributes the cash to the creditors." David G. Epstein et al., *Bankruptcy* § 1-5, at 8-9 (1st ed. 1993).

of the Lemmon Avenue terminal, to include the addition of more gates. *Id.* at 472-75; PX 107C.

Up to this point, Atlantic Southeast, a Delta affiliate, had remained a tenant at the Lemmon Avenue terminal. Tr. 456 (Naul). However, because Legend had also provided additional routine services such as cleaning, security, and landscaping, Hampstead decided that, rather than keep the Lemmon Avenue terminal open and charge Atlantic Southeast for these services, Atlantic Southeast should move to the main terminal. *Id.* This decision was consistent with Hampstead's overall marketing plan because it never intended to use the Lemmon Avenue terminal solely for the purpose of housing numerous smaller tenants. *Id.* at 457.

As a result of Hampstead's decision, Atlantic Southeast moved its operations from the Lemmon Avenue terminal to the main terminal at Love Field. *Id.* at 1813-16 (Gwyn). In 2001, Atlantic Southeast paid $28,191 per year to lease two gates at the main terminal at Love Field. *Id.* at 1815; DX 31; *see also* Tr. 2085-90 (Anastas). In 2002, Dallas raised the rent for those two gates to $72,306.30 per year. Tr. 1817-18 (Gwyn); DX 39. In 2003, Atlantic Southeast informed Dallas that it was terminating its lease at Love Field. Tr. 1860-61 (Gwyn).

E. Hampstead's Acquisition of the Master Lease

In 2003, given the fact that the aviation industry was slow to recover after 9/11, and given the fact that Hampstead believed that the Wright Amendment would be repealed, Hampstead began to look into different investment opportunities at Love Field. Tr.

464-65, 485 (Naul). As a result, on December 24, 2003, Hampstead (through Virginia Aerospace) acquired the Master Lease from Dalfort Aerospace. Jt. Stip. ¶ 9. In so doing, Hampstead achieved its original investment objective, which was to acquire the entire 26.8-acre leasehold. Tr. 79 (McNamara). In order to complete the deal, however, Hampstead had to sell some land located across the street from the Lemmon Avenue terminal to a car dealership. *Id.* at 467 (Naul).

As a result of obtaining the Master Lease, Hampstead was able to move quickly to demolish Dalfort Aerospace's hangar facilities and start construction on parking and additional gates, if a new user for the Lemmon Avenue terminal was found. *Id.* at 467-69. Hampstead remained bound, however, by a contractual term in the Master Lease previously negotiated by Legend and Dalfort Aerospace—that heavy aircraft maintenance could not be performed on the site. *Id.* at 468-71; JX 4.

F. Hampstead's Attempts to Amend the Leases and Disagreements With Dallas Over the Terms of the Leases

In 2004, in an effort to attract additional subtenants, such as aircraft manufacturer Adam Aircraft, Hampstead petitioned Dallas for amendments to the Master Lease.[7] Tr. 1782-84

[7] If a tenant wanted to amend or extend its lease with Dallas, the tenant would first negotiate the amendment with Dallas's director of aviation. Tr. 1758 (Poole). The director of aviation would then recommend the amendment to the city manager, who would then recommend it to the city council for consideration. *Id.* The city council, of which the mayor of Dallas was a voting

(Poole); DX 51. First, Hampstead sought to eliminate the fifty percent rent-sharing provision, which it believed was not imposed on the other tenants at Love Field. DX 51. Second, Hampstead sought to have the Master Lease amended to include a ten-year renewal option, which it claimed was typical of the other leases on the property. *Id.* Although Dallas did not object to extending the lease—it agreed to a forty-year extension—it did not agree to eliminate the rent-sharing provision. Tr. 1782, 1785 (Poole); DX 52. In other words, while Dallas believed that the addition of Adam Aircraft at Love Field would be a source of good jobs for the city, it was not willing to forgo the revenue derived from the Master Lease's rent-sharing provision.[8] Tr. 1782 (Poole).

In addition to refusing to eliminate the Master Lease's rent-sharing provision, Dallas expressed its concern to Hampstead that the rent-sharing provision was in fact being violated. DX 62. In a November 15, 2005 letter written by Mr. Gwyn to Mr. Grayson, president of Virginia Aerospace, Mr. Gwyn stated:

> [I]t was our understanding that use of the sublease premises parking garage for a non-aviation use was a temporary solution while the sublessee's parking garage was being built. Once the sublessee's parking garage was completed, we expected the sublease and their use of Love Field aviation facilities to

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member, then voted on the proposed amendment. *Id.* at 1846 (Gwyn).

[8] Ultimately, Adam Aircraft located its manufacturing facilities elsewhere in the United States. Tr. 556-58 (Naul).

> terminate. Please be reminded . . . [that] Lessee's primary business shall be aviation-related. This letter shall serve as notice that all non-aviation use of the leased premises must be terminated immediately.

Id. In his December 1, 2005 letter of response, Mr. Grayson first indicated that he was surprised by the city's concerns since various subtenants had been operating on the property without objection for several years. *Id.* He then stated that Love Terminal Partners had been notified and that it would, in turn, notify subtenant Sewell Motors ("Sewell") of the city's concerns. DX 66. Finally, Mr. Grayson stated his belief that Premiere Limousine, one of the other subtenants, was providing "aviation related services as a transporter of airplane owners, operators, and passengers," and that, therefore, its use of the property was permissible under the lease. *Id.*

In his December 16, 2015 reply to Mr. Grayson's letter, Mr. Gwyn stated:

> In regards to the use of the facility, when Sewell Village Cadillac ("Sewell") began using the facility, I was told that this use would be on a temporary basis while their parking garage was being constructed and that they would vacate the facility upon completion of their garage. This did not occur and was one of the reasons for our previous letter. . . . I have agreed to Sewell's request to continue their use of the facility, subject to the above reference Lease and while the additional parking structure is being constructed. . . . As for the limousine service,

I do not object to their use at this time, however, this is not to be interpreted or construed as a consent to any agreement between the limousine service and Love Terminal Partners, L.P. nor a waiver of the City's rights and privileges under the Lease.

As for the Sublease rentals, it is our interpretation of the Lease that any rentals receive[d] under a sublease, including any other business agreement holding under the Lease, (i.e., sub-sublease, license, etc.) will be subject to the 50% rent share provision as stated in Article XX of the Lease. In fact, Section 13[,] Assignment and Sub-letting of the Sublease between Virginia Aerospace and Love Terminal Partners, L.P. (["]Sublessee")[,] states that

"…SUBLESSEE SHALL BE RESPONSIBLE TO PAY ANY AND ALL AMOUNTS, IF ANY, WHICH SUBLESSOR IS OBLIGATION TO PAY TO LANDLORD IN CONNECTION WITH SUCH REVENUES AND INCOME UNDER ARTICLE XX OF THE MAIN LEASE IN CONNECTION WITH ANY SUB-SUBLEASE…"

As you can see from the above, this 50% rent share was contemplated when the sublease was executed by your predecessor. The fact that the City has not pursued these excess revenues during the temporary sub-sublease/sub-sublicense agreements does not mean that the City has waived its right to pursue these revenues in the future.

DX 68 (DAL-CFC-002182-83).

G. Hampstead's Income From Subtenants, Valuation of the Leases, and Attempts to Sell the Leases

Following Legend's bankruptcy, Hampstead was still able to earn income from its subtenants. Tr. 2097-98 (Naul). From 2002 to 2008, the largest payments were from Sewell, although Hampstead also received payments from the car dealership from 1999 to 2001. *Id.* at 2098-99. Other revenue came from an aviation freight company, a limousine company, two automobile dealerships, an aviation reservation service, and several wireless telecommunications companies. *Id.* at 518-20; DX 105. From 2004 to 2008, however, Hampstead's income from these properties did not cover their annual rental payment, which was approximately $537,000. Tr. 2100-02 (Naul); DX 105.

In the 2005 and 2006 financial reports for Hampstead Investment Partners III, L.P., the value of the assets owned by Love Equity Partners III was listed as approximately $17.1 and $17.2 million, respectively. DX 76; DX 91. In the 2006 report, an additional caveat as to the valuation of the assets was provided:

> In the absence of better information, the general partner has continued to value the investment at the appraised values from March 2005. Such appraised values considered the flight restrictions in [effect] at the time that precluded long-haul flights out of Love Field. Thus, the appraised values did not assume a best-case (no flight restrictions) scenario and the general partner continues to

> believe those appraised values represent the best information currently available.

DX 91. According to Ms. Moog, Hampstead's accountant, the financial reports provided only the property's book value, not its market value:

> Q Is it possible that book value would not reflect the current market value of assets?
>
> * * *
>
> A Yes. Book value -- there's no—you could make no assertion as to whether book value equaled market value.
>
> * * *
>
> Q They're not the same thing.
>
> A They're not the same thing.
>
> * * *
>
> Q Based upon your review of Defense Exhibit 91, is it your understanding that the auditors considered the appraisal reports that they reviewed to be a reliable indication of the value of the assets themselves?
>
> A It's my opinion that they did not consider them to be valuable -- they didn't consider them to be a true valuation, which was the reason for the significant caveats included in the second paragraph that describes the valuation.

Tr. 1692-64 (Moog).

In early 2006, Hampstead held discussions with Pinnacle Airlines ("Pinnacle") regarding a possible sale of the Master Lease. *Id.* at 85 (McNamara), 486 (Naul). According to Mr. Naul, Pinnacle was

extremely interested in the property and on April 28, 2006, Hampstead sent Pinnacle a proposal. *Id.* at 486-88 (Naul). According to the terms of the proposal, Hampstead agreed on a price of $100 million for the entire property (the Master Lease) or $85 million for just the existing gates (the Sublease). *Id.* at 489-90; JX 32. However, the sale to Pinnacle was never consummated. Tr. 491 (Naul). Hampstead also engaged in preliminary discussions with JetBlue, but nothing ever came of them. *Id.* at 486, 514-15.

H. Hampstead's Cessation of Operations at Love Field

For fifteen months following the WARA's enactment, Hampstead continued to pay the rent on the Master Lease. *Id.* at 80 (McNamara). However, in March 2008, Hampstead informed Dallas of its intent to cease rental payments on the Master Lease and Sublease. Jt. Stip. ¶ 12. Subsequently, on November 20, 2008, Dallas informed Hampstead that it was in default under both leases. *Id.* Dallas then instituted eviction proceedings and in December 2008, was granted possession of the leaseholds. *Id.* Demolition of the Lemmon Avenue terminal, which had begun on July 20, 2009, was completed by September 29, 2009.[9] *Id.* ¶ 9.

Between 1999 and 2008, Hampstead invested between $60 and $70 million in Legend and the Lemmon Avenue terminal. Tr. 77 (McNamara). Over

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[9] The court, accompanied by counsel, party representatives, and city officials, toured the Lemmon Avenue terminal on March 25, 2009, prior to its demolition. The site visit also included a tour of other facilities at Love Field.

the course of its existence, Love Terminal Partners lost more than $25.5 million in income plus an additional $8.5 million due to depreciation and abandonment of assets. *Id.* at 1712 (Wetzel). Similarly, Virginia Aerospace, over the course of its existence, lost over $12 million in income plus an additional $5.5 million due to depreciation and abandonment of assets. *Id.* at 1713-15. Moreover, at no time did Hampstead earn enough rental income to cover the monthly payments on the Master Lease. Id. at 2101-02 (Naul).

I. Hampstead's Plans for a Sixteen-Gate Terminal

In 2012,[10] Hampstead commissioned a set of architectural plans from the firm of Good Fulton Farrell ("GFF") for the expansion of the six-gate Lemmon Avenue to a sixteen-gate terminal. Tr. 1015 (Cullum); PX 107G. Hampstead never discussed these plans with Dallas, Tr. 531 (Naul), or the Federal Aviation Administration ("FAA"), *id.* at 1760 (Poole).

THE GOVERNMENT'S LIABILITY FOR FIFTH AMENDMENT TAKINGS

I. Legal Standards

A. Fifth Amendment Takings Generally

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This clause "was designed to bar

[10] Previously, in 2002 and in 2005, Hampstead commissioned a series of architectural sketches from the Dallas firm of HKS, regarding possibilities for expansion on the 26.8 acres covered by the Master Lease. Tr. 471-75, 532-34 (Naul); PX 107C; DX 64.

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The chief and one of the most valuable characteristics of the bundle of rights commonly called 'property' is 'the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the Government.'" *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993) (quoting *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991)). The Takings Clause does not prohibit the taking of property. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003). Rather, it proscribes a taking without just compensation. *Id.*; *see also First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987) (providing that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

Traditionally, "[p]roperty has been well defined to be a person's right to possess, use, enjoy, and dispose of a thing not inconsistent with the law of the land." *Peabody v. United States*, 43 Ct. Cl. 5, 16 (1907). "Real property, tangible property, and intangible property all may be the subject of takings claims." *Conti v. United States*, 291 F.3d 1334, 1338-39 (Fed. Cir. 2002) (citations omitted). Included in the category of intangible property rights are leases. *See Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("As a general proposition, a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof." (citing *Lemmons*

v. United States, 496 F.2d 864, 873 (Ct. Cl. 1974); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States.").

The United States Court of Appeals for the Federal Circuit "has developed a two-step approach to takings claims." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002); *accord Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). First, a plaintiff must identify the property interest that was allegedly taken. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 79 Fed. Cl. 400, 408 (2007); *see also Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) ("[A] court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a 'stick in the bundle of property rights.'"). Second, "[o]nce a property right has been established, the court must then determine whether a part or a whole of that interest has been appropriated by the government for the benefit of the public." *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti*, 291 F.3d at 1339); *see also Karuk Tribe of Cal.*, 209 F.3d at 1374 ("If a plaintiff possesses a compensable property right . . . a court determines whether the

governmental action at issue constituted a taking of that 'stick.'"). Courts "do not reach this second step without first identifying a cognizable property interest." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

Finally, jurisdiction over takings claims against the United States lies in the Court of Federal Claims. *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987) ("[T]he 'just compensation' required by the Fifth Amendment has long been recognized to confer upon property owners whose property has been taken for public use the right to recover money damages from the government."); *accord Russell v. United States*, 78 Fed. Cl. 281, 289 (2007) ("The Takings and Just Compensation Clauses of the Fifth Amendment do constitute a money-mandating source and claims under these clauses are within the jurisdiction of the court.").

B. Two Types of Takings

According to the United States Supreme Court ("the Supreme Court"), the government may effect a taking of such "private property by either physical occupation or regulation." *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed. Cir. 2004) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992)); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23 (1992) (describing "two distinct classes" of takings: (1) physical occupation of property; and (2) regulation of the use of property).

1. Physical Takings

A physical taking constitutes "a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of

the property." *Boise Cascade Corp.*, 296 F.3d at 1353; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking . . ."); *Hendler*, 952 F.2d at 1375 ("A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking . . ."). A physical taking occurs when "government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) (explaining that a "permanent physical occupation" occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises"). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)); *see also Yee*, 503 U.S. at 522 ("Where the government authorizes a physical occupation of property (or actually takes title) the Takings Clause generally requires compensation."). A permanent physical occupation "is a per se physical taking . . . because it destroys, among other rights, a property owner's right to exclude." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1356 (Fed. Cir. 2006), *aff'd on other grounds*, 552 U.S. 130 (2008).

"In a physical takings case, the inquiry is limited to whether the claimant can establish a physical

occupation, not necessarily of infinite duration, of his property by the Government." *Applegate v. United States*, 35 Fed. Cl. 406, 414 (1996) (citing *Loretto*, 458 U.S. at 441). "The physical occupation need not occur directly, but can be found in a physical injury to real property substantially contributed to by a public improvement." *Id.* (citing *United States v. Kan. City Life Ins. Co.*, 339 U.S. 799, 809-10 (1950)); *see also Love Terminal Partners, L.P.*, 97 Fed. Cl. at 424 (describing a physical taking arising from the government's enactment of legislation targeting the plaintiff's six-gate terminal for destruction).

2. Regulatory Takings

A regulation that restricts the use of property or unduly burdens private property interests results in a regulatory, not a physical, taking. *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 (Fed. Cir. 2008); *accord Tuthill Ranch, Inc.*, 381 F.3d at 1137. In other words, a regulatory taking is one in which "the government prevents the landowner from making a particular use of the property that otherwise would be permissible." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (citing *Lucas*, 505 U.S. at 1014).

Originally, the Supreme Court held "that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014. However, it later concluded "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth

Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *see also Members of Peanut Quota Holders Ass'n*, 421 F.3d at 1330 ("While a taking often occurs as a result of a physical invasion or confiscation, the Supreme Court has long recognized that 'if a regulation goes too far it will be recognized as a taking.'" (quoting *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922))). There are two types of regulatory takings: categorical and noncategorical.[11] *Huntleigh USA Corp.*, 525 F.3d at 1378 n.2.

a. Categorical Takings: The Lucas Analysis

A categorical taking is one in which "*all* economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000) (emphasis in original); *see also Lucas*, 505 U.S. at 1015 (indicating that categorical treatment is appropriate "where regulation denies all economically beneficial or productive use of land"). In other words, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). Such a taking, like a permanent physical invasion of property, is deemed a per se taking under the Fifth Amendment. *See Lingle*, 544 U.S. at 538; *see*

[11] Although regulatory takings may be temporary or permanent, they "'are not different in kind.' Both require compensation." *Kemp v. United States*, 65 Fed. Cl. 818, 823 n.2 (2005) (quoting *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 318).

also Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 477 (Fed. Cl. 2009) (stating that "[g]overnment regulation goes 'too far,' and effects a total or 'categorical' taking, when it deprives a landowner of all economically viable use of his 'parcel as a whole'" (citations omitted)).

As with all takings, a plaintiff must first demonstrate title to a property right that has purportedly been taken, *see Good v. United States*, 39 Fed. Cl. 81, 84 (1997), and then the court must determine the extent to which the property has been appropriated, *see Members of Peanut Quota Holders Ass'n*, 421 F.3d at 1330. Even where the court concludes, however, that the regulation has taken all economically viable use, no compensation is owed and the state "may resist compensation . . . if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. In other words, a compensable taking does not occur if the government's common law nuisance and property principles prohibit the desired land use:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of

> private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally . . . .

Id. at 1029; *accord Hendler v. United States*, 38 Fed. Cl. 611, 615 (1997) ("Because a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights."), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999). At all times, the government bears the burden of identifying those "background principles of nuisance and property law that prohibit" the plaintiff's intended use of the property. *Lucas*, 505 U.S. at 1031.

b. NonCategorical Takings: The Penn Central Factors

Unlike a categorical taking, a noncategorical taking "fall[s] short of eliminating all economically beneficial use of property." *Consumers Energy Co. v. United States*, 84 Fed. Cl. 152, 156 (2008) (citing *Palazzolo*, 533 U.S. at 617). A noncategorical taking is the "consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use . . ." *Palm Beach Isles Assocs.*, 231 F.3d at 1357. In determining whether a noncategorical taking has occurred, courts look to the factors identified by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978):

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have

> identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. *See Goldblatt v. Hempstead*, [369 U.S. 590, 594 (1962)]. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g.*, *United States v. Causby*, 328 U.S. 256, (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124.

II. Analysis

A. Plaintiffs Have Established a Lucas Categorical Taking of Their Leasehold

1. Plaintiffs Possessed Valid Property Interests at the Time of the Taking

Although the parties dispute the issue,[12] this court previously concluded that plaintiffs have valid

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[12] While defendant concedes that plaintiffs held the right to the 26.8 acres at Love Field covered by the Master Lease as of October 13, 2006, defendant argues that plaintiffs' current claims go beyond the terms of the Master Lease in two respects. Def.'s Posttrial Br. 47. First, defendant claims that plaintiffs ignore the fact that the Master Lease expires on September 30, 2023, and does not contain an automatic right of renewal. *Id.* at 47-48. Second, defendant claims that plaintiffs ignore the fact that the

property interests: Virginia Aerospace is the successor in interest to the 26.8 acres at Love Field covered by the Master Lease initially executed in 1955 between Dallas and Braniff, and Love Terminal Partners is a sublessee under the Master Lease. *See Love Terminal Partners, L.P.*, 97 Fed. Cl. at 386-87.

Furthermore, the scope of plaintiffs' leasehold interests is clearly defined. As noted above, Article VIII of the Master Lease provided that Virginia Aerospace's primary business had to be aviation-related.[13] *See* JX 1 (LTP-000828-29). In addition, although not incorporated into the Master Lease, when Virginia Aerospace acquired the Master Lease in 2003, one of the conditions of sale was that the property not be used for the performance of heavy aircraft maintenance. *See* Tr. 468-71 (Naul); JX 4 (LTP-011376-77).

Master Lease contains a rent-sharing provision that requires the lessee to pay Dallas fifty percent of any rental income collected from a sublessee. *Id.* at 48. As a result, defendant reasons, plaintiffs (1) valued the Master Lease as if it ended in 2036 rather than 2023, (2) failed to opine as to whether the sixteen-gate terminal would be built without a lease extension, and (3) failed to consider the effect of the Master Lease's rent-sharing provision in their highest and best use valuations. *Id.* These arguments, however, go to the value of plaintiffs' leaseholds, and not to whether plaintiffs have identified valid property interests, an issue which is undisputed.

[13] Although it is clear that Hampstead used its properties for nonaviation related purposes, the court finds that, based on the language of Article VIII of the Master Lease, it did not have the right to do so, irrespective of the fact that Dallas chose not to enforce that provision. *See* DX 66; DX 68.

Having identified plaintiffs' valid property interests, the court must now determine whether the federal government appropriated those interests for public use.

2. The WARA Destroyed All Economically Beneficial and Productive Use of the Subject Property

In assessing whether a categorical taking has occurred, i.e., one in which all economic value has been taken by, in this case, a federal statute—the WARA—the court must review the testimony of the parties' expert witnesses regarding the potential uses for plaintiffs' leaseholds. In support of their argument that the federal government, through the enactment of the WARA, deprived their leasehold of all

economically viable use, plaintiffs rely upon the testimony of Messrs. Hazel[14] and Massey.[15]

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[14] Mr. Hazel is an aviation consultant specializing in commercial facilities. Tr. 1210-11 (Hazel). He studies the operation of airport facilities such as retail businesses, parking, and concessions, compares them to other airports—both domestic and international—and then offers recommendations for improvements. *Id.* He has worked in the aviation industry since 1983. *Id.* at 1211-12. He holds a bachelor's degree from Princeton University, a juris doctor from the University of Chicago, and a master of business administration from George Washington University. *Id.* at 1212. After practicing law for approximately five years, he took a job with U.S. Air. *Id.* at 1212-13. Although he started as a regulatory attorney at U.S. Air, in 1989, he was promoted to Assistant Vice President of Properties, and became responsible for obtaining lease rights at airports, negotiating leases, and voting on the budgets for over 100 airports along the East Coast, and in Canada, the Caribbean, and Europe. *Id.* at 1216-17. He was then promoted to Assistant Vice President of Properties and Facilities and subsequently Vice President of Properties and Facilities, and became responsible for overseeing the design, planning, and project management of the airline's facilities. *Id.* at 1217-20. He left U.S. Air in 2001 to become an aviation consultant, the position he still holds. *Id.* at 1221-26.

[15] Mr. Massey is a commercial real estate appraiser. Tr. 1334 (Massey). He has a bachelor's degree in business administration from Texas Tech University and an MAI designation, and is licensed in commercial real estate appraisal in Texas. *Id.* He has been performing appraisals since 1970 and has appraised over 20,000 properties, including properties in almost every state in the United States, the Caribbean, Mexico, and Canada. *Id.* at 1336. He previously appraised at least ten properties at Love Field, including multiple commercial properties, an airplane overhaul facility, car rental lots, and airplane storage hangars. *Id.* at 1337-39. He also appraised airport properties elsewhere in Texas, including at Meacham Airport and Alliance Airport in Fort Worth, as well as at airports in Oklahoma City, Oklahoma; Sacramento, California; Arkansas; and New Mexico. *Id.* at 1340-41. In addition, he served on the board of a regional airport in

Mr. Hazel, whom the court qualified as an expert in airport commercial facilities,[16] first testified that following the WARA's enactment, there were "no other economical uses" for the 26.8-acre property covered by the Master Lease apart from use as a passenger air terminal.[17] *Id.* at 1231-32. Specifically, Mr. Hazel concluded that little to no income was available from a total of six different categories: (1) passenger terminal rental fees, (2) passenger landing fees, (3) car rental fees, (4) income from retail as well as food and beverage, (5) cargo rental fees, and (6) income from a hotel. With respect to passenger terminal rental and passenger landing fees, he testified that these sources were wholly precluded by the WARA:

> So if you look at the major sources of airport revenue, I'll go through them, the biggest source is terminal rental, passenger terminal rental, and that doesn't apply because WARA restricts and prevents this facility from being used as a passenger terminal, so that's off the list. The next biggest slice is passenger landing fees. This area can't be used to generate landing fees because it's not a runway. That's off the list, clearly.

Collin County, Texas, located just north of Dallas. *Id.* at 1341-42. He has been qualified as an expert witness in real estate appraisal over 100 times and has testified regarding those appraisals between fifty and sixty times. *Id.* at 1343-44.

[16] Tr. 1228 (Hazel).

[17] Mr. Hazel defined economical use as whether revenue would exceed expenses. Tr. 1258 (Hazel).

Id. at 1235-36. With respect to car rentals, he testified this too was not an available source of revenue for plaintiffs:

> Rental car revenue to airports is generated from people who rent cars, and then a percentage of their rental is paid to the airport by the rental car company, typically 10 percent. There's no way for this site to capture that revenue. That's revenue paid by the rental car companies to the airport, so it doesn't apply.

Id. at 1237. He testified that the same was true with respect to income from retail, food, and beverage:

> The third area is food and beverage and retail, and the food and beverage slice is smaller than many people might expect. It's 2.9 percent, and the retail slice . . . is 3.5 percent . . . Those numbers refer to passenger terminal food and beverage and retail, and we've already been told that we can't operate this as a passenger terminal, so those don't apply either.

Id. He also testified that there was little demand for additional cargo rental space:

> [W]hat you see is that Love Field generates very, very little cargo. I mean, it's not in the top 100 of U.S. airports. The cargo is going to be at DFW, is at DFW and to a secondary extent, at Alliance. There's limited cargo activity [at Love Field]. There's very little demand for cargo activity there. I don't see this at all as a potential use of this site. There's no demand for that.

Id. at 1239. Finally, with respect to building a hotel on the site, he testified that the conditions were not optimal:

> I concluded that it makes no sense. I need to give you a little background again. All things being equal, businesses prefer to operate off the airport than on the airport, and the reason for that is that off the airport, you can own your property. You can put a mortgage on it. You can own it fee simple, number one, whereas on the airport, you just get a lease, and that causes problems. Two, it's more expensive to be on the airport. You've got higher cost of security. You've got to badge your employees. It's just generally more expensive to be on the airport, and so if you need to be in the airport, if you're operating a terminal concession, you have no choice, but if it's a facility that could be on the airport or off the airport without any significant locational benefit, you're generally going to want to be off the airport.
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> * * *
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> Well, there's already two hotels right on Mockingbird, right near the entrance to the airport, off airport, so why would anyone want to drive 2.7 miles to a hotel located on a leasehold at the airport? It just doesn't make any sense to me.

Id. at 1245-46.

In addition, Mr. Hazel dismissed the two uses suggested by defendant's experts. With respect to

building an additional Fixed Base Operator ("FBO"), he testified that there was simply no demand:

> FBOs provide the fuel and the facilities that private aircraft use when they are at an airport. Most of their revenue comes from the sale of fuel, but they also charge for parking. They may provide maintenance services. They typically have a terminal with some lounge facilities, et cetera, and so Love Field has six FBOs. One or two of the documents refer to seven, but I observed six FBOs.
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> * * *
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> In addition, the corporate operators have learned to improve their fuel procurement, and so what used to be the main source of revenue for FBOs is really getting squeezed. There used to be very healthy markups on fuel. If you look at the rack rates for fuel costs at FBOs, they look like high costs, but actually, the corporate operators are negotiating deals with the chains, which significantly limit markups, so this is a business that is getting tougher and tougher, like many businesses at an airport that has a huge number of FBOs.

Id. at 1240-41.

He came to the same conclusion with respect to the potential for income from off-airport parking, noting that Love Field already had adequate facilities. *Id.* at 1242-44. In support of his position, he cited the June 2008 Five-Party Agreement for Love Field, which indicated that the airport's 7,000 close-in parking spaces were adequate for the average day. *Id.*

at 1243. He also noted that if plaintiffs were to build a parking facility on their property, it would be 2.7 miles away from the main terminal. *Id.* at 1244. He further noted that there already was an off-airport parking facility, as well as a car rental business with additional parking, both of which were located at the entrance to the airport. *Id.* at 1244-45.

Finally, Mr. Hazel noted that vacant terminals were typically demolished and that it was extremely difficult to find a tenant looking for a short-term lease that would provide the lessor with a profit. *Id.* at 1246.

Ultimately, it was Mr. Hazel's opinion, based on his experience constructing terminals in Boston, New York City, Philadelphia, Phoenix, and San Diego, that Hampstead's proposed plans for a sixteen-gate terminal "show a terminal that [c]ould be successfully used as a passenger airline terminal." *Id.* at 1248-49. Specifically, he noted that (1) the plan allowed for a twenty-seven-foot separation between wingtips, more than the fifteen-foot separation recommended by the FAA, and therefore the terminal was capable of accommodating the widest of the narrow-body fleet aircraft, *id.* at 1250-51; (2) the sixteen-gate terminal averaged approximately 27,500 square feet per gate, roughly comparable to the renovated Ronald Reagan Washington National Airport, id. at 1252-53; (3) the departure lounges averaged approximately 2,400 square feet, larger than the 1,500 square feet recommended by the FAA, *id.* at 1253-54; (4) the terminal's spaces were sufficient to accommodate areas for ticketing, lobbies, circulation, baggage claim, airline operations, and short-term parking, *id.* at 1254-57; (5) the aircraft utilizing the terminal would

be able to enter and leave the terminal as well as use the taxiways, *id.* at 1257; and (6) the terminal was capable of meeting passenger demand, even at peak-hour levels, *id.* at 1249.

Mr. Massey, whom the court qualified as an expert in commercial real estate appraisal,[18] testified that his conclusions regarding the highest and best use of the 9.3-acre Sublease were based on whether the intended use was (1) legally permissible, (2) physically possible, (3) financially feasible, and (4) designed to allow the maximum potential return.[19] *Id.* at 1348, 1352 (Massey). With regard to the highest and best use of the property before the enactment of the WARA, he concluded that it was "as a scheduled airline terminal as it was built and designed," and that the highest and best use of the same property after the enactment of the WARA was as "some type of aviation use." *Id.* at 1352-53. He specifically rejected the postenactment use of the leasehold as an FBO because he believed there was not room for another FBO at Love Field. *Id.* at 1355. In response to Mr. Perkins's testimony, discussed below, that the highest and best use for the property was as "a high-end" FBO, Mr.

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[18] *Id.* at 1345 (Massey).

[19] Mr. Massey defined highest and best use as "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, and financially feasible and that results in the highest value." PX 90 at 44. This definition of highest and best use is consistent with this court's case law and the Appraisal Institute's definition of highest and best use, of which the court takes judicial notice. *See Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 156 (1990) ("*Loveladies Harbor I*"); Appraisal Institute, *The Appraisal of Real Estate* 278 (13th ed. 2008).

Massey testified that the field of FBOs was saturated and that the terminal was too far from the active taxiway and therefore lacked the potential for visibility, good signage, and aircraft storage. *Id.* at 1358-59. In addition, he concluded that using the site for parking would not be financially feasible and therefore not the highest and best use, due to the existence of over 7,000 parking spaces at Love Field. *Id.* at 1359-60. In support of this conclusion, he cited the deposition testimony of Mr. Poole, who stated that Dallas had no plans to build additional parking at Love Field. *Id.*

With regard to the fair market value of the property prior to the enactment of the WARA,[20] Mr. Massey concluded that the 9.3-acre leasehold covered by the Sublease was worth $20.5 million. *Id.* at 1369-71; PX 90 at 1. Mr. Massey utilized two approaches to determine the before value of the property. First, he used the income approach, which he defined as "a forecast of gross income, less expenses, the derived net operating income and then the method of capitalizing it into an indication of value." Tr. 1368 (Massey). In addition to conducting his own appraisal using this method, he also relied upon the analysis in a report prepared by the Meehan Group, which included Ms.

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[20] At trial, Mr. Massey explained that his assessment of the value of the property before the enactment of the WARA assumed that someone assessing the property before the WARA's passage would have known that the legislation was going to be enacted, but not that it was going to restrict Love Field to just twenty gates and not that it would trigger the complete destruction of the Lemmon Avenue terminal. Tr. 1398-99 (Massey).

Meehan,[21] an aviation consultant, and Mr. Anderson, an expert appraiser of aviation-specific assets, whose work was reviewed and corroborated by Mr. Miller. *Id.* at 1368-69. Then, Mr. Massey used the replacement cost approach, which he defined as the cost to recreate the facility less depreciation costs. *Id.* at 1371-72. In determining the replacement value, he relied on a computer-driven program widely used in the industry—the Marshall and Swift Commercial Estimator 7—as well as projections made by Mr. Cullum, another one of plaintiffs' expert witnesses. *Id.* at 1372-74. He then reconciled the values produced by the two methodologies and came up with a final figure of $20.5 million. *Id.* at 1374-75. While he noted that real estate appraisers also use a methodology called the simplified market approach, wherein one compares similar properties on the market, he stated that he was unable to use that approach in this case because of the uniqueness of Love Field. *Id.* at 1367-68.

With regard to the fair market value of the property following the enactment of the WARA, Mr. Massey concluded that the Sublease had a fair market value of negative $665,000,[22] which was calculated by

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[21] Ms. Meehan specializes in airport demand. Tr. 566 (Meehan). She began her consulting career upon receiving a master's degree in city and regional planning, with a specialization in transportation economics, from Harvard University. *Id.* at 573-74. She has over thirty years of experience in the field. *Id.* at 567.

[22] In his expert report, Mr. Massey concluded that the value of the Sublease after the enactment of the WARA was $419,000. PX 90 at 57. At trial, however, Mr. Massey conceded on cross-examination that he made a mathematical error in his expert report, and that the actual after value of the Sublease was

taking the value of the Sublease after the enactment of the WARA ($0) and subtracting the cost of demolition ($655,000); Mr. Massey recommended demolition so that plaintiffs would not have to pay ad valorem taxes, as well as security, maintenance, and insurance fees. *Id.* at 1375-79, 1417-24. Thus, he calculated that the total amount of damages owed for the physical taking of the terminal and parking garage was $21,165,000.[23] *Id.* at 1425.

To counter the testimony of plaintiffs' expert witnesses and support its argument that the WARA did not cause a regulatory taking of plaintiffs' leaseholds because the legislation did not take anything of value,

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$4,000,195. From his testimony, the court further understood that both figures were based on an assumption that plaintiffs could continue to lease 25% of the parking garage to Sewell for car storage, a use that Mr. Massey acknowledged at trial was not permissible under the terms of the Sublease, thus rendering the parking garage after the enactment of the WARA functionally obsolete. *See* Tr. 1414-17 (Massey).

[23] Mr. Massey derived this figure by adding the value of the property before the taking ($20.5 million) to the cost of demolishing the property after the taking ($655,000).

defendant relies upon the testimony of Messrs. Perkins[24] and Reed.[25]

Mr. Perkins, whom the court qualified as an expert in the appraisal of aviation-related real

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[24] Mr. Perkins is an appraiser of aviation-related real estate and other assets, and also develops and leases aviation-related real estate. Tr. 2450 (Perkins). Mr. Perkins holds a bachelor's degree from Harvard University, and is a certified appraiser in Texas and New Jersey. *Id.* at 2450-51. He also has a private pilot's license. *Id.* at 2466. Mr. Perkins has more than twenty-five years of experience appraising aviation-related real estate, and over twenty-eight years of experience developing property at airports. *Id.* at 2450. He has been involved in more than 300 aviation-related appraisal assignments and has served as an expert witness in four other cases. *Id.* at 2450, 2466-77.

[25] Mr. Reed is a principal with Reed & Associates, and serves as a management consultant to the aviation industry. Tr. 2162-63 (Reed). He holds a bachelor's degree in psychology from Washington and Jefferson College and a master's degree in urban and regional planning, with emphases in transportation and finance, from the University of Pittsburgh. *Id.* at 2162. He has over twenty-five years of experience as a management consultant to the aviation and transportation industries and has worked with a diverse group of airports in the United States, Europe, and Asia. DX 108 at 44. He has assisted in over fifty airport and airline lease negotiations at over fifteen airports, involving assessments of airport cost, revenue structures, and airport lease agreements. *Id.* For twenty-one years, he provided financial and management consulting services to the Detroit Metropolitan Wayne County Airport as its principal consultant. Tr. 2164 (Reed). During his career, he "has supervised and prepared more than 20 financial feasibility studies in support of the sale of airport revenue bonds" at several airports, another "20 detailed financial plans for construction of [major airport] facilities, and more than 30 detailed annual cost allocations and rate setting studies in support of airport fees and charges." DX 108 at 44.

estate,[26] testified that the highest and best use of plaintiffs' leaseholds—the entire 26.8-acre property—both before and after the enactment of the WARA, was as "a general aviation phased development of hangars that served high end aircraft, turbine aircraft,"[27] a use unlike that of a typical FBO. *Id.* at 2491-92, 2508 (Perkins). According to Mr. Perkins, a general aviation hangar operated differently than a typical FBO, which he described as being heavily dependent upon fuel sales:

> A fixed based operation in this case will be a subtenant of the developer or the owner of the property. The owner doesn't necessarily have a stake in his fuel sales insofar as his ability to make his rent, but he offers the owner the opportunity to have a fuel handling agent on the premises. As I said before, oftentimes in this type of development you're offering the advantageous fuel sale as incentive to pay a fairly desirable rental rate. And, of course, some of those tenants aren't going to necessarily have the personnel or want to put fuel in the airplane. So a big part of something like this, you have to have a mechanism by which the airplanes can refuel so the base tenants can avail themselves of a good price that you're offering as incentive.

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[26] Tr. 2472 (Perkins).

[27] In conducting his highest and best use analysis, Mr. Perkins considered the same four criteria as Mr. Massey—whether the intended use was legal, physically possible, financially feasible, and likely to result in the highest value. Tr. 2489 (Perkins).

Id. at 2510-11. In addition, he identified two other advantages of using the property for a hangar development: its large square footage and comparatively low rental rate under the existing Master Lease. *Id.* at 2499-500.

In assessing the property's highest and best use, he considered the value of the existing improvements, noting that the most valuable improvements were the garage and the apron. *Id.* at 2500-04; *see also* DX 109 at 115 ("The ramp, supporting utilities and drainage infrastructure and, to a somewhat lesser extent, the automobile parking lot along Lemmon Avenue cannot produce revenue by themselves, but are . . . the most valuable improvements present on the subject [property] as improved."). Ultimately, while Mr. Perkins concluded that the terminal facility and the Dalfort Aerospace maintenance hangar were capable of producing some revenue to offset costs, he did not believe that the potential revenue would exceed the financial benefit of demolishing and then redeveloping the site. DX 109 at 115.

Notwithstanding his assessment of the property's highest and best use as a hangar development, Mr. Perkins conceded that there were two major obstacles to plaintiffs' use of the property as such. Tr. 2492-93 (Perkins). First, he noted that the seventeen-year lease term available under the Master Lease made it difficult to recover the cost of financing the property if, for example, the bank required a ten-year amortization period. *Id.* Second, he noted that the rent-sharing provision of the Master Lease would have prevented any new construction. *Id.* at 2493-94. He therefore explained that any party contemplating an

investment in the leasehold in 2006 would have to get a lease extension as well as relief from the rent-sharing provision. *Id.* at 2493-94.

With regard to the fair market value of the Sublease, both before and after the enactment of the WARA, Mr. Perkins concluded that it was worth $10,850,000. *Id.* at 2513; DX 109 at 145. Finding that the unique character of the property precluded the use of the sales comparison approach and that the income approach "produced a value that clearly was below the approach that recognized the highest and best use," he used the cost approach to value the property. Tr. 2514 (Perkins). He noted, however, that his appraisal did not take into account (1) the cost to build the proposed hangar development, *id.* at 2550; (2) the demand for general aviation hangars and associated services at Love Field, *id.* at 2559, 2569; or (3) the number of flights serviced by Love Field's existing FBOs, finding the number of take-offs and landings to be irrelevant, *id.* at 2560. Instead, he stated that the more appropriate metric to review when assessing "the health of FBOs or general aviation" was to look at the amount of fuel that was burned at the airport, noting further that when, in 2002, Love Field went from two to four FBOs, the total volume of fuel sold actually increased. *Id.* at 2663-64. Finally, Mr. Perkins conceded that the enactment of the WARA made no difference in his valuation of the property. *Id.* at 2555.

According to Mr. Reed, whom the court qualified as an expert in airport management and airport finances,[28] although the Lemmon Avenue terminal

[28] Tr. at 2177 (Reed).

was constructed to provide airline passenger service, the Master Lease had other potential economically beneficial uses, both before and after the enactment of the WARA. *See* Tr. 2444 (Reed); DX 108. When overseeing a financial feasibility study, Mr. Reed first examines the airline's use and lease agreement. Tr. 2168-69 (Reed). From this document, he learns how the airport's tenant airlines are expected to do business, pay for such facilities, abide by restrictions, and in some cases, cover the airport's losses. *Id.* at 2168. He then reviews all of the other operations within the airport complex, including operations on the airfield side, in the terminal building, and in the automobile parking area. *Id.* at 2170. He specifically examines the revenues derived from parking, concessions, advertising, and news and gift vendors. *Id.* at 2170-71. He then factors in all of these revenues and expenses to model the financial operation of the airport. *Id.* at 2171. Finally, he evaluates the number of people that will use the airport, or "in-planed passengers," and from that figure, estimates the number of passengers who will use the airport's parking facilities. *Id.* at 2172.

Applying this methodology, Mr. Reed assessed the potential uses of plaintiffs' leaseholds, beginning with an examination of their use of the property as a terminal. *Id.* at 2179-80. First, he considered the Lemmon Avenue terminal's airside location, focusing on the size of the hold rooms, the passenger corridors, the gates, the jet bridges or attachments, and the baggage systems. *Id.* at 2179-80. Second, he examined the terminal's roadside location, which includes the roadways and everything involved in a passenger's movement from a car, taxi, or bus into the terminal

building and toward an airplane. *Id.* at 2183. Third, he assessed the yearly trends in passenger traffic at Love Field, beginning in 2002. *Id.* at 2199. Finally, he made projections regarding future demand for parking, revenue from parkers, depreciation of capital improvements, and costs to operate a parking business. *Id.* at 2201-15. Upon concluding this review, Mr. Reed made the following determinations: (1) using the leaseholds as a commercial aviation terminal would be difficult given the layout of both the airside and roadside of the Lemmon Avenue terminal, and expansion of the building to meet demand would only exacerbate the problem, *id.* at 2181-87; (2) using the leaseholds as a parking facility would be profitable, producing a net revenue of $31,000,453 from 2007 to 2023, given the increase in passenger activity at Love Field after the passage of the WARA, *id.* at 2199-2001, 2219; DX 108 at 4; and (3) allowing communications antennae to be placed on top of the parking structure would also be profitable, yielding an additional $653,000 (in current-year dollars) in revenue from 2007 to 2023, DX 108 at 4.

In this case, the court concludes that plaintiffs have established a *Lucas* categorical taking as to the entirety of their leasehold. In so concluding, the court is persuaded by the testimony of Messrs. Hazel and Massey and unpersuaded by the testimony of Messrs. Perkins and Reed, as explained below.

Significantly, both Messrs. Hazel and Massey testified that the highest and best use of plaintiffs' leasehold, following the enactment of the WARA, was as a passenger air terminal, the one use expressly forbidden by the WARA. Mr. Hazel came to this

conclusion after reviewing all available sources of potential revenue, to include (1) passenger terminal rental fees, (2) passenger landing fees, (3) car rental fees, (4) income from retail as well as food and beverage, (5) cargo rental fees, (6) income from a hotel, (7) income from FBOs, and (8) income from additional off-airport parking. Mr. Hazel also reviewed Hampstead's plans for a 16-gate terminal. Mr. Massey came to this same conclusion after considering whether the intended use was (1) legally permissible, (2) physically possible, (3) financially feasible, and (4) allowed the maximum potential return. In addition, both experts also testified that while plaintiffs could expect to receive some revenue from the property if it was utilized as a site for parking, it would not be an economical use of the property. Finally, the court notes that both experts' testimony that the WARA destroyed all economically beneficial and productive use of the subject property echoes Mr. Naul's testimony that although plaintiffs initially believed the enactment of the WARA would be beneficial to them, upon its enactment, they realized it "had the effect of taking [their] gates away" and was in fact "devastating for [them]." Tr. 501 (Naul). In summary, because the WARA contained explicit language that completely precluded plaintiffs from utilizing the property as a commercial airline terminal, which is the property's highest and best use, the court must conclude that no economic value remained following the legislation's enactment, thus constituting a categorical taking.

Contrary to plaintiffs' experts, who both agreed that the property's highest and best use was as a passenger air terminal, recognized that such use was the only use permitted under the Master Lease, and

noted that such use was directly precluded by the enactment of the WARA, defendant's experts offered inconsistent views on the property's potential uses.

Mr. Perkins, the only defense expert who offered testimony as to the property's highest and best use, concluded that the property could be used as a phased general hangar development. However, there are numerous reasons why the court is unpersuaded by his conclusion.

First, and foremost, the court discounts Mr. Perkins's premise that the WARA would not be a significant factor in a potential buyer's decision to purchase the property:

> Q So in your opinion, a buyer, for example, would not ascribe much priority to the anticipated immediate bump in passenger traffic on Southwest Airlines as soon as those single ticketing restrictions were lifted.
>
> A Yes, sir, he might think of that, but I think also the buyer would think that, well, how is that to benefit this property? Southwest is already entrenched in the terminal owned by the city. Is it reasonable to assume that the buyer for this property believed that he could somehow benefit by that?
>
> Q So you didn't see any way a buyer of this property could benefit from repeal of the single ticketing restrictions of the Wright Amendment?
>
> A I think the buyer would evaluate it, but there are other factors connected with terminal operation that the buyer would also

> be aware of. The fact that the Wright Amendment perhaps is subject to outright repeal or some modification is indeed a consideration, but I think also that there's other evidence to suggest that no matter what happens to the Wright Amendment, the future of alternative terminal development at Love Field is at least somewhat cloudy as of the point in time I think this evaluation would be happening.

Id. at 2553-54 (Perkins). In this respect, the court further notes that none of the other experts conceded, as did Mr. Perkins, that the WARA played no role whatsoever in their overall assessment of the property:

> Q So, in effect, you determined that the Wright Amendment Reform Act made no difference whatever in the value of this property, right?
>
> A Once, in my own mind, that I was certain that in terms of size, location and the market at Love Field that general aviation was a more promising long-term development option, I didn't consider the Wright Amendment as a factor.
>
> Q So the Wright Amendment Reform Act made absolutely no difference in the value of this property?
>
> A That's correct.

Id. at 2555. However, as detailed above, significant plans were made by the aviation industry in anticipation of the passage of the WARA. For example,

pursuant to the Five-Party Agreement, plans were made to tear down the Lemmon Avenue terminal, phase out restrictions on service from Love Field, and reduce the number of gates available for passenger service at Love Field from thirty-two to twenty. In sum, it is inconceivable to the court that such dramatic changes to the air passenger service operations at Love Field would have no impact whatsoever on an expert's assessment of the highest and best use of a piece of property directly affected by those plans.

Second, the court is unpersuaded by Mr. Perkins's finding that the highest and best use of plaintiffs' property was as a phased general hangar development for the simple reason that he failed to consider the profitability of using the property as such. Although he stated that he had a general sense of what it would cost to build the hangars on the leasehold, he admitted that he never actually prepared an estimate of those costs:

> Q Okay. Now, did you prepare some sort of design or master plan for the [phased general hangar] development here?
>
> A Not from a standpoint of actually physically locating hangars. What I did is an analysis based on the capacity of the site to support a certain amount of hangar space and other elements, some buildings, based on its size and configuration. I think I explained it earlier as a percentage of the size of the site.
>
> Q Right. So you, apart from just assuming that a percentage of the site will be consumed in custom built hangars for somebody, you

don't have an actual design that you have drawn out on a map or on a plot plan.

* * *

A Not in a finished form. What I did is sort of look at the plan and put some areas to it, but I didn't really draw specific buildings. I kind of made some assumptions, recognizing that there might be, in fact, an FBO on the property and that has a little different configuration. I did think about positioning buildings on the property as far as being closer to Lemmon Avenue or closer to the taxiway.

Q It's pretty hard to figure out how much it's going to cost to construct all of this if you haven't drawn anything out, isn't it?

A Well, I did an analysis where I assumed there was a certain amount of a type of hangar space, for instance, a couple hundred thousand square feet of corporate hangar space, 50,000 square feet, maybe, of a potential fixed base operation, and then essentially made an estimate based on what I think that should cost in Dallas at that time.

* * *

Q Okay. So you don't really know what it would cost because you don't really know what you're going to build, right? Fair enough?

A That's correct.

Id. at 2548-50. Mr. Perkins also never estimated how much revenue would be generated by his proposed FBO.

In addition, while Mr. Perkins conceded that Love Field had more FBOs than any other airport in the top 100 major airports in the United States, he failed to explain why the owner of an airplane currently being housed at Love Field would move their plane to this new FBO:

> Q And how many major airports in this country have six or seven FBOs already?
>
> A Only Dallas Love, to my knowledge.
>
> Q Right. The other 99 have fewer, correct?
>
> A Yes.
>
> * * *
>
> Q And the airplanes that are going to be housed in those hangars, they're going to have to come from where they're now being housed at other FBOs, right?
>
> A Some of them will.

Id. at 2559-60, 2569.

Ultimately, Mr. Perkins's conclusion that the leasehold was worth $10,850,000 was derived from adding the total depreciated value of the existing improvements (the apron, approaches, parking lot and structure, engineering, overhead minus the terminal) to the total capitalized leasehold advantage (the difference between the market rent and the contract rent), id. at 2528, a calculation that fails to assign any value to use of the property as an FBO.

By comparison, Mr. Hazel's conclusion that there was no demand for an additional FBO at Love Field was supported by his review of the market at Love Field:

> With six FBOs, Love Field has excess FBO capacity in what has become a slow or no-growth business. No new FBOs have entered Love Field in many years, and it is likely that at least one of the current FBOs is interested in exiting the market. In general, FBO margins are being reduced as corporate jet operators pressure FBOs to cut their fuel margins, which have historically been the primary source of FBO profitability. The number of smaller general aviation aircraft using Love Field has dropped substantially in recent years. As with cargo facilities, to convert the existing facilities on the Site to FBO use would involve demolition, sit remediation, and rebuilding, and would make no economic sense.

PX 91 at 10; *see also* PX 95 at 9-10.

Mr. Anderson,[29] whom the court qualified as an expert in aviation asset valuation,[30] had a similar view regarding the market for additional FBOs at Love Field:

> Q Mr. Anderson, how competitive is the general aviation market at Love Field?
>
> A Hypercompetitive.
>
> Q Hyper?
>
> A Extreme. At the time it had six or seven FBOs serving that market and serving that one airport. There's no other airport in the United States that has that level of a crowded marketplace. And what that does is reduces the amount of activity and revenue that each individual FBO can generate, . . . given the fairly fixed cost structure of an FBO . . . .

Tr. 2592 (Anderson). Mr. Anderson further noted that in 2006, Love Field averaged twenty-one daily departures per FBO, a figure which placed Love Field 85 out of the top 100 airports in the country—the higher the ranking, the greater the number of departures per FBO. *Id.* at 2593-94. According to Mr. Anderson, this figure is significant because it

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[29] Mr. Anderson is an aviation financial analyst and appraiser. Tr. 859 (Anderson). He has a bachelor's degree from Rutgers University and a master of business administration from the Massachusetts Institute of Technology. Id. at 859-60. He has over fourteen years of experience valuing tangible aviation assets such as "aircraft, aircraft parts, aircraft engines, ground equipment" as well as intangible aviation assets, such as airport landing and takeoff slots and airport terminal leases. Id. at 861-63; PX 88 Appendix B.

[30] Tr. 868-69 (Anderson).

demonstrates that the market for FBOs at Love Field was saturated:

> Just based on my experience working with FBOs, [the number of daily departures per FBO] is a key operational metric at which you look. It drives how many gallons of fuel you sell. It accounts for two-thirds, or 75 percent, of an FBO's revenue. It can drive how much line maintenance you perform and it can drive certain other ancillary type services, so the more aircraft you handle, the more departures, the greater revenue you will generate.

Id. at 2595.

Nor is the court persuaded by Mr. Reed's conclusion that the leasehold could have been used for an airport parking operation. First and foremost, Mr. Reed admitted that he never opined on the highest and best use of the property but instead concluded that the property could support multiple uses:

> Q So who's correct about the highest and best use of the property, you or Mr. Perkins?
>
> A I believe we're both correct in our own way. There can be multiples uses on a property. In fact, this property during its history has had multiple uses. The garage has been used by parking passengers of the Lemmon Avenue terminal, it's been used by a[n] automobile dealership, it's been used by a limousine company. There [have] been many different uses of the garage. There [have] also been many different uses of the aviation side of the

property. I believe all of those uses can be permitted. Are permitted.

Q So by your analysis are you saying the parking structure and parking lot, for example, can be both used as an amenity for Mr. Perkins's proposed development of high end airplane hangars and for a parking business for the main terminal?

A I'm not aware of the details of what he was conceiving of, but there's certainly plenty of area on that property to provide parking for hangars in the immediate proximity to those new hangars. The parking structure is on one corner of the property.

Q That wasn't my question. If the parking structure is used as an amenity for the hangars, that is, as a place for people to park their cars when they go to the hangars, it can't also be used for a parking business, as you propose, can it?

A Depending how many cars, you would simply allocate a number of spaces to that use and that would reduce . . . the number of cars you could park in there for people who are going to the main terminal.

* * *

Q And did you make a highest and best use determination?

A I did not.

Id. at 2442-45 (Reed).

In addition, Mr. Reed conceded that the success and therefore the profitability of the parking facility he envisioned was based on an unsupported assumption that individuals currently parking their cars either in Dallas's facility or in one of the private facilities would transfer their business to a parking lot on Lemmon Avenue:

> Q Surely the City of Dallas doesn't want to empty its own parking lot in order to fill the Lemmon Avenue parking lot?
>
> A I don't believe they would empty it. I believe what they would do is simply better utilize it. Structure A, which is the closest, could be purely for short term, people who are called meters and greeters, people who come to the airport to meet and pick up somebody. Thereby, you'd get very high turnover and very high daily revenue off of that parking garage.
>
> Q But they already get that revenue, presumably, right?
>
> A They are getting mostly long-term parking. People are paying the rate because it's relatively low. At $14 a day it is a fairly low rate.
>
> Q Right, but back to my point. If you're going to capture 22 percent of the market, you're going to have to get, you're going to have to take those cars out of someone else's lot because we already have ample parking today, right?

> A Yes. They will be taken out of both types of parking products, either the structured parking or the surface lots.
>
> Q Got it. It's a fact, though, isn't it, that you've done no market study that would support your assumption that either those who park at the city lots would move to this remote parking or those who park at the existing remote parking lots would move to the Lemmon Avenue parking business?
>
> * * *
>
> A I have not[.]

Id. at 2425-27; *see also id.* at 2428-29.

Finally, Mr. Reed admitted that rather than estimate how much it would cost to shuttle passengers back and forth from the proposed parking garage to the main terminal, he relied upon figures devised by Love Terminal Partners to shuttle passengers from a garage it planned to build across the street from the Lemmon Avenue terminal to the terminal:

> Q Let's talk now about how people get from the parking structure to the main terminal. As I understand it, you anticipated running a van service, correct?
>
> A That's correct.
>
> Q And that would be a van that does a circular route from the parking lot, or the parking structure, over to the main terminal and back again, right?
>
> A That's correct.

> Q About how many vans would you need to conduct that service?
>
> A I believe the original estimates by the Love Terminal Partners were five vans.
>
> Q I'm a little confused. The Love Terminal Partners were not sending passengers over to the main terminal, were they?
>
> A There was a plan to shuttle across the street to the garage that was planned to be built, so my understanding was, as I looked at the document, that they had estimated what the cost was to operate that would be.
>
> * * *
>
> Q Okay. And you didn't make any effort to determine how much it would cost, how many vans you'd need, in order to take people from Lemmon Avenue all the way over to the main terminal and to run that shuttle service, right?
>
> A I didn't adjust their numbers. No.

Id. at 2435-37.

By comparison, Mr. Hazel's conclusion that the site could not be profitably used for parking was based not on unsupported assumptions, but rather on city-prepared planning documents for Love Field:

> So the TARP, which is [a] planning document for Love Field[,] has a detailed analysis of parking in the document and in the appendix, and what the TARP concludes, and you can read the words yourself, is that Love Field, which added 4,000 parking spaces right close

> to the terminal in 2002 and 2003 and already had parking spaces, so it now has about 7,000 really close-in parking spaces, if you read the TARP, what the TARP says, is that we have adequate parking for the future. We have adequate parking for the average day. We have adequate parking for the typical peak day.

Id. at 1243 (Hazel). In addition, Mr. Hazel focused on the significant competition for parking, from operations closer to the main terminal that already existed:

> One of those, The Parking Spot, is a national chain, and so it has advantages already compared to anyone who's starting from scratch in a remote location because it has some corporate customers with big discounts, et cetera.
>
> The other one, Thrifty Park, is simply a car rental place that's operating parking on the other side, but [its] right at the entrance as well.

Id. at 1245.

Like Mr. Hazel, Mr. Anderson also discounted Mr. Reed's proposed parking business. According to Mr. Anderson, at 2.6 miles from the main terminal, the Lemmon Avenue terminal was simply too far for passengers to go for parking when they could currently find parking between 0.9 and 1.1 miles from the main terminal. Id. at 2599 (Anderson). In addition, Mr. Anderson questioned Mr. Reed's pricing and revenue assumptions:

A In essence, for the period of 2007 through 2015 he has projected rates for the city garages that . . . grow at an average annual rate of 4.3 percent per year.

Q And how does that compare with his projections for increases at his proposed Lemmon Avenue parking structure?

A During the same period he's assuming that prices would increase at an average annual rate of 10.7 percent . . . for the two facilities, the garage and the surface lot. So, in essence, he's assuming that prices would increase . . . more than twice as fast at the Lemmon Avenue terminal [than they] would at the primary competitor, which would be the city garage.

Q Are you aware of any reasoning that would support that assumption?

A I'm not. I think that with a clearly deficient product relative to the city garages, you would need to maintain a very substantial price discount to be able to attract customers.

* * *

Q Okay. And what percent of market share does Mr. Reed project that the Lemmon Avenue parking business would garner?

A . . . . If you look at the year 2013, which is, again, when they . . . would only have one garage and one parking spot on the envisioned site, . . . they would be accounting for 12 percent of capacity, but Mr. Reed indicates that he's assumed this facility

> would capture 22 percent of the market, so that seems to be quite a variance between the share of capacity and the share of the market. And if you couple that with the strong price increases that are envisioned in his projections, it just seems implausible.
>
> Q Okay. Based on those calculations, what is your opinion of the revenue projections that Mr. Reed makes?
>
> A I believe the revenue projections are wildly overstated.

Id. at 2600-03. In addition, Mr. Anderson concluded that Mr. Reed failed to either wholly or adequately consider expenses such as taxes, ground rent, and capital expenditures when calculating the parking business's operating costs. *Id.* at 2603-05. Correcting for these errors, Mr. Anderson concluded that the nominal value of the property, if used as a parking business, was $1.1 million, as opposed to Mr. Reed's estimate of $31 million. *Id.* at 2605. When Mr. Anderson further refined his figure by discounting the cash flow value, his $1.1 million figure was reduced to negative $1.9 million. *Id.* at 2606. Ultimately, Mr. Anderson concluded that using the property for a parking business was "not an economically viable use." *Id.*

Finally, the court notes that even though the proposed sixteen-gate terminal was never built, the evidence demonstrates that there was a market for plaintiffs' property at the time of the taking. As explained by Ms. Meehan, whom the court qualified as

an expert in forecasting airport passenger demand,[31] the airline industry suffered a deep recession from 2001 to 2005:

> . . . The significance of this period is that for the network carriers, which are most of the industry, . . . during that four and a half 2001 to mid-2005 period, they actually lost more money than they had ever made, so it was a startling period for the network carriers. It wasn't just caused by 9/11. It was a recession that started in the spring of 2001, but 9/11 was the nail in the coffin.

Id. at 603 (Meehan). By 2006, however, the industry had recovered. PX 89 at 35. As a result, and in anticipation of the Wright Amendment being repealed, plaintiffs began to engage in discussions with carriers such as Jet Blue and Pinnacle about acquiring the leasehold. Tr. 84-87 (McNamara); 485-87 (Naul). Had the WARA not been enacted, plaintiffs would have been able to realize the value of their leasehold. Instead, following the enactment of the WARA, the value of plaintiffs' property was reduced to zero. *Id.* at 1424-25 (Massey).

In conclusion, the court determines that the expert testimony of Messrs. Hazel and Massey was, unlike the testimony offered by the defense witnesses, highly reliable and persuasive. Accordingly, based upon plaintiffs' experts' testimony, the court finds that the highest and best use of plaintiffs' leasehold before the enactment of the WARA was as a passenger airline terminal. In addition, the court determines that,

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[31] Tr. 585-86 (Meehan).

following the enactment of WARA, such use was completely prohibited. As a result, plaintiffs were deprived of all economically viable use of the property by a regulation—a *Lucas* categorical taking.

B. In the Alternative, Plaintiffs Have Established a Taking of Their Property Under the NonCategorical *Penn Central* Factors

As noted above, under *Penn Central*, the court must consider the following three factors: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with the plaintiff's distinct investment-backed expectations; and (3) the character of the governmental action.[32] *Penn Cent. Transp. Co.*, 438 U.S. at 124. In this case, all three factors weigh in plaintiffs' favor.

1. The Economic Impact of the WARA Was Absolute; No Economic Value Remained After Its Passage

The economic impact factor is "intended to ensure that not every restraint imposed by government to adjust the competing demands of private owners [will] result in a takings claim." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (Fed. Cir. 1994) ("*Loveladies Harbor II*"). Clearly, "[g]overnment hardly could go on if to some extent values incident to

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[32] "The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." *Lingle*, 544 U.S. at 539.

property could not be diminished without paying for every such change in the general law." *Pa. Coal Co.*, 260 U.S. at 413. Although there is no "automatic, numerical barrier preventing compensation," *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990), plaintiffs must show that the regulation caused a "serious financial loss," *Loveladies Harbor II*, 28 F.3d at 1177. Thus, an analysis of the economic impact of the governmental action requires "a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action." *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Walcek v. United States*, 49 Fed. Cl. 248, 258, 267 (2001). This fair market value, in the context of a taking, is based on the property's highest and best use. *See Olson v. United States*, 292 U.S. 246, 255 (1934). Finally, "[t]he economic analysis is often expressed in the form of a fraction, the numerator of which is the value of the subject property encumbered." *Id.* at 258; *see also Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

Plaintiffs argue that the enactment of the WARA destroyed "all profitable use" of their property. Pls.' Posttrial Br. 33. According to plaintiffs, even if they had been able to profit from utilizing the property for automobile parking or as an FBO, those "nominal uses" would not have provided enough revenue for plaintiffs to cover their approximately $1.8 million annual rent and carrying expenses. *Id.* at 33-34. In addition, plaintiffs argue that as a result of the passage of the WARA, they were unable "to recoup any

of [their] investment through operation or sale of the leasehold." *Id.* at 34.

Defendant counters that the enactment of the WARA had absolutely no economic impact on the market value of plaintiffs' leasehold. Def.'s Posttrial Br. 65. Specifically, defendant claims that (1) plaintiffs lost millions in the years before the passage of the WARA and had no agreements in place at the time the legislation was enacted that would have reversed that loss; (2) plaintiffs offered no evidence as to the value of their leasehold immediately before the enactment of the WARA, thus rendering their valuations meaningless; and (3) plaintiffs' leasehold was worth the same amount before and after the WARA passed. *Id.* at 67-83.

In resolving this issue, the court is again persuaded by the well-reasoned testimony of Messrs. Hazel and Massey. Mr. Hazel stated unequivocally that the Master Lease lacked any pecuniary value following the enactment of the WARA:

> First, no economically beneficial uses remained for the 26.8-acre site covered by the Virginia Aerospace lease following the determination that it could not be used as a passenger airline terminal. The prohibitions against the use of the Site for either a passenger terminal or aircraft maintenance meant that the leasehold for the Site had no economic value. The cost of facilities demolition and site remediation, the lease requirement that the lessee invest a minimum of $5 million in capital improvements, and the payment of ground

> rent all combine to render this Site of no economically beneficial use.

PX 91 at 20. Mr. Massey, testifying as to the value of the Sublease, went even further, concluding that it had a negative value following the WARA's passage. Thus, based on the testimony of Messrs. Hazel and Massey, the court concludes that plaintiffs suffered a serious financial loss.[33] As there can be no greater diminution in value than 100% to qualify for compensation as a noncategorical regulatory taking, this factor weighs entirely in plaintiffs' favor. Furthermore, although Hampstead was able to continue to pay the $3.8 million in carrying costs for 2.5 years while engaged in litigation over the WARA, because the statute's economic impact was so complete in that there was no hope of using the property in any economically viable way, Hampstead was forced to cease paying rent, resulting in its ultimate eviction from the site.

2. The WARA Destroyed Plaintiffs' Distinct Investment-Backed Expectations

Consideration of this factor is intended "to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Cienega Gardens v. United States*,

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[33] While Mr. Perkins testified that the value of the Sublease remained the same before and after the enactment of the WARA, thus resulting in a 0% diminution in value, the court is not persuaded by his testimony because his assessment was not based on the property's use as a commercial aviation terminal, its highest and best use.

331 F.3d 1319, 1346 (Fed. Cir. 2003) (quoting *Loveladies Harbor II*, 28 F.3d at 1177). In order to satisfy this criterion, plaintiffs must demonstrate that their investment-backed expectations were objectively reasonable. *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984)). In other words, such an expectation "must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus*, 467 U.S. at 1005 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

Defendant advances three arguments in support of its position that plaintiffs lacked distinct investment-backed expectations. First, according to defendant, plaintiffs could not have had a reasonable investment-backed expectation that they would be able to build a sixteen gate terminal on their property at the time they acquired their leasehold because the plans for the sixteen-gate terminal were not created until 2012. Def.'s Posttrial Br. 83. Second, defendant argues that when Love Terminal Partners acquired the Sublease in 1999, it was for continued use as a terminal by Legend and other airlines as well as for parking, *id.* at 84-85, and that when Virginia Aerospace acquired the Master Lease in 2003, it was "for auto parking and plane storage," *id.* at 86. Third, defendant argues that when plaintiffs acquired their leasehold interests, they would not have been able to build a 16-gate terminal on the property. *Id.* at 87. According to defendant, the proposed 16-gate terminal was designed to offer "regularly scheduled passenger service to destinations throughout the United States, on aircraft holding 140 or more passengers, from mid-2008 onward," service that would not have been permitted in 1999 and 2003. *Id.*

Plaintiffs counter that at the time they acquired their leasehold, they did have a reasonable investment-backed expectation that they would use their property for commercial passenger services. Pls.'s Posttrial Br. 43. In support of their contention, plaintiffs noted that as part of its due diligence, Hampstead did the following: (1) examined all legal issues surrounding Love Field, including the Wright Amendment; (2) created financial models reflecting the profitability of Legend or any other airline flying out of the Lemmon Avenue terminal; (3) surveyed the real estate surrounding Love Field; (4) evaluated the demand for 56-seat aircraft; and (5) considered the value of gate rentals at the Lemmon Avenue terminal. *Id.* at 35-37. As a result of these efforts, plaintiffs contend, they went ahead with their investment of $60 million in the Lemmon Avenue terminal, plus an additional $6.5 million to purchase the Master Lease, believing that the investment would be profitable irrespective of Legend's success or failure. *Id.* at 38-40. Finally, plaintiffs argue that no amount of due diligence could have predicted the complete destruction of the Lemmon Avenue terminal, as specified by the WARA. *Id.* at 40.

The first step in the court's analysis is to determine whether plaintiffs actually expected or actually relied upon the repeal of the Wright Amendment. *See Cienega Gardens*, 331 F.3d at 1346. In other words, did plaintiffs expect that they would be able to use their property for commercial aviation services? In this case, it is abundantly clear that they did.

The strongest proof of plaintiffs' plans for the leasehold is the extent to which Hampstead engaged in due diligence prior to acquiring the property. As detailed above, such efforts included extensive internal reviews of real estate, legal, and financial issues by Mr. Read and his team, as well as the hiring of various external consultants to review Legend's business plans and examine data Legend had gathered as part of its own due diligence efforts—even though Hampstead's plans for the terminal were not tied to Legend's success as an airline.

In addition, according to Mr. Read, Hampstead accorded great weight to the 1992 DOT study. The DOT study found that there would be tremendous benefit to consumers if the Wright Amendment was abolished, because of increased competition:[34]

> A change to the Wright Amendment will result in more service, more competition, lower fares, and more traffic for the Dallas-Fort Worth Metroplex and the region. Travellers to or from the Metroplex region will save an estimated $183 million per year in air fares. The amount of additional service

[34] Movement to repeal the Wright Amendment began as early as 1987, when Senator Robert Dole of Kansas introduced an amendment to an appropriations bill proposing a modification of the Wright Amendment to permit Southwest to fly to Witchita, Kansas from Love Field. PX 9 (LTP-020310). Two years later, in 1989, Congressman Dan Glickman of Kansas, along with sixteen original cosponsors, introduced a bill calling for the total repeal of the Wright Amendment. *Id.* No action was taken. Congressman Glickman along with seventeen cosponsors reintroduced the bill in 1991 but again, no action was taken. *Id.* (LTP-020311).

> that can be provided at Love Field beyond the 214,000 annual operations today will be limited by airspace interactions caused by Love Field's proximity to Dallas-Fort Worth Airport and the orientation of its runways in relation to those at Dallas-Fort Worth Airport. Safety will be maintained by FAA-imposed procedures, and noise impacts on the region will continue to decline as older "Stage 2" aircraft are phased out. Aircraft delays would become a significant problem only if operations reach the unlikely level of 360,000 operations annually. Under all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the region's dominant airport.

PX 9 (LTP-020284); *see also* Tr. 633 (Meehan); PX 89 at 11-13.

Finally, Mr. McNamara, Hampstead's founder, testified that Hampstead acquired the Legend Avenue terminal specifically because it believed that the Wright Amendment would be repealed:

> A In the Legend terminal we looked at it as if all the signs were that the Wright Amendment was going away. The terminal itself, we knew that the underlying lease had all these rights to fly, and that was a major advantage to have an airport that was so strategic that you could . . . own this leasehold real estate in a place that was such a dominant airport.
>
> * * *

Q Now, you've talked a bit about the Wright amendment. I'd like to go back to that discussion for a moment and ask how did the existence of the Wright Amendment affect Hampstead Group's decision to acquire the subject property back in 1999?

A Well, it was clear that the Wright Amendment was on its way out and that early on Southwest was a - - you had a very unusual circumstance because you had Southwest at Love Field and you had DFW, two major airlines at DFW. And so gradually Southwest was moving toward a decision to fight to open up the Wright Amendment, and Southwest was really the one who could have helped pull it off. And we believed that.

There was congressional pressure from primarily Jeb Hensarling and one other congressman there to try to open up the Wright Amendment because Dallas itself had the highest airfares in the nation because DFW was basically a monopoly for American Airlines. They didn't want to lose their pricing power with a competitor at Love Field.

Q Did you ever express to anyone your belief that the Wright Amendment was on its way out, was going to be repealed?

A Oh, yes. Anyone who would ask me.

Q Okay.

> A I mean, it was the talk of everywhere in Dallas. I mean, people believing this thing was going away.

Tr. 67, 81-82 (McNamara).

Mr. McNamara also indicated that Hampstead put a great deal of stock in Mr. Swensen's belief, following Mr. Swensen's attendance at the one-day investor's meeting,[35] that the investment was sound:

> A . . . . Coincidently, David Swensen was in town on some of the Yale related activity and I said look, why don't you come in and sit down with us while we go through the due diligence and just watch us in action. You know, just take a look at it and see what you think.
>
> Q See what we're doing with your money?
>
> A Yeah, exactly. Which he did. So he sat in for the whole five hours of our due diligence session.
>
> Q And at the conclusion of that due diligence session did Mr. Swensen express any opinion as to his state of mind regarding this potential investment?
>
> * * *

[35] Although Mr. Read, in a June 23, 1999 memorandum from Hampstead to its investors regarding Legend Airlines, does not reference the Wright Amendment, the court does not find that this document stands for the proposition that Hampstead did not consider its repeal a significant factor in its decision to invest in Legend. *See* JX 11.

> A . . . . Yes. David said it looks like you've covered all the bases, and I see no reason why you shouldn't do this. Furthermore, just an aside. If he had even winked that he didn't think we should do this I wouldn't have done it. I mean, here you have this guy in the room with you at the time, that he's gone through the whole process you've gone through, and if there was any thought that [it] was imprudent of us to do I wouldn't have done it.

Id. at 76-77. Thus, plaintiffs have proven that they actually expected or actually relied upon the repeal of the Wright Amendment.

Turning to the second step in the court's analysis, determining whether a reasonable investor in Hampstead's position would have believed that the Wright Amendment would be repealed, thereby opening up the market at Love Field, *see Cienega Gardens*, 331 F.3d at 1348, the court is persuaded by the testimony of Ms. Meehan. Significantly, in this case, it is clear that Hampstead's belief that the Wright Amendment would be repealed was reasonable for the simple fact that Hampstead was not alone in believing that the repeal would happen.

Ms. Meehan, who specializes in forecasting passenger demand, described what would occur at Love Field following the repeal of the Wright Amendment:

> . . . Love Field non-stop airline schedules would expand to include many locations outside the nine states allowed by the Wright Amendment. Repeal would require longer-haul aircraft, and a terminal facility able to

> accommodate them. [Love Terminal Partners/Virginia Aerospace ("LTP/VA")] would therefore reconfigure the existing Lemmon Avenue facility from the 6 gates, designed for smaller regional aircraft, to a facility that would accommodate the aircraft preferred by Love Field's existing and prospective customers: the narrow-body (single aisle) aircraft. Examples of those aircraft are the Boeing 737-700 (used by Southwest Airlines) or the A320 (used by JetBlue).

PX 89 at 1.

She then described Southwest's efforts to repeal the Wright Amendment, local support for Southwest's campaign, and the resulting concern on the part of American and DFW:

> In November 2004, Southwest began an aggressive campaign to repeal the Wright Amendment. As part of the "Wright is Wrong" campaign, Southwest developed a website, www.SetLoveFree.com, and released a 4-page press packet detailing its opposition to the Wright Amendment. Southwest argued that after 26 years "the Wright Amendment is an anti-competitive relic."
>
> * * *
>
> Nor was Southwest the only one pushing for repeal of the Wright Amendment. Local citizen groups and individuals also lobbied for the repeal of the Wright Amendment. Many brought their support directly to Southwest—in October 2005, Southwest sent over 200,000

> signatures it had collected through a petition drive, and 40,000 messages from the SetLoveFree website to Congress.
>
> * * *
>
> In response to Southwest's lobbying, American Airlines and DFW both retained expert consultants to examine the impact of the repeal of the Wright Amendment. The conclusions of both studies were that Congress should maintain the restrictions of the Wright Amendment because doing otherwise would have severe implications for DFW and American Airlines.
>
> * * *
>
> With repeal of the Wright Amendment becoming inevitable, American Airlines began to plan for change. In February of 2005, American Airlines Chairman and CEO Gerard Arpey said, "Were the Wright Amendment to be repealed, we would have to build an operation at Love Field because that is where the customers are going or want to go." In December of 2005, American announced that it was returning to Love Field, signaling the airlines' belief that the Wright Amendment was close to being repealed.

PX 89 at 10-13.

Ms. Meehan also commented on the reaction by Dallas to the likelihood that the Wright Amendment would be repealed:

> Knowledge of the imminent repeal of the Wright Amendment is evident in the premise for the report prepared for Dallas Love Field entitled, "Dallas Love Field Impact Analysis in the Absence of the Wright Amendment", May 31, 2006. . . . The City of Dallas prepared the report to develop future air service scenarios at Dallas Love Field that could realistically result if the Wright Amendment is repealed and compare those results to the environmental results that were contained in the 32-gate full build-out scenario included in the 2001 Dallas Love Field Master Plan (unanimously approved by the Dallas City Council and based on the assumed existence of the Wright Amendment). The very comparison conducted in the report provides further evidence of the market's perspective—the Wright Amendment would be repealed in favor of more competition.

Id. at 13-14. Like the report prepared by Dallas, the DOT study referenced above further demonstrates that it was reasonable for an investor in Hampstead's position to believe that major changes were coming to Love Field.

Finally, the court notes that no amount of due diligence on Hampstead's part, or on the part of any investor in its position at the time, could have predicted the devastating effect the WARA would ultimately have. According to Mr. McNamara, had he had any idea about the way in which the Wright Amendment would be repealed, Hampstead would not have acquired the leasehold:

> Q Mr. McNamara, as you sit here today how do you evaluate Hampstead's decision to invest in Love Terminal back in 1999?
>
> A Well, needless to say if when we did our underwriting, when you go back and look at our underwriting of all the threats of the regulatory change—Wright Amendment, no Wright Amendment, all those issues—we did not analyze that the federal government would pass a law at the [behest] of the City of Dallas, the City of Fort Worth, DFW, American Airlines and Southwest, and they would all get together and go pass a law and take that terminal from me. That was not in our analysis. Had I known that, obviously I would not have made the investment, right, knowing that it's going to be taken from you without payment of any kind. However, I didn't know that. And knowing what I know about the value of that terminal, but for that fact I would be very happy to make that investment again.

Tr. 90 (McNamara). Therefore, the court concludes that plaintiffs acquired their leasehold interests in reasonable reliance on the repeal of the Wright Amendment.

3. The WARA Destroyed Plaintiffs' Property Rights for the Sole Benefit of the Signatories to the Five-Party Agreement

When reviewing the character of the governmental action, the "reviewing court [must] consider the purpose and importance of the public

interest reflected in the regulatory imposition. In effect, a court [must] balance the liberty interest of the private property owner against the Government's need to protect the public interest through imposition of the restraint." *Loveladies Harbor II*, 28 F.3d at 1176. The court does so by considering "the actual burden imposed on property rights, [and] how that burden is allocated." *Lingle*, 544 U.S. at 543.

Defendant argues that "Congress enacted WARA to effect the orderly removal of the Wright Amendment's restrictions on scheduled air passenger service at Dallas Love Field," and that the "WARA's text shows Congress's intent to strike a balance between introducing forms of scheduled air passenger services that had not been offered at Love Field since the construction of DFW Airport, and minimizing the burden of those services on the surrounding environs." Def.'s Posttrial Br. 88. Defendant argues further that "Congress's goal of authorizing service from Dallas Love Field that had not been offered there since the creation of DFW Airport, while minimizing the community and environmental impacts of such an increased range of services, is an important one, and [ ] should be respected." *Id.* at 89. Finally, defendant argues that the WARA's cap on gates at Love Field applied to all parties equally: "[T]he statute equally restricts the City of Dallas, Plaintiffs, and anyone else from exceeding the 20-gate limit, regardless of the number of gates they might have had the right to construct before the WARA." *Id.*

Plaintiffs, on the other hand, characterize the enactment of the WARA as follows:

> Ouster of LTP/VA, akin to a physical taking, is exactly what the [WARA] accomplished here. The statute required demolition of LTP/VA's airline gates and prohibited them from ever again using this property for air passenger service. The purpose of this provision was to clear the way for Southwest and American airlines to divide up the Dallas market by limiting Love Field to 20 airline gates (thus limiting the number of commercial airline flights at Love Field), protecting DFW's interest in keeping flights coming in to that airport rather than the much more convenient Love Field. LTP/VA's air passenger business, which stood in the way of this plan, had to be eliminated—both physically in the case of the terminal gates and economically by the prohibition on air passenger service.

Pls.' Posttrial Br. 42.

The court agrees with plaintiffs' assessment of the character of the government's action. While, as defendant argues, the stated goal of the WARA may have been to strike a balance between the need to increase air passenger services from Love Field while minimizing the burden on the surrounding community, the way in which this stated goal was accomplished did not treat all parties equally. The WARA, which was the codification of the Five-Party Agreement, was enacted solely to protect the interests of two cities (Dallas and Fort Worth), two airlines (Southwest and American), and a competing airport (DFW), all to the detriment and expense of plaintiffs.

Indeed, the statute was clearly anticompetitive, a fact acknowledged by the United States District Court for the Northern District of Texas:

> By reducing the flight output at Love Field through a 20-gate restriction, allocating the gates at Love Field to uphold Southwest's dominance over the short-haul market, and requiring that the LTP Terminal be demolished, the [WARA] almost undoubtedly conflicts with the Sherman Act. . . . But in the case of airline competition in the North Texas region, Congress is willing to tolerate and sanction some anticompetitive behavior as a means of effecting the eventual end to the Wright Amendment restrictions that hamstring domestic flights to and from Love Field.

Love Terminal Partners, L.P. v. City of Dallas, Tex., 527 F. Supp. 2d 538, 560 (N.D. Tex. 2007).

In addition, because the WARA not only called for the destruction of the Lemmon Avenue terminal gates but prohibited plaintiffs from ever again using the property as a commercial passenger air terminal, the impact of the WARA was akin to a physical taking. As noted by the court in its previous opinion, "[w]hile the Supreme Court's regulatory takings jurisprudence cannot be characterized as unified, courts aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain," *Love Terminal Partners, L.P.*, 97 Fed. Cl. at 376 (internal quotation

marks omitted), and such a regulatory action is exactly what occurred in this instance.

In short, as part of its ad-hoc, circumstances-specific analysis, the court concludes that plaintiffs have also demonstrated a taking of the entire 26.8-acre leasehold under the *Penn Central* factors.

RELIEF TO BE AWARDED TO PLAINTIFFS

I. Just Compensation

The task of determining what amount of money a plaintiff is owed for a Fifth Amendment taking of its property falls exclusively to the judicial branch:

> [Inverse condemnation] suits [are] based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933).

Having concluded that plaintiffs are entitled to just compensation for the per se physical taking of the six passenger gates at the Lemmon Avenue terminal

and for the regulatory taking of the entire 26.8-acre leasehold, the court must therefore now determine the amount for which the federal government is liable.

A. Fair Market Value

1. Legal Standard

When property has been taken, the owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson*, 292 U.S. at 255; *accord Ga.-Pac. Corp. v. United States*, 226 Ct. Cl. 95, 105 (1980) ("In the context of a fifth amendment taking, just compensation has been interpreted to mean 'the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.'" (quoting *Almota Farmers Elevator & Whse. Co. v. United States*, 409 U.S. 470, 473-74 (1973))). Just compensation "means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (citation omitted). "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of taking." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)). The Supreme Court defined the standard as follows:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon

> just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Olson, 292 U.S. at 255; *see also Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878) ("The inquiry . . . must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."). "Highest and best use has been defined as [t]he reasonably probable and legal use of [property], which is physically possible, appropriately supported, financially feasible, and that results in the highest value, including those uses to which the property may be readily converted." *Brace v. United States*, 72 Fed. Cl. 337, 350 (2006) (quoting *Loveladies Harbor I*, 21 Cl. Ct. at 156) (internal quotation marks omitted); accord Appraisal Institute, *supra*, at 278.

In addition to the fair market value, an award of just compensation necessarily includes interest. *Miller v. United States*, 223 Ct. Cl. 352, 399 (Ct. Cl. 1980) ("Where there has been an appropriation of private property for public use within the meaning of the fifth amendment, 'the right to interest[,] or a fair equivalent, attaches itself automatically to the right to an award of damages.'" (quoting *Shoshone Tribe v.*

United States, 299 U.S. 476, 497 (1937))). That interest accrues from the date of the taking until the date the government disburses payment. *See Kirby Forest Indus., Inc.*, 467 U.S. at 10. Furthermore, where an inverse condemnation has occurred, resulting in a delay of payment, such interest must be compounded. *See Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 415 (1994) ("[B]ecause of the long delay since the date of taking in this case, the award of compound interest is not only proper, but its denial would effectively undercut the protections of the fifth amendment to our Constitution."); *see also Vaizburd v. United States*, 67 Fed. Cl. 499, 504 (2005) ("Compounding we view as a routine means by which a reasonable person would protect themselves, over an extended period of time, from erosion of their investment."); *Bowles v. United States*, 31 Fed. Cl. 37, 52-53 (1994) ("[P]rohibiting the landowner from recovering compound interest acts to retroactively reduce the value of just compensation at the time of the taking by undervaluing its present worth." (citation omitted)).

Ultimately, the determination of just compensation "should be carefully tailored to the circumstances of each particular case." *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1368 (Fed. Cir. 2012). In "dealing with a thorny issue of valuation, it is for this court to 'synthesize in its mind the . . . record before it, determine to what extent opinion evidence rested on facts, consider and weigh it all, and come up with figures supported by all the evidence . . . . '" *Wash. Metro. Area Transit Auth. v. United States*, 54 Fed. Cl. 20, 36 (2002) (quoting *United States v. N. Paiute Nation*, 183 Ct. Cl. 321, 346

(1968)). As the Court of Federal Claims has explained, "in the context of setting just compensation . . . valuation transcends mere mathematical calculation, and involves the exercise of judgment—first by the experts and ultimately by the court." *Wash. Metro. Area Transit Auth.*, 54 Fed. Cl. at 36 (citing *Standard Oil Co. of N.J. v. S. Pac. Co.*, 268 U.S. 146, 156 (1925) ("It must be remembered in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment.")).

2. Analysis

As stated in *Olson*, although a property's highest and best use is not necessarily the absolute measure of value, in this case, given the (1) industry-wide expectation that the Wright Amendment would be repealed; (2) restrictions on use imposed by the Master Lease; and (3) fact that the court heard contradictory testimony concerning the profitability of utilizing the property either as a parking garage or as a custom-built hangar development, the court will base its just compensation determination on a valuation of the property as if it was being used as a commercial aviation terminal, its highest and best use. Because only plaintiffs offered expert testimony on the value of the property if used as a commercial aviation terminal, only the expert valuations provided by Messrs. Miller,[36] and Massey are relevant to the

[36] Mr. Miller is an aviation consultant who specializes in the valuation of aviation assets. Tr. 2681 (Miller). He is the director of public private partnerships at Royal HaskoningDHV, and has also served as president of InterVistas Consulting LLC. PX 114 at 38. He has a bachelor's and a master's degree in economics

court's analysis. The court must still determine, however, whether their reports are worthy of reliance. *See Celsis In Vitro, Inc. v. CelizDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (finding "no error in the district court's reliance on [ ] unrebutted expert testimony" because such testimony was reasonable and supported by the record).

a. The Entire Leasehold

The court begins its valuation of the entire leasehold by summarizing Mr. Anderson's expert report and then Mr. Miller's expert report, wherein he reviews Mr. Anderson's work and ultimately concludes that it meets industry standards.

Mr. Anderson began his assessment by researching the "general expectations in the industry with regards to the Wright Amendment and how that would impact the value of the lease." Tr. 878 (Anderson). Based on the findings and conclusions of a colleague, Ms. Meehan, he noted the following:

> The date of the valuations presented in this report is October 13, 2006, the date on which the Wright Amendment Reform Act was

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from West Virginia University, and a juris doctor from the University of Tulsa College of Law. *Id.* at 2684. Mr. Miller has almost twenty years of experience valuing assets, including airports, airline assets, and FBOs. *Id.* at 2682. Mr. Miller has performed over 100 airport lease valuations throughout the course of his career, including for three terminals at the John F. Kennedy International Airport ("JFK") in New York City; Chicago Midway International Airport ("Chicago Midway"); Sanford Orlando International Airport in Florida; and the airports in Recifi, Peru, and San Juan, Puerto Rico. *Id.* at 2687-88. Many of these valuations were for large institutional investors. *Id.* at 2690-700.

> signed into law. I express my expert opinion of the value of the Subject Asset as of that date assuming no Wright Amendment Reform Act, but otherwise fully reflecting the environment of that time where there was an expectation of the rescission of the Wright Amendment.

PX 88 at 6. He then concluded, again based on Ms. Meehan's work, that there was demand for additional gates. Tr. 878 (Anderson). Next, in order to determine whether and how that demand could be satisfied using plaintiffs' property, he examined three factors. *Id.* at 878-79.

First, he calculated what a terminal operator would require in terms of revenue. *Id.* at 882. Specifically, he examined the revenue that plaintiffs would expect to earn in four categories (1) food and beverage concessions, (2) retail concessions, (3) rental car concessions, and (4) car parking—ultimately arriving at a dollar estimate per passenger for each of the revenue streams. *Id.* at 883-93. He then calculated the total amount of revenue that would be generated for each year, beginning in 2008 and ending in 2036. *Id.* at 893-94. He explained that he projected revenues up to 2036 because, although he was aware that plaintiffs' leases expired earlier, he felt that anyone investing in this type of facility would need a longer recovery period than what was allowed under the existing lease and that such lease renewals were typically granted. *Id.* at 894-95.

Second, Mr. Anderson examined the types of expenses a terminal operator would likely incur, such as (1) personnel, (2) utilities, (3) supplies, (4)

maintenance, and (5) insurance—and determined how much each would cost. *Id.* at 895-97. He then calculated total expenses per passenger, also projecting these figures up to 2036. *Id.* at 898. In this case, his figures included a projected increase of between three and four percent annually early in the forecast and two percent later in the forecast. *Id.*

Third, Mr. Anderson looked at related investments, also referred to as capital expenditures. *Id.* at 900. Specifically, he looked at three categories of expenditures: (1) initial development/redevelopment costs, (2) ongoing and future maintenance costs, and (3) investments in working capital. *Id.* With regard to determining the cost to construct an expanded terminal, he relied on estimates provided by Mr. Cullum,[37] finding them to be reasonable.[38] *Id.* at 900-

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[37] Mr. Cullum has been a construction manager and development manager for construction projects for over thirty-three years. Tr. 980-82 (Cullum). He has an undergraduate degree in architecture from Stanford University and a Bachelor of Architecture with honors from the University of Texas at Austin. *Id.* at 978. He also has master's degrees in city planning and architecture and urban design from the University of Pennsylvania. *Id.* He has extensive experience overseeing all aspects of construction, including design, financing, general contractor selection, permitting, and assessing cost estimates. *Id.* at 983-87.

[38] Mr. Cullum, whom the court qualified as an expert in construction management, testified that "the estimated cost of the expanded sixteen-gate terminal as of the year 2007 would be $60,675,034." Tr. 1012 (Cullum); *see also* PX 87. In reaching this figure, he first considered the final cost to build the Legend terminal and garage in 1999 and then projected that cost to 2007, Tr. 1013-14 (Cullum), the year after the WARA was passed. Next, he considered the expansion cost, based on the sixteen-gate plans prepared by the GFF architectural firm. *Id.* at 1015. Then, he

01. With regard to maintenance costs, he based his calculation on the amount of depreciation that would occur over the twenty-five-to-thirty-year period, assuming a portion of each year's depreciation was reinvested in the facility. *Id.* at 901. Finally, with regard to determining the working capital necessary to operate the terminal, he estimated that plaintiffs would need enough cash to cover six months' worth of expenses and then projected that figure out until 2036. *Id.* at 901-02.

After projecting total revenues, total expenditures, and total capital requirements, Mr. Anderson calculated the cash flows year by year using two cash flow metrics: (1) EBITDA (earnings before interest, taxes, depreciation, and amortization), and (2) net cash flow. *Id.* at 903-04. Finally, he determined the market value of plaintiffs' leaseholds utilizing two methodologies: (1) the discounted cash flow ("DCF")-based methodology; and (2) the multiples-based methodology.[39] *Id.* at 906-08. Under the DCF-based

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asked Denis Curtin, the director of preconstruction estimating with the Dallas-based Rogers-O'Brien Construction Company, to review the cost to build the original terminal and come up with a new cost to build that same terminal in 2007. *Id.* at 1017-20. Finally, he and Mr. Curtin worked together to estimate the cost of building the sixteen-gate expansion in 2007. *Id.* at 1020. In preparing this final estimate, Mr. Cullum also relied on estimates from two additional companies: (1) Dallas Demolition, which provided a cost estimate for demolition; and (2) Oliver Wyman, Inc., which provided a cost estimate for jet bridges and baggage systems. *Id.* at 1022-25, 1040.

[39] "Under the discounted cash flow-based methodology . . . the value of an asset equals the Present Value of the net cash flows that the asset is expected to generate for its owner." PX 88 at 4. "Under the 'Multiples-Based Methodology,' the value of an asset

methodology, using a discount rate of 8.3 percent, Mr. Anderson calculated that the value of plaintiffs' leasehold interest was $118.4 million, whereas under the multiples-based methodology, the value was $148.6 million. *Id.* at 906-14. Giving equal weight to both methodologies, he ultimately concluded that the value of plaintiffs' property was $133.5 million. *Id.* at 915.

Mr. Miller, whom the court qualified as an expert in the field of aviation consulting, specializing in the valuation of aviation assets,[40] and whose testimony was offered for the purpose of reviewing Mr. Anderson's expert report, concluded that Mr. Anderson's report "was well done, [and critically for the court,] that it met the industry standards." *Id.* at 2711 (Miller); *see also* PX 114. Mr. Miller identified numerous reasons why he credited Mr. Anderson's work. First, Mr. Miller noted that it was common for consultants specializing in aviation asset valuation to use both the DCF-based and multiples-based methodologies, but that the multiples-based methodology was usually reserved for long-term leases, such as a ninety-nine-year lease. Tr. 2712-13 (Miller).

Second, Mr. Miller concluded that Mr. Anderson had properly employed the DCF-based methodology. *Id.* at 2713.

Third, Mr. Miller conducted his own DCF analysis and compared his results to Mr. Anderson's. *Id.* at

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is determined by multiplying the annual earnings (cash flow) by a factor (multiple)." *Id.*

[40] Tr. 2707-08 (Miller).

2714. In terms of expected revenues, the two had similar figures for the earlier years, but in the later years, Mr. Miller's projected parking revenues were lower. *Id.* at 2716-17. In terms of expected operating revenues, their results were "reasonably close," with Mr. Miller arriving at lower amounts in the initial periods and Mr. Anderson arriving at higher amounts beyond 2030. *Id.* at 2719-20. Finally, in terms of net cash flows, the two were "very close," with Mr. Miller showing lower figures in the latter periods, around 2025. *Id.* at 2720-22. Using his own net cash flow figures and a discount rate of 7.7 percent, Mr. Miller determined that the net present value of plaintiffs' property was $152.1 million. *Id.* at 2724.

Fourth, Mr. Miller concluded that his and Mr. Anderson's valuations of $152.1 million and $133.4 million, respectively,[41] were close given the underlying assumptions:

> Q Okay. Is this kind of difference in calculation of net present value something you've seen before in other valuations that you've done over the years?
>
> A Yes, I have.
>
> Q Okay. And how common is it?
>
> A It's very common. It's what makes the market. That's why we win some and we lose some in the privatization field. We may come up with a different valuation than what a competitive consortium would put together.

[41] Mr. Anderson concluded that the value of plaintiffs' property was $133.5 million but Mr. Miller testified that Mr. Anderson valued the property at $133.4 million. Tr. 2726 (Miller).

> We lose, they win, and vice versa. Sometime we come up.

Id. at 2727. In this regard, Mr. Miller noted that (1) had he used Mr. Anderson's 8.3 percent discount rate, his final figure would have been $140 million, *id.* at 2427; (2) had he used the multiples-based methodology, his final figure would have been $204 million, *id.* at 2728; and (3) had he averaged the two numbers, his final figures would have been approximately $175 million, *id.*

Fifth, Mr. Miller concluded, based on his review of Ms. Meehan's report and based on his own experience, that Mr. Anderson properly assessed the property's highest and best use. *Id.* at 2730-31.

Sixth, Mr. Miller concluded that Mr. Anderson had properly analyzed the effect of the WARA on the property's highest and best use based on the fact that within the aviation industry, beginning in the early 1990s, it was widely believed that the Wright Amendment would be repealed:

> Q Okay. In your opinion, would it have been more reasonable, more appropriate for Mr. Anderson to have limited the highest and best use of the subject property to only the destinations and the types of airplanes that were allowed by the Wright Amendment in 2006?
>
> A No, it was not.
>
> Q And why not?
>
> A Really for the same reason, because it was -- the expectation was the Wright Amendment would be repealed, and therefore

> the value, and it would start at that time. That was the take.

Id. at 2732-33.

Seventh, Mr. Miller concluded that it was reasonable for Mr. Anderson to assume that plaintiffs would be able to extend their lease with Dallas until 2036:

> A First, I did review testimony from City officials, I believe a Mr. Poole, which indicated that it was common practice for the City of Dallas to extend leases based upon getting something back for capital improvements, what we would normally call.
>
> Also, my experience both working at airports as well as in my professional experience since then, it was very common for airports to extend leases for good customers, as long as they're investing in the airport and creating jobs.

Id. at 2733.

Finally, Mr. Miller concluded that it was reasonable for Mr. Anderson to rely on Mr. Cullum's construction cost projections because (1) Mr. Cullum had experience in the Dallas construction market and had been involved in the construction of the Lemmon Avenue terminal, the terminal at issue in this case, *id.* at 2734; (2) Mr. Cullum's estimates, while lower than those actually incurred at other sites (such as JFK in New York City), were appropriate because the cost to build a terminal at other sites might be much higher due to market differences in passenger volume, soil composition, and unionization, *id.* at 2736; and (3) Mr.

Cullum performed his extrapolations with input from Mr. Hazel, whom Mr. Miller had met in the early 1990s, had worked with on many occasions, and whom, in his opinion, produced a "professionally done" expert report, *id.* at 2737-38.

Defendant argues that the court should reject Mr. Miller's valuation because it was based on numerous erroneous assumptions. Prior to considering each of defendant's contentions, the court notes that defendant cites no authority, and the court cannot find any, for the proposition that an expert must consider all possible alternatives in order for his opinion to be valid. Rule 702 of the Federal Rules of Evidence, which outlines the permitted scope of expert witness testimony, states the following:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Furthermore, the advisory committee's note to the rule adds the following:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Fed. R. Evid. 702 advisory committee's note. With these principles in mind, the court now considers defendant's arguments.

First, defendant argues that Mr. Miller erroneously assumed that the Wright Amendment would be completely repealed, instead of considering the possibility that the repeal might not be complete or immediate. Def.'s Posttrial Br. 70. However, apart from the joint statement issued by the signatories to the Five-Party Agreement, which specified what actions were sought and when they were sought, there is no indication that there was any consensus among those in the aviation industry regarding the exact timing and breadth of the repeal.

Second, defendant argues that Mr. Miller erroneously based his valuation on an assumption that the Master Lease would be extended from 2023 to 2036. Def.'s Posttrial Br. at 74-75. However, although the original lease was due to expire on September 30, 2012, several witnesses testified that it was customary for Dallas to extend leases at Love Field. *See* Tr. 2733 (Miller) (testifying "that it was common practice for the City of Dallas to extend leases based on getting something back for capital improvements"), 1758-59, 1788-89 (Poole) (testifying that Dallas had an

established process for extending leases and that Dallas had extended leases in the past), 2851-52 (Gwyn) (testifying that Dallas was likely to extend a lease for a good tenant at Love Field). In addition, in its 2004 response to plaintiffs' petition to amend the Master Lease, although Dallas did not agree to forgo the Master Lease's 50% rent-sharing provision, it indicated its willingness to extend the lease for 40 years. *Id.* at 1782, 1785 (Poole); DX 52.

Third, defendant argues that Mr. Miller erroneously based his valuation on the assumption that a sixteen-gate terminal could be built on the property between 2007 and 2008 for a cost of $60.7 million, a figure he obtained from Mr. Cullum. Def.'s Posttrial Br. 79-82. However, the court credits Mr. Miller's reliance on Mr. Cullum's construction cost projections given Mr. Cullum's general experience in the Dallas market and specific experience with the Lemmon Avenue terminal. *See* Tr. 2734 (Miller). In addition, the court accepts Mr. Miller's conclusion that it is inappropriate to compare the cost to build a terminal at Love Field in Dallas with the cost to build a terminal at JFK in New York City, given the vast differences between the two markets. *See id.* at 2736.

Fourth, defendant argues that Mr. Miller's valuation erroneously failed to take into account the Master Lease's rent-sharing provision. Def.'s Posttrial Br. 76-77. According to defendant, not only does the Master Lease apply a 50% rent-sharing provision to the relationship between Virginia Aerospace, the lessee, and Love Terminal Partners, the sublessee, but it also applies a 50% rent-sharing provision to the relationship between Love Terminal Partners, the

sublessee, and any sub-sublessee. *Id.* at 77 (citing DX 68 at 1). Defendant's argument lacks merit for two reasons. First, as noted above, Hampstead's business model was explicitly developed to avoid the payment of rent to Dallas as a result of Virginia Aerospace's leasing of property to Love Terminal Partners and, in fact, no payments were ever made to Dallas pursuant to the rent-sharing provision. Second, none of the lease provisions cited by defendant supports the proposition that the rent-sharing provision applies to rent received by Love Terminal Partners from a third-party sub-sublessee. Although Mr. Gwyn's December 16, 2015 letter referenced Article XX in support of his contention that rents from a "sub-sublease, license, etc." were subject to the Master Lease's rent-sharing provision, DX 68 at 1, Article XX does not so provide. Rather, Article XX only addresses monies owed by the lessor as a result of payments from a sublessee, not a sub-sublessee. *See* JX 1 (LTP-000793).

Finally, defendant argues that Mr. Miller erroneously assumed that by mid-2008, the commercial aviation terminal could have been used for flights to any United States destination by airplanes carrying 140 or more passengers. Def.'s Posttrial Br. 50-51, 70. However, given Ms. Meehan's forecast of a vast increase in passenger demand following the repeal of the Wright Amendment, and given Hampstead's plans for a sixteen-gate terminal capable of meeting that demand, Mr. Miller's assumption that larger planes would be permitted to fly out of the Lemmon Avenue terminal is not unreasonable.

Thus, contrary to defendant's arguments, the court credits Mr. Miller's testimony and therefore

concludes that the value of the 26.8-acre leasehold is $133.5 million.

b. The 9.3-Acre Property

Defendant argues that the court should reject Mr. Massey's appraisal on the grounds that it is neither relevant nor credible. *Id.* 93. In this section, the court will only address those arguments that are novel—those arguments that defendant did not advance in reference to Mr. Miller's testimony.

First, defendant argues that Mr. Massey's cost approach to valuation was flawed because he relied on Mr. Cullum's estimate of the cost to construct the original six-gate terminal, a figure that did not account for depreciation. Id. at 97-98. However, as noted above, Mr. Massey's replacement cost approach, which relied both on Mr. Cullum's cost estimate and the Marshall and Swift Commercial Estimator, did take depreciation costs into account. Tr. 1371-74 (Massey).

Second, defendant argues that Mr. Massey's conclusion that the property in the before condition was worth $20,500,000 was significantly higher than the $12.3 million Hampstead told its investors the property was worth in December 2005. Def.'s Posttrial Br. 93. However, as Ms. Moog testified, the book value of plaintiffs' assets is not the same as the market value.

Finally, with respect to defendant's argument that Mr. Massey violated the Uniform Standards of Professional Appraisal Practice by (1) failing to acknowledge that his assessment was based on a hypothetical condition—that the lease would be extended; and (2) committing a "multi-million-dollar

multiplication error," the court notes simply that its assessment of Mr. Massey's testimony is not bound by professional standards and that the court has explained above why these alleged violations do not impact the validity of Mr. Massey's overall appraisal.

Thus, contrary to defendant's arguments, the court credits Mr. Massey's testimony. Significantly, Mr. Massey was the only expert who offered a valuation based on what the court has deemed to be the property's highest and best use—as an airline terminal. Furthermore, although Mr. Massey made a significant mathematical error, in which he erroneously valued the 9.3-acre property after the enactment of the WARA at $419,000 instead of $4,000,195, that calculation had no impact on the court's analysis because it was based on the mistaken assumption that 25% of plaintiffs' parking garage could still be used for car storage when in fact, that use was prohibited under the terms of the Master Lease. Ultimately, the court accepts Mr. Massey's valuation, and concludes that the property's value at the time of the taking was $21,165,000.

B. Interest

In this case, plaintiffs' property was the target of an inverse condemnation. Thus, plaintiffs are entitled to interest from the date of the taking, October 13, 2006, until the date of judgment. Furthermore, because a significant amount of time has passed since the date of the taking and the present, just shy of 9.5 years, plaintiffs are also entitled to have that interest compounded. The only remaining issue therefore is to determine the appropriate interest rate.

Plaintiffs have requested that the court apply the interest rate set forth in the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (2012) ("CDA"). Pls.' Br. 66. In support of its request, plaintiffs state only that CDA "interest rates have been used several times by this Court to set forth a uniform method of establishing interest rates . . ." *Id.* at 67 (internal quotations marks omitted).

Defendant argues that if plaintiffs are entitled to an award of just compensation, to include interest, the court should use the interest rate set forth in the Declaration of Taking Act, 40 U.S.C. § 3116 (2012) ("DTA"). Def.'s Contentions of Fact & Law 39-40. Defendant contends that the DTA is "a standardized and uniform method for calculating delay compensation in the direct condemnation context, [and] provides the best approximation of delay compensation and preserves uniformity in awards among landowners in both direct and inverse condemnation cases." *Id.* at 40. Furthermore, defendant argues that "[a]bsent special proof that an award calculated under the [DTA] does not satisfy the just compensation requirement of the Fifth Amendment, this Court should not depart from the [DTA] rate." *Id.*

In awarding just compensation under the Fifth Amendment, the court emphasizes once more that it is bound only by the Constitution, and therefore not by any statutorily-based rate schedule. Furthermore, "[t]he court's primary goal in determining a correct interest rate is to employ an interest calculation that does not just 'yiel[d] a higher or lower interest payment, but rather . . . is the more accurate measure

of the economic harm of the property owners.'" *Biery v. United States*, No. 07-693L et al., 2012 WL 5914521, at *3 (Fed. Cl. Nov. 27, 2012) (unpublished decision) (quoting *NRG Co. v. United States*, 31 Fed. Cl. 659, 670 n.8 (1994)). That said, the court will now consider the use of the CDA and DTA interest rates.

CDA interest rates were developed specifically for use "in government contract cases to measure interest to be paid to government contractors on valid claims previously presented by the contractors to government contracting officers." *NRG Co.*, 31 Fed. Cl. at 665. Under the CDA, interest "begins to run on the date the contractor presents a proper claim to the contracting officer and continues to run until the date of payment." *Id.* "CDA interest rates are calculated based on the applicable private commercial interest rates for new loans maturing in approximately five years." *Id.* Use of CDA interest rates thus assumes that "(1) the contractor had borrowed in the private commercial market the entire amount of money the government [was] ultimately found to owe the contractor, and (2) the contractor's loan, with interest adjusted every six months, remained outstanding until the date the government made its payment." *Id.* at 666. Those assumptions may not best approximate the situation faced by a landowner because real property is not typically "covered by outstanding loans equal to 100 percent of the value of the property" and because "real estate loans are collateralized loans [and therefore] often can be obtained on comparatively better terms than an unsecured five-year loan." *Id.* at 667.

The DTA, on the other hand, was specifically enacted to apply to direct condemnation cases:

> As the Supreme Court noted, the Declaration of Taking Act had a twofold purpose: "to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment[, and] to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property."

Tulare Lake Basin Water Storage Dist. v. United States, 61 Fed. Cl. 624, 629 (2004) (quoting *Miller*, 317 U.S. at 381). Pursuant to the DTA, for a period of not more than one year, "interest shall be calculated from the date of taking at an annual rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System." 40 U.S.C. § 3116(a)(1). For a period of more than one year, interest shall be compounded annually. *Id.* § 3116(a)(2). Using DTA interest rates thus assumes that the landowner would be able to borrow at the same rate as the government. *Pitcairn v. United States*, 547 F.2d 1106, 1122 (1976) ("The yield on a series of hypothetical Government bonds is not relevant in ascertaining the injury plaintiff has suffered. It measures compensation only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can."). Using DTA interest rates further assumes "that the landowner, on the day of the taking, would have invested the fair-market value of his property in exclusively 52-week T-bills, then rolled them over on the anniversary of the taking each year,"

thereby "(a) receiv[ing] little interest, (b) [having] no access to the principal; and, (c) [engaging in] zero diversification." Mark F. Hearne, II et al., *The Fifth Amendment Requires the Government to Pay an Owner Interest Equal to What the Owner Could Have Earned had the Government Paid the Owner the Fair-Market Value of Their Property on the Date the Government Took the Owner's Property*, 1 Brigham-Kanner Prop. Rights Conference J. 3, 24-25 (2012).

In this takings case, it is the court's view that the best way to determine the proper rate of interest is to utilize the prudent investor rule ("PIR"). "Pursuant to this rule, the appropriate interest rate is calculated based not on an assessment of how a particular plaintiff would have invested any recovery, but rather on how a 'reasonably prudent person' would have invested the funds to 'produce a reasonable return while maintaining safety of principal.'" *Tulare Basin Water Storage Dist.*, 61 Fed. Cl. at 627 (quoting *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464-65 (9th Cir. 1980)); *accord Independence Park Apartments v. United States*, 61 Fed. Cl. 692, 717 (2004) (noting that the PIR "does not require that a reference be made only to a rate of interest on Treasury securities where the United States is the defendant"), *rev'd on other grounds*, 449 F.3d 1235 (Fed. Cir. 2006). Thus, the approach is attractive because it does not rely on the court having to perform a "complex factual assessment" of each plaintiff's unique circumstances at the time of the taking, *Tulare Lake Basin Water Storage Dist.*, 61 Fed. Cl. at 628-29 (citing *NRG*, 31 Fed. Cl. at 668), and because the PIR more accurately reflects a reasonably prudent investor's experience in the marketplace. Finally, the

PIR is especially well suited to the facts of this case. Plaintiffs Virginia Aerospace and Love Terminal Partners are entities of the Hampstead Group, a sophisticated private equity firm whose clients include large institutional investors such as Yale, Princeton, and Stanford Universities.

There are, however, many indices upon which the court may choose to rely. In this case, the court will, in an exercise of its discretion, utilize the Moody's Composite Index of Yields on Aaa Long Term Corporate Bonds ("Moody Rate") as the most appropriate measure of interest. As stated by the court in *Pitcairn*:

> [L]ong-term corporate bond yields are an indicator of broad trends and relative levels of investment yields or interest rates. They cover the broadest segment of the interest rate spectrum. The corporate bond market is large, substantially in excess of long-term Government bonds[,] and long-term corporate yields measure basic trends and relative levels of interest rates from one period to another.

Pitcairn, 547 F.2d at 1124; *see also Sears v. United States*, 124 Fed. Cl. 730, 734 (2016) ("[W]here the United States is the defendant, the [PIR does not require] the interest rate to be based on U.S. Treasury securities, particularly when another instrument such as the Moody's Aaa Index can provide a similar 'safety of principal' investment over a period spanning a number of years." (citations omitted)), 736 (discounting use of the Vanguard Balanced Index Fund, a diversified mutual fund, as the best measure

of interest due to its 7.4% volatility); *Textainer Equip. Mgmt. Ltd. v. United States*, 115 Fed. Cl. 708, 718-19 (2014) (exercising discretion to award a combination of the DTA rate and the Moody Rate); *Adkins v. United States*, No. 09-503L et al., 2014 WL 448428, at *1-2 (Fed. Cl. Feb. 4, 2014) (exercising discretion to award the Moody Rate rather than the DTA rate); *Biery*, 2012 WL 5914521, at *2-5 (exercising discretion to award the Moody rate rather than the DTA).

II. Attorneys' Fees and Costs

Plaintiffs are also entitled to reasonable attorneys' fees, expenses, and costs under section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c) (2012). The court defers determining the amount due under the statute, however, until the completion of litigation.

CONCLUSION

For the reasons stated above, the court finds that the federal government effected a per se physical taking of the six passenger gates at the Lemmon Avenue terminal and a regulatory taking of the entire 26.8-acre leasehold. The court further finds that plaintiffs are entitled to just compensation in the amount of $133,500,000 plus interest (based on the Moody Rate) compounded annually from October 13, 2006, the date of the taking, to the date of payment. Judgment to this effect shall be issued pursuant to Rule 54 of the Rules of the United States Court of Federal Claims because there is no just reason for delay. In due course, plaintiffs may apply for an award of attorneys' fees and all costs, to include appraiser and expert witness fees.

IT IS SO ORDERED.

/s/Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

Appendix D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-536L

LOVE TERMINAL PARTNERS, L.P., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Filed: February 11, 2011

OPINION AND ORDER

SWEENEY, Judge

Before the court are Defendant's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim ("motion") and Plaintiffs' Cross-Motion for Summary Judgment on Partial Liability ("cross-motion"). In this action, plaintiffs Love Terminal Partners, L.P. and Virginia Aerospace, LLC ("Love Terminal Partners" and "Virginia Aerospace," respectively; "plaintiffs," collectively) allege that the Wright Amendment Reform Act of 2006 ("WARA") prohibited the use of 26.8 acres of Dallas Love Field Airport ("Love Field") to which they hold long-term lease rights and effected a taking without just compensation in contravention of the Fifth

Amendment to the United States Constitution. Defendant moves, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), to dismiss the complaint, asserting that plaintiffs have failed to plead any facts that, if true, prove that the government placed regulatory limitations upon plaintiffs' use of the leased property. Furthermore, defendant contends that any impact the WARA had upon plaintiffs constitutes a consequential loss for which compensation is unavailable. Plaintiffs seek partial summary judgment on liability, contending that the WARA constituted a per se, physical taking of six air passenger gates that Love Terminal Partners constructed on the leased property. For the reasons discussed below, defendant's motion is denied and plaintiffs' cross-motion is granted.

* * *

I. FACTUAL BACKGROUND[1]

A. Love Field and Dallas-Fort Worth International Airport ("DFW")

The history of Love Field is defined, in large measure, by the rivalry between the City of Dallas

[1] The facts set forth below are derived from the complaint ("Compl."); the parties' briefs; exhibits attached to defendant's motion ("Def.'s Mot. Ex.") and plaintiffs' cross-motion ("Pls.' Ex."); prior decisional law from the United States District Court for the Northern District of Texas ("Northern District of Texas"), the United States Court of Appeals for the Fifth Circuit, and Texas state courts; legislative materials; law review articles; and other secondary materials that provide relevant background information. *See, e.g., Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb Inc.*, 798 F.2d 862, 865 (7th Cir. 1983) (discussing the difference between taking judicial notice of

("Dallas") and the City of Fort Worth ("Fort Worth"). In 1917, the Dallas Chamber of Commerce purchased the land that now constitutes Love Field and leased it to the United States Army. Royce Hanson, *Civic Culture and Urban Change Governing Dallas* 37 (2003). Following World War I, the Dallas Chamber of Commerce developed Love Field into an aviation-oriented industrial park and, in 1927, sold Love Field to Dallas. *Id.* at 38. Love Field then began servicing Dallas as its municipal airport.

During the 1950s and early 1960s, Dallas and Fort Worth, which are separated by approximately thirty miles, *City of Dallas, Tex. v. Sw. Airlines Co.*, 494 F.2d 773, 774 (5th Cir. 1974), aff'g 371 F. Supp. 1015 (N.D. Tex. 1973), operated competing airports, *Am. Airlines, Inc. v. U.S. Dep't of Transp.*, 202 F.3d 788, 793 (5th Cir. 2001), and were "bitter rival[s] for the business of commercial aviation and commercial air carriers," *Sw. Airlines Co.*, 371 F. Supp. at 1019; see also H.R. Rep. No. 109-600, pt. 2, at 4 (2006) (noting that Dallas and Fort Worth "engaged in a protracted airport rivalry"). In 1962, the Civil Aeronautics Board ("CAB"), the predecessor to the United States Department of Transportation ("DOT"), explored the benefits of designating a specific airport as the single point through which all interstate air carrier service to Dallas and Fort Worth would be provided. *Sw. Airlines Co.*, 371 F. Supp. at 1020. Two years later, the CAB determined that the competition between the two cities' airports was harmful and ordered Dallas and Fort Worth to reach a voluntary

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materials as a substitute for evidence and utilizing materials for background information).

agreement designating one airport through which CAB-regulated carriers would serve both communities. *See id.*

The cities were unable to designate one of the existing airports to serve the region. Instead, they reached a compromise by agreeing to construct a new airport, DFW, that would be located halfway between Dallas and Fort Worth. In 1968, Dallas and Fort Worth adopted a Regional Airport Concurrent Bond Ordinance ("1968 Bond Ordinance"), which provided that both cities would take all necessary steps to provide for the orderly and efficient phase-out at Love Field and transfer of services to DFW.[2] In 1970, the eight air carriers that serviced the Dallas and Fort Worth communities agreed to transfer their operations to DFW.[3]

Southwest Airlines Company ("Southwest"), however, chose to stay at Love Field. In 1971, Southwest commenced intrastate air service from

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[2] "The central component of the [1968] Bond Ordinance was that Dallas and Fort Worth agreed to phase out passenger air service at their existing airports, including Dallas Love Field." H.R. Rep. No. 109-600, pt. 1, at 1.

[3] These eight air carriers included: American Airlines, Inc. ("American"); Braniff Airways, Inc. ("Braniff"); Continental Airlines, Inc.; Delta Air Lines, Inc. ("Delta"); Eastern Air Lines, Inc.; Frontier Airlines, Inc.; Ozark Air Lines, Inc.; and Texas International Airlines, Inc. *Sw. Airlines Co.*, 371 F. Supp. at 1021 n.1; *accord* S. Rep. No. 109-317, at 2 n.1 (2006). Each air carrier signed letter agreements and then executed use agreements with the DFW Airport Board ("DFW Board") in which it agreed to relocate its services to DFW in conformity with the 1968 Bond Ordinance. *Am. Airlines, Inc.*, 202 F.3d at 793; *Sw. Airlines Co.*, 371 F. Supp. at 1021.

Love Field to the Cities of Houston and San Antonio pursuant to a certificate issued by the Texas Aeronautics Commission ("TAC").[4] Because it was running solely intrastate flights from Love Field, Southwest was exempt from CAB certification, did not execute a use agreement, *see supra* note 3, and refused to transfer its operations to DFW, *Am. Airlines, Inc.*, 202 F.3d at 793. On October 20, 1971, Southwest advised the DFW Board that it intended to remain at Love Field. Southwest's refusal to transfer its operations to DFW spawned litigation between Southwest and the cities, both of which maintained that permitting Southwest to remain at Love Field would financially threaten DFW. In 1973, the Northern District of Texas ruled that Dallas and Fort Worth could "not lawfully exclude" Southwest from Love Field "so long as Love Field remains open as an airport." *Sw. Airlines Co.*, 371 F. Supp. at 1035. As a result, Dallas, Fort Worth, and the DFW Board could not consolidate passenger service at DFW as envisioned by the 1968 Bond Ordinance. H.R. Rep. No.

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[4] Prior to November 12, 1971, Southwest operated out of Love Field, but the TAC certificate authorized Southwest "to serve the Dallas-Fort Worth region through 'any' airport in the area." *Sw. Airlines Co.*, 371 F. Supp. at 1021. On November 12, 1971, the TAC "directed all TAC certificated airlines not to change the airports from which they were then conducting their intrastate services unless they first obtained written approval from the TAC to do so." Id. Accordingly, Southwest remained at Love Field. As of 2007, Southwest serviced approximately ninety-five percent of the passenger traffic at Love Field. *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F. Supp. 2d 538, 543-44 (N.D. Tex. 2007).

109-600, pt. 1, at 2. DFW ultimately opened for commercial air service in 1974.

In 1975, Dallas adopted Ordinance 14505 in order to exclude all commercial airlines from Love Field. S. Rep. No. 109-317, at 2. Ordinance 14505 imposed a fine of $200 per landing at—or takeoff from—Love Field by certificated airlines. Southwest sued and successfully enjoined Dallas from enforcing the ordinance, which "flew squarely in the face" of the order previously entered by the Northern District of Texas in *Sw. Airlines Co. Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 396 F. Supp. 678, 680 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir. 1977).

B. Congressional Involvement, 1979-1996

Congress deregulated the airline industry and fostered competition by enacting the Airline Deregulation Act of 1978. Southwest "viewed deregulation as an opportunity to become an interstate air carrier," S. Rep. No. 109-317, at 2, and announced plans to commence interstate service from Love Field to the City of New Orleans, Louisiana. It submitted an application to the CAB, which granted the application over the objections of DFW and American after concluding that it lacked the authority to deny it.[5] *Id.*; *Am. Airlines, Inc.*, 202 F.3d at 793. After the CAB granted Southwest's application, "[m]any Texas officials, particularly those in Fort Worth, worried that Southwest and other airlines would begin to fly all over the country from Love Field,

[5] Southwest's application was "in contravention of the intention of [Dallas and Fort Worth] as expressed in the [1968] Bond Ordinance." H.R. Rep. No. 109-600, pt. 1, at 2.

thus drawing traffic away from DFW and endangering DFW's financial stability." Eric A. Allen, Comment, *The Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field*, 55 J. Air L. & Com. 1011, 1018-19 (1990). Litigation over air service at Love Field seemed imminent.

1. The Wright Amendment

Congress, with the consent of Dallas and Fort Worth, intervened in order to end the "continuous disagreement, frequent litigation, and constant uncertainty" associated with Love Field. S. Rep. No. 109-317, at 16. The Senate Report indicated the unique nature of Congress's involvement in Love Field, emphasizing that it was the "only time" Congress intervened in such a manner. *Id.* After the CAB permitted Southwest to commence interstate service from Love Field, Texas Congressman Jim Wright of Fort Worth, the Majority Leader of the United States House of Representatives, introduced an amendment to the International Air Transportation Competition Act of 1979 that was intended to protect the economic vitality of DFW by prohibiting interstate commercial air service from Love Field. Ultimately, a compromise agreement, known as the "Wright Amendment," was reached. The Wright Amendment authorized flights from Love Field to locations within Texas and four contiguous states—Arkansas, Louisiana, New Mexico, and Oklahoma—and limited interstate air transportation provided by commuter airlines to the operation of aircraft with a passenger capacity of fifty-six passengers or less. The agreement was codified into

section 29 of the International Air Transportation Competition Act of 1979.

The Wright Amendment (1) allowed Love Field to remain open, (2) limited the region Southwest served out of Love Field, and (3) generally banned interstate service from the airport. It authorized travel to the four exempted states only if those flights did not "provide any through service or ticketing with another air carrier" and did not "offer for sale transportation to or from, and the flight or aircraft d[id] not serve, any point which [was] outside any such State."[6] Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). The Wright Amendment "was intended to provide 'a fair and equitable settlement'" to the "unique" situation presented by Love Field and was "not to be construed

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[6] In other words, "air carriers [we]re prohibited from advertising or listing 'connecting' flights from an authorized Love Field flight to a point beyond the Love Field service area." Allen, *supra*, at 1012. The *Love Terminal Partners, L.P.* court explained the Wright Amendment's impact:

> The market for commercial airline services in North Texas is a series of submarkets. Because the Wright Amendment restricts long-haul flights, American is the dominant carrier at DFW . . . and is able to charge above-market premiums for flights to and from DFW . . . Southwest controls the majority of gates at Love Field and is able to charge premiums for short-haul flights to and from Love Field. Consequently, two separate monopolists have forced consumers to pay artificially inflated prices for commercial air travel to and from North Texas.

527 F. Supp. 2d at 544; *see also* H.R. Rep. No. 109-600, pt. 2, at 6 ("The Wright Amendment expressly protects DFW from competition from Love Field and establishes a monopoly on longhaul air travel at DFW, dominated by American Airlines.").

'as a harbinger of any similar proposals for any other airport or area.'" H.R. Rep. No. 109-600, pt. 1, at 2. Congress did not modify the Wright Amendment until 1996, S. Rep. No. 109-317, at 3, after which time several amendments loosened air travel restrictions at Love Field, Pls.' Opp'n Def.'s Mot. & Pls.' Cross-Mot. Summ. J. Partial Liability ("Pls.' Cross-Mot.") 5.

2. The Shelby Amendment

In 1996, Legend Airlines, Inc. ("Legend") sought to provide long-haul air service to and from Love Field using larger airplanes configured to comply with the Wright Amendment's fiftysix seat limitation. Although Legend "filed a petition to operate pursuant to the exception in the Wright Amendment that appeared to permit unrestricted interstate service by airlines operating aircraft with a seating capacity of less than 56 passengers," the DOT Office of General Counsel determined that the Wright Amendment exception applied only to aircraft that had been originally configured to hold fewer than fifty-six passengers. S. Rep. No. 109-317, at 3. Following this determination, Alabama Senator Richard Shelby sought to expand the Love Field service area to include five additional states. John Grantham, *A Free Bird Sings the Song of the Caged: Southwest Airlines' Fight to Repeal the Wright Amendment*, 72 J. Air L. & Com. 429, 448 (2007). The final bill, however, contained only three states, *id.*, and Congress ultimately adopted the "Shelby Amendment" as part of the Department of Transportation and Related Agencies Appropriations Act of 1998.

The Shelby Amendment defined the phrase "passenger capacity of 56 passengers or less"

contained in the Wright Amendment to "include[] any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." *Am. Airlines, Inc.*, 202 F.3d at 794 (alteration in original). Therefore, the Shelby Amendment permitted longer-haul flights on larger airplanes so long as the airplanes were reconfigured to accommodate fifty-six or fewer passengers. The Shelby Amendment also added Alabama, Kansas, and Mississippi to the list of states that airlines could serve directly from Love Field. S. Rep. No. 109-317, at 3.

After passage of the Shelby Amendment, Southwest offered flights from Love Field to Mississippi and Alabama. *Am. Airlines, Inc.*, 202 F.3d at 794-95. Legend also announced plans to offer long-haul service to states outside the Love Field service area using reconfigured aircraft. Shortly thereafter, the Love Field air service controversy reignited. Fort Worth and American sought to enjoin enforcement of the Shelby Amendment, and the ensuing litigation prevented Legend from offering service from Love Field until 1999. *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 544.

C. Love Terminal Partners' Construction of a New Terminal at Love Field

Braniff commenced express and freight services from Love Field in 1929. On June 10, 1955, Dallas executed a long-term lease ("Master Lease") with Braniff, granting Braniff the exclusive use of approximately thirty-six acres, together with the

nonexclusive right to use runways, taxiways, and other airport facilities, at Love Field.[7] Compl. ¶ 5; *see also* Def.'s Reply Supp. Mot. Dismiss & Opp'n Pls.' Mot. Partial Summ. J. ("Def.'s Reply") Ex. 1 (containing the Master Lease). The Master Lease permitted the use of the premises solely for air transportation purposes.

On August 11, 1999, Love Terminal Partners, a Delaware limited partnership with its principal place of business in Dallas, subleased approximately nine acres encompassed under the Master Lease for the purpose of providing commercial air passenger service at Love Field.[8] Compl. ¶¶ 1, 6. Thereafter, Love Terminal Partners constructed a luxury airline passenger terminal ("Lemmon Avenue Terminal"), which included "parking, concessions, state-of-the-art facilities for accommodating air travelers, and six

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[7] The thirty-six acres were later reduced to approximately 26.8 acres. Compl. ¶ 5.

[8] The sublease

> included "the non-exclusive right to use the Airport and all landing areas, runways, taxiways, ramp and apron areas, improvements, fixtures, appurtenances, services and facilities as may from time to time be installed thereon for the general operation of the Airport . . . ." In its sublease[, Love Terminal Partners] agreed to abide by all of the provisions of the [M]aster [L]ease, including the limitation of use to air transportation purposes.

Compl. ¶ 6 (first alteration in original). Alan Naul, president of Love Terminal Partners, stated that the "sole purpose in leasing the terminal premises was to construct and operate . . . a private commercial airline terminal to provide luxury air passenger service at Love Field." Pls.' Ex. 1 at 2 (Decl. Alan Naul ("Naul Decl.") ¶ 4).

passenger gates,"[9] *id.* ¶ 7, at a cost of approximately $20 million, Pls.' Ex. 1 at 2 (Naul Decl. ¶ 4). According to plaintiffs, the luxury and regional jet business was a significant part of their business plan. Plaintiffs state that they constructed the Lemmon Avenue Terminal to cater to the market for first-class airplanes flying out of Love Field with destinations to Los Angeles, New York, and Washington, DC. Dallas, plaintiffs allege, eventually "incorporated the six gates" at the Lemmon Avenue Terminal into a master plan for expansion of Love Field ("Love Field Master Plan"). Compl. ¶ 7.

Love Terminal Partners licensed the Lemmon Avenue Terminal to Legend. Plaintiffs acknowledge that Legend's ability to commence air transportation services was undermined by the several years of litigation of which it was a part. Legend ultimately filed for bankruptcy protection in 2000. Thereafter, the Lemmon Avenue Terminal reverted back to Love Terminal Partners.

On December 12, 2003, Virginia Aerospace, a Virginia limited liability corporation with its principal place of business in Dallas, acquired the Master Lease, subject to the Love Terminal Partners sublease, to provide commercial passenger airline service at Love Field in conjunction with Love Terminal Partners.

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[9] Lemmon Avenue provided "uninhibited access to the . . . facility, and allow[ed] passengers using the facility to bypass the congestion associated with the older, less well-situated terminal[] owned by the city of Dallas." Pls.' Ex. 1 at 2 (Naul Decl. ¶ 5). Mr. Naul opined that the Lemmon Avenue Terminal was "one of the newest in the nation, and the only privately owned terminal at a public airport." *Id.*

Plaintiffs ultimately "planned to expand the terminal and related air passenger services beyond the 9 acres subleased by [Love Terminal Partners] as air traffic at Love Field increased." *Id.* ¶ 3. In 2006, plaintiffs entered into negotiations with Pinnacle Airlines, Inc. ("Pinnacle") to assign their leasehold interests in the Lemmon Avenue Terminal. Such an agreement "would have introduced a new competitive airline to the Love Field market, increased competition by using a terminal that was not subject to control by Dallas, and introduced competition into markets monopolized by Southwest and Dallas." *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 544. Although plaintiffs and Pinnacle worked to complete the transfer of plaintiffs' interests in the leases on the land and the Lemmon Avenue Terminal, they ultimately failed to reach an agreement.[10]

Plaintiffs also negotiated with other airlines, including JetBlue Airways. Nevertheless, defendant asserts that plaintiffs "do not allege that there has been any regularly scheduled commercial air service utilizing the Lemmon Avenue Terminal since Legend's dissolution." Def.'s Mot. Dismiss Pls.' Compl.

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[10] In an antitrust lawsuit filed in the Northern District of Texas, see infra Part I.F, plaintiffs alleged that negotiations with Pinnacle, which would have produced an agreement valued at approximately $100 million, were "almost complete" in June 2006, but ultimately fell through after Mayor Laura Miller publicly announced that Dallas intended to demolish the Lemmon Avenue Terminal. *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 554-55. Plaintiffs alleged that Mayor Miller "made this statement before any public meeting was convened on the issue . . . ." *Id.* at 555. Pinnacle subsequently terminated the negotiations. *Id.*

Failure State Claim ("Def.'s Mot.") 4. According to plaintiffs, the September 11, 2001 terrorist attacks significantly and adversely affected their business as well as air transportation generally.

E. Efforts to Amend or Repeal the Wright Amendment

In late 2004, Southwest initiated a new campaign to repeal the Wright Amendment. In response, the Senate Committee on Commerce, Science, and Transportation conducted a hearing, after which Missouri Senator Kit Bond lobbied for through-ticketing to states outside of the Love Field service area. Ultimately, Congress added only Missouri to the list of Wright Amendment exempted states. *See* Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006, Pub. L. No. 109-115, § 181, 119 Stat. 2396. Shortly thereafter, American opened additional ticket counters and gates at Love Field.

Thereafter, several bills were introduced in Congress concerning the repeal or modification of the Wright Amendment. *See* H.R. 6228, 109th Cong. (2006); H.R. 5830, 109th Cong. (2005); H.R. 5576, §§ 901-906, 109th Cong. (2006). Southwest advocated for a complete repeal of the Wright Amendment. American, by contrast, "lobbied for . . . , at a minimum, continuation of the Wright Amendment restrictions." *Love Terminal Partners, L.P.*, 527 F. Supp. at 545.

1. Congress Recommends a Local Solution

In March 2006, members of Congress, recognizing "decades of litigation and contentious debate among local communities, airports and airlines over the establishment and development of DFW, the subsequent use of Love Field, and proposed legislative changes to the Wright Amendment," H.R. Rep. No. 109-600, pt. 1, at 3, recommended that Dallas and Fort Worth jointly propose a solution to the problems caused by Wright Amendment, *Love Terminal Partners, L.P.*, 527 F. Supp. at 545; *accord* S. Rep. No. 109-317, at 3. Dallas and Fort Worth passed resolutions requesting that Congress "not act concerning the Wright Amendment" until the cities could propose a solution. *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 545; *see also* S. Rep. No. 109-317, at 3 (stating that both cities requested that Congress "provide them time to develop a local solution"). On June 16, 2006, the mayors of Dallas and Fort Worth, together with other officials, announced an agreement, issuing a "Joint Statement Among the City of Dallas, the City of Fort Worth, Southwest Airlines, American Airlines, and DFW International Airport to Resolve the 'Wright Amendment' Issues" ("Joint Statement").[11] *See* Def.'s Mot. Ex. A.

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[11] Plaintiffs, in *Love Terminal Partners, L.P.*, asserted that

> [Dallas, Fort Worth, American, Southwest, and the DFW Board] had already begun conspiring . . . to divide the North Texas markets for commercial air passenger service. In August 2005[,] Southwest and Dallas secretly discussed destroying the [Lemmon Avenue] Terminal. The conspiracy proceeded in secret

The Joint Statement memorialized the signatories' commitment to seeking the enactment of legislation that would amend and ultimately repeal the Wright Amendment. Among other provisions, the Joint Statement indicated that the signatories agreed that international commercial passenger service would be limited exclusively to DFW, and "[t]hrough ticketing to or from a destination beyond the 50 United States and the District of Columbia [would] be prohibited from Dallas Love Field." *Id.* at 1 (Joint Statement ¶ 1(a)). The Joint Statement signatories sought "to eliminate all the remaining restrictions on service from [Love Field] after eight years from the enactment of legislation," *id.* (Joint Statement ¶ 1(b)), and to reduce "as soon as practicable" the number of gates available for passenger air service at Love Field from thirty-two to twenty, *id.* (Joint Statement ¶ 3). Dallas agreed to acquire "the portions of the lease on the Lemmon Avenue facility[,] up to and including

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> throughout 2005 and into February 2006. By early February 2006, [Dallas, Fort Worth, American, Southwest, and the DFW Board] had agreed that the [Lemmon Avenue] Terminal should be destroyed to ensure the success of the scheme to divide the North Texas markets and to insulate Southwest from increased competition . . . . [N]egotiations [continued] through a series of closed-door discussions . . . .
>
> After several months of secret negotiations, Dallas, Fort Worth, [the] DFW Board, Southwest, and American issued . . . a [Joint Statement].

527 F. Supp. 2d at 545. *But see* H.R. Rep. No. 109-600, pt. 1, at 3-4 (explaining that Dallas and Fort Worth approached Southwest and American separately, engaged in several months of deliberations, and formulated a consensus proposal that culminated in the parties' execution of the Joint Statement).

condemnation, necessary to fulfill the obligations under this agreement" and to "demoli[sh] . . . the Legend gates immediately upon acquisition of the lease to ensure the facility can never again be used for passenger service." *Id.* at 2 (Joint Statement ¶ 5). The signatories also agreed that the Joint Statement was predicated on Congress enacting legislation to implement the terms of the agreement.

On July 11, 2006, the Joint Statement signatories executed a "Contract Among the City of Dallas, the City of Forth Worth, Southwest Airlines Co., American Airlines, Inc., and DFW International Airport Board Incorporating the Substance of the Terms of the June 15, 2006 Joint Statement Between the Parties to Resolve the 'Wright Amendment' Issues" ("Contract," also referred to by the parties as the "Local Agreement"). *See* Pls.' Ex. 2. By executing the Contract, Dallas, Fort Worth, American, Southwest, and the DFW Board "bound themselves to the terms of the Joint Statement, with certain modifications." *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 545. The Contract indicated that

> [t]he Parties hereby represent to the Congress of the United States, and to the Citizens of the Dallas-Fort Worth [area] that they have approved of and support the proposed local solution. The Parties each separately covenant that they will not now or in the future, support, encourage or participate in any effort to defeat or modify or amend the legislation that is described in this Agreement.

Pls.' Ex. 2 at 6 (Contract art. I ¶ 14).

2. Enactment of the WARA

On July 13, 2006, two days after execution of the Contract, Texas Senator Kay Bailey Hutchison introduced S. 3661, "A bill to amend section 29 of the International Air Transportation Competition Act of 1979 regulating air transportation to and from Love Field, Texas." S. Rep. No. 109-317, at 14. Senator Hutchison's bill was enacted, as amended, as the WARA on October 13, 2006. Pub. L. No. 109-352, 120 Stat. 2011 (2006). As enacted, the WARA expanded service by permitting

> [a]ir carriers and, with regard to foreign air transportation, foreign air carriers, [to] offer for sale and provide through service and ticketing to or from Love Field, Texas, and any United States or foreign destination through any point within Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama.

§ 2(a), 120 Stat. at 2011. The WARA repealed the Wright Amendment in its entirety after a period of eight years. Id. § 2(b), 120 Stat. at 2011. It also addressed specific Contract provisions concerning the future of Love Field. Section 5 of the WARA, "Love Field Gates," provides:

> (a) IN GENERAL.—The city of Dallas, Texas, shall reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates. Thereafter, the number of gates available for such service shall not exceed a maximum of 20 gates. The city of Dallas, pursuant to its authority to operate and

> regulate the airport as granted under chapter 22 of the Texas Transportation Code and this Act, shall determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006. To accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases.
>
> (b) REMOVAL OF GATES AT LOVE FIELD. —No Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act, but Federal funds or passenger facility charges may be used for other airport facilities under chapter 471 of title 49, United States Code.[12]

Id. § 5(a)-(b), 120 Stat. at 2012 (footnote added). The statute was not intended to affect general aviation service at Love Field.[13] Id. § 5(c), 120 Stat. at 2012.

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[12] Chapter 471 of title 49 of the United States Code governs airport development. *See* 49 U.S.C. §§ 47101-47175 (2006).

[13] Specifically,

> [n]othing in this Act shall affect . . . flights to or from Love Field by general aviation aircraft for air taxi service, private or sport flying, aerial photography, crop dusting, corporate aviation, medical evacuation, flight training, police or fire fighting, and similar general aviation purposes, or by aircraft operated by

The Love Terminal Partners, L.P. court held "plainly and unambiguously incorporates all the rights and obligations of the Contract."[14] 527 F. Supp. 2d at 558.

F. Plaintiffs' Legal Challenges

After execution of the Contract but before Congress enacted the WARA, plaintiffs filed an antitrust lawsuit in the Northern District of Texas. Mr. Naul explained:

> In an all-out effort to save our business, on July 17, 2006, [plaintiffs] sued the City of Dallas and the other parties to the July 11, 2006 agreement in the federal district court for the Northern District of Texas, alleging that the July 16, 2006 agreement (codified a few months later in the [WARA]) was invalid under the Sherman Antitrust Act [of 1890, 15 U.S.C. §§ 1-7 (2006),] as an agreement in restraint of trade. Separately, [plaintiffs] also filed suit in Texas State court, alleging that the July 11, 2006 agreement had been negotiated in secret, in violation of the Texas Open Meetings Act [("TOMA"), Tex. Gov't Code Ann. §§ 551.001-.146 (West 2004 & Supp. 2007)].

Pls.' Ex. 1 at 2-3 (Naul Decl. ¶ 7) (footnotes omitted). The *Love Terminal Partners, L.P.* court

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> any agency of the Federal Government or by any air carrier under contract to any agency of the Federal Government.

Pub. L. No. 109-352, § 5(c), 120 Stat. at 2012.

[14] The government contends that this holding by the Northern District of Texas was incorrect.

determined that the parties' conduct in connection with the adoption of both the Joint Statement and the Contract "represent[ed] the culmination of [their] efforts to petition Congress," 527 F. Supp. 2d at 552, holding that the WARA "compel[led the signatories to the Contract] to implement the terms of the Contract," *id.* at 560, and that the Joint Statement and Contract—as well as the signatories' activities leading up to execution of the Joint Statement and Contract that it determined were directed toward lobbying the government for legislative action—were immune from antitrust liability under the *Noerr-Pennington* doctrine,[15] *id.* at 558. A year later, the Court of

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[15] The *Noerr-Pennington* doctrine is derived from two United States Supreme Court ("Supreme Court") decisions: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). In *Noerr Motor Freight, Inc.*, the Supreme Court determined that the Sherman Antitrust Act of 1890 did "not apply to mere group solicitation of governmental action," observing that

> [t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

365 U.S. at 139. The Supreme Court reasoned that "disqualify[ing] people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information" and "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." Id. It therefore held that the legality of efforts directed toward obtaining

Appeals of Texas affirmed the dismissal of plaintiffs' state claim.[16] Love Terminal Partners, L.P., 256

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governmental action was "not at all affected by any anticompetitive purpose it may have had." *Id.* at 140.

Four years later, the *Pennington* Court reaffirmed that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," explaining that "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition" since such conduct "is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. As the United States Court of Appeals for the Federal Circuit ("Federal Circuit") recognized, the *Noerr-Pennington* doctrine "immunizes, under the First Amendment, solicitation of government action even though the sole purpose of the solicitation is to restrain competition." *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1307 (Fed. Cir. 1999); *see also City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991) (explaining that "federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). Moreover, immunity under the Noerr-Pennington doctrine applies even when private parties conspire with government officials to effectuate an anticompetitive outcome. *Omni Outdoor Adver., Inc.*, 499 U.S. at 382-83; *see also id.* at 383 (rejecting the need to create a "'conspiracy' exception to *Noerr*," indicating that "antitrust laws regulate business, not politics," and reasoning that "[t]he same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials").

[16] The Court of Appeals of Texas rejected plaintiffs' argument that the Joint Statement violated the TOMA and was therefore void, reasoning that the TOMA expressly provided that an action "'by a governmental body in violation of this chapter is voidable'—not void or void ab initio. . . . If an action is void or void

S.W.3d at 895, 897. According to Mr. Naul, "[t]he dismissal of both lawsuits . . . dashed [plaintiffs'] hopes for saving the[ir] business." Pls.' Ex. 1 at 3 (Naul Decl. ¶ 9).

G. Plaintiffs Default on the Master Lease

While their lawsuits were pending, plaintiffs made monthly lease payments of approximately $45,000 to Dallas. Id. (Naul Decl. ¶ 8). Plaintiffs also paid approximately $100,000 per month in expenses associated with utilities, maintenance, insurance, and security services for the Lemmon Avenue Terminal.[17] *Id.* (Naul Decl. ¶ 8). Mr. Naul stated that

> [t]he failure of [plaintiffs'] legal challenges meant, as we well knew, that [plaintiffs] would never be allowed to use this property for air passenger service, that at least part (and probably all) of the terminal would be

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ab initio, the transaction is a nullity. If, however, conduct is merely voidable, the act is valid until adjudicated and declared void." *Love Terminal Partners, L.P. v. City of Dallas*, 256 S.W.3d 893, 897 (Tex. App. 2008) (quoting Tex. Gov't Code Ann. § 551.141) (footnote & citations omitted). Furthermore, the Court of Appeals of Texas noted that, before the WARA was enacted, "there had been no adjudication declaring the Love Field Agreement void. When the [WARA] incorporated the [C]ontract, Dallas' obligations, including demolition of the [Lemmon Avenue] Terminal, became a matter of federal law." *Id.* Accordingly, the court determined that, "since Dallas' performance is now compelled by federal law, any challenge to the Love Field Agreement is moot." *Id.*

[17] According to Mr. Naul, plaintiffs incurred expenses for security "because there is direct access from the [Lemmon Avenue] Terminal to the runway and other sensitive airport facilities . . . ." Pls.' Ex. 1 at 3 (Naul Decl. ¶ 8).

> demolished (since it is hard to conceive how or why one would demolish the gates and leave the building standing). [Plaintiffs] had no other prospect of deriving any significant income (other than some minor parking charges) from any of the [26.8] acres.

Id. (Naul Decl. ¶ 9).

On October 18, 2006, less than one week after enactment of the WARA, the Dallas City Council passed a resolution ("Dallas City Council Resolution") authorizing Dallas to acquire the Master Lease and the Love Terminal Partners sublease. Pls.' Ex. 6. The Dallas City Council acknowledged that "certain tracts of property on Lemmon Avenue at Love Field have, among other things, six gates that have not been used for commercial air passenger service since late 2000 . . . ." *Id.* at 2 (Dallas City Council Resolution Whereas ¶ 12). It determined that acquisition of "all or a portion of the leasehold interests, if any, on the Lemmon Avenue tracts in order to comply with the provisions of [the WARA]" was in the public interest. *Id.* (Dallas City Council Resolution Whereas ¶ 13). Accordingly, the Dallas City Council directed the city manager and city attorney

> to promptly take all necessary steps to ensure that the City of Dallas complies with the provisions of [the WARA] and all other applicable laws, including taking all appropriate steps to acquire, including the exercise of the right of eminent domain, if such becomes necessary, all or a portion of the leasehold interests, if any, from Virginia Aerospace . . . , Love Terminal

> Partners . . . , and all other persons claiming an interest in certain tracts of property at Love Field with addresses of 7701 and 7777 Lemmon Avenue.

Id. (Dallas City Council Resolution § 1). Acquisition of this property, the Dallas City Council indicated, was "for municipal and public purposes and a public use and that public necessity require[d] the acquisition." *Id.* (Dallas City Council Resolution § 2).

Plaintiffs learned that Dallas obtained an appraisal valuating their leaseholds. According to Mr. Naul, the appraisal valued the property "at next to nothing," which was not surprising to him because "the sole economic use of the terminal and leased area [wa]s for air passenger service and, under the [WARA], that use [wa]s forbidden." Pls.' Ex. 1 at 4 (Naul Decl. ¶ 10). Plaintiffs

> did not believe that [they] could obtain an appraisal showing significant value for the lease and terminal, given the provisions of the [WARA], and [they] therefore saw no reason to continue paying rent and other monthly charges during a condemnation proceeding, which would likely result in little, if any, compensation to [them].

Id. "Seeing no alternative," plaintiffs determined in March 2008 that they "must stop the financial hemorrhage of about $145,000 per month in rent and expenses for the . . . leases and terminal." *Id.* (Naul Decl. ¶ 11). To that end, plaintiffs informed Dallas of their intent to cease rental payments and to extricate themselves from the monthly costs of utilities, maintenance, insurance, and security. *Id.*

In a May 13, 2008 letter to plaintiffs, Daniel T. Weber, Director of Aviation for Dallas, advised that plaintiffs' failure to provide security and other services at the Lemmon Avenue Terminal and related facilities constituted a breach of the Master Lease:

> We understand from your May 8, 2008, letter that . . . Virginia Aerospace . . . and Love Terminal Partners . . . no longer have tenants, staff, or utilities on the leased premises. This is a serious concern to the City of Dallas . . . .
>
> The City is obligated under its Federal grants with the Federal Aviation Administration . . . to keep Love Field and all the facilities which are necessary to serve the aeronautical users of the airport . . . "operated at all times in a safe and serviceable condition." . . . [T]hese obligations extend to [plaintiffs'] use of the leased premises. [At] a minimum, the leased premises must be kept safe and secure. [Plaintiffs] must ensure that all locks are working properly, all secured areas are kept secure, and the absence of utilities on the leasehold does not compromise the security or safety of Love Field. Failure to comply with these standards will both violate Federal requirements and constitute a breach of Virginia Aerospace's and Love Terminal Partners' lease obligations.

Pls.' Ex. 5 at 1. On May 22, 2008, Dallas notified plaintiffs that their failure to make monthly lease rental payments for April 2008 and May 2008

constituted a breach of the Master Lease, and further advised that, "[i]n the event that the delinquent rental payments [were] not paid to the City . . . , the City [would] proceed to enforce any and all of the rights and remedies that it may have under the terms of the Lease, or that the City may have in law or equity." Pls.' Ex. 3 at 3.

Following significant discussions between the parties, Dallas, on November 20, 2008, informed plaintiffs that their lease rights were terminated and demanded that plaintiffs vacate the premises for failure to pay rent. Dallas then instituted eviction proceedings against plaintiffs. On December 9, 2008, Dallas obtained a final judgment granting it possession of the premises. Plaintiffs estimate that, from June 2006 until they surrendered possession of the premises in December 2008, they spent approximately $3.8 million in rent and other expenses.

H. Plaintiffs' Property Interests

The property interests plaintiffs claim they possess are threefold. First, plaintiffs assert ownership interests in leaseholds. Love Terminal Partners asserts a leasehold interest in nine acres of land encompassed under the Master Lease that it subleased in order to provide commercial air passenger service at Love Field. Virginia Aerospace asserts a leasehold interest in the Master Lease, subject to the Love Terminal Partners sublease. These leaseholds, plaintiffs contend, granted them the right to exclude others from entry upon the property encompassed therein. Second, plaintiffs assert a property right to engage in commercial air passenger service at Love Field, as authorized under their

respective leases. Third, Love Terminal Partners asserts an ownership interest in the Lemmon Avenue Terminal, which it constructed in 1999 and over which it asserted an exclusive right to use, rent, alter, renovate, and lease space within that facility.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint in the United States Court of Federal Claims ("Court of Federal Claims") on July 23, 2008. On January 5, 2009, while briefing on the government's motion was pending, plaintiffs moved the court to schedule a site inspection of the premises encompassed by the Master Lease because Dallas planned to demolish the Lemmon Avenue Terminal. Pls.' Mot. Schedule Site Inspection Before Demolition Leased Premises 1; *see also id.* Ex. 1 (containing a December 24, 2008 letter from Christopher Caso, Assistant City Attorney, representing that Dallas "agree[d] to postpone the demolition of any structures on the property prior to the judge's inspection"). The court granted the motion, *see* Order, Jan. 5, 2009, and, on March 25, 2009, toured the Love Field facilities, as well as the Lemmon Avenue Terminal and other structures on the leased premises, with counsel, Messrs. Naul and Caso, and other officials representing Dallas and Love Field. Plaintiffs advised the court that demolition of the Lemmon Avenue Terminal gates commenced in August 2009 and was completed in September 2010.

III. LEGAL STANDARDS

A. Nature of a Fifth Amendment Takings Claim

"The chief and one of the most valuable characteristics of the bundle of rights commonly called

'property' is 'the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.'" *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993) (quoting *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991)). The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This provision "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Takings Clause does not prohibit the taking of property. Rather, it proscribes a taking without just compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); *see also First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 315 (1987) (explaining that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). "Real property, tangible property, and intangible property all may be the subject of takings claims." *Conti v. United States*, 291 F.3d 1363, 1338-39 (Fed. Cir. 2002) (citations omitted). Lease rights are recognized property rights that are subject to the Takings Clause. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."); *see also U.S. Trust Co.*

of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("As a general proposition, a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof." (citing *Lemmons v. United States*, 496 F.2d 864, 873 (Ct. Cl. 1974))). The Court of Federal Claims possesses jurisdiction over takings claims against the United States. *See Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987) ("[T]he 'just compensation' required by the Fifth Amendment has long been recognized to confer upon property owners whose property has been taken for public use the right to recover money damages from the government."); *Russell v. United States*, 78 Fed. Cl. 281, 289 (2007) ("The Takings and Just Compensation Clauses of the Fifth Amendment do constitute a money-mandating source and claims under these clauses are within the jurisdiction of the court.").

The Supreme Court "has recognized that the government may 'take' private property by either physical occupation or regulation." *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed. Cir. 2004); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23 (1992) (describing "two distinct classes" of takings: (1) physical occupation of property; and (2) regulation of the use of property); *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) ("A 'taking' may occur either by physical invasion or by regulation."); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 (Fed. Cir. 2008) ("A compensable taking can occur not only through the government's

physical invasion or appropriation of private property but also by government regulations that unduly burden private property interests[.]" (citation omitted)), *aff'g* 75 Fed. Cl. 642 (2007), cert. denied, 129 S. Ct. 626 (2008). The analysis employed with respect to cases involving a physical occupation, "for the most part, involves the straightforward application of per se rules," whereas "regulatory takings jurisprudence . . . is characterized by 'essentially ad hoc, factual inquires,' designed to allow 'careful examination and weighing of all the relevant circumstances.'"[18] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)); *see also Yee*, 503 U.S. at 523 ("The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."). Nevertheless, courts have recognized that "there is no bright line between physical and regulatory takings."[19] *Estate of Hage*, 82 Fed. Cl. at 208.

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[18] A categorical taking, which is also referred to as a per se taking, *see Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 477-78 (2009), may also result from regulatory restrictions placed on property. *See infra* Part III.A.2.

[19] Indeed, *Estate of Hage v. United States* is one such example. In that case, the plaintiffs owned land and operated a ranch in central Nevada that was used for grazing cattle and livestock. 82 Fed. Cl. 202, 205 (2008). The Nevada Department of Wildlife received permission from the United States Forest Service ("Forest Service") to release elk into the region where the plaintiffs' ranch was located. *Id.* at 206. The plaintiffs objected, contending that the elk drank water and ate forage that belonged to them. Id. Thereafter, the Forest Service erected electric fences

The Federal Circuit "has developed a two-step approach to takings claims." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002); *accord Acceptance Ins. Cos.*, 583 F.3d at 854. First, a plaintiff must identify the property interest that was allegedly taken. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 79 Fed. Cl. 400, 408 (2007); *see also Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) ("[A] court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a 'stick in the bundle of property rights.'"). Second, "[o]nce a property right has been established, the court must then determine whether a

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that excluded the plaintiffs' cattle from waters and nearby forage owned by the plaintiffs. *Id.* Years later, the Forest Service, finding that certain lands were "overgrazed," ordered the plaintiffs to remove their cattle. *Id.* at 206-07. Eventually, the Forest Service twice impounded the plaintiffs' cattle, selling them at auction and retaining the proceeds. *Id.*

Addressing the plaintiffs' takings claim, the Court of Federal Claims determined that a physical taking occurred as a result of the government's construction of fences around streams in which the plaintiffs had established a vested water right, explaining that the Forest Service's activities constituted a "'physical ouster' which deprived Plaintiffs of the use of their property." *Id.* at 211. It also determined that various Forest Service policies deprived the plaintiffs of access to their lands and effected a regulatory taking. *Id.* at 211-12. The "severe reduction in water flow to Plaintiffs' patented lands," the court concluded, "deprived them of the water they needed for irrigation[,] making the ranch unviable and which they could have sold in the market." *Id.* at 212. A regulatory taking, the court determined, also resulted from the Forest Service preventing the plaintiffs from accessing, and limiting their ability to maintain, various ditches. *Id.* at 212-13.

part or a whole of that interest has been appropriated by the government for the benefit of the public." *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti*, 291 F.3d at 1339); *see also Ammon*, 209 F.3d at 1374 ("If a plaintiff possesses a compensable property right, . . . a court determines whether the governmental action at issue constituted a taking of that 'stick.'" (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995))). Courts "do not reach this second step without first identifying a cognizable property interest." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

"Whether a compensable taking has occurred is a question of law based on factual underpinnings." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350 (Fed. Cir. 2003). While takings cases involve fact-intensive inquiries, *see Penn Cent. Transp. Co.*, 438 U.S. at 124; *see also Ammon*, 209 F.3d at 1374 (noting that the second step of the court's analysis is "an intensely factual inquiry"), such inquiries are "not standardless," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

1. Physical Takings

A physical taking constitutes "a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property." *Boise Cascade Corp.*, 296 F.3d at 1353; *see also Loretto*, 458 U.S. at 426 ("[A] permanent physical occupation authorized by government is a taking . . . ."); *Hendler*, 952 F.2d at 1375 ("A physical occupation of private property by the government which is adjudged to be of a permanent nature is a

taking . . . ."). A physical taking occurs when "government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) (explaining that a "permanent physical occupation" occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises"). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)); *see also Yee*, 503 U.S. at 522 ("Where the government authorizes a physical occupation of property (or actually takes title) the Takings Clause generally requires compensation."). A permanent physical occupation "is a per se physical taking . . . because it destroys, among other rights, a property owner's right to exclude." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1356 (Fed. Cir. 2006), *aff'd on other grounds*, 552 U.S. 130 (2008); *accord Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (characterizing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

"A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*,

544 U.S. 528, 539 (2005). Permanent, however, "does not mean forever, or anything like it." *Hendler*, 952 F.2d at 1376. "[T]he concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." *Id.* at 1377. In fact, the Federal Circuit noted that "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time . . . ." *Id.* at 1376. Moreover, the physical occupation "need not occur directly, but can be found in a physical injury to real property substantially contributed to by a public improvement." *Applegate v. United States*, 35 Fed. Cl. 406, 414 (1996).

The inquiry in a physical takings case "is limited to whether the claimant can establish a physical occupation of his property by the Government." *Id.* In *Loretto*, the Supreme Court explained: "[W]hen the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434-35 (citation omitted). While physical takings precedents are not necessarily applicable to cases in which a regulatory taking has been alleged, *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323, "a pure physical taking rarely exists 'because our government and its agents rarely seize or occupy property without some arguable legal or regulatory authority,'"[20] *Roth v. United States*, 73

[20] Indeed, the physical taking of property that occurred in *Loretto*, namely, the installation of cable television devices in apartment buildings, was authorized by a state law regulating

Fed. Cl. 144, 148 (2006) (quoting *Store Safe Redlands Assocs. v. United States*, 35 Fed. Cl. 726, 728 (1996)).

2. Regulatory Takings

A regulation that restricts the use of property or unduly burdens private property interests is not a physical taking. *Huntleigh USA Corp.*, 525 F.3d at 1378; *Tuthill Ranch, Inc.*, 381 F.3d at 1137. The Federal Circuit characterizes a regulatory taking as one in which "the government prevents the landowner from making a particular use of the property that otherwise would be permissible." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)). Until the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922),

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landowners by preventing interference with the installation of cable television equipment on their property. *See* 458 U.S. at 421, 423-24; *see also Penn Cent. Transp. Co.*, 438 U.S. at 122 (stating that the Fifth Amendment "is made applicable to the States through the Fourteenth Amendment" (citing *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897))). The Supreme Court did not question whether the statute in question served a legitimate public purpose and therefore fell within the state's police powers. Instead, it addressed whether "an otherwise valid regulation so frustrate[d] property rights that compensation must be paid." *Loretto*, 458 U.S. at 425; *see also Lingle*, 544 U.S. at 539 (explaining that a "common touchstone" in takings jurisprudence is the "severity of the burden that government imposes upon private property rights"). In fact, the Supreme Court has upheld land-use regulations that either destroyed or adversely affected recognized property interests "in instances in which a . . . tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land . . . ." *Penn Cent. Transp. Co.*, 438 U.S. at 125.

"it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (alteration in original) (citation omitted). "Beginning with *Mahon*, . . . the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle*, 544 U.S. at 537; *see also Members of Peanut Quota Holders Ass'n*, 421 F.3d at 1330 ("While a taking often occurs as a result of a physical invasion or confiscation, the Supreme Court has long recognized that 'if a regulation goes too far it will be recognized as a taking.'" (quoting *Mahon*, 260 U.S. at 415)).

Regulatory takings are subdivided into two categories: (1) categorical and (2) noncategorical.[21] *Huntleigh USA Corp.*, 525 F.3d at 1378 n.2. A categorical taking is one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000); *see also Lucas*, 505 U.S. at 1015 (indicating that categorical treatment is appropriate "where

[21] Regulatory takings may be temporary or permanent, though these takings "'are not different in kind.' Both require compensation." *Kemp v. United States*, 65 Fed. Cl. 818, 823 n.2 (2005) (quoting *First English Evangelical Luteran Church of Glendale*, 482 U.S. at 318) (citation omitted).

regulation denies all economically beneficial or productive use of land"). Thus, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019. A categorical taking, like a permanent physical invasion of property, is deemed a per se taking under the Fifth Amendment. *See Lingle*, 544 U.S. at 538; *see also Res. Invs., Inc.*, 85 Fed. Cl. at 477 (stating that "[g]overment regulation goes 'too far,' and effects a total or 'categorical' taking, when it deprives a landowner of all economically viable use of his 'parcel as a whole'").

A noncategorical taking "fall[s] short of eliminating all economically beneficial use of property." *Consumers Energy Co. v. United States*, 84 Fed. Cl. 152, 156 (2008) (citing *Palazzolo*, 533 U.S. at 617). A noncategorical taking is the "consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use . . . ." *Palm Beach Isles Assocs.*, 231 F.3d at 1357. "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors . . . ." *Palazzolo*, 533 U.S. at 617 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124). As Justice Brennan explained in Penn Central Transportation Co., the Supreme Court had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government," 438

U.S. at 124, and instead focused "largely 'upon the particular circumstances [in that] case,'" *id.* (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (alteration in original)). Nevertheless, the *Penn Central Transportation Co.* Court extrapolated from prior decisions "several factors that have particular significance," namely: (1) economic impact of the regulation on the plaintiff; (2) extent to which the regulation has interfered with distinct investment-backed expectations; and (3) character of the governmental action.[22] 438 U.S. at 124; see also *Lingle*, 544 U.S. at 540 (stating that the *Penn Central Transportation Co.* inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests"). Such a test for regulatory takings requires a comparison of "the value that has been taken from the property with the value that remains in the property . . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). While the Supreme Court's regulatory takings jurisprudence "cannot be characterized as unified," courts "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

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[22] "The *Penn Central [Transportation Co.]* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." *Lingle*, 544 U.S. at 539.

3. The *Lucas* "Antecedent Inquiry"

A plaintiff must demonstrate title to a property right that has been purportedly taken. *Good v. United States*, 39 Fed. Cl. 81, 84 (1997). In *Lucas*, the Supreme Court explained: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. This approach, the *Lucas* Court indicated, "accords . . . with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Id.*

A "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers[.]" *Id.*; *see also Hendler v. United States*, 38 Fed. Cl. 611, 615 (1997) ("Because a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights."), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999). Moreover, a taking does not occur if the government's common law nuisance and property principles prohibit the desired land use:

> Any limitation so severe cannot be newly legislated or decreed (without compensation),

> but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally . . . .

Id. at 1029; *accord Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, at *23 (Tex. Nov. 5, 2010) ("Property owners may not use their property in a way that unreasonably interferes with the property rights of others."). The *Lucas* Court rejected as inconsistent with the Takings Clause the notion that a landowner's title "is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use . . . ." 505 U.S. at 1028. Moreover, the government bears the burden of "identify[ing] background principles of nuisance and property law that prohibit" the plaintiff's use of the property. *Id.* at 1031.

B. Ripeness

"When considering a Fifth Amendment takings claim, the court first must consider whether plaintiffs' claims have ripened." *Benchmark Res. Corp. v. United States*, 74 Fed. Cl. 458, 463 (2006). Where applicable, the ripeness doctrine may constrain a court's ability to adjudicate a case. *See id.* ("In holding a claim to be unripe, the court essentially is refusing to exercise

jurisdiction over the case."). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . .'" *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). The ripeness doctrine is derived from both "Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."[23] *Id.* at 808 (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). Courts, when addressing ripeness, must make a fact-specific determination of "whether the issues are fit for judicial decision" and "whether there is sufficient risk of suffering immediate hardship." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1580-81 (Fed. Cir. 1993). "[T]he question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (citing *Reno*, 509 U.S. at 57 n.18).

As the Court of Federal Claims recognized in *McDonald v. United States*, a takings cause of action, whether physical or regulatory, "first accrues when 'all the events which fix the government's alleged

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[23] Congress created the Court of Federal Claims under Article I of the Constitution. 28 U.S.C. § 171(a). Courts established under Article I are not bound by the "case or controversy" requirement of Article III. *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996). However, the Court of Federal Claims and other Article I courts traditionally apply the "case or controversy" justiciability doctrines in their cases for prudential reasons. *See id.*; *CW Gov't Travel, Inc. v. United States*, 46 Fed. Cl. 554, 558 (2000). These doctrines include ripeness, standing, mootness, and political questions. *Fisher*, 402 F.3d at 1176 (panel portion).

liability have occurred and the plaintiff was or should have been aware of their existence.'" 37 Fed. Cl. 110, 114 (1997) (quoting *Hopland Band of Pomo Indians v. United States*, 844 F.2d 1573, 1577 (Fed. Cir. 1988)); *see also Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (indicating that a claim accrues when the government, "by some specific action, took a private property interest for a public use without just compensation"); *Goodrich v. United States*, 63 Fed. Cl. 477, 480 (2005) ("When a taking is pleaded, a claim accrues when the taking occurs."). A determination of when a takings claim accrues is governed by an objective standard. *Otay Mesa Prop. L.P. v. United States*, 86 Fed. Cl. 774, 785 (2009) (citing *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995)), *appeal docketed*, No. 2011-5008 (Fed. Cir. Oct. 13, 2010). With respect to a physical takings claim, "if the United States has entered into possession of the property[,] . . . [i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues." *United States v. Dow*, 357 U.S. 17, 22 (1958). However, "[t]here is . . . some doubt regarding the date of the accrual of a physical taking claim versus the date at which such a claim becomes ripe for litigation." *Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428, 435 (2009); *see also Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004) ("It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.").

A regulatory takings claim will not accrue until the claim is ripe. *Royal Manor, Ltd. v. United States*,

69 Fed. Cl. 58, 61 (2005). "A regulatory taking claim is ripe (and thus accrues) when 'the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" *Barlow & Haun, Inc.*, 87 Fed. Cl. at 435 (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985)). "When the taking is effected by legislation, the taking accrues on the enactment of the legislation introducing the physical taking." *Kemp*, 65 Fed. Cl. at 822 (citing *Fallini*, 56 F.3d at 1382-83); *see also Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558 (Fed. Cir. 1985) ("The complaint alleges a legislative taking, effective to accrue the claim on the date of the enactment of the statute . . . ."); *Entines v. United States*, 39 Fed. Cl. 673, 679 (1997) ("When the government takes private property pursuant to legislative directive, any resulting takings claims accrue when the legislation becomes effective."). A takings claim predicated upon an act of Congress accrues on the date of the legislative enactment because "it is fundamental jurisprudence that the [a]ct's objective meaning and effect were fixed when the [a]ct was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect." *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993).

C. RCFC 12(b)(6) Motion to Dismiss

An RCFC 12(b)(6) motion tests the sufficiency of a complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *see also RhinoCorps Ltd. Co. v. United States*, 87 Fed. Cl. 481, 492 (2009) ("A motion made

under Rule 12(b)(6) challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced."). The purpose of RCFC 12(b)(6) "is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)). When considering an RCFC 12(b)(6) motion, the court "must determine 'whether the claimant is entitled to offer evidence to support the claims,' not whether the claimant will ultimately prevail." *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-19 (1982)). A failure to allege a cause of action upon which relief can be granted warrants a judgment on the merits rather than a dismissal for want of jurisdiction. *Litecubes, LLC v. N. Light Prods.*, Inc., 523 F.3d 1353, 1361 (Fed. Cir. 2008).

The Supreme Court clarified the degree of specificity with which a plaintiff must plead facts sufficient to survive a Rule 12(b)(6) motion in *Bell Atlantic Corp.*, stating that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555 (citation & quotation marks omitted). While a complaint need not contain "detailed" factual allegations, those "[f]actual allegations must be enough to raise a right to relief

above the speculative level . . . ."[24] *Id.* In other words, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp.*, 550 U.S. at 556). This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also id.* (stating that a complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" (citing *Bell Atl. Corp.*, 550 U.S. at 555)). Neither allegations "that are 'merely consistent with' a defendant's liability," *id.* (quoting *Bell Atl. Corp.*, 550 U.S. at 557), nor "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are sufficient, *id.* (citing *Bell Atl. Corp.*, 550 U.S. at 555).

The court "must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006) (citations & quotation marks omitted); *accord Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). Courts "generally consider only the allegations contained in the complaint, exhibits attached to the complaint[,] and matters of public record" when deciding a motion to dismiss. *Pension*

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[24] In so holding, the Supreme Court determined that the "no set of facts" language set forth in *Conley v. Gibson*, 355 U.S. 41, 45 (1957), had "earned its retirement." *Bell Atl. Corp.*, 550 U.S. at 563.

Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). However, materials appearing in the record of the case may also be taken into account without converting a motion to dismiss into one for summary judgment. 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004); cf. RCFC 12(d) ("If, on a motion under RCFC 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56."). Courts have "complete discretion to determine whether or not to accept the submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion" and rely upon that material. 5C Wright & Miller, *supra*, at § 1366. Such discretion generally is exercised when the proffered material is "likely to facilitate the disposition of the action." *Id.*

D. Motion for Summary Judgment

Plaintiffs filed a cross-motion for partial summary judgment pursuant to RCFC 56. Issues of statutory interpretation and other matters of law may be adjudicated on a motion for summary judgment. *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Sharp v. United States*, 580 F.3d 1234, 1237 (Fed. Cir. 2009). The moving party, which bears the initial burden of demonstrating the absence of genuine issues of material fact, *Celotex Corp.*, 477 U.S. at 323, discharges its burden by

"pointing out . . . that there is an absence of evidence to support the nonmoving party's case," *A Olympic Forwarder, Inc. v. United States*, 33 Fed. Cl. 514, 518 (1995). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Cloutier v. United States*, 19 Cl. Ct. 326, 328 (1990) ("A material fact is one which will make a difference in the result of a case."), *aff'd*, 937 F.2d 622 (Fed. Cir. 1991). "[W]hen establishing entitlement to judgment as a matter of law, the movant must present material facts to support the legal elements of its claim." *Liquidating Tr. Ester Duval of KI Liquidation, Inc. v. United States*, 89 Fed. Cl. 29, 38 (2009). An issue is genuine if it "may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. The moving party is not required to support its application with affidavits, but instead may rely solely on the pleadings, depositions, answers to interrogatories, and admissions. *Celotex Corp.*, 477 U.S. at 324. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial, *id.*, and must come forward with "specific facts showing that there is a genuine issue for trial," RCFC 56(e).

The court must view inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the nonmoving party produces sufficient evidence to raise a genuine issue of fact material to the outcome of the case, then the motion for summary judgment should be denied. *Eli Lilly & Co. v. Barr Labs.*, Inc., 251 F.3d 955, 971 (Fed. Cir. 2001). Even where the facts are not

disputed, the moving party still must demonstrate that it is entitled to judgment as a matter of law. *Massey v. Del Labs.*, Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Following "adequate time for discovery," entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

IV. DISCUSSION

Defendant asserts that plaintiffs fail to allege facts that support a finding that the government effected a physical or regulatory taking of plaintiffs' property interest. According to defendant, no physical taking has occurred in this case because the United States did not acquire plaintiffs' airport facilities and lease rights. Moreover, defendant argues, no regulatory taking occurred because the WARA does not limit plaintiffs' use of the property. In support of its argument, defendant notes that the statute omits any reference to plaintiffs or their property. Plaintiffs counter by arguing that the WARA requires Dallas to acquire all or part of their lease and demolish the six gates Love Terminal Partners constructed at the Lemmon Avenue Terminal. Additionally, plaintiffs argue that the government's enactment of the WARA effected a per se taking that destroyed all the economically beneficial use of their leased property,

including the terminal, and their right to fly commercial passenger flights from their terminal. According to plaintiffs, these allegations state a Fifth Amendment takings claim that survives defendant's motion.

Plaintiffs further argue that they are entitled to summary judgment because the WARA requires Dallas to demolish passenger gates built by Love Terminal Partners at the Lemmon Avenue Terminal, actions they contend constitute a physical taking. Prior to the enactment of the WARA, Love Terminal Partners possessed the right to exclude Dallas from demolishing its passenger gates. It has been long recognized that the right to sole, exclusive possession, in other words, the right to exclude, is "one of the most valuable characteristics of the bundle of rights commonly called 'property . . . .'" *Mitchell Arms, Inc.*, 7 F.3d at 215 (quoting *Hendler*, 952 F.2d at 1374). Love Terminal Partners, plaintiffs assert, lost that right when the WARA mandated demolition of its passenger gates as part of the overall plan to reduce the number of available gates at Love Field from thirty-two to twenty and ensure that the Lemmon Avenue Terminal gates could never be used for air passenger service. According to plaintiffs, the WARA's requirement that the Love Field passenger gates be demolished effected a legislative taking that entitles them to just compensation.

A. Plaintiffs' Takings Claim Is Ripe

As an initial matter, the court addresses defendant's argument that plaintiffs' claim is unripe. Ripeness, of course, is an issue that the court may address sua sponte. *Coalition for Common Sense in*

Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 1316 (Fed. Cir. 2006); *supra* Part III.B. Defendant emphasizes that, at the time plaintiffs filed their complaint,

> the Lemmon Avenue Terminal ha[d] not been physically impacted by anyone. Thus, any allegation by Plaintiffs that the possible future demolition of the facility may result in a taking of their property for which they are entitled to compensation fails for lack of ripeness. . . . To the extent that Plaintiffs are alleging a taking of their property resulting from the possible future destruction of the Lemmon Avenue Terminal, the Court must also dismiss the claim pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction.

Def.'s Mot. 11 n.7. Defendant maintains that the mere passage of the WARA effectuated no taking because no physical occupation or intrusion of plaintiffs' property had occurred. According to defendant, Dallas would need to take specific action that interfered with the property before a taking would occur. As mentioned above, such action occurred with the demolition of the Lemmon Avenue Terminal gates that began in August 2009 and concluded in September 2010.

Plaintiffs argue that their complaint alleges a legally cognizable legislative taking because enactment of the WARA deprived them of, among other things, the right to exclude, thereby constituting a per se, physical taking. They assert that the date Dallas demolished the Lemmon Avenue Terminal gates is not relevant to the takings analysis because a statute that precludes a property owner of the right to

exclude is a per se taking, and, consequently, a legislative taking is ripe on the day legislation containing such a provision becomes law. According to plaintiffs, any question of ripeness in this case is resolved by the Federal Circuit's decision in *Fallini*.[25] The court agrees with plaintiffs.

In *Fallini*, Nevada cattle ranchers alleged that the government effected a taking of their property by requiring them to provide water to wild horses living in the area.[26] 56 F.3d at 1379. Although the Fallinis alleged in their complaint that the uncompensated taking commenced in 1971, the Fallinis did not file suit until 1992.[27] *Id.* at 1381. In support of their

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[25] Plaintiffs also cite *Loretto* and *Kemp*, the latter of which relies upon *Fallini*, as well as several other cases, in support of their position. *Loretto* did not directly address issues of ripeness. Defendant notes that *Fallini* addressed a statute of limitations issue.

[26] The Fallinis alleged that the Wild Free-Roaming Horses and Burros Act, which "prohibited the removal, destruction, or harassment of wild horses and burros found on public lands, and . . . authorized the Secretary of the Interior to issue regulations providing for the management of the wild horses and burros," effected a taking of their property because they were (1) required to provide water to wild horses and (2) prohibited from fencing their water sources in a way "that would permit cattle access to the water but prevent wild horses from having access." *Fallini*, 56 F.3d at 1380. The Court of Federal Claims granted summary judgment to the government, but the Federal Circuit vacated on statute of limitations grounds, never reaching the merits. *Id.*

[27] On October 3, 1983, the Fallinis sent a bill to the Bureau of Land Management seeking compensation for the water consumed by the wild horses. *Fallini*, 56 F.3d at 1381. That date, the Federal Circuit indicated, represented when the "'permanent nature' of the taking was evident to the Fallinis . . . ." *Id.* at 1382.

contention that their suit was timely filed, the Fallinis argued, among other things, that every drink taken by a wild horse since 1971 "constituted a separate taking." *Id.* The Federal Circuit determined that the Fallinis could not overcome the six-year limitations bar set forth in 28 U.S.C. § 2501. *Id.* at 1381, 1383.

Analogizing the Fallinis' argument to a taking of real property, the Federal Circuit explained that when the government enacts legislation requiring a beachfront property landowner to allow others to walk along the beach, thereby creating an easement across the landowner's property, a separate and distinct taking of property does not occur each time a pedestrian utilizes the easement. Id. at 1382 (citing *Nollan*, 483 U.S. at 831[28]). The Federal Circuit reasoned that the "only governmental action" that constituted a taking was "the government's directive forbidding the Fallinis from shooing the horses away from the water that the Fallinis have produced at their developed water sources," not the recurrence of "every new drink taken by every wild horse." *Id.* at 1383. That directive occurred, the Federal Circuit indicated,

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Nevertheless, the Fallinis, in order to overcome the statute of limitations bar, advanced the theory that they experienced a continuous taking throughout the previous decade and that the taking "did not stabilize until November 28, 1986, a date slightly less than six years before the filing of their suit." *Id.* at 1381. The Federal Circuit rejected this argument. *Id.* at 1382.

[28] The government distinguishes *Nollan*, arguing that the Supreme Court did not address the issue of ripeness and that, as was the case in *Loretto*, physical entry onto the property at issue had already occurred. Here, the government emphasizes that no one has entered upon plaintiffs' property at the time plaintiffs filed their complaint.

in 1971 when Congress enacted the Wild Free-Roaming Horses and Burros Act, which the Fallinis themselves identified as the "governmental action that prevented them from fencing the horses away from their water sources . . . ." *Id.* Because the Fallinis "admit[ted] that they suffered injury from the date of enactment" of the Wild Free-Roaming Horses and Burros Act, the Federal Circuit concluded that, "[f]or purposes of claim accrual, such a taking occurs on the date of enactment of the legislation." *Id.* at 1382-83. Although defendant here contends that no physical taking would ever occur if Dallas did not access plaintiffs' property, *Fallini* suggests otherwise, instructing that, for purposes of determining when a taking occurred, a court must focus upon the date of "enactment of the statute" and not the individual intrusions upon the property committed thereafter.[29] *Id.* at 1383; *see also id.* (noting that the proper focus, for statute of limitations purposes, was upon the time of the government's action, not the time of the

[29] The *Fallini* court noted that "[i]f the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking might well be different. But the horses are not agents of the Department of the Interior . . . ." 56 F.3d at 1383; *see also Colvin Cattle Co. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006) ("[B]ecause wild horses are outside the government's control, they cannot constitute an instrumentality of the government capable of giving rise to a taking."); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986) (en banc) (emphasizing the "fallacy" in an argument that "wild horses are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of . . . .property").

consequences flowing therefrom (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980))).

The *Fallini* court left open the question of what governmental action would constitute a taking if an intrusion occurred by an agent or instrumentality of the government. *Id.*; *supra* note 29. That situation arose in *Kemp*, which, like *Fallini*, raised a statute of limitations issue. *See* 65 Fed. Cl. at 822. Unlike Fallini, Kemp involved actions taken by the National Park Service ("NPS") to acquire the plaintiff's property following the enactment of a federal statute authorizing the expansion of Rocky Mountain National Park.[30] *Id.* at 819; *see* Act of Dec. 22, 1980, Pub. L. No. 96-560, § 111(a), 94 Stat. 3265-274 (revising the boundaries of Rocky Mountain National Park). The plaintiff alleged that the government used her property once the Act became law and did so for approximately nineteen years. *Kemp*, 65 Fed. Cl. at 823; *see also id.* at 822 (recounting the plaintiff's allegations that, beginning on December 22, 1980, the National Park Service "began to allow 'the public to traverse and use the land without [her] permission or acquiescence'"). Notwithstanding her allegation that "'[u]pon the effective date of the Act, the United States utilized the property as its own and for public use as part of the [National Park],'" the plaintiff did not file suit until after the temporary taking ended. *Id.* at 823 (alterations in original) (quoting the complaint).

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[30] The NPS is a federal agency within the United States Department of the Interior. *See* 16 U.S.C. § 1 (2006) ("There is created in the Department of the Interior a service to be called the National Park Service . . . .").

The *Kemp* court, relying upon *Fallini*, reiterated that "[w]hen the taking is effected by legislation, the taking accrues on the enactment of the legislation introducing the physical taking." *Id.* at 822. It explained: "[T]he taking accrued when the government legislation allowed [Rocky Mountain National Park] to start using the land as its own and deprived [plaintiff] of her right to exclude." *Id.* at 824. That right to exclude, the *Kemp* court reasoned, was extinguished upon the legislative enactment, not on the date that the public began traversing across the property. *See id.* at 825. Thus, *Kemp* suggests that the NPS's activities or encroachments on the property that occurred subsequent to the legislative enactment were irrelevant for the purpose of determining when the plaintiff's claim accrued because "only the *original act permitting the* public access is considered a compensable taking." *Id.* (emphasis added). Accordingly, even if no one entered the plaintiff's property within six years after the Act became law, the triggering action nevertheless remained the legislation's enactment: "Ms. Kemp's claim is barred by the statute of limitations because it was not filed within six years of the date the claim first accrued[] (December 22, 1980, the date on which the government expanded the boundaries of the National Park and began to use Ms. Kemp's land) . . . ." *Id.* at 824; *see also Hair v. United States*, 52 Fed. Cl. 279, 283 (2002) (concluding that takings claims associated with the San Francisco Peace Treaty, which was ratified by the United States in April 1951 and waived all reparations claims of the Allied powers arising out of any actions taken by Japan during World War II, were untimely because "a taking claim based on a treaty

accrues 'when the taking occurs,'" *i.e.*, when the treaty extinguished the plaintiff's legal rights against the government (quoting *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1482)).

The same principle is evident in other cases. For example, in *Whitney Benefits, Inc.*, the Federal Circuit reversed a United States Claims Court determination that "no taking could have occurred up to the date of hearing and it was then uncertain whether a taking ever would occur" as a result of Congress's enactment of the Surface Mining Control and Reclamation Act. 752 F.2d at 1554. It explained: "The complaint alleges a *legislative taking, effective to accrue the claim on the date of enactment of the statute*, but if a taking occurred on any later date, the court would allow amendment, and the theory of dismissal was and could only be that it had not occurred at all and could not have." *Id.* at 1558 (emphasis added). The Federal Circuit made a similar determination in *Maritrans, Inc.*, reversing a Court of Federal Claims ruling that enactment of the Oil Pollution Act of 1990 ("OPA90") did not ripen a takings claim related to seven vessels. 342 F.3d at 1359, 1361. The Federal Circuit reasoned: "Upon enactment, OPA90 interfered in a 'clear, concrete fashion' with Maritrans' 'primary use' of its tank barges . . . . Maritrans suffered actual injury upon enactment of OPA90. At that time, the useful lives of its single hull tank barges were shortened from sixty years to between five and twenty-five years." *Id.* at 1360-61. Furthermore, although ripeness was not at issue in *Loretto*, implicit in the Supreme Court's decision was the recognition that the plaintiff's cause of action accrued when the New York legislature enacted a regulation preventing landowners from

"'interfer[ing] with the installation of cable television facilities upon his property or premises . . . .'" 458 U.S. at 423 (quoting N.Y. Exec. Law § 828 (McKinney Supp. 1981-1982)); *see also Cienega Gardens v. United States*, 265 F.3d 1237, 1244 (Fed. Cir. 2001) (indicating that a taking occurs when government action, "although not encroaching upon or occupying private property, still affects and limits its use").

The government contends that *Loretto* is distinguishable because "a third party had in fact entered the plaintiff's property and placed cable wires on the structure." Def.'s Reply 26. Although the telecommunications company "routinely obtained authorization for its installations from property owners" before the New York legislature enacted the regulation at issue in *Loretto*, 458 U.S. at 423, this fact alone is not dispositive. Whereas the property owners previously negotiated with the telecommunications company for compensation that equaled five percent of the gross revenues realized from the property, the regulation limited the property owners' ability to "demand payment . . . 'in excess of any amount which the [State Commission on Cable Television] . . . by regulation, determine[d] to be reasonable.'" *Id.* (second alteration in original) (quoting N.Y. Exec. Law § 828). The "'character of government action'" in *Loretto*, viz., the enactment of a regulation that eviscerated the property owner's right to exclude the telecommunications company from installing its equipment, was what the Supreme Court determined "so frustrate[d] property rights that compensation must be paid." *Id.* at 426; see also *id.* (explaining that the character of the government action is "not only . . . an important factor in resolving whether the

action works a taking *but also is determinative*" (emphasis added)).

A claim accrues when the government, "by some specific action, [takes] a private property interest for a public use without just compensation." *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1481. Here, plaintiffs allege that their leases allow only a single use of Love Field, namely air transportation, and that the WARA precludes their use of the premises for air transportation purposes. Plaintiffs are correct that they allege in their complaint a legally cognizable legislative taking arising from Congress's prohibition of the sole economic use of their leasehold property and that the WARA deprived them of the ability to exclude persons on the day it was enacted.

The court determines that plaintiffs' claim was ripe at the time they filed their complaint. The principles derived from *Loretto* and discussed in *Fallini*, *Kemp*, *Maritrans, Inc.*, and *Whitney Benefits, Inc.* indicate that a claim alleging that the WARA effected a taking became ripe on October 13, 2006, the date the legislation became law.[31] To hold otherwise would subject plaintiffs to a "Catch-22" wherein a

[31] Plaintiffs, citing Supreme Court and Federal Circuit precedent, maintain that "the deprivation of the right to exclude, not the actual 'boots on the ground' physical occupancy . . . constitute[s] the taking." Pls.' Reply Gov't's Opp'n Cross-Mot. ("Pls.' Reply") 22 (discussing *Kaiser Aetna* and *Whitney Benefits, Inc.*). In light of plaintiffs' representation that Dallas completed demolition of the Lemmon Avenue Terminal gates in September 2010, amendment of the complaint to incorporate this allegation, in accordance with RCFC 15(a)(2), remains available to plaintiffs. *See Whitney Benefits, Inc.*, 752 F.2d at 1558.

cause of action accrues and the statute of limitations begins running, but a claim cannot be filed because it is not ripe. Were the court to adopt defendant's position, plaintiffs might ultimately find themselves facing a statute of limitations defense that the plaintiffs in *Fallini* and *Kemp* could not overcome.

Furthermore, the court rejects the government's argument that the holding in *Williamson County Regional Planning Commission* warrants a finding in this case that plaintiffs' claim is unripe. In *Williamson County Regional Planning Commission*, Tennessee law permitted a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking. 473 U.S. at 194. The respondent, however, did not seek compensation through the procedure provided under state law. *Id.* Because the respondent failed to utilize that procedure, the Supreme Court determined that the respondent's claim was not ripe. *Id.* at 196- 97. Specifically, it indicated that no constitutional violation could occur "until just compensation has been denied," *id.* at 194 n.13, explaining that "the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking," *id.* at 195. In other words, the state action was "not 'complete' until the State fail[ed] to provide adequate compensation for the taking." *Id.* Until such time as the respondent showed that the state procedure was either unavailable or inadequate, its taking claim was premature. *Id.* at 196-97.

Here, neither Dallas nor any state legislative body created a mechanism through which plaintiffs could

seek compensation for the taking of their property interests. Plaintiffs did not institute suit in state court claiming an inverse condemnation or pursue an alternative remedy under Texas law because they contend that Dallas is acting as an agent of the United States. Indeed, plaintiffs claim that the WARA, rather than a Texas statute, effected a taking of their property, and the WARA sets forth no special procedure for plaintiffs to invoke in order to obtain compensation. Accordingly, plaintiffs have availed themselves of the process provided by the Tucker Act. The Supreme Court has held that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.* at 195. To determine whether a remedy exists under the Tucker Act for a claim arising out of a taking pursuant to a federal statute, courts must ascertain whether Congress, in the statute in question, withdrew the Tucker Act grant of jurisdiction to entertain a suit founded upon the Constitution. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). Defendant does not claim that the WARA in any way affects the Tucker Act, and nothing in the statute or its legislative history indicates that Congress intended to withdraw Tucker Act jurisdiction. *See* 120 Stat. at 2011-14; *see also Ruckelshaus*, 467 U.S. at 1017 (explaining that a repeal of the Tucker Act's jurisdiction by implication is disfavored); *Acceptance Ins. Cos.*, 503 F.3d at 1336 (stating that "withdrawal of Tucker Act jurisdiction by implication is disfavored, which means that a court must find that the statute at issue . . . reflects an unambiguous congressional intent to displace the Tucker Act's waiver of sovereign immunity"). Thus,

the Supreme Court's holding in *Williamson County Regional Planning Commission* that a property owner must first utilize procedures created by the state to seek just compensation as a result of conduct by a state municipality planning commission is inapposite here.

B. Defendant's Motion

Having determined that plaintiffs' claim is ripe, the court turns to defendant's motion. Defendant argues that no taking in contravention of the Fifth Amendment has occurred because the United States did not acquire any land, airport facilities, or leasehold rights. Defendant also contends that the United States did not order Dallas to acquire plaintiffs' property interests. Furthermore, defendant argues that the WARA does not contain any regulatory limitations on the use of plaintiffs' property. Before it addresses the substance of defendant's argument, the court must determine whether the exhibits appended to the parties' briefs require the court to convert defendant's motion into one for summary judgment under RCFC 56. *See* RCFC 12(d).

1. The Parties' Exhibits Are Not "Matters Outside the Pleadings" That Require Conversion of Defendant's Motion to a Motion for Summary Judgment

As discussed in Part III.C, *supra*, the court has discretion to consider materials beyond the pleadings and "is not limited to the four corners of the complaint" when ruling upon an RCFC 12(b)(6) motion. 5B Wright & Miller, *supra*, at § 1357 (discussing Rule 12(b)(6) of the Federal Rules of Civil Procedure

("FRCP")). Courts "have allowed consideration of matters incorporated by reference or integral to the claim . . . ." *Id.*; *see also In re Syntex Corp. Secs. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996) ("When deciding a motion to dismiss, a court may consider the complaint and 'documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994))). "Where a complaint refers to a document but does not incorporate it, a party may submit a copy of the document to support or oppose a motion to dismiss as long as the document is 'central' to the complaint." *P.D. v. Mt. Vernon Cmty. Sch. Corp.*, No. 1:07-CV-1048-DFH-JMS, 2008 WL 1701877, at *1 (S.D. Ind. Apr. 10, 2008).

Here, defendant appended to its motion the following documents: the Joint Statement; Senate Report No. 109-317, a Senate Committee on Commerce, Science, and Transportation report; and the declaration of J. Michael Nicely, the manager of the Texas Airport Development Office in Fort Worth for the Federal Aviation Administration ("FAA"). Additionally, defendant appended to its reply brief copies of plaintiffs' brief filed in the antitrust action before the Northern District of Texas and supplements to the Master Lease. In support of their crossmotion, plaintiffs appended a declaration from Mr. Naul, the Contract, correspondence between plaintiffs and Dallas related to the property encompassed by the Master Lease, a state court final judgment granting Dallas a writ of possession of the premises encompassed by the Master Lease, and the Dallas City Council Resolution.

None of these materials warrants conversion of defendant's motion into one for summary judgment. First, these materials clarify, rather than add anything new to, the allegations in the complaint. *See Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993) (rejecting an argument that materials were outside the pleadings on an FRCP 12(b)(6) motion where the documents "did nothing more than verify the complaint" and "added nothing new, but, in effect, reiterated the contents of the complaint itself"). Second, these materials fall within the "narrowly defined category of materials a court can consider without converting a[n FRCP] 12(b)(6) motion to one for summary judgment. This category includes exhibits attached to the complaint, undisputed documents relied upon by the plaintiff, other items appearing in the record of the case, and matters of public record." *Stuler v. United States*, No. 07-642, 2008 WL 957009, at *2 (W.D. Pa. Apr. 8, 2008) (citation omitted). Senate reports, court filings, and resolutions passed by municipalities are public records. *See Biomed. Patent Mgmt. Corp. v. Cal., Dep't of Health Servs.*, 505 F.3d 1328, 1331 (Fed. Cir. 2007) ("[C]ourt filings . . . are matters of public record . . . ."); *Jones v. Butler*, No. 09-03128, 2009 WL 2461885, at *5 (E.D. Pa. Aug. 11, 2009) (recognizing that a city council resolution is "unquestionably a matter of public record"); *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072, 1079 (E.D. Cal. 2007) ("[T]he Senate Report is a public record . . . ."). The Joint Statement, which is publicly accessible via Love Field's Internet website, see "Agreement Reached on Love Field," at http://www.dallas-lovefield.com/pdf/Wright_Amend_Agreement061506.

pdf (last visited Feb. 11, 2011), as well as Mr. Nicely's and Mr. Naul's declarations, are no different. *See United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) ("Public records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet." (quoting *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999))). Under Texas law, the Joint Statement is a "local government record," a "document . . . created or received by a local government or any of its officers or employees pursuant to law . . . in the transaction of public business." Tex. Loc. Gov't Code Ann. § 201.003 (West 2008). Local government records are subject to public information access laws. *See id.* § 201.009(a). "Public information" includes, among other things, "information that is collected, assembled, or maintained . . . in connection with the transaction of official business," *id.* § 552.002(a)(1), by a "municipal governing body," *id.* § 552.003(1)(A)(iii). Additionally, defendant utilizes Mr. Nicely's declaration to indicate that, as of November 18, 2008, the Lemmon Avenue Terminal gates had not been demolished. *See* Def.'s Mot. Ex. C at 1 (Decl. J. Michael Nicely ¶ 5). Such an eyewitness observation, the court finds, "reflect[s] common knowledge," *Olson v. Ford Motor Co.*, 481 F.3d 619, 629 (8th Cir. 2007), and courts may, among other things, "take notice of matters of common observation," *N.Y. Indians v. United States*, 170 U.S. 1, 32 (1898). Furthermore, Mr. Naul's declaration merely supplements, rather than adds new material to, the complaint. Accordingly, the court's consideration of these materials does not require

conversion of defendant's motion into one for summary judgment.

2. Plaintiffs Have Identified a Property Interest That Was Allegedly Taken

Under the Federal Circuit's two-step approach to analyzing takings claims, plaintiffs must first identify the property interest allegedly taken. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Ammon*, 209 F.3d at 1374. Plaintiffs allege that Love Terminal Partners subleased nine acres of the area covered by the Master Lease "for the purpose of providing commercial air passenger service at Love Field," Compl. ¶ 6, and that Virginia Aerospace eventually acquired the Master Lease, "subject to the [Love Terminal Partners] sublease, for the purpose of providing commercial passenger airline service at Love Field, in cooperation with [Love Terminal Partners]," *id.* ¶ 8; *see also* Pls.' Cross-Mot. 12-13 (arguing that the complaint alleges that plaintiffs "own property in the form of their Love Field leases (including the [Lemmon Avenue] Terminal, gates, and the right to fly from these gates)"). Thus, plaintiffs assert, they have identified a property interest for purposes of the Fifth Amendment:

> The first step of the inquiry is easily satisfied: the commercial leases, the [Lemmon Avenue] Terminal, gates, and the right to fly are property within the meaning of the Fifth Amendment. [Virginia Aerospace] is the assignee of the original Braniff Airlines 1955 lease, which now covers 26.8 acres, and [Love Terminal Partners] holds a sublease of nine of those acres, on which it has constructed the

> [Lemmon Avenue] Terminal. Both leases allow use of these airport premises for air transportation purposes only. [Love Terminal Partners] constructed the Terminal with six gates in 1999.

Pls.' Cross-Mot. 13 (footnotes omitted); *see also id.* at 14 (noting that the complaint alleges that plaintiffs "each held a leasehold interest at Love Field" at the time the WARA was enacted).

> As the Federal Circuit observed, the Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment. Instead, "existing rules and understandings" and "background principles" derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking. These existing rules often involve and define "the citizen's relation to the physical thing, as the right to possess, use and dispose of it."

Conti, 291 F.3d at 1340 (quoting *Lucas*, 505 U.S. at 1030; *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)) (citation & footnote omitted); *accord Acceptance Ins. Cos.*, 583 F.3d at 857; *see also Hage v. United States*, 35 Fed. Cl. 147, 168 (1996) ("Property rights are generally defined by state law . . . ."). Here, plaintiffs maintain that Love Terminal Partners, at the time the WARA was enacted, possessed the exclusive right to use, rent, alter, renovate, and lease space within the Lemmon Avenue Terminal building. Plaintiffs further argue that Dallas, at no time, had

the right to enter onto the property. Plaintiffs further explain that their business plan included expansion of the terminal and related air passenger services beyond the nine acres subleased by Love Terminal Partners as air traffic at Love Field increased.

It is abundantly clear that plaintiffs possess a valid property interest. In *Travis Central Appraisal District v. Signature Flight Support Corp.*, the Court of Appeals of Texas recognized that the ownership interest at issue in that case was "an ownership interest in a *leasehold*. Because the City [of Austin] own[ed] the improvements but lease[ed] them to appellees, it is perfectly correct to refer to appellees' ownership interests in the leased facilities and allow them the right to 'sell' that leasehold interest."[32] 140 S.W.3d 833, 841 (Tex. App. 2004); *see also Panola County Appraisal Dist. v. Panola County Fresh Water Supply Dist. No. 1*, 69 S.W.3d 278, 283 (Tex. App. 2002) ("A leasehold interest is an ownership right in land that belongs to the lessee."), 284 ("An ownership interest in a leasehold is the legal right to possess that property for a set period of time . . . ."); Def.'s Reply Ex. B at 4 (Master Lease art. II ¶ 1 (providing that Dallas "hereby leases and rents to Lessee for Lessee's

[32] The Master Lease provides that, upon its termination, title to "all permanent improvements, including but not limited to buildings, structures, wings, or annexes to buildings, paved areas, utility lines, roads, fences, walls, or anything affixed to any building in such a way as to become a fixture under Texas law . . . erected on the Premises, whether by Lessor or Lessee or any sub-lessee, shall immediately vest in Lessor," subject to automatic revestment of title in Lessee or any sub-lessee under certain conditions. Def.'s Reply Ex. B at 27 (Master Lease art. XVII ¶ 1).

exclusive use, and Lessee hereby agrees to hire and take, . . . the Premises")). As the Court of Appeals of Texas further noted, the ownership of a leasehold interest

> has a measurable fair market value because there are people who are willing to purchase and do purchase that right to possess the property under the terms of the lease. Furthermore, the assignee of the leasehold may in turn convey his or her ownership right to another person and obtain the fair market value existing at that time.

Panola County Appraisal Dist., 69 S.W.3d at 284. *See generally Gen. Motors Corp.*, 323 U.S. at 373(recognizing that just compensation was required by the Fifth Amendment in a case where the federal government deprived a tenant, which held a long-term lease, of occupancy of portions of a leased building); *see also U.S. Trust Co. of N.Y.*, 431 U.S. at 19 n.16 (recognizing that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid"); *Sun Oil Co*., 572 F.2d at 818 (stating that "a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof").

Plaintiffs assert that the complaint adequately alleges their ownership of the leasehold, noting that it describes the lease and the property interests acquired by both Love Terminal Partners and Virginia Aerospace. Defendant does not appear to challenge the premise that plaintiffs own a property right in their leases. Rather, it contends that Dallas, not plaintiffs,

owns the Lemmon Avenue Terminal and that the government neither acquired nor assumed any rights or responsibilities under plaintiffs' leases with Dallas. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003). Plaintiffs have both identified and alleged possession, through their ownership of their leasehold interests, of "a 'stick in the bundle of property rights,'" *Ammon*, 209 F.3d at 1374, at the time of the purported taking.

3. Plaintiffs Have Alleged Government Appropriation of Their Ownership in the Leaseholds

"If a property right has been established, the court must then determine whether the Government has taken it in part or in whole." *Griffin Broadband Comm'ncs, Inc. v. United States*, 79 Fed. Cl. 320, 323 (2007). Defendant, as noted above, claims that no taking has occurred. First, it states that the *sine qua non* of a physical taking is the requirement that the plaintiff submit to the physical occupation of property and emphasizes that the United States has not entered upon the leasehold property. Next, defendant asserts that the WARA effected no regulatory taking of plaintiffs' leasehold property because the legislation placed no limit on how plaintiffs could use their property. Third, defendant emphasizes the significance of the absence of any reference to plaintiffs or their leasehold interests in the WARA.

Defendant's arguments ignore the fact that the Love Terminal Partners and Virginia Aerospace leases permitted use of the premises only for air

transportation purposes. Plaintiffs contend that the WARA's prohibition of such uses and requirement that Dallas acquire the leases and demolish the passenger gates so that the leased premises can never again be used for air transportation purposes clearly establish a legislative taking. Specifically, plaintiffs allege in their complaint that (1) the Master Lease permits the sole use of the Love Field premises for air transportation, (2) the WARA precludes all uses for that purpose, (3) the WARA requires that Dallas acquire plaintiffs' leases in part or in whole, and (4) Dallas must, pursuant to the WARA, demolish the passenger gates of the Lemmon Avenue Terminal so that those gates can never again be used for air passenger service. Plaintiffs claim that the WARA's legislative prohibition on the sole economically beneficial use of the premises constitutes a per se taking under Lucas. Additionally, plaintiffs assert a claim for a physical taking because the WARA requires the physical demolition of the passenger gates at the Lemmon Avenue Terminal. Thus, the court determines that plaintiffs sufficiently allege that the government appropriated their ownership in their leaseholds. Next, the court addresses whether plaintiffs have stated a takings claim by addressing their physical and regulatory takings theories.

4. Plaintiffs' Complaint States a Takings Claim

As explained in Part III.C, *supra*, a motion made pursuant to RCFC 12(b)(6) "challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced." *Advanced Cardiovascular Sys., Inc.*, 988 F.2d at 1160. Plaintiffs

argue that their complaint sufficiently alleges a claim for relief, asserting that a physical taking occurred because the WARA required the physical demolition of the passenger gates at the Lemmon Avenue Terminal. Alternatively, plaintiffs assert that the WARA effected a regulatory taking on grounds that it legislatively prohibited the sole economically beneficial use of the premises. As the Supreme Court has recognized, "[c]onsideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well" because neither inquiry encompasses the other. *Yee*, 503 U.S. at 537. Nevertheless, each inquiry "might be subsidiary to a question embracing both—Was there a taking?" *Id.* Thus, plaintiffs' position that the WARA effected a taking in two different ways reflects their advancement of "separate *arguments* in support of a single claim," rather than separate claims. *Id.* at 535; *see also Acceptance Ins. Cos.*, 583 F.3d at 854 ("A 'taking' may occur *either* by physical invasion *or* by regulation." (emphasis added)); *cf. Estate of Hage*, 82 Fed. Cl. at 211-13 (determining that the government effected both physical and regulatory takings of the plaintiffs' property).

a. Plaintiffs' Complaint States a Claim for a Physical Taking

Plaintiffs allege that a physical taking of their leasehold interest occurred when their legal right to exclude was extinguished, asserting that Dallas was acting pursuant to a federal mandate set forth in the WARA and, as such, was an agent of the federal government. *See Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc) (explaining that

"when the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions"). By contrast, defendant maintains that plaintiffs failed to allege that the United States physically invaded or occupied their property. According to defendant, any limitation established by the WARA were directed at Dallas, not plaintiffs.

In support of its position, defendant relies upon *Loretto* and that decision's emphasis upon a physical intrusion that, according to defendant, had not occurred in this case at the time plaintiffs filed their complaint. Defendant suggests that *Loretto* stands for the proposition that a physical taking is not established until the physical intrusion reaches the level of a permanent physical occupation. According to defendant,

> [i]n *Loretto*, unlike the instant case, a third party had in fact entered the plaintiff's property and placed cable wires on the structure. Plaintiffs must admit that, to the contrary, the City of Dallas ha[d] not demolished the terminal gates on the Lemmon Avenue facility. . . . [T]he language of *Loretto* makes clear that a physical taking is not established until 'the physical intrusion reaches the extreme form of a permanent physical occupation.' Here, there [wa]s no physical intrusion, let alone a physical

> intrusion that represents a permanent physical occupation.[33]

Def.'s Mot. 26-27 (footnote added) (citation omitted).

Yet, the *Loretto* Court addressed whether the New York statute authorizing a telecommunications company to install equipment on private property without interference from the landowners effected the physical taking. That a physical intrusion had already occurred was not relevant to the *Loretto* Court's analysis. In its decision, the Supreme Court held that "a permanent physical occupation *authorized by government* is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426 (emphasis added). In so holding, the Supreme Court implicitly recognized that the statutory enactment granting the telecommunications company entry onto the property to install its equipment—and not the actual, physical entry by the telecommunications company—triggered the extinguishment of what it previously termed the property owner's "'right to exclude,'" which is "universally held to be a fundamental element of the property right," *Kaiser Aetna*, 444 U.S. at 180. Therefore, *Loretto* suggests that a court's focus is upon the government's enactment of legislation that deprives a landowner of one of the sticks in his bundle of rights. In this case, plaintiffs allege that the WARA authorized Dallas to demolish the Lemmon Avenue Terminal gates and precluded them from excluding Dallas from entry onto

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[33] As previously noted, Dallas ultimately demolished the Lemmon Avenue Terminal gates. As discussed in Part IV.C.4.c.iv, *infra*, Dallas acted pursuant to the express language set forth in the WARA.

their property. These allegations are sufficient to state a takings claim. Thus, plaintiffs' claim is not predicated upon any future entry by Dallas onto the premises.

The Supreme Court's decision in *Nollan* does not suggest otherwise. There, the Supreme Court observed that "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 832. In that case, the plaintiffs leased, with an option to buy, beachfront property that contained a small bungalow that had fallen into disrepair. Id. at 827. Their option to buy "was conditioned on their promise to demolish and replace" the bungalow, actions that could not be accomplished absent a coastal development permit from the California Coastal Commission ("CCC"). Id. at 828. The plaintiffs applied to the CCC for a permit, and the CCC recommended issuance of the permit subject to a condition that the plaintiffs "allow the public an easement to pass across a portion of their property . . . ." *Id.* Challenging the CCC's condition, the plaintiffs asserted that it constituted a taking, and they successfully obtained a writ of mandamus from the Ventura County Superior Court directing that the permit condition be stricken.[34] *Id.* at 829. While the CCC's appeal to the California Court of Appeal was pending, the plaintiffs tore down the bungalow, built

[34] The California Court of Appeal reversed. *See Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719 (1986), rev'd, 483 U.S. at 825.

a new house, and purchased the property, actions of which the CCC was not aware. *Id.*

The taking in *Nollan* did not occur when any individual entered upon or traversed across the plaintiffs' property. Rather, it occurred when the CCC conditioned issuance of the permit upon the plaintiffs' forfeiture of their right to exclude others from passing across their property:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to build their house on their agreeing to do so, we have no doubt there would have been a taking. . . . We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

Id. at 831 (quoting *Loretto*, 458 U.S. at 433).

Here, the fact that Congress chose Dallas as its agent to demolish the gates, rather than assign that responsibility to the FAA or any other federal entity, does not relieve defendant of its takings liability. It is well established that the United States may incur takings liability when another entity acts as its agent. *See, e.g., Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940) ("[A]ction which constitutes the taking of property is within [the government's] constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus

validly conferred. The action of the agent is 'the act of the government.'" (quoting *United States v. Lynah*, 188 U.S. 445, 465 (1903)); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1363 (Fed. Cir. 2005) (stating that "when separate corporate entities act for the United States, the United States is liable for their takings" and that "when state agencies act as agents of the United States, the United States may incur takings liability"); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1196 (Fed. Cir. 2004) (recognizing that stateimposed restrictions upon property may be attributed to the federal government for purposes of a takings analysis where the state officials acted as agents of the federal government or pursuant to federal authority). As the Federal Circuit stated in Preseault, where "the Federal Government authorized and controlled the behavior of the State[,] . . . the consequences properly fall there." 100 F.3d at 1531. It added:

> Both the State and the Federal Governments were fully invested in the effort . . . . It would be absurd to deny the Preseaults their Constitutional rights on the grounds that the State has concluded it was the Federal Government who did it, and the Federal Government has concluded it was the State. In sum, the Government cannot now point its finger at the State and say 'they did it, not us.' As in *Hendler*, when the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions.

Id. at 1551.

Dallas previously and successfully argued that it was required to demolish the Lemmon Avenue Terminal gates pursuant to the WARA, *see Love Terminal Partners, L.P.*, 256 S.W.3d at 897, thereby effectively asserting that it was acting pursuant to a federal mandate. Here, defendant contends that the WARA imposed no such mandate and that plaintiffs' dispute rests with Dallas, rather than the federal government. In essence, plaintiffs find themselves in the midst of the same finger-pointing to which the Federal Circuit referred in *Preseault*.

The ruling in the Northern District of Texas makes clear that Dallas could not institute direct condemnation proceedings and demolish plaintiffs' gates without the authority granted to it under the WARA because such actions would have been anticompetitive in nature and therefore contrary to the Sherman Antitrust Act of 1890. The Northern District of Texas, acknowledging Dallas's obligations under the WARA, explained that antitrust liability did not attach to Dallas, as well as the co-defendants in that case, because their "actions . . . [we]re compelled by the [WARA], including by the Contract that the [WARA] incorporates. Congress would not have endorsed the Contract and then have subjected defendants to antitrust liability for acting under its aegis." *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 560. Thus, plaintiffs have sufficiently alleged that the WARA extinguished their right to exclude Dallas, which was acting as an agent of the federal government, from demolishing the Lemmon Avenue Terminal and that, consequently, the federal

government effected a taking of their property interests without just compensation in contravention of the Fifth Amendment. Accordingly, plaintiffs state a takings claim based upon their theory that the WARA subjected them to a physical taking of their property.

b. Plaintiffs Are Entitled to Offer Evidence in Support of Their Regulatory Takings Theory

Plaintiffs allege that the WARA, which was "intended to place a limit on commercial passenger service at Love Field by prohibiting the use of the 26.8 acres leased by [plaintiffs] for commercial passenger service," requires the demolition of "all of the passenger gates at [Love Terminal Partners'] existing terminal building to ensure that that facility (as well as the [Virginia] Aerospace lease) can never again be used for passenger service." Compl. ¶ 9. Plaintiffs further allege that enactment of the WARA precluded them from utilizing "for air transportation purposes" the Lemmon Avenue Terminal, Virginia Aerospace's lease, and Love Terminal Partners' sublease. *Id.* ¶ 10. In other words, according to plaintiffs, the WARA's legislative prohibition on the only economically beneficial use of the premises rises to the level of a per se taking under *Lucas*.

Both the Joint Statement and the Contract reflect the signatories' intent to reduce "the number of gates available for scheduled passenger air service at [Love Field] . . . from the 32 gates envisioned in 2000 to 20 gates." Def.'s Mot. Ex. A at 1 (Joint Statement ¶ 3). According to defendant, one objective of the WARA was limiting the number of gates operating at Love

Field, particularly since the results of an environmental study showed that reducing the number of terminal gates from thirty-two to twenty would be equivalent to the then-existing thirty-two gates given the use of larger airplanes for longer-haul flights.[35] Defendant asserts, however, that the WARA did not prohibit the designation of the Lemmon Avenue Terminal gates as six of the twenty gates that could be used for passenger air service. In fact, defendant theorizes, Dallas could have contracted with plaintiffs to add additional gates at the Lemmon Avenue Terminal and transfer the entire Love Field airport operations to the Lemmon Avenue Terminal. According to defendant, the only limitation imposed upon Dallas would be that Dallas continue allocating those twenty gates to the airlines operating out of Love Field as of July 11, 2006, in accordance with the Contract. Thus, defendant argues, plaintiffs have no claim for a per se regulatory taking.

Defendant's theory, however, is unsustainable because it ignores the plain language of the Contract. The Contract, which required Dallas to acquire all or part of plaintiffs' leases and to demolish the passenger gates at the Lemmon Avenue Terminal, became part of a federal statute, plaintiffs claim, by virtue of its incorporation by reference into the WARA. Indeed, plaintiffs rely upon a holding of the Northern District of Texas, which determined that the WARA "plainly and unambiguously incorporate[d] all the rights and

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[35] Plaintiffs assert that the WARA imposed upon Dallas a mandate to eliminate gates because it would have been unlawful for the city to do so for the purpose of limiting air transportation competition.

obligations of the Contract. . . . [Section 5(a)] manifest[ed] Congress' intent to incorporate into the [WARA] the terms of the Contract executed on July 11, 2006 . . . ." *Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 558-59.

> The *Love Terminal Partners, L.P.* court determined that the WARA
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> refers without qualification to Dallas' obligation to act in accordance "with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006." The "contractual rights and obligations" that existed "as of the effective date of" the Reform Act are those included in the Contract.
>
> . . . .
>
> . . . Considering the statute as a whole, the court concludes that the Reform Act unambiguously incorporates the entire Contract.
>
> Accordingly, the court holds that the Reform Act compels [Dallas, Fort Worth, American, Southwest, and the DFW Board] to implement the terms of the Contract.

Id. at 559-60. This court is not bound by the Northern District of Texas's decision. *See AINS, Inc. v. United States*, 365 F.3d 1333, 1336 n.1 (Fed. Cir. 2004) (stating that Court of Federal Claims decisions, "like those of federal district courts, are instructive but not precedential, and do not bind future court rulings"); *see also Coltec Indus., Inc. v. United States*, 454 F.3d

1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims."). Nevertheless, the reasoning set forth by the *Love Terminal Partners, L.P.* court is persuasive.

More compelling than the ruling in the Northern District of Texas litigation is the WARA's legislative history, which indicates that the statute "would *implement a compromise agreement* reached . . . on July 11, 2006, regarding air service at Dallas Love Field." H.R. Rep. No. 109-600, pt. 2, at 3 (emphasis added). Indeed, defendant's theory that the WARA does not preclude use of the Lemmon Avenue Terminal runs afoul of the Love Field Master Plan, which formed the basis of the Contract into which the signatories entered. It is clear that moving the twenty gates to the 26.8 acres encompassed by the Master Lease would be inconsistent with the Love Field Master Plan because neither the Love Field Master Plan nor any of the plans described by the airport authorities to plaintiffs contemplated having passenger gates on those 26.8 acres. Indeed, that is precisely what is stated in the July 11, 2006 Contract. Dallas was to (1) redevelop Love Field in accordance with the Love Field Master Plan, which called for a $150-200 million terminal to be placed in the general location where the old terminal is now located; (2) acquire the Lemmon Avenue facility; and (3) demolish the Lemmon Avenue Terminal gates.

The Contract provided, among other things, that (1) the number of gates available for passenger service at Love Field would "be, as soon as practicable,

reduced from the 32 gates . . . to 20 gates and that Love Field [would] thereafter be limited permanently to a maximum of 20 gates," Pls.' Ex. 2 at 3 (Contract art. I ¶ 3), a reduction that was "consistent with a revised Love Field Master Plan, based upon the 2006 Love Field Impact Analysis Update," id.; and (2) Dallas would, "consistent with a revised Love Field Master Plan," significantly redevelop portions of Love Field, acquire all or a portion of the lease on the Lemmon Avenue facility, and "demoli[sh]. . . the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease to ensure that that facility can never again be used for passenger service," id. at 4 (Contract art. I ¶ 5). It is inconceivable that Dallas could demolish the Lemmon Avenue Terminal gates in compliance with these Contract provisions and simultaneously contract with plaintiffs to transfer all Love Field operations to a facility that was slated for demolition and could never again be utilized for passenger air service.

Plaintiffs have alleged that Congress incorporated the terms of the Contract into the WARA. As a signatory to the Contract, Dallas committed itself to, among other things, (1) redevelop Love Field in accordance with a master modernization plan,[36] (2) acquire all or part of the Lemmon Avenue Terminal "necessary to fulfill its obligations under this Contract," and (3) "demoli[sh] . . . the gates at the Lemmon Avenue facility immediately upon

[36] Plaintiffs emphasize that the Love Field Master Plan compelled the demolition of the Lemmon Avenue Terminal and precluded the future use of the 26.8 acres encompassed under the Master Lease for passenger service.

acquisition of the current lease to ensure that that facility can never again be used for passenger service." *Id.* (Contract art. I ¶ 5). The Contract's signatories committed themselves to "encourag[ing] and seek[ing] the passage of legislation necessary and appropriate to implement the terms and spirit of th[e] Contract,"[37] *id.* at 6 (Contract art. I ¶ 14), and, absent congressional action, the Contract was null and void, *id.* at 7 (Contract art. I ¶ 17). It is beyond dispute that Congress, by enacting the WARA, approved a plan for the allocation of twenty gates among the airlines that were serving Love Field as of July 11, 2006, the date of the Contract. Plaintiffs have sufficiently alleged that this plan included the acquisition of their leaseholds and demolition of the Lemmon Avenue Terminal gates.

Plaintiffs also allege that Congress, by enacting the WARA, precluded all economically beneficial use of their leased property, the Lemmon Avenue Terminal, and their right to fly commercial passenger flights from the Lemmon Avenue Terminal. Plaintiffs claim that the Master Lease restricts their activities to air transportation purposes. Compl. ¶¶ 5-6, 8. Once the WARA became law, plaintiffs maintain that "[t]hey could no longer use or market the terminal and the gates or the leased premises, because they were slated for city acquisition." Pls.' Cross- Mot. 21; *see also* Compl. ¶ 10 (alleging that "[a]s a result of Congress' passage of the [WARA] in 2006, [Love Terminal Partners'] terminal building and 9-acre

[37] The signatories to the Contract also covenanted that they would "oppose any legislative effort that [was] inconsistent with the terms of [the] Contract." Pls.' Ex. 2 at 6 (Contract art. I ¶ 14).

sublease, as well as [Virginia] Aerospace's 26.8-acre lease, cannot be used for air transportation purposes" (footnote omitted)). Indeed, plaintiffs note that their proposed business deal with Pinnacle collapsed after Dallas officials publicly announced that the Lemmon Avenue Terminal would be demolished. See supra note 10 and accompanying text.

Defendant contends that any impact plaintiffs experienced as a result of the WARA was, at most, a noncompensable derivative economic injury. It relies, in part, upon the Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), suggesting that the impact encountered in that case, which did not result in a taking, was far more direct and substantial than the impact plaintiffs experience here. In *Omnia Commercial Co.*, the plaintiff, by assignment, became the owner of a contract to purchase steel at a price below market. 261 U.S. at 507. In October 1917, before any deliveries had been made under the contract, the government "requisitioned the steel company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant'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."[38] *Id.* The plaintiff claimed that the government's action had "the effect . . . [of] tak[ing] for the public use [its] right

[38] The Supreme Court assumed, for the purposes of the case, that the officer who made the requisition order and gave the directions respecting noncompliance with the contract possessed the statutory authority to bind the government. *Omnia Commercial Co.*, 261 U.S. at 508.

of priority to the steel plate expected to be produced by the steel company and thereby appropriat[ing] for public use [its] property in the contract." *Id.* at 508.

The Supreme Court disagreed. While the contract "was property within the meaning of the Fifth Amendment," the Supreme Court reasoned that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense" in cases where property was destroyed to prevent the spread of fire. *Id.* It explained that the government, by exercising its requisition power, "dealt only with the steel company, which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the order." *Id.* at 511. As a result, "performance of the contract was rendered impossible. It was not appropriated, but ended." *Id.*; *see also id.* at 513 (stating that "the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government"). The Supreme Court elaborated:

> If, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable. What was here requisitioned was the future product of the steel company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, ipso facto, took the latter. This, however, is to confound the

> contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. . . . Plainly here there was no acquisition of the obligation or the right to enforce it.
>
> . . . .
>
> . . . If one makes a contract for the personal services of another, or for the sale and delivery of property, the government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract.

Id. at 510-11. The Supreme Court found no taking because "there was no acquisition of the obligation [to perform pursuant to the contract] or the right to enforce it," *id.* at 511, and "[f]rustration and appropriation are essentially different things,"[39] *id.* at 513. Ultimately, the government's conduct in *Omnia Commercial Co.* frustrated the plaintiff's business expectations, i.e., a large profit flowing from the purchase of low-priced steel, but did not effect a taking. *NL Indus., Inc. v. United States*, 839 F.2d 1578, 1579 (Fed. Cir. 1988).

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[39] In so holding, the Supreme Court recognized that the government "took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities." *Omnia Commercial Co.*, 261 U.S. at 513. Adopting the plaintiff's position, it reasoned, required a conclusion that "the government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its actions made impossible." *Id.* Such a position, the Supreme Court determined, was unsustainable. *Id.*

Whereas the government's requisition of steel targeted the subject matter of—and not the rights provided by—the contract at issue in *Omnia Commercial Co.*, *see* 261 U.S. at 511 ("If the steel company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract, but enforcement of the statute [under which the requisition was made and directions related to noncompliance with the contract were issued]."), the WARA, plaintiffs argue, directly targets plaintiffs' property rights. The plaintiff in *Omnia Commercial Co.* ultimately could have sought the steel that was requisitioned to the government from another source. In the instant case, however, plaintiffs are directly regulated by the WARA to the extent that Dallas has been required by the government to destroy the Lemmon Avenue Terminal gates and ensure that plaintiffs can never utilize that facility for air transportation services, the sole use authorized under the Master Lease.[40] In essence, plaintiffs assert that

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[40] Defendant emphasizes that no taking occurred in *Omnia Commercial Co.* despite the Supreme Court's recognition that the plaintiff there was directly targeted by the federal government. *See* Def.'s Reply 8 (noting that the Supreme Court in *Omnia Commercial Co.* indicated that the government "requisitioned the steel company's entire production of steel plate for the year 1918, *and directed [the Allegheny Steel Company] not to comply with the terms of [Omnia's] contract*" (quoting 261 U.S. at 507)); *id.* at 8 & n.6 (arguing that the Federal Circuit, in *Huntleigh USA Corp.*, recognized that "'in *Omnia [Commercial Co.]*, the government's actions were directed squarely at the contractual relationship that existed between Allegheny and Omnia'" and stating that the Air Transportation Security Act ("ATSA") "'had the effect of bringing to an end Huntleigh's security screening contracts with airlines'" (quoting 525 F.3d at 1373, 1381)). Yet, the *Omnia Commercial Co.* Court expressly distinguished

the WARA, by compelling Dallas to act consistently with the Love Field modernization plan, directly regulated their conduct and extinguished their rights under the Master Lease. As the United States Court of Claims observed,

> [T]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights. Nor need the government directly appropriate the title, possession or use of the properties in question since it is "the deprivation of the former rather than the accretion of a right or interest to the sovereign (which) constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all

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between requisitioning the subject matter and taking the contract: "[T]he effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government." 261 U.S. at 513. The WARA, unlike the government's actions in *Omnia Commercial Co*., did nothing to bring the Master Lease to an end. Furthermore, although the ATSA may have effectuated the end of the contracts at issue in *Huntleigh USA Corp*., none of the airlines, save for American, affirmatively terminated those contracts. 525 F.3d at 1375-76. Instead, the parties themselves "treated their contracts as terminated upon the government's full assumption of screening functions at airports," *id*. at 1375, a fact that, as discussed below, is absent in this case.

> or most of his interest in the subject matter to amount to a taking."

R. J. Widen Co. v. United States, 357 F.2d 988, 993 (Ct. Cl. 1966) (quoting *Gen. Motors Corp.*, 323 U.S. at 378) (emphasis added) (citation omitted).

Recent Federal Circuit decisions cited by the parties reflect situations in which the effects of government regulation did not deprive the plaintiff of all or most of its property interests. For example, in *Huntleigh USA Corp.*, the Federal Circuit affirmed a Court of Federal Claims decision finding no taking after Congress enacted the ATSA, legislation that transferred the responsibility for airport security screening from airlines to the federal government in the aftermath of the September 11, 2001 terrorist attacks.[41] *See* 525 F.3d at 1370. It acknowledged that Congress, which eliminated the market for airport screening functions by "concentrat[ing] all screening functions in the federal government," did not preclude the plaintiff from continuing to provide those services.[42] *Id.* at 1375. In essence, the government preempted the market but did nothing to affect the plaintiff's contract rights. As such, the Federal Circuit

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[41] The plaintiff, which was a company that provided passenger and baggage screening services at airports, had contracts with approximately seventy-five airlines for such services when the ATSA became law in November 2001. *Huntleigh USA Corp.*, 525 F.3d at 1373-74.

[42] The Court of Federal Claims noted that the various airlines with which the plaintiff contracted "allowed the contracts to expire pursuant to their terms" following the enactment of the ATSA. *Huntleigh USA Corp.*, 75 Fed. Cl. at 646.

determined that the ATSA "merely frustrated [the plaintiff's] business interests . . . ." *Id.* at 1384.

The situation implicated in *Huntleigh USA Corp.*, however, is distinguishable from what occurred in this case. First, unlike the plaintiff in *Huntleigh USA Corp.*, plaintiffs in this case allege that their contract rights—specifically, their ability to exclude—were directly affected by passage of the WARA. Second, the Master Lease, unlike the contracts in *Huntleigh USA Corp.*, did not expire pursuant to its terms after passage of the WARA. Third, as plaintiffs note, nothing in the ATSA "required the airport owners to demolish Huntleigh's airport screening equipment to ensure that it could never again be used for airport screening purposes, as the [WARA] requires with respect to [plaintiffs'] six passenger gates . . . ." Pls.' Reply 7.

Similarly, the Federal Circuit's decision in *Air Pegasus of D.C., Inc.* does not support defendant's position. There, the Federal Circuit found that no taking occurred because the plaintiff "failed to assert a cognizable property interest for purposes of the Fifth Amendment." 424 F.3d at 1215. The plaintiff, which owned and operated a heliport business in Washington, DC, signed a lease in which it was permitted to use property "*solely in the conduct of a private use and/or public use heliport/vertiport* . . . and for any uses related thereto . . . ." *Id.* at 1209. Immediately following the September 11, 2001 terrorist attacks, the FAA "used its emergency powers to shut down virtually all commercial air traffic throughout the United States" and then restricted commercial air travel within

twenty-five nautical miles of the nation's capital, thereby preventing the plaintiff from resuming its flight operations. *Id.* The plaintiff ultimately abandoned its lease and ceased operations at its Washington, DC location. *Id.*

Although the aforementioned facts appear somewhat similar to those at issue in the case *sub judice*, the case is wholly distinguishable. As a preliminary matter, the court notes that the *Air Pegasus of D.C., Inc.* case arose in the aftermath of the September 11, 2001 terrorist attacks. Conversely, the WARA arose as a congressional solution to a local problem, *i.e.*, the competition between Dallas and Fort Worth. Indeed, the legislative history of the WARA acknowledges the unique nature of Congress's involvement, noting that the Wright Amendment and subsequent legislative enactments represent "the only time Congress has intervened . . . to promulgate specific rules relating to the scope of a locally owned airport." S. Rep. No. 109-317, at 16. Next, the court finds great significance in the *Air Pegasus of D.C., Inc.* plaintiff's failure to claim that its property interest was taken by the FAA's regulation. *See* 424 F.3d at 1215 ("Air Pegasus does not appear to assert that its property was actually taken . . . ."). Instead, the plaintiff conceded that its "takings claim was really for compensation resulting from a 'derivative injury.'" *Id.* Takings jurisprudence is clear that a "derivative injury" is not compensable. Thus, while the plaintiff owned a property interest in its leasehold, *id.* at 1216, the Federal Circuit determined that Air Pegasus of D.C., Inc.

> did not itself own or operate any helicopters[and] does not allege that the FAA's restrictions regulated its operations under the lease. Instead, Air Pegasus basically alleges that the FAA, by regulating helicopters owned by third parties, frustrated its business expectations at the . . . heliport. Therefore, like the appellant in *Omnia [Commercial Co.]*, Air Pegasus, while no doubt injured by reason of the government's actions, has not alleged a taking of private property under the Fifth Amendment.

Id.

In stark contrast, plaintiffs here specifically allege that the WARA regulated their conduct under the Master Lease, precluded them from operating their business, and directed the destruction of the Lemmon Avenue Terminal gates. Thus, plaintiffs lost the "right to exclude" by operation of federal legislation. Moreover, nothing in *Air Pegasus of D.C., Inc.* suggests that the plaintiff in that case erected any improvements upon the leased premises or that the FAA mandated that the plaintiff's leased premises be demolished to ensure that those premises could never be utilized for air transportation or related services again.

The court also declines to adopt defendant's argument that *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995), *aff'g* 30 Fed. Cl. 216 (1993), provides significant guidance. There, the plaintiffs—767 Third Avenue Associates and its agent, Sage Realty Corporation—entered into leases with three organizations from the then-Socialist Federal

Republic of Yugoslavia ("SFRY") in 1981. 48 F.3d at 1576. When these organizations extended their leases ten years later, "the SFRY was experiencing significant turmoil" that eventually erupted into a bloody ethnic and civil war. *Id.* at 1577. In 1992, the United States formally acknowledged that the SFRY ceased to exist, and President George H.W. Bush issued executive orders blocking the SFRY's property and interests, and freezing its assets. *Id.* As a result, the SFRY tenants sent lease termination notices to plaintiffs, and the United States Department of the Treasury ("Treasury Department") subsequently entered and inspected the premises that the SFRY tenants previously occupied.[43] *Id.* The plaintiffs sued, alleging that the government's closure of the SFRY's offices in its building "constituted a regulatory taking of its property, consisting of the benefits of its leases . . . ." *Id.* at 1578. The Court of Federal Claims held that no taking occurred.[44] *See 767 Third Ave. Assocs.*, 30 Fed. Cl. at 221-23.

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[43] Although Treasury Department agents posted a notice on the doors of the former SFRY tenants' offices stating that the premises were closed and that access was restricted, the government granted the plaintiffs access to the premises and later removed all restrictions. *767 Third Ave. Assocs.*, 48 F.3d at 1578. In fact, at no time were the locks changed or guards placed at the doors to restrict entry. *Id.* at 1583. Moreover, plaintiffs were granted access to the premises on the one occasion they requested access. *Id.*

[44] The Court of Federal Claims determined that none of the plaintiffs had a "compensable investment-backed expectation 'to be free from government interference with [its] contract rights.'" *767 Third Ave. Assocs.*, 48 F.3d at 1578 (alteration in original) (quoting 30 Fed. Cl. at 222). Furthermore, the court held that the government's actions did not constitute a per se physical taking

The Federal Circuit affirmed, recounting numerous instances in which the government exercised its sovereign powers against other countries and reasoning that plaintiffs "could not have had a reasonable investment-backed expectation . . . that [their] leases to the SFRY organizations would proceed totally without interference by the government." *767 Third Ave. Assocs.*, 48 F.3d. at 1580. Indeed, the court emphasized that the plaintiffs could not have had a reasonable expectation of noninterference by the government in light of the possibility of changing world circumstances generally and, more specifically, the uncertain future of Yugoslavia and the instability in the Balkans, a region that succumbed to "turmoil for generations." *Id.* at 1581. Relying upon *Omnia Commercial Co.*, the Federal Circuit explained that the government's actions "did not take any property interest of [the plaintiffs]" because the SFRY tenants "still had a legal obligation to pay rent," *id.* at 1582, and the government never acquired any obligation to pay rent or prevented plaintiffs from enforcing their agreements with the SFRY, *id.* at 1583. Accordingly, the Federal Circuit concluded, the "government's actions in this case . . . did not take [the plaintiffs'] interests in the leases."[45] *Id.*

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because "the government 'did not take physical possession of the subject premises and [plaintiffs were] never physically denied access to the property on those occasions when [they] asked for access.'" *Id.* (quoting *767 Third Ave. Assocs.*, 30 Fed. Cl. at 222).

[45] The Federal Circuit also found that no per se taking occurred because the plaintiffs neither submitted to a physical occupation nor were subjected to a regulation that deprived them of all economically beneficial or productive use of their property. 48

As the Federal Circuit noted, nothing prevented the *767 Third Avenue Associates* plaintiffs from finding new tenants to replace the SFRY tenants. That is hardly the situation in the case now before the court. The demolition of the gates simultaneously destroyed plaintiffs' lease rights and any hope they had of attracting new tenants. *See supra* note 10. Moreover, the government action at issue in *767 Third Avenue Associates* did not affect the physical structure such that it could never again be utilized as rental property. As a result, the *767 Third Avenue Associates* plaintiffs were not deprived of all economically beneficial or productive use of their property. *See* 48 F.3d at 1583-84. Unlike the plaintiffs in 767 Third Avenue Associates, which were dealing with an organization from a then-Soviet bloc country whose interests ran afoul of United States foreign policy, plaintiffs in the case *sub judice* allege they suffered a taking because Dallas and Fort Worth secured congressional intervention to (1) eliminate their ability to conduct business and (2) direct Dallas to destroy improvements at the Lemmon Avenue Terminal located on their leasehold property. There were no foreign policy concerns at stake in this case. Rather, the sole concern was to resolve air transportation issues related to the operations at Love Field and DFW. In order to modernize and redevelop the airport

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F.3d at 1583. With regard to the latter, the Federal Circuit noted that the government's actions "were directed to keeping the SFRY organizations out of the property, not preventing use by [plaintiffs]." *Id.* at 1584. Indeed, the court noted, plaintiffs "might well have made other uses of the offices. It failed to request any such uses, however[, and plaintiffs'] failure to explore all possibilities serves to bar any regulatory taking claim." *Id.*

in accordance with the Love Field Master Plan, Dallas was required to acquire the 26.8 acres leased by plaintiffs and to demolish the Lemmon Avenue Terminal gates, and demolition of the gates ensured that the Lemmon Avenue Terminal could never again be used for passenger service. See Pls.' Ex. 2 at 4 (Contract art. I ¶ 5). Even assuming that Dallas did not demolish the Lemmon Avenue Terminal gates, the Contract nevertheless mandated that the leased premises never again be used for passenger air service. *See id.*

As the Federal Circuit explained in *Palmyra Pacific Seafoods, L.L.C. v. United States*, "when a party alleges that a contract has been taken, courts should distinguish between the claimed taking of the subject matter of a contract and the taking of the contract itself." 561 F.3d 1361, 1365 (Fed. Cir. 2009). The element absent from *Omnia Commercial Co., Huntleigh USA Corp.*, *Air Pegasus of D.C., Inc.*, and *767 Third Avenue Associates* is that the plaintiffs never alleged that the government regulations at issue targeted their property rights or took their contracts. Indeed, the Federal Circuit determined that these cases were virtually identical. *See Huntleigh USA Corp.*, 525 F.3d at 1381 (stating that *Air Pegasus of D.C., Inc.* "is indistinguishable from this case because in both *Air Pegasus [of D.C., Inc.]* and this case the party alleging a taking, rather than having its own property taken, saw its business interests frustrated by governmental regulation of third parties"); *Air Pegasus of D.C., Inc.*, 424 F.3d at 1216 (stating that the plaintiff, "like the appellant in *Omnia [Commercial Co.]*, . . . while no doubt injured by reason of the government's actions, has not alleged a

taking of private property"); *767 Third Ave. Assocs.*, 48 F.3d at 1581-83 (discussing *Omnia Commercial Co.*, noting that the circumstances of that case were virtually indistinguishable from the case before the Federal Circuit, and emphasizing that the government did not take any property interest). By contrast, plaintiffs have removed themselves from the circumstances presented in *Omnia Commercial Co.* and its progeny because they allege that the government specifically targeted and took their contractual rights under the Master Lease. In fact, plaintiffs assert that the WARA deprived them of all economically beneficial and productive use of their property because they could "no longer use or market the terminal and the gates or the leased premises, because they were slated for city acquisition." Pls.' Cross-Mot. 21. By asserting that the WARA extinguished their right to exclude under the Master Lease, *see supra* Part IV.B.4.a, plaintiffs present a set of facts which suggests that the WARA targeted their specific contractual right to quiet enjoyment under the Master Lease. Because plaintiffs assert that the WARA directly targeted their contract rights under the Master Lease by depriving them of all economically beneficial and productive use of their property through condemnation of their leases and demolition of the Lemmon Avenue Terminal gates, they have sufficiently alleged that this statute effected a taking and may present evidence in support of their theory.

Finally, defendant does not argue that plaintiffs, by constructing and operating the Lemmon Avenue Terminal, used their leaseholds in a manner that was harmful to public health or safety. Defendant also does

not assert that any restriction placed upon plaintiffs' use of their leaseholds merely precludes them from engaging in a use prohibited by their leases. Accordingly, no argument has been made that the nuisance exception to a taking applies in this case.

In sum, the court, which assumes that plaintiffs' well-pled factual allegations are true and indulges in all reasonable inferences in favor of the nonmovant plaintiffs, *United Pac. Ins. Co.*, 464 F.3d at 1328, concludes that plaintiffs have pled "factual content to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S. Ct. at 1949. Plaintiffs are entitled to offer evidence in support of their takings claim. *See Chapman Law Firm Co.*, 490 F.3d at 938. Accordingly, defendant's motion is denied.

C. Plaintiffs' RCFC 56 Cross-Motion

As discussed in Part III.D, *supra*, summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* RCFC 56(c). Plaintiffs argue that because the WARA mandated a legislative, physical taking of the Lemmon Avenue Terminal gates, they are entitled to partial summary judgment: "The [WARA]'s mandate that Dallas demolish the passenger gates deprives [Love Terminal Partners] of its pre-existing property right to exclude others (including Dallas) from invading these gates to destroy them. The legislative deprivation of [plaintiffs'] right to exclude, without more, constitutes a taking." Pls.' Cross-Mot. 30. The physical taking issue turns on the court's interpretation of the requirements arising under the WARA and is an issue

of law that can be adjudicated on a motion for summary judgment. *See Billings v. United States*, 322 F.3d 1328, 1332 (Fed. Cir. 2003) ("The underlying issue, one of statutory . . . construction, is a question of law . . . ."); *Santa Fe Pac. R.R. Co.*, 294 F.3d at 1340 (recognizing, in a takings case, that "[i]ssues of statutory interpretation and other matters of law may be decided on motion for summary judgment"); *see also Palmyra Pac. Seafoods, L.L.C.*, 561 F.3d at 1361 ("[C]ontract rights can be the subject of a takings action." (citing *Lynch*, 292 U.S. at 579)). Before the court analyzes the WARA, it addresses plaintiffs' proposed findings of uncontroverted fact ("Pls.' PFUF") and defendant's objections thereto ("Def.'s Resp. Pls.' PFUF") in order to determine whether any genuine issue of material fact exists that would preclude summary judgment.

1. Defendant's Discovery-Related Objections Are Insufficient Under RCFC 56

In support of their cross-motion, plaintiffs propose six findings of uncontroverted fact. The parties do not dispute that the WARA provided, among other things, that Dallas would "'determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006.'" Pls.' PFUF ¶ 2 (quoting Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012); Def.'s Resp. Pls.' PFUF ¶ 2. Additionally, the parties do not dispute the October 18, 2006 passage of the Dallas City Council Resolution, which provided, in part, that

> "after the administrator of the [FAA] has provided notice to Congress in accordance with Section of Public Law 109-352, the City Manager and the City Attorney are hereby directed to promptly take all necessary steps to ensure that the City of Dallas complies with provisions of Public Law 109-352 and all other applicable laws, including taking all appropriate steps to acquire, including the exercise of the right of eminent domain, if such becomes necessary, all or a portion of the leasehold interests, if any, from Virginia Aerospace, . . . Love Terminal Partners . . . , and all other persons claiming an interest in certain tracts of property at Love Field with addresses of 7701 and 7777 Lemmon Avenue."

Pls.' PFUF ¶ 4 (quoting Pls.' Ex. 6 at 2 (Dallas City Council Resolution § 1)); Def.'s Resp. Pls.' PFUF ¶ 4. Defendant, however, disputes that plaintiffs owned the Lemmon Avenue Terminal. *Compare* Pls.' PFUF ¶ 1 (stating that Love Terminal Partners owned the Lemmon Avenue Terminal), with Def.'s Resp. Pls.' PFUF ¶ 1 (asserting that the Lemmon Avenue Terminal "is and always has been owned by . . . Dallas" (citing Def.'s Reply Ex. B at 27 (Master Lease art. XVII ¶ 1))). Defendant also contends that numerous elements of the WARA do not apply to certificated air carriers. *Compare* Pls.' PFUF ¶ 3 (enumerating various "contractual rights and obligations existing as of the effective date of the [WARA] for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006"), *with* Def.'s Resp. Pls.' PFUF ¶ 3 ("[N]umerous

elements of the *Local Agreement*, including provisions related to the disposition of the leased property at Love Field, do not relate to certificated air carriers . . . ." (emphasis added)). Furthermore, defendant raises several discovery-based objections. *See, e.g.*, Def.'s Resp. Pls.' PFUF ¶¶ 1, 5, 6 (asserting that defendant cannot provide complete responses to plaintiffs' proposed finding of uncontroverted fact because it has not been provided with an opportunity to conduct discovery); *see also* Def.'s Reply 27 (arguing that plaintiffs' cross-motion should be denied because "the United States has not had an opportunity to conduct discovery at this early stage of the litigation regarding threshold issues necessary to make such a determination, such as the scope of Plaintiffs' property interest").

Defendant's discovery-based objections are insufficient under RCFC 56. Generally, courts should not rule upon a motion for summary judgment prior to affording the parties an opportunity to conduct discovery. *See Celotex Corp.*, 477 U.S. at 322 (allowing summary judgment after an "adequate time for discovery"). Nevertheless, RCFC 56(e) provides that a party opposing summary judgment must "by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." Reliance "merely on allegations or denials in its own pleading" is insufficient, and the court may enter summary judgment against the opposing party if it fails to respond in the manner prescribed under the rule. *Id.*

RCFC 56(f) "enables a court to deny or stay a motion for summary judgment to permit additional discovery if the non-movant explains by affidavit why

it cannot fulfill the requirements of RCFC 56(e)." *Theisen Vending Co. v. United States*, 58 Fed. Cl. 194, 197 (2003). It provides:

> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

RCFC 56(f). The party "must set forth 'with some precision,' the evidence it hopes to obtain, how this evidence would likely disclose issues of material fact, and why it is unable to access such evidence without further discovery." *Padilla v. United States*, 58 Fed. Cl. 585, 593 (2003). Thus, the opposing party "cannot evade summary judgment simply by arguing that additional discovery is needed; rather, [it] must meet the requirements of Rule 56(f)." *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 n.5 (5th Cir. 2002); *see also Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989) ("A party may not simply assert that discovery is necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit.").

The *Theisen Vending Co.* court, following an examination of the standards set forth by several circuit courts of appeals, articulated a five-part set of prerequisites for relief under RCFC 56(f):

> [T]he non-movant must by affidavit and supporting papers: (1) specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient to raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner.

58 Fed. Cl. at 198. The court emphasized that "[t]hese prerequisites should not impair the salutary, generous purposes of the Rule." *Id.*

Here, defendant neither moved for discovery nor submitted any affidavit in support of a discovery request. In *Padilla*, the plaintiff filed a motion for discovery, though the court noted that the plaintiff's failure to file an affidavit with its motion constituted "procedural error." 58 Fed. Cl. at 593. Notwithstanding the plaintiff's error, the court determined that the plaintiff merely asserted that discovery was necessary without complying with the substantive requirements of RCFC 56(f) and, on that basis, denied the motion. *Id.* Even if the court here liberally construes defendant's statements in its reply and responses to plaintiffs' proposed findings of uncontroverted fact as requests for discovery in this case, defendant has still failed to (1) specify what discovery is needed, (2) indicate how that discovery might raise a genuine issue of material fact, (3) explain whether it previously endeavored to obtain

those facts, and (4) state grounds for its failure to have discovered those facts at an earlier time. *See Theisen Vending Co.*, 58 Fed. Cl. at 198.

Defendant had, but did not pursue, an opportunity to contest the information contained in Mr. Naul's declaration that accompanied plaintiffs' cross-motion. Defendant, as the nonmoving party, did not produce any evidence that raises a genuine issue of fact material to the outcome of the case. *See Eli Lilly & Co.*, 251 F.3d at 971. As such, defendant does not sufficiently contradict Mr. Naul's testimony concerning the following facts:

1. Love Terminal Partners "owned a luxury airline terminal building, containing six passenger gates, at Love Field . . . ." Pls.' PFUF ¶ 1 (citing Pls.' Ex. 1 at 1-2 (Naul Decl. ¶¶ 1, 3-4)).[46]

[46] Although defendant cites the Master Lease in support of its contention that Dallas owned the Lemmon Avenue Terminal, *see* Def.'s Resp. Pls.' PFUF ¶ 1 (citing Def.'s Reply Ex. B at 27 (Master Lease art. XXVII ¶ 1)), plaintiffs note that "the facts are undisputed that [Love Terminal Partners] constructed its terminal on land leased from [Virginia Aerospace], *and the underlying fee estate is owned by the city of Dallas*," Pls.' Reply 27 (emphasis added). Furthermore, plaintiffs' leasehold constitutes an interest in real property under Texas law. *See Travis Cent. Appraisal Dist.*, 140 S.W.3d at 841; *Panola County Appraisal Dist.*, 69 S.W.3d at 284. As the Court of Appeals of Texas explained, "[b]ecause the City owns the improvements but leases them to appellees, it is perfectly correct to refer to appellees' ownership interests in the leased facilities and allow them the right to 'sell' that leasehold interest." *Travis Central Appraisal Dist.*, 140 S.W.3d at 841. Thus, plaintiffs "possess[] a 'stick in the bundle of property rights,'" *Adams*, 391 F.3d at 1218 (quoting

2. The Justice Court for Dallas County, on December 9, 2008, issued an order granting Dallas possession of the leased premises, and plaintiffs surrendered possession of the leased premises to Dallas. Pls.' PFUF ¶ 5 (citing Pls.' Ex. 1 (Naul Decl. ¶ 13); Pls.' Ex. 4).

3. Love Terminal Partners has not been paid any compensation for the alleged taking of its leased premises or the Lemmon Avenue Terminal and its six gates. Pls.' PFUF ¶ 6 (citing Pls.' Ex. 1 (Naul Decl. ¶ 15)).

Furthermore, defendant's objection to plaintiffs' third proposed finding of uncontroverted fact states that plaintiffs "are seeking a legal interpretation of the [WARA]" and indicates that "numerous elements" of the Contract do not pertain to certificated air carriers. Def.'s Resp. Pls.' PFUF ¶ 3. This objection does not defeat an award of summary judgment because statutory construction and contract interpretation are both matters of law. *See Hawkins v. United States*, 469 F.3d 993, 1000 (Fed. Cir. 2006) ("Statutory construction is a matter of law . . . ."); *Billings*, 322 F.3d at 1332. Accordingly, absent a genuine issue of material fact, the court directs its attention to the pertinent question of law.

2. Principles of Statutory Construction

Plaintiffs argue that the WARA incorporates the entirety of the Contract and mandates that Dallas

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Ammon, 209 F.3d at 1374), though ascertaining the precise scope of those rights may require discovery.

comply with the Love Field Master Plan, thereby obligating Dallas (1) to acquire plaintiffs' leasehold interests and (2) to demolish the Lemmon Avenue Terminal. Defendant asserts that plaintiffs' interpretation is incorrect, emphasizing that the United States has not restricted plaintiffs' use of its property. Furthermore, defendant argues that the WARA only incorporates limited contractual rights and obligations.

When construing a statute, courts begin with the "literal text, giving it its plain meaning," *Hawkins*, 469 F.3d at 1000; *see also Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute."), and "must presume that a legislature says in a statute what it means and means in a statute what it says there,"[47] *Germain*, 503 U.S. at 253-54. Words in a statute "are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997). "Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Timex V.I., Inc.*, 157 F.3d at 882. In cases where the statute's text does not explicitly address the precise question, then courts rely upon other tools of statutory construction, including the statute's structure and legislative history. *Id.* Additionally, "[i]n expounding a statute,

[47] Although "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation," the Supreme Court described this principle as the one cardinal canon that precedes all others. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) ("The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning.").

[courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1850). As the Federal Circuit has instructed, "[c]orrect statutory interpretation is that which is 'most harmonious with [the statutory] scheme and with the general purposes that Congress manifested." *BlackLight Power, Inc. v. Rogan*, 295 F.3d 1269, 1273 (Fed. Cir. 2002) (quoting C*omm'r v. Engle*, 464 U.S. 206, 217 (1984)) (second alteration in original); *see also Delverde SrL v. United States*, 202 F.3d 1360, 1364-65 (Fed. Cir. 2000) (stating that a court "must try to read the statute as a whole, to give effect to all of its parts, and to avoid, if possible, rendering language superfluous").

3. The Doctrine of Judicial Estoppel Does Not Apply to Plaintiffs' Contrary Positions Advanced Before the Northern District of Texas and the Court of Federal Claims

Defendant places some importance upon the fact that plaintiffs advance an argument in this case that is opposite to one they advanced in their antitrust litigation before the Northern District of Texas. In the Texas litigation, plaintiffs argued that the WARA addressed, among other things, the reduction of gates at Love Field, but did not compel Dallas to demolish the Lemmon Avenue Terminal gates. In this case, defendant asserts that plaintiffs' argument before the district court was correct, but that the North District of Texas erred in its interpretation of the WARA.

That plaintiffs asserted an argument in their antitrust litigation before the Northern District of Texas that is contrary to the position they now advance in the Court of Federal Claims warrants a brief discussion of the equitable doctrine of judicial estoppel, which is "designed to 'protect the integrity of the judicial process . . . .'" *CRV Enters., Inc. v. United States*, 626 F.3d 1241, 1248 (Fed. Cir. 2010). The doctrine of judicial estoppel "posits that 'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'" *HighQBPO, LLC v. United States*, 84 Fed. Cl. 360, 364 (2008) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (stating that judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase"); cf. James Wm. Moore et al., *Moore's Federal Practice* § 134.30 (3d ed. 2009) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). Judicial estoppel "is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996). Because it "serves a different function from other forms of estoppel, such as equitable estoppel or collateral estoppel[,] . . . judicial estoppel may apply in contexts

when other forms of estoppel do not."[48] *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995). A decision whether to invoke judicial estoppel lies within the court's discretion. *Id.*; *see also New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) ("Because the rule is intended to prevent 'improper use of judicial machinery,' estoppel 'is an equitable doctrine invoked by a court at its discretion[.]'" (citation omitted)).

As the Court of Federal Claims explained, "there is no precise formula regarding when the doctrine of judicial estoppel should be applied . . . ." *Alpha I, L.P. ex rel. Sands v. United States*, 89 Fed. Cl. 347, 360 (2009); *accord New Hampshire*, 532 U.S. at 750. Nevertheless, the Supreme Court articulated several factors that inform a court's determination:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception

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[48] Defendant notes:

> [B]ecause the United States was not a party to the district court litigation, the decision in that case has no preclusive effect in the instant case, and neither issue preclusion nor claim preclusion appl[ies] to the findings in that case. Collateral estoppel or issue preclusion may only be applied to a "party to the prior litigation."

Def.'s Reply 12 n.7 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). As discussed below, Federal Circuit precedent sets forth that privity is also a necessary element for application of judicial estoppel.

> that either the first or the second court was misled[.]" Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

New Hampshire, 532 U.S. at 750-51 (citations omitted). Additionally, while a "majority of courts do not require mutuality of judicial estoppel," viz., that "a party is not required to have been a party to the prior proceeding to be able to invoke judicial estoppel,"[49] 18 Moore et al., *supra*, at § 134.33, the Federal Circuit has retained the privity requirement, *see Jackson*

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[49] *See, e.g.*, *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) (stating that doctrine of judicial estoppel "protects the integrity of the judicial system, not the litigants; therefore, . . . '[w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required'" (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996))); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1220 (6th Cir. 1990) ("Judicial estoppel is not bounded by the limits of mutuality and finality that protect the parties in collateral estoppel.").

Jordan, Inc. v. Plasser Am. Corp., 747 F.2d 1567, 1579 (Fed. Cir. 1984) (stating that "[n]o case is cited where the doctrine [of preclusion of inconsistent positions (*i.e.*, judicial estoppel)] was applied in favor of a total stranger to the first phase of the dispute . . . or . . . outside the context of a particular set of related transactional facts").

Since the United States was not a party in the Northern District of Texas antitrust litigation, the privity requirement is not satisfied. *See id.* Notwithstanding the absence of privity, the doctrine of judicial estoppel would not apply for another important reason: plaintiffs failed to persuade the Northern District of Texas to accept their interpretation of the WARA, an interpretation that is contrary to the one they advance here. It is immaterial, for the purpose of analyzing any potential judicial estoppel issue, that plaintiffs did not ultimately prevail on the merits before the Northern District of Texas. *See Reynolds v. Comm'r*, 861 F.2d 469, 473 (6th Cir. 1988) ("The 'prior success' requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits. 'Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as a part of a final disposition.'" (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 n.5 (6th Cir. 1982))). Therefore, the doctrine of judicial estoppel has no application in this case.

4. Numerous Provisions of the WARA Contain Language Utilized in the Contract

The purpose of the WARA was to "implement a compromise agreement reached by the City of Dallas; the City of Fort Worth, Texas; American Airlines; Southwest Airlines; and Dallas-Fort Worth International Airport . . . on July 11, 2006, regarding air service at Dallas Love Field."[50] H.R. Rep. No. 109-600, pt. 1, at 1; *see also* Pls.' Ex. 2 at 2 (Contract art. I ¶ 1 (providing that the signatories "agree[d] to seek the enactment of legislation *to allow for the full implementation of [the] Contract*" (emphasis added))); H.R. Rep. No. 109-600, pt. 2, at 31 (expressing support from Congressman John Conyers, Jr. for an amendment to draft legislation that would "preserve[] the agreement made by the parties"). Although the Contract is not explicitly referenced in the statute until section 5, it is clear that Congress intended to incorporate the Contract into the statute.[51]

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[50] In fact, the Contract signatories covenanted that they would "support, encourage and seek the passage of legislation necessary and appropriate to implement the terms and spirit of [the] Contract. The Parties each separately covenant[ed] that they [would] oppose any legislative effort that [was] inconsistent with the terms of [the] Contract." Pls.' Ex. 2 at 6 (Contract art. I ¶ 14). The signatories' support for the WARA evidences their belief that the legislation would fully implement the Contract.

[51] The Court of Appeals of Texas noted that the WARA "explicitly incorporate[d] many of the Love Field Agreement's provisions." *Love Terminal Partners, L.P.*, 256 S.W.3d at 896. A similar determination was made by the Northern District of

a. The WARA Contains Identical Provisions to Those Set Forth in the Contract

Congress utilized language throughout the WARA that borrows from or is virtually identical to language in the Contract. Such similarities are apparent in at least five statutory provisions. First, Congress modified section 29(c) of the International Air Transportation Competition Act of 1979 to provide that

> [a]ir carriers and, with regard to foreign air transportation, foreign air carriers, may offer for sale and provide through service and ticketing to or from Love Field, Texas, and any United States or foreign destination through any point within Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama.

Pub. L. No. 109-352, § 2(a), 120 Stat. at 2011. Section 2(a) of the WARA is consistent with the Contract, wherein the signatories sought "[t]o immediately allow airlines serving Love Field to offer through ticketing between Love Field and any destinations (including international destinations) through any point in Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, and Alabama, and to market such services[.]" Pls.' Ex. 2 at 2 (Contract art. I ¶ 1(a)). Second, the WARA repealed the Wright Amendment after a period of eight years,

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Texas. *See Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 547 ("The [WARA] explicitly incorporate[d] many of the Contract's provisions.").

Pub. L. No. 109-352, § 2(b), 120 Stat. at 2011, which gave effect to the signatories' explicit intent, *see* Pls.' Ex. 2 at 2-3 (Contract art. I ¶¶ 1, 1(b) (stating that the signatories sought to effect the repeal of the Wright Amendment and "eliminate all the remaining restrictions on air service from Love Field after eight years from the enactment of legislation")). Third, Congress restricted charter flights at Love Field to destinations within the fifty states and the District of Columbia, and limited charter flights to "no more than 10 per month per air carrier for charter flights" beyond Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, and Alabama, Pub. L. No. 109-352, § 4(a)(1)-(2), 120 Stat. at 2011, restrictions expressly enumerated in the Contract, *see* Pls.' Ex. 2 at 10 (Contract art. II § 16 (providing that "[c]harter flights at Love Field shall be limited to destinations within the 50 United States and the District of Columbia and shall be limited to no more than ten per month per air carrier except as otherwise permitted by Section 29(c) of the Wright Amendment")). Fourth, Congress mandated that "[a]ll flights operated to or from Love Field by air carriers that lease terminal gate space at Love Field shall depart from and arrive at one of those leased gates." Pub. L. No. 109-352, § 4(b), 120 Stat. at 2012. Although this provision contains two exceptions that were not incorporated in the Contract,[52] *see id.* § 4(b)(1)-(2), it is virtually identical in form and

[52] The two exceptions concern "flights operated by an agency of the Federal Government or by an air carrier under contract with an agency of the federal government" and "irregular operations." Pub. L. No. 109-352, § 4(b)(1)-(2), 120 Stat. at 2012.

substance to the relevant Contract provision, *see* Pls.' Ex. 2 at 10 (Contract art. II § 16 ("All flights operated by air carriers that lease terminal gate space shall depart from and arrive at one of those leased gates.")). Fifth, Congress provided that "[c]harter flights from Love Field . . . operated by air carriers that do not lease terminal space at Love Field may operate from nonterminal facilities or one of the terminal gates at Love Field," Pub. L. No. 109-352, § 4(c), 120 Stat. at 2012, language that mirrors the Contract, *see* Pls.' Ex. 2 at 10 (Contract art. II § 16 ("Charter flights operated by air carriers that do not lease terminal space may operate from non-terminal facilities or one of the 20 terminal gates.").

These examples, standing alone, constitute strong evidence that Congress intended to incorporate the Contract into the WARA. Additionally, numerous provisions within section 5 of the WARA support this conclusion:

1. Dallas "shall reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates." Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012; cf. Pls.' Ex. 2 at 3 (Contract art. I § 3 ("[C]onsistent with a revised Love Field Master Plan . . . , the number of gates available for passenger air service at Love Field will be, as soon as practicable, reduced from the 32 gates envisioned in the 2001 Love Field Master Plan to 20 gates . . . .")).

2. "[T]he number of gates available for such service shall not exceed a maximum of 20 gates." Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012; cf. Pls.' Ex. 2 at 3 (Contract art. I § 3 ("Love Field will thereafter be limited permanently to a maximum of 20 gates.")).

3. Nothing in the WARA

> shall affect general aviation service at Love Field, including flights to or from Love Field by general aviation aircraft for air taxi service, private or sport flying, aerial photography, crop dusting, corporate aviation, medical evacuation, flight training, police or fire fighting, and similar general aviation purposes, or by aircraft operated by any agency of the Federal Government or by any air carrier under contract to any agency of the Federal Government.

Pub. L. No. 109-352, § 5(c), 120 Stat. at 2012; *cf.* Pls.' Ex. 2 at 10 (Contract art. II ¶ 16 (providing that "[n]othing in this Contract is intended to affect general aviation service at Love Field, including, but not limited to, flights to or from Love Field by general aviation aircraft for air taxi service, private or sport flying, aerial photography, crop dusting, business flying, medical evacuation, flight training, police or fire fighting, and similar general aviation purposes, or by

aircraft operated by any agency of the U.S. Government or by any airline under contract to any agency of the U.S. Government")).

4. "No Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act . . . ." Pub. L. No. 109-352, § 5(b), 120 Stat. at 2012; *cf.* Pls.' Ex. 2 at 4 (Contract art. I ¶ 5 ("The City of Dallas . .. agrees that it will acquire all or a portion of the lease on the Lemmon Avenue facility . . . necessary to fulfill its obligations under this Contract. The City of Dallas further agrees to the demolition of the gates at the Lemmon Avenue facility . . . .")).

In short, the WARA either replicates or gives effect to parallel Contract provisions, thereby indicating that the Contract formed the basis upon which the WARA was drafted. Indeed, Senator Hutchison, within two days after the Contract was executed, introduced a bill in the United States Senate that mirrored the Contract's provisions. The court's conclusion is also supported by the Northern District of Texas's ruling in Love Terminal Partners, L.P., which determined that the Contract contained many terms that the WARA later explicitly adopted.

b. The WARA Explicitly References the Contract

In addition to incorporating Contract language into the WARA, the statute also

explicitly references the Contract. As explained fully in Part IV.C.4.c.ii, *infra*, the clause "in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006" refers directly to the Contract. Moreover, specific references to the Contract, the date on which it was executed, and its signatories are contained in section 5(d) of the WARA, which provides:

> (d) ENFORCEMENT.—
>
> (1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Transportation and the Administrator of the [FAA] may not make findings or determinations, issue orders or rules, withhold airport improvement grants or approvals thereof, deny passenger facility charge applications, or take any other actions, either self-initiated or on behalf of third parties—
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> (A) that are inconsistent with the *contract dated July 11, 2006, entered into by the city of Dallas, the city of Fort Worth, the DFW International Airport Board, and others regarding the resolution of the Wright Amendment issues*, unless

> actions by the *parties to the contract* are not reasonably necessary to implement *such contract*; or
>
> (B) that challenge the legality of any provision of *such contract*.

Pub. L. No. 109-352, § 5(d)(1)(A)-(B), 120 Stat. at 2012 (emphasis added). Furthermore, Congress stipulated that the "contract described in paragraph (1)(A) of this subsection, and any actions taken by the parties to such contract that are reasonably necessary to implement its provisions, shall be deemed to comply in all respects with the parties' obligations under title 49, United States Code." Id. § 5(d)(2), 120 Stat. at 2013. The only contract described in section 5(d)(1)(A) is, as noted above, the Contract executed by Dallas, Fort Worth, the DFW Board, American, and Southwest on July 11, 2006. Accordingly, the court determines that the explicit references to the Contract in the language of the statute demonstrate Congress's intent to incorporate the Contract into the WARA.

c. Section 5 of the WARA Codifies Under Federal Law Specific Obligations Set Forth in the Contract

Congress, by incorporating the Contract into the WARA, rendered the obligations set forth in the Contract matters of federal law. *See Love Terminal Partners, L.P.*, 256 S.W.3d at 897 (referencing section 5 of the statute); *see also Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 558 (holding that the statute incorporated "all the rights and obligations of the Contract" (emphasis added)). Indeed, during the state court litigation, Dallas, along with other named

defendants employed by the city, advanced this precise argument, claiming that "since Dallas' performance is now *compelled by federal law*, any challenge to the Love Field [Local] Agreement is moot." *Love Terminal Partners, L.P.*, 256 S.W.3d at 897 (emphasis added). The Court of Appeals of Texas ultimately agreed. *Id.*

Section 5(a) of the WARA enumerates the specific obligations imposed upon Dallas under federal law.[53] The court addresses each below.

i. The WARA Requires That Dallas Reduce the Number of Gates at Love Field

The WARA provides that Dallas "*shall reduce* as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates." Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012. Use of the term "shall" denotes the imperative and connotes a mandatory obligation. *See Merck & Co. v. Hi-Tech Pharmacal Co.*, 482 F.3d 1317, 1322 (Fed. Cir. 2007); *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 173 (2005). Nothing in the WARA's language explicitly states or suggests that the term "shall" does not mean exactly what it says. Whereas the Contract indicates that all of the signatories collectively agreed to reduce the number of gates at Love Field, *see* Pls.' Ex. 2 at 3 (Contract art. I ¶ 3 ("The Parties agree [to] . . . reduce[] . . . the 32 gates . . . to 20 gates and

[53] As discussed in Part IV.C.4.a, *supra*, these obligations were derived from the Contract executed by five signatories: Dallas; Fort Worth; the DFW Board; and American and Southwest, two certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006.

that Love Field will thereafter be limited permanently to a maximum of 20 gates")), the WARA imposes that obligation solely upon Dallas.[54] The requirement that Dallas reduce the number of gates is again referenced in section 5(d)(2), which provides that certain provisions of the WARA "shall only apply with respect to facilities that remain at Love Field *after the city of Dallas has reduced the number of gates at Love Field as required by subsection (a)* . . . ." Pub. L. No. 109-352, § 5(d)(2)(A), 120 Stat. at 2013 (emphasis added). Therefore, failure on the part of Dallas to reduce the number of gates to no more than twenty constitutes a violation of the WARA and, in turn, a violation of federal law.

The WARA also mandates that "the number of gates available for such service shall not exceed a maximum of 20 gates." *Id.* § 5(a), 120 Stat. at 2012. Once again, this requirement is mandatory and is derived from the Contract, *see* Pls.' Ex. 2 at 3 (Contract art. I ¶ 3), and there is no indication that the term "shall," as used here, does not mean exactly what it says. Furthermore, the WARA imposes upon Dallas the additional obligation of ensuring that no more

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[54] Defendant argues that the WARA "incorporates certain rights and obligations only 'for certificated air carriers.'" Def.'s Reply 13-14. Yet, it is clear that under the Contract, no specific signatory was obligated to reduce the number of gates at Love Field. Three of those parties—Dallas, Fort Worth, and the DFW Board—are not certificated air carriers. Congress, by mandating that Dallas reduce the gates, clarified that this obligation rested with one signatory, which is not a certificated air carrier. Accordingly, defendant's position that the WARA only applies to certificated air carriers is unsustainable based upon a plain reading of the statute.

than twenty gates at Love Field are utilized for passenger air service now or in the future. § 5(d)(2)(B)(i), 120 Stat. at 2013 (providing that certain provisions of the WARA shall not be construed to require the city of Dallas "*to construct additional gates beyond the 20 gates referred to in subsection (a)*" (emphasis added)).

Because the Love Field Master Plan, as indicated by the Contract signatories, originally envisioned thirty-two gates at the airport, *see* Pls.' Ex. 2 at 3 (Contract art. I ¶ 3 ("[T]he number of gates available for passenger air service at Love Field will be, as soon as practicable, reduced from the 32 gates envisioned in the 2001 Love Field Master Plan to 20 gates . . . .")), the next inquiry focuses upon how Dallas must determine which gates are eliminated in order to comply with the WARA's mandate that no more than twenty gates can be made available for passenger service.

ii. The WARA Requires That Dallas Allocate the Number of Gates in Accordance With the Contract

The WARA provides that

> *[t]he city of Dallas*, pursuant to its authority to operate and regulate the airport as granted under chapter 22 of the Texas Transportation Code and this Act, *shall determine the allocation of leased gates* and manage Love Field *in accordance with contractual rights and obligations existing* as of the effective date of this Act *for certificated air carriers providing scheduled passenger service at Love*

Field on July 11, 2006.[55] Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012 (emphasis & footnote added). Once again, use of the term "shall"

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[55] Defendant argues that plaintiffs' interpretation of the WARA is incorrect because it believes plaintiffs omit or ignore the phrase "effective date of this Act." In construing the WARA, the court must give effect to the language Congress employed, including the phrase "effective date of this Act." It is apparent that Congress, by utilizing this phrase, recognized that only certain provisions of the Contract became effective on July 11, 2006. The Contract provides:

> 6. EFFECTIVE DATE. Notwithstanding anything to the contrary herein, the Parties agree that (i) Sections 1, 7, 8, 9, 14, 15, and 16 of Article I and all Sections of Article II shall take effect as of the last date of execution of this Contract by any of the Parties and (ii) *the remaining Sections of Article I shall take effect on the date that legislation that would allow the Parties to implement the terms and spirit of this Contract is signed into law*.

Pls.' Ex. 2 at 8 (Contract art. II ¶ 6) (emphasis added). The Contract provisions that expressly addressed gate allocation are contained in paragraph 3 of article I. *See id.* at 3 (Contract art. I ¶ 3). Although the signatories bound themselves to these provisions on July 11, 2006, these provisions did not take effect until the WARA was signed into law. Therefore, Congress, by utilizing the phrase "effective date of this Act" within the clause "contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006," Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012, recognized that paragraph 3 of article I addressed contractual rights and obligations that existed, but had yet to take effect, as of the effective date of the WARA. Indeed, these provisions could not take legal effect unless and until congressional action permitted implementation thereof. Thus, the WARA enabled these contractual rights and obligations to become mandatory under federal law as of the effective date of the WARA.

> denotes the imperative and connotes a mandatory obligation, and nothing in this language explicitly states or suggests that the term "shall" does not mean exactly what it says. The WARA does not provide Dallas with any discretion to determine which gates it must remove.[56] Instead, Dallas must allocate leased gates "in accordance with those rights and obligations existing . . . for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006."[57] *Id*.

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[56] Plaintiffs advanced an argument in their antitrust litigation that section 5(a) did not require Dallas to determine the allocation of leased gates at Love Field in accordance with rights and obligations specified in the Contract. *See Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 558; *supra* Part IV.C.3. The Northern District of Texas rejected this argument. *See Love Terminal Partners, L.P.*, 527 F. Supp. 2d at 558-60.

[57] In their antitrust litigation, plaintiffs argued that, under the doctrine of last antecedent, the phrase "in accordance with contractual rights and obligations" modified the obligation imposed upon Dallas to manage Love Field, not the obligation to determine the allocation of leased gates. 527 F. Supp. 2d at 558. The doctrine of last antecedent "is a canon of statutory construction, which states that 'qualifying words, phrases and clauses must be applied to the words or phrases immediately preceding them and are not to be construed as extending to and including others more remote.'" *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000) (quoting *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989)). Like its corollary, the rule of punctuation, the doctrine of last antecedent is a guideline and not an absolute rule. *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1336 (Fed. Cir. 2008) (citing *Bingham, Ltd. v. United States*, 724 F.2d 921, 926 n.3 (11th Cir. 1984)). The Northern District of Texas rejected plaintiffs' argument, holding that the WARA "plainly and unambiguously

> This language specifically references the Contract. The July 11, 2006 date is not coincidental. *See, e.g.*, H.R. Rep. No. 109-600, pt. 2, at 11 (explaining that section 5 "provides that any action taken by the parties that is reasonably necessary to implement the provisions of the July 11, 2006 agreement, and the agreement itself, is deemed to comply in all respects with the parties['] obligations under title 49, United States Code"); *see also* Pub. L. No. 109-352, § 5(d)(2), 120 Stat. at 2013 (providing that the Contract "shall be deemed to comply in all respects with the parties' obligations under title 49). Indeed, it represents the date on which the signatories executed the Contract. *See* Pls.' Ex. 2 at 10-11.

Additionally, the certificated air carriers providing scheduled passenger service at Love Field

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incorporate[d] all of the rights and obligations of the Contract," and explain[ed]:

> [P]laintiffs' attempt to avoid the Act's clear statutory intent by relying on the doctrine of last antecedent, which "is hardly a mandatory rule of statutory construction," "can assuredly be overcome by other indicia of meaning," and "is not applied where the context indicates otherwise[.]"
>
> In relevant part, § 5(a) of the Act directs Dallas to "determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006."

527 F. Supp. 2d at 558-59 (emphasis added) (citations omitted).

on July 11, 2006, were either signatories to the Contract—American and Southwest—or mentioned therein—ExpressJet Airlines, Inc. ("ExpressJet"). As the Senate Committee on Commerce, Science, and Transportation specifically recognized, American and Southwest engaged in extensive negotiations concerning their rights at Love Field:

> [L]ocal community leaders have reached a consensus[, which is] . . . reflected in an *agreement dated July 11, 2006*.
>
> (5) The *agreement dated July 11, 2006*, does not limit an air carrier's access to the Dallas Fort Worth metropolitan area, and in fact may increase access opportunities to other carriers and communities. It is not Congressional intent to limit any air carrier's access to either airport. . . .
>
> . . . .
>
> (7) Congress also recognizes that the *agreement, dated July 11, 2006*, does not harm any city that is currently being served by these airports, and thus the agreement does not adversely affect the airline industry or other communities that are currently receiving service, or hope to receive service in the future.
>
> (8) Congress finds that the *agreement, dated July 11, 2006*, furthers the public interest as consumers in, and accessing, the Dallas and Forth Worth areas should benefit from increased competition.

> (9) Congress also recognizes that each of the parties was forced to make concessions to reach an agreement. . . . The negotiations between the two communities forced [Southwest and American] to respond . . . to a host of options, which ultimately were included, as part of the *agreement dated July 11, 200*6.

S. Rep. No. 109-317, at 17 (emphasis added). The rights and obligations existing for American, Southwest, and ExpressJet were specifically defined in several paragraphs of the Contract. In paragraph 3(b) of article I, American and Southwest agreed that they could "not subdivide a 'gate.'" Pls.' Ex. 2 at 3 (Contract art. I ¶ 3(a)). American and Southwest also "agree[d] to voluntarily surrender gate rights under existing leases in order to reduce the number of gates as necessary to implement this agreement." *Id.* (Contract art. I ¶ 3(b)). Paragraph 3(b) of article I further provided:

> During the four year period from the date the legislation . . . is signed into law: Southwest . . . shall have the preferential use of 15 gates under its existing lease to be used for passenger operations; American . . . shall have the preferential use of 3 gates under its existing lease to be used for passenger operations; and ExpressJet . . . shall have the preferential use of 2 gates under its existing lease to be used for passenger operations. Thereafter, Southwest . . . shall have the preferential use of 16 gates under its existing lease to be used for passenger operations;

> American . . . shall have the preferential use of 2 gates under its existing lease to be used for passenger operations; and ExpressJet . . . shall have the preferential use of 2 gates under its existing lease to be used for passenger operations. In consideration of Southwest['s] . . . substantial divestment of gates at Love Field and the need to renovate or reconstruct significant portions of the concourse, Southwest . . . shall have the sole discretion (after consultation with the City) to determine which of its gates it uses within its existing leasehold at Love Field during all phases of reconstruction. Upon the earlier of (i) the completion of the concourse renovation, or (ii) 4 years from the date the legislation as provided herein is signed into law, all Parties agree that facilities will be modified as necessary, up to and including demolition, to ensure that Love Field can accommodate only 20 gates for passenger service.

Id. Additionally, paragraphs 10 and 11 of article I addressed gate allocations if either airline "[chose] to operate passenger service from another airport within an 80-mile radius of Love Field in addition to its operations at Love Field" and required each airline to voluntarily relinquish a fixed number of gates until the year 2025. *See id.* at 5-6 (Contract art. I ¶¶ 10-11 (requiring that Southwest and American voluntarily relinquish "up to 8 gates" and "up to one and one-half gates," respectively, after which those gates would become available to other carriers)). By mandating that Dallas determine the allocation of leased gates in

accordance with the Contract, the WARA incorporated these Contract provisions into federal law and compelled compliance therewith.

The WARA also provides that, "[t]o accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases."[58] Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012. This provision mandates that Dallas abide by terms in its leases with American and Southwest that pertain to the sharing of preferential lease gates. The "scarce resource provision" of these leases is referenced in two paragraphs of the Contract. First, paragraph 3(b) of article I provided:

To the extent a new entrant carrier seeks to enter Love Field, the City of Dallas will seek voluntary accommodation from its existing carriers to accommodate the new entrant service. If the existing carriers are not able or are not willing to accommodate the new entrant service, then the City of *Dallas agrees to require the sharing of preferential lease gates, pursuant to Dallas' existing lease agreements*. To the extent that any existing airline gates leased at Love Field revert to the City of Dallas, these gates shall be converted to common use during the existing term of the lease.[59]

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[58] The term "new entrant air carriers," of course, does not refer to American, Southwest, or ExpressJet because these three certificated air carriers were providing scheduled passenger service at Love Field on July 11, 2006.

[59] Although Dallas "agree[d]" to require the sharing of preferential lease gates when it executed the Contract on July 11, 2006, this provision did not take effect until enactment of the WARA. *See* Pls.' Ex. 2 at 8 (Contract art. II ¶ 6); *supra* note 55.

Pls.' Cross-Mot. 3 (Contract art. I ¶ 3(b)) (emphasis & footnote added). The WARA binds Dallas to this commitment as a matter of federal law. Second, paragraph 12 of article I provided:

> *Each carrier shall enter into separate agreements* and take such actions, as necessary or appropriate, *to implement its obligations under this Contract. Similarly, the Cities shall enter into such agreements* and take such actions, as necessary or appropriate, *to implement the Contract*. All such agreements and actions are subject to the requirements of law. *Such agreements shall include amendments to: (i) American Airlines' Love Field terminal lease; and (ii) Southwest Airlines' Love Field terminal lease.* The City of Dallas shall develop a revised Love Field Master Plan consistent with this Contract.

Id. at 6 (Contract art. I ¶ 12) (emphasis added). The WARA makes this obligation binding upon Dallas, requiring it to amend its leases, as necessary, to comply with the terms of the Contract.

Furthermore, the WARA explicitly authorizes Dallas to implement those portions of the Contract that relate to preferential gate leases with American, Southwest, and ExpressJet by ensuring that neither the FAA nor any other federal agency can interfere with those contractual agreements. Although the WARA provides that nothing in the statute shall be construed

> to limit the authority of the [FAA] or any other Federal agency to enforce requirements

> of law and grant assurances . . . that impose obligations on Love Field to make its facilities available on a reasonable and nondiscriminatory basis to air carriers seeking to use such facilities, or to withhold grants or deny applications to applicants violating such obligations with respect to Love Field[,]

§ 5(e)(1)(E), 120 Stat. at 2013, this provision pertains only to facilities remaining at Love Field after Dallas reduces the number of gates, and it "shall not be construed to require the city of Dallas, Texas . . . to modify or eliminate preferential gate leases with air carriers in order to allocate gate capacity," *id.* §§ 5(e)(2)(A), (B)(ii), 120 Stat. at 2013. Therefore, the WARA ensures that, while those portions of the Contract that pertain to gate allocation at Love Field are matters of federal law, the federal government may not interfere with the rights and obligations set forth in paragraph 3 of article I of the Contract.

The WARA requires that Dallas allocate gates in accordance with the terms of the Contract, which defined the rights and obligations existing for American, Southwest, and ExpressJet, the three certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006.[60] It also limits the federal government's authority to withhold grants or deny applications based upon preferential gate

[60] There is no dispute between the parties that the WARA reduces the number of gates at Love Field to twenty, allocates those gates among the certificated air carriers in accordance with the Contract, and, within eight years, repeals any limitations contained in the Wright Amendment.

leases entered into by Dallas with American, Southwest, and ExpressJet. Any interpretation of the WARA that does not take into account the Contract's leased gate allocation provisions would effectively render the language "in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006," irrelevant and mere surplusage. Accordingly, Congress incorporated the Contract's leased gate allocation provisions into federal law, thereby requiring Dallas's compliance with—and ensuring that the federal government could not alter—those provisions.

iii. The WARA Requires That Dallas Manage Love Field in Accordance With the Contract

In addition to requiring that Dallas allocate leased gates in accordance with the Contract, the WARA imposes upon Dallas the following requirement:

> *The city of Dallas*, pursuant to its authority to operate and regulate the airport as granted under chapter 22 of the Texas Transportation Code and this Act, *shall* determine the allocation of leased gates and *manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006*.

Id. § 5(a), 120 Stat. at 2012 (emphasis added). This requirement is separate and distinct from the

obligation imposed upon Dallas to determine the allocation of leased gates. If the allocation of leased gates was, in fact, part of the management of Love Field, then Congress would have no need to include the term "manage," which would have been subsumed by the phrase "determine the allocation of leased gates," in the WARA. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("'The cardinal principle of statutory construction is to save and not to destroy.' It is our duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section . . . ." (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Inhabitants of Montclair Twp. v. Ransdell*, 107 U.S. 147, 152 (1883)) (citations omitted)). Therefore, Congress imposed upon Dallas two separate and distinct requirements: (1) determine the allocation of leased gates in accordance with the Contract; and (2) manage Love Field in accordance with "contractual rights and obligations existing . . . for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006." As stated previously, use of the term "shall" denotes the imperative and connotes a mandatory obligation, and nothing in this language explicitly states or suggests that the term "shall" does not mean exactly what it says.

The WARA precludes Dallas from exercising discretion in determining how to manage Love Field. Instead, the WARA requires that Dallas manage Love Field in accordance with the contractual rights and obligations existing for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006, a direct reference to the date upon which the signatories executed the Contract. *See*

supra Part IV.C.iv.c.ii. Therefore, the next inquiry turns to how Dallas must manage Love Field under the Contract in order to comply with section 5(a) of the WARA.

Numerous Contract provisions indicate how Dallas was required to manage Love Field. Paragraph 5 of article I imposed upon Dallas at least twelve separate requirements related to airport management. Dallas was required to: (1) "significantly redevelop portions of Love Field, including the modernization of the main terminal, consistent with a revised Love Field Master Plan"; (2) "acquire all or a portion of the lease on the Lemmon Avenue facility, up to and including condemnation, necessary to fulfill its obligations under this Contract"; (3) "demoli[sh] . . . the gates at the Lemmon Avenue facility immediately upon acquisition of the current lease to ensure that that facility [could] never again be used for passenger service"; (4) finance a modernization program by investing no less than $150 million and no greater than $200 million in 2006 dollars ("Spending Cap"); (5) develop and construct a "'people mover' connector" ("Connector") to the Dallas Area Rapid Transit ("DART") mass transit system; (6) ensure that the Spending Cap would be "exclusive of the costs connected with the acquisition and demolition of the Lemmon Avenue Terminal gates and of the capital costs associated with" the Connector; (7) recover costs for the demolition of the Lemmon Avenue Terminal gates from airport users; (8) "seek state, federal, DART, and any other available public funds to supplement . . . [passenger facility charges] funds"; (9) utilize its best efforts, if passenger facility charges were not approved for the modernization plan,

"to seek and use [passenger facility charges], state, federal, DART, and any other available public funds (other than City of Dallas general funds) as the only sources of funding for the Connector and to avoid impacting terminal rents and landing fees"; (10) recover costs for the modernization plan by negotiating amendments to the leases executed by Southwest, American, and ExpressJet; (11) adopt city ordinances modifying terminal rents and landing fees to be paid by airline users at Love Field; and (12) determine, together with Southwest, "a phase-in of the [modernization plan]" and "decide which party will fund and manage the construction." Pls.' Ex. 2 at 4-5 (Contract art. I ¶ 5).

In addition to the provisions set forth in paragraph 5 of article I, Dallas was required to "develop a revised Love Field Master Plan consistent with [the] Contract." *Id.* at 6 (Contract art. I ¶ 12). Dallas also "agree[d] to grant American . . . and Southwest . . . options to extend their existing terminal leases until 2028." *Id.* at 7 (Contract art. I ¶ 17). Furthermore, the Contract clarified the funding limitations paragraph 5 of article I imposed upon Dallas:

> Any capital spending obligations of the City of Dallas under this Contract for airport projects that require the expenditure of public funds or the creation of any monetary obligation shall be limited obligations, payable solely from airport revenues or the proceeds of airport revenue bonds issued by or on behalf of the City of Dallas, such revenue bonds being payable and secured by

> the revenues derived from the ownership and operation of Love Field.

Id. (Contract art. II ¶ 2).

These Contract provisions defined how Dallas was required to manage Love Field. All of the obligations set forth in paragraph 5 of article I took effect on the date that the WARA was signed into law, *see id.* (Contract art. II ¶ 6); *supra* note 55, and could not have been effectuated absent congressional approval. Absent incorporation of these provisions into the WARA, the phrase "in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006," would be irrelevant and mere surplusage. Accordingly, Congress, by mandating that Dallas manage Love Field in accordance with the contractual rights and obligations contained in the Contract, incorporated those rights and obligations, as discussed above, into federal law.

iv. The WARA Requires That Dallas Demolish the Lemmon Avenue Terminal

In addition to mandating that Dallas reduce the number of gates at Love Field, the WARA requires that Dallas, as part of this reduction, remove the Lemmon Avenue Terminal gates. Defendant, however, contends otherwise, arguing that the WARA does not regulate where the twenty Love Field gates must be located or who must own those gates. According to defendant, the WARA permits Dallas, if it so chooses, to contract with plaintiffs to add additional gates at the Lemmon Avenue Terminal and

relocate the entire Love Field airport operations to that facility. The only limitations upon Dallas, defendant argues, are its continued allocation of those twenty gates among the airlines that were operating on July 11, 2006, as required by the Contract. Defendant's argument finds no support in the plain language of the WARA.

As discussed in Part IV.C.4.c.ii, *supra*, section 5(a) of the WARA requires that Dallas allocate leased gates in accordance with the Contract. Pursuant to paragraph 5 of article I of the Contract, Dallas "agree[d] to the *demolition of the gates at the Lemmon Avenue facility* immediately upon acquisition of the current lease *to ensure that that facility [could] never again be used for passenger service*." Pls.' Ex. 2 at 4 (Contract art. I ¶ 5) (emphasis added). The Contract did not specify demolition of "some" gates. Rather, it stated "the gates," indicating the signatories' intent that Dallas demolish all of the gates. This conclusion is further supported by the fact that Dallas was required to ensure that the "facility" could never again be used for passenger service. The term "facility" appears in both the Contract and the WARA, and retention of any passenger gate at the Lemmon Avenue Terminal would run afoul of the requirement that the "facility" never again be used for such a purpose. Dallas, therefore, could not retain any of the Lemmon Avenue Terminal gates as part of the twenty that will operate at Love Field.

It is not possible for Dallas to fulfill the requirements of the WARA-viz., remove the gates at the Lemmon Avenue Terminal as part of its reduction of gates at Love Field, Pub. L. No. 109-352, § 5(a)-(b),

120 Stat. at 2012, and ensure that the "Lemmon Avenue facility" can never again be used for passenger service under the Contract, Pls.' Ex. 2 at 4 (Contract art. I ¶ 5), a requirement that Congress incorporated into the WARA—while preserving the option to add additional gates to the Lemmon Avenue Terminal. If, as defendant suggests, the signatories intended for the Lemmon Avenue Terminal to serve as the center for air passenger services, then they would not have agreed to the demolition of preexisting gates. Moreover, they would not have agreed to transfer air passenger services to a facility targeted for destruction because the WARA's unambiguous statutory language states that the Lemmon Avenue Terminal gates shall never again be used for air passenger services. Furthermore, Congress would not have mandated that Dallas remove the Lemmon Avenue Terminal gates or, for that matter, restricted the type of funding Dallas could use for that demolition if transfer of airport operations to the very facility designated for demolition had been contemplated. Clearly, once the gates are demolished, little use remains. Because the WARA mandates that Dallas demolish the Lemmon Avenue Terminal gates and ensure that it could never again be utilized for passenger service, Dallas would violate federal law if it moved its Love Field operations to the Lemmon Avenue Terminal.

v. The WARA Specifies how Dallas May Fund the Reduction of Gates at Love Field

The WARA stipulates what funds Dallas may and may not use to demolish the Lemmon Avenue Terminal facility. Section 5 provides:

> (b) REMOVAL OF GATES AT LOVE FIELD.—No Federal funds or passenger facility charges may be used *to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act*, but Federal funds or passenger facility charges may be used for other airport facilities under chapter 471 of title 49, United States Code.

Pub. L. No. 109-352, § 5(b), 120 Stat. at 2012 (emphasis added). Accordingly, Congress, in section 5(b) of the WARA, mandated that Dallas (1) demolish the Lemmon Avenue Terminal and (2) not utilize federal funds or passenger facility charges in order to do so.[61] Furthermore, Congress expressly permitted Dallas to use federal funds or passenger facility charges to remove any other gates at Love Field. If Congress did not intend to require the demolition of the Lemmon Avenue Terminal, then it would not have incorporated section 5(b) in the WARA.

vi. The WARA's Limitations Upon the DOT and the FAA Do Not Affect the

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[61] Although the statute provides that Dallas may not use federal funds or passenger facility charges to demolish the Lemmon Avenue Terminal gates, the term "may" does not suggest that Dallas's obligation to remove the gates is discretionary. *Cf. Contreras v. United States*, 64 Fed. Cl. 583, 593 (2005) ("The proper inference drawn from the distinction between 'may' and 'shall' in the same statute further strengthens the presumption that 'may' is discretionary."). Rather, as discussed above, this section of the WARA reflects congressional intent to require that Dallas demolish the Lemmon Avenue facility in accordance with the Contract and to disallow Dallas from utilizing certain funds to effectuate that result.

Determination That the WARA Incorporates the Contract Into Federal Law

Section (d)(1), quoted in Part IV.C.4.b, *supra*, precludes the DOT and the FAA from making findings or determinations, issuing orders or rules, withholding airport improvement grants or approvals thereof, denying passenger facility charge applications, or taking any other actions, either self-initiated or on behalf of a third party, that (1) are inconsistent with the Contract or (2) challenge the legality of any Contract provision. *Id*. § 5(d)(1)(A)-(B), 120 Stat. at 2012. The Contract did not mention either the DOT or the FAA. Instead, the signatories indicated that the Contract was "made subject to the provisions of the Charter and ordinances of the cities of Dallas and Fort Worth, in existence as of the date hereof, and all applicable State and federal laws." Pls.' Ex. 2 at 7 (Contract art. II ¶ 5).

Defendant maintains that any determination that the WARA incorporates the entire Contract would render section 5(d)(1) of the WARA entirely superfluous. Conversely, plaintiffs argue that, absent section 5(d)(1), federal agencies could issue orders that call for actions at Love Field that would be inconsistent with the codified Contract. According to plaintiffs, the Contract makes no mention of either the FAA or the DOT, and the WARA, they contend, "neither expressly imposes obligations on them nor affords them rights." Pls.' Reply 14. Plaintiffs further assert that "[i]nsuring that FAA actions are consistent with the agreement struck among all of the local parties is sound legislative draftsmanship and not, as

the Government would have it, an indication that Congress did not intend to mandate that the parties comply with the terms of the agreed-upon Wright Amendment compromise." *Id.* at 14-15.

Draft legislation of the WARA, as reported in the Senate, initially conferred upon the DOT "exclusive jurisdiction with respect to the agreement described in section 5(a) of this Act." S. 3661, 109th Cong. § 6 (2006). This language was ultimately removed. By incorporating section 5(d)(1) into the WARA, Congress ensured that any subsequent actions by the DOT and the FAA could neither frustrate nor challenge as unlawful the signatories' rights and obligations under the Contract. Plaintiffs explain that, in section 5(d)(1), Congress prohibited the Secretary of the DOT and the Administrator of the FAA from taking any action inconsistent with the Contract. Thus, plaintiffs conclude that the FAA and the DOT are prohibited from taking any action whatsoever.

The parties' respective arguments notwithstanding, neither plaintiffs nor defendant discusses the impact of section (e) of the WARA, which qualifies the general exclusions placed upon the DOT and the FAA set forth in section (d)(1). Although neither the DOT nor the FAA may take actions that are inconsistent with or challenge the Contract, the WARA does not preclude either entity from enforcing its programs related to aviation safety, labor, the environment, national historic preservation, civil rights, small business concerns, veterans preferences, disability access, and revenue diversion. Pub. L. No. 109-352, § 5(e)(1)(A)-(B), 120 Stat. at 2013. Moreover, the WARA does not limit the FAA's authority—or the

authority of another federal agency—to enforce requirements of law and grant assurances that impose obligations on Love Field to make its facilities, viz., those that exist after Dallas reduces the number of gates, available "on a reasonable and nondiscriminatory basis to air carriers seeking to use such facilities, or to withhold grants or deny applications to applicants violating such obligations with respect to Love Field." *Id.* §§ 5(e)(1)(E), (2)(A), 120 Stat. at 2013. Thus, by enacting section 5(d), Congress reinforced its intention to incorporate the Contract into federal law by ensuring that DOT and FAA policymaking does not affect any of the provisions contained therein. Congress may delegate to an agency policymaking responsibilities or it may withhold doing so. As the United States Court of Appeals for the Ninth Circuit observed,

> [t]oday's administrative law jurisprudence is . . . driven by a pragmatic view of the roles of Congress and the administrative agencies. That jurisprudence does not inquire whether Congress has delegated legislative power at all, but only whether Congress has placed appropriate limits on the agency's exercise of legislative authority. . . .
>
> Nor must Congress intend—in whatever sense a collective body intends anything—each and every regulation an agency promulgates to implement a statute. To the contrary, Congress may choose not to legislate specifically in a particular area but instead leave it to the agency to fill out the area with regulations. In such instances, the

> agency performs much like a legislature, albeit only as to matters pre-designated by Congress.

Save Our Valley v. Sound Transit, 335 F.3d 932, 957 (9th Cir. 2003) (citations omitted).

Here, Congress chose to explicitly legislate with respect to Love Field. When it incorporated the Contract into federal law, Congress simultaneously defined and limited the ability of the DOT and the FAA to regulate those matters encompassed by the Contract. That the DOT and the FAA are statutorily obligated to neither act in a manner that is inconsistent with the Contract nor challenge the legality of the Contract does not render section 5(d) meaningless or surplusage. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes . . . ."). Section 5(d) merely defines the rights and obligations of the DOT and the FAA with respect to Contract provisions that are now part of a federal mandate.[62] Indeed, the Northern District of Texas determined that the WARA's directive to the FAA provided further evidence of congressional intent to incorporate the Contract as a whole in the statute.

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[62] The court finds no support in the WARA for defendant's contention that "inclusion of all of the terms of the Local Agreement into the [WARA] would automatically preclude anyone, including the FAA and the DOT, from taking any actions inconsistent with the Local Agreement." Def.'s Reply 16-17. Section 5(d) only precludes the FAA and the DOT from taking actions that are inconsistent with the Contract. *See* Pub. L. No. 109-352, § 5(d)(1)(A)-(B), 120 Stat. at 2012. No other agency is referenced in this provision, and section 5(e) preserves DOT and FAA authority. *Id.* § 5(e)(1)(B), (E), 120 Stat. at 2013.

Love Terminal Partners, L.P., 527 F. Supp. 2d at 559. Accordingly, a determination that the WARA incorporates the Contract into federal law does not render section 5(d) superfluous or surplusage.[63]

5. Incorporation of the Contract Into the WARA Does Not Create Constitutional,Contractual, or Statutory Conflicts

Defendant advances the position that incorporation of the Contract into the WARA creates numerous conflicts. First, it asserts that plaintiffs' interpretation of the WARA, viz., that Congress, by enacting the WARA, has violated the Fifth Amendment by taking property without just compensation, "violates the [canon] of constitutional avoidance . . . ." Def.'s Reply 15. Second, it argues that incorporation of the Contract into the WARA would "create a conflict for the City of Dallas," id. at 17, adding that plaintiffs' interpretation of the WARA creates a "'catch 22' for the City of Dallas," *id.* at 18. The court addresses each argument in turn.

a. The Canon of Constitutional Avoidance Is Not Implicated in This Case

The canon of constitutional avoidance "is a doctrine of statutory interpretation—that is, it is relevant when the court is construing disputed statutory language." *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1368 (Fed. Cir. 2009). "Where a possible construction of a statute would

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[63] The court, therefore, rejects defendant's assertion that incorporation of the Contract into the WARA creates statutory conflicts. *See infra* Part IV.C.5.b.

render the statute unconstitutional, courts must construe the statute 'to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Consol. Coal Co. v. United States*, 528 F.3d 1344, 1347 (Fed. Cir. 2008) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). In other words, the "elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). The canon of constitutional avoidance "is subject only to the qualification that the interpretation that 'save[s] a statute from unconstitutionality' must be reasonable . . . ." *Consol. Coal Co.*, 528 F.3d at 1347 (alteration in original). As the Supreme Court explained, the canon of constitutional avoidance "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Plaintiffs have not challenged the constitutionality of the WARA.[64] Moreover, Congress's failure to address in the WARA the government's liability to pay just compensation in the event that a taking occurred does not require invocation of the

[64] Congress enacted the WARA pursuant to the powers granted under the Commerce Clause. *See* H.R. Rep. No. 109-660, pt. 1, at 8-9; *see also* U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

canon of constitutional avoidance. In *Ruckelshaus*, the Supreme Court observed:

> Congress' failure specifically to mention or provide for recourse against the Government may reflect a congressional belief that use of data by EPA in ways authorized by FIFRA effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur.

467 U.S. at 1018-19. The same principles apply here. In *Preseault v. Interstate Commerce Comm'n*, the Supreme Court distinguished between inquiring into whether a statute effected a taking and whether Tucker Act remedies were available for claims arising out of a taking. 494 U.S. 1, 12 (1990). It explained that the "proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but rather 'whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] "founded . . . upon the Constitution."'" *Id.* (alterations in original). In other words, the court must assess whether Congress precluded an aggrieved party from seeking redress via the Tucker Act, not whether a statute can be reasonably construed to avoid a determination that it effects a taking.

Here, the fact that Congress did not address the liability of the government to pay just compensation in the event a taking occurred neither renders the WARA unconstitutional nor requires the court to

invoke the canon of constitutional avoidance. The *Preseault* Court indicated that it had "always assumed that the Tucker Act is an 'implie[d] promis[e]' to pay just compensation which individual laws need not reiterate." *Id.* at 13 (alterations in original) (quoting *Yearsley*, 309 U.S. at 21). Because a Tucker Act remedy "exists unless there are unambiguous indications to the contrary," *id.*, congressional silence with respect to providing recourse against the government may reflect Congress's belief that the WARA either effected no taking or that the Tucker Act provided an adequate remedy in the event such a taking occurred. There is no indication that Congress, by enacting the WARA, intended to preclude recourse to the Tucker Act in the event that a taking did occur. Indeed, this dispute is properly before the court, and neither party contests that the court possesses jurisdiction under the Tucker Act to entertain a Fifth Amendment takings claim. As the *Ruckelshaus* Court explained, Congress's failure to address in a statute the government's liability to pay just compensation in the event of a taking "cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy." 467 U.S. at 1019. Congress did not express any intention in the WARA to withdraw a remedy under the Tucker Act in order to preclude plaintiffs' claim. *See Preseault*, 494 U.S. at 12. Because there is no legitimate dispute that the WARA permits a Tucker Act remedy if it causes a Fifth Amendment taking, the doctrine of constitutional avoidance, which would require the court to seek an alternative interpretation of the WARA in the event of a "constitutional problem," has no application here.

b. Incorporation of the Contract Into the WARA Creates No Conflict for Dallas

Defendant, as noted previously, next contends that the WARA only pertains to certificated air carriers, arguing that incorporation of the Contract into the WARA would also require incorporation of "all contracts relating to management of Love Field that existed as of the effective date of the Act . . . ." Def.'s Reply 17. According to the defendant, plaintiffs' interpretation of the WARA would require incorporation of the Master Lease, which authorizes plaintiffs to use the leased premises for air transportation uses.

Defendant's interpretation of section 5(a) of the WARA is overly broad. The WARA does not compel Dallas to comply with each contract pertaining to all facets of operations at Love Field that were in effect on the date of the statute's enactment. In fact, defendant concedes that Congress did not intend to regulate all aspects of Love Field. For example, defendant acknowledges that the WARA does not address any agreements between Dallas and restaurants located at the Love Field terminal. As explained in Parts IV.C.4.c.ii-iii, *supra*, the WARA requires that Dallas allocate leased gates and manage Love Field in accordance with the contractual rights and obligations "existing as of the effective date of this Act *for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006*," Pub. L. No. 109- 352, § 5(a), 120 Stat. at 2012, language that refers specifically and directly to the Contract. Nowhere in the WARA does Congress, either explicitly or implicitly, incorporate any other agreement or

contract to which Dallas is a party. Therefore, incorporation of the Contract into the WARA does not impose upon Dallas conflicting legislative mandates.

c. Incorporation of the Contract Does Not Result in an "Unfunded Mandate"

Defendant also asserts that plaintiffs' interpretation that the WARA incorporates the Contract is unreasonable because it would create an unfunded mandate by requiring Dallas to acquire plaintiffs' leasehold interests without providing the federal funds necessary to carry out that directive. According to defendant, Congress intended that Dallas would collect funds from airport users and then utilize those monies to compensate plaintiffs. Specifically, defendant argues:

> While Plaintiffs argue for the incorporation of Dallas's solely contractual obligation to acquire and destroy the six passenger gates at the Lemmon Avenue facility into the [WARA], they conveniently ignore Dallas's concomitant obligation to acquire the leasehold interests through the exercise of its power of eminent domain. Moreover, they ignore that the Local Agreement specifically provides a funding source for the acquisition of the passenger gates: "airport users." If Plaintiffs' reading of the [WARA] is correct, Dallas's contractual obligation to acquire the gates through the use of its power of eminent domain has also been incorporated in the [WARA]. That obligation extends not only to Dallas's exercise of its power of eminent domain, but also to the source of funds to pay

> for that exercise—and it is not the United States.

Def.'s Reply 18 (citation omitted). It further notes that the Congressional Budget Office ("CBO") determined that the WARA "'contain[ed] no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act,'"[65] *id.* at 17 n.10 (quoting S. Rep. No. 109-317, at 15), and, as a result, require[d] Dallas to demolish the Lemmon Avenue Terminal without receiving a federal reimbursement for the costs associated with acquiring and demolishing the gates, *see id.* Thus, defendant argues, "[p]laintiffs need only seek the appropriate enforcement of the [WARA] against the City of Dallas to recoup what they believe they are owed." *Id.* at 19.

Plaintiffs dismiss the government's argument, asserting that congressional intent with respect to the source of compensation for the demolition of their gates is irrelevant. Instead, they argue that Congress may not legislate away a right to just compensation. Pls.' Reply 16 (citing *Jacobs v. United States*, 290 U.S.

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[65] The Unfunded Mandates Reform Act of 1995 ("UMRA"), Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C. (2006)), addresses situations wherein federal law imposes duties upon state and local governments without providing federal grants to pay for them. *Recent Legislation*, 109 Harv. L. Rev. 1469, 1469 (1996); *see also* 2 U.S.C. §§ 1501(2) (providing that one of the purposes of the UMRA was "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding"), 1501(5) (providing that an additional purpose of the UMRA was "to require that Congress consider whether to provide funding to assist State, local, and tribal governments in complying with Federal mandates").

13 (1933)). In *Jacobs*, the Supreme Court reversed a determination that the petitioner was not entitled to interest as part of the just compensation awarded for a taking of property. *See* 290 U.S. at 15-16. Explaining that the "concept of just compensation is comprehensive, and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation,'" *id.* at 17-18 (quoting *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923)), the *Jacobs* Court emphasized that the right to recover just compensation for property taken by the United States for public use was guaranteed by the Fifth Amendment, not by any statute: "Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment . . . ." *Id.* at 16. Thus, plaintiffs contend, whether Congress intended that airport user fees, as opposed to federal funds, be utilized to provide compensation to plaintiffs for acquisition of the Lemmon Avenue Terminal gates is beside the point.

Congress, when it enacted the UMRA, expressed "concern[] about shifting costs from Federal to State and local authorities . . . ." 2 U.S.C. § 1513(a)(1). Under the UMRA, a federal intergovernmental mandate means

> (A) any provision in legislation, statute, or regulation that—
>
> (i) would impose an enforceable duty upon State, local, or tribal governments, except—

(I) a condition of federal assistance; or

(II) a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B)[]; or

(ii) would reduce or eliminate the amount of authorization of appropriations for—

(I) Federal financial assistance that would be provided to State, local, or tribal governments for the purpose of complying with any such previously imposed duty unless such duty is reduced or eliminated by a corresponding amount; or

(II) the control of borders by the Federal Government . . . ;

(B) any provision in legislation, statute, or regulation that relates to a thenexisting Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority, if the provision—

(i)(I) would increase the stringency of conditions of assistance to State, local, or tribal governments under the program; or

> (II) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to State, local, or tribal governments under the program; and
>
> (ii) the State, local, or tribal governments that participate in the Federal program lack authority under the program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation, statute, or regulation.

2 U.S.C. § 658(5). The CBO recognized that the WARA "[made] the necessary changes in federal law *to implement an agreement among the cities of Dallas and Fort[] Worth and American and Southwest Airlines*," adding that "*[a]ny costs* to those cities or the state of Texas *would be incurred voluntarily*." S. Rep. No. 109-317, at 15 (emphasis added).

The UMRA addresses situations in which the federal government imposes mandates upon local governments but does not provide adequate funding. Congress cautioned that "the Federal Government should not shift certain costs to the State, and States should end the practice of shifting costs to local governments, which forces many local governments to increase property taxes[.]" 2 U.S.C. § 1513(b)(1). Such is not the case here. As the CBO recognized, any cost to Dallas as a result of enactment of the WARA would be voluntarily incurred by the city. Indeed, when

Dallas executed the Contract, it voluntarily agreed to demolish the Lemmon Avenue Terminal gates and to finance the Love Field modernization plan. The Contract provided that Dallas must make no greater than a $200 million investment—*i.e.*, the Spending Cap—and that capital and operating costs for the modernization plan could be recovered through passenger facility charges. Pls.' Ex. 2 at 4 (Contract art. I ¶ 6). Spending Cap costs, however, were exclusive of any other costs associated with the acquisition and demolition of the Lemmon Avenue Terminal gates, all of which were to be recovered from "airport users." *Id.* Section 5(b) of the WARA authorizes these commitments by Dallas, none of which would have legal effect absent congressional action, *see supra* note 55, and clarifies the limits of "airport users" by mandating that Dallas utilize neither federal funds nor passenger facility charges to fund the removal of these gates. Pub. L. No. 109-352, § 5(b), 120 Stat. at 2012. Nothing in the WARA itself directs Dallas to utilize specific funds to compensate plaintiffs. Instead, the WARA only addresses which funds may not be utilized to remove the gates at the Lemmon Avenue Terminal.

Furthermore, although the Contract provided that the "costs for the acquisition and demolition" of the Lemmon Avenue Terminal gates must be "recovered from airport users," Pls.' Ex. 2 at 4 (Contract art. I ¶ 5), this provision only addressed compensation to Dallas for any costs it ultimately incurs. It did not set aside funds to compensate any third party. Indeed, the Contract created no third party beneficiary rights: "The provisions of this Contract are solely for the benefit of the Parties

hereto; and nothing in this Contract, express or implied, shall create or grant any benefit, or any legal or equitable right, remedy, or claim hereunder, contractual or otherwise, to any other person or entity." *Id.* at 8 (Contract art. II ¶ 11). Moreover, the Dallas City Council Resolution did not address compensation to a third party or the source of such funds. Instead, it authorized Dallas to "tak[e] all appropriate steps to acquire" the Master Lease, which included exercise of eminent domain "if such becomes necessary . . . ." Pls.' Ex. 6 at 2 (Dallas City Council Resolution § 1); *see also id.* (Dallas City Council Resolution § 2 (providing that the acquisition "is for municipal and public purposes and a public use and that public necessity requires the acquisition")). It did not mandate that Dallas utilize its eminent domain powers.

Of course, Dallas always maintained its right to exercise eminent domain powers. The Contract provided that Dallas "agree[d]" to acquire "all or a portion of the lease on the Lemmon Avenue facility, up to and including condemnation, necessary to fulfill its obligations under the Contract." Pls.' Ex. 2 at 4 (Contract art. I ¶ 5). In fact, each provision contained in the first part of paragraph 5 of article I of the Contract indicated that Dallas "agree[d]" to engage in certain conduct: it "agrees that it will significantly redevelop portions of Love Field"; "agrees that it will acquire all or a portion" of the Master Lease; and "agrees to the demolition of the gates at the Lemmon Avenue facility." *Id.* According to defendant, the WARA simply permitted Dallas to take certain actions and provided no mandate. *Cf. id.* at 7 (Contract art. I ¶ 16 ("If the U.S. Congress does not enact legislation

by December 31, 2006, that would *allow* the Parties to implement the terms and spirit of this Contract, . . . then this Contract is null and void unless all parties agree to extend this Contract." (emphasis added))).

As explained in Parts IV.C.4.c.i-iv, *supra*, whereas Dallas committed itself to these actions under the Contract, the WARA obligates Dallas to perform. The fact remains that Dallas never did exercise its eminent domain powers to acquire the Lemmon Avenue Terminal, *see* Pls.' Ex. 6 at 2 (Dallas City Council Resolution § 1 (requiring Dallas to "compl[y] with the provisions of . . . [the WARA] and all other applicable laws, *including taking all appropriate steps to acquire, including the exercise of the right of eminent domain, if such becomes necessary, all or a portion of the leasehold interests, if any, from . . . property at Love Field with addresses of 7701 and 7777 Lemmon Avenue*" (emphasis added))), and nothing in the WARA requires that Dallas resort to eminent domain. The WARA mandates that Dallas act in accordance with the Contract, which contains Dallas's voluntary commitment to acquire the Lemmon Avenue Terminal and demolish the Lemmon Avenue Terminal gates as part of the broader requirement that Dallas reduce the number of gates at Love Field to effectuate the repeal of the Wright Amendment. *See* Pub. L. No. 109-352, § 5(a), 120 Stat. at 2012 (requiring that Dallas manage Love Field in accordance with the contractual rights and obligations set forth in the Contract). Stated simply, the WARA does not impose upon Dallas an unfunded mandate because Dallas voluntarily assumed the costs, contingent upon congressional approval, of those

actions. The WARA merely reflects Congress's assent to the commitments set forth in the Contract.

The fact that Dallas must, under federal law, comply with the terms of the Contract and, in turn, recover any costs it incurs for the acquisition and demolition of the Lemmon Avenue Terminal gates from airport users without reliance upon federal funds or passenger facility charges does not insulate the government from compensating for any consequential taking. Even if the Contract, as incorporated under the WARA, requires that airport user funds be utilized to compensate plaintiffs, an "owner's right to just compensation cannot be made to depend upon . . . statutory provisions." *Seaboard Air Line Ry. Co.*, 261 U.S. at 306. In *Monongahela Navigation Co. v. United States*, the Supreme Court rejected the notion that Congress could determine an appropriate measure of compensation, stating:

> By this legislation[,] [C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through [C]ongress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The [C]onstitution has declared that just

> compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. 312, 327 (1893). Accordingly, whether Congress intended to provide a mechanism through which compensation should be paid for the demolition of the Lemmon Avenue Terminal gates is immaterial. As previously noted, a Tucker Act remedy exists, and Congress did not withdraw Tucker Act jurisdiction when it enacted the WARA. *See supra* Parts IV.A, IV.C.5.a. Furthermore, section 5(b) of the WARA, by authorizing Dallas to utilize federal funds or passenger facility charges to reduce the number of gates other than those at the Lemmon Avenue Terminal, merely provides that the costs associated with this reduction were permissible airport costs and not revenue diversion. *See* H.R. Rep. No. 109-600, pt. 1 at 6; H.R. Rep. No. 109-600, pt. 2 at 11.

In short, defendant's argument that the WARA cannot simultaneously mandate that Dallas demolish the Lemmon Avenue Terminal gates without providing a funding mechanism ignores a key element: Dallas previously committed itself to acquire and to demolish the Lemmon Avenue Terminal when it executed the Contract. Absent congressional approval of the Contract, the agreements made therein were null and void. Therefore, by recognizing that the WARA contained no intergovernmental mandate as defined in the UMRA, the CBO explicitly acknowledged that any costs associated with the WARA were being borne by the signatories voluntarily and were not imposed upon them by the federal government as additional obligations that expanded the scope of the Contract.

6. The WARA's Legislative History Confirms That Congress Intended to Incorporate the Contract Into Federal Law

In Parts IV.C.4.a-c, *supra*, the court analyzed the plain language of the WARA and determined that Congress unambiguously intended to incorporate the Contract into the statute. In light of this conclusion, the court need not consider the WARA's legislative history. *See Timex V.I., Inc.*, 157 F.3d at 882. Nevertheless, because the legislative history further supports this determination, the court determines that a brief discussion is warranted.

When the WARA was first introduced in the Senate, the draft legislation provided, in part:

> (a) In General.—Except as provided in subsection (b), *any actions* taken by the City of Dallas, the City of Fort Worth, Southwest Airlines, American Airlines, and/or the Dallas-Fort Worth International Airport Board (referred to in this section as the 'parties') *that are reasonably necessary to implement the provisions of the agreement dated July 11, 2006*, and titled CONTRACT AMONG THE CITY OF DALLAS, THE CITY OF FORT WORTH, SOUTHWEST AIRLINES CO., AMERICAN AIRLINES, INC., AND DFW INTERNATIONAL AIRPORT BOARD INCORPORATING THE SUBSTANCE OF THE TERMS OF THE JUNE 15, 2006 JOINT STATEMENT BETWEEN THE PARTIES TO RESOLVE THE 'WRIGHT AMENDMENT' ISSUES,

> *shall be deemed to comply in all respects with the parties' obligations under all Federal laws, rules, orders, agreements, and other requirements.*

S. 3661, 109th Cong. § 4(a) (as introduced in Senate, July 13, 2006) (emphasis added). A subsequent version of the Senate bill contained a modified provision indicating that the Contract "shall be deemed to comply in all respects with the parties' obligations under title 49, United States Code, and any other competition laws . . . ." *See* S. 3661, 109th Cong. § 5(a) (as reported in Senate, Aug. 1, 2006). The bills introduced and reported in the House of Representatives contained similar language. *See* H.R. 5830, 109th Cong. § 5(a) (as reported in House, Sept. 15, 2006); H.R. 5830, 109th Cong. § 5(a) (as introduced in House, July 18, 2006).

According to the House Transportation and Infrastructure Committee, H.R. 5830 was designed to "*implement a compromise agreement reached* by the City of Dallas, Texas; the City of Fort Worth, Texas; American Airlines; Southwest Airlines; and Dallas-Fort Worth International Airport (DFW) *on July 11, 2006*, regarding air service at Dallas Love Field." H.R. Rep. No. 109-600, pt. 1, at 1 (emphasis added). "Given the unique history of the development of DFW," the Committee indicated its belief that H.R. 5830 was "*necessary and appropriate to implement the July 11 agreement*." *Id.* at 4 (emphasis added). Indeed, the Committee recognized that "the legislation provide[d] *congressional approval to an agreement* that pertains to a 'local issue' . . . ." H.R. Rep. No. 109-600, pt. 2, at 8 (emphasis added); *see also* 152 Cong. Rec. H8003

(daily ed. Sept. 29, 2006) (statement of Rep. Mica) ("This legislation . . . would implement a locally initiated and locally approved agreement that seeks to change and eventually eliminate what has been commonly known as the Wright amendment . . . ."), H8008 (daily ed. Sept. 29, 2006) (statement of Rep. Oberstar) (stating that the WARA "would implement an agreement reached by the Cities of Dallas and Fort Worth, the Dallas/Fort Worth International Airport Board, American Airlines and Southwest Airlines"). The Contract, the Committee acknowledged, "provide[d] that the number of gates at Love Field would be immediately and permanently reduced from 32 to 20" and that "existing gate facilities would be physically demolished" in order to effect that result.[66] H.R. Rep. No. 109-600, pt. 2, at 8. Thus, Congress, the Committee recognized, intended to codify key provisions of the Contract under federal law. *See* H.R. Rep. No. 109-600, pt. 1, at 5 (noting that the Committee "decided to *codify the key components of the locally-initiated and locally-approved July 11 agreement in H.R. 5830*" (emphasis added)), 8 (stating that H.R. 5830 was "crafted narrowly to *codify only those aspects of the July 11 agreement that require changes to federal law*" (emphasis added)); *see also* 152 Cong. Rec. H8003 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner) (expressing concern that the bill "codifie[d] an agreement among private and local government parties").

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[66] Congress was also cognizant of plaintiffs' antitrust litigation pending before the Northern District of Texas. *See* H.R. Rep. No. 109-600, pt. 2, at 8.

The WARA "recognize[d] that the city of Dallas [was] the entity responsible for operating Love Field, and [would] reduce the gates there to 20 and will allocate those gates with existing commitments and obligations, including commitments to accommodate potential new entrants." 152 Cong. Rec. S10560 (daily ed. Sept. 29, 2006) (statement of Sen. Cornyn). In order for Dallas to fulfill its responsibility to operate Love Field, the WARA "provide[d] a congressional approval, requiring the demolition of existing gates at Love Field, some of which [were] privately owned and utilized by airlines to offer additional air passenger service to points across the United States." *Id.* at H8003 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner). Notwithstanding this mandate, Texas Senator John Cornyn expressed his belief that

> the proposed legislation reflects a Congressional *sanction for the city of Dallas to manage Love Field* in a manner that it deems in the best interests of its citizens, and *in accordance with a hard fought local compromise*, a sanction made necessary only by the existence of the Wright amendment itself.

Id. at S10560 (daily ed. Sept. 29, 2006) (statement of Sen. Cornyn) (emphasis added). Thus, Congress sought to give full effect to the Contract, which was the product of significant and substantial work by the signatories, *see id.* at H8004 (daily ed. Sept. 29, 2006) (statement of Rep. Johnson) (noting that the WARA outlined a "compromise" that "require[d] give and take of all vested stakeholders"), H8006 (daily ed. Sept. 29, 2006) (statement of Rep. Barton) (stating that the

"compromise was hammered out in a deliberative fashion" and that the legislation was "a balanced compromise that has the support of Dallas and Fort Worth"); *see also id.* at H8010 (daily ed. Sept. 29, 2006) (statement of Rep. Burgess) (characterizing the Contract as an "historic compromise"); S. Rep. No. 109-317, at 17 (recognizing the "concessions" made by the signatories to reach an agreement), and legislators, *see* 152 Cong. Rec. H8010 (daily ed. Sept. 29, 2006) (statement of Rep. Costello) ("I know there was a lot of 'give and take' on both sides to reach this legislative agreement.") Senator Hutchison further explained:

> The cities did a great job. They made an agreement and they brought it to Congress. I have felt since the beginning, *it was Congress's responsibility to take that agreement, ratify it and mandate that the agreement be kept in its entirety because it is so balanced*. And if you did away with the Wright amendment, but you did not have the 20 gate limit and the implementation of the 20 gates, it could have gone out of balance.
>
> *So this act*, regardless of anything else that has been said, *authorizes*, *mandates, and protects all aspects of performance of the legislation's terms, including that the city of Dallas reduce and allocate gates according to this act, its contractual obligations as contemplated by the act, and the local compromise and the balance it has achieved*.

Id. at S10561 (daily ed. Sept. 29, 2006) (statement of Sen. Hutchison) (emphasis added); *cf. id.* at H8008

(daily ed. Sept. 29, 2006) (statement of Rep. Oberstar) (indicating that the House bill "would implement three core provisions of the parties' contract: to repeal the Wright Amendment 8 years after enactment of this Act; eliminate the restrictions on through-ticketing from Love Field; and to cap the Love Field gates at 20 in perpetuity").

By giving full effect to the Contract, Congress recognized that the WARA "direct[ed] the City of Dallas to reduce the number of operational gates to no more than 20, which include[d] the removal of the 6 so-called Lemmon Avenue gates, and allow[ed] the City to allocate the use of the remaining gates based on existing leases and obligations." *Id.* at H8008 (daily ed. Sept. 29, 2006) (Statement of Rep. Oberstar); see also id. at S10562 (daily ed. Sept. 29, 2006) (statement of Sen. Hutchison) ("[T]he law we are passing speaks for itself. The law is very clear in what it instructs the city of Dallas to do, as well as the FAA and the [DOT] in implementing this agreement. I think it is a major piece of legislation that is absolutely right."). Indeed, Minnesota Congressman James L. Oberstar emphasized that Congress possessed the authority "to direct the closing of gates for safety, environmental or economic reasons . . . ." *Id.* at H8008 (daily ed. Sept. 29, 2006) (statement of Rep. Oberstar). Thus, a majority of legislators did not hesitate to incorporate into federal law the Contract, which represented "the desire of the community to make sure that the more urban of its two airports does not become overbearing." *Id.* at H8008 (daily ed. Sept. 29, 2006) (statement of Rep. Meeks).

Nevertheless, other members of Congress expressed concern about codifying the Contract into federal law. Texas Congressman Jeb Hensarling objected:

> [The Contract] does not get Congress out of the business of interfering with airport competition. That is the essence of the Wright Amendment, not the specific interference of perimeter restrictions. For example, in the local agreement, the City of Dallas agrees to reduce the number of gates at Love Field from 32 to 20. Though I might not like it, I respect their right to contractually bind themselves and decide whether Love Field is limited to 20 gates, 10 gates or even shut down. It is their airport.
>
> *But I believe it is wrong for the parties to ask Congress to establish into Federal law their private contractual obligations. Those are enforceable in court. By including these privately made agreements in a new federal law, Congress would be replacing one complex set of anti-competitive rules with another.* Terminating today's version of the Wright Amendment, whereby Congress imposes distance limitations on an airport, only to replace it with a new version of the Wright Amendment whereby Congress imposes gate limitations on an airport, does not constitute repeal—today, in 8 years or ever. Additionally, the unusual anti-trust exemption language is troubling.

> For far too long the Wright Amendment has been a burden on both consumers and the national economy. In the spirit of compromise, I again would support a simple federal law that would enact immediate through-ticketing, full[]repeal of Wright in 8 years while respecting the rights of American Airlines, Southwest Airlines, D/FW and the cities of Fort Worth and Dallas to otherwise enter into lawful contracts to mutually bind themselves as they choose.

Id. at H8011 (daily ed. Sept. 29, 2006) (statement of Rep. Hensarling) (emphasis added). Wisconsin Congressman Jim Sensenbrenner, Jr. objected that the WARA provided congressional approval of a contract that required the demolition of the Lemmon Avenue Terminal and fostered anti-competitive objectives, *id.* at H8003-04 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner), stating that the legislation "effectively delegate[d] . . . power on this issue [of an antitrust exemption] to the people who came to Congress, and they asked us to ratify this agreement. We shouldn't be delegating antitrust immunity to anybody," *id.* at H8009 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner). Despite such opposition, Alaska Congressman Don Young set forth his position that "[a] lot of times we lose sight of solving problems in this body by hanging up on jurisdiction or hanging up on some small clause. But we are the people that write the laws, we create the laws, and we try to make them work." *Id.* at H8010 (daily ed. Sept. 29, 2006) (statement of Rep. Young).

Congress, by enacting the WARA, gave full effect to the Contract, an instrument that legislators themselves encouraged Dallas and Fort Worth to negotiate on their own in an effort to resolve disputes arising from the Wright Amendment. *See* S. Rep. No. 109-317, at 3 ("In March 2006, *at the urging of some members of Congress*, the Cities of Dallas and Fort Worth passed resolutions requesting Congress provide them time to develop a local solution." (emphasis added)). In so doing, Congress intended to—and did—give effect to the Contract, into which the signatories entered pursuant to Texas law, under federal law. Such an intent is clearly expressed in the statute's legislative history and, as discussed in Parts IV.C.4.a-c, in the plain language of its provisions.

7. Plaintiffs Are Entitled to Partial Summary Judgment

Defendant characterizes plaintiffs' taking claim as a dispute between a lessor, Dallas, and lessees, plaintiffs. According to defendant, if the lessor expresses the intention to demolish a building on the leasehold and then terminates the lease, the lessees must look to the lessor, and not a third party, for compensation. Defendant's lessor-lessee characterization, however, fails to account for the unique circumstances involved in this case, viz., congressional intervention in a local dispute that has, over the years, required legislative action to ensure that locally crafted agreements were binding upon the parties. *See* H.R. Rep. No. 109-600, pt. 1, at 2. Here, Dallas, the lessor in defendant's analogy, presented to Congress an agreement in which Dallas committed, among other things, to demolish a building that was

part of plaintiffs' leasehold interests. Such a commitment was, absent congressional approval, null and void. By enacting legislation that approved the agreement, Congress mandated that the lessor fulfill this commitment under federal law. The lessor, now obligated to act in accordance with its commitment under a federal statutory mandate, acts under the aegis of the United States such that its actions are imputed to the federal government for the purpose of a takings analysis. See *Preseault*, 100 F.3d at 1551. The fact that the lessor could have, absent the government's involvement, acted on its own, the Federal Circuit instructs, is "immaterial." *Id.*

Based upon its analysis of the WARA, the court holds that the statute incorporated the Contract into federal law, thereby mandating that Dallas fulfill the obligations to which it agreed on July 11, 2006, including acquisition and demolition of the Lemmon Avenue Terminal. This federal mandate imposed upon Dallas enabled it to satisfy, in part, its obligation to reduce the number of gates at Love Field for passenger air service and to manage the airport in accordance with the rights and obligations set forth in the Contract. Although Dallas was required to act by the authority of the federal government, it is the latter party that is responsible for any taking that stems from Dallas's conduct.

The court further holds that the WARA did not withdraw a Tucker Act remedy for any taking that resulted from Dallas acting in a manner that was consistent with the Contract and was based upon a federal statutory mandate. Although the WARA designated Dallas as the party responsible for

acquiring and demolishing the Lemmon Avenue Terminal gates as part of a broader commitment to modernize Love Field and to facilitate the end of the Wright Amendment, the federal government sanctioned such actions. Accordingly, the court concludes that the WARA effected a per se, physical taking of plaintiffs' property for which the government is liable to pay just compensation, and plaintiffs are entitled to partial summary judgment based upon their physical taking theory.

V. CONCLUSION

For the reasons discussed above, the government's motion is **DENIED**, and plaintiffs' cross-motion is **GRANTED**. The parties shall, **by no later than Friday, March 25, 2011**, file a joint status report proposing further proceedings.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

Appendix E

RELEVANT STATUTORY PROVISIONS

Wright Amendment Reform Act of 2006, Pub. Law 109-352, 120 Stat. 2011

An Act

To amend section 29 of the International Air Transportation Competition Act of 1979 relating to air transportation to and from Love Field, Texas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Wright Amendment Reform Act of 2006".

SEC. 2. MODIFICATION OF PROVISIONS REGARDING FLIGHTS TO AND FROM LOVE FIELD, TEXAS.

(a) EXPANDED SERVICE.—Section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 9-92; 94 Stat. 35) is amended by striking "carrier, if (1)" and all that follows and inserting the following: "carrier. Air carriers and, with regard to foreign air transportation, foreign air carriers, may offer for sale and provide through service and ticketing to or from Love Field, Texas, and any United States or foreign destination through any point within Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama.".

(b) REPEAL.—Section 29 of the International Air Transportation Competition Act of 1979 (94 Stat.

35), as amended by subsection (a), is repealed on the date that is 8 years after the date of enactment of this Act.

SEC. 3. TREATMENT OF INTERNATIONAL NONSTOP FLIGHTS TO AND FROM LOVE FIELD, TEXAS.

No person shall provide, or offer to provide, air transportation of passengers for compensation or hire between Love Field, Texas, and any point or points outside the 50 States or the District of Columbia on a nonstop basis, and no official or employee of the Federal Government may take any action to make or designate Love Field as an initial point of entry into the United States or a last point of departure from the United States.

SEC. 4. CHARTER FLIGHTS AT LOVE FIELD, TEXAS.

(a) IN GENERAL.—Charter flights (as defined in section 212.2 of title 14, Code of Federal Regulations) at Love Field, Texas, shall be limited to—

(1) destinations within the 50 States and the District of Columbia; and

(2) no more than 10 per month per air carrier for charter flights beyond the States of Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, and Alabama.

(b) CARRIERS WHO LEASE GATES.—All flights operated to or from Love Field by air carriers that lease terminal gate space at Love Field shall

depart from and arrive at one of those leased gates; except for—

(1) flights operated by an agency of the Federal Government or by an air carrier under contract with an agency of the Federal Government; and

(2) irregular operations.

(c) CARRIERS WHO DO NOT LEASE GATES.—Charter flights from Love Field, Texas, operated by air carriers that do not lease terminal space at Love Field may operate from nonterminal facilities or one of the terminal gates at Love Field.

SEC. 5. LOVE FIELD GATES.

(a) IN GENERAL.—The city of Dallas, Texas, shall reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates. Thereafter, the number of gates available for such service shall not exceed a maximum of 20 gates. The city of Dallas, pursuant to its authority to operate and regulate the airport as granted under chapter 22 of the Texas Transportation Code and this Act, shall determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006. To accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases.

(b) REMOVAL OF GATES AT LOVE FIELD.—No Federal funds or passenger facility charges may be used to remove gates at the Lemmon Avenue facility, Love Field, in reducing the number of gates as required under this Act, but Federal funds or passenger facility charges may be used for other airport facilities under chapter 471 of title 49, United States Code.

(c) GENERAL AVIATION.—Nothing in this Act shall affect general aviation service at Love Field, including flights to or from Love Field by general aviation aircraft for air taxi service, private or sport flying, aerial photography, crop dusting, corporate aviation, medical evacuation, flight training, police or fire fighting, and similar general aviation purposes, or by aircraft operated by any agency of the Federal Government or by any air carrier under contract to any agency of the Federal Government.

(d) ENFORCEMENT.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Transportation and the Administrator of the Federal Aviation Administration may not make findings or determinations, issue orders or rules, withhold airport improvement grants or approvals thereof, deny passenger facility charge applications, or take any other actions, either self-initiated or on behalf of third parties—

(A) that are inconsistent with the contract dated July 11, 2006, entered into by the city of Dallas, the city of Fort

Worth, the DFW International Airport Board, and others regarding the resolution of the Wright Amendment issues, unless actions by the parties to the contract are not reasonably necessary to implement such contract; or

(B) that challenge the legality of any provision of such contract.

(2) COMPLIANCE WITH TITLE 49 REQUIREMENTS.—A contract described in paragraph (1)(A) of this subsection, and any actions taken by the parties to such contract that are reasonably necessary to implement its provisions, shall be deemed to comply in all respects with the parties' obligations under title 49, United States Code.

(e) LIMITATION ON STATUTORY CONSTRUCTION.—

(1) IN GENERAL.—Nothing in this Act shall be construed—

(A) to limit the obligations of the parties under the programs of the Department of Transportation and the Federal Aviation Administration relating to aviation safety, labor, environmental, national historic preservation, civil rights, small business concerns (including disadvantaged business enterprise), veteran's preference, disability access, and revenue diversion;

(B) to limit the authority of the Department of Transportation or the

Federal Aviation Administration to enforce the obligations of the parties under the programs described in subparagraph (A);

(C) to limit the obligations of the parties under the security programs of the Department of Homeland Security, including the Transportation Security Administration, at Love Field, Texas;

(D) to authorize the parties to offer marketing incentives that are in violation of Federal law, rules, orders, agreements, and other requirements; or

(E) to limit the authority of the Federal Aviation Administration or any other Federal agency to enforce requirements of law and grant assurances (including subsections (a)(1), (a)(4), and (s) of section 47107 of title 49, United States Code) that impose obligations on Love Field to make its facilities available on a reasonable and nondiscriminatory basis to air carriers seeking to use such facilities, or to withhold grants or deny applications to applicants violating such obligations with respect to Love Field.

(2) FACILITIES.—Paragraph (1)(E)—

(A) shall only apply with respect to facilities that remain at Love Field after the city of Dallas has reduced the number of gates at Love Field as required by subsection (a); and

(B) shall not be construed to require the city of Dallas, Texas—

(i) to construct additional gates beyond the 20 gates referred to in subsection (a); or

(ii) to modify or eliminate preferential gate leases with air carriers in order to allocate gate capacity to new entrants or to create common use gates, unless such modification or elimination is implemented on a nationwide basis.

SEC. 6. APPLICABILITY.

The provisions of this Act shall apply to actions taken with respect to Love Field, Texas, or air transportation to or from Love Field, Texas, and shall have no application to any other airport (other than an airport owned or operated by the city of Dallas or the city of Fort Worth, or both).

SEC. 7. EFFECTIVE DATE.

Sections 1 through 6, including the amendments made by such sections, shall take effect on the date that the Administrator of the Federal Aviation Administration notifies Congress that aviation operations in the airspace serving Love Field and the Dallas-Fort Worth area which are likely to be conducted after enactment of this Act can be accommodated in full compliance with Federal Aviation Administration safety standards in accordance with section 40101 of title 49, United States Code, and, based on current expectations, without adverse effect on use of airspace in such area. Approved October 13, 2006.