UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/04/2016

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

cc: 16-1889 - Julian v. US
United States Court of Federal Claims, Case No. 1:15-cv-01344-EJD

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER B. JULIAN, RENEE G. JULIAN,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2016-1889

Appeal from the United States Court of Federal Claims in No. 1:15-cv-01344-EJD, Senior Judge Edward J. Damich.

Decided: August 4, 2016

CHRISTOPHER B. JULIAN, Ararat, VA, pro se.

RENEE G. JULIAN, Ararat, VA, pro se.

MELISSA BAKER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., ALLISON KIDD-MILLER.

Before PROST, *Chief Judge,* CHEN, and STOLL, *Circuit Judges.*

PER CURIAM.

Plaintiffs Christopher B. Julian and Renee G. Julian filed suit in the United States Court of Federal Claims alleging that the government breached an implied contract and/or violated the Fifth Amendment's Takings Clause when the United States District Court for the Western District of Virginia dismissed an earlier suit filed by Plaintiffs under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1964(c). In an order issued March 10, 2016, the Court of Federal Claims dismissed Plaintiffs' complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. *Julian v. United States*, No. 15-1344C, 2016 WL 929219, at *2–3 (Fed. Cl. Mar. 10, 2016) (*Order*). In that same order, the court denied Plaintiffs' request that the assigned judge—Senior Judge Edward J. Damich—recuse himself from the case. *Id.* at *3. We find no error in the court's analysis and agree that dismissal was proper. We therefore *affirm*.

BACKGROUND

Plaintiffs' claims in this case arise from dismissal of an earlier case they filed in the Western District of Virginia. On September 16, 2013, Plaintiffs filed suit against the United States Department of Agriculture (USDA), seven federal employees, and one Virginia state employee requesting judicial review of the USDA's decision to deny Plaintiffs a Farm Ownership Loan and alleging a variety of due process and other tort claims.[1] *Julian v. Rigney*,

[1] Specifically, Plaintiffs lodged allegations of negligence, fraud, fraudulent misrepresentation, conspiracy,

No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 38311, at *13 (W.D. Va. Mar. 24, 2014). The district court dismissed Plaintiffs' claims, with the exception of the request for review of the USDA's decision to deny the loan. *Id.* at *83. The district court subsequently granted the USDA's motion for summary judgment that it acted within its authority when it denied Plaintiffs' loan request. *Julian v. Rigney*, No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 113190, at *18 (W.D. Va. Aug. 15, 2014). The Court of Appeals for the Fourth Circuit affirmed the district court's decisions, *Julian v. U.S. Dep't of Agriculture*, 585 F. App'x. 850, 850–51 (4th Cir. 2014), and the Supreme Court denied Plaintiffs' cert petition, *Julian v. U.S. Dep't of Agriculture*, 135 S. Ct. 1901, 1902 (2015).

Plaintiffs then filed suit in the Court of Federal Claims seeking damages of $42 million. They alleged that the United States government breached an implied contract when the Western District of Virginia dismissed their earlier case. Plaintiffs reason as follows: (1) the government offered to enter into a contract with private citizens through the codification of § 1964(c) of the RICO Act, which allows persons who suffer injuries to their business or property through a violation of the RICO Act to serve as "private attorneys general" and sue for damages in federal district court, *see Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987); (2) Plaintiffs accepted this offer by filing their complaint in the Western District of Virginia; and (3) the government breached the implied contract when the district court dismissed Plaintiffs' claims. In the alternative, Plaintiffs alleged that the district court's dismissal effec-

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racketeering, and violations of the Fair Credit Reporting Act. *Julian v. Rigney*, No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 38311, at *13 (W.D. Va. Mar. 24, 2014).

tuated an unlawful "taking" of Plaintiffs' personal property (i.e., the implied contract) under the Fifth Amendment.

On March 10, 2016, the Court of Federal Claims dismissed Plaintiffs' action. The court held that it lacked jurisdiction to review the Western District of Virginia's dismissal of Plaintiffs' earlier case and that Plaintiffs failed to state a claim for breach of contract or an unlawful taking. *Order*, 2016 WL 929219, at *2–3. As part of the order, Judge Damich denied Plaintiffs' request that he recuse himself because he refused to attest to Plaintiffs that he had taken his statutory oath to perform his duties under the Constitution.[2] *Id.* at *3.

In response to the Court of Federal Claims' order, Plaintiffs filed a petition for writ of mandamus to this court. We converted Plaintiffs' petition to a notice of appeal on April 19, 2016. We have jurisdiction to address Plaintiffs' appeal under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review whether the Court of Federal Claims properly dismissed a complaint for either a lack of jurisdiction or for failure to state a claim upon which relief can be granted de novo. *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000). Plaintiffs bear the burden of establishing jurisdiction by a preponderance of the evidence. *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002). We "uphold[] the Court of Federal Claims' evidentiary rulings absent an abuse of discretion." *Id.*

Dismissal for failure to state a claim under Rule 12(b)(6) is proper only when a plaintiff "can prove no set

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[2] Plaintiffs included this request in a footnote in their opposition to the government's motion to dismiss. Judge Damich treated the request as a motion for recusal. *Id.* at *3.

of facts in support of his claim which would entitle him to relief." *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (internal quotation marks and citation omitted). "In reviewing the Court of Federal Claims' grant of a Rule 12(b)(6) motion, we must assume that all well-pled factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-movant." *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004).

The Court of Federal Claims properly found that it lacked jurisdiction over Plaintiffs' claims. While styled as breach of contract and takings claims, Plaintiffs' claims are, at bottom, requests that the Court of Federal Claims review the Western District of Virginia's decision to dismiss Plaintiffs' earlier action.[3] "The Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . relating to proceedings before those courts." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Moreover, to the extent that Plaintiffs now argue that the RICO Act is, itself, a money-mandating statute conferring jurisdiction on the Court of Federal Claims,[4] we hold that it is not. *See Treviño v. United*

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[3] The Court of Federal Claims also dismissed claims it understood Plaintiffs to raise under the due process clauses of the Fifth and Fourteenth Amendments. *Order*, 2016 WL 929219, at *2. In their opening brief, Plaintiffs make clear that none of their claims "w[ere], or [are], based on violations of the Fifth and Fourteenth Amendments." Appellants' Opening Br. 38. "[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Therefore, we do not address this portion of the court's opinion.

[4] *See* Appellants' Opening Br. 39 ("As has been consistently argued by Appellants throughout these proceedings 18 U.S.C. § 1964(c) is absolutely [a] money

States, 557 F. App'x 995, 998 (Fed. Cir. 2014); *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009).

The Court of Federal Claims' alternative analysis—i.e., that Plaintiffs failed to state a claim for which relief could be granted—was likewise correct. Plaintiffs' allegations do not establish that any contract existed between Plaintiffs and the government. Plaintiffs' characterization of § 1964(c) of the RICO Act as a contract "offer" is false. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights.'" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (quoting *Dodge v. Bd. of Ed.*, 302 U.S. 74, 79 (1937)). Nothing in the RICO Act suggests it was intended to function as a contract offer to private citizens.

Plaintiffs also failed to allege an unlawful taking under the Fifth Amendment. Plaintiffs contend that their RICO Act claim in the Western District of Virginia represented a property right that was taken by the government when the district court dismissed the claim. We have held that frustration of a legal claim, like that alleged by Plaintiffs, is not a compensable taking. *See Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988) (holding that international agreement that barred Iranian hostages from bringing legal action could not form the basis of a takings claim).

Finally, we hold that Judge Damich did not abuse his discretion when he denied Plaintiffs' motion that he recuse himself from the case. *See Shell Oil Co. v. United States*, 672 F.3d 1283, 1288 (Fed. Cir. 2012) ("Consistent with the vast majority of courts to consider this issue, we

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mandating statute, which provides substantive property rights in money damages.").

review a judge's failure to recuse for an abuse of discretion."). By statute, all federal judges must swear or affirm to perform their duties under the Constitution before taking office. *See* 28 U.S.C. § 453. There is no requirement that a federal judge later establish that he took that oath or affirmation to the satisfaction of any particular party.

AFFIRMED

COSTS

Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Rehearing (Fed. Cir. R. 40)
and
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)

Q. When is a petition for rehearing appropriate?

A. Petitions for rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for rehearing is not appropriate. A petition for rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for rehearing to be appropriate. Counsel seeking rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

Q. When is a petition for hearing or rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merit panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a suggestion for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow identifiable decisions of the U.S. Supreme Court or Federal Circuit precedential opinions or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for rehearing granted by merits panels or petitions for rehearing en banc accepted by the court?

A. The data regarding petitions for rehearing since 1982 shows that merits panels granted some relief in only three percent of the more than 1900 petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions were accepted less frequently, in only 16 of more than 1100 requests. Historically, the court itself initiated en banc review in more than half (21 of 37) of the very few appeals decided en banc since 1982. This sua sponte, en banc review is a by-product of the court's practice of circulating every precedential panel decision to all the judges of the Federal Circuit before it is published. No count is kept of sua sponte, en banc polls that fail to carry enough judges, but one of the reasons that virtually all of the more than 1100 petitions made by the parties since 1982 have been declined is that the court itself has already implicitly approved the precedential opinions before they are filed by the merits panel.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals. As a matter of interest, very few petitions for certiorari from Federal Circuit decisions are granted. Since 1982, the U.S. Supreme Court has granted certiorari in only 31 appeals heard in the Federal Circuit. Almost 1000 petitions for certiorari have been filed in that period.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the $300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.