No. 99-244 and 99-253

IN THE SUPREME COURT OF THE UNITED STATES

MOBIL OIL EXPLORATION AND PRODUCTION SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

LEGISLATIVE MATERIALS AND REGULATIONS

COURT RULES

UNIFORM LAWS

MISCELLANEOUS

REPLY BRIEF OF PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

The Federal Circuit grounded its holding on two propositions: first, that "the [OBPA] was not the operative cause of [Mobil's and Marathon's] failure to obtain the required permits," Pet. App. 2a, and second, that the repeal of the OBPA absolved the Government of any liability for its action, *id.* 13a. In its Brief, Mobil demonstrated conclusively that the Federal Circuit erred in relying on "causation" in a case involving restitution and on a post-lawsuit retraction to cure an anticipatory repudiation.

Having no effective answer to Mobil's arguments, *see also* Mobil Op. Cert. Reply 1, 5, the Government falls back on two positions that are wholly unsupported by the Federal Circuit's opinion: (1) that the OBPA did not constitute a "material breach" of Petitioners' leases and (2) that Mobil has waived its claims.[1] Neither argument can save the decision below.

A. Material Breach.

1. *The Undisputed Facts.* a. While the Government did not promise that Mobil would succeed in finding oil or gas, the Government *did* promise that it would approve Mobil's POEs, PODs, and drilling permits if they comply with the OCSLA. *See* Lease § 1, Marathon Pet. App. 175a (leases issued "pursuant to" and "subject to" the OCSLA); *see also* Pet App. 70a, 72a (Government promised Mobil a

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[1] We deal below, *see* p. 2 n.3, with the Federal Circuit's unexplained (and inexplicable) statement that there was "no evidence of a breach of contract by the United States." The Government's third argument – that Mobil has received all of the remedy it deserves – is merely a corollary of its material breach argument.

specific "regulatory process").[2] In consideration of that promise, Mobil paid the Government up-front bonuses totaling $78 million.

The OBPA clearly compelled a breach of this duty. Without amending the OCSLA, the OBPA superseded the OCSLA plan- and permit-approval process for which Mobil had contracted and replaced it with an altogether different and much more onerous scheme that imposed OBPA requirements for the approval of "*any* exploration plan," "*any* development and production plan," "*any* application for permit to drill," or "*any* drilling" on "*any* lands" of the North Carolina OCS. OBPA § 6003(c)(1) (emphasis added). Thus, the OBPA applied not only to Mobil's POE for its first exploratory well, but also to every subsequent POE, POD, and drilling permit that Mobil would need throughout the life of the leases. Even the Federal Circuit agreed that the OBPA, having been enacted in 1990, was not an "applicable statute" to which the 1981 leases were subject: "To read the [leases] ... as incorporating [the OBPA] ... would raise serious questions about illusory contracts, and perhaps ... constitutional concerns." Pet. App. 10a.[3]

b. There is no merit in the Government's suggestion that the OBPA was simply a means of "implementing" the pre-existing "applicable statutes" to which Mobil's leases were subject. Gov't Br. 23. NEPA's requirements had been

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[2] As only one example, pursuant to OCSLA § 1340(c) and § 1 of the leases, the Government agreed to approve Mobil's initial POE "within thirty days of its submission," unless it was defective under the OCSLA.

[3] The Federal Circuit's statement that "there is no evidence of a breach of contract by the United States," Pet. App. 16a, cannot be reconciled with its recognition that the OBPA was not authorized by § 1 of the leases, *see id.* 9a-10a. Instead, as Mobil has previously noted, *see* Mobil Br. 22 n.19, this statement can only be understood in the context of the court's erroneous reliance on causation.

fully satisfied prior to the OBPA by DOI's unprecedented 2000-page environmental report, which fully supported DOI's NEPA "Finding Of No Significant Impact." J.A. 139. The OCSLA's POE approval requirements had been met on the basis of *existing* information, exactly as required by OCSLA § 1346(d) and reflected in DOI's finding that the POE was "approvable in all respects" but for the OBPA's moratorium. Marathon Pet. App. 194a. Moreover, the OBPA addressed only the Secretary of the Interior's responsibilities, not the State's or Secretary of Commerce's under the CZMA.

c. After receiving the OBPA scientific panel's report, nearly a year after it was due, *see* Mobil Br. 8, Secretary Lujan reported to Congress in April 1992 that he had sufficient information "to make a reasoned decision about the activities presently proposed ...." Marathon Pet. App. 201a. He nonetheless acceded to the Panel's recommendation to complete two additional studies – which ultimately were not completed until 1994 – before he could approve Mobil's POE for its first exploratory well. He also agreed with the Panel that additional environmental information would be required for each and every stage of OCS development through "post production." *See id.* In doing so, the Secretary interpreted the OBPA as requiring years of additional studies not only for Mobil's first exploratory well but also for every subsequent exploratory, delineation, and production well. *See id.* 199a. *See generally Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, as the Government conceded below, "those additional potential activities remained barred by the OBPA [even] after the Secretary's 1992 OBPA certification." Fed. Cir. Br. 30. Moreover, Secretary Lujan reported that further studies for

these activities would "not begin in earnest prior to reviewing the initial exploration drilling." Marathon Pet. App. 202a.[4]

Consequently, the OBPA constituted (1) an open-ended prohibition (2) on the approval of any POE, any POD, or any drilling permit (3) for every well that Mobil might need to drill offshore North Carolina, until the Act's requirements were satisfied. The OBPA thus pervaded the entire contractual relationship between Mobil and the Government and constituted a wholesale restructuring of the bargain the parties had struck in 1981.

2. *The Settled Law.* The Government recognizes that the issue of materiality turns on the application of "basic principles of contract law," Gov't Br. 24-25 (quoting *United States v. Allegheny County*, 322 U.S. 174, 183 (1944)). However, the Government does not even mention the *Restatement (Second) of Contracts* (1981), "from which [courts are] inclined to fashion ... federal common law rule[s]" since the principles contained in the *Restatement* "represent the 'prevailing view' among the states." *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (quoting E. Allan Farnsworth, *Farnsworth on Contracts* § 7.3 (1990)). All five of the factors set forth in § 241 of the *Restatement*

[4] Contrary to the Government's suggestion, Secretary Lujan's April 1992 certification did *not* cure the breach precipitated by the OBPA. He was not acting "voluntarily," Gov't Br. 15, or "on his own initiative," *id.* at 35, in further refusing to "issue a permit, approve the exploration plan, or allow any drilling," Marathon Pet. App. 202a, because the OCSLA directed that he "shall" approve Mobil's POE within 30 days. OCSLA § 1340(c)(1). Rather, he was acting pursuant to the explicit recommendation of the scientific panel, which the OBPA created, *see* OBPA § 6003(e), and which required the Secretary to abide by its recommendations or to provide Congress with his "detailed justification" for departing from those recommendations, *see id.* § 6003(c)(3)(A).

for determining whether a breach is material condemn the Government's argument.[5]

a. *Performance Reasonably Expected.* The first factor in determining whether a breach is material is "the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange." *Restatement, supra*, § 241 cmt. b. The focus is on the parties' "expect[ations]" at the time of "the exchange."[6] When Mobil entered into the "exchange" at issue here in 1981, it reasonably "expected" that the Government would abide by its promise – the principal one the Government made in return for $78 million – to approve POEs, PODs, and other drilling permit applications according to the well-defined schedules prescribed in the OCSLA and incorporated by reference into § 1 of the leases. When Congress enacted the OBPA, it simply discarded the OCSLA's approval process and thus deprived Mobil of the principal performance that it expected from the Government. *See generally* I George E. Palmer, *The Law of Restitution* § 4.5, at 410 (1978) ("In deciding whether the breach is essential enough to justify restitution, a court should be concerned primarily with the objective of the plaintiff in seeking the performance promised by the defendant.").

Ignoring altogether the leases' specific incorporation of the OCSLA, the Government and its *amici* cite *Secretary*

[5] Although all five *Restatement* factors confirm the Court of Federal Claims' finding of materiality, a plaintiff need not satisfy all five conditions to prevail. *See Restatement, supra*, § 241 cmt. a.

[6] *See also Restatement (First) of Contracts* § 275(a) (1932) (considering "[t]he extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated"); *Link v. Department of the Treasury*, 51 F.3d 1577, 1583 (Fed. Cir. 1995) (finding a material breach where the injured party was "deprived of the full benefit ... *for which he had bargained*").

of the Interior v. California, 464 U.S. 312 (1984), in suggesting that OCS leases confer no rights at all. But nothing in *Secretary of the Interior*, *id.* at 337, 339 (holding that OCS lease sales are not subject to the CZMA and referring to an OCS lessee's "priority" in obtaining permits), sustains the Government's unilateral and drastic revision of the agreed-upon process for plan and permit approvals under the OCSLA, as occurred here. To the contrary, the Court's opinion in that case in careful detail discusses the OCSLA approval process without *any* suggestion that lessees do not have important contractual rights regarding that process. *See id.* at 335-41.

Section 241's emphasis on the "extent" of the breach reflects the commonsense proposition that "[a] quantitatively serious breach is more likely to be considered material." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.18, at 415 (4th ed. 1998). The repudiation occasioned by the OBPA was "quantitatively serious" in at least two respects. First, the Government's principal promise to Mobil, in return for the $78 million that it paid for its leases, was that Mobil's applications would be approved if consistent with the OCSLA and other "applicable" statutes. The OBPA unquestionably breached that promise. *See* pp. 1-2 & n.3, *supra*.

Second, the OBPA flatly prohibited the Government from performing its contractual duties with respect to Mobil's exploratory well for a *minimum* of 13 months. Even the Government concedes that, as applied, the OBPA banned *all* activities for at least 20 months (*i.e.*, until Secretary Lujan's April 1992 report to Congress). In fact, the requirements imposed by the OBPA on Mobil's first POE were not lifted until July 1994, when the last OBPA-precipitated study for that well was completed almost four years after the POE should (and *would*) have been approved under the OCSLA. The OBPA's prohibitions as to all future drilling plans extended *ad infinitum*.

The *Restatement* cites *Northern Helex Co. v. United States*, 455 F.2d 546 (Cl. Ct. 1972), as an example of a case "based on the extent of deprivation of benefits to the injured party." *Restatement, supra*, § 241 reporter's note. In *Northern Helex*, the court expressed "not the slightest doubt" that the Government's failure to perform by withholding payments "over many months" constituted a material breach. *Northern Helex*, 455 F.2d at 550. *A fortiori*, there cannot be "the slightest doubt" that the breach here is material.[7]

In attempting to explain away Mobil's reasonable "expect[ations]" under its OCS leases, the Government contends that Mobil's leases were issued "subject" to statutes and regulations permitting lease suspension in certain circumstances, *see* Gov't Br. 23, and that "[u]nder the[se] applicable statutes and regulations, the United States was entitled to require a suspension of the leases to 'conduct an environmental analysis,'" *id.* 33. The Government argues that this "is precisely what Congress directed in enacting the OBPA," *id.*, and thus there was no breach. Neither the OCSLA nor applicable regulations sustain this argument.

The Government's argument that the "national interest" suspension authority of OCSLA § 1334(a)(1)(A) supports it here, *see* Gov't Br. 31-32, fails to report that such

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[7] The Government disingenuously relies on non-contract cases refusing to impose "coercive sanction[s]" due to government delay. Gov't Br. 37-38. But the imposition of a common law monetary remedy against the Government has never been equated with a prohibition against governmental conduct. *See Winstar*, 518 U.S. at 881-84. Thus, the Government's refusal to perform on the timetable promised in a contract has frequently been deemed a material breach without any suggestion that non-contract cases limit the available remedy. *See, e.g., Pinewood Realty Ltd. Partnership v. United States*, 617 F.2d 211, 215 (Cl. Ct. 1980) (one month delay in conveying property); *Northern Helex*, 455 F.2d at 550 (two year delay in payment); *Overstreet v. United States*, 55 Cl. Ct. 154, 174 (1920) (five week delay in installment payment).

suspensions may be granted only "*at the request of a lessee.*" The only OCSLA authority for a suspension without the lessee's consent applies where the Secretary finds a "threat of *serious*, *irreparable*, or *immediate* harm or damage" to life, property, mineral deposits, or the environment. OCSLA § 1334(a)(1)(B) (emphasis added).[8] There has never been any contention that these circumstances applied here; DOI had found just the opposite, *see* p. 3, *supra*, and *at most*, the OBPA suggested that existing environmental studies purportedly had not "allayed concerns" about the adequacy of environmental information. OBPA § 6003(b)(7).[9]

The Government's reliance upon 30 C.F.R. § 250.10(b)(4),[10] which allows the Secretary to suspend a lease when it "is necessary ... to conduct an environmental analysis," Gov't Br. 32, is similarly misplaced. This argument simply recycles and repeats under a different guise the Government's untenable contention that the OBPA, although not an "applicable statute" to which the leases were subject under their express terms, merely implemented pre-existing "applicable statutes" such as NEPA and the OCSLA. *See* pp. 2-3, *supra*. But in agreeing to be bound by "applicable statutes," Mobil surely did *not* agree to a suspension for an "environmental analysis" required by an *inapplicable* statute like the OBPA.

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[8] This suspension power was doubtless the one referred to in the House report cited by the Government as authorizing a more-than-30-day delay in approving a POE, *see* Gov't Br. 32 n.11.

[9] The Government's reference to its powers to cancel OCS leases "under the terms of the OCSLA," Gov't Br. 8, does not aid it here, because such cancellation must be accompanied by compensation. *See* OCSLA § 1334(a)(2)(C).

[10] 30 C.F.R. § 250.110(b)(4) as recodified.

DOI never found – nor could it have found – that the OCSLA, NEPA, or any other "applicable statute" made it "necessary" to suspend the leases to conduct an environmental analysis. Indeed, only two months prior to the OBPA's enactment, DOI completed its 2000-page Environmental Report on Mobil's proposed well – calling it "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," J.A. 179 – and concluded under NEPA that Mobil's well "would not result in *any* significant environmental impacts." Pet. App. 5a (emphasis added); *accord* J.A. 139 (finding of no significant impact).

DOI itself recognized this proposition, because it did not invoke § 250.10(b)(4) to justify the suspensions when the OBPA was enacted in 1990 (as the Government does now). Instead, DOI acknowledged that it was suspending Mobil's leases *in order to comply with the OBPA*, citing § 250.10(b)(7) as authority for its action. J.A. 129-30, 132. Tellingly, in its brief to this Court, the Government does not even mention § (b)(7) – which allows suspensions when judicial decrees "prohibit[]" OCS activities "or the permitting of those activities."[11]

The clash between the OBPA and Mobil's "expect[ations]" upon entering the leases could not be

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[11] In the Federal Circuit, the Government argued that § (b)(7) was "totally irrelevant" and "clearly demonstrates a mistake" by DOI. Fed. Cir. Br. 26. However, it was not necessary to suspend operations under § (b)(4) to conduct an environmental analysis, because the OBPA itself guaranteed that there could be no operations during the pendency of the studies required by that Act. Section (b)(7) is used where a judicial decree, or similar outside factor – here the OBPA – has "prohibit[ed]" OCS activities, and thus § (b)(7) serves only as a device to "suspend" the running of a lease's primary (here 10-year) term and thereby to ensure that the lease is extended during the period of such prohibition.

clearer. As the Court of Federal Claims found – and as the Government has not seriously disputed –

> [C]ommon sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

Pet. App. 63a.

b. *Adequacy of Compensation.* In determining materiality, courts should also consider "the extent to which the injured party can be adequately compensated for the part of th[e] benefit of which he will be deprived." *Restatement, supra*, § 241(b). An explanatory note indicates that § 241(b) is concerned primarily with an injured party's ability to prove its damages with sufficient certainty. *See id.* cmt. c.

Here, it would have been impossible to calculate the actual damages Mobil suffered from the OBPA: There was no way of predicting either in 1990 (when the Act was passed) or in 1992 (when the suits were filed) (1) whether the OBPA would ever allow DOI to grant all of the permits that Mobil would need over the life of the leases to explore, produce, and develop the oil and gas that might be found offshore North Carolina or (2) if such permits were ultimately granted, whether the economic, technical, or other considerations Mobil would then confront would make it feasible for Mobil to proceed with exploration and production.

By contrast, Mobil's action for rescission of the lease agreements and restitution of its up-front bonus payments does not pose any problems of proof. As the foremost scholar of the law of restitution has observed, "proof of

damages may present unusual difficulties, whereas proof of the value of [a plaintiff's] performance is relatively easy, and restitution is the means by which he recovers the value of that performance." I Palmer, *supra*, § 4.1, at 368. Indeed, citing the relative facility of proving restitution as compared to consequential damages, Professor Corbin noted that "even courts that do not like to recognize an anticipatory repudiation as a breach for which an action for damages will lie are willing to maintain an immediate action for restitution of the consideration paid." 4 Arthur L. Corbin, *Corbin on Contracts* § 978, at 929-30 (1951). *See also* Mobil Br. 25-26.

c. *Forfeiture.* The *Restatement* also focuses on "the extent to which the party failing to perform or to offer to perform will suffer forfeiture." *Restatement, supra*, § 241(c). The more a breaching party has performed, the more likely it will, on a finding of material breach, suffer forfeiture of any part performance it has rendered; consequently, "a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance." *Id.* cmt. d; *accord* Calamari & Perillo, *supra*, § 11.18, at 414 ("The earlier the breach the more likely it will be regarded as material."). Courts should therefore consider "to what extent, if any, the contract has been performed at the time of the breach." Calamari & Perillo, *supra*, § 11.18, at 414.

Here, although the Government's repudiation did not occur until nine years after the leases were executed in 1981, it occurred *before* DOI had approved Mobil's initial POE pursuant to OCSLA § 1340(c)(1), which both lower courts correctly described as the "first step" in the OCS process. Thus, there was no threat in this case that the Government would lose any of its part performance *because it had not provided any.*

d. *Cure.* The likelihood that a breach will be cured is another relevant consideration in determining materiality. *See Restatement, supra*, § 241 (d) & cmt. e. Here, there was no such possibility because DOI was required to comply with the OBPA until Congress repealed the Act, three-and-a-half years after Mobil filed suit and one month after the decision of the Court of Federal Claims, when it was too late to retract the repudiation and thus cure the Government's earlier repudiation. Mobil Br. 35-37.

e. *Lack of Good Faith.* Finally, a breaching party's failure to adhere to accepted standards of good faith and fair dealing is "a significant circumstance in determining whether a failure is material ...." *Restatement, supra*, § 241 cmt. f; *see also Link*, 51 F.3d at 1582 (suggesting that bad faith alone is sufficient to support a determination of material breach). The undisputed facts of this case confirm DOI Assistant Secretary O'Neal's description of the OBPA as an act of "bad faith." J.A. 182.

Central to the breaching party's good faith is whether the breach was intentional. Indeed, § 275(e) of the *Restatement (First) of Contracts* (from which the present-day § 241(e) is derived) observes that "the willfulness of the breach ... so far increase[s] the demerit of the wrongdoer that the law is less inclined if a breach is willful to require the injured party to perform." *Restatement (First) of Contracts* § 275(e) & cmt. a; *accord* Calamari & Perillo, *supra*, § 11.18, at 414-15 & n.13 ("[W]illful breach is more likely to be regarded as material."); 6 Samuel Williston, *A Treatise on the Law of Contracts* § 842, at 171 (3d ed. Walter H.E. Jaeger, ed., 1962) ("Willfulness of the breach ... is an important element in the case."); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.) ("The willful transgressor must accept the penalty of his transgression.").

It is undisputed in this case that the Government's repudiation of Mobil's leases was intentional, for the

Government abandoned its arguments under the sovereign acts and unmistakability doctrines. Accordingly, it did not challenge on appeal the Court of Federal Claims' finding that the OBPA was "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," *id.* 91a. *See generally United States v. Winstar Corp.*, 518 U.S. 839, 898 & n.45 (1996) (government actions "directed principally and primarily at plaintiffs' contractual right" are not sovereign acts).

Both the text and the clear legislative history[12] of the OBPA confirm that the Act was targeted at Mobil's proposed well and was specifically intended to abrogate Mobil's lease rights. *See generally* Mobil Br. 5-7. The text of the OBPA refers by name to "the Mobil Oil Company," OBPA § 6003(b)(7), and supporters and opponents of the OBPA alike described the Act as a "moratorium" on Mobil's exploration and production activities, *see* 136 Cong. Rec. 22,275 (1990) (Rep. Jones); J.A. 113 (DOI Secretary Lujan).[13]

According to the *Restatement*, "[g]ood faith performance ... of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified

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[12] In *Winstar*, this Court indicated its willingness to examine legislative history in determining questions of contract breach, where the pitfalls often associated with the consideration of legislative history in the context of statutory interpretation are not implicated. *See Winstar*, 518 U.S. at 902 n.50.

[13] As these citations demonstrate, the Government's suggestions that the "legislative record" does not contain evidence of the OBPA's purpose, *see* Gov't Br. 33 n.13, and that the OBPA was "enacted out of a concern of Congress" that DOI "give proper attention to" NEPA and the CZMA, *see id.* 12, are simply false. In any event, the Government's failure to appeal the trial court's finding that the OBPA was "specifically enacted to delay indefinitely" Mobil's OCS activities precludes it from now seeking to attribute a different purpose to the Act.

expectations of the other party." *Restatement, supra*, § 205 cmt. a. Far from acting with "faithfulness to an agreed common purpose" of the OCS leases and "consisten[tly] with [Mobil's] justified expectations," the OBPA was aimed specifically and intentionally at undermining Mobil's lease rights.

3. *Causation/Repeal.* Ignoring the relevant factors establishing the materiality of its breach, the Government simply plows forward, acting as if the repeal of the OBPA somehow relieves it of its breach. Specifically, the Government contends that "[p]etitioners' ability to undertake exploration activities under these leases was at all times – both before enactment of the OBPA and after its repeal – blocked by North Carolina's objections under the CZMA." Gov't Br. 36. This, however, is not an argument about breach or materiality – it is an argument about causation. Indeed, in the very next sentence of its brief, the Government unabashedly invokes the concept of "but for" causation: "*Even if the OBPA had never been enacted*, petitioners would ... have experienced precisely the same delay in proceeding with the proposed operations" as a result of North Carolina's CZMA objections. *Id.* (emphasis added). Such arguments, in the face of Mobil's unrefuted demonstration that both causation and a post-complaint OBPA repeal are irrelevant to a claim for restitution, in and of themselves expose the weakness of the Government's arguments in this case.[14]

[14] Moreover, as demonstrated in Mobil's Opening Brief, North Carolina's objections to the first POE and the NPDES permit under the CZMA were curable by performing the studies North Carolina demanded (or by no-discharge operations that would remove the need for an NPDES permit). Mobil Br. 9 n.7, 24 n.21. It is no answer to speculate that the delay precipitated by North Carolina's CZMA objections *might* have extended beyond Mobil's first POE to affect subsequently submitted plans and permit applications by virtue of the State's demand for still more (...continued)

B. Waiver.

The Government's waiver argument – which is premised on what Professor Palmer has called the "outmoded election of remedies doctrine," I Palmer, *supra*, § 4.13, at 481 – is substantially different than the one advanced in the trial court. *See* p. 18 n.17, *infra*. The Government now contends that Mobil "waived" its claim for material breach when, after the OBPA's enactment, it (1) continued to urge performance by "submitting a proposed plan of exploration," (2) attempted to protect its rights by "pursuing administrative proceedings" challenging North Carolina's CZMA objections, and (3) sought suspension of its leases pending those proceedings. Gov't Br. 42. This waiver argument fails for three independent reasons.

1. Like the rest of the Government's brief, the waiver argument incorrectly assumes that the extent of the breach was limited to the enactment of the OBPA and the Secretary's failure to approve Mobil's first POE within the 30 days required by OCSLA § 1340(c)(1). However, the Secretary's interpretation and application of the OBPA, as well as the fact that the Government would not cure its repudiation, only became clear when Secretary Lujan limited his April 1992 certification under the Act to Mobil's first POE and then refused to approve *even that POE* pending the completion of years of additional OBPA studies.

A month after the Secretary's April 1992 decision so interpreting and applying the OBPA, Conoco, Inc., filed the

studies. In contrast to the CZMA, which introduced only a speculative *possibility* that Mobil's plans and applications *might* be delayed, the OBPA imposed a *certainty of substantial (and perhaps indefinite) delay for every permit.*

complaint initiating this case and provided notice to Mobil under Court of Federal Claims Rule 14. J.A. 1. On July 23, 1992, Mobil filed a motion for an enlargement of time to postpone the filing of its complaint "pending final Congressional action on the bills" that potentially would have mooted the issues in this case by providing statutory compensation for the North Carolina (as well as other OCS) leases. *See* Fed. Cir. App. 1005, 1008. Mobil filed its complaint on October 28, 1992, shortly after the 102nd Congress ended its session without providing a statutory resolution to the issue. J.A. 2. A waiver cannot occur unless "the injured party knows, or has reason to know, of the relevant facts ...." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.19, at 511 (2d ed. 1998). Here, Mobil promptly filed suit upon learning the "relevant facts."

2. As Mobil has consistently pointed out, the enactment of the OBPA constituted an anticipatory repudiation of Mobil's leases. By legislating and implementing new and burdensome requirements in violation of the leases, the Government announced – before the time for performance under those leases had arrived – that it either could not or would not perform its obligations under the leases in the manner the parties had agreed. It is settled beyond dispute that, in the case of an anticipatory repudiation, "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." *Restatement*, *supra*, § 257; *accord* U.C.C. § 2-610(b) (1989) (An injured party may "resort to any remedy for breach ... even though he has notified the repudiating party that he would await the latter's performance and has urged retraction."); 4 Corbin, *supra*, § 981, at 940 ("[M]ere delay in bringing a suit does not disentitle the injured party to relief. ... [O]ne who has received a definite repudiation is not to be penalized for his efforts to bring about its retraction and to get that which is due without a law suit.").

Mobil was not required to sue immediately following enactment of the OBPA without first learning the extent of the Government's breach and encouraging the Government to honor its obligations. When the scope of the OBPA became clear by virtue of the Secretary Lujan's April 1992 interpretation of the Act and congressional remedies were exhausted, Mobil promptly brought this action seeking restitution of its bonus payments. That is all the law required.[16]

3. An injured party waives its remedy for breach due to non-performance only by accepting the breaching party's continued performance *under the contract*. *See, e.g.*, *Restatement*, *supra*, § 373 cmt. a (party loses its right to restitution only by "acceptance or ... retention ... of performance" with knowledge of defects); *id.* § 246(1) (waiver only upon injured party's "acceptance or ... retention for an unreasonable time of the [breaching party's] performance"); II Farnsworth, *supra*, § 8.19, at 514 (same). The Government's own cases confirm this limitation on the waiver doctrine. *See, e.g.*, *ARP Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991); *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306, 1313-14 (Cl. Ct. 1976).

Here, Mobil accepted no performance from the Government because it tendered none – the OBPA prevented the Government from rendering even the first performance asked of it, *see* p. 11, *supra*, and even after the Act's requirements were finally satisfied, DOI *never* approved Mobil's POE, *see* Marathon Br. 15. While the Government

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[16] The Government apparently misses the irony of its waiver argument faulting Mobil for filing a POE for its four Manteo tracts, *see* Gov't Br. 40, 42, while simultaneously contending that Mobil has no right to complain of the OBPA regarding its one non-Manteo tract because it did not file a POE for that tract, *see id.* 39 n. 20.

may have taken other actions after enactment of the OBPA – *e.g.*, completion of the studies that were required by the Act, resolution by the Secretary of Commerce of the CZMA appeal – those actions were not part of the Government's promised "performance" under the leases.

Moreover, the Government has not ventured beyond the vaguest of generalities, *see* Gov't Br. 42, in attempting to explain how it "*substantial[ly]* change[d] [its] position in reliance" on Mobil's supposed affirmance of the lease contracts – a necessary element of its waiver claim. 5A Corbin, *supra*, § 1220, at 461 (emphasis added); *accord Riess v. Murchison*, 503 F.2d 999, 1008 (9th Cir. 1974) (requiring "*substantial* change of position in reliance" on plaintiff's action); *North American Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950) (requiring "*material[]* change"). The administrative expenses incurred by the Government in receiving – but not approving – Mobil's POE, processing Mobil's CZMA appeal, and granting suspensions are *de minimis* compared to the restitution owed to Mobil and Marathon in the light of the Government's material breach.[17]

Finally, the Government has not even suggested that, in seeking suspensions and taking other actions to preserve its rights, Mobil actually "intended" to relinquish its claim for material breach.[18] *See, e.g.*, *Havoco of America, Inc. v.*

[17] The Government never argued in the Court of Federal Claims that its receipt of Mobil's POE or the Department of Commerce's processing of Mobil's CZMA appeal could serve as predicates for a waiver argument. Accordingly, the Government offered no evidence concerning the administrative expenses entailed in these actions. The same is true regarding the September 1992 suspensions sought by Mobil, which was the only predicate for the Government's waiver argument in that Court. *See* Fed. Cir. App. 1004.

[18] The Government's reliance on Mobil's suspension requests is flawed in other respects. First, the Government never explains how the grant of a suspension order in any way constitutes "performance" of its (...continued)

Hilco, Inc., 799 F.2d 349, 354 (7th Cir. 1986) ("[A]n essential element of waiver is that the injured party intended to affirm the contract and intended to abandon his right to recover damages. 'If the intention to waive is implied from conduct, the conduct should speak the intention clearly.'" (quoting *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 111 (9th Cir. 1960)); *Ducheneaux v. Miller*, 488 N.W.2d 902, 911 & n.8 (S.D. 1992) ("[I]ntent to acquiesce or waive is essential to establishing a waiver to a breach of contract."); *Galesburg Clinic Ass'n v. West*, 706 N.E.2d 1035, 1037 (Ill. Ct. App. 1999) ("In the context of a breach of contract, waiver is the express or implied voluntary and intentional relinquishment of a known and existing right."). Mobil's initiation of this litigation and its subsequent active pursuit of the case conclusively show that it never intended to acquiesce in the Government's breach, to affirm the repudiated contract, or to waive its claims.

C. Remedy.

As Mobil pointed out in its Opening Brief – and as the Government has not disputed – upon a determination that the OBPA materially breached the OCS leases, Mobil is entitled to elect restitution as its remedy in this case. Mobil Br. 23-35. The Government's argument that Mobil's only remedy is an extension of its leases, *see* Gov't Br. 43-44, collapses with the refutation of its material breach argument.

obligations under the leases. Second, the Government relies on correspondence that is not contained in the record. *See* Gov't Br. 42-43 & App. 1a-6a.

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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