No. 98-1860

In the Supreme Court of the United States

MAURICE BIANCHI, FDBA M. BIANCHI OF CALIFORNIA, PETITIONER

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

An agreement settling a government contract dispute provided that the settlement was without prejudice to the contractor's pursuit of a remaining claim. The Armed Services Board of Contract Appeals (ASBCA) then awarded the contractor a specified sum on that claim. In the present suit, the district court and court of appeals held that the government must pay that sum to a bank to which the contractor had assigned his rights to payments under the contract. The questions presented are as follows:

1. Whether the government is obligated to pay the ASBCA award twice: once to the bank pursuant to the assignment, and again to the contractor directly pursuant to the settlement agreement.

2. Whether the contractor's suit to compel payment of the ASBCA award to it is an action against the government based upon a contract which, because the amount involved exceeds $10,000, lies within the exclusive jurisdiction of the Court of Federal Claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 163 F.3d 564. The opinion of the district court (Pet. App. 18a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1998. A petition for rehearing was denied on February 17, 1999 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on May 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979 and 1980, the Defense Personnel Support Center (DPSC) awarded to petitioner's sole proprietorship three contracts to make clothing for the military. Petitioner assigned its rights under those contracts to the Bank of America (Bank) as collateral for money it borrowed from the Bank. The Bank notified the government of that assignment pursuant to the Assignment of Claims Act of 1940, 41 U.S.C. 15. The Bank later made petitioner two additional loans totaling $550,000. The Bank and petitioner obtained the guarantees of the Small Business Administration (SBA) for 90% of the two loans. Pet. App. 7a, 49a-50a.

In 1981, the government terminated two of petitioner's contracts for default. Petitioner defaulted on both its SBA-guaranteed loans and its non-guaranteed loans to the Bank. The Bank recovered on its guarantees from the SBA and in return assigned its interest in the guaranteed loans to the SBA. Pet. App. 50a.

Petitioner filed a series of claims with the Armed Services Board of Contract Appeals (ASBCA) regarding its defaulted contracts. Pet. App. 7a.[1] In 1988, petitioner and the government entered a settlement agreement, pursuant to which the government paid petitioner $1,141,220.83 in satisfaction of his claims. *Id.* at 7a-8a, 64a n.**, 93a-94a. The parties agreed that the settlement was "without prejudice to [petitioner's] right to pursue" two claims: (1) "any and all Value Engineering Change Proposal Claims under his contracts with DPSC," and (2) an application for legal fees

[1] The ASBCA is an administrative board established pursuant to 41 U.S.C. 607 to adjudicate appeals from final decisions of Department of Defense contracting officers relating to claims by government contractors. See 41 U.S.C. 601-613.

and litigation expenses under the Equal Access to Justice Act, 5 U.S.C. 504. Pet. App. 94a. A Value Engineering Change Proposal (VECP) claim is a claim pursuant to a contract clause that permits the contractor to share in the savings realized by the government from a change to an existing contract proposed by the contractor and accepted by the government. *Id.* at 22a n.2; see *id.* at 120a- 125a. The settlement agreement was incorporated into a decision of the ASBCA. *Id.* at 96a-99a.

2. Upon discovering that the government had paid the settlement amount to petitioner, the Bank filed suit against the government in the United States Court of Federal Claims. The Bank alleged that the $1,141,220.83 should have been paid to the Bank pursuant to petitioner's assignment to it of all of his rights to receive contract payments. The government denied liability to the Bank on the ground that the SBA had a superior security interest in the proceeds of the ASBCA claims. The government also filed a third-party claim against petitioner for the return of the $1,141,220.83, on the ground that the money had been erroneously paid to petitioner and instead should have been offset against the amount owed by him to the SBA. The Court of Federal Claims granted summary judgment for the government, holding that the Bank had assigned its rights under the contract to the SBA. The court also ordered petitioner to return the $1,141,220.83 to the government. Pet. App. 8a-9a, 51a.

The court of appeals reversed. *Bank of America Nat'l Trust & Sav. Ass'n* v. *United States*, 23 F.3d 380 (Fed. Cir. 1994) (Pet. App. 43a-65a). The court held that the government was bound by the settlement agreement to pay the $1,141,220.83 to petitioner and that petitioner was not obligated to return that sum.

Pet. App. 52a-54a. The court of appeals further held that the government was obligated to pay the same amount to the Bank, on the ground that "[t]he government's payment to [petitioner] in settlement of the contract dispute was a payment under the contract that should have gone to the bank under the assignment." *Id.* at 56a.

3. Meanwhile, petitioner applied to the ASBCA for attorney's fees and litigation costs. See Pet. App. 100a-115a. The ASBCA awarded petitioner $475,724.51 in fees and expenses. *Id.* at 115a. The government declined to pay petitioner that money, asserting a setoff against petitioner's indebtedness to the SBA. See *id.* at 35a-36a.

Petitioner then filed suit in the District Court for the District of Nevada to compel payment of the fee award. The district court granted summary judgment to the government, but the court of appeals reversed. *Bianchi* v. *Perry*, 140 F.3d 1294 (9th Cir. 1998) (Pet. App. 28a-42a). The court of appeals construed the settlement agreement to preclude the government from asserting a setoff against petitioner's fee award. Pet. App. 38a-42a.

4. Petitioner also pursued his VECP claim on one of the defaulted contracts. That claim is the subject of the petition for certiorari.

In 1993, the ASBCA awarded petitioner $58,613.03 plus interest on the VECP claim. Pet. App. 118a-169a. When the government refused to pay that amount to petitioner directly, he brought suit to compel payment in the District Court for the District of Nevada. *Id.* at 19a. Pursuant to Federal Rule of Civil Procedure 22, the government interpleaded the Bank, requesting the court to determine whether the Bank was entitled to the VECP award pursuant to petitioner's assignment

to the Bank of all of his rights to receive contract payments. *Ibid.*

The district court granted summary judgment for the Bank and ordered the government to pay the VECP award to the Bank, not to petitioner. Pet. App. 18a-27a. It held that petitioner was collaterally estopped from contesting the validity of its assignment to the Bank because that issue had been litigated in *Bank of America*. *Id.* at 23a-25a. The district court also held that the assignment was valid under the Assignment of Claims Act of 1940, 41 U.S.C. 15. Pet. App. 24a-25a.

The court of appeals affirmed. Pet. App. 1a-17a. The court concluded that petitioner "was barred by the collateral estoppel doctrine from contending that the assignment agreement was not valid." *Id.* at 6a. The court of appeals also held that the district court lacked jurisdiction over petitioner's request for a writ of mandamus directing the government to pay him the VECP award. *Id.* at 13a-14a. The court explained that a claim against the government on a contract exceeding $10,000 is within the exclusive jurisdiction of the Court of Federal Claims. *Id.* at 14a (citing 28 U.S.C. 1346(a)(2), 1491(a)(1)). It concluded that "[b]ecause [petitioner] seeks damages totalling more than $10,000 based on the settlement agreement, the complaint for a writ of mandamus should have been filed in the Court of Federal Claims." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner's claim was contractual in nature and was therefore required to be brought in the Court of Federal Claims. That holding does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The courts below held that the Bank was entitled, as petitioner's assignee, to receive the proceeds of petitioner's VECP award. See Pet. App. 6a, 14a, 17a, 23a-25a. Petitioner does not challenge that holding. His claim in this case therefore reduces to the proposition that the government should be ordered to pay the VECP award twice: once to the Bank pursuant to petitioner's assignment of his DPSC contract rights, and again to petitioner directly.[2]

Petitioner identifies no source of law outside the settlement agreement that could plausibly be thought to compel that result. To the contrary, the interpleader procedure established by Federal Rule of Civil Procedure 22, and invoked by the government in this case, serves precisely to ensure that parties are not subjected to such duplicative liability. If the government is in fact obligated to pay the VECP award to petitioner notwithstanding its liability to the Bank, that obligation can only arise from the settlement agreement between the parties. See Pet. 9 (asserting that "the Government was obligated to [the Bank] pursuant to [petitioner's] assignment to the Bank and remained liable to [petitioner] under the terms of the independent Stipulation to Board decision").

Thus, the court of appeals correctly held (Pet. App. 14a-17a) that petitioner's claim for money arises under the settlement agreement and is therefore a claim against the government based upon a contract. Because it exceeds $10,000 in amount, that claim lies within the exclusive jurisdiction of the Court of Federal Claims. See 28 U.S.C. 1346(a)(2), 1491(a)(1). Petitioner argues that his right to payment from the government

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[2] Payment to the Bank, of course, would itself benefit petitioner insofar as it reduces his outstanding indebtedness.

was "clear and certain"; that the government's duty to pay was "so plainly prescribed as to be free from doubt"; and that the district court was therefore authorized to exercise mandamus jurisdiction under 28 U.S.C. 1361. See Pet. 13. Mandamus jurisdiction, however, exists only if no other remedy is available. *Heckler* v. *Ringer*, 466 U.S. 602, 616-617 (1984). Here the Tucker Act, 28 U.S.C. 1491(a)(1), expressly confers jurisdiction on the Court of Federal Claims for "any claim against the United States * * * for liquidated or unliquidated damages in cases not sounding in tort."

In any event, petitioner's claim to relief under the settlement agreement is hardly "clear and certain." The agreement simply states that "[t]his settlement is without prejudice to [petitioner's] right to pursue any and all [VECP] Claims under his contracts with DPSC." Pet. App. 94a. Nothing in the agreement suggests, much less compels, the conclusion that the government must pay the amount of the VECP award both to petitioner and to the Bank.

2. Petitioner also contends that the court of appeals' ruling in this case is inconsistent with the decision of the Federal Circuit in *Bank of America Nat'l Trust & Sav. Ass'n* v. *United States*, 23 F.3d 380 (1994) (Pet. App. 43a-65a), and that of the Ninth Circuit in *Bianchi* v. *Perry*, 140 F.3d 1294 (1998) (Pet. App. 28a-42a). That claim is incorrect.

a. Because the suit in *Bank of America* was filed in the Court of Federal Claims, the jurisdictional question presented in the instant case could not have arisen. On the merits, the Federal Circuit in *Bank of America* held that a different provision of the settlement agreement—one specifically providing that petitioner was "entitled to recover $617,500.00" plus interest, Pet. App. 93a—precluded the government from recouping

money paid to petitioner, even after the United States was directed to pay the same sum to the Bank. See *id.* at 51a-56a. The Court of Federal Claims had no occasion to construe the VECP provision of the settlement agreement.

b. The Ninth Circuit in *Perry* held that the settlement agreement precluded the government from offsetting petitioner's attorney's fee award against an existing debt to the SBA. Pet. App. 38a-42a. The court did not order the government to pay the same award twice, however; it did not construe the VECP provision of the settlement agreement; and there was no claim in that case that petitioner had assigned his right to the fee award to the Bank. The *Perry* court's willingness to reach the merits of petitioner's suit may be in tension with the same court's decision in the instant case that claims arising under the settlement agreement must be brought in the Court of Federal Claims. The court in *Perry*, however, did not address the jurisdictional issue that was the basis for its decision in the present case. Cf. *Lewis* v. *Casey*, 518 U.S. 343, 352, n.2 (1996) ("we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect"). In any event, any inconsistency between two decisions of the Ninth Circuit would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1999