2017-2391

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONTINENTAL SERVICE GROUP, INC., PIONEER CREDIT RECOVERY, INC., PROGRESSIVE FINANCIAL SERVICES, INC.

Plaintiffs-Appellees

COLLECTION TECHNOLOGY, INC., ALLTRAN EDUCATION, INC.,

Plaintiffs

V.

UNITED STATES, PREMIERE CREDIT OF NORTH AMERICA, LLC, GC SERVICES LIMITED PARTNERSHIP, VALUE RECOVERY HOLDINGS, LLC, WINDHAM PROFESSIONALS, INC., AUTOMATED COLLECTION SERVICES, INC.,

Defendants

CBE GROUP, INC., FMS INVESTMENT CORP.,

Defendants – Appellees

V.

NATIONAL RECOVERIES, INC.

Movant-Appellant

2017-2391

Appeals from the United States Court of Federal Claims in
No. 1:17-cv-00499-SGB,
Chief Judge Susan G. Braden

BRIEF OF APPELLEE CONTINENTAL SERVICE GROUP, INC.

September 25, 2017

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONTINENTAL SERVICE GROUP, INC. **v.** UNITED STATES

Case No. 2017-2391

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)

CONTINENTAL SERVICE GROUP, INC.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Continental Service Group, Inc.	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None

September 25, 2017
Date

/s/ Todd J. Canni
Signature of counsel

Please Note: All questions must be answered

Todd J. Canni
Printed name of counsel

cc:

Reset Fields

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SUMMARY OF THE ARGUMENT

The Court of Federal Claims ("COFC") correctly determined that National Recoveries, Inc. ("NRI") does not meet the standards for intervention. Rule 24(a) of the Rules of the Court of Federal Claims ("RCFC") requires the Court to allow intervention if, upon timely application, the applicant (1) claims an interest relating to the property or transaction which is the subject of the action and (2) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless (3) the applicant's interest is adequately protected by existing parties. RCFC 24(a)(2). Moreover, for a party to be permitted to intervene, the Federal Circuit has explained that its claimed interest must be direct, immediate and "legally protectable," *i.e*., "one which the substantive law recognizes as belonging to or being owned by the applicant." *American Maritime Transport, Inc. v. United States* 870 F.2d 1559, 1561 (Fed. Cir. 1989). The Federal Circuit has further explained that a court cannot allow intervention to protect an ***"indirect or contingent" interest***. *Id.* (emphasis added). Additionally, "the intervenor must either gain or lose by the *direct legal operation* and effect of the judgment." *Id*. (emphasis in original). Here, the COFC correctly denied NRI's Motion to Intervene because NRI does not claim an interest that meets these stringent standards.

The preliminary injunction under attack enjoins ED from performing the work destined for the protested contracts using either the awardees ***or any other contract holder, including NRI***. The COFC reasonably determined that to best maintain the pie of work for the ultimate awardees of the protested contracts and to prevent ED from siphoning off such work to other contract holders (such as NRI), it was necessary to enjoin ED from sending any new accounts to any contractors for a temporary period while ED corrects the fatal evaluation flaws that gave rise to the protests.

NRI is solely focused on the ***scope of the injunction*** and not the subject of the litigation, which is whether ED unreasonably erred in finding Continental Service Group, Inc. ("ConServe") non-responsible and failing to award ConServe a contract. NRI's desire to intervene in this litigation is solely based on its desire to argue that the ***preliminary injunction should be narrowed*** so that it does not enjoin ED from issuing NRI and the other small business contractors new account transfers during the pendency of the corrective action. This is the entirety of NRI's interest in this litigation. NRI's interest, at best, is tangential, indirect, and contingent, which is insufficient to meet the intervention standards. Indeed, the COFC held that because "a judgment in this case will not affect the Small Business' ability to receive new accounts," NRI and has "failed to demonstrate that [it] will

either gain or lose by *direct* legal operation and effect of the judgment." Appx000130 (emphasis in original) (internal citation omitted).

Other than complaining about the scope of the injunction, NRI has ***no other interest*** in this procurement. NRI was not an interested offeror. NRI holds an ***entirely separate and distinct contract*** that has a ***10-year period of performance*** and runs until 2024. While NRI has no guarantee of receiving any future transfers from ED, once this injunction is ultimately lifted, ED may decide how to proceed with account transfers, ***which may or may not include transfers to NRI***. The COFC recognized this fact, holding that "the Small Businesses are not entitled to receive any new accounts as a matter of contract law…". *Id*. When viewed in the appropriate light, the injunction merely places a ***temporary pause*** on ED's ability to issue new account transfers until the corrective actions are completed. This temporary pause serves to ensure that plaintiffs, including ConServe, avoid the irreparable harm that would result if ED were permitted to ***siphon off work from the protested contracts*** to other contract holders during the pendency of the corrective action.

Moreover, NRI's interests are ***more than adequately represented*** by the Appellants who also argue for the lifting of the injunction, including ED who is the party that originally started siphoning off work to give it to NRI and the other

small business contractors. Adding another voice in favor of lifting the injunction is unnecessary.

For these reasons, NRI does not meet the standards for intervention and, thus, this Court should affirm the COFC's decision.

STATEMENT OF RELATED CASES

ConServe's counsel is unaware of any other appeal in or from the same civil action or proceeding in the lower court previously before this or any other appellate court. ConServe concurs with NRI's statement of related cases. *See* ECF 14 at 1.

STATEMENT OF THE CASE

I. Student Loan Debt Recovery Program

ED administers student financial assistance programs pursuant to Title IV of the Higher Education Act of 1965. Since 1981, ED has used private collection agencies ("PCAs") to assist in administering ED's debt management and collection systems. *Coast Professional, Inc. et al. v. United States*, 120 Fed. Cl. 727, 730 (2015), vacated and remanded, 828 F.3d 1349, 1351 (Fed. Cir. 2016). PCAs collect payments on defaulted student accounts and assist qualifying borrowers to resolve their default status voluntarily by making reasonable and affordable payments. Appx102042-102043 (¶¶ 7-8). ED has contracted for the services of PCAs to support collection activities for these defaulted loans through the several contract vehicles discussed below.

1. The 2009 Awards

In 2009, ED awarded an identical task order contract to 22 PCAs under each PCA's respective General Services Administration Schedule 520-4 contract for private collection services. *Coast*, 120 Fed. Cl. at 730-31. Five of the 22 task order contracts were awarded to small business PCAs under a small business set-aside competition, and the remaining 17 task orders were awarded in an "unrestricted" competition that was open to both small and other-than-small ("large") businesses. *Id.* at 731.

The 22 contracts had virtually identical terms and conditions and included an "ordering" period, where new accounts were transferred to the PCAs for collection, followed by a 2-year "in-repayment" period, where the PCAs could continue to service rehabilitated accounts but would not receive new accounts. At the end of the in-repayment period, ED would administratively recall any accounts remaining on a PCA's contract (unless the PCA was awarded a subsequent contract, in which case the accounts would be transferred to that new contract). Appx100169-100172 (¶¶ 6-11). Each of these contracts included a base period of performance and option periods. *Coast*, 120 Fed. Cl. at 730. The ordering period for the majority of the 2009 task orders ended in April 2015. *Id.* at 732.

2. The 2015 and 2017 Award-Term Extensions

The 2009 contracts included a provision that allowed ED to reward its ***top-performing PCAs*** by extending their performance through Award-Term Extension ("ATE") contracts. Appx101740. The ATE contracts were intended to serve as bridge contracts between the expiration of the 2009 contracts and ED's award of follow-on unrestricted contracts. *Id.* Thus, the ordering period for an ATE contract could potentially last up to two years.

When ED made its initial ATE awards in 2015, ED awarded contracts to ***only five companies, including ConServe***. *Id.*; Appx100693. Four PCAs that were not deemed top performers and, thus, not awarded 2015 ATE contracts, including Appellants Alltran Education, Inc. ("Alltran")[1] and Pioneer Credit Recovery, Inc. ("Pioneer"), filed bid protests with the COFC (docketed as *Coast Professional, Inc. et al.*, No. 15-207 *et al.*). *Id.*; Appx100693. The COFC initially dismissed those suits for lack of jurisdiction; however, this Court reversed. *Coast Prof'l, Inc. v. United States*, 828 F.3d 1349 (Fed. Cir. 2016).

During the litigation but after the period of performance for the ATE contracts expired, ED ultimately determined to award ATE contracts to all four *Coast* protesters, including Alltran and Pioneer. Appx101992. Thus, on May 1, 2017, approximately two years after the original ATE awards were made and after

[1] Alltran was known at the time as Enterprise Recovery Systems, Inc.

the ATE contracts had been completed, ED awarded Alltran and Pioneer contracts similar to those received by the five original ATE awardees in 2015. Appx102005.

On May 22, 2017, ConServe filed a protest at the COFC challenging ED's non-competitive, limited-source May 1 ATE awards. The protest was docketed as *Continental Service Group, Inc.*, No. 17-664, and remains pending before the COFC.

3. The 2014 Small Business Contracts

In September 2014, ED awarded a set of 11 small business PCA contracts. Appx100169-100170. Each of these contracts had a performance period of five years with a five year option, allowing the small business contractors the ability to receive account transfers from ED up to 2024. Appx840007. Performance under some of those contracts began in November 2015 and, by 2016, all 11 small business contractors were receiving new accounts. Appx100697; Appx100071. NRI was one of these 11 awardees.

4. The 2016 Unrestricted Procurement: The Subject of this Litigation

In December 2015, ED issued Solicitation No. ED-FSA-16-R-0009 for a new set of unrestricted contracts that each will last up to 10 years. Appx100028-100029. NRI did not submit an offer in response to this solicitation. Because NRI was not offeror under this procurement, it could not have been in-line for award under the solicitation that is the subject of this litigation.

In December 2016, ED awarded contracts to 7 large business PCAs. Shortly thereafter, 22 disappointed offerors, including ConServe, filed bid protests with the United States Government Accountability Office ("GAO").

GAO consolidated all but two of the PCA protests, ConServe's being one of the two, and issued a protected decision in the consolidated case on March 27, 2017. GAO sustained 13 of the protests and recommended that ED reopen the competition, request and evaluate revised proposals, and make a new award decision. *See Gen. Revenue Co.*, *et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106.

On March 28, 2017, ConServe notified GAO that it was withdrawing its protest before GAO and intended to pursue its protest at the COFC. ConServe's protest, filed the same day, was docketed as *Continental Service Group, Inc. v. United States*, Docket No. 17-449C (Fed. Cl.) (the "ConServe Litigation"). Appx100022-100058.

I. ConServe's COFC Protest

ConServe's COFC Complaint challenged ED's determination that ConServe was not responsible. ED concluded that ConServe was not committed to subcontracting 31 percent of the total contract award to small businesses, as required by the Solicitation, based upon an inconsistency in ConServe's Small Business Subcontracting Plan and its Small Business Participation Plan.

Appx100022 (¶1). ConServe alleged, *inter alia*, that ED's automatic disqualification of ConServe on this basis violated the Small Business Act, 15 U.S.C. § 637(d), as implemented by Federal Acquisition Regulation ("FAR") 19.7. Appx100024-100025. ConServe stated that under these regulations, and agency is required to "negotiate" with all "apparently successful offerors" in connection with any concerns of their Small Business Subcontracting Plans, and ED admittedly failed to do so. Appx100024.

II. The COFC's Grant and Continuation of Injunctive Relief

On March 29, 2017, the COFC enjoined ED from "authorizing the purported awardees to perform on the contract award under Solicitation No. ED-FSA-16-R-0009 for a period of fourteen days, *i.e.* until April 12, 2017" and "transferring work to be performed under the contract at issue in this case to other contracting vehicles to circumvent or moot this bid protest for a period of fourteen days, *i.e.* until April 12, 2017." Appx100142 (temporary restraining order).

On April 10, 2017, the COFC extended the preliminary injunction through April 24, 2017. Appx100659. Then, on April 19, 2017, the COFC stayed the proceedings for 30 days to allow ED to "explore[] a global solution" to this consolidated protest and related protests. *See* Appx100700. In response to subsequent motions, the court scheduled a preliminary injunction hearing for May

2, 2017. *See* Appx101025-101027 (reviewing earlier decisions to issue and extend temporary restraining order and setting hearing date).

Following the May 2 hearing, the COFC issued a preliminary injunction, enjoining ED from: (1) authorizing the ***purported awardees to perform on the contract*** awards under Solicitation No. ED-FSA-16-R-0009; and (2) ***transferring work*** to be performed under the contract at issue in this case ***to other contracting vehicles*** to circumvent or moot this bid protest. Appx000093. The COFC determined, in relevant part, that: "Plaintiffs and Intervenor-Plaintiffs will be immediately and irreparably injured, if ED allows continued performance on Task Orders issued under Solicitation No. ED-FSA-16-R-0009, or otherwise transfers work to another contracting vehicle to circumvent or moot this bid protest." Appx000092. The COFC also determined that the other injunctive relief factors weighed in favor of injunctive relief. Appx000092-000093.

On May 31, 2017, the COFC continued the preliminary injunction, citing, in part, information that undermined ED's claimed harm, including the alleged harm to the borrowers, and that supported the continuation of the injunctive relief. Appx000001-000015.

III. The COFC's Denial of NRI's Motion to Intervene

On April 26, 2017, NRI filed a Motion to Intervene (the "Motion") in the ConServe Litigation. Appx101036-101043. Importantly, the Motion was not

"accompanied by a pleading that sets out the claim or defense for which intervention is sought" ***as required by Rule 24(c)***.

NRI's Motion claimed that NRI had a legally protectable interest in the ConServe Litigation because the preliminary injunction temporarily prohibits ED from transferring new student loan accounts to the existing contracts, including NRI's contract. Appx000130. On July 7, 2017, the COFC issued a Memorandum Opinion and Order denying NRI's Motion. Appx000124-000130. In this order, the COFC held that NRI and the other small business contractors do not have a legally protectable interest in the outcome of the case. Appx000129. Among the COFC's findings, the COFC explained that NRI does not have such an interest because NRI's existing contract does not require that ED place any new student loan transfers with NRI. Appx000130. The COFC order identified a statement from ED contained in the record explaining that ED "***does not [] reserve pools of accounts for a particular contractor or set of contracts***." *Id*. (emphasis added). Accordingly, the Court concluded that, "the Small Businesses [including NRI] ***are not entitled to receive any new accounts*** as a matter of contract law; at best, they have an expectancy of potential new student loan accounts." *Id*. (emphasis added). The Court also found that because "the Small Businesses' existing contracts have not been challenged… [A] judgment in this case will not affect the Small Business's ability to receive new accounts." *Id*. (emphasis added). On these bases,

the COFC denied NRI's Motion. *Id*. On August 2, 2017, NRI filed its Notice of Appeal of the July 7, 2017 Order.

IV. NRI's Interests Have Been Represented by the Government and Others

To say that NRI's interests have been adequately represented is an understatement. It was ED that originally decided to siphon off work from the protested contracts and to give account transfers to NRI, among the other small business contractors. Additionally, from the first hearing in March, the Government has repeatedly represented NRI's interests in the ConServe Litigation by arguing that the injunction should only apply to the awardees of the protested contracts and not to the small business contractors, such as NRI. When the COFC issued a temporary restraining order that prohibited ED from assigning debt collection accounts to any existing contract vehicles, the Government's very first act was to file a Motion to Amend the Court's Temporary Restraining Order to lift the prohibition on ED assigning accounts to the contracts held by the small business contractors. *See* Appx100161-100164. Thereafter, the Government and others have consistently submitted filings and presented arguments seeking to carve the small business contractors out from the injunction at the expense of other parties. *See, e.g.*, Appx101692 (Government Counsel arguing that the portion of the injunction affecting the small business contract holders should be vacated), May 22, 2017, Hr'g Tr., at 46:8 - 47:7; *see also* Appx101865, May 22, 2017, Hr'g

Tr., at 19:20-23 (Alltran's counsel asserting that the small business contract holders should be able to receive account transfers during corrective action). Suffice it to say that NRI has been adequately represented throughout this litigation.

STANDARD OF REVIEW

"The Claims Court's legal determinations, including interpretations of statutes and regulations, are subject to *de novo* review and its factual determinations are re-viewed for clear error." *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1357–58 (Fed. Cir. 2015). The Federal Circuit has not previously determined whether to apply a *de novo* standard or an abuse of discretion standard when reviewing a trial court's denial of a motion to intervene as a matter of right. *See Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Association*s, 695 F.3d 1310, 1314 (Fed. Cir. 2012).

NRI argues that the Court should apply a *de novo* standard of review in this case because "there is no factual dispute. The scope of the injunction at issue has had a very clear, undisputed impact upon NRI's contract." ECF 14 at 8. This assertion is incorrect. ConServe disputes NRI's claim that the scope of the Preliminary Injunction has caused NRI to suffer a loss. In fact, ConServe has consistently argued that the Preliminary Injunction *does not* impact NRI's contract and that it merely puts a ***temporary pause on ED's ability to transfer new accounts***. It is ConServe's position that once the litigation is resolved, regardless

of the outcome, NRI's 10-year contract will remain unchanged and NRI will remain eligible to receive account transfers at ED's discretion.

NRI also ignores the second factual question—the question of whether NRI will win or lose by "direct legal operation" of the outcome of the case. *See Am. Mar. Trans., Inc.* 870 F.2d at 1561. Contrary to NRI's claim, NRI's interest is, at best, indirect and contingent.

Because there are factual issues in dispute, this Court should review the COFC's decision under the more deferential abuse of discretion standard. Moreover, even if the Court applies the *de novo* standard of review, it should still affirm the COFC's decision because there was no error in the COFC's judgment.

ARGUMENT

I. The COFC Did Not Err By Concluding That NRI Does Not Claim an Interest Related to the Property or Transaction That is the Subject of the Action

RCFC 24(a) requires the Court to allow intervention if, upon timely application, the applicant (1) claims an interest relating to the property or transaction which is the subject of the action and (2) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless (3) the applicant's interest is adequately protected by existing parties. RCFC 24(a)(2). Moreover, for a party to be permitted to intervene, the Federal Circuit has explained that its claimed interest must be direct, immediate and "legally protectable," *i.e.*, "one which the

substantive law recognizes as belonging to or being owned by the applicant." *Am. Mar. Trans., Inc.* 870 F.2d at 1561. The Federal Circuit further explained that a court cannot allow intervention to protect an "indirect or contingent" interest. *Id.* Additionally, "the intervenor must either gain or lose by the *direct legal operation* and effect of the judgment." *Id*. (emphasis in original). Here, the COFC correctly denied NRI's Motion because NRI does not claim an interest that meets these standards.

A. The COFC Correctly Determined That NRI Does Not Have a Legally Protectable Interest In the ConServe Litigation Because NRI's Contract Does Not Guarantee It Any Additional Account Transfers and the Preliminary Injunction Merely Temporarily Pauses ED From Issuing New Accounts

In its order denying NRI's Motion, the COFC held that NRI and the other small business contractors[2] do not have a legally protectable interest in the outcome of the case. Appx000129. NRI claimed to have such an interest because the Preliminary Injunction temporarily prohibits ED from transferring new student loan accounts to the existing contracts, including NRI's contract. Appx000130. The COFC explained that NRI does not have a legally protectable interest, because ***NRI's existing contract does not require that ED place any new student loan transfers with NRI***. *Id*. In support of this position, the COFC identified a

[2] Notably, NRI is the only small business contractor to appeal the COFC's decision. F.H. Cann & Associates, Inc. moved for leave to file an amicus brief instead.

statement contained in the record from ED explaining that ***ED "does not [] reserve pools of accounts for a particular contractor or set of contracts***." *Id*. (emphasis added). The Court concluded that, "In short, the Small Businesses [including NRI] are not entitled to receive any new accounts as a matter of contract law; at best, they have an expectancy of potential new student loan accounts." *Id*.

NRI concedes that it does not have a right to receive any additional accounts under its existing contract. ECF 14 at 11 ("***While NRI is not entitled to a particular number of account placements under the Contract***…") (emphasis added). NRI argues, instead, that it has a legally protectable interest in remaining eligible to receive new account placements. *Id*. NRI has significantly overstated its plight.

The Preliminary Injunction has not rendered NRI ineligible to receive new account placements. Rather, it has imposed ***a temporary pause on ED's issuance of new account placements*** to any of the debt-collection contractors. NRI's contract has not been modified in any way. Once this protest is resolved and the injunction is lifted, ED will be able to resume account transfers at its discretion including to NRI and other contractors. The injunction has no bearing whatsoever on NRI's eligibility to receive account transfers over the life of its 10-year contract once the injunction is lifted. Moreover, ***the injunction does not interfere with NRI's ability to continue to service the tens of thousands of in-service accounts***

that NRI has already received. Appx100071. Thus, the Preliminary Injunction has not nullified or rendered meaningless NRI's contract, as NRI complains.

Notably, the Preliminary Injunction prohibits ED from transferring new accounts to any contractor, not just NRI. Therefore, NRI will not lose the opportunity to eventually receive the currently-paused accounts as a result of the Preliminary Injunction, because these accounts will not be transferred to others during this period. Once the injunction is lifted, these paused account transfers will be available for ED to transfer. Accordingly, the mere pause in ED's ability to make new transfers to NRI's 10-year contract does not provide NRI with an interest in this protest that is sufficient to satisfy the test under Rule 24(a)(2).

NRI also argues that the COFC's decision ignores the terms of NRI's contract. NRI quotes portions of its contract which state that ED shall conduct Competitive Performance and Continuous Surveillance ("CPCS") to determine the adequacy of contractors' performance and that, "incentive fees and transfers of new accounts shall be based upon each contractor's total CPCS score." ECF 14 at 12 *citing* Appx840049.[3] NRI's reliance on this language is unwarranted. This portion of NRI's contract explains how ED will administer the incentive fees and transfers of new accounts, in the event that it decides to transfer new accounts to

[3] NRI has not proffered any evidence to support its self-serving contention that NRI is a high performing contractor that would be entitled to addition account transfers, even under this flawed contract interpretation.

the small business contractors. It does not, however, guarantee that ED will transfer new accounts to NRI or the other small business contractors. Indeed, NRI concedes in its brief that, under the terms of its contract, a contractor with high CPCS scores is in line to receive new accounts ***only "to the extent they are available***." *Id*. at 12 (emphasis added). As explained by ED and recognized by the COFC, NRI's contract does not obligate ED to transfer any particular number of contracts to any contractor or pool of contractors and, therefore, does not guarantee NRI the opportunity to compete for a specific number of transfers.

NRI cites *Freedom Wireless, Inc. v. Boston Commc'ns Grp., Inc.*, No. 2006-1020, 2006 WL 8071423, at *2 (Fed. Cir. Mar. 20, 2006) (unpublished) for the proposition that an intervenor has a legally protectable right where its right to perform certain work has been enjoined or otherwise impacted, through injunctive relief. ECF 14 at 11.[4] That case, however, is wholly inapposite to the case at hand. In *Freedom Wireless*, the intervenor had a legally protectable interest in the outcome of the appeal, because the district court had ***permanently enjoined the intervenor and similarly situated parties from making, using, or selling certain wireless services***. Here, NRI has not been permanently enjoined from doing anything. Rather, the Preliminary Injunction in this case merely puts a temporary

[4] Moreover, this unpublished decision is non-precedential, meaning that the Court will not give such a decision the effect of binding precedent. Federal Rule of Appellate Procedure 32.1; Federal Circuit Rule 32.1.

pause on ***ED's ability to transfer new accounts until the litigation is resolved***. Thus, NRI's alleged plight is far less significant, as NRI does not stand to permanently lose its opportunity to conduct business as the intervenor did in *Freedom Wireless*.

B. The COFC Correctly Found That NRI Failed to Demonstrate That It Will Either Gain or Lose by Direct Legal Operation and Effect of the Judgment

In addition to finding that NRI does not have a legally protectable interest in the ConServe Litigation, the COFC also determined that NRI failed to demonstrate that it "will either gain or lose by direct legal operation and effect of the judgment." *Am. Mar. Transp.*, 870 F.2d at 1561 (emphasis in original). The COFC explained that NRI's existing contract has not been challenged and, therefore, the judgment in the case will not impact NRI's ability to receive new accounts. Appx000130. Indeed, NRI readily admitted that it originally had no interest in the protest until the injunctive relief was issued. Therefore, NRI does not have a direct interest in the outcome of this case.

NRI argues that this Court should allow it to intervene because of its interest in the Preliminary Injunction, ***which it admits is merely a "collateral matter***." ECF 14 at 13 (emphasis added). NRI argues that because "collateral matters," such as preliminary injunctions, may be considered part of an action for some purposes, NRI should be allowed to intervene because it will "gain or lose by the

direct legal operation" of any decision regarding the Preliminary Injunction. *Id*. at 14.

NRI's position is contrary to the case law of this Court and otherwise unreasonable. This Court has held that to intervene in a case, a party must have a "direct" interest in the outcome of the case and that such an interest cannot be "indirect" or "contingent." *Am. Mar. Transp.*, 870 F.2d at 1561. Thus, NRI's insistence that it has a right to intervene as a result of its interest in the "collateral matter" of the Preliminary Injunction is unpersuasive. NRI points to instances where courts have found that a collateral matter should be considered part of an action, but does not demonstrate that such examples are relevant in this context. Indeed, the relevant case law focuses on the impact of the ultimate "judgment" in a case, not on the temporary impact of collateral matters, because such matters are temporary and tangential in nature. *Id*. As the COFC recognized, the outcome of this case will have no bearing on NRI because NRI's contract has not been challenged.

Moreover, as discussed above, NRI will not suffer a direct loss, or any loss, as a result of the Preliminary Injunction because the Preliminary Injunction merely pauses ED's ability to transfer new accounts for a limited time until the protest is resolved. Once the Preliminary Injunction is lifted, ED will be free to transfer accounts to NRI, as was the case before the Preliminary Injunction was issued.

This will remain true for the remainder of NRI's 10-year contract. Thus, contrary to NRI's claims, any alleged harm suffered by NRI as a result of this temporary pause will resolve once the injunction is lifted.

At best, NRI has an ***indirect*** interest in ConServe's bid protest action. Such an interest stands in stark contrast to the type of direct interests that have been found sufficient to justify intervention under Rule 24(a). *See, e.g., Armour of Am. v. United States*, 70 Fed. Cl. 240, 243-244 (2006) (finding protection from disclosure of trade secrets and confidential research information a sufficient interest to justify intervention under Rule 24(a)); *Honeywell Int'l Inc. v. United States*, 71 Fed. Cl. 759, 765 (2006) (finding an interest in protecting a patent a sufficient interest for intervention of right under RCFC Rule 24(a)).

Finally, NRI has not attempted to explain why the COFC's decision not to consider these collateral matters to be part of the judgment in this litigation is a legal error. NRI has not and cannot point to any authority in support of this position. For these reasons, the COFC's denial of NRI's Motion should be affirmed.

II. Even If This Court Finds That the COFC Did Err, It Should Remand This Case to the COFC to Determine Whether NRI's Interests Are Adequately Represented By the Government and Whether NRI Complied with Rule 24(c)

Even if this Court finds that the COFC erred in determining that NRI does not have a legally protectable interest in the outcome of ConServe's bid protest,

this Court should remand this matter to the COFC to determine whether NRI's interest are adequately represented by the Government and whether NRI complied with RCFC 24(c), which requires that a motion to intervene "must state the grounds for the intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

A. NRI's Interests Are Adequately Represented by the Government

Under RCFC 24(a)(2), a party shall only be allowed to intervene if its interests are not adequately represented by existing parties. Here, NRI's interests are adequately represented by the Government, which has been advocating for NRI and the other small business contractors since the onset of the litigation. Because the COFC found that NRI does not have a legally protectable interest in the litigation, it did not need to reach this issue.

From the outset of this litigation, NRI's interests have been well-represented by the team of Department of Justice attorneys representing ED. Indeed, immediately after the Court issued a temporary restraining order that prohibited ED from assigning debt collection accounts to any existing contract vehicles, the Government's first act was to file a Motion to Amend the Court's Temporary Restraining Order to lift the prohibition on the ED assigning accounts to the contracts held by the small business contractors. *See* Appx100161-100164. The Government, thereafter, has consistently fought, in both hearings and its filings, to

carve the small business contractors out from the injunction at the expense of other parties. *See, e.g.,* Appx101692 (arguing that the portion of the injunction affecting the small business contract holders should be vacated); May 22, 2017, Hr'g Tr., at 46:8 - 47:7.

Moreover, other parties have aided the Government in its efforts to lift the injunction to try to siphon work to the small business contractors at the expense of other parties. *See, e.g.*, Appx101865, May 22, 2017, Hr'g Tr., at 19:20-23 (Alltran's counsel stating that the small business contractors should be able to receive account transfers during corrective action). In short, the Government's filings and statements in the litigation – in concert with those of other offerors – demonstrate that NRI's interests are already represented. Thus, the COFC's decision denying the Motion should be affirmed.

B. NRI's Motion Should Be Denied Because NRI Failed to Comply with Rule 24(c)

Rule 24(c) states in unambiguous and mandatory terms that a motion to intervene "must state the grounds for the intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." RCFC 24(c) (emphasis added). NRI's Motion was not "accompanied by a pleading that sets out the claim or defense for which intervention is sought" as required by Rule 24(c), and, therefore, must be denied. Because the Court denied NRI's motions on the grounds discussed above, it did not need to reach this issue.

NRI has provided no explanation as to why it has failed to file such a pleading. This lack of explanation must be viewed as an admission that no such justification exists. This Court should, therefore, remand this case to the COFC for consideration of this issue in the event that it finds that the Court erred in its decision.

CONCLUSION

For the reasons set forth herein, ConServe respectfully requests that this Court affirm the COFC's July 7, 2017 order denying NRI's Motion to Intervene.

Dated: September 25, 2017

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Attorney for Plaintiff-Appellee, Continental Service Group, Inc.

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September 25, 2017

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