COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12370

A.L. PRIME ENERGY CONSULTANT, INC.,

PLAINTIFF-APPELLEE,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT-APPELLANT.

On Reservation and Report from the
Superior Court for Suffolk County

OPENING BRIEF OF DEFENDANT-APPELLANT MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Defendant-Appellant Massachusetts Bay Transportation Authority, by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of Massachusetts Bay Transportation Authority: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of Massachusetts Bay Transportation Authority's Stock: None.

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INTRODUCTION

This case presents what should have been a simple question of contract interpretation, but it resulted in a sweeping Superior Court decision that threatens to substantially undermine state government efforts to save taxpayer money. In 2015, Defendant-Appellant Massachusetts Bay Transportation Authority ("MBTA") entered a two-year fuel supply contract with Plaintiff-Appellee A.L. Prime Energy Consultant, Inc. ("A.L. Prime," and the "Contract"). The Contract allowed MBTA to terminate it for MBTA's "convenience," "in [MBTA's] sole discretion," and "for any reason." R.A. 013. After about one year, MBTA cancelled the Contract and moved to a less expensive government-wide fuel purchasing plan. A.L. Prime sued, alleging that the termination constituted a breach of contract. The Superior Court denied MBTA's motion to dismiss and, in doing so, held that, for government entities, "terminating a contract solely to obtain a better price from another contractor constitutes a bad faith termination or an abuse of discretion." R.A. 224. That decision was wrong as a matter of law and this Court should reverse it.

The Superior Court made several significant

errors in holding that MBTA could not terminate the Contract to save taxpayer money.[1] Most importantly, the decision below does not even address, and is inconsistent with, the plain language of the Contract. Courts in Massachusetts and around the country have recognized that the language found in the Contract's termination clause - particularly but not limited to "for any reason" - provides a contracting party broad authority to terminate for whatever reason it chooses, including to move to a lower cost supplier. The Contract also specifies that A.L. Prime's "sole and exclusive remedy" in the event of termination would be payment for work already performed and for A.L. Prime's mobilization and demobilization costs. The Contract expressly states that MBTA would "not be responsible for" payment for work not performed. MBTA's termination notice stated that MBTA would provide the contractual termination payment, R.A. 099-100, underlining the fact that there was no breach of contract.

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[1] For purposes of its motion to dismiss and this appeal, MBTA accepts as true all well-pleaded facts in the complaint. MBTA reserves the right to challenge any factual allegations, and notes that it would show, if necessary, that it terminated the contract for multiple reasons in addition to obtaining a lower cost elsewhere.

The Superior Court based its holding entirely on its review of cases involving the termination of federal government contracts. But none of those cases involved contracts containing the broad termination right set forth on the face of the Contract. Instead, those cases all concerned a specific, and narrower, termination clause required under federal contracting law. And even those cases did not hold that the federal government may not terminate contracts to save money. Those cases actually hold that federal government entities only act in bad faith if they enter a contract intending to terminate it. That is not alleged here.

The Superior Court also expressed concern that it would be unfair to allow MBTA to cancel the contract so shortly after entering it. That concern too was misplaced. Again, the Contract provided that upon termination A.L. Prime would be paid for work performed and its mobilization and demobilization costs. There is no dispute that MBTA will be making that payment, such that A.L Prime will not lose a penny. On the other hand, it is terrible public policy to hold that public entities such as MBTA - many of which are confronting budget shortfalls that will

require cuts to be made somewhere - are locked into contracts that needlessly waste government resources even if those contracts contain the clear termination clause at issue here.

For these reasons, the decision below should be reversed and the case dismissed. Those who agree to provide the government broad termination rights should be held to their agreements, and should not be allowed to use the courts to change the explicit terms of the deal.

QUESTION PRESENTED

Did the Superior Court err in concluding that MBTA could be liable for terminating the A.L. Prime contract if MBTA's reason was to obtain a better price from another contractor, even though the contract allowed MBTA to terminate for its "convenience," "for any reason," and "in its sole discretion," and limited A.L. Prime's relief to amounts MBTA stated that it would pay when it terminated?

STATEMENT OF THE CASE AND FACTS

I. The MBTA/A.L. Prime Contract

MBTA operates one of the largest public mass-transit systems in the nation, including an integrated network of bus, rapid transit, light rail, and

commuter rail lines, and special services for disabled passengers.[2] Hundreds of thousands of Massachusetts residents rely on MBTA each day to get from point A to point B safely, efficiently, and cost-effectively. See generally id. A.L. Prime is a fuel supply company based in Saugus, Massachusetts. R.A. 010.

MBTA awarded the Contract, under which A.L. Prime would supply diesel fuel to the MBTA for two years, on or about July 1, 2015, with an effective date of September 1, 2015. R.A. 010, 012. At issue in this case is the Contract's termination clause. In it, MBTA retained the right, "in its sole discretion," to terminate the contract "for its convenience and/or for any reason," so long as A.L. Prime received, as its "sole and exclusive remedy," compensation for its mobilization and demobilization costs and work already performed. R.A. 013. The pertinent clause states, in full:

> **5.29.3 Termination for Convenience.** The Authority may, in its sole discretion, terminate all or any portion of this Agreement or the work required hereunder, at any time for its convenience and/or for any reason by giving written notice to the

[2] See generally MBTA Fiscal & Management Control Board, "Strategic Plan" at 26 (Apr. 2017), https://malegislature.gov/Reports/4842/Final%20MBTA%20Strategic%20Plan.pdf.

> Contractor thirty (30) calendar days prior to the effective date of termination or such other period as is mutually agreed upon in advance by the parties. If the Contractor is not in default or in breach of any material term or condition of this Agreement, the Contractor shall be paid its reasonable, proper and verifiable costs in accordance with generally accepted government contracting principles as set forth in the Federal Acquisition Regulations, including demobilization and contract closeout costs, and profit on work performed and Accepted up to the time of termination to the extent previous payments made by the Authority to the Contractor have not already done so. Such payment shall be the Contractor's sole and exclusive remedy for any Termination for Convenience, and upon such payment by the Authority to the Contractor, the Authority shall have no further obligation to the Contractor. The Authority shall not be responsible for the Contractor's anticipatory profits or overhead costs attributable to unperformed work.

Id. (emphases added).

II. MBTA Terminates the Contract

Since at least 2009, MBTA has faced persistent, substantial operating deficits.[3] MBTA faces pressures

[3] See "Strategic Plan," supra, at 26 ("Beginning in 2009, dedicated funding and own-source revenue were inadequate to cover expenses[.]"); Governor Charlie Baker, "Governor Charles D. Baker's Budget Recommendation - House 1 Fiscal Year 2018," (Jan 25, 2017), http://www.mass.gov/bb/h1/fy18h1/exec_18/hdefault.htm (MBTA operating deficit in FY 17 was $125 million). Facts concerning MBTA's budget are provided merely by way of background for the Court and to illustrate the broader implications of the Superior Court's legal ruling; the facts themselves are not

on its budget from taxpayers, customers, employees, and government officials. It must spend the money necessary to cover its operational and capital expenses, including the costs of fleet and yard maintenance and labor, while meeting government mandates, keeping its fares reasonable, cutting as few services as possible, and minimizing the burden on taxpayers posed by public subsidies.[4]

MBTA has been attempting to find short- and long-term solutions to this ongoing budget crisis. It has so far managed to cover its expenses by, among other things, obtaining larger state subsidies and deferring capital expenditures.[5] But taking additional money from state coffers burdens taxpayers either through higher taxes or cuts to other government programs.[6] Dipping

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essential to MBTA's argument on its motion to dismiss, which turns on the plain language of the Contract.

[4] See generally Governor's Special Panel to Review the MBTA, "Back on Track: An Action Plan to Transform the MBTA" (Apr. 8, 2015), http://www.mass.gov/governor/docs/news/mbta-panel-report-04-08-2015.pdf.

[5] See "An Action Plan to Reform the MBTA," supra, at 8, 17 (noting that "[d]ue to a severe imbalance between costs and revenues, the MBTA would be insolvent if not for continuing and increasing Commonwealth subsidies" and that "the MBTA spent only $2.3 billion of the $4.5 billion it had planned to spend on capital construction" over the previous five years).

[6] See generally "Budget Recommendation - House 1 Fiscal Year 2018," supra (describing continued fiscal

into funds set aside for infrastructure and repair projects also drives up long-term repair costs and decreases short- and long-term service reliability.[7]

This case involves one effort by MBTA to improve efficiency and bring its budget into balance without imposing painful costs and cuts on taxpayers, customers, and employees. A.L. Prime alleges that in April 2016 - after MBTA had purchased fuel from A.L. Prime under the Contract for about eight months - MBTA informed A.L. Prime that it had the opportunity to purchase fuel under a statewide procurement contract administered by the Commonwealth's Operational Services Division. R.A. 012. MBTA allegedly determined that it could save money by doing so. Id.[8] In July 2016, MBTA sent a letter informing A.L. Prime that,

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challenges facing the Commonwealth, including addressing structural deficits in light of "slower revenue growth").

[7] See "Strategic Plan," supra, at 5 (deferred capital expenditures "contribut[ed] to the deterioration of the State of Good Repair, increase[d] operating costs, and diminish[ed] the quality of service").

[8] See also "Second Annual Report," MBTA Fiscal and Management Control Board (Dec. 15, 2016), at 62-63, http://www.mbta.com/uploadedfiles/About_the_T/Board_Meetings/Final%2012.13.2016%20FMCB%20Second%20Annual%20Report.pdf (describing the importance of cost savings from volume discounts in statewide procurement contracts, including the diesel fuel supply contract at issue here).

effective August 15, 2016 (almost halfway through the contract), MBTA would exercise its termination right. R.A. 012, 099-100. The letter also explicitly stated that MBTA would provide A.L. Prime its "sole and exclusive remedy" under the contract for early termination: payment for work performed and reimbursement for mobilization and demobilization costs. R.A. 099-100.

A.L. Prime responded by demanding that MBTA rescind the termination. R.A. 014, 102-108. When MBTA declined to do so, A.L. Prime filed its complaint in this case on September 2, 2016. The complaint raises claims for Breach of Contract (Count I) and Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II), and seeks recovery of A.L. Prime's unspecified "financial and pecuniary loss." R.A. 014-016. While the damages demanded are left unstated, because MBTA agreed to pay A.L. Prime for its mobilization and demobilization costs and for fuel actually delivered, see R.A. 099-100, MBTA assumes that A.L. Prime is seeking payments for lost profits after the termination date, i.e., for fuel that was never actually delivered. This is despite A.L. Prime's agreement in the Contract that MBTA "shall not be

responsible" for "anticipatory profits" for "unperformed work."

III. MBTA's Motion to Dismiss

On October 7, 2016, MBTA moved to dismiss A.L. Prime's complaint pursuant to Mass. R. Civ. P. 12(b)(6). In the memorandum supporting its motion, MBTA relied on the unambiguous terms of the contractual termination provision and the fact that MBTA had promised to make the required termination payment.

On March 6, 2017, the Superior Court (Kaplan, J.) denied MBTA's motion to dismiss. R.A. 226. The Superior Court did not decide the case based on the actual language of the Contract - to the contrary, that language went unaddressed in the Court's legal analysis. Instead, the Superior Court announced a general rule that, in claims brought against government entities, "a plaintiff can establish bad faith or abuse of discretion by proving that the termination occurred simply to obtain a better price from another contractor." R.A. 226; see also id. at 224 ("terminating a contract solely to obtain a better price from another contractor constitutes a bad faith termination or abuse of discretion"). The court based

this rule on federal contracting cases, particularly Krygoski Construction Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996). R.A. 223-24.

In explaining its holding, the Superior Court also expressed concern that MBTA's termination decision unfairly transformed a "two-year" contract into one of "brief duration." R.A. 226. In providing this policy-based rationale, the Superior Court did not address the fact that MBTA had stated that it would pay A.L. Prime for its mobilization and demobilization costs, thereby addressing any fixed costs A.L. Prime may have incurred in connection with the Contract.

MBTA filed a timely motion for reconsideration or, in the alternative, to report the case for interlocutory review pursuant to Mass. R. Civ. P. 64. On April 21, 2017, the Superior Court denied MBTA's motion for reconsideration but granted MBTA's Rule 64 motion. The Superior Court stayed all trial court proceedings during the pendency of the interlocutory appeal.[9]

[9] MBTA also filed a petition with a Single Justice of the Appeals Court for interlocutory relief pursuant to M.G.L. c. 231, § 118 (first paragraph). The Single Justice stayed all appellate proceedings pending the

Following assembly of the record, the appeal was docketed in the Appeals Court on June 19, 2017. MBTA subsequently filed an application for direct appellate review, which this Court granted on July 27, 2017.

SUMMARY OF ARGUMENT

It is impossible to reconcile the Superior Court's decision with the plain language of the Contract. That language unambiguously allows MBTA, in its "sole discretion," to terminate the Contract for its "convenience" or "for any reason," so long as MBTA provides A.L. Prime its "sole and exclusive remedy": compensation for mobilization and demobilization costs and payment for fuel delivered. Further, the Contract expressly establishes that MBTA "shall not be responsible" for the damages A.L. Prime presumably is seeking in this lawsuit. Numerous courts from around the country have recognized that such contract language allows termination for any reason at all, including to move to a lower cost supplier. The Superior Court should have granted MBTA's motion to

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Superior Court's consideration of the motion for reconsideration or to report. After the Superior Court granted MBTA's Rule 64 motion, MBTA filed a motion in the Appeals Court to withdraw its c. 231, § 118 (first paragraph) petition as moot, which the Single Justice granted on May 5, 2017.

dismiss on this basis.

In reaching the opposite holding, the Superior Court improperly relied on federal precedent and Morton Street LLC v. Sheriff of Suffolk County, 453 Mass. 485, 486-87 (2009), which the Superior Court misread to restrict the use of termination clauses. Morton Street actually stands for the proposition that terminations to save money are proper. And the federal cases on which the Superior Court relied are inapposite. They involved different contractual language that does not allow termination "for any reason." Moreover, those cases make clear that the question of bad faith concerns an intent to terminate at the time of contracting. A.L. Prime's complaint has no allegation that MBTA entered this contract intending to terminate it.

Even beyond the plain language of the Contract, considerations of public policy support enforcing MBTA's express contractual termination right. A.L. Prime will be made whole for its reliance costs in entering the contract; there is nothing unfair about MBTA exercising its right to terminate the contract earlier than two years, so long as A.L. Prime receives what it agreed would be its "sole and exclusive"

remedy for early termination. The Superior Court's decision, on the other hand, eliminates the availability of termination clauses as a key tool for promoting efficiency in public contracting and addressing budgetary issues.

For all of these reasons, this Court should reverse the Superior Court's denial of MBTA's motion to dismiss.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the Superior Court's ruling on a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) de novo. See, e.g., Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014). A motion to dismiss should be granted where the facts alleged in the complaint do not support relief as a matter of law. Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). Dismissal is particularly appropriate where, as here, the plaintiff makes "detailed factual allegations which the plaintiff contends entitle [it] to relief," but those allegations "clearly demonstrate that the plaintiff does not have a claim." Fabrizio v. City of Quincy, 9 Mass. App. Ct. 733, 734 (1990).

To the extent that the Superior Court interpreted the terms of the Contract, a trial court's "interpretation of an unambiguous contract . . . is subject to plenary review on appeal." Bank v. Thermo Elemental Inc., 451 Mass. 638, 648 (2008); see also EventMonitor, Inc. v. Leness, 473 Mass. 540, 549 (2016) (This Court reviews de novo the Superior Court's "interpretation of the meaning of a term in a contract."). A breach of contract claim should be dismissed under Rule 12(b)(6) where the contract, on its face, unambiguously precludes the relief the plaintiff seeks. See, e.g., Flomenbaum v. Commonwealth, 451 Mass. 740, 752 (2008).

Although, in reviewing a motion to dismiss, the Court should "accept as true the facts alleged in the plaintiff's complaint as well as any favorable inferences that reasonably can be drawn from them," the Court should not accept as true "legal conclusions cast in the form of factual allegations." Polay v. McMahon, 468 Mass. 379, 382 (2014). In determining the sufficiency of the allegations in the complaint, the Court may properly consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." Schaer v.

Brandeis University, 432 Mass. 474, 477 (2000).

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT IGNORED THE CONTRACT'S PLAIN LANGUAGE.

The Superior Court's holding is contradicted by the plain language of the Contract, which is the proper starting and ending point in a case like this. No matter MBTA's subjective motivation - saving money or otherwise - its decision to terminate the Contract was consistent with the Contract's terms. Further, the Contract unambiguously forecloses the relief A.L. Prime seeks in this lawsuit.

It is a fundamental contract law principle that "unambiguous" language "must be construed according to its plain meaning." Balles v. Babcock Power Inc., 476 Mass. 565, 571-72 (2017); see also Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 427 (1995) (courts should "construe and enforce unambiguous terms according to their plain meaning"); Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706 (1992) ("It is elementary that an unambiguous agreement must be enforced according to its terms"). Language is ambiguous only where "the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken."

Id.

There can be no reasonable difference of opinion about the meaning of the key terms in the Contract. The phrase "for any reason" is "open to only one rational interpretation." Rae v. JP Morgan Chase Bank, 22 Mass. L. Rptr. 325, 2007 WL 1166059, at *4 (Mass. Super. Ct. Apr. 18, 2007).[10] It means "all possible reasons, not[] a narrower subset of reasons." Sensomatic Sec. Corp. v. Sensomatic Elecs. Corp., 273 F. App'x 256, 266 (4th Cir. 2008). For example, in Horbal v. Cannizzaro, 81 Mass. App. Ct. 1102, 2011 WL 6029682, at *2 (Mass App. Ct. Dec. 6, 2011) (Rule 1:28 op.), the Appeals Court interpreted a stock purchase agreement that ostensibly committed a buyer to make certain purchases, but also gave the buyer the right to refuse to make those purchases "for any reason or no reason." After the buyer exercised its right of refusal, another stockholder filed a derivative action alleging breach of contract. Id. The court affirmed dismissal of the claim, reasoning that the "for any

[10] In many places in this brief, MBTA relies on Superior Court decisions and summary dispositions from the Appeals Court. Few published decisions concerning the specific contract language at issue here exist. MBTA assumes that this is because parties rarely dispute the meaning of such unambiguous language.

reason or no reason" term removed the buyer's "unconditional[] obligat[ion]" to make the purchases and left it free to exercise its refusal right without justification or explanation. Id.

Likewise, in Rae, 2007 WL 1166059 at *3, the court interpreted a real estate contract providing that "[i]f the mortgagee does not convey title to the Buyer for any reason, the mortgagee's sole responsibility shall be the return of deposit paid." Id. (emphasis added). Although the buyer insisted that the mortgagee could terminate the deal only if it was unable to convey clean title, the court held that the contract provided the mortgagee an unconditional right to terminate, so long as it returned the buyer's deposit. Id. As the court explained, "[a] reasonable person could not interpret the words 'for any reason' to mean 'only if clean title cannot be conveyed.'" Id.; see also DSF Inv'rs, LLC v. Lyme Timber Co., 18 Mass. L. Rptr. 411, 2004 WL 3414427, at *11 (Mass. Super. Ct. Dec. 22, 2004), aff'd, 67 Mass. App. Ct. 1110 (2006) (Rule 1:28 op.) (contractual term permitting termination of a deal "at any time for any reason" was "unambiguous" in providing both parties a "safe harbor" to walk away).

The phrase "in its sole discretion" is likewise unambiguous. By its "plain terms," it "vests" the "option" to terminate the contract solely with MBTA, and establishes that A.L. Prime "has no contractual right" to a contract term of any set length. Savidge v. TransCanada Power Mktg., Ltd., 23 Mass. L. Rptr. 149, 2007 WL 3014701, at *1-*2 (Mass. Super. Ct. Sept. 6, 2007) (contractual term making bonus payments to a consultant contingent on certain land sales, and permitting potential seller, "in its sole discretion," not to sell the land, unambiguously left consultant with "no contractual right" to bonus payments after land was not sold).

Courts routinely turn back attempts to read some limit into the scope of a party's "sole discretion." For example, in P. Gioioso & Sons, Inc. v. Liberty Mutual Insurance Co., 33 Mass. L. Rptr. 511, 2016 WL 5372570, at *4 (Mass. Super. Ct. Aug. 27, 2016), the court interpreted a contract permitting an insurer to "adjust[]" the "amount of collateral . . . at [its] sole discretion." Deeming this "sole discretion" term "straightforward and unambiguous," the court granted the insurer summary judgment on the insured's claim that the setting of "unreasonably high" collateral had

breached the contract and the implied covenant of good faith and fair dealing. And in Niederhauser v. Paradigm Geophysical Corp., 33 Mass. L. Rptr. 429, 2016 WL 3919325, at *3 (Mass. Super. Ct. May 25, 2016), the court found "simple and unequivocal" a contractual term giving one party "absolute and sole discretion" to determine whether to provide a reward upon submission of a proposed solution to a problem. The court explained that the "contention that these terms can reasonably be interpreted to mean something other than [the party offering the reward] does not have to accept any proposed [s]olution, even if it can be shown to meet the criteria, is unavailing." Id.

Given these unambiguous terms, MBTA's termination of the Contract comports perfectly with the parties' agreement even assuming, as alleged, that MBTA's only intent was to seek a better price. Many courts have recognized that one logical reason that a party might seek termination of a services contract is to obtain a better price elsewhere. See Highland Supply Corp. v. Tecnologia De Comunicaciones Avanzadas, SA. De C.V., 2008 WL 370695, at *2-*3 (S.D. Ill. Feb. 11, 2008) (a party may seek lower prices under a contract that gives the party the ability to cancel an order "for

any reason," subject to its "sole discretion"); cf. United Airlines, Inc. v. Good Taste, Inc., 982 P.2d 1259, 1266 (Alaska 1999) (under an at-will agreement, company could terminate contract in pursuit of a "more advantageous arrangement" and "the goal of achieving higher profits from a lower-bidding supplier"); Cronk v. Vogt's Ice Cream, 15 N.Y.S.2d 649, 655 (1939) (a party may bring an at-will contract to an end to obtain a better price, as such a contract may be "discontinued for any reason or no reason").

Not only did MBTA have the right to terminate the agreement to move to a lower cost supplier, it also has no obligation under the Contract to provide A.L. Prime a penny more than what it has offered to pay: payment for fuel actually delivered and for A.L. Prime's mobilization and demobilization costs. See R.A. 099-100. A.L. Prime agreed that such a payment would be its "sole and exclusive remedy," and further agreed that MBTA "shall not be responsible . . . for anticipatory profits." These phrases too have an unambiguous meaning. "Sole remedy means sole remedy": "[a]ny attempt to seek damages in excess of" payment for mobilization and demobilization costs and for fuel already delivered "is barred by the plain language" of

the agreement. Genesis II, LLC v. Chan, 24 Mass. L. Rptr. 487, 2008 WL 4635856, at *2 (Mass. Super. Ct. Sept. 30, 2008), aff'd, 79 Mass. App. Ct. 1124 (2011). In Genesis, as here, the plaintiff had already been promised her "sole remedy," and the court determined that the parties' contractual "agreement as to remedies" "controlled" the case: the language "could not be more unambiguous" in barring the plaintiff from receiving anything more than she had already been promised. Id.; see also, e.g., Sullivan v. Kahn, Litwin, Renza & Co., 2016 WL 6908358, at *2 (Mass. Super. Ct. Sept. 15, 2016) (phrase "sole and exclusive remedy" signals a "liquidated damages provision . . . serv[ing] as the exclusive remedy for the non-breaching party").

The phrase "shall not be responsible" also has an unambiguous meaning. MBTA's "liability was expressly limited by [this] language," Plastics Color & Compounding, Inc. v. Allied Prod. Corp., 16 Mass. L. Rptr. 362, 2003 WL 21500562, at *3 (Mass. Super. Ct. Apr. 7, 2003), such that A.L. Prime had no entitlement to anticipatory profits resulting from MBTA's decision to terminate. See also id. ("It is difficult to imagine how the parties could have expressed their

intentions more clearly and unambiguously[.]"); Leyden v. Spaulding & Slye Co., 2008 WL 241085, at *1 (Mass. Super. Ct. Jan. 3, 2008) (contractual term "shall not be responsible" unambiguously foreclosed certain liability).

Because MBTA exercised a contractual right that unambiguously permitted termination to obtain a better price elsewhere, and because MBTA promised to pay A.L. Prime its contractual remedy for early termination, MBTA breached neither the Contract itself nor the implied covenant of good faith and fair dealing.[11]

Consistent with the terms of the Contract, this

[11] The implied covenant may not be "invoked to create rights and duties not otherwise provided for in the existing contractual relationship." Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004). A breach of the implied covenant only "occurs when one party violates the reasonable expectations of the other." Chokel v. Genzyme, 449 Mass. 272, 276-77 (2007). A.L. Prime agreed that MBTA had "sole discretion" to terminate the contract at any time and "for any reason" upon payment of a "sole and exclusive remedy." Thus, A.L. Prime's only reasonable expectation under the Contract was that it would provide fuel to MBTA until MBTA exercised its termination right and paid A.L. Prime's sole and exclusive remedy, or until two years had elapsed, whichever came first. See id. (directors of company did not breach the covenant by exchanging stock when price was relatively low, thus reducing the payout to stockholders, because the stockholder agreement permitted directors to exchange stock "'at any time,' which, at a minimum, contemplates an exchange that could occur when the stock price is rising or falling").

Court should reverse the Superior Court's decision denying MBTA's motion to dismiss.

III. THERE IS NO RULE PROHIBITING GOVERNMENT ENTITIES FROM TERMINATING CONTRACTS TO PURSUE COST SAVINGS

Rather than interpreting the plain text of the Contract, the Superior Court announced a per se rule that government entities, unlike other contracting parties, cannot terminate a contract to move to a lower cost supplier. The Superior Court stated that it found this rule in this Court's decision in Morton Street and in federal precedent. Morton Street, however, plainly supports MBTA's position in this litigation. And the federal cases, for their part, do not contain the per se rule that the Superior Court thought it had identified, a fact recognized by other state courts around the country. Those federal cases are, moreover, distinguishable, because they concern different contract language and a different regulatory scheme.

A. Morton Street Permits Government Entities to Exercise Termination Rights to Save Money.

The Superior Court read this Court's decision in Morton Street as standing for the principle that "there must be some predicate for the termination other than the opportunity to obtain a better price."

R.A. 225. That is not correct.

In Morton Street, a sheriff had entered into a lease containing a provision permitting termination "for [her] convenience." 453 Mass. at 494. After outside funding for the lease dried up, the sheriff - already "fac[ing] a considerable deficit" - was forced "to determine whether to find money within her own budget." Id. Rather than "reducing or eliminating the funding devoted to other obligations or programs," the sheriff exercised her termination right. Id. This Court saw nothing improper about the sheriff's decision, calling it "one of the many challenging decisions that public officials with considerable obligations and limited resources often need to make, especially during difficult fiscal times, in order to allocate available resources more suitably." Id. According to Morton Street, convenience meant whatever was "suitable" to the sheriff, which could include saving money to address a deficit.

The same is true here. A.L. Prime alleges that MBTA exercised its termination right to (in the words of Morton Street) "allocate available resources more suitably" by saving money on fuel expenses. Nothing in Morton Street suggests that doing so constitutes bad

faith. Moreover, Morton Street only concerned the meaning of the term "convenience"; the contract at issue in that case did not contain the broad "for any reason," "sole discretion," and "sole and exclusive remedy" language found in the MBTA-A.L. Prime contract. For the reasons given above, whatever the meaning of "convenience" standing alone, the additional language found in the Contract requires judgment for MBTA in this case.

B. Federal Cases Involve Different Contract Language And Do Not Preclude Terminations To Save Taxpayer Money.

The federal cases on which the Superior Court principally relied in discerning its per se rule come no closer to supporting its holding.[12] As an initial matter, these cases all involved Federal Acquisition Regulations allowing termination not "for any reason" and in the government entity's "sole discretion," but only when a contracting officer determines termination

[12] The Superior Court suggested that "reference to federal case law is particularly appropriate in this case" because the Contract's termination clause "explicitly references and incorporates the Federal Acquisition Regulations." R.A. 223. But the Contract does not generally incorporate federal contracting law; it references federal regulations only to aid in defining the scope of A.L. Prime's "sole and exclusive remedy," not to impose restrictions on MBTA's right to terminate the Contract in the first place. See R.A. 013.

to be "in the Government's interest." 48 C.F.R. § 49.101(b). This "Government interest" standard has given rise to a body of case law by which courts review termination decisions for their specific justifications. See, e.g., Krygoski, 94 F.3d at 1544-45 (closely examining the financial justification for termination under the "Government interest" standard and concluding that the "contracting officer had ample justification"). Because the Contract contains an entirely different termination clause than that found in federal contracts - one that allows termination for "any reason" - the federal cases do not address the straightforward question of contract interpretation at issue here.

Even putting aside the key differences between contract language, the federal cases cited by the Superior Court do not hold that a government entity cannot terminate a contract to seek a better price elsewhere. The Superior Court focused on a stray statement in Krygoski, 94 F.3d at 1541, that "[a] contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source." R.A. 224. But this statement was not part of Krygoski's holding or

reasoning. Instead, it was only a summary description of the holding in a different case, Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).[13]

As the Federal Circuit went on to make clear in Krygoski, "Torncello applies only when the Government enters a contract with no intention of fulfilling its promises." Krygoski, 94 F.3d at 1545; see also id. at 1541-42 (observing that in Torncello, the government entity knew at the outset that it could "acquire the same service at a lower price from another contractor," yet made a "promise" to the plaintiff "it never had an intention to keep"). The court in Krygoski thus focused on the knowledge and intent of the parties at the time the contract was formed. Because "the record show[ed] no evidence that the [government entity] intended from the outset to void its promises[,]" the court reasoned, "Torncello [did] not apply." Id. at 1545.[14]

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[13] The sentence did not even appear in the legal analysis sections of the Krygoski opinion. It was included in a factual background section, which "traced some of the history" of termination clauses in federal contracts. Krygoski, 94 F.3d at 1540.

[14] Other Federal Circuit decisions also have recognized that Torncello "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting

The Superior Court also cited more recent federal trial court cases, but none of these depart from Krygoski's central focus on the time of contract formation (nor could they, given that Krygoski is binding appellate precedent for those courts). To be sure, the cases the Superior Court cited all refer in passing to Kyrgoski's "better bargain" dictum. See TigerSwan, Inc. v. United States, 110 Fed. Cl. 336, 341-42, 347 (2013); Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622, 627 (2000); NCLN20, Inc. v. United States, 99 Fed. Cl. 734, 759 (2011). But none of these cases involved a government entity's termination of a contract to save money. See Northrop Grumman, 46 Fed. Cl. at 627 (government entity terminated the contract "to save the [space] program," not to cut costs); TigerSwan, 110 Fed. Cl. at 342 (involving alleged favoritism for a preferred

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to the convenience termination clause." Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990); see also T & M Distributors, Inc. v. United States, 185 F.3d 1279, 1284 n. 4 (Fed. Cir. 1999) (Torncello is limited to bad faith at the time of contract formation); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1582 (Fed. Cir. 1995) (refusing to extend Torncello "to the situation in which the government contracts in good faith but, at the same time, has knowledge of facts supposedly putting it on notice that, at some future date, it may be appropriate to terminate the contract").

incumbent contractor whose prices were higher); NCLN20, 99 Fed. Cl. at 759 (replacement contractor's price was no lower than the terminated contractor's price). The courts in these cases therefore had no occasion to apply the dicta from Krygoski, let alone to hold that a government entity cannot terminate a contract to obtain a better price elsewhere.

In summary, the federal cases on which the Superior Court relied did not address the language of the Contract and at most stand for the proposition that it is bad faith to enter a contract with no intention of performing. They therefore no have relevance to the interpretation of the Contract or to allegations in this case.

C. The Superior Court's Decision Conflicts With Decisions From Other States.

For the reasons given above, the Superior Court's interpretation of the Contract was wrong as a matter of Massachusetts law. Indeed, if Massachusetts were to adopt a rule that its state government cannot terminate contracts to save taxpayer money, that would mark the Commonwealth as an extreme outlier among the States, as other jurisdictions have held that government entities are entitled to exercise broad

termination rights in order to reduce costs.

For example, in Vila & Son Landscaping Corp. v. Posen Construction, Inc., 99 So. 3d 563, 564 (Fla. Dist. Ct. App. 2012), the Florida appeals court considered a termination clause allowing a government contractor to terminate a subcontract "at any time, in whole, or from time to time in part, . . . for its convenience," subject to payment of particular termination fees. The court reasoned that the "plain language of the subcontract" and the "reasonable expectations of the contracting parties" clearly allowed the contractor to terminate in pursuit of a better price elsewhere. Id. at 568.

In the process, the court recognized that Torncello and Krygoski do not stand "for the general proposition that terminating for convenience to obtain a better price is bad faith," but instead only concern the parties' intent at the time of contract formation. Id. at 568-69; supra at 27-30; see also, e.g., District of Columbia v. Organization for Environmental Growth, Inc., 700 A.2d 185, 200 (D.C. 1997) (calling Torncello "one of the more frequently misunderstood holdings in government contract law" and refusing to apply it where the government entity had not entered

the contract intending to terminate it); GiniCorp v. Capgemini Gov't Sols., LLC, 2007 WL 420132, at *11 (Va. Cir. Ct. Jan. 2, 2007) ("[T]he present status of the common law of government contracts encourages utilization of convenience termination provisions, unless the Government . . . did not intend to honor the contract at its inception" (emphasis in original)).

Likewise, in 4N International, Inc. v. Metropolitan Transit Authority, 56 S.W.3d 860, 861 (Tex. Ct. App. 2001), the Texas appeals court considered a clause permitting a public transportation entity to terminate a contract whenever termination would be "in its best interest," and limiting the contractor's payment at termination to the cost of "items actually furnished." After "a dispute arose regarding [the contractor's] prices," the public transportation entity exercised its termination right and the contractor sued. Id.

Although both parties agreed that federal termination clause precedents applied, the court "disagree[d]." Id. at 862. Applying general principles of contract interpretation instead, the court found that the contract was "unambiguous" in providing the

public transportation entity with freedom "to terminate . . . with or without cause," regardless of subjective motivation, so long as the contractor received its termination payment. Id. at 863; see also A.J. Temple Marble & Tile v. Long Island R.R., 659 N.Y.S.2d 412, 414-16 (N.Y. Sup. Ct. 1997) (allowing termination to save money where public transportation entity had no intent to terminate at the time of contract formation and distinguishing Torncello on this basis); Capital Safety, Inc. v. New Jersey, 848 A.2d 863, 867 (N.J. Super. Ct. App. Div. 2004) (explaining that exercising a termination right "for the purpose of saving the government money does not provide a basis for a finding of bad faith.").

MBTA is unaware of any case from any other State adopting and applying the Superior Court's per se rule, let alone with respect to a contract allowing termination "for any reason."[15] This Court should not

[15] Like the federal trial courts discussed supra at 29-30, two state courts have quoted the Krygoski "better bargain" dictum without applying it. See Mb Oil, Co. v. City of Albuquerque, 382 P.3d 975, 979-80 (N.M. Ct. App. 2016) (termination was proper because contractor could not meet demand); RAM Eng'g & Const., Inc. v. University of Louisville, 127 S.W.3d 579, 587 (Ky. 2003) (government entity did not terminate the contract to obtain a better price, but instead because a losing bidder had challenged the procurement process

make Massachusetts the first State to unnecessarily hamper its government in efforts to conserve taxpayer resources.

IV. ALLOWING THE GOVERNMENT TO TERMINATE CONTRACTS TO OBTAIN A BETTER PRICE IS SOUND PUBLIC POLICY.

Even beyond plain language and precedent, considerations of fairness and public policy require reversal here. The Superior Court's decision to disregard the Contract's plain language not only deprives MBTA of its benefit of the bargain, it also deprives all government entities in the Commonwealth of a valuable tool for safeguarding the public fisc.

Allowing MBTA to exercise its express contractual right to terminate "for any reason," and limiting A.L. Prime to the "sole and exclusive" remedy it agreed to accept for early termination, is consistent with the public's interest in allowing a government entity to move to a lower cost supplier. Ultimately, government entities are spending the taxpayers' money, and they have an obligation to spend it wisely. As part of this obligation, public entities must ensure the "timely and efficient completion of [] contract work," and so they often include provisions granting "considerable

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in court and government entity wanted to avoid potential service disruptions).

discretion and flexibility in administering the contract." First Nat'l Ins. Co. of Am. v. Commonwealth, 391 Mass. 321, 325 (1984) (emphasis added); see also id. ("Public policy supports this flexibility."); John T. Callahan & Sons, Inc. v. City of Malden, 430 Mass. 124, 132 (1999) (recognizing the public interest in "protect[ing] the public fisc by obtaining the best work at the lowest possible price").

The Superior Court's holding prevents government entities like MBTA from doing precisely what this Court approved in Morton Street: exercising termination clauses to achieve efficiencies and cost savings. See supra at 24-26. Under the rule articulated by the Superior Court, these entities will be forced to find other ways to address ongoing budget deficits. In MBTA's case, this might include cutting valuable services, requesting larger taxpayer subsidies, charging the commuting public higher prices, or deferring necessary maintenance. See supra at 6-8. Each of these alternatives would impose substantial, unjustified burdens on the public. These are burdens that would not be necessary were MBTA able to terminate the Contract "for any reason," without

paying A.L. Prime anything more than its reliance costs and for work actually performed.

Rather than taking into account the broad policy implications of its holding, the Superior Court focused on MBTA's supposedly unfair treatment of A.L. Prime. According to the Superior Court, MBTA prejudiced A.L. Prime by transforming a "two year supply contract" into one of "brief duration." R.A. 226 (emphasis in original). But the Superior Court's fairness concerns rest on a misunderstanding of the parties' agreement. The parties always understood that MBTA could terminate the contract at any time short of two years, which is why they included a specific provision specifying the relief MBTA would provide A.L. Prime should that contingency occur. When MBTA stated that it was terminating the Contract it promised to provide that relief. There is thus nothing unfair about the nearly year-long period the Contract ran.

In any event, as a matter of law, the Superior Court's fairness concerns provide no basis for ignoring the Contract's plain terms. Courts may refuse to enforce contracts according to their terms only out of a "conviction, grounded in legislation and

precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." Beacon Hill Civil Ass'n v. Ristorante Toscano, 422 Mass. 318, 320 (1996). "The test is, whether the underlying tendency of the contract under the conditions described was manifestly injurious to the public interest and welfare." Adams v. East Boston Co., 236 Mass. 121, 128 (1920). In declining to enforce the Contract according to its terms, the Superior Court did not identify any public interest at stake, let alone ground such an interest in "legislation and precedent," or explain why limiting A.L. Prime to its contractual sole and exclusive remedy would be "manifestly injurious to the public interest and welfare."

Had A.L. Prime wanted to limit the scope of MBTA's termination right, it should have refused to participate in the procurement unless MBTA modified the "for any reason" and "sole discretion" language. MBTA may have agreed to different language, it may have insisted upon a lower contract price, or it may have entered into an agreement with a different vendor willing to accept the terms of this Contract. Having induced MBTA to select it as a fuel supplier by

agreeing to the terms in the Contract, A.L. Prime should not now be allowed to seek in the courts compensation far beyond what the Contract explicitly provides as A.L. Prime's "sole and exclusive remedy."

CONCLUSION

For the foregoing reasons, MBTA respectfully requests that this Court reverse the Superior Court's decision denying MBTA's motion to dismiss.

Dated: August 10, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for Massachusetts Bay Transportation Authority, hereby certify that I have served two copies of this Opening Brief and of the Record Appendix by causing them to be delivered by First Class Mail and email to counsel for A.L. Prime Energy Consultant, Inc., this 10th day of August, 2017:

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