Nos. 2015-5103, -5133

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STARR INTERNATIONAL COMPANY, INC.,
in its own right and on behalf of two classes of others similarly situated,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross-Appellant,

and

AMERICAN INTERNATIONAL GROUP, INC.,

Defendant-Appellee.

Appeals from the United States Court of Federal Claims in Case No. 1:11-cv-00779-TCW, Judge Thomas C. Wheeler

OPENING BRIEF OF PLAINTIFF-APPELLANT STARR INTERNATIONAL COMPANY, INC.

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CERTIFICATE OF INTEREST

Counsel for Starr International Company, Inc. ("Starr") certifies the following:

1. The full name of every party or amicus represented by me is: Starr International Company, Inc., and the following two classes of common shareholders of American International Group, Inc. ("AIG"), a Delaware corporation:

   a. The Credit Agreement Class defined as: "All persons or entities who held shares of AIG Common Stock on or before September 16, 2008 and who owned those shares as of September 22, 2008, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman." A000064.

   b. The Stock Split Class defined as: "All persons or entities who owned shares of AIG Common Stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman." *Id*.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: 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 are:

Boies, Schiller & Flexner LLP: David Boies, Robert Silver, Nicholas Gravante Jr., Robert J. Dwyer, Alanna C. Rutherford, Amy J. Mauser, Hamish P.M. Hume, Samuel Kaplan, Duane Loft, Scott E. Gant, Anthony T. Kronman, Abby Dennis, Julia C. Hamilton, Laura Harris, Ilana Miller, John Nicolaou, David L. Simons, Craig Wenner, William Bloom, James Kraehenbuehl, Matthew Shahabian, Mathew Schutzer, and Luke Thara.

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Stone & Magnanini LLP: David S. Stone, Jason C. Spiro, and Erika B. Levin.

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STATEMENT OF RELATED CASES

Counsel for Starr is not aware of any currently pending cases in this Court or any other Court that will be directly affected by this appeal. Previously, a panel of this Court consisting of Circuit Judges Dyk, Moore, and Taranto heard a petition by the United States for a writ of mandamus to vacate a discovery order. *See In re United States*, Misc. No. 163, 542 F. App'x 944 (Fed. Cir. 2013).

JURISDICTIONAL STATEMENT

The court below had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, for both the illegal exaction and takings claims of Starr and the two classes it represents.

Tucker Act jurisdiction exists over the illegal exaction claims because "where the government collects money pursuant to an erroneous construction of a statute, a claim for the return of that sum is cognizable as a claim founded on an act of Congress and, as such, is a claim within the express jurisdiction" of the Tucker Act. *O'Bryan v. United States*, 93 Fed. Cl. 57, 66 (2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011); *accord Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (concluding jurisdiction exists where "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" and asserts "that the value sued for was improperly paid, exacted, or taken . . . in contravention of the Constitution, a statute, or a regulation"); *Gmo.*

Niehaus & Co. v. United States, 153 F. Supp. 428, 432 (Ct. Cl. 1957) (holding that a claim to recover monetary value of stock seized without legal authority was "'founded upon any Act of Congress'" for purposes of Court of Claims jurisdiction) (quoting 28 U.S.C. § 1491); *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996) ("jurisdiction exists even when the provision allegedly violated does not contain compensation mandating language"); *Casa de Cambio Comdiv S.A. de C.V. v. United States*, 48 Fed. Cl. 137, 143-44 (2000), *aff'd*, 291 F.3d 1356 (Fed. Cir. 2002).

Tucker Act jurisdiction exists over claims which seek "just compensation" for uncompensated takings pursuant to the Fifth Amendment of the Constitution. *See United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.").

This Court has jurisdiction under 28 U.S.C. § 1295(a)(3) because the appeal arises from a final judgment entered by the Court of Federal Claims on June 17, 2015. A000169. Appellants filed a timely notice of appeal on June 18, 2015 (and an amended notice on July 27, 2015). A501348-49, A501350-51.

STATEMENT OF THE ISSUES

1. Where the court below found that the Government's unauthorized requirement that Plaintiffs surrender 79.9% of their equity as "additional

consideration" for a Federal Reserve loan "constituted an illegal exaction under the Fifth Amendment", and where the undisputed market value of the illegally exacted equity at the time acquired by the Government was between $26.7 billion and $35.4 billion, and the Government later sold that equity for between $17.6 billion and $18.3 billion, was it an error of law to hold that Plaintiffs were not entitled to any relief and the Government was entitled to keep what it had illegally exacted "in its pocket"?

2. Was it an error of law for the court below to deny any relief for the Government's illegal exaction of 79.9% of Plaintiffs' equity based on a Takings Clause damages analysis where no decision by any court has applied a Takings Clause damages analysis to an illegal exaction claim, and where every prior case finding an illegal exaction holds that the Government must return the property illegally exacted (or its value)?

3. Even if a takings analysis were applicable, was it an error of law for the court below to apply a hypothetical "but-for" economic loss analysis applicable only to certain regulatory takings cases instead of the legal principles applicable to cases where there is an outright transfer of ownership of property to the Government, as provided in well-established precedent most recently reaffirmed by the Supreme Court's decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015)?

4. If Plaintiffs do not have a claim for relief as an illegal exaction, was it an error of law for the court below to deny Plaintiffs' unconstitutional conditions claim, holding that the unconstitutional conditions doctrine applies only in the case of land use exactions and only if the condition threatens something more than the loss of a discretionary benefit, contrary to the Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013)?

5. Was it clear error for the court below to deny the claims of the Stock Split Class where the undisputed evidence at trial established that the only reason AIG – controlled by the Government – could have structured the reverse stock split as it did was to enable the Government to utilize the 79.9% interest it had illegally exacted to deprive the Stock Split Class of its right to block further dilution of its equity interest in AIG?

STATEMENT OF THE CASE

Starr brought suit against the United States ("the Government") in the Court of Federal Claims, on its own behalf and on behalf of two classes of AIG shareholders, seeking relief for (i) the Government's unlawful acquisition of 79.9% of their AIG equity (including voting control) as "additional compensation" for a loan to AIG under Section 13(3) of the Federal Reserve Act (A301790; A300124; A300589); and (ii) a reverse stock split by AIG while it was controlled by the Government which enabled the Government to obtain common stock for its preferred stock without a shareholder vote. A500016-17 ¶¶ 55-57; A500019 ¶ 65; A500021 ¶¶ 76-78; A50027-28 ¶¶ 97-100.[1] Starr asserted claims for Illegal Exactions, Takings, and Unconstitutional Conditions. A500044-46 ¶¶ 169-78.

The court below granted in part the Government's motion to dismiss, allowing Starr to proceed with illegal exaction and takings claims, but not unconstitutional conditions claims. *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 81-83, 87 (2012). The Government moved for reconsideration and later interlocutory review, which the court below denied. *Starr Int'l Co. v. United States*, 107 Fed. Cl. 374 (2012); *Starr Int'l Co. v. United States*, 112 Fed. Cl. 56 (2013).

The court below certified the two separate shareholder classes: (i) the Credit Agreement Class; and (ii) the Stock Split Class and appointed Starr as the representative of both classes. *Starr Int'l Co. v. United States*, 109 Fed. Cl. 628 (2013).[2]

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[1] Starr also alleged derivative claims on behalf of AIG and named AIG as a nominal defendant. A500043-47; *Starr Int'l Co. v. United States*, 103 Fed. Cl. 287 (2012). The Government and AIG filed motions to dismiss Starr's derivative claims, which the court below granted. *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 466-80 (2013). Starr does not appeal that decision.

[2] The court below also issued a decision allowing the deposition of Chairman Ben Bernanke (*Starr Int'l Co. v. United States*, 112 Fed. Cl. 601 (2013)), which the Government appealed. *See* Statement of Related Cases.

A trial was held commencing on September 29, 2014, and continuing for 37 trial days. *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 431 (2015). The court below heard testimony from thirty-six witnesses and received into evidence more than 1,600 exhibits. *Id.* at 431-32.

On June 15, 2015, the court below issued its decision on the merits. It held that the Government had illegally exacted 79.9% of Plaintiffs' equity ownership and voting control. *Id.* at 466. Because the court held that the Government had no authority to demand Plaintiffs' equity, the court did not expressly reach Plaintiffs' claims that in any event the Government lacked authority to discriminatorily exact equity for punitive purposes without any findings, investigation, or hearing.

The court also did not reach the merits of Plaintiffs' takings claim because it held that the Government's exaction was illegal, and therefore it could not support a Fifth Amendment taking. *Id.* at 472.

Despite finding that the Government acted illegally, the court then held that the Credit Agreement Class was not entitled to any relief, applying a hypothetical analysis based on a regulatory takings case. *Id.* at 473-74.

With respect to the claims of the Stock Split Class, the court below held that there was no liability because there was no evidence that the reverse stock split was designed to allow the Government to exchange its preferred shares for common shares without holding a separate class vote. *Id*. at 435.

Judgment was entered on June 17, 2015. A000169.

On June 18, 2015, Starr filed a notice of appeal, which it amended on July 27, 2015. A501348-49, A501350-51.

STATEMENT OF FACTS

A. Introduction

In 1932, at the depth of the Depression, Congress amended the Federal Reserve Act (Section 13(3)) to enable the Federal Reserve to loan money to assist "any individual, partnership, or corporation" that was solvent and could provide security for the loan, but which because of "unusual and exigent circumstances" could not borrow money from private sources. 12 U.S.C. § 343 (2006).

Over the next 75 years, including during the financial crisis of 2008-2009, the Government assisted hundreds of companies with 13(3) loans. Many of those companies (*e.g.*, Bank of America, Citigroup, Goldman Sachs, and Morgan Stanley) were considered critical to the overall economy; many (*see, e.g.*, A000148-49) were not. All were charged a low interest rate, consistent with the statutory command that the compensation for a 13(3) loan be a rate "fixed with a view of accommodating commerce and business" (A000148). None were required to surrender equity.

In September 2008, at the depth of the financial crisis, the Government made a secured 13(3) loan to AIG. It is undisputed that AIG satisfied all of the requirements for a 13(3) loan. Indeed, the Government concluded that making such a loan was essential "because of the catastrophic consequences an AIG bankruptcy would have had on other financial institutions and the economy" (A000112).

Nevertheless, without any authorization and contrary to the plain language of 13(3), for the first (and last) time in the history of 13(3) loans, the Government charged AIG an extortionate interest rate, a $1.7 billion commitment fee, and required AIG's shareholders to surrender 79.9% of their equity as "additional compensation" for the loan. It did so not because AIG had done anything wrong ("AIG actually was *less* responsible for the crisis than other major institutions" – A000099 (emphasis in original); "many financial institutions engaged in much riskier and more culpable conduct than AIG, but received much more favorable loan treatment from the Government" – A000134).

Instead, AIG's shareholders were "basically killed" (Paulson: A302754) and AIG "nationalized" (A000119; Geithner: A101445:16-19; Paulson: A101231:12-17) because "it was important to be seen as being harsh and punitive to the AIG shareholders in order to quell possible opposition to TARP and other further assistance." (Paulson: A101255:20-56:3).

The trial court recognized that the Government had committed an "illegal exaction under the Fifth Amendment" (A000147), and the equity the Government illegally exacted was worth between $26-$35 billion at the time exacted, and was later sold for approximately $18 billion.

The question on this appeal is whether the Government is entitled to retain the illegal exaction "in its pocket" and leave AIG's shareholders without any remedy for the violation of their constitutional rights.

B. Because Of The Worst Financial Crisis Since The Great Depression, Numerous Solvent Financial Institutions, Including AIG, Experienced Crippling Liquidity Shortages.

Congress enacted Section 13(3) "with a view of accommodating commerce and business" (12 U.S.C. § 357), recognizing that "in a financial crisis, solvent but illiquid companies may require emergency assistance." A000147 (citing A501358).

"In September 2008, the American economy faced the worst financial crisis since the Great Depression" (A000104 (citing Bernanke: A101958, A300722; Geithner: A304709)). "The crisis . . . began in August 2007" (A000104), and worsened until September 2008 (A000104-07) when with Lehman's bankruptcy "'the country was plunged into . . . the most wrenching financial crisis since the Great Depression.'" A000111 (quoting Paulson: A101200-01).

Lehman's bankruptcy filing was "the most destabilizing financial event since the bank runs of the Depression" (Geithner: A303317). Immediately, financial markets "really froze" (Paulson: A101203:23-04:2), "were in a crisis condition and essentially not functioning" (Herzog: A107032:20-25), and were "in free fall" (Geithner: A101421:16-19); it was "a classic financial panic" (Bernanke: A303027), the "worst financial crisis since the Great Depression" (Geithner: A303099), "the worst financial crisis in global history" (Bernanke: A300722); "short-term financing—whether secured by collateral or not—was vanishing . . . there was simply no liquidity in the system" (Geithner: A303300-01).

"This crisis was so widespread that it affected the viability of nearly every financial firm, including institutions that were solvent at the time." A000104 (citing Geithner: A101445, A101556, A302163). "Financial institutions stopped lending to each other and every financial institution faced enormous pressure and strain." A000105 (citing Offit: A107920, A107927). "Of the thirteen most important financial institutions in the United States, twelve 'had either failed or were at risk of failure.'" A000105 (quoting Bernanke: A101960); A000107 (citing Cragg: A105031-32); A000109 (citing Offit: A107920, A107928; Bernanke: A101960; Cragg: A104942, A104945; Liddy: A103183-84).

While AIG's insurance subsidiaries were "thriving and profitable", AIG Financial Products ("AIGFP"), a financial services subsidiary of AIG, "experienced a severe liquidity shortage due to the collapse of the housing market." A000099. AIG had guaranteed AIGFP's obligations. A000162.

Before the Lehman bankruptcy, AIG would have been able to continue to address its liquidity needs through private funding (Baxter: A100675:8-11), but once Lehman filed for bankruptcy, private funding options were not available. A000111-12 (citing Willumstad: A106396-97; A200495).

C. On September 16, 2008, The Government Concluded That AIG Satisfied All Of The Requirements For A 13(3) Loan And That A Loan Was Necessary.

The Government concluded that AIG satisfied the requirements for a 13(3) loan, including that "it could secure a loan with AIG's insurance subsidiaries, which could be sold off to pay any borrowing, and not run the risk of losing money." Alvarez: A100601:1-19, A100360:13-18, A100613:12-22; A301603; Paulson: A302700.

The Government also concluded (as it had with many other companies) that a 13(3) loan was necessary to avoid an AIG bankruptcy and that it could not afford to allow AIG to file for bankruptcy "because of the catastrophic consequences an AIG bankruptcy would have had on other financial institutions and the economy." A000112 (citing A500301, A500314; Geithner: A303297; Bernanke: A301896; Paulson: A300929).

On September 16, 2008, the Federal Reserve Board of Governors approved a term sheet for an $85 billion 13(3) loan to AIG. A000113-14. The term sheet required that the Government receive equity, described as "'warrants for the purchase of common stock of AIG representing 79.9% of the common stock of AIG on a fully-diluted basis.'" A000113 (quoting A200006); A000119 (citing A200010; Bernanke: A101975).

The Board of Governors "understood that the warrants would be non-voting until they were exercised, would have an exercise price, and required shareholder approval before the warrants could be issued." A000114 (citing Bernanke: A101975; Baxter: A100816; A200010). "The strike price to exercise warrants in this instance would have been approximately $30 billion, calculated at 12 billion shares times the par value of $2.50 per share." A000118 (citing Zingales: A103827-28; Cragg: A105107-08).

On the afternoon of September 16, Federal Reserve Bank of New York ("FRBNY") President Timothy Geithner called AIG's CEO, Robert Willumstad, and told him "FRBNY would be sending him a term sheet and that he had two hours to convince AIG's Board of Directors to accept." A000114. President Geithner made clear that the terms were being presented on a "'take-it-or-leave-it'" basis (A000114-15 (quoting Baxter: A300040 and citing Geithner: A302194)), and the "Federal Reserve was the only fire station in town". A000115; Geithner: A101444; Liddy: 103200.

On the evening of September 16, the AIG Board met and approved two resolutions. The first authorized AIG to enter into a Credit Facility with FRBNY, consistent with the terms described at the AIG Board meeting, and the second authorized AIG to enter into short-term, fully-secured demand notes with FRBNY to address AIG's immediate liquidity needs. A000115-16 (citing A200040-41). Between September 16 and 19, the Government loaned AIG $37 billion pursuant to demand notes, due on the earlier of September 23 or the Government's demand for payment. A000117 (citing A200055-58).

D. On September 16, 2008, The Government Assumed Immediate Control Of AIG And Thereafter Changed Key Terms Of The Proposed Loan.

"When the Government began lending money to AIG on September 16, 2008, it promptly took control of the company" (A000119 (citing Offit: A107938, A107964-65, A107968 and quoting Dahlgren: A102640-41); A000120 (quoting Dahlgren: A102601 and citing Geithner: A101565-66); A000121 (quoting A300015 and A300033); A000121-22 (quoting A300039)), and replaced AIG's CEO "with a new CEO of the Government's choosing", Edward Liddy. A000119-20 (citing Paulson: A101227-28, A302701).

On September 17, FRBNY's Sarah Dahlgren and Liddy met with senior AIG executives, and Dahlgren told them "we 'are here, you're going to cooperate.'" A000119 (quoting A301575 and citing Dahlgren: A102817-18); A000120 (quoting Dahlgren: A102643).

The "Government in effect nationalized AIG." A000119; Geithner: A101445:16-19; Paulson: A101231:12-17.

Between September 17 and 21, government attorneys internally expressed concern that the warrants approved by the Board of Governors would not give the Government immediate voting control over AIG. A300065; A300070; A300067-68; A300037. To address this concern, the Government decided to change the equity demanded from non-voting warrants with a $30 billion strike price to immediately voting preferred shares convertible to common shares, later called the "Series C Preferred Stock," with no strike price. A000118, A000122.

This change was designed to help the Government "fend off the shareholder attempts to 'reclaim' the company" (A000119 (quoting A300147)); avoid "shareholder activism among minority shareholders at AIG" (A300081); and address the "concern that AIG's former CEO, Hank Greenberg, who continues to hold a substantial minority interest in the common shares, would join with other existing shareholders to vote the current common stock in a way that would undermine the Government's interest in AIG". A300158. The change gave the Government "important benefits", including avoiding payment of a $30 billion strike price and obtaining immediate voting control without shareholder approval. A000118-19.

"Avoiding a shareholder vote was a key government objective." A000119 (citing A304682; A304770; A300147).

The Government changed the equity demanded to voting convertible preferred shares even though the "legal staffs of FRBNY and the Federal Reserve acknowledged that they could not obtain or hold equity, or acquire voting control, of a commercial entity." A000152-53 (citing Baxter: A300107, A304003, A300064; A300117; A300163; Alvarez: A300077); A000122 (citing A300157; Geithner: A300388; Alvarez: A300483). "As FRBNY's outside counsel from Davis Polk & Wardwell observed on September 17, 2008 in the midst of the AIG takeover, 'the [government] is on thin ice and they know it.'" A000101 (quoting A304686).

To "circumvent FRBNY's and the Treasury's lack of authority to own AIG shares directly", FRBNY's General Counsel Thomas Baxter "conceived of the idea of putting the Series C Preferred stock in a trust". A000122 (citing Baxter: A100791, A301568, A200061). "The creation of the trust in an attempt to circumvent the legal restriction on holding corporate equity is a classic elevation of form over substance" and did not "cure the illegal exaction." A000155.

The "Government unilaterally imposed the key terms of the Credit Agreement on AIG." A000117 (citing Liddy: A103293-94; Dahlgren: A102779-80). In fact, "FRBNY first presented a proposal for convertible preferred voting stock to AIG at 6:31 PM on September 21, 2008, prior to an AIG Board meeting . . . that night." A000118 (citing A300096).

Earlier everyone had believed the equity component would be non-voting warrants. A000114 (citing A300018, A300021; A200016; A201476, A201483-87; Alvarez: A100262; Baxter: A100695); A000116 (citing A304418; A300048; A303985).

(a) Following the September 16 AIG Board meeting, "'the clear expectation of AIG management was that . . . warrants with no vote'" would be issued to the Government. A000118 (quoting Liddy: A103136); *see also* Offit: A107931:5-9.

(b) Contemporaneous press accounts of the potential FRBNY loan to AIG also reported that "the form of equity to be acquired by the Federal Reserve would be common stock warrants." A000116.

(c) "The September 21, 2008 AIG board minutes state: Although 'the Board had originally been led to believe that the form of equity participation by the Treasury Department would be warrants, the form of equity participation to be issued in connection with the Credit Agreement is now proposed to be convertible preferred stock, the terms of which were reflected in a term sheet delivered to Board

> members prior to the meeting.'" A000117-18 (quoting A200064); A000118 (quoting Liddy: A103129-30).

The Government again made its offer take-it-or-leave-it and informed the AIG Board "if the Board did not approve the transaction that evening, the likely result would be that the Bank [FRBNY] would refuse to fund the Corporation the next day" (A200065) and "would call" the "Note" (the $37 billion in outstanding demand notes). A300088; Shannon: A103654:12-55:20. Because the AIG Board "did not feel as though they had any choice" (A200066), it accepted the new terms. A200068. AIG executives believed "'the government stole at gunpoint 80 percent of the company'". A000119 (quoting AIG's Vice Chairman Frenkel: A300100).

The Credit Agreement, effective as of September 22, 2008, was signed by Liddy on AIG's behalf on September 23, 2008. A200215, A200217, A200280; Brandow: A105877:17-25.

The final loan terms for the $85 billion revolving credit facility included in addition to the exacted equity, a 12% interest rate on all borrowed funds, and an additional $1.7 billion commitment fee. A000095-96; A303986; A200082, A200090, A200101, A200113. The interest rate was "much higher than the 3.25 to 3.5 percent interest rates offered to other troubled financial institutions" (A000095); government officials recognized the interest rate was "too high"

(A000125), "crazily high" (A000125 (quoting A300106)), and "loan sharky" (Baxter: A300103, A100823:11-14). The demand for equity was unprecedented.

E. The Government Was Not Authorized To Exact Equity As Consideration For A 13(3) Loan, Let Alone For The Purpose Of Punishing Shareholders.

The plain language of the statute makes clear that the Government is not authorized to exact equity as consideration for a 13(3) loan, and that the only consideration for a 13(3) loan is "an interest rate 'subject to review and determination by the Board of Governors' and 'fixed with a view of accommodating commerce and business.'" A000148; A000151; 12 U.S.C. §§ 343, 357 (2006).[3]

The Government's lack of authorization to exact equity as consideration for a 13(3) loan is confirmed by the statute's legislative history (A304419; SLHA000034[4]; SLHA000019) and by the Government's own consistent interpretation of its authority prior to September 2008. *See* Geithner & Baxter: A400001-02; A501564; A501515; A501417; Geithner: A300388.

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[3] In addition to every other problem with the loan, there was never any "review and determination by the Board of Governors" of the demand for voting convertible preferred stock despite the requirements of § 357 and the statutory requirement that five governors approve any 13(3) loan. A000114 (citing Alvarez: A100188); A000119 (citing Bernanke: A102025).

[4] "SLHA" refers to the Statutes and Legislative History Addendum to this brief.

As the court below found, "with the exception of AIG, the Government has never demanded equity ownership from a borrower in the 75-year history of Section 13(3) of the Federal Reserve Act." A000099.

F. The Government Exacted Its 79.9% Interest In AIG To Punish AIG Shareholders.

The Government "treated AIG much more harshly than other institutions in need of financial assistance" and "publicly singled out AIG as the poster child for causing the September 2008 economic crisis", even though "AIG actually was *less* responsible for the crisis than other major institutions" (A000099, emphasis in original); "many financial institutions engaged in much riskier and more culpable conduct than AIG, but received much more favorable loan treatment from the Government." A000134 (citing A304701; Cragg: A104996; A304247; A304187; A304052; A304631; Paulson: A101236); A000135-36 (citing Geithner: A101675; A304760).

"By taking 79.9 percent equity and voting control of AIG, the Government exacted the shareholders' property interests." A000146; *see also* A000151. AIG's existing equity holders went from owning 100% of the company to owning 20.1%. A000095. As the Government's financial economics expert, Anthony Saunders, acknowledged: if "the Government had made the revolving credit facility available for the same interest rate and the same fees and terms, except not required the 79.9

percent of the equity", the value of that equity "would be captured by the common shareholders". A108260:11-17.

The illegal exaction was targeted at, and intended to punish, AIG's "shareholders" (A301790; A304693), and "did indeed punish the shareholders". Paulson: A101243:16-44:2. The Government's Rule 30(b)(6) witness and restructuring officer, James Millstein, admitted that the Government's demand for equity was directed at AIG's "shareholders". A304693. Earlier Millstein had been more blunt: taking equity was designed "to penalize the shareholders of the Company". A301790. Secretary Geithner said the same: "We forced losses on shareholders proportionate to the mistakes of the firm." A302147. Secretary Paulson was even more candid: Defendant was "punitive," even "too punitive" (A101230:25-31:6); it "basically killed the shareholders" (A302754); AIG was "a political scapegoat" and "it was important to be seen as being harsh and punitive to the AIG shareholders in order to quell possible political opposition to TARP and other further assistance." A101254:22-55:2, A101255:20-56:3; *see* A501015, A501051-55.

G. The Government Never Held A Hearing, Undertook An Investigation, Or Made Any Findings Concerning Whether Punishing AIG Shareholders Was Appropriate.

Secretary Paulson did not believe "Treasury or the Federal Reserve or in fact anyone in connection with the government" undertook "any investigation or analysis or made any findings concerning whether AIG had engaged in any excessive risk-taking or other misconduct" prior to September 22, 2008. A101236:5-11.

Chairman Bernanke could not "identify anyone at the Federal Reserve or in government" that he "believed reached a conclusion, in September, that AIG had mismanaged its business or taken on excessive risks". A102135:2-8, A102134:17-35:1. In determining how much compensation to require for the AIG loan, Bernanke did not take into account or give any consideration to "whether or not AIG had engaged in excessive risk taking". A102131:14-24.

Secretary Geithner agreed no one within the Government tried "to determine whether the management decisions that AIG had made were bad management decisions at the time they were made". A101653:18-22, A101652:23-53:6.

FRBNY Vice President Alejandro Latorre admitted at no time through September 16 "did anyone identify any specific poor risk management practice that they believed AIG had engaged in" (A102057:13-20), and there was no "effort made to assess whether AIG's risk management practices" were "better or worse than other companies that were in financial distress" (A102058:13-17).

The Board of Governors did not discuss or consider the purpose of the 79.9% equity demand prior to authorizing the loan to AIG at the September 16, 2008 meeting.

(a) The minutes of the September 16, 2008 Federal Reserve Board of Governors meeting approving the terms of the AIG 13(3) loan do not indicate any discussion or consideration of the purpose of the 79.9% equity demand. A200001-12.

(b) Chairman Bernanke could not recall any discussion at the September 16, 2008 Board of Governors meeting as to why the warrants were for 79.9% of AIG shareholders' equity, as opposed to some other percentage. A102002:2-7.

Strikingly, no "estimate" was "made as to how much additional compensation the equity component provided". Bernanke: A101983:24-84:3.

H. The Equity Exacted By The Government Had A Market Value Of Tens of Billions of Dollars.

Plaintiffs and the Government both determined the fair market value of the 79.9% interest illegally exacted by the Government as a condition for the Section 13(3) loan by multiplying the market price of a share of AIG common stock by the number of common shares implied by the Government's 79.9% interest. *See* A000157; A400148-49; A304697. The only difference between the parties was that the Government valued that interest as of September 16, 2008 (when the non-binding term sheet was proffered), while Plaintiffs valued it as of September 22, 2008 (the effective date of the binding Credit Agreement). A000157; Kothari: A104551:15-52:1. The court below found that, prior to September 22, "no legally binding agreement existed between AIG and FRBNY entitling the Government to an equity interest and voting control of AIG." A000156.

Using September 22, 2008 as the valuation date, the Credit Agreement Class's expert, Deputy Dean S.P. Kothari of the M.I.T. Sloan School of Business, valued the Government's 79.9% interest at $38.9 billion. A000157.[5] Dr. Saunders, the Government's expert, similarly calculated that the Government's interest was worth $38.7 billion using a stock price from the same date as Dean Kothari used. A400149.

Using a September 16, 2008 valuation date, Dr. Saunders valued the Government's equity at $26.7 billion (A400148) and the Government's auditor

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[5] Dean Kothari calculated that value by multiplying $3.31, the "lowest price for AIG common stock during the three-day period of September 22-24, 2008" (A000157; A304697) by 14.691 billion shares (reflecting the 2.953 billion shares held by existing common shareholders and equity unit holders and the 79.9% dilution). A000157; *see also* A304696; Kothari: A104555:2-58:3. That calculation valued AIG's common stock at $48.626 billion, which meant that the Government's 79.9% interest was valued at $38.852 billion. Because 8.9% of that interest had belonged to the owners of AIG equity units, Dean Kothari calculated the value of 91.1% of that interest illegally exacted or taken without just compensation from the AIG common shareholders at $35.4 billion. A000157.

(Deloitte & Touche) contemporaneously valued that interest at $24.5 billion. A000157 (citing A201456-57).

The Government ultimately exchanged the Series C Preferred Stock for 562,868,096 shares of AIG common stock, which it later sold during the period from May 24, 2011 through December 14, 2012 for at least $17.6 billion. A000134 (citing A304533 n.197); A302290-91.[6] The Government's expert, Dr. David Mordecai, testified that the Government received $18.3 billion for the AIG shares it exacted (A107763:13-16). The only consideration the Government had paid for that equity was $500,000 in loan forgiveness. A000134.

AIG fully repaid the loan and the Government also received $6.7 billion in interest and fees under the Credit Agreement. A000133 (citing Alvarez: A100611-12).

I. AIG, Under The Government's Control, Designed And Implemented A Reverse Stock Split That Deprived The Stock Split Class Of Its Right To Vote On, And Block, Further Dilution Of Its Equity Interest In AIG.

Although the Government initially acquired its 79.9% interest in the form of voting convertible preferred stock, the Government always intended to convert that

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6 The Government's choice as to when and how to sell its AIG common stock affects the proceeds received. For example, had the Government sold all of its holdings on December 31, 2013, it would have received $28.7 billion for the common stock received in exchange for the Series C Preferred Stock based on the market price at that time. A304533, A304620; Kothari: A104539:12-15.

stock into more liquid (and thus more valuable) AIG common stock (Alvarez: A100425:14-18; Geithner: A101519:6-11; A500749-52). The Government could not do so under AIG's existing capital structure because AIG had only five billion authorized common shares (approximately three billion of which had already been issued). A200684. For the Government to hold its 79.9% interest in the form of common stock, almost fifteen billion common shares were required. A300183, A300190.

The Government initially believed that because it held a 79.9% voting interest through its acquisition of preferred shares, it could control any shareholder vote and therefore could increase the number of authorized common shares without the existing common shareholders' consent. *See, e.g.*, A304680-81.

After a shareholder suit was filed in Delaware Chancery Court in early November 2008, seeking to confirm AIG common shareholders' right to block the further dilution of their shares (A300143), the Government agreed that a class vote of the existing common shareholders was required under Delaware law to increase the number of authorized common shares – a vote the Government knew would likely fail because the Government could not participate in the vote.[7] A304633;

[7] This concern proved well-founded. The common shareholders rejected a proposal to increase the number of authorized common shares from 5 billion to 9.225 billion on June 30, 2009, when they voted on the reverse stock split. *See* A303992.

A304671; 8 Del. C. § 242(a)(3), (b)(2). The Government and its counsel immediately began developing strategies to avoid a separate common shareholder vote (A304668; *see also* A304660), and delayed the shareholder vote required under the Credit Agreement to provide time to do so. *See* A300206-11; A300478; A300615-16; Dahlgren: A102768:3-9, A102720:10-21:6, A102723:1-3.

In October 2008, the New York Stock Exchange ("NYSE") threatened to delist AIG and other companies whose stock prices were depressed by the financial crisis if the prices remained under the $1.00 minimum after June 30, 2009. A201114. AIG, under the Government's control,[8] designed and implemented a solution that would both avoid delisting and also enable the Government to transform its preferred shares into more valuable common shares without a shareholder vote.

The Government's desire to avoid seeking shareholder approval was informed by Bear Stearns' shareholders exercising their "right to block" in March 2008. Baxter: A100770:5-74:2, A100779:15-80:21. JPMorgan, a recipient of Government financing to purchase Bear Stearns, initially agreed to acquire the firm for $2 per share (Paulson: A302567), but Bear Stearns' shareholders rejected this "extremely unattractive deal" (Geithner: A303262), requiring the Government to

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[8] *See infra* note 15.

approve JPMorgan raising its offer to $10 per share. *See* Paulson: A302575; Bernanke: A102259:25-60:9.

To avoid a repeat of the Bear Stearns situation, AIG and the Government proposed a 20:1 reverse stock split (in which existing shareholders received one new share for every 20 existing shares they held), applicable solely to issued, but not to authorized unissued, shares, as the only alternative to avoid delisting. A201113-16. AIG could have avoided delisting by implementing a lower ratio for the split (such as a 5:1 ratio) and/or by making the split applicable to all authorized shares. Kothari: A104810:9-13, A104879:8-14. There was no rationale for splitting only issued but not authorized unissued shares, or delaying the vote until no alternative structure could be considered, except to deprive existing common shareholders of their right to block further dilution.

Because this proposal did not require separate approval by each class of stock, the Government controlled the vote, guaranteeing its approval. *See* A201059. Moreover, because this was the only alternative shareholders were given to avoid delisting, shareholders were coerced into accepting what was proposed. Smith: A107724:3-6.

After the split, AIG still had five billion authorized shares, but only approximately 150 million issued common shares, allowing the Government to exchange its Series C Preferred Stock for approximately 600 million common shares (A000132; A201112; *see also* Brandow: A105852:5-25; Daines: A108515:14-19, A108517:14-18), which after the split gave the Government its 80% of the common equity.

The Government has never offered any explanation for why the reverse stock split applied only to issued, but not to authorized but unissued, shares. Dahlgren: A102931:1-5; Baxter: A101140:15-19; Liddy: A103164:20-67:22, A103279:23-82:7; Foshee: A103560:5-12. The only reasonable conclusion is that while a reverse stock split was desirable to avoid delisting, the particular reverse stock split was designed to take away the blocking rights of the Stock Split Class without compensating the Class for giving up their right to block the Government from further diluting their equity interest.

SUMMARY OF ARGUMENT

The trial court found that the Government was not authorized to require shareholders' equity as consideration for a 13(3) loan made under the Federal Reserve Act (A000147), a finding compelled by the plain language of the statute and confirmed by legislative history and policy, as well as the Federal Reserve's own consistent practice and interpretations prior to the AIG loan. A000147-56; *see supra* pp. 18-19. The court also found that the exaction of Plaintiffs' equity was discriminatory and an attempt to punish AIG shareholders for the acts of the corporation even though "AIG actually was *less* responsible for the crisis than other major institutions". A000099 (emphasis in original).

However, the trial court concluded that this Court's opinion in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), which the trial court considered a controlling "closely analogous" case (A000158), required it to offset the benefit of the 13(3) loan against the value of what the Government had illegally exacted. A000158-59. Because the trial court believed that in the absence of the 13(3) loan AIG would have been insolvent and forced to file for bankruptcy, and that Plaintiffs' shares would then have been essentially "worthless", the court held Plaintiffs were entitled to no relief despite the illegal exaction of their equity. A000103.

The court recognized the contradiction inherent in this result:

> Common sense suggests that the Government should return to AIG's shareholders the . . . revenue it received from selling the AIG common stock it illegally exacted from the shareholders for virtually nothing. (A000158).

It also recognized the unfairness of its ruling:

> a troubling feature of this outcome is that the Government is able to avoid any damages notwithstanding its plain violations of the Federal Reserve Act. (A000103).

As discussed in more detail below, the trial court's failure to provide a remedy for the Government's illegal exaction is contrary to over a century of legal precedent. Illegal exaction cases uniformly hold that where the Government exacts unauthorized consideration for the granting of an authorized Government benefit, the Government must "return", "disgorge", "make restitution" of what it has improperly exacted. *See infra* pp. 32-40. No case finding an illegal exaction has ever permitted the Government to retain what was unlawfully acquired by offsetting the value of the Government benefit bestowed.

The trial court's reliance on *A&D Auto Sales* in denying any relief to the Credit Agreement Class for the Government's illegal exaction was error:

> <u>*First*</u>, *A&D* was a takings case and its relief analysis was contrary to every decided illegal exaction case, and to the Supreme Court's recent decision in *Koontz* (*see infra* pp. 32-37, 54-56);
>
> <u>*Second*</u>, *A&D* was a regulatory takings case whose analysis is inapplicable even to takings cases where the Government itself acquires property outright (*see infra* pp. 47-48); and
>
> <u>*Third*</u>, there was no claim in *A&D* that any Government action lacked statutory authority.

Alternatively, if the Court concludes that Plaintiffs are not entitled to relief for an illegal exaction, the court below erred in dismissing their takings claim based on the imposition of an unconstitutional condition. The principles of an unconstitutional conditions claim are similar to the principles of an illegal exaction claim. They hold that where the Government ties a benefit it is offering to the plaintiff's forfeiture of other property rights, the plaintiff is entitled to relief in the form of return of that property and a hypothetical economic loss analysis does not apply. *See infra* pp. 52-56. Allowing the Government to offset the value of the authorized government action (the 13(3) loan) for which the Government demanded improper consideration (Plaintiffs' equity) would effectively nullify Plaintiffs' constitutional rights. As the Supreme Court held: "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 133 S. Ct. at 2594-95.

Finally, the trial court erred in denying the claims of the Stock Split Class. Through the reverse stock split, the Government (through its control of AIG) deprived AIG's common shareholders of their right to block the further dilution of their interests. The evidence was undisputed that there was no reason to structure the reverse stock split in the manner in which it was done other than to eliminate the blocking rights of the Stock Split Class. The evidence was also undisputed that to otherwise obtain conversion of its preferred shares would have required the Government to compensate the Stock Split Class.

STANDARD OF REVIEW

Errors of law are reviewed *de novo*, without deference to the trial court. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1012 (Fed. Cir. 2003).

The decision by the court below not to award any relief on the illegal exaction claim of the Credit Agreement Class was based on its interpretation of a legal standard and is therefore reviewed *de novo*. *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1013 (Fed. Cir. 2006). The decision by the court below to dismiss Plaintiffs' unconstitutional conditions claim on a motion to dismiss was based on an error of law and also is reviewed *de novo*. *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 954 (Fed. Cir. 2013).

Factual findings, including those underlying the dismissal of the claims of the Stock Split Class, are reviewed for clear error. *1st Media, LLC v. Elec. Arts, Inc.*, 694 F.3d 1367, 1372 (Fed. Cir. 2012).

ARGUMENT

I. Having Held That The Government Illegally Exacted 79.9% Of Plaintiffs' Equity, It Was An Error Of Law For The Trial Court To Deny Any Relief.

A. All Illegal Exaction Precedent And Policy Requires The Government To Return To Plaintiffs The Property (Or Its Monetary Value) Illegally Exacted By The Government.

An illegal exaction takes place when a "'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp.*, 372 F.2d at

1007); *see also Fireman v. United States*, 44 Fed. Cl. 528, 536 (1999) ("the Plaintiffs have stated a cause of action for illegal exaction or, phrased differently, a cause of action to recover their money in the government's pocket"). Where, as here, the Government exacts property, sells that property, and receives money in return, the Government has, in effect, exacted money from the plaintiff. *See, e.g.*, *Casa de Cambio*, 48 Fed. Cl. at 145 ("Several cases hold that, under the illegal exaction doctrine, a plaintiff may seek the return of the monetary value of property seized or otherwise obtained by the government."); *Bowman*, 35 Fed. Cl. at 401 ("cases such as the instant one – where the Government exacts property which it later sells and for which it receives money – must necessarily qualify for consideration under the established illegal exaction jurisdiction. Were an illegal exaction to be found, Plaintiff could receive the value of his forfeited property."); *Gmo. Niehaus & Co. v. United States*, 373 F.2d 944, 961 (Ct. Cl. 1967).

In finding liability for "an illegal exaction under the Fifth Amendment" (A000147), but not awarding any relief to the 259,576 AIG shareholders in the Credit Agreement Class, the decision of the court below radically departed from more than a century of illegal exaction precedent. Every other decision finding that the Government exacted property without legal authority has ordered the Government to return the property (or its value) exacted. *See, e.g., Suwannee S.S. Co. v. United States*, 279 F.2d 874, 877 (Ct. Cl. 1960); *Gmo. Niehaus*, 373 F.2d at

961; *Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1018 (Ct. Cl. 1980); *Aerolineas*, 77 F.3d at 1578; *MacLeod v. United States*, 229 U.S. 416, 435 (1913); *PSI Energy, Inc. v. United States*, 411 F.3d 1347, 1350 (Fed. Cir. 2005).

The basic principle that a property owner who suffered an illegal exaction is entitled to recover the property (or its value) illegally exacted is illustrated by *Land v. Dollar*, 330 U.S. 731 (1947). In *Land*, the Maritime Commission and Reconstruction Finance Corporation provided financial assistance (including two loans and an operating subsidy) to Dollar Steamship when it was in "difficult financial straits." *Id.* at 733. As a condition of such assistance, government officials required Dollar's shareholders to provide their common stock to the Maritime Commission. *Id*. After Dollar paid off the loans, Dollar's shareholders filed suit to recover their stock. The Government opposed the return arguing that the shareholders had voluntarily agreed to provide their stock in return for assistance required to keep the company afloat. The Supreme Court, ruling for the shareholders, held the shareholders were entitled to the return of the shares "if either of respondents' [the shareholders'] contentions was established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares." *Id*. at 735-36.

B. The Court Below Erred By Applying A Takings Damages Analysis To An Illegal Exaction Case.

The court below premised its analysis of whether the Credit Agreement Class was entitled to relief for the Government's illegal conduct solely on case law construing the Takings Clause. A000158-59. But that standard does not apply to an illegal exaction claim.

While a taking involves the *authorized* acquisition of property for a public purpose, an illegal exaction involves the Government acting *outside* of its statutory authority. A000144. "Takings and illegal exaction claims are conceptually distinct. Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." *Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (citations omitted). The two distinct claims have two different approaches to remedial rights.[9] If there is an illegal exaction, government officials who exacted property without statutory authority must return the property (or its value) to its rightful

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[9] A takings claim arises under the Just Compensation Clause of the Fifth Amendment, while an illegal exaction claim "involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution." *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). The text of the Due Process Clause does not mention "just compensation". There is therefore no statutory basis or precedent for applying a "just compensation" analysis to an illegal exaction claim.

owner. *See supra* pp. 32-34. No case other than the decision by the court below has applied a takings just compensation analysis to an illegal exaction claim.

In a takings case, the question is what is "just compensation" to compensate a property owner for the loss of property taken for a public purpose (as noted *infra*, pp. 44-46). Even if this were the appropriate question in this case, Plaintiffs would be entitled to the relief they seek (*see infra* pp. 47-51). But this is not the appropriate question in an illegal exaction case, where the Government is required to return property (or its value) exacted without authorization. *See, e.g.*, *Bull v. United States*, 295 U.S. 247, 260 (1935) ("If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer."); *Aerolineas*, 77 F.3d at 1573 ("an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' Suit can then be maintained under the Tucker Act to recover the money exacted.") (citation omitted); *accord Eastport S.S. Corp.*, 372 F.2d at 1007-08.

The remedial standard in illegal exaction cases is similar to the common law equitable remedy of disgorgement. It follows the general legal principle that a party who unlawfully appropriates property must return the property appropriated (or its value). As Plaintiffs argued below:

> The Government, for an illegal exaction, must "disgorge benefits that it has actually and calculably received from an asset it has been improperly withholding." *United States v. $277,000 U.S. Currency*,

> 69 F.3d 1491, 1498 (9th Cir. 1995); *see also O'Bryan v. United States*, 93 Fed. Cl. 57, 65-66 (2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011) (awarding refund of grazing fees imposed on plaintiff in violation of Bureau of Interior regulations); *Seatrade Corp. v. United States*, 285 F.2d 448, 449-50 (Ct. Cl. 1961) (awarding plaintiff damages equivalent to the sum illegally exacted by the United States Maritime Commission); *Clapp v. United States*, 117 F. Supp. 576, 581-82 (Ct. Cl. 1954) (same).

A500104 ¶ 97.

C. There Is No Policy Or Precedential Support For Offsetting The Value Of An Authorized Government Benefit Against The Value Of Illegally Exacted Consideration.

Many illegal exaction cases involve a Government benefit tied to, and more valuable than, the monetary value of the illegal exaction. No case prior to the decision below suggests that the authorized benefit received must somehow be offset against what has been illegally exacted. For example:

- In *Alyeska*, 624 F.2d at 1017-18, notwithstanding the Government's argument that it would not have issued a permit for the pipeline right of way absent payment of the $12 million fee, the court ordered the return of the $12 million fee without considering the value of the right of way to plaintiff because the Government had no legal authority to make that demand.

- In *Suwannee*, 279 F.2d at 877, the fact that "valuable privileges" were provided by the Government in exchange for the illegally exacted fee was not a defense, and the Government was required to return the illegally exacted fee.

- In *Land v. Dollar*, if the Maritime Commission's acquisition of the shareholders' stock was not authorized, the government officials' obligation to return the stock was unchanged by the fact that the stock had been provided to the Government because the company

> was in "difficult financial straits." 330 U.S. at 733, 735-36. Indeed, as was later noted in *Dollar v. Land*, 184 F.2d 245, 251-52 (D.C. Cir. 1950), the stock "had little or no market value" when the Government obtained possession and Dollar Steamship's negotiations for Government assistance "began as attempts to avoid bankruptcy".

In each of these cases, the rationale for the remedy – the return of the money or property illegally exacted – was that government officials "have no authority" to add to their lawful powers "the superogatory function of picking up a few dollars for the public treasury." *Suwannee*, 279 F.2d at 877; *see also United States v. Lee*, 106 U.S. 196, 220-21 (1882) (holding that to permit the Government to retain property "seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation" "sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights").

As the Supreme Court recognized in *Koontz*, the value of the Government benefit will often exceed what the Government demands; otherwise the demand would not be met. 133 S. Ct. at 2595. Allowing the Government to offset the value of the authorized government action for which the Government has exacted unauthorized consideration against the value of that illegally exacted consideration would effectively nullify the illegal exaction doctrine. For this reason **no** illegal exaction case has ever required a successful plaintiff to offset the value of the authorized government action against the illegally exacted consideration the Government is being asked to disgorge.

If the "economic loss" standard had been applied in *Koontz*, *Dollar*, *Alyeska*, *Suwannee*, and similar cases, the plaintiffs in those cases would have had no remedy because each was better off providing the illegal consideration demanded to get the government benefit. None of those decisions considered whether the plaintiff would have been better or worse off if it had not received the government benefit. There was only one relevant question: what was the property or monetary value that the Government had exacted without authority that had to be returned?

As the trial court acknowledged under its decision: "the Government often may ignore the conditions and restrictions of Section 13(3) knowing that it will never be ordered to pay damages." A000103. This Court should not sanction that result.

The limits of government power in domestic affairs are set by Congress within the bounds of the Constitution. If those limits are ignored, there are no limits. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint.").

D. The Trial Court Erred In Conflating The Government's Lawful Action With Its Unlawful Action.

The court below offset Plaintiffs' benefit from the Government's *lawful* actions (the 13(3) loan to AIG) against the Government's monetary gain from its *unlawful* actions (the illegal exaction of equity). The court below improperly conflated the Government's two actions and treated them as a single indivisible action.[10] But this effectively erases the central issue in the case, which is whether the Government was authorized to exact its 79.9% equity interest requirement for the loan. The Supreme Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Koontz*, 133 S. Ct. at 2596.

The court below should have focused on the value of the property that the Government obtained as a result of the one action the court below found to be unlawful. That is exactly what the Court of Claims and this Court have done when the Government has previously combined legal contract terms with illegal contract

[10] The trial court stated that "Starr must prove that it suffered some economic harm from the Government's taking or illegal exaction" (A000158). Even if this (rather than disgorgement of what the Government had illegally exacted) were the correct relief standard, the illegal exaction obviously harmed Plaintiffs by depriving them of 79.9% of their equity. The only way to find no harm is to conflate the illegal exaction and the legal loan.

terms that exact money. All have held that the proper remedy is to refund the value illegally exacted without regard for the benefit received. *See Alyeska*, 624 F.2d at 1016-18; *Finn v. United States*, 428 F.2d 828, 832 (Ct. Cl. 1970); *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317-18 (Ct. Cl. 1970); *Suwannee*, 279 F.2d at 877; *Se. Oil Fla., Inc. v. United States*, 119 F. Supp. 731, 735 (Ct. Cl. 1953).

E. Application Of The Correct Legal Standard Entitles The Credit Agreement Class To The Return Of The Value Of The Property Illegally Exacted.

1. The Credit Agreement Class Is Entitled To The Market Value Of The 79.9% Interest Received By The Government At The Time Of Exaction.

It is undisputed that the market value of the illegally exacted equity was between $24.5 billion and $35.4 billion at the time of the exaction. The range is a result of a dispute as to when the equity was exacted. The Government contended any exaction occurred the evening of September 16 when the AIG Board agreed to a term sheet. Plaintiffs asserted that since any September 16, 2008 term sheet was by its express terms nonbinding, since the Government unilaterally changed material terms after September 16, and since any legal entitlement to equity by the Government first occurred when the September 22 Credit Agreement was executed (on September 23), the exaction occurred as of September 22 (the effective date of the agreement) or possibly September 23. A000156-57; Brandow: A105877:17-25.

There is no dispute as to what the illegally exacted equity was worth on September 16, September 22, or September 23. There may be a dispute as to how much of that value was the result of the 13(3) loan, but the market value of the equity on those dates was agreed by both sides' experts, each of which used a stock market-based approach for determining the value of the equity received by the Government. A400149; A304695.

The difference in the parties' calculation of that value concerns only the date on which the calculation was made. The Class valued the equity on September 22, the date the Credit Agreement became effective, resulting in a valuation of $38.9 billion (A000157), with the Credit Agreement Class entitled to recover $35.4 billion ($38.9 billion minus the 8.9% interest attributable to AIG equity unit holders). *See supra* note 5. Using a stock price from the same date Plaintiffs' expert used, the Government's expert similarly valued the Government's equity interest at $38.7 billion (A400149) and at $26.7 billion using a September 16 valuation date (A400148).

2. At A Minimum, The Credit Agreement Class Is Entitled To Receive The $18.3 Billion Cash Proceeds The Government Received For The Illegally Exacted Equity.

The appropriate relief for an illegal exaction of property that is sold is the return of the value of the property when exacted and, if that value cannot be determined, the proceeds from the Government's sale of the property. *See, e.g.*, *Gmo. Niehaus*, 373 F.2d at 961-62 (where the record did "not show the exact market value of the vested securities at the time of the seizure", court awarded proceeds from sale of illegally exacted securities).

There is no dispute the Government sold the illegally exacted equity. The Government's expert testified it was sold for $18.3 billion. Mordecai: A107763:13-16. The Government's contemporaneous reports stated that such equity was sold for $17.6 billion. A302290-91; A000134 (citing A304533 n.197). The difference arises because the Government commingled and diluted the illegally exacted equity with the equity received pursuant to TARP. Kothari: A104538:22-39:11. The Government reports assume that the equity received from the two sources was sold *pro rata*. A302290-91. The Government's expert concluded that the first acquired equity (the illegally exacted equity) was sold last. A400042-43.

In addition to the proceeds from the sale of the illegally exacted equity, the Government received $6.7 billion in interest and fees in connection with the AIG 13(3) loan (A000133), for a total profit on the loan of between $24.3 billion and $25.0 billion.

If ordered to return the proceeds from its sale of the illegally exacted equity, the Government will still earn a significant profit of $6.7 billion on its September loan (A000133), even though Federal Reserve loans "are made not for profit but for a public purpose". A303713.

F. Even If The Government Were Liable For A Taking (Rather Than An Illegal Exaction) And A "Just Compensation" Analysis Applied, The Court Below Misapplied The Applicable Law By Using A Hypothetical Economic Loss Standard.

1. A Hypothetical Economic Loss Approach Does Not Apply Where, As Here, The Government Itself Takes Possession Of Property.

As discussed above, a "just compensation" analysis is not applicable to an illegal exaction case. This basic error of the court below was compounded by its reliance on an analysis that would have been improper even if the Government's actions were analyzed as a taking. The framework used by the court below is applicable only to *regulatory takings cases* and does not apply to cases involving the physical acquisition of property. Where, as here, the Government acquires property outright, "just compensation" requires an award of the actual fair market value of the appropriated property, not an award based on what might have happened in a hypothetical "but for" world.

As the court below held in denying the Government's motion to dismiss, "the alleged harm here can be said to have resulted from a direct appropriation of the common shareholders' property" (A000030-31).[11] "A physical taking is the 'paradigmatic taking' and occurs by 'a direct government appropriation' . . . . The jurisprudence pertaining to physical takings 'involves the straightforward application of *per se* rules.'" *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008) (quoting *Lingle v. Chevron*, 544 U.S. 528, 537 (2005) and *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003)). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Brown*, 538 U.S. at 233 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). The proper measure of just compensation is "the fair market value" of the property "at the time of the taking." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973).

By contrast, the analytical framework for a regulatory taking is fundamentally different. As the Supreme Court explained in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), when a property owner "contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a

[11] *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 102 n.26 (Del. 2006).

condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex." *Id.* at 322 n.17. This is what is referred to in the cases as a hypothetical or but-for economic loss analysis. But that is not the applicable analysis when the Government itself acquires private property outright (and is certainly not the relevant inquiry for an illegal exaction); it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id*. at 323.

No case has ever held that where the Government acquires outright ownership of property, as it did here, the taking is anything other than a physical or per se taking.[12] The Fifth Amendment accords the same protections to intangible property interests as it does to tangible property interests. *See, e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1329-30 (Fed. Cir. 2003) (contract rights); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest generated on funds); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (unsecured claim on an estate's assets protected by Fourteenth Amendment's Due Process Clause); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets).

[12] The trial court's reliance on *Brown* was misplaced for several reasons including that the Government did not itself acquire any property, and the property interest at issue was held not to have any market value.

2. The Regulatory Takings Case Of *A&D Auto Sales* Is Wholly Inapposite.

In conducting an economic loss analysis based on a hypothetical "but for" world of bankruptcy, the court below relied primarily on *A&D Auto Sales*, 748 F.3d 1142, describing it as a "closely analogous case". A000158. But there are three crucial differences between that case and this one. *First*, *A&D* is a takings case where the issue is what is the amount of "just compensation" necessary to compensate property owners for the authorized regulatory taking of their property. 748 F.3d at 1150-51. By contrast, the law of illegal exactions requires the Government to return the property (or its value) exacted without authorization to its rightful owner. *Land*, 330 U.S. at 735-36; *Gmo. Niehaus*, 373 F.2d at 961-62.

Second, *A&D* was a regulatory takings case whose analysis is inapplicable even to takings cases where the Government has itself acquired outright ownership of property. In the regulatory takings context, the question is whether a government action is so burdensome that it amounts to a *de facto* taking of a citizen's property. That analysis does not apply to a physical takings case, where, in contrast, there is no dispute that the Government actually took the property.

Where the Government itself acquires a citizen's property outright, the cases uniformly hold that the measure of compensation is the market value of what has been taken. This rule was recently reaffirmed by the Supreme Court in *Horne*, 135 S. Ct. 2419. In *Horne,* the Government made the same erroneous argument that plaintiff received a "net gain" relative to a hypothetical but-for world where the plaintiff did not receive any benefits from government action and as such any loss should be offset by the gain. *Id*. at 2432. The Supreme Court rejected the argument, reasoning that there was "no support for its hypothetical-based approach . . . . Instead, our cases have set forth a clear and administrable rule for just compensation: The Court has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking." *Id.* (quotations and citations omitted). It is undisputed that the market value of what the Government acquired was tens of billions of dollars.

Third, in *A&D* there was no claim that any government action was unauthorized. The trial court's remedy analysis in this case conflated an authorized government action (a 13(3) loan) with an unauthorized government action (the exaction of equity as consideration).

3. Moreover, The Hypothetical Bankruptcy Upon Which The Court Below Relied Was A But-For World That The Court Below Found, As A Finding Of Fact, Was Not Plausible Or Possible.

In holding that the Credit Agreement Class was not entitled to any relief, the court below valued the interest exacted by speculating as to its potential value in a hypothetical AIG bankruptcy (A000102-03; A000159), notwithstanding its express finding that such a counterfactual world was not plausible or even possible. The trial court's finding that "government officials were not prepared to let AIG file for bankruptcy because of the catastrophic consequences an AIG bankruptcy would have had on other financial institutions and the economy" (A000112) is extensively supported. A000112-13 (quoting Baxter: A100676; Paulson: A300928-29, A101206; Bernanke: A301896, A303041, A101970; Geithner: A303297). *Accord*:

(a) Paulson: in an hour long conference call at 8:00 am on September 16, Paulson, Bernanke, Geithner, Federal Reserve Governors Kohn, Warsh, and Duke all agreed, "Whatever else happened, we could not let AIG go down" (A302700);

(b) Geithner: "We did not have the option of bankruptcy" (A300926; A101424:6-25:3);

(c) Baxter: "At no point did we believe that we should let AIG file" (A304004-05); and

(d) Bernanke: "action was necessary" (A101970:11-14).[13]

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[13] Moreover, the trial court's finding that AIG would be "worthless" in a bankruptcy is against the substantial weight of the evidence, including contemporaneous Government documents. *See, e.g.*, A300001 ("Problem is that bankruptcy option is very attractive for the firm Very solvent lots of capital but no liquidity"); A300592 (OTS Director Scott Polakoff: "It is critically important to note that AIG's crisis was caused by liquidity problems, not capital inadequacy."). The Government did not call its bankruptcy expert at trial.

Similarly, the trial court's finding that the "assets of" AIG's insurance subsidiaries "would have been seized by state or national governmental authorities to preserve value for insurance policyholders" (A000103) was contrary to the state regulators' contemporaneous assurances that "If parent files for bankruptcy, it does not force the insurance regulators to do anything" and that "Solid P&C companies

4. The Trial Court's Error Is Clear From The Supreme Court's Recent *Horne* Decision.

As the Supreme Court recently held, if there is a "transfer of title", the property owner loses "any right to control" the disposition of the property and a regulatory takings analysis is inapplicable. *Horne*, 135 S. Ct. at 2429. When "there has been a physical appropriation, 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken." *Id.* (quoting *Tahoe-Sierra*, 535 U.S. at 323). As a result, the Supreme Court held, where the Government takes ownership of property, there is "no support" for a "hypothetical-based" approach. *Id.* at 2431-32 (rejecting argument that Government did not owe any damages for property it took because the owners had a "net gain" relative to a hypothetical world in which the Government did not take property from or provide benefits to the owners).

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with sufficient capital . . . would be walled off from the insolvency proceedings. The companies can continue to run, plenty of money to pay claims" (A303981-82). *See also* A302137 ("No one suspected any of the life insurance companies would be insolvent, even under a worst-case scenario."). The Government never offered any testimony from state regulators to rebut this evidence, and the trial court instead relied on speculation from Davis Polk attorney Marshall Huebner and hearsay by Blackstone's John Studzinski (A000103). Huebner conceded that he was not "an expert in insurance law" and "would prefer not to run the risk of giving sworn testimony about what an insurance seizure really entails" (A106133:22-34:3). Studzinski and others at Blackstone "did very little formal work around filing of bankruptcy" (A107122:11-16) and had "never dealt with a situation like this before . . . where you have a bankruptcy of the holding company and overcapitalization of insurance companies" (A107120:13-16).

Where, as here, the Government itself acquires outright ownership of property, with the right to transfer and sell the property, the proper measure of just compensation is the market value of the property taken.

5. Even Applying A Correct "Just Compensation" Analysis, The Appropriate Measure Of Compensation Is $35.4 Billion, The Fair Market Value Of The Property At The Time It Was Appropriated.

As explained above, both Starr's expert and the Government's expert concluded that the fair market value of the Credit Agreement Class's *pro rata* share of all the equity on the date it was appropriated was $35.4 billion ($38.9 billion minus the 8.9% interest attributable to AIG equity unit holders). *See supra* p. 42.

Alternatively, the Supreme Court in *Horne* held that, at a minimum, the Government's own contemporaneous calculation of the fair market value of the property taken was dispositive, reasoning that the "Government cannot now disavow that valuation". 135 S. Ct. at 2433. Here, there is no contemporaneous Government valuation as of September 22, but the Government auditor's contemporaneous valuation of the 79.9% equity as of September 17, 2008 (which, it is undisputed, would be less than the valuations as of September 22) was $24.5 billion. A000157; A201456-57.

II. The Court Below Erred In Dismissing The Unconstitutional Conditions Claims Made By The Credit Agreement Class.

In the complaint, Plaintiffs asserted a claim under "the well-settled doctrine of unconstitutional conditions". *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (quotation omitted). The principles of an unconstitutional conditions claim are similar to the principles of an illegal exaction claim, and it is not necessary to reach this claim if this Court holds that the Government must disgorge what it has illegally exacted and has "in its pocket."

A. The Court Below Erred In Holding That The Unconstitutional Conditions Doctrine Did Not Apply.

In dismissing the Class's unconstitutional conditions claim, the court below made two legal errors.

First, the court below incorrectly held that the unconstitutional conditions doctrine applies only to "land use exactions." A000041-42. However, in *Koontz*, 133 S. Ct. at 2600, the Supreme Court expressly rejected that proposition (claims include a Government-ordered "relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property"). *See also id.* at 2598-99 (holding that the doctrine also applies to "monetary exactions").

Earlier this year the Supreme Court again emphasized that from a constitutional point of view, there is nothing that sets real property rights in a different category than personal property rights. "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne*, 135 S. Ct. at 2426; *accord Frost & Frost Trucking v. R.R. Comm'n*, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."); *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507 (1926).

Second, the court below mistakenly concluded that an unconstitutional conditions claim could not be established unless the plaintiff lost more than a discretionary benefit. A000042. Again, the Supreme Court in *Koontz* expressly rejected the argument, holding that:

> "Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights." 133 S. Ct. at 2596 (citations omitted).

Indeed, authorized "discretion" has never marked the outer limits of constitutional protection. *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983).

B. The Unconstitutional Conditions Doctrine Entitles The Credit Agreement Class To The Fair Market Value Of The 79.9% Interest Appropriated By The Government.

Based on the trial record, the Government's demand for 79.9% of Plaintiffs' equity was the very type of demand that courts have previously found to "frustrate the Fifth Amendment right to just compensation". *Koontz*, 133 S. Ct. at 2595. As the court below found, the Government "imposed a draconian requirement to take 79.9 percent equity ownership in AIG as a condition of the loan." A000095. The condition resulted in a violation of the shareholders' right to just compensation because it transferred tens of billions of dollars of their equity and voting interests to the Government for "virtually nothing." A000158.

The fact that the discretionary benefit is more valuable than the condition the Government attaches to it is irrelevant. As in *Koontz* and other cases finding the Government imposed an unconstitutional condition, the AIG Board was "likely to accede to the government's demand, no matter how unreasonable" because the value of a 13(3) loan in a financial crisis "is more valuable than any just compensation the owner could hope to receive for" the surrendered property. *Koontz*, 133 S. Ct. at 2595.

The condition here also lacked the requisite nexus and rough proportionality to the proffered benefit[14] because, as the court below found, the "Government's unduly harsh treatment of AIG in comparison to other institutions seemingly was misguided and had no legitimate purpose, even considering concerns about 'moral hazard.'" (A000100). It was also an unconstitutional condition under the principles of *Frost & Frost Trucking*, *Hanover Fire*, and *Parks*, *supra*.

Just compensation for the Government's appropriation of property through an unconstitutional condition must be the fair market value of the property taken, without considering the value of the discretionary benefit used to coerce the surrender of the property. *See Nollan*, 483 U.S. at 841-42; *Koontz*, 133 S. Ct. at 2594-95.

The Government cannot avoid paying that value based on the theory that the owner would have been worse off if it had kept the property and not received the discretionary benefit. Indeed, unconstitutional conditions typically occur when the Government threatens to deny a discretionary benefit "that is worth far more than property it would like to take." *Koontz*, 133 S. Ct. at 2594. As the *Koontz* Court held, "demands of this sort frustrate the Fifth Amendment right to just

[14] *See Koontz*, 133 S. Ct. at 2593; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836-37 (1987) ; *Dolan*, 512 U.S. at 385.

compensation" if no compensation would be owed whenever the discretionary benefit is "worth far more than property it would like to take." *Id.* at 2594-95.

III. In Denying The Claims Of The Stock Split Class, The Court Below Erred By Disregarding The Undisputed Evidence That The Reverse Stock Split Was Structured To Circumvent The Class's Right To Block Further Dilution.

In concluding that the purpose of the reverse stock split was to avoid delisting, the court below ignored undisputed evidence that the Government and AIG (which continued to be controlled by the Government[15]) structured the reverse stock split to deprive the Stock Split Class of its right to block further dilution of its interests. *See supra* pp. 24-28. The court below, considering the evidence as a whole, committed error in denying the claims of the 196,674 members of the Stock Split Class. A000130-32.

[15] As the trial court found, "there can be little doubt that the Government controlled AIG." A000121-22 (citing Bernanke: A300535; A304703; A304705; Dahlgren: A102676; A300015; A300033; A300039).

The proxy statement for the reverse stock split proposal itself states, "AIG is controlled by the Trust" (A201059). The Trust, in turn, was controlled by the Government. A000155-56. The Government specifically required that the proxy statement be "acceptable to the Trust," and the Government was actively involved in reviewing, revising, and controlling the timing of the 2009 proxy. A201014; A300612-16; A304683. "Mr. Bernanke testified before Congress on March 23, 2009 that 'AIG is effectively under our control'" (A000121 (quoting A300535)).

A. The Government Always Had The Goal Of Monetizing Its 79.9% Interest By Obtaining AIG Common Stock.

The Government's goal from the time it entered into the Credit Agreement was the monetization of its 79.9% interest in AIG.

> "The key players in the Credit Agreement events immediately understood the effect of this agreement. On September 23, 2008, Davis Polk's Mr. Huebner observed to FRBNY's Mr. Baxter '[t]he real joy comes when we get back the $85 [billion], with $10 +++ in fees and interest, and make the [T]reasury tens of billions it deserves (and needs!) on the equity.'" A000119 (citing A304676).

As Secretary Geithner testified, "it was important to the Government that the preferred stock be convertible into common stock because common stock was much more liquid and could be transferred more easily and, hence, was more valuable". Geithner: A101519:6-11; A500749-52; Alvarez: A100425:14-18.

Converting the Government's 79.9% interest from Series C Preferred Stock to AIG common shares required an increase in the number of authorized AIG common shares from 5 billion to 15 billion, which could be accomplished only with the existing common shareholders' approval, voting as a class, to amend AIG's Charter. A200319. The existing common shareholders therefore had the right to block any increase.

The Government did not realize a separate common shareholders class vote would be required until an AIG shareholder filed suit seeking to confirm AIG common shareholders' right to block further dilution of their shares. *See*

A000126-27; A304633; A304671; *supra* p. 25. The Government actively participated in the *Walker* lawsuit. A000126 (citing A300200-01; A304658-59; A304689; A304691-92; A304667-69); A000127 (citing A304659; A304667-68; A300194; A304656-57; Baxter: A101132-33).

When the lawsuit was settled with AIG's promise to hold a shareholder vote, the Government and its counsel continued to work on developing stratagems that would avoid such a vote.[16]

B. The Reverse Stock Split's Structure Benefited The Government By Permitting The Exchange Of Its Preferred Stock For AIG Common Shares, Without Paying The Stock Split Class Money For Their Blocking Rights.

There is no dispute that a reverse stock split avoided delisting. *See supra* pp. 26-27. There is also no dispute that the structure of the reverse stock split unnecessarily benefited the Government by depriving the Stock Split Class of its right to block further dilution of its interest in AIG without compensation. It is also clear that without a reverse stock split the Government could not have obtained common stock for its preferred shares without compensating the Stock Split Class. *See supra* pp. 24-25.

[16] A304660-61 (Brandow, outside counsel to the Government: "focus from the start of this transaction was to find a way for the trust to acquire the power to control the company without having to get the consent of the common stockholders."); *see also* A304678; A304702.

The objectionable features of the reverse stock split were: (1) the use of a 20:1 ratio; (2) the application of the split to only issued – and not to all authorized – shares; and (3) delaying the vote on the reverse stock split until the NYSE deadline so competing proposals could not be submitted (A201048; A201114). None of these features were required to avoid delisting.

It was undisputed that the delisting threat could have been addressed by applying it to all authorized shares, and not limiting it to the authorized shares that had been issued. Foshee: A103560:5-12. No witness at trial could explain why the reverse stock split applied to only issued shares. *See* Dahlgren: A102931:1-5; Baxter: A101140:15-19; Liddy: A103164:20-67:22, A103279:23-82:7; Foshee: A103560:5-12. AIG's own proxy advisors indicated they would have preferred a structure that applied to all authorized common shares, both issued and unissued. A3000684. The only reason for reverse splitting issued shares but not unissued shares was to permit the Government to obtain common shares without a common shareholder vote.

While recognizing that through the reverse stock split, "the Government could exchange its preferred shares for common shares without a separate class vote of the common shareholders" (A000132), the court below failed to address whether under the Fifth Amendment the Government could do so without compensating the existing common shareholders for illegally exacting, or taking without just compensation, their blocking rights under Delaware's General Corporation Law. Furthermore, the Government was able to benefit from the reverse stock split only because it was able to delay and control that vote with the preferred stock it illegally acquired as a result of the Credit Agreement. A000100-01. *See* A500817, No. 798; A303992. Since, as the court below held, the Government could not legally acquire or hold that equity (A000100-01; A000147-56), using that equity to achieve the reverse stock split was similarly illegal.

As Government witnesses concede, the reverse stock split enabled the Government to exchange all of the AIG Preferred Stock acquired as a result of the Credit Agreement and subsequent TARP financing for 92.1% of AIG's common stock (A000133) without having to get (and pay for) the approval of AIG common shareholders. *See* Brandow: A105852:5-25; Daines: A108515:14-19, A108517:14-18.

The Government action damaged the Stock Split Class in that the common shareholders were not compensated for loss of their right to block further dilution of their shares. *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 460, 479 (Del. Ch. 2011) (awarding damages when "a controlling stockholder uses a reverse split to freeze out minority stockholders without any procedural protections"); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 434 (Del. Ch. 2002) (the Government is not immunized from "inequitable actions in technical conformity with statutory law”); *Uni-Marts, Inc. v. Stein*, No. 14713, 1996 WL 466961, at *10 (Del. Ch. Aug. 12, 1996) (upholding allegations that defendants improperly deployed corporate assets “for the purpose of controlling the vote of the corporation’s own stock” despite no statutory claim).

The value of the right to block the authorization and issuance of enough AIG common stock to permit the Government to obtain common shares for its Series C Preferred Stock was estimated to be $339 million, or less than 2% of what these shares were sold for. Kothari: A104601:15-02:16; A304699; A304557 ¶ 124.

The reverse stock split also allowed the Government to exchange its Series E and F Preferred Stock (acquired by investing capital in AIG using TARP (A000133)) valued at $26.1 billion (A302034) for 1,092,169,866 AIG common shares valued at $49.1 billion (A304014; A107282:10-20; A304700). Of that $23 billion gain to the Government, $4.33 billion represented the value of the Stock Split Class’s blocking rights. *See* Kothari: A104594:10-12, A104780:14-81:9; A304551; A304698.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and:

(a) award the Credit Agreement Class its *pro rata* share of the $38.9 billion fair market value of the equity acquired by the Government at the time of exaction or, at a minimum, the $18.3 billion in proceeds from the Government's sale of that equity;

(b) if the Court holds the Credit Agreement Class is not entitled to relief pursuant to its illegal exaction claim, award the Credit Agreement Class its *pro rata* share of the $38.9 billion fair market value of the equity acquired by the Government as relief for a taking without just compensation or an unconstitutional condition, or, in the alternative, remand for further proceedings on such claims; and

(c) remand for further proceedings on the Stock Split Class's reverse stock split claims.

Dated: August 25, 2015

Respectfully submitted,

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Opinions and Judgment Relevant to Appeal Addendum

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In the United States Court of Federal Claims

No. 11-779C

(Filed: July 2, 2012)

STARR INTERNATIONAL COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant, and AMERICAN INTERNATIONAL GROUP, INC., Nominal Defendant.	Shareholder Direct and Derivative Claims Arising From Government Bailout of Distressed Entity; Fifth Amendment Takings Claims; Government's Motion to Dismiss Pursuant to RCFC 12(b)(1) and 12(b)(6); 28 U.S.C. § 1500; Equal Protection and Due Process Claims; Standing; Unconstitutional Condition Claim; Illegal Exaction Claim.

David Boies, with whom were *Robert J. Dwyer*, *Nicholas A. Gravante Jr.*, *Hamish P. M. Hume*, *Samuel C. Kaplan*, *Duane L. Loft*, *Julia C. Hamilton*, and *Luke Thara*, Boies, Schiller & Flexner LLP, Armonk, New York, and *John L. Gardiner*, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, for Plaintiff, Starr International Company, Inc.

Brian M. Simkin, Assistant Director, with whom were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Shalom Brilliant*, *Timothy P. McIlmail*, *Brian A. Mizoguchi*, *John Roberson*, Senior Trial Counsel, *Christopher A. Bowen*, *Renee A. Gerber*, *Karen V. Goff*, *Michael S. Macko*, *John J. Todor*, *Amanda L. Tantum*, *Jacob A. Schunk*, and *Vincent D. Phillips*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Defendant.

Joseph S. Allerhand, *Stephen A. Radin*, and *Jamie L. Hoxie*, Weil, Gotshal & Manges LLP, New York, New York, for Nominal Defendant, American International Group, Inc.

OPINION AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

WHEELER, Judge.

This case arises from the Government's bailout of American International Group, Inc. ("AIG") in September 2008 as AIG faced a liquidity crisis. At that time, Plaintiff, Starr International Company, Inc. ("Starr") was one of the largest shareholders of AIG common stock. Starr alleges that rather than providing the liquidity support it offered to comparable financial institutions, Defendant ("the Government")[1] exploited AIG's vulnerable financial position by becoming a controlling lender and controlling shareholder of AIG in September 2008. According to Starr, the Government took control of AIG so that it could use the corporation and its assets to provide a "backdoor bailout" to other financial institutions. In so doing, Starr alleges that the Government took AIG's property, including 562,868,096 shares of AIG common stock, without due process or just compensation.

On November 21, 2011, Starr filed a complaint in this Court against the United States, as well as a complaint in the U.S. District Court for the Southern District of New York against the Federal Reserve Bank of New York ("FRBNY"). See 1:11-cv-08422 (PAE). Starr subsequently filed an amended complaint in this Court on January 31, 2012, alleging violations of the Due Process, Equal Protection, and Takings Clauses of the United States Constitution, as well as an illegal exaction claim.[2] Starr asserts allegations of coercion, misrepresentation, and discrimination in support of its constitutional and illegal exaction claims, but not as free-standing tort allegations. Starr seeks damages from the Government of at least $25 billion based upon the alleged market value of the 562,868,096 shares of AIG common stock as of January 14, 2011, the date on which the Government ultimately received the shares.

Starr brings its claims individually and on behalf of a class of others similarly situated, pursuant to Rule of the Court ("RCFC") 23, and derivatively on behalf of AIG, pursuant to RCFC 23.1. Starr is a privately held Panama corporation, which is, and was at all relevant times, a shareholder of AIG common stock. AIG is a Delaware corporation. In an order dated February 10, 2012, the Court joined Nominal Defendant,

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[1] Throughout this opinion the Court refers to Defendant, the United States as "the Government," which Starr defines as "the [U.S.] Department of the Treasury and its agents acting at its direction." Compl. ¶ 2. In so doing, the Court takes no position on the issue of who may have been acting under the control of the federal government at the time of the incidents alleged.

[2] When referencing "Starr's Complaint" or citing to "Compl.," the Court is referring to Starr's amended complaint filed January 31, 2012.

AIG as a necessary party pursuant to RCFC 19(a).[3] See Starr Int'l Co. v. United States, 103 Fed. Cl. 287 (2012).

On March 1, 2012, counsel for the Government filed a motion pursuant to RCFC 12(b)(1) and 12(b)(6), requesting the Court to dismiss Starr's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Counsel for AIG and Starr filed briefs in response on March 26, 2012 and March 29, 2012, respectively, and counsel for the Government filed a reply on April 26, 2012. The Court held oral argument on the Government's motion to dismiss on June 1, 2012 at the National Courts Building in Washington, DC.[4]

After considering the parties' filings and oral presentations, the Court grants in part and denies in part the Government's motion to dismiss. The Court grants the Government's RCFC 12(b)(1) motion as to: (i) any Due Process claims not characterized as illegal exactions; and (ii) any Equal Protection claims. For the time being, the Court defers the issue of whether Starr adequately pled its demand on AIG's board or the futility of such a demand, as required by RCFC 23.1. The Court denies the remainder of the Government's motion challenging subject matter jurisdiction. The Court grants the Government's RCFC 12(b)(6) motion as to: (i) Starr's takings claim based on the Government's conversion of its preferred stock to common stock, insofar as Starr alleges the taking of the same equity interest more than once; and (ii) Starr's use of the rough proportionality test articulated in Dolan v. City of Tigard, 512 U.S. 374 (1994). The Court denies the Government's RCFC 12(b)(6) motion in all other respects.

FACTUAL BACKGROUND

The Government actions at issue arose because AIG found itself in a liquidity crisis in the summer of 2008. To understand the cause of AIG's liquidity issues—and the Government's alleged contribution to those issues—the Court provides background regarding AIG's business related to derivatives, and, in particular, credit default swaps ("CDSs"). The following facts, including the background on AIG's CDS business, are drawn from Starr's Complaint. For purposes of this motion to dismiss, the Court accepts as true all of the allegations in Starr's Complaint.

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[3] In a notice and order dated January 31, 2012, the Court advised AIG that as a party to this case, it would be bound by the Court's final judgment and may participate in this case to any extent it deems appropriate. See Dkt. No. 23.

[4] The Court cites to the Government's March 1, 2012 motion to dismiss as "Def.'s Mot. __"; AIG's March 26, 2012 response as "AIG Resp. __"; Starr's March 29, 2012 opposition as "Pl.'s Opp. __"; the Government's April 26, 2012 reply as "Def.'s Rep. __"; and the transcript of the June 1, 2012 oral argument as "Tr. __ (Name of counsel)."

I. AIG's CDS Business

Starting in the 1980s, a wholly-owned subsidiary of AIG, AIG Financial Products ("AIGFP") began entering into contracts called derivatives, whereby one party in effect paid a fee to the other party to take on the risk of a business transaction. In 1998, AIGFP expanded this business to include an early form of what has become known as a "credit default swap." A CDS is a contract that functions like an insurance policy for debt securities instruments. In exchange for payments over time by a client, or "counterparty," the party writing the CDS is obligated to pay the counterparty the par value of the debt instrument in the event the instrument defaults. The party writing the CDS then succeeds to the counterparty's interest in the debt instrument.

The securities referenced by the CDSs written by AIGFP included collateralized debt obligations ("CDOs"). A CDO is a complex investment product typically backed by a pool of fixed-income assets. The collateral backing of a CDO can consist of various types of assets, including asset-backed securities ("ABSs"). Residential mortgage-backed securities were a common type of ABS used to form CDOs. In December 2005, AIGFP executives determined that writing CDSs on CDOs backed by subprime mortgage debt was too risky, and AIGFP stopped writing such CDSs; however, the CDSs AIGFP had already written remained on its books.

In writing CDSs referencing CDOs, AIGFP took on two types of risk: credit risk and collateral risk. If any CDO defaulted, i.e., could no longer meet its obligation to pay interest to holders of the securities, AIG was responsible for paying the remainder of the CDO's obligation. This was the credit risk. In some cases, AIG was required to post collateral in connection with a CDS as an assurance that it would be able to perform its obligation in the event of a default. Many of AIGFP's CDS contracts contained provisions requiring AIGFP to post cash collateral if AIGFP's credit rating fell or if the valuation of the underlying CDO fell below a certain threshold. This was the collateral risk.

II. AIG's Liquidity Issues In 2008 And The Government's Response

Beginning in 2007, AIGFP's CDS counterparties started to claim that the value of the underlying CDOs was falling precipitously and to make increasingly large collateral calls on AIGFP. Those calls increased in the spring and summer of 2008. At the same time, many of AIG's assets were relatively illiquid and difficult to sell quickly. Due to the confluence of increased collateral calls and AIG's inability to sell certain assets, AIG faced a "liquidity squeeze" beginning in July 2008 and continuing into September 2008. Compl. ¶ 40. The following is the account, as alleged by Starr, of the Government's discriminatory response to AIG's financial difficulties.

To address its liquidity issues, Starr "repeatedly" sought access to the Federal Reserve's discount window.[5] Id. ¶ 42. While the Government provided such access to other domestic and foreign institutions, it withheld access to the discount window, as well as other forms of liquidity assistance, from AIG. Over the weekend of September 13-14, 2008, in addition to continuing to seek access to the discount window, AIG attempted to identify a private-sector solution to its liquidity issues. During that time, the Government "discouraged" non-U.S. investors from participating in a private-sector solution to AIG's liquidity needs. Id. ¶ 49.

On September 15, 2008, Lehman Brothers Holdings Inc. filed for bankruptcy. That same day, the Government brokered talks among a consortium of banks in an attempt to arrange private financing for AIG. Those talks ultimately failed. Later that afternoon, the three largest rating agencies, Moody's, S&P, and Fitch Ratings Services, downgraded AIG's long-term credit rating. At that point, AIG faced possible bankruptcy as it would no longer have liquidity sufficient to meet the cash collateral demands of AIGFP's counterparties.

Starr claims that by engaging in the discriminatory treatment recounted above, the Government contributed to AIG's financial difficulties. According to Starr, the Government interfered with AIG's ability to raise capital and contributed to the decision to downgrade AIG's credit rating by denying AIG access to financial assistance given to other institutions and "insisting inaccurately" that it would not provide any assistance to AIG. Id. ¶ 53. The Government's actions and inaction also maximized the leverage of the private-sector consortium, putting the banks in a position to demand "oppressive terms" that the Government itself would later demand from AIG. Id. Two of the banks in the consortium had "severe conflicts of interest," as they would be among the largest beneficiaries of the Government's eventual bailout of AIG. Id.

Moreover, Starr alleges that the Government used AIG's financial difficulties to "coerce" it to agree to a government takeover of the corporation, thereby allowing the Government to use the corporation and its assets to bail out other financial institutions. Compl. ¶ 54. As explained below, Starr maintains that the Government takeover commenced in September 2008 when the Government took control of AIG; continued in June 2009 when the Government circumvented shareholder rights; and culminated in January 2011 when the Government acquired over 90% of AIG's common stock, of which 562,868,096 shares were taken without just compensation.

[5] The Federal Reserve discount window is a means by which eligible institutions can borrow money from a Federal Reserve bank in order to meet temporary liquidity needs.

III. September 2008: The Loan Transaction Between The FRBNY And AIG

A. The Term Sheet

Pursuant to its authority under Section 13(3) of the Federal Reserve Act ("FRA") (hereinafter "Section 13(3)"), Pub. L. No. 63-43, § 13(3) (1913) (codified as amended at 12 U.S.C. § 343 (2006)), the Government offered AIG access to the discount window on specific terms provided in a "term sheet." Compl. ¶ 55(a). The offer included the following terms: "(i) an FRBNY credit facility to AIG of $85 billion secured by all of AIG's assets . . . [with] an initial annual cost to AIG of approximately 14.5% per annum, (ii) a requirement that the Government be given control of AIG as controlling lender and controlling shareholder, and (iii) a promise that the Government would receive a nearly 80% equity stake in AIG." Id. According to Starr, the Government's offer was based on a term sheet formulated by the private-sector consortium the Government had assembled. Id. ¶ 55(b).

After delivering the term sheet to AIG, Starr claims the Government "falsely advised" AIG's CEO that it would be the only offer AIG would get, "pressured" AIG's Board of Directors (the "AIG board") to make a decision within hours, and "falsely and irresponsibly represent[ed] that it was willing to risk destroying the global economy" if AIG did not accept the Government's demands. Id. ¶¶ 58, 58(a). According to Starr, AIG's board accepted the Government's terms before the opening of the next trading day, September 17, 2008. Id. ¶¶ 58(a), 59. Also on September 17, 2008, Starr submits that the Government fired AIG's CEO and replaced him with Edward M. Liddy, who acted at all relevant times as if he were under the control of the FRBNY and the Government. Id. ¶¶ 60-61.

B. The Credit Agreement and Subsequent Agreements

On September 22, 2008, the FRBNY and AIG entered into an agreement ("the Credit Agreement"), under which the FRBNY agreed to extend up to $85 billion in credit to AIG on a revolving basis. The Credit Agreement required AIG to fully secure the loan with AIG assets, pay the interest rate specified in the September 16, 2008 term sheet, and issue to a trust ("the Trust") Series C Preferred Stock convertible to 79.9% of AIG's common stock.

To implement the terms of the Credit Agreement, the parties subsequently entered into three related agreements. On January 16, 2009, the parties entered into the AIG Credit Facility Trust Agreement (the "Trust Agreement"), which established the Trust to hold the Government's Series C Preferred Stock. According to Starr, the Trust "was created 'for the sole benefit of the United States Treasury'" and consisted entirely of the Series C Preferred Stock. Compl. ¶¶ 69-70 (quoting the Trust Agreement). The Series C Preferred Stock provided the Trust with voting power equivalent to a 79.9% interest in

AIG. In addition, on March 1, 2009, the parties entered into the "Stock Purchase Agreement" to facilitate the conversion of the Government's preferred stock into common stock. Id. ¶ 91. Ultimately, upon the closing of the "Recapitalization Plan" on January 14, 2011, the Government converted its preferred stock into 562,868,096 shares of common stock. Id. ¶ 101.

At the time of the Credit Agreement, Starr maintains that a 79.9% ownership interest in AIG common stock was valued at $23 billion. Id. ¶ 67. Yet, according to Starr, the Trust "was required to pay nothing more than $500,000 for the Series C Preferred Stock with the purported 'understanding that additional and independently sufficient consideration was also furnished to AIG by the [FRBNY] in the form of its lending commitment . . . under the Credit Agreement.'" Id.

What Starr calls the "grossly disproportionate" terms of the loan transaction form the basis of Starr's takings claims. Id. ¶ 55(d). Starr asserts that AIG compensated the Government for its lending commitment by fully securing the loan with AIG assets and offsetting any risk by agreeing to a 14.5% interest rate on the loan. By also demanding a 79.9% interest in AIG, Starr claims the Government acted in excess of its authority under Section 13(3) and took the property of AIG and its shareholders without just compensation. See Compl. ¶ 171.

IV. June 2009: The AIG Shareholder Meeting And Reverse Stock Split

Starr maintains that the Credit Agreement gave the Government the "contractual right" to receive the Series C Preferred Stock convertible to 79.9% of AIG common stock. Tr. 53, 109 (Boies); see also Compl. ¶ 65. As Starr explains, however, AIG's then-governing Restated Certificate of Incorporation (AIG's "Charter") did not authorize a sufficient number of common shares to allow the Government to acquire a 79.9% interest in AIG. The Charter provided for 5 billion shares of authorized common stock, of which more than 3 billion had been issued or reserved, leaving less than 40% available for conversion. To enable the Government to acquire a 79.9% interest in AIG, the Government needed to amend the Charter to increase the number of authorized shares of common stock.

To increase the number of authorized shares, Starr contends that Delaware law required the Government to obtain approval from a majority of the then-existing common shareholders voting as a separate class. Id. ¶ 81 (citing Del. Code Ann. tit. 8, § 242 (2012)). Consistent with Delaware law, Starr maintains that the Government represented in the Delaware Court of Chancery, in its securities filings, and in the Stock Purchase Agreement, that it would not convert its preferred stock into common stock without an independent vote of the then-existing common shareholders to increase the number of authorized shares.

According to Starr, at AIG's annual shareholder meeting on June 30, 2009, the Government "circumvent[ed]" the requisite vote of the common stock shareholders by means of a reverse stock split. Id. ¶ 102. The meeting materials included two proposals (relevant here), which Starr calls "Proposal 3" and "Proposal 4." Id. ¶¶ 94, 97. Proposal 3 sought to amend the Charter to increase the number of authorized common shares. With the then-existing common shareholders voting as a separate class, Proposal 3 failed. Anticipating that Proposal 3 would fail, the meeting materials also included Proposal 4, which sought to implement a reverse 20:1 stock split that would apply to issued, but not authorized, shares. With the Government's controlling vote participating, Proposal 4 passed.

By means of the reverse stock split, the Government reduced the number of issued common shares from approximately 3 billion to 150 million, while leaving the number of authorized common shares at 5 billion. Correspondingly, the Government increased the percentage of authorized but unissued shares from less than 40% of the outstanding common stock to more than 90% of the outstanding common stock. This enabled the Government to convert its preferred stock into a majority share of AIG common stock, which it did on January 14, 2011, upon the closing of the Recapitalization Plan.

According to Starr, the conversion "completed" the Government's taking of the AIG shareholders' interests. Id. ¶ 101(a). Starr contends that the Government obtained the common shares for "virtually nothing" ($500,000, i.e., what the Government allegedly paid for the Series C Preferred Stock), given that the shares had a market value in excess of $25 billion as of January 14, 2011. Id. ¶¶ 101(a), (c).

V. The Maiden Lane III Transactions

In addition to the Government's alleged taking of over 562 million shares of AIG common stock, Starr contends that the Government took cash collateral posted by AIG to effect a "backdoor bailout" of AIG's counterparties.

Starr explains that in the summer of 2008, AIG was receiving collateral calls from its counterparties due to the counterparties' own collateral calls. At that time, the FRBNY created a special purpose vehicle designated Maiden Lane III ("ML III"), ostensibly to resolve AIG's obligations to its CDS counterparties. According to Starr, AIG and the FRBNY funded ML III, with AIG ultimately posting $32.5 billion in cash collateral, along with an additional $5 billion equity investment, and the FRBNY lending ML III $24.3 billion.

Starr maintains that "[t]hrough its control over AIG," the FRBNY "required AIG" to use ML III to purchase CDO assets from AIGFP counterparties. Compl. ¶ 114. In a series of transactions executed in November and December 2008, ML III purchased approximately $62.1 billion worth of notional CDO assets from AIGFP counterparties.

As part of the purchase price, the counterparties retained the cash collateral that AIG had posted prior to ML III's formation.

Starr contends that the FRBNY paid the AIGFP counterparties near face value for their CDOs in exchange for their agreement to cancel their CDS contracts with AIG. The FRBNY also required AIG to execute releases waiving all claims against the counterparties arising out of the contracts cancelled through ML III. Starr asserts a taking of AIG's collateral based upon its position that AIG's obligations could have been compromised for substantially less than face value.

DISCUSSION

Based on the foregoing facts, Starr seeks just compensation for the Government's taking of the property of AIG and AIG shareholders to engineer a "backdoor bailout" of AIG's counterparties during the financial crisis in 2008. First, Starr brings a direct takings claim based on the Government's alleged expropriation of the economic value and voting power associated with the shares of AIG common stock owned by Starr and the class. Second, Starr advances derivative claims to recover just compensation for the Government's alleged taking of a 79.9% equity interest in AIG, as well as a portion of the collateral posted by AIG prior to the formation of ML III. Finally, Starr brings an illegal exaction claim, asserting that the Government exacted and retained AIG's property in excess of the Government's statutory and regulatory authority.

The Government urges the Court to dismiss this action pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. First, the Government contends that 28 U.S.C. § 1500 bars this action because Starr has pending in district court an action advancing substantially the same claims as alleged here. Second, according to the Government, this Court lacks jurisdiction to hear Starr's Equal Protection and Due Process claims because those Constitutional provisions are not money-mandating. Third, the Government argues that Starr lacks standing to maintain its direct claim because the interests forming the basis of that claim belong to AIG, not Starr or any other shareholder. Fourth, the Government contends that Starr lacks standing to advance its derivative claims because Starr failed to plead adequately a demand on AIG's board or the futility of such a demand.

Even if the Court were to find that it possesses jurisdiction, the Government urges the Court to dismiss Starr's takings and illegal exaction claims under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. The Government urges dismissal of Starr's takings claims based on the following five allegations: (1) Starr fails to pinpoint the action(s) for which the Government allegedly owes just compensation; (2) Starr relies upon allegations that the FRBNY's actions were unlawful and unauthorized; (3) Starr fails to demonstrate that the challenged transactions were involuntary; (4) Starr fails to identify legally cognizable property interests taken from it or AIG; and (5) Starr relies, in part, on a "rough proportionality" test that is inapplicable here.

As to Starr's illegal exaction claim, the Government contends that Starr does not satisfy the jurisdictional prerequisites for such a claim because Starr fails to demonstrate that any statute mandates the return of money to it or AIG. Moreover, as with Starr's takings claims, the Government maintains that AIG voluntarily entered into the loan agreement, and, as such, AIG's agreement to transfer equity in exchange for a loan was not an "exaction." Likewise, neither was the transaction "illegal," according to the Government, because the FRBNY did not exceed its authority under Section 13(3) of the FRA when it caused the transfer of AIG equity to the Trust in consideration for the loan. The Court addresses each of the Government's arguments in turn.

I. Standard Of Review

To survive a motion to dismiss, a plaintiff need only "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A well-pleaded complaint may proceed even if it appears on the face of the pleadings that "recovery is very remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In sum, the Court considers the Government's motion to dismiss keeping in mind that Starr's burden at this phase is "minimal." Colonial Chevrolet Co. v. United States, 103 Fed. Cl. 570, 574 (2012). Although the facts of this case are vigorously contested, the Court must accept all well-pleaded allegations in Starr's Complaint and construe the facts in the light most favorable to Starr.

II. Whether The Court Lacks Subject Matter Jurisdiction To Hear Plaintiffs' Claims

Subject matter jurisdiction is a threshold issue to be considered before proceeding to the merits of a case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Where subject matter jurisdiction over a claim is at issue, the plaintiff must establish jurisdiction by a preponderance of the evidence. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988) (internal citations omitted). In "determining whether a motion to dismiss should be granted, the . . . Court may find it necessary to inquire into jurisdictional facts that are disputed." Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). If subject matter jurisdiction is lacking, the Court must dismiss the action. RCFC 12(h)(3).

A. Whether the Court Possesses Subject Matter Jurisdiction In Light of 28 U.S.C. § 1500 and Starr's Pending Action in District Court

The Government contends that 28 U.S.C. § 1500 bars this action because Starr has pending in district court an action advancing substantially the same claims as alleged here. By operation of Section 1500, this Court "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." United States v. Tohono O'odham Nation, 131 S. Ct. 1723, 1727 (2011). As the U.S. Supreme Court explained in Tohono O'odham, "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in [this Court], if they are based on substantially the same operative facts, regardless of the relief sought in each suit." Id. at 1731. Section 1500 deprives this Court of jurisdiction, however, only where a plaintiff commences a suit in the other court before filing in this Court. Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 949 (Ct. Cl. 1965).

The Government argues that the sequence of filing rule, stated in Tecon, is no longer controlling authority in light of dicta from Tohono O'odham. See Def.'s Mot. 13-14. The Court recently addressed this same argument in United Keetoowah Band of Cherokee Indians in Okla. v. United States, holding that dicta from Tohono O'odham does not supersede otherwise binding precedent from Tecon. ___ Fed. Cl. ___, 2012 WL 1005907 at *10 (Mar. 27, 2012). The Court also concluded that the *per se* rule from Passamaquoddy Tribe v. United States, is limited to circumstances "'when evidence is lacking as to which of the two complaints was filed first.'" 82 Fed. Cl. 256 (2008), aff'd, 426 F. App'x 916 (2011) (non-precedential) (quoting Kaw Nation of Okla. v. United States, 103 Fed. Cl. 613, 634 (2012)).

Here, it is undisputed that Starr filed its complaint in this Court prior to filing in the U.S. District Court for the Southern District of New York. See Tr. 9 (Todor). Consequently, the *per se* rule from Passamaquoddy Tribe is inapplicable, and the rule articulated in Tecon dictates that Section 1500 does not deprive this Court of subject matter jurisdiction.

Further, the Court is not convinced that the district court action naming the FRBNY as Defendant would trigger application of Section 1500 in the first place. Starr could not have sued the FRBNY in the Court of Federal Claims. The Court is skeptical of an interpretation of Section 1500 that would require Starr to forgo one of its two actions, which it could not have filed in the same court based upon the named Defendants.

B. Whether the Court Possesses Jurisdiction Over Claims Starr Characterizes As Due Process and Equal Protection Violations

The Government next argues that the Court does not have subject matter jurisdiction over Starr's Due Process and Equal Protection claims. See Def.'s Mot. 14. The Tucker Act, 28 U.S.C. § 1491(a)(1), operates as a grant of subject matter jurisdiction for "specified types of claims against the United States" and as "a waiver of sovereign immunity with respect to those claims." United States v. Mitchell, 463 U.S. 206, 212

(1983) (internal footnote omitted). The Act does not, however, create a substantive right to recover against the Government. United States v. Testan, 424 U.S. 392, 398 (1976). Instead, that substantive right must stem from either a "money-mandating" source of positive law or an "illegal exaction" under the color of positive law. Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967), abrogated in part on other grounds by Malone v. United States, 849 F.2d 1441, 1444-45 (Fed. Cir. 1988).

These two types of permissible Tucker Act claims can be thought of as complements. Crocker v. United States, 37 Fed. Cl. 191, 197 (1997), aff'd per curiam, 125 F.3d 1475 (Fed. Cir. 1997). The first type of claim seeks to recover affirmative damages from the Government pursuant to a statutory, regulatory, or constitutional provision. Id. The second type of claim seeks to recover funds already paid to the Government pursuant to a statutory, regulatory, or constitutional provision. Id. The U.S. Court of Appeals for the Federal Circuit has indicated that even in the case of an illegal exaction, a claimant must satisfy the usual money-mandating requirement of the Tucker Act. See Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005).[6] Specifically, the "claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" Norman, 429 F.3d at 1095 (quoting Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

An illegal exaction also may be conceptualized as "a deprivation of property without due process of law." Id. In that sense, it is an exception to the general rule that the Due Process Clause of the Fifth Amendment is not money-mandating. Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987) (internal citation omitted). Neither is the Equal Protection Clause money-mandating. Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (internal citation omitted). Based on the foregoing, Starr may maintain its Due Process claim in this Court only insofar as it is based on an illegal exaction theory. Starr may not maintain an Equal Protection claim as a stand-alone claim in this Court.

C. Whether Starr Has Standing To Bring Its Direct Claim[7]

Starr brings a direct takings claim for the Government's alleged "expropriation of

[6] But see Figueroa v. United States, 57 Fed. Cl. 488, 499 (2003) ("In the context of an illegal exaction, the court has jurisdiction regardless of whether the provision relied upon can be reasonably construed to contain money-mandating language." (citing Bowman v. United States, 35 Fed. Cl. 397, 401 (1996))), aff'd, 466 F.3d 1023 (Fed. Cir. 2006).

[7] This Court has jurisdiction over takings claims against the U.S. Government pursuant to the Tucker Act. Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1362 (Fed. Cir. 2005) (quoting 28 U.S.C. § 1491(a)(1) (2006)) (noting that this Court's jurisdiction "includes on its face all takings claims against the United States"). The parties dispute, however, whether Starr can bring such a claim directly.

the economic value and voting power associated with plaintiff's shares of AIG common stock." Pl.'s Opp. 29. The Government contends that Starr lacks standing to assert its expropriation claim[8] directly because, under Delaware law, such claims are generally derivative only and Starr's claim does not fall within the exception to that general rule. See Def.'s Rep. 4-5. As set forth below, the Court finds that Starr has pled facts sufficiently alleging a harm to the suing stockholders independent of any harm to AIG and as such, has standing to advance its expropriation claim directly.

1. Applicable law

In Tooley v. Donaldson, 845 A.2d 1031 (Del. 2004), the Supreme Court of Delaware clarified the test for determining whether a claim is derivative or direct. The determination, it said, turns "*solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Id. at 1033 (emphasis in original). In other words, "a court should look to the nature of the wrong and to whom the relief should go." Id. at 1039. The court explained that "[t]he stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." Id.

Central to Starr's claims is its assertion that the Government forced AIG to issue to the Government over 562 million shares of AIG common stock worth over $20 billion[9]

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[8] While Starr labels its direct claim as one for "expropriation," Pl.'s Opp. 29, the Supreme Court of Delaware has at times called such claims "dilution" claims, In re Tri-Star Pictures, 634 A.2d 319, 330 (Del. 1993), and has used the terms "expropriation" and "dilution" interchangeably, see Gatz v. Ponsoldt, 925 A.2d 1265, 1278 (Del. 2007) (stating that a recapitalization resulted in "a dilution or expropriation of value and voting power"); see also Gentile v. Rossette, 906 A.2d 91, 102 n.26 (Del. 2006) ("In *Tri-Star*, this Court articulated the harm to the minority in terms of a "dilution" of the economic value and voting power of the stock held by the minority. In this case, we adopt a more blunt characterization—extraction or expropriation—because that terminology describes more accurately the real-world impact of the transaction upon the shareholder value and voting power . . . and the uniqueness of the resulting harm to the minority shareholders individually."). Likewise, in addressing Starr's direct claim, this opinion refers to it interchangeably as Starr's "expropriation" or "dilution" claim.

[9] In its prayer for relief, Starr requests damages in an amount "no . . . less than $25 billion," which it maintains was the market value for the 562,868,096 shares of AIG common stock as of January 14, 2011, the date upon which the Government exchanged its Series C Preferred Stock for common stock. Compl. at 57, ¶ H. As set forth below, infra Part III.A.1, the Court finds that Starr ultimately places the Government's taking of a 79.9% equity interest in AIG at September 22, 2008, when the Government allegedly "imposed" the Credit Agreement upon AIG's board, see Compl. ¶¶ 63-64, 67; Tr. 51-52, 100-01, 105 (Boies). Around the time of the Credit Agreement, Starr maintains that an ownership interest in 79.9% of AIG's common stock was valued at $23 billion. Compl. ¶ 67. At this stage of the case, the Court does not seek to approximate any potential damages but merely explains the reason for its imprecise reference to "over $20 billion."

in exchange for the Series C Preferred Stock, "for which the Government paid virtually nothing" ($500,000). Pl.'s Opp. 11; Compl. ¶¶ 67, 174. Such "corporate overpayment" claims[10] are "premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable." Feldman, 956 A.2d at 655. The Supreme Court of Delaware has said that such claims are normally regarded as exclusively derivative. Rossette, 906 A.2d at 99. This is because, in Tooley terms, the corporation is "the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Id.

The Supreme Court of Delaware has recognized, however, "a species of corporate overpayment claim" that is "both derivative and direct in character." Id.; In re Tri-Star Pictures, 634 A.2d 319; Gatz, 925 A.2d 1265. In Rossette, 906 A.2d at 100, and subsequently in Gatz, 925 A.2d at 1278, the court explained that such a claim arises where:

> (1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders.

Where such a transaction occurs, the court held that in addition to having a derivative claim, the public shareholders also have a direct claim for the expropriation, or dilution, of their economic value and voting power. Rossette, 906 A.2d at 100.

In so holding, the court was careful to point out that this type of corporate overpayment claim has two independent aspects, despite arising from the same transaction. See id. at 99. The first aspect is that the corporation was forced to overpay for an asset (here, the $85 billion loan) in the exchange (here, for the 79.9% stake in AIG). Id. This aspect is the basis for the derivative claim because "any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." Id. "[S]uch equal 'injury,'" said the court, "is not viewed as, or equated with, harm to specific shareholders individually." Id.

The second aspect is that, by means of the overpayment (in the form of excessive shares), the minority shareholders lost a portion of the economic value and voting power

[10] The Delaware Court of Chancery has referred to such "corporate overpayment" claims as "wrongful dilution" claims. Feldman v. Cutaia, 956 A.2d 644, 655 (Del. Ch. 2007).

of their stock interest. Id. This aspect is the basis for the direct claim because the harm "is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares," i.e., the basis for the derivative claim. Rossette, 906 A.2d at 99. Rather, "[a] separate harm also results:"

> an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence, the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited.

Id. In such a case, the court held that public shareholders are entitled to bring a direct claim "to recover the value represented by the overpayment." Id.

2. The parties' arguments

Relying in part on the framework set forth in Gatz and Rossette, Starr asserts that it has standing to bring a direct claim because the Government first took control of AIG and then used that control to expropriate a 79.9% interest in AIG from the minority shareholders.[11] See Pl.'s Opp. 22-23. Specifically, Starr claims that the Government gained control of AIG on September 16, 2008 pursuant to the term sheet. See Tr. 78, 106, 109 (Boies). As stated in Starr's Complaint, one of the terms "demanded" by the Government, ¶ 55(d), was "a requirement that the Government be given control of AIG as controlling lender and controlling shareholder," ¶ 55(b). In addition, Starr claims that the next day, September 17, 2008, "the Government unilaterally fired AIG's CEO and replaced him with a new CEO (Edward M. Liddy) who would be under FRBNY's control." Id. ¶ 60; see also Tr. 57, 67, 106, 109 (Boies). Starr alleges that "[a]t all relevant times, Mr. Liddy acted as if he were under the control of and the agent of FRBNY and the Government." Compl. ¶ 61.

Thereafter, Starr asserts that the Government used its control of AIG to expropriate the economic and voting interests of the then-existing common stock shareholders. See Pl.'s Opp. 22-23. Starr alleges that pursuant to the Credit Agreement,

[11] "Minority" shareholders refers to the AIG common shareholders at the time of the alleged expropriations. The Court refers to them as "minority" shareholders in the sense that, according to Starr's allegations, they no longer controlled AIG after September 16, 2008. Tr. 78 (Boies). The Court does not refer to them as minority shareholders because of the percentage of their ownership interest in AIG common stock. See In re PNB Holding Co. S'holders Litig., No. Civ. A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) (Under Delaware law, "a controlling shareholder exists when a stockholder: 1) owns more than 50% of the voting power of a corporation; or 2) exercises control over the business and affairs of the corporation." (citing Kahn v. Lynch Comm. Sys., Inc., 638 A.2d 1110, 1113-14 (Del. 1994))).

signed September 22, 2008, the Government took 79.9% of the minority shareholders' "equity interest," consisting of dividends and liquidation value, as well as 79.9% of their "first voting interest," consisting of dividend and shareholder voting rights (but not yet common stock only voting rights). Tr. 101 (Boies); see also Slide 20.[12] Subsequently, Starr alleges that the Government took 79.9% of the minority shareholders' common stock only voting rights by means of the reverse stock split on June 30, 2009 and the conversion of the Series C Preferred Stock into over 562 million shares of common stock on January 14, 2011. Tr. 101 (Boies); see also Slide 16.

The Government concedes that the Gatz-Rossette line of cases recognize the right of a plaintiff to bring a direct claim where a stockholder uses its "'majority or effective control'" to dilute minority shares.[13] See Def.'s Rep. 5 (quoting Rossette, 906 A.2d at 100). The Government contends, however, that Starr's claim does not fall within that Gatz-Rossette framework because the Government was not a stockholder, nor did it have majority or effective control of AIG, when the purported dilution occurred. Id.

Key to the Government's position is its assertion that any alleged dilution occurred on September 16, 2008, when AIG agreed to transfer a 79.9% equity interest to the Government in exchange for the $85 billion loan. Id. (citing Compl. ¶ 4); Tr. 17 (Todor). In the Government's view, the subsequent events—the issuance of the Series C Preferred Stock to the Trust, the reverse stock split, and the conversion of the preferred stock into common stock—were merely implementations of the September 16 agreement. See Tr. 17-18 (Todor). On September 16, 2008, however, the Government notes that "neither the United States nor the FRBNY was a common shareholder," as AIG did not issue the Series C Preferred Stock to the Trust until March 1, 2009 and the Government did not acquire AIG common stock until January 14, 2011. See Def.'s Rep. 5 (citing Compl. ¶¶ 52-54); Tr. 17-18 (Todor). Moreover, the Government asserts that it could not have used its majority or effective control to increase its share at the expense of the minority because it acquired control at the same time it acquired its 79.9% share: on September 16, 2008. See Tr. 17-18 (Todor).

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[12] During the oral argument held on June 1, 2012, counsel for Starr provided the Court with a binder consisting of copies of power point slides, which Starr used to support its argument. Upon request by the Government, the Court agreed to consider only those slides to which counsel for Starr referred during his presentation. This opinion refers to those slides as "Slide __."

[13] Initially, in its motion to dismiss, the Government failed to address Gatz or Rossette and contended that Starr's dilution claim was solely derivative and not direct because AIG suffered the alleged harm and would receive the benefit of any recovery. Def.'s Mot. 17. In its reply, however, the Government conceded that "the [*Rossette*] and *Gatz* cases recognize[e] that ordinarily derivative claims for dilution can become direct if the plaintiff sustainably alleges that the dilution was accomplished by a controlling shareholder that used its majority power discriminatorily to dilute minority shareholders." Def.'s Rep. 5.

3. Analysis

In determining whether Starr has standing to advance its direct claim, the Court notes that the question of when the purported dilution occurred is a factual one that cannot be decided definitively at this time. The Court does not have before it the September 16, 2008 term sheet or the September 22, 2008 Credit Agreement and cannot make any conclusive determinations as to what rights the Government obtained pursuant to either agreement. While the Government maintains that any purported dilution occurred on the same date the Government acquired control of AIG, the Court must accept as true Starr's position to the contrary.

The Court notes that it is unclear why, if Starr's position is to be believed, the term sheet was binding as to control but not as to the transfer of the 79.9% interest in AIG (or why the former was not simply the result of the latter). As stated in Starr's Complaint, the term sheet consisted of three terms, including "a requirement that the Government be given control of AIG" and "a promise that the Government would receive a nearly 80% equity stake in AIG." ¶ 55(a). Starr's position appears to be that while the term sheet was sufficient to establish the Government's control over AIG, it was not sufficient to give the Government the "contractual right" to a 79.9% interest in AIG. Tr. 53, 109 (Boies). Regardless, insofar as Starr claims that the Government first acquired control of AIG (on September 16, 2008) and then used that control to expropriate a 79.9% interest in AIG from the minority shareholders, <u>Gatz</u> and <u>Rossette</u> can be read to support the right of the minority shareholders to bring a direct claim for the expropriation of a portion of the economic value and voting power embodied in their interests.

The Court acknowledges that the circumstances in <u>Gatz</u> and <u>Rossette</u> are distinguishable from those here. Both <u>Gatz</u> and <u>Rossette</u> involved breach of fiduciary duty claims rather than takings claims. Moreover, even under Starr's rendition of the facts, the Government was not a stockholder when the initial dilution purportedly occurred, as the parties agree that stock was not issued to the Trust until March 1, 2009. <u>See</u> Tr. 25 (Simkin), 101 (Boies).

Nevertheless, the Court is persuaded that the facts alleged here are sufficiently analogous to those in <u>Gatz</u> and <u>Rossette</u> to support Starr's right to maintain a direct claim for the taking of its equity and voting interests. Whether styled as a takings claim or a breach of fiduciary duty claim, the Plaintiffs here, like those in <u>Gatz</u> and <u>Rossette</u>, seek compensation for the improper extraction of the economic value and voting power associated with their shares of stock. In <u>Gatz</u> and <u>Rossette</u>, it was important that a controlling shareholder existed because only then did a fiduciary duty to the minority shareholders arise. As stated in <u>Dubroff v. Wren Holdings, LLC</u>, <u>Rossette</u>'s "linkage of equity dilution claims to a controlling shareholder grows out of the principle that a controlling shareholder owes fiduciary duties to the shareholders of the corporation she controls." C.A. No. 3940-VCN, 2009 Del. Ch. LEXIS 89, at *11 (May 22, 2009). Here, however, the Government has a preexisting duty under the Fifth Amendment not to take private property for public use without paying just compensation. As in Gatz and Rossette, the Government had an obligation not to appropriate the minority shareholders' property interests[14]—irrespective of whether the Government was a stockholder when the purported dilution occurred.

Given the Government's preexisting duty not to take property without paying just compensation, the Court looks to Gatz and Rossette to determine *who* has the right to maintain a takings claim against the Government: AIG or the shareholders individually. As in Gatz and Rossette, Starr claims that AIG was forced to overpay (ultimately in the form of over 562 million shares of common stock) for an asset of lesser value (the Series C Preferred Stock). As in Rossette, Starr's claim falls comfortably within the framework articulated in Tooley. See 906 A.2d at 102. First, assuming the truth of Starr's allegations, the Government extracted from the public shareholders, and redistributed to itself, "a portion of the economic value and voting power embodied in the minority interest." Id. at 100. As a result, AIG's shareholders were harmed "uniquely and individually" to the same extent that the Government benefited. Id. Second, counsel for AIG represented at oral argument that the Government continues to own 61% of AIG today. Tr. 82 (Allerhand). If Starr were to prevail on its derivative claim only, any recovery would go to AIG, with the Government receiving an amount corresponding to its ownership percentage. Because the party that suffers the alleged harm should be the beneficiary of any recovery, the Government's continuing ownership interest in AIG provides further support for the view that Plaintiffs have standing to bring a direct claim. For the foregoing reasons, the Court concludes that Starr has standing to advance its direct claim.

D. Whether Starr Has Adequately Pled Demand on AIG's Board or Excusal of Demand for Purposes of Its Derivative Claim

The Government next argues that the Court should dismiss Starr's derivative claims under RCFC 23.1 because Starr failed to make a demand on AIG's board or to plead adequately why such a demand should be excused.[15] Def.'s Mot. 18. In response, both Starr and Nominal Defendant, AIG have asked the Court to defer ruling on the

[14] This conclusion presupposes that the shareholders have a legally cognizable property interest in the economic value and voting power associated with their shares of common stock. At this stage of the proceedings, the Court finds that they do. See Discussion, p. 31.

[15] RCFC 23.1(b)(3) provides that the complaint must "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort."

demand issue until after the Government's motion to dismiss has been resolved.[16] See AIG Resp. 3; Pl.'s Opp. 24. The Government opposes the proposal to defer ruling on the demand issue, contending that doing so would "reverse proper procedure," "waste judicial resources," and "violate the requirement that a plaintiff possess standing." Def.'s Rep. 6-7.

In light of the purpose underlying the demand requirement, the Court finds no reason to address the demand issue at this time. The purpose of the demand requirement is to protect the "directors' power to manage the affairs of the corporation." Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988) (citing Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984)). As the Supreme Court of Delaware explained in Aronson:

> By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement . . . exists at the threshold, first to insure that a stockholder exhausts his intercorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.

473 A.2d at 811-12. Here, AIG—the party the demand requirement was meant to protect—has not sought to enforce its right to a demand but instead, has requested that the Court defer ruling on the issue. Under such circumstances, the Court is not compelled to address the demand issue at this time.

Moreover, deferring the demand issue will preserve judicial resources. In an order dated March 13, 2012, the Court stated that "in the event that [it] denies the Government's March 12, 2012 motion to dismiss, AIG may file an answer . . . or dispositive motion within twenty days after the Government's filing of its answer." Dkt. No. 35. If the Court were to decide the demand issue now, based upon the parties' filings to date, it is conceivable that it would need to do so again upon receiving the pending filing from AIG. The Government concedes as much. Therefore, in the interest of judicial economy, the Court will rule on the demand issue after it receives AIG's upcoming filing. Once AIG has made its filing, the Court will have all of the parties' views before it and will be in the best position to decide the demand issue definitively.

[16] In its opposition to the Government's motion to dismiss, Starr argued in the alternative that, should the Court decide to rule on the demand issue now, its Complaint satisfies the demand requirement because it adequately demonstrates that demand is excused in this case. Pl.'s Opp. 25.

In sum, concerning the Government's motion to dismiss pursuant to RCFC 12(b)(1), the Court concludes that: (i) 28 U.S.C. § 1500 does not deprive the Court of jurisdiction over this action; (ii) the Court has jurisdiction over Starr's illegal exaction claim; (iii) the Court does not otherwise have jurisdiction over any Due Process claims or any Equal Protection claims; and (iv) Starr has standing to bring its direct claim. In addition, the Court defers the demand issue for the time being. The Court now turns to the Government's motion to dismiss pursuant to RCFC 12(b)(6).

III. Whether Starr Has Failed To State A Claim Upon Which Relief Can Be Granted

In addition to its jurisdictional arguments, the Government urges the Court to dismiss Starr's takings claims, as well as its illegal exaction claim, pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

To survive a 12(b)(6) motion, a plaintiff must provide "'a short and plain statement of the claim showing that [it] is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). The plaintiff must provide more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). A court should assume the truthfulness of all well-pleaded factual allegations "and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556).

In asserting that Starr fails to state a takings claim, the Government makes five primary arguments. The Court addresses each one in turn.

A. Review of Starr's Takings Claims

1. Whether Starr fails to state a takings claim because it has not pinpointed adequately the government action(s) requiring just compensation

a. The parties' arguments

The Government argues that Starr fails to state a takings claim because it does not "pinpoint the specific act for which the Government allegedly owes just compensation." Def.'s Mot. 24. Starr concedes that a "takings analysis requires identification of the action or actions that require just compensation." Pl.'s Opp. 44 n.22. In response to the Government's argument, however, Starr merely states that the Government "cannot credibly claim . . . that it does not understand the basis for Starr's claim that the

Government owes just compensation." Id. Like the Government, the Court has not found Starr's filings to be a model of clarity on this issue. Nevertheless, for purposes of a motion to dismiss, the Court finds that Starr has identified sufficiently the government actions allegedly requiring just compensation.

b. Applicable law

The Federal Circuit has stated that where a plaintiff alleges a taking consisting of "several distinct actions viewed in concert," its "'characterization . . . is too broad.'" Acceptance Ins. Co. v. United States, 583 F.3d 849, 855 (Fed. Cir. 2009) (quoting Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995)). Instead, a plaintiff must "pinpoint what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation." Branch, 69 F.3d at 1575. In Branch, the plaintiff characterized its takings claim as consisting of the Government's "assessment and . . . consequent seizure and closure of the Maine National Bank." Id. The Federal Circuit held that the plaintiff's characterization was "too broad." Id. The court noted that the bank's insolvency, which led to its seizure and closure, was the "direct result" of the Government's assessment of liability. Id. Consequently, the court pinpointed the assessment as the action to be examined for a Fifth Amendment taking. Id.

c. Analysis

During oral argument on the Government's motion to dismiss, Starr characterized the alleged taking of a 79.9% equity interest in AIG as occurring in three steps, including the signing of the Credit Agreement, the reverse stock split, and the conversion of the Series C Preferred Stock into over 562 million shares of common stock. Tr. 52-56 (Boies); Slide 18. As in Acceptance and Branch, the Court finds that Starr's characterization is too broad. Instead, the Court must determine the precise event that fixed any potential government liability. Creppel v. United States, 41 F.3d 627, 634 (Fed. Cir. 1994) (internal citation omitted).

Notwithstanding Starr's characterization at oral argument, Starr's Complaint, opposition brief, and other statements to the Court serve to pinpoint the precise government actions that it contends require just compensation. There are three such actions. First, in its Complaint and statements during oral argument, Starr consistently alleges that the Government took a 79.9% equity interest in AIG when it "imposed" the Credit Agreement on AIG's board, Compl. ¶ 64, thereby obtaining a "contractual right" to the Series C Preferred Stock convertible into 79.9% of AIG's common stock, Tr. 53 (Boies); see also Compl. ¶¶ 63, 65; Tr. 51-52, 100-01, 105 (Boies). Moreover, in response to the Government's argument that it had not identified adequately the government conduct requiring just compensation, Starr highlighted its allegations that "the credit agreement contained . . . disproportionate terms" and that the Government "coerced the AIG Board." Pl.'s Opp. 44 n.22. Starr's response supports the view that it alleges the first taking occurred when the Government imposed the Credit Agreement on AIG's board. This view also comports with Starr's direct claim, whereby Starr maintains that the Government took 79.9% of the minority shareholders' "equity interest" and "first voting interest" by means of the Credit Agreement. Tr. 100-01 (Boies); see also Slide 20. The actual issuance of the preferred stock to the Trust was simply the "direct result," Branch, 69 F.3d at 1575, or "implement[ation]," as Starr puts it, Tr. 101 (Boies), of the provisions of the Credit Agreement.

Second, in its Complaint, statements during oral argument, and opposition brief, Starr alleges that pursuant to the reverse stock split on June 30, 2009, the Government took the remaining voting rights (the voting rights for the common stock only votes) of the then-existing common stock shareholders. Compl. ¶¶ 100, 102, 177; Tr. 54-55, 105 (Boies); Slide 16; Pl.'s Opp. 44 n.22 (citing the Government's "nullifi[cation] [of] shareholder protections" as an action requiring just compensation). To be precise, Starr claims that the Government took the common stock shareholders' "right to exclude [the] Government (or anyone) from diluting [the] pool of Common Stock by more than 40%," Slide 21, by eliminating the majority control the common stock shareholders had when voting as a separate class, see Compl. ¶¶ 81, 95-97.

To address Starr's claim, the Court recaps the relevant events that occurred during the June 2009 AIG shareholder meeting. As noted, pursuant to the Credit Agreement, the Government received the right to the Series C Preferred Stock convertible to 79.9% of AIG common stock. See Compl. ¶¶ 65-66, 79. Prior to the June 30, 2009 shareholder meeting, however, over 60% of AIG's common stock was issued or reserved, such that the Government could not convert its preferred shares into 79.9% of AIG common stock. See id. ¶¶ 79-80. With over 60% of all authorized common stock, the common stock shareholders possessed majority voting power when voting as a separate class. See id. ¶¶ 79-83, 95-97; Slide 21.

By means of the reverse stock split on June 30, 2009, the Government decreased the number of issued shares from approximately 3 billion to approximately 150 million, while leaving the number of authorized shares at 5 billion. See Compl. ¶ 97. "Through these machinations," id., the Government increased the percentage of authorized shares available for conversion, thereby enabling the Government ultimately to obtain an approximate 90% interest in AIG common stock, see id. ¶¶ 94-101. Correspondingly, the common shareholders lost their ability to prevent anyone from diluting the pool of common stock by more than 40% and ultimately, lost their majority vote when voting as a separate class. Slide 21. Even if the Government had the contractual right under the Credit Agreement to convert its preferred stock into 79.9% of AIG common stock, see id. ¶ 65; Tr. 53 (Boies), it was unable to do so prior to the reverse stock split, and the then-existing common shareholders retained their majority in a separate class vote. Thus, the second taking accrued, if at all, when the Government effected the reverse stock split on June 30, 2009.

Third, Starr has maintained throughout this litigation that the Government effected a taking in November and December 2008 when it used the $32.5 billion in cash collateral posted by AIG to purchase certain CDOs from AIGFP counterparties. Compl. ¶¶ 108, 112-115; Tr. 106 (Boies); see also Pl.'s Opp. 29, 44 n.22 (citing the Government's use of AIG assets "to effect a 'backdoor bailout'" as an action requiring just compensation).

Finally, Starr also alleges that the Government effected a taking when it converted its Series C Preferred Stock to 562,868,096 shares of AIG common stock on January 14, 2011. Tr. 52-56 (Boies); Slide 18. In its Complaint, Starr points to different government actions as amounting to the same taking. Compare Compl. ¶¶ 66-67 (indicating that the Government took a 79.9% equity interest in AIG on September 22, 2008 pursuant to the Credit Agreement), with id. ¶¶ 101, 101(a) (indicating that the Government took the same interest on January 14, 2011 pursuant to the conversion of its preferred stock into common stock). Moreover, in other filings with the Court, Starr specifically states that the January 14, 2011 conversion was a taking "independent[]" of the alleged taking on September 22, 2008. Slide 18.

As the Government points out, however, "the same equity interest cannot have been taken twice." Def.'s Rep. 23. If Starr's claims are to be believed, on September 22, 2008, the Government obtained a "contractual right" to the "Series C Preferred Stock convertible to 79.9% of AIG's equity." Compl. ¶ 65; Tr. 53 (Boies). If the Government, in fact, "took" the 79.9% equity interest in AIG on September 22, 2008, it could not have taken that interest again on January 14, 2011. Instead, after September 22, 2008, the Government held the property interest in the preferred stock and the right to convert it into common stock. Under such circumstances, the Government's conversion of its preferred stock into over 562 million shares of common stock could not have been an additional taking.

In sum, Starr's filings and representations allege that the actions the Government could not carry out without paying just compensation were: (1) the imposition of the Credit Agreement on September 22, 2008; (2) the reverse stock split on June 30, 2009; and (3) the Government's use of AIG collateral to purchase certain CDOs from AIG counterparties in November and December of 2008. The Court emphasizes that it makes no determinations as to the ultimate merit of Starr's claims. Nevertheless, for purposes of this motion to dismiss, the Court concludes that Starr has sufficiently identified the government actions allegedly requiring just compensation.

2. Whether Starr fails to state a takings claim because it alleges the FRBNY's actions were unauthorized or unlawful

The Government next argues that "to maintain a takings claim, Starr must, at a minimum, concede that the actions that it alleges constitute takings were authorized and lawful." Def.'s Mot. 25. The Government characterizes Starr's takings claims as "premised upon allegations that the Government violated Section 13(3) of the Federal Reserve Act." Id. As such, the Government urges the Court to dismiss Starr's action for failure to state a takings claim. Id. In response, Starr denies asserting that the Government's actions were "unauthorized" as the term is used in the case law to preclude a takings claim. Pl.'s Opp. 45. Starr also rejects the Government's position that it must concede the legality of the government action for all purposes to maintain a takings claim. Id.

To state a cognizable takings claim, a plaintiff must allege: (1) that "the government conduct at issue was 'authorized,' *i.e.*, . . . chargeable to the government"; and (2) "a *Fifth Amendment* taking for which just compensation is sought, rather than a separate statutory or regulatory violation for which damages or equitable relief is sought." Del-Rio Drilling Programs Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998). As explained below, the Court finds that Starr has satisfied both of the Del-Rio requirements to state a takings claim.

a. Authorization

The Federal Circuit has made clear that "[a] compensable taking arises only if the government action in question is authorized." Del-Rio, 146 F.3d at 1362. This is because "when a government official engages in *ultra vires* conduct, the official 'will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, cannot create a claim against the Government founded upon the Constitution.'" Id. (quoting Hooe v. United States, 218 U.S. 322, 335 (1910)). Government conduct is *ultra vires*, or unauthorized, if it is "either explicitly prohibited or . . . outside the normal scope of the government officials' duties." Id.

Here, while Starr alleges that the Government acted in *excess* of its statutory authority under Section 13(3), see Compl. ¶¶ 12, 58(a), 76-77, 171, Starr does not allege that Section 13(3) explicitly prohibited the government actions, see Pl.'s Opp. 44. Moreover, Starr does not allege that in acting to manage the 2008 financial crisis, government officials acted outside the normal scope of their duties, see Pl.'s Opp. 44, and the Government certainly does not maintain that its actions were *ultra vires*, see Def.'s Mot. 8 (stating that "the FRBNY agreed to assist AIG using its emergency authority under section 13(3) of the Federal Reserve Act"). Instead, Starr alleges that the government actions were "authorized" at the highest levels. Pl.'s Opp. 44-45 ("[T]he takings here were approved by senior Government officials, including the Secretary of the Treasury."); Compl. ¶¶ 104-06. As such, the issue of authorization does not bar Starr's takings claims.

b. Lawfulness

Regarding the lawfulness of a governmental action in the takings context, the Federal Circuit has been careful to emphasize two related points. As an initial matter, a plaintiff is not barred from advancing a takings claim simply because it alleges that the government conduct was unlawful on other grounds. See Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006); Del-Rio, 146 F.3d at 1362. In Del-Rio, the Federal Circuit noted that in the takings context, courts have distinguished between unauthorized conduct and conduct that is authorized but nonetheless unlawful. 146 F.3d at 1362. The court noted that "a government official may act within his authority even if his conduct is later determined to have been contrary to law" and held that it is no barrier to a takings claim that "the government's action was legally flawed in some respect." Id. at 1362-63.

In evaluating a takings claim, however, courts assume that the government conduct at issue was lawful and look to whether that action constituted a taking in violation of the Fifth Amendment. Acadia Tech., 458 F.3d at 1331; Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001). Again, the Federal Circuit has been careful to distinguish between its valid exercise of jurisdiction where a plaintiff claims the government action constituted a taking *regardless* of whether the action was unlawful, and its lack of jurisdiction where a plaintiff claims the government action constituted a taking *because* the action was unlawful. Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1369 (Fed. Cir. 2005) (internal citation omitted). In Lion Raisins, the plaintiff alleged that the agency action constituted a taking *because* the action was unlawful. Id. The Federal Circuit held that under those circumstances, the plaintiff did not have a right to litigate the issue as a takings claim but instead should have used the mandated administrative review proceeding. Id. at 1369-70.

In addition to its takings claims, Starr maintains that the Government exceeded its authority under Section 13(3) of the FRA to illegally exact a 79.9% interest in AIG. Pl.'s Opp. 46. Under the Federal Circuit's reasoning from Acadia Tech., 458 F.3d at 1330, and Del-Rio, 146 F.3d at 1362, Starr's allegation that the Government acted unlawfully does not bar Starr from advancing its takings claims. In fact, the Court of Federal Claims has held specifically that a plaintiff may advance a takings claim and an unlawful exaction claim concurrently. See Figueroa, 57 Fed. Cl. at 496.[17]

[17] In the event future factual development shows that the Government's actions were not authorized under Section 13(3) of the FRA, Starr could advance its illegal exaction claim to recover just compensation for the value of the property at issue. As in asset forfeiture cases, where a plaintiff seeks the value of wrongly-forfeited assets that may have been sold, damaged, or destroyed, see e.g., Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137 (2000); Bowman v. United States, 35 Fed. Cl. 397 (Fed. Cl. 1996), the Government here cannot simply restore Plaintiffs' voting power or proportional equity stake. "The egg has been scrambled and there is no apparent way to restore the status quo ante." Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002).

Further, Starr asserts that its takings claim "does not depend on successfully establishing that the Government lacked authority under Section 13(3)." Pl.'s Opp. 46. Starr maintains that even if the Government acted lawfully under Section 13(3) in demanding a 79.9% interest in AIG, the Government's actions still constituted a taking under the unconstitutional conditions doctrine. Tr. 102 (Boies) ("[I]t is either illegal exaction because it's illegal or it's an unconstitutional condition if it is pursuant to an authorized condition . . . that is disproportionate."). This demonstrates that unlike the plaintiff in Lion Raisins, Starr is not merely restating a statutory violation as a takings claim. This conclusion is supported by the fact that Starr seeks just compensation corresponding to the value of the property allegedly taken by the Government, rather than damages based upon a statutory violation. See Compl. at 57, ¶ H. The Court concludes that Starr has stated a takings claim insofar as it concedes that the government actions at issue were authorized and constituted a taking irrespective of their lawfulness.

3. Whether Starr fails to state a takings claim because it has not shown that it or AIG lost a legally cognizable property interest

The Government also contends that Starr fails to state a takings claim because it has not identified a legally cognizable property interest taken by the Government. To establish a takings claim, a plaintiff must demonstrate as a threshold matter the existence of a legally cognizable property interest. See Am. Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363, 1371 (Fed. Cir. 2004) (citing Maritrans Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003)). If the plaintiff fails to do so, the court's takings inquiry ends. Id. (citing Maritrans, 342 F.3d at 1352).

Starr identifies at least three property interests allegedly taken by the Government: (1) the "economic value and voting power" associated with the Plaintiffs' shares of AIG common stock; (2) the 79.9% equity interest in AIG, ultimately represented by 562,868,096 shares of AIG common stock;[18] and (3) the $32.5 billion of collateral posted by AIG prior to the formation of ML III. See Pl.'s Opp. 29. For purposes of Starr's derivative claim, it is not in dispute that the 79.9% equity interest in AIG is a legally cognizable property interest. Tr. 39 (Simkin).[19] The question remains, however, whether Starr has a legally cognizable property interest in: (1) the equity and voting power associated with the Plaintiffs' shares of AIG common stock for purposes of Starr's direct

[18] Whether stated as a 79.9% equity interest or 562,868,096 shares of AIG common stock, it is undisputed that the equity interest in AIG is a protectable property interest. As explained above, however, Starr cannot maintain that the Government took the same property interest more than once. Thus, while Starr identifies both the 79.9% equity interest and the over 562 million shares of AIG common stock as protectable property interests, the Court views the taking of AIG equity as occurring, if at all, on September 22, 2008.

[19] The Government nevertheless denies that it "took" the 79.9% equity interest in AIG, as it maintains that it paid $85 billion in consideration for the 79.9% interest. Tr. 39 (Simkin).

claim; and (2) the $32.5 billion of collateral posted by AIG for purposes of Starr's derivative claim.

a. The equity and voting power associated with Plaintiffs' shares of AIG common stock

i. The parties' arguments

The Government contends that Starr does not have a cognizable property interest in the economic value and voting power associated with its shares of AIG common stock. Def.'s Rep. 23-24. It emphasizes that Starr and the other AIG shareholders retain their shares of AIG common stock and do not have a cognizable property interest in either a fixed value or a particular percentage of equity or voting control in AIG. Def.'s Mot. 36-37. According to the Government, "[c]ommon stock comes with no guarantees or rights to proceeds, and share value is therefore not a protected property interest." Id. at 37. In addition, the Government maintains that Starr's common stock did not carry with it "a right to exclude others from entering the pool of AIG Common Stock," and thus, the stock did not include "a right to a particular percentage of equity or voting control in AIG." Id. The Government avers specifically that "voting rights are not property for purposes of the Takings Clause" but are, "at most, collateral interests" not protectable under the Fifth Amendment. Def.'s Rep. 25.

By contrast, Starr contends that it has a cognizable property interest in the equity and voting power associated with its shares of AIG common stock. Pl.'s Opp. 16. Starr cites Gatz, 925 A.2d at 1281, Rossette, 906 A.2d at 100, and Dubroff v. Wren Holdings, LLC, Nos. 3940-VCN, 6017-VCN, 2011 WL 5137175, at *8 (Del. Ch. Oct. 28, 2011), for its position that "settled Delaware law . . . protects against 'expropriation' of the 'economic value and voting power' of public shareholders' stock through the exercise of a party's control." Id. While Starr concedes that the Government did not physically take Plaintiffs' common shares, it asserts that the Government "engineered a transaction [the reverse stock split] that accomplished precisely the same result in economic substance." Id. at 5, 17; Tr. 110 (Boies) ("[T]he substance of what happened here was that [the Government] took 80 percent of the stock rights . . . Starr had, 80 percent of the dividend rights, 80 percent of the liquidation rights, 80 percent of the voting rights."). According to Starr, Delaware law "prohibits the use of [such] stratagems" by entitling common shareholders to vote as a class on any proposal that would serve to dilute the shareholders' interests. Pl.'s Opp. 19; Tr. 105 (Boies).

ii. Applicable law

While the Fifth Amendment protects against the taking of private property for public use without just compensation, the U.S. Constitution does not "create or define the scope of the 'property' interests protected." Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1213 (Fed. Cir. 2005). Instead, courts look to "background principles" and "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth" Amendment. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (quoting Bd. of Regents of State Colleges. v. Roth, 408 U.S. 564, 577 (1972)). "These 'background principles' and 'rules and understandings' focus on the nature of the citizen's relationship to the alleged property, such as whether the citizen had the rights to exclude, use, transfer, or dispose of the property." Members of the Peanut Quota Holders Ass'n v. United States ("Peanut Quota"), 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing United States v. Gen. Motors, 323 U.S. 373, 378 (1945)). Courts have long-recognized that the protections of the Takings Clause apply to intangible property, in addition to real and personal property. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) ("That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.").

To determine whether an intangible interest constitutes a property interest protected by the Fifth Amendment, the Federal Circuit has noted that "express statutory language can prevent the formation of a protectable property interest." Peanut Quota, 421 F.3d at 1330 (citing United States v. Fuller, 409 U.S. 488, 494 (1973)). Absent such language, courts look to whether the alleged property interest includes the right to transfer and the right to exclude, which "indicia are part of an individual's bundle of property rights." Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982)). The Court thus looks to whether the equity and voting power associated with the Plaintiffs' shares of AIG common stock include the right to transfer and the right to exclude.

iii. Analysis

Transferability

"The right to transfer is a traditional hallmark of property." Id. at 1332 (citing Loretto, 458 U.S. at 435-36). It is undisputed that stock is personal property and transferable under Delaware law. See Del. C. Ann. tit. 8, § 159 ("The shares of stock in every corporation shall be deemed personal property and transferable."). In addition, Delaware law recognizes the right of shareholders to transfer the voting rights associated with their stock. See Del. C. Ann. tit. 8, § 218. As stated by the Delaware Court of Chancery, "[s]hareholders are free to do whatever they want with their votes, including selling them to the highest bidder." Hewlett v. Hewlett-Packard Co., C.A. No. 19513-NC, 2002 Del. Ch. LEXIS 44 at *11 (Apr. 8, 2002); see also Schreiber v. Carney, 447 A.2d 17, 25 (Del. Ch. 1982) ("Delaware law has for quite some time permitted stockholders wide latitude in decisions affecting the restriction or transfer of voting rights."). The transferability of shareholder equity and voting rights under Delaware law supports the view that they constitute protected property under the Fifth Amendment.

See Peanut Quota, 421 F.3d at 1333; see also Am. Pelagic, 379 F.3d at 1374 (noting that the authority to assign, sell, or transfer indicates a protectable property interest). The Court therefore turns to the question of excludability.

Excludability

The U.S. Supreme Court has called the right to exclude "perhaps the most fundamental of all property interests." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (internal citations omitted). As the Federal Circuit stated in Mitchell Arms, Inc. v. United States, "[t]he chief and one of the most valuable characteristics of the bundle of rights commonly called 'property' is 'the right to sole and exclusive possession – the right to *exclude* strangers, or for that matter friends, but especially the Government.'" 7 F.3d 212, 215 (Fed. Cir. 1993) (quoting Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (emphasis original)).

Here, the Government maintains that Starr did not have a property interest in a specific value or particular percentage of voting control in AIG because Plaintiffs' common stock did not include the "right to exclude." Def.'s Mot. 37; Def.'s Rep. 24-25. In the Government's view, Delaware law did not entitle the common shareholders to prevent, through a separate class vote or otherwise, the reverse stock split that allowed the Government to exchange its preferred shares for common stock and thereby dilute the minority shareholders' interests. Def.'s Rep. 25-26. While Starr concedes that Delaware *statutory* law did not entitle the common shareholders to vote as a class on the reverse stock split, Starr submits that the common shareholders were entitled to such a vote due to AIG's past representations to the Delaware Court of Chancery. Tr. 105 (Boies). Assuming the truth of the allegations in Starr's Complaint, the Court agrees with Starr.

According to Starr, a lawsuit was filed in the Delaware Court of Chancery on November 4, 2008 (Walker v. AIG, CA No. 4142-CC) "to ensure that the rights of the Common Stock shareholders of AIG were respected with regard to the Government's acquisition of a controlling interest in the Company." Compl. ¶ 85. The lawsuit allegedly "sought . . . 'an order declaring that . . . [the Series C Preferred Stock] is not convertible into common stock absent a class vote by the common stock to increase the number of authorized common shares, as well as all relief appropriate in light of the Board of Directors' . . . failure to act in the interests of the common stockholders who are entitled to reject the dilution of their shares." Id. The Delaware Court of Chancery found the request for relief moot, however, in light of AIG's representation that there would be a separate vote of the common shareholders on any proposal "'that increases the number of authorized common shares and decreases the par value of the common shares.'" Id. ¶ 86 (quoting the Delaware court's February 5, 2009 "Consent Order").

Although the Consent Order required a separate vote to "*increase* the number of *authorized* common shares," (emphasis added) as opposed to *decrease* the number of *issued* shares (what allegedly occurred here), the order should be read in light of the fact that the lawsuit also requested appropriate relief based upon the common shareholders' right "'to reject the dilution of their shares.'" Id. ¶ 85. In finding the request for relief moot due to AIG's representations, the Delaware Court of Chancery appears to have sought not only to protect the common shareholders' right to a class vote on any proposal to *increase* the number of authorized shares, but also to protect the common shareholders from the dilution of their shares generally. While the Government may have complied technically with the Consent Order by allowing the common shareholders to vote as a class on Proposal 3, the Government appears to have violated the spirit, if not the letter, of the order by not holding a common shareholder vote on the reverse stock split, which led to the dilution of the common shareholders' equity and voting interests.

The Court does not have before it the entirety of the filings in the Delaware Court of Chancery and makes no definitive determination at this time as to whether the common shareholders were entitled to a separate class vote on the reverse stock split. Assuming the truth of the allegations in Starr's Complaint, however, it appears that the common shareholders were entitled to such a vote under the Consent Order; they appear to have had a right to exclude at least the holders of the Series C Preferred Stock from diluting their shares of common stock. The potential existence of that right to exclude further supports Starr's view that the common shareholders had a cognizable property interest in the equity and voting power associated with their shares.

Delaware case law

In addition to the issues of transferability and excludability, there is significant Delaware case law to support the view that the equity and voting power associated with the common shareholders' stock is a property interest protectable under the Fifth Amendment. Delaware courts have consistently protected the economic and voting power embodied in public shareholders' stock by entitling them to recover when that power is expropriated from them by a controlling party. Feldman, 951 A.2d 727 (Del. 2008); Gatz, 925 A.2d 1265 (2007); Rossette, 906 A.2d 91 (2006); Tri-Star, 634 A.2d 319 (1993). The right to recover is not premised on the *physical* expropriation of a shareholder's stock; instead, it is "premised on the theory that the corporation, by issuing additional stock for inadequate consideration, made the complaining stockholder's investment less valuable." Feldman, 951 A.2d at 732.

The Government argues that any claim that it "indirectly affected the value of property . . . is not compensable pursuant to the Takings Clause." Def.'s Rep. 24. However, the authority cited by the Government to support this principle is distinguishable from the instant case. In Air Pegasus, the plaintiff did not have a protectable property interest because the "economic injury [was] not the result of the government taking [the plaintiff]'s property, but [was] the more attenuated result of the government's purported taking of other people's property." 424 F.3d at 1212. Unlike in

Air Pegasus, the alleged harm here can be said to have resulted from a direct appropriation of the common shareholders' property rather than that of a third party.

The common shares ultimately issued to the Government did not belong to the minority shareholders. Nonetheless, Starr asserts that the taking of its equity and first voting interest occurred pursuant to the Credit Agreement when the Government obtained the contractual right to a 79.9% share of AIG common stock. Insofar as the then-existing common shareholders held 60% of AIG's authorized common stock, the Government, in obtaining the contractual right to 79.9% of it, by necessity "took" (or at least acquired the authority to take) a portion of the shareholders' equity and voting interests. Moreover, in effecting the reverse stock split on June 30, 2009, the Government allegedly reduced the number of shares that each shareholder held by a 20:1 ratio. In Starr's view, the reverse stock split was akin to the Government appropriating directly 79.9% of the shareholders' stock. Starr claims that through these "machinations," the Government "destroyed" the value of the common shareholders' stock. Compl. ¶¶ 97, 169. The actual mechanics and effect of the Credit Agreement, reverse stock split, and issuance of common stock are factual questions to be considered at a later stage. For purposes of the Government's motion to dismiss, however, Starr has sufficiently alleged the destruction of a property interest protected under Delaware law.[20]

Finally, the Government's argument that voting rights are not property under the Fifth Amendment ignores Delaware case law specifically protecting voting interests. Delaware courts have observed that voting is a fundamental shareholder right, In re Gaylord Container Corp. S'holders Litig., 747 A.2d 71, 81 (Del. Ch. 1999) (internal citation omitted), and have recognized the right of shareholders to bring a direct claim for the dilution of their voting power, see id.; Oliver v. Boston Univ., C.A. No. 16570-NC, 2006 Del. Ch. LEXIS 75 at *76 (2006). Based on the foregoing, the Court concludes that Starr has identified, at this stage, a protectable property interest in the equity and voting power associated with the Plaintiffs' shares of common stock.

b. The $32.5 billion of collateral posted by AIG prior to the formation of ML III

Finally, the Government maintains that AIG did not have a property interest in the $32.5 billion in collateral AIG posted prior to the formation of ML III. Def.'s Rep. 26. In the Government's view, "AIG had to post cash collateral to its CDS counterparties because of the fall of the value of the [underlying CDOs], as well as the fall of AIG's credit rating." Id. at 26-27. Once AIG posted the collateral, it no longer had a property interest in it. Id. at 27. Moreover, even if AIG had reason to expect that its obligations

[20] The U.S. Supreme Court has stated expressly that "destruction is tantamount to taking." United States v. Gen. Motors Corp., 323 U.S. 373, 384 (1945).

could be compromised for less than face value, "it had no constitutionally-protected property interest" in that expectation. Id.

At the outset, the Court wishes to clarify the precise property interest allegedly taken by the Government. Starr has maintained that the Government effected a taking of AIG property in connection with the ML III transactions in November and December 2008. Starr's Complaint is unclear, however, as to whether Starr seeks just compensation for the alleged taking of AIG's $32.5 billion in cash collateral; $5 billion equity investment in ML III; or residual interests in the CDO assets purchased by ML III. Read together, however, Starr's Complaint, opposition brief, and statements during oral argument indicate that Starr specifically claims a taking of a portion of the $32.5 billion in cash collateral AIG posted prior to the formation of ML III.

Starr claims that AIGFP's CDS counterparties received close to face value through the ML III transactions but that AIG's obligations could have been compromised for "substantially less." Compl. ¶¶ 116-17. Specifically, during oral argument, counsel for Starr averred that the CDOs purchased by ML III "were worth, at most . . . 60 cents on the dollar" and that "some of the counter[]parties offered to compromise." Tr. 65 (Boies). "Given the Government's control of AIG," however, AIG was made to forfeit the collateral "in its entirety." Pl.'s Opp. 20-21. Given these representations, the Court concludes that the property interest Starr alleges the Government took pursuant to the ML III transactions is the portion of the $32.5 billion in cash collateral retained by AIGFP's counterparties in excess of the compromise amount the counterparties might have accepted. The relevant question for the Court therefore, is whether AIG has a legally cognizable property interest in the portion of the $32.5 billion in collateral that might have been preserved by compromise.

Again, the Court does not have before it the documents giving rise to AIG's obligations to post collateral or those underlying the ML III transactions. Accordingly, the Court finds it premature to rule definitively on the rights held by the relevant parties and hence, the existence of AIG's property interest in the ML III collateral. Nonetheless, the Court concludes that the collateral itself would be a protectable property interest under the Fifth Amendment.

The Federal Circuit has held that generalized statutory obligations to pay money do not constitute unconstitutional takings of private property. See Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (en banc) (internal citation omitted). However, a specific sum of money, "derived from ownership of particular deposits in an established account," is a protectable property interest under the Fifth Amendment. Adams v. United States, 391 F.3d 1212, 1224-25 (Fed. Cir. 2004) (recognizing a depositor's property right in the interest accruing in a custodial account).

Here, the $32.5 billion in collateral posted by AIG is more akin to the property described in Adams than that invoked in Commonwealth Edison. AIG did not make an outlay to the Government pursuant to any industry-wide statutory scheme. Rather, according to Starr, AIG posted cash collateral to AIGFP counterparties to secure specific CDO assets. The counterparties merely held AIG's money, pending fluctuations in AIG's credit rating and in the value of the underlying CDOs. In this sense, the counterparties held AIG's cash collateral in constructive accounts pending events in the financial markets. The collateral is thus comparable to the "deposits in an established account" found to be protectable property interests in Adams.

Moreover, as noted in Hearts Bluff Game Ranch, Inc. v. United States, a key indicator of a property right is the "ability to sell, assign, transfer, or exclude." 669 F.3d 1326, 1330 (Fed. Cir. 2012). Here, pursuant to the ML III transactions in November and December 2008, the AIGFP counterparties retained all of AIG's collateral in exchange for their CDOs. See Compl. ¶ 116. These transactions illustrate that the collateral was capable of "sale," "assignment," or "transfer." Based on the foregoing, the Court concludes that Starr has adequately alleged a property interest in the disputed portion of the $32.5 billion in collateral posted by AIG prior to the formation of ML III.

4. Whether Starr fails to state a takings claim because its allegations do not demonstrate that the challenged transactions were involuntary

The Government next asserts that Starr fails to allege the type of government action necessary to state a takings claim because the property allegedly taken was acquired through "agreed-upon transaction[s]." Def.'s Mot. 26. In particular, the Government cites four transactions allegedly constituting takings and argues that they were carried out with the requisite consent from AIG: (1) the reverse stock split; (2) the loan agreement; (3) the Government's conversion of its preferred stock into common stock; and (4) the ML III transactions. The Court addresses the voluntariness of each of the four transactions in turn.

a. The reverse stock split

As explained above, Starr brings a direct claim for the Government's alleged expropriation of the shareholders' equity and voting power, expropriated in part by means of the reverse stock split on June 30, 2009. For purposes of its direct claim, Starr maintains that the Government cannot assert consent as a defense to the reverse stock split because the Government "nullified the shareholders' right to withhold consent" by "circumvent[ing] the class vote requirement through a reverse stock split." Pl.'s Opp. 30. The Government rejects Starr's position, contending that Delaware law did not entitle the common shareholders to a separate class vote on the reverse split. Def.'s Rep. 12 (citing Del. C. Ann. tit. 8, §§ 242(a)(3), (b)(2)).

As a preliminary matter, the Court notes that the voluntariness (or not) of the reverse stock split goes only to the alleged taking of what Starr calls "the voting rights for [the] class-specific, common-stock only votes." Slide 20. As explained above, supra Part II.C.2, these are the only rights that Starr has alleged the Government took by means of the reverse split for purposes of its direct claim. See Tr. 101 (Boies). In addition, the voluntariness (or not) of the reverse stock split in June 2009 has no bearing on whether AIG's board voluntarily accepted the loan agreement in September 2008. Insofar as Starr's opposition brief indicates that it does, the Court rejects its position. There have been no allegations that any form of shareholder approval was necessary to enter into the loan agreement; only that certain shareholder approvals were required to effect the reverse stock split. See Tr. 105 (Boies). With the above in mind, the Court turns to whether the Government effected the reverse stock split in contravention of any necessary shareholder approvals.

During oral argument, counsel for Starr conceded that Delaware *statutory* law did not entitle the common shareholders to vote as a separate class on the reverse stock split. Id. Nevertheless, Starr maintains that the reverse stock split "was done in contravention of the [Government's] earlier representation in the Delaware court." Id. As discussed above, the facts alleged in Starr's Complaint indicate that the Consent Order, issued by the Delaware Court of Chancery on February 5, 2009, entitled the common shareholders to vote as a separate class on the reverse stock split. The parties agree that such a vote by the common shareholders did not, in fact, occur. In light of that fact, the Court rejects the Government's consent argument as to the reverse stock split.

b. The loan agreement

i. Whether AIG freely agreed to accept the $85 billion loan

The parties' arguments

The Government contends that Starr fails to state a takings claim because Starr's allegations do not support its assertion that the Government "compelled" AIG to agree to the loan terms offered on September 16, 2008. Def.'s Mot. 28. According to the Government, Starr "does not allege that it or AIG faced any adverse *Government* action should it have rejected those terms, or that any governmental power was invoked or even existed to compel acceptance of these terms." Id. at 28-29 (emphasis in original). "Rather," says the Government, "the allegations demonstrate that AIG voluntarily transferred equity in exchange for a loan." Id. at 29.

In Starr's view, its Complaint demonstrates that the Government "[c]ompelled" AIG to accept the Credit Agreement by employing a "strategy [that] forced the AIG Board into an unnecessary game of 'chicken' with the global economy, leaving the Board with no choice but to yield." Pl.'s Opp. 31-32. In the weeks leading up to the loan agreement, Starr alleges the Government "contributed to AIG's credit downgrade," thereby "exacerbat[ing] AIG's liquidity issues." Id. at 33. Regarding the loan transaction specifically, Starr claims that the Government offered AIG "grossly" unfair terms and improperly threatened AIG's board by "misleading" it into believing the offer was the only one it would receive and "pressuring" it to decide whether to accept the loan agreement within hours. Id. at 32.

Applicable law

To establish coercion or duress, a plaintiff must show that: (1) it "involuntarily accepted" the other party's terms; (2) "circumstances permitted no other alternative"; and (3) "said circumstances were the result of coercive acts of" the other party.[21] Fruhauf Sw. Garment Co. v. United States, 126 Ct. Cl. 51, 62 (1953). A coercive act is one that is "wrongful," but need not be illegal. Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1330 (Fed. Cir. 2003). For example, an act may be wrongful and hence, coercive if it "violates notions of fair dealing." Id. (quoting Sys. Tech. Assocs., Inc. v. United States, 699 F.2d 1383, 1387-88 (Fed. Cir. 1983)).

This Court's jurisprudence has shown that the bar for establishing duress is a high one. To substantiate a claim of duress, a plaintiff "must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors." Fruhauf, 126 Ct. Cl. at 52. In other words, "[t]he assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities." Id. Moreover, "[a]bsent wrongful conduct, economic pressure and the threat of considerable financial loss do not constitute duress." IMS Eng'rs-Architects, P.C. v. United States, 92 Fed. Cl. 52, 66 (2010) (internal citations omitted). Instead, it must be shown that the plaintiff's assent "was induced by an improper threat which left the recipient no reasonable alternative save to agree." David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981). Such threats include those that "would breach a duty of good faith and fair dealing under a contract as well as threats which, though lawful in themselves, are enhanced in their effectiveness in inducing assent to unfair terms because they exploit prior unfair dealing on the part of the party making the threat." Id. (internal citation omitted).

Analysis

Starr alleges that the Government coerced AIG's board both to accept the terms offered on September 16, 2008, see ¶ 49(a), 58(a), and to accept the Credit Agreement on

[21] The Court notes that Starr does not rely on its allegations of coercion and misrepresentation as freestanding torts, see Pl.'s Opp. 34, as "tort cases are outside the jurisdiction of the Court of Federal Claims," Keene Corp. v. United States, 508 U.S. 200, 214 (1993) (internal footnote omitted). Instead, Starr asserts ancillary tort allegations, including coercion and misrepresentation, in support of its position that AIG did not voluntarily enter into the Credit Agreement. See Pl.'s Opp. 34.

September 22, 2008, see ¶ 64 (stating that the Credit Agreement was "imposed upon, and not voluntarily agreed to by, the AIG board"). In light of Starr's allegation that the Government acquired control of AIG on September 16, 2008, see id. ¶ 55(a); Tr. 109 (Boies), the Court views that date as the relevant one for determining whether AIG voluntarily agreed to the terms of the loan transaction. If AIG voluntarily agreed to the terms offered on September 16, 2008, giving the Government control of AIG, it is untenable to maintain that the Government's use of that control rendered AIG's subsequent actions involuntary. Those actions would be, for all intents and purposes, Government actions, acquiesced in by AIG beforehand pursuant to the September 16, 2008 term sheet.[22] Therefore, to determine whether Starr has stated a cognizable takings claim, the relevant question is whether AIG voluntarily agreed to the terms proposed on September 16, 2008.

Starr has alleged repeatedly that AIG's board involuntarily accepted the Government's term sheet on September 16, 2008, see Compl. ¶¶ 49(a), 58(a); Pl.'s Opp. 31, and that the circumstances surrounding its acceptance led to no other alternative, see Compl. ¶ 58(a). Importantly, Starr also has alleged that the circumstances leading the board to accept the Government's unfair terms were the result of the Government's wrongful conduct. As noted above, Starr alleges that the Government's actions and inaction in the weeks leading up to the loan agreement contributed to AIG's dire financial situation. Pl.'s Opp. 33. Specifically, Starr claims that prior to September 16, 2008, "[t]he Government discouraged sovereign wealth funds and other non-United States investors from participating in a private-sector solution to AIG's liquidity needs." Compl. ¶ 49. Starr also asserts that "the Government interfered with AIG's ability to raise capital and contributed to the decision to downgrade AIG's credit rating, which itself triggered collateral calls that imposed pressure on AIG to declare bankruptcy within 24 hours." Id. ¶ 53.

Moreover, Starr indicates that the Government induced AIG's assent to the "grossly" unfair terms by an improper threat, whereby the Government misled AIG's board into believing that the September 16, 2008 offer was the only one it would get and pressured the board to decide within hours. Pl.'s Opp. 32. Starr attempts to portray the Government as having engaged in unfair practices leading up to the loan agreement, thereby enabling the Government to exploit the situation in which AIG found itself on September 16, 2008. See Compl. ¶ 58(a) ("By irrationally relying on loans in lieu of guarantees, consistently declining to grant AIG liquidity access on the same terms as

[22] Even if AIG's board gave the Government control of the corporation on September 16, 2008, thereby acquiescing in the Government's subsequent running of the corporation, AIG/the Government appears to have tied its own hands as to the reverse stock split by seemingly representing to the Delaware Court of Chancery that it would "act in the interests of the common stockholders who are entitled to reject the dilution of their shares." Compl. ¶ 85. In the Court's view, AIG/the Government's obligation to allow the common stockholders to vote as a class on the reverse stock split arose, if at all, from the Delaware Consent Order.

other similarly situated entities with lower quality collateral, contributing to a credit downgrade and interfering with AIG's ability to raise capital and the general ability to secure private sector support by repeatedly and inaccurately representing that there would be no Government assistance to AIG, organizing a private-sector effort at a critical time led by two banks with severe conflicts of interest that the Government did not believe had a significant chance of success . . . demanding consideration it was not legally authorized (by statute or otherwise) to demand, ensuring through its actions and representations that the Board would have only hours to make the decision to avoid a global economic meltdown, instructing AIG to undo its plans for bankruptcy without first informing AIG of its intentions, and falsely and irresponsibly representing that it was willing to risk destroying the global economy if the AIG Board did not accept its extortionate demands, the Government coerced the Board into accepting the Government's demands.").

The Court acknowledges that the Government vigorously disputes Starr's characterization of the voluntariness of the loan agreement, see e.g., Def.'s Mot. 29-30 (contending that AIG's acceptance of the loan agreement was the result of its business judgment and not an involuntary action); the circumstances surrounding AIG's acceptance of the loan agreement, id. at 30 (asserting that "AIG was free to reject both the FRBNY's conditions and its funding, no matter how hard that choice may have been"); and the cause of those circumstances, id. at 29 (arguing that "[t]o the extent that AIG's management . . . felt 'compelled'" to accept the terms, "that was the result of business risks taken by AIG and developments in the financial sector of the economy, not any action taken by the Government."). On a motion to dismiss, however, the Court must assume the truth of the plaintiffs' allegations and leave the determination as to their merit for a later stage. At this point, Starr has alleged sufficiently that the Government coerced AIG's board into accepting the terms of the September 16, 2008 loan agreement. Accordingly, the Court rejects the Government's consent argument with regard to the loan agreement.

ii. Whether the loan transaction was a rescue of AIG from the consequences of its own business risks

In the alternative, the Government argues that even if AIG's board did not accept the loan agreement voluntarily, the loan transaction would not constitute a taking because it was a rescue of AIG from the consequences of its own business risks. Def.'s Mot. 31. In support of its position, the Government notes that the central underpinning of the Takings Clause is "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Id. (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Government contends that this is not a case where the public should be made to shoulder the costs of the loan transaction because AIG's own risky business practices created the crisis, which necessitated the transaction. Id.

Furthermore, the Government emphasizes that AIG was the intended beneficiary of the loan agreement. The Government states that "[b]y September 16, 2008, as a result of the business risks that it took, AIG was facing bankruptcy." Id. at n.12. At that point, according to the Government, the loan transaction was not a taking but a governmental "rescue." Id. at 31. The Government points out that where a private party "'is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public.'" Id. (quoting Nat'l Bd. of YMCAs v. United States, 395 U.S. 85, 92 (1969)). As the particular beneficiary of the loan agreement, the Government maintains that "AIG and its shareholders, not the public," should bear the costs associated with the agreement. Id.

Whatever may be the merit of the Government's position, it is not the position alleged in Starr's Complaint. As discussed above, Starr sets forth a very different account of the causes of its financial situation, placing significant blame on specific government actions and inaction prior to September 16, 2008. See Compl. ¶¶ 49, 53, 58(a). Whether AIG or the Government caused or contributed to the dire financial situation of AIG in September 2008, and whether AIG was the particular intended beneficiary of the loan agreement, are factual issues to be considered at a later stage. Given the existing factual disputes on these issues, the Court denies the Government's request to dismiss Starr's takings claim on the basis that the loan agreement was a rescue of AIG from the consequences of its own business risks.

c. The Government's acquisition of AIG common stock in January 2011

The Government next argues that Starr has failed to state a takings claim with respect to the 562,868,096 shares of common stock the Government received in exchange for its preferred stock on January 14, 2011. Def.'s Mot. 32. According to the Government, Starr's Complaint demonstrates that the Government received the common stock through a voluntary exchange of its preferred stock, id. (citing Compl. ¶ 172), and "does not allege that the Government seized or otherwise confiscated those common stock shares," id.

As set forth above, it is a contested factual issue whether the Government coerced AIG into accepting the terms of the loan agreement on September 16, 2008. If the Court assumes the truth of Starr's allegations, however, the Government gained control of AIG on September 16, 2008 and used that control to extract a 79.9% equity interest in AIG pursuant to the Credit Agreement on September 22, 2008. See Pl.'s Opp. 22-23. As the Court explained above, Starr cannot advance multiple takings claims based upon the same equity interest. Insofar as the Government's acquisition of the 562,868,096 shares of common stock resulted from the Credit Agreement, which gave the Government the "right" to 79.9% of AIG's common stock, Tr. 53, 105 (Boies), the Court reads Starr's allegations as stating that any taking of AIG equity occurred on September 22, 2008, see

Compl. ¶ 65 (stating that "the Credit Agreement . . . required AIG ultimately to issue to a trust . . . Series C Preferred Stock convertible to 79.9% of AIG's equity"). Because Starr cannot maintain a claim for the taking of the same property interest more than once, the Court need not address the voluntariness of the January 14, 2011 conversion.

d. The use of AIG collateral in the ML III transactions

The Government also contends that Starr fails to state a takings claim with regard to the transactions among AIG, ML III, and specific AIG counterparties. Def.'s Mot. 32. In the Government's view, Starr's allegations demonstrate that the transactions resulted from "AIG's negotiated agreements with its counterparties." Id. at 32-33. In other words, Starr's allegations show that "AIG agreed to create ML III and took the FRBNY's financing to enable ML III to discharge AIG's obligations to counterparties." Id. at 33. The Government posits that while Starr argues that the terms of the agreements were less favorable to AIG than they should have been, Starr does not allege that the Government did anything to appropriate AIG's property. Id.

By contrast, Starr maintains that it has made "numerous specific allegations" showing that "the Government controlled AIG with respect to all major transactions." Pl.'s Opp. 34-35. Starr contends that the Government "used its control" to pay off AIG counterparties "using $32.5 billion of AIG collateral." Id. at 34. In reply, the Government maintains that Starr's allegations "do not establish the Government's control over the decisions by AIG's board to agree to the [ML III] transaction." Def.'s Rep. 17.

The parties' positions are decidedly at odds on a factual issue that cannot be resolved at this stage. For purposes of the Government's motion to dismiss, Starr has pled sufficiently that the Government obtained control of AIG and then used that control to engineer the ML III transactions. See Compl. ¶¶ 112-15 (specifically alleging that the "FRBNY is the controlling party and managing member of ML III" and through that control required AIG to use ML III "to fund the purchase of CDOs from the counterparties"). The Court notes that the issue of whether AIG voluntarily agreed to the ML III transactions may turn on whether AIG voluntarily entered into the initial loan transaction, allegedly giving the Government control of AIG. Both issues, however, are factual ones that the Court defers until a later stage.

5. Whether Starr may recover based upon the rough proportionality test established in Dolan

Starr contends that irrespective of whether the Government coerced AIG's board into accepting the loan agreement, the Government owes just compensation because "the conditions that the Government imposed upon AIG were disproportionate to the benefits conferred" in violation of the unconstitutional conditions doctrine. Pl.'s Opp. 40. Specifically, Starr alleges that the Government violated the "rough proportionality" test established in Dolan v. City of Tigard, 512 U.S. 374 (1994), by requiring a 79.9% interest in AIG in exchange for a fully-secured, high interest loan, see Pl.'s Opp. 35.

a. Applicable law

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." Dolan, 512 U.S. at 385 (internal citations omitted).[23] In Dolan, the landowner, Florence Dolan had applied to the City of Tigard for a permit to redevelop her property. Id. at 379. The City Planning Commission granted a permit to Ms. Dolan on the conditions that she dedicate portions of her property for improvement of a storm drainage system and for a pedestrian/bicycle pathway. Id. at 380. Ms. Dolan contended that in so doing, the City "forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements." Id. at 385-86.

In evaluating Ms. Dolan's claim, the Supreme Court expanded upon its test, partially articulated in Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987), for determining whether a condition upon land use constitutes an unconstitutional condition in violation of the Fifth Amendment, Dolan, 512 U.S. at 391. The Court stated that first, it must determine "whether the 'essential nexus' exists between the 'legitimate state interest'" and the condition imposed by the Government. Dolan, 512 U.S. at 386 (quoting Nollan, 483 U.S. at 837). If such a nexus exists, then the Court must decide whether the Government has shown a "rough proportionality" between "the required dedication" and "the projected impacts of the proposed development." Id. at 386, 391.

[23] In Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926), Justice Sutherland explained the justification for the doctrine of unconstitutional conditions as follows:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

The Court ultimately remanded the case for further proceedings, concluding that the City had not made sufficient findings regarding the impact of the proposed development to support its land use requirement. Id. at 396.

b. Analysis

Starr argues that the Government's conditions under the loan agreement were disproportionate to the benefits conferred in violation of Dolan's rough proportionality test. Pl's Opp. 40. In so doing, Starr maintains that the issue of proportionality is a factual one not capable of being resolved on a motion to dismiss. Id. The Court disagrees. As explained below, the Court finds that, as a matter of law, Dolan's rough proportionality test is inapplicable to the case at hand.

i. Dolan's rough proportionality test applies only to land use exactions.

From the time of Dolan, there has been ample indication that the rough proportionality test applies only in the context of land use exactions.[24] In City of Monterey v. Del Monte Dunes, the U.S. Supreme Court noted that while "concerns for proportionality animate the Takings Clause . . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. 687, 702 (1999) (internal citations omitted). Del Monte Dunes had brought a claim for a regulatory taking where "the city, in a series of repeated rejections, denied its proposals to develop a parcel of land, each time imposing more rigorous demands on the developers." Id. at 693-94. In that context the Court explained that the rule applied in Dolan "was not designed to address . . . the much different questions arising where . . . the landowner's claim is based not on excessive exactions but on denial of development." Id. at 703. Thereafter, in Lingle v. Chevron, the Supreme Court observed that "[b]oth *Nollan* and *Dolan* involved *Fifth Amendment* takings challenges to adjudicative land-use exactions" and quoted positively its statement that "[the Court] ha[s] not extended this standard 'beyond the special context of [land-use] exactions.'" 544 U.S. 528, 546-47 (2005) (quoting Del Monte Dunes, 526 U.S. at 702).

The circuit courts of appeals have followed suit. For example, in Clajon Prod. Corp., the Tenth Circuit took the view that "both *Nollan* and *Dolan* follow from takings jurisprudence's traditional concern that an individual cannot be forced to dedicate his or

[24] In Clajon Prod. Corp. v. Petera, the U.S. Court of Appeals for the Tenth Circuit explained that "'[d]evelopment exactions' are where a governmental agency requires that a property owner dedicate some of his or her land for public use before granting that property owner a permit to develop the land. This 'exaction' of land often involves the actual deeding of some of the property to the public—either in the form of an easement or an outright transfer of the land." 70 F.3d 1566, 1578 n.20 (10th Cir.1995).

her *land* to a public use without just compensation." 70 F.3d at 1578 (emphasis added). The court went on to conclude that "the 'essential nexus' and 'rough proportionality' tests are properly limited to the context of development exactions." Id. at 1579. Likewise, the U.S. Court of Appeals for the Ninth Circuit declined to extend the rough proportionality test to a case involving monetary exactions. See San Remo Hotel L.P. v. San Francisco City & Cnty., 364 F.3d 1088, 1098 (9th Cir. 2004). In light of the Supreme Court's reluctance to apply the Nollan/Dolan test "beyond the special context" of land use exactions—even in a case involving land restrictions, Del Monte Dunes, 526 U.S. at 702—and the repeated clear statements that the test is meant to apply only in cases involving land use exactions, the Court declines to extend the test to the unique facts of this case.

ii. The factual predicates for using Dolan's rough proportionality test are not alleged here.

Even if the Nollan/Dolan test were to be applied outside the context of land use exactions, the factual predicate for using the test is not alleged here. In Nollan and Dolan, local commissions granted the landowners building permits to develop their properties only on the conditions that the landowners dedicate portions of their properties to public easements. Nollan, 483 U.S. at 828; Dolan, 512 U.S. at 377. In both cases, if the landowners rejected the conditions, they would have given up not only the permits, but also the right to develop their properties. In that way, the localities were in a position to exploit their police power to obtain the easements without paying just compensation.

Here, in placing certain conditions on AIG's receipt of the $85 billion loan, the Government was not exercising preexisting regulatory authority, or anything akin to a state or locality's police powers. In Nollan and Dolan, the landowners were restricted from building on their land, and the localities would lift those restrictions only if the landowners agreed to certain conditions. By contrast, here, if AIG had refused the conditions of the loan agreement, AIG would not have been subject to any ongoing restrictions; AIG simply would not have obtained the loan. In this way, the Government was not in a position to exploit any existing regulatory power to induce the loan transaction. Because Starr has not alleged the occasion for coercion that was present in Nollan and Dolan, the Court finds the test articulated in those cases inapplicable here.

In sum, concerning the Government's motion to dismiss pursuant to RCFC 12(b)(6), the Court concludes that: (i) Starr cannot maintain a claim for the taking of AIG equity based upon the Government's conversion of its preferred shares to common shares while also maintaining a claim for the taking of that same property interest pursuant to the Credit Agreement; and (ii) Starr cannot maintain a takings claim based upon Dolan's rough proportionality test. In all other respects, the Court denies the Government's RCFC 12(b)(6) motion as it pertains to Starr's takings claims.

B. Review of Starr's Illegal Exaction Claim

Finally, Starr advances an illegal exaction claim under the color of Section 13(3) of the FRA. Starr claims that the Government, in conditioning the loan on its acquisition of a controlling equity interest in AIG, exceeded its authority under Section 13(3). Pl.'s Opp. 48. Starr concedes that Section 13(3) did not expressly prohibit the Government's actions. Starr asserts, however, that the strict purpose of Section 13(3) is to extend credit to financial institutions in exigent circumstances and that the FRA does not provide, either expressly or impliedly, authority to the FRBNY to purchase equities. Id. at 48-50.

The Government urges the Court to dismiss Starr's illegal exaction claim. First, the Government contends that Starr does not satisfy the jurisdictional prerequisites for such a claim because Starr fails to demonstrate that any statute mandates the return of money to it or AIG. Def.'s Rep. 28. Second, as with Starr's takings claims, the Government submits that AIG voluntarily entered into the loan agreement, and, as such, AIG's agreement to transfer equity in exchange for a loan was not an "exaction." Id. at 28-29. Third, the Government denies that the FRBNY exceeded its statutory authority in conditioning its loan on a transfer of AIG equity to the Trust and therefore, denies that the transaction was "illegal." Id. at 29-33.

As explained above, the Court finds that existing factual disputes make it inappropriate at this time to resolve the question of whether AIG voluntarily entered into the loan transaction with the Government. Accordingly, the Court rejects the Government's position that it should dismiss Starr's illegal exaction claim because the parties entered into a voluntary agreement such that there was no "exaction." The Court addresses the Government's remaining arguments below.

1. Whether Starr, or any other private litigant, has standing to bring claims to enforce the FRBNY's compliance with Section 13(3)

Before turning to the Government's two remaining arguments, the Court addresses whether Starr has standing to enforce the FRBNY's compliance with Section 13(3). In Lucas v. Fed. Reserve Bank of Richmond, the U.S. Court of Appeals for the Fourth Circuit determined that only "the government, the sovereign which created and limited its powers," has standing to enforce a Federal Reserve bank's compliance with Section 13(3). 59 F.2d 617, 621 (4th Cir. 1932) (internal citations omitted). The Fourth Circuit reached this conclusion by extending the U.S. Supreme Court's ruling in Kerfoot v. Farmers' & Merchs.' Bank, 218 U.S. 281, 287 (1910), which stated that "[w]here a corporation is incompetent by its charter to take a title . . . a conveyance to it is not void, but only voidable, and the sovereign alone can object."

At issue here is whether the Court should apply Lucas to the instant facts. While persuasive, Lucas is not controlling precedent. Its reliance on the text of The National

Bank Act ("NBA"), 13 Stat. 99, 101 (1864), as amended by Section 16 of the Glass-Steagall Act, 48 Stat. 162, 184-85 (1933) (codified as amended at 12 U.S.C.A. § 24 Seventh (West 2008)), and NBA jurisprudence, such as Kerfoot, is sensible outside the standing context; however, a national bank and a Federal Reserve bank differ in important respects, which bear directly upon standing. Private national banks and public Federal Reserve banks serve different customers—private businesses and consumers, in the case of the former, and member banks and associated financial institutions, in the case of the latter. A national bank operates by virtue of a national charter, which the Government provides at its grace. Whereas the Government is the natural regulator of a national bank, its licensee, there is no obvious regulator of a Federal Reserve bank other than the member banks and associated financial institutions that it serves.

Member banks and associated financial institutions, and their appropriate representatives, ought to have standing to ensure a Federal Reserve bank's compliance with the rule of law.[25] In light of the considerable financial requirements that Starr alleges the FRBNY imposed upon AIG, and the lack of an alternative public regulator, Starr has standing to challenge the FRBNY's compliance with Section 13(3) of the FRA.

2. Whether Starr fails to plead an illegal exaction claim because Section 13(3) is not a money-mandating statute

The Government next contends that Starr fails to satisfy the jurisdictional prerequisites of an illegal exaction claim because it does not demonstrate that any statute mandates the return of money to it or AIG. Def.'s Rep. 28. Specifically, the Government maintains that neither Section 13(3) nor Section 4 of the FRA expressly or impliedly provides for the return of money.[26] Id. at n.9. In support of its argument, the Government asks the Court to analogize to cases decided outside the illegal exactions context, which purportedly illustrate that Section 13(3) is not money-mandating. Id.

As noted above, the Federal Circuit has indicated that an illegal exaction claim requires a showing that the statute causing the exaction is either expressly or implicitly money-mandating. See Norman, 429 F.3d at 1095; Cyprus Amax, 205 F.3d at 1373. But see Figueroa, 57 Fed. Cl. at 499; Bowman, 35 Fed. Cl. at 401. As this case involves novel applications of Section 13(3), the question of whether that section is money-mandating is also a novel one. While the Government maintains that case law "suggest[s]" that Section 13(3) is not money-mandating, the cases it cites—in a footnote—were admittedly decided outside the illegal exactions context and come from

[25] Starr still must show that it is an appropriate representative of AIG, a question not addressed in this opinion.

[26] A claim under Section 13(3) of the FRA necessarily implicates Section 4 of the FRA as well, which enumerates the statutory powers of the various Federal Reserve banks. See 12 U.S.C. § 341 Seventh (2006).

non-controlling jurisdictions. See Def.'s Rep. 28 n.9. Given the limited briefing the parties have provided on the money-mandating issue, the Court concludes that it is premature at this stage to rule decisively on the issue, let alone treat it as dispositive for purposes of Starr's illegal exaction claim.

3. Whether Starr fails to plead an illegal exaction claim because the FRBNY did not exceed its authority under Section 13(3) of the FRA

Finally, the Government contends that Starr fails to state an illegal exaction claim because the FRBNY did not exceed its authority under Section 13(3) in causing the transfer of AIG equity to the Trust as consideration for the loan.

The Court's analysis of this issue depends largely upon whether the parties' exchange under the Stock Purchase Agreement was a "purchase of," or a "security interest in," the Series C Preferred Stock by the FRBNY. A Federal Reserve bank unquestionably can, and indeed must, take a security interest in the collateral of a corporation to which it discounts commercial paper. Bd. of Governors of the Fed. Reserve Sys. ("1936 Circular"), 22 Fed. Reserve Bulletin 71, 124 (Feb. 1936) ("[A] Federal Reserve bank shall ascertain to its satisfaction by such means as it may deem necessary . . . [t]hat the indorsement or security offered is adequate to protect the Federal Reserve bank against loss."); Fed. Reserve Bd. ("1932 Circular"), 18 Fed. Reserve Bulletin 473, 519 (Aug. 1932). Moreover, that security interest may be in corporate stock. Lucas, 59 F.2d at 619-21 (internal citations omitted); see also Cal. Nat'l Bank v. Kennedy, 167 U.S. 362, 369 (1897). The law regulating a Federal Reserve bank's purchases, however, is much less settled.

Pursuant to the loan agreement and the Stock Purchase Agreement, the FRBNY agreed to provide AIG up to $85 billion in emergency revolving credit conditioned upon: (1) a security interest in all of AIG's assets; (2) an approximate 14.5% interest rate; and (3) AIG's issuance of the Series C Preferred Stock to the Trust in exchange for $500,000. See Compl. ¶¶ 55(a), 58-59, 63-67, 69, 73. Several aspects of the agreements indicate that the FRBNY purchased, rather than merely took a security interest in, the preferred shares.

First, as Starr emphasizes, the preferred shares do not appear to have "'secure[d]' the Government's loan to AIG as collateral because the Government retains the stock even if AIG pays off the loan with interest." Pl.'s Opp. 48; Compl. ¶ 78. Moreover, according to Starr, the Credit Agreement already provided for a security interest in all of AIG's assets, in addition to the 14.5% interest rate on the loan. Based upon the information currently before the Court, there does not appear to have been anything more for the preferred stock to secure. Lastly, the Court observes that the parties' use of the label "Stock *Purchase* Agreement" is much more suggestive of a "purchase" than a "security interest." Gov. Mot. 9 (emphasis added).

Based on the foregoing, and for purposes of ruling on the Government's motion to dismiss, the Court will treat the parties' exchange as a "purchase of" the Series C Preferred Stock for $500,000. Accordingly, the relatively straightforward law governing the security interests of a Federal Reserve bank does not control. Instead, the Court looks to the less-settled law governing a Federal Reserve bank's purchases.

a. Whether the FRBNY had express authority under Section 13(3) to condition its loan to AIG on the issuance of stock to the Trust

As the Court's analysis of the FRBNY's express authority under Section 13(3) is dependent upon the text of the relevant statutes and regulations, the Court excerpts them in pertinent part:

> Every Federal reserve bank shall have power to establish from time to time, subject to review and determination of the Board of Governors . . . rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business.

12 U.S.C. § 357 (2006).

> In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System . . . may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of [12 U.S.C. § 357 (2006)], to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal reserve bank. . . . All such discounts for individuals, partnerships, or corporations shall be subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe.

Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343 (2006).

Starr contends that the provisions set forth above did not expressly authorize the Government to condition its loan to AIG on receiving a majority stake in the corporation. Pl.'s Opp. 48. Instead, Starr maintains that the "only consideration for a loan prescribed by" Section 13(3) "is an interest rate subject to the determination of the Board of Governors." Id. at 49. The Court agrees.

The plain text of Section 13(3) does not expressly authorize a Federal Reserve bank to demand stock in a corporation in return for discounted paper. Moreover, Starr's view is supported by Federal Reserve circulars explaining the Federal Reserve banks' powers under Section 13(3) to discount commercial paper for corporations in exigent circumstances. One such circular states that "bank discounts as commonly understood do not apply to a bank's acquisition through purchase of other assets, securities or obligations, such as, for example, corporate stocks, bonds or debentures." Bd. of Governors of the Fed. Reserve Sys., 44 Fed. Reserve Bulletin 241, 269 (Mar. 1958) (internal quotation omitted). Another states that "[s]uch discounts may be made only at rates established by the Federal Reserve banks, subject to review and determination by the Board of Governors of the Federal Reserve System." 1936 Circular, 22 Fed. Reserve Bulletin at 123; 1932 Circular, 18 Fed. Reserve Bulletin at 518; see also 12 U.S.C. § 357 (2006).

Based on the plain text of Section 13(3) and the Federal Reserve circulars quoted above, the Court concurs with commentary concluding that there simply "is no express authority for the Federal Reserve to purchase . . . equities." David Small & James Clouse, Limits the Federal Reserve Act Places on Monetary Policy, 19 Ann. Rev. Banking L. 553, 579 (2000). The Court turns to whether the FRBNY had implied authority under Section 13(3) to require an equity interest in AIG in exchange for exigent financing.

b. Whether the FRBNY had implied authority under the FRA to condition its loan to AIG on the issuance of stock to the Trust

Section 4 of the FRA, which enumerates the statutory powers of the Federal Reserve banks, provides:

> [A] Federal Reserve bank . . . shall have power . . . [t]o exercise . . . all powers specifically granted by the provisions of this chapter and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this chapter.

12 U.S.C. § 341 Seventh (2006). The question is whether a Federal Reserve bank's "incidental powers" under the FRA include the power to purchase corporate stock. This question is one of first impression. To address it, the Court analogizes to jurisprudence interpreting a national bank's authority within the meaning of the NBA, 12 U.S.C.A. § 24 Seventh (West 2008). As both parties acknowledge in their briefs, see Def.'s Rep. 28-33; Pl.'s Opp. 49, the relevant portions of the FRA and the NBA are similarly phrased. Compare FRA, 12 U.S.C. § 341 Seventh (2006), with NBA, 12 U.S.C.A. § 24 Seventh (West 2008); see also Lucas, 59 F.2d at 620 ("The section of the Federal Reserve Act

granting incidental powers to the Federal Reserve Banks is practically the same as the section granting incidental powers to national banking associations.").

In Cal. Nat'l Bank v. Kennedy, 167 U.S. 362, 369 (1897) ("California National"), the U.S. Supreme Court stated that the "power to purchase or deal in stock of another corporation . . . is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred." The Government attempts to "cabin" California National, an opinion from 1897 that pre-dates Congress's 1933 passage of the Glass-Steagall Act. Def.'s Rep. 31. According to the Government, Section 16 of the Glass-Steagall Act "modifie[d]" California National, "by limiting a [national] bank to buying or selling stocks for customers, and not 'for its own account.'" Id. The Government emphasizes that no corresponding prohibition appears in the incidental powers provision of 12 U.S.C. § 341 relating to Federal Reserve banks. Id. at 32.

Even if the Glass-Steagall Act could be read as limiting the prohibition in California-National only to a national bank purchasing or dealing in corporate stock "for its own account," requiring the issuance of the Series C Preferred Stock to the Trust seems to qualify as the FRBNY dealing for its own account. The Government attempts to distinguish between ownership of AIG stock by the FRBNY and acquisition of the stock by the Trust concededly structured to benefit the Treasury Department. See Def.'s Rep. 29 ("The FRBNY never acquired any AIG stock, and thus did not violate any restriction upon its acquisition of stock. Preferred stock was acquired by the Trust for the benefit of the Treasury, and Starr does not contend that any statute prohibited such an acquisition of stock."). Without greater factual development, the Court is disinclined to indulge the Government's distinction.

Indeed, according to Starr, the Trust controlled the selection of AIG board members under the terms of the Credit Agreement. Pl.'s Opp. 27; see also Compl. ¶ 166. The Trust was subject to a standard of care (1) not to act contrary to the Government's interests, and (2) to elect Directors who would uphold the same standard. Pl.'s Opp. 27; see also Compl. ¶ 165. "According to the Trust Agreement, the Trust . . . was created 'for the sole benefit of the United States Treasury.'" Compl. ¶ 69.

Based on the facts currently before the Court, it is not clear why the Government would use a trust procedure unless to circumvent the Supreme Court's holding in California National. Presumably, the Government does not have the typical concerns of private sector entities when creating trusts, such as estate and tax planning. Thus, at this stage, the Court perceives no meaningful legal distinction between FRBNY and Trust ownership of the Series C Preferred Stock. For purposes of the Government's motion to dismiss, the Court rules that the FRBNY's incidental powers under Section 4 of the FRA did not authorize it to condition the provision of exigent financing on AIG's issuance of stock to the Trust. Based on the foregoing, the Court denies the Government's 12(b)(6) motion in its entirety as it pertains to Starr's illegal exaction claim.

CONCLUSION

In sum, the Court GRANTS the Government's RCFC 12(b)(1) motion as to: (i) any Due Process claims not characterized as illegal exactions; and (ii) any Equal Protection claims. For the time being, the Court defers the issue of whether Starr adequately pled a demand on AIG's board or the futility of such a demand. The Court DENIES the remainder of the Government's RCFC 12(b)(1) motion.

The Court GRANTS the Government's RCFC 12(b)(6) motion as to: (i) Starr's takings claim based on the Government's conversion of its preferred stock to common stock, insofar as Starr alleges the taking of the same equity interest more than once; and (ii) Starr's use of Dolan's rough proportionality test to assert a takings claim. The Court DENIES the Government's RCFC 12(b)(6) motion in all other respects.

Pursuant to RCFC 12(a)(4), the Government shall file its Answer to Starr's Complaint within 14 days of this opinion, on or before July 16, 2012. Counsel for the parties shall conduct an Early Meeting of Counsel as required by Appendix A of the Court's rules within 14 days of the Government's Answer. Discovery, including RCFC 26 disclosures, may commence after the Early Meeting of Counsel. In addition, counsel for the parties shall submit to the Court the Joint Preliminary Status Report ("JPSR") required by Appendix A within 28 days of the Government's Answer, on or before August 13, 2012. Upon receiving the parties' JPSR, the Court will arrange a preliminary scheduling conference.

As stated in the Court's March 13, 2012 order, AIG may file an answer or other response to Starr's Complaint within 20 days of the Government's filing of its Answer, see Dkt. No. 35, on or before August 6, 2012.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 11-779C

(Filed: September 17, 2012)

************************************	*	
STARR INTERNATIONAL COMPANY, INC.,	*	
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	Motion for Reconsideration; Standing; Judicial Notice; Illegal Exaction; Federal Reserve Act, 12 U.S.C. § 343 et seq. (2006).
Defendant,	*	
and	*	
AMERICAN INTERNATIONAL GROUP, INC.,	*	
Nominal Defendant.	*	
************************************	*	

David Boies, with whom were *Robert J. Dwyer*, *Nicholas A. Gravante Jr.*, *Hamish P. M. Hume*, *Samuel C. Kaplan*, *Duane L. Loft*, *Julia C. Hamilton*, and *Luke Thara*, Boies, Schiller & Flexner LLP, Armonk, New York, and *John L. Gardiner*, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, for Plaintiff, Starr International Company, Inc.

Brian M. Simkin, Assistant Director, with whom were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Shalom Brilliant*, *Timothy P. McIlmail*, *Brian A. Mizoguchi*, *John Roberson*, Senior Trial Counsel, *Christopher A. Bowen*, *Renee A. Gerber*, *Karen V. Goff*, *Michael S. Macko*, *John J. Todor*, *Amanda L. Tantum*, *Jacob A. Schunk*, and *Vincent D. Phillips*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Defendant.

Joseph S. Allerhand, *Stephen A. Radin*, and *Jamie L. Hoxie*, Weil, Gotshal & Manges LLP, New York, New York, for Nominal Defendant, American International Group, Inc.

OPINION AND ORDER ON
DEFENDANT'S MOTION FOR RECONSIDERATION

WHEELER, Judge.

On August 9, 2012, the Government filed a motion for reconsideration of the Court's July 2, 2012 49-page opinion addressing the Government's motion to dismiss the amended complaint of Plaintiff, Starr International Company ("Starr"). The motion for reconsideration has been fully briefed and is ready for decision.

In the July 2, 2012 opinion, the Court granted in part the Government's motion to dismiss as to: (i) any due process claims not characterized as illegal exactions; (ii) any equal protection claims; (iii) Starr's takings claims based on the Government's conversion of its preferred stock to common stock, insofar as Starr alleged the taking of the same equity more than once; and (iv) Starr's use of the rough proportionality test. See Starr Int'l Co. v. United States, __ Fed. Cl. __, 2012 WL 2512920, at *1 (July 2, 2012). The Court deferred the issue of the Rule 23.1 demand requirement for a shareholder's derivative suit, and denied the Government's motion to dismiss in all other respects. Id.

In its motion for reconsideration, the Government maintains that Starr: (i) lacks standing to bring its direct claim; (ii) lacks standing to bring its illegal exaction claim; and (iii) possessed no property interest that was adversely affected by the American International Group ("AIG") reverse stock split. Def.'s Mot. for Recons. 1. For the reasons stated below, the Government's motion for reconsideration is DENIED.

I. Standards of Review

a. Reconsideration

The Government filed its motion for reconsideration pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"). Id. Rule 54(b) states, in relevant part, that:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

RCFC 54(b). This rule permits a court, in its discretion, to modify an interlocutory decision upon a motion for reconsideration. See Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) ("The decision whether to grant reconsideration lies largely within the discretion of the district court."). A motion for reconsideration is not to be used as an opportunity for a disappointed party to re-litigate issues in the case. See Prati v. United States, 82 Fed. Cl. 373, 376 (2008) (internal quotations omitted). Rather, a motion for reconsideration may be granted "upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States." RCFC 59(a)(1)(C); Grand Acadian, Inc. v. United States, 93 Fed. Cl. 637, 640 (2010); see also Stevens v. United States, No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. June 4, 2012) (explaining that such circumstances include "discovery of new and different material evidence that was not presented [before], or an intervening change of controlling legal authority, or when a prior decision is clearly incorrect and its preservation would work a manifest injustice.") (citing Intergraph Corp. v. Intel Corp., 253 F.3d 695, 698 (Fed. Cir. 2001)).

b. Motion to Dismiss

To survive a motion to dismiss, a plaintiff need only "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A well-pleaded complaint may proceed even if it appears on the face of the pleadings that "recovery is very remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In sum, the Court considered the Government's motion to dismiss keeping in mind that Starr's burden at this phase was "minimal." Colonial Chevrolet Co. v. United States, 103 Fed. Cl. 570, 574 (2012). Although the facts of this case are vigorously contested, the Court must accept all well-pleaded allegations in Starr's amended complaint and construe the facts in the light most favorable to Starr.

II. Whether Starr Has Standing to Bring Its Direct Claim

In its motion, Defendant contends that Starr's allegations regarding the Government's control and subsequent dilution of the AIG minority shareholders' interest are implausible and should be rejected by the Court. See Def.'s Mot. for Recons. 3. The Government communicated these same sentiments in its motion to dismiss and at oral argument. See Def.'s Mot. to Dismiss 15-18; June 1, 2012 Oral Arg. Tr. 17-19. The Court carefully considered the Government's position and provided its opinion on the matter. See Starr Int'l, 2012 WL 2512920, at *9-13. The Government has not asserted any "intervening change of controlling legal authority," nor has it demonstrated that the Court's decision would work a "manifest injustice." See Stevens, 2012 WL 2021740, at *4.

Instead, the Government asserts that "two key contract documents" eviscerate Starr's standing regarding its direct claim: the September 2008 Term Sheet and the Credit Agreement. Def.'s Mot. for Recons. 3-4. These "key documents" were submitted to the Court for the first time as an attachment to the Government's motion for reconsideration. Id. at Attach. A. The Government did not submit these documents during the motion to dismiss stage, and in any event, the Court is not inclined to review evidentiary documents in the process of ruling upon a motion to dismiss. The Government simply has not shown any basis for reconsideration.

Next, the Government encourages the Court to take judicial notice of the Term Sheet and Credit Agreement. Def.'s Mot. for Recons. 3, 5. In limited circumstances, a court may, in its discretion, take judicial notice of evidence outside of the pleadings, such as public records or documents incorporated into the complaint by reference. See AstraZeneca Pharm. LP v. Apotex Corp., 669 F.3d 1370, 1378 n.5 (Fed. Cir. 2012); Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 884 (Fed. Cir. 1985). Given the complexity of this case and the potential differing interpretations of these documents, see e.g., Def.'s Mot. for Recons. 4-8; Pl.'s Resp. 4-5, the Court declines to take judicial notice of the Term Sheet and the Credit Agreement. Accordingly, the Government's motion for reconsideration as it pertains to Starr's direct claim is denied.

III. Review of Starr's Illegal Exaction Claim

The Government argues that the Court should reconsider its denial of the motion to dismiss the illegal exaction claim because (i) Starr lacked standing to enforce the Federal Reserve Bank of New York's ("FRBNY's") compliance with Section 13(3) of the Federal Reserve Act ("FRA") (hereinafter "Section 13(3)"), Pub. L. No. 63-43, § 13(3) (1913) (codified as amended at 12 U.S.C. § 343 (2006)); (ii) Starr failed to cite a money-mandating statute; and (iii) the FRBNY had authority to condition the financing to AIG. Def.'s Mot. for Recons. 12.

a. Standing

The Court recognizes that the Board of Governors serves a regulatory role in exercising general supervision over Federal Reserve banks like the FRBNY. See 12 U.S.C. §§ 248(j), 343 (2006). This acknowledgement, however, does not alter any material aspect of the Court's previous opinion. Starr alleges that the FRBNY exceeded its authority under Section 13(3), resulting in an illegal exaction. Pl.'s Opp'n. 9. Illegal exactions create substantive rights conferring standing. Starr Int'l, 2012 WL 2512920, at *8 (citing Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967). Accordingly, provided that Starr has validly asserted an illegal exaction claim, standing is established.

b. Money-mandating Statute

In its motion, the Government reasserts that the Court lacks jurisdiction over Starr's illegal exaction claim because Starr has not cited a money-mandating statute. Def.'s Mot. for Recons. 14. As a general rule, claims asserting a violation of the Due Process Clause alone are not sufficient to establish jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (2006). See Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (citing Murray v. United States, 817 F.2d 1580, 1582 (Fed. Cir. 1987)). An exception exists, however, for monetary claims based on an illegal exaction: "In the context of an illegal exaction, the court has jurisdiction regardless of whether the provision relied upon can be reasonably construed to contain money-mandating language." Figueroa v. United States, 57 Fed. Cl. 488, 496 (2003); aff'd, 466 F.3d 1023 (Fed. Cir. 2006). Moreover, as the Court stated in its opinion, "the question of whether [Section 13(3)] is money-mandating is . . . a novel one," Starr International Co. v. United States, __ Fed. Cl. __, 2012 WL 2512920, at *36 (July 2, 2012), and the Court must draw all reasonable inferences in favor of the plaintiff, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Therefore, even if the citation of a money-mandating statute is required to bring an illegal exaction claim, at this stage Starr is entitled to the inference that Section 13(3) is indeed money-mandating.

c. The Board's Authority Under Section 13(3)

For purposes of ruling on the Government's motion to dismiss, the Court found ample support for a reasonable inference that the FRBNY purchased the Series C Preferred Stock. Starr Int'l, 2012 WL 2512920, at *36-37. In determining that the exchange was a "purchase," the Court looked at various factors such as: (i) the Government's loan to AIG being sufficiently secured without the preferred shares; (ii) the Government's retention of the stock even if the loan is paid off with interest; and (iii) the parties' use of the label "Stock Purchase Agreement." Id. As the Court pointed out in its opinion, neither the plain text of Section 13(3) nor the Federal Reserve circulars provide any "express authority for the Federal Reserve to purchase . . . equities." Id. at *38 (quoting David Small & James Clouse, Limits the Federal Reserve Act Places on Monetary Policy, 19 Ann. Rev. Banking L. 553, 579 (2000)).

The Government disagrees with the Court's characterization of the exchange as a "purchase," asserting again that the Series C Preferred Stock was merely consideration for the loan to AIG. Def.'s Mot. for Recons. 16. The Government argues that Section 13(3) allowed the Board to condition the $85 billion lending commitment to AIG upon the additional consideration of the Series C Preferred Stock to the Trust. Id. at 16-17. This argument fails, however, as the "only consideration for a loan prescribed by" Section 13(3) "is an interest rate subject to the determination of the Board of Governors."

Starr Int'l, 2012 WL 2512920, at *37. The Government is merely repackaging its previous arguments, based on assumptions that the Court already has rejected.

The Government's argument that the Board had implied authority to demand transfer of equity in exchange for a loan is similarly unavailing. The Court determined, for purposes of the Government's motion to dismiss, that interest rates are the only permissible form of consideration for a loan under the FRA. See id. Although the FRA does indeed confer incidental powers upon Federal Reserve banks, it grants only such powers that "shall be necessary to carry on the business of banking *within the limitations prescribed by this chapter*." 12 U.S.C. § 341 Seventh (2006) (emphasis added). Thus, because the FRA only permits the Board to demand consideration in the form of interest rates, the Board did not have implied authority to demand the transfer of equity as consideration for the loan to AIG. Accordingly, the Government's motion for reconsideration with respect to Starr's illegal exaction claim is denied.

IV. Whether Common Shareholders Possessed a Property Interest

Similar to its claim regarding the Term Sheet and Credit Agreement, the Government seeks to introduce a stipulation and order from the Delaware Court of Chancery ("Stipulation"). Def.'s Mot. for Recons. 19, Attach. A. The Government argues that the Stipulation was not intended to protect common shareholders of AIG from dilution of their shares. Id. at 20. The Government's position hinges on the Court taking judicial notice of the Stipulation at this stage of the proceedings. Def.'s Mot. for Recons. 19-21. As discussed in Part II above, the Court may take judicial notice of certain categories of documents in its discretion. See Indium Corp. of Am., 781 F.2d at 884. The Stipulation is but one document that may be relevant to the Chancery Court's decision, and the parties may want to introduce other documents to support their interpretations of the Stipulation. At present, the Court declines to take judicial notice of the filings in the Delaware Court of Chancery and instead preserves the issue for later consideration on the merits.

CONCLUSION

Based upon the foregoing, the Government's motion for reconsideration is DENIED.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 11-779C

(Filed: March 11, 2013)

************************************	*	
STARR INTERNATIONAL COMPANY, INC., on its behalf and on behalf of a class of others similarly situated,	*	
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	Fifth Amendment and Illegal Exaction Claims; Certification of Class Action Under Rule 23 of the Court of Federal Claims; Appointment of Class Counsel.
Defendant,	*	
And	*	
AMERICAN INTERNATIONAL GROUP, INC.,	*	
Nominal Defendant.	*	
************************************	*	

David Boies, with whom were *Robert J. Dwyer*, *Julia C. Hamilton, Luke Thara, Hamish P. M. Hume*, and *Samuel C. Kaplan*, Boies, Schiller & Flexner LLP, Armonk, New York, and *John L. Gardiner*, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, for Plaintiff, Starr International Company, Inc.

Brian A. Mizoguchi, Senior Trial Counsel, with whom were *Joyce R. Branda*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *John J. Todor*, Senior Trial Counsel, *Renee A. Gerber*, and *David S. Silverbrand*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant.

Joseph S. Allerhand, *Stephen A. Radin*, and *Jamie L. Hoxie*, Weil, Gotshal & Manges LLP, New York, New York, for Nominal Defendant, American International Group, Inc.

OPINION AND ORDER REGARDING CLASS CERTIFICATION

WHEELER, Judge.

Before the Court is the motion of plaintiff Starr International Company, Inc. ("Starr") to certify two classes and appoint class counsel pursuant to Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC"). In its initial and amended complaints, Starr alleged that through the actions of (1) the imposition of the Credit Agreement on September 22, 2008 by which the Government obtained a 79.9% equity interest in American International Group, Inc. ("AIG"), and (2) the reverse stock split on June 30, 2009 by which shareholders were denied a separate vote, the Government effected a taking or illegal exaction of the property of shareholders in violation of the Fifth Amendment of the U.S. Constitution. In a prior opinion and order on the Government's motion to dismiss, the Court determined that Starr had sufficiently pled these two events as government actions allegedly requiring just compensation, although the Court made no determination as to the merits of such claims. Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 69 (2012).

On December 3, 2012, Starr filed a motion for class certification and appointment of class counsel, with an accompanying memorandum. In its motion and memorandum, Starr proposed two classes, one for each of these government actions, that consist of the named plaintiff and other similarly situated individuals or entities whose property was allegedly expropriated. On February 1, 2013, the Government opposed this motion, arguing that Starr had not satisfied all of the requirements of Rule 23, namely, those of typicality, commonality, and adequacy. Starr replied on February 11, 2013. Both parties submitted expert reports as attachments to their memoranda, those of Dr. Gordon Rausser for the plaintiff and Dr. Lucy Allen for the defendant. See Mem. Attach. 1; Opp'n Ex. 1. After careful review, and for the reasons set forth below, plaintiff's motion to certify the classes and appoint class counsel is GRANTED.

Discussion

Class action suits in the Court of Federal Claims are governed by Rule 23. Under this rule, a member of a class may sue as a representative party on behalf of other members only if the following prerequisites are met:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

RCFC 23(a). Additionally, for the class action to be maintainable, the Court must find that "the United States has acted or refused to act on grounds generally applicable to the class," common questions of law and fact predominate, and a class action is superior to other methods for adjudication of the controversy. RCFC 23(b); Singleton v. United States, 92 Fed. Cl. 78, 82 (2010). The criteria for certifying a class action have been distilled to five requirements: numerosity, commonality, typicality, adequacy, and superiority. Barnes v. United States, 68 Fed. Cl. 492, 494 (2005). The party seeking class certification must satisfy each of these requirements by a preponderance of the evidence. Geneva Rock Prods., Inc. v. United States, 100 Fed. Cl. 778, 782 (2011) (citing Filosa v. United States, 70 Fed. Cl. 609, 615 (2006)). In the interests of judicial economy and efficiency, however, courts construe the requirements of Rule 23 liberally, "or at least not narrowly," in favor of class certification. Barnes, 68 Fed. Cl. at 502; see also, e.g., Geneva Rock, 100 Fed. Cl. at 782; Singleton, 92 Fed. Cl. at 82. This approach is consistent with the general principal that "class actions are not 'disfavored' in the United States Court of Federal Claims." Adams v. United States, 93 Fed. Cl. 563, 574 (2010); see also Barnes, 68 Fed. Cl. at 502 ("If the proposition that class actions are 'disfavored' ever was valid, it certainly is no longer so.").

Here, Starr proposes certification of two classes: (1) the "Credit Agreement Class;" and (2) the "Stock Split Class." Mot. 2-3; Mem. 3.[1] The Credit Agreement Class is comprised of the following:

> All persons or entities who held shares of AIG Common Stock on or before September 16, 2008 and who owned those shares as of September 22, 2008 . . . , excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A Langerman.

Mem. 3. The second proposed class, that of the Stock Split Class, is defined as follows:

[1] As the Government points out, Starr presented more precise definitions of these two classes in its supporting memorandum than in its motion for class certification. Opp'n 3 n.1; compare Mot. 2-3, with Mem. 3. Like the Government, the Court presumes that Starr intended the more precise definition of the classes set forth in its memorandum.

> All persons or entities who owned shares of AIG Common Stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date . . . , excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman.

Id. Starr asserts that each of these classes represents "a defined, cohesive group of shareholders with identical claims and interests arising from actions of the Government 'generally applicable to the class.'" Id. (citing RCFC 23(b)(2)). The Government does not contest numerosity. Opp'n 7. The Court will address the contested requirements of Rule 23 in more detail below.

I. Commonality

The requirement of commonality consists of three sub-elements derived from Rule 23: "(1) whether 'there are questions of law or fact common to the class,' RCFC 23(a)(2); (2) whether 'the United States has acted or refused to act on grounds generally applicable to the class,' RCFC 23(b)(2); and (3) whether those common questions 'predominate over any questions affecting only individual members,' RCFC 23(b)(3)." Geneva Rock, 100 Fed. Cl. at 788 (quoting Haggart v. United States, 89 Fed. Cl. 523, 532 (2009)). "Individual class members need not be identically situated to warrant a finding of commonality," id., but "[t]heir claims must depend upon a common contention," Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). This common contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. Class-wide factual or legal questions predominate over specific, individual, issues of class members if resolution of the former can be achieved through generalized proof and are more substantial than specific, individualized issues. See Geneva Rock, 100 Fed. Cl. at 789 (citing Barnes, 68 Fed. Cl. at 496). The threshold for proving commonality is "not high." King v. United States, 84 Fed. Cl. 120, 125 (2009) (citing Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986)).

Applying these principles, and for the reasons explained below, the Court finds that the commonality requirement for both classes is met. Here, the claims of the members within each putative class are based on the same exact government action, either the Credit Agreement or the reverse stock split. This unifying nexus of the claims makes the issue justiciable, unlike in Wal-Mart, where "respondents wish[ed] to sue about literally millions of employment decisions at once." 131 S. Ct. at 2552. If the government action relevant to each proposed class did constitute a taking or illegal exaction, "then the putative class members will be owed just compensation regardless of the specific property interest they held [at the time]." Geneva Rock, 100 Fed. Cl. at 789.

Here, the putative Credit Agreement Class alleges that the Government's acquisition of 79.9% equity interest in AIG constituted an illegal exaction or a taking without just compensation. As the Court found in its opinion and order on the Government's motion to dismiss, Starr had sufficiently identified that "the imposition of the Credit Agreement on September 22, 2008" was a government action allegedly requiring compensation. Starr Int'l, 106 Fed. Cl. at 69. The Credit Agreement affected all putative members, and the acquisition of 79.9% of equity interest in AIG "is the wellspring of all the putative class members' claims." Geneva Rock, 100 Fed. Cl. at 789 (finding that the government's issuance of a Notification of Interim Trail Use was a single act that affected all putative class members); Singleton, 92 Fed. Cl. at 84 (same). Thus, the Government acted on grounds applicable to the entire class.

Moreover, the resolution of the Credit Agreement issue will affect all putative class members. Thus, the putative class shares a common question of law or fact. See Geneva Rock, 100 Fed. Cl. at 789 ("A class shares a common question of law or fact when there is at least one issue whose resolution will affect all or a significant number of the putative class members.") (internal citation omitted); Fisher v. United States, 69 Fed. Cl. 193, 199 (2006) ("The requirement for a common question of law is satisfied when there is one core common legal question that is likely to have one common defense."); cf. Wal-Mart, 131 S. Ct. at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.").

Finally, the determination of whether the Credit Agreement was a taking or an illegal exaction predominates over any individual variations within the class, as its resolution will not require individualized proof. All members of the putative class share the same core legal question of whether the Credit Agreement was a government action requiring just compensation, and resolution of this question can be achieved through generalized proof. See Douglas R. Bigelow Trust v. United States, 97 Fed. Cl. 674, 678 (2011) (finding commonality satisfied where "all plaintiffs share the same core legal question: did a Fifth Amendment taking occur"). If successful, the members of the putative class will likely receive different damages based on their proportionate shareholdings at the relevant time period. See Mem. Attach. 1 at ¶ 11 (Rausser Decl.). However, "[t]he fact that the eventual award 'will ultimately require individualized fact determinations is insufficient, by itself' to defeat a class action." King, 84 Fed. Cl. at 126 (citing Curry v. United States, 81 Fed. Cl. 328, 334 (2008)).

Similar to the Credit Agreement issue, the members of the putative Stock Split Class share the core legal question of whether the reverse stock split constituted a taking or an illegal exaction without just compensation of the "equity and voting power associated with the Plaintiffs' shares of common stock." Starr Int'l, 106 Fed. Cl. at 75. The reverse stock split on June 30, 2009 is the "wellspring" of the putative class members' claims. Geneva Rock, 100 Fed. Cl. at 789. This single act of the Government is applicable to all those persons or entities owning shares of AIG common stock on that day. The resolution of whether the reverse stock split constituted a government action requiring just compensation will affect all putative class members, and thus, the class shares common questions of law and fact. Id.

These common questions predominate over issues specific to individual members of the putative class. Starr alleges that "[t]he taking that occurred was the right to a separate class vote," a vote that each individual shareholder, and putative class member, was entitled to by right. Reply 5. How the individual shareholders voted, and whether or not they voted, is irrelevant to Starr's allegation that the putative class members were entitled to a separate, independent vote. Therefore, the Government's argument that shareholders who voted differently or did not vote are not similarly situated is without merit. Whether the members were entitled to such a vote, and whether the reverse stock split was a government action that denied them of that right without just compensation, can be resolved through generalized proof applicable to the entire class. Accordingly, the requirement of commonality is met for both classes.

II. Typicality

Typicality is intertwined with commonality, and the analysis of these two requirements "tends to merge." Barnes, 68 Fed. Cl. at 498. To establish typicality, "[t]he named plaintiff need only show that its 'claims share the same essential characteristics as the claims of the class at large.'" Geneva Rock, 100 Fed. Cl. at 790 (quoting Curry, 81 Fed. Cl. at 335)). "Courts 'have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.'" King, 84 Fed. Cl. at 126 (quoting 7A Wright et al., Federal Practice and Procedure § 1764, at 270-71)).

Here, Starr's claim shares the same essential characteristics as the claim of the proposed Credit Agreement Class because it is based on the same factual and legal predicates. Both Starr and the putative class members were shareholders of AIG common stock "on or before September 16, 2008 and [] owned those shares as of September 22, 2008[.]" Mem. 3. Starr and the putative class members seek a remedy from the same government action and premised upon a common theory, that the Credit Agreement constituted a taking or an illegal exaction of their property requiring just compensation. Thus, Starr's claim is typical of the class.

Starr's claim that the reverse stock split constituted a taking or an illegal exaction of its voting rights is also typical of the claim of the Stock Split Class. Both Starr and the putative class members were "persons or entities who owned shares of AIG Common Stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date[.]" Id. Both Starr and the putative class members seek just compensation from the same government action premised upon a common theory. The typicality requirement, therefore, has been met for both classes.

III. Adequacy

In determining whether the adequacy requirement is met, "courts first consider the adequacy of class counsel and, second, ensure that class members do not 'have interests that are antagonistic to one another.'" King, 84 Fed. Cl. at 127 (citing Barnes, 68 Fed. Cl. at 499)). Here, the first prong of adequacy of class counsel is not contested, Opp'n 7, and the Court agrees that the proposed class counsel is "qualified, experienced, and generally able to conduct the litigation," Adams, 93 Fed. Cl. at 576. The inquiry into the second prong of this requirement overlaps significantly with commonality and typicality. Singleton, 92 Fed. Cl. at 85 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 n.20 (1997)).

Here, the interests of the putative class members within their respective classes are not antagonistic to each other. Rather, the interests of Starr, the named plaintiff, and the proposed class members "are aligned because all plaintiffs would assert the same legal claim, a taking in contravention of the Fifth Amendment, arising out of the same government actions[.]" Haggart, 89 Fed. Cl. at 535 (finding adequacy requirement met); Geneva Rock, 100 Fed. Cl. at 790 (same). Within each class, the members have identical interests, proportionate to their shareholdings at the time of the alleged expropriation. Accordingly, the adequacy requirement is met.

The Government posits that Starr cannot adequately represent both classes because there are conflicts within the proposed classes, as well as conflicts between the two different proposed classes. In arguing that there are conflicts between the two proposed classes, the Government highlights the premise that "the Government can only take the same property once," Opp'n 14, and avers that both classes allege a taking of the same interests, id. at 15. Starr disagrees with the characterization, and points out that the signing of the Credit Agreement and the reverse stock split were two distinct events that each resulted in a taking of different interests, and recovery for both classes would be proportionate to the amount of shares held at the time of the taking. Reply 10-11; see also id. at 8 ("[e]ach of the actions taken by the Government had an effect that was shared across all of the common stock on a ratable basis, share for share.") (citing Rausser Dep. at 67-68, 184-85, Jan. 11, 2013). Starr's proposal of two classes is consistent with the Court's previous findings of sufficient allegations that the Government had conducted two separate actions requiring just compensation: "(1) the imposition of the Credit Agreement on September 22, 2008; [and] (2) the reverse stock split on June 30, 2009[.]"

Starr Int'l, 106 Fed. Cl. at 69.[2] Just as at the motion to dismiss to stage, the Court makes no determinations as to the merits of Starr's claims at this juncture, but finds Starr to have sufficiently alleged that the interests of the two proposed classes are distinct and nonexclusive, and therefore there is no conflict between the classes.

With regards to the purported conflicts within the class, the Government relies upon the fact that "not all members of each class are only members of that class" to argue that those with larger proportionate holdings in another class prevents the class from being "united in seeking the maximum possible recovery." Opp'n 15 (citing Amchem, 521 U.S. at 610). As stated above, the Court does not view the two proposed classes as having interests that are antagonistic to one another. Therefore, the mere fact that some members within one class may stand to benefit more from their shareholdings in another class does not create a conflict within the individual classes.

The Government further contends that conflicts exist between the direct and derivative claims "such that Starr's counsel should not represent both AIG derivatively and a direct class." Opp'n 15. The status of Starr's derivative claims currently is under review by the Court. In January 2013, AIG rejected Starr's demand under Rule 23 to join in the lawsuit. Starr is required, by prior order, to clarify whether it intends to pursue its shareholder derivative claims and whether AIG should remain as a party. See Dkt. No. 99. Until Starr's position on the derivative claims has been articulated, the Court finds any ruling on potential conflicts between direct and derivative claims to be premature. If the Court deems it necessary to address this issue at a later date, it will do so.

IV. Superiority

In order for a case to be maintained as a class action, it must be "superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). To determine whether superiority is met, courts engage in "a cost/benefit analysis, weighing any potential problems with the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action." Barnes, 68 Fed. Cl. at 499 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163-64 (1974); 7A Wright et al., Federal Practice & Procedure § 1780, at 197-98)).

Here, such a cost/benefit analysis tips decidedly in favor of class certification. Litigating the claims of both putative classes in one action "will achieve economies of scale in time, effort and expense," Bigelow, 97 Fed. Cl. at 678, because all plaintiffs

[2] During the motion to dismiss stage, the Court also found that Starr had sufficiently identified a third government action requiring just compensation, that of "the Government's use of AIG collateral to purchase certain CDOs from AIG counterparties in November and December of 2008." Starr Int'l, 106 Fed. Cl. at 69. As this third government action "is a derivative claim brought on behalf of AIG, not a direct shareholder claim," it is not subject to this class certification motion. See Mem. 2 n.2.

within each class are affected by the same government action: either the Credit Agreement or the reverse stock split. Considering the estimation of Plaintiff's counsel that the putative plaintiffs may number more than tens of thousands of geographically dispersed persons, Mem. 6, 15, class certification is by far the most efficient method of adjudicating these claims. Moreover, "the defenses the government will likely use in response to plaintiffs' claims should be identical, and the law which the court will apply to resolve plaintiffs' claims should also be identical." Singleton, 92 Fed. Cl. at 86. As addressed above, the differences in individual damages are not determinative of class certification, Geneva Rock, 100 Fed. Cl. at 789, therefore the fact that some class members may recover more than others does not preclude certification.

Although the Government has argued that certain requirements of Rule 23 class certification have not been met, it "has not claimed that the pursuit of a class action here would be less efficient than pursuing the claims represented here in individual or consolidated actions." Bigelow, 97 Fed. Cl. at 678 n.7 (finding superiority satisfied and noting as probative the defendant's failure to argue any efficient alternative to a class action). Accordingly, the Court finds that the requirement of superiority is met.

Certification

Based on the foregoing, the Court hereby determines that this case may be maintained as a class action and GRANTS plaintiff's motion to certify. Pursuant to Rule 23(c), the Court "must define the class and the class claims, issues, or defenses, and must appoint class counsel under RCFC 23(g)." The Court adopts the definitions of the classes as proposed by the named plaintiff:

1. The Credit Agreement Class: All persons or entities who held shares of AIG Common Stock on or before September 16, 2008 and who owned those shares as of September 22, 2008, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A Langerman.

2. The Stock Split Class: All persons or entities who owned shares of AIG Common Stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman.

The Court defines the primary issue for the Credit Agreement Class to be whether the 79.9% equity interest in AIG obtained by the Government constituted an illegal exaction or a taking without just compensation. The Court defines the primary issue for the Stock Split Class to be whether the reverse stock split on June 30, 2009 constituted an illegal exaction or taking without just compensation.

Rule 83.1 of this Court allows for "only one attorney of record in a case at any one time," who shall be "an attorney (not a firm)." RCFC 83.1(c)(1). All other attorneys assisting the attorney of record shall be designated "of counsel" for the class. Id. The Court designates David Boies of the firm Boies, Schiller & Flexner, LLP as counsel of record for the classes. The other attorneys and law firms identified in plaintiff's motion for class certification, to the extent of their participation in this litigation, shall be designated "of counsel" in subsequent filings with the Court.

Conclusion

For the foregoing reasons, plaintiff's motion for class certification is GRANTED. The Court certifies a class action in this case and appoints David Boies as class counsel. On or before April 1, 2013, the parties shall file a joint status report proposing a plan to satisfy the notice requirements of Rule 23(c)(2) and addressing further notice proceedings. Pursuant to Rule 10(a), all subsequent pleadings in this case shall use the caption shown above.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 11-779C

(Filed: June 26, 2013)

STARR INTERNATIONAL COMPANY, INC., on its behalf and on behalf of a class of others similarly situated, Plaintiff, v. THE UNITED STATES, Defendant, and AMERICAN INTERNATIONAL GROUP, INC., Nominal Defendant.	Fifth Amendment Taking and Illegal Exaction Claims; Motions to Dismiss Shareholder Derivative Action Due to Corporation's Refusal of Plaintiff's Demand Under RCFC 23.1; Application of Business Judgment Rule Under Delaware Law; Waiver of Demand Futility Argument by Making Demand; Independence of Board Members Appointed During Government Control; Whether Counsel Advising Corporation Had Conflict of Interest; Standing to Bring Direct Claims.

David Boies, with whom were *Robert J. Dwyer*, *Nicholas A. Gravante, Jr.*, *Alanna C. Rutherford*, *Julia C. Hamilton*, *Hamish P. M. Hume*, and *Samuel C. Kaplan*, Boies, Schiller & Flexner LLP, Armonk, New York, and *John L. Gardiner*, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, for Plaintiff, Starr International Company, Inc.

Brian A. Mizoguchi, Assistant Director, with whom were *Joyce R. Branda*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Scott D. Austin*, Assistant Director, *Timothy P. McIlmail* and *John J. Todor*, Senior Trial Counsel, *David D'Alessandris*, *Renee Gerber*, *Vincent D. Phillips*, and *Matthew F. Scarlato*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant.

Joseph S. Allerhand, with whom were *Stephen A. Radin*, and *Jamie L. Hoxie*, Weil, Gotshal & Manges LLP, New York, New York, for Nominal Defendant, American International Group, Inc.

OPINION AND ORDER ON
MOTIONS TO DISMISS

WHEELER, Judge.

Plaintiff Starr International Company, Inc. ("Starr") commenced this lawsuit against the United States in November 2011, challenging the Government's economic bailout of American International Group, Inc. ("AIG") that began in September 2008. During the time periods relevant to this case, Starr was one of the largest shareholders of AIG common stock. Starr alleges that the Government's actions in acquiring control of AIG constituted a taking without just compensation and an illegal exaction in violation of the Fifth Amendment. Starr's claims consist of shareholder derivative claims brought on behalf of AIG, and direct claims brought on behalf of Starr and two classes of AIG shareholders.[1]

Under Rule 23.1 of this Court, one of the requirements to maintain a shareholder derivative action is to show that a demand has been made on the board of directors of the corporation. Rules of the Court of Federal Claims ("RCFC") 23.1(b)(3)(A). Alternatively, a plaintiff must demonstrate "the reasons for not obtaining the action or not making the effort," RCFC 23.1(b)(3)(B), such as a showing that a demand on the board of directors would have been futile.

When Starr commenced this action on November 21, 2011, the United States owned a majority of AIG's voting stock. In addressing the requirements of RCFC 23.1, Starr alleged that a demand on AIG's Board of Directors at that time would have been futile because of the improbability that a government-controlled AIG would agree to sue the United States. However, during the next ten months, the Government sold its stock in AIG, and by September 2012, the Government had significantly reduced its ownership shares of the corporation.

With the Government no longer in control of AIG's voting stock, Starr made a demand on AIG's Board of Directors on September 21, 2012, requesting the corporation to participate in Starr's lawsuit against the United States. After an extensive process of informing the AIG Board members about the lawsuit through written and oral presentations, the AIG Board unanimously refused Starr's demand on January 9, 2013.

[1] Thus far, the Court has issued four published opinions in this case, all captioned as Starr International Company, Inc. v. United States: (1) 103 Fed. Cl. 287 (2012), joining nominal defendant AIG as a necessary party; (2) 106 Fed. Cl. 50 (2012), ruling upon the Government's first motion to dismiss; (3) 107 Fed. Cl. 374 (2012), denying the Government's motion for reconsideration; and (4) 109 Fed. Cl. 628 (2013), certifying classes for purposes of a class action, and appointing class counsel.

The AIG Board's decision not to allow pursuit of its corporate claims has triggered a new round of motions. On April 5, 2013, AIG, in its role as nominal defendant, filed a motion to dismiss Starr's shareholder derivative claims for lack of standing. AIG, a Delaware corporation, maintains that the decision of its Board of Directors to refuse Starr's demand is entitled to great deference through the application of Delaware's "business judgment rule," and therefore the shareholder derivative claims must be dismissed. The business judgment rule embodies a presumption that directors are "faithful to their fiduciary duties." Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004). The rule respects a board's decision to refuse a shareholder demand unless the decision "cannot be 'attributed to any rational business purpose.'" In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). "[F]ew, if any, plaintiffs surmount this obstacle." RCM Sec. Fund, Inc. v. Stanton, 928 F.2d 1318, 1328 (2d Cir. 1991).

Also on April 5, 2013, the Government filed a motion to dismiss both the direct and derivative claims for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Starr filed an opposition brief to these motions on April 26, 2013, and AIG and the Government filed reply briefs on May 8, 2013. The Court heard oral argument in Washington, D.C. on May 17, 2013.

After carefully reviewing the parties' positions, the Court grants AIG's and the Government's motions to dismiss Starr's shareholder derivative claims, but denies the Government's motion to dismiss the direct claims. Although the derivative claims are dismissed, the Court notes that Starr has raised some concerns worthy of thoughtful consideration. First, the Court is troubled that counsel for the Treasury Department (the defendant agency), made threatening statements to AIG's Board members when the Board was fulfilling its legal obligation to consider entry into this lawsuit.[2]

Further, AIG attached to its motion a host of articles indicating a "media frenzy" in reaction to the proposition that AIG would join this lawsuit against the United States. These articles carried titles such as "Lawsuit Fiasco Mars AIG 'Thank You' Campaign," "Washington's Jaw Drops at Possibility of AIG Lawsuit," and "How About Charging AIG With Treason?" AIG Mot., Exs. 3-5. The articles contain inflammatory quotations from a number of public figures and elected officials who apparently lacked any understanding that AIG was *required* to consider entry into the lawsuit under the demand process of Delaware law. It is unfortunate that AIG's Board members had to deal with this misplaced pressure and public outcry.

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[2] Outside counsel for the Treasury Department, Frances E. Bivens of Davis Polk & Wardwell LLP, informed the AIG Board in her January 9, 2013 presentation that, if AIG decides to join the lawsuit, "AIG will be terminated . . . . A decision [to join the suit] could also lead to another wave of congressional investigations, and AIG employees and AIG Board members could be called to testify before Congress and justify the decision to pursue a lawsuit asking the U.S. taxpayers to return billions of dollars to AIG." Jan. 9, 2013 AIG Board Tr. at 61-62.

Also of concern to the Court is the low evaluation of Starr's potential success on the merits, presented to the Board by its advising counsel. AIG retained some of the finest counsel and expert consultants available to weigh the strengths and weaknesses of Starr's case. Some of these persons assessed the case as having a very low probability of success, even placing small percentages on Starr's likelihood of prevailing. These counsel and consultants then shared their assessments with AIG's Board. Although professionals surely can opine on the pros and cons of a lawsuit, the Court cannot see how anyone could have made a precise assessment of this fact-dependent case without knowing what all of the evidence ultimately will show. To be sure, the Court's ultimate disposition of this case will be based upon the evidence admitted at trial, not upon someone else's assessment of the merits. The granting of AIG's motion does not mean that the Court endorses any of the information presented to AIG's Board.

Overall, however, AIG's Board employed a rigorous review process and reached a reasonable decision, well explained in filings with the Court. In the circumstances presented, Delaware law requires the Court to give deference to AIG's Board under the business judgment rule. The Board was free to consider all relevant factors, including business factors unrelated to the merits of the lawsuit, and it did so. Not only did AIG reach an informed and reasonable decision, its Board members fulfilled their fiduciary duty while dealing with difficult outside pressures. Set forth below is a detailed explanation of the Court's ruling on the pending motions.

SHAREHOLDER DERIVATIVE CLAIMS

Starr alleges that AIG was harmed by Government conduct beginning on September 16, 2008, after the Government took over AIG as a controlling shareholder and lender. Specifically, Starr alleges that the Government took or illegally exacted a 79.9% equity and voting interest from AIG in September 2008, and gave away to AIG counterparties AIG's legal rights and $32.5 billion of its collateral through the Maiden Lane III ("ML III") transactions in November 2008. These government actions, Starr claims, constitute a taking and illegal exaction of the property and property rights of AIG without due process or just compensation. Both AIG and the Government assert that Starr's complaint does not satisfy the particularized pleading requirements of Rule 23.1, and therefore must be dismissed.

I. Summary of Relevant Facts

Beginning in July 2008 and continuing into September 2008, AIG faced a liquidity crisis. On September 22, 2008, the Federal Reserve Bank of New York ("FRBNY") and AIG entered into an agreement ("the Credit Agreement"), under which the FRBNY agreed to extend up to $85 billion in credit to AIG on a revolving basis. Starr Int'l, 106 Fed. Cl. at 57. The Credit Agreement required AIG to issue to a trust ("the Trust") Series

C Preferred Stock convertible to 79.9% of AIG's common stock. Id. To implement this requirement, on January 16, 2009, the parties entered into the AIG Credit Facility Trust Agreement ("the Trust Agreement"), which established the Trust to hold the Government's Series C Preferred Stock. Id.; 2d Am. Compl. ¶ 83. According to Starr, the Trust "was created 'for the sole benefit of the United States Treasury'" and consisted entirely of the Series C Preferred Stock. 2d Am. Compl. ¶¶ 84-85 (quoting the Trust Agreement). The Series C Preferred Stock provided the Trust with voting power equivalent to a 79.9% interest in AIG. Id. at ¶ 88.

As of November 2011, through exercise of its voting control, the Board of Trustees had appointed eight of the twelve members to the AIG Board of Directors. Id. at ¶ 183. Of the remaining four positions, one member was appointed directly by the Treasury Department, and the other three "were holdovers at the time of the Government takeover and continued on the Board thereafter." Id. AIG's filings with the Securities and Exchange Commission ("SEC") reflect that there have been no changes to the Board of Directors' composition since May 11, 2011. AIG Mot. 7 (citing Apr. 5, 2012 AIG Proxy Statement at 12-18).

Since the time of its initial Complaint on November 21, 2011, which was superseded by a First Amended Complaint, filed on January 31, 2012, Starr has alleged that it was futile to make a demand on the AIG Board. In their filings regarding the Government's motion to dismiss the First Amended Complaint, both Starr and AIG asked the Court to defer ruling on the demand issue until the Government's March 1, 2012 motion to dismiss had been resolved. Starr Int'l, 106 Fed. Cl. at 65-66. In the interest of judicial economy, the Court granted this request. Id. at 66.

After the Court ruled upon the Government's motion to dismiss, Starr and AIG entered into an agreement in which Starr agreed to make a demand on the AIG Board with respect to all derivative claims. Dkt. No. 64-1 at 2 (Demand Agreement). The Government was not a party to this agreement. The agreement outlined the contemplated demand process and stipulated to each party's rights after the Board reached a determination, including as follows:

> If the Board refuses the demand, Starr International may seek to pursue derivative claims in the CFC and SDNY Actions by challenging the Board's decision to refuse the demand by filing amended complaints alleging that the demand was wrongfully refused and/or not required as a matter of law. AIG may respond with any and all arguments.

Id. at 3. Starr subsequently made a demand on the AIG Board, which the Board refused on January 9, 2013.

a. Starr's Demand and the Board's Refusal

On January 23, 2013, AIG sent a letter to Starr's counsel setting forth the process by which the Board considered the demand and the rationale for its refusal. Dkt. No. 87-1 ("Demand Refusal Letter"). On the same day, AIG's counsel filed this letter and the accompanying exhibits with the Court. Given that the continued viability of Starr's derivative claims centers on the propriety of the AIG Board's demand refusal, the Court addresses the demand refusal in detail below.

The AIG Board's Regulatory, Compliance and Public Policy Committee (the "Committee") assisted the Board in its consideration of Starr's demand. Id. at 2. The Committee retained attorneys from the law firms of Simpson Thacher & Bartlett LLP ("Simpson") and Seitz Ross Aronstam & Moritz LLP ("Seitz Ross") to serve as counsel to the Board in its consideration of the demand. Id. Simpson has served as independent counsel to the Board for many years. Id. Weil, Gotshal & Manges LLP ("Weil"), counsel for AIG, also assisted the Board in its consideration. Id. at 5.

The Board and the Committee provided the parties with a set of protocols in the months leading up to the Board's decision. Id. at 2. From November 2, 2012 through December 5, 2012, the AIG Board received three rounds of briefing from Starr, the Department of Justice, the Treasury Department, and the FRBNY. Id. These submissions totaled 184 pages, and were submitted to all members of the Board as they were received. Id. The Committee met at four separate intervals to discuss the parties' written submissions and to determine what additional information and materials would assist the Board members in their consideration of Starr's demand, which resulted in the circulation of additional protocols concerning the January 9, 2013 oral presentations. Id.

On December 21, 2012, the Seitz Ross law firm provided a package of materials to the Board, consisting of a chronology of events, a chart summary of the parties' respective positions, and a presentation entitled "Summary of Underlying Legal Claims, Defenses, Facts and Rulings." Id. The same day, Seitz Ross provided the presenting parties with specific questions on behalf of the Committee, and asked them to devote attention to these questions during their oral presentations. Id. at 3. The Board previously had received copies of this Court's July 2, 2012 and September 17, 2012 rulings, and the November 19, 2012 ruling from the United States District Court for the Southern District of New York involving Starr's companion claims against the FRBNY. Id. at 2. In that case, the District Court granted the FRBNY's motion to dismiss. Starr has appealed the District Court's decision to the United States Court of Appeals for the Second Circuit.

On January 4, 2013, AIG received presentation materials from Starr and the Treasury Department, which were made available to the Board. Id. The Department of Justice provided a letter to AIG in which counsel for the Government declined AIG's invitation to appear before the Board. Id. The Department of Justice explained that it had "decided . . . not [to] address the substantive merits of this matter outside of the litigation." Id. at Ex. 21.

The day before the oral presentations, the Board[3] met to discuss the demand and the submitted materials, and to prepare for the January 9, 2013 meeting. Id. at 3. During this meeting, Mr. Paul Curnin, an attorney from Simpson, discussed and answered questions concerning the demand, the merits of the claims, and other contextual matters. Id. at 3-5. Mr. Curnin reviewed the factors that the Board was permitted to consider in addressing the demand:

> Starr's likelihood of success, potential damages, potential costs to AIG, such as attorneys' fees, indemnification obligations, the impact the suit might have on other litigation, relations with regulators and elected officials, potential harm to AIG's corporate brand and image, and any other factor the Board deems relevant.

Id. at 3. Mr. Curnin reported the view of the multiple advising attorneys that Starr's claims "had a low likelihood of success," which he quantified to be around twenty percent, with a five percent margin of error. Id. at 3-4.

Mr. Joseph S. Allerhand, as well as knowledgeable members of AIG's management, addressed the ML III transactions pertaining to Starr's claims. Id. at 5. Mr. Allerhand also discussed and answered questions concerning AIG's indemnification obligations and the "Government's contention that AIG would lose billions of dollars in net operating losses if Starr prevailed." Id.

The members of the Board then discussed their views of the demand based on the submissions and briefings of the parties along with the advice of the Board's counsel. Id. The members concluded that they would carefully consider the parties' presentations the

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[3] In addition to the Board of Directors, the minutes from the January 8, 2013 meeting reflect the presence of the following persons: Michael R. Cowan, Executive Vice President and Chief Administrative Officer; Peter D. Hancock, Executive Vice President – Property and Casualty Insurance; David L. Herzog, Executive Vice President and Chief Financial Officer; Jeffrey J. Hurd, Executive Vice President – Human Resources and Communications; Thomas A. Russo, Executive Vice President and General Counsel; Sid Sankaran, Executive Vice President and Chief Risk Officer; Brian T. Schreiber, Executive Vice President and Treasurer; Jay S. Wintrob, Executive Vice President – Life and Retirement; Tal S. Kaissar, Vice President – Tax; Michael W. Leahy, Vice President and Deputy General Counsel; Eric N. Litzky, Vice President – Corporate Governance; Jeffrey A. Welikson, Vice President, Corporate Security and Deputy General Counsel; Messrs. Joseph S. Allerhand and Stephen A. Radin of Weil; Messrs. Paul C. Curnin, Michael J. Garvey and Michael D. Nathan of Simpson; Mr. Henry E. Gallagher, Jr. of Connolly Gallagher LLP; and Messrs. Bradley R. Aronstam and Collins J. Seitz, Jr. of Seitz Ross. See AIG Board Mtg. Minutes (Jan. 8, 2013).

next day and would announce their determination on the demand as promptly as possible. Id. at 6.

On January 9, 2013, the Board met with representatives of Starr, the Treasury Department, and the FRBNY. Counsel for each party made initial presentations, Starr's counsel was permitted to reply, and then each party presented closing statements. Id. The presenters left the room, during which time the Board conferred and formulated follow-up questions. Id. The presenters reentered the meeting, answered questions from the Board for approximately 40 minutes, and were given a final opportunity to make further comments. Id. The presenters then left the meeting, and the Board deliberated. Id. Board members inquired of counsel whether the presentations had altered their previous opinions of Starr's claims, to which they replied in the negative. Id. Each director then spoke and offered his or her view that Starr's demand should be refused, for a variety of reasons, including:

> [T]he low likelihood of success on the merits, the realistic potential damages, the uncertainty in allocating any potential damages among the direct and derivative claims, the potential harm to AIG's goodwill and the positive image that AIG worked so hard to restore since September 2008 (consistent with the negative reaction by the public, media, regulators and elected officials even to the Board's consideration of the Demand), the fact that "a deal is a deal," and AIG's potential indemnification obligations.

Id. at 7. The Board then took two votes, one including the full Board, and one excepting the three members who had served on the Board in September 2008. Id. Both votes resulted in a unanimous determination to refuse Starr's demand. Id. AIG issued a press release later the same day, reflecting the Board's determination. Id.

b. Starr's Second Amended Complaint

On March 11, 2013, Starr filed its Second Amended Verified Class Action Complaint. In this complaint, Starr maintains its argument of demand futility, despite the fact that Starr made a demand on the Board. 2d Am. Compl. ¶¶ 180, 191. Starr contends that it reserved the right to argue demand futility through the September 5, 2012 agreement with AIG, in which Starr agreed to make a demand on the Board "provided that Plaintiff could still assert that 'the demand was wrongfully refused and/or not required as a matter of law.'" Id. at ¶ 190 (citing Demand Agreement at 3).

In addition to its demand futility argument, Starr alleges that the demand was wrongfully refused, as "the Board did not objectively and disinterestedly exercise its business judgment or due care in considering the demand." Id. at ¶ 191. Starr alleges other grounds for its assertion that the Board wrongfully refused its demand: the strength of Starr's case, the Board's reliance on "conflicted counsel," the personal and reputational interests of individual members, and Government threats and intimidation. Id. at ¶¶ 192, 205-09. Starr further argues that the Board's decision was flawed because the Board failed to give deference to legal decisions already made in this case and disregarded evidence of significant damage to AIG as a result of the Government's taking. Id. at ¶¶ 211-13. Additionally, Starr alleges that the Board made a predetermined decision to refuse the demand, evidenced by the issuance of its decisional press release only three hours after presentations were complete. Id. at ¶ 216.

II. Standard of Review

Under RCFC 23.1, a shareholder plaintiff bringing a derivative action must "state with particularity" in its complaint "any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members," and if applicable, "the reasons for not obtaining the action or not making the effort." Rule 23.1 does not create the demand requirement, but merely outlines the procedural framework for alleging a derivative claim. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 96 (1991). The requirement to make a demand, and the adequacy thereof, is a substantive obligation to be evaluated under the law of the state of the company's incorporation. Id. at 97. Here, AIG is a Delaware corporation, and therefore Delaware law governs the extent of the demand requirement and the circumstances under which Starr may proceed derivatively. Derivative suits are "an extraordinary procedural device," and thus such complaints are subject to a heightened pleading standard, namely, the requirements of Rule 23.1. Stepak v. Addison, 20 F.3d 398, 402 (11th Cir. 1994). The Court will evaluate Starr's complaint under this standard.

Discussion

In its Second Amended Complaint, Starr brings derivative claims on AIG's behalf for damages resulting from the Government's alleged taking or illegal exaction of a 79.9% interest in AIG, as well as damages related to the Maiden Lane III transactions. 2d Am. Compl. ¶ 235. Starr argues that it has raised a reasonable doubt that the AIG Board conducted a reasonable investigation in good faith because of the Board's (1) reliance on conflicted counsel, (2) lack of independence, and (3) failure to consider the merits of Starr's claims and the material facts relevant to the claims. AIG and the Government contend that Starr lacks standing to assert these derivative claims, as Starr waived any demand futility argument by making a demand on the Board, and Starr has failed to allege facts creating a reasonable doubt that the Board's decision is entitled to the presumption of the business judgment rule, a requirement to establish wrongful refusal. As set forth below, the Court finds that Starr has not demonstrated a reasonable doubt that the Board's decision is entitled to the presumption of the business judgment rule, and therefore has no standing to advance derivative claims on behalf of AIG.

I. Applicable Law

If a claim belongs to a corporation, it is the corporation itself, acting through its board of directors, which determines whether or not to assert the claim. Grimes v. Donald, 673 A.2d 1207, 1215 (Del. 1996) *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000). A derivative form of action is "an extraordinary procedural device," Stepak, 20 F.3d at 402, which allows an individual shareholder to bring "suit to enforce a *corporate* cause of action against officers, directors, and third parties," Kamen, 500 U.S. at 95 (quoting Ross v. Bernhard, 396 U.S. 531, 534 (1970)). An individual shareholder's ability to advance such a claim, however, is tempered by the demand requirement, calling for a shareholder to show that the board wrongfully refused his pre-suit demand on the board to assert the corporation's claim (wrongful refusal), or to establish that pre-suit demand is excused because the directors are incapable of making an impartial decision regarding the pursuit of the litigation (demand futility). See Wood v. Baum, 953 A.2d 136, 140 (Del. 2008). "[T]he demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) *overruled in part on other grounds by* Brehm, 746 A.2d at 254. "[R]eceipt of demand makes it crystal clear to the directors of a Delaware corporation that the decision whether to commit the corporation to litigation lies solely in their discretion." Kamen, 500 U.S. at 105.

If a demand is made and refused, the shareholder has spent an "'arrow' in the 'quiver.' The spent 'arrow' is the right to claim that demand is excused." Grimes, 673 A.2d at 1218-19 (citing Spiegel v. Buntrock, 571 A.2d 767, 775 (Del. 1990) ("[a] shareholder who makes a demand can no longer argue that demand is excused.")); see also FLI Deep Marine LLC v. McKim, 2009 WL 1204363, *3 (Del Ch. 2009) ("Delaware law could hardly be clearer" in holding that shareholders may not invoke the futility exception after submitting a demand to the board).

A board that refuses a shareholder's demand is entitled to the presumption of the business judgment rule, which "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company," Aronson, 473 A.2d at 812 (citations omitted); see also Beam, 845 A.2d at 1048 (business judgment rule is a presumption that directors were faithful to their fiduciary duties). The presumption is determinative, unless the shareholder can allege facts with particularity creating a reasonable doubt that the board is not entitled to the benefit of the presumption. Grimes, 673 A.2d at 1219 (citing Levine v. Smith, 591 A.2d 194, 212 (Del. 1991)). "[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'" In re Walt Disney, 906 A.2d at 74 (quoting Sinclair Oil, 280 A.2d at 720).

In making a demand on the board, a shareholder "not only tacitly concedes [the] lack of self-interest and independence of a majority of the Board, but expressly concedes both issues." Levine, 591 A.2d at 212. Therefore, where a shareholder's complaint is predicated on wrongful refusal, the only issue for a trial court to determine is the application of the business judgment rule to the board's refusal of demand. Levine, 591 A.2d at 212; Spiegel, 571 A.2d at 778 ("The ultimate conclusion of the [board] . . . is *not* subject to judicial review.") (quoting Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981)). The burden is on the shareholder to rebut the presumption of the business judgment rule by alleging facts with particularity that create a reasonable doubt as to the good faith and reasonableness of the board's investigation. Levine, 591 A.2d at 212 (citing Spiegel, 571 A.2d at 778); Aronson, 473 A.2d at 812; see also Scattered Corp. v. Chi. Stock Exch., Inc., 701 A.2d 70, 75 (Del. 1997) ("This [principle] is completely consistent with the Grimes teaching that a board that appears independent *ex ante* may not necessarily act independently *ex post* in rejecting a demand."), *overruled in part on other grounds by* Brehm, 746 A.2d at 254.

"Reasonableness implicates the business judgment rule's requirement of procedural due care"; that is, whether the board acted on an informed basis in rejecting the demand. Levine, 591 A.2d at 213 (citations omitted). Although a board of directors has a duty to act on an informed basis in responding to a demand, "there is obviously no prescribed procedure that a board must follow." Id. at 214 ("[A] determination of what matters will (and will not) be considered must necessarily fall within the board's discretion."). The directors have the discretion to determine "the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to the demand." Rales v. Blasband, 634 A.2d 927, 935 (Del. 1993); Levine, 591 A.2d at 212, 214 (upholding refusal and finding that board had no obligation "to permit a demanding shareholder to make an oral presentation at a meeting"). Accordingly, a board need not be informed of *every* fact, but "is responsible for considering only *material* facts that are *reasonably available*, not those that are immaterial or out of the Board's reasonable reach." Brehm, 746 A.2d at 259; see also Rales, 634 A.2d at 935 ("If a factual investigation is required, it must be conducted reasonably and in good faith.").

As an initial matter, the Court rejects Starr's claim of demand futility. Starr submitted a demand to the Board, which, according to long-standing corporate law precedent, conclusively waives any right to assert demand futility. See, e.g., Grimes, 673 A.2d at 1218-19; Spiegel, 571 A.2d at 775. Starr's September 5, 2012 agreement with AIG, in which Starr purportedly reserved "the right to assert that demand was . . . excused," Opp'n 1, is insufficient to overcome binding black letter law. Thus, with respect to the derivative claims, the only issue for the Court to determine is whether Starr has sufficiently alleged particularized facts creating a reasonable doubt that the Board conducted a reasonable investigation in good faith.

II. Conflicted Counsel

a. The Parties' Arguments

Starr contends that the AIG Board's decision was flawed because the Board was advised by conflicted law firms that dominated the demand process. Starr alleges that because the Board "allowed the very advisers who had advised in favor of the challenged transactions to advise them on whether to challenge the transactions[,]" 2d Am. Compl. ¶ 205, there is reason to doubt whether the Board informed itself of all material information reasonably available prior to making a business decision, Opp'n 15-16. In particular, Starr argues that "the[se] law firms were active participants charged with examining the transactions and advising the Company and the Board as to their propriety and legality," and therefore "are inherently biased in favor of defending the advice that they had previously rendered and avoiding a judicial decision to the contrary." Opp'n 17. Starr predominantly relies upon Stepak, a case applying Delaware law and holding that corporate counsel's prior representation of individual directors regarding the same transactions created a reasonable doubt as to the board's investigation and consideration of a shareholder demand, which the court found to be dominated by conflicted counsel. See Stepak, 20 F.3d at 410-11. Here, Starr claims that the Simpson and Weil law firms were conflicted and dominated the Board's evaluation of the demand, thereby preventing the Board from making a truly informed decision. Opp'n 18. Although AIG retained a third law firm, Seitz Ross, as independent counsel, Starr posits that, in light of Simpson and Weil's "domination," the participation of Seitz Ross had no "cleansing effect." Id. at 22 (quoting Stepak, 20 F.3d at 409).[4]

Regarding the participation of the Simpson law firm, Starr argues that the AIG Board unjustifiably relied on Mr. Curnin's counsel and opinions evaluating Starr's claims. Id. In alleging that Simpson dominated the process, Starr highlights Simpson's role in communicating with the Board and presenting evidence: Mr. Curnin outlined various options the Board could pursue, listed factors the members could consider in evaluating the demand, and summarized the legal claims at issue. Id. at 18. Further, Mr. Curnin shared with the Board his "view that Starr had a low likelihood of success on the merits and the damages were far below the damages claimed by Starr." Id. (quoting AIG Comm. Mtg. Minutes (Jan. 5, 2012)). Similarly, Starr alleges that the Board unjustifiably relied on the opinion of Mr. Allerhand from Weil "as to the validity and value of the ML III derivative claims" because of Weil's advisory role to AIG in 2008. Id. at 19.

Starr further argues that the Board erroneously relied on the opinions of two experts that were selected by conflicted counsel, Professor John C. Coates and Dean

[4] Starr does not allege that Seitz Ross had any disabling conflict.

Erwin Chemerinsky. Id. at 20-22. As an extension of counsel's desire to defend the propriety of their 2008 advice, Starr alleges that "conflicted counsel controlled both the interaction with the experts and the presentation of their opinions." Id. at 20 ("Plaintiff was not given the opportunity to review or comment on these opinions or even made aware of their existence until after demand was denied."). Moreover, Starr suggests that these selected experts were biased advisers themselves: "Prof. Coates had government contacts and thus may have a bias in the Government's favor"; "the limited amount Dean Chemerinsky has published on th[e relevant] subjects reveals a bias in favor of the Government and against property owners, and thus, a likely bias against Starr's claim." Id. at 21-22.

AIG and the Government vigorously dispute Starr's characterization of the Board's counsel as "conflicted," arguing that such allegations are not only illogical and unsubstantiated, but also irrelevant. Preliminarily, the moving parties both point out that Starr was aware of the involvement of all three law firms before, during, and after the demand process, but Starr did not voice any concerns about conflict until the Second Amended Complaint, after receiving an outcome with which it disagreed.[5] Def.'s Reply 15; Tr. 40 (Allerhand).

AIG and the Government argue that the basic premise for Starr's conflicted counsel argument is critically flawed. As they point out, Starr alleges that the wrongdoer who caused its injury was the United States Government – not AIG or any of the Board members. The Department of Justice represents the United States Government, and the Simpson and Weil law firms represent AIG and the Board. AIG Reply 3-4. Given that Starr does not allege harm to the corporation at the hands of AIG or its Board of Directors, the moving parties argue, there is no conflict presented by Simpson or Weil advising the Board. Id. at 3; Def.'s Reply at 13-14. The moving parties contend that Stepak, the predominant case on which Starr relies, is inapposite, because the corporation's advising attorneys in that case had represented individual directors in criminal proceedings relating to the same subject matter as the demand. AIG Reply 4-5; Def.'s Reply 15-16.

Additionally, AIG points to Starr's assertions that its taking and illegal exaction claims do not implicate the directors' fulfillment of their fiduciary duties. AIG Reply 5 (citing Demand Refusal Letter, Ex. 3 at 5, 6 (Starr's Nov. 2, 2012 Submission to the Board)). Therefore, given that Simpson and Weil advised the directors in 2008, and the directors' conduct in 2008 is not being challenged, the attorney-client relationship presents no conflict within a suit where a shareholder of a corporation is suing the United States. Id.

[5] The Government states that the Court should reject Starr's conflicted counsel argument as untimely, analogizing to "a person who is aware of a patent error in a Government contracting process [who] chooses to 'sit on its rights' and 'roll the dice and see' if it receives [the] award before filing a challenge." Def.'s Reply 15 (citing Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007)).

AIG specifically denies that the Board erroneously "reli[ed] on conflicted counsel to shape the process and control the information provided to the Board with regard to demand" by emphasizing the depth of Seitz Ross's involvement in the demand process. Id. at 6. The Board's letter refusing Starr's demand, as well as the Board minutes submitted by Starr, demonstrate that:

> [T]wo partners from Seitz Ross, upon being engaged in November 2012, participated in every meeting at which Starr's demand was considered, advised the Board regarding the merits of the claims, co-authored and distributed work product to the Board regarding Starr's demand, and co-authored the letter to Starr refusing the demand. See Jan. 5, 8 and 9, 2013 Minutes (Dkt. Nos. 121-1, 121-2, 121-4); Dec. 21, 2012 and Jan. 23, 2013 Letters (Dkt. Nos. 87-1, 87-20).

Id. To that contention, the Government adds that the Board was not "dependent on" the legal opinions of their retained firms, as the Board received extensive written submissions, Powerpoint presentations, and oral presentations from other competent entities, including counsel for Starr. Def.'s Reply 16.

Finally, regarding the expert opinions received by the Board, AIG argues that "Starr alleges no facts that even begin to suggest that AIG's board's reliance on Professor Coates and Dean Chemerinsky was not reasonable," highlighting the experts' "impeccable credentials." AIG Reply 6-7 (citing McPadden v. Sidhu, 964 A.2d 1262, 1270-71 (Del. Ch. 2008), for the principle that a plaintiff must allege particularized facts showing that reliance on an expert's advice "was grossly negligent"). Similarly, the Government contends that "Starr's unsubstantiated second-guessing of the independent experts' qualifications or alleged biases . . . fails to support its contentions." Def.'s Reply 16.

b. Analysis

In Stepak, the plaintiff claimed his demand was wrongfully refused, alleging that the board's investigation was dominated by counsel with an irreconcilable conflict of interest. See 20 F.3d at 403. This conflict, the plaintiff argued, arose from corporate counsel's representation of officers and directors in criminal proceedings involving the same subject matter of the demand. Id. at 403-04. After a careful review of the evidence, the court found that the plaintiff had alleged specific facts to rebut the presumption of the business judgment rule:

> Selection of a law firm that has *actually represented the alleged wrongdoers* in proceedings related to the very subject

> matter that the law firm is now asked to neutrally investigate reaches, in our opinion, the level of gross negligence and is incompatible with a board's fiduciary duty to inform itself of all material information reasonably available prior to making a business decision. Such a shortcoming strips a board's rejection of a shareholder demand of the protection of the business judgment rule.

Id. at 405 (internal citations omitted) (emphasis added). The court discussed the important role of the demand requirement in preserving the directors' independence, and explained "to properly distinguish between meritorious and frivolous shareholder allegations, corporate counsel must be able to exercise independent professional judgment, free of any bias in favor of his individual clients." Id. at 404-05 (citations omitted).[6] Thus, counsel's representation of the alleged wrongdoers compromised their ability to exercise independent judgment, and therefore undermined the independence of the board. Id.

Here, as Starr itself has asserted, the alleged wrongdoer is the United States Government – not AIG, and not any of the individual directors. See Tr. 64 (Boies)[7]; see generally 2d Am. Compl. ¶¶ 220-237 (Starr's claims for relief, no directors named). Starr offers no facts alleging that either Simpson or Weil represent, or have represented the Government in any relevant capacity. Thus, the underlying premise of conflict in Stepak is not present in this case, and the Court finds no indication that either Simpson or Weil had any disabling conflict regarding Starr's demand.

Additionally, even if the Simpson or Weil law firms were considered to be conflicted, the Court finds, based on the thorough documentation of the demand process, that their roles in the investigation and presentation process did not amount to domination of the directors' consideration of demand. In Stepak, the court found the plaintiff had alleged with sufficient particularity that conflicted counsel had dominated the consideration of his demand. The court noted the allegations that conflicted counsel: (1) served as the defendant's general counsel when plaintiff's demand was received, considered, and rejected; (2) conducted the investigation of the demand and presented the demand to the directors; (3) drafted the board's demand refusal letter; and (4) was present

[6] The court also noted that corporate counsel's prior representation of the alleged wrongdoer-directors burdened counsel with confidentiality duties towards the individual wrongdoer-directors. Stepak, 20 F.3d at 406. Given the law firm's ethical obligation of confidentiality, "a board's selection of that firm as the primary investigator is tantamount to a decision to forego 'material information reasonably available.'" Id. (quoting Aronson, 473 A.2d at 812).

[7] "We don't have to prove that [the members of the board] breached their fiduciary duty. That's not part of our takings case. It's not part of our illegal exaction case. We don't have to prove that." Tr. 64 (Boies).

at and participated in a subsequent board meeting to discuss the demand, at which independent counsel was not present. Stepak, 20 F.3d at 407-08. The court noted that independent counsel's "lone presentation" at a preliminary board meeting was insufficient "to remove any taint associated with [conflicted counsel's] involvement." Id. at 409.

Again, Starr's reliance on Stepak is misplaced, as its facts are easily distinguishable from those present before the Court. Initially, AIG exceeded its investigatory duties by hiring the independent firm of Seitz Ross, "even though not required." AIG Comm. Mtg. Minutes (Nov. 1, 2012). AIG also had its own office of corporate counsel, representatives of which were present at the relevant board and committee meetings. See id. (listing attendance of General Counsel representatives); AIG Comm. Mtg. Minutes (Jan. 5, 2013) (same); AIG Board Mtg. Minutes (Jan. 8, 2013) (same); AIG Board Mtg. Minutes (Jan. 9, 2013) (same). Unlike the "lone presentation" of independent counsel at a single board meeting, Stepak, 20 F.3d at 409, Seitz Ross was present at each of the Board's meetings regarding Starr's demand, as well as the Committee's January 5, 2013 meeting. Seitz Ross also co-authored work product to inform and advise the Board on Starr's demand, and co-authored the demand refusal letter. Additionally, the AIG Board was not "dependent on" the legal opinions of purportedly conflicted counsel, Opp'n 20, as the Board received extensive written submissions from Starr, the Department of Justice, the Treasury Department, and the FRBNY, as well as oral presentations from Starr, the Treasury Department, and the FRBNY. Demand Refusal Letter at 2-3. In contrast to the flawed process conducted by the board in Stepak, AIG took the extra step of hiring a third firm as counsel, received the work product and advice of three law firms, and made an informed decision to refuse Starr's demand.

Starr relies upon two other cases that discuss the need for independent counsel when a board delegates its decision-making power to a special litigation committee. See Brinckerhoff v. JAC Holding Corp., 263 A.D.2d 352, 353 (N.Y. 1st Dep't 1999); In re Par Pharm., Inc. Derivative Litig., 750 F. Supp. 641, 647 (S.D.N.Y. 1990). In both Brinckerhoff and In re Par Pharmaceutical, the board of directors appointed a special litigation committee to investigate and advise it on the plaintiff's derivative claims, which included allegations that the individual directors breached their fiduciary duties. 263 A.D.2d at 352-53; 750 F. Supp. at 642, 646-47. The court in Brinckerhoff harbored a reasonable doubt as to the adequacy of the committee's investigation because the committee was not advised by independent counsel and its report "was a mere two pages in length with respect to the subject transaction, and failed to document the special committee's procedures, reasoning and conclusions, thus effectively insulating its investigation from scrutiny by the courts." 263 A.D.2d at 353 (citing In re Par Pharm., 750 F. Supp. at 647). The court based its two-paragraph slip opinion on the analysis set forth in In re Par Pharmaceutical, where the district court found that the special litigation committee's failure to retain independent counsel or "document in any manner its procedures, reasoning or conclusions" resulted in an impermissibly flawed review process. In re Par Pharm., 750 F. Supp. at 646-47.

Here, the AIG Board did not create or delegate its decision to a special litigation committee, as the Board members were not compromised by self-interest or lack of independence. Moreover, as Starr itself points out, its complaint does not allege that the individual directors breached their fiduciary duties, Tr. 64 (Boies), and therefore, the directors are not named as defendants in the current action. Thus, Brinckerhoff and In re Par Pharmaceutical are not applicable to the AIG Board's procedure in considering Starr's demand, and have no bearing on the case at bar.[8] The Court finds no fault with the Board retaining and relying on the Simpson, Weil, and Seitz Ross law firms, and accordingly, cannot say that the Board's choice of counsel undermines the reasonableness of the Board's investigation. Moreover, the extensive documentation of the Board's procedures, reasoning, and conclusions has enabled this Court to conduct a thorough, informed review of the Board's process.

Furthermore, Starr has not alleged facts that plausibly suggest the bias of Professor Coates or Dean Chemerinsky, which Starr itself concedes is speculative. Opp'n 21-22. Starr's assertion that "Prof. Coates had government contacts and thus may have a bias in the Government's favor," Opp'n 21, is far from colorable evidence of a bias against Starr. Similarly, Starr's attempt to link a phrase in one of Dean Chemerinsky's publications to "a bias in favor of the Government and against property owners, and thus, a likely bias against Starr's claim," id. at 22, is a bridge too far. The presumption that board members properly exercise their business judgment also extends to their reliance on experts, Brehm, 746 A.2d at 261, and Starr has not alleged particularized facts to rebut this presumption.

The Court finds Starr's allegations of conflicted counsel to be without merit, and insufficient to raise a reasonable doubt that the AIG Board is entitled to the presumption of the business judgment rule.

III. The Board's Independence

a. The Parties' Arguments

Next, Starr alleges that the "members of the Board [that] participated in the decision to reject Starr's demand . . . could not be expected to pass objective judgment on their own action and inaction." 2d Am. Compl. ¶ 183. Preliminarily, Starr argues that by

[8] The existence of the Committee to assist the AIG Board in its consideration of the demand does not alter the inapplicability of these cases, as "[t]he use of a committee of the board formed to respond to a demand or to advise the board on its duty in responding to a demand is not the same as the SLC [special litigation committee] process[.] It is important that these discrete and quite different processes not be confused." Grimes, 673 A.2d at 1216 n.13.

making a demand, it did not concede the independence of the AIG Board, as a board "may appear to be independent, but may not always act independently." Opp'n 26 (quoting Grimes, 673 A.2d at 1219). The Court distills Starr's grounds for the Board's lack of independence into three primary allegations: (1) the directors were elected by the Government while it held a majority stake in AIG; (2) the directors appointed by the Trustees were obligated to act in the best interests of the Treasury Department; and (3) the directors faced potential harm to their professional reputations and relationships with the federal government in the event they allowed this suit to go forward. Id. at 26-30.

Starr argues that because the Department of Treasury elected all twelve members of the current Board, those Board members "could not be expected to authorize a lawsuit against the Government[.]" 2d Am. Compl. ¶ 188. Starr emphasizes the fact that eight of the Board's twelve members "were first elected to the Board by the Trustees of the Government's Trust exercising their voting control to elect members of the Board[.]" Id. at ¶ 183; Opp'n 29. Starr suggests that the Trust functioned as an agent of the Government, as it was run by former Government officials, under the Government's advice and instructions, and for the Government's best interests. 2d Am. Compl. ¶ 184. The Trustees themselves, under the Trust Agreement, "could only take actions that are 'in or not opposed to the best interests of the Treasury.'" Id. at ¶ 187 (quoting § 3.03(a) of the Trust Agreement). This "standard of care," Starr argues, necessarily dictated that the Trustees were "duty bound to elect only Board members who similarly will act only 'in or not opposed to the best interests of the Treasury.'" Id. Accordingly, Starr argues, the Trustees' duty to the Treasury was transposed onto the Board members who were elected by the Trustees, thereby establishing the AIG Board's lack of independence to consider Starr's demand.

Finally, Starr argues that the governmental pressure and public outcry against AIG prevented the Board from exercising independent, objective judgment. Starr highlights threats made by outside counsel for the Treasury Department in arguing that "[t]he directors were well aware that the risk of harm to their professional reputation and relationship with the federal government from authorizing the derivative claims to proceed exceeded any risk that would result from rejecting the demand." Opp'n 27. Starr points to the Oracle case, in which a special litigation committee was established to evaluate a shareholder's demand to bring action against directors for insider trading. In re Oracle Corp. Derivative Litig., 824 A.2d 917, 920-21 (Del. 2003). In finding that the independence of the special litigation committee was compromised, the court noted that a decision to allow the derivative suit to proceed "would have potentially huge negative consequences for the Trading Defendants, not only by exposing them to the possibility of a large damage award but also by subjecting them to great reputational harm." Id. at 940-41. Starr relies on Oracle for its statement that courts "cannot assume – absent some proof of the point – that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk." Id. at 938. Here, Starr argues, the government pressure and the "media frenzy" surrounding Starr's demand created "exactly the kind of position when a board is in that it's not able to make the kind of independent judgment that needs to be made for the benefit of the shareholders." Tr. 58 (Boies). Starr contends that this argument is bolstered by the fact that the Board "rush[ed] to judgment," issuing its decisional press release three hours after the presentations had concluded. Opp'n 29.

In response, AIG and the Government first assert that by virtue of making a demand, Starr conceded the independence and disinterestedness of the Board. AIG Mot. 24-25; Def.'s Mot. 15. Regardless of whether or not this argument was waived, the moving parties further contend that Starr alleges no facts showing that the Board lacked independence. In addressing the relevant case law, AIG and the Government argue that the election of directors by a majority shareholder does not strip directors of the presumption of independence, nor does director approval or participation in a challenged wrongdoing establish lack of independence. AIG Mot. 26-33; Def.'s Mot. 18-20. Furthermore, the moving parties argue that the directors elected by Trustees were not bound to act in the best interests of the Treasury Department, but instead had fiduciary obligations to AIG, breaches of which are not alleged by Starr. AIG Mot. 30-31; Def.'s Mot. 19. Finally, they contend that the Board properly considered all relevant facts surrounding Starr's demand, and that "AIG's directors had every right to decide, in the exercise of their business judgment, that suing the Government for its rescue of AIG is not the right thing for AIG to do, and that AIG's interests are better served by focusing on the future and not joining litigation concerning the past." AIG Mot. 3-4.

b. Analysis

The Court first addresses whether, by making a demand on the Board, Starr conceded the independence of the directors. Levine explains that in making a demand, a shareholder "not only tacitly concedes [the] lack of self-interest and independence of a majority of the Board, but expressly concedes both issues." 591 A.2d at 212. The Delaware Supreme Court in Scattered Corp. more recently stated that the "[f]ailure of an otherwise independent-appearing board or committee to act independently is a failure to carry out its fiduciary duties in good faith or to conduct a reasonable investigation. Such failure could constitute wrongful refusal." 701 A.2d at 75. The Court views the intersection of these and other cases as standing for the following proposition: when a demand is made on a board, the demanding shareholder concedes the independence of its members, absent particularized allegations creating a reasonable doubt that the demand was properly refused. Accordingly, the Court proceeds to evaluate Starr's allegations of lack of independence under the reasonable doubt standard.

i. Election of Board Members During Government's Control Period

It is well established under Delaware law that "in the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation." Aronson, 473 A.2d at 815; see also, e.g., Beam, 845 A.2d at 1054 n.37 (quoting Aronson). "The mere nomination of a director by a majority shareholder . . . is insufficient to demonstrate lack of independence." S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., 2011 WL 863007, at *10 (Del. Ch. Mar. 9, 2011) (citing Aronson, 473 A.2d at 816). Election at the behest of a controlling shareholder "is the usual way a person becomes a corporate director." Aronson, 473 A.2d at 816. Thus, the fact that the twelve Board members were elected when the Government controlled a majority equity interest in AIG is insufficient to create a reasonable doubt as to their independence.

Additionally, Starr's contention that three of the directors served on AIG's Board during the challenged transactions and therefore "have a personal interest in defending conduct attacked in this litigation," 2d Am. Compl. ¶ 206, is conclusory and without merit. As AIG explained in its motion, even when individual directors are sued, "mere directorial approval of a transaction" is insufficient to show lack of independence. See AIG Mot. 32-33 (quoting Aronson, 473 A.2d at 817). Therefore in this case, where the individual directors are not being sued, participation and approval of the challenged transaction can hardly serve to disqualify those directors, or cast a shadow of doubt on the reasonableness of the Board's consideration of Starr's demand.

ii. Election of Board Members by Trustees

Starr argues that because the Trustees had a fiduciary obligation to only take actions that are "in or not opposed to the best interests of the Treasury," any directors elected by the Trustees also could only take actions that are "in or not opposed to the best interests of the Treasury." 2d Am. Compl. ¶ 187. This transposition of duty, however, is the cog in the fiduciary wheel. Whatever the Trustees' obligations to the Treasury may have been, such duties could not be imposed on persons without any legal relationship to the Trust. Thus, the Board members elected by the Trustees had no legal fiduciary duty to the Trust, and by virtue of that premise, no legal fiduciary duty to the Treasury Department.

Even under the hypothetical premise that some of the AIG directors had a duty to act in the best interests of the Treasury Department, such a duty could not displace the fiduciary obligations to AIG that the directors acquired upon their election. See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("[T]he best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."). Moreover, the Trust was dissolved on January 14, 2011, 2d Am. Compl. ¶ 84, nine months before Starr filed its initial complaint and twenty months before Starr decided to make a demand on the Board. See AIG Mot. 29. Therefore, at the time of Starr's demand, it was impossible for Board members elected by the Trustees to have any obligations pursuant to a non-existent Trust Agreement.

iii. Public and Governmental Pressure on the Board

Finally, Starr's allegations that public and governmental pressure compromised the Board's independence and rushed it to make an uninformed decision do not serve to create a reasonable doubt that the Board is entitled to the presumption of the business judgment rule. Starr does not allege any facts that directly call into question the acts of any individual director. Nowhere in its Second Amended Complaint does Starr allege that any individual director personally acted without honesty and good faith or that any particular director was beholden to the Government so as to value his or her reputation higher than his or her fiduciary duties. See In re J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 808, 824-25 (Del. 2005) (finding plaintiffs' allegations of the directors' financial, charitable, or personal relationship to the alleged wrongdoer were insufficient to show that directors were beholden to the alleged wrongdoer).

Starr's general allegations that the Board's objectivity and independence were compromised by media and government attention does not place this case within the ambit of Oracle. As in Brinckerhoff and In re Par Pharmaceutical, the court in Oracle assessed the independence of a special litigation committee. Oracle, 824 A.2d at 937. The Delaware Supreme Court has explained that "[u]nlike the demand-excusal context, where the board is presumed to be independent, the SLC [special litigation committee] has the burden of establishing its own independence by a yardstick that must be 'like Caesar's wife' – 'above reproach.'" Beam, 845 A.2d at 1055 (quoting Lewis v. Fuqua, 502 A.2d 962, 967 (Del. Ch. 1985)). Here, the AIG Board did not appoint a special litigation committee, and the burden remains on Starr to rebut the presumption, with particularized facts, that the Board acted in good faith and in the best interest of the corporation.[9]

Moreover, it may well have been the case that "the public and governmental outcry . . . confirmed to the Board that reputational considerations favored denial of the demand," Opp'n 27-28, but if so, that fact is of no moment to the Court's consideration of whether the Board was reasonably informed in making its decision. The Court has received many filings that attest to the so-called "media frenzy" sparked by this case, and the Court finds the Government's observation regarding the attendant circumstances to be astute: Starr "mistakenly conflates public reaction to AIG's actions with the directors' personal reputation." Def.'s Reply 19. As AIG points out, "[n]o responsible board could possibly consider suing the Government without also considering the impact the suit was expected to have on the corporation's name, image and relationships with shareholders, customers, regulators and elected officials." AIG Reply 7. This is especially true in the

[9] Additional facts demonstrate the inapplicability of Oracle to Starr's argument. The shareholders of Oracle brought a derivative action alleging that four individual directors engaged in insider trading, in violation of criminal law. Oracle, 824 A.2d at 921. Once again, Starr does not allege any wrongdoing on the part of the individual directors, criminal or otherwise.

circumstances here, where "AIG is in the business of selling insurance and financial products, and its reputation with its customers, with its regulators, does matter." Tr. 35 (Allerhand). The Board's consideration of this reputational harm in making its business decision was eminently rational, and indeed the failure to consider such potential harm would have been plainly irrational. Given the mounting scrutiny that AIG was receiving regarding the demand, and the depth of knowledge and information possessed by the Board both leading up to the January 9, 2013 presentations and directly after the presentations, the Court cannot say that the Board's same-day refusal of Starr's demand was irrational.

Finally, while the Court has noted its displeasure with the Treasury Department's outside counsel threatening the AIG Board of Directors at the January 9, 2013 presentation, there is no evidence that these statements caused the Board to alter the final outcome. These Board members have been under the public microscope for the past five years, and are accustomed to making difficult decisions under scrutiny. They have weathered the storm well, and are now seemingly beyond the crisis of 2008. The Board did not need to hear anything from the Treasury Department to figure out that the corporation should weigh the risk of having the Government as an adversary. The issue of governmental relations was destined to be a major factor for the Board members regardless of what the Treasury Department's counsel told them on January 9, 2013.

Reviewing all of the evidence, the Court finds that the Board is entitled to the presumption that it made a good faith, rational business decision in the best interest of the corporation.

IV. Merits and Material Facts

a. The Parties' Arguments

Starr alleges that there is reason to doubt the reasonableness of the Board's investigation because it disregarded the following key factors: (1) the merits of Starr's underlying allegations; (2) this Court's previous rulings; and (3) the potential recoverable damages for AIG. Starr alleges that "[t]he AIG Board's wrongful refusal of Starr's demand is evidenced by the strength of Starr's case," 2d Am. Compl. ¶ 192, and the Board "could not have engaged in an objective assessment of the demand without fair and disinterested consideration of the validity and value of Plaintiff's claims," Opp'n 24. In its complaint, Starr highlights evidence obtained through discovery, as well as evidence presented as part of the Board's January 9, 2013 meeting and public facts, to demonstrate the Board's awareness of the strength of Starr's taking and illegal exaction claims. Id. at ¶¶ 192-204. Tied to this assertion is Starr's claim that the Board disregarded this Court's previous rulings, which included an "analysis of critical issues of law" relevant to the merits of Starr's case. Opp'n 24. Additionally, Starr argues that "[i]n evaluating possible damages, the Board ignored AIG's own prior contemporaneous determination . . . that valued the 79.9% interest taken and/or illegally exacted at $23 billion." Id. at 25. Starr claims that the Board erroneously relied upon conflicted counsel's view that the value of the equity interest was "far below the value claimed by Starr." Id. (quoting Demand Refusal Letter at 5).

AIG and the Government counter that these arguments amount to mere disagreement with the Board's decision, and "Delaware law does not permit a plaintiff to overcome the business judgment rule simply by asserting that the substance of a board of director's decision was wrong." AIG Mot. 17 (quoting cases); see also Def.'s Mot. 21. Moreover, the moving parties assert that the merits of the case and the relevant judicial decisions were indeed considered by the Board, along with a variety of other permissible factors, in making a rational business decision in the best interests of AIG. Finally, regarding damages, AIG highlights that AIG's "'own prior contemporaneous valuation' was a *post*-rescue valuation, not a pre-rescue valuation." AIG Reply 12 (citing Nov. 10, 2008 AIG Form 10-Q at 25-26).

b. Analysis

Once a demand has been made on a board, the directors have the discretion to determine "the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to a demand." Rales, 634 A.2d at 935. When determining whether to advance a particular lawsuit, a board must balance many factors: "ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal." Zapata, 430 A.2d at 788. Given that the board must act to serve the best interests of the corporation, "[i]t is within the bounds of business judgment to conclude that a lawsuit, even if legitimate, would be excessively costly to the corporation or harm its long-term strategic interests." In re InfoUSA, Inc. S'holders Litig., 953 A.2d 963, 986 (Del. Ch. 2007); see also Burks v. Lasker, 441 U.S. 471, 485 (1979) ("There may well be situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue[.]").

Here, the Board considered the likelihood of success of Starr's claims on the merits as a factor when it made its decision. The Board compared this factor along with "the substantial harm AIG might suffer pursuing the action, including damage to AIG's corporate brand and image," as well as its "relationships with shareholders, customers, regulators, and elected officials[.]" AIG Mot. 19 (citing Demand Refusal Letter at 5-6). Regardless of the merits underlying Starr's claim, the claim belongs to the corporation, see Grimes, 673 A.2d at 1215, and the Board acted within its discretion by choosing not to advance it. Even if this Court viewed the potential merit of Starr's claims favorably,[10]

[10] The Court again emphasizes the statement made in the July 2012 opinion, that "it makes no determinations as to the ultimate merit of Starr's claims." Starr Int'l, 106 Fed. Cl. at 69.

it is not the province of the courts to compel corporate directors to advance lawsuits. At this juncture, the Court's inquiry is limited to evaluating the process with which the Board considered Starr's demand.

During the entire demand process, AIG's Board conducted itself in an exemplary fashion, with an eye towards thoroughness and transparency. AIG's demand refusal letter and the exhibits are replete with references to this Court's prior rulings and opinions, which belies Starr's assertion that the Board "disregarded the Court's rulings." Opp'n 24; see also 2d Am. Compl. ¶ 213 (noting "[t]he failure of the Board and those who were advising it to give any meaningful consideration to the Court's Opinion"). The letter itself states that "[t]he Board had previously received copies of the rulings in the two actions," Demand Refusal Letter at 2, and the rulings were extensively cited and discussed in Starr's written submissions to the Board, Starr's oral presentation to the Board, the minutes of the Board's meetings, and the presentation materials prepared by counsel for AIG, id. at Exs. 3, 7, 11, 24. To be sure, the Court's rulings are "material facts that are reasonably available," Brehm, 746 A.2d at 259, and the record amply supports the fact that the Board fulfilled its duty to be informed of them in considering Starr's demand.

Starr's argument regarding damages valuation similarly is without merit. In evaluating potential damages, the Board considered its own evidence and the opinion of independent experts retained to advise the Board. See AIG Reply 12; Demand Refusal Letter at 5. The Board was aware of AIG's filings with the SEC and the differing interpretations of the fair market value of the equity interest. See Demand Refusal Letter, Ex. 18 at 14 (Simpson & Seitz Ross presentation slide discussing 10-Q Form and competing valuation positions). The Board was not required, however, to expressly "acknowledge AIG's own statements on the issue." Opp'n 25; see Levine, 591 A.2d at 214 ("[I]n responding to a demand . . . there is obviously no prescribed procedure that a board must follow."); FLI Deep Marine LLC, 2009 WL 1204363, at *4 ("To allow Plaintiffs the ability to dictate the manner in which the Board . . . investigates their allegations would 'be an unwarranted intrusion' upon the authority our law confers on a board of directors to manage the business and affairs of the corporation.") (quoting Levine, 591 A.2d at 214).

The AIG Board conducted a reasonable investigation, was aware of all material facts reasonably available, and did not disregard any key factors. The Court concludes that in considering and balancing all of the competing factors, the Board made a rational business decision, in the good faith belief that its decision was in the best interests of the corporation. Accordingly, Starr has failed to create a reasonable doubt that the Board's demand refusal is entitled to the presumption of the business judgment rule.

V. Conclusion

For the foregoing reasons, the Court holds that Starr has failed to allege particularized facts that create a reasonable doubt as to the good faith or reasonableness of the Board's investigation of Starr's demand. To the contrary, the Court finds that AIG, its Board of Directors, and its advising counsel conducted the demand process in an informed, transparent, rational, and exemplary fashion. The Board's decision to refuse Starr's demand is entitled to the presumption of the business judgment rule, and will not be disturbed by this Court.[11] Accordingly, AIG's and the Government's motions to dismiss Starr's derivative claims are GRANTED.

DIRECT CLAIMS

In its Second Amended Complaint, Starr asserts two direct claims: first, that the Government's September 2008 acquisition of a 79.9% equity and voting interest in AIG constituted a taking or an illegal exaction of the property of AIG and its shareholders;[12] and second, that the June 30, 2009 stock split, by which shareholders were denied a separate vote, constituted a taking and illegal exaction of the property of the shareholders. In the July 2012 opinion on Defendant's motion to dismiss, the Court ruled that Starr had standing to advance a direct claim against the Government for the alleged appropriation of its equity interest and voting power. Starr Int'l, 106 Fed. Cl. at 65-66. The Court stated that "the Government has a preexisting duty under the Fifth Amendment not to take private property for public use without paying just compensation," and therefore, the Government had an obligation not to appropriate minority shareholders' property interests, "irrespective of whether the Government was a stockholder when the purported dilution occurred." Id. at 65. The Court observed, based upon Starr's allegations, that "AIG's shareholders were harmed uniquely and individually to the same extent that the Government benefited." Id. (internal quotations omitted).

Discussion

In now urging the Court to dismiss Starr's direct claims, the Government points to "new material facts" demonstrating that Starr's direct claims are in fact solely derivative. Additionally, the Government argues that Starr's illegal exaction complaint is not legally viable, as the Government never dealt with Starr or other shareholders directly. Starr rejects the Government's contention that new material facts have arisen, and argues that the Government is merely trying to re-litigate the same arguments presented in its initial

[11] The Court notes that despite this opinion's organization of Starr's allegations within separate headings, the Court does not regard any of Starr's allegations as exclusive to the others. When viewed both individually and as a whole, Starr's arguments are insufficient to raise a reasonable doubt that the AIG Board is entitled to the benefit of deference under the business judgment rule.

[12] The first claim also is a shareholder derivative claim.

motion to dismiss and its motion for reconsideration. For the reasons set forth below, the Court agrees with Starr, and the Government's motion to dismiss Starr's direct claims is DENIED.

I. Standard of Review

To survive a motion to dismiss, a plaintiff need only "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A well-pleaded complaint may proceed even if it appears on the face of the pleadings that "recovery is very remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In sum, the Court considers the Government's motion to dismiss keeping in mind that Starr's burden at this phase is "minimal." Colonial Chevrolet Co. v. United States, 103 Fed. Cl. 570, 574 (2012).

II. New Material Facts

The Government asserts that two new material facts demonstrate the derivative nature of Starr's purported direct claims: (1) Starr's admission that the harm to shareholders was shared on a pro rata basis; and (2) the Treasury Department no longer has any ownership interest in AIG.

In its memorandum in support of class certification, Starr asserted that the harm suffered by shareholders was "shared across all of the common stock on a ratable basis, share for share." Def.'s Mot. 8 (quoting Rausser Decl. ¶ 19; Pl.'s Mot. for Class Cert. 10). The Government contends this concession of the harm is dispositive of Starr's purported direct claims, as "[i]t is black letter law that, if 'all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature.'" Id. (quoting Feldman v. Cutaia, 951 A.2d 727, 735 (Del. 2008)).

In making the argument that Starr's class definitions reveal solely derivative claims, the Government selectively quotes the Court's July 2012 opinion and neglects to mention the overarching point to which the selected quotations lead: when shares are diluted on a pro rata basis, the claim is typically derivative; however, in the genus of corporate overpayment claims, Starr's claim is of the "species" considered "both derivative and direct in character." Starr Int'l, 106 Fed. Cl. at 62 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Although "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation," a claim is not per se derivative if it affects all stockholders equally. Tooley v. Donaldson, 845 A.2d 1031, 1039 (Del. 2004) ("[W]e expressly disapprove . . . the concept that a claim is necessarily derivative if it affects all stockholders equally."). Thus, the mere fact that AIG shareholders were injured on a ratable, share-by-share basis does not dictate the derivative nature of their claims. Accordingly, the definition of the class does not alter the Court's July 2012 determination "that Starr has pled facts sufficiently alleging a harm to the suing stockholders independent of any harm to AIG and as such, has standing to advance its expropriation claim directly." Starr Int'l, 106 Fed. Cl. at 62.

In finding that Starr's claim fell within the Tooley framework, the Court noted that "the Government's continuing ownership interest in AIG provide[d] *further* support for the view" that Starr had standing to bring a direct claim. Starr Int'l, 106 Fed. Cl. at 65 (emphasis added). The Government's ownership interest in AIG in July 2012 merely bolstered the Court's conclusion that, assuming the truth of Starr's allegations, the appropriation of a 79.9% interest at the expense of the minority shareholders gave rise to a direct claim. Thus, because the Government's ownership was not a necessary component to establish standing, the Treasury Department's subsequent divestment does not "vitiate[]" the "basis for the Court's earlier opinion." Def.'s Mot. 9. Although the Treasury Department's divestment is a new fact, it is not material to the Court's determination that Starr has standing to advance its direct claim.

III. Illegal Exaction

Alternatively, the Government argues that even if the Court finds Starr to have pled a valid direct takings claim, Starr's allegations of a direct illegal exaction claim are unavailing. The Government argues that Starr's illegal exaction claim should be dismissed for three reasons: (1) Starr never paid money or conveyed stock to the United States; (2) the alleged diminution in stock value did not have a direct and substantial impact on the shareholders; and (3) because the Government was not a controlling shareholder at the time of the alleged exaction, the claim is solely derivative.

As stated above, the Court previously has held that, assuming the truth of Starr's allegations, Starr may maintain a direct claim for the taking of its equity and voting interests, because "the Government extracted from the public shareholders, and redistributed to itself, a portion of the economic value and voting power embodied in the minority interest." Starr Int'l, 106 Fed. Cl. at 65 (internal citations omitted). In essence, the minority shareholders have adequately alleged that they conveyed a portion of the economic value and voting power to the Government, and as a result, suffered a direct and substantial impact to their own property rights. See Norman v. United States, 429 F.3d 1081, 1096 (Fed. Cir. 2005) ("[A] plaintiff has a claim for an illegal exaction only where the government [action] has direct and substantial impact on the plaintiff asserting the claim.") (internal quotations omitted).

Moreover, the United States had an obligation not to appropriate minority shareholders' property interests, "irrespective of whether the Government was a stockholder." Starr Int'l, 106 Fed. Cl. at 65. The Court has found that this constitutional obligation, applied to the facts alleged by Starr, is sufficient to maintain a direct takings claim. Id. Given that the test for whether a plaintiff may advance an illegal exaction claim "is identical to the Takings test," Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1364 (Fed. Cir. 2002), the Court repeats its previous ruling that Starr has standing to pursue its illegal exaction claim.

For the foregoing reasons, the Government's motion to dismiss Starr's direct claims is DENIED.

CONCLUSION

In summary, the Court GRANTS AIG's and the Government's motions to dismiss Starr's shareholder derivative claims, and DENIES the Government's motion to dismiss Starr's direct claims. AIG is hereby dismissed as a party to this action. Pursuant to RCFC 12(a)(4), the Government shall file its Answer to Starr's Second Amended Complaint within 20 days of this opinion, on or before July 16, 2013. As stated in the Court's April 17, 2013 order, the Court will conduct the next quarterly discovery conference on Tuesday, July 9, 2013 at 10:00 AM (EDT). The Court expects that trial dates will be established at this conference.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 11-779C

(Filed: June 15, 2015)

STARR INTERNATIONAL COMPANY, INC., in its own right and on behalf of two classes of others similarly situated, Plaintiff, v. THE UNITED STATES, Defendant.	Government's Financial Rescue and Takeover of American International Group (AIG); Fifth Amendment Taking and Illegal Exaction Claims; Shareholder Class Action; Demand for Corporate Equity and Voting Control as Consideration for Loan; Section 13(3), Federal Reserve Act; Effect of AIG Board's Approval of Terms; Damages; Economic Loss Analysis.

David Boies, with whom were *Robert B. Silver, Robert J. Dwyer, Alanna C. Rutherford, Amy J. Mauser, Abby Dennis, Julia C. Hamilton, Laura Harris, Ilana Miller, John Nicolaou, Matthew R. Shahabian, David L. Simons, Craig Wenner, William Bloom,* and *James A. Kraehenbuehl,* Boies, Schiller & Flexner LLP, Armonk, New York, and *John L. Gardiner, R. Ryan Stoll,* and *Gregory Bailey,* Skadden, Arps, Slate, Meagher & Flom LLP, New York City, New York, for Plaintiff.

Brian A. Mizoguchi, Assistant Director, with whom were *Benjamin C. Mizer,* Acting Assistant Attorney General, *Robert E. Kirschman, Jr.,* Director, *Kenneth M. Dintzer,* Deputy Director, *Scott D. Austin, Claudia Burke,* and *Joshua E. Gardner,* Assistant Directors, *John Roberson* and *John J. Todor,* Senior Trial Counsel, *Renee Gerber, Matthew F. Scarlato, Mariana T. Acevedo, David D'Alessandris, Vincent D. Phillips*, and *Zachary J. Sullivan*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant.

OPINION AND ORDER

WHEELER, Judge.

Plaintiff Starr International Company, Inc. ("Starr") commenced this lawsuit against the United States on November 21, 2011. Starr challenges the Government's financial rescue and takeover of American International Group, Inc. ("AIG") that began on September 16, 2008. Before the takeover, Starr was one of the largest shareholders of AIG common stock. Starr alleges in its own right and on behalf of other AIG shareholders that the Government's actions in acquiring control of AIG constituted a taking without just compensation and an illegal exaction, both in violation of the Fifth Amendment to the U.S. Constitution. The controlling shareholder of Starr is Maurice R. Greenberg, formerly AIG's Chief Executive Officer until 2005, and one of the key architects of AIG's international insurance business. Starr claims damages in excess of $40 billion.

On the weekend of September 13-14, 2008, known in the financial world as "Lehman Weekend" because of the impending failure of Lehman Brothers, U.S. Government officials feared that the nation's and the world's economies were on the brink of a monumental collapse even larger than the Great Depression of the 1930s. While the Government frantically kept abreast of economic indicators on all fronts, the leaders at the Federal Reserve Board, the Federal Reserve Bank of New York, and the U.S. Treasury Department began focusing in particular on AIG's quickly deteriorating liquidity condition. AIG had grown to become a gigantic world insurance conglomerate, and its Financial Products Division was tied through transactions with most of the leading global financial institutions. The prognosis on Lehman Weekend was that AIG, without an immediate and massive cash infusion, would face bankruptcy by the following Tuesday, September 16, 2008. AIG's failure likely would have caused a rapid and catastrophic domino effect on a worldwide scale.

On that following Tuesday, after AIG and the Government had explored other possible avenues of assistance, the Federal Reserve Board of Governors formally approved a "term sheet" that would provide an $85 billion loan facility to AIG. This sizable loan would keep AIG afloat and avoid bankruptcy, but the punitive terms of the loan were unprecedented and triggered this lawsuit. Operating as a monopolistic lender of last resort, the Board of Governors imposed a 12 percent interest rate on AIG, much higher than the 3.25 to 3.5 percent interest rates offered to other troubled financial institutions such as Citibank and Morgan Stanley. Moreover, the Board of Governors imposed a draconian requirement to take 79.9 percent equity ownership in AIG as a condition of the loan. Although it is common in corporate lending for a borrower to post its assets as collateral for a loan, here, the 79.9 percent equity taking of AIG ownership was much different. More than just collateral, the Government would retain its ownership interest in AIG even after AIG had repaid the loan.

The term sheet approved by the Board of Governors contained other harsh terms. AIG's Chief Executive Officer, Robert Willumstad, would be forced to resign, and he would be replaced with a new CEO of the Government's choosing. The term sheet included other fees in addition to the 12 percent interest rate, such as a 2 percent commitment fee payable at closing, an 8 percent undrawn fee payable on the unused amount of the credit facility, and a 2.5 percent periodic commitment fee payable every three months after closing. Immediately after AIG began receiving financial aid from the Government on September 16, 2008, teams of personnel from the Federal Reserve Bank of New York and its advisers from Morgan Stanley, Ernst & Young, and Davis Polk & Wardwell, descended upon AIG to oversee AIG's business operations. The Government's hand-picked CEO, Mr. Edward Liddy, assumed his position on September 18, 2008. Although the AIG Board of Directors approved the Government's harsh terms because the only other choice would have been bankruptcy, the Government usurped control of AIG without ever allowing a vote of AIG's common stock shareholders.

Out of this nationalization of AIG, Starr has identified two classes of common stock shareholders that were affected by the Government's actions: (1) a class comprised of AIG shareholders who held common stock during September 16-22, 2008 when the Government took 79.9 percent ownership of AIG in exchange for the $85 billion loan; and (2) a reverse stock split class comprised of AIG shareholders who held common stock on June 30, 2009 when the government-controlled board engineered a twenty-for-one reverse stock split to reduce the number of AIG's issued shares, but left the number of authorized shares the same. The Court formally certified these two classes of shareholders as plaintiffs on March 11, 2013. See Starr Int'l Co. v. United States, 109 Fed. Cl. 628 (2013). Under the Court's Rule 23 "opt in" procedure to join in a class action, 274,991 AIG shareholders have become class plaintiffs in this case.

The main issues in the case are: (1) whether the Federal Reserve Bank of New York possessed the legal authority to acquire a borrower's equity when making a loan under Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343 (2006); and (2) whether there could legally be a taking without just compensation of AIG's equity under the Fifth Amendment where AIG's Board of Directors voted on September 16, 2008 to accept the Government's proposed terms. If Starr prevails on either or both of these questions of liability, the Court must also determine what damages should be awarded to the plaintiff shareholders. Other subsidiary issues exist in varying degrees of importance, but the two issues stated above are the focus of the case.

The Court conducted a 37-day trial in Washington, D.C. spanning from September 29 through November 24, 2014. The Court heard the testimony of 36 witnesses, 21 for Plaintiff's case, and 15 for Defendant's case. Plaintiff's fact witnesses were, in the order presented: Scott Alvarez, Thomas Baxter, Patricia Mosser, Henry Paulson, Timothy Geithner, Ben Bernanke, Alejandro LaTorre, Susan McLaughlin, Margaret McConnell, Sarah Dahlgren, Edward Liddy, Chester Feldberg, Douglas Foshee, Mark Symons, Kathleen Shannon, James Head, and Donald Farnan. Plaintiff's four expert witnesses were: Luigi Zingales, Paul Wazzan, S.P. Kothari, and Michael Cragg. Defendant's fact witnesses were, in the order presented: Andrew Colaninno, John Brandow, Marshall Huebner, Robert Willumstad, Brian Schreiber, Robert Reeder, David Herzog, James Lee, Peter Langerman, Morris Offit, and Howard Smith. Defendant's four expert witnesses were: Jonathan Neuberger, David Mordecai, Anthony Saunders, and Robert Daines. The Court also received the video deposition testimony of John Studzinski, a witness who lives abroad. The trial record consists of 8,812 transcript pages and more than 1,600 exhibits.[1]

Certain waivers of the attorney-client privilege occurred during the course of the proceedings. In the discovery phase, due to the Government's assertion of a defense that the Federal Reserve Bank's taking of a borrower's equity under Section 13(3) of the Federal Reserve Act was legal, the Court ruled that any privileged communications among the Department of the Treasury, the Federal Reserve Board, the Federal Reserve Bank of New York ("FRBNY"), and their counsel relating to the issue of legality must be produced. See Discovery Order No. 6, Nov. 6, 2013, at 2-3, Dkt. No. 182. During trial, the Court expanded this ruling to include the production of prior legal memoranda relied upon or relating to the propriety and legal limits of agency action under Section 13(3) of the Federal Reserve Act. See Tr. 1950-55.[2] The Court made this ruling upon learning of the existence of an FRBNY "Doomsday Book" that contains guidance on the range of permissible government actions in a time of crisis. The Court required FRBNY to produce these additional documents during trial, and the FRBNY complied. See Boies, Tr. 3548 ("Treasury has now provided all documents, broadly defined, which concern the authority of the Federal Reserve or Treasury to acquire or hold equity in connection with a 13(3) loan.").

Other waivers of the attorney-client privilege resulted from Defendant's counsel calling two Davis Polk & Wardwell lawyers to testify, John Brandow and Marshall Huebner, and asking them about legal advice they provided to FRBNY and the Department of Treasury. See, e.g., Tr. 5801 (Mr. Scarlato: "[D]id you think that disclosing the [New York Stock Exchange] ten-day rule would, in fact, provide a roadmap to shareholders to seek an injunction?" Mr. Brandow: "No, because there was no basis for an injunction. . . . [W]ith respect to Delaware law, there was no basis for the shareholders to have a vote."); Tr. 5851 (Mr. Scarlato: Did you "provide[] legal advice to

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[1] The Court has included a description of the relevant entities and persons in an Appendix to this opinion.

[2] The Court will cite to the evidentiary record as follows: August 6, 2014 Stipulations – Stip. ¶ __; Trial Testimony – Witness name, Tr. page; Joint Exhibits – JX __ at page; Plaintiff's Exhibits – PTX __ at page; Defendant's Exhibits – DX at page. Some of the exhibits have a "U" in the exhibit number to indicate that, although the documents were originally offered with redactions to protect privileged material, they were later admitted in unredacted form due to Defendant's waivers of the attorney-client privilege, explained below.

the New York Fed or Treasury in connection with the exchange transaction?"); Tr. 6061-62 (Mr. Gardner: "Why did Davis Polk advise that option B was the best yet identified option?"); Tr. 6130 (Mr. Gardner: What was your "understanding as to why you were being asked to consider the consequences of an AIG bankruptcy after September 16, 2008?"); Tr. 6135 (Mr. Gardner: "[W]hat advice, if any, did you provide on how derivative counterparties would respond to a bankruptcy filing by AIG?"); Tr. 6139 (Mr. Gardner: "[W]hat advice did you provide to the New York Fed or Treasury on the likelihood that the New York Fed would be fully repaid in the event of a bankruptcy?"); Tr. 6141 (Mr. Gardner: What was the advice you provided "to the New York Fed and Treasury after September 2008 regarding the likelihood of policyholder cancellations if AIG filed for bankruptcy?").

Defendant's waiver of the attorney-client privilege was so broad and covered so many subjects that the Court found a waiver as to any previously privileged documents relating to the Government's economic rescue of AIG. Tr. 6249 (Court: "I have the impression that any communication involving the law firm of Davis Polk & Wardwell relating to AIG, that the privilege has been waived."); Tr. 6251-52 (Court: "I think at this point anything [relating to] AIG has been waived involving Davis Polk."). The Court's ruling required Defendant to produce documents previously claimed to be privileged, and to uncover redactions from documents offered into evidence. Significantly, the Court also required the Davis Polk & Wardwell law firm to produce expeditiously internal and client communications relating to the financial rescue of AIG. Tr. 7224-41 (discussing the Davis Polk privilege issue and adopting the proposal of a law firm representative, Ms. Francis Bivens, for the production of internal Davis Polk documents). Davis Polk complied with the Court's request using reasonable time and search parameters, but the documents produced were so extensive that Plaintiff could not review all of them prior to the close of trial. Accordingly, the Court granted Plaintiff's post-trial motion to supplement the evidentiary record with 133 additional exhibits. Order, Jan. 6, 2015, Dkt. No. 417.

Defendant planned to call as witnesses three other law firm lawyers who served as outside counsel to AIG. These lawyers were Robert Reeder and Rodgin Cohen from Sullivan & Cromwell, and Joseph Allerhand from Weil, Gotshal & Manges. Due to the unequivocal position of AIG to preserve its attorney-client privilege under any circumstances, tr. 7736-37 (Mr. Carangelo: "AIG's position has been consistent throughout this proceeding and throughout discovery to not waive the privilege"), the Court ruled that these lawyers should not testify. Tr. 7738-39 (Court: "I give paramount importance to the privilege concerns of AIG . . . I'm not going to hear testimony in open court from any of these lawyers. So, that includes Mr. Cohen, Mr. Reeder, and Mr. Allerhand."). The Court reasoned that the relevant testimony of these persons could only relate to the professional legal services they furnished to AIG, and therefore presented too great a risk that AIG's privilege might be violated. Mr. Reeder had provided preliminary testimony in the trial, but the Court's ruling obviated his need to appear further. In the Court's view, a stark contrast existed between Defendant's conscious decision to waive its own federal agency privilege, and calling AIG lawyers as witnesses that would imperil AIG's privilege. See Tr. 7054-55.

Following the completion of trial, the Court received post-trial briefs from the parties on February 19, 2015, and post-trial response briefs on March 23, 2015. The Court heard closing arguments from counsel on April 22, 2015.

The weight of the evidence demonstrates that the Government treated AIG much more harshly than other institutions in need of financial assistance. In September 2008, AIG's international insurance subsidiaries were thriving and profitable, but its Financial Products Division experienced a severe liquidity shortage due to the collapse of the housing market. Other major institutions, such as Morgan Stanley, Goldman Sachs, and Bank of America, encountered similar liquidity shortages. Thus, while the Government publicly singled out AIG as the poster child for causing the September 2008 economic crisis (Paulson, Tr. 1254-55), the evidence supports a conclusion that AIG actually was *less* responsible for the crisis than other major institutions. The notorious credit default swap transactions were very low risk in a thriving housing market, but they quickly became very high risk when the bottom fell out of this market. Many entities engaged in these transactions, not just AIG. The Government's justification for taking control of AIG's ownership and running its business operations appears to have been entirely misplaced. The Government did not demand shareholder equity, high interest rates, or voting control of any entity except AIG. Indeed, with the exception of AIG, the Government has never demanded equity ownership from a borrower in the 75-year history of Section 13(3) of the Federal Reserve Act. Paulson, Tr. 1235-36; Bernanke, Tr. 1989-90.

The Government did realize a significant benefit in nationalizing AIG. Since most of the other financial institutions experiencing a liquidity crisis were counterparties to AIG transactions, the Government was able to minimize the ripple effect of an AIG failure by using AIG's assets to make sure the counterparties were paid in full on these transactions.[3] What is clear from the evidence is that the Government carefully orchestrated its takeover of AIG in a way that would avoid any shareholder vote, and maximize the benefits to the Government and to the taxpaying public, eventually

[3] According to a chart available to the Government on September 16, 2008, the following financial institutions were among those with significant economic exposure to AIG: ABN AMRO, Banco Santander, Bank of America, Barclays, BNP, Calyon, Citigroup, Credit Suisse, Danske Bank, Deutsche Bank, Goldman Sachs, HSBC, ING, JP Morgan, Merrill Lynch, Morgan Stanley, Rabobank, Société Générale, and UBS. JX 60 at 3.

resulting in a profit of $22.7 billion to the U.S. Treasury. PTX 658. AIG's benefit was to avoid bankruptcy, and to "live to fight another day." PTX 195 at 8; see also testimony of AIG Board member Morris Offit, Tr. 7392 ("we were giving AIG the opportunity to, in effect, live, that the shareholder would still have a 20 percent interest rather than being wiped out by a bankruptcy.").

The Government's unduly harsh treatment of AIG in comparison to other institutions seemingly was misguided and had no legitimate purpose, even considering concerns about "moral hazard."[4] The question is not whether this treatment was inequitable or unfair, but whether the Government's actions created a legal right of recovery for AIG's shareholders.

Having considered the entire record, the Court finds in Starr's favor on the illegal exaction claim. With the approval of the Board of Governors, the Federal Reserve Bank of New York had the authority to serve as a lender of last resort under Section 13(3) of the Federal Reserve Act in a time of "unusual and exigent circumstances," 12 U.S.C. § 343 (2006), and to establish an interest rate "fixed with a view of accommodating commerce and business," 12 U.S.C. § 357. However, Section 13(3) did not authorize the Federal Reserve Bank to acquire a borrower's equity as consideration for the loan. Although the Bank may exercise "all powers specifically granted by the provisions of this chapter and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this chapter," 12 U.S.C. § 341, this language does not authorize the taking of equity. The Court will not read into this incidental powers clause a right that would be inconsistent with other limitations in the statute. Long ago, the Supreme Court held that a federal entity's incidental powers cannot be greater than the powers otherwise delegated to it by Congress. See Fed. Res. Bank of Richmond v. Malloy, 264 U.S. 160, 167 (1924) ("[A]uthority to do a specific thing carries with it by implication the power to do whatever is necessary to effectuate the thing authorized – not to do another and separate thing, since that would be, not to carry the authority granted into effect, but to add an authority beyond the terms of the grant."); see also First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 659 (1924) ("Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted."); Suwannee S.S. Co. v. United States, 150 Ct. Cl. 331, 336, 279 F.2d 874, 876 (1960) ("No statute should be read as subjecting citizens to the uncontrolled caprice of officials.").

[4] "Moral hazard" refers to the Government's concern that the availability of Federal Reserve bailout loans might motivate private companies to accept risky propositions, knowing that the Government will extend credit to them if they fail. The Government's policy is to discourage such corporate thinking. Geithner, Tr. 1763-64; Bernanke, Tr. 2215-16.

Moreover, there is nothing in the Federal Reserve Act or in any other federal statute that would permit a Federal Reserve Bank to take over a private corporation and run its business as if the Government were the owner. Yet, that is precisely what FRBNY did. It is one thing for FRBNY to have made an $85 billion loan to AIG at exorbitant interest rates under Section 13(3), but it is quite another to direct the replacement of AIG's Chief Executive Officer, and to take control of AIG's business operations. A Federal Reserve Bank has no right to control and run a company to whom it has made a sizable loan. As FRBNY's outside counsel from Davis Polk & Wardwell observed on September 17, 2008 in the midst of the AIG takeover, "the [government] is on thin ice and they know it. But who's going to challenge them on this ground?" PTX 3283, Davis Polk email. Answering this question, the "challenge" has come from the AIG shareholders, whom the Government intentionally excluded from the takeover process.

A ruling in Starr's favor on the illegal exaction claim, finding that the Government's takeover of AIG was unauthorized, means that Starr's Fifth Amendment taking claim necessarily must fail. If the Government's actions were not authorized, there can be no Fifth Amendment taking claim. See Alves v. United States, 133 F.3d 1454, 1456-58 (Fed. Cir. 1998) (Taking must be based on authorized government action); Figueroa v. United States, 57 Fed. Cl. 488, 496 (2003) (If the government action complained of is unauthorized, "plaintiff's takings claim would fail on that basis."); see also Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995) (same). Thus, a claim cannot be both an illegal exaction (based upon unauthorized action), and a taking (based upon authorized action).

The Government defends on the basis that AIG voluntarily accepted the terms of the proposed rescue, which it says would defeat Starr's claim regardless of whether the challenged actions were authorized or unauthorized. While it is true that AIG's Board of Directors voted to accept the Government's proposed terms on September 16, 2008 to avoid bankruptcy, the board's decision resulted from a complete mismatch of negotiating leverage in which the Government could and did force AIG to accept whatever punitive terms were proposed. No matter how rationally AIG's Board addressed its alternatives that night, and notwithstanding that AIG had a team of outstanding professional advisers, the fact remains that AIG was at the Government's mercy. Case law is divided on whether the death knell of bankruptcy represents a real board of directors' choice in such circumstances. Compare Swift & Courtney & Beecher Co. v. United States, 111 U.S. 22, 28-29 (1884) ("The parties were not on equal terms. . . . The only alternative was to submit to an illegal exaction or discontinue its business.") and In re Consolidated Pretrial Proceedings in Air West Securities Litig., 436 F. Supp. 1281, 1290 (N.D. Cal. 1977) ("[D]efendants' claim that Trustees should be denied recovery . . . because they had an alternative source of recovery (bankruptcy) has never been held to be an adequate alternative under the law of business compulsion.") with Starr Int'l Co. v. Fed. Reserve

Bank of N.Y., 906 F. Supp. 2d 202, 219 n.13 (S.D.N.Y. 2012) ("Even a choice between a rock and a hard place is still a choice.") and FDIC v. Linn, 671 F. Supp. 547, 560 (N.D. Ill. 1987) ("Threatened bankruptcy is insufficient to create economic duress."). Voluntary acceptance, however, is not a defense to an illegal exaction claim. See the "Legal Analysis" section, "Illegal Exaction Claim," below.

With regard to Starr's reverse stock split claim, the evidence supports a conclusion that the primary motivation for the split was to ensure AIG was not delisted from the New York Stock Exchange ("NYSE"). In June 2009, AIG was in jeopardy of having its stock delisted because the stock value was teetering at or below $1.00 per share. The NYSE will not list stocks that are valued at less than $1.00 per share. Indeed, Starr voted its shares in favor of the reverse stock split resolution. Although it might be logical to conclude that the twenty-for-one decrease in the number of issued shares, with no change in the authorized shares, was designed to allow the Government's preferred stock to be exchanged for common stock, there is no evidence that this was the case. The Court concludes that the motivation for the reverse stock split was to assure the continued listing of AIG stock on the NYSE. Accordingly, Starr's reverse stock split claim is denied.

Turning to the issue of damages, there are a few relevant data points that should be noted. First, the Government profited from the shares of stock that it illegally took from AIG and then sold on the open market. One could assert that the revenue from these unauthorized transactions, approximately $22.7 billion, should be returned to the rightful owners, the AIG shareholders. Starr's claim, however, is not based upon any disgorgement of illegally obtained revenue. Instead, Starr's claim for shareholder loss is premised upon AIG's stock price on September 24, 2008, which is the first stock trading day when the public learned all of the material terms of the FRBNY/AIG Credit Agreement. The September 24, 2008 closing price of $3.31 per share also is a conservative choice because it represents the lowest AIG stock price during the period September 22-24, 2008. Yet, this stock price irrefutably is influenced by the $85 billion cash infusion made possible by the Government's credit facility. To award damages on this basis would be to force the Government to pay on a propped-up stock price that it helped create with an $85 billion loan. See United States v. Cors, 337 U.S. 325, 334 (1949) ("[V]alue which the government itself created" is a value it "in fairness should not be required to pay.").

In the end, the Achilles' heel of Starr's case is that, if not for the Government's intervention, AIG would have filed for bankruptcy. In a bankruptcy proceeding, AIG's shareholders would most likely have lost 100 percent of their stock value. DX 2615 (chart showing that equity claimants typically have recovered zero in large U.S. bankruptcies). Particularly in the case of a corporate conglomerate largely composed of insurance subsidiaries, the assets of such subsidiaries would have been seized by state or national governmental authorities to preserve value for insurance policyholders. Davis Polk's lawyer, Mr. Huebner, testified that it would have been a "very hard landing" for AIG, like cascading champagne glasses where secured creditors are at the top with their glasses filled first, then spilling over to the glasses of other creditors, and finally to the glasses of equity shareholders where there would be nothing left. Huebner, Tr. 5926, 5930-31; see also Offit, Tr. 7370 (In a bankruptcy filing, the shareholders are "last in line" and in most cases their interests are "wiped out.").

A popular phrase coined by financial adviser John Studzinski, in counseling AIG's Board on September 21, 2008 is that "twenty percent of something [is] better than 100 percent of nothing." Studzinski, Tr. 6936-37. Others, such as Mr. Liddy and Mr. Offit, also embraced this philosophy, believing the top priority was for AIG to live to fight another day. If the Government had done nothing, the shareholders would have been left with 100 percent of nothing. In closing arguments, responding to Starr's allegation that FRBNY imposed punitive terms on AIG (which it did), Defendant's counsel Mr. Dintzer observed, "[i]f the Fed had wanted to harm AIG in some way, all it had to do was nothing." Dintzer, Closing Arg., Tr. 151.

The Federal Circuit's guidance in a case of this type requires that Starr show its economic loss. "[P]roving economic loss requires a plaintiff to show what use or value its property would have but for the government action." A&D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1157 (Fed. Cir. 2014). The analysis here leads to the conclusion that, if the Government had done nothing to rescue AIG, the company would have gone bankrupt, and the shareholders' equity interest would have been worthless. Accordingly, the Court finds that the first plaintiff class prevails on liability because of the Government's illegal exaction, but recovers zero damages. The Court finds that the second plaintiff class, basing its claim on the reverse stock split, is not entitled to recovery for either liability or damages.

As the Court noted during closing arguments, a troubling feature of this outcome is that the Government is able to avoid any damages notwithstanding its plain violations of the Federal Reserve Act. Closing Arg., Tr. 69-70. Any time the Government saves a private enterprise from bankruptcy through an emergency loan, as here, it can essentially impose whatever terms it wishes without fear of reprisal. Simply put, the Government often may ignore the conditions and restrictions of Section 13(3) knowing that it will never be ordered to pay damages. With some reluctance, the Court must leave that question for another day. The end point for this case is that, however harshly or improperly the Government acted in nationalizing AIG, it saved AIG from bankruptcy. Therefore, application of the economic loss doctrine results in damages to the shareholders of zero.

Findings of Fact

A. The September 2008 Financial Crisis

In September 2008, the American economy faced the worst financial crisis since the Great Depression in the 1930s. Bernanke, Tr. 1958 ("[T]he country at that time was in the most severe financial crisis since the Great Depression."); PTX 548 at 24 (Bernanke). The crisis that began in August 2007 had the world "at the edge of the abyss." "It was the worst financial shock in more than a century." In the United States, the initial loss to household wealth was five times as severe as compared to the initial loss of wealth during the Great Depression. PTX 671 at 2 (Geithner).

This crisis was so widespread that it affected the viability of nearly every financial firm, including institutions that were solvent at the time. PTX 663 at 11; Geithner, Tr. 1445, 1556 (noting that a solvent company may fail if it becomes illiquid). During a panic, liquidity freezes up and firms are forced to sell off assets in a fire sale, which "bring[s] asset prices down below their long-run value, which then harms everybody else's ability to borrow against assets." This condition creates a vicious cycle where people with liquid assets no longer extend liquidity to others, and it causes a significant contraction to the financial markets, affecting even solvent institutions. Cragg, Tr. 5424-25; PTX 663 at 11 (Geithner: If a solvent entity becomes "caught up in the run, even the strongest will not survive."). Officials in Government and private enterprise were working around the clock. Baxter, Tr. 840 ("I can't tell you which day it was, Mr. Boies, because I was pretty much working 24/7 at that time. The days were nights; the nights were days.").

The crisis that would come to a head in September 2008 "arrived in force on August 9, 2007." PTX 706 at 78 (Paulson). Foreclosures in the housing market began to rise, credit spreads widened, and the amount of liquidity available to firms decreased substantially. PTX 709 at 156. By March 2008, the Federal Reserve found there were "unusual and exigent circumstances" sufficient for it to lend outside the banking system. Baxter, Tr. 656-57, 659. On March 14, 2008, the Federal Reserve authorized an emergency loan to Bear Stearns under its Federal Reserve Act Section 13(3) authority. PTX 1201 at 2-3. On March 16, 2008, the Federal Reserve created the Primary Dealer Credit Facility ("PDCF") for primary dealers to obtain overnight liquidity. Stip. ¶ 51 (the PDCF loaned as much as $40 billion a night); PTX 728 at 1-2. Between March and September 2008, the financial markets continued to deteriorate. Alvarez, Tr. 136-37 (stating that "[l]iquidity was becoming difficult to get with any kind of haircut on a secured basis, and unsecured credit was becoming all but unavailable.").[5]

By September 2008, panic among financial institutions had caused the private market to freeze and stop functioning altogether. This panic also led to a run on money market funds that, in turn, began to dump commercial paper, and the "commercial paper market went into shock." PTX 708 at 90 (Bernanke). Financial institutions stopped lending to each other and every financial institution faced enormous pressure and strain. Offit, Tr. 7920, 7927. Of the thirteen most important financial institutions in the United States, twelve "had either failed or were at risk of failure." Bernanke, Tr. 1960.

There were five major causes of the September 2008 financial crisis: (1) the so-called "housing bubble"; (2) the floating interest rates of subprime mortgages; (3) the rating agencies' misrepresentations of the riskiness of certain securities such as collateralized debt obligations ("CDOs"); (4) the "originate-to-distribute" business model; and (5) the collapse of the alternative banking system. The "housing bubble" was caused by low interest rates and poor lending practices by mortgage originators and banking and financial institutions. Following September 11, 2001, the Government kept interest rates artificially low to encourage home buying. Saunders, Tr. 8379 (The roots of the financial crisis are traceable to "when interest rates were lowered after 9/11 and then there was a buildup of subprime mortgages."). The low interest rates in turn over-stimulated the housing market and resulted in the over extension of credit. In addition to the artificially low interest rates, banks and financial institutions had adopted poor lending practices extending mortgages to borrowers for housing that they could not actually afford. These mortgages, especially the subprime mortgages, included floating interest rates. When interest rates began to rise during 2006 and home prices began to drop, many low income homeowners could no longer meet their mortgage commitments and either became delinquent or defaulted on their loans. Saunders, Tr. 8380; PTX 599 at 5 (Bernanke).

Another major cause of the financial crisis was the "originate-to-distribute" business model developed by financial institutions. Under the "originate-to-distribute" model, "originators would transfer mortgages to other entities instead of holding them to maturity." PTX 624 at 117-19, 130-54. Mortgage originators would first transfer or sell mortgages to a special purpose vehicle ("SPV"). This process would then lead to the creation of CDOs, which are securities or tranches representing tiered rights to be paid from the revenue of the pool. The originator of the SPV then either marketed the CDOs

[5] A "haircut" in the financial industry is a percentage discount applied to the market value of a security or the face value of a bond to account for the risk of loss that an investment in the security or bond poses. See Alvarez, Tr. 130-32; PTX 2856 at 171 (Cragg Expert Report).

to investors or retained them on the balance sheet. Cragg, Tr. 4952-55. Between 2004 and 2007, "nearly all of the adjustable rate subprime mortgages written were packaged into residential mortgage-backed securities ("RMBS") and a large share of these subprime RMBS were purchased by managers of CDOs of asset backed securities." Stip. ¶ 37; PTX 11 at 10; PTX 583 at 8 (by 2006, subprime mortgages accounted for 20 percent of the total mortgages on the market whereas in 1994, they only accounted for five percent of the total market). This "originate-to-distribute" model increased the amount of money available for housing loans and resulted in mortgage originators paying less attention to a borrower's credit and making loans without "sufficient documentation or care in underwriting" because the risk of non-payment had been transferred to others. PTX 607 at 11 (Bernanke). Rating agencies downplayed the riskiness of the CDOs and related securities, and the Government later charged some of these agencies with fraud for their misrepresentations regarding the safety of CDOs and related securities. PTX 661 at 2-3.

Finally, the alternative or "shadow" banking system collapsed, further worsening the September 2008 financial crisis. The alternative banking system had developed as a way to provide trillions of dollars of short-term liquidity to financial firms. Between 2003 and 2006, the alternative banking system grew at an exponential rate and by the time the housing bubble burst in 2006, it was larger in size than the traditional banking sector. Cragg, Tr. 4942, 4945. At its peak, the size of the shadow banking system was approximately $13 trillion. Cragg, Tr. 4943; PTX 5302. But the shadow banking system was not regulated in the same way that traditional banks are regulated. Instead, this alternative system consisted primarily of investment banks and broker dealers that extended credit in competition with traditional banks. These investment banks and broker dealers originated loans, packaged those loans into securities, and created institutions that would buy those securities and distribute them to investors. Cragg, Tr. 4941-43. In this "shadow" system, "what was most important was the ability to do deals, because it was fees that generated profits." Cragg, Tr. 4947. By contrast, in the traditional banking system, most of the income comes from what is called spread income. Spread income is "the difference between the cost of money coming into the bank versus . . . the interest that [the bank is] able to charge on mortgages and other loans." Cragg, Tr. 4946-47.

Significantly, the alternative system also included the "repo" market which provided short-term funding for companies by "funding through repurchase agreements where the investment banks would put out assets overnight and use that as collateral." PTX 548 at 13 (Bernanke). The repo market was particularly important to the broker dealers of the alternative banking system because "half of their balance sheet was supported by repo." Cragg, Tr. 5005-06. Before the crisis began, bankers considered repos safe. But starting in 2007, the repo lenders grew concerned they would receive collateral instead of cash and these lenders responded by imposing higher haircuts or pulling away and causing some borrowers to lose access to repo entirely. PTX 650 at 12-13 (Bernanke). Repo financing was particularly susceptible to a financial crisis because it was overnight financing which had to be renewed every day. PTX 706 at 115-16 (Paulson) ("Most of this money was lent overnight."). By September 2008, the size of the repo market had dropped precipitously, falling from $4.5 trillion in March 2008 to $3.5 trillion, a decrease of 20 percent. Cragg, Tr. 5006.

B. AIG's Financial Condition in 2008

The bursting of the housing bubble and the collapse of the alternative or shadow banking system exposed nearly every major financial institution to significant liquidity risks beginning in 2007 and into September 2008. Cragg, Tr. 5031-32 ("Lehman, Morgan Stanley, Goldman Sachs, Merrill Lynch . . . were all, you know, in fear of failure, because of liquidity."). Financial institutions such as AIG, Lehman, Morgan Stanley, Goldman Sachs, and Merrill Lynch faced these liquidity risks due, in part, to their massive CDO and CDS[6] portfolios. See Cragg, Tr. 4987-89; Saunders, Tr. 8074-75, DX 1356 at 28; DX 1883 at 23 ("[AIG's] super senior CDS portfolio began in 1998 and had a total net exposure of $465 billion at June 30, 2007."). Though AIG, unlike other major financial firms, had "stop[ped] writing credit protection on multi-sector CDOs" in 2005, stip. ¶ 42, its securities lending program in its Financial Products Division ("AIGFP") still faced substantial risks from its existing CDS portfolio.[7] First, AIG's CDS agreements contained substitution provisions which allowed CDO managers to swap pre-2006 RMBS with "more suspect" 2006 and 2007 subprime RMBS that presented "more problematic credit issues." Cragg, Tr. 5304, 5307. Second, AIG had failed to hedge against the risk it faced from its multi-sector CDS contracts. Schreiber, Tr. 6541-44; Saunders, Tr. 8086. Starr itself concluded that a significant portion of AIG's 2008 liquidity problems was the result of its failures in risk management. Smith, Tr. 7687-90; DX 211 at -10576.

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[6] A CDS is a "credit default swap contract" and is akin to financial insurance, whereby the CDS seller collects premium payments in exchange for guaranteeing the performance of a debt obligation. Cragg, Tr. 4964; PTX 549 at 7; Saunders, Tr. 8071-72.

[7] At a time when AIG was exiting the CDO market, other financial firms such as Goldman Sachs, Citigroup, and Merrill Lynch were dramatically increasing their CDO transactions. From 2005 to 2006, Goldman Sachs' CDO transactions doubled, going from $12.6 billion to $25.4 billion. Merrill Lynch *tripled* the size of its CDO transactions from 2005 to 2006, issuing approximately $14 billion in 2005 to $40.9 billion in 2006. Citigroup more than doubled the size of its CDO transactions going from $11.1 billion in 2005 to $28.3 billion by 2007. Cragg, Tr. 4987-89. As evidenced by a May 17, 2007 speech at the Federal Reserve Bank of Chicago, Mr. Bernanke had a favorable view of the home mortgage market two years after AIG had stopped accepting additional CDO risk. PTX 1041 at 6; Bernanke, Tr. 2142-43.

AIG began to face liquidity issues from both its CDS portfolio and securities lending program starting in 2007. The CDS contracts "carried substantial liquidity risks for AIG" because they required AIG to post cash collateral in three circumstances: (1) a default in a covered CDO; (2) a decline in the CDOs' market value; (3) a downgrade of an individual CDO tranche; or (4) a rating downgrade for AIG itself. Saunders, Tr. 8072-73. If AIG's credit rating declined, AIG would be forced to post billions of dollars in collateral due to the terms of its CDS contracts. Cragg, Tr. 5036-37 (noting that "[e]ventually the credit rating agencies [got] concerned about AIG's liquidity" which led to more liquidity problems and then the run on AIG).

Under AIG's securities lending program, AIG could borrow money by lending securities to third parties in exchange for cash collateral. This program created a liquidity risk by allowing borrowers to return the borrowed securities and demand the return of their cash collateral in as little as a few days, whereas the average maturity of the RMBS investments or assets that AIG purchased with the security borrowers' cash collateral was about five years. Saunders, Tr. 8145-46; Cragg, Tr. 5287-90. If securities borrowers did not roll over their existing borrowings, AIG would have to respond to securities returns by either selling the investments it had purchased or providing cash from other sources. Saunders, Tr. 8147. AIG continued to expand this program in 2006 and 2007, investing the cash collateral in risky subprime and alternative "Alt-A" RMBS. Saunders, Tr. 8097-98; Kothari, Tr. 4870. By September 2008, 84 percent of the collateral obtained through the securities lending program had been invested in either subprime mortgages or Alt-A mortgages. Saunders, Tr. 8099-8100.

In order for AIG to manage its liquidity needs from the CDS portfolio and the securities lending program, the company, starting in 2007, created a Liquidity Risk Committee to "measure, monitor, control and aggregate liquidity risks across AIG" and began to build liquidity. Willumstad, Tr. 6477; DX 939 at 99. To build liquidity, AIG decided to raise additional capital from the market. In May 2008, AIG raised "$20 billion in new capital by issuing a mix of common stock, equity units, and junior subordinated debentures," which was the largest private capital raise in history at that time. Stip. ¶ 56; PTX 587 at 13-14; Willumstad, Tr. 6481. AIG continued to try to strengthen its balance sheet, raising another $3.25 billion in capital in August 2008. JX 188 at 3; Stip. ¶ 66; Offit, Tr. 7917 ("I had made a statement to the board and I said I didn't know whether we were the most overcapitalized company in this country or the most undercapitalized. I said it all depends on housing prices. And that was really the variable."). To conserve cash, AIG also halted merger discussions with a number of entities that it had been contemplating acquiring. Willumstad, Tr. 6483. In addition, "AIG hired JP Morgan Chase to help develop funding options" and "approached Berkshire Hathaway about providing a $5 billion backstop to AIG's guaranteed investment contracts." Stip. ¶¶ 67, 69. As of August 2008, AIG's outside auditors from PricewaterhouseCoopers ("PWC") concluded that AIG's liquidity needs did not rise "to the level of concern that required disclosure." Farnan, Tr. 4243; DX 175 at 233 (as of June 30, 2008, AIG's cash and short-term investments totaled $82.2 billion). By September 2008, AIG had reduced its securities lending balance by 25 percent from its peak. PTX 625 at 4.

Despite the capital raises and AIG's other efforts to conserve cash, AIG's liquidity problems continued in August and September 2008 due to the further deteriorating condition of the financial markets, the lack of available liquidity, and similar difficulties facing other financial institutions. See Offit, Tr. 7920, 7928; Bernanke, Tr. 1960; Cragg, Tr. 4942, 4945; Liddy, Tr. 3183-84 ("I thought the company faced a very complex liquidity squeeze, in line with that which was affecting many other financial institutions."). Many market participants such as AIG also "found it difficult to derive fair market values for their securities based on market transactions." PTX 221 at 4; see also Willumstad, Tr. 6484-86. Accordingly, AIG was forced to post collateral to its counterparties that "way exceeded any reasonable estimate of the actual risk of nonpayment on the CDS contracts" and this circumstance further strained AIG's liquidity. Cragg, Tr. 5016-17.

C. September 13-14, 2008 – "Lehman Weekend"

In the weeks leading up to "Lehman Weekend," FRBNY's Mr. Geithner met twice with AIG's Chief Executive Officer, Mr. Willumstad. On July 8, 2008, Mr. Geithner held a meeting as a courtesy because Mr. Willumstad had just become AIG's new CEO, and on July 29, 2008, they met again at Mr. Willumstad's request. Mr. Willumstad did not indicate in either of these meetings that AIG was facing significant liquidity issues, and he did not request any FRBNY assistance. Geithner, Tr. 1720-21; PTX 715 at 1. Mr. Willumstad asked during the July 29 meeting if AIG might borrow from FRBNY if the need arose in the future. Willumstad, Tr. 6342-44; Geithner, Tr. 1721. In response, Mr. Geithner explained that providing AIG with access to FRBNY lending facilities would be unlikely for "moral hazard" reasons because AIG was an insurance company, not a bank. Geithner, Tr. 1721-22. "Moral hazard" refers to the concern that Federal Reserve loans might encourage companies to assume undue risk in the hope of receiving government support on favorable terms if they fail. Geithner, Tr. 1763-64; Bernanke, Tr. 2215-16 (when deciding whether to authorize FRBNY to offer a rescue loan to AIG, the Board of Governors discussed the "moral hazard . . . that would attend such a loan."). The Federal Reserve began to monitor AIG more closely in August 2008. PTX 24, 26, 27, 29, 30, 33.

Mr. Geithner and Mr. Willumstad met a third time on Tuesday, September 9, 2008, where Mr. Willumstad raised AIG's interest in becoming a primary dealer to gain access to FRBNY's Primary Dealer Credit Facility ("PDCF"). Willumstad, Tr. 6370-71; Geithner, Tr. 1722-24. Mr. Willumstad was aware that the process for becoming a primary dealer would require at least two months for AIG to establish a primary dealer affiliate. Willumstad, Tr. 6359-61; JX 43 at 3 (Sept. 5, 2008 AIG Board minutes). Ultimately, AIG did not apply to become a primary dealer. Willumstad, Tr. 6373.

In August 2008, AIG learned that credit rating agencies were considering downgrading AIG because of continued earnings volatility and financial deterioration. DX 178 at -1005 (Fitch Ratings). AIG retained JP Morgan as a financial adviser to develop funding options and strategic alternatives. Willumstad, Tr. 6350. In early September 2008, AIG's management remained optimistic about raising up to $20 billion in capital to address liquidity needs, and considered using asset sales and a dividend cut to increase available funds even more. Willumstad, Tr. 6360; JX 43 at 3. Mr. Willumstad met with credit rating agencies during the week of September 8-12, 2008 "with the hope and expectation that they would wait until the end of September" before deciding to downgrade AIG. Willumstad, Tr. 6366-67; DX 227 at -5283. During this one-week period, AIG's stock price fell from $22.76 to $12.14 per share. Willumstad, Tr. 6369; JX 188 at 4 (AIG 2008 Form 10-K).

By Friday, September 12, 2008, AIG was caught in a "downward spiral" due to its likely credit rating downgrades, increased CDS collateral calls, the decline of its mortgage-related assets, the absence of market liquidity, and the decline of its stock price. Mr. Willumstad spoke to Mr. Geithner on Friday morning, September 12, indicating that AIG had urgent and severe liquidity needs in the range of $13 to $18 billion to meet its collateral demands. Geithner, Tr. 1726-27; Willumstad, Tr. 6374-75. As a result of an afternoon meeting with AIG representatives on September 12, FRBNY reported that "AIG is facing serious liquidity issues that threaten its survival viability." Mosser, Tr. 1292; PTX 42 at 1.

Upon learning of AIG's liquidity needs on September 12, 2008, the Federal Reserve encouraged AIG and other private-market participants to pursue a private solution over the coming weekend. During September 13-14, 2008, FRBNY and Board of Governors representatives met or spoke repeatedly with AIG and its representatives to understand AIG's needs and to explore potential options to address the financial pressures. Mr. Geithner commissioned teams of FRBNY staff to study AIG's financial profile and assess AIG's financial condition and needs. Over this weekend, the role of these teams expanded to include consideration of the pros and cons of lending to AIG, analysis of the consequences of an AIG bankruptcy, and an overall evaluation of AIG's importance to the national and world economies. Geithner, Tr. 1729; Mosser, Tr. 1334; LaTorre, Tr. 2300-01; DX 307 at -6652-53; DX 398 at -9979.

In meetings and other communications with AIG, FRBNY and Board of Governors representatives encouraged AIG's efforts to borrow money or raise capital from the private sector. Geithner, Tr. 1730 ("[T]he purpose of those meetings [was] for [AIG] to give us a better feel for the nature of their financial difficulties, the scale of the assistance they may need, and to lay out for us or provide a report on progress they were making or not making in their efforts to raise private assistance."); Bernanke, Tr. 2203 ("I understood that there were some private sector negotiations going on with at least one and maybe more private equity firms.").

The meetings on Saturday, September 13, 2008 also included discussions of possibly freeing up collateral held by AIG's New York insurance subsidiaries to provide liquidity to the parent company. Willumstad, Tr. 6380-81. On Saturday evening, Mr. Geithner and Secretary of the Treasury Henry Paulson met with Mr. Willumstad and other AIG executives and advisers for an update on AIG's private sector efforts. Mr. Willumstad explained that AIG was pursuing possible commercial deals, but he thought some liquidity support from the Treasury Department or the Federal Reserve might be necessary to assist AIG in achieving a private sector solution. Willumstad, Tr. 6380-82; Geithner, Tr. 1730-31.

During the weekend of September 13-14, 2008, AIG increased its estimate of how much money it needed to survive. The increasing AIG projections raised concerns about whether it was possible to pinpoint AIG's actual needs and exposure. AIG's initial $18 billion liquidity projection increased to $45 billion on Sunday (DX 1882 at 106-07), and to at least $75 billion on Monday (JX 74 at 21).

On Sunday, September 14, 2008, Mr. Willumstad reported to government officials that AIG's efforts to secure private sector funding had been unsuccessful. Willumstad, Tr. 6389-90. AIG had not found any private firm or sovereign wealth fund that was willing to provide sufficient financing to stabilize the company, and in time to meet AIG's needs. AIG's Chief Financial Officer, David Herzog, testified "[w]hatever ideas [investment bank consultants] came up with just simply weren't executable." Herzog, Tr. 6957.

In the early hours of Monday, September 15, 2008, Lehman Brothers filed for bankruptcy. Stip. ¶ 93; Willumstad, Tr. 6390-91; Alvarez, Tr. 493. Before its bankruptcy, Lehman Brothers had been a prominent investment bank and a primary dealer. Baxter, Tr. 1101-02; LaTorre, Tr. 2312. Mr. Paulson agreed that, "right after Lehman failed, the country was plunged into . . . the most wrenching financial crisis since the Great Depression." Paulson, Tr. 1200-01. The Lehman Brothers' bankruptcy made AIG's financial crisis much worse. The marketplace reacted to the Lehman announcement by tightening liquidity, which made conventional financing sources more difficult to access. AIG's counterparties began withholding payments to AIG and refusing to transact with AIG even on a secured, short-term basis. Willumstad, Tr. 6396-97; JX 188 at 4.

By Monday, September 15, 2008, FRBNY concluded that AIG could not raise private capital. Mr. Geithner asked JP Morgan and Goldman Sachs to organize a private consortium of lenders to try to rescue AIG. Mr. Willumstad recommended these two entities because they were most knowledgeable about AIG, and best suited to arrange a syndicated rescue loan. Geithner, Tr. 1744 ("I asked two banks, after consulting with Mr. Willumstad, to undergo an effort to assess whether they could arrange a substantial source of private financing.").

During Monday and early Tuesday, September 15-16, 2008, senior bankers from Goldman Sachs and JP Morgan consulted with other banks, including Morgan Stanley, to assess AIG's immediate liquidity needs and economic value. Lee, Tr. 7073; Head, Tr. 3768-69. JP Morgan's James Lee was one of the country's leading arrangers of syndicated loans. Lee, Tr. 7078. A group from Goldman Sachs and JP Morgan worked through the night to develop terms that might be attractive to other banks. Mr. Willumstad kept AIG's Board apprised of these efforts, including an "expectation that banks [would] ultimately be paid in some form of equity." JX 74 at 2. These efforts proved unsuccessful principally because of the perception that AIG's borrowing needs exceeded AIG's value by tens of billions of dollars. Lee, Tr. 7075.

During the lead-up to "Lehman Weekend" and the following Monday, government officials were not prepared to let AIG file for bankruptcy because of the catastrophic consequences an AIG bankruptcy would have had on other financial institutions and the economy. Def.'s Resp. to Pl.'s 2nd RFAs No. 206 ("The failure of AIG could easily have led to a worldwide banking run and a severe financial meltdown, devastating millions of people financially along the way."); Id. No. 233 ("The Federal Reserve made its decision to lend based on a judgment that a failure of AIG would cause dramatically negative consequences for the financial system and the economy, consequences worse than what occurred in the aftermath of the failure of Lehman Brothers."); Baxter, Tr. 676 (On September 16, Messrs. Bernanke, Geithner, and Paulson "all concluded that if AIG filed for bankruptcy, that would have catastrophic effects for financial markets.").

Further on this point, in his book *"Stress Test,"* Mr. Geithner observed:

> The U.S. financial system seemed even more exposed to AIG than it had been to Lehman. Europe and Asia were also more exposed to AIG. And not only was AIG larger than Lehman, with a more complex derivatives book, its decline had been

> much swifter, which would be even scarier to markets. "If they default, you'll see default probabilities explode on all financial firms," I said. In other words, mass panic on a global scale.

PTX 709 at 208.

Mr. Bernanke also shared these views. PTX 599 at 77 ("AIG's demise would be a catastrophe."); PTX 708 at 92, Collection of Mr. Bernanke's Lectures in *"The Federal Reserve and The Financial Crisis,"* ("In our estimation, the failure of AIG would have been basically the end. It was interacting with so many different firms. It was so interconnected with both the U.S. and the European financial systems and global banks."); Bernanke, Tr. 1970 (AIG was "a case where action was necessary.").

Mr. Paulson concurred with his colleagues. PTX 564 at 142 (AIG's collapse "would have buckled our financial system and wrought economic havoc on the lives of millions of our citizens."); Id. at 141 ("An AIG failure would have been devastating to the financial system and to the economy."); Paulson, Tr. 1206 ("[I]t would be catastrophic if AIG filed for bankruptcy." While "the system could withstand a Lehman failure, if AIG went down, the country faced a real disaster.").

D. September 16, 2008 Loan and Term Sheet

Once the Federal Reserve concluded that it could not allow AIG to file for bankruptcy, it drafted a term sheet for the Board of Governors' approval. The Board of Governors convened a meeting on September 16, 2008 to approve the term sheet as required under Section 13(3) of the Federal Reserve Act. Alvarez, Tr. 509-10. This meeting was the only one that the Board of Governors held before the AIG Credit Agreement was executed. Bernanke, Tr. 1974-75.

The term sheet approved by the Board of Governors is included in the record as JX 63. Alvarez, Tr. 188; Bernanke, Tr. 1974. This term sheet expressly stated that the form of equity would be "[w]arrants for the purchase of common stock of AIG representing 79.9% of the common stock of AIG on a fully-diluted basis." JX 63 at 6.[8]

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[8] The objective of the Board of Governors in setting a 79.9 percent rate was to keep the Government's equity ownership of AIG below 80 percent, because at an 80 percent or higher level, the Federal Reserve or the Treasury Department would be considered the controlling owner of AIG. See Alvarez, Tr. 515-16. At an ownership level above 80 percent, principles of "push down" accounting would have likely required FRBNY to recognize AIG's assets and liabilities on its own books and records. JX 146 at 23-28 (PwC analysis, Nov. 9, 2008); Farnan, Tr. 4408-13.

Warrants are a "contract by which the corporation gives an irrevocable option to the holder to purchase authorized corporate stock within a period of time at a price and upon terms specified in the contract." Tribble v. J.W. Greer Co., 83 F. Supp. 1015, 1022 (D. Mass. 1949). For the AIG term sheet presented to the Board of Governors, the members understood that the warrants would be non-voting until they were exercised, would have an exercise price, and required shareholder approval[9] before the warrants could be issued. Bernanke, Tr. 1975; Baxter, Tr. 816; see also JX 63 at 10. Other key provisions of the term sheet voted on by the Board of Governors included a drawn interest rate of 12 percent (3.5 percent London InterBank Offered Rate[10] ("Libor") floor + 850 basis points), an undrawn fee of 8.5 percent, meaning that any amount not drawn by AIG would be charged an interest rate of 8.5 percent, a commitment fee of 3 percent of the total facility, and a periodic commitment fee of 2.5 percent "payable in kind every [three] months after closing." JX 63 at 6. The five Board of Governors members unanimously voted to approve the term sheet. JX 63 at 4. This was the only term sheet the Board of Governors ever saw or approved. Alvarez, Tr. 188.

Following the Board of Governors meeting on September 16, 2008, the Davis Polk lawyers began to circulate a term sheet time-stamped 1:44 PM to FRBNY and Treasury officials. PTX 86 at 1. This term sheet, like the one presented to the Board of Governors, stated that warrants would be the form of equity granted to the Federal Reserve. Id. at 4. At 2:15 PM that day, Mr. Baxter sent Mr. Alvarez a term sheet providing for "Warrants for the purchase of common stock of AIG representing 79.9% of the common stock of AIG on a fully-diluted basis." JX 64-A at 1; Alvarez, Tr. 262; Baxter, Tr. 695. Later, at 3:21 PM, a black-lined term sheet was distributed, showing changes from earlier drafts. However, the warrants provision in the term sheet remained unchanged. JX 378 at 1, 8-12.

In the afternoon of September 16, 2008, Mr. Geithner called Mr. Willumstad to tell him that FRBNY would be sending him a term sheet and that he had two hours to convince AIG's Board of Directors to accept. PTX 673 at 24 (Geithner: "[W]e're going

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[9] Under New York Stock Exchange Listed Company Manual Rule 312.03, "shareholder approval is required prior to the issuance of warrants exercisable into twenty percent or more of the voting power of a corporation's common stock unless a company invokes an exception to Rule 312.03 that waives the requirement of a shareholder vote when (1) the delay in securing shareholder approval would seriously jeopardize the financial viability of the Corporation's enterprise and (2) reliance by the Corporation on such exception is expressly approved by the Audit Committee of the Board." JX 75 at 2. On September 16, 2008, the AIG Audit Committee approved the issuance of warrants without shareholder approval, invoking Rule 312.03. Id. at 3.

[10] LIBOR is an interest rate benchmark that has been called "the world's most important number." In re LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 676 (S.D.N.Y. 2013).

to send you a term sheet, you're not going to like it, but you have an hour to get your Board to approve it, two hours, we gave them a deadline, and you are not going to be running the company."). According to Mr. Baxter, the Federal Reserve's offer to AIG was "take it or leave it. Nothing could be negotiated." PTX 126; see also Liddy, Tr. 3200 ("The only game in town was the Federal Reserve."); Paulson, Tr. 1444 ("Federal Reserve was the only fire station in town."). The AIG Board meeting to discuss the proposed Federal Reserve loan commenced at approximately 5:00 PM that day. JX 74 at 1. At the start of the meeting, Mr. Richard Beattie of Simpson Thacher & Bartlett informed the directors about key aspects of the $85 billion credit facility. Id. at 3. Mr. Willumstad also relayed to the Board of Directors what Mr. Geithner had said: that as one of the conditions to accepting the Federal Reserve's loan facility, he would be replaced as CEO of AIG. Id. at 3-4.

The law firms of Simpson Thacher & Bartlett, Sullivan & Cromwell, and Weil Gotshal then gave the AIG directors comprehensive legal advice on whether they should accept the loan or file for bankruptcy. Id. at 4-5; Offit, Tr. 7349-50, 7373. After hearing from these advisers and engaging in a lengthy discussion regarding the pros and cons of filing for bankruptcy, the AIG Board of Directors decided that accepting the loan was a better alternative than bankruptcy. JX 74 at 9-11 (Offit: "AIG, as a financial institution based on trust, cannot survive in bankruptcy;" Sutton: "[t]he risks of bankruptcy are simply too high and there is too great a likelihood that the value of AIG would drop very quickly, hurting all the constituencies about whom the Board must be concerned."); Offit, Tr. 7392 ("[B]y accepting the terms . . . shareholder[s] would still have a 20 percent interest rather than being wiped out by a bankruptcy, and . . . one day [AIG] could again be a very vibrant company."). Of the twelve AIG board members, all but Mr. Bollenbach voted in favor of the Federal Reserve loan. JX 74 at 14. The AIG directors believed doing so was in the best interests of AIG and its shareholders and that it was a better alternative to bankruptcy. Willumstad, Tr. 6432; Offit, Tr. 7402-03; JX 74 at 11. AIG's directors were independent of FRBNY and the Government, with no affiliation with or dependence on FRBNY or the Government for their livelihood. Willumstad, Tr. 6435-36.

Before the conclusion of the board meeting on September 16, 2008, the AIG Board of Directors adopted two resolutions. The first authorized AIG "to enter into a transaction with the Federal Reserve Bank of New York (the 'Lender') to provide a revolving credit facility of up to $85 billion on terms consistent with those described at this meeting, including equity participation equivalent to 79.9 percent of the common stock of the Corporation on a fully-diluted basis." The second resolution authorized AIG "to enter into a $14 billion demand note with the Lender" and to "enter into such additional demand notes . . . as any Authorized Officer determines is necessary or appropriate to meet the liquidity needs of the Corporation prior to the execution of the definitive documentation of the Credit Facility." JX 74 at 13-14. After the Board of Directors approved the loan facility, FRBNY immediately advanced funds to AIG. Offit, Tr. 7938.

Someone presented a two-page term sheet to Mr. Willumstad prior to the AIG Board meeting. It is unclear from the evidence exactly what version of the term sheet he saw. Willumstad, Tr. 6515. Mr. Huebner testified that Mr. Wiseman of Sullivan & Cromwell handed out hard copies of a term sheet to AIG's Board members, stating the form of equity would be "79.9 percent equity equivalent to common stock, *form to be determined*." Huebner, Tr. 5945-46 (emphasis added). However, this evidence contradicts the testimony of Mr. Willumstad and Mr. Offit who both testified that they did not see a term sheet during the September 16, 2008 board meeting. JX 76 at 1; Willumstad, Tr. 6515; Offit, Tr. 7936. The Court cannot determine what version of the term sheet Mr. Willumstad actually received or whether any hard copies, much less what version, of the term sheet were shown to AIG's Board of Directors. All the term sheets circulated on September 16, 2008 did state, however, that "[t]his Summary of Terms is not intended to be legally binding on any person or entity." JX 63 at 5 (time-stamped 7:42:23 AM); JX 64-A at 3 (time-stamped 3:50:06 AM); JX 64-A at 9 (time-stamped 1:54:10 PM); JX 71 at 2.

According to various press releases issued on the night of September 16, 2008 or the following day, the public would have understood that the form of equity to be acquired by the Federal Reserve would be common stock warrants. PTX 2736 at 1 (New York Times press release) ("Fed Staffers, who briefed reporters at 9:15 tonight, don't even want us to say the government will control AIG. The government will name new management, and will have veto power over all important decisions. And it will have a *warrant* allowing it to take 79.9 percent of the stock whenever it wants."); PTX 131 at 3 (New York Times) ("Under the plan, the Fed will make a two-year loan to AIG of up to $85 billion and, in return, will receive *warrants* that can be converted into common stock giving the government nearly 80 percent ownership of the insurer, if the existing shareholders approve."); PTX 1593 at 3 (A.M. Best) ("Current AIG shareholders will see their equity diluted 79.9% by the issuance of *warrants* to the federal government."). Though some press releases issued on September 16-17, 2008 stated the Government would receive a 79.9 percent equity interest in AIG without stating the form of equity, "no published report prior to the evening of September 23, 2008, explicitly stated that the Government would receive voting preferred stock." <u>See</u> PTX 234 at 1; DX 419 at -1425; JX 79 at 2.

After the board meeting concluded on September 16, 2008, Mr. Willumstad signed a single signature page that had nothing attached. JX 76 at 1-2; Willumstad Tr. 6438-39, 6441-42. An AIG representative faxed a copy of the signature page to FRBNY's Mr.

Baxter at 8:44 PM. PTX 94 at 1-2. The final version of the term sheet was sent at 8:51 PM after the Government received the signed signature page. Def.'s Resp. to Pl.'s 3rd Interrog. No. 2 (identifying DX 437 as the final version). The key terms included in the final version of the term sheet were nearly identical to those approved by the Board of Governors except that the equity term stated "[e]quity participation equivalent to 79.9% of the common stock of AIG on a fully-diluted basis. Form to be determined." DX 437 at -025.

E. Development of the September 22, 2008 Credit Agreement

During September 16-19, 2008, the Government lent significant funds to AIG pursuant to fully secured demand notes. These demand notes were separate agreements and they were cancelled on September 23, 2008 after the execution of the Credit Agreement. JX 84 (demand notes); JX 107 at 12, 23, 38-39, 74-75; Baxter, Tr. 761; Liddy, Tr. 3044. Under the demand notes, AIG was obligated to pay the principal, fees and interest on the demand of FRBNY or on September 23, 2008, whichever came earlier. Stip. ¶ 150.

FRBNY representatives, with the assistance of their outside counsel, Davis Polk, drafted the Credit Agreement. Brandow, Tr. 5887; Baxter, Tr. 935-36. At AIG's September 18, 2008 board meeting, "Mr. Litsky [Vice President of Corporate Governance] noted that a number of directors had raised questions regarding the process by which the various agreements with the Federal Reserve and Treasury would be approved. Mr. Wiseman [Sullivan & Cromwell] explained the process in detail, and noted that the documents were still being drafted by counsel for the Federal Reserve and that counsel for the Corporation hoped to receive them shortly." JX 94 at 6.

During September 17-21, 2008, discussions occurred between FRBNY and AIG representatives, but the Government unilaterally imposed the key terms of the Credit Agreement on AIG. None of the key terms were subject to negotiations. Liddy, Tr. 3293-94 (AIG had several discussions about the terms with Sarah Dahlgren, but was told "there was not going to be any change."); Dahlgren, Tr. 2779-80 (Mr. Liddy "expressed unhappiness with respect to the equity piece of the deal between September 16th and September 21st."). AIG's September 21, 2008 board minutes state that "[c]oncern was raised about the Corporation's inability to conduct further negotiations with the Bank." JX 103 at 6; see also PTX 195 at 7 (handwritten note) ("Fed gets it both ways not purely negotiated.").

The Government changed some of the key terms of the Credit Agreement from those that the Federal Reserve's Board of Governors had approved on September 16, 2008. The September 21, 2008 AIG board minutes state: Although "the Board had originally been led to believe that the form of equity participation by the Treasury Department would be warrants, the form of equity participation to be issued in connection with the Credit Agreement is now proposed to be convertible preferred stock, the terms of which were reflected in a term sheet delivered to Board members prior to the meeting." JX 103 at 3. Mr. Liddy confirmed "[w]e had been anticipating that it would be warrants. It was, in fact, preferred stock. So, it was a change from what was anticipated." Liddy, Tr. 3129-30; see also Liddy, Tr. 3136 ("the clear expectation of AIG management was that there would be warrants with no vote" but the final Credit Agreement "provided preferred stock with a 79.9 percent vote.").

There are two major differences between warrants and convertible preferred voting stock. First, with convertible preferred voting stock, the Government would acquire voting rights from the moment the preferred stock was issued. Warrants would have voting rights only after the warrants were exercised. Geithner, Tr. 1492-93; Alvarez, Tr. 261. Second, in order to exercise the warrants, the Government must pay a strike price. Zingales, Tr. 3826-27; Kothari, Tr. 4824. The strike price to exercise warrants in this instance would have been approximately $30 billion, calculated at 12 billion shares times the par value of $2.50 per share. Zingales, Tr. 3827-28; Cragg, Tr. 5107-08. The Government avoided the $30 billion strike price payment and obtained immediate voting control of AIG through the issuance of convertible preferred voting stock.

FRBNY first presented a proposal for convertible preferred voting stock to AIG at 6:31 PM on September 21, 2008, prior to an AIG Board meeting to be held that night. PTX 196 at 1. The summary of terms described the form of equity as "Convertible Participating Serial Preferred Stock" that "will vote with the common stock on all matters submitted to AIG's stockholders" and will be entitled to control "79.9%" of the vote. Id. at 3. The document available at the board meeting was a term sheet, not a draft of the complete Credit Agreement. JX 103 at 2 ("Mr. Reeder reviewed a summary of the principal terms of the facility that had been prepared for review by the members."); Offit, Tr. 7965-66 (Mr. Offit never saw anything but the term sheet).

Between the evening of September 21st and the morning of September 23rd, more changes were made to the Credit Agreement. Brandow, Tr. 5878. On September 22, 2008 at 9:37 PM, Davis Polk sent a draft of the Credit Agreement "requesting that all parties review and sign off within the hour." PTX 1645 at 2. This version added to Section 5.11, "Trust Equity," the following language: "The Borrower shall use best efforts to cause the composition of the board of directors of the Borrower to be, on or prior to the date that is 10 days after the formation of the Trust, satisfactory to the Trust in its sole discretion." Id. at 49-50.

Changing the form of equity from warrants to voting convertible preferred stock in the Credit Agreement yielded important benefits to the Government. Avoiding a shareholder vote was a key government objective. PTX 3272 (Sept. 17, 2008 Davis Polk email: "avoiding a SH vote we don't control is a primary goal."); PTX 3129 at 7 (Nov. 5, 2008 Davis Polk email: "We succeeded in finding a structure that allows the trust to gain control of the company without a shareholder vote."); PTX 349 (Treasury counsel Stephen Albrecht, discussing need to "fend off the shareholder attempts to 'reclaim' the company.").

The Federal Reserve's Board of Governors did not consider or approve any of the changes that FRBNY made to the Credit Agreement. The Board of Governors had approved the term sheet on September 16, 2008 that contemplated an equity component of non-voting warrants with a strike price (exercise price). JX 63 at 10. The Chairman of the Board of Governors "understood that the warrants would not have a vote until they had been exercised." Bernanke, Tr. 1975. There also was no mention of creating a trust during the Board of Governors meeting. Bernanke, Tr. 2028 ("[T]he provision for a trust" was never "presented to the Board of Governors for approval."). The Board of Governors never voted to approve the Credit Agreement. Bernanke, Tr. 2025.

On September 21, 2008, AIG's Board, without shareholder vote or approval, passed a resolution authorizing the execution of the Credit Agreement. JX 103 at 1, 7. The key players in the Credit Agreement events immediately understood the effect of this agreement. On September 23, 2008, Davis Polk's Mr. Huebner observed to FRBNY's Mr. Baxter "[t]he real joy comes when we get back the $85 [billion], with $10 +++ in fees and interest, and make the [T]reasury tens of billions it deserves (and needs!) on the equity." PTX 3228 at 1. On September 22, 2008, AIG's Dr. Jacob Frenkel stated to a colleague, Oakley Johnson, "the [G]overnment stole at gunpoint 80 percent of the company." PTX 228 at 1.

F. The Government's Control of AIG

When the Government began lending money to AIG on September 16, 2008, it promptly took control of the company. Offit, Tr. 7938, 7964-65, 7968. FRBNY's Sarah Dahlgren prepared "an immediate punch list for taking control of AIG." Dahlgren, Tr. 2640-41. On September 17, 2008, Ms. Dahlgren told a group of high-level AIG executives, we "are here, you're going to cooperate." PTX 581 at 2; Dahlgren, Tr. 2817-18. Mr. Paulson testified that the Government in effect nationalized AIG. Paulson, Tr. 1445.

On September 16, 2008, prior to any discussions with the AIG Board, the Government terminated Mr. Willumstad as AIG's Chief Executive Officer, and replaced him with a new CEO of the Government's choosing. Secretary of the Treasury, Henry Paulson, "worked on finding a new CEO for the company. We had less than a day to do it – AIG's balances were draining by the second. I asked Ken Wilson [Treasury] to drop everything and help. Within three hours he had pinpointed Ed Liddy, the retired CEO of Allstate." Mr. Paulson "called Ed Liddy and offered him the position of AIG chief on the spot." Paulson, Tr. 1227-28; PTX 706 at 263. The Treasury's Dan Jester told Ms. Dahlgren that Mr. Liddy is "the person who is going to be the new CEO of AIG." Dahlgren, Tr. 2639. Mr. Liddy accepted the position, and at his request, Ms. Dahlgren "prepared some bullet points that we thought he should focus on in his initial interactions with the company." Dahlgren, Tr. 2645, 2917-18.

On the morning of September 17, 2008, Mr. Liddy met with Ms. Dahlgren, and other AIG senior managers, "including the CFO, the chief risk officer, [and] the general counsel." Dahlgren, Tr. 2641-42. Mr. Liddy "was clearly the one in charge" during that meeting. Dahlgren, Tr. 2643. Mr. Liddy and Ms. Dahlgren conveyed the message to AIG senior managers that "[t]he Fed is coming in and now we are going to talk about what we are going to do." Dahlgren, Tr. 2644. AIG senior managers at this meeting were "shell-shocked and at other times terrified." Id.

The AIG Board convened a meeting on September 18, 2008. The Government informed key Board members, Mr. Bollenbach and Mr. Offit, that Mr. Liddy would fill the dual role of Chairman and CEO of AIG. Liddy, Tr. 3040-41; Offit, Tr. 7930. At the board meeting, the board's counsel, Mr. Beattie, explained that "these are uncharted waters for any board, but that Mr. Liddy was accepted as Chief Executive Officer as part of the agreement to accept government financing on September 16 and that the board was acting in accordance with its duties to formally implement that agreement by appointing Mr. Liddy as Chief Executive Officer." JX 94 at 2; Offit, Tr. 7929-30. Mr. Paulson "assumed the board would approve" Mr. Liddy's installation. Paulson, Tr. 1228.

Beginning on September 16, 2008, "the government in the form of the Federal Reserve, working with the Treasury, became very deeply involved in the overall strategy" of AIG. PTX 449 at 15-16. When Mr. Geithner appointed Ms. Dahlgren to head the AIG monitoring team, he told her "[y]ou're going to take on AIG, we are going to make them a loan, and you are going to run it." Dahlgren, Tr. 2601; Geithner, Tr. 1565-66. According to FRBNY's counsel, Mr. Baxter, "we had a team that we sent to AIG to monitor AIG on a continuous basis." Baxter, Tr. 935. This team spent "an enormous amount of time over at AIG," including "people who spent much of their time at AIG [Financial Products] up in Connecticut." Dahlgren, Tr. 2602. Ms. Dahlgren "spent at least part of every day at AIG" during the early stages of the Federal Reserve's monitoring of AIG. Dahlgren, Tr. 2603. By October 2008, Ms. Dahlgren was leading an effort to replace current AIG board members with new members of the Government's choice. PTX 310 (Oct. 19, 2008 email, Dahlgren to Geithner, recommending new board members, and stating "Morris Offit is prepared to hand his resignation to Ed [Liddy] when he asks."). Even at earlier stages, FRBNY's plan was to replace all of AIG's Board members. PTX 3248 at 2 (Sept. 20, 2008 Davis Polk email: "We plan to take out the board and insert our own people. . . ."); PTX 3290 (Sept. 16, 2008 Davis Polk email: "The Fed wants the entire board to resign and be replaced.").

The AIG monitoring team consisted of hundreds of government officials and outside advisers. Dahlgren, Tr. 2605. The monitoring team included professionals "from Ernst & Young, from Morgan Stanley, and from Davis Polk." Dahlgren, Tr. 2603-04; PTX 524 (containing a "working group list" of team members from FRBNY, Morgan Stanley, Davis Polk, Blackstone, and Ernst & Young). Morgan Stanley had approximately "[one] hundred individuals throughout the firm in different disciplines" who worked on the AIG engagement "on behalf of" FRBNY. Head, Tr. 3722. Morgan Stanley's scope of work was very broad, and encompassed virtually every important decision and activity. JX 222 at 3-4; PTX 303 at 1, 8. Ernst & Young also had "upwards of [one] hundred people" assisting on the monitoring team. Dahlgren, Tr. 2605. Blackrock worked to value AIG's assets (JX 379 at 2) and to devise, structure, and manage Maiden Lane II and Maiden Lane III (explained in section J below). Dahlgren, Tr. 2647; Head, Tr. 3743-44; JX 382 at 1, 25. Approximately ten to twenty Davis Polk lawyers were working with Ms. Dahlgren on AIG. Dahlgren, Tr. 2606.

AIG was required to reimburse FRBNY for all expenses incurred by FRBNY's advisers. Dahlgren, Tr. 2606-08; JX 251 at 316-17 (AIG 2009 10-K Report acknowledging AIG's obligation to reimburse FRBNY for the monitoring team expenses). There was no budget for all of the persons and firms helping the Federal Reserve, but it was "very expensive." Geithner, Tr. 1569.

Based upon statements made by government officials, there can be little doubt that the Government controlled AIG. Mr. Bernanke testified before Congress on March 23, 2009 that "AIG is effectively under our control." PTX 447 at 50. Donald Kohn, Vice Chair of the Federal Reserve, stated on September 23, 2008 that the Fed is "definitely acting like we own the company [AIG]. Will need to consolidate on our balance sheet." PTX 233. Ms. Dahlgren told Standard & Poor's on October 1, 2008 that she was speaking on behalf of the "largest creditor and 80% equity holder of the company [AIG]." PTX 270 at 2; Dahlgren, Tr. 2676. Ms. McConnell's handwritten notes from September 15, 2008 state "loan comes with conditions, plan to run the company [AIG]." PTX 68 at 14. On September 16, 2008, FRBNY's Christopher Calabria stated in an email "We own [AIG], essentially. I can't believe it." PTX 97. On September 17, 2008, FRBNY's Michael Silva, Chief of Mr. Geithner's staff, wrote in an email that Mr.

Greenberg "should have said he WAS one of the largest shareholders in the company [AIG]. The Federal Reserve is now the largest shareholder in the company." PTX 109.

On September 19, 2008, prior to executing the Credit Agreement, FRBNY's Joseph Sommer recommended that Ms. Dahlgren attend the National Association of Insurance Commissioners Conference, "[n]ow that you are the proud new owner of an insurance company." PTX 1607-U at 1; Dahlgren, Tr. 2789 (Ms. Dahlgren attended the conference).

G. The Creation of a Trust

In mid-September 2008, the Government recognized that the Treasury and FRBNY might not have the legal authority to take the Series C Preferred stock given to the Treasury under the terms of the September 22, 2008 Credit Agreement. See, e.g., PTX 320-U at 1 ("we agree that there is no power" for the Federal Reserve to "hold AIG shares."); PTX 370 at 3 ("Treasury lacks the legal authority to hold directly voting stock of AIG."); PTX 409 at 177 (Geithner: "Under section 13(3) of the Federal Reserve Act, the Fed is prohibited from taking equity or unsecured debt positions in a firm."); PTX 443 at 1 ("Nice try on the preferred stock investments! We still don't have that authority."). Thus, government officials began to look for ways to avoid the legal restriction preventing the U.S. Treasury and FRBNY from holding AIG's voting preferred stock.

During the period September 16-20, 2008, Mr. Baxter conceived of the idea of putting the Series C Preferred stock in a trust as a way to circumvent FRBNY's and the Treasury's lack of authority to own AIG shares directly. Baxter, Tr. 791; PTX 580 at 3 (Baxter); see also JX 90. Mr. Baxter asked Davis Polk to consider various options to avoid direct ownership by FRBNY and Treasury of a majority voting interest in AIG, including "warrants that are exercisable upon sale" and "holding shares in a voting trust." JX 90.

Davis Polk developed two proposals, Options A and B. Option A contemplated a combination of preferred shares with limited voting rights and warrants exercisable only on transfer to a third party. Option B consisted of preferred shares with full voting rights to be held by an independent trust. PTX 159-U at 6-7. The Government ultimately selected Option B and began to draft a term sheet to reflect that the form of equity would now be voting preferred stock, as opposed to the warrants originally approved by the Board of Governors. See PTX 183 at 3-4; JX 63 at 6. On September 21, 2008, during a noon conference call, the Government formally decided to issue the Series C Preferred Stock to an AIG Credit Facility Trust, established for the benefit of the Treasury. JX 101 at 1-3; JX 107 at 137 (stating the AIG Credit Facility Trust was "established for the benefit of the United States Treasury" and changing the "purchaser" of the stock from FRBNY to the Trust).

To administer the trust, FRBNY, in consultation with the Treasury, selected three trustees who had close ties to the Federal Reserve System. Baxter, Tr. 986. Chester Feldberg worked at FRBNY for 36 years and "had a close relationship with many Federal Reserve employees and officials." Feldberg, Tr. 3334-35. Jill Considine "had chaired the audit and risk committee of the board of directors of the Federal Reserve Bank" and had previously served a six-year term as a member of the board of the FRBNY. Baxter, Tr. 988-89; Def.'s Resp. to Pl.'s 2nd RFAs No. 770. Douglas Foshee was the chair of the Board of Directors of the Federal Reserve Bank of Dallas, Houston Branch, and Central Houston, Inc. during the time he served as trustee. Foshee, Tr. 3453; Def.'s Resp. to Pl.'s 2nd RFAs No. 772.

Ms. Dahlgren and the trustees signed the final AIG Credit Facility Trust Agreement on January 16, 2009 and the Trust received the Series C Convertible Preferred Stock in March 2009. JX 172 at 1, 25; JX 191 at 2. There were at least eight key provisions of the Trust Agreement. First, the trust was established for the "sole benefit of the Treasury." JX 172 at 5. Second, FRBNY had the power to appoint the trustees. Id. Third, only the Board of Governors could terminate the trust or amend its authorization. Id. at 6. Fourth, the trustees, in exercising their discretion with the trust stock, were advised they were to "maximize[e] the Company's (AIG's) ability to honor its commitments to, and repay all amounts owed to, the FRBNY or the Treasury Department." Id. at 10. Fifth, FRBNY was to control the defense of "any actual or threatened suit or litigation of any character involving the Trust" and the trustees could not make "any admissions of liability . . . or agree to any settlement without the written consent of the FRBNY." Id. at 13. Sixth, FRBNY, in consultation with the Treasury, had the power to remove a trustee. The trustees also could only be removed in exceptional circumstances such as those involving dishonesty, untrustworthiness, or dereliction of duty. Id. at 14. Seventh, the trustees were required to act "in or not opposed to the best interests of the Treasury." Id. at 15 (providing indemnification rights to the trustees). Last, the Trustees were to ask FRBNY for clarification regarding the Trust Agreement and the Government had the right to seek specific performance from the Trustees for compliance with their obligations. Id. at 19-20, 23. AIG representatives had no involvement in the preparation or approval of the Trust Agreement, and no participation in any trustee meetings. PTX 435 at 8-9 (lack of any notice to AIG); Dahlgren, Tr. 2760-64 (no AIG involvement in trustees' meetings).

In their capacity as trustees, Mr. Feldberg, Ms. Considine, and Mr. Foshee understood they had fiduciary duties to the Treasury, and not to AIG's common stock shareholders. Feldberg, Tr. 3442; Huebner, Tr. 6272-73; PTX 372 at 1; PTX 3286 at 1.

The trustees also knew they could not sell or dispose of the trust stock unless FRBNY approved, and they questioned their level of independence. Feldberg, Tr. 3442; 3566-7l; DX 630 at -312 to -313. On October 30, 2008, the trustees sent a memorandum to Mr. Baxter seeking to clarify their level of independence. DX 630 at -312-13. The trustees were concerned with Section 2.04(d) of the Trust Agreement which set forth two potentially conflicting goals for the trustees to consider when exercising their discretion. First, the trustees were to maximize AIG's ability to repay advances under the Credit Agreement. Second, the trustees were to manage AIG so as not to disrupt financial market conditions as it was in the "best interests of the stockholders of the Company [AIG]." Id. The Government never removed Section 2.04(d) from the Trust Agreement, but did specify the two goals were "non-binding" on the trustees' discretionary power to vote the trust stock. JX 172 at 10. This position satisfied the trustees that they would be independent in performing their fiduciary duties as trustees. Feldberg, Tr. 3407.

During their time as trustees, Mr. Feldberg, Ms. Considine, and Mr. Foshee received information about AIG through FRBNY representatives, because the trustees did not attend AIG's board or committee meetings. Baxter, Tr. 1006; PTX 516 at 49-50. The trustees engaged Spencer Stuart, an executive recruitment firm, to assist in identifying potential new candidates for AIG's board of directors. In June 2009, at the annual shareholder meeting, the trustees proposed the candidates for election. Feldberg, Tr. 3419-26; Foshee, Tr. 3521, 3524-26. Before voting on matters and selecting the board of directors for AIG, however, the trustees consulted with FRBNY. Baxter, Tr. 842-43. The trustees also did not participate in matters affecting the Trust's ownership rights, including the reverse stock split. Feldberg, Tr. 3364, 3373-74.

H. The Restructuring of AIG's Loan in November 2008

After FRBNY and AIG entered into the September 22, 2008 Credit Agreement, AIG needed more liquidity support. Geithner, Tr. 1761 ("Over the course of the succeeding weeks, really almost immediately, AIG was . . . facing escalating losses and a dramatic escalation in their needs for liquidity."). Ultimately, AIG received nearly $100 billion in additional support, including nearly $50 billion in new capital. On October 6, 2008, the Federal Reserve created an additional $37.8 billion lending facility to address liquidity pressures AIG was facing from its securities lending program. PTX 696 at 16-18.

Officials at FRBNY and AIG recognized that a restructuring of the Credit Agreement would be necessary. Dahlgren, Tr. 2772-73 ("[T]he terms of the AIG Credit Facility were viewed by the ratings agencies and ultimately by [Dahlgren] as being too onerous and counterproductive."). On October 4, 2008, the Treasury Department's Dan Jester asked FRBNY to "rethink the terms of the deal; deal was onerous." PTX 279 at 2.

On October 15, 2008, representatives of FRBNY and the Board of Governors met to discuss the "need[] to press forward" with regard to restructuring the AIG deal. PTX 297 at 1.

From as early as September 16, 2008, many officials within the Government recognized that the interest rate charged to AIG on FRBNY's rescue loan was too high. PTX 2211 at 10 (Mr. Baxter thought the interest rate assessed against AIG was "[m]ore of a loan shark" rate.); PTX 318 (Ms. McConnell expressed dismay to Mr. Geithner regarding the "crazily high" interest rate forced on FRBNY.); PTX 145 (Ms. McLaughlin stated in a September 18, 2008 email that "[w]e should have been charging 3.5% . . . not 12% . . . it is wrong that this was done w/o [FRBNY's] input."). Financial analysts at UBS felt that the terms for AIG were harsh. PTX 1665 at 3 (Sept. 25, 2008 report: "If the [G]overnment wanted to help existing AIG shareholders, the terms of the [C]redit [F]acility [A]greement would have been less onerous and dilutive in the first place."). Morgan Stanley made similar observations. PTX 246 at 1 (Sept. 24, 2008 report: "terms are even more punitive than we originally expected, making us question the risk-reward profile of the company."). Mr. Geithner, recalling the AIG events in 2012, observed: "We replaced the management and the boards of directors. We forced losses on shareholders proportionate to the mistakes of the firm." PTX 648 at 8.

Despite the initial \$85 billion rescue loan and the October 2008 \$37.8 billion securities lending facility, AIG's financial condition worsened. In November 2008, the ratings agencies again threatened to downgrade AIG due to an expected \$24.5 billion quarterly loss. Baxter, Tr. 1016. AIG filed its SEC Form 8-K/A on November 10, 2008, announcing a \$24.47 billion loss for the third quarter of 2008. JX 149 at 4. That same day, the Federal Reserve and the Treasury Department announced a restructuring of the credit facility, and provided a package of new assistance to stabilize AIG. Id. at 16-18.

The restructuring package contained elements intended to avert an AIG downgrade and bankruptcy, including: (a) \$40 billion of TARP ("Troubled Asset Relief Program")[11] capital support; (b) modifications to the original loan terms including a reduction in interest rate by 5.5 percent, a reduction in the undrawn funds interest rate to 0.75 percent, and an extension of the loan term from two years to five years; (c) transfer of AIG's RMBS investments from its securities lending portfolio to a newly created special purpose vehicle called Maiden Lane II; and (d) creation of another special purpose vehicle called Maiden Lane III to eliminate AIG's CDS posting obligations and CDS-related liquidity risks. JX 147 at 2; JX 149 at 16-18; PTX 5362 (Cragg chart).

[11] TARP was a program authorized under the Emergency Economic Stabilization Act of 2008 ("EESA") that permitted the Treasury Department to, among other things, purchase equity investments in troubled companies. See 12 U.S.C. §5211(a)(1) (2008); see also Alvarez, Tr. 162-63.

With the $40 billion in TARP assistance, the Treasury Department purchased AIG's Series D Preferred Stock, a newly created class of stock that had terms more onerous than other TARP equity purchased by Treasury. JX 158 at 2. The Series D Preferred Stock had an annual dividend rate to the Government of 10 percent. Id. at 10. In contrast, the $125 billion in preferred stock purchased by Treasury under the Capital Purchase Program from "eight of the country's largest financial institutions" had an annual dividend rate of 5 percent. PTX 622 at 30; see also PTX 422 at 57-59. The $40 billion purchase price paid by Treasury under the Capital Purchase Program was immediately "used to pay down the current outstandings on the Fed loan," also reducing the maximum borrowing limit from $85 billion to $60 billion. Dahlgren, Tr. 2875-76; PTX 622 at 34; PTX 5200.

I. The *Walker* Lawsuit

On November 4, 2008, a group of AIG shareholders filed a lawsuit in the Delaware Chancery Court complaining that the Government's Series C Preferred Stock should not be converted into AIG common stock without a shareholder vote. Walker v. AIG, Inc., Case No. 4142-CC (Del. Ch., Nov. 4, 2008). On November 5, 2008, Michael Leahey, Associate General Counsel at AIG, forwarded the *Walker* complaint to AIG General Counsel Stasia Kelly and to AIG's outside counsel at Weil Gotshal, stating, "[h]ere is a copy of the new shareholder complaint filed last night in Delaware seeking, among other things, an order declaring that the Super Voting Preferred is not convertible into common stock absent a class vote by the common stock to increase the number of authorized shares." PTX 3259 at 1.

Less than 20 minutes later, Davis Polk received the *Walker* complaint. Mr. Huebner of Davis Polk observed "this is potentially serious." PTX 3259 at 1. Within the next 30 minutes, Ms. Beamon of Davis Polk notified FRBNY's Ms. Dahlgren and Mr. Baxter, "[p]lease find attached a new complaint filed last night against AIG that has some potentially serious ramifications." PTX 343 at 1. Defendant monitored the *Walker* lawsuit and received updates from AIG's outside counsel, Weil Gotshal, on the status of the *Walker* lawsuit. PTX 377 at 1-2; PTX 3164 at 1-2; PTX 3302 at 1; PTX 3316 at 1-2; PTX 3223 at 1-3.

On November 6, 2008, the Board of Governors legal staff prepared a memorandum analyzing the *Walker* lawsuit and whether Delaware law would require AIG to hold a separate class vote on the charter amendments. PTX 3221. The memorandum concluded that "[t]he face of the Delaware statute cited above seems to indicate that common shareholders would have the right to vote separately from the preferred shareholders both to increase the number of common shares and to decrease the common shares' par value." Id. at 3.

Defendant made suggestions to AIG on how to litigate the *Walker* case. Davis Polk's Mr. Huebner stated on November 7, 2008: "I asked them to – if they think it logical – point out to the plaintiffs that the lien claim is likely equally frivolous and should be dropped from any amended complaint." PTX 3164 at 2. AIG counsel consulted with Defendant's counsel about settling the lawsuit on November 20, 2008: "Plaintiff is prepared to drop the lawsuit, but we may have a fight with respect to legal fees. We would like to discuss with you before responding." PTX 3223 at 1-2. Mr. Huebner then forwarded the settlement proposal to Mr. Baxter. Id. at 1; see also PTX 376 at 1; Baxter, Tr. 1132-33.

Defendant provided approval to AIG to pay the *Walker* plaintiffs' attorneys' fees: "The original 'ask' by the plaintiffs was $350,000, which has since been reduced to $175,000. Weil believes that AIG should pay this amount, and that it would cost more to litigate the issue further. They said that they plan to do so 'unless the Fed objects.' We haven't previously to my recollection, been asked to sign off on settlements of this nature, but I think that, given the circumstances, Weil wants us to run this past you." PTX 3128, Beamon to FRBNY, at 2. Mr. Baxter responded: "No objection to the compromise on [attorneys'] fees." Id. at 1.

AIG, with Defendant's agreement, represented to the Delaware Court on November 7, 2008 that "there's no dispute between the parties" on the question of whether a separate class vote of the common stock shareholders would be required to amend the certificate of incorporation to increase the number of authorized shares or to change the stock's par value (JX 143 at 7), which was reflected in the Consent Order issued by the court (JX 176 at 2). Also on November 7, 2008, counsel for AIG informed the Delaware Court that: "It is AIG's position that any amendment to its certificate of incorporation to increase the number of authorized shares of common stock or to change the par value of that stock requires a class vote of holders of record of a majority of the shares of common stock outstanding on the record date for that vote. . . . I think in view of that representation, there's no dispute between the parties." JX 143 at 7.

On February 5, 2009, the Delaware Chancery Court entered a Consent Order which included the following findings:

> WHEREAS, during a conference with the Court on November 7, 2008, AIG's counsel stated that any amendment to the Restated Certificate of Incorporation to increase the number of authorized common shares or to decrease the par

> value of the common shares would be the subject of a class vote by the holders of the common stock, and, based on this representation, plaintiff's counsel agreed that the plaintiff's request for an order granting this relief is moot;
>
> WHEREAS, AIG publicly disclosed on November 10, 2008, in its Form 10Q filing for the third quarter of 2008, that the holders of the common stock will be entitled to vote as a class separate from the holders of the Series C Preferred Stock on any amendment to AIG's Restated Certificate of Incorporation that increases the number of authorized common shares and decreases the par value of the common shares.

JX 176 at 2-4. Kathleen Shannon, AIG's Senior Vice President, Secretary, and Deputy General Counsel, submitted an affidavit to the Delaware Chancery Court in February 2009 confirming AIG's position from as early as September 2008 that a class vote of common shareholders was required under Delaware law to increase the number of authorized shares or to decrease the par value of common stock shares. JX 181.

On November 9, 2008, as a result of the *Walker* lawsuit, Defendant amended the Credit Agreement to note that "common stockholders voting as a separate class" will vote on "amendments to AIG's certificate of incorporation to (a) reduce the par value of AIG's common stock to $0.000001 per share and (b) increase the number of authorized shares of common stock to 19 billion. JX 147 at 9; JX 150 at 193. This amendment to the Credit Agreement was intended "to implement the representation that had been made to the Delaware court two days earlier." Brandow, Tr. 5861-62.

Despite the representations to the Delaware Court, the entry of the Consent Order, and the amendment to the Credit Agreement, there never was a shareholders' meeting at which the AIG common stockholders, voting as a class, had an opportunity to vote on whether to reduce the par value of AIG's common stock or to increase the number of AIG's authorized shares. Liddy, Tr. 3163-64.

J. Maiden Lane II and III

Soon after AIG and FRBNY executed the Credit Agreement on September 22, 2008, AIG began seeking concessions from various counterparties to unwind and terminate the CDS transactions that were causing many of AIG's liquidity issues. These attempts generally were unsuccessful, and FRBNY representatives stepped in to take over the negotiations with counterparties on behalf of AIG. PTX 333 at 1 (FRBNY asked

Elias Habayeb of AIG to "stand down on all discussions with counterparties on tearing up/unwinding CDS trades on the CDO portfolio."); see also Dahlgren, Tr. 2994-95; Herzog, Tr. 6998-7002. FRBNY's short-lived attempts to negotiate concessions from AIG's counterparties also proved unsuccessful. Alvarez, Tr. 354-55; Baxter Tr. 1028.

FRBNY informed AIG of its unsuccessful negotiations with counterparties on November 8, 2008, telling AIG and its outside counsel, Weil Gotshal, that the counterparties would receive full par value. DX 2131 at -7727. AIG's counterparties also received complete releases from AIG for all legal action, including any potential fraud or misrepresentation claims. Baxter, Tr. 1071 (the deal "negotiated by representatives of the New York Fed with the counterparties" "involved 100 percent par, plus the releases."). In this way, FRBNY was able to assure that the major financial institutions would be made whole and would not suffer any losses from their transactions with AIG.

On November 10, 2008, some leading credit rating agencies informed AIG that they expected to downgrade the company unless AIG presented a solution to stabilize the company and improve its financial condition. Baxter, Tr. 1028; LaTorre, Tr. 2323, 2331. A downgrade of AIG's rating would have triggered additional collateral calls on AIG's CDS portfolio. To avoid a ratings downgrade, AIG asked the Government for additional assistance. Liddy, Tr. 3222-25, 3231. AIG's Board of Directors approved a new Government proposal on November 9, 2008. JX 144 at 9-13. The Government's proposal included the creation of a new entity known as "Maiden Lane III." Id. at 11, 53-54; Liddy, Tr. 3235-36.[12]

Under the terms of Maiden Lane III, FRBNY loaned $30 billion and AIG contributed $5 billion to have Maiden Lane III purchase certain multi-sector CDOs underlying CDSs written by AIGFP. Baxter, Tr. 1020; DX 664 at -18; JX 149 at 17. Using Maiden Lane III, FRBNY and AIG were able to terminate the CDSs, and thereby remove AIG's exposure to collateral calls from its CDS portfolio. Liddy, Tr. 3230-31 (Maiden Lane III "remove[d] that cash drain and liability off of [AIG's] balance sheet."); Schreiber, Tr. 6623 (Maiden Lane III eliminated the "volatility and ongoing liquidity drain" from AIG's CDS exposures). FRBNY's loan to Maiden Lane III was senior to AIG's contribution and was to be repaid in full before AIG received any payment on its $5 billion contribution. PTX 2800 at 34-35. After the amounts were repaid in full, FRBNY received 67 percent and AIG received 33 percent of any additional Maiden Lane III net proceeds. Id.

[12] The "Maiden Lane" entities are named for the street in New York City that runs behind FRBNY's office building. Baxter, Tr. 889-90.

Between November 25 and December 31, 2008, Maiden Lane III purchased $62.1 billion in par amount of CDO securities from AIGFP's counterparties and terminated the associated CDSs. JX 188 at 41. By June 2012, AIG completely repaid the Government's Maiden Lane III loan with interest. By July 2012, AIG received repayment of its Maiden Lane III contribution with interest. CDOs purchased by Maiden Lane III were then sold through a series of auctions, culminating on August 23, 2012. PTX 2540 at 1. This process resulted in a net gain to the Government of approximately $6.6 billion with $737 million in interest. Id.; DX 1883 at App'x C ¶ 29.

In addition to Maiden Lane III, the Government used another special purpose vehicle, Maiden Lane II, to purchase AIG's RMBS for $19.8 billion. JX 188 at 41, 250; PTX 2800 at 34 (stating that the "nonagency RMBS . . . had an approximate fair value of $20.8 billion."). Under the terms of Maiden Lane II, the Government's loan would be repaid first, including accrued interest, and then any net proceeds from the transaction would be divided: FRBNY was to receive five-sixths while AIG's subsidiaries would receive one-sixth. PTX 2800 at 34. In March 2011, the Government announced that it would begin selling the securities in the Maiden Lane II portfolio. The sales of all the securities as well as the cash flow they generated while held in Maiden Lane II created a net gain of approximately $2.8 billion to FRBNY for the benefit of U.S. taxpayers. PTX 2539 at 1; see also DX 1883, Saunders Report, App'x C, ¶ 28.

Ultimately, as a result of Maiden Lane II and Maiden Lane III, AIG's counterparties received tens of billions of dollars in Government assistance. PTX 549 at 34 ("there is no question that the effect of FRBNY's decisions . . . was that tens of billions of dollars of Government money was funneled inexorably and directly to AIG's counterparties."); Cragg, Tr. 5097-98 (noting $29 billion in payments to AIG's counterparties). Although AIG had offered to buy back the CDOs underlying Maiden Lane II and III as part of a 2010 restructuring, Defendant refused to authorize this action, despite the fact it would still make a profit on the transaction. See JX 324 at 3, 7 ("If the FRBNY accepts this offer, the loans that the FRBNY made to Maiden Lane II will be repaid in full, with interest, and the FRBNY will realize a profit of approximately $1.5 billion on its residual equity interest in Maiden Lane II."); see also PTX 3366 at 1, 4.

K. Reverse Stock Split

During the weeks following the Credit Agreement, AIG's stock continued to trade at a low price. Herzog, Tr. 7011 ("the stock price had fallen below a dollar for a period of time."); JX 221 at 70 ("The share price of AIG Common Stock has declined significantly since the third quarter of 2008, and, during February and March 2009, and occasionally since then, it has closed below $1.00 per share."). On October 14, 2008, the NYSE sent a letter to Mr. Liddy warning that AIG was at risk of being delisted under

NYSE rules. DX 601 (NYSE requires its listed companies to have an "[a]verage closing share price of not less than $1.00 over a 30 trading day period."). In response, Mr. Liddy requested AIG management to develop a plan to keep AIG's common stock from being delisted. Liddy, Tr. 3264.

Mr. Herzog testified that he first proposed the idea of a reverse stock split to increase the trading price of AIG common stock. Herzog, Tr. 7012-13. In December 2008, AIG's outside counsel, Sullivan & Cromwell, drafted a proxy statement proposing the reverse stock split. JX 164 at 26-28. After consultation with D.F. King, an independent proxy solicitor, regarding the terms of the contemplated reverse stock split, AIG proposed a reverse stock split at a twenty-to-one ratio. JX 178 at 7; Liddy, Tr. 3280-81. On May 20, 2009, AIG's Board of Directors unanimously voted to include the reverse stock split in the 2009 proxy statement. JX 218 at 4; Liddy, Tr. 3267-68.

On June 30, 2009,[13] at AIG's annual shareholder meeting, AIG included on its proxy statement the resolution to amend AIG's certificate of incorporation to effect a reverse stock split of issued shares at a ratio of twenty-to-one. JX 221 at 2, 69-73 (Proposal Four). At the shareholder meeting, the preferred shareholders and 85 percent of the voting common shareholders, including Starr, voted to approve the reverse stock split. JX 226 at 6; DX 814-A at 1. Starr and other common stock shareholders knew that by approving the reverse stock split, it would make almost five billion shares of common stock available for future issuance. JX 221 at 68. AIG's proxy statement also disclosed that the shares "may be issued by AIG's Board of Directors in its sole discretion. Any future issuance will have the effect of diluting the percentage of stock ownership and voting rights of the present holders of AIG Common Stock." Id. at 70.

Plaintiff contends that the reverse stock split was proposed with a preferred-to-common stock exchange in mind as a way to avoid a separate class vote of the common stockholders, but there is insufficient evidence in the record to support Plaintiff's claims. Starr presented little evidence showing that the idea for the exchange preceded the reverse stock split, or that the Government proposed the reverse stock split to avoid a separate class vote of the common shareholders. Every witness at trial testified unequivocally that Starr and AIG's other shareholders voted for the twenty-to-one reverse stock split to avoid a delisting on the NYSE. See, e.g., Liddy, Tr. 3267 ("It gave us the best chance of keeping the stock listed on the New York Stock Exchange."); Herzog, Tr. 7014 ("Well, I know why I suggested it, and that was because I was concerned about the delisting of the stock, and that's why I suggested it to Morris [Offit]."); Smith, 7711-12 (supported the one-for-twenty stock split "[s]olely for the reason that it addressed the delisting issue."). The proxy statement AIG filed with the

[13] June 30, 2009 was also the day the NYSE suspension of its minimum price for listing expired. JX 221 at 2, 70 (day AIG's stock would be delisted).

Securities and Exchange Commission confirmed that the "primary purpose of the reverse stock split [was] to increase the per share trading price of AIG Common Stock." JX 221 at 69.

The first time FRBNY and the Treasury contemplated the idea of an exchange was in 2010 when AIG began to explore various ways to end the Government's involvement in AIG's affairs. Shannon, Tr. 3701-02 (Q: "[W]hen was the first consideration that you're aware of exchanging [the Series C preferred stock] for common shares?" A: "In connection with the . . . recapitalization . . . in the fall of 2010."). AIG wanted to improve its credit rating and gain access to private capital and credit markets that were unavailable while it had existing obligations to the Government. PTX 2248 at 28; Langerman, Tr. 7165; PTX 609 at 16; JX 271 at 7. To achieve that goal, AIG along with Treasury, the trustees, and FRBNY, began to negotiate a comprehensive plan that would allow AIG to exit the Credit Facility and repay its outstanding debt. JX 271 at 26; PTX 578; Schreiber, Tr. 6667-68; Langerman, Tr. 7164-65, 7170-71. Both AIG and the Trust engaged advisers to assist with the negotiations. Feldberg, Tr. 3393; Schreiber, Tr. 6727; PTX 2249 at 2-3 (listing advisers present at the September 29, 2010 AIG Board meeting). During the negotiations, the idea of exchanging the preferred shares for common stock was developed, which would legally allow the Government to avoid a separate class vote of the common shareholders.[14] Brandow, Tr. 5854.

On September 30, 2010, following extensive negotiations, the Government and AIG signed a term sheet setting forth the terms of the recapitalization transaction. JX 285; JX 306 (parties signed a Master Transaction Agreement on December 8, 2010 which implemented the September 30, 2010 term sheet). The exchange was facilitated by the twenty-to-one reverse stock split which had increased the number of authorized but unissued shares. Zingales, Tr. 3850-51; Brandow, Tr. 5852. As a result of the reverse stock split, the Government could exchange its preferred shares for common shares without a separate class vote of the common shareholders. JX 302 at 8; Brandow, Tr. 5852.

There were three series of preferred stock (Series C, Series E, and Series F) that were exchanged for common stock in the 2011 restructuring agreement. Each series of preferred stock that was exchanged for common stock in 2011 is defined below, including the Series D stock acquired under TARP that had already been exchanged for Series E preferred stock prior to the 2011 restructuring agreement:

[14] Under Delaware law, the exchange did not require a separate class vote of the common shareholders. A separate class vote is only required if "the amendment would increase or decrease the aggregate number of authorized shares of such class" or "increase or decrease the par value of the shares of such class." 8 Del. C. § 242(b)(2) (2014).

Series C Preferred Stock: convertible stock issued to the Government on September 22, 2008 under the $85 billion Credit Agreement, which provided the Government with 79.9 percent equity and voting control in AIG. PTX 196 at 3; JX 110 at 1, 3, 66. The stock was later placed into a trust on January 16, 2009. Def.'s Resp. to Pl.'s 2nd RFAs No. 726.

Series D Preferred Stock: stock purchased by Treasury for $40 billion on November 25, 2008 under TARP. JX 158 at 2. The Series D Preferred Stock had an annual dividend rate to the Government of 10 percent and the dividends owed were cumulative, meaning that dividends owed under the stock accumulated until AIG made the payment. Id. at 10-11.

Series E Preferred Stock: stock acquired by the Government on April 17, 2009 as part of a March 2009 restructuring agreement that allowed the Government to exchange its Series D Preferred Stock for Series E. The Series E was noncumulative, and as such, was looked upon more favorably by the credit agencies. Like the Series D Preferred Stock, it also had a dividend rate of 10 percent per year. PTX 589 at 96 n.362 (noncumulative stock more closely resembles common stock); JX 208 at 3 (reporting AIG's issuance of the Series E Preferred Stock).

Series F Preferred Stock: stock issued to Treasury on April 17, 2009 under a credit facility where Treasury agreed to provide $30 billion to AIG in exchange for the preferred stock. The Series F Preferred Stock was noncumulative and had a dividend rate of 10 percent. JX 209 at 3 (reporting AIG's issuance of the Series F Preferred Stock).

The September 30, 2010 term sheet took effect on January 14, 2011 and terminated the Credit Facility. AIG paid FRBNY $21 billion in cash, which represented "complete repayment of all amounts owing under the Credit Agreement." JX 314 at 2. The Government earned a profit of $6.7 billion on the Credit Facility. Alvarez, Tr. 611-12 ($6.7 billion represented interest and fees). As part of the Recapitalization Plan, the Government also acquired 92.1 percent of AIG's common stock through an exchange of its preferred shares. Stip. ¶ 212. To acquire 92.1 percent of the common stock, the Treasury exchanged its Series C preferred stock for 562.9 million shares of common stock and exchanged the Series E and Series F preferred stock for 1.09 billion shares of common stock. Id. AIG also issued ten-year warrants to existing shareholders with a strike price of $45 on January 19, 2011. JX 285 at 9-10; JX 311 at 3; PTX 609 at 58 ("Exchange price of $45.00 per AIG common share, a 26.2% premium to market"). The number of warrants received was equal to the number of shares held as of the Record

Date ("the date on which one must be registered as a stockholder on the stock book of a company in order to receive a dividend declared by the company") multiplied by 0.533933. JX 311 at 3; Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 732 F.2d 859, 861 (11th Cir. 1984) (defining record date).

L. The Government's Common Stock

From May 24, 2011 through December 14, 2012, the Government sold 1,655,037,962 shares of AIG common stock at prices ranging from $29 to $32.50 per share for a total of $51,610,497,475. PTX 2852 at 65 n.197. Assuming that the common shares received in exchange for Series C Preferred Stock are treated as being sold pro rata with common shares received in exchange for Series E and F Preferred Stock, the amount received for the Series C Preferred Stock would be $17.6 billion. Id.

Defendant's only payment to AIG for the Series C Preferred Stock was $500,000 in loan forgiveness that FRBNY provided to AIG in September 2008. JX 107 at 37-38 (§ 402(e)); JX 185 at 2. AIG recorded the fair value for the Series C Preferred Stock as $23 billion. JX 188 at 293-94; Kothari, Tr. 4700. Ultimately, the Government received $22.7 billion in profit on the sale of all AIG stock it had acquired. PTX 658; see also Bernanke, Tr. 2014 (return to the Government "on all of the assistance that was given to AIG, whether it was from the Federal Reserve or TARP or some other place," was $23 billion.); Schreiber, Tr. 6684-85 (stating the Government received "all of the money they put into AIG back plus a profit of approximately $23 billion.").

M. Treatment of Other Distressed Financial Entities

During the financial crisis, many financial institutions engaged in much riskier and more culpable conduct than AIG, but received much more favorable loan treatment from the Government. In fact, financial institutions that originated and marketed subprime mortgage-backed securities made representations and disclosures that the Government later concluded were false and misleading. There was fraud in the underwriting process. Cragg, Tr. 4996; PTX 5321 (summarizing the results of government litigation against Bank of America, Citigroup, JP Morgan, Merrill Lynch, and Countrywide). The Department of Justice charged many firms with fraud related to the financial crisis. DOJ press releases, PTX 2734 (Bank of America), PTX 2527 (Citigroup), PTX 2473 (JP Morgan), PTX 2872 (Merrill Lynch and Countrywide).

Citigroup. The DOJ "has brought claims against a number of companies, including Citi, alleging that these companies had engaged in fraudulent conduct that caused the financial crisis." Paulson, Tr. 1236. In July 2014, the Government announced that "after collecting nearly 25 million documents relating to every residential mortgage backed security issued or underwritten by Citigroup in 2006 and 2007, our teams found that the misconduct in Citigroup's deals devastated the nation and the world's economies, touching everyone." PTX 2527 at 2. Mr. Geithner concluded that Citigroup had taken excessive risks. Geithner, Tr. 1675.

Bank of America. In March 2014, Bank of America agreed to pay $9.3 billion to settle claims brought by the Federal Housing Finance Agency under its statutory mandate to recover losses incurred by Fannie Mae and Freddie Mac accusing the Bank, and subsidiaries Merrill Lynch and Countrywide Financial, of "misrepresenting the quality of loans underlying residential mortgage-backed securities purchased by the two mortgage finance companies between 2005 and 2007." PTX 2504 at 1. In August 2014, Bank of America paid $16.65 billion, approximately 10 percent of its market capitalization, to settle a Department of Justice probe related to the Bank's misconduct in originating mortgage securities. The settlement was "the largest civil settlement with a single entity in American history," and Bank of America "acknowledged that it sold billions of dollars of RMBS without disclosing to investors key facts about the quality of the securitized loans. . . . The bank has also conceded that it originated risky mortgage loans and made misrepresentations about the quality of those loans." PTX 2734 at 1. The U.S. District Court for the Southern District of New York held in a case brought by the United States that Countrywide Financial engaged in conduct that "was from start to finish the vehicle for a brazen fraud by the defendants, driven by a hunger for profits and oblivious to the harms thereby visited, not just on the immediate victims but also on the financial system as a whole." United States ex. rel. O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 503 (S.D.N.Y. 2014). According to then-Attorney General Eric Holder, Merrill Lynch and Countrywide "knowingly, routinely, falsely, and fraudulently [marketed] and sold these loans as sound and reliable investments." PTX 2872 at 1.

Goldman Sachs. In July 2010, Goldman Sachs settled with the SEC, "paying a record $550 million fine. Goldman 'acknowledge[d] that the marketing materials for the ABACUS 2007-AC1 transaction contained incomplete information. In particular, it was a mistake for the Goldman marketing materials to state that the reference portfolio was "selected by" ACA Management LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson's economic interests were adverse to CDO investors.'" PTX 624 at 221.

JP Morgan. In November 2013, the Department of Justice announced a $13 billion settlement of claims brought by the United States "in which JP Morgan acknowledges that it regularly represented to RMBS investors that the mortgage loans in various securities complied with underwriting guidelines. Contrary to those representations, as the statement of facts explains, on a number of different occasions, JP Morgan employees knew that the loans in question did not comply with those guidelines and were not otherwise appropriate for securitization, but they allowed the loans to be securitized – and those securities to be sold – without disclosing this information to investors. This conduct, along with similar conduct by other banks that bundled toxic loans into securities and misled investors who purchased those securities, contributed to the financial crisis." PTX 2473 at 1.

Morgan Stanley. In February 2014, Morgan Stanley "agreed to pay $1.25 billion to the Federal Housing Finance Agency to resolve claims that it sold shoddy mortgage securities to Fannie Mae and Freddie Mac." "According to the agency's lawsuit, Morgan Stanley sold $10.58 billion in mortgage-backed securities to Fannie and Freddie during the credit boom, while presenting 'a false picture' of the riskiness of the loans." "Many of the loans involved were originated by subprime lenders, like NewCentury and IndyMac, bundled into bonds and sold to Fannie and Freddie. One group of loans had default and delinquency rates as high as 70 percent, according to the lawsuit." PTX 2485 at 1. Mr. Geithner concluded that Morgan Stanley had taken excessive risks. Geithner, Tr. 1675.

In contrast to the wrongful conduct of the above entities, no claims of fraud or misconduct have been brought by the Department of Justice against AIG for any of AIG's actions in the years leading up to or during the financial crisis. Paulson, Tr. 1236.

The Federal Reserve, following the Bagehot Principle,[15] used Section 13(3) of the Federal Reserve Act a number of times in 2008 to lend to institutions in need of liquidity. Mr. Bernanke explained the Federal Reserve's approach to lending in 2008:

> During the financial crisis, the Federal Reserve provided two basic types of liquidity support under section 13(3) – broad-based credit programs aimed at addressing strains affecting groups of financial institutions or key financial markets, and credit directed to particular systematically-important institutions in order to avoid a disorderly failure of those institutions. In both cases the purpose of the credit was to mitigate possible adverse effects on the broader financial sector and the economy. Liquidity facilities of the first type included the Primary Dealer Credit Facility (PDCF), the Term Securities Lending Facility (TSLF), the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity

[15] Bagehot's Principle, first enunciated in Walter Bagehot's 1873 book, "Lombard Street," is that in a time of financial crisis or panic, the central bank should freely lend to entities or persons in need of cash liquidity if they have adequate collateral to post for the loan.

> Facility (AMLF), the Commercial Paper Funding Facility (CPFF), the Money Market Investors Funding Facility (MMIFF), and the Term Asset-Backed Securities Loan Facility (TALF). Liquidity support provided to particular institutions to avert a disorderly failure included credit provided through Maiden Lane LLC to facilitate the acquisition of Bear Stearns by J.P. Morgan Chase, and credit provided to American International Group (AIG) through a revolving credit line and through Maiden Lane II LLC and Maiden Lane III LLC. The Federal Reserve, acting with the U.S. Treasury and FDIC, also agreed to provide loss protection and liquidity support to Citigroup and Bank of America on designated pools of assets utilizing authority provided under section 13(3), but ultimately did not extend any credit to either of these institutions.

PTX 616 at 10 (Bernanke).

On March 16, 2008, the Federal Reserve authorized FRBNY to establish the PDCF to provide a source of liquidity to primary dealers, including Goldman Sachs, Morgan Stanley, Bear Stearns, and Lehman Brothers. PTX 12 at 3-4; PTX 1202 at 1; PTX 693 at 4-5; Alvarez, Tr. 83. The terms of the PDCF included an interest rate at the primary credit rate with very small fees. The primary credit rate was "somewhere on the order of 2-1/2 to 3 percent." Bernanke, Tr. 1995-97. The Government did not demand any equity in exchange for PDCF lending. PTX 12 at 3-4; Baxter, Tr. 1085. The Federal Reserve provided assistance to primary dealers without monitoring the way the primary dealers were managed. Baxter, Tr. 1093.

There were 20 firms that were eligible to use the PDCF. Cragg, Tr. 5051; PTX 5348. Countrywide continued to be a primary dealer despite the fact that it was in "significant financial trouble." Baxter, Tr. 1101. "Lehman Brothers continued to be a primary dealer until after the parent had gone into bankruptcy." Baxter, Tr. 1101-02.

In September 2008, the Federal Reserve expanded the range of collateral that borrowers could pledge at the PDCF. PTX 59 at 2-3; PTX 696 at 2-3. Borrowers could post non-investment grade bonds and equities. Paulson, Tr. 1234-35. The collateral included "mortgage-backed securities and asset-backed securities," and there "wasn't very much trading" in either at that time. Bernanke, Tr. 2278-79. On September 21, 2008, FRBNY expanded the range of collateral that Morgan Stanley, Goldman Sachs, and Merrill Lynch could pledge at the PDCF to include foreign currency denominated securities. McLaughlin, Tr. 2411-12. The expanded collateral "had more risk." McLaughlin, Tr. 2445.

By September 29, 2008, the Federal Reserve had loaned $155.7682 billion through the PDCF, including $15 billion to Barclay's Capital, $10 billion to Goldman Sachs, $5 billion to Goldman Sachs' London branch, $29.694 billion to Merrill Lynch, $6.589 billion to Merrill Lynch's London branch, $40.0621 billion to Morgan Stanley, and $21.23 billion to Morgan Stanley's London branch. PTX 728 at 11. Although FRBNY provided Section 13(3) loans to many institutions in 2008 and 2009, FRBNY did not take an equity stake in any of those institutions, including Citigroup, Bank of America, Bear Stearns, JP Morgan, Morgan Stanley, or Goldman Sachs. Baxter, Tr. 1083-85; Bernanke, Tr. 1989-90 (only AIG was required to provide its equity as compensation); Geithner Tr. 1396-97. The shareholders of Citibank, Goldman Sachs, Bear Stearns, and all the firms that had access to the PDCF got "a windfall as a result of government assistance." Geithner, Tr. 1903. On September 21, 2008, the Federal Reserve Board of Governors permitted Morgan Stanley and Goldman Sachs to become bank holding companies while waiving the normal five-day antitrust waiting period for such an application. PTX 200, 201, 220; Bernanke, Tr. 2116-17.

The following chart shows a comparison of the Federal Reserve's financial assistance to AIG and Morgan Stanley during September 16-30, 2008:

Date	AIG		Morgan Stanley	
Sept.16, 2008	$14B loan	12% Interest Rate	$16.5B loan	2.25% - 3% Interest Rate
Sept. 22, 2008	$37B loan	12% Interest Rate 2% Commitment Fee 8.5% Undrawn Amounts Fee	$60.6B loan	2.25% - 3% Interest Rate No Commitment Fee No Undrawn Amounts Fee
Sept. 29, 2008	$55B loan	79.9% Equity $85 Billion Commitment Ceiling 25% Collateral Haircut	$97.3B loan	No Equity No Commitment Ceiling 6-10% Collateral Haircut

PTX 5356 (Cragg chart, citing source exhibits, PTX 728, 2565, 2857 at 152-171; JX 107, 108).

N. Expert Testimony

Plaintiff and Defendant offered the testimony of four experts each during the trial. The Court summarizes below the main points of each expert's testimony.

Plaintiff's experts:

Dr. Michael Cragg. The Court accepted Dr. Cragg as an expert in "economics and financial markets." Cragg, Tr. 4928; 4934. Dr. Cragg summarized his testimony in five main points. First, Dr. Cragg assessed AIG's financial condition. He asserted that "[t]he liquidity crisis at AIG was caused by the same market forces that affected every major financial institution during one of the worst financial panics in world history." Dr. Cragg then explained the Federal Reserve's role as lender of last resort. According to Dr. Cragg, "[t]he punitive terms imposed by the Federal Reserve on AIG's shareholders, including the onerous interest rate and equity taking, were inconsistent both with (1) the Federal Reserve's central banking function of lender of last resort, and (2) the manner in which the Federal Reserve exercised its lender of last resort powers with respect to other institutions." Moreover, "[t]he Federal Reserve was able to impose punitive terms on AIG's shareholders by misusing its monopoly position as lender of last resort to expropriate AIG shareholder equity in a manner entirely inconsistent with any legitimate economic policy or rationale." Dr. Cragg addressed the explanations given for the Government's treatment of AIG. Dr. Cragg asserted that the "Government's alleged justifications for treating AIG in this manner, *i.e.*, punishment, addressing moral hazard, preventing a windfall, and compensating for credit risk, [were] not economically supportable." Finally, if "there [were] an economically rational explanation for the Government's abuse of power, it [was] one of political expediency: AIG was a political scapegoat." PTX 5300 at 1; see also Cragg, Tr. 4935-37.

Dr. S.P. Kothari. The Court accepted Dr. Kothari as an expert in "accounting and finance." Kothari, Tr. 4525-26; 4529. Dr. Kothari was a damages expert for Plaintiff. During the trial, Dr. Kothari provided the Court with his valuations of the Credit Agreement Class and the Reverse Stock Split Class takings. Dr. Kothari valued the 79.9 percent equity and voting interest (Credit Agreement Class) acquired by the Defendant at \$35.4 billion or \$13.16 a share using a market-based approach. A "market-based approach" is an assessment of the fair market value of equity as of a given date. Kothari, Tr. 4543-44; PTX 5202; PTX 2852 at 21. For the Reverse Stock Split Class, Dr. Kothari valued the Series E and F Preferred stock at \$4.33 billion or \$1.61 per share and the Series C Preferred Stock at \$0.34 billion or \$0.13 per share as of June 30, 2009. Dr.

Kothari also valued the Government's return on all the liquidity and financing it provided to AIG as of January 14, 2011, stating that the Government earned a total return of $37.5 billion.

Dr. Christopher Paul Wazzan. The Court accepted Dr. Wazzan as an expert in prejudgment interest. Wazzan, Tr. 4416, 4420. At trial, Dr. Wazzan testified that the appropriate prejudgment interest rate would be best determined by looking at a rate of return on a synthetic portfolio comprised of competitors of AIG. Wazzan, Tr. 4423-26. Looking at such a portfolio, the appropriate prejudgment interest rate to compensate Plaintiff would be 7.0 percent for the Credit Agreement Class and 20.1 percent for the Reverse Stock Split Class. Wazzan, Tr. 4428; see also PTX 2841.

Professor Luigi Zingales. The Court accepted Professor Zingales as an expert in "economics and corporate governance." Zingales, Tr. 3796; 3799. Professor Zingales offered expert testimony on Defendant's effective economic control of AIG, asserting that Defendant took "effective economic control" on September 16, 2008, which continued well beyond July 1, 2009. The effective economic control Defendant took over AIG was evidenced by the Government's equity ownership, ability to select directors, its direct and indirect control or influence over management, and its monopoly position as the lender of last resort. PTX 5045 (noting only one of these factors is necessary to find control). "Direct or indirect control is shown by hiring, firing, and compensating executive officers;" "engaging in new business lines;" "making substantial changes in operations;" "raising additional debt or equity capital;" "merging and consolidating;" and "selling, transferring, or disposing of material subsidiaries or major assets." PTX 5046. The trust created to hold AIG's assets did not remove the Government's effective economic control over AIG, as it was established for the sole benefit of the Treasury, the trustees were required to act in the best interests of the Treasury, and Defendant appointed the trustees and had the power to replace them. PTX 5059.

Defendant's Experts

Professor Robert Daines. The Court accepted Professor Daines as an expert in "corporate governance, corporate finance, and the economic analysis of corporate control." Daines, Tr. 8432-33. Professor Daines summarized his testimony into three main points. First, he critiqued Professor Zingales's analysis of effective economic control. Daines, Tr. 8436. Professor Daines testified that Professor Zingales's analysis was fundamentally flawed for three reasons: (1) the board's incentives were aligned with AIG's shareholders; (2) effective economic control does not explain whether the AIG board acted in the shareholders' interests; and (3) "[e]ffective economic control [did] not mean that the Government's conditions made AIG worse off." DX 2801; DX 2802.

Second, Professor Daines explained the difference between warrants and preferred stock. According to Professor Daines, the "equity participation terms of the September 22, 2008 Credit Agreement were not materially different from the terms approved by AIG's board on September 16, 2008." DX 2801; see also Daines, Tr. 8436. Professor Daines critiqued Professor Zingales's analysis of the reverse stock split. He testified that Professor Zingales's analysis of the reverse stock split was fundamentally flawed because the primary purpose of the stock split was to increase AIG's trading price, many companies also conducted reverse stock splits that did not reduce the number of authorized shares, and common shareholders, including at least some of whom were the plaintiff shareholders, voted for the reverse stock split. DX 2801; DX 2816; see also Daines, Tr. 8436.

Dr. Jonathan Neuberger. The Court accepted Dr. Neuberger as an expert in "financial economics, the quantification of economic harm, and the determination of prejudgment interest rates." Neuberger, Tr. 5557-59. Dr. Neuberger offered testimony on prejudgment interest. He asserted that if prejudgment interest is awarded, it should be at a rate equal to a risk free rate of return since Plaintiff should not be compensated for risks it did not bear. DX 2403; DX 2407. A good proxy for a risk free rate of return would be government securities such as one-year Treasury bills or the five year Treasury Inflation Protected Securities ("TIPS") rate. Using Treasury bills or the TIPS rate as proxies would yield interest rates of 0.5 and 0.3 percent or 2.9 and 3.2 percent to compensate Plaintiff for the two alleged takings.

Dr. David K. A. Mordecai. The Court accepted Dr. Mordecai as an expert in "financial economics, fixed income and credit markets, credit default swap markets, and distressed lending." Mordecai, Tr. 7445, 7457. Dr. Mordecai was a damages expert for Defendant. At trial, Dr. Mordecai summarized his testimony into four main points. First, he provided an opinion on the initial rescue, asserting that it "did not result in an economic loss to AIG's shareholders." Second, Dr. Mordecai addressed the need for the Government to obtain an equity component in AIG. Dr. Mordecai opined that "[w]ithout the equity component, the Revolving Credit Facility ("RCF") [would] not [have] provide[d] a return to adequately compensate for the significant risk of lending to AIG." He critiqued Dr. Kothari's estimate of the alleged harm suffered by both the Credit Agreement Class and the Reverse Stock Split Class as being fundamentally flawed. DX 2601. According to Dr. Mordecai, Dr. Kothari's estimates of the alleged harm suffered by both classes was flawed because share dilution does not equal economic loss, Dr. Kothari ignored that AIG's stock price actually increased as a result of the initial rescue, and Dr. Kothari did not estimate a value for the losses to shareholders.

Professor Anthony Saunders. The Court accepted Professor Saunders as an expert in "financial economics." Saunders, Tr. 8067-68. Professor Saunders summarized his testimony in eight main points. First, Professor Saunders addressed AIG and its financial condition. He asserted that "AIGFP's un-hedged Multi-Sector CDS portfolio exposed AIG to significant liquidity risk." Further, the "deterioration in AIG's financial condition and risk profile were primarily caused by factors unique to AIG, not market-wide forces as Dr. Cragg claim[ed]." Professor Saunders testified that the "ex-ante risk of lending to AIG was extremely high as of September 16, 2008." Next, he addressed whether AIG could have become a primary dealer. According to Professor Saunders, AIG did not meet the requirements to become a primary dealer and, "in any event, access to the PDCF would not have solved AIG's liquidity crisis." Professor Saunders critiqued Dr. Kothari's valuations of the Credit Agreement Class and the Reverse Stock Split Class. He claimed that Dr. Kothari's valuation of the Credit Agreement Class claims as being worth $35.4 billion or $13.16 per share did not make economic sense as AIG's "stock price did not approach the value Dr. Kothari claims was lost under his 'bounce back' theory." Similarly, Dr. Kothari's valuation of the Reverse Stock Split Class claims as of June 30, 2009 did not make economic sense because there was no economic loss to the shareholders as a result of increasing the number of unissued authorized shares. DX 2701-02, 2753; see also Saunders, Tr. 8069-71.

O. AIG Epilogue

AIG survived the 2008 economic crisis. AIG repaid all loan amounts to the U.S. Government, although it sold valuable insurance assets worth billions of dollars to achieve this objective. PTX 5371 (Cragg chart). The Government's extension of the loan term from two years to five years was critical to AIG's survival. Schreiber, Tr. 6627 (Extension of the loan term "was the most important asset we had. It avoided a rapid-fire sale of our businesses."). AIG did not file for bankruptcy protection, and it continues today as a publicly-traded company on the New York Stock Exchange.

History of Proceedings

The Court's docket sheet for this case, currently containing 442 docket entries, provides a detailed chronological history of every judicial filing. With few exceptions, all of the filings are available to the public. The proceedings began with Starr's filing of the original complaint on November 21, 2011.

The Court has issued seven published decisions thus far in this case. On February 10, 2012, the Court added AIG as a nominal defendant for Starr's shareholder derivative claims. Starr Int'l Co. v. United States, 103 Fed. Cl. 287 (2012). On July 2, 2012, the Court granted in part and denied in part Defendant's motion to dismiss, allowing most of Starr's causes of action to proceed. Starr Int'l Co. v. United States, 106 Fed. Cl. 50 (2012). On September 17, 2012, the Court denied Defendant's motion for reconsideration of the July 2, 2012 ruling. Starr Int'l Co. v. United States, 107 Fed. Cl. 374 (2012). On March 11, 2013, the Court certified two classes of plaintiff shareholders who could proceed with this action under Rule 23: (a) the Credit Agreement Class, consisting of persons or entities who owned shares of AIG common stock during September 16-22, 2008, excluding Defendant and the named trustees; and (b) the Stock Split Class, consisting of persons or entities who owned shares of AIG common stock on June 30, 2009, AIG's annual shareholder meeting date, excluding Defendant and the named trustees. Starr Int'l Co. v. United States, 109 Fed. Cl. 628 (2013). On June 26, 2013, the Court granted AIG's and the Government's motions to dismiss Starr's shareholder derivative claims, and denied the Government's motion to dismiss Starr's direct claims. The Court also dismissed AIG as a party to this action. Starr Int'l Co. v. United States, 111 Fed. Cl. 459 (2013). On July 29, 2013, the Court authorized Plaintiff to take the deposition of Ben S. Bernanke. Starr Int'l Co. v. United States, 112 Fed. Cl. 56 (2013). On September 27, 2013, the Court denied Defendant's motion to certify the Court's June 26, 2013 ruling for interlocutory review. Starr Int'l Co. v. United States, 112 Fed. Cl. 601 (2013).

The Court also has issued various unpublished rulings and orders, including a denial of Defendant's motion for summary judgment (Dkt. No. 282, issued Aug. 25, 2014), and Discovery Orders No. 1-11. Of these, Discovery Order No. 6 perhaps is the most significant, where the Court ruled upon multiple claims of the attorney-client privilege and the deliberative process privilege. Dkt. No. 182, issued Nov. 6, 2013.

Jurisdiction – Section 13(3) of the Federal Reserve Act

As noted above, the Court has addressed a number of jurisdictional and standing questions at earlier stages of this case. The Court dismissed some of Starr's allegations in the amended complaints, and dismissed AIG as a nominal defendant, but ruled that the two classes of shareholders could proceed to trial on the taking and illegal exaction claims under the Fifth Amendment to the U.S. Constitution. The Court's earlier rulings on these issues need not be repeated here. However, there is one jurisdictional issue where the Court previously granted an inference in Starr's favor, but which now requires further analysis. See Starr Int'l Co., 107 Fed. Cl. at 378 (deferring ruling on whether a money-mandating statute is required for an illegal exaction claim).

The Government contends that the Court lacks jurisdiction over Starr's illegal exaction claim because Section 13(3) of the Federal Reserve Act is not a money-mandating source of law. The general rule is that the Court of Federal Claims possesses jurisdiction under the Tucker Act, 28 U.S.C. § 1491, of claims based upon a constitutional provision, statute, or regulation when "the constitutional provision, statute, or regulation is one that is money-mandating." Def.'s Post-Trial Concl. of Law at 108 (citing Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc)). While Fifth Amendment taking claims are based upon the money-mandating language "nor shall private property be taken for public use without just compensation," illegal exaction claims are based upon the Due Process Clause of the Fifth Amendment. See, e.g., Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1363 (Fed. Cir. 2002). The Due Process Clause does not contain a money-mandating provision, and therefore an illegal exaction claim requires reference to another statute or regulation to create jurisdiction in this Court. See Hamlet v. United States, 873 F.2d 1414, 1416-17 (Fed. Cir. 1989) (this Court can adjudicate constitutional claims if they are made in conjunction with a money-mandating source of law).

This Court ordinarily lacks jurisdiction of due process claims under the Tucker Act, but possesses jurisdiction of illegal exaction claims "when the exaction is based on an asserted statutory power." Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1995). As defined, an illegal exaction claim involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). Illegal exaction claims often arise in tax disputes. A classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the Government. See, e.g., City of Alexandria v. United States, 737 F.2d 1022, 1028 (Fed. Cir. 1984). However, illegal exaction claims arise in many other contexts as well, such as the AIG shareholders' lawsuit here.

Fifth Amendment taking claims and illegal exaction claims are two sides of the same coin: taking claims are based upon authorized actions by government officials, whereas illegal exaction claims are based upon unauthorized actions of government officials. See Aerolineas Argentinas, 77 F.3d at 1579 (Nies, J., concurring):

> As recognized in United States v. Testan, 424 U.S. 392, 401-402, 96 S. Ct. 948, 954-55, 47 L. Ed. 2d 114 (1976), a Tucker Act claim for damages against the United States based upon a statute may take one of two forms: a claim under a money-mandating statute or a claim for money improperly exacted or retained. A claimant must rely either on a statute that mandates payment of money from the government to the claimant or on an illegal exaction, that is, a payment to the government by the claimant that is obtained without statutory authority. See Clapp v. United States, 127 Ct. Cl. 505, 117 F. Supp. 576 (1954). The first is founded on statutory authorization; the second on the absence of statutory authorization. One is the flip side of the other.

Id. Intuitively, taking claims and illegal exaction claims ought to be on equal jurisdictional footing in this Court, but a problem is created because taking claims stem from explicit money-mandating language in the Fifth Amendment, while illegal exaction claims do not.

In addressing this jurisdictional problem for illegal exaction claims, some decisions have dispensed with the requirement for a money-mandating statute, seemingly embracing the concept that the Government should not escape responsibility for its unauthorized actions based on a jurisdictional loophole. See Figueroa v. United States, 57 Fed. Cl. 488, 495-96 (2003) ("In the context of an illegal exaction, the court has jurisdiction regardless of whether the provision relied upon can be reasonably construed to contain money-mandating language."); Bowman v. United States, 35 Fed. Cl. 397, 401 (1996) ("In illegal exaction cases, in contrast to other actions for money damages, jurisdiction exists even when the provision allegedly violated does not contain compensation mandating language."); Aerolineas Argentinas, 77 F.3d at 1573 ("[A]n illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' Suit can then be maintained under the Tucker Act to recover the money exacted.") (quoting Clapp, 127 Ct. Cl. at 513, 117 F. Supp. at 580); Auto. Club Ins. Ass'n v. United States, 103 Fed. Cl. 268, 273 (2012) (Where an illegal exaction is alleged, the Tucker Act "enables suit even in the absence of a money-mandating statute.").

Other decisions have espoused a slightly tighter standard, but one that is still broader than simply requiring a "money-mandating" source of law. The lead case in this category is Norman v. United States, 429 F.3d 1081 (Fed. Cir. 2005), which states:

> An illegal exaction involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. See, e.g., Casa de Cambio Comdiv, 291 F.3d at 1363. . . . To invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or *by "necessary implication,"* that "the remedy for its violation entails a return of money unlawfully exacted." Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000) (concluding that the Tucker Act provided jurisdiction over an illegal exaction claim based upon the Export Clause of the Constitution because the language of that clause "leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy").

Id. at 1095 (emphasis added).

Even under the more demanding test of Norman, the words "by necessary implication" would lead to a finding of jurisdiction in this case. Certainly, where the Government has imposed unlawful conditions in connection with an emergency loan under Section 13(3) of the Federal Reserve Act, the Government should not be permitted to insulate itself from liability by arguing that Section 13(3) is not "money-mandating." If this were true, the Government could nationalize a private corporation, as it did to AIG, without fear of any claims or reprisals. Section 13(3) does not contain express "money-mandating" language, but "by necessary implication," the statute should be read to allow the shareholders' cause of action here. By taking 79.9 percent equity and voting control of AIG, the Government exacted the shareholders' property interests. The two certified classes of AIG common stock shareholders were the parties directly affected by the Government's unlawful action, and "by necessary implication," they should be permitted to maintain their lawsuit.

The Government also argues that Section 13(3) of the Federal Reserve Act is a discretionary statute and cannot be money-mandating because of the language stating "the Board of Governors . . . may authorize" a loan, (citing Doe v. United States, 463 F.3d 1314, 1324 (Fed. Cir. 2006)). Def.'s Post-Trial Resp. Br. at 20-21. However, in the case of Section 13(3), the discretionary part of the statute is in allowing the Government to consider whether it would extend an emergency rescue loan to AIG. Section 13(3) did not *require* the Government to make an emergency loan to any entity, including AIG. Once it decided to make an emergency loan to AIG, the Government's discretion ended. At that point, the Government had to abide by the restrictions of Section 13(3), which did not include the steps it took in taking 79.9 percent equity and acquiring voting control to nationalize AIG. Further, Doe is an overtime pay case, not an illegal exaction case, and does not apply in the circumstances presented here.

Last, the Government argues that even if Section 13(3) of the Federal Reserve Act were money-mandating, Starr could not recover because it is not an intended beneficiary of Section 13(3). Def.'s Post-Trial Concl. of Law at 109. Rather, the Government says that "[S]ection 13(3) exists for the benefit of the financial system." Id. If the Government means that "financial system" includes only the Federal Reserve System and the Department of Treasury, this assertion is incorrect.

Starr is entitled to sue for the return of its money or property because it is an intended beneficiary under the Federal Reserve Act. See 12 U.S.C. § 343; see also Alyeska Pipeline Serv. Corp. v. United States, 224 Ct. Cl. 240, 261-62, 624 F.2d 1005, 1018 (1980) ("Where the payments were exacted in violation of a statute intended to benefit the person seeking recovery, it is immaterial that the person failed to protest when making the payment."). The Court declines to read Section 13(3) in a way that limits its benefits to only the governmental side of the financial system, and not to the individual businesses, corporations, partnerships or investors that comprise the entire financial system. Such a reading would allow the Federal Reserve Board to impose any conditions it desired on a Section 13(3) loan and avoid any judicial complaint of its unauthorized acts. The remedies for the financial system must be available to all who comprise it, including the common stock shareholders of a nationalized AIG.

Legal Analysis

A. The Illegal Exaction Claim

Upon a full consideration of the record and the arguments of counsel, the Court finds that FRBNY's taking of 79.9 percent equity ownership and voting control of AIG constituted an illegal exaction under the Fifth Amendment. The Board of Governors and the Federal Reserve Banks possessed the authority in a time of crisis to make emergency loans to distressed entities such as AIG, but they did not have the legal right to become the owner of AIG. In the Federal Reserve's history of making hundreds of emergency loans to commercial entities, the loan to AIG represents the only instance in which the Federal Reserve has demanded equity ownership and voting control. There is no law permitting the Federal Reserve to take over a company and run its business in the commercial world as consideration for a loan.

Prior to 1932, the Federal Reserve Banks generally could lend only to banks that were members of the Federal Reserve System. PTX 742 at 135. In 1932, Congress recognized that, in a financial crisis, solvent but illiquid companies may require emergency assistance. Congress enacted Section 13(3) of the Federal Reserve Act, which authorized the Federal Reserve to issue loans to any "individual, partnership, or corporation" in the "unusual and exigent circumstances" where the borrower was unable to secure adequate credit from private sources, but had sufficient assets to secure the loan. Emergency Relief and Construction Act of 1932, Pub. L. No. 72-302 § 210, 47 Stat. 709, 715.

The text of Section 13(3) of the Federal Reserve Act provides:

> In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System, by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the

> provisions of section 357 of this title, to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal reserve bank: *Provided,* That before discounting any such note, draft, or bill of exchange for an individual or a partnership or corporation the Federal reserve bank shall obtain evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions. All such discounts for individuals, partnerships, or corporations shall be subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe.

12 U.S.C. § 343 (2006). Four requirements must be met in order for Section 13(3) to apply: (1) unusual and exigent circumstances; (2) the loan must be authorized by an affirmative vote of not less than five members of the Board of Governors; (3) the loan must be secured to the satisfaction of the lending Federal reserve bank; and (4) the borrower must be unable to secure adequate credit accommodations from other banking institutions. Id. In Section 14(d) of the Federal Reserve Act, Congress also provided that the consideration for a Section 13(3) loan must be an interest rate "subject to review and determination of the Board of Governors" and "fixed with a view of accommodating commerce and business." 12 U.S.C. § 357.

Section 13(3) achieves the purpose of assisting a broad range of entities and persons during a time of economic crisis. PTX 708 at 14 (Bernanke); see also PTX 682 at 6. Long ago, Walter Bagehot described the responsibility of central banks in financial crises in his book "Lombard Street," published in 1873. The Bagehot Principle is that, during a panic, central banks should lend freely to whomever comes to the door; "as long as they have collateral, give them money." PTX 708 at 14. The Bagehot Principle is widely accepted in the financial world, and is endorsed by the Federal Reserve and its officials. PTX 709 at 126 (Geithner) ('Lombard Street' is the "bible of central banking."); PTX 708 at 14 (Bernanke) ("If a central bank follows Bagehot's rule, it can stop financial panics."); see also Cragg, Tr. 5421-22; Zingales, Tr. 4126-27.

Since its enactment in 1932, the Federal Reserve has used Section 13(3) to assist individual, non-bank institutions. From 1932 to 1936, the Federal Reserve made 123 loans under Section 13(3) to various individual, non-bank institutions for non-marketable collateral. PTX 2816 at 4 ("During this period, the Board authorized the Federal Reserve

Banks to make discounts only for individuals and nonbank entities."). Examples of the loans made in the early years of Section 13(3) are:

> 1932 – A $300,000 loan to Smith-Corona Company, a typewriter company.
>
> 1932 – A $250,000 loan to Miller Cummings Company, a vegetable grower.
>
> 1933 – A $25,000 loan to L.N. Renault and Sons secured by 5,000 shares of common stock in a brewing company and certificates representing ten barrels of brandy and 89 barrels of rum to pay farmers for grapes.
>
> 1936 – A $13,060.73 loan to Phenix Marble Company secured by shipments of marble products.

Id. at 5-6. In 1966 and 1969, the Federal Reserve authorized extensions of credit to institutions in the thrift industry, although no credit was actually extended. PTX 2814 at 1. The Federal Reserve then utilized Section 13(3) again in 2008 in the billion dollar transactions described in this opinion.

An illegal exaction occurs when the Government requires a citizen to surrender property the Government is not authorized to demand as consideration for action the Government is authorized to take. Aerolineas Argentinas, 77 F.3d at 1572-73 (Illegal exaction occurs when "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."); see also Trayco, Inc. v. United States, 994 F.2d 832, 837-38 (Fed. Cir. 1993); Eastport S.S. Corp., 178 Ct. Cl. at 605, 372 F.2d at 1007-08.

In Suwannee S.S. Co. v. United States, 150 Ct. Cl. 331, 279 F.2d 874 (1960), for example, the Government, through the Maritime Administrator, required a citizen to surrender $20,000 it was not authorized to demand as a condition for receiving the Government's approval to sell two of its ships to a foreign purchaser. Id. at 875-76. Under the Shipping Act, the plaintiff could not sell the ships without the Administrator's permission. Id. at 874. The Administrator agreed to the sale on the condition that the plaintiff pay $20,000 to the Government. Id. at 875. The plaintiff accepted the terms proposed by the Administrator, paid the $20,000, and later sued the United States claiming that the "Maritime had no legal authority to condition its approval of the requested transfer upon the payment of $20,000." Id. at 875-76.

In response to the plaintiff's claim in Suwannee, the Government argued that it "had the power to deny the plaintiff permission to make the desired transfer" and that under the statute, it had "complete freedom to impose conditions upon any permission granted." Id. at 876. The Court rejected the Government's argument, stating:

> *We suggest that no statute should be read as subjecting citizens to the uncontrolled caprice of officials,* unless the statute has to do with the powers of the President in dealing with foreign relations, the powers of a military commander in the field, or some comparable situation. . . . The vice of the $20,000 is its irrelevance. There can hardly be a more serious defect in the carrying on of government than allowing matters which have nothing to do with the case to be dragged in, and to affect decisions. If the Government has valuable privileges to award, and if it desires to get money for them, it should, as it does in many situations, invite bids or negotiation. If it does not, its *officials have no authority to add to their function of determining the compatibility of the application with the public interest, the supererogatory function of picking up a few dollars for the public treasury.*

Id. at 876-77 (emphasis added); see also Clapp v. United States, 127 Ct. Cl. at 514, 117 F. Supp. at 581 (Shipping Act did not authorize the Government to condition sale on the payment of a fee because, if the provision were read to permit such a condition, "[t]aken literally that section would permit the Administration to impose any condition whatever, however irrelevant.").

When the Government has no obligation to confer a benefit, as in the case of a Section 13(3) loan under the Federal Reserve Act, if it decides in its discretion to provide the benefit, the Government cannot demand the surrender of rights it lacks authority to demand. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013) ("[W]e have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights."); United States v. Chicago, M., St. P. R. Co., 282 U.S. 311, 328-29 (1931) ("[T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution."); Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

The Government's inability to require forfeiture of rights and property in exchange for discretionary benefits is unchanged during times of crisis, when the rule of law is maintained by requiring that government acts be authorized by statute and the Constitution. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.'") (quoting Wilson v. New, 243 U.S. 332, 348 (1917)); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end.").

In the present case, it is undisputed that the Government required from AIG the surrender of 79.9 percent of Plaintiff's equity and voting control, as consideration for a Section 13(3) loan under the Federal Reserve Act. There is nothing in the Federal Reserve Act that authorized the Government to demand equity or voting control as consideration for a Section 13(3) loan. As the Court previously has held in this case, "the only consideration for a loan prescribed by 'Section 13(3) is an interest rate subject to the determination of the Board of Governors.'" Starr Int'l Co., 107 Fed. Cl. at 378 (quoting Starr Int'l Co., 106 Fed. Cl. at 85).

Defendant contends that the terms imposed upon AIG and its shareholders are authorized by the language in Section 13(3) stating that the Federal Reserve loans are "subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe." 12 U.S.C. § 343 (2006). Section 4 of the Federal Reserve Act grants to the reserve banks "all powers specifically granted by the provisions of this chapter and such incidental powers as shall be necessary to carry on the business of banking *within the limitations prescribed by this chapter.*" 12 U.S.C. § 341 (emphasis added).

A federal entity's incidental powers cannot be greater than the powers otherwise delegated to it by Congress. Federal Reserve Bank of Richmond v. Malloy, 264 U.S. 160, 167 (1924) ("[A]uthority to do a specific thing carries with it by implication the power to do whatever is necessary to effectuate the thing authorized – not to do another and separate thing, since that would be, not to carry the authority granted into effect, but to add an authority beyond the terms of the grant."); First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 659 (1924) ("Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted."); California Nat'l Bank v. Kennedy, 167 U.S. 362, 369 (1897) ("The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred."). Thus, because there is no express power to demand consideration for a Section 13(3) loan beyond an interest rate fixed with a view of accommodating commerce and business, the acquisition of equity and voting control of AIG was not incidental to any Federal Reserve power.

Defendant's reliance on Lucas v. Federal Reserve Bank of Richmond, 59 F.2d 617 (4th Cir. 1932), is misplaced. Lucas stands for the proposition that a reserve bank can accept collateral as additional security for a loan, to be released after the loan is repaid. Id. at 620. Here, the AIG equity and voting control were not returned after the loan was paid off. Defendant retained and profited from its sale of this property, even after the loan amounts had been repaid.

The Court's interpretation of Section 13(3) of the Federal Reserve Act is buttressed by Congress's passage in 1945 of the Government Corporation Control Act, 31 U.S.C. § 9102, which prohibits government entities from acquiring a controlling stake in a corporation so as to make the corporation an agency of the Government without express congressional authorization. The Court's interpretation also is consistent with Federal Reserve Circulars published after the passage of Section 13(3). Bd. of Governors of the Fed. Reserve Sys., 44 Fed. Reserve Bulletin 241, 269 (Mar. 1958) ("[B]ank discounts as commonly understood do not apply to a bank's acquisition through purchase of other assets, securities or obligations, such as, for example, corporate stocks, bonds or debentures."); 1936 Circular, 22 Fed. Reserve Bulletin 71, 123 (Feb. 1936) ("[D]iscounts may be made only at rates established by the Federal Reserve banks, subject to review and determination by the Board of Governors of the Federal Reserve System.").

Defendant and its outside counsel from Davis Polk & Wardwell performed legal analysis of the Federal Reserve's authority under Section 13(3), and concluded that the Federal Reserve most likely lacked authority to demand equity and voting control from AIG. PTX 3283 at 1 (Davis Polk email, Sept. 17, 2008) ("There is no express authority, which is one of the reasons Treasury and the Fed discussed their actions with congressional leaders of both parties. Maybe it's an implied power of setting the conditions for lending money under 13(3) of the [F]ederal [R]eserve [A]ct, but the [Government] is on thin ice and they know it. But who's going to challenge them on this ground?"); see also PTX 336 at 1 (Board of Governors Legal Division memorandum, Nov. 1, 2008) ("No provision of the Federal Reserve Act expressly authorizes the Federal Reserve to acquire the equity of any entity."); JX 386 at 3 (FRBNY's independent auditor, Deloitte) (FRBNY "is prohibited by law from holding equity securities in a commercial enterprise.").

The legal staffs of FRBNY and the Federal Reserve acknowledged that they could not obtain or hold equity, or acquire voting control, of a commercial entity. FRBNY's General Counsel, Mr. Baxter, noted during an interview on May 11, 2010:

> Neither the Fed nor the [T]reasury had authority to hold the shares. When we saw equity on term sheet – problem of legal ownership and the conflict. Maybe strike that and not take equity. But then thought of taxpayer. Create a trust, put shares in trust. For benefit of American people. We had to decide that right away.

PTX 2211 at 10. Mr. Baxter notified the Board of Governors' counsel, Mr. Alvarez, on October 23, 2008, "we agree that there is no power" for the Federal Reserve "to hold AIG shares." PTX 320-U at 1. Mr. Alvarez's notes of a September 18, 2008 conference call among FRNBY, the Board of Governors, Treasury, and Davis Polk, attribute to Mr. Baxter the following comments: "signif issues w/Fed controlling AIG;" "legal, conflicts, regulatory, etc.;" "don't have statutory authority to control." PTX 148 at 1. Legal Division of Board of Governors, November 1, 2008: The Fed "[c]an't acquire equity." PTX 336 at 2. The Federal Reserve is "prohibited from acquiring and holding stock as an equity kicker in connection with a loan by the Bank, as are commercial banks." PTX 370-A at 2 (Nov. 2008). Mr. Alvarez to Mr. Baxter on September 21, 2008: "Just to confirm, ownership of stock along the lines in this term sheet will not work for the Fed – trust or no trust. It's fine if Treasury takes the stock, which I thought from the discussion last week was foreclosed." PTX 183 at 1; see also DX 118 (Mr. Baxter's email to Mr. Geithner referring to the need for "loophole lawyering" in operating under a 75-year old statute).

Mr. Alvarez testified in detail about FRBNY's conflict of interest problem. He stated "I was concerned about the conflicts that would arise if we were viewed as both the lender and as the owner of AIG. The owner and the lender don't always have the same interests, and that can create a conflict internally." Alvarez, Tr. 553. Mr. Alvarez further testified:

> I also was concerned that the Federal Reserve has access to substantial amounts of confidential information about a variety of financial institutions and that there would be the

> perception that AIG would have – if the Federal Reserve were the owner for an extended period of time, that the – that AIG would have access to that information or the New York Reserve Bank would use that information to benefit AIG. So, I was concerned about the public perception that AIG was in a privileged place.

Id. Mr. Alvarez also believed that the Federal Reserve should not be "running AIG and . . . responsible for its decisions." Alvarez, Tr. 554. He also was concerned that, if the Federal Reserve owned AIG, the accountants "would consolidate the balance sheet of AIG onto the balance sheet of the Federal Reserve." Id. Such a consolidation of two trillion dollar entities would "double the size of the Federal Reserve's balance sheet." Id.

It is debatable whether the vote of the AIG Board of Directors on September 16, 2008 was voluntary, or whether acceptance of the Government's terms was the only realistic choice. However, as a matter of law, the vote of AIG's Board to accept the term sheet offered by the Government does not constitute a defense to an illegal exaction claim. A person or entity cannot ratify an illegal government action. Many cases have found illegal exactions where citizens have voluntarily paid money to the Government as a result of a demand that the Government was not authorized to make. American Airlines, Inc. v. United States, 551 F.3d 1294, 1302 (Fed. Cir. 2008) (user fees charged to airline were an illegal exaction despite airline's failure to protest initial payments of the fee, because "failure to challenge an improper agency action does not ratify such actions or insulate [Government] from later objections and litigation."); Alyeska Pipeline, 224 Ct. Cl. at 248, 624 F.2d at 1010 (unauthorized fee imposed on, and paid by, plaintiff as a condition of obtaining a right-of-way agreement for a pipeline was an illegal exaction); Finn v. United States, 192 Ct. Cl. 814, 820, 428 F.2d 828, 831 (1970) (wage garnishments made to recover moving costs of former FBI agent under a contract were an illegal exaction because "[i]f officials of the Government make a contract they are not authorized to make, the other party is not bound by estoppel or acquiescence or even failing to protest."); Chris Berg, Inc. v. United States, 192 Ct. Cl. 176, 183, 426 F.2d 314, 317 (1970) (same holding involving Government's refusal to consider errors made in plaintiff's contract bid); Eastport S.S., 178 Ct. Cl. at 603-04, 372 F.2d at 1006 (imposition of a fee charged to, and paid by, plaintiff to obtain the legally required permission to sell two ships to a foreign purchaser was an illegal exaction even though the payment was made without protest.).[16]

[16] Other cases rejecting a voluntariness defense to an illegal exaction claim are: O'Bryan v. United States, 93 Fed. Cl. 57 (2010); Bautista-Perez v. Mukasey, No. C 07-4192 TEH, 2008 WL 314486 (N.D. Cal. Feb. 4, 2008); Continental Airlines, Inc. v. United States, 77 Fed. Cl. 482 (2007); PSI Energy Inc. v. United States, 411 F.3d 1347 (Fed. Cir. 2005); Aerolineas Argentinas, 77 F.3d at 1564; United States v. Best Foods, Inc., 47 C.C.P.A. 163, 170 (1960); Suwannee S.S. Co., 279 F.2d at 877; Sprague S.S. Co. v.

In arguing that voluntariness is a defense, Defendant chiefly relies on the Supreme Court's decision in United States v. Edmonston, 181 U.S. 500 (1901). Edmonston establishes voluntariness as a defense only in the narrow circumstances where there is a mutual mistake of law regarding the calculation of how much – not whether – the Government is entitled to charge or take, and where there is no clear congressional purpose that would be defeated by the assertion of such a defense. In Edmonston, the plaintiff paid the United States $2.50 per acre of land even though the statutory sale price was $1.25 per acre. The Supreme Court held that the plaintiff was not entitled to the amount of overpayment because "the transaction was purely voluntary on [the plaintiff's] part, and that while there was a mistake it was mutual and one of law, a mistake on his part not induced by any attempt to deceive or misrepresentation by the government officials." Id. at 515. In the present case, the Government's actions were not mistaken, but were deliberate.

Similarly, the Government's creation of a trust to hold the shares of AIG stock does not cure the illegal exaction. FRBNY's counsel, Mr. Baxter, developed the idea of a trust during September 16-22, 2008 as a way to circumvent the Federal Reserve's lack of authority to hold equity. Baxter, Tr. 791; see also PTX 368 at 3 (Alvarez) ("The creation of the Trust is necessary . . . because neither the Reserve Bank nor the Treasury Department has the legal authority to hold the equity in the form of preferred or common stock directly."). In an April 30, 2010 interview, Mr. Baxter stated: "We didn't have the legal authority to own shares, we didn't want to control the company. That's why the credit facility trust and the equity participation went to trust – legal ownership was in the trust, which has three independent trustees, so there's no control in Treasury or the Fed." PTX 580 at 3. The trust was not executed until January 16, 2009, four months after the Government took control of AIG.

The creation of the trust in an attempt to circumvent the legal restriction on holding corporate equity is a classic elevation of form over substance. The three appointed trustees had lengthy historical ties to the Federal Reserve. The trust was created "for the sole benefit of the Treasury." JX 172 at 5, § 1.01 (Trust Agreement). FRBNY, in consultation with Treasury, had the power to appoint the trustees. Id. at § 1.02. The trust was revocable only by the Federal Reserve Board of Governors. Id. at § 1.03. FRBNY, in consultation with Treasury, had the power to remove a trustee. Id. at § 3.02(d). The trustees' standard of care was to act "in or not opposed to the best interests

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United States, 145 Ct. Cl. 642, 172 F. Supp. 674 (1959); Eversharp Inc. v. United States, 129 Ct. Cl. 772, 125 F. Supp. 244 (1954); Clapp, 127 Ct. Cl. at 515, 117 F. Supp. at 582; Lancashire Shipping Co. v. United States, 4 F. Supp. 544 (S.D.N.Y. 1933); James Shewan & Sons v. United States, 73 Ct. Cl. 49 (1931); Star Motor Co. of Cal. v. United States, 71 Ct. Cl. 348, 41 F.2d 901 (1930).

of the Treasury." Id. at § 3.03(a)(i). The trustees were the "protectors of the Federal equity stake in AIG" and "should not care about the AIG minority shareholders." PTX 3286 at 1 (Baxter); see also Huebner, Tr. 6272-73 (trustees had no "separate duties to the common shareholders."). The manner in which FRBNY controlled AIG with its hand-picked CEO, carefully selected board members, and its hundreds of on-premises advisers belies any conclusion that the operations of the trust were independent.

B. The Fifth Amendment Taking Claim

As the Court indicated at the beginning of closing arguments on April 22, 2015, Starr's illegal exaction and taking claims under the Fifth Amendment actually are asserted in the alternative. An illegal exaction claim "by its name suggests an illegal action," whereas a Fifth Amendment taking "has to be by a legal action." Closing Arg., Tr. 8. Starr's counsel, Mr. Boies, agreed with this assertion, and confirmed that Starr "only need[ed] one" of those claims in order to prevail. Id. at 8, 10. Since the Court has ruled in Starr's favor on the illegal exaction claim, the Court does not need to consider Starr's Fifth Amendment taking claim. This ruling is in line with applicable case law, holding that the same government action cannot be both an unauthorized illegal exaction and an authorized taking. See Alves v. United States, 133 F.3d 1454, 1456-58 (Fed. Cir. 1998) (taking must be based on authorized government action); Figueroa, 57 Fed. Cl. at 496 (If the government action complained of is unauthorized, "plaintiff's takings claim would fail on that basis."); see also Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995) (same).

Damages

A. Summary of Starr's Damages Claim

Starr asserts that, in an illegal exaction case, the plaintiff's damages recovery should be the return of the monetary value of property seized or obtained by the Government. Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 145 (2000), aff'd, 291 F.3d 1356 (Fed. Cir. 2002); see also Bowman v. United States, 35 Fed. Cl. 397, 401 (1996) ("Were an illegal exaction to be found, Plaintiff could receive the value of his forfeited property.").

For the Credit Agreement Class, Starr contends that the fair value of the seized property should be calculated as of September 22, 2008, the effective date of the Credit Agreement. Prior to that date, no legally binding agreement existed between AIG and FRBNY entitling the Government to an equity interest and voting control of AIG. The only document existing before the Credit Agreement was the September 16, 2008 term sheet, which on its face was legally nonbinding and unenforceable. The term sheet states that "it is not intended to be legally binding on any person or entity." JX 63 at 5; see, e.g. Richbell Info. Sys., Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 297 (N.Y. App. Div. 2003) (explaining that a term sheet is a "classic example of an unenforceable 'mere agreement to agree,'" and holding that "we recognize that term sheets, such as those used here, will not support a claim of breach of contract or of the duty of good faith."). All versions of the term sheet in this case state that the term sheet will be governed by New York law.

According to Starr, the fair market value of the Series C Preferred shares acquired by the Government is best determined by referring to the New York Stock Exchange per share price of AIG's common stock on September 22, 2008. The Series C Preferred Stock was economically equivalent to AIG's common stock, which was actively traded on the New York Stock Exchange. The market value per share of AIG's common stock represented the best independent valuation available for valuing the Government's beneficial interest in the Trust. Def.'s Resp. to Pl.'s 3rd Interrog. No. 18; Kothari, Tr. 4543-44.

Defendant paid only $500,000 into the Trust to obtain 79.9 percent of AIG's common stock equity. Plaintiff's expert, Dr. Kothari, placed a value of $35.378 billion on the Government's 79.9 percent equity ownership. PTX 5212. Dr. Kothari begins with a per share value of $3.31 as of the market's closing on September 24, 2008. The $3.31 per share price was the lowest price for AIG common stock during the three-day period of September 22-24, 2008, and thus is conservatively based. PTX 5209. He then multiplies the per share price by 14.691 billion outstanding shares, yielding a total of $48.626 billion for all of AIG's common stock. PTX 5212. As the next step, Dr. Kothari adjusts the total for the 79.9 percent of equity owned by the Government ($38.852 billion), and then reduces the amount by another 8.9 percent to exclude certain equity units. Id. The total value in this calculation is $35.378 billion. Id. To determine the damages award for each class member, the calculation would be $35.378 billion times the shares held by the class member, divided by the 14.691 billion outstanding common shares. PTX 5202; see also PTX 5212.

The record contains other valuations of the Government's 79.9 percent equity stake in AIG. The other valuations relied upon the AIG per share stock price for September 16, 2008, the date of the term sheet, but otherwise were very similar to Dr. Kothari's analysis. Deloitte, serving as FRBNY's auditor, used a stock price of $2.29 per share, and valued the Government's equity at $24.5 billion. PTX 5204; JX 385 at 1-2. KPMG, serving as AIG's valuation consultant, used a stock price of $2.05 per share, and valued the Government's equity at $23 billion. PTX 5203, 5204; PTX 375 at 21. AIG in its own behalf, used a stock price of $2.05 per share, and valued the Government's equity at $23 billion. PTX 5203, 5204; JX 137 at 2, 7.

B. Economic Loss Analysis

Common sense suggests that the Government should return to AIG's shareholders the $22.7 billion in revenue it received from selling the AIG common stock it illegally exacted from the shareholders for virtually nothing. However, case law construing "just compensation" under the Fifth Amendment holds that the Court must look to the property owner's loss, not to the Government's gain. Brown v. Legal Found. of Wash., 538 U.S. 216, 235-36 (2003) (The "'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the [G]overnment's gain."); Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) ("Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation."); United States v. Miller, 317 U.S. 369, 375 (1943) ("Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker."); Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) (Holmes, J.) ("And the question is, What has the owner lost? not, What has the taker gained?").

Ultimately, Starr must prove that it suffered some economic harm from the Government's taking or illegal exaction. In applying this standard, the Court must consider the value of the Plaintiff's property but for the challenged government actions. In other words, what would the value of Plaintiff's property have been if the Government had done nothing? Brown, 538 U.S. at 240-41 (plaintiffs had lost nothing because they would not have received any interest even in the absence of a challenged government program).

A closely analogous case is A&D Auto Sales, Inc. v. United States, 748 F.3d 1142 (Fed. Cir. 2014). At the trial court level, former owners of Chrysler and General Motors car dealerships alleged an uncompensated taking of their property from the Government's Troubled Asset Relief Program ("TARP"), 12 U.S.C. § 5211. Plaintiffs alleged that the takings occurred when the Government required Chrysler and General Motors to terminate dealerships as a condition of obtaining financial assistance. The property rights in question were franchise contracts, ongoing automobile businesses, and automobile dealer rights under state law. The Court denied the Government's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Colonial Chevrolet Co. v. United States, 103 Fed. Cl. 570 (2012); Alley's of Kingsport, Inc. v. United States, 103 Fed. Cl. 449 (2012) (Hodges, J.). The Court, however, granted Defendant's motion to certify for interlocutory appeal the issue of whether a plaintiff must plead a known, specific takings theory to survive a dispositive motion on the pleadings. Alley's of Kingsport v. United States, 106 Fed. Cl. 762 (2012); Colonial Chevrolet v. United States, 106 Fed. Cl. 619 (2012).

On appeal, the Federal Circuit consolidated the cases for review, and styled the appeal as A&D Auto Sales, Inc. The Federal Circuit held that the car dealers' complaints failed to state a takings claim without "allegations regarding the but-for economic loss of value of the plaintiffs' franchises." 748 F.3d at 1158. The Federal Circuit reasoned:

> Absent an allegation that GM and Chrysler would have avoided bankruptcy but for the Government's intervention and that the franchises would have had value in that scenario, or that such bankruptcies would have preserved some value for the plaintiffs' franchises, the terminations actually had no net negative economic impact on the plaintiffs because their franchises would have lost all value regardless of the government action.

Id. Since the cases were at the motion to dismiss stage, before any trial on the merits, the Federal Circuit permitted plaintiffs the opportunity to amend their complaints to include the necessary factual allegations.

Applying the reasoning of A&D Auto Sales, the Court must examine what would have happened to AIG if the Government had not intervened. The inescapable conclusion is that AIG would have filed for bankruptcy, most likely during the week of September 15-19, 2008. In that event, the value of the shareholders common stock would have been zero. By loaning AIG $85 billion under the September 22, 2008 Credit Agreement, the Government significantly enhanced the value of the AIG shareholders' stock. While the taking of 79.9 percent equity ownership and the running of AIG's business were not permitted under the Federal Reserve Act, the Government did not cause any economic loss to AIG's shareholders, because as Mr. Studzinski said, "[twenty] percent of something [is] better than [100] percent of nothing." Studzinski, Tr. 6937. Under the economic loss analysis, the Credit Agreement Class is entitled to zero damages.

Defendant's Procedural Defense of Waiver

The Government contends that Starr waived its illegal exaction claim by accepting the terms of FRBNY's rescue, and failing to allege the illegality of the credit agreement or the reverse stock split until after Starr had received the full benefits of the rescue between September 2008 and January 2011. Def.'s Post-Trial Concl. of Law at 116-17. The Government asserts that this decision precludes Starr from now seeking to undo AIG's September 2008 agreement. Id.

The statute of limitations for Starr's action is "six years after such claim first accrues." 28 U.S.C. § 2501. By filing suit in November 2011, Starr is well within the six-year range of operative events that began in September 2008. As this opinion demonstrates, the circumstances relating to the Government's rescue and takeover of AIG continued to evolve through 2011, and the Government did not complete its sale of AIG common stock on the open market until December 2012. Starr and its counsel acted reasonably in filing suit when it did. Although the media reported much of the information about AIG during the years in question, Starr's Mr. Greenberg was not privy to any of the significant FRBNY, Treasury, or AIG Board of Directors meetings.

The record supports a conclusion that FRBNY, Treasury, and their outside counsel from Davis Polk & Wardwell carefully orchestrated the AIG takeover so that shareholders would be excluded from the process. These entities avoided at all cost the opportunity for any shareholder vote. Having intentionally kept the shareholders in the dark as much as possible, it rings hollow for Defendant to contend that the shareholders waived the right to sue by failing to object.

Case law strongly supports this conclusion. In American Airlines, 551 F.3d at 1302, the Federal Circuit observed that "[f]ailure to challenge an improper agency action does not ratify such action or insulate it from later objection and litigation." The Federal Circuit saw no reason to disturb the trial court's holding. Id. Similarly, in Clapp, 127 Ct. Cl. at 515, 117 F. Supp. at 582, the Court of Claims ruled "[w]e find it hard to imagine a case where the Government can take a citizen's money, by refusing him something to which he is entitled, and then keep the money on the ground of estoppel. This defense is beneath the dignity of the Government." Id.

Accordingly, Defendant's waiver argument is without merit.

Conclusion

Based upon the foregoing, the Court concludes that the Credit Agreement Shareholder Class shall prevail on liability due to the Government's illegal exaction, but shall recover zero damages, and that the Reverse Stock Split Shareholder Class shall not prevail on liability or damages. The Clerk is directed to issue final judgment consistent with this opinion.

The parties are invited to brief the issues relating to costs and attorneys' fees in accordance with the Court's rules and applicable law.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

APPENDIX OF RELEVANT ENTITIES AND PERSONS

Plaintiff and the Plaintiff Classes

Plaintiff Starr International Company, Inc. ("***Starr International***") is a privately held Panama corporation with its principal place of business in Switzerland. ***Maurice R. "Hank" Greenberg*** is the Chairman of Starr International. Until 2005, ***Howard Smith*** was chief financial officer and chief administrative officer of AIG. He now serves as vice chairman of finance of C.V. Starr and as a director of Starr International. Smith, Tr. 7673-74.

The "***Credit Agreement Class***" is the class of persons and entities allegedly injured by the Fifth Amendment taking or illegal exaction of a 79.9 percent equity interest in AIG pursuant to the Credit Agreement. The "Credit Agreement Class" consists of "All persons or entities who held shares of AIG common stock on or before September 16, 2008 and who owned those shares as of September 22, 2008, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman." Opinion and Order Regarding Class Certification, Starr Int'l Co. v. United States, 109 Fed. Cl. 628, 636-37 (2013).

The "***Reverse Stock Split Class***" is the class of persons and entities allegedly injured by the events and actions resulting in the reverse stock split. The Reverse Stock Split Class consists of "All persons or entities who held shares of AIG common stock on June 30, 2009 and were eligible to vote those shares at the annual shareholder meeting held on that date, excluding Defendant, any directors, officers, political appointees, and affiliates thereof, as well as members of the immediate families of Jill M. Considine, Chester B. Feldberg, Douglas L. Foshee, and Peter A. Langerman." Id. at 637.

American International Group, Inc. ("AIG")

AIG was incorporated as a holding company for various general and life insurance businesses in 1967. Stip. ¶ 22. At all relevant times, AIG has been a Delaware corporation with its principal executive offices located in New York City. Stip. ¶ 20. In 2008, ***AIG Financial Products ("AIGFP")*** was a separate wholly-owned subsidiary of the AIG parent company. Stip. ¶ 49. AIG guaranteed all of AIGFP's obligations, and prior to March 2005, AIGFP benefited from AIG's AAA rating. Stip. ¶ 41.

From 2004 to 2009, ***Jacob Frenkel*** was AIG's Vice Chairman and Vice Chairman of AIG's Global Economic Strategies Group. Bernanke, Tr. 2189; JX 188 at 20.

From July 2005 through October 2008, ***David Herzog*** served as Senior Vice President and Comptroller of AIG. Since October 2008, Mr. Herzog has been the Chief Financial Officer of AIG. Herzog, Tr. 6953-55.

In 2008, ***Anastasia "Stasia" Kelly*** served as General Counsel and Vice Chairman of AIG. Huebner, Tr. 6115; JX 188 at 20. Ms. Kelly left AIG on December 30, 2009. JX 251 at 523-28.

During the relevant period, ***Paula Reynolds*** served as Vice Chairman and Chief Restructuring Officer of AIG. Liddy, Tr. 3250; Herzog, Tr. 7036; JX 188 at 20.

In 2008, ***Brian Schreiber*** served as Senior Vice President for Strategic Planning at AIG. Mr. Schreiber currently serves as AIG's Deputy Chief Investment Officer. Schreiber, Tr. 6533.

In 2008 and 2009, ***Kathleen Shannon*** served as Deputy General Counsel, Senior Vice President and Corporate Secretary for AIG. As Deputy General Counsel, Ms. Shannon was the senior securities and corporate finance lawyer at AIG. Shannon, Tr. 3646.

During the relevant period, ***Anthony Valoroso*** served as head of accounting policy for AIG. Farnan, Tr. 4165.

On June 15, 2008, ***Robert Willumstad*** replaced Martin Sullivan as AIG's Chief Executive Officer. Mr. Willumstad served as AIG's CEO until September 16, 2008. PTX 589 at 59, 72. From December 2006 until September 16, 2008, Mr. Willumstad was Chairman of the AIG Board of Directors. Willumstad, Tr. 6328-29.

On September 22, 2008, ***AIG's Board of Directors*** consisted of the following members: Stephen F. Bollenbach, Martin S. Feldstein, Suzanne Nora Johnson, Fred H. Langhammer, Edward M. Liddy, George L. Miles, Jr., Morris W. Offit, James F. Orr III, Virginia M. Rometty, Michael H. Sutton, and Edmund S.W. Tse. JX 103 at 1.

Edward Liddy joined AIG's Board of Directors after September 18, 2008 upon being named Chairman and CEO. JX 94 at 2-3. Mr. Liddy was recruited for this position by Christopher Cole, then Chairman of Goldman Sachs' investment banking division, and by Ken Wilson, a former Goldman Sachs banker who then worked for Mr. Paulson at the U.S. Treasury Department. Liddy, Tr. 3024-27.

AIG's Consultants and Advisers

BlackRock served as an outside financial adviser for AIG. AIG retained BlackRock in June 2008 to value its credit default swap portfolio. In October 2008, FRBNY engaged BlackRock to evaluate various issues relating to AIG's credit default swap exposure. Stip. ¶¶ 57, 156, 157.

Blackstone Advisory Partners LLP was hired as AIG's adviser the weekend prior to September 12, 2008. Blackstone remained as AIG's adviser when AIG's Board discussed the credit agreement proposed by FRBNY. Studzinski, Tr. 4500. John Studzinski led Blackstone's work for AIG in September 2008. JX 74 at 17.

KPMG was retained by AIG in October 2008 to conduct a valuation of the Series C Preferred Stock. PTX 375 at 3.

JP Morgan Chase & Co. is a large financial institution that provides commercial and investment banking services. AIG hired JP Morgan to help develop funding options in late August 2008. Stip. ¶ 67. Mr. Geithner later requested JP Morgan (along with Goldman Sachs) to explore a private sector solution for AIG during the weekend of September 13-14, 2008, and continuing into the first part of the following week. PTX 709 at 208. ***James Lee*** is JP Morgan's senior investment banker who headed this effort for Mr. Geithner. Lee, Tr. 7067-69.

PricewaterhouseCoopers ("PwC") has served as AIG's independent auditors for several decades. Farnan, Tr. 4160. During the relevant time period, ***Donald Farnan*** was the primary accountant on the PwC team serving AIG. Farnan, Tr. 4298.

Simpson, Thacher & Bartlett LLP served as outside counsel to AIG's Board of Directors in 2008. Stip. ¶ 31. Lawyers ***Richard Beattie*** and ***James Gamble*** of Simpson Thacher advised AIG's Board of Directors during the time periods relevant to this case. JX 94 at 1.

Sullivan & Cromwell LLP served as outside counsel to AIG in 2008. JX 74 at 1. ***Rodgin Cohen***, Chairman of Sullivan & Cromwell, advised not only AIG, but also "just about every other firm that got in trouble during the crisis," including Fannie Mae, Lehman Brothers, and Bear Stearns. PTX 709 at 163. Lawyers ***Michael Wiseman*** and ***Robert Reeder*** of Sullivan & Cromwell also advised AIG during the periods relevant to this case. JX 74 at 1; Reeder, Tr. 6851.

Weil, Gotshal & Manges LLP served as one of AIG's outside counsel, including from 2008 through the present. Stip. ¶ 30. ***Joseph Allerhand*** of Weil Gotshal advised AIG during the periods relevant to this case. JX 74 at 1-2.

The Federal Government and its Agents

The ***Department of the Treasury*** is an executive agency of the United States. The Secretary of the Treasury is appointed by the President and is an official of the U.S. Government. Def.'s Resp. to Pl.'s 2nd RFAs Nos. 1-3.

From July 10, 2006 until January 20, 2009, ***Henry "Hank" Paulson*** was the Secretary of the Treasury. Prior to becoming Secretary of the Treasury, Mr. Paulson worked at Goldman Sachs for more than 20 years, serving as CEO from 1999 until May 2006. Def.'s Resp. to Pl.'s 2nd RFAs Nos. 45, 47. In August 2008, Mr. Paulson recruited Dan Jester, a former Goldman Sachs executive, to join the Treasury Department as a contractor. PTX 706 at 190-91.

From January 26, 2009 through January 25, 2013, ***Timothy F. Geithner*** was Secretary of the Treasury. Prior to being Secretary of the Treasury, Mr. Geithner served as President of the Federal Reserve Bank of New York. Def.'s Resp. to Pl.'s 2nd RFAs Nos. 46, 56.

The ***Federal Reserve System*** is the central bank of the United States, established by Congress in 1913. The Federal Reserve System is comprised of the Board of Governors and twelve regional Federal Reserve Banks. Stip. ¶ 1.

The ***Board of Governors*** of the Federal Reserve System is an agency of the United States. The Board of Governors supervises and regulates the operations of the Federal Reserve Banks. Stip. ¶ 2. The Board of Governors is responsible for, among other things, regulating and supervising banks that are members of the Federal Reserve System, bank holding companies, and international banking facilities in the United States. Stip. ¶ 11.

The Board of Governors is comprised of up to seven members, called "Governors." Governors are appointed by the President and confirmed by the U.S. Senate. The Chairman and Vice Chairman of the Board of Governors also are appointed by the President and confirmed by the Senate. The nominees to these posts must already be members of the Board or must be simultaneously appointed to the Board. The terms for these positions are four years. Members of the Board of Governors are officials of the United States. Stip. ¶ 3.

The ***Federal Open Markets Committee ("FOMC")*** is responsible for conducting open market operations – the purchase and sale of securities by the central bank. The Federal Reserve uses open market operations to adjust the supply of reserve balances to manage the federal funds rate (the rate at which banks lend reserve balances overnight). The FOMC consists of the members of the Board of Governors, the President of the Federal Reserve Bank of New York, and four of the remaining Reserve Bank presidents, who rotate through one-year terms. Stip. ¶ 13.

From February 1, 2006 through January 31, 2014, ***Ben Bernanke*** was the Chairman of the Federal Reserve System. Def.'s Resp. to Pl.'s 2nd RFAs No. 53.

From June 23, 2006 through June 23, 2010, ***Donald Kohn*** was Vice Chairman of the Federal Reserve System. Def.'s Resp. to Pl.'s 2nd RFAs No. 54.

During the relevant period, ***Mr. Bernanke, Mr. Kohn, Elizabeth Duke, Randall Kroszner,*** and ***Kevin Warsh*** were members of the Board of Governors. JX 63 at 1; Alvarez, Tr. 510.

The members of the Board of Governors are in continual contact with other policy makers in government. The Board has regular contact with members of the President's Council of Economic Advisers and other key economic officials. The Chairman also meets from time to time with the President and has regular meetings with the Secretary of the Treasury. Stip. ¶ 4. The Federal Reserve Banks operate under the general supervision of the Board of Governors. Stip. ¶ 7.

Since 2004, ***Scott Alvarez*** has been the General Counsel for the Federal Reserve. Alvarez, Tr. 79-80. During the relevant period, ***Richard Ashton*** was deputy general counsel in the Legal Division for the Federal Reserve. Alvarez, Tr. 300.

The ***Federal Reserve Bank of New York ("FRBNY")*** is one of the twelve regional Federal Reserve Banks. Among other functions, FRBNY performs fiscal agency functions for the U.S. Treasury, certain federal agencies, and other entities. Def.'s Resp. to Pl.'s 2nd RFAs Nos. 28-29. FRBNY and other Federal Reserve Banks process federal payments and deposits to Treasury's account and service Treasury securities. Def.'s Resp. to Pl.'s 2nd RFAs No. 35.

Thomas Baxter has served as General Counsel of FRBNY for nearly 20 years. Baxter, Tr. 796.

In 2008, ***Alejandro LaTorre*** was an Assistant Vice President working on FRBNY's Open Market Desk, the monetary policy implementing arm of the Federal Reserve System. LaTorre, Tr. 2080-82.

From July 2007 to 2011, ***Margaret McConnell*** was the FRBNY Deputy Chief of Staff for Policy. McConnell, Tr. 2506-07.

In September 2008, ***Susan McLaughlin*** was the senior officer with oversight responsibility for the discount window, leading a function that was called "financial management and discount window." McLaughlin, Tr. 2394.

From December 2006 through 2008, ***Patricia Mosser*** was a Senior Vice President in the Markets Group at FRBNY. Mosser, Tr. 1159-60; Def.'s Resp. to Pl.'s 2nd RFAs No. 62.

On September 17, 2008, FRBNY established an on-site team at AIG led by FRBNY employee ***Sarah Dahlgren*** to help FRBNY understand and monitor the company. Def.'s Resp. to Pl.'s 2nd RFAs No. 416. The monitoring team represented the interests of the Federal Reserve as the lender to AIG, to ensure compliance with the terms of the Credit Agreement, and to supervise the company's decision-making. PTX 516 at 50.

On January 16, 2009, ***Jill M. Considine, Chester B. Feldberg,*** and ***Douglas Foshee*** became trustees for the AIG Credit Facility Trust Agreement, creating the AIG Credit Facility Trust. JX 172 at 4. ***Peter Langerman*** became a trustee on February 26, 2010 following Mr. Foshee's departure. Langerman, Tr. 7158; Foshee, Tr. 3453; DX 843 at -567.

Beginning on September 16, 2008, ***Davis Polk & Wardwell LLP*** served as legal counsel to Defendant in connection with the drafting and execution of the terms of the AIG Credit Agreement and the related agreements, including the AIG Credit Facility Trust Agreement and Stock Purchase Agreement. Stip. ¶¶ 109, 110. Davis Polk also provided advice and counsel to FRBNY and the Treasury Department concerning a variety of issues relating to AIG. Def.'s Resp. to Pl.'s 3rd Interrog. No. 25. Lawyers from Davis Polk who advised Defendant included partners ***John Huebner, John Brandow***, and ***Ethan James***. Brandow, Tr. 5790, 5869-69; Huebner, Tr. 5933.

On September 19, 2008, FRBNY retained ***Ernst & Young ("E&Y")*** to perform services for FRBNY in connection with Defendant's loan to AIG. Def.'s Resp. to Pl.'s 3rd Interrog. No. 25. ***Mark Symons*** was E&Y's engagement partner in connection with its retention by FRBNY. Symons, Tr. 3588.

Morgan Stanley began advising FRBNY on the morning of September 15, 2008 regarding AIG. Head, Tr. 3714. Morgan Stanley also provided advice to FRBNY in connection with the drafting of the terms of the Credit Agreement. Stip. ¶ 35. FRBNY formally engaged Morgan Stanley in October 2008 to provide assistance with "strategic alternatives" for AIG. PTX 303 at 1; Head, Tr. 3720-21. ***James Head*** has worked at Morgan Stanley for 20 years in mergers and acquisitions and was a member of the Morgan Stanley team advising Defendant on matters relating to AIG. Head, Tr. 3713-14.

Goldman Sachs Group, Inc. is a large financial institution with a significant investment banking business. PTX 706 at 392. Goldman Sachs was involved in exploring a private solution for AIG during September 13-15, 2008, and in selecting a new Chief Executive Officer for AIG, Mr. Edward Liddy, at the request of government officials.

Wachtell, Lipton, Rosen & Katz provided legal services to the Treasury Department relating to AIG, including assisting Treasury in drafting the terms of Defendant's loan to AIG, beginning on or around September 14, 2008 through September 19-20, 2008. The United States did not memorialize its retention of the Wachtell law firm for services rendered regarding AIG, and Wachtell did not seek compensation for such services. Def.'s Resp. to Pl.'s 3rd Interrog. No. 25; PTX 98-U at 1-3; JX 85 at 1; JX 376-U at 1, 3-7; Alvarez, Tr. 290. In September 2008, Wachtell represented Morgan Stanley in its successful efforts to become approved by the Federal Reserve as a bank holding company. JX 377 at 1-2.

In the United States Court of Federal Claims

No. 11-779 C

STARR INTERNATIONAL COMPANY, INC., in its own right and on behalf of two classes of others similarly situated

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 15, 2015,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the Credit Agreement Shareholder Class shall prevail on liability due to the Government's illegal exaction, but shall recover zero damages, and that the Reverse Stock Split Shareholder Class shall not prevail on liability or damages.

Hazel C. Keahey
Clerk of Court

June 17, 2015 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

Statutes and Legislative History Addendum

TABLE OF CONTENTS FOR THE STATUTES AND LEGISLATIVE HISTORY ADDENDUM

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES ENACTED THROUGH THE 109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b, by the Office of the Law Revision Counsel of the House of Representatives

VOLUME SIX

TITLE 11—BANKRUPTCY

TO

TITLE 12—BANKS AND BANKING

§§ 1–1750jj

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

40-106 O Sig-1

tion 13 (as now constituted) are classified to sections 92, 343 to 347, 347c, 347d, 361, 372, and 373 of this title.

For decision by U.S. Supreme Court that, despite faulty placement of quotation marks, act Sept. 7, 1916, placed within section 13 of act Dec. 23, 1913, each of the ten pars. located between the phrases that introduced the amendments to sections 13 and 14 of said act, that only the seventh par. (rather than seventh to tenth pars.) comprised the amended R.S. §5202, and that section 20 of act Apr. 5, 1918 (40 Stat. 512) (which amended R.S. §5202 comprised of a single par.), did not amend section 13 of said act so as to repeal the eighth to tenth pars., see *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc., et al.*, 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed. 2d 402 (1993). As the result of subsequent amendments, such seventh to tenth pars. of section 13 now constitute the ninth to twelfth pars. The ninth par. amended former section 82 of this title, and the tenth to twelfth pars. are classified to sections 361, 92, and 373, respectively, of this title.

AMENDMENTS

1980—Pub. L. 96–221 inserted references to other depository institutions and provisions respecting applicability to other items presented for payment, and substituted provisions setting forth items to constitute required balance to include items in transit, Federal Reserve bank services, and other appropriate factors, for provisions requiring the balance to be sufficient to offset items in transit held for the account of the bank.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–221 effective on first day of sixth month which begins after Mar. 31, 1980, see section 108 of Pub. L. 96–221, set out as a note under section 248 of this title.

§343. Discount of obligations arising out of actual commercial transactions

Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Board of Governors of the Federal Reserve System to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this chapter. Nothing in this chapter contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount, and the notes, drafts, and bills of exchange of factors issued as such making advances exclusively to producers of staple agricultural products in their raw state shall be eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days, exclusive of grace.

In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System, by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of section 357 of this title, to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal reserve bank: *Provided*, That before discounting any such note, draft, or bill of exchange for an individual or a partnership or corporation the Federal reserve bank shall obtain evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions. All such discounts for individuals, partnerships, or corporations shall be subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe.

(Dec. 23, 1913, ch. 6, §13 (pars.), 38 Stat. 263; Sept. 7, 1916, ch. 461, 39 Stat. 752; Mar. 4, 1923, ch. 252, title IV, §402, 42 Stat. 1478; July 21, 1932, ch. 520, §210, 47 Stat. 715; Aug. 23, 1935, ch. 614, title II, §203(a), title III, §322, 49 Stat. 704, 714; Pub. L. 102–242, title IV, §473, Dec. 19, 1991, 105 Stat. 2386.)

CODIFICATION

Section is comprised of the second and third pars. of section 13 of act Dec. 23, 1913, as amended. The act of Mar 4, 1923, split the second par. of section 13, as amended in 1916 (39 Stat. 752), into two pars., the first of which constitutes the first par. of this section and the second as section 344 of this title. The act of July 21, 1932, added the second par. of this section which was designated to follow the second par. of section 13. For classification to this title of other pars. of section 13, see Codification note set out under section 342 of this title.

AMENDMENTS

1991—Pub. L. 102–242 struck out "of the kinds and maturities made eligible for discount for member banks under other provisions of this chapter" after first reference to "bills of exchange" in second par.

1935—Act Aug. 23, 1935, §322, substituted words immediately preceding proviso for "indorsed and otherwise secured to the satisfaction of the Federal reserve bank."

1932—Act July 21, 1932, added second par.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§344. Discount or purchase of bills to finance agricultural shipments

Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice, and protest by such bank as to its own indorsement exclusively, and subject to regulations and limitations to be prescribed by the Board of Governors of the Federal Reserve System, any Federal reserve bank may discount or purchase bills of exchange payable at sight or on demand which grow out of the domestic ship-

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME SIX

TITLE 11—BANKRUPTCY

TO

TITLE 12—BANKS AND BANKING

§§ 1–1750jj

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

40-106 D Sig-1

(Dec. 23, 1913, ch. 6, §14(c), 38 Stat. 264.)

CODIFICATION

Section is comprised of subsec. (c) of section 14 of act Dec. 23, 1913. For classificaticn to this title of remainder of section 14, see Codification note under section 353 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 263, 412 of this title.

§357. Establishment of rates of discount

Every Federal reserve bank shall have power to establish from time to time, subject to review and determination of the Board of Governors of the Federal Reserve System, rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business, but each such bank shall establish such rates every fourteen days, or oftener if deemed necessary by the Board.

(Dec. 23, 1913, ch. 6, §14(d), 38 Stat. 264; Apr. 13, 1920, ch. 128, 41 Stat. 550; Mar. 4, 1923, ch. 252, title IV, §407, 42 Stat. 1480; Aug. 23, 1935, ch. 614, title II, §§203(a), 206(b), 49 Stat. 704, 706.)

CODIFICATION

Section is comprised of subsec. (d) of section 14 of act Dec. 23, 1913. For classification to this title of remainder cf section 14, see Codification note under section 353 of this title.

AMENDMENTS

1935—Act Aug. 23, 1935, §206(b), inserted words at end of section beginning "but each such".

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 263, 343, 412 of this title.

§358. Establishment of accounts for purposes of open-market operations; correspondents and agencies

Every Federal reserve bank shall have power to establish accounts with other Federal reserve banks for exchange purposes and, with the consent or upon the order and direction of the Board of Governors of the Federal Reserve System and under regulations to be prescribed by said Board, to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may be deemed best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell, with or without its indorsement, through such correspondents or agencies, bills of exchange (or acceptances) arising out of actual commercial transactions which have not more than ninety days to run, exclusive of days of grace, and which bear the signature of two or more responsible parties, and, with the consent of the Board of Governors of the Federal Reserve System, to open and maintain banking accounts for such foreign correspondents or agencies, or for foreign banks or bankers, or for foreign states as defined in section 632 of this title. Whenever any such account has been opened or agency or correspondent has been appointed by a Federal reserve bank, with the consent of or under the order and direction of the Board of Governors of the Federal Reserve System, any other Federal reserve bank may, with the consent and approval of the Board of Governors of the Federal Reserve System, be permitted to carry on or conduct, through the Federal reserve bank opening such account or appointing such agency or correspondent, any transactions authorized by this section under rules and regulations to be prescribed by the board.

(Dec. 23, 1913, ch. 6, §14(e), 38 Stat. 264; Sept. 7, 1916, ch. 461, 39 Stat. 754; June 21, 1917, ch. 32, §6, 40 Stat. 235; Aug. 23, 1935, ch. 614, title II, §203(a), 49 Stat. 704; Apr. 7, 1941, ch. 43, §1, 55 Stat. 131.)

CODIFICATION

Section is comprised of subsec. (e) cf section 14 of act Dec. 23, 1913. For classification to this title of remainder of section 14, see Codification note under section 353 of this title.

AMENDMENTS

1941—Act Apr. 7, 1941, inserted in first sentence "and which bear the signature of twc or more responsible parties" and "or for foreign states as defined in section 632 of this title".

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 263, 412 of this title.

§359. Purchase and sale of acceptances of intermediate credit banks and agricultural credit corporations

Every Federal reserve bank shall have power to purchase and sell in the open market, either from or to domestic banks, firms, corporations, or individuals, acceptances of Federal intermediate credit banks and of national agricultural credit corporations, whenever the Board of Governors of the Federal Reserve System shall declare that the public interest so requires.

(Dec. 23, 1913, ch. 6, §14(f), as added Mar. 4, 1923, ch. 252, title IV, §405, 42 Stat. 1480; amended Aug. 23, 1935, ch. 614, title II, §203(a), 49 Stat. 704.)

CODIFICATION

Section is comprised of subsec. (f) of section 14 of act Dec. 23, 1913, as added Mar. 4, 1923. For classification to this title of remainder of section 14, see Codification note under section 353 cf this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

NATIONAL AGRICULTURAL CREDIT CORPORATION

Title II of the Agricultural Credits Act, act Mar. 4, 1923, title II, §§201–217, 42 Stat. 1461, authorized creation of national agricultural credit corporations, prior tc re-

UNITED STATES CODE

2012 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES ENACTED THROUGH THE 112TH CONGRESS

(ending January 2, 2013, the last law of which was signed on January 15, 2013)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME TWENTY-ONE

TITLE 27—INTOXICATING LIQUORS

TO

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2013

76-420 v21_T D Sig-1

(2) Antitrust and unfair trade orders—in the circuit where unlawful act occurred or petitioner resides or carries on business;

(3) Bridge alteration; cost orders—in the circuit where bridge is wholly or partly located;

(4) Civil aeronautics orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(5) Commodity exchange orders—in the circuit where board of trade has its principal place of business or in circuit where petitioner for review of exclusion order carries on business;

(6) Electric and water power orders—in the District of Columbia or circuit where licensee or public utility to which order relates is located or has its principal place of business;

(7) Food, drug and cosmetic orders—in the circuit where person adversely affected resides or has his principal place of business;

(8) Gas orders—in the District of Columbia or circuit where company to which order relates is located or has its principal place of business;

(9) National Labor Relations Board's final orders—in the District of Columbia or circuit where unfair labor practice occurred or violator resides or transacts business;

(10) Packers cease and desist orders—in the circuit where packer has his principal place of business;

(11) Radio license decisions—in the District of Columbia;

(12) Securities and Exchange Commission orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(13) Seed orders—in the circuit where violator resides or has his principal place of business;

(14) Wage orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(15) Foreign Trade Zones Board orders—in the circuit where the Zone is located;

(16) Customhouse broker licenses—in circuit where applicant or licensee resides or has his principal place of business.

ORDERS ENFORCEABLE

(1) Antitrust and unfair trade orders—in the circuit where unlawful act occurred or person allegedly committing unlawful act resides or carries on business;

(2) National Labor Relations Board's final orders—in the circuit where unfair labor practice occurred or violator resides or transacts business;

(3) Seed orders—in the circuit where violator resides or has his principal place of business.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1292 of this title.

Changes were made in phraseology.

By Senate amendment, this section was renumbered "1294", and subsec. (b), which related to the Tax Court, was eliminated. Therefore, as finally enacted, section 1141(b)(1)(2)(3) of Title 26, U.S.C., Internal Revenue Code 1939, was not one of the sources of this section. The Senate amendments also eliminated section 1141 of the Internal Revenue Code 1939 from the schedule of repeals. See Senate Report No. 1559.

AMENDMENTS

1982—Pub. L. 97–164 substituted "Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions" for "Appeals from reviewable decisions" in introductory provisions.

1978—Pub. L. 95–598 directed the amendment of section by substituting "district, bankruptcy, and territorial" for "district and territorial" and by adding pars. (5) and (6) relating to panels designated under section 160(a) of this title and bankruptcy courts, respectively, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pars. (4), (5). Pub. L. 87–189 redesignated par. (5) as (4) and repealed former par. (4) which provided that appeals from the Supreme Court of Puerto Rico should be taken to the Court of Appeals for the First Circuit. See section 1258 of this title.

1959—Pars. (4) to (6). Pub. L. 86–3 redesignated pars. (5) and (6) as (4) and (5), respectively, and repealed former par. (4) which provided that appeals from the Supreme Court of Hawaii should be taken to the Court of Appeals for the Ninth Circuit. See section 91 of this title and notes thereunder.

1958—Par. (2). Pub. L. 85–508 redesignated par. (3) as (2) and repealed former par. (2) which provided that appeals from the District Court for the Territory of Alaska or any division thereof should be taken to the Court of Appeals for the Ninth Circuit. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Pars. (3) to (7). Pub. L. 85–508 redesignated pars. (4) to (7) as (3) to (6), respectively.

1951—Par. (7). Act Oct. 31, 1951, added par. (7).

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86–3 effective on admission of State of Hawaii into the Union, see note set out under section 91 of this title. Admission of Hawaii into the Union was accomplished Aug. 25, 1959, on issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86–3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the

District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of—

(A) the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board, except that an applicant or a party to a derivation proceeding may also have remedy by civil action pursuant to section 145 or 146 of title 35; an appeal under this subparagraph of a decision of the Board with respect to an application or derivation proceeding shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 7107(a)(1) of title 41;

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 7107(b) of title 41. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 7107(b) of title 41. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

(Added Pub. L. 97–164, title I, §127(a), Apr. 2, 1982, 96 Stat. 37; amended Pub. L. 98–622, title II, §205(a), Nov. 8, 1984, 98 Stat. 3388; Pub. L. 100–418, title I, §1214(a)(3), Aug. 23, 1988, 102 Stat. 1156; Pub. L. 100–702, title X, §1020(a)(3), Nov. 19, 1988, 102 Stat. 4671; Pub. L. 102–572, title I, §102(c), title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4507, 4516; Pub. L. 106–113, div. B, §1000(a)(9) [title IV, §§4402(b)(2), 4732(b)(14)], Nov. 29, 1999, 113 Stat. 1536, 1501A–560, 1501A–584; Pub. L. 111–350, §5(g)(5), Jan. 4, 2011, 124 Stat. 3848; Pub. L. 112–29, §§7(c)(2), 19(b), Sept. 16, 2011, 125 Stat. 314, 331.)

References in Text

The Harmonized Tariff Schedule of the United States, referred to in subsec. (a)(7), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

Section 211 of the Economic Stabilization Act of 1970, referred to in subsec. (a)(11), is section 211 of Pub. L. 91–379, title II, formerly set out as an Economic Stabilization Program note under section 1904 of Title 12, Banks and Banking.

Section 5 of the Emergency Petroleum Allocation Act of 1973, referred to in subsec. (a)(12), is section 5 of Pub. L. 93–159, which was classified to section 754 of Title 15, Commerce and Trade, and was omitted from the Code.

Section 506(c) of the Natural Gas Policy Act of 1978, referred to in subsec. (a)(13), is classified to section 3416(c) of Title 15.

Section 523 of the Energy Policy and Conservation Act, referred to in subsec. (a)(14), is classified to section 6393 of Title 42, The Public Health and Welfare.

Amendments

2011—Subsec. (a)(1). Pub. L. 112–29, §19(b), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;".

Subsec. (a)(4)(A). Pub. L. 112–29, §7(c)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;".

Subsec. (a)(10). Pub. L. 111–350, §5(g)(5)(A), substituted "section 7107(a)(1) of title 41" for "section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1))".

Subsec. (b). Pub. L. 111–350, §5(g)(5)(B), substituted "section 7107(b) of title 41" for "section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b))".

Subsec. (c). Pub. L. 111–350, §5(g)(5)(C), substituted "section 7107(b) of title 41" for "section 10(b) of the Contract Disputes Act of 1978".

1999—Subsec. (a)(4)(A). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(A)], inserted "United States" before "Patent and Trademark".

Subsec. (a)(4)(B). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(B)], substituted "Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office" for "Commissioner of Patents and Trademarks".

Subsec. (a)(4)(C). Pub. L. 106–113, §1000(a)(9) [title IV, §4402(b)(2)], substituted "145, 146, or 154(b)" for "145 or 146".

1992—Subsec. (a)(3). Pub. L. 102–572, §902(b)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(11) to (14). Pub. L. 102–572, §102(c), added pars. (11) to (14).

1988—Subsec. (a)(1). Pub. L. 100–702 inserted ", exclusive rights in mask works," after "copyrights".

Subsec. (a)(7). Pub. L. 100–418 substituted "U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States" for "headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States".

1984—Subsec. (a)(4)(A). Pub. L. 98–622 substituted "Patent Appeals and" for "Appeals or the Board of Patent".

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by section 7(c)(2) of Pub. L. 112–29 effective upon the expiration of the 1-year period beginning on Sept. 16, 2011, and applicable to proceedings commenced on or after that effective date, with certain exceptions, see section 7(e) of Pub. L. 112–29, set out as a note under section 6 of Title 35, Patents.

Pub. L. 112–29, §19(e), Sept. 16, 2011, 125 Stat. 333, provided that: "The amendments made by this section [enacting section 1454 of this title and section 299 of Title 35, Patents, and amending this section and section 1338 of this title] shall apply to any civil action commenced on or after the date of the enactment of this Act [Sept. 16, 2011]."

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by section 1000(a)(9) [title IV, §4402(b)(2)] of Pub. L. 106–113 effective on date that is 6 months after Nov. 29, 1999, and, except for design patent application filed under chapter 16 of Title 35, applicable to any application filed on or after such date, see section 1000(a)(9) [title IV, §4405(a)] of Pub. L. 106–113, set out as a note under section 154 of Title 35, Patents.

Amendment by section 1000(a)(9) [title IV, §4732(b)(14)] of Pub. L. 106–113 effective 4 months after Nov. 29, 1999, see section 1000(a)(9) [title IV, §4731] of Pub. L. 106–113, set out as a note under section 1 of Title 35, Patents.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by section 102(c) of Pub. L. 102–572 effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102–572, set out as a note under section 905 of Title 2, The Congress.

Amendment by section 902(b)(1) of Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 effective Jan. 1, 1989, and applicable with respect to articles entered on or after such date, see section 1217(b)(1) of Pub. L. 100–418, set out as an Effective Date note under section 3001 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–622 applicable to all United States patents granted before, on, or after Nov. 8, 1984, and to all applications for United States patents pending on or filed after that date, except as otherwise provided, see section 106 of Pub. L. 98–622, set out as a note under section 103 of Title 35, Patents.

Amendment by Pub. L. 98–622 effective three months after Nov. 8, 1984, see section 207 of Pub. L. 98–622, set out as a note under section 41 of Title 35.

EFFECTIVE DATE

Section effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

ABOLITION OF TEMPORARY EMERGENCY COURT OF APPEALS

Pub. L. 102–572, title I, §102(d), (e), Oct. 29, 1992, 106 Stat. 4507, provided that:

"(d) ABOLITION OF COURT.—The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 [Pub. L. 91–379, formerly set out as a note under section 1904 of Title 12, Banks and Banking] is abolished, effective 6 months after the date of the enactment of this Act [Oct. 29, 1992].

"(e) PENDING CASES.—(1) Any appeal which, before the effective date of abolition described in subsection (d), is pending in the Temporary Emergency Court of Appeals but has not been submitted to a panel of such court as of that date shall be assigned to the United States Court of Appeals for the Federal Circuit as though the appeal had originally been filed in that court.

"(2) Any case which, before the effective date of abolition described in subsection (d), has been submitted to a panel of the Temporary Emergency Court of Appeals and as to which the mandate has not been issued as of that date shall remain with that panel for all purposes and, notwithstanding the provisions of sections 291 and 292 of title 28, United States Code, that panel shall be assigned to the United States Court of Appeals for the Federal Circuit for the purpose of deciding such case."

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1296. Review of certain agency actions

(a) JURISDICTION.—Subject to the provisions of chapter 179, the United States Court of Appeals

UNITED STATES CODE

2012 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES ENACTED THROUGH THE 112TH CONGRESS

(ending January 2, 2013, the last law of which was signed on January 15, 2013)

Prepared and published under authority of Title 2, U.S. Code, Section 285b, by the Office of the Law Revision Counsel of the House of Representatives

VOLUME TWENTY-ONE

TITLE 27—INTOXICATING LIQUORS

TO

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2013

76-420 v21_T D Sig-1

1954—Act Sept. 3, 1954, ch. 1263, §43, 68 Stat. 1241, inserted "; actions involving Tennessee Valley Authority" in item 1491 and struck out item 1493 "Departmental reference cases".

1949—Act May 24, 1949, ch. 139, §86, 63 Stat. 102, added item 1505.

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6[1] of that Act.

(b)(1) Both the Unites[2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, §7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, §44(a), (b), 68 Stat. 1241; Pub. L. 91–350, §1(b), July 23, 1970, 84 Stat. 449; Pub. L. 92–415, §1, Aug. 29, 1972, 86 Stat. 652; Pub. L. 95–563, §14(i), Nov. 1, 1978, 92 Stat. 2391; Pub. L. 96–417, title V, §509, Oct. 10, 1980, 94 Stat. 1743; Pub. L. 97–164, title I, §133(a), Apr. 2, 1982, 96 Stat. 39; Pub. L. 102–572, title IX, §§902(a), 907(b)(1), Oct. 29, 1992, 106 Stat. 4516, 4519; Pub. L. 104–320, §12(a), Oct. 19, 1996, 110 Stat. 3874; Pub. L. 110–161, div. D, title VII, §739(c)(2), Dec. 26, 2007, 121 Stat. 2031; Pub. L. 110–181, div. A, title III, §326(c), Jan. 28, 2008, 122 Stat. 63; Pub. L. 110–417, [div. A], title X, §1061(d), Oct. 14, 2008, 122 Stat. 4613; Pub. L. 111–350, §5(g)(7), Jan. 4, 2011, 124 Stat. 3848; Pub. L. 112–81, div. A, title VIII, §861(a), Dec. 31, 2011, 125 Stat. 1521.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §250(1) (Mar. 3, 1911, ch. 231; §145, 36 Stat. 1136).

District courts are given concurrent jurisdiction of certain claims against the United States under section 1346 of this title. (See also reviser's note under that section and section 1621 of this title relating to jurisdiction of the Tax Court.)

The proviso in section 250(1) of title 28, U.S.C., 1940 ed., relating to claims growing out of the Civil War, commonly known as "war claims," and other claims which had been reported adversely before March 3, 1887 by any court, department, or commission authorized to determine them, were omitted as obsolete.

The exception in section 250(1) of title 28, U.S.C., 1940 ed., as to pension claims appears in section 1501 of this title.

[1] See References in Text note below.

[2] So in original. Probably should be "United".

Words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action. In any event, the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act, sections 741–752 of title 46, U.S.C., 1940 ed., Shipping, vests exclusive jurisdiction over suits in admiralty against the United States in the district courts. *Sanday & Co. v. U.S.*, 1932, 76 Ct.Cl. 370.

For additional provisions respecting jurisdiction of the court of claims in war contract settlement cases see section 114b of Title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

References in Text

Section 6 of the Contract Disputes Act of 1978, referred to in subsec. (a)(2), was classified to section 605 of former Title 41, Public Contracts, and was repealed and restated as subsecs. (a) to (c)(1) and (d) to (h) of section 7103 of Title 41, Public Contracts, by Pub. L. 111–350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855.

The Tennessee Valley Authority Act of 1933, referred to in subsec. (c), is act May 18, 1933, ch. 32, 48 Stat. 58, which is classified generally to chapter 12A (§831 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 831 of Title 16 and Tables.

Amendments

2011—Subsec. (a)(2). Pub. L. 111–350 substituted "section 7104(b)(1) of title 41" for "section 10(a)(1) of the Contract Disputes Act of 1978".

Subsec. (b)(6). Pub. L. 112–81 added par. (6).

2008—Subsec. (b)(5). Pub. L. 110–417 struck out par. (5), as added by Pub. L. 110–161, which read as follows: "If a private sector interested party commences an action described in paragraph (1) in the case of a public-private competition conducted under Office of Management and Budget Circular A–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an official or person described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action."

Pub. L. 110–181 added par. (5).

2007—Subsec. (b)(5). Pub. L. 110–161 added par. (5).

1996—Subsec. (a)(3). Pub. L. 104–320, §12(a)(2), struck out par. (3) which read as follows: "To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security."

Subsecs. (b), (c). Pub. L. 104–320, §12(a)(1), (3), added subsec. (b) and redesignated former subsec. (b) as (c).

1992—Subsec. (a)(1). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(2). Pub. L. 102–572, §907(b)(1), inserted before period at end ", including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act".

Pub. L. 102–572, §902(a)(2), substituted "Court of Federal Claims" for "Claims Court".

Subsec. (b). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Subsec. (a)(1). Pub. L. 97–164 designated first two sentences of existing first undesignated paragraph as subsec. (a)(1) and substituted "United States Claims Court" for "Court of Claims".

Subsec. (a)(2). Pub. L. 97–164 designated third, fourth, and fifth sentences of existing first undesignated paragraph as par. (2) and substituted "The Claims Court" for "The Court of Claims" and "arising under section 10(a)(1) of the Contract Disputes Act of 1978" for "arising under the Contract Disputes Act of 1978".

Subsec. (a)(3). Pub. L. 97–164 added par. (3).

Subsec. (b). Pub. L. 97–164 designated existing second undesignated paragraph as subsec. (b) and substituted "United States Claims Court" for "Court of Claims", "conduct of, the Tennessee Valley Authority, or" for "actions of, the Tennessee Valley Authority, nor", "Tennessee Valley Authority Act of 1933" for "Tennessee Valley Authority Act of 1933, as amended,", and "actions by or against the Authority" for "suits by or against the Authority".

1980—Pub. L. 96–417 substituted "Court of Claims of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action" for "in suits" in second par.

1978—Pub. L. 95–563 provided that the Court of Claims would have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

1972—Pub. L. 92–415 inserted provisions authorizing the court to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records and to issue such orders to any United States official and to remand appropriate matters to administrative and executive bodies with proper directions.

1970—Pub. L. 91–350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1954—Act Sept. 3, 1954, inserted "; actions involving Tennessee Valley Authority" in section catchline and altered the form of first par. to spell out the general jurisdiction of the Court in paragraph form rather than as clauses of the par.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" near beginning of section, and inserted last par.

Effective Date of 2011 Amendment

Pub. L. 112–81, div. A, title VIII, §861(b), Dec. 31, 2011, 125 Stat. 1521, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any cause of action filed on or after the first day of the first month beginning more than 30 days after the date of the enactment of this Act [Dec. 31, 2011]."

Effective Date of 2008 Amendment

Pub. L. 110–181, div. A, title III, §326(d), Jan. 28, 2008, 122 Stat. 63, provided that: "Subparagraph (B) of section 3551(2) of title 31, United States Code (as added by subsection (a)), and paragraph (5) of section 1491(b) of title 28, United States Code (as added by subsection (c)), shall apply to—

"(1) a protest or civil action that challenges final selection of the source of performance of an activity or function of a Federal agency that is made pursuant to a study initiated under Office of Management and Budget Circular A–76 on or after January 1, 2004; and

"(2) any other protest or civil action that relates to a public-private competition initiated under Office of Management and Budget Circular A–76, or to a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, on or after the date of the enactment of this Act [Jan. 28, 2008]."

EFFECTIVE DATE OF 2007 AMENDMENT

Paragraph (5) of subsec. (b) of this section applicable to protests and civil actions that challenge final selections of sources of performance of an activity or function of a Federal agency that are made pursuant to studies initiated under Office of Management and Budget Circular A–76 on or after Jan. 1, 2004; and to any other protests and civil actions that relate to public-private competitions initiated under Office of Management and Budget Circular A–76, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, on or after Dec. 26, 2007, see section 739(c)(3) of Pub. L. 110–161, set out as a note under section 501 of Title 31, Money and Finance.

Amendment by Pub. L. 110–161 applicable with respect to fiscal year 2008 and each succeeding fiscal year, see section 739(e) of Pub. L. 110–161, set out as a note under section 501 of Title 31, Money and Finance.

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–320, § 12(b), Oct. 19, 1996, 110 Stat. 3875, provided that: "This section [amending this section and section 3556 of Title 31, Money and Finance, and enacting provisions set out as notes under this section and section 3556 of Title 31] and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date."

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by section 902(a) of Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

Pub. L. 102–572, title IX, § 907(b)(2), Oct. 29, 1992, 106 Stat. 4519, provided that: "The amendment made by paragraph (1) [amending this section] shall be effective with respect to all actions filed before, on, or after the date of the enactment of this Act [Oct. 29, 1992], except for those actions which, before such date of enactment, have been the subject of—

"(A) a final judgment of the United States Claims Court, if the time for appeal of that judgment has expired without an appeal having been filed, or

"(B) a final judgment of the Court of Appeals for the Federal Circuit."

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96–417, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2391, formerly set out as an Effective Date note under section 601 of former Title 41, Public Contracts.

EFFECTIVE DATE OF 1972 AMENDMENT

Pub. L. 92–415, § 2, Aug. 29, 1972, 86 Stat. 652, provided that: "This Act [amending this section] shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment [Aug. 29, 1972]."

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–350 applicable to claims and civil actions dismissed before or pending on July 23, 1970, if the claim or civil action was based upon a transaction, omission, or breach that occurred not more than six years prior to July 23, 1970, notwithstanding a determination or judgment made prior to July 23, 1970, that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States, see section 2 of Pub. L. 91–350, set out as a note under section 1346 of this title.

SAVINGS PROVISION

Pub. L. 104–320, § 12(e), Oct. 19, 1996, 110 Stat. 3875, provided that:

"(1) ORDERS.—A termination under subsection (d) [set out below] shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(2) PROCEEDINGS AND APPLICATIONS.—(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

"(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination."

SUNSET PROVISION

Pub. L. 104–320, § 12(d), Oct. 19, 1996, 110 Stat. 3875, provided that: "The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) [set out above] shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection."

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, set out as a note under section 542 of Title 6.

STUDY ON CONCURRENT JURISDICTION

Pub. L. 104–320, § 12(c), Oct. 19, 1996, 110 Stat. 3875, required that, no earlier than 2 years after Dec. 31, 1996, the General Accounting Office was to undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction was necessary, which study was to be completed no later than Dec. 31, 1999, and was to specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

§ 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief

West's Delaware Code Annotated
Title 8. Corporations
Chapter 1. General Corporation Law
Subchapter VIII. Amendment of Certificate of Incorporation; Changes in Capital and Capital Stock

8 Del.C. § 242

§ 242. Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations

Effective: August 1, 2014
Currentness

(a) After a corporation has received payment for any of its capital stock, or after a nonstock corporation has members, it may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment; and, if a change in stock or the rights of stockholders, or an exchange, reclassification, subdivision, combination or cancellation of stock or rights of stockholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, subdivision, combination or cancellation. In particular, and without limitation upon such general power of amendment, a corporation may amend its certificate of incorporation, from time to time, so as:

(1) To change its corporate name; or

(2) To change, substitute, enlarge or diminish the nature of its business or its corporate powers and purposes; or

(3) To increase or decrease its authorized capital stock or to reclassify the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing the number of shares, or by subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares; or

(4) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared; or

(5) To create new classes of stock having rights and preferences either prior and superior or subordinate and inferior to the stock of any class then authorized, whether issued or unissued; or

(6) To change the period of its duration; or

(7) To delete:

a. Such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares; and

b. Such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective.

Any or all such changes or alterations may be effected by 1 certificate of amendment.

(b) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner:

(1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders; provided, however, that unless otherwise expressly required by the certificate of incorporation, no meeting or vote of stockholders shall be required to adopt an amendment that effects only changes described in paragraph (a)(1) or (7) of this section. Such special or annual meeting shall be called and held upon notice in accordance with § 222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby unless such notice constitutes a notice of internet availability of proxy materials under the rules promulgated under the Securities Exchange Act of 1934 [15 U.S.C. § 78a et seq.]. At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against any proposed amendment that requires adoption by stockholders. If no vote of stockholders is required to effect such amendment, or if a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(2) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph. The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection, if so provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

(3) If the corporation is a nonstock corporation, then the governing body thereof shall adopt a resolution setting forth the amendment proposed and declaring its advisability. If a majority of all the members of the governing body shall vote in favor of such amendment, a certificate thereof shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title. The certificate of incorporation of any nonstock corporation may contain a provision requiring any amendment thereto to be approved by a specified number or percentage of the members or of any specified class of members of such corporation in which event such proposed amendment shall be submitted to the members or to any specified class

of members of such corporation in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation; and in the event of the adoption thereof by such members, a certificate evidencing such amendment shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(4) Whenever the certificate of incorporation shall require for action by the board of directors of a corporation other than a nonstock corporation or by the governing body of a nonstock corporation, by the holders of any class or series of shares or by the members, or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.

(c) The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a nonstock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members.

Credits
56 Laws 1967, ch. 50; 57 Laws 1969, ch. 148, §§ 18-21; 59 Laws 1973, ch. 106, § 7; 63 Laws 1981, ch. 25, § 12; 64 Laws 1983, ch. 112, § 24; 67 Laws 1990, ch. 376, § 10; 70 Laws 1996, ch. 349, §§ 5-7, eff. July 1, 1996; 70 Laws 1996, ch. 587, §§ 14, 15; 72 Laws 1999, ch. 123, § 5, eff. July 1, 1999; 77 Laws 2010, ch. 253, §§ 33-35, eff. Aug. 1, 2010; 77 Laws 2010, ch. 290, § 7, eff. Aug. 2, 2010; 79 Laws 2014, ch. 327, § 6, eff. Aug. 1, 2014.

Codifications: 8 Del.C. 1953, § 242

Notes of Decisions (170)

8 Del.C. § 242, DE ST TI 8 § 242
Current through 80 Laws 2015, ch. 153. Revisions to 2015 Acts by the Delaware Code Revisors were unavailable at the time of publication.

End of Document

72D CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { DOCUMENT No. 360

DISAPPROVAL OF H. R. 12445

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RETURNING

WITHOUT APPROVAL H. R. 12445, AN ACT TO RELIEVE DESTITUTION, TO BROADEN THE LENDING POWERS OF THE RECONSTRUCTION FINANCE CORPORATION, AND TO CREATE EMPLOYMENT BY AUTHORIZING AND EXPEDITING A PUBLIC-WORKS PROGRAM AND PROVIDING A METHOD OF FINANCING SUCH PROGRAM

JULY 11, 1932.—Referred to the Committee on Ways and Means; message and bill ordered to be printed

To the House of Representatives:

I am returning herewith, without my approval, H. R. 12445, "Emergency relief and construction act of 1932."

On the 31st of May last I addressed the Senate recommending further definite and large-scale measures to aid in relief of distress and unemployment imposed upon us by the continued degeneration in the world economic situation. These proposals were made after discussion with leaders of both political parties in Congress and in endeavor to secure united nonpartisan action.

They were in brief:

1. Authorization to the Reconstruction Corporation to loan up to $300,000,000 to State governments which are unable to finance themselves to care for distress, such loans to be made upon the basis of need.

2. Authorization to the Reconstruction Finance Corporation to buy bonds or otherwise temporarily to finance public bodies and to provide part of needed loans in limited cases also to private industry, to increase employment through construction of sound self-liquidating or income-producing projects.

3. Authorization to the corporation to undertake to finance exports of agricultural products and to make loans to institutions on the security of agricultural commodities in order to assure the carrying of normal stocks and the orderly marketing of these commodities.

4. To increase authority of the corporation to issue securities by a further $1,500,000,000.

The bill now under consideration consists of three titles, of which I shall first refer to Title I and Title III:

Title I

As this title has been amended, it now stands in accord with my recommendation.

Title III

This portion of the measure proposes to expend $322,000,000 on public works. I have expressed myself at various times upon the extreme undesirability of increasing expenditure on nonproductive public works beyond the $500,000,000 of construction already in the Budget. It is an ultimate burden upon the taxpayer. It unbalances the Budget after all our efforts to attain that object. It does not accomplish the purpose in creating employment for which it is designed, as is shown by the reports of the technical heads of the bureaus concerned that the total annual direct employment under this program would be less than 100,000 out of the 8,000,000 unemployed. Strongly as I feel that this departs from sound public finance, and that it does not accomplish the purpose for which it is instituted, I am not prepared for this reason alone to withhold my assent to the bill provided there is a proper provision that (except for expenditure on public roads which is deductible from future appropriations, together with park and forest roads and trails) these works should not be initiated except on certificate of the Secretary of the Treasury that the moneys necessary for such expenditure are available or can be obtained without interference with current financing operations of the Government. The expression of this principle in the present bill is not in this form and is not adequate.

Title II

This title is the major extension of the authority of the Reconstruction Finance Corporation. The creation of the Reconstruction Finance Corporation itself was warranted only as a temporary measure to safely pass a grave national emergency which would otherwise have plunged us into destructive panic in consequence of the financial collapse in Europe. Its purpose was to preserve the credit structure of the nation and thereby protect every individual in his employment, his farm, his bank deposits, his insurance policy, and his other savings, all of which are directly or indirectly in the safe keeping of the great fiduciary institutions. Its authority was limited practically to loans to institutions which are under Federal or State control or regulation and affected with public interest. These functions were and are in the interest of the whole people.

Our problem now is to further widen the activities of the Reconstruction Corporation in the field of employment and to further strengthen agriculture in such a practical fashion as will benefit the whole people, as will not damage any part of the people and confer no special privileges upon any of the people.

So far as those portions of the proposed extension of authority to the corporation provide authorization temporarily to finance self-liquidating works up to the sum of $1,500,000,000, it is in accord with my recommendations. The section dealing with agricultural relief does not provide for loans to sound institutions upon the security of agricultural products in order to assist in production and finance of normal holdings and stocks of these commodities and thus aid in the orderly marketing of agricultural products so sorely needed at the present time. Such action would contribute to improve price levels of farm products.

There are several secondary objections to this title with which I will not trouble the Congress, because my major objection to the measure, as now formulated, lies in the inclusion of an extraordinary extension of authority to the Reconstruction Corporation to make loans to "individuals, to trusts, estates, partnerships, corporations (public or quasi public or private), to associations, joint-stock companies, States, political subdivisions of States, municipalities, or political subdivisions thereof." The following objections are directed to this particular provision:

First. This expansion of authority of the Reconstruction Corporation would mean loans against security for any conceivable purpose on any conceivable security to anybody who wants money. It would place the Government in private business in such fashion as to violate the very principle of public relations upon which we have builded our Nation, and render insecure its very foundations. Such action would make the Reconstruction Corporation the greatest banking and money-lending institution of all history. It would constitute a gigantic centralization of banking and finance to which the American people have been properly opposed for the past 100 years. The purpose of the expansion is no longer in the spirit of solving a great major emergency but to establish a privilege whether it serves a great national end or not.

Second. One of the most serious objections is that under the provisions of this bill those amongst 16,000 municipalities and the different States that have failed courageously to meet their responsibilities and to balance their own budgets would dump their financial liabilities and problems upon the Federal Government. All proper and insuperable difficulties they may confront in providing relief for distress are fully and carefully met under other provisions in the bill.

Third. The board of directors of the Reconstruction Corporation inform me unanimously that miscellaneous loans under this provision are totally impracticable and unworkable. It would be necessary to set up a huge bureaucracy, to establish branches in every county and town in the United States. The task of organization, of finding competent personnel, would not be a matter of months but of years. Hundreds of thousands of applications representing every diversity of business and interest in the country would immediately flood the board, all of which must be passed upon by seven men. The directors would be dependent upon the ability and integrity of local committees and branch managers. Every political pressure would be assembled for particular persons. It would be within the power of these agencies to dictate the welfare of millions of people, to discriminate between competitive business at will, and to deal favor and disaster amongst them. If it be contended that these hundreds of thousands of miscellaneous loans will be used to increase employment, then an additional bureaucracy for espionage must follow up each case and assure that these funds be used for such purpose.

Fourth. The sole limitation under the bill is that loans shall be secured and that the borrowers shall not have been able to obtain loans from private institutions upon acceptable terms. This at once throws upon the corporation all the doubtful loans in the United States. It would result in every financial institution calling upon their customers whom they regard as less adequately secured to discharge their loans and to demand the money from the Government through the Reconstruction Corporation. The organization would be constantly subjected to conspiracies and raids of predatory interests, individuals and private corporations. Huge losses and great scandals must inevitably result. It would mean the squandering of hundreds of millions of public funds to be ultimately borne by the taxpayer.

Fifth. The bill provides only the funds to the corporation which the Senate with reason deemed the minimum necessary to aid construction projects and to cover loans to the States in aid of distress. There is, therefore, no provision in the bill for any sum of money for the purpose of these miscellaneous loans. The corporation would thereby be charged with a duty impossible to carry out in practice with no additional funds with which to make loans unless the unemployment projects and the loans to the States are abandoned or seriously curtailed and the fundamental purpose of the legislation defeated.

Sixth. Under the new obligations upon the Reconstruction Corporation to finance the additional construction activities and loans to the States in addition to its present activities it will be necessary for the corporation to place over $3,000,000,000 of securities. It can place these securities only because the credit of the United States is pledged to secure these obligations. To sell any such vast amount of securities at a time like this is a difficult enough task, strong as is the credit of the United States, without having the credit of the Government undermined by the character of use to which it is directed that these moneys should be applied. As long as obligations of the corporation are based on wholly sound securities for self-liquidating purposes, of which early repayment is assured, there is no burden upon the taxpayer. There is an assurance of a strengthening of the economic situation. But if the funds of the corporation are to be squandered by making loans for the purposes here referred to, it will be at once evident that the credit of the Government is being misused and it is not too much to say that if such a measure should become law it further weakens the whole economic situation by threatening the credit of the United States Government with grave consequences of disaster to our people.

CONCLUSION

This proposal violates every sound principle of public finance and of government. Never before has so dangerous a suggestion been seriously made to our country. Never before has so much power for evil been placed at the unlimited discretion of seven individuals.

In view of the short time left to the Congress for consideration of this legislation and of the urgent need for sound relief measures, the necessity of which I have on several occasions urged upon the Congress, I recommend that a compromise should be reached upon terms suggested by members of both Houses and both parties, and that the Congress should not adjourn until this is accomplished. Such compromise proposal should embrace:

First. Title I of H. R. 12445, the act now under consideration, covering provisions for loans to States in amount of $300,000,000 for the care of distress in States where needed.

Second. Title III of this act, with the provision made applicable to all parts of the title except for roads and trails, that such works shall not be initiated except on certificate of the Secretary of the Treasury that the funds necessary are available and can be obtained without interference with the current financing operations of the Government.

Third. That there should be substituted for Title II the substance of the provisions in the substitute bill introduced by Senator Wagner and passed by the Senate, or Senate bill 4822, introduced by Senator Barbour, or section 4 of the substitute bill introduced by Representative Hawley. Among them they provide not only loans for construction work of projects of self-liquidating character but also essential aids to agriculture.

Fourth. That the corporation be authorized to increase its issues of capital by $1,800,000,000 for these purposes.

With the utmost seriousness I urge the Congress to enact a relief measure, but I can not approve the measure before me fraught as it is with possibilities of misfeasance and special privileges, so impracticable of administration, so dangerous to public credit and so damaging to our whole conception of governmental relations to the people as to bring far more distress than it will cure.

HERBERT HOOVER.

THE WHITE HOUSE, *July 11, 1932.*

[H. R. 12445. Seventy-second Congress of the United States of America; at the first session, Begun and held at the City of Washington on Monday, the seventh day of December, one thousand nine hundred and thirty-one]

An act to relieve destitution, to broaden the lending powers of the Reconstruction Finance Corporation, and to create employment by providing for and expediting a public-works program

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Relief and Construction Act of 1932."

TITLE I—RELIEF OF DESTITUTION

SECTION 1. (a) The Reconstruction Finance Corporation is authorized and empowered to make available out of the funds of the corporation the sum of $300,000,000, under the terms and conditions hereinafter set forth, to the several States and Territories, to be used in furnishing relief and work relief to needy and distressed people and in relieving the hardship resulting from unemployment, but not more than 15 per centum of such sum shall be available to any one State or Territory. Such sum of $300,000,000, shall, until the expiration of two years after the date of enactment of this Act, be available for payment to the governors of the several States and Territories for the purposes of this section, upon application therefor by them in accordance with subsection (c), and upon approval of such applications by the corporation.

(b) All amounts paid under this section shall bear interest at the rate of 3 per centum per annum, and, except in the case of Puerto Rico and the Territory of

Alaska, shall be reimbursed to the corporation, with interest thereon at the rate of 3 per centum per annum, by making annual deductions, beginning with the fiscal year 1935, from regular apportionments made from future Federal authorizations in aid of the States and Territories for the construction of highways and rural post roads, of an amount equal to one-fifth of the share which such State or Territory would be entitled to receive under such apportionment, except for the provisions of this section, or of an amount equal to one-fifth of the amounts so paid to the governor of such State or Territory pursuant to this section and all accrued interest thereon to the date of such deduction, whichever is the lesser, until the sum of such deductions equals the total amounts paid under this section and all accrued interest thereon. Whenever any such deduction is made, the Secretary of the Treasury shall immediately pay to the corporation an amount equal to the amount so deducted. If any State or Territory shall, within two years after the date of enactment of this Act, enter into an agreement with the corporation for the repayment to the corporation of the amounts paid under this section to the governor of such State or Territory, with interest thereon as herein provided, in such installments and upon such terms as may be agreed upon, then the deduction under this subsection shall not be made unless such State or Territory shall be in default in the performance of the terms of such agreement. In the case of a default by the State or Territory in any such agreement, the agreement shall thereupon be terminated and reimbursement of the unpaid balance of the amount covered by such agreement shall be made by making annual deductions in the manner above provided (beginning with the fiscal year next following such default) from regular apportionments made to such State or Territory from future Federal authorizations in aid of the States and Territories for the construction of highways and rural post roads. Before any amount is paid under this section to the governor of Puerto Rico or of the Territory of Alaska, Puerto Rico or the Territory of Alaska shall enter into an agreement with the corporation for the repayment of such amount with interest thereon as herein provided, in such installments and upon such terms and conditions as may be agreed upon.

(c) The governor of any State or Territory may from time to time make application for funds under this section, and in each application so made shall certify the necessity for such funds and that the resources of the State or Territory, including moneys then available and which can be made available by the State or Territory, its political subdivisions, and private contributions, are inadequate to meet its relief needs. All amounts paid to the governor of a State or Territory under this section shall be administered by the governor, or under his direction, and upon his responsibility. The governor shall file with the corporation and with the auditor of the State or Territory (or, if there is no auditor, then with the official exercising comparable authority) a statement of the disbursements made by him under this section.

(d) Nothing in this section shall be construed to authorize the corporation to deny an otherwise acceptable application under this section because of constitutional or other legal inhibitions or because the State or Territory has borrowed to the full extent authorized by law. Whenever an application under this section is approved by the corporation in whole or in part, the amount approved shall be immediately paid to the governor of the State or Territory upon delivery by him to the corporation of a receipt therefor stating that the payment is accepted subject to the terms of this section. (e) Any portion of the amount approved by the corporation for payment to the governor of a State or Territory shall, at his request, and with the approval of the corporation, be paid to any municipality or political subdivision of such State or Territory if (1) the governor makes as to such municipality or political subdivision a like certificate as provided in subsection (c) as to the State or Territory, and (2) such municipality or political subdivision enters into an agreement with the corporation for the repayment to the corporation of the amount so paid, at such times, at such rates of interest, and upon such other terms and conditions, as may be agreed upon between the corporation and such municipality or political subdivision. The amount paid to any municipality or political subdivision under this subsection shall not be included in any amounts reimbursable to the corporation under subsection (b) of this section.

(f) As used in this section the term "Territory" means, Alaska, Hawaii, and Puerto Rico.

TITLE II—AMENDMENTS TO RECONSTRUCTION FINANCE CORPORATION ACT

SEC. 201. Section 5 of the Reconstruction Finance Corporation Act is amended to read as follows:

"SEC. 5. (a) To aid in financing agriculture, commerce, industry, and housing, including facilitating the exportation of agricultural and other products, and to assist in the relief of unemployment, the corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this Act as it may determine, to any person when in the opinion of the board of directors of the corporation such person is unable to obtain funds upon reasonable terms through banking channels. Any receiver of any national bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same.

"(b) In the exercise of its powers under this section the corporation shall so far as practicable give preference to—

"(1) loans to, or contracts with (and the corporation is hereby empowered to make such loans and contracts), States, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political subdivisions of States, public corporations, boards and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities: *Provided*, That nothing herein contained shall be construed to prohibit the Reconstruction Finance Corporation, in carrying out the provisions of this paragraph, from purchasing securities having a maturity of more than ten years;

"(2) loans to corporations formed wholly for the purpose of providing housing for families of low income, or for reconstruction of slum areas, which are regulated by State or municipal law as to rents, charges, capital structure, rate of return, and areas and methods of operation, to aid in financing projects undertaken by such corporations which are self-liquidating in character;

"(3) loans to private corporations to aid in carrying out the construction, replacement or improvement of bridges, tunnels, docks, viaducts, waterworks, canals, and markets, devoted to public use and which are self-liquidating in character;

"(4) loans to private limited dividend corporations to aid in the protection and development of forests and other renewable natural resources, which are regulated by a State or political subsivision of a State and are self-liquidating in character; and

"(5) loans to aid in financing the construction of any publicly owned bridge to be used for railroad, railway, and highway uses, the construction cost of which will be returned in part by means of tolls, fees, rents, or other charges, and the remainder by means of taxes imposed pursuant to State law enacted before the dare of enactment of the Emergency Relief and Construction Act of 1932; and the Reconstruction Finance Corporation is further authorized and empowered to purchase bonds of any State, municipality, or other public body or agency issued for the purpose of financing the construction of any such bridge irrespective of the dates of maturity of such bonds.

For the purpose of this subdivision a project shall be deemed to be self-liquidating if such project will be made self-supporting and financially solvent and if the construction cost thereof will be returned within a reasonable period by means of tolls, fees, rents, or other charges, or by such other means (other than by taxation) as may be prescribed by the statutes which provide for the project. All loans and contracts made by the Reconstruction Finance Corporation in respect of projects of the character specified in paragraphs (1) to (5) of this subdivision shall be subject to the conditions that no convict labor shall be directly employed on any such project, and that (except in executive and administrative positions), so far as practicable, no individual employed on any such project shall be permitted to work more than 30 hours in any one week, and that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents. The provisions of this subdivision shall apply with respect to projects in Puerto Rico and the Territories to the same extent as in the case of projects in the several States, and as used in this subdivision the term "States" includes Puerto Rico and the Territories.

"(c) The Reconstruction Finance Corporation shall submit monthly to the President and to the Senate and the House of Representatives (or the Secretary of the Senate and the Clerk of the House of Representatives, if those bodies are not in session) a report of its activities and expenditures under this section, together with a statement showing the names of the borrowers to whom loans and advances were made, and the amount involved in each case, except that such statement shall not show the names of the borrowers of the classes to whom loans could be made under this section before its amendment by the Emergency Relief and Construction Act of 1932, unless the loan or advance was made under subdivision (b) of this section.

"(d) In order that the surpluses of agricultural products which have accumulated in public and private warehouses and elevators may not have a depressing effect upon current prices of such products, the corporation is authorized and directed to make loans under this section, in such amounts as may in its judgment be necessary, for the purpose of financing sales of such surpluses in the markets of foreign countries in which such sales can not be financed in the normal course of commerce; but no such sales shall be financed by the corporation if, in its judgment, such sales will affect adversely the world markets for such products.

"(e) The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of this Act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.

"(f) All loans made under this section, and all contracts of the character described in paragraph (1) of subdivison (b), shall be fully and adequately secured, except that in the case of loans (other than loans of the character described in paragraph (1) of subdivision (b)) to States, political subdivisions thereof, municipalities, instrumentalities or agencies of one or more States or municipalities or political-subdivisions thereof, or public corporations, the loan may be made if, in the opinion of the board of directors of the corporation, the payment of the interest on the loan and the payment of the principal of the loan are adequately assured. The corporation, under such conditions as it shall prescribe, may take over or provide for the administration and liquidation of any collateral accepted by it as security for such loans. Such loans may be made directly upon promissory notes or by way of discount or rediscount of obligations tendered for the purpose, or otherwise in such form and in such amount and at such interest or discount rates as the corporation may approve: *Provided*, That no loans or advances (except loans under subdivision (d)) shall be made upon foreign securities or foreign acceptances as collateral or for the purpose of assisting in the carrying or liquidation of such foreign securities and foreign acceptances. In no case shall the aggregate amount advanced under this section to any one person (including, in the case of a corporation, its subsidiary or affiliated organizations) exceed at any one time 2½ per centum of (1) the authorized capital stock of the Reconstruction Finance Corporation plus (2) the aggregate amount of bonds of the corporation authorized to be outstanding when the capital stock is fully subscribed.

"(g) Each such loan may be made for a period not exceeding three years, and the corporation may from time to time extend the time of payment of any such loan, through renewal, substitution of new obligations, or otherwise, but the time for such payment shall not be extended beyond five years from the date upon which such loan was made originally: *Provided*, That loans or contracts of the character described in subdivision (b) may be made for a period not exceeding ten years: *Provided further*, That loans or contracts of the character described in paragraph (1) or (5) of subdivision (b) may be made for a period exceeding ten years when it is the judgment of the board of directors of the corporation that it is necessary to purchase securities as provided in such paragraphs and that it is not practicable to require the reimbursement of the corporation, within ten years, through the repurchase or payment of such securities, or in any other manner.

"(h) The corporation may make loans under this section at any time prior to January 23, 1933; and the President may from time to time postpone such date of expiration for such additional period or periods as he may deem necessary, not beyond January 22, 1934.

"(i) No fee or commission shall be paid by any applicant for a loan under the provisions of this section in connection with any such application or any loan made or to be made under this section, and the agreement to pay or payment of any such fee or commission shall be unlawful.

"(j) No loan shall be made to a railroad or to a receiver of a railroad except on the approval of the Interstate Commerce Commission. Any railroad may obligate itself in such form as shall be prescribed and otherwise comply with the requirements of the Interstate Commerce Commission and the corporation with respect to the deposit or assignment of security hereunder, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification, other than such as may be imposed by the Interstate Commerce Commission and the corporation under the provisions of this section.

"(k) As used in this section and section 8, the term 'person' means an individual, a trust or estate, a partnership, a corporation (public, quasi-public, or private), an association, a joint-stock company, a State, a political subdivision of a State, a municipality, and any instrumentality or agency of one or more States or municipalities or political subdivisions thereof. As used in this section and section 15 the term 'State' includes Alaska, Hawaii, and Puerto Rico.

"(l) No loans shall be made under this section to a State, a political subdivision of a State, a municipality, an instrumentality or agency of one or more States or municipalities or political subdivisions thereof, or a public corporation, except (1) loans to assist in the relief of unemployment, or (2) loans of the character specified in paragraph (1) of subdivision (b).

"(m) The Reconstruction Finance Corporation may make such rules and regulations as may be necessary to carry out the provisions of this section."

SEC. 202. Section 8 of the Reconstruction Finance Corporation Act is amended to read as follows:

"SEC. 8. In order to enable the corporation to carry out the provisions of this Act, the Treasury Department, the Federal Farm Loan Board, the Comptroller of the Currency, the Federal Reserve Board, the Federal reserve banks, and the Interstate Commerce Commission are hereby authorized, under such conditions as they may prescribe, to make available to the corporation, in confidence, such reports, records, or other information as they may have available relating to the condition of persons with respect to whom the corporation has had or contemplates having transactions under this Act, or relating to persons whose obligations are offered to or held by the corporation as security for loans under this Act, and to make through their examiners or other employees for the confidential use of the corporation, examinations of applicants for loans. Every applicant for a loan under this Act shall, as a condition precedent thereto, consent to such examination as the corporation may require for the purposes of this Act and that reports of examinations by constituted authorities may be furnished by such authorities to the corporation upon request therefor."

SEC. 203. (a) Section 9 of the Reconstruction Finance Corporation Act is amended by striking out the words "three times" each time such words appear in such section and inserting in lieu thereof "six and three-fifths times."

(b) The first proviso of section 2 of the Reconstruction Finance Corporation Act is amended by inserting after "as set out in section 9" the following: "(as in force prior to its amendment by the Emergency Relief and Construction Act of 1932)," but the Secretary of Agriculture is directed to continue making loans to farmers under the provisions of such section 2.

TITLE III—PUBLIC WORKS

SEC. 301. (a) For the purpose of providing for emergency construction of certain authorized public works with a view to increasing employment and carrying out the policy declared in the Employment Stabilization Act of 1931, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $322,224,000, which shall be allocated as follows:

(1) For expenditure in emergency construction on the Federal-aid highway system, $120,000,000. Such sum shall be apportioned by the Secretary of Agriculture to the several States by the method provided in section 21 of the Federal Highway Act, as amended and supplemented (U. S. C., title 23, sec. 21). The amounts apportioned to the States shall be available as a temporary advance of funds to meet the provisions of such Act as to State funds. The amount apportioned to any State under this paragraph may be used to match the regular annual Federal-aid apportionments made to such State (including the one for the fiscal year ending June 30, 1933), and when so used such amount shall be available for expenditure in paying the share of such State in the cost of Federal-aid projects. No amounts apportioned under this paragraph shall be advanced except for work on the Federal-aid highway system performed before July 1, 1933: *Provided*, That the amounts so advanced shall be reimbursed to the Federal Government over a period of ten years, commencing with the fiscal year 1938, by making annual deductions from regular apportionments made from future authorizations for carrying out the provisions of such Act, as amended and supplemented: *Provided further*, That all contracts involving the expenditure of such amounts shall contain provisions establishing minimum rates of wages, to be predetermined by the State highway department, which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work: *And provided further*, That in the expenditure of such amounts, the limitations in the Federal Highway Act, as amended and supplemented, upon highway construction, reconstruction, and bridges within municipalities and upon payments per mile which may be made from Federal funds, shall not apply. As used in this paragraph, the term "State" includes the Territory of Hawaii. The term "highway," as defined in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, for the purposes of this paragraph only, shall be deemed to include such main State parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

(2) For expenditure in emergency construction during the fiscal year ending June 30, 1933, $16,000,000, as follows: (A) For the construction and improvement of national-forest highways, $5,000,000; (B) for the construction and maintenance of roads, trails, bridges, fire lanes, and so forth, including the same objects specified in the paragraph commencing with the words "Improvement of the national forests" under the heading "National Forest Administration" in the Agricultural Appropriation Act for the fiscal year ending June 30, 1932, approved February 23, 1931 (46 Stat. 1242), $5,000,000; (C) for the construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in the national parks and national monuments under the jurisdiction of the Department of the Interior, including areas to be established as national parks authorized under the Act of May 22, 1926 (U. S. C., Supp. V, title 16, secs. 403 to 403c), and under the Act of May 25, 1926 (U. S. C., Supp. V, title 16, secs. 404 to 404c), and national park and monument approach roads authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended, $3,000,000; (D) for construction and improvement of Indian reservation roads under the provisions of the Act approved May 26, 1928 (U. S. C., Supp. V, title 25, sec. 318a), $1,000,000; and (E) for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservations, under the provisions of section 3 of the Federal Highway Act, as amended and supplemented (U. S. C., Supp. V, title 23, secs. 3 and 3a), $2,000,000. The Secretary of Agriculture and the Secretary of the Interior, respectively, are authorized to make rules and regulations for carrying out the foregoing provisions of this section with a view to providing the maximum employment of local labor consistent with reasonable economy of construction.

(3) For the prosecution of river and harbor projects heretofore authorized, $30,000,000.

(4) For the prosecution of flood-control projects heretofore authorized, $15,500,000.

(5) For the continuation of construction of the Hoover Dam and incidental works, as authorized by the Boulder Canyon Project Act, approved December 21, 1928 (U. S. C., Supp. V, title 43, ch. 12A), $10,000,000.

(6) For expenditure by the Department of Commerce for air-navigation facilities, including equipment, $500,000.

(7) For constructing or purchasing and equipping lighthouse tenders and light vessels for the Lighthouse Service as may be specifically approved by the Secretary of Commerce, $950,000, and for establishing and improving aids to navigation and other works as may be specifically approved by the Secretary of Commerce, $2,860,000.

(8) For the engineering work of the Coast and Geodetic Survey, Department of Commerce, heretofore authorized, $1,250,000.

(9) For the construction of projects included in the report of the Federal Employment Stabilization Board, laid before the Senate January 25, 1932, which have heretofore been authorized or which do not require specific authorization, under the Bureau of Yards and Docks, Navy Department, $10,000,000, of which not to exceed $300,000 shall be available for the employment of classified personal services in the Bureau of Yards and Docks and in the field service to be engaged upon such work and to be in addition to employees otherwise provided for.

(10) For emergency construction of public building projects outside the District of Columbia (including the acquisition, where necessary, by purchase, condemnation, or otherwise, of sites and additional land for such buildings, the demolition of old buildings where necessary, and the construction, remodeling, or extension of buildings), such projects to be selected by the Secretary of the Treasury and the Postmaster General from the allocated public building projects specified in House Document Numbered 788, Seventy-first Congress, third session, $100,000,000. Such projects shall be carried out within the estimated limits of cost specified in such document, and in selecting such projects preference shall be given to places where Government facilities are housed in rented buildings under leases which will expire on or before July 1, 1934, or which may be terminated on or prior to that date by the Government.

(11) For the construction and installation at military posts of such buildings and utilities and appurtenances thereto as may be necessary, $15,164,000, as follows:

Albrook Field, Canal Zone: Quartermaster maintenance building, $20,000; post exchange, theater, and gymnasium, completion of, $42,000.

Barksdale Field, Louisiana: Noncommissioned officers' quarters, $252,000; officers' quarters, $609,000; barracks, $474,000; hospital, completion of, $225,000; garage, completion of, $30,000; quartermaster warehouse, completion of, $15,000.

William Beaumont General Hospital, Texas: Noncommissioned officers' quarters, $7,000; warehouse, $15,000.

Fort Benning, Georgia: Barracks, $650,000.

Fort Bliss, Texas: Noncommissioned officers' quarters, $50,000; officers' quarters, $150,000.

Bolling Field, District of Columbia: Noncommissioned officers' quarters, $54,000; dispensary, completion of, $30,000; post exchange, theater, and gymnasium, completion of, $45,000; officers' mess, $50,000; enlargement of central heating plant to provide for quarters area, $95,000.

Fort Bragg, North Carolina: Barracks, completion of, $40,000; noncommissioned officers' quarters, $160,000.

Carlisle Barracks, Pennsylvania: Heating plant, $200,000.

Chanute Field, Illinois: Noncommissioned officers' quarters, $137,000; central heating plant for technical and quarters area, $200,000.

Camp Devens, Massachusetts: Roads and sidewalks, $75,000; service club, $30,000; post exchange and gymnasium, $50,000.

Fort Douglas, Utah: Noncommissioned officers' quarters, $15,000.

Dryden, Texas: Barracks, $20,000.

Duncan Field, Texas: Quartermaster warehouse, $40,000; quartermaster maintenance building, $20,000; garage, $40,000; fire and guard house, $25,000.

Fort Du Pont, Delaware: Noncommissioned officers' quarters, $60,000.

Edgewood Arsenal, Maryland: Noncommissioned officers' quarters, $70,000.

Fitzsimons General Hospital, Colorado: Gymnasium, recreation, and social hall, $150,000.

Hamilton Field: Officers' quarters, $215,000; noncommissioned officers' quarters, $120,000.

Fort Hamilton, New York: Noncommissioned officers' quarters, $100,000.

Fort Benjamin Harrison, Indiana: Noncommissioned officers' quarters, $120,000.

Hensley Field, Texas: Noncommissioned officers' quarters, $8,000; officers' quarters, $30,000; roads, utilities, and improvement of flying field, $25,000; replacement of pumping plant, $3,000; sewage-disposal plant, $3,000.

Holabird Quartermaster Depot, Maryland: Hospital, $120,000.

Fort Sam Houston, Texas: Noncommissioned officers' quarters, $150,000; officers' quarters, $350,000.

Fort Howard, Maryland: Hospital, $125,000.

Fort Hoyle, Maryland: Noncommissioned officers' quarters, $70,000.

Fort Humphreys, Virginia: Officers' quarters, $150,000.

Fort Huachuca, Arizona: Post exchange, gymnasium, and service club, $100,000.

Fort Jay, New York: Noncommissioned officers' quarters, $130,000; barracks, completion of, $70,000; Officers' quarters, $125,000; nurses' quarters, completion of, $35,000.

Jefferson Barracks, Missouri: Noncommissioned officers' quarters, $65,000; additions to kitchens and mess halls, $55,000.

Camp Knox, Kentucky: Hospital, $200,000.

Langley Field, Virginia: Central heating plants for quarters area, $60,000; quartermaster maintenance building, $20,000; fire house, $20,000; barracks, medical detachment, $30,000; garage, completion of, $15,000; magazine, completion of, $10,000.

Fort Lawton, Washington: Noncommissioned officers' quarters, $30,000.

Fort Leavenworth, Kansas: Nurses' quarters, $60,000.

Letterman General Hospital, California: Two wards, $150,000.

Fort Lewis, Washington: Barracks, completion of, $30,000; water main, $30,000; noncommissioned officers' quarters, $75,000; officers' quarters, $65,000.

Fort Logan, Colorado: Noncommissioned officers' quarters, $53,000.

Fort McClellan, Alabama: Headquarters, $50,000; recreation hall, $35,000; gymnasium, $45,000.

Fort McPherson, Georgia: Nurses' quarters, $70,000; contagious ward for hospital, $70,000.

Maxwell Field, Alabama: Officers' quarters, $940,000; officers' mess, $55,000.

March Field, California: Barracks for medical detachment, $25,000; contagious ward for hospital, $12,000; bakery, $15,000; laundry, $60,000; enlisted men's service club, $50,000; officers' mess, $50,000; theater, $40,000.

Fort Mason, California: Officers' quarters, $110,000.

Fort Meade, South Dakota: Riding hall, $25,000.

Fort George G. Meade, Maryland: Noncommissioned officers' quarters, $150,000; officers' quarters, $50,000.

Mitchel Field, New York: Noncommissioned officers' quarters, $118,000; bakery, $15,000; incinerator, $10,000; enlisted men's service club, $50,000; theatre, $40,000; sewage-disposal plant, $40,000; fence, $31,000; quartermaster gasoline storage, $3,000; magazine, $15,000; officers' mess, $50,000; coal storage and handling system, $70,000; roads, walks, and surface-drainage system, $86,000.

Fort Monmouth, New Jersey: Addition to hospital, $75,000; noncommissioned officers' quarters, $170,000; band barracks, $35,000.

Fort Myer, Virginia: Barracks, $100,000.

Fort Oglethorpe, Georgia: Noncommissioned officers' quarters, $120,000.

Fort Ontario, New York: Noncommissioned officers' quarters, $50,000.

Plattsburg Barracks, New York: Additions to barracks, $25,000; barracks, $255,000.

Pope Field, North Carolina, for the Air Corps troops: Barrack, $140,000; noncommissioned officers' quarters, $84,000; officers' quarters, $140,000.

Post Field, Oklahoma, for Air Corps troops: Barracks, $140,000; noncommissioned officers' quarters, $84,000; officers' quarters, $140,000.

Presidio of San Francisco, California: Noncommissioned officers' quarters, $60,000; addition to headquarters, $50,000.

Randolph Field, Texas: Barracks, completion of, $56,000; gymnasium, completion of, $70,000; roads and utilities, $243,000; completion of chapel and school, $50,000.

Raritan Arsenal, New Jersey: Noncommissioned officers' quarters, $75,000.

Walter Reed General Hospital, District of Columbia: Noncommissioned officers' quarters, $120,000; addition to nurses' quarters, $300,000.

Rock Island Arsenal, Illinois: Noncommissioned officers' quarters, $15,000.

Rockwell Field, California: Noncommissioned officers' quarters, $234,000; officers' quarters, $266,000.

Fort Winfield Scott, California: Noncommissioned officers' quarters, $140,000.

Selfridge Field, Michigan: Gymnasium and theater, $80,000; garage, $40,000; quartermaster maintenance building, $20,000; post exchange, $45,000; officers' mess, $60,000; enlisted men's service club, $50,000; bakery, $15,000; roads and utilities, $75,000.

Fort Sill, Oklahoma: Barracks, $875,000; noncommissioned officers' quarters, $72,000; officers' quarters, $75,000; gun sheds, $48,000; stables, $30,000; vehicle shed, $10,000.

Fort Snelling, Minnesota: Quartermaster warehouse, $65,000; barracks, medical detachment, $40,000.

Fort Totten, New York: Noncommissioned officers' quarters, $30,000.

Fort Wadsworth, New York: Officers' quarters, $75,000.

Fort Francis E. Warren, Wyoming: Noncommissioned officers' quarters, $120,000.

West Point, New York: For addition to hospital, $250,000; barracks for service detachment, $250,000.

Fort George Wright, Washington: Noncommissioned officers' quarters, $60,000.

(b) No part of the sum appropriated by this section, except the amount for expenditure under paragraph (1) or (2) of subsection (a), shall be expended if the Secretary of the Treasury certifies to the President that the amount necessary for such expenditure is not available and can not be obtained upon reasonable terms.

SEC. 302. There is hereby authorized to be appropriated not to exceed $7,436,000, to be expended for the construction and installation at military posts, and at airports and landing fields, of such technical buildings and utilities and appurtenances thereto as may be necessary, as follows:

Albrook Field, Canal Zone: Technical buildings and installations, completion of, $293,000; gasoline-storage system, completion of, $25,000.

Barksdale Field, Louisiana: Hangars, $350,000; headquarters and operations buildings, completion of, $89,200; gasoline-storage system, completion of, $20,000; paved aprons, $100,000.

Fort Benning, Georgia: Hangar, combination, $88,000; gasoline-storage system, $10,000; improvement of landing field and building area, $25,000; heating plant, $20,000; paved aprons, $20,000.

Benton Field, Alameda, California: Completion of shops, including assembly and test hangars, dope storage, heating and engine test block, $605,500; depot warehouse, $500,000; administration building, $80,000; railroad spur, $8,000; quartermaster warehouse, maintenance and salvage building, $35,000; garage, $48,000; fire and guard house, $30,000; pier, $125,000; paint, oil, and dope storage and oil reclamation, $35,000; gasoline-storage system, $20,000; paved aprons, $80,000.

Fort Bliss, Texas: Operations building, $10,000.

Bolling Field, District of Columbia: Paved aprons, completion of, $22,800; heating plant for technical area, completion of, $78,000; field shops, completion of, $6,000; improvement of landing field and building area, $615,000.

Chanute Field, Illinois: Hangars, $170,000; paved aprons, $30,000; improvement of landing field and technical area, $15,000; enlargement of central heating plant and steam lines, $185,000.

Dryden, Texas: Paved aprons and hangar floor, $15,000.

Duncan Field, Texas: Depot administration building, $60,000; gasoline-storage system, completion of, $15,000.

Hatbox Field, Muskogee, Oklahoma: Roofing and sidewalls for hangar, and paved aprons, $15,000.

Hamilton Field, California: Headquarters and operations building, to complete, $35,000; improvement of landing field and building area, $120,000.

Langley Field, Virginia: Remodeling two hangars into shops, and for ceilings in and additions to hangars, $91,000; gasoline-storage system, completion of, $21,000; bomb storage, $19,000; improvement of landing field and building area, $25,000; machine-gun range, $6,000.

Luke Field, Hawaiian Department: Air depot, plane overhaul and assembly, $200,000.

March Field, California: Gasoline-storage system, completion of, $10,000; aircraft-bomb storage, $5,000.

Maxwell Field, Alabama: Squadron officers' school and/or additions to school building, $150,000; gasoline-storage system, $10,200; improvement of landing field, $100,000; camera obscura, $4,000; bomb storage, $13,000; machine-gun and bombing range, $6,000.

Mitchell Field, New York: Improvement of landing field, $80,000; gasoline-storage system, completion of, $5,000; bomb storage, $13,000; machine-gun range, $2,000.

Panama Canal Zone: Improvement of emergency landing fields at Gamboa Reach and Camp Gaillard, $20,000.

Patterson Field, Ohio: Hangars, headquarters and operations, and heating plant, completion of, $251,300; improvement of landing field and building area, $5,000; gasoline-storage system, completion of, $10,000.

Pope Field, North Carolina: Hangar—balloon-dismantle, transfer, and reerection of, $110,000; paved aprons, $15,000; paint, oil, and dope storage, $5,000.

Post Field, Oklahoma: Hangar—balloon-dismantle, transfer, and reerection of, $110,000; paved aprons, $15,000.

Randolph Field, Texas: Engine-test stands and building, $40,000; oil storage, $15,000; gasoline-storage system, completion of, $10,000; aerial target range, $20,000.

Rockwell Field, California: Hangars, $576,000; Air Corps warehouse, $80,000; operations building, $20,000; remodeling a permanent building for radio, parachute, and armament building, $20,000; administration building, $80,000; photographic building, $36,000; paint, oil, and dope storage, $15,000; gasoline-storage system, $30,000; paved aprons, $95,000; central heating plants, $100,000; improvement of landing field and technical building area, $100,000; camera obscura, $5,000; bomb storage, $15,000.

Schoen Field, Indiana: Grading landing field, $5,000.

Scott Field, Illinois: Hangar, $90,000; headquarters and operations buildings, $80,000; barracks, $271,000; radio building, $10,000; photo building, $36,000; gas plant and chemical storage, $50,000; central heating plants, $145,000; gasoline-storage system, $10,000; paved aprons, $40,000; improvement of landing field and building area, $50,000; machine-gun butts, $3,000.

Selfridge Field, Michigan: Gasoline-storage system, completion of, $10,000.

Wheeler Field, Hawaiian Department: Gasoline-storage system, completion of $31,000; paved aprons, $38,000.

Sec. 303. No money shall be available for expenditure under this title in connection with a project in the District of Columbia, except as provided in section 301 (a) (11) and in section 302.

Sec. 304. The last paragraph of section 6 of the Federal Highway Act, approved November 9, 1921, as amended and supplemented (U. S. C., title 23, sec. 6), is hereby amended to read as follows:

"Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its system of primary or interstate and secondary or intercounty highways equal to 7 per centum of the total mileage of such State, as required by this Act, said State, through its State highway department, by and with the approval of the Secretary of Agriculture, is hereby authorized to increase the mileage of the primary or interstate and secondary or intercounty systems by additional mileage equal to not more than 1 per centum of said total mileage of such State, and thereafter to make like increases in the mileage of said systems whenever provision has been made for the completion and maintenance of 90 per centum of the mileage of said systems previously authorized in accordance herewith."

Sec. 305. After the date of the enactment of this Act, in the acquisition of any land or site for the purposes of section 301 (a) (10):

(1) The period of solicitation of proposals by public advertisement shall be ten days in lieu of twenty days;

(2) In any case in which such site or land is to be acquired by condemnation, the provisions of section 355 of the Revised Statutes, as amended, shall not apply; and

(3) Notwithstanding the provisions of section 1 of the Act entitled "An Act to expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain," approved February 26, 1931 (U. S. C., Supp. V, title 40, sec. 258a), in any case in which any land or any interest therein is to be acquired by condemnation, the Secretary of the Treasury, through the Attorney General, may, prior to the institution of condemnation proceedings, file with the clerk of the

district court of the district in which such land is located a declaration of taking, containing the matters required by such section to be included in a declaration of taking. The declaration of taking shall be accompanied by the deposit with such clerk, to the use of the parties who may be found to be entitled thereto, of the amount of the estimated compensation stated in the declaration. As soon as practicable after the filing of such declaration of taking, the Secretary of the Treasury shall cause to be posted in a prominent place upon the land a notice reciting (A) that the land or the interest therein is taken by the United States for public use, (B) that a declaration of taking in respect of such land or interest therein has been filed with the clerk of the court of the district, and (C) that there has been deposited with such clerk, to the use of the parties who may be found to be entitled thereto, the estimated just compensation for the land or interest therein taken. The Secretary of the Treasury shall give written notice similar to the posted notice, by personal service in the case of actual occupants of the premises or, if with reasonable diligence such personal service can not be made, he shall send such notice by registered mail directed to the premises, and he shall send notice by registered mail directed to their last known address in the case of all parties who the Secretary ascertains have or may have, an interest in such land, and he may give such additional notice by newspaper publication or otherwise as he deems necessary. Upon posting notice on the land, title to the land or interest therein shall vest in the United States, and the right to just compensation therefor shall vest in the parties entitled thereto. The Secretary of the Treasury shall cause notice to be personally served upon, or if with reasonable diligence such service can not be made, to be sent by registered mail to, actual occupants of the premises, setting a time (not earlier than 20 days after the service or sending of such notice) at which such parties shall surrender possession, and at the end of such time, the right to possession shall vest in the United States. The Secretary of the Treasury may designate any person to serve any notice under the preceding provisions of this subsection and such person shall have power to enter upon such land for the purpose of posting notice or to make personal service of notice. If any such party fails or refuses so to surrender possession, upon summary petition for an order to surrender possession filed in such district court by or on behalf of the Secretary of the Treasury, the court may, by writ of assistance or other process, order the surrender of possession. A petition in condemnation shall be filed in such district court as soon after the filing of the declaration of taking as practicable. In any such condemnation proceeding, no further declaration of taking shall be required, and the provisions of section 1 of such Act of February 26, 1931, authorizing the court to fix the time when parties in possession shall be required to surrender possession, shall not apply. If such petition for condemnation is not filed within a reasonable time after the filing of such declaration of taking, any person entitled to just compensation in respect of the property so taken shall be entitled to sue the United States in the court in which such declaration of taking was filed. The procedure in such suit shall be the same as in suits against the United States founded upon contract, except that such suit may be heard even if the amount of the claim is greater than $10,000 and except that the procedure for the ascertainment of the amount of just compensation shall be the same as such procedure in condemnation proceedings. If the petition for condemnation is filed prior to the time the commissioners in condemnation, jurors, or other persons charged with the duty of valuing the property are empaneled, such suit shall be dismissed, except that such suit and the condemnation proceedings may, in the discretion of the court, and under rules prescribed by it, be consolidated to such extent as the court may deem practicable. In any suit authorized to be brought under this subsection or in any condemnation proceeding involving land acquired in accordance with this subsection, the court shall enter judgment against the United States in favor of the parties entitled for the sum or sums awarded as just compensation, respectively, for the land or interest therein taken for the use of the United States and such judgment shall be paid out of the sums deposited with the court and such additional sums as may be awarded shall be paid in the same manner as sums awarded in judgments in cases in which the United States has consented to be sued. The provisions of such Act of February 26, 1931, except as modified by this subsection, shall apply to all such suits or condemnation proceedings. The provisions of this subsection shall not be construed to be in substitution for, but shall be supplemental to, any method of acquiring land or interests therein provided in existing law.

SEC. 306. In the construction of post offices and of buildings for post offices and other offices provided for in section 301 (a) (10), the Secretary of the Treasury with the cooperation of the Postmaster General may use such standard plans (heretofore or hereafter prepared) as may be most adaptable to the particular building to be constructed.

SEC. 307. All contracts let for construction projects pursuant to this title shall be subject to the conditions that no convict labor shall be directly employed on any such project, and that (except in executive and administrative positions), so far as practicable, no individual employed on any such project shall be permitted to work more than 30 hours in any one week, and that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents.

SEC. 308. For each fiscal year beginning with the fiscal year 1934, there is authorized to be appropriated, for the purposes of the sinking fund provided in section 6 of the Victory Liberty Loan Act, as amended, in addition to amounts otherwise appropriated, an amount equal to 2½ per centum of the aggregate amount of the expenditures made, out of appropriations made or authorized in this title, on or after the date of the enactment of this Act and on or before the last day of the fiscal year for which the appropriation is made.

JNO. N. GARNER,
Speaker of the House of Representatives.
CHARLES CURTIS,
Vice President of the United States and President of the Senate.

I certify that this Act originated in the House of Representatives.

SOUTH TRIMBLE,
Clerk.

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72D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1760

EMERGENCY RELIEF BILL

JULY 6, 1932.—Ordered to be printed

Mr. CRISP, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H. R. 12445]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 12445) to relieve destitution, to broaden the lending powers of the Reconstruction Finance Corporation, and to create employment by authorizing and expediting a public-works program and providing a method of financing such program, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

Amendment numbered 1:

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this act may be cited as the "Emergency relief and construction act of 1932."

TITLE I—RELIEF OF DESTITUTION

SECTION 1. (a) The Reconstruction Finance Corporation is authorized and empowered to make available out of the funds of the corporation the sum of $300,000,000, under the terms and conditions hereinafter set forth, to the several States and Territories, to be used in furnishing relief and work relief to needy and distressed people and in relieving the hardship resulting from unemployment, but not more than 15 per cent of such sum shall be available to any one State or Territory. Such sum of $300,000,000 shall, until the expiration of two years after the date of enactment of this act, be available for payment to the governors of the several States and Territories for the purposes of this section, upon application therefor by them in accordance with subsection (c), and upon approval of such applications by the corporation.

(b) All amounts paid under this section shall bear interest at the rate of 3 per centum per annum, and, except in the case of Puerto Rico and the Territory of Alaska, shall be reimbursed to the corporation, with interest thereon at the rate of 3 per centum per annum, by making annual deductions, beginning with the fiscal year 1935, from regular apportionments made from future Federal authorizations in aid of the States and Territories for the construction of highways and rural post roads, of an amount equal to one-fifth of the share which such State or Territory would be entitled to receive under such apportionment, except for the provisions of this section, or of an amount equal to one-fifth of the amounts so paid to the governor of such State or Territory pursuant to this section and all accrued interest thereon to the date of such deduction, whichever is the lesser, until the sum of such deductions equals the total amounts paid under this section and all accrued interest thereon. Whenever any such deduction is made, the Secretary of the Treasury shall immediately pay to the corporation an amount equal to the amount so deducted. If any State or Territory shall, within two years after the date of enactment of this act, enter into an agreement with the corporation for the repayment to the corporation of the amounts paid under this section to the governor of such State or Territory, with interest thereon as herein provided, in such installments and upon such terms as may be agreed upon, then the deduction under this subsection shall not be made unless such State or Territory shall be in default in the performance of the terms of such agreement. In the case of a default by the State or Territory in any such agreement, the agreement shall thereupon be terminated and reimbursement of the unpaid balance of the amount covered by such agreement shall be made by making annual deductions in the manner above provided (beginning with the fiscal year next following such default) from regular apportionments made to such State or Territory from future Federal authorizations in aid of the States and Territories for the construction of highways and rural post roads. Before any amount is paid under this section to the Governor of Puerto Rico or of the Territory of Alaska, Puerto Rico or the Territory of Alaska shall enter into an agreement with the corporation for the repayment of such amount with interest thereon as herein provided, in such installments and upon such terms and conditions as may be agreed upon.

(c) The governor of any State or Territory may from time to time make application for funds under this section, and in each application so made shall certify the necessity for such funds and that the resources of the State or Territory, including moneys then available and which can be made available by the State or Territory, its political subdivisions, and private contributions, are inadequate to meet its relief needs. All amounts paid to the governor of a State or Territory under this section shall be administered by the governor, or under his direction, and upon his responsibility. The governor shall file with the corporation and with the auditor of the State or Territory (or, if there is no auditor, then with the official exercising comparable authority) a statement of the disbursements made by him under this section.

(d) Nothing in this section shall be construed to authorize the corporation to deny an otherwise acceptable application under this section because of constitutional or other legal inhibitions or because the State or Territory has borrowed to the full extent authorized by law. Whenever an application under this section is approved by the corporation in whole or in part,

the amount approved shall be immediately paid to the governor of the State or Territory upon delivery by him to the corporation of a receipt therefor stating that the payment is accepted subject to the terms of this section.

(e) Any portion of the amount approved by the corporation for payment to the governor of a State or Territory shall, at his request, and with the approval of the corporation, l paid to any municipality or political subdivision of such State or Territory if (1) the governor makes as to such municipality or political subdivision a like certificate as provided in subsection (c) as to the State or Territory, and (2) such municipality or political subdivision enters into an agreement with the corporation for the repayment to the corporation of the amount so paid, at such times, at such rates of interest, and upon such other terms and conditions, as may be agreed upon between the corporation and such municipality or political subdivision. The amount paid to any municipality or political subdivision under this subsection shall not be included in any amounts reimbursable to the corporation under subsection (b) of this section.

(f) As used in this section the term "Territory" means Alaska, Hawaii, and Puerto Rico.

TITLE II—AMENDMENTS TO RECONSTRUCTION FINANCE CORPORATION ACT

SEC. 201. Section 5 of the Reconstruction Finance Corporation act is amended to read as follows:

"SEC. 5. (a) To aid in financing agriculture, commerce, industry, and housing, including facilitating the exportation of agricultural and other products, and to assist in the relief of unemployment, the corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this act as it may determine, to any person when in the opinion of the board of directors of the corporation such person is unable to obtain funds upon reasonable terms through banking channels. Any receiver of any national bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same.

"(b) In the exercise of its powers under this section the corporation shall so far as practicable give preference to—

"(1) loans to, or contracts with (and the corporation is hereby empowered to make such loans and contracts), States, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political subdivisions of States, public corporations, boards and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities: Provided, That nothing herein contained shall be construed to prohibit the Reconstruction Finance Corporation, in carrying out the provisions of this paragraph, from purchasing securities having a maturity of more than ten years;

"(2) loans to corporations formed wholly for the purpose of providing housing for families of low income, or for reconstruction of slum areas, which are regulated by State or municipal law as to rents, charges, capital structure, rate of return, and areas and methods of operation, to

aid in financing projects undertaken by such corporations which are self-liquidating in character;

"(3) *loans to private corporations to aid in carrying out the construction, replacement or improvement, of bridges, tunnels, docks, viaducts, waterworks, canals, and markets, devoted to public use and which are self-liquidating in character;*

"(4) *loans to private limited dividend corporations to aid in the protection and development of forests and other renewable natural resources, which are regulated by a State or political subdivision of a State and are self-liquidating in character; and*

"(5) *loans to aid in financing the construction of any publicly owned bridge to be used for railroad, railway, and highway uses, the construction cost of which will be returned in part by means of tolls, fees, rents, or other charges, and the remainder by means of taxes imposed pursuant to State law enacted before the date of enactment of the emergency relief and construction act of 1932; and the Reconstruction Finance Corporation is further authorized and empowered to purchase bonds of any State, municipality, or other public body or agency issued for the purpose of financing the construction of any such bridge irrespective of the dates of maturity of such bonds.*

"*For the purposes of this subdivision a project shall be deemed to be self-liquidating if such project will be made self-supporting and financially solvent and if the construction cost thereof will be returned within a reasonable period by means of tolls, fees, rents, or other charges, or by such other means (other than by taxation) as may be prescribed by the statutes which provide for the project. All loans and contracts made by the Reconstruction Finance Corporation in respect of projects of the character specified in paragraphs (1) to (5) of this subdivision shall be subject to the conditions that no convict labor shall be directly employed on any such project, and that (except in executive and administrative positions), so far as practicable, no individual employed on any such project shall be permitted to work more than 30 hours in any one week, and that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents. The provisions of this subdivision shall apply with respect to projects in Puerto Rico and the Territories to the same extent as in the case of projects in the several States, and as used in this subdivision the term "States" includes Puerto Rico and the Territories.*

"(c) *The Reconstruction Finance Corporation shall submit monthly to the President and to the Senate and the House of Representatives (or the Secretary of the Senate and the Clerk of the House of Representatives, if those bodies are not in session) a report of its activities and expenditures under this section, together with a statement showing the names of the borrowers to whom loans and advances were made, and the amount involved in each case, except that such statement shall not show the names of borrowers of the classes to whom loans could be made under this section before its amendment by the emergency relief and construction act of 1932, unless the loan or advance was made under subdivision (b) of this section.*

"(d) *In order that the surpluses of agricultural products which have accumulated in public and private warehouses and elevators may not have a depressing effect upon current prices of such products, the corporation is authorized and directed to make loans under this section, in such amounts as may in its judgment be necessary, for the purpose of financing* *sales of such surpluses in the markets of foreign countries in which such sales can not be financed in the normal course of commerce; but no such sales shall be financed by the corporation if, in its judgment, such sales will affect adversely the world markets for such products.*

"(*e*) *The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of this act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe.*

"(*f*) *All loans made under this section, and all contracts of the character described in paragraph (1) of subdivision (b), shall be fully and adequately secured, except that in the case of loans (other than loans of the character described in paragraph (1) of subdivision (b)) to States, political subdivisions thereof, municipalities, instrumentalities or agencies of one or more States or municipalities or political subdivisions thereof, or public corporations, the loan may be made if, in the opinion of the board of directors of the corporation, the payment of the interest on the loan and the payment of the principal of the loan are adequately assured. The corporation, under such conditions as it shall prescribe may take over or provide for the administration and liquidation of any collateral accepted by it as security for such loans. Such loans may be made directly upon promissory notes or by way of discount or rediscount of obligations tendered for the purpose, or otherwise in such form and in such amount and at such interest or discount rates as the corporation may approve: Provided, That no loans or advances (except loans under subdivision (d)) shall be made upon foreign securities or foreign acceptances as collateral or for the purpose of assisting in the carrying or liquidation of such foreign securities and foreign acceptances. In no case shall the aggregate amount advanced under this section to any one person (including, in the case of a corporation, its subsidiary or affiliated organizations) exceed at any one time 2½ per centum of (1) the authorized capital stock of the Reconstruction Finance Corporation plus (2) the aggregate amount of bonds of the corporation authorized to be outstanding when the capital stock is fully subscribed.*

"(*g*) *Each such loan may be made for a period not exceeding three years, and the corporation may from time to time extend the time of payment of any such loan, through renewal, substitution of new obligations.*

or otherwise, but the time for such payment shall not be extended beyond five years from the date upon which such loan was made originally: Provided, That loans or contracts of the character described in subdivision (b) may be made for a period not exceeding ten years: Provided further, That loans or contracts of the character described in paragraph (1) or (5) of subdivision (b) may be made for a period exceeding ten years when it is the judgment of the board of directors of the corporation that it is necessary to purchase securities as provided in such paragraphs and that it is not practicable to require the reimbursement of the corporation, within ten years, through the repurchase or payment of such securities, or in any other manner.

"(h) The corporation may make loans under this section at any time prior to January 23, 1933; and the President may from time to time postpone such date of expiration for such additional period or periods as he may deem necessary, not beyond January 22, 1934.

"(i) No fee or commission shall be paid by any applicant for a loan under the provisions of this section in connection with any such application or any loan made or to be made under this section, and the agreement to pay or payment of any such fee or commission shall be unlawful.

"(j) No loan shall be made to a railroad or to a receiver of a railroad except on the approval of the Interstate Commerce Commission. Any railroad may obligate itself in such form as shall be prescribed and otherwise comply with the requirements of the Interstate Commerce Commission and the corporation with respect to the deposit or assignment of security hereunder, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification, other than such as may be imposed by the Interstate Commerce Commission and the corporation under the provisions of this section.

"(k) As used in this section and section 8, the term 'person' means an individual, a trust or estate, a partnership, a corporation (public, quasi-public, or private), an association, a joint-stock company, a State, a political subdivision of a State, a municipality, and any instrumentality or agency of one or more States or municipalities or political subdivisions thereof. As used in this section and section 15 the term 'State' includes Alaska, Hawaii, and Puerto Rico.

"(l) No loans shall be made under this section to a State, a political subdivision of a State, a municipality, an instrumentality or agency of one or more States or municipalities or political subdivisions thereof, or a public corporation, except (1) loans to assist in the relief of unemployment, or (2) loans of the character specified in paragraph (1) of subdivision (b).

"(m) The Reconstruction Finance Corporation may make such rules and regulations as may be necessary to carry out the provisions of this section."

SEC. 202. Section 8 of the Reconstruction Finance Corporation act is amended to read as follows:

"SEC. 8. In order to enable the corporation to carry out the provisions of this act, the Treasury Department, the Federal Farm Loan Board, the Comptroller of the Currency, the Federal Reserve Board, the Federal reserve banks, ~~and the~~ Interstate Commerce Commission are hereby authorized, under such conditions as they may prescribe, to make available to the corporation, in confidence, such reports, records, or other information as they may have available relating to the condition of persons

with respect to whom the corporation has had or contemplates having transactions under this act, or relating to persons whose obligations are offered to or held by the corporation as security for loans under this act, and to make, through their examiners or other employees for the confidential use of the corporation, examinations of applicants for loans. Every applicant for a loan under this act shall, as a condition precedent thereto, consent to such examination as the corporation may require for the purposes of this act and that reports of examinations by constituted authorities may be furnished by such authorities to the corporation upon request therefor."

SEC. 203. (a) Section 9 of the Reconstruction Finance Corporation act is amended by striking out the words "three times" each time such words appear in such section and inserting in lieu thereof "six and three-fifths times."

(b) The first proviso of section 2 of the Reconstruction Finance Corporation act is amended by inserting after "as set out in section 9" the following: "(as in force prior to its amendment by the emergency relief and construction act of 1932)," but the Secretary of Agriculture is directed to continue making loans to farmers under the provisions of such section 2.

TITLE III—PUBLIC WORKS

SEC. 301. (a) For the purpose of providing for emergency construction of certain authorized public works with a view to increasing employment and carrying out the policy declared in the employment stabilization act of 1931, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $322,224,000, which shall be allocated as follows:

(1) For expenditure in emergency construction on the Federal-aid highway system, $120,000,000. Such sum shall be apportioned by the Secretary of Agriculture to the several States by the method provided in section 21 of the Federal highway act, as amended and supplemented ~~(~~U. S. C., title 23, sec. 21). The amounts apportioned to the States shall be available as a temporary advance of funds to meet the provisions of such act as to State funds. The amount apportioned to any State under this paragraph may be used to match the regular annual Federal-aid apportionments made to such State (including the one for the fiscal year ending June 30, 1933), and when so used such amount shall be available for expenditure in paying the share of such State in the cost of Federal-aid projects. No amounts apportioned under this paragraph shall be advanced except for work on the Federal-aid highway system performed before July 1, 1933: Provided, That the amounts so advanced shall be reimbursed to the Federal Government over a period of ten years, commencing with the fiscal year 1938, by making annual deductions from regular apportionments made from future authorizations for carrying out the provisions of such act, as amended and supplemented: Provided further, That all contracts involving the expenditure of such amounts shall contain provisions establishing minimum rates of wages, to be predetermined by the State highway department, which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work: And provided further, That in the expenditure of such amounts, the limitations in the Federal highway act, as amended and supplemented, upon highway construction, reconstruction~~,~~ and

bridges within municipalities and upon payments per mile which may be made from Federal funds, shall not apply. As used in this paragraph, the term "State" includes the Territory of Hawaii. The term "highway," as defined in the Federal highway act, approved November 9, 1921, as amended and supplemented, for the purposes of this paragraph only, shall be deemed to include such main State parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

(2) For expenditure in emergency construction during the fiscal year ending June 30, 1933, $16,000,000, as follows: (A) For the construction and improvement of national-forest highways, $5,000,000; (B) for the construction and maintenance of roads, trails, bridges, fire lanes, and so forth, including the same objects specified in the paragraph commencing with the words "Improvement of the national forests" under the heading "National Forest Administration" in the Agricultural appropriation act for the fiscal year ending June 30, 1932, approved February 23, 1931 (46 Stat. 1242), $5,000,000; (C) for the construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in the national parks and national monuments under the jurisdiction of the Department of the Interior, including areas to be established as national parks authorized under the act of May 22, 1926 (U. S. C., Supp. V, title 16, secs. 403 to 403c), and under the act of May 25, 1926 (U. S. C., Supp. V, title 16, secs. 404 to 404c), and national park and monument approach roads authorized by the act of January 31, 1931 (46 Stat. 1053), as amended, $3,000,000; (D) for construction and improvement of Indian reservation roads under the provisions of the act approved May 26, 1928 (U. S. C., Supp. V, title 25, sec. 318a), $1,000,000; and (E) for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservations, under the provisions of section 3 of the Federal highway act, as amended and supplemented (U. S. C., Supp. V, title 23, secs. 3 and 3a), $2,000,000. The Secretary of Agriculture and the Secretary of the Interior, respectively, are authorized to make rules and regulations for carrying out the foregoing provisions of this section with a view to providing the maximum employment of local labor consistent with reasonable economy of construction.

(3) For the prosecution of river and harbor projects heretofore authorized, $30,000,000.

(4) For the prosecution of flood-control projects heretofore authorized, $15,500,000.

(5) For the continuation of construction of the Hoover Dam and incidental works, as authorized by the Boulder Canyon project act, approved December 21, 1928 (U. S. C., Supp. V, title 43, ch. 12A), $10,000,000.

(6) For expenditure by the Department of Commerce for air-navigation facilities, including equipment, $500,000.

(7) For constructing or purchasing and equipping lighthouse tenders and light vessels for the Lighthouse Service as may be specifically approved by the Secretary of Commerce, $950,000, and for establishing and improving aids to navigation and other works as may be specifically approved by the Secretary of Commerce, $2,860,000.

(8) For the engineering work of the Coast and Geodetic Survey, Department of Commerce, heretofore authorized, $1,250,000.

(9) For the construction of projects included in the report of the Federal Employment Stabilization Board, laid before the Senate January 25, 1932, which have heretofore been authorized or which do not require specific authorization, under the Bureau of Yards and Docks, Navy Department, $10,000,000, of which not to exceed $300,000 shall be available for the employment of classified personal services in the Bureau of Yards and Docks and in the field service to be engaged upon such work and to be in addition to employees otherwise provided for.

(10) For emergency construction of public building projects outside the District of Columbia (including the acquisition, where necessary, by purchase, condemnation, or otherwise, of sites and additional land for such buildings, the demolition of old buildings where necessary, and the construction, remodeling, or extension of buildings), such projects to be selected by the Secretary of the Treasury and the Postmaster General from the allocated public building projects specified in House Document Numbered 788, Seventy-first Congress, third session, $100,000,000. Such projects shall be carried out within the estimated limits of cost specified in such document, and in selecting such projects preference shall be given to places where Government facilities are housed in rented buildings under leases which will expire on or before July 1, 1934, or which may be terminated on or prior to that date by the Government.

(11) For the construction and installation at military posts of such buildings and utilities and appurtenances thereto as may be necessary, $15,164,000, as follows:

Albrook Field, Canal Zone: Quartermaster maintenance building, $20,000; post exchange, theater, and gymnasium, completion of, $42,000.

Barksdale Field, Louisiana: Noncommissioned officers' quarters, $252,000; officers' quarters, $609,000; barracks, $474,000; hospital, completion of, $225,000; garage, completion of, $30,000; quartermaster warehouse, completion of, $15,000.

William Beaumont General Hospital, Texas: Noncommissioned officers' quarters, $7,000; warehouse, $15,000.

Fort Benning, Georgia: Barracks, $650,000.

Fort Bliss, Texas: Noncommissioned officers' quarters, $50,000; officers' quarters, $150,000.

Bolling Field, District of Columbia: Noncommissioned officers' quarters, $54,000; dispensary, completion of, $30,000; post exchange, theater, and gymnasium, completion of, $45,000; officers' mess, $50,000; enlargement of central heating plant to provide for quarters area, $95,000.

Fort Bragg, North Carolina: Barracks, completion of, $40,000; noncommissioned officers' quarters, $160,000.

Carlisle Barracks, Pennsylvania: Heating plant, $200,000.

Chanute Field, Illinois: Noncommissioned officers' quarters, $137,000; central heating plant for technical and quarters area, $200,000.

Camp Devens, Massachusetts: Roads and sidewalks, $75,000; service club, $30,000; post exchange and gymnasium, $50,000.

Fort Douglas, Utah: Noncommissioned officers' quarters, $15,000.

Dryden, Texas: Barracks, $20,000.

Duncan Field, Texas: Quartermaster warehouse, $40,000; quartermaster maintenance building, $20,000; garage, $40,000; fire and guard house, $25,000.

Fort Du Pont, Delaware: Noncommissioned officers' quarters, $60,000.

Edgewood Arsenal, Maryland: Noncommissioned officers' quarters, $70,000.

Fitzsimons General Hospital, Colorado: Gymnasium, recreation, and social hall, $150,000.

Hamilton Field, California: Officers' quarters, $215,000; noncommissioned officers' quarters, $120,000.

Fort Hamilton, New York: Noncommissioned officers' quarters, $100,000.

Fort Benjamin Harrison, Indiana: Noncommissioned officers' quarters, $120,000.

Hensley Field, Texas: Noncommissioned officers' quarters, $8,000; officers' quarters, $30,000; roads, utilities, and improvement of flying field, $25,000; replacement of pumping plant, $3,000; sewage-disposal plant, $3,000.

Holabird Quartermaster Depot, Maryland: Hospital, $120,000.

Fort Sam Houston, Texas: Noncommissioned officers' quarters, $150,000; officers' quarters, $350,000.

Fort Howard, Maryland: Hospital, $150,000.

Fort Hoyle, Maryland: Noncommissioned officers' quarters, $70,000.

Fort Humphreys, Virginia: Officers' quarters, $150,000.

Fort Huachuca, Arizona: Post exchange, gymnasium, and service club, $100,000.

Fort Jay, New York: Noncommissioned officers' quarters, $130,000; barracks, completion of, $70,000; officers' quarters, $125,000; nurses' quarters, completion of $35,000.

Jefferson Barracks, Missouri: Noncommissioned officers' quarters, $65,000; additions to kitchens and mess halls, $55,000.

Camp Knox, Kentucky: Hospital, $200,000.

Langley Field, Virginia: Central heating plant for quarters area, $60,000; quartermaster maintenance building, $20,000; fire house, $20,000; barracks, medical detachment, $30,000; garage, completion of, $15,000; magazine, completion of, $10,000.

Fort Lawton, Washington: Noncommissioned officers' quarters, $30,000.

Fort Leavenworth, Kansas: Nurses' quarters, $60,000.

Letterman General Hospital, California: Two wards, $150,000.

Fort Lewis, Washington: Barracks, completion of, $30,000; water main, $30,000; noncommissioned officers' quarters, $75,000; officers' quarters, $65,000.

Fort Logan, Colorado: Noncommissioned officers' quarters, $53,000.

Fort McClellan, Alabama: Headquarters, $50,000; recreation hall, $35,000; gymnasium, $45,000.

Fort McPherson, Georgia: Nurses' quarters, $70,000; contagious ward for hospital, $70,000.

Maxwell Field, Alabama: Officers' quarters, $940,000; officers' mess, $55,000.

March Field, California: Barracks for medical detachment, $25,000; contagious ward for hospital, $12,000; bakery, $15,000; laundry, $60,000; enlisted men's service club, $50,000; officers' mess, $50,000; theater, $40,000.

Fort Mason, California: Officers' quarters, $110,000.

Fort Meade, South Dakota: Riding hall, $25,000.

Fort George G. Meade, Maryland: Noncommissioned officers' quarters, $150,000; officers' quarters, $50,000.

Mitchel Field, New York: Noncommissioned officers' quarters, $118,000; bakery, $15,000; incinerator, $10,000; enlisted men's service club, $50,000; theater, $40,000; sewage-disposal plant, $40,000; fence,

$31,000; quartermaster gasoline storage, $3,000; magazine, $15,000; officers' mess, $50,000; coal storage and handling system, $70,000; roads, walks, and surface-drainage system, $86,000.

Fort Monmouth, New Jersey: Addition to hospital, $75,000; noncommissioned officers' quarters, $170,000; band barracks, $35,000.

Fort Myer, Virginia: Barracks, $100,000.

Fort Oglethorpe, Georgia: Noncommissioned officers' quarters, $120,000.

Fort Ontario, New York: Noncommissioned officers' quarters, $50,000.

Plattsburg Barracks, New York: Additions to barracks, $25,000; barracks, $255,000.

Pope Field, North Carolina, for the Air Corps troops: Barracks, $140,000; noncommissioned officers' quarters, $84,000; officers' quarters, $140,000.

Post Field, Oklahoma, for Air Corps troops: Barracks, $140,000; noncommissioned officers' quarters, $84,000; officers' quarters, $140,000.

Presidio of San Francisco, California: Noncommissioned officers' quarters, $60,000; addition to headquarters, $50,000.

Randolph Field, Texas: Barracks, completion, of $56,000; gymnasium, completion of, $70,000; roads and utilities, $243,000; completion of chapel and school, $50,000.

Raritan Arsenal, New Jersey: Noncommissioned officers' quarters, $75,000.

Walter Reed General Hospital, District of Columbia: Noncommissioned officers' quarters, $120,000; addition to nurses' quarters, $300,000.

Rock Island Arsenal, Illinois: Noncommissioned officers' quarters, $15,000.

Rockwell Field, California: Noncommissioned officers' quarters, $234,000; officers' quarters, $266,000.

Fort Winfield Scott, California: Noncommissioned officers' quarters, $140,000.

Selfridge Field, Michigan: Gymnasium and theater, $80,000; garage, $40,000; quartermaster maintenance building, $20,000; post exchange, $45,000; officers' mess, $60,000; enlisted men's service club, $50,000; bakery, $15,000; roads and utilities, $75,000.

Fort Sill, Oklahoma: Barracks, $875,000; noncommissioned officers' quarters, $72,000; officers' quarters, $75,000; gun sheds, $48,000; stables, $30,000; vehicle shed, $10,000.

Fort Snelling, Minnesota: Quartermaster warehouse, $65,000; barracks, medical detachment, $40,000.

Fort Totten, New York: Noncommissioned officers' quarters, $30,000.

Fort Wadsworth, New York: Officers' quarters, $75,000.

Fort Francis E. Warren, Wyoming: Noncommissioned officers' quarters, $120,000.

West Point, New York: For addition to hospital, $250,000; barracks for service detachment, $250,000.

Fort George Wright, Washington: Noncommissioned officers' quarters, $60,000.

(b) No part of the sum appropriated by this section, except the amount for expenditure under paragraph (1) or (2) of subsection (a), shall be expended if the Secretary of the Treasury certifies to the President that the amount necessary for such expenditure is not available and can not be obtained upon reasonable terms.

Sec. 302. There is hereby authorized to be appropriated not to exceed $7,436,000, to be expended for the construction and installation at military posts, and at airports and landing fields, of such technical buildings and utilities and appurtenances thereto as may be necessary, as follows:

Albrook Field, Canal Zone: Technical buildings and installations, completion of, $293,000; gasoline-storage system, completion of, $25,000.

Barksdale Field, Louisiana: Hangars, $350,000; headquarters and operations buildings, completion of, $89,200; gasoline-storage system, completion of, $20,000; paved aprons, $100,000.

Fort Benning, Georgia: Hangar, combination, $88,000; gasoline-storage system, $10,000; improvement of landing field and building area, $25,000; heating plant, $20,000; paved aprons, $20,000.

Benton Field, Alameda, California: Completion of shops, including assembly and test hangars, dope storage, heating and engine test block, $605,500; depot warehouse, $500,000; administration building, $80,000; railroad spur, $8,000; quartermaster warehouse, maintenance and salvage building, $35,000; garage, $48,000; fire and guard house, $30,000; pier, $125,000; paint, oil, and dope storage and oil reclamation, $35,000; gasoline-storage system, $20,000; paved aprons, $80,000.

Fort Bliss, Texas: Operations building, $10,000.

Bolling Field, District of Columbia: Paved aprons, completion of, $22,800; heating plant for technical area, completion of, $78,000; field shops, completion of, $6,000; improvement of landing field and building area, $615,000.

Chanute Field, Illinois: Hangars, $170,000; paved aprons, $30,000; improvement of landing field and technica area, $15,000; enlargement of central heating plant and steam lines, $185,000.

Dryden, Texas: Paved aprons and hangar floor, $15,000.

Duncan Field, Texas: Depot administration building, $60,000; gasoline-storage system, completion of, $15,000.

Hatbox Field, Muskogee, Oklahoma: Roofing and sidewalls for hangar, and paved aprons, $15,000.

Hamilton Field, California: Headquarters and operations building, to complete, $35,000; improvement of landing field and building area, $120,000.

Langley Field, Virginia: Remodeling two hangars into shops, and for ceilings in and additions to hangars, $91,000; gasoline-storage system, completion of, $21,000; bomb storage, $19,000; improvement of landing field and building area, $25,000; machine-gun range, $6,000.

Luke Field, Hawaiian Department: Air depot, plane overhaul and assembly, $200,000.

March Field, California: Gasoline-storage system, completion of, $10,000; aircraft-bomb storage, $5,000.

Maxwell Field, Alabama: Squadron officers' school and/or additions to school building, $150,000; gasoline-storage system, $10,200; improvement of landing field, $100,000; camera obscura, $4,000; bomb storage, $13,000; machine-gun and bombing range, $6,000.

Mitchel Field, New York: Improvement of landing field, $80,000; gasoline-storage system, completion of, $5,000; bomb storage, $13,000; machine-gun range, $2,000.

Panama Canal Zone: Improvement of emergency landing fields at Gamboa Reach and Camp Gaillard, $20,000.

Patterson Field, Ohio: Hangars, headquarters and operations, and heating plant, completion of, $251,300; improvement of landing field *and building area, $5,000; gasoline-storage system, completion of, $10,000.*

Pope Field, North Carolina: Hangar—balloon-dismantle, transfer, and reerection of, $110,000; paved aprons, $15,000; paint, oil, and dope storage, $5,000.

Post Field, Oklahoma: Hangar—balloon-dismantle, transfer, and reerection of, $110,000; paved aprons, $15,000.

Randolph Field, Texas: Engine-test stands and building, $40,000; oil storage, $15,000; gasoline-storage system, completion of, $10,000; aerial target range, $20,000.

Rockwell Field, California: Hangars, $576,000; Air Corps warehouse, $80,000; operations building, $20,000; remodeling a permanent building for radio, parachute, and armament building, $20,000; administration building, $80,000; photographic building, $36,000; paint, oil, and dope storage, $15,000; gasoline-storage system, $30,000; paved aprons, $95,000; central heating plants, $100,000; improvement of landing field and technical building area, $100,000; camera obscura, $5,000; bomb storage, $15,000.

Schoen Field, Indiana: Grading landing field, $5,000.

Scott Field, Illinois: Hangar, $90,000; headquarters and operations buildings, $80,000; barracks, $271,000; radio building, $10,000; photo building, $36,000; gas plant and chemical storage, $50,000; central heating plants, $145,000; gasoline-storage system, $10,000; paved aprons, $40,000; improvement of landing field and building area, $50,000; machine-gun butts, $3,000.

Selfridge Field, Michigan: Gasoline-storage system, completion of, $10,000.

Wheeler Field, Hawaiian Department: Gasoline-storage system, completion of, $31,000; paved aprons, $38,000.

SEC. 303. No money shall be available for expenditure under this title in connection with a project in the District of Columbia, except as provided in section 301 (a) (11) and in section 302.

SEC. 304. The last paragraph of section 6 of the Federal highway act, approved November 9, 1921, as amended and supplemented (U. S. C., title 23, sec. 6), is hereby amended to read as follows:

"Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its system of primary or interstate and secondary or intercounty highways equal to 7 per centum of the total mileage of such State, as required by this act, said State through its State highway department, by and with the approval of the Secretary of Agriculture, is hereby authorized to increase the mileage of the primary or interstate and secondary or intercounty systems by additional mileage equal to not more than 1 per centum of said total mileage of such State, and thereafter to make like increases in the mileage of said systems whenever provision has been made for the completion and maintenance of 90 per centum of the mileage of said systems previously authorized in accordance herewith."

SEC. 305. After the date of the enactment of this act, in the acquisition of any land or site for the purposes of section 301 (a) (10):

(1) The period of solicitation of proposals by public advertisement shall be ten days in lieu of twenty days;

(2) In any case in which such site or land is to be acquired by condemnation, the provisions of section 355 of the Revised Statutes, as amended, shall not apply; and

(3) Notwithstanding the provisions of section 1 of the act entitled "An act to expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain," approved February 26, 1931 (U. S. C., Supp. V, title 40, sec. 258a), in any case in which any land or any interest therein is to be acquired by condemnation, the Secretary of the Treasury, through the Attorney General, may, prior to the institution of condemnation proceedings, file with the clerk of the district court of the district in which such land is located a declaration of taking, containing the matters required by such section to be included in a declaration of taking. The declaration of taking shall be accompanied by the deposit with such clerk, to the use of the parties who may be found to be entitled thereto, of the amount of the estimated compensation stated in the declaration. As soon as practicable after the filing of such declaration of taking, the Secretary of the Treasury shall cause to be posted in a prominent place upon the land a notice reciting (A) that the land or the interest therein is taken by the United States for public use, (B) that a declaration of taking in respect of such land or interest therein has been filed with the clerk of the court of the district, and (C) that there has been deposited with such clerk, to the use of the parties who may be found to be entitled thereto, the estimated just compensation for the land or interest therein taken. The Secretary of the Treasury shall give written notice similar to the posted notice, by personal service in the case of actual occupants of the premises or, if with reasonable diligence such personal service can not be made, he shall send such notice by registered mail directed to the premises, and he shall send notice by registered mail directed to their last known address in the case of all parties who the Secretary ascertains have or may have an interest in such land, and he may give such additional notice by newspaper publication or otherwise as he deems necessary. Upon posting notice on the land, title to the land or interest therein shall vest in the United States, and the right to just compensation therefor shall vest in the parties entitled thereto. The Secretary of the Treasury shall cause notice to be personally served upon, or if with reasonable diligence such service can not be made, to be sent by registered mail to actual occupants of the premises, setting a time (not earlier than 20 days after the service or sending of such notice) at which such parties shall surrender possession, and at the end of such time the right to possession shall vest in the United States. The Secretary of the Treasury may designate any person to service any notice under the preceding provisions of this subsection and such person shall have power to enter upon such land for the purpose of posting notice or to make personal service of notice. If any such party fails or refuses so to surrender possession, upon summary petition for an order to surrender possession filed in such district court by or on behalf of the Secretary of the Treasury, the court may, by writ of assistance or other process, order the surrender of possession. A petition in condemnation shall be filed in such district court as soon after the filing of the declaration of taking as practicable. In any such condemnation proceeding, no further declaration of taking shall be required, and the provisions of section 1 of such act of February 26, 1931, authorizing the court to fix the time when parties in possession shall be required to surrender possession, shall not apply. If such petition for condemnation is not filed within a reasonable time after the filing of such declaration of taking, any person entitled to just compensation in respect of the property

so taken shall be entitled to sue the United States in the court in which such declaration of taking was filed. The procedure in such suit shall be the same as in suits against the United States founded upon contract, except that such suit may be heard even if the amount of the claim is greater than $10,000 and except that the procedure for the ascertainment of the amount of just compensation shall be the same as such procedure in condemnation proceedings. If the petition for condemnation is filed prior to the time the commissioners in condemnation, jurors, or other persons charged with the duty of valuing the property are empaneled, such suit shall be dismissed, except that such suit and the condemnation proceedings may, in the discretion of the court, and under rules prescribed by it, be consolidated to such extent as the court may deem practicable. In any suit authorized to be brought under this subsection or in any condemnation proceeding involving land acquired in accordance with this subsection, the court shall enter judgment against the United States in favor of the parties entitled for the sum or sums awarded as just compensation, respectively, for the land or interest therein taken for the use of the United States and such judgment shall be paid out of the sums deposited with the court and such additional sums as may be awarded shall be paid in the same manner as sums awarded in judgments in cases in which the United States has consented to be sued. The provisions of such act of February 26, 1931, except as modified by this subsection, shall apply to all such suits or condemnation proceedings. The provisions of this subsection shall not be construed to be in substitution for, but shall be supplemental to, any method of acquiring land or interests therein provided in existing law.

SEC. 306. In the construction of post offices and of buildings for post offices and other offices provided for in section 301 (a) (10), the Secretary of the Treasury with the cooperation of the Postmaster General may use such standard plans (heretofore or hereafter prepared) as may be most adaptable to the particular building to be constructed.

SEC. 307. All contracts let for construction projects pursuant to this title shall be subject to the conditions that no convict labor shall be directly employed on any such project, and that (except in executive and administrative positions), so far as practicable, no individual employed on any such project shall be permitted to work more than 30 hours in any one week, and that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents.

SEC. 308. For each fiscal year beginning with the fiscal year 1934, there is authorized to be appropriated, for the purposes of the sinking fund provided in section 6 of the Victory Liberty loan act, as amended, in addition to amounts otherwise appropriated, an amount equal to 2½ per centum of the aggregate amount of the expenditures made, out of appropriations made or authorized in this title, on or after the date of the enactment of this act and on or before the last day of the fiscal year for which the appropriation is made.

And the Senate agree to the same.

Amendment numbered 2:

That the House recede from its disagreement to the amendment of the Senate numbered 2, and agree to the same with an amendment as follows:

In lieu of the title proposed to be inserted by the Senate amendment insert the following:

To relieve destitution, to broaden the lending powers of the Reconstruction Finance Corporation, and to create employment by providing for and expediting a public-works program.

And the Senate agree to the same.

J. W. Collier,
Charles R. Crisp,
Henry T. Rainey,
Isaac Bacharach,
Managers on the part of the House.

Peter Norbeck,
Smith W. Brookhart,
Robert F. Wagner,
Managers on the part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 12445) to relieve destitution, to broaden the lending powers of the Reconstruction Finance Corporation, and to create employment by authorizing and expediting a public-works program and providing a method of financing such program submit the following written statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

Amendment No. 1:

RELIEF OF DESTITUTION

Title I of the House bill authorized the appropriation of $100,000,000, to be available until July 1, 1933, to the President for the relief of persons "who may be in need of the necessaries of life." In disbursing this amount the President was authorized to create agencies for that purpose or to employ existing agencies, and to cooperate with State or local organizations; and to disburse the relief as gifts or loans, either of money or of supplies.

Title II of the House bill authorized the Reconstruction Finance Corporation to make loans to assist in the relief of unemployment from any funds available to the corporation, with no limitation of amount other than that applicable to all loans upon the aggregate amount of advances to any one person.

Special provision is made by section 4 of the Senate amendment for advancing $300,000,000 to States and Territories to furnish "relief and work relief" to "needy and distressed people" and to aid "in relieving the hardship resulting from unemployment," such amount to be apportioned among the several States and Territories in proportion to population. Such advances may be made until two years after the passage of the act, and are to be reimbursed with interest at 3 per centum per annum by annual deductions beginning in 1935 from future Federal authorizations for road aid (except in the case of Alaska which receives no Federal road aid and must, therefore, make other arrangements for repayment). The States and Territories are, however, given the option of making an agreement with the corporation for other means of repayment. Advances are to be made on application of the State or Territory through its governor certifying the necessity therefor and the inadequacy of its own resources, and funds are to be administered by the governor.

Under the bill as agreed to in conference (Title I) $300,000,000 is to be made available by the Reconstruction Finance Corporation to the States and Territories (no State or Territory to receive more than 15 per centum) for the purposes set forth in section 4 of the Senate amendment, such sums to be available for payment to the governors of the States or Territories upon application by them within two years from the date of the passage of the act, approved by the corporation, certifying the necessity for the payment and the inadequacy of the resources of the States or Territories. Payments made to the governor are to be administered by him under his direction and upon his own responsibility, but he is to file a statement of his disbursements. Any portion of the amount approved by the corporation for payment to a governor shall, at his request, and with the approval of the corporation, be paid to any municipality or political subdivision if the governor makes like certificate of necessity and if the municipality or political subdivision enters into an agreement with the corporation for the repayment of the advance. Advances (other than to municipalities or political subdivisions) are to be reimbursed to the corporation in the manner provided in the Senate amendment.

GENERAL PROVISIONS

The House bill authorized $1,000,000,000 of additional securities of the Reconstruction Finance Corporation and placed such amount in the same fund as the original $2,000,000,000 ($500,000,000 capital and $1,500,000,000 securities) authorized under existing law. The Senate amendment provides additional securities of $1,800,000,000 and keeps such additional amount as a separate fund for the uses and purposes stated in the Senate amendment. The bill as agreed to in conference provides for additional securities of $1,800,000,000, such amount to be placed in the same fund as the original $2,000,000,000 authorized under existing law.

The House bill broadened the class of persons to whom loans can be made (both with the old money and the new money) so as to include any person and permitted the loan to be made for any purpose so long as the loan was to aid in financing agriculture, commerce, industry, or housing, including facilitating the exportation of agricultural and other products, or to assist in the relief of unemployment, whereas under existing law the authority to make loans is confined to lending to banks, insurance companies, railroads, and certain other specified institutions. Under existing law no express mention is made of loans to aid in housing or in relief of unemployment.

The Senate amendment leaves untouched the authority of the Reconstruction Finance Corporation under existing law in its use of the funds provided by existing law. It provides (sec. 1) that the corporation may use the new money in making loans to finance self-liquidating projects as follows:

(1) To States, municipalities, and public agencies to aid in financing projects authorized by Federal or State law.

(2) To corporations formed for providing housing for families of low income, or for reconstruction of slum areas, which are regulated by State or municipal law.

(3) To private corporations for construction, replacement, or improvement of bridges, tunnels, docks, viaducts, water works, and canals devoted to public use.

(4) To private limited-dividend corporations for the protection and development of forests and other renewable natural resources, regulated by State law.

The Senate amendment also authorizes the making of loans to aid in financing the construction of publicly owned bridges for railroad, railway, and highway purposes, in part self-liquidating and in part liquidated by taxes imposed under laws heretofore enacted.

The total amount for the above purposes under the Senate amendment is $1,460,000,000.

The effect of the conference action is to accept the provisions of the House bill as to loans by the Reconstruction Finance Corporation, with a limitation that no borrower can obtain a loan unless the Reconstruction Finance Corporation is satisfied that the applicant is unable to secure funds through banking channels, and with a provision that, so far as practicable, in making loans preference shall be given to the five classes of loans for which authority is granted by the Senate amendment.

Under the bill as agreed to in conference no loans can be made to States, political subdivisions, municipalities, instrumentalities, or agencies of one or more States or municipalities or political subdivisions, or public corporations, except loans to assist in the relief of unemployment and loans to aid in financing self-liquidating projects. The bill as agreed to in conference also provides that the Reconstruction Finance Corporation may make rules and regulations to carry out the provisions of the loan section.

The House bill adopted the provisions of existing law that loans by the corporation can not be made after January 22, 1933, subject to the right of the President to extend the period for not more than one year. The Senate amendment provides that the new loans authorized by it may be made at any time during the life of the Reconstruction Finance Corporation. The bill as agreed to in conference adopts the provisions of the House bill.

The House bill retained the provisions of existing law as to the term for which loans may be made, namely, three years, with power in the Reconstruction Finance Corporation to extend the term to five years.

The Senate amendment in the case of new loans authorized by it provides that they may be made for not exceeding 10 years, except that the loan may be made for a longer period when the corporation finds it necesssary to make the loan by the purchase of securities.

The bill as agreed to in conference retains the provisions of the House bill, except that loans of the character enumerated in the Senate amendment, to which under the conference agreement preference is given, may be made for not exceeding 10 years, with a further provision that such loans may be made for a longer period when the corporation finds it necessary to make the loan by the purchase of securities and that it is not practicable to reimburse the corporation within 10 years.

Under both the House bill and the Senate amendment loans must be made on adequate security, except that the House bill provided that loans could be made to States, municipalities, etc., if the Reconstruction Finance Corporation was satisfied that the payment of the principal and interest was "adequately assured." The bill as agreed to in conference adopts the House bill, with the exception that loans to States, municipalities, etc., of a character to which preference is given must be made on adequate security.

FARM RELIEF

The House bill (sec. 201) directed the Reconstruction Finance Corporation to make loans for the purpose of financing sales of surpluses of agricultural products in the markets of foreign countries in which such sales could not be financed in the normal course of commerce unless in the judgment of the corporation such sales would adversely affect the world markets; but no loan could be made for the export of cotton or wheat held by the Federal Farm Board or the Stabilization Corporations. The House bill (sec. 203) also directed the Secretary of Agriculture to continue to make loans to farmers under section 2 of the Reconstruction Finance Corporation act from the $200,000,000 made available by such section. Under the general terms of Title II of the House bill the Reconstruction Finance Corporation was authorized to make loans to any person to aid in financing agriculture.

The Senate amendment (sec. 1 (b)) directs the Reconstruction Finance Corporation to advance to the Secretary of Agriculture, in addition to the $200,000,000 allocated to him by section 2 of the Reconstruction Finance Corporation act, not to exceed $40,000,000 out of the $1,500,000,000 of securities authorized by section 2 of the Senate amendment, for financing sales in foreign markets as just described in the case of the House bill, except that the prohibition on loans for the export of wheat or cotton held by the Federal Farm Board or the Stabilization Corporations does not appear in the Senate amendment.

The conference agreement adopts the provisions of the House bill, but relieves such loans from the general prohibition on the taking of foreign securities or foreign acceptances as collateral, and omits the prohibition on loans for the exportation of cotton or wheat held by the Federal Farm Board or the stabilization corporations.

The bill as agreed to in conference also incorporates a provision found in section 1(d) of the Senate amendment and not contained in the House bill which authorizes the Reconstruction Finance Corporation to create in any one or more of the Federal land bank districts a regional agricultural credit corporation with paid-up capital of not less than $3,000,000 subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the $200,000,000 allocated to the Secretary of Agriculture under section 2 of the Reconstruction Finance Corporation act. Such credit corporations are to be managed by officers and agents appointed by the Reconstruction Finance Corporation and their expenses are to be supervised and paid by the Reconstruction Finance Corporation. Such credit corporations are authorized to make advances to farmers and stockmen for agricultural purposes (including crop production), or for the raising, breeding, fattening, or marketing of livestock.

COMPTROLLER OF THE RECONSTRUCTION FINANCE CORPORATION

The bill as agreed to in conference omits section 12 of the Senate amendment, which provides that the Comptroller General of the United States shall be the comptroller of the Reconstruction Finance Corporation with authority to prescribe and administer the accounting procedure, and under which he may act through persons designated or employed by him, who are to be paid out of the funds of the corporation. The House bill contained no similar provision.

LABOR PROVISIONS

The bill as agreed to in conference incorporates the provisions contained in the Senate amendment (secs. 7 and 8), which are not found in the House bill, providing that all loans made by the Reconstruction Finance Corporation shall be subject to the conditions that no convict labor shall be directly employed, that no person shall be permitted to work more than 30 hours in any one week, and that preference shall be given to qualified ex-service men with dependents. The provision of the Senate amendment requiring that hand labor shall be used wherever practicable is omitted.

FEDERAL PUBLIC WORKS

FINANCING OF THE PROGRAM

The House bill authorized appropriations for the public-works program, left the financing to the ordinary course of Treasury operations under existing law, and authorized appropriations to the existing sinking fund of additional amounts equal to 2½ per cent of the aggregate amount of the expenditures made for the program. The House bill (sec. 361) also imposed a tax of one-fourth of 1 cent per gallon on gasoline.

The Senate amendment (sec. 6) provides for the financing of the public-works program by means of a special bond issue the proceeds of which are appropriated for the program, and provides a sinking fund for such bond issue.

The effect of the conference agreement is to appropriate out of the Treasury for the public-works program, to eliminate the Senate special bond issue, the Senate sinking fund, and the gasoline tax, and to retain the authority to finance under existing law and the House provisions with respect to the sinking fund.

Under the bill as agreed to in conference no part of the appropriation made by the bill (except the amount appropriated for roads and forest trails) is to be expended if the Secretary of the Treasury certifies to the President that the amount necessary for such expenditure is not available and can not be obtained upon reasonable terms.

LABOR PROVISIONS

The House bill provided (sec. 343) that on all work under the bill on the Federal public works program no convict labor should be directly employed, and that so far as practicable, no person should be permitted to work more than five days in any one week. The Senate amendment has the same provision (sec. 7) with respect to convict labor, and limits the hours of work to not more than 30 in any one week, and adds that hand labor shall be used wherever practicable. The Senate amendment (sec. 8) further provides that preference shall be given to qualified ex-service men with dependents.

The effect of the conference agreement (sec. 307) is to accept the provisions of the Senate amendment, and to eliminate the part relating to hand labor.

PUBLIC BUILDINGS

The House bill (sec. 301) authorized the acquisition of sites for, and the construction of, 955 specifically named post offices, courthouses, immigration stations, and quarantine stations at a total estimated cost of $174,274,000.

The Senate amendment (sec. 5) appropriates $100,000,000 for the construction of public buildings, to be selected by the Secretary of the Treasury and the Postmaster General from the projects set forth in House Document No. 788, Seventy-first Congress, third session. Preference is to be given to places where the Government leases premises under leases terminable on or before July 1, 1934.

The conference agreement (sec. 301 (10)) accepts the Senate provision with clarifying changes making certain that the total cost of the several projects shall be within the estimated limits of cost specified and that the sums shall be available for the acquisition of sites.

The House bill (sec. 302) changed the limits of cost on 15 specifically named public building projects already authorized, at a total increase in cost of $5,013,000 (sec. 302); reauthorized the construction of 245 public building projects specifically named, which projects have not reached the contract stage, and reauthorized an appropriation of $90,000,000 for the purpose (sec. 303); authorized the construction of 1,186 post offices, each costing not more than $50,000, in towns specifically named, and authorized an appropriation of $59,300,000 for the purpose (sec. 304); and authorized the construction of 406 post offices, each costing not more than $35,000, in towns specifically named, and authorized an appropriation of $14,210,000 for the purpose (sec. 305). There are no comparable provisions in the Senate amendment. The conference agreement omits these provisions of the House bill.

The House bill contained provisions relating to the construction of the post offices, courthouses, immigration stations, and quarantine stations to be constructed under the House bill, which provided (1) an expeditious method of acquiring land therefor (sec. 341), and (2) that standard plans should be used so far as practicable (sec. 342). The House bill also provided (sec. 344) that in post offices costing $55,000 or less heretofore or hereafter constructed, the postmaster should perform the custodial duties required in connection with the building without extra compensation. There are no comparable provisions in the Senate amendment.

The bill as agreed to in conference retains the provisions of the House bill relating to expeditious acquisition of sites (sec. 305) and the use of standard plans (sec. 306), but omits the provision with respect to postmasters performing custodial services.

ROADS

The House bill (sec. 321 (b) and (c)) authorized appropriations of $166,000,000, of which $150,000,000 was for apportionment to the States for expenditure on the Federal-aid highway system to be repaid by them out of future road aid. The remaining $16,000,000 was for roads in national forests, national parks and monuments, Indian reservations, and public lands.

The Senate amendment (sec. 5 (a) (1) and (2)) appropriates $120,000,000 for highway aid to the States and $16,000,000 for the other roads.

The bill as agreed to in conference contains the Senate provision, with clarifying changes.

The Senate amendment, for the purposes of the road construction provided for in the bill: (1) Sets aside the limitations of the Federal highway act upon the expenditure of Federal funds in building highways and bridges in municipalities and the limitations of expenditure per mile on Federal-aid highways (sec. 5(a) (1)); (2) provides for the maximum use of local labor (sec. 5 (a) (2)); (3) provides for the predetermination and establishment of minimum rates of wages to be paid on road projects (sec. 5 (a) (1)); and (4) includes main State parkways within the definition of highways (sec. 9 (b)). There were no corresponding provisions in the House bill. The bill as agreed to in conference retains the provisions of the Senate amendment (sec. 301 (1) (2)).

RIVERS AND HARBORS

The House bill (sec. 311) authorized the prosecution of 79 river and harbor projects, which were listed in the bill and were not previously authorized by law, at an estimated cost of about $250,000,000. The Senate amendment (sec. 13) authorizes the prosecution of five river and harbor projects (not found in the House bill) which are listed in the section and which were not previously authorized by law. The bill as agreed to in conference omits both the House and Senate provisions.

The House bill (sec. 312) authorized the appropriation of $27,435,000 for two already authorized river and harbor projects which were listed in the bill. There is no comparable provision in the Senate amendment and the bill as agreed to in conference omits this section.

The House bill (sec. 313) authorized an appropriation of not to exceed $130,000,000 for the prosecution of 107 previously authorized river and harbor projects. There is no comparable provision in the Senate amendment and the bill as agreed to in conference omits this section.

The Senate amendment (sec. 5 (a) (4)) appropriates $30,000,000 for the prosecution of river and harbor projects heretofore authorized. The bill as agreed to in conference retains the Senate provision.

FLOOD CONTROL

The House bill (sec. 331) provided for the prosecution of flood control work on the Mississippi River and the Sacramento River and authorized an appropriation of $180,692,468 for the purpose. The Senate amendment (sec. 5 (a) (4)) appropriates $15,500,000 for the prosecution of flood control projects already authorized. The bill as agreed to in conference retains the Senate provision.

MILITARY CONSTRUCTION

The House bill (sec. 332) authorized an appropriation of $15,335,000 for construction of 152 named military housing projects located at 66 posts. The comparable Senate provision (sec. 10) authorizes the expenditure of $15,164,000 for the same purposes except that the Senate amendment omits one project and changes the cost on another. The bill as agreed to in conference (sec. 301 (11)) retains the Senate provision.

The House bill (sec. 333) authorized an appropriation of $7,165,000 for the construction at military posts, air posts, and landing fields of technical buildings and appurtenances and utilities; 95 projects at 26 posts are listed. The comparable provision of the Senate amendment (sec. 11) is the same as the House bill except that $6,651,000 is authorized to be appropriated, one project is omitted, and the cost has been changed on another. The bill as agreed to in conference (sec. 302) retains the projects in the Senate provisions except that one project contained in the House provision is restored, and one project contained in section 332 of the House bill is transferred to this section.

MISCELLANEOUS CONSTRUCTION

The construction projects set forth in the following list are contained in the Senate amendment but were not contained in the House bill. The total of appropriations for these projects is $25,560,000, as follows:

(1) Hoover Dam, construction and incidental works, $10,000,000 (sec. 5 (a) (5)).

(2) Department of Commerce, construction of air-navigation facilities, $500,000 (sec. 5 (a) (6)).

(3) Department of Commerce, Lighthouse Service, vessels, $950,000; aids to navigation, $2,860,000 (sec. 5 (a) (6)).

(4) Department of Commerce, Coast and Geodetic Survey engineering work, $1,250,000 (sec. 5 (a) (6)).

(5) Navy Department, Bureau of Yards and Docks, $10,000,000 (sec. 5 (a) (7)).

The bill as agreed to in conference retains the Senate provision.

The remaining part of the $500,000,000 emergency construction bond issue not allocated under the Senate amendment to the public works projects provided for in the amendment is, by the amendment (sec. 5 (a) (9)), made available for expenditure on permanent improvement projects, to be selected by the President, for which appropriations have been made or are hereafter to be made for expenditure during the fiscal year 1932 or 1933. Unexpended balances of appropriations made outside this bill for projects so selected by the President are to be covered into the Treasury as miscellaneous receipts (sec. 5 (b)). There were no comparable provisions in the House bill. The bill as agreed to in conference omits the Senate provision.

Amendment No. 2: The effect of the action on this amendment is to retain the title of the House bill with minor amendments.

J. W. Collier,
Charles R. Crisp,
Henry T. Rainey,
Isaac Bacharach,
Managers on the part of the House.

O

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, I caused the foregoing Opening Brief of Plaintiff-Appellant Starr International Company, Inc. to be served via the Court's ECF system on:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e). The brief contains 13,915 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: August 25, 2015

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