No. 11-779C
(Judge Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STARR INTERNATIONAL COMPANY, INC.,
on its behalf and on behalf of a class of others
similarly situated,

Plaintiff,

v.

UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND TO COMPEL PRODUCTION OF DOCUMENTS

JOYCE R. BRANDA
Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

BRIAN A. MIZOGUCHI
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-3319
Facsimile: (202) 514-7969
Email: brian.mizoguchi@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

AMANDA L. TANTUM
Trial Attorney

October 11, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. Starr Cannot Satisfy The High Standards For Motions To Strike Affirmative Defenses Or Demonstrate Why The Government Should Be Denied The Opportunities To Develop Its Theories That Have Been Afforded To Starr 3

A. The Court Should Decline To Grant The "Disfavor[ed]" Motion To Strike 4

B. Starr Cannot Demonstrate Why The Government Should Be Denied The Opportunities To Develop Its Theories, Particularly When Starr Fails To Establish Any Prejudice 5

II. The Affirmative Defenses Of Payment And Contingent Offset Are Available Against Starr 8

A. The Value Of The Shareholders' Equity Interest In AIG Is Derived Indirectly, And Solely, From AIG's Value 8

B. Our Payment Defense Properly Seeks To Rebut Starr's Claim That AIG Overpaid For The Government's Rescue And To Demonstrate The Benefits AIG's Shareholders Obtained From The Government's Actions 9

C. The Benefits, In The Form Of Net Operating Losses, That Arose From The United States' Actions Must Be Weighed In Measuring The Effect Of The Alleged Taking Or Exaction 12

III. The Affirmative Defenses Of Equitable Estoppel, Laches, And Waiver Were Alleged And Are Available Against Starr 12

IV. The United States' Defenses Based Upon FRBNY's Agreement With AIG Should Not Be Struck 14

V. The Government Has Not Waived Any Privilege By Raising Affirmative Defenses 15

A. Starr's Claim That It Is Entitled To Attorney-Client Communications Due To Paragraph 241 Is Baseless 16

B. Starr's Assertion That The Government Put Its Intent And Understanding At Issue And Thereby Waived The Deliberative Process Privilege Is Unsupported 18

C. Starr's Claim That The Government Will Suffer No Harm From The Disclosure Of The Documents Is Unsupported And Cannot Bolster Starr's Request For Attorney-Client Privilege Communications And Documents Covered By The Deliberative Process Privilege 21

CONCLUSION..22

TABLE OF AUTHORITIES

CASES

Aetna Cas. & Sur. Co. v. Dow Chemical Co.,
10 F. Supp. 2d 800 (E.D. Mich. 1998) 14

Alpha I, L.P. ex rel. Sands v. United States,
83 Fed. Cl. 279 (2008) 19

Am. Airlines, Inc. v. United States,
77 Fed. Cl. 672 (2007) 18

Brinton v. Dep't of State,
636 F.2d 600 (D.C. Cir. 1980) 21

Cienega Gardens v. United States,
503 F.3d 1266 (Fed. Cir. 2007) 10

Confidential Informant 59-05071 v. United States,
108 Fed. Cl. 121 (2012) 20

Dairyland Power Coop. v. United States,
77 Fed. Cl. 330 (2007) 20

Dodson v. Strategic Restaurants Acquisition Co. II, LLC,
289 F.R.D. 595 (E.D. Cal. 2013) 7

EEOC v. Citizens Bank & Trust Co. of Md.,
117 F.R.D. 366 (D. Md. 1987) 21

Entergy Nuclear Fitzpatrick, LLC v. United States,
93 Fed. Cl. 739 (2010) 4, 5

FDIC v. Eckert Seamans Cherin & Mellott,
754 F. Supp. 22 (E.D.N.Y. 1990) 5

FDIC v. Ornstein,
73 F. Supp. 2d 277 (E.D.N.Y. 1999) 5

First Heights Bank, FSB v. United States,
46 Fed. Cl. 312 (2000) 19

Fisherman's Harvest, Inc. v. United States,
74 Fed. Cl. 681 (2006) 4

Ford Motor Co. v. United States,
94 Fed. Cl. 211 (2010) 18, 19

Fort James Corp. v. Solo Cup Co.,
412 F.3d 1340 (Fed. Cir. 2005) 17

Hassan v. USPS,,
842 F.2d 260 (11th Cir. 1988) 4

Hasty v. Lockheed Martin Corp.,
No. 98 Civ. 1950, 1999 WL 600322 (E.D. La. Aug. 6, 1999) 16

In re EchoStar Commc'ns Corp.,
448 F.3d 1294 (Fed. Cir. 2006) 16, 17

In re Grand Jury Investigation,
399 F.3d 527 (2d Cir. 2005) 21

In re Sealed Case,
121 F.3d 729 (D.C. Cir. 1997) 18, 19

In re Subpoena Duces Tecum,
145 F.3d 1422 (D.C. Cir. 1998) 19

Jackson v. City of Centreville,
269 F.R.D. 661 (N.D. Ala. 2010) 4

Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.,
971 F.2d 732 (Fed. Cir. 1992) 17

Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC,
752 F. Supp. 2d 721 (W.D. Va. 2010) 4, 5

Oliver v. Boston Univ,
No. Civ.A. 16570-NC, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006) 6

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 10

Salcer v. Envicon Equities Corp.,
744 F.2d 935 (2d Cir. 1984) 5

Sikorsky Aircraft Corp. v. United States,
102 Fed. Cl. 38 (2011) 21

Sikorsky v. United States,
106 Fed. Cl. 571 (2012) 19

Starr Int'l Co., Inc. v. United States,
106 Fed. Cl. 50 (2012) 6, 10, 11

Starr Int'l Co., Inc. v. United States,
111 Fed. Cl. 459 (2013) 6, 8

The Shinnecock Indian Nation v. Kempthorne,
652 F. Supp. 2d 345 (E.D.N.Y. 2009) 22

Woodburn v. A.K. Amir-Jahed,
No. 96-1394-MLB, 1997 WL 557302 (D. Kan. Jul. 28, 1997) 4

STATUTES

Federal Reserve Act § 13(3) 16, 22

OTHER AUTHORITIES

2 James W. Moore, *et al.*,
Moore's Federal Practice and Procedure § 12.37[1] (3d ed. 2004) 4

5C Charles A. Wright & Arthur R. Miller,
Federal Practice & Procedure § 1380 (3d ed. 2004) 4

5 Charles A. Wright & Arthur R. Miller,
Federal Practice & Procedure Supplemental Service § 1274 (3d ed. 2013) 7

RULES

RCFC 12(f)(1) 4

RCFC 12(f)(2) 4

RCFC 26 7

RCFC 30(b)(6) 7

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STARR INTERNATIONAL COMPANY, INC., on its behalf and on behalf of a class of others similarly situated,	)	
Plaintiff,	)	
v.	)	**No. 11-779C**
	)	**(Judge Wheeler)**
UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND TO COMPEL PRODUCTION OF DOCUMENTS

Defendant, the United States, respectfully responds to the motion to strike affirmative defenses and compel documents filed by plaintiff, Starr International Company, Inc. (Starr).

INTRODUCTION

The United States asserts seven affirmative defenses in response to Starr's second amended complaint: payment, contingent offset, equitable estoppel, waiver, laches, hold harmless, and severability. Answer, Dkt. #243, ¶¶ 240-63. Starr now asks the Court to take the extraordinary step of striking these defenses, which provide a legal framework for considering the full and complete terms of the rescue of American International Group, Inc. (AIG), which underlies Starr's claims. Starr cannot satisfy the stringent standards for a motion to strike our affirmative defenses – disfavored in this Court and others – particularly when there are disputed issues of fact and questions of law and Starr has not demonstrated any prejudice from our pursuit of these defenses.

The Court has granted Starr wide latitude to assert its own claims on various theories, and the Court has indicated its interest in "the full picture" of the rescue. Hr'g Tr. 24:22-24 (July 9, 2013). In that context, it would be unfair and inappropriate at the pleading stage to restrict the

United States' ability to pursue its defenses. Further, it would make no sense as a practical matter because most of the facts relevant to those defenses will be developed as part of the discovery afforded to Starr in its attempt to prove its claims. Thus, striking the United States' affirmative defenses would not significantly streamline discovery or narrow the case.

Further, striking these defenses would be erroneous because the defenses are sufficiently pleaded. The Court should, thus, permit the United States to demonstrate that the alleged unconstitutional taking and exaction were effected purely through the Government's and the Federal Reserve Bank of New York's (FRBNY) business dealings with AIG.

The Court has clarified that Starr is bringing a "corporate overpayment" claim "by asserting that the Government forced AIG to issue to the Government over 562 million shares of AIG common stock for insufficient consideration." Order on Def.'s Mot. to Certify Interlocutory Appeal, Dkt. #159, *Starr Int'l Co., Inc. v. United States*, at 4 (Fed. Cl. Sept. 27, 2013). Our affirmative defenses of payment and offset and those based upon the "hold harmless" and severability clauses of AIG's agreement with FRBNY, therefore, properly (1) respond to Starr's claims that AIG overpaid for its rescue, and (2) seek to demonstrate that Starr and other shareholders, as well as AIG, should be bound by the agreements made by AIG in return for FRBNY's commitments. Indeed, Starr acknowledges that the shareholders were harmed or benefited solely as the ratably-shared, indirect effect on all shareholders of transactions entered into by AIG. Pl. Mem. in Support of Mot. to Certify Class, Dkt. #81, Attachment 1 (Rausser Decl.) ¶ 19 (Dec. 3, 2012) (Starr's direct claims are "shared across all of the common stock on a ratable basis, share for share"); *see also id.* ¶ 11. Accordingly, there is no reason to foreclose affirmative defenses based on the terms of the rescue, including benefits accepted by AIG.

These affirmative defenses relate to FRBNY's agreement with AIG and that agreement's effects upon the equity value – Starr's alleged property interest. These effects include benefits to the equity value from the Government's actions. In addition, Starr misstates our affirmative defenses of equitable estoppel, laches, and waiver. These defenses are based on what *Starr* knew, yet declined to act upon. The Answer alleges that had Starr itself objected to the terms of the contractual rescue of AIG as illegal or unconstitutional at the time of the rescue – rather than silently accepting the indirect benefits – FRBNY and the United States could have taken steps to eliminate, reduce, or restructure the assistance provided to AIG.

Finally, Starr is not entitled to attorney-client privileged documents because the Government did not put the advice of counsel at issue in our affirmative defenses. Starr is, likewise, not entitled to documents over which we have asserted deliberative process privilege because Starr describes no compelling need for these documents.

ARGUMENT

I. Starr Cannot Satisfy The High Standards For Motions To Strike Affirmative Defenses Or Demonstrate Why The Government Should Be Denied The Opportunities To Develop Its Theories That Have Been Afforded To Starr

Starr fails to demonstrate why the Court should take the extraordinary step of striking the United States' affirmative defenses and preventing it from providing the full picture of the rescue of AIG, particularly given the disputed issues of law and fact and the absence of prejudice to Starr from our exploration of these defenses.

A. The Court Should Decline To Grant The "Disfavor[ed]" Motion To Strike

In general, "[c]ourts view motions to strike with disfavor and rarely grant them."[1] *Entergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 742 (2010) (quoting *Fisherman's Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (2006) (citing 5C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1380, at 394 (3d ed. 2004); 2 James Wm. Moore, *et al.*, Moore's Federal Practice § 12.37[1], at 12-99 (3d ed. 2004))), *recons. denied*, 101 Fed. Cl. 464 (2011), *aff'd*, 711 F.3d 1382 (Fed. Cir. 2013). In fact, it is not the Court's practice – or that of most courts – to strike paragraphs of a pleading. Hr'g Tr. 21:17-20 (July 9, 2013).

Indeed, when considering a motion to strike a defense, a court must "construe the pleadings liberally to give the defendant a full opportunity to support its claims at trial." *Entergy*, 93 Fed. Cl. at 742 (citations and internal quotation marks omitted). "[T]he purpose of Rule 8(c)," which lists defenses that a defendant must affirmatively state, "is simply to guarantee that the opposing party *has notice* of any additional issue that may be raised at trial" or a subsequent dispositive motion "so that he or she is prepared to properly litigate it." *Jackson v. City of Centreville*, 269 F.R.D. 661, 662 (N.D. Ala. 2010) (quoting *Hassan v. USPS*, 842 F.2d 260, 263 (11th Cir. 1988)) (emphasis added); *accord Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 725-26 (W.D. Va. 2010). Indeed, even the cases relied on by Starr acknowledge that motions to strike affirmative defenses "are 'not favored'"

---

[1] As Starr appears to acknowledge, its motion to strike our affirmative defenses is untimely. Starr did not file the motion within 21 days after the filing of our Answer, as required by RCFC 12(f)(2), but instead nearly one month after the deadline set by the Court's Rules. Starr has not sought leave to file its motion to strike out of time, and the motion should be denied on this basis. *See*, *e.g.*, *Woodburn v. A.K. Amir-Jahed*, No. 96-1394-MLB, 1997 WL 557302, at *1 (D. Kan. Jul 28, 1997). The Court should deny Starr's unstated request that the Court act "on its own" under RCFC 12(f)(1) to strike the affirmative defenses.

and will only be granted if "it appears to a certainty that [a] plaintiff[] would succeed" despite any set of facts proven to support the defense. *FDIC v. Ornstein*, 73 F. Supp. 2d 277, 279 (E.D.N.Y. 1999) (citation and internal quotation marks omitted), cited at Mot. to Strike at 3; *see also FDIC v. Eckert Seamans Cherin & Mellott*, 754 F. Supp. 22, 23 (E.D.N.Y. 1990), cited at Mot. to Strike at 3.

A defendant's pleading need not "'show' the court or the plaintiff that the defendant is entitled to the defense." *Odyssey Imaging*, 752 F. Supp. 2d at 726. Further, the Court has concluded that, "[i]f sufficiency of the defense depends on disputed issues of fact or questions of law, a motion to strike should not be granted." *Entergy*, 93 Fed. Cl. at 742 (collecting cases); *accord Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *rev'd on other grounds*, 478 U.S. 1015 (1986) (concluding that the court should refrain from deciding disputed and substantial questions of law on a motion to strike due in part to the risk of offering an advisory opinion). The Government's affirmative defenses present legal questions, as indicated by Starr's reliance upon legal conclusions in numerous decisions. Mot. to Strike at 4-12. Given the parties' dispute over these issues, Starr's motion to strike should not be granted.

Applying these principles, the Court should conclude that Starr fails to demonstrate any basis for striking the Government's affirmative defenses.

B. Starr Cannot Demonstrate Why The Government Should Be Denied The Opportunities To Develop Its Theories, Particularly When Starr Fails To Establish Any Prejudice

The Court should afford the Government the opportunity to develop its defenses and present the complete picture of AIG's rescue.

First, Starr incorrectly assumes that we cannot challenge its direct claims following the Court's denial of our motion to dismiss these claims for lack of standing. Mot. to Strike at 5-6,

9-10. The Court's preliminary conclusion "that Starr has pled facts sufficiently alleging" a harm supporting a direct claim, *Starr Int'l Co., Inc. v. United States*, 111 Fed. Cl. 459, 482 (2013) (*Starr III*) (citing *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. 50, 62 (2012) (*Starr I*)), does not imply that additional factual development might not demonstrate that Starr suffered no harm independent of the harm to AIG. *See*, *e.g.*, *Oliver v. Boston Univ.*, No. Civ.A. 16570-NC, 2006 WL 1064169, at *16 (Del. Ch. Apr. 14, 2006) (unpublished) (revisiting, "with the benefit of evidence," the question whether plaintiff's challenges "present derivative, and not direct, claims").

Thus, the Court should allow us to develop the legal and factual grounds for these defenses, as it has allowed Starr to pursue, through discovery, its own claims. The Court has indicated that it wants "to have the full picture on everything that occurred regarding the Government's rescue of AIG" and, has even allowed Starr to obtain discovery related to Maiden Lane III "even though that's a derivative claim," that was dismissed, "and it's not a basis for damages in this case." Hr'g Tr. 24:22-25:1 (July 9, 2013). The Court reasoned that the expanded scope of discovery was "relevant factually . . . to give us the picture of what the Government was thinking about doing here" and why the Government "d[id] it the way they did here." *Id.* Tr. 25:2-4. Indeed, the Court recently held that whether or not a direct claim ultimately will lie, including whether the shareholders suffered any harm independent of any harm to AIG, "cannot be answered in a vacuum, but rather requires a full evidentiary record" to resolve. Order on Def.'s Mot. to Certify Interlocutory Appeal, Dkt. #159, at 5; *see also Starr I*, 106 Fed. Cl. at 62 (holding that Starr had stated direct claim by "alleging a harm to the suing stockholders independent of any harm to AIG"). Starr's motion to strike our affirmative defenses is at odds with the Court's desire to avoid restriction of the trial to "narrow slices of

effectual activity." Hr'g Tr. 25:8-9 (July 9, 2013). The Court should, therefore, deny Starr's effort to preclude the development of the "full picture" of the transaction with AIG and AIG's promises to FRBNY, made in return for its rescue.

Second, the Court should reject Starr's argument that it is prejudiced by the Government's assertion of affirmative defenses. Starr does not even purport to be burdened by six of the seven defenses, and its argument relating to the hold harmless defense falls short. Mot. to Strike at 4. Indeed, even Starr's claim of prejudice resulting from the hold harmless defense is misguided. Starr's alleged burden purportedly stems from testimony that we will seek at a RCFC 30(b)(6) deposition of Starr, namely, "the indemnification AIG agreed to provide the FRBNY." *Id.* As this subject is only one of sixteen that we will raise at the RCFC 30(b)(6) deposition, Starr cannot demonstrate any marginal burden resulting from this single topic. *See* Ex. A (Def. Am. Notice of RCFC 30(b)(6) Deposition, Schedule A at 6 (Sept. 11, 2013)). Starr is suing the United States for billions of dollars; it has taken 8 depositions and one 30(b)(6) deposition of three individuals, and apparently intends on taking at least 31 more. It is beyond ridiculous for Starr to assert that the preparation of a witness in a 30(b)(6) deposition on one subject is "burdensome." Indeed, if this were – actually – the case, Starr's proper remedy should be to pursue a protective order under RCFC 26. Starr has not sought such an order because it knows the alleged burden will not support such an order.

Finally, if the Court determines that it should strike any of our affirmative defenses as insufficiently pleaded, the Court should provide the United States with the opportunity to file an amended, more-specific pleading. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure Supplemental Service* § 1274 (citing *Dodson v. Strategic Restaurants Acquisition Co. II, LLC*, 289 F.R.D. 595 (E.D. Cal. 2013)).

II. The Affirmative Defenses Of Payment And Contingent Offset Are Available Against Starr

The Court should reject Starr's motion to strike the defenses of payment and contingent offset, as these defenses are properly pleaded against Starr.

Seeking to strike these affirmative defenses, Starr asserts that they concern "alleged consideration that AIG received" or "potential offsets against AIG," not Starr. Mot. to Strike at 4-5. Starr mischaracterizes these defenses. The Court should see the context of the Government's rescue of AIG to understand the commercial reasonableness of the loan terms, the full value of the benefit that the Government provided for the AIG shares it received, why the AIG Board voluntarily accepted the loan terms, and the resulting lack of any dilution of economic value of AIG's common shares.

It is axiomatic that the United States must be entitled to defend itself against Starr's claims of "corporate overpayment" by demonstrating that – on account of the benefits *received by AIG* in connection with the rescue transaction – there was no corporate overpayment. Starr's suggestion that the United States would be able to make that case by asserting defenses of payment and contingent offset against AIG but not against Starr is untenable under Starr's own theory of harm – namely, that AIG's corporate overpayment for the rescue it received injured shareholders "on a ratable, share-by-share basis," based on the impact of the agreed rescue terms on the value of AIG's common shares. *Starr III*, 111 Fed. Cl. at 482.

A. The Value Of The Shareholders' Equity Interest In AIG Is Derived Indirectly, And Solely, From AIG's Value

The Court has determined that "AIG shareholders were injured on a ratable, share-by-share basis[.]" *Starr III*, 111 Fed. Cl. at 482. Starr also acknowledges that its claims for lost

economic value and voting rights are dependent upon the same harm shared ratably across all shares in AIG. Pl. Mem. in Support of Mot. to Certify Class, Dkt. #81, Rausser Decl. ¶ 11.

Further, the shareholders assert that the lost value of their shares can be computed as a percentage of AIG's equity. Starr contends that the 79.9 percent transfer of AIG's equity interest forms the basis for Starr's allegation of the loss of 79.9 percent of the value of Starr's holding of AIG stock.[2] It is, however, elementary that a company's liabilities affect the company's value. AIG's contractual obligations, thus, determine the value of Starr's claimed shareholder equity interest. AIG's contract with FRBNY provided for the payment of equity and interest in return for AIG's receipt of the $85 billion credit facility.[3] Because AIG is not entitled to additional consideration under its contract with FRBNY, the shareholders' equity interest cannot be valued as though that contractual, agreed-upon exchange of consideration was insufficient. The Court should decline to strike our affirmative defenses of payment and contingent offset and afford us the opportunity to develop these arguments.

B. Our Payment Defense Properly Seeks To Rebut Starr's Claim That AIG Overpaid For The Government's Rescue And To Demonstrate The Benefits AIG's Shareholders Obtained From The Government's Actions

Even if the contractual restrictions to AIG's right to additional consideration could be set aside with respect to the shareholders' claim for additional compensation, the United States is entitled to prove that – to the extent the Government's action could (incorrectly) be considered a

[2] *See*, *e.g.*, Hr'g Tr. 111:21-25 (June 1, 2012) (asserting that the Government "took 80 percent of the equity of the company and used $37.5 billion of the company's assets to pay off other financial players 100 cents on the dollar because they thought that was good for the economy"); *see also* Second Am. Compl., Dkt. #101, at 33 (heading) ("Plaintiff and the Class Had a Reasonable, Investment-Backed Expectation That the Government Could Not and Would Not Appropriate Approximately 80% of the Equity of AIG"); Hr'g Tr. 102:22-24 (June 1, 2012) (basing Starr's illegal exaction claim on "[t]he 80 percent equity interest, where they are getting $25 billion worth of stock for a 500,000 payment" from AIG being "grossly disproportionate").

[3] *See* Ex. B (Term Sheet); Ex. C (Credit Agreement).

taking – AIG's shareholders received just compensation when AIG received the $85 billion lending commitment and $500,000 in exchange for the 79.9 percent equity stake, interest, and fees. As a threshold matter, therefore, as explained in our payment defense, Starr cannot establish economic impact for its takings claim, *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007) (placing burden on plaintiff to establish all "factors"), or demonstrate that it suffered a net exaction. Our payment defense, additionally, would demonstrate that the Government provided benefits to the AIG shareholders by preventing their shares from losing all value in bankruptcy. The benefits obtained by a property owner in connection with an alleged taking – such as those obtained by Starr and other AIG shareholders from FRBNY's payment – must offset the value of the allegedly taken property. *Cienega Gardens*, 503 F.3d at 1283 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978)).

In addition, our payment defense will advance the "factual inquiry" sought by the Court. Order on Def.'s Mot. to Certify Interlocutory Appeal, Dkt. #159, at 4. Starr asserts a direct claim to recover AIG's alleged overpayment for the 2008 FRBNY loan. *See Starr I*, 106 Fed. Cl. at 63-64. If, however, the United States did not underpay for the equity stake, as Starr alleges, then AIG did not overpay for the loan, and Starr and other shareholders have no claim for compensation from the United States – even under the asserted theory that property taken pursuant to the Takings Clause is equivalent to a corporate majority shareholder's duty to minority shareholders not to underpay for assets of the corporation. Accordingly, our payment defense alleges that "AIG received $500,000, *plus the lending commitment of the FRBNY*, in consideration for 100,000 shares of Series C convertible preferred stock that AIG issued to AIG Credit Facility Trust," and that, therefore, "neither [Starr], nor members of the certified classes

are entitled to additional compensation or a return of any property in connection with the transactions about which plaintiff complains." Answer ¶ 240 (emphasis added).

Contrary to Starr's claim, the Court did not, in its July 2, 2012 opinion, reject our payment defense. Mot. to Strike at 7. Instead, the Court explained that, to support a direct claim based upon an alleged overpayment, "public shareholders are entitled to bring a direct claim 'to recover the value represented by the overpayment[]'" "in the form of excessive shares." *Starr I*, 106 Fed. Cl. at 63. Starr cannot demonstrate that "the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited," *id.*, if the controlling shareholder was not benefited through receipt of too many shares for the payment that it provided – that is, if the controlling shareholder did not provide "assets . . . that have a lesser value" than the shares, Order on Def.'s Mot. to Certify Interlocutory Appeal, Dkt. #159, at 4.

Nor may Starr limit the Court's inquiry to one facet of the Government's action – the clauses of the Term Sheet and Credit Agreement allowing for AIG's transfer of shares to the Government – while excluding other related clauses, such as the consideration provided by FRBNY. If AIG agreed to the equity term as being consideration for the credit facility, the fact of an agreed-upon and performed exchange would establish that just value was received by AIG and thus ratably by its shareholders. *See*, *e.g.*, Ex. C (Credit Agreement). This is particularly true where, as here, without the rescue loan, AIG's shareholder equity would have been worthless as AIG faced bankruptcy. The Court should allow the United States the opportunity to defend against Starr's claim that the commitment to lend AIG up to $85 billion in its time of need was an underpayment to AIG.

C. The Benefits, In The Form Of Net Operating Losses, That Arose From The United States' Actions Must Be Weighed In Measuring The Effect Of The Alleged Taking Or Exaction

Because the Court should consider the benefits AIG obtained from the net operating losses (NOLs), which existed because of the United States' rescue, the Court should deny Starr's motion to strike our affirmative defenses of payment and contingent offset.

FRBNY's payment and lending commitment as well as AIG's capacity to use NOLs were benefits that AIG – and, therefore, its shareholders – received as a result of the FRBNY rescue. But for the rescue, AIG would have lost the capacity to use these NOLs. The value of the shareholders' equity interest was, thus, increased ratably across all shares by AIG's capacity to use its NOLs. The United States properly alleged and is entitled to show that the benefit that the shareholders received from AIG's continued capacity to use its NOLs as a result of the alleged taking must be deducted from the alleged harm suffered by the shareholders as a result of the alleged taking.

Accordingly, the Court should permit the United States to prove that AIG's NOLs reduced the company's tax liabilities, Answer ¶¶ 258-62, and benefited the company, thus undermining Starr's claim to a loss of economic value.

III. The Affirmative Defenses of Equitable Estoppel, Laches, And Waiver Were Alleged And Are Available Against Starr

The Court should deny Starr's motion to strike our affirmative defenses of equitable estoppel, laches, and waiver, because Starr's motion rests on the false premise that those defenses seek to impute AIG's knowledge and actions to Starr. *See* Mot. to Strike at 9-10; Answer ¶¶ 241-50.

To the contrary, the defenses are directed to Starr's own knowledge, actions, and inactions. In particular, the United States avers (1) that "*Starr International learned* of the terms

of the FRBNY's contractual rescue of AIG, including the Equity Consideration, on or about the September 16, 2008 execution by AIG of the Summary of Terms Senior Bridge Facility (Term Sheet)," Answer ¶ 243 (emphasis added); (2) that "*Starr*[] fail[ed] to complain in a timely fashion" about the terms of the rescue, *id.* ¶ 250 (emphasis added); (3) that Starr delayed three-and-one-half years before filing suit, *id.* ¶ 248; and (4) that both "AIG and Starr" failed to "complain to the Financing Entities that the contractual rescue of AIG constituted a taking or an illegal exaction, or was otherwise illegal or unenforceable," *id.* ¶ 249. Our affirmative defenses, therefore, plainly allege that Starr had direct knowledge of the rescue and its terms, but failed to take timely action.

Starr also wrongly contends that the Answer fails to adequately plead prejudice to the United States from Starr's failure to timely complain. In its Answer, the United States avers:

> [i]f [] Starr International had informed the Financing Entities in a timely manner that [it] considered the Financing Entities' contractual rescue of AIG to constitute a taking or an illegal exaction, or that the rescue was otherwise illegal or unenforceable, in whole or in part, the Federal Entities could have considered and taken steps to eliminate, reduce, or re-structure the assistance provided to AIG prior to the issuance of the full amount of funds loaned or infused into AIG, including without limitation the $85 billion September 2008 credit facility, the Federal Reserve's commercial paper funding facility, Maiden Lane II, Maiden Lane III, and the Department of the Treasury's [(Treasury)] purchase of Series D (converted to Series E) and Series F preferred stock.

Id. ¶ 245.

Had Starr raised its concerns and claims in a timely manner, FRBNY or the Government could have eliminated, reduced, or restructured the AIG assistance – thereby negating Starr's takings and illegal exaction claims. Instead, FRBNY and the Government committed a total of $182 billion to the AIG rescue – nearly $100 billion after AIG again faced bankruptcy, in addition to the initial $85 billion credit facility. These lost opportunities are themselves

prejudice to the Government. *See Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F. Supp. 2d 800, 814 (E.D. Mich. 1998).

In addition, the September 22, 2008 Credit Agreement required AIG to replace invalid, illegal, or unenforceable provisions with valid provisions the economic effect of which was as close as possible to the original contract's terms.[4] That is, even assuming (contrary to fact and precedential decisions) that an equity term was obtained in violation of the Constitution, it would have had to be replaced by AIG's provision of the economic equivalent of that term. Starr's unreasonable delay in challenging the rescue as a taking or illegal exaction reduced any flexibility FRBNY and the Government had in the replacement options that might have been provided by AIG – another lost opportunity prejudicing the Government. *See Aetna Cas. & Sur. Co.*, 10 F. Supp. 2d at 814.

For all these reasons, the Court should deny Starr's request to strike the Government's equitable estoppel, laches, and waiver defenses.

IV. The United States' Defenses Based Upon FRBNY's Agreement With AIG Should Not Be Struck

The Court should reject Starr's motion to strike the Governments severability and hold harmless defenses. *See* Answer ¶¶ 251-54, 255-57.

In the Credit Agreement, AIG agreed to two provisions – (1) a reformation ("severability") clause, and (2) an indemnification ("hold harmless") clause – that affect AIG's economic obligations to FRBNY and the Government and, it follows, affect Starr's claims as well. *Id.* Because an exploration of these clauses and the overall Credit Agreement will provide the Court with a "full picture" of the Government's rescue of AIG, the Court should deny Starr's motion to strike the affirmative defenses based upon the clauses.

[4] *See* Ex. C (Credit Agreement) at § 8.12

Starr argues that the Credit Agreement's severability and indemnification clauses will have no impact on shareholder claims. This is wrong. AIG's contractual obligations to indemnify FRBNY and the Government or provide the economic equivalent of the equity terms limited the value of AIG's stock, including that of members of the shareholder class who currently hold equity in AIG. Thus, Starr's motion to strike ignores the reality of the transactions at issue in this case and would, in contravention of the Court's intent, restrict the explanation of AIG's rescue to "narrow slices" of activity and contractual promises. Hr'g Tr. 25:8-9 (July 9, 2013). Starr cannot re-write AIG's contractual obligations after FRBNY and the United States succeeded in saving AIG from bankruptcy. Certainly, the Court should not permit Starr to block the Government from explaining these obligations at trial while Starr simultaneously relies upon other obligations (the payment of equity) to support its claims. Additionally, as noted in Section I above, additional information about these transactions may demonstrate that Starr cannot assert its challenges as direct claims.

The Court should, thus, deny Starr's motion to strike our affirmative defenses based upon the "hold harmless" and severability clauses of AIG's contracts.

V. The Government Has Not Waived Any Privilege By Raising Affirmative Defenses

The Court should conclude that the Government's assertion of affirmative defenses cannot result in the waiver of privilege.

Starr moves to compel production of documents over which we have asserted attorney-client privilege or deliberative process privilege, based upon its claim that we have waived applicable privileges. Mot. to Strike at 12, 15. Specifically, Starr (1) argues that the statement in paragraph 241 of the Answer (identified incorrectly by Starr as paragraph 242) that the Government "did not believe that the terms of AIG's rescue constituted a taking or property

without just compensation or an illegal exaction" waives any claim of attorney-client or deliberative process privilege related to the scope of the Government's authority under Federal Reserve Act § 13(3), and (2) moves to compel production of all related documents. Mot. to Strike at 12 (quoting Answer ¶ 241); *id.* at 15.

As an initial matter, because the documents sought by Starr are relevant only if these affirmative defenses remain in the case, the Court should entertain Starr's motion to compel only if the Court properly denies Starr's motion to strike these defenses. If the Court does consider Starr's motion to compel, the Court should conclude that it is meritless.

A. Starr's Claim That It Is Entitled To Attorney-Client Communications Due To Paragraph 241 Is Baseless

Starr claims that it is entitled to attorney-client communications because paragraph 241 put "the Government's knowledge of the legality or illegality of its asserted Federal Reserve Act § 13(3) authority at issue." Mot. to Strike at 12; *id.* at 13 ("advice, discussion, or other communication" including lawyers). The Government, however, has not raised an affirmative defense of reliance on advice of counsel. Where a defendant "has not yet invoked an advice of counsel defense," a motion to compel is "premature," and "there are no grounds for finding a waiver of the attorney-client privilege." *Hasty v. Lockheed Martin Corp.*, No. Civ.A. 98-1950, 1999 WL 600322, at *1 (E.D. La. Aug. 6, 1999).

Starr fails to acknowledge that the United States Court of Appeals for the Federal Circuit has rejected the contention that waiver can result from the mere possibility – in a plaintiff's view – that advice of counsel could have some relevance to an issue. Specifically, the court has explained that a party "can waive the attorney-client privilege when . . . it *uses* the advice to establish a defense." *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006) (considering the assertion of the defense of reliance on advice of counsel) (emphasis added).

That is, the party must actually "disclos[e] an attorney-client communication" to "defend[] its actions," while withholding or redacting other legal advice concerning the same subject matter, before the Federal Circuit would find waiver. *Id.*; *accord Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005). This is the only ground that the Federal Circuit has concluded can result in an "at issue" waiver. *EchoStar*, 448 F.3d at 1301. Our affirmative defenses did not plead that we consulted or relied on counsel to obtain a belief that this was not a taking or illegal exaction, nor have we relied upon advice of counsel in asserting any defenses. Starr provides no support for its claim that a party can waive attorney-client privilege merely by describing its "intent" or "understanding" without reference to attorney-client communications. *See* Mot. to Strike at 12-13.

Finally, the Government's affirmative defenses are based on Starr's failure to notify the Government or FRBNY in a timely manner of its claim that the rescue of AIG constituted a taking or an illegal exaction, and the Government's consequent lack of an opportunity timely to consider Starr's current complaint and then eliminate, reduce, or restructure the assistance to AIG. *See* Answer ¶¶ 245-50. The prefatory fact that FRBNY, the Board of Governors of the Federal Reserve System, and Treasury did not believe that the rescue constituted a taking of property without just compensation or an illegal exaction, *id.* ¶ 241, is not an element of the affirmative defenses.[5]

---

[5] "The elements of equitable estoppel are (1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992). "The elements of laches are (1) unreasonable delay in assertion of one's rights against another; and (2) material prejudice to the latter attributable to the delay." *Id.* And "[f]or a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or

The Court should thus reject Starr's unsupported contention that the Government has waived the attorney-client privilege even though it is not relying upon advice of counsel or privileged communications to make its defense.

B. Starr's Assertion That The Government Put Its Intent And Understanding At Issue And Thereby Waived The Deliberative Process Privilege Is Unsupported

The Court should conclude that the Government's answer does not waive the deliberative process privilege for any document.

Starr's argument that the Government has waived the deliberative process privilege relies on the concept of subject-matter waiver. Because the Government has alleged that "it did not believe that the terms of AIG's rescue constituted a taking of property without just compensation or an illegal exaction" in paragraph 241 of its Answer, Starr argues, the Government may not assert privilege over documents showing "the Government's intent and understanding of the scope of its authority to enter into the loan commitment with AIG and documents relating to those questions." Mot. to Strike at 12-14.

Starr's argument is fatally flawed. "There is no subject-matter waiver associated with the deliberative process privilege." *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 218 (2010); *see also In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997). The courts thereby seek to "ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents." *In re Sealed Case*, 121 F.3d at 741. Applying the "sword and a shield" analogy would be incompatible with the essence of the doctrine. Instead, "the Government's release of a document waives the privilege only for

---

privilege." *Am. Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 680 (2007) (citations and quotation marks omitted).

the document specifically released, not for related materials." *Ford*, 94 Fed. Cl. at 218 (citing *In re Sealed Case*, 121 F.3d at 741).

Starr relies on *Sikorsky v. United States*, 106 Fed. Cl. 571 (2012), in support of its argument that deliberative process privilege is susceptible to subject matter waiver. *Sikorsky* is at odds with the persuasive reasoning of the *Ford Motor* and *In re Sealed Case* decisions. But the suggestion in *Sikorsky* that deliberative process privilege "may" be waived on a subject matter basis was irrelevant to its holding that deliberative process privilege can be waived by failing to assert it in a timely manner. *See id.* at 577, 580. That mere suggestion cannot overcome the weight of authority holding that deliberative process privilege is not vulnerable to subject matter waiver. Further, *Sikorsky* mistakenly relied on *Alpha I, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279, 290 (2008), for that suggestion. *Alpha* itself provided no authority for its conclusion. *Id.* In any event, *Alpha* undermines Starr's argument, because there the Court merely reasoned that if a deliberative document had been produced in a prior litigation, the Government was required to produce that document. *Id.*

Starr alternatively relies on the holding in *In re Subpoena Duces Tecum*, 145 F.3d 1422 (D.C. Cir. 1998), that "[i]f the plaintiff's cause of action is directed at the government's intent, . . . it makes no sense to permit the government to use the privilege as a shield." Mot. to Strike at 14 (quoting *In re Subpoena Duces Tecum*, 145 F.3d at 1424). For at least two reasons, *In re Subpoena Duces Tecum* is inapposite here. First, this Court has expressly rejected *In re Subpoena Duces Tecum* and its "an automatic bar on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant." *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321-22 (2000). Second, even if *In re Subpoena Duces Tecum* were applicable, it concerns only situations where the plaintiff's "theory *required* him to show"

the Government's intent, 145 F.3d at 1423 (emphasis added). Agency deliberations, or individual officials' motives, personal beliefs, or decision-making, however, are irrelevant to a takings or illegal exaction analysis. Nor do the Government's defenses of equitable estoppel, laches, and waiver put its intent at issue.

Because there is no subject-matter waiver in the context of the deliberative-process privilege, this Court has developed a five-factor balancing test to determine when specific documents must be disclosed: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *Dairyland Power Co-op. v. United States*, 77 Fed. Cl. 330, 338 (2007). Starr has, at most, touched on three of these five factors in broad strokes: relevance, the Government's role in the litigation, and harm. *See* Mot. to Strike at 13-15. Without even recognizing two of the five factors or applying the any of the five factors to specific documents, Starr cannot prevail on its motion to compel.

The Court should reject Starr's apparent attempt to revise this long-established balancing test by asserting that the deliberative process privilege does not apply when documents are simply "directly relevant to the case." Mot. to Strike at 14-15 (citing *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 142 (2012)). In *Confidential Informant*, the Court, instead, engaged in the balancing test, concluding that "plaintiff has demonstrated compelling need sufficient to overcome the privilege" and noting that, in that case, the Government "alleged no specific harm that would flow from the disclosure of these particular documents." *Id.*

Further, Starr's contention that the Government is "seek[ing] affirmative relief" is meritless, as we have only stated an affirmative *defense*, not sought affirmative relief against a plaintiff, as the EEOC did in a decision relied upon by Starr. Mot. to Strike at 14 (quoting *Citizens Bank & Trust*, 117 F.R.D. at 366). Affirmative defenses are not claims for affirmative relief. *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38, 48 n.14 (2011). In any event, *Citizens Bank & Trust* still applied the traditional "balancing test" requiring a showing of evidentiary need, which Starr has not made. 117 F.R.D. at 366.

Starr, thus, fails to support its contention that the Government has waived the deliberative process privilege.

C. Starr's Claim That the Government Will Suffer No Harm From The Disclosure Of The Documents Is Unsupported And Cannot Bolster Starr's Request For Attorney-Client Privileged Communications And Documents Covered By The Deliberative Process Privilege

Because Starr has failed to demonstrate any entitlement to documents over which we have asserted attorney-client privilege or the deliberative process privilege, the Court need not consider Starr's claim that the Government will suffer no harm from disclosure of the documents. Starr's contention, in any event, is wholly irrelevant to its demand for materials protected by the attorney-client privilege.

The attorney-client privilege is not subject to a balancing test that would weigh the harms to the parties from disclosure or non-disclosure of the protected material. *See*, *e.g.*, *In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005). To the extent the Court does consider questions of harm related to our deliberative process privilege assertions, Starr's argument related to harm is baseless.

Courts have routinely rejected the claim – asserted by Starr – that the passage of time removes the need for the protection of deliberations. *See*, *e.g.*, *Brinton v. Dep't of State*, 636

F.2d 600, 605 (D.C. Cir. 1980) (deliberative process exemption applied to legal opinions even though documents were several years old and noting that the State Department could retain the opinions for "an indefinite period of time"); *The Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 359 (E.D.N.Y. 2009) (thirty-year-old documents protected under deliberative process privilege). The documents withheld under the deliberative process privilege relate to sensitive discussions regarding Treasury's policies with respect to the administration of billions of dollars of taxpayer money – including those used to support AIG – as well as Treasury's broader role in preserving financial stability and protecting the United States economy. Release of these documents could undermine Treasury's ability to respond to future financial disruptions, and to craft policies that protect the public from private entities in financial distress.

The Court should, therefore, deny Starr's motion to compel production of documents based upon its contention that the Government waived any claim of privilege related to its authority under Federal Reserve Act § 13(3).

CONCLUSION

For these reasons, the Court should deny Starr's motion to strike our affirmative defenses and to compel production of documents.

Respectfully submitted,

JOYCE R. BRANDA
Deputy Assistant Attorney General

s/ Jeanne E. Davidson
JEANNE E. DAVIDSON
Director

OF COUNSEL:

AMANDA L. TANTUM
Trial Attorney

s/ Brian A. Mizoguchi
BRIAN A. MIZOGUCHI
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-3319
Facsimile: (202) 514-7969
Email: brian.mizoguchi@usdoj.gov

October 11, 2013

Attorneys for Defendant