IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STARR INTERNATIONAL COMPANY, INC., Individually and on Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	No. 11-00779C (TCW)
v.	:	
UNITED STATES,	:	
Defendant.	:	

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE AND TO COMPEL PRODUCTION OF DOCUMENTS

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October 18, 2013

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The Government fails to address the key issue raised by Plaintiff's motion to strike: its affirmative defenses fail, as a matter of law, and should therefore be stricken.

First, the Government does not cite any legal authority supporting the assertion of its contract-based defenses against Plaintiff and the Classes as defenses to their direct non-contractual claims. Instead of citing any supporting legal authority, the Government erroneously tries to recast Plaintiff's claim as a derivative corporate overpayment claim, which it unquestionably is not.

Second, for its laches and waiver defenses, the Government fails to cite a single case allowing those defenses where the plaintiff, as here, has asserted its claim within the applicable limitations period. Because there is no dispute that Plaintiff filed its claim within the applicable limitations period, the Government's laches and waiver defenses fail as a matter of law.

Third, it is well-established Federal Circuit law that an equitable estoppel defense can be asserted only if the plaintiff made a representation on which the defendant relied. Because the Government has never contended that Plaintiff made any misrepresentation to the Government on which it relied, equitable estoppel as a defense fails as a matter of law. [1]

Finally, the Government misconstrues Plaintiff's argument with respect to waiver of privilege as applied to its understanding as to whether there was a valid legal basis for taking a 79.9 percent equity interest in AIG. The law does not require the Government to allege that it

[1] Additionally, the Government should not be given leave to amend its Answer. The Federal Circuit has held that where, as here, an affirmative defense is legally infirm, a court should deny leave to amend. *See Sanofi-Aventis v. Apotex Inc.,* 659 F.3d 1171, 1182 (Fed. Cir. 2011) ("One good reason to deny leave to amend is when such leave would be futile.") (quoting *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 55 (2d Cir. 1995)); *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1353 (Fed. Cir. 2006) (same).

relied on the advice of counsel for there to be a waiver. The Federal Circuit applies a balancing test in determining whether there has been waiver, with the most important factor being whether the Government's affirmative conduct placed protected information at issue by making it relevant to the case. That test is met here. Because the deliberations of the Government concerning its decision to take a 79.9 percent equity interest in AIG have been placed directly at issue in this litigation, privilege as to those deliberations has been waived.

I. The Government Has Failed To Establish That Its Contract-Based Affirmative Defenses Are Supportable As A Matter Of Law

The Government's contract-based affirmative defenses (payment, contingent offset, severability, hold harmless, and indemnification) only work, as the Government itself demonstrates in its brief, if this case is recast as one involving derivative claims. The Government repeatedly states that this case is about "corporate overpayment" to justify its affirmative defenses. *See, e.g.,* Def.'s Br. in Opp. to Mot. to Strike ("Opp.") 2, 8, 10, 11. As stated in Plaintiff's opening brief, however, and as understood by this Court, the harm that the Plaintiff and the Class are alleging is distinct from any derivative claim that AIG overpaid for the financing commitment it received from the Government:

> [***T*]*he expropriation for which Plaintiff is seeking compensation is separate and independent from AIG's overpayment for the financing commitment from the Government, even though they arise from the same transaction***. *See* Order (July 2, 2012) (Dkt. No. 50) at 14–18. Plaintiff's claim is not for the diminution in value of AIG's stock price as a whole, but rather its expropriation claim is for the extraction from the Classes of AIG shareholders, and a redistribution to the Government, of a portion of the economic value and voting power embodied in the shareholder Classes' interest of AIG stock. *See id.* at 18. ***This harm is independent from any harm to AIG relating to the overpayment***, *see id.* at 14, ***and is unaffected by any defense that could be asserted against AIG***. Plaintiff's claims rest on the Government's improper use of its control of AIG to expropriate the economic and voting interests of the shareholder Classes, which violated the Government's fiduciary duties to the shareholder Classes. *See id.* at 17. This harm was unique and individual to the shareholder Classes and separate from the

> dilution in value of AIG's stock. *Id.* at 18. Thus, any consideration received by AIG is irrelevant to Plaintiff's claims.

Pl.'s Mem. in Supp. of Mot. to Strike ("Pl.'s Br.") 7–8 (emphasis added).

By focusing on corporate overpayment, the Government seeks to defend itself against derivative claims that Plaintiff cannot assert in a direct action. For example, certain of the Government's affirmative defenses would only be applicable if Plaintiff asserted a derivative claim on behalf of AIG for breach of contract. *See* Opp. 11 (noting that the payment defense relates to "the equity term as being consideration for the credit facility" thus establishing an "agreed-upon and performed exchange" with AIG); 12 (noting the contingent offset defense relates to benefits that AIG received as a result of the FRBNY takeover); 13–14 (noting that if shareholders had objected earlier, the Government could have changed the terms of the contract with AIG); 14–15 (noting "AIG's contractual obligations to indemnify FRBNY and the Government"). However, Plaintiff has not, nor can it, bring a claim for breach of contract. Breach of contract is a derivative claim, *see Suess v. United States*, 33 Fed. Cl. 89, 93–94 (1995), and shareholders may not bring a direct claim against the government for breach of contract. *See Whited v. United States*, 230 Ct. Cl. 963, 965 (1982) (noting that precedent dictates a "shareholder, even a majority or sole shareholder, may not bring suit as an individual alleging breach of his corporation's contract with the United States").

For example, Plaintiff cannot claim it is owed money or value due to breach of the Credit Agreement (as opposed to objecting to the extent of its terms). Thus, there can be no trigger for the contractual defense of indemnity. Plaintiff also cannot argue that the Credit Agreement is invalid, thus opening the door to the Government's defense that the Credit Agreement is an "agreed-upon and performed exchange" supported by adequate consideration. These contractual claims and defenses require a derivative action. Because the contract-based affirmative defenses

the Government seeks to advance all relate to a derivative corporate overpayment claim, and the only claims being litigated in this action are direct claims, the contract-based defenses cannot stand. *FDIC v. Ornstein*, 73 F. Supp. 2d 277, 279–80 (E.D.N.Y. 1999) ("When an affirmative defense is unsupportable as a matter of law, it should be stricken in order to avoid unnecessary litigation on the question.").[2]

A. Payment and Contingent Offset Are Contract-Based Defenses That Have No Bearing On A Takings Or Exaction Claim

The Government appears to be under the misimpression that without its affirmative defenses of payment and contingent offset, the Court would not "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." Opp. 8. The Government is wrong that it can only provide such context if it is allowed to continue to assert the legally insupportable defenses of payment and contingent offset.

First, these are all topics that the Government may address by examining witnesses in deposition and at trial.

Second, this argument only underscores the Government's conflation of direct and derivative claims mentioned above. For example, the Government claims that it "must be entitled to defend itself against Starr's claims of 'corporate overpayment' by demonstrating … the benefits *received by AIG.*" Opp. 8 (emphasis in original).

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[2] The Government also claims that discovery on the affirmative defenses will not be burdensome because Plaintiff has not filed a motion for a protective order against the Government's 30(b)(6) subpoena. Opp. 7. As the Government is well aware, Plaintiff and the Government have been engaged in discussions concerning the scope of the Government's 30(b)(6) subpoena and filed a joint status report this week concerning the remaining disputes about the 30(b)(6) notice.

Third, the Government conflates Plaintiff's burden of proof and an affirmative defense. Opp. 10–11. Contrary to the Government's suggestion, Plaintiff is not attempting to limit the Court's inquiry. Opp. 11. Indeed, the Government may raise issues relating to the various terms of the Term Sheet and Credit Agreement irrespective of whether contract-based affirmative defenses are available. Raising the affirmative defense of payment and contingent offset, however, will not help the Government rebut Plaintiff's showing of unique and individual harm necessary to satisfy a direct claim. *Id.* Similarly, the Government may establish the validity of discounts to Plaintiff's damages calculation without advancing the payment and contingent offset defenses which are inapposite to this direct shareholder case. Opp. 12.

B. In Support of Its Affirmative Defenses of Severability, Hold Harmless, and Indemnification, The Government Relies Upon An Unnecessary Case Construction Which Plaintiff Does Not Claim

With respect to its severability and hold harmless defenses, the Government contends that striking the affirmative defenses will somehow limit it from discussing the parts of the Credit Agreement that it believes demonstrate that the Government saved AIG from bankruptcy. Opp. 15. But, as explained above, the existence of the affirmative defenses neither expands nor contracts the ability of the Government to discuss any parts of the agreements at issue.

In addition, the Government continues to wrongly assert that there was a binary choice for the Government's actions: (1) a Government "rescue" that included the illegal taking and exaction of 79.9% equity interest or (2) letting AIG file for bankruptcy. This was not the choice the Government faced; nor is it the basis for Plaintiff's claims. As set forth in the Complaint and various other pleadings, Plaintiff and the Classes allege that once the decision was made to provide AIG with a loan, the Government had the option of doing so legally without the unauthorized taking of equity, or illegally, which is what Plaintiff alleges actually occurred. Any

evidence of but-for worlds in which AIG was bankrupt (or other alternative scenarios) has no bearing on whether the Government's real-world actions constituted unconstitutional takings without just compensation or illegal exactions.[3]

II. The Affirmative Defenses Of Laches, Equitable Estoppel, and Waiver Are Based On Mistakes Of Undisputed Fact And Law

The Government tries to justify its assertion of these defenses, arguing they are directed to Plaintiff's knowledge, actions, or inactions surrounding the Government's takeover of AIG. Opp. 12. The Government's argument does not negate the fact that each of these defenses is deficient as a matter of law.

A. Laches Is Inapplicable To Claims Brought Within The Statute Of Limitations Period

The Government does not dispute that Plaintiff's claims were filed within the applicable six-year statute of limitations set forth in the Tucker Act. 28 U.S.C. § 2501; *see also Hair v. United States*, 350 F.3d 1253, 1256–60 (Fed. Cir. 2003) (finding the Court of Federal Claims' six-year statute of limitations applicable to constitutional takings claims). In these circumstances the defense of laches fails as a matter of law.

First, "an equitable timeliness rule adopted by courts cannot bar claims that are brought within the legislatively prescribed statute of limitations." *Lyons P'ship., L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001); *see also Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993) ("When a limitation on the period

[3] With regard to the affirmative defense of indemnification, if the Government really wants the opportunity to contend that its actions, including imposing an indemnification provision upon AIG in the Credit Agreement, further diminished the value of shareholders' equity interest – a claim that only benefits the Classes – it can offer evidence in support of this argument. *See* Opp. 15 ("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."). But, as with the defenses of severability and hold harmless, there is no factual or legal basis for allowing such a defense to proceed in light of the action's present posture.

for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period."). Because laches is an equitable timeliness rule, it has no application here because Plaintiff filed its constitutional claims within the legislatively prescribed limitations period. *See Cornetta v. United States*, 851 F.2d 1372, 1376 (Fed. Cir. 1988) ("Because laches is an equitable defense, it has traditionally been unavailable in actions at law brought within the applicable statute of limitations.").[4]

Second, courts have permitted the assertion of a laches defense where a claim was filed within the applicable limitations period only in "extraordinary circumstances." *Six v. United States*, 71 Fed. Cl. 671, 681 (2006); *see also PlanetSpace, Inc.*, 92 Fed. Cl. at 531 ("Absent extraordinary circumstances, this court will not invoke laches to bar an otherwise timely protest.") (internal quotation marks omitted); *United Enter. & Assocs. v. United States,* 70 Fed. Cl. 1, 21 (2006) (same); *CW Gov't Travel, Inc. v. United States,* 61 Fed. Cl. 559, 569 (2004) (same). The Government therefore bears a "heavy burden of proof" to overcome the default prohibition on laches defenses when a claim is timely brought under the applicable statute of limitations. *Cygnus Corp. v. United States,* 63 Fed. Cl. 150, 154 (2004); *see also Lankster*, 87 Fed. Cl. at 755.[5] No such extraordinary circumstances have been presented here.

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[4] Adhering to that precedent, the Court of Federal Claims has repeatedly held "that laches cannot ordinarily be invoked as a defense to legal claims where a statute of limitations is normally available to preclude the recovery on stale claims." *S.E.R., Jobs For Progress, Inc. v. United States*, 759 F.2d 1, 9 (Fed. Cir. 1985) (collecting Court of Federal Claims cases); *see also PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 530–31 (2010) (following *Adv. Cardiovascular Sys., Inc.* in holding that laches generally cannot be invoked to shorten a statutory limitations period); *Lankster v. United States*, 87 Fed. Cl. 747, 755 (2009) (same); *Colon v. United States*, 71 Fed. Cl. 473, 483 (2006), *aff'd sub nom. Acevedo v. United States*, 216 F. App'x 977 (Fed. Cir. 2007) (same); *Miss. Dep't of Rehab. Servs. v. United States*, 61 Fed. Cl. 20, 30 (2004) (same); *Travelers Indem. Co. v. United States*, 16 Cl. Ct. 142, 154 (1988) ("the doctrine of laches is inappropriate where a statute of limitations exists").

[5] Moreover, while Plaintiff disputes the Government's characterization of this action as concerning its obligations under contracts with AIG, the law is clear that the defense of laches is rarely applicable to contracts with the Government. *Tuftco Corp. v. United States*, 614 F.2d 740, 746 (Ct. Cl. 1980) (noting

B. The Government Has Failed To Allege Any Misrepresentation Or Duty By Plaintiff That Would Permit It To Advance An Equitable Estoppel Defense

The Government claims it is entitled to an estoppel defense because Plaintiff "failed to take timely action." Opp. 13. The Government claims the defense is directed at Plaintiff's "own knowledge, actions, and inactions" rather than imputed knowledge from AIG. Opp. 12. Even accepting the Government's argument, the Government does not claim Plaintiff made any misleading communication to the Government on which the Government relied – legal prerequisites to the application of an equitable estoppel defense.

As the Federal Circuit had held, "equitable estoppel requires misrepresentation by the plaintiff and reliance on the misrepresentation by the [defendant]." *State Contracting & Eng'g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1065 (Fed. Cir. 2003); *see also A.C. Aukerman Co. v. R.L. Chaides Const. Co.,* 960 F.2d 1020, 1042 (Fed. Cir. 1992) (a defendant asserting equitable estoppel must establish that the plaintiff "communicate[d] something in a misleading way" and that the defendant relied upon that misleading communication) (internal quotation marks omitted); *Henry v. United States,* 870 F.2d 634, 636–37 (Fed. Cir. 1989)(same). "[S]ilence alone will not create an estoppel unless there was a clear duty to speak." *A.C. Aukerman Co.*, 960 F.2d at 1043. The Government has failed to plead any misleading conduct by Plaintiff, or any corresponding reliance by the Government, thus rendering its affirmative defense of equitable estoppel deficient as a matter of law.

C. The Government Has Not Met The Threshold Standards To Support The Defenses Of Waiver and Prejudice

The Government avers that because the Term Sheet was executed and announced on September 16, 2008, Plaintiff was aware three and a half years prior to filing suit of the basis of

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the court "has never applied the defense of laches in a contract suit"); *see also Standard Oil Co. of Cal. v. United States*, 685 F.2d 1322, 1344 (Ct. Cl. 1982) (same).

its claims but failed to take timely action. Opp. 12–14. The Government fails to cite a single case were a waiver defense was valid, notwithstanding the Plaintiff's assertion of a constitutional claim within the limitations period.

In support of its assertion of a waiver defense, the Government cites only to an insurance case (Opp. 14), upon which its reliance is misplaced. In *Aetna Casualty & Surety Co. v. Dow Chemical Co.*, cited by the Government, the prejudice at issue was whether delayed notification of an insurance claim prejudiced the insurer through "a lost opportunity to evaluate, negotiate, defend, or settle a claim or suit." 10 F. Supp. 2d 800, 814 (E.D. Mich. 1998). Dow sought indemnification coverage under a series of insurance policies. *Id.* at 805. Its insurers disputed their duty to indemnify Dow, arguing they were prejudiced by Dow's untimely notice. *Id.* For example, insurers alleged that, although aware of a groundwater contamination problem in 1989, Dow failed to notify its insurers of this contamination until 1991. *Id.* at 817. The insurers alleged that they were materially prejudiced by this delay through the death of witnesses, the removal of five storage tanks at issue in the contamination, lost memories of witnesses, lost documents, and the physical alteration of the site over the passage of time. *Id.* at 817–18. Although the court found that Dow had knowledge of the contamination in 1989, it refused to find that Dow waived its claim for indemnity. *Id.* The Court ultimately ruled that there was no material prejudice and also reiterated that it is a well-established principle "that untimely notice will not excuse an insurer's obligation to indemnify unless it can prove it was actually and materially prejudiced by the insured's delay." *Id.* at 833.

Moreover, as a matter of fact, the Government cannot seriously argue that, had Plaintiff argued sooner that the Government's taking of a 79.9% equity interest in AIG were illegal, "the Federal Entities could have considered and taken steps to eliminate, reduce, or re-structure the

assistance provided to AIG." Opp. 13. The premise of the Government's defense is that it did not know what it did was illegal. *See* Answer ¶ 241. The evidence obtained thus far indicates that Government officials clearly understood at the time the Credit Agreement was executed that there was no authority to take equity. Ex. A (PX 23); Ex. B, 30(b)(6) Dep. of the United States (Baxter) 94:5–97:23; Ex. D, Paulson Dep. 175:15–177:21, Oct. 1, 2013; Ex. E at 2(Letter from Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys, to Henry M. Paulson, Jr., Sec'y, Dep't of the Treasury (Nov. 9, 2008)). In addition, several politicians, journalists, and various other individuals raised the issue of the basis for the Government's authority for the loan. *See, e.g.,* Henry Paulson*, On the Brink* 241 (Hachette Book Group 2010); United States Government Accounting Office, *Financial Crisis: Review of Federal Reserve System Financial Assistance to American International Group, Inc.* 88, 91 (Sept. 2011); DealBook, *A.I.G.: So Many Questions*, N.Y. Times.com, (Sep. 18, 2008, 10:46 AM), *available at* http://dealbook.nytimes.com/2008 /09/18/aig-so-many-questions. If the knowledge that the Government already had, and the questions already raised regarding authority for the loan, was not enough to sway the Government's nationalization of AIG, it is hard to imagine how Plaintiff's expression of its views would have changed the outcome.[6]

In these circumstances, there is no legal or factual basis for invocation of a waiver defense. *See Fred Hutchinson Cancer Research Ctr. v. BioPet Vet Lab, Inc.*, 2011 WL 2551002,

[6] The Government's assertion that earlier disapproval from Plaintiff might have changed the Government's course of action, in any event, is belied by the facts. Maurice Greenberg, Plaintiff's CEO, publically expressed concern with the Government's position in 2008, stating: "The Government should realize that its purpose is to get paid back, not wring every dollar of income it can out of the company today." Carol J. Loomis, *AIG's Rescue Has a Long Way to Go*, Fortune Magazine, Dec. 28, 2008, http:// money.cnn.com/2008/12/23/news/companies/AIG_150bailout_Loomis.fortune/index.htm.

at *5 (E.D. Va. 2011) ("A defense that would not, under the facts alleged, constitute a valid defense to the action can and should be deleted.") (internal quotations and citation omitted).[7]

III. The Government Has Waived Any Privilege To Materials Covered By Its Affirmative Defenses Or For Issues That The Government Has Otherwise Affirmatively Put At Issue

The Government contends that it has not waived attorney-client or deliberative process privilege in asserting that: "At the time the FRBNY entered into a contractual rescue of AIG, the FRBNY, the Board of Governors of the Federal Reserve System, and the Department of the Treasury (collectively referenced for purposes of pleading defenses as 'Financing Entities') did not believe that the terms of AIG's rescue constituted a taking of property without just compensation or an illegal exaction." Answer ¶ 241. The Government argues that there can be no waiver of privilege because the Government's "affirmative defenses did not plead that [the Government] consulted or relied on counsel to obtain a belief that this was not a taking or illegal exaction, nor have we relied upon the advice of counsel in asserting any defenses." Opp. 17. Contrary to the Government's argument, the applicable case law does not require the Government to specifically mention communications with counsel in order to have waived privilege.

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[7] Even if this were a dispute over the contract with AIG, the law is clear that a Term Sheet is not a contractual obligation. *John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 (2d Cir. 1983) ("The Terms Sheet is only a summary and proposal."); *The Mark Andrew of the Palm Beaches, Ltd. v. GMAC Comm. Mortg. Corp.*, 265 F. Supp. 2d 366, 378–79 (S.D.N.Y. 2003) ("To the extent that the plaintiffs base their claim for breach of contract on a breach of the Term Sheet, the defendant is entitled to summary judgment, because the Term Sheet did not create any binding contractual obligation upon GMAC."); *see also* Restatement (Second) of Contracts § 26 (1957) ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). This is also a point conceded by the Government's own witnesses. *See* Ex. A, 30(b)(6) Dep. of the United States (Alvarez) 20:10–21:3; Ex. B, 30(b)(6) Dep. of the United States (Baxter) 81:5–81:13. Moreover, there are numerous versions of the Term Sheet, none of which were executed by the Government, and all of which contain different versions of the terms and the nature of the equity being solicited. *See, e.g.*, Ex. C (PX 69 at 5 ("This Summary of Terms is not intended to be legally binding on any person or entity"),PX 213 at 3 (same), PX 359 at 2 (same)).

The Federal Circuit has adopted the *Hearn* balancing test for determining waiver of privilege. *See Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204–05 (Fed. Cir. 1987) (citing *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)). The central factor of the test is whether a party's affirmative act places protected information at issue "by making it relevant to the case." *Hearn*, 68 F.R.D. at 581. Waiver under *Hearn* may occur if a party "makes factual assertions the truth of which can only be assessed by examination of the privileged communication." *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 470 (S.D.N.Y. 1996) (noting the "governing principle" of *Hearn* does not require the privilege holder to attempt to make use of a privileged communication). Thus, waiver may be implied when "fairness requires." *See In re Grand Jury Proceedings*, 219 F.3d 175, 182–83 (2nd Cir. 2000). In paragraph 241, the Government put its knowledge and understanding of the law at the time of the taking at issue and anything that would form that knowledge and belief, including attorney-client communications, executive communications, and internal deliberations are now fair game for understanding the reasonableness of that belief.

The Government also devotes four pages to arguing that its production of some documents reflecting its deliberations does not constitute a subject matter waiver. Opp. 18. ("Starr's argument that the Government has waived the deliberative process privilege relies on the concept of subject-matter waiver."). This argument misses the mark. Plaintiff is not contending that because it has some documents evidencing deliberative process that all documents containing deliberative process must be released. As Plaintiff stated in its initial brief, and as clearly supported by the law, "when the deliberations of a government agency are at issue, the Privilege is not available to bar disclosure of such deliberations." *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004); *see also In re Subpoena Duces Tecum*

Served on the Office of the Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998). "[W]hen the Government seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over, thus allowing the government to 'play with defendant's hole card upturned and its hole card down under any claim of governmental or executive privilege.'" *EEOC v. Citizens Bank & Trust Co. of Md.*, 117 F.R.D. 366, 366 (E.D. Md. 1987) (quoting *EEOC v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373, 1383 (D.N.M.1974)).

Finally, the Government contends that "[r]elease 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." Opp. 22. The Government's overstates its claim, as it ignores the wealth of public disclosures that have already been made concerning the Government's deliberations over its capacity to respond to financial crises and the specific AIG loan at issue. *See, e.g.*, Henry Paulson*, On the Brink* 192–93, 200–05, 216–49 (Hachette Book Group 2010); Baird Webel, Congressional Research Service, *Government Assistance for AIG: Summary and Cost* (2013); United States Government Accountability Office, *Review of Federal Reserve System Financial Assistance to American International Group, Inc.* (2011); Congressional Oversight Panel, *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy* (2010). It also fails to account for the changes in law that have occurred since the execution of the Credit Agreement that negate any potential harm from the release of these materials as they occurred under a different legislative regime. *See, e.g.*, Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, Oct. 3, 2008, 122 Stat. 3765 (creating the TARP program and providing Treasury with greater authority to address financial crises and provide emergency relief); Dodd-Frank Wall Street Reform and Consumer Protection Act

("Dodd-Frank"), Pub. L. No. 111-203, July 21, 2010, 124 Stat. 1376; id. at Title XI, § 1101 (amending Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343).

As such, to the extent the Government relies upon an affirmative defense or otherwise puts its knowledge of the legality of its own actions at issue, the United States should be found to have waived any privilege with respect to those documents.[8]

CONCLUSION

Based on the foregoing arguments and the arguments set forth in Plaintiff's original motion to strike, Plaintiff and the Class Members respectfully request that this Court strike the Government's affirmative defenses and compel production of documents by the Government.

Dated: New York, New York
October 18, 2013

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[8] The Government places unwarranted weight on its contention that Plaintiff must show that the defenses prejudice it. The Rules of the United States Court of Federal Claims do not predicate the court's authority to strike an insufficient pleading on a finding of prejudice. The injection of these faulty defenses would undo principles of judicial economy and place additional burden on the Plaintiff through discovery on insufficient and irrelevant defenses. *See also* Pl. Br. at 4. Furthermore, the judicial authority to grant a motion to strike at any time undercuts the Government's concerns of timeliness. Finally, the Government reliance on *Woodburn v. A.K. Amir-Jahed*, No. 96-1394-MLB, 1997 WL 557302 (D. Kan. July 28, 1997), does not contradict this. Opp. 4 n.1. Along with noting that the 12(f) motion was untimely filed, the court in *Woodburn* ruled that the issue raised in the 12(f) motion was both inappropriate for a motion to strike and required both contract interpretation and factual discovery to adjudicate. *Woodburn*, 1997 WL557302, at *1. Because the 12(f) motion in *Woodburn* lacked a legal basis, the court in that case did not have the opportunity to grant the motion even though it was untimely filed. *See Williams v. Jader Fuel Co. Inc.*, 944 F.2d 1388, 1399 (7th Cir. 1991) ("Courts have read Rule 12(f) to allow a district court to consider a motion to strike at any point in a case, reasoning that it is considering the issue of its own accord despite the fact that its attention was prompted by an untimely filed motion.") (collecting cases).

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