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. THE UNITED STATES, *Defendant.*	No. 11-00779C (TCW)

PLAINTIFFS' CORRECTED PROPOSED CONCLUSIONS OF LAW

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1. Section 13(3) authorizes the Federal Reserve in "unusual and exigent circumstances" to serve as Lender of Last Resort and loan money to "any individual, partnership, or corporation," that does not have private sources of liquidity but has the ability to provide security for the loan.

2. The function of the Lender of Last Resort is to stop financial panics by lending to institutions that are solvent but cannot access the credit markets because of an absence of liquidity. The fundamental operating principle of the Lender of Last Resort, as attributed to Walter Bagehot in his book *Lombard Street*, is that it should stand ready to "lend to merchants, to minor bankers, to 'this man and that man,' whenever the security is good." PTX 733; PTX 708 at 14 (*The Federal Reserve and the Financial Crisis*).

3. Congress placed the Federal Reserve in the role of the Lender of Last Resort for non-banks when it enacted Section 13(3) of the Federal Reserve Act ("FRA"). Unlike ordinary Federal Reserve Bank credit, which can be extended generally to depository institutions only, *see, e.g.*, 12 U.S.C. § 347b; 12 C.F.R. §§ 201.3, 201.4, Section 13(3) states that, in "unusual and exigent circumstances," the Board of Governors can authorize a Federal Reserve Bank to lend to any "individual, partnership, or corporation," so long as the borrower does not have access to private sources of liquidity and the loan is "secured to the satisfaction of the Federal reserve bank," 12 U.S.C. § 343 (2006).

4. Specifically, Section 13(3) 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).

5. AIG satisfied each of the requirements for a 13(3) loan in September 2008: (a) there were "unusual and exigent circumstances"; (b) AIG was "unable to secure adequate credit accommodations from other banking institutions"; and (c) it had sufficient assets to secure a loan to the satisfaction of the Federal reserve bank. 12 U.S.C. § 343 (2006).

II. The Only Consideration Authorized by Congress for a 13(3) Loan Is An Interest Rate Determined by the Board of Governors Which Shall Be "Fixed with A View of Accommodating Commerce and Business."

6. The only consideration authorized by Congress for a Section 13(3) loan is an interest rate determined by the Federal Reserve Board of Governors, which shall be "fixed with a view of accommodating commerce and business". 12 U.S.C. § 357 (2006).

7. Section 14(d) of the Federal Reserve Act limits the rates at which Section 13(3) loans may be extended, providing that: "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*". 12 U.S.C. § 357 (2006) (emphasis added). These rates are the only form of consideration prescribed by Sections 13(3) and 14(d). *See* 12 U.S.C. §§ 343, 357 (2006); 1936 Circular, 22 *Fed. Reserve Bulletin* at 123 (Fed. 1936) ("Such 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."); 1932 Circular, 18 *Fed. Reserve Bulletin* at 518 (Aug. 1932) (same); *see also Starr Int'l Co.*, 107 Fed. Cl. at 378 ("interest rates are the only permissible form of consideration for a loan under the FRA"); *Starr Int'l Co.*, 106 Fed. Cl. at 85 (same).

8. Regulation A, codified at 12 C.F.R. § 201.1 *et seq.*, "establishes rules under which a Federal Reserve Bank may extend credit to depository institutions and others." 12 C.F.R. § 201.1(b).

9. With respect to emergency credit extended under Section 13(3), Regulation A states:

> Emergency credit for others. In unusual and exigent circumstances and after consultation with the Board of Governors, a Federal Reserve Bank may extend credit to an individual, partnership, or corporation that is not a depository institution if, in the judgment of the Federal Reserve Bank, credit is not available from other sources and failure to obtain such credit would adversely affect the economy. If the collateral used to secure emergency credit consists of assets other than obligations of, or fully guaranteed as to principal and interest by, the United States or an agency thereof, credit must be in the form of a discount and five or more members of the Board of Governors must affirmatively vote to authorize the discount prior to the extension of credit. Emergency credit will be extended at a rate above the highest rate in effect for advances to depository institutions.

12 C.F.R. § 201.4(d).

10. Consistent with Sections 13(3) and 14(d) of the Federal Reserve Act and Regulation A, the only consideration authorized for a 13(3) loan is an interest rate affirmatively approved by a vote of five or more members of the Board of Governors.

11. Section 14(d) of the Federal Reserve Act states that Federal Reserve Banks shall set the "rates of discount to be charged by the Federal reserve bank for each class of paper". 12 U.S.C. § 357. The plain language of Section 14(d) requires that interest rates for 13(3) loans be set based on class of paper, and not based on the identity or nature of the borrower.

III. Defendant's Conduct Constituted A Taking of the Property of AIG Common Shareholders Without Just Compensation.

12. Defendant's conduct constituted a taking of the property of AIG common shareholders without just compensation.

13. The Fifth Amendment proscribes the taking of private property "for public use, without just compensation." U.S. Const. amend. V. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001).

14. Defendant directly appropriated shareholders' voting and equity interests in AIG by means of the Credit Agreement and directly appropriated shareholders' rights to vote as a class by means of the Reverse Stock Split. Thus, "the alleged harm here can be said to have resulted from a direct appropriation of the common shareholders' property." *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. 50, 74, *recons. denied*, 107 Fed. Cl. 374 (2012); *id.* at 82-83 ("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.").[1]

15. Defendant agrees that the takings in this case are not regulatory takings because they involve the direct appropriation of property rights. *See* Def.'s Mot. to Dismiss (Doc. 30) at 26 ("Starr does not allege a regulatory taking; indeed, it mentions no Government regulations that burden its or AIG's private property interests. Rather, Starr alleges that the Government appropriated its and AIG's property." (citations omitted)); *see also* Mot. to Dismiss Hr'g Tr. 20:11-21, 33:3-5, 34:6-7.

16. "When evaluating whether governmental action constitutes a taking, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether the government's action amounted to a compensable taking of that property interest." *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011).

A. The Equity and Voting Rights of AIG Common Shareholders Constitute Cognizable Fifth Amendment Property Interests.

17. The equity and voting rights of AIG common shareholders constitute cognizable Fifth Amendment property interests.

18. The Supreme Court has established that cognizable Fifth Amendment property interests "are created and their dimensions are defined by existing rules or understandings that

[1] In contrast with a direct appropriation of property rights, for a regulatory taking, even the fact of damage is sufficiently uncertain that "a showing of but-for economic use or value is a necessary element". *A & D Auto Sales, Inc. v. United States,* 748 F.3d 1142, 1157 (Fed. Cir. 2014); *see also Cienega Gardens v United States,* 503 F.3d 1266, 1281 (Fed. Cir. 2007) (noting that for a court to find a regulatory taking has occurred, "what has evolved in the case law is a threshold requirement that plaintiffs show serious financial loss from the regulatory imposition in order to merit compensation.") (internal quotation marks and alteration omitted)).

stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotations omitted); *see also Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 511, 519 (Fed. Cir. 2011) (same) (remanding to the trial court for a determination based on Oregon law "on a case-by-case basis, of any outstanding property interest questions").

19. Property "consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (same).

20. The right to exclude is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

21. "Courts have long-recognized that the protections of the Takings Clause apply to intangible property, in addition to real and personal property." *Starr Int'l Co.,* 106 Fed. Cl. at 72 (citing *Ruckelshaus*, 467 U.S. at 1003 (including trade secrets, materialmen's and real estate liens, and valid contracts within Fifth Amendment property rights)[2]); *see also Members of the Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1333 (Fed. Cir. 2005) (holding that statutorily defined, transferable, and excludable interest in peanut quota was a

[2] "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: It is conceivable that the term 'property' in the Taking Clause was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." *Ruckelshaus*, 467 U.S. at 1003 (citations and quotations omitted).

property interest). Courts will weigh a variety of factors when deciding whether a cognizable property interest exists, including whether the interest is assignable or transferable, or can form the *res* of a trust. *See Ruckelshaus*, 467 U.S. at 1002 (noting that trade secrets "have many of the characteristics of more tangible forms of property").

22. "It is undisputed that stock is personal property and transferable under Delaware law." *Starr Int'l Co.*, 106 Fed. Cl. at 72 (citing 8 Del. C. § 159 ("The shares of stock in every corporation shall be deemed personal property and transferable.")). The fact that a corporate charter may place limited restrictions or conditions on the transfer of stock does not change the characterization of stock as a property interest. *See Members of the Peanut Quota Holders Ass'n, Inc.*, 421 F.3d at 1333 (finding a property interest in a crop quota allocated by statute despite limited restrictions on its transfer).

23. Furthermore, "Delaware courts have observed that voting is a fundamental shareholder right." *Starr Int'l Co.*, 106 Fed. Cl. at 75 (citing *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999)); *see also Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest. They are limited only by any fiduciary duty owed to other stockholders."). The right to vote generally is of "overriding importance," and "many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994).

24. "Delaware law recognizes the right of shareholders to transfer the voting rights associated with their stock." *Starr Int'l Co.*, 106 Fed. Cl. at 73 (citing 8 Del. C. Ann. § 218; *Hewlett v. Hewlett–Packard Co.*, C.A. No. 19513–NC, 2002 WL 549137 at *4 (Del. Ch. Apr. 8,

2002) ("Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder."); *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.")).

25. By virtue of Delaware law's requirement of a class vote before a class of shares can be further divided, stock ownership likewise consists of the right to exclude others. *See* 8 Del. C. § 242(b)(2) (requiring a separate class vote for Charter amendments that increase or decrease the number of authorized shares); *cf. Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 539 (2005) (recognizing that "an owner's right to exclude others" is "perhaps the most fundamental of all property interests").

26. "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." *Starr Int'l Co.*, 106 Fed. Cl. at 74 (citing *Feldman v. Cutaia*, 951 A.2d 727 (Del. 2008); *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006); *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319 (Del. 1993)).

27. Thus, Delaware law prohibits the use of stratagems designed to deprive shareholders of voting rights, and prohibits generally the use of formalistic devices to accomplish substantive outcomes that are impermissible. For example, in *Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994), the Delaware Supreme Court held:

> Under the statutory framework of the General Corporation Law, many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders. Such actions include elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. Because of the overriding importance of voting rights, this Court and the Court of Chancery

> have consistently acted to protect stockholders from unwarranted interference with such rights.

Id. at 42 (citation omitted); *see also id*. at 45 (recognizing "the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights"); *Sellers v. Joseph Bancroft & Sons Co.*, 2 A.2d 108, 112-13 (Del. Ch. 1938) (enforcing corporate charter provision relating to transfer of voting rights).[3]

28. Consistent with and in acknowledgement of these well-established shareholder property rights, when Congress enacted the Emergency Economic Stabilization Act ("EESA"), which authorized the Troubled Asset Relief Program ("TARP"), Congress made it clear that the Government was to respect, not circumvent, the refusal of shareholders to approve an increase in the number of authorized shares, and granted Treasury the authority to hold equity under narrow circumstances. Under EESA, the Secretary of Treasury can hold equity: (1) only directly; (2) in limited amounts; (3) in the form of warrants or other non-voting stock; (4) for a one-year period unless it obtains permission to hold equity for a longer period; and (5) if it provides periodic reports on its activities to Congress. P.L. 110-342, § 101, 122 Stat. 3765 (enacted October 3, 2008) (codified at 12 U.S.C. § 5211 *et seq.*).

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[3] *See Paramount*, 637 A.2d 42 n.11 (citing *Schnell v. Chris–Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (holding that actions taken by management to manipulate corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management" were "contrary to established principles of corporate democracy" and therefore invalid); *Giuricich v. Emtrol Corp*., 449 A.2d 232, 239 (Del. 1982) (holding that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated"); *Centaur Partners, IV v. Nat'l Intergroup*, 582 A.2d 923, 927 (Del. 1990) (holding that supermajority voting provisions must be clear and unambiguous because they have the effect of disenfranchising the majority); *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) (directors' duty of disclosure is premised on the importance of stockholders being fully informed when voting on a specific matter); *Blasius Indus., Inc. v. Atlas Corp*., 564 A.2d 651, 659 n.2 (Del. Ch. 1988) ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.")).

29. Moreover, EESA makes clear the right of shareholders to vote on the issuance of additional authorized shares, and recognizes that shareholder approval may not be obtained: "Should the financial institution not have sufficient authorized shares, including preferred shares that may carry dividend rights equal to a multiple number of common shares, the Secretary may, to the extent necessary, accept a senior debt note in an amount, and on such terms as will compensate the Secretary with equivalent value, in the event that a sufficient shareholder vote to authorize the necessary additional shares cannot be obtained." *See* 12 U.S.C. § 5223(d)(2)(F).

30. As this Court concluded in ruling on Defendant's motion to dismiss, class members have identified "a protectable property interest in the equity and voting power associated with the Plaintiffs' shares of common stock." *Starr Int'l Co.*, 106 Fed. Cl. at 75.

31. The Credit Agreement Class had a cognizable property interest in the equity and voting rights associated with their AIG stock. The rights to dividends and to participate in the company's management are fundamental property rights under Delaware law.

32. The Reverse Stock Split Class had a cognizable property interest in the right to a common stock–only vote to prevent the further dilution of the common stock's voting and equity rights. Unlike the rights of the Credit Agreement Class that were applicable to all then-existing shareholders in their capacity as shareholders generally, the voting and anti-dilution rights held by the Reverse Stock Split Class were unique to common shareholders in their relation to other shareholders, such as the Series C Preferred shareholders (the Government).

B. Defendant's Appropriation of Plaintiffs' Equity and Voting Rights Constitute Compensable Takings.

33. Defendant's appropriation of Plaintiffs' equity and voting rights constitute compensable takings.

34. "Once a court has found that the plaintiff had a compensable property interest, it must 'determine whether the governmental action at issue amounted to a compensable taking of that property interest.'" *Nat'l Food & Beverage Co., Inc. v. United States*, 103 Fed. Cl. 63, 69 (2012) (quoting *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)).

35. Where, as here, the taking involves the direct appropriation of property rights, "the court need merely decide whether 'a direct government appropriation or physical invasion of private property' has occurred." *Nat'l Food & Beverage Co.*, 103 Fed. Cl. at 69 (quoting *Lingle*, 544 U.S. at 537 (calling a direct appropriation a "paradigmatic taking requiring just compensation").) When takings cannot be characterized as direct appropriations or physical invasions, the determinations are "essentially *ad hoc*, factual inquiries". *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

C. Plaintiffs Are Entitled to "Just Compensation".

36. Plaintiffs are entitled to just compensation.

37. As this Court previously recognized, in order to state valid takings claims, Plaintiffs must assert "'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.'" *Starr Int'l Co.,* 106 Fed. Cl. at 69 (emphasis omitted) (quoting *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998)).

38. A takings claim and an illegal exaction claim are two distinct causes of action. *Figueroa v. United States*, 57 Fed. Cl. 488 (2003) (permitting takings and illegal exaction claims to be pled in the alternative), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006); *Arcadia Tech., Inc. v. United States*, 458 F.3d 1327, 1330 (Fed. Cir. 2006) (A "takings claim is separate from a challenge to

the lawfulness of the government's conduct: a taking does not result simply because the government acted unlawfully nor does a takings claim fail simply because the government's conduct is subject to challenge as unlawful."); *Starr Int'l Co.*, 106 Fed. Cl. at 71 ("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.").

39. When, as here, the Government directly appropriates an interest in property, "the government must provide just compensation to the owner." *Nat'l Food & Beverage Co.,* 103 Fed. Cl. at 69 (citing *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008) ("The jurisprudence pertaining to physical takings 'involves the straightforward application of *per se* rules.'")).

40. This obligation to compensate exists regardless of whether the Government's appropriation was for less than the entire property interest. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("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.") (citations omitted). The government "is required to pay for that share no matter how small." *Id.* at 322 (citing *Loretto*, 458 U.S. 419 (part of a rooftop); *United States v. Causby*, 328 U.S. 256 (1946) (airspace above private property)).

41. "Just compensation" means that "the owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–74 (1973) (citation omitted); *see also Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on

equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.") (citation omitted).

1. "Just Compensation" for a Taking is Based on the "Fair Market Value of the Property" Taken by the Defendant.

42. "Just compensation" for a taking is based on the "fair market value of the property" taken by the Defendant.

43. "'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984); *see also United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("And 'just compensation' means the full monetary equivalent of the property taken.").

2. "Fair Market Value" Is the Price that Would be Set by a Willing Buyer and a Willing Seller, Neither of which Was under any Compulsion to Buy or Sell.

44. "Fair market value" is the price that would be set by a willing buyer and a willing seller, neither of which was under any compulsion to buy or sell."

45. "'The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts.'" *United States v. Cartwright*, 411 U.S. 546, 551 (1973) (26 C.F.R. § 2031-1(b)); *see also Georgia-Pac. Corp. v. United States*, 640 F.2d 328, 336 (Ct. Cl. 1980) ("The 'monetary equivalent' referred to above has found acceptance in the concept of fair market value, which value is normally to be ascertained, with reference to the property in question, from what a willing buyer would pay in cash to a willing seller, neither being under any compulsion to buy or sell and both being fully informed knowledgeable about all relevant matters.").

46. "The owner is entitled to fair market value, but that term is not an absolute standard nor an exclusive method of valuation. The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law." *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citations and quotations omitted).

3. There Were No Special Benefits Conferred by Defendant's Taking.

47. There are no special benefits conferred by Defendant's taking of Plaintiffs' equity and voting rights.

48. In a Takings case (but not an Illegal Exaction case), a defendant may try to offset certain benefits, if any, which offset the amount of recovery. *Bauman v. Ross*, 167 U.S. 548, 584 (1897); *see also Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63, 75 (2002). "Special benefits, as distinguished from general benefits which do not offset recovery, are those which are direct and peculiar to the particular property." *United States v. Trout*, 386 F.2d 216, 221-22 (5th Cir. 1967) (quotations omitted).

49. "Although the plaintiff has the burden to prove a taking occurred, this ultimate burden does not require the plaintiff to identify and come forward with evidence rebutting economic harm. The plaintiff must establish economic impact, but it need not establish the absence of any mitigating factors. Offsetting benefits, if there are any, must be established by the government to rebut the plaintiff's economic impact case." *CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011) (citing *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1275 (Fed. Cir. 2009) (refusing to apply offsetting benefits when the "government points to no economic data in the record to support its assertion of offsetting benefits").)

50. Defendant's claim that a "but-for" bankruptcy scenario is relevant to the calculation of just compensation is incorrect for multiple reasons, including:

a. First, the requirement that there be "a showing of but-for economic use or value is a necessary element" applies only to a regulatory taking. *A & D Auto Sales,* 748 F.3d 1142. There is a fundamental difference between a regulatory taking and a taking involving a direct appropriation. In a regulatory taking the Government typically does not directly appropriate or receive anything of value, causing even the fact of damage to be uncertain.

b. Second, Defendant's "but-for" world ignores its pre-litigation position that it never would have permitted AIG to file for bankruptcy given the catastrophic consequences that an AIG bankruptcy would likely have on the overall economy. Findings of Fact ¶ 5.0.

c. Third, Defendant cannot meet its burden because an offsetting benefits argument contradicts not only the economic premises required to activate Section 13(3), but also the depressed and fear-driven pricing it acknowledged arose from panic market conditions. Findings of Fact ¶ 2.0. It is the job of the Lender of Last Resort to correct those artificial panic conditions and, once corrected, prices and valuations are expected to rebound. This does not mean the Lender of Last Resort added value – only that it fulfilled its obligations to cure the panic. PTX 708 at 14; PTX 684 at 2; Dudley Dep. 62:2-63:12.

d. Fourth, the hypothetical bankruptcy scenario is too speculative to form the basis for offsetting benefits. *See CCA Assocs.*, 667 F.3d at 1245 ("The Court of Federal Claims conducted a thorough analysis of the offsetting benefits evidence proffered by the government, and concluded the potential benefits were too speculative to mitigate CCA's proof of economic harm. We see no

error in this analysis and no clear error in the extensive fact findings of the trial court on the offsetting benefits."); *see also Bauman*, 167 U.S. at 584 (stating that "any special and direct benefits, capable of present estimate and reasonable computation," can be considered); *United States v. Improved Premises Known as No. 46-70 McLean Ave. in City of Yonkers, Westchester Cnty*., 54 F. Supp. 469, 471 (S.D.N.Y. 1944) ("Conjecture cannot form a legitimate basis for an award of compensation." (citing *United States v. Sponenbarger*, 308 U.S. 256, 256–65 (1939)).

e. Fifth, AIG paid a fair price for the loan that resolved the company's liquidity needs. AIG fully secured the loan and paid principal, interest, and fees associated with the loan that exceeded the value of the Credit Facility. Findings of Fact ¶ 10.0.

f. Sixth, and independently dispositive, if Defendant was not authorized to condition a 13(3) loan on an exaction of equity, it cannot offset one against the other.

51. Defendant therefore cannot meet its burden with respect to establishing offsetting benefits.

IV. Defendant's Acquisition through the Credit Agreement of Voting Preferred Stock Representing 79.9% of Plaintiffs' Equity and Voting Control Was An Illegal Exaction.

52. Defendant's acquisition through the Credit Agreement of voting preferred stock representing 79.9 percent of Plaintiffs' equity and voting control was an illegal exaction.

53. An illegal exaction claim exists when "the Government has the citizen's money in its pocket, and the claim is to recover an illegal exaction made by officials of the Government,

which exaction is based upon a power supposedly conferred by a statute." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967) (quotations omitted), *abrogated in part on other grounds by Malone v. United States*, 849 F.2d 1441, 1444–45 (Fed. Cir. 1988). *See also Aerolinas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996) ("[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 v. United States,* 117 F. Supp. 576, 580 (1954)). Defendant's acquisition and retention of 79.9 percent of the Credit Agreement Class's equity and voting control constituted an illegal exaction.

A. Defendant's Conduct Constitutes An Illegal Exaction If It Exacts Money or Property "In Contravention of the Constitution, A Statute or A Regulation."

54. Defendant's conduct constitutes an illegal exaction if it exacts money or property in contravention of the Constitution, a statute or a regulation.

55. An "illegal exaction claim may be maintained 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.'" *Aerolineas*, 77 F.3d at 1572–73 (quotations omitted); *Stephanatos v. United States*, 306 F. App'x 560, 564 (Fed. Cir. 2009) (same); *Trayco v. United States*, 994 F.2d 832, 837–38 (Fed. Cir. 1993) (same). "The Tucker Act provides jurisdiction to recover an illegal exaction when the exaction is based on an asserted statutory power." *Aerolineas*, 77 F.3d at 1573.

56. The relevant statute relied on by Defendant to justify its receipt of a 79.9% equity stake in AIG is the Federal Reserve Act, and in particular Section 13(3) of the Act. *See* Def.'s Response to Pl.'s Third Interrogatories Nos. 5, 14; Def.'s Response to Pl.'s First RFA No. 16.0; JX 172 at 4; PTX 410 at 5.

57. Defendant's receipt of a 79.9% equity interest in AIG was a purchase of, and not merely a security interest in, the equity. *See* Findings of Fact ¶¶ 11.0, 19.0, 23.0.

58. As explained below, because the Federal Reserve Act neither explicitly nor implicitly authorizes requiring sale of equity in return for a secured loan, Defendant's exaction was illegal as a matter of law. *Starr Int'l Co.*, 106 Fed. Cl. at 85 ("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."); *id*. at 87 ("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").

59. Defendant exacted the Credit Agreement Class's equity in contravention of the Due Process clause of the Fifth Amendment. This court has jurisdiction over a Due Process claim alleging an illegal exaction. *See Casa de Cambio Comdiv S.A. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002); *see also Starr Int'l Co.*, 106 Fed. Cl. at 61 ("Starr may maintain its Due Process claim in this Court only insofar as it is based on an illegal exaction theory.").

B. The Federal Reserve Act Does Not Expressly Authorize Defendant to Demand Equity as a Condition of a Section 13(3) Loan.

60. The Federal Reserve Act does not expressly authorize Defendant to demand equity as a condition of a Section 13(3) loan.

61. Defendant concedes that neither the Federal Reserve Act nor any statute or regulation in effect in September 2008 "explicitly granted authority to FRBNY" to "acquire stock on its own account in exchange for agreeing to discount a loan." Def.'s Response to Pl.'s First RFA Nos. 16.0, 16.1; *see also* Def.'s Response to Pl.'s First RFA Nos. 17.0, 17.1 (admitting that no statute or regulation "explicitly granted authority to FRBNY" "to acquire additional consideration on its own account in exchange for agreeing to discount a loan"); Def.'s

Motion to Dismiss Reply (Apr. 26, 2012), ECF No. 46, at 30 n.10 ("purchasing equities is not *expressly* enumerated among the Federal Reserve's powers").

62. Instead, as this Court held, "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). These requirements would be superfluous and contradicted if the Federal Reserve could override them to punish solvent borrowers by demanding unlimited consideration or transfers of control. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (applying "the canon against interpreting any statutory provision in a manner that would render another provision superfluous"); *Walther v. Sec'y of Health & Human Servs.*, 485 F.3d 1146, 1150 (Fed. Cir. 2007) (holding that "'a statute should be interpreted so as not to render one part inoperative'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1368 (Fed. Cir. 2005) ("it is our task to construe the two statutes in a way that best resolves any possible conflict between them") (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

63. There is no evidence that Congress intended, as Defendant claims, to use the "limitations, restrictions, and regulations" language from the last sentence of Section 13(3) to give the Board specific authority to require additional consideration – not contemplated by the statutory text – as a condition for a particular Section 13(3) loan. To the contrary, Congress used the *same language* to apply to the rediscounting of paper for member banks under Section 13 of the original Federal Reserve Act (*see* Federal Reserve Act, Pub. L. No. 63-43 § 13, 38 Stat. 251, 264 (1913), and in 1916 to apply to the "discount and rediscount" of paper for member banks (Federal Reserve Act, Amendments, Pub. L. No. 64-270, 39 Stat. 752, 753 (1916)). *See also*

PTX 742 at 25 ("*All* discounts were made subject to such regulations, limitations, and restrictions as might be prescribed by the Federal Reserve Board") (emphasis added).

64. The Federal Reserve's own prior interpretations likewise support the conclusion that a Reserve Bank cannot demand anything more than interest in exchange for a 13(3) loan. The regulation governing the "terms of credit" for 13(3) loans that was in place in September 2008 authorized only the charging of interest with no authorization to acquire equity or additional consideration. *See* 12 C.F.R. § 201.4(d). Similarly, contemporaneous circulars issued by the Federal Reserve just after the enactment of Section 13(3) confirm that Section 13(3) loans "may be made *only* at rates established by the Federal Reserve banks, subject to review and determination by the Federal Reserve Board." 1932 Circular, 18 Fed. Reserve Bulletin at 518–20 (Aug. 1932) (emphasis added); *see also* 1936 Circular, 22 Fed. Reserve Bulletin at 123–25 (Fed. 1936) (same). The regulation and circulars also contain no procedures for *punishing* borrowers or any suggestion that FRBNY could require equity or consideration beyond the interest rate.

65. The language and structure of the Federal Reserve Act, its historical background, and basic principles of statutory interpretation also demonstrate that Section 13(3) does not authorize the Federal Reserve or its agents to acquire equity in a Section 13(3) borrower.

66. The Federal Reserve Act's emergency lending powers are designed to provide liquidity to companies in "unusual and exigent circumstances" by charging them a rate of interest established with "a view of accommodating commerce and business." 12 U.S.C. §§ 343, 357; *see also* ¶¶ 1-11 above. This goal of "accommodating commerce and business" reflects the fact that Federal Reserve loans "are made not for profit but for a public purpose." PTX 742 at 18; *cf.*

Def.'s Motion for Summary Judgment at 38 (the purpose of Section 13(3) lending is "to maintain the stability of the financial system").

67. "Rates of discount" and "discounts" for loans have never been interpreted to mean anything beyond interest rates for a loan or credits for security given.

68. Demanding that a borrower additionally grant the Government a 79.9% stake in the company is inconsistent with the Federal Reserve Act's mandate to "accommodat[e] commerce and business," *see* 12 U.S.C. § 357.

69. Review of the legislative history at the time of the 1932 amendments to the Federal Reserve Act confirms Congressional intent to limit Government involvement in private corporations. Ten days before signing Section 13(3) into law, President Hoover vetoed legislation that would have allowed the Reconstruction Finance Corporation ("RFC"), an instrumentality tasked with "provid[ing] emergency financing facilities for financial institutions" and stabilizing the national economy, similar to the Fed, to engage in non-emergency direct lending because it "would place the Government in private business." 75 Cong. Rec. 15040, 15041 (July 11, 1932);[4] Reconstruction Finance Corporation Act, Pub. L. No. 72-2, 47 Stat. 5 (1932); *see also* Federal Reserve Act § 4(8), 12 U.S.C. § 301 (2006).

70. Congress further reinforced Reserve Banks' lack of authority to demand equity by enacting the 1945 Government Corporation Control Act, which prohibits government entities from acquiring a controlling equity stake in a corporation without express Congressional authorization. 31 U.S.C. § 9102 ("An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."); *id.* §

[4] President Herbert Hoover, *Veto of the Emergency Relief and Construction Bill* (July 11, 1932), *in* Public Papers of the Presidents of the United States: Herbert Hoover 309 (1977), *also available at* http://www.presidency.ucsb.edu/ws/?pid=23157.

101 (defining "agency" to include federal instrumentalities); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 388-90 (1995) .

C. The Federal Reserve Act Does Not Implicitly Authorize Defendant to Demand Equity as a Condition of a Section 13(3) Loan.

71. The Federal Reserve Act does not implicitly authorize Defendant to demand equity as a condition of a Section 13(3) loan.

72. FRBNY's incidental powers under Section 4 of the FRA did not authorize it to condition the provision of exigent financing on AIG's surrender of equity. *See Starr Int'l Co*., 107 Fed. Cl. at 378 ("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"); *Starr Int'l Co.*, 106 Fed. Cl. at 87 ("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").

73. The "incidental powers" provision of Section 4 of the Federal Reserve Act provides 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 (2006) (emphasis added). On its face, this provision clearly contemplates that Reserve Banks' incidental authority is circumscribed by the express authority provided by the statute.

74. As the Supreme Court has repeatedly recognized, a federal entity's incidental powers cannot be greater than the powers otherwise delegated to it by Congress. *See Fed. Reserve Bank of Richmond v. Malloy*, 264 U.S. 160, 167 (1924) ("authority 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.").

75. Because there is no express power to purchase stock or demand consideration for a Section 13(3) loan beyond an interest rate fixed with a view of accommodating commerce and business, the acquisition of stock here was not incidental to any power; it would be a new power. Indeed, construing the Federal Reserve Act's grant of "incidental powers" that are "within the limitations prescribed by this chapter," 12 U.S.C. § 341, to implicitly include *broader* authority to demand *any* form of consideration would render the Act's interest rate provision superfluous and thus frustrate congressional intent. *See Bilski*, 130 S. Ct. at 3228; *Walther*, 485 F.3d at 1150.

D. There Was No Authorization to Demand Any Consideration for a 13(3) Loan Without the Approval of the Board of Governors.

76. There was no authorization to demand any consideration for a 13(3) loan without the approval of the Federal Reserve Board of Governors.

77. The Federal Reserve Board of Governors is the only governmental entity with authority to approve a Section 13(3) loan. *See* 12 U.S.C. § 343.

78. The final terms of the AIG loan, including critical aspects such as the form of equity and the use of the Trust, were never voted on and authorized by five or more members of the Board of Governors. *See* Findings of Fact ¶¶ 9.1, 9.2, 16.0. Accordingly, in setting the terms of the Defendant's loan to AIG, the Government failed to comply with Regulation A as set out in 12 C.F.R. § 201.4(d); 12 U.S.C. §§ 343, 357.

E. Defendant Is Not Entitled to Deference for Its Statutory Interpretation, Which Is Contrary to the Plain Language and Its Prior Understanding of the Act, And Is an *Ad Hoc* Argument to Justify Action Already Taken.

79. Defendant is not entitled to deference for its statutory interpretation, which is contrary to the plain language and its prior understanding of the Act, and is an *ad hoc* argument to justify action already taken.

80. Defendant has previously asserted that it is entitled to deference in its interpretation of the powers granted by the Federal Reserve Act. *See* Def.'s Motion for Summary Judgment (July 2, 2014), ECF No. 246, at 29, 35.

81. Where, as here, Defendant's interpretation of Section 13(3) is unreasonable and contrary to the plain language, structure, and legislative history of the provision, it is accorded no deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984) (holding that deference is afforded only to reasonable interpretations of ambiguous statutory provisions); *Soc. Sec. Bd v. Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function."); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1574 (Fed. Cir. 1996) (*Chevron* deference "does not permit abdication of the judicial responsibility to determine whether the challenged regulation is contrary to statute or devoid of administrative authority"); *Killip v. Office of Personnel Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (same).

82. Moreover, the Board of Governors, the only governmental entity with authority to approve a Section 13(3) loan, did not vote on or approve either the form of equity established in the Credit Agreement, or creation of the Trust. *See* Findings of Fact ¶¶ 9.1, 9.2, 16.0.

83. Rather the decision to require preferred, voting equity was made by FRBNY, which is a governmental instrumentality. *See* Findings of Fact ¶¶ 15.2 – 15.4; Def.'s Responses to Pl.'s Second RFA, General Objections ¶ 10 (stating Defendant's position that FRBNY is "a

Government instrumentality"); Joint Status Report on Discovery (Oct. 17, 2013), ECF No. 166, at 32-34 (describing FRBNY's position that it is a federal instrumentality); U.S. Treasury 30(b)(6) (Millstein) Dep. 15:5-8 ("[t]he loan was extended by a different instrumentality of the federal government, which was the Federal Reserve Bank of New York"); *see also Fed. Reserve Bank of St. Louis v. Metrocentre Imp. Dist. No. 1, City of Little Rock, Ark.*, 657 F.2d 183, 186 (8th Cir. 1981) ("we hold that the federal reserve banks are instrumentalities of the federal government"), *aff'd* 455 U.S. 995 (1982); *see also Fed. Reserve Bank of Boston v. Comm'r. of Corp. & Taxation of Commonwealth of Massachusetts*, 499 F.2d 60, 62 (1st Cir. 1974) (same).

84. Federal instrumentalities are not entitled to *Chevron* deference. *See Costello v. Grundon*, 651 F.3d 614, 631 (7th Cir. 2011) (remanding to the district court where "language in its decision implies that it may have deferred to what it believed (mistakenly) was an official opinion of the Federal Reserve Board"). Nothing in the Federal Reserve Act permits the Board of Governors to delegate to a Reserve Bank either the setting of rates or the novel decision to take equity. *Id*. at 632 (explaining that the "Board and the Federal Reserve Banks are two expressly independent statutory entities" and that the "Board may delegate certain of its functions to Federal Reserve banks, but it may not delegate any of its functions relating to rulemaking or pertaining principally to monetary and credit policies") (internal quotations omitted).

85. Further, Defendant's acquisition of 79.9 percent of shareholder equity was not the type of deliberative decision intended to have "the force of law" that is entitled to deference under *Chevron*. *See United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) (rejecting *Chevron* deference for tariff classifications that did not "bind more than the parties to the ruling").

86. First, it was an *ad hoc* and admittedly unprecedented decision applying only to AIG with no public or formal legal analysis. *See id*. at 232; *Eldredge v. Dep't of the Interior*, 451 F.3d 1337, 1342 (Fed. Cir. 2006) (no deference to advisory opinion that did not result from delegated authority "to make rules carrying the force of law" and that was not "binding on other parties") (internal citation omitted). Indeed, there is no documentation of the reasons for extracting 79.9% equity or charging the onerous interest rate to AIG. *See* Def.'s Response to Pl.'s First Interrogatories No. 3 ("the United States is not aware of any discrete, non-privileged, documented analysis performed by the United States or by FRBNY, based on information provided by FRBNY, regarding the type and amount of consideration to include in its offer of assistance to AIG on September 16, 2008"); *see also Freeman v. Quicken Loans*, 626 F.3d 799, 805 (5th Cir. 2010) ("Where the agency has not used a deliberative process such as notice-and-comment rulemaking, or where the process by which the agency reached its interpretation is unclear, the court cannot presume Congress intended to grant the interpretation the force of law.").

87. Second, the decision to take equity transferred enormous financial benefit to Defendant in response to public pressure. "*Chevron* deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction by the agency is arguably inconsistent with Congressional intent." *Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 824 (9th Cir. 2009).

88. Third, Defendant's present interpretation of its incidental powers and authority under Section 13(3) is inconsistent both with the Federal Reserve's prior interpretation as set forth in the circulars issued just after the enactment of Section 13(3), and Defendant's contemporaneous admissions at the time of the loan. *See* 1932 Circular, 18 *Fed. Reserve*

Bulletin at 518-20 (Aug. 1932) (stating that Section 13(3) loans "may be made only at rates established by the Federal Reserve banks, subject to review and determination by the Federal Reserve Board");1936 Circular, 22 *Fed. Reserve Bulletin* at 123-25 (Fed. 1936) (same); Findings of Fact ¶ 21.0. "[A]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (internal quotation omitted).

89. Finally, Defendant did not seize upon the language on which it now places primary reliance to justify its taking/illegal exaction until after the briefing on its motion to dismiss. Such *post hoc* rationalizations in defense of agency action during litigation are not to be credited. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) ("The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalization for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied the principle of [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *id*. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 838 (Fed. Cir. 2006) (same); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) ("Where the agency's interpretation seeks to advance its litigation position, deference is typically not afforded to the agency's position announced in a brief."); *Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("post-hoc rationalizations will not create a statutory interpretation deserving of deference"); *Timken Co. v. United States*, 894 F.2d 385, 389 (Fed. Cir. 1990) ("Agency action

cannot be sustained on *post hoc* rationalizations supplied during judicial review.") (quotations omitted); *see also Alcoa*, *Inc. v. United States*, 509 F.3d 173, 183 n.9 (3d Cir. 2007) (A "'position adopted in the course of litigation lacks the indicia of *expertise, regularity, rigorous consideration, and public scrutiny* that justify *Chevron* deference.'") (quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001)).

90. The decision to demand equity lacked a procedure "tending to foster the fairness and deliberation that should underlie a pronouncement" having the force of law. *See Mead*, 533 U.S. at 230 (finding that where there was no procedure "tending to foster the fairness and deliberation that should underlie a pronouncement" having the force of law, no deference to differential treatment would be granted).

91. Defendant's demand for 79.9 percent of AIG was unlike the notice-and-comment rulemaking or formal adjudication present in the "overwhelming number of" Supreme Court cases applying *Chevron* deference, *see Mead*, 533 U.S. at 230, as well as the opinion letter in *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995) (applying *Chevron* deference to an opinion letter by the Comptroller of the Currency addressing the authority of national banks generally to sell annuities).

F. At the Time of the Credit Agreement Exaction in September 2008, Treasury Also Had No Statutory or Regulatory Authority to Demand or Hold Stock in a Private Entity.

92. At the time of the Credit Agreement exaction in September 2008, Treasury also had no statutory or regulatory authority to demand or hold stock in a private entity.

93. Prior to the passage of the Emergency Economic Stabilization Act ("EESA") on October 3, 2008, Treasury had no authority to acquire equity. Even in the midst of the 2008 financial crisis, Congress expressed reluctance to provide *any* branch of the Government with

authority to hold equity except under strictly circumscribed provisions. Thus, EESA authorizes the Secretary of Treasury, but not Federal Reserve banks, for only a limited time (one-year with extensions upon application) to acquire stock warrants in exchange for assistance provided pursuant to EESA – stock warrants that are specifically required to be non-voting. *See* 12 U.S.C. § 5223 (d)(1) (directing that the Secretary of the Treasury "receive nonvoting common stock or preferred stock" or "voting stock with respect to which, the Secretary agrees not to exercise voting power").

94. Government officials have acknowledged that Treasury had no authority to acquire an equity interest in AIG. *See* Findings of Fact ¶ 21.2.

G. Plaintiffs Are Entitled to Receive the Value of Their Exacted Equity and Voting Rights.

95. Plaintiffs are entitled to receive the value of their exacted equity and voting rights.

96. Where the Government exacts property from a plaintiff in contravention of its statutory authority, that plaintiff is entitled to receive the value of its property. *See Casa de Cambio Comdiv S.A.de C.V. v. United States*, 48 Fed. Cl. 137, 145 (2000) (collecting cases), *aff'd*, 291 F.3d 1356 (Fed. Cir. 2002) ("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."); *Andres v. United States*, No. 03-2654, 2005 WL 6112616, at *2 (Fed. Cl. July 28, 2005) (noting that an illegal exaction claim occurs "where the Government has taken plaintiff's property and converted that property into money, preventing the return of the illegally-taken property"); *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."); *id.* ("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"); *see also Litzenberger v. United States*, 89 F.3d 818, 820 (Fed. Cir. 1996) (indicating that the value of seized property could be recovered as an illegal exaction); *Bernaugh v. United States*, 38 Fed. Cl. 538, 540, 543 (1997) (seeking "recovery of the value of forfeited property").

97. 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).

98. Defendant acquired and held 79.9% of the Credit Agreement Class's equity for the sole benefit of the Treasury in the form of convertible preferred shares, as well as nonvoting, nonconvertible shares that were obtained in connection with Defendant's loan to AIG pursuant to TARP. JX 107 at 46, 137; JX 172 at 5. Defendant's shares were exchanged for common stock on January 14, 2011, and immediately transferred to Treasury. *See* Def.'s Response to Pl.'s Second RFA No. 740; Saunders Report, Appendix C ¶¶ 25-26. Treasury subsequently sold its Series C preferred shares for $17.6 billion. *See* Def.'s Response to Pl.'s Second RFA Nos. 660, 662, 774. The 79.9 percent equity that Defendant exacted from shareholders was worth $35.4 billion or $13.16 per share on September 22, 2008. *See* Kothari ¶ 22, Exhibit V.C-2.

99. Sums deposited from improperly exacted property may be returned pursuant to the general appropriation in 31 U.S.C. § 1322(b)(2) (2012), which provides:

> (b) Except as provided in subsection (c) of this section, necessary amounts are appropriated to the Secretary of the Treasury to make payments from--(1) the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown"; and (2) the United States Government account *"Refund of Moneys Erroneously Received and Covered" and other collections erroneously deposited* that are not properly chargeable to another appropriation.

Id. at § 1322(b)(2) (2012) (emphasis added); *see also Bowman*, 35 Fed Cl. at 401 n.7.

100. Where, as here, property, rather than money, was exacted, a plaintiff may obtain the monetary value of the property exacted. *See Casa de Cambio*, 48 Fed. Cl. at 145–46. "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" and that consequently "a plaintiff who has lost property may, at least in some circumstances, bring either a takings claim or an illegal exaction claim (or both, in the alternative)." *Id.*

101. In order to calculate the value of the equity that Defendant exacted from Plaintiff and the Credit Agreement Class, the value of the equity should be calculated as of the date the stock was illegally exacted. *See Gmo. Niehaus & Co. v. United States*, 373 F.2d 944, 961 (Ct. Cl. 1967) (value of securities at the time of seizure is the proper measure for calculating damages for their illegal exaction to the extent calculable, but if not calculable the proper measure is the proceeds from the sale of the securities).

V. Defendant Was Not Authorized To Include Terms in the Credit Agreement with the Purpose or Effect of Punishing AIG Shareholders.

102. Defendant was not authorized to include terms in the Credit Agreement with the purpose or effect of punishing AIG shareholders.

103. At the time of the Credit Agreement and subsequently, the Defendant justified the taking of 79.9% of AIG's equity as done to "punish" AIG shareholders and avoid moral hazard. *See* Findings of Fact ¶ 23.1. There was, however, no statutory authority for the Defendant to

take punitive measures against AIG shareholders. The Federal Reserve Act's sole guidance to a Reserve Bank pricing a 13(3) loan is in Section 14(d) of the Act, which commands a reserve bank to set the rate "with a view of accommodating commerce and business." 12 U.S.C. § 357.

104. In 2008, neither the Federal Reserve Board nor the Federal Reserve Bank of New York had any regulatory or internal guidelines for deciding when taking punitive action is appropriate. *See* Findings of Fact ¶ 24.0. Similarly, the Federal Reserve had no administrative function that would permit determinations of actions warranting punishment.

A. Defendant's Plain Lack of Authority to Impose a Penalty Is Made Plainer Still by the Lack of Any Necessity for Defendant to Do So Given Defendant's Ability to Retain the Option of Pursuing a Penalty, If Appropriate, in a Manner Consistent with Due Process and the Rule of Law.

105. Defendant's plain lack of authority to impose a penalty is made plainer by the lack of any necessity for Defendant to do so given Defendant's ability to retain the option of pursuing a penalty, if appropriate, in a manner consistent with due process and the rule of law.

106. In the context of the financial crisis, during which it was Defendant's responsibility to address market failures, Defendant has generally followed providing assistance to financial institutions with investigations, negotiations, and, where appropriate, fines and settlements. *See, e.g.*, U.S. Dep't of Justice, Press Release (July 14, 2014), "Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages" (settling claims brought, *inter alia*, under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)).[5] This is what due process requires before imposing a penalty. *See also* Findings of Fact ¶¶ 25.0, 26.0.

[5] *Available at* http://www.justice.gov/opa/pr/2014/July/14-ag-733.html.

107. The lack of any procedural protections or process requirements in the text of the Federal Reserve Act as it relates to 13(3) makes plain that Congress did not authorize the Federal Reserve to use 13(3) as a means to punish individual institutions. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988) ("federal statutes are to be construed so as to avoid serious doubts as to their constitutionality"). Congress could not have intended to confer the power to selectively punish when it required no procedures for determining who should be punished or for what or by how much, given the significant due process, equal protection, and delegation concerns that would result from such unconstrained authority. *Id.*

108. The terms of Defendant's assistance to AIG were not "fixed with a view of accommodating commerce and business," but were instead carried out with the unauthorized purpose to punish AIG shareholders. Specifically, by extracting 79.9% of AIG's equity in addition to a fully secured, high-interest loan, Defendant punished AIG shareholders with no authority to do so.

B. Defendant Was Especially Not Authorized to Take "Punitive" Action Without Any Analysis, Investigation, and Findings, or Any Notice or an Opportunity to Be Heard, or Any Criteria for When to Take Punitive Action.

109. Defendant was especially not authorized to take "punitive" action without any analysis, investigation, findings, or any notice or an opportunity to be heard, or any criteria for when to take punitive action.

110. Defendant has no authority to punish an individual or institution without providing notice of the intent to impose a penalty and an opportunity to be heard. *See Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385–86 (1908); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not

involve the stigma and hardships of a criminal conviction, is a principle basic to our society."). The amount of process that is due in any particular circumstance requires balancing: (1) the interests of the individual in retaining the property and the injury threatened by the official action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the costs and administrative burden of the additional process, and the interests of the government in efficient adjudication. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

VI. There Was No Voluntary Agreement that Bars Defendant's Credit Agreement Claims.

111. There was no voluntary agreement that bars Defendant's Credit Agreement claims.

A. Voluntary Agreement Is Not A Defense to Plaintiffs' Illegal Exaction Claims.

112. Voluntary agreement is not a defense to Plaintiffs' illegal exaction claims.

113. In *Suwannee Steamship Co. v. United States,* 279 F.2d 874 (Ct. Cl. 1960), pursuant to the Merchant Marine Act, the plaintiff sought from the Maritime Administrator permission to sell two of its ships to a foreign purchaser. *Id.* at 874-75. The plaintiff needed such permission by law and it could come only from the Administrator. *Id.* at 874. The Administrator agreed to the sale, but also introduced (that is, created) a condition making its approval contingent on the payment by the plaintiff of a sum of $20,000. *Id.* at 875. The plaintiff accepted the terms proposed by the Administrator, paid the $20,000, and subsequently sued the United States, claiming that "Maritime had no legal authority to condition its approval of the requested transfer upon the payment of $20,000." *Id.* at 876.

114. In response to the plaintiff's claim in *Suwannee*, the Government made two arguments. The first was 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.* The second was that the plaintiff, by entering into a contract to pay the $20,000, had voluntarily agreed to the payment. *Id.* at 877. The Court rejected both of the Government's arguments. In rejecting the first argument, it stated:

> We suggested that no statute should be read *as subjecting citizens to the uncontrolled caprice of officials*, unless that 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. . . . officials have no authority to add to their function of determining the compatibility of the application with the public interest, the superogatory function of picking up a few dollars for the public.

Id. at 876 (emphasis added). Having described why impermissible dangers arise when an official vested with power is allowed to demand consideration for its exercise of discretion not authorized by Congress, the court went on to rule that because of the lack of authorization to tie a payment to the approval sought, "the doctrine of voluntary payment should not be applied." *Id.* at 877; *see also Swift & Courtney & Beecher Co. v. United States*, 111 U.S. 22, 30 (1884) ("If a person illegally claims a fee *colore officii*, the payment is not voluntary, so as to preclude the party from recovering it back. 'If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary.'") (internal citations and quotations omitted); *Am. Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 680 (2007) (citing *Swift* as supporting "a long standing legal tradition that illegally exacted funds may be recovered, regardless of whether the plaintiff previously raised a protest.").

115. Where Congress has legislated how far Government officials may go in conferring a discretionary benefit as it did in Section 13(3), it does not allow for Government officials to impose conditions irrelevant to those set forth in the statute. *See Sprague S.S. Co. v.*

United States, 145 Ct. Cl. 642, 645-46 (1959); *see also Malloy*, 264 U.S. at 167 ("authority 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.").

116. Even in cases where the same risks and special vulnerabilities present in *Suwannee* are not present, this Court and the Federal Circuit have held that voluntariness is not a defense if an illegal exaction claim has occurred "in violation of a statute intended to benefit the person seeking recovery." *See, e.g., Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1017-18 (Ct. Cl. 1980) ("The line we have drawn is that a voluntary payment may be recovered if the statute barring the payment was enacted for the benefit of the person seeking recovery but may not be recovered if enacted for the benefit of another."). [6] If, as here, an illegal exaction occurs in violation of a statute that benefits the persons seeking recovery, voluntariness is not a defense.

B. Unless Plaintiffs Were Parties to the Credit Agreement or Given An Opportunity to Approve or Disapprove the Agreement or Its Terms, They Could Not Have Voluntarily Agreed to Defendant's Taking or Exaction of Their Equity and Voting Control.

117. Unless Plaintiffs were parties to the Credit Agreement, or given an opportunity to approve or disapprove the Agreement or its terms, they could not have voluntarily agreed to Defendant's taking or exaction of their equity and voting control.

118. Defendant's reliance on the actions of AIG's Board to show voluntary agreement ignores the fact that what is at issue here is Plaintiffs' direct claim for Defendant's taking of 79.9% of their equity and voting rights.

[6] *See also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (recognizing "special vulnerability of land use permit applicants to extortionate demands for money" by permitting authorities).

119. Defendant has cited no case where Board action voided shareholders' direct claims for dilution.

120. AIG common shareholders never approved (and were never given the opportunity to approve or disapprove) the transaction.

121. It was Defendant's actions that prevented the very parties against whom it now asserts a voluntary agreement defense from having the opportunity to make any decision, much less a voluntary one. *See* Findings of Fact ¶¶ 28.0 – 29.0.

C. There Was No Voluntary Agreement by AIG Because Defendant Controlled AIG.

122. There was no voluntary agreement by AIG because Defendant controlled AIG.

123. During the relevant time period, Defendant exercised effective economic control over AIG. *See* Findings of Fact ¶¶ 13.0, 27.0.

124. In view of Defendant's exercise of control over AIG, AIG was not in a position to make a voluntary decision. 8 Del. Code § 203 (c)(4) ("'Control,' including the terms 'controlling,' 'controlled by' and 'under common control with,' means the possession, directly or indirectly,' 'controlled by' and 'under control with,' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise.").

125. Defendant's exercise of control forecloses its voluntary agreement defense.

D. In Any Event, There Was No Voluntary Agreement Even By AIG Because AIG Was Under Duress.

126. In any event, there was no voluntary agreement even by AIG because AIG was under duress.

1. The Circumstances Required to Activate Section 13(3), By Definition, Make the Existence of Duress More Likely.

127. The circumstances required to activate Section 13(3), by definition, make the existence of duress more likely.

128. Section 13(3) of the Federal Reserve Act provides Defendant power to grant loans to solvent non-banks during times of "unusual and exigent circumstances", where credit is not otherwise reasonably available. 12 U.S.C. § 343 (2006).

129. Firms subject to these dynamics are subject to special vulnerabilities that increase as time passes and the dynamic persists unabated. Conversely, in these circumstances, the Defendant has monopoly power, along with leverage that only increases until the panic is abated. This widening asymmetry of leverage and power is the natural result of the market failures that trigger Section 13(3) powers in the first instance. *See* Findings of Fact ¶¶ 2.0 – 4.0.

130. "Duress, understood most concretely, is the situation in which one person obtains a temporary monopoly that it tries to use to obtain a benefit to which it is not entitled." *Prof'l Serv. Network, Inc., v. Am. Alliance Holding Co.*, 238 F.3d 897, 900 (7th Cir. 2000); *see also Trompler, Inc. v. N.L.R.B.*, 338 F.3d 747, 751 (7th Cir. 2003) ("The seamen in the *Alaska Packers'* case had in effect a monopoly of the employer's labor supply at a critical period, and the exploitation of temporary monopolies is, as explained in the *Professional Service Network* case [citation omitted], the functional meaning of the legal concept of duress.") (citing *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902)); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 131 (1971) ("The existence of economic or business compulsion is demonstrated by proof that immediate possession of needful goods is threatened") (quotation and citation omitted).

131. Accordingly, "duress" would arise if the lender of last resort sought to *exploit* the panic conditions that its enormous power was designed and conferred to allow it to correct.

2. Duress Exists If There Was Not A Reasonable Alternative and Defendant Contributed to the Lack of A Reasonable Alternative by Acting Wrongfully (Whether or Not Illegally).

132. Duress exists if there was not a reasonable alternative and Defendant contributed to the lack of a reasonable alternative by acting wrongfully (whether or not illegally).

133. To establish duress or coercion, 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. *Fruhauf Sw. Garment Co. v. United States*, 126 Ct. Cl. 51, 62 (1953); *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2002).

134. "Illegal action by the government (that is, action in violation of a statute or regulation) can support a finding of duress. However, an act can be coercive without being illegal. Government coercion may be supported by a finding that the government engaged in wrongful acts by violating the contract without a good-faith belief that its actions were justified or by violating the covenant of good faith and fair dealing implicit in every contract." *Rumsfeld,* 329 F.2d at 1330 (quoting *David Nassif Assoc. v. United States*, 226 Ct. Cl. 372, 385 (1981)) (internal citations omitted).

135. Wrongful conduct that is not illegal includes "threats that would breach a duty of good faith and fair dealing under a contract" (*David Nassif*, 664 F.2d at 12); "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.* at 12); or an act that "violates notions of fair dealing." *Sys. Tech. Assocs., Inc., v. United* States, 699 F.2d 1383, 1387-88 (Fed. Cir. 1983). As this Court previously stated, conduct is "wrongful

and hence, coercive if it 'violates notions of fair dealing.'" *Starr Int'l Co*., 106 Fed. Cl. at 77 (quoting *Rumsfeld*, 329 F.3d at 1330).

136. The "involuntarily accepted" prong is satisfied by proof of the other two prongs. *Pew Forest Prods. v. United States*, 105 Fed. Cl. 59, 67 (2012) ("Duress occurs when a party involuntarily accepts another party's terms because the circumstances permitted no alternative and such circumstances were the result of the other party's coercive acts."); Restatement (Second) of Contracts § 175(1) (1981) (contract voidable if "assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative").

137. Where the Government's wrongful conduct forces a plaintiff to choose between unacceptable choices, the plaintiff's choice is involuntary. *See, e.g., Schultz v. U.S. Navy*, 810 F.2d 1133, 1137 (Fed. Cir. 1987) (where plaintiff was undisputedly in poor health, "the agency could not legitimately confront Ms. Schultz with the choice of returning to work, resigning retroactively, or facing AWOL charges"); *Murphy v. United States*, 69 Fed. Cl. 593, 605-06 (2006) (resignation involuntary if result of "unjustified" government action); *Terban v. Dep't of Energy*, 216 F.3d 1021, 1026 (Fed. Cir. 2000) (resignation involuntary if Government "lacked reasonable grounds" for threatening to take adverse action).

138. Defendant contends that AIG voluntarily accepted the loan's punitive terms because AIG was advised by counsel and some directors testified that they acted voluntarily. Accepting Defendant's position, even the most constrained choice, induced by the most improper means imaginable, would be "voluntary" for duress purposes. In a literal sense, even a person accosted by a gunman makes a "voluntary" choice between giving up his money or getting shot. *See* Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 471-72 (2005); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569 (1933).

139. However, as cases such as *Pew Forest Products* and *Schultz* demonstrate, "voluntariness" for duress purposes is something entirely different; for there to be voluntariness, there must be a choice between options that are not constrained as the result of unfair or overreaching conduct.

140. The party claiming duress need not show that it lacked *any* alternative. A party claiming duress must only establish that it had no "reasonable alternative." *Starr Int'l Co.*, 106 Fed. Cl. at 78 (quoting *David Massif Assocs.*, 644 F.2d at 12); *see also Sys. Tech. Assocs.*, 699 F.2d at 1387 (noting that CFC case law "emphasi[zes] the lack of a reasonable alternative") (citing, *inter alia*, *Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 653 (Ct. Cl. 1981)).

141. The standard for determining whether an alternative is "reasonable" is "a practical one under which account must be taken of the exigencies in which the victim finds himself, and the mere availability of a legal remedy is not controlling if it will not afford effective relief to one in the victim's circumstances." Restatement (Second) of Contracts § 175, comment b (1981). An alternative is not reasonable if it would cause the plaintiff to incur "heavy financial loss." *Id*. at Illustrations 3 & 4.

142. Cases have held that alternatives are not reasonable if they would result in "large monetary damages" or bankruptcy. *Kelsey-Hayes Co. v. Gal taco Red law Castings Corp*., 749 F. Supp. 794, 798 (E.D. Mich. 1990); *see also Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382, 391 (Ct. Cl. 1969) ("'The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction *or discontinue its business*'") (emphasis added) (quoting *Swift & Courtney*, 111 U.S. at 28-29; *Petters Co. Inc. v. BLS Sales Inc*., No. C 04-02160 CRB, 2005 WL 2072109, at *8 (N.D. Cal. 2005) ("financial ruin or bankruptcy is not a reasonable alternative"); *Osanitsch v. Marconi PLC*, No. CV 05–3988 CRB,

2009 WL 5125821, *7 (N.D. Cal. 2009) (duress may be found if "bankruptcy or financial ruin" are the only options); *Northern Fabrication Co., Inc. v. UNOCAL*, 980 P.2d 958, 960-61 (Alaska 1999) (fact issue where party contended contract was signed under duress because failure to sign "would have meant sure bankruptcy"); *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc*., 678 S.W.2d 661, 686 (Tex. App. 1984) (economic duress may be found if victim was forced "to choose between distasteful and costly situations, i.e., bow to duress or face bankruptcy, loss of credit rating, or loss of profits from a venture"); *Litten v. Jonathan Logan, Inc*., 286 A.2d 913, 917 (Pa. Super. 1971) (finding duress because "If plaintiffs had refused to sign, bankruptcy would have been the result").

a. To Establish Duress, Defendant's Wrongful Conduct Need Only Contribute Substantially to AIG's Financial Distress and Lack of Reasonable Alternatives.

143. To establish duress, Defendant's wrongful conduct need only contribute substantially to AIG's financial distress and lack of reasonable alternatives.

144. A party claiming duress is only required to establish that the defendant's conduct substantially contributed to its financial distress and resulting lack of reasonable alternatives—not that the defendant was the sole cause.

145. For example, in *Aircraft Associates & Manufacturing Co. v. United States*, 174 Ct. Cl. 886 (1966), the plaintiff successfully bid on the right to demilitarize certain aircrafts. *Id.* at 888. The plaintiff hoped to profit from the deal by recovering and selling the aluminum in the plane carcass. *Id.* at 889. Ultimately, however, the plaintiff could not fulfill the contract, and in order to get relief in price, agreed to a release of claims against the Government. The plaintiff's difficulties were caused by (1) "a drop in the aluminum market", (2) the plaintiff's "highly optimistic guess as to the amount of aluminum that could be obtained from the carcasses", and (3) "the removal by personnel of defendant of a substantial number of parts from the aircraft

between the time the invitation for bids was issued and before title passed to plaintiff." *Id.* at 889. While the Government was not the only factor inducing the plaintiff's assent to the release, the court nonetheless found duress because "the Government's wrongful removal of the parts contributed substantially to plaintiff's financial distress." *Id.* at 896; *see also James Shewan & Sons, Inc. v. United States*, 73 Ct. Cl. 49, 81-83 (1931) (finding duress where Government's misconduct was a but-for cause of the plaintiff's signing the contract, while noting that plaintiff's financial circumstances were also partly caused by plaintiff's tax debt and a post-war slowdown in plaintiff's business); Restatement (Second) Contracts, § 175, comment c (1981) ("A party's manifestation of assent is induced by duress if the duress substantially contributed to his decision to manifest his assent.").

146. As the factual record shows, Defendant played a substantial role in creating the economic circumstances that gave rise to AIG's financial distress and resulting lack of reasonable alternatives. *See* Findings of Fact ¶¶ 6.0 – 7.0. Notwithstanding AIGFP's decision in late 2005 to stop making commitments to multi-sector CDS contracts backed by subprime mortgage-backed securities, issuances of subprime-backed securities sharply increased in volume, with the quality of these later vintages deteriorating and causing a general loss of confidence. By March 2008, the Federal Reserve recognized that valuations of securities exposed to subprime mortgages involved panic and no longer reflected ordinary market activity that would reflect their expected value. Nevertheless, Defendant repeatedly rebuffed AIG's efforts to obtain access to programs and assistance made available to others. Findings of Fact ¶ 7.3. In circumstances where the Lender of Last Resort will eventually intervene, mere delay in doing so inexorably heightens the pressure on the increasingly weakened borrower. Findings of Fact ¶ 7.0.

b. Defendant Acted Wrongfully If It Misused Its Monopoly Power as Lender of Last Resort By Acting to Exploit the Artificial Market Conditions It Was Obligated to Correct, and Thereby Gained A Benefit to Which It Was Not Entitled and That It Could Never Have Obtained But for Market Failure.

147. Defendant acted wrongfully if it misused its monopoly power as Lender of Last Resort by acting to exploit the artificial market conditions it was obligated to correct, and thereby gained a benefit to which it was not entitled and that it could never have obtained but for market failure.

148. "Duress, understood most concretely, is the situation in which one person obtains a temporary monopoly that it tries to use to obtain a benefit to which it is not entitled." *Prof'l Serv. Network*, 238 F.3d at 900.[7]

149. AIG accepted the Credit Agreement terms under duress because Defendant exploited its power as lender of last resort, and AIG's special vulnerability in a financial panic, to require AIG unconstitutionally to surrender 79.9% of the company's equity as a loan condition in violation of the Fifth Amendment. The Supreme Court's recent decision in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), in addressing the unconstitutional conditions doctrine, stated that "land use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." 133 S. Ct. at 2594. The special vulnerability to coercion that a 13(3) borrower confronts is even more acute

[7] In a line of cases involving war-time price controls, several courts have held that the Government could not exploit its monopoly power created by such price controls to take private property, even for the war effort, without paying just compensation. *See, e.g.*, *Swiss Fed. Rys. v. United States*, 125 Ct. Cl. 444, 451-52 (1953); *United States v. Buxton Lines*, 165 F.2d 993, 996 (4th Cir. 1948); *Wilson Athletic Goods Mfg. Co. v. United States*, 161 F.2d 915, 917-18 (7th Cir. 1947).

given that the statute only applies in financial panics when the Government by its terms has a temporary monopoly on liquidity and the borrower needs access to that liquidity to survive.

150. While *Koontz* involved conditions imposed on a land use permit, it made clear that the prohibition against withholding a discretionary benefit "because someone refused to give up constitutional rights" (*Id.* at 2603) applies to other discretionary government benefits as well. As the Court explained:

> Virtually all of our unconstitutional conditions cases involve a gratuitous government benefit of some kind. *See, e.g., Regan,* 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (tax benefit); *Memorial Hospital*, 415 U.S. 250, 94 S. Ct. 1076, 39 L.Ed.2d 306 (healthcare); *Perry*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (public employment); *United States v. Butler*, 297 U.S. 1, 71, 56 S. Ct. 312, 80 L.Ed. 477 (1936) (crop payments); *Frost* [*v. R.R. Comm'n of State of Cal.*, 271 U.S. 583 (1926)] (business license). 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. *E.g., United States v. American Library Assn., Inc.,* 539 U.S. 194, 210, 123 S. Ct. 2297, 156 L.Ed.2d 221 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech *even if he has no entitlement to that benefit*" (emphasis added and internal quotation markets omitted)); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S. Ct. 215, 97 L.Ed 216 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). 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.

151. Various other courts have similarly recognized that the Government acts wrongfully when it exploits a citizen's need for a discretionary benefit to obtain the unrelated forfeiture of constitutional rights. *See, e.g., Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998) ("'[T]he government may not require a person to give up a constitutional right – here, the right to receive just compensation when property is taken for a public purpose – in exchange

for a discretionary benefit[.]'" (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)); *Suwannee*, 279 F.2d at 876 ("We suggest that no statute should be read as subjecting citizens to the uncontrolled caprice of officials, unless that 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."); *Amen v. City of Dearborn*, 718 F.2d 789, 795-97 (6th Cir. 1983) (holding that the city cannot misuse its power to artificially reduce individuals' property values, eliminate other potential buyers, and then refuse to pay anything more than the artificially depressed price); *Moore v. City of Tallahassee*, 928 F. Supp. 1140, 1145-46 (N.D. Fla. 1995) (denying summary judgment on the basis that the claim was supported by evidence that the city acted wrongfully by misusing its zoning powers to depress the price of property it wished to purchase); *United States v. 220.0 Acres of Land (Assateague Island Case)*, 324 F. Supp. 1170 (D. Md. 1971) (finding the federal government could not encourage the state government to deny building and zoning permits in order to depress the value of land the federal government later purchased for less than fair value); *see also* Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 217 (1996) (duress may be found where "the end sought to be achieved (the demand) bears no relationship to the intrinsic purposes of the power or right used in seeking to obtain it").

152. Defendant's conduct would therefore be wrongful if: (i) Defendant intended to grant the benefit regardless of whether AIG accepted the equity condition because it was otherwise in Defendant's interest to do so; (ii) Defendant imposed the equity condition for political reasons to scapegoat AIG and to facilitate the passage of EESA; (iii) Defendant imposed the equity condition to exploit AIG being "incredibly unpopular" (Paulson Dep. 253:3-7); or (iv) the equity condition otherwise was unrelated to a legitimate government purpose because the

loan was fully secured and because the Government had failed to conduct any investigation to determine that AIG was more deserving of punishment than other borrowers.

c. Defendant Acted Wrongfully If It Discouraged Other Sources of Liquidity from Providing Liquidity to AIG.

153. Defendant acted wrongfully if it discouraged other sources of liquidity from providing liquidity to AIG.

154. Defendant enhanced its leverage over AIG by interfering with AIG's ability to obtain other sources of liquidity prior to presenting the term sheet to AIG on September 16, 2008 on a take-it-or-leave-it basis and in the days thereafter. *See* Findings of Fact ¶¶ 7.4, 7.6, 7.7, 11.0.

155. In *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), the plaintiff was in negotiations with a foreign government to sell certain surplus radar equipment that was being stored in the Philippines. *Id.* at 459. The U.S. Government, seeking to block the sale, used its influence over the government of the Philippines to convince it to place an export embargo on the radar equipment. *Id.* at 460. The plaintiff subsequently agreed to turn over the property to the U.S. Government, in exchange for a reservation of the right to sue. *Id.* at 463-64. The court found that the U.S. Government had taken the plaintiff's property, explaining that because of the Government's "instigating the embargo" and "other acts prevent[ing] the property from getting on the market," *id.* at 465, the equipment's "resale had been made impossible," and there "was no real prospect of a favorable sale of the radar equipment, after the embargo upon its exportation," *id.* at 464*; see also Amen*, 718 F.2d at 795-97 (holding that the city could not misuse its power to artificially reduce individuals' property values, eliminate other potential buyers, and then refuse to pay anything more than the artificially depressed price); *Moore*, 928 F. Supp. at 1145-46 (denying city's summary judgment motion on plaintiff's substantive due

process and inverse condemnation claims where plaintiff presented evidence that the city discouraged private citizens from buying plaintiff's property, and then purchased the property for an artificially reduced price).

156. As in *Turney*, *Amen*, and *Moore*, if Defendant contributed to AIG's financial vulnerability and lack of options by actively discouraging other potential investors, and used its improperly enhanced leverage over AIG to force the AIG Board to accept its terms and surrender Plaintiffs' property without just compensation, its conduct was wrongful.

d. Defendant Acted Wrongfully If It Increased Pressure on AIG by Giving the AIG Board Only an Unreasonably Short Period of Time to Consider Defendant's "Offer."

157. Defendant acted wrongfully if it increased its pressure on AIG by giving the AIG Board an unreasonably short period of time to consider Defendant's "offer."

158. Defendant knew prior to September 2008 that AIG would eventually face the panic conditions that only a Lender of Last Resort could ameliorate, yet maximized its leverage by waiting until AIG was on the brink of a bankruptcy filing to give AIG a take-it-or-leave-it offer that it had to respond to in a matter of hours, refusing to engage in any negotiation, and threatening, absent agreement, to cut off all of its funding to AIG. *See* Findings of Fact ¶¶ 2.1, 4.0, 7.0, 8.2, 11.0.

159. Generally, forcing a party to decide on an offer within an unreasonably short period of time is evidence of duress. "[D]uress is usually marked by immediacy" where the "non-consenting party must make an immediate decision to agree to the terms of the contract or face the threatened harm". *Freedlander, Inc. v. Nat'l Bank of N.C.*, 706 F. Supp. 1211, 1217 (E.D. Va. 1988); *see also Sneeden v. United States*, 33 Fed. Cl. 303, 307 (1995) (affirming a hearing officer's opinion explaining that even if a $3.5 million settlement offer with a 24 hour deadline for acceptance "were coercive when made," such impropriety was overcome by the

Government's subsequent decision to give the contractor an additional 30 days to consider the offer); *Alloy Prods. Corp. v. United States*, 157 Ct. Cl. 376, 379-81 (1962) (finding no duress in part because the plaintiff signed the agreement 18 months after the alleged duress); *Cianci v. JEM Enter., Inc.*, No. Civ.A. 16419-NC, 2000 WL 1234647, at *10-11 (Del. Ch. July 11, 2000) (finding no duress in part because of the significant lapse of time between the threat and the assent). Here, in the face of a liquidity crisis, Defendant purposefully increased its leverage over AIG by delaying its assistance. *See Sys. Tech. Assocs.*, 699 F.2d at 1388 ("delay attributable to the Government is relevant to disposition of the claim that the Government exerted duress through deliberate delay").

e. Defendant Acted Wrongfully If It Imposed A Penalty on Plaintiffs Without Authority to Do So.

160. Defendant acted wrongfully if it imposed a penalty on Plaintiffs without authority to do so.

161. At the time of the Credit Agreement, Defendant's justification for requiring AIG to surrender a 79.9% equity interest in AIG was to punish AIG shareholders and to avoid moral hazard. *See* Findings of Fact ¶ 23.1.

f. Defendant Acted Wrongfully If It Imposed a Penalty Without Any Analysis, Investigation, and Findings, or Any Notice or an Opportunity to Be Heard, or Any Criteria for When to Take Punitive Action.

162. Defendant acted wrongfully if it imposed a penalty without any analysis, investigation, and findings, or any notice or any opportunity to be heard, or any criteria for when to take punitive action.

163. The imposition of punishment without providing notice of the intent to impose a penalty and an opportunity to be heard is a violation of the most basic procedural due process protections. *See Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385-86 (1908); *see also*

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[The] right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

g. Defendant Acted Wrongfully If It Discriminated Against AIG.

164. Defendant acted wrongfully if it discriminated against AIG.

165. The Federal Reserve has no authority to discriminate among 13(3) borrowers.

166. As explained above, while Section 13(3) permits Defendant to set interest rates based on the class of paper (12 U.S.C. § 357), it does not permit Defendant to set loan terms based on the identity or nature of the borrower.

h. Defendant Acted Wrongfully If It Withheld Access to Federal Reserve Loans and Assistance for Political Purposes.

167. Defendant acted wrongfully if it withheld access to Federal Reserve loans and assistance for political purposes.

168. Government officials worried that a perceived "bailout" of AIG would be harshly criticized. Treasury Secretary Paulson concluded that punishing AIG was necessary to secure Congress's approval of TARP (Paulson Dep. 251:17-254:13), explaining that "AIG was incredibly unpopular. If there was a – if there was a political scapegoat, it was AIG." (*Id.* 253:3-7.) As a result, no other recipient of Government loans and assistance received the same equity surrender term imposed on AIG. Findings of Fact ¶¶ 19.0, 23.6.

* * *

169. Each of the above examples of wrongful conduct, individually and collectively, provides an independent basis for satisfying the wrongfulness requirement. This conduct

substantially contributed to AIG's lack of a reasonable alternative to assenting to Defendant's punitive loan terms; AIG was therefore subject to duress when it assented.

VII. The Trust Did Not Cure the Unconstitutional and Illegal Exaction of Plaintiffs' Equity or Voting Control.

170. The Trust did not cure the unconstitutional and illegal exaction of Plaintiffs' equity or voting control.

A. Defendant Cannot Accomplish Through a Trust That Which Congress Has Denied It Authority to Accomplish Directly.

171. Defendant cannot accomplish through a trust that which Congress has denied it authority to accomplish directly.

172. The only consideration for a Section 13(3) loan that is authorized is an interest rate set "with a view of accommodating commerce and business," 12 U.S.C. § 357 (2006). Because Section 13(3) does not authorize the taking of equity as consideration for a loan, the ultimate recipient of the equity is irrelevant and has no bearing on whether the exaction of the equity was permissible under Section 13(3).

173. Defendant cannot use a trust to accomplish indirectly what it is not allowed to do directly. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that the government cannot act indirectly to "produce a result which [it] could not command directly"); *Merchants' Nat'l Bank v. United States*, 101 U.S. 1, 3–4 (1879) ("The contention by the United States that this is not a tax upon the note is to argue that the national government may do indirectly what it cannot do directly. The argument has been frequently met and answered by this court. In the case last cited it was admitted that the power of the government to borrow money could not be directly opposed; but a distinction was taken, in argument, between direct opposition and those measures which had ultimately the same effect. The distinction was promptly repudiated by the court.");

United States v. Doyle, 121 F.3d 1078, 1086 (7th Cir. 1997) ("The government also cannot achieve indirectly what it cannot achieve directly."); *United States v. Smith*, 47 F.3d 681, 684 (4th Cir. 1995) ("The government should not be allowed to do indirectly what it cannot do directly.").

174. Similarly, Defendant cannot establish a trust using its incidental powers to accomplish something it lacked authority to do under the same incidental powers. "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." *First Nat'l Bank*, 263 U.S. at 659; *see also Malloy*, 264 U.S. at 167 ("authority 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."); *Texas & Pacific Ry. Co. v. Pottorff*, 291 U.S. 245, 253 (1934) ("The measure of their powers is the statutory grant; and powers not conferred by Congress are denied.").

B. Defendant Necessarily Had to Acquire the Right to AIG's Equity in Order to Provide the Equity to the Trust.

175. Defendant necessarily had to acquire the right to AIG's equity in order to provide the equity to the Trust.

176. The Trust was not established until *four months after* Defendant exacted 79.9% of AIG shareholders' equity. *See* Def.'s Responses to Pl.'s Second RFA No. 726 (admitting that the "Trust did not exist until the AIG Credit Facility Trust Agreement was signed on January 16, 2009"). It is undisputed that FRBNY was the settlor of the Trust. *See* Def.'s Response to Pl.'s Second RFA No. 767. It is further undisputed that the Series C Preferred constituted the entirety of the Trust's corpus. *See* Answer ¶ 85 (admitting that the Series C shares were the "entirety" of

the corpus of the trust). Thus, in order for the Trust to be valid at its creation in January 2009, FRBNY must have had a property interest in the Series C stock at the time the Trust was created. *See* Uniform Trust Code § 401, cmt. (2000) ("a trust is not created until it receives property"); *Bogert's The Law of Trusts and Trustees* § 43.

177. Moreover, FRBNY, not the Trust, purchased the Series C shares for $500,000 in September 2008. *See* Findings of Fact ¶ 22.5. FRBNY's purchase of the Series C shares in September 2008 further establishes that Defendant possessed a legal entitlement to the equity before transferring that equity to the Trust, according it a controlling equity stake in AIG upon execution of the September 2008 Credit Agreement.

178. Similarly, it is undisputed that: (1) Defendant was the sole beneficiary of the Trust; and (2) Treasury ultimately held, sold, and profited from the equity exacted from AIG's shareholders. Findings of Fact ¶¶ 22.3.1, 22.5.

179. The trust structure thus provides no basis for Defendant to argue that it did not acquire, hold, or profit from the equity interest in AIG. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) ("The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'") (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1879)); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding that where there is a symbiotic or interdependent relationship between the Government and the entity that the entity will be found to be a Government actor).

180. Accordingly, as this Court observed in denying Defendant's motion to dismiss, there was "no meaningful legal distinction between FRBNY and Trust ownership of the Series C Preferred Stock." *Starr Int'l Co.*, 106 Fed Cl. at 87.

C. Defendant Was AIG's Controlling Shareholder Upon Execution of the Credit Agreement.

181. Defendant was AIG's controlling shareholder upon execution of the Credit Agreement.

182. At all relevant times, AIG was a Delaware corporation. JX 172 at 4. As a matter of Delaware corporate law, possession of an entitlement to a 79.9% equity interest in AIG made Defendant AIG's controlling shareholder. *See Brown v. Fenimore*, 3 Del. J. Corp. L. 552, 555 (Del. Ch. Jan. 11, 1977) (explaining that "Stockholder status is created" not by issuance of a certificate of stock, but "by a subscription for stock and the acceptance of such subscription by the corporation."); *see also* 8 Del. C. § 203 (c)(9)(ii) (defining "interested stockholders" as those that have "the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement, or understanding").

183. Based on federal securities and Delaware law, Defendant's right to the stock is sufficient to deem it the beneficial owner of the stock. *See* SEC Release No. 34-64628, 17 C.F.R. 240, 2011 WL 2246370, at 4 (June 8, 2011) ("Under Rule 13d-3(a), a person may become a beneficial owner even though the person has not acquired the equity security."); *see also Brown*, 3 Del. J. Corp. L. at 555 (finding that "a certificate [is] only an indicia of ownership or a muniment of title," where an agreement establishes an unconditional right to stock); *W.T. Grant Co. v. Comm'r of Internal Revenue*, 58 T.C. 290, 304-05 (1972) *rev'd and remanded on other grounds sub nom. W.T. Grant Co. v. Comm'r of Internal Revenue,* 483 F.2d 1115 (2d Cir. 1973) (holding, in bankruptcy context, that an agreement to purchase stock is sufficient to confer stockholder status where it does not set forth conditions precedent to such status, notwithstanding the fact that the purchaser does not yet hold the shares); *accord Del. L. of Corp. and Bus. Org.* §

5.18 ("The status of a person as a stockholder is not dependent on the issuance or possession of a stock certificate.").

184. Even though Defendant utilized the trust mechanism in an attempt to circumvent its lack of statutory authority to acquire equity, Defendant acquired a controlling equity stake in AIG upon the execution of the September 2008 Credit Agreement.

D. Defendant Was AIG's Controlling Lender upon Secure Demand Note Lending on September 16.

185. Defendant was AIG's controlling lender upon secure demand note lending on September 16, 2008.

186. Defendant made loans to AIG pursuant to a series of short term demand notes, secured by AIG assets, beginning on the evening of September 16, 2008, with the first note for $14 billion and, by September 19, 2008, had loaned a total of $37 billion to AIG pursuant to these demand notes. Findings of Fact ¶ 12.2. These demand notes made Defendant AIG's controlling lender.

E. Defendant Lacked Authority to Create a Trust Under the Federal Reserve Act.

187. Defendant lacked authority under the Federal Reserve Act to create a trust.

188. Defendant's claimed authority for the establishment of the Trust is Sections 13(3) and 4 of the Federal Reserve Act. *See* Def.'s Response to Pl.'s Second RFA No. 730; Def.'s Response to Pl.'s Third Interrogatories No. 14; JX 172 at 4; PTX 410 at 5.

189. However, nothing in the express language of Sections 4 or 13(3) of the Federal Reserve Act permits Defendant to establish a trust. *See* 12 U.S.C. §§ 341, 343 (2006). Because the Federal Reserve Act's incidental powers do not permit Defendant to acquire an equity stake in a corporation, the Act cannot permit Defendant to acquire an equity stake in a corporation *and*

to establish a trust to hold that equity. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that the government cannot act indirectly to "produce a result which [it] could not command directly").

190. Moreover, Defendant admits that the Board of Governors of the Federal Reserve did not vote on whether to create the Trust or whether the Series C Preferred Shares should be issued to and held by the Trust. *See* Defendant's Response to Plaintiff's First RFA Nos. 29.3, 29.5. The plain language of Section 13(3) states that a Reserve Banks' authority depends on Board of Governors authorization and "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). Regulation A, which governs the extension of emergency credit, also requires an affirmative vote of five or more members of the Board of Governors to authorize the extension of credit.

191. Consequently, the lack of Board of Governors approval provides an additional, independent basis for finding that an equity demand utilizing an unauthorized Trust was illegal.

F. The Trust Violated New York Trust Law If It Was Created to or Sought to Be Used to Circumvent Defendant's Inability to Acquire Equity in AIG.

192. The Trust violated New York trust law if it was created, or sought to be used, to circumvent Defendant's inability to acquire equity in AIG.

193. The AIG Credit Facility Trust was governed by state law. *See In re Laher*, 496 F.3d 279, 288 (3d Cir. 2007) ("trusts are creatures of state law"); *Sonnenschein v. Reliance Ins. Co.*, 353 F.2d 935, 937 n.2 (2d Cir. 1965) ("it is clear that state law governs whether a trust relationship exists"); *see also Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177–78 (1940) (holding that federal courts should apply a state law rule of decision in a trust case). The Trust

was created under and governed by New York law. *See* JX 172 at 21, § 5.03; Def.'s Response to Pl.'s Second Interrogatories No. 14.

194. Under New York law, the settlor of a trust can only convey to a trust property that the settlor owns. *See Bogert's The Law of Trusts and Trustees* § 43 ("The settlor must have, when the trust is created, a property interest equal to or greater than the interest to be conveyed in trust"); 106 *N.Y. Jur.2d Trusts* § 100 ("the owner of personal property may create an *inter vivos* trust therein by delivering" the property to the trustee).

195. There is no rational explanation for Defendant's use of a trust other than "to circumvent the Supreme Court's holding in *California National*," that the power to purchase stock is not incidental to the express powers conferred to national banks under the analogous National Bank Act. *Starr Int'l Co*., 106 Fed. Cl. at 87.

196. The Trust was created because the relevant decision-makers knew that Defendant lacked authority to acquire AIG's equity. *See* Findings of Fact ¶¶ 21.0, 22.2.

197. The use of the Trust to evade the prohibition on Defendant's acquisition of equity under the Federal Reserve Act violates New York law, which governed the Trust. *See* JX 172, at § 5.03; Practice Commentary, McKinney's N.Y. Est. Powers & Trusts Law § 7-1.4 (explaining that a trust may not be created to "evade or violate the law" or to "violate public policy"); *Bogert's The Law of Trusts and Trustees* § 211 (explaining that a trust "may be invalid because it is intended to accomplish an illegal purpose").

G. The Trust Was a Sham That Created No Real Separation from Defendant.

198. The Trust was a sham that created no real separation from Defendant.

1. The Trust Was Not Independent.

199. The Trust was not independent.

200. The Trust was specifically created to give the "optics" of distancing the Defendant from ownership of the Series C and from the resulting control of the Company. PTX 288 at 6.

201. But as the Trust Agreement reflects, the Trust was simply Defendant operating under a different name. In functional terms, one branch of Defendant (FRBNY), as settlor, arranged for three Federal Reserve-affiliated persons to hold title to AIG's equity as Trustees for another branch of the Government (Treasury), as beneficiary. Moreover, it is undisputed that concurrent with the dissolution of the Trust in January 2011, title to AIG's equity, then in the form of AIG common shares, was transferred to the Treasury, which proceeded to hold and sell the exacted equity. *See* Def.'s Response to Pl.'s Second RFA Nos. 739-744; Def.'s Response to Pl.'s Third Interrogatories No. 13.

202. The trust termination rule applicable here underscores the illusory nature of the Trust. Treasury was sole beneficiary of the Trust. *See* JX 172 at 5, §§ 1.01, 1.02. Whenever a trust has only a single beneficiary, as it did here, that beneficiary has the power to terminate the trust at will, even if the trust is by its terms irrevocable. Treating FRBNY and Treasury as a common person for purposes of the trust termination rule, this case falls squarely within the rule that "[i]f the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished." Restatement (Second) Trusts § 339 (1959). Similarly, this case falls unambiguously within the rule as formulated in the Third Restatement, that "if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust." Restatement (Third) Trusts § 65(1) (2003). Quite apart from any of the terms of the Trust, because Treasury had full

equitable title to the Trust assets, Treasury had the power to dissolve the Trust and reassert the underlying legal title to those assets at will.

203. The Trust's illusory nature is also illustrated by numerous provisions of the Trust Agreement that required the Trustees to act subject to and in furtherance of the Defendant's interests. The terms of the Trust, drafted by Defendant's lawyers, were carefully drafted to simultaneously create the illusion of Trustee independence while stripping the Trustees of core trust powers and duties. For example:

- The Trust Agreement provided that "the FRBNY wishes the Trustees to have absolute discretion and control over the Trust Stock," but "subject to the terms of this Trust Agreement." JX 172 at 5; *see also id*. at 10, § 2.04(d). Other Trust terms, however, prescribed how the Trustees were to transact with or vote the shares, effectively eliminating the "absolute discretion and control over the Trust Stock" that the Trust ostensibly gave the Trustees. *See, e.g., id*. at 9, § 2.03(d) (requiring the trustees to execute transactional documents "which shall have been approved in form and substance by the FRBNY"); 9–10, 12–13, §§ 2.04(c) and 2.05(a) (specifying how the trustees shall vote the shares on certain transactions).

- The Trust terms provided that the Trust was to be irrevocable, but subject to an "except" clause that allowed the Board of Governors of the Federal Reserve System to terminate or amend the Trust. *Id.* at 6, § 1.03. The "irrevocable" Trust was therefore revocable.

- Trust law provides that, in order to enforce the trust and to protect the interests of trust beneficiaries, trustees are empowered to commence or defend litigation. *See, e.g*., Restatement (Second) Trusts §§ 177–78 (1959). The Trust Agreement, however, provides that FRBNY—not the Trustees—shall "control the defense of any actual or threatened suit or litigation of any character involving the Trust," and forbids the trustees from "mak[ing] any admissions of liability" or "agree[ing] to any settlement without the written consent of the FRBNY." JX 172 at 13, §§ 2.07(a), (b).

- A characteristic feature of trust law is that trustees may seek judicial intervention in circumstances in which "there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." *See* Restatement (Third) Trusts § 71 (2007). In contrast, the Trust Agreement permitted the Trustees to request FRBNY to resolve any questions as to the scope of their powers or duties or the interpretation of Trust provisions, the interpretation of which by FRBNY was binding. JX 172 at 19–20, § 3.05(g).

- Trust law provides trustees with broad transactional powers and subjects those powers to the core duty of prudent administration, which is the ordinary standard of care for trustees. *See* Uniform Trustee Powers Act (1964), *substantially recodified as* Uniform

> Trust Code § 816 (2000); McKinney's N.Y. Est. Powers & Trusts Law § 11-1.1; Restatement (Third) Trusts § 77 (2007). Significantly, the Trust eliminates this core element of trusteeship. Section 3.05(a) provides that the "duties, responsibilities and obligations of the Trustees shall be limited to those expressly set forth" in the instrument. JX 172 at 18, § 3.05(a). Section 3.03, which purports to supply the "Standard of Care" for the Facilities Trust, contains none. *Id*. at 15–16, § 3.03. The provision is simply an exoneration clause, protecting the trustees from liability for good faith reliance upon the terms of the Trust.

204. "A trustee's duties, like trustee powers, may be modified by the terms of the trust, but the duties of trusteeship are subject to certain minimum standards that are fundamental to the trust relationship and normally essential to it." Restatement (Third) Trusts § 86, cmt. b (2007) (cross-references omitted); *accord* Uniform Trust Code § 105(b), cmt. (2000) ("a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity"). The AIG Trust failed to satisfy those minimum standards. This so-called Trust was in function an agency relationship, in which the so-called Trustees were subject to Defendant's direction and control. *See* Def.'s Response to Pl.'s Second RFA Nos. 740-44; Findings of Fact ¶¶ 22.3 – 22.5.

205. Because the Trust was simply a "legal shell," PTX 273 at 16, the Trust's acquisition of equity was indistinguishable from Defendant's acquisition of equity.

2. The Trust Was an Instrumentality of Defendant.

206. The Trust was an instrumentality of Defendant.

207. There is also no reason to differentiate between the Trust and Defendant because the Trust was an instrumentality of the United States. "While there is no bright line rule regarding what constitutes a 'federal instrumentality,' the Supreme Court has looked to several factors, including: whether the entity was created by the government; whether it was established to pursue governmental objectives; whether government officials handle and control its operations; and whether the officers of the entity are appointed by the government." *Augustine*

v. Dep't of Veterans Affairs, 429 F.3d 1334, 1339 n.3 (Fed. Cir. 2005); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397–98 (1995) (considering these factors to find that Amtrak was an instrumentality of the United States).

208. Each of the factors identified by the Supreme Court supports the conclusion that the Trust was a federal instrumentality.

- The Defendant created the Trust. *See* JX 172 at 5, § 1.01 ("the FRBNY hereby establishes a trust designated as the AIG Credit Facility Trust for the sole benefit of the Treasury").

- The Defendant both recruited and appointed the Trustees. *See* Def.'s Response to Pl.'s Second RFA No. 765 ("FRBNY recruited the individuals who served as Trustees for the AIG Credit Facility Trust"); JX 172 at 5, § 1.02 ("The FRBNY, in consultation with the Treasury Department, hereby appoints the Trustees").

- Each of the three initial trustees had close ties to the Federal Reserve or one of its regional banks. *See* Def.'s Response to Pl.'s First RFA Nos. 25.0, 25.1; Def.'s Response to Pl.'s Second RFA No. 772 (admitting that Chester Feldberg had been an FRBNY employee for over 35 years, Jill Considine had just completed a six-year term as a member of FRBNY's Board, and Douglas Foshee was a member of the Board of Directors of the Dallas Federal Reserve Bank when named a Trustee).

- The Trust was established to pursue governmental objectives. Indeed by its terms the trust was established "for the sole benefit of the Treasury." *See* JX 172 at 5, § 1.01; *see also id*. at 7, § 2.04(d), instructing the Trustees of the Defendant's view that the Trust should be operated in order to "maximize[e] the Company's ability to honor its commitments to, and repay all amounts owed to, the FRBNY or the Treasury Department" and "in a manner that that will not disrupt financial market conditions". In fact, the Trustees were explicitly required to act "in or not opposed to the best interests of the Treasury." *Id*. at 15, § 3.03(a).

209. The Trust Agreement also proves that Government officials handled and controlled the Trust's operations. Specifically, the Trust Agreement:

- Gave Defendant the power to remove a Trustee. *See* JX 172 at 14, § 3.02(d);

- Required the Trustees to provide Defendant with regular custodial reports and to attend quarterly meetings with Defendant to discuss "the administration of the Trust," *id*. at 20, § 4.01;

- Required Defendant's approval before disposition of any of the Trust's assets, *id*. at 11, § 2.05(a);

- Granted Defendant the right to control any litigation with the Trust, *id*. at 13, § 2.07; and
- Granted Defendant the right to enforce the Trust's "best interests of the Treasury" standard of care through an action for specific performance brought in the United States District Court for the Southern District of New York. *Id*. at 23, § 6.07.

Defendant also handled and controlled the Trust's operations, and the Trustees were dependent upon Defendant and acted consistently with its wishes. *See* Findings of Fact ¶ 22.5.3.

210. Defendant's contemporaneous representations provide further confirmation that the Trust was a federal instrumentality. *See L'Enfant Plaza Props., Inc. v. United States*, 209 Ct. Cl. 727, 727-78 (1976) (reasoning that Government's assurance that an entity was a federal instrumentality was one reason for ruling that the entity was a federal instrumentality); Def.'s Responses to Pl.'s Second RFA No. 728 (admitting that "in February 2009 FRBNY General Counsel Thomas Baxter took the position that the issuance of the equity interest to the Trust was not subject to certain state law change in control requirements because the Trust functioned as an instrumentality of the United States in connection with that issuance"); Findings of Fact ¶¶ 22.3-22.5.

VIII. The Reverse Stock Split Was An Independent and Additional Wrong That Appropriated Equity And Voting Rights from the Stock Split Class.

211. The Reverse Stock Split was an independent and additional wrong that appropriated equity and voting rights from the Reverse Stock Split Class.

212. The members of the Stock Split Class had a cognizable property interest in the voting dilution caused by the June 30, 2009 20:1 reverse stock split.

213. In its motion for summary judgment, Defendant conceded, as it must, under Delaware law, "common shareholders have a right to a separate class vote before a Delaware corporation can change the number of authorized common shares or change their par value." Def.'s Summary Judgment Br. at 49 (citing 8 Del. C. § 242 (b)(2)). Defendant also conceded

that the *Walker* Stipulation and Order of Dismissal from the case filed in November 2008 to protect the interests of common shareholders from the dilutive effects of the Credit Agreement, was based on "AIG's representation that any proposal '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.'" *Id.* at 44; JX 176 at 2 (Stipulation and Order of Dismissal, *Walker v. AIG*, C.A. No. 4142-CC (Del. Ch. Feb. 5, 2009)); PTX 344 at 19 (Complaint ¶¶ 52-54, *Walker v. AIG*, C.A. No. 4142-CC (Del. Ch. Feb. 5, 2009)).[8] Furthermore, Defendant did not and cannot dispute that Delaware law prohibits the use of stratagems that are designed to deprive shareholders of their voting rights. *See Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994).

214. Therefore, as this Court previously stated, under the Consent Order, the Stock Split Class "had a right to exclude at least the holders of the Series C Preferred Stock [i.e., the Defendant] from diluting their shares of common stock." *Starr Int'l Co.*, 106 Fed. Cl. at 74. "[A]lthough the Consent Order required a separate vote to *increase* the number of *authorized* common shares," and not "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*. at 73

[8] The Complaint in *Walker v. AIG*, C.A. No. 4142-CC (Del. Ch. Nov. 4, 2008) sought an order "declaring invalid and unenforceable the provision of the Super Voting Preferred calling for the Super Voting Preferred to vote with the common stock on an amendment of AIG's Restated Certificate of Incorporation to increase the number of authorized common shares and decrease the par value of the common shares" and "declaring that the conversion feature of the Super Voting Preferred is invalid and unenforceable in the absence of *an uncoerced, affirmative vote of the holders of a majority of the common shares, voting as a class*, to amended the Restated Certificate of Incorporation to increase the number of authorized common shares and the decrease the [sic] par value of the common shares." PTX 344 ¶¶ 53-54, at 19 (emphasis added).

(internal quotations omitted). The *Walker* Consent Order reaffirmed Plaintiffs' right to a separate class vote under Delaware law.

215. Thus, the sole basis of dispute with respect to the Reverse Stock Split claims is Defendant's allegation that "there is no evidence to support Starr's allegation that the reverse stock split was 'deliberately engineered to ***guarantee*** that sufficient authorized shares of AIG Common Stock were available to allow the Government to convert or exchange its Series C Preferred Stock.'" Def.'s Summary Judgment Br. at 50 (quoting 2d Am. Compl. ¶ 112 (emphasis in original)). As Plaintiffs' Findings of Fact show, the evidence, as will be established at trial, squarely refutes this claim. Findings of Fact ¶ 29.0. Defendant is equally incorrect to assert, as a fallback argument, that its motivations are irrelevant under the doctrine of independent legal significance. Def.'s Summary Judgment Br. at 51.

216. As this court has observed, "[w]hile the Government may have complied technically with the Consent Order" protecting the Reverse Stock Split Class' right to a separate class vote under Delaware law, the Government "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." *Starr Int'l Co.*, 106 Fed. Cl. at 74.

A. The Doctrine of "Independent Legal Significance" Does Not Defeat the Reverse Stock Split Class's Claims.

217. The doctrine of "independent legal significance" does not defeat the Reverse Stock Split Class's claims.

218. Defendant's "independent legal significance" argument ignores the limitations on that doctrine: "inequitable action does not become permissible simply because it is legally possible." *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (internal quotation marks omitted); *see also Brody v. Zaucha*, 697 A.2d 749, 755 (Del. 1997) (same).

219. The doctrine of independent legal significance does not immunize "inequitable actions in technical conformity with statutory law." *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 434 (Del. Ch. 2002). For this reason, the doctrine of independent legal significance does not apply when litigants "properly invoke the equitable obligation of corporate fiduciaries (*i.e.*, plausible claims of self-dealing in its many guises)." *Uni-Marts, Inc. v. Stein*, Civ. A. Nos. 14713, 14893, 1996 WL 466961, at *9-10 (Del. Ch. Aug. 12, 1996).

220. Far from overruling cases such as *Paramount*, 637 A.2d at 42, that prohibit the use of stratagems designed to deprive shareholders of their voting rights, cases applying the doctrine of independent legal significance expressly recognize that the two principles can and should co-exist, and that, if either principle is to give way to the other, it is the doctrine of independent legal significance that must give way to the principles espoused in *Paramount* when a litigant's reliance on that doctrine seeks to justify technically legal yet inequitable conduct undertaken by a company or its controlling shareholders in an effort to nullify the voting rights of minority shareholders.

1. Defendant Is Responsible for the Reverse Stock Split.

221. Defendant is responsible for the Reverse Stock Split.

222. Defendant's ownership of and control over AIG is sufficient to characterize the Reverse Stock Split as a Government act. *See* Findings of Fact ¶ 27.0.

223. Beyond Defendant's domination and control of AIG generally, the Defendant's unilateral decision *not* to hold a separate class vote on the relevant Charter Amendments, its admission that it communicated with AIG about the *Walker* litigation, and its extensive involvement in the content and timing of the June 2009 Proxy, provide additional, independent bases for finding that the Reverse Stock Split was both (a) a Government act; and (b) a Government act performed with the intent to circumvent the rights and obligations of AIG

shareholders under Delaware law. Plaintiffs' rights under Delaware law were reaffirmed by contractual obligations, representations made in SEC filings and the *Walker* lawsuit, and through coercive means both against AIG and its shareholders. *See* Findings of Fact ¶¶ 28.0, 29.0.

224. The Constitution constrains governmental action "by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia,* 100 U.S. 339, 346–347 (1879). Thus, "[i]n any case where government action is causally related to private misconduct which leads to property damage—a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (quoting *Nat'l Bd. of YMCA v. United States,* 395 U.S. 85, 93 (1969)) (emphasis omitted).

225. While "no one fact can function as a necessary condition across the board for finding state action," courts have identified "a host of facts that can bear on the fairness of such an attribution, as the Supreme Court explained in *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents." We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies," or when government is "entwined in [its] management or control."

531 U.S. 288, 295-96 (2001) (citations and brackets omitted).

226. During the entire time the Reverse Stock Split was conceived, proposed, and voted upon, Defendant had control over AIG.

227. Defendant also controlled the Trust, which operated as a federal instrumentality.

228. Because of Defendant's control over AIG, the Reverse Stock Split constituted a Government act.

B. The Reverse Stock Split Represented an Incremental Economic Taking and Illegal Exaction of the Rights of the Reverse Stock Split Class.

229. The Reverse Stock Split represented an incremental economic taking and illegal exaction of the rights of the Reverse Stock Split Class.

230. Defendant's dilution of the RSS Class's common stock through the exchange of the Series C, E, and F preferred shares without a common stock-only vote was the direct result of the Reverse Stock Split.

231. The RSS Class's harm is the deprivation of its right to reject the dilution of its shares—the right embodied in Delaware law, the *Walker* Consent Order, and confirmed by the various agreements between AIG and Defendant as well as AIG's SEC filings made while under Defendant's ownership and control.

232. There is no provision of Delaware law that allows a reverse stock split to be used to obtain the same end result as the authorization of more shares of a specific class of stock, without requiring a class-only vote. *See Lacos Land Co. v. Arden Grp., Inc*., 517 A.2d 271, 278-79 (Del. Ch. 1986) (holding that a vote to approve a recapitalization that gave control to the then-CEO where shareholders were unmistakably told in disclosures that unless they approved the recapitalization, the CEO would oppose transactions "which could be determined by the Board of Directors to be in the best interests of all of the stockholders" failed "to satisfy the mandate of Section 242(b) of our corporation law requiring shareholder consent to charter amendments"); *Phillips v. Insituform of N. Am., Inc.*, 13 Del. J. Corp. L. 774, 783 (Del. Ch. Aug. 27, 1987) ("the board manipulated the machinery of corporate governance in order to give the directors time to take steps to deprive the receivers of the power that the Ringwood stockholders possessed, by

deferring the annual meeting-for the admitted reason that the board could not know on April 26th how the receivers would vote.").

233. Defendant cannot escape its obligation to allow a shareholder vote simply because the Reverse Stock Split offered an opportunity for the Government to exchange its shares without a vote. The Government is not immunized from "inequitable actions in technical conformity with statutory law." *In re Pure Resources, Inc.*, 808 A.2d at 434; *see also Uni-Marts,* 1996 WL 466961, at *10.

234. If a controlling entity could use a reverse stock split to bypass the shareholder vote requirement of Section 242(b)(2), its protections would effectively be rendered meaningless. *See Reis v. Hazelett Strip-Casting Corp*., 28 A.3d 442, 460 (Del. Ch. 2011) (awarding damages to plaintiff and finding that when "a controlling stockholder uses a reverse split to freeze out minority stockholders without any procedural protections, the transaction will be reviewed for entire fairness with the burden of proof on the defendant fiduciaries. A reverse split under those circumstances is the 'functional equivalent' of a cash-out merger.") (citations omitted).

IX. Defendant's Contract Affirmative Defenses Apply Solely to AIG and Thus Do Not Limit Plaintiffs' Recovery.

235. Defendant's contract affirmative defenses apply solely to AIG and thus do not limit Plaintiffs' recovery.

236. Defendant bears the burden of proof on each of its affirmative defenses. *See, e.g., Jazz Photo Corp. v. Int'l Trade Comm'n,* 264 F.3d 1094, 1102 (Fed. Cir. 2001) ("The burden of establishing an affirmative defense is on the party raising the defense.").

237. In addition, any affirmative defense that is not raised in a responsive pleading is waived. *See Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012) ("Ordinarily in civil litigation, a[n affirmative defense] is forfeited if not raised in a defendant's answer or in an amendment thereto. An affirmative defense, once forfeited, is excluded from the case . . . ." (internal quotation marks, citations, brackets, and footnote omitted); *Todd v. United States*, 292 F.2d 841, 845 (Ct. Cl. 1961) ("an affirmative defense . . . must be pleaded or it is considered waived"); RCFC 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . .").

238. Accordingly, the only affirmative defenses that Defendant can claim are those that it pleaded in its Answer and that survived the plaintiff's motion to strike. *See* Def.'s Answer to Pl.'s Second Am. Verified Class Action Compl. (Doc. 143) ¶¶ 240-263 (pleading as affirmative defenses: payment, equitable estoppel, laches, waiver, hold harmless, severability, and contingent offset); Order dated November 8, 2013 (Doc. 183) (striking laches defense).

A. Plaintiffs Did Not Ratify or Waive Defendant's Takings or Illegal Exaction.

239. Plaintiffs did not ratify or waive Defendant's takings or illegal exaction.

1. For Waiver to Apply, Plaintiffs Would Have Had to Have Acted with Full Knowledge of the Facts to Knowingly and Intentionally Give Up Rights.

240. For waiver to apply, Plaintiffs would have had to have acted with full knowledge of the facts to knowingly and intentionally give up rights.

241. Defendant therefore has the burden of establishing that Plaintiffs waived their right to challenge Defendant's taking and/or illegal exaction of equity voluntarily, knowingly, and intelligently. "For a waiver to be effective, 'it must be clearly established that there was intentional relinquishment of a known right or privilege.'" *Am. Airlines, Inc. v. United States*, 77

Fed. Cl. 672, 680 (2007) (quoting *Brookhart v. Janis,* 384 U.S. 1, 4 (1966)); *see also Fuentes v. Shevin,* 407 U.S. 67, 94-95 (1972) ("a waiver of constitutional rights in any context must, at the very least, be clear"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) ("we are unwilling to find waiver in circumstances which fall short of being clear and compelling"); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"); *McCall v. U.S. Postal Service,* 839 F.2d 664, 667 (Fed. Cir. 1988) (waiver will only be found where it is "knowing and voluntary").

242. As the Supreme Court has ruled, courts "must indulge every reasonable presumption against waiver" of "fundamental" constitutional rights. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

243. The Credit Agreement Class members could not – and did not – voluntarily, knowingly, or intelligently waive their right to just compensation for Defendant's taking and/or illegal exaction of 79.9 percent of their equity interest because they were never afforded any opportunity to be heard and to object to such taking and/or illegal exaction.

2. In any Event, Ratification and Waiver Do Not Apply Where a Contract Provision Is Unlawful.

244. Ratification and waiver do not apply where a contract provision is unlawful.

245. "Failure to challenge an improper agency action does not ratify such action or insulate it from later objection and litigation." *Am. Airlines, Inc. v. United States,* 551 F.3d 1294, 1302 (Fed. Cir. 2008) (citing *Swift & Courtney & Beecher Co. v. United States,* 111 U.S. 22, 29 (1884)); *see also Cal. Or. Power Co. v. Fed. Power Comm'n,* 139 F.2d 426, 434-35 (D.C. Cir. 1956) ("The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it.") (quoting *Peoples Bank v. Eccles,* 161 F.2d 636,

644 (D.C. Cir. 1947), *rev'd on other grounds*, 333 U.S. 426 (1948)); *Johnson Mgmt. Grp. CFC, Inc. v. Martinez*, 308 F.3d 1245, 1256-57 (Fed. Cir. 2002) (holding government did not waive its right to challenge a contractual provision that its agent had agreed to that was contrary to law or regulation).

3. Ratification Does Not Apply Because Defendant Controlled AIG.

246. Ratification does not apply because Defendant controlled AIG.

247. Ratification does not apply for the additional reason that Plaintiffs cannot be found to have ratified the Credit Agreement or any actions taken thereafter with respect to implementing its terms, while AIG was under Defendant's control. During the entire period of Defendant's loan to AIG, Defendant controlled AIG. *See* Findings of Fact ¶¶ 13.0, 27.0.

248. "No acts can constitute a ratification, however, that are or were done although the fear or influence that operated to induce the original transaction is still effective." 28 WILLISTON ON CONTRACTS § 71:9 (4th ed. 1990), *cited with approval in Goldman v. Bequai*, 19 F.3d 666, 675 (D.C. Cir. 1994); RESTATEMENT (SECOND) OF CONTRACTS § 380 cmt. b (1981) ("A party's power of avoidance for incapacity, duress, undue influence or abuse of a fiduciary relation is not lost by conduct while the circumstances that made the contract voidable continue to exist."); *see also Farmers' & Ginners' Cotton Oil Co. v. United States*, 76 Ct. Cl. 294, 311 (1932) (rejecting ratification defense to duress argument even where plaintiff accepted the benefits of the illegal contract as the government's position would have required the plaintiff "to make the damages resulting from the coercion far greater and much more injurious than is required by the unlawful contract").

4. Ratification and Waiver Do Not Apply Because Defendant Has Unclean Hands.

249. Ratification and waiver do not apply because Defendant has unclean hands.

250. Ratification and waiver are also inapplicable here because the doctrine of unclean hands bars Defendant from asserting that the Credit Agreement Class waived its right to challenge the taking and/or illegal exaction of a 79.9 percent equity interest, or ratified the Credit Agreement's terms.

251. In general, "equity will not lend its aid to enable a party to reap the benefits of his misconduct." *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1376 (Fed. Cir. 2001). Plaintiffs had the right to express disapproval or approval of the Credit Agreement terms through a shareholder vote. *See, e.g., Paramount Commc'ns,* 637 A.2d at 42 ("Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference of such rights."). Defendant took actions to prevent Plaintiffs from having an opportunity to object to the terms of the Credit Agreement (*see* Findings of Fact ¶¶ 15.3, 28.0, 29.0). Accordingly, Defendant should not be permitted to reap the benefits of its misconduct.

B. The Contract Based Affirmative Defenses of Payment, Contingent Offset/Recoupment, Hold Harmless, and Severability Are All Limited to AIG and Do Not Apply to Plaintiffs.

252. The contract based affirmative defenses of payment, contingent offset/recoupment, hold harmless, and severability are all limited to AIG and do not apply to Plaintiffs.

253. In a derivative suit, a shareholder plaintiff asserts claims on behalf of a corporation, and any defense available against the corporation is also available against the shareholder plaintiff. *See*, *e.g.*, *Schleiff v. Baltimore & Ohio R.R. Co.*, 130 A.2d 321, 327 (Del. Ch. 1955); *In re Salomon Inc. S'holders' Deriv. Litig.*, No. 91 Civ. 5500 (RPP), 1994 WL 533595, at *4 (S.D.N.Y. Sept. 30, 1994) ("'Stockholders in a derivative action stand in the shoes

of the corporation and are subject to the same defenses as are available against the corporation.'") (internal quotation marks omitted). But this action is not a derivative action. *See Starr Int'l Co., Inc. v. United States*, 111 Fed. Cl. 459, 465 (2013).

254. This is a direct action in which Plaintiffs have direct claims against Defendant, which are independent of and separate from any claims of AIG. *See Starr Int'l Co*., 106 Fed. Cl. at 62 ("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") (emphasis added); *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1277-81 (Del. 2007) (holding that plaintiff could bring a direct claim for the "expropriation of voting power and economic value from Regency's public stockholders"); *Gentile v. Rossette*, 906 A.2d 91, 99-101 (Del. 2006) (same).

255. Because of the legal distinction between a corporation and its shareholders, courts will not hold shareholders liable for the contractual obligations of a corporation. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *Middle Tenn. News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001) ("corporate officers and shareholders acting on behalf of the corporation are generally not liable for the contractual obligations of the corporation"); 18A Am. Jur. 2d Corporations § 725 ("A person is not ordinarily liable on contracts entered into by a corporation in which he or she owns stock."); 13 Fletcher Cyc. Corp. § 6222 ("Generally, a shareholder is not liable for the debts or acts of the corporation"). It is undisputed that *only AIG*, not AIG common shareholders, entered into the Credit Agreement. *See In re Mushroom Transp. Co., Inc.*, 247 B.R. 395, 398 (E.D. Pa. 2000) (contractual provisions are only enforceable against "nonsignatories that are closely related to the

contractual relationship or that should have foreseen governance by the clause") (internal quotation markets omitted).

256. Plaintiffs had no contractual relationship with FRBNY. JX 107 at 1, 6; *see also* Def.'s Motion for Summary Judgment, ECF No. 246 (July 2, 2014), at 39 (discussing the fact that "AIG agreed" and "AIG was contractually bound" by the Credit Agreement, but saying nothing about an agreement between Plaintiff and the Government). Plaintiffs were also not intended beneficiaries of the Credit Agreement and therefore are not bound by the contractual terms of the Credit Agreement. *See Port Chester Elec. Const. Co. v. Atlas,* 40 N.Y.2d 652, 655, 39 N.Y.S.2d 327, 330 (1976) (internal citations omitted) ("[A]n intent to benefit the third party must be shown and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts."); *Perfetto v. CEA Engineers P.C.*, 80 N.Y.S.2d 788, 789 (2d Dep't 2014) (affirming the dismissal of contract claim because "no intent to benefit the plaintiffs is apparent from the face of the contract:"); *Holloway v. Ernst & Young LLP*, No. 113346/09, 2010 WL 2927256, at *4 (N.Y. Sup. Ct. July 21, 2010) ("although a person holds shares in a company, it does not entitle that person to benefit from that company's agreements as a third-party beneficiary").

257. Defendant's affirmative defenses of hold harmless and severability are contractual remedies under the Credit Agreement. *See* Answer ¶¶ 251-57 (describing the defenses as based on Sections 8.05(b) and 8.12 of the Credit Agreement). But "[a]bsent a contractual relationship, there can be no contractual remedy." *See Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 747 F.3d 44, 49 (2d Cir. 2014) (internal quotation marks omitted); *Suffolk Cnty. v. Long Island Lighting Co.*, 728 F.2d 52, 63 (2d Cir. 1984) (same); *Fernandes v. Equitable Life Assurance Soc'y of U.S.*, 4 A.D.3d 214, 215 (N.Y. App. Div. 1st Dep't 2004) (holding that "there

is no basis for extending these contractual rights to Equitable, who is not in contractual privity"); *Pacetti v. United States*, 50 Fed. Cl. 239, 244-45 (2001) (officer of corporation, who was not personally a party to the contract, could not seek contractual remedies). These defenses therefore fail as a matter of law as applied to Plaintiffs.

258. That Plaintiffs were not parties to the Credit Agreement similarly defeats Defendant's other affirmative defenses. The defense of payment concerns alleged consideration that AIG, not Plaintiffs, received; they are therefore not barred from receiving compensation for Defendant's expropriation of their voting and economic power. *See* Answer ¶ 240 (alleging that "*AIG received* $500,000, plus the lending commitment of the FRBNY, in consideration for 100,000 shares of Series C convertible preferred stock") (emphasis added).

259. The expropriation for which Plaintiffs seek compensation is separate and independent from any alleged overpayment by AIG for Defendant's financing commitment. *See Starr Int'l Co*., 106 Fed. Cl. at 64-65. Thus, any claim of purported consideration received by AIG is irrelevant to Plaintiff's direct claims. *See Gatz*, 925 A.2d at 1277 (holding that plaintiff could bring a direct claim for the "expropriation of voting power and economic value" from public shareholders); *Gentile*, 906 A.2d at 99-101; *see also Dole Food Co.*, 538 U.S. at 474.

260. The defense of contingent offset/recoupment also concerns potential offsets against AIG, not Plaintiff. Answer ¶¶ 258-63. Defendant alleges that, but for its own actions, AIG would have either been taken over by a private consortium or gone bankrupt, which would have resulted in AIG losing a tax benefit called net operating loss carryforwards ("NOLs"). But as Defendant states in its affirmative defense, the NOLs belonged *to AIG* – not to Plaintiff. *Id*. ¶ 261. Plaintiffs' direct claims against Defendant are unaffected by any offset/recoupment claim

potentially available against AIG. *See Dole Food Co.*, 538 U.S. at 474; *Suffolk Cty.*, 728 F.2d at 63; *Fernandes*, 4 A.D.3d at 215; *Pacetti*, 50 Fed. Cl. at 244-45.

261. Defendant therefore cannot meet its burden on any of its contract defenses.

C. The Equitable Estoppel Affirmative Defense Is Likewise Limited to AIG and Does Not Apply to Plaintiffs.

262. Defendant's equitable estoppel affirmative defense is likewise limited to AIG and does not apply to Plaintiffs.

263. "[E]quitable 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). "[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.

264. Defendant has failed to satisfy the elements of equitable estoppel. First, Defendant has not identified anything communicated by Plaintiffs that was misleading, or that Defendant relied on and took action as a result.

265. Second, to assert an equitable estoppel defense, a party "must introduce evidence of some damages or prejudice suffered by it as a direct result of the [alleged delay in asserting a claim]." *Simmons Precision Prods., Inc. v. United States*, 546 F.2d 886, 992 (Ct. Cl. 1976) (rejecting affirmative defense of equitable estoppel where party presented no evidence of damage or prejudice suffered by it); *see also N. Pac. R. Co. v. Boyd*, 228 U.S. 482, 509 (1913) ("[U]nless the nonaction of the complainant operated to damage the defendant or to induce it to change its

position there is no necessary estoppel arising from the mere lapse of time."); *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992) ("material prejudice" is required element to assert equitable estoppel); *Southern Ry. Co. v. United States*, 228 Ct. Cl. 712, 715 n.3 (1981) (to assert an equitable estoppel defense, a party provided with a false statement or from whom material facts were concealed must establish that it "relied on or acted on [the information] to his prejudice").

266. Here, Defendant suffered no prejudice by the passage of time. First, regardless of Plaintiffs' actions, Defendant would have provided financial assistance to AIG because it would never have allowed AIG to file for bankruptcy. *See* Findings of Fact ¶ 5.0. In addition, Defendant was fully compensated for its loan to AIG – it received back the full principal payment plus interest, just as it was entitled to under Section 13(3) to "accommodate commerce and business." *See* Findings of Fact ¶ 10.3.1. The notion that Defendant might have taken different actions had Plaintiffs expressed the view that Defendant's conduct was illegal or implausible is irrelevant and inadequate to establish this necessary element on which it bears the burden.

267. Because there is no record evidence that Defendant suffered material prejudice as a result of Starr's alleged delay in bringing a claim, the Defendant's equitable estoppel defense fails as a matter of law.

D. Defendant May Not Avoid the Illegality of Its Exaction by Relying on an "Economic Equivalence" Contract Term that Would Provide It with Precisely the Benefit the Law Precludes It from Acquiring.

268. Defendant may not avoid the illegality of its exaction by relying on an "economic equivalence" contract term that would provide it with precisely the benefit the law precludes it from acquiring.

269. Defendant has argued that even if the demand for 79.9 percent of shareholders' equity was illegal, Plaintiffs "would not have suffered any legally compensable injury" because under Section 8.12 of the Credit Agreement, in the event that any provision is declared illegal, the parties "shall endeavor in good faith negotiations to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions." *See, e.g.,* Def.'s Summary Judgment Br. at 39.

270. This argument is wrong because, for the reasons discussed above, the Defendant lacked authority to demand any consideration beyond an interest rate "fixed with a view of accommodating business and commerce," including a 79.9 percent equity stake in AIG or the economic equivalent of that equity interest. This is especially true here, where the loan (as Defendant concedes) was fully secured, and Defendant obtained the equity interest (and the economic equivalent provision) *in addition to* interest. *See* Findings of Fact ¶ 10.0. The purpose of the equity demand was not to "accommodate commerce and business" but rather to punish AIG shareholders. *See* Findings of Fact ¶ 23.1. Thus, any attempt to demand the economic equivalent of 79.9% of AIG would be similarly illegal. This provision also was never approved by the Board of Governors and was thus illegal for that reason as well.[9]

[9] In addition to recognizing the absence of any authority to demand the economic equivalent under section 13(3), this Court could potentially invalidate the provision as analogous to usury savings clauses, which provide that if an interest rate is declared usurious, the borrower must pay the maximum rate allowable by law. New York courts and courts interpreting New York law have previously declared such provisions invalid. *Simsbury Fund, Inc. v. New St. Louis Assocs.*, 204 A.D.2d 182, 182 (N.Y. App. Div. 1st Dep't 1994) (holding that "language therein purporting to reduce the interest rate to the legal rate in the event of a finding of usury, do not make the subject agreements nonusurious."); *Hillair Capital Invs., L.P. v. Integrated Freight Corp.*, 963 F. Supp. 2d 336, 338 (S.D.N.Y. 2013) ("Under New York law, the 'usury avoidance clause' does not, by itself, save an agreement from a charge of usury."); *Roswell Capital Partners LLC v. Alternative Const. Techs.*, No. 08 Civ. 10647 (DLC), 2009 WL 222348, at *15 n.13 (S.D.N.Y.

X. Plaintiffs Are Entitled to Prejudgment Interest and Attorneys' Fees.

271. Plaintiffs are entitled to prejudgment interest and attorneys' fees.

272. If the government takes private property without paying just compensation at the time of the taking, the Constitution requires the payment of prejudgment interest. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10–11 (1984) ("If the Government pays the owner before or at the time the property is taken, no interest is due on the award . . . . But if disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.") (citations omitted).

273. Prejudgment interest should accrue from the date of the taking. *See Otay Mesa Prop., L.P. v. United States*, 111 Fed. Cl. 422, 423–24 (2013) ("The Court acknowledges the existence of ample case law holding that interest in a Fifth Amendment taking should run from the date of the taking. This principle recognizes the time value of money and the opportunity a plaintiff has lost to earn income on its damages award. A delay in payment is also a delay in the use of the money.") (citations omitted).

274. When prejudgment interest is awarded in a taking case, the calculation of interest owed should be based on compound interest. *Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 414 (Fed. Cl. 1994) ("Where the government delays its payment for 'taken' property, an award of compound interest is appropriate.").

Jan. 30, 2009) ("While the Debentures and the Notes contain 'usury avoidance' language (stating that, for example, interest shall accrue on an payment upon which defendant has default at 'eighteen (18) percent per annum ... or the maximum amount allowed by applicable law,'), 'language therein purporting to reduce the interest rate to the legal rate in the event of a finding of usury, do not make the subject agreements nonusurious.'") (quoting *Simsbury*, 204 A.D.2d at 182).

275. The proper rate of interest to achieve just compensation is a question of fact. *See Studiengesellschaft Kohle, m.b.H. v. Dart Indus., Inc.*, 862 F.2d 1564, 1580 (Fed. Cir. 1988) ("the question of the rate at which such an award should be made is a matter left to the sound discretion of the trier of fact").

276. Plaintiff is also entitled to an award of attorneys' fees and costs. *See, e.g., Kirby Forest Indus.*, 467 U.S. at 10-11(just compensation mandate requires putting property owner in "as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation"); 28 U.S.C. § 2412; 42 U.S.C. § 4654(c).

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