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,	)	No. 11-779C (Judge Thomas C. Wheeler)
v.	)	
UNITED STATES,	)	Filed under seal
Defendant,	)	

DEFENDANT'S PROPOSED CONCLUSIONS OF LAW

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The Equity Claim

I. Starr Cannot Establish A Taking Of Its Property For The Equity Claim

A. Starr Has Not Identified An Authorized, Sovereign Government Action That Deprived Starr Of Its Property

1. The Takings Clause of the Fifth Amendment of the Constitution applies only to authorized Governmental action. *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998); *see also 767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1582-83 (Fed. Cir. 1995); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1330-31 (Fed. Cir. 2006); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362-63 (Fed. Cir. 1998) (*citing United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920)).

2. The underlying Governmental action on which a takings claim is based must be legal and authorized. If it was not, then this Court does not possess jurisdiction for a taking claim, because a "Tucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication." *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978) (citation omitted); *see also Armijo v. United States*, 663 F.2d 90, 95 (Ct. Cl. 1981) ("If

. . . Congress meant to withhold authority to take, the lack of authority defense [to a takings claim] is valid and must prevail.").

3. A takings claim may not be based upon an assertion of illegality; "to the extent that the plaintiff claims it is entitled to prevail *because* the agency acted in violation of statute or regulation," the plaintiff does not have "a right to litigate that issue in a takings action." *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (emphasis in original).

4. Therefore, "[a] claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993); *see also Acadia Tech.*, 458 F.3d at 1331.

5. Starr pursues a takings claim and simultaneously a claim for illegal exaction, the latter of which requires a threshold legal determination of whether the Federal Reserve Act authorized the Federal Reserve Bank of New York's agreement with AIG. Although the Court has allowed Starr to pursue both claims alternatively, Starr may not offer facts in support of one claim that contradict facts in support of the other.

6. For a compensable taking to occur, the Government must act in its sovereign capacity; actions taken "in the government's proprietary capacity, not in its sovereign capacity" do not constitute a taking. *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993) (citing *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978)).

7. When a plaintiff alleges that the Government's actions towards an intermediate third party effected a taking of the plaintiff's property separately from any taking of the third party's property, "a compensable taking does not occur unless the government's actions on the intermediate third party have a 'direct and substantial' impact on the plaintiff asserting the takings claim." *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1361

(Fed. Cir. 2002).

8. A Federal reserve bank has no obligation to make a loan to any entity under Section 13(3) of the Federal Reserve Act; loans are discretionary and the statute is permissive rather than mandatory. 12 U.S.C. § 343.

9. Pursuant to the Reciprocity Act, "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction." 28 U.S.C. § 2502. "Reciprocity will lie between the United States and a foreign nation so long as American citizens may sue the foreign sovereign on the same terms as native citizens." *Ferreiro v. United States*, 350 F.3d 1318, 1322 (Fed. Cir. 2003). In addition, a plaintiff cannot pursue a takings claim for a taking of property in a foreign country in the absence of any allegation of a relationship between the plaintiff and the United States. *See Atamirzayeva v. United States*, 524 F.3d 1320, 1329 (Fed. Cir. 2008).

10. Therefore, plaintiff class members who are foreign nationals must affirmatively demonstrate reciprocity for American citizens in the foreign sovereignty to be able to pursue their takings and illegal exaction claims. For the takings claim, foreign class members must also establish a relationship between the foreign plaintiff and the United States sufficient to give rise to a takings claim.

1. Starr Will Not Identify A Specific Government Act That Constituted A Taking

11. A takings plaintiff must "pinpoint what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation."

Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995). Characterizing an alleged taking as consisting of several distinct actions viewed collectively is "too broad." *See Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009).

12. A claim that Government action indirectly affected the value of property is not compensable pursuant to the Takings Clause. *See, e.g., Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005).

2. No Taking Occurred Because AIG Acted Voluntarily When It Agreed To The Challenged Transactions

13. There can be no taking when whatever acts complained of are those of private parties, not the Government. *Alves*, 133 F.3d at 1458; *see also 767 Third Ave. Assocs.*, 48 F.3d at 1582-83. Although a Fifth Amendment taking may occur when the Government commands actions by a third party that would constitute a taking if undertaken directly by the government, *Tex. State Bank v. United States*, 423 F.3d 1370, 1376-77 (Fed. Cir. 2005) (*citing Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991)), no compensable taking occurs if the Government engages in "friendly" persuasion of the third party rather than compulsion, or if the third party exercises its own discretion in a manner that affects the plaintiff's property. *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985); *Tex. State Bank*, 423 F.3d at 1376-77 (*citing Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297, 300-01 (Fed. Cir. 1987)).

14. Plaintiffs assert that a taking arose from FRBNY's September 2008 rescue loan to AIG. Pl. Concl. ¶14. It is undisputed that, if AIG had rejected the rescue loan, Starr would have no takings claim to assert. Starr further acknowledges that AIG was not compelled by statute, regulation, or Government force to participate in the September 2008 rescue agreement that

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provided $85 billion in assistance to the failing company.

15. In the absence of the Government using its sovereign authority to force a transaction, the courts will not find a taking has occurred. Property cannot be taken under the Fifth Amendment when it is conveyed voluntarily by agreement. *Norman v. United States*, 429 F.3d 1081, 1089 (Fed. Cir. 2005) (holding that a voluntary transfer of property is “not a proper basis on which to premise a takings claim”); *Tex. State Bank*, 423 F.3d at 1376-77 (the government must “compel[]” or “command[]” a transfer of property to be liable for a taking).

16. For there to be a taking, the conduct claimed to be a taking must involve compulsion by the Government or “required acquiescence.” *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992) (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)). Required acquiescence means that “the owner is forced to surrender the property under threat of legal sanction.” *Colo. Springs Prod. Credit Ass’n v. Farm Credit Admin.*, 967 F.2d 648, 657-58 (D.C. Cir. 1992). Acquiescence cannot be deemed required or compelled merely because refusal would involve a substantial sacrifice or disadvantage for the owner. *Cf. Yee*, 503 U.S. at 527-28 (court rejected mobile home park owners’ claim that local, rent-control ordinance amounted to physical occupation of owners’ property, because owners “voluntarily rented their land to mobile home owners . . . [and] neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so”).

17. Starr’s voluntary approval, or lack thereof, of AIG’s rescue is not relevant to the determination of whether a taking occurred.

18. As the Court has previously ruled, Starr’s claims rely upon “whether *AIG* voluntarily agreed to the terms proposed on September 16, 2008.” *Starr Int’l Co. v. United States*, 106 Fed. Cl. 50, 78 (2012) (*Starr I*) (emphasis added); *see also A & D Auto Sales*, 748

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F.3d at 1154 (takings liability for a third party's acts only exists "if the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive"). Under that ruling, which Starr sought and obtained in order to keep its claim alive in the face of an agreement between AIG and FRBNY, Starr's approval is irrelevant.

19. Starr cites no authority for its novel argument that a shareholder can assert a direct claim for a taking against the United States based upon the effect of the Government's agreement with a corporation directed by the shareholders' chosen fiduciaries, simply because the shareholders did not separately agree to the corporation's decisions. *See* Pl. Concl. ¶¶ 117-121.

20. Delaware law only requires separate shareholder approval of corporate conduct in limited circumstances. No shareholder approval was required before AIG could agree to the rescue deal. *See generally* Del. Code tit. 8 §§ 101 *et seq.*; *see also Starr I*, 106 Fed. Cl. 50 at 76 ("There have been no allegations that any form of shareholder approval was necessary to enter into the loan agreement; only that certain shareholder approvals were required to effect the reverse stock split. *See* Tr. 105 (Boies).").

21. Because the Government interacted only with AIG, any harm allegedly done to Starr could only have been accomplished by *AIG's* promise to issue equity in return for the company's rescue. AIG is an intermediate and necessary third party that caused the alleged taking. Starr's claims, therefore, rely upon the takings case law concerning an intermediate third party, which require Starr to demonstrate that the Government actually compelled, directed, or required AIG's agreement to the rescue terms. *See A & D Auto Sales*, 748 F.3d at 1154-55 (summarizing cases that examine takings liability for third party actions).

3. AIG Could Not Have Been Coerced Into Agreeing To Provide a 79.9 Percent Equity Interest In Exchange For An $85 Billion Loan Because The Company Acted Voluntarily

22. Unless the Government coerced AIG into accepting the rescue loan, Starr lacks the Government conduct necessary to support a takings claim. Therefore, as this Court has held, Starr's takings claim must fail if "AIG voluntarily agreed to the terms proposed on September 16, 2008." *Starr I*, 106 Fed. Cl. at 78.

23. To prove that AIG did not voluntarily agree to the terms offered by FRBNY, Starr must satisfy the well-established standard for duress. To prove duress, "a plaintiff must show that: (1) it 'involuntarily accepted' the other party's terms; (2) 'circumstances permitted no other alternative'; and (3) 'said circumstances were the result of coercive acts of' the other party." *Id.* at 77 (quoting *Fruhauf Sw. Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953)) (footnote omitted).

24. To establish duress, a plaintiff must prove each of these elements. *Bergman v. United States*, 28 Fed. Cl. 580, 585-86 (1993).

25. "The standard [for duress] now looks more closely at the defeat of the will of the party coerced." *Sys. Tech. Assocs., Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983); *see also Sinclair v. United States*, 66 Fed. Cl. 487, 493 (2005) (plaintiff's resignation was not involuntary, as a matter of law, where his resignation letter "admits that he was not subject to coercion" and where plaintiff "does not claim that he submitted his resignation against his wishes"); *Plechner v. Widener Coll., Inc.*, 569 F.2d 1250, 1260 (3d Cir. 1977) (law school trustees did not act under duress where "trustee witnesses denied that they were coerced," and were "experienced in making difficult and important decisions under pressure"). A party cannot have acted under duress when it consulted with its attorneys before agreeing to the terms and

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acted in conformance with its attorneys' advice to agree. *Henderson Cnty. Drainage Dist. No. 3 v. United States*, 53 Fed. Cl. 48, 56-57 (2002).

26. To establish duress, Starr must demonstrate that the Government asserted influence over AIG when it accepted the terms of the $85 billion rescue package, and that "the government's influence over the third party was coercive rather than merely persuasive." *A & D Auto Sales*, 748 F.3d at 1155. To do this, the Court must look to whether the Government's conduct was "designed to *compel* specific actions" by the third party. *Id.* (emphasis added).

27. When a third party has a choice to accept or reject an offer by the Government — even if that choice is a very hard one — there can be no "coercion" sufficient to attribute that party's chosen action to the United States. Coercion is not established where the Government entices or persuades, rather than compels, a party to act, "however difficult refusal may be as a practical matter" for the party. *A & D Auto Sales*, 748 F.3d at 1155 (quoting *Langenegger*, 756 F.2d at 1572); *see also B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1325 (Fed. Cir. 2000) (where Congress conditioned Federal funding of States on restricting cigarette sales to minors, "Congress may have provided the bait, but California decided to bite," and coercion was not established precisely because "it was California's decision"); *In re Sea-Land Corp. S'holders Litig.*, No. Civ. A. 8453, 1988 WL 49126, at *3 & n.4 (Del. Ch. May 13, 1988) ("'[L]everage' is not actual domination and control"); *Gilbert v. El Paso Co*., 490 A.2d 1050, 1055-56 (Del. Ch. 1984).

28. "The fact that an individual is faced with inherently unpleasant alternatives does not make his or her choice involuntary." *Petrick v. United States*, 12 Cl. Ct. 700, 702 (1987).

29. An offer of a Section 13(3) loan is not inherently coercive. An "assertion of duress must be proven to have been the result of the defendant's conduct *and not by the*

plaintiff's necessities." *Starr I*, 106 Fed. Cl. at 77 (quoting *Fruhauf*, 126 Ct. Cl. at 52) (emphasis added).

30. AIG and its directors will testify that their will was not defeated and that they acted voluntarily, which establishes voluntariness and the absence of duress. In a typical duress case, the allegedly coerced party claims that its will was overcome, and the court must test that claim. Where an allegedly coerced party admits that it agreed voluntarily or denies that it was coerced or denies acting under duress, there is no basis to establish duress. *See Plechner*, 569 F.2d at 1260 (law school trustees, who were not the plaintiffs, did not act under duress where "trustee witnesses denied that they were coerced"); *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 219 n.13 (S.D.N.Y. 2012) (*Starr II*) (AIG's board "acceded — regretfully, and perhaps angrily, but, as a matter of law, voluntarily — to the hard terms on which FRBNY was willing to extend the $85 billion credit facility.").

31. Delaware corporations such as AIG vest their boards of directors with authority to authorize the company's entry into business transactions. Del. Code tit. 8, § 141(a) (the "business and affairs" of a corporation are to be "managed by or under the direction of [its] board of directors").

32. Under Delaware law, directors are presumed to have acted independently and in the best interests of the corporation and its shareholders when making a decision regarding the corporation. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. Supr. 2000). "[E]ven proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other

relationships the directors are beholden to the controlling person." *Aronson*, 473 A.2d 815-16. Even a "stockholder's control of a corporation" does not establish that the directors are not independent from the majority shareholder. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1054 (Del. 2004); *see also In re Paxson Commc'n Corp. S'holders Litig.*, No. Civ. A. 17568, 2001 WL 812028, at *9 & n.52 (Del. Ch. July 12, 2001) ("Even where the *potential* for domination or control by a controlling shareholder exists, the complaint must allege particularized allegations that would support an inference of domination or control.") (emphasis in original).

33. To establish that AIG's participation in the transactions at issue was controlled or compelled by the Government rather than voluntary, Starr must prove that the Government displaced the capacity of AIG's board of directors to exercise independent judgment over its decisions to authorize AIG to enter into the challenged transactions. *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, No. Civ. A. 1668-N, 2006 WL 2521426, at *4 & n.38 (Del. Ch. Aug. 25, 2006) ("[Q]uestions of control . . . should be assessed at the board level in terms of whether the board's capacity to exercise its judgment independently has been impaired."); *In re W. Nat'l Corp. S'holders Litig.*, No. 15927, 2000 WL 710192, at *8 (Del. Ch. May 22, 2000) ("the standard for determining whether [an entity] exercises control over the corporation requires a judicial finding of actual control over the *business and affairs* of the corporation," and "the *business and affairs* of a Delaware corporation fall under the direction of its board of directors") (emphases in original); *Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 407 (Del. Ch. 1999) (equating control of the company with actual control of decisions by directors).

34. To establish that an individual director's decision to authorize AIG to enter into a particular transaction was controlled by, rather than independent of, the Government, Starr must

prove that the individual director was beholden to the Government or so under its influence that he or she was unable to exercise independent judgment as to the best interests of AIG and its shareholders with regard to that transaction. *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). Independence is defined to mean "that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Id.* To establish lack of independence, a plaintiff must show that the directors are "beholden" to the defendants or "so under their influence that their discretion would be sterilized." *Id.*; *see also Aronson*, 473 A.2d at 816 ("[A] plaintiff charging domination and control of one or more directors must allege *particularized facts* manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.'") (emphasis added); *In re CompuCom Sys., Inc. S'holders Litig.*, No. 499-N, 2005 WL 2481325, at *8 (Del. Ch. Sept. 29, 2005) ("Control over individual directors is established by facts demonstrating that 'through personal or other relationships the directors are beholden to the controlling person' or so under their influence that 'their discretion would be sterilized.'") (quoting *Rales*, 634 A.2d at 936).

35. Starr must establish that a majority of AIG's directors were each individually beholden to and not independent of the Government with respect to the challenged transactions. A lack of independence on the part of one director does not establish a lack of independence by the others. *In re CompuCom Sys.*, 2005 WL 2481325, at *8 ("A party alleging domination and control of a company's board of directors bears the burden of proving such control by showing a lack of independence on the part of the directors.") (quoting *Odyssey Partners*, 735 A.2d at 407 (Del. Ch. 1999); *In re Dow Chem. Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769, at *7 n.31 (Del. Ch. Jan. 11, 2010) ("Plaintiffs must show that at least half of the board is not

disinterested and independent.") (citing *Beam*, 845 A.2d at 1046); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192 at *11 ("First, plaintiffs must adduce some evidence demonstrating [a director's] bias. Second, they also must show that he imposed his bias on other board members such that they were beholden to him and (by extension) [the defendant]").

36. The ability to appoint or to remove a director does not establish control over that director. *Aronson*, 473 A.2d at 816 ("[I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director."); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 978 (Del. Ch. 2003), *aff'd* 845 A.2d 1040 (Del. 2004) (defendant's "overwhelming voting control" over company enabling her to "remove or replace any or all of the directors" did not establish that directors lacked independence over decisions involving defendant absent "allegations demonstrating that remaining on [the] board is material to the outside directors"); *In re Paxson Commc'n Corp. S'holders Litig.*, 2001 WL 812028 at *9 (shareholder's power to select all company directors and officers did not establish domination or control over those directors).

37. Nor does a third party's past relationship with a director establish a lack of independence on the part of that director. *In re CompuCom Sys.*, 2005 WL 2481325 at *9 & n.51 (existence of former business relationships was insufficient to establish that directors were controlled by third party) (citing *Beam*, 845 A.2d at 1052); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192 at *17 ("[A] director's past employment with the company on whose board he sits does not alone establish that directors' lack of independence.").

38. Monitoring or even being consulted regarding a board's decisions does not establish domination or control of the board's decision-making. *Tex. State Bank*, 423 F.3d at

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1377 (distinguishing between compelled conduct and conduct in which a "third party has exercised its own discretion" to act in response to a government offer or request); *In re Sea-Land Corp. S'holders Litig.*, 1988 WL 49126 at *3 ("actual domination and control" requires a showing that a third party "actually directed" the board to enter into a transaction "on terms dictated by" that party); *id.* at *3 n.4 (distinguishing persuasion from domination or control); *In re W. Nat'l*, 2000 WL 710192 at *8 ("The mere fact that . . . management solicited the view of a 40 percent shareholder with respect to an extraordinary business transaction and ultimately agreed with the view expressed by that shareholder does not indicate a relationship of domination and control."); *Starr II*, 906 F. Supp. 2d at 216 ("[A]n entity controls a corporation" when it "exercises actual control," defined as "domination . . . through actual exercise of direction over corporate conduct") (quoting *Gilbert*, 490 A.2d at 1055).

39. A lender's exercise of contractual rights cannot give rise to a takings claim because that exercise does not compel or control the counterparty's actions. *See Hughes Commc'ns Galaxy*, 271 F.3d at 1070 ("Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity. Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights.") (citing *Sun Oil*, 572 F.2d at 818); *Superior Vision Servs.*, 2006 WL 2521426 at *4-5 (the exercise of "a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take" does not amount to control over the corporation's conduct); *In re Bear Stearns Litig.*, 870 N.Y.S.2d 709, 740 (Sup. Ct. 2008) (to determine if a lender controls a company such that it may be liable for breaches of fiduciary duty, it is not "enough to show that the [third party lender] had leverage by virtue of certain contractual rights.").

40. A third party's potential to obtain a majority interest in a company in the future does not constitute control or domination over that company. *Gilbert*, 490 A.2d at 1055 (an imminent acquirer of a company which "used its *right* to future control as leverage to fashion" an "agreement more to its benefit" did not exercise actual control over a company's decision to enter into a transaction with the potential acquirer) (emphasis in original); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192 at *6 & n.14 (third party's ability to acquire a majority interest in the future did not amount to control over company's decision to enter into transaction with that third party); *Starr II*, 906 F. Supp. 2d at 216 ("'The potential ability to exercise control' does not suffice, as it 'is not equivalent to the actual exercise of that ability.'") (quoting *In re Sea-Land Corp.*, No. 8453, 1987 WL 11283, at *5 (May 22, 1987)).

4. AIG Was Not Coerced Into Accepting The Revolving Credit Facility Because Circumstances Permitted Another Alternative

41. Even if a party faces bankruptcy by rejecting the lender's terms, the availability of bankruptcy as an alternative negates coercion or duress as a matter of law, as long as directors retain the capacity to choose between accepting the lender's terms and a bankruptcy filing. *See Garelick v. Sullivan*, 987 F.2d 913, 917 (2d Cir. 1993) ("[E]conomic hardship is not equivalent to legal compulsion for purposes of takings analysis."); *In re Bear Stearns Litig.*, 870 N.Y.S.2d at 740 (even when no options appeared to be available other than a proposed transaction, "refusing to lend necessary funds" and even "threatening to place [the] company into bankruptcy" unless deal terms were accepted did "not demonstrate the requisite control" to be liable for a breach of fiduciary duty claim); *Freedlander, Inc. The Mortg. People v. NCNB Nat'l Bank of N.C.*, 706 F. Supp. 1211, 1220 (E.D. Va. 1988) ("[F]iling a petition in bankruptcy has been held to be a legal option defeating a claim of economic duress."), *aff'd*, 921 F.2d 272 (4th

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Cir. 1990); *FDIC v. Linn*, 671 F. Supp. 547, 560 (N.D. Ill. 1987) (holding that "[t]hreatened bankruptcy is insufficient to create economic duress"); *Starr II*, 906 F. Supp. 2d at 219 n.13 ("[O]n September 16, 2008, AIG's Board had, and was actively considering, the alternative choice of bankruptcy. . . . FRBNY's term sheet presented an alternative course for the Board to consider, and the Board chose that course. Even a choice between a rock and a hard place is still a choice."); *see also Ad Hoc Adelphia Trade Claims Commi. v. Adelphia Commc'ns Corp.*, 337 B.R. 475, 478 (S.D.N.Y. 2006) ("While the alternatives presented all were unpleasant, that does not render the situation coercive in any legally relevant sense.").

42. Starr's reliance on *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382 (Ct. Cl. 1969), is misplaced. That case does not stand for the proposition that the alternative of bankruptcy defeats a duress claim, but rather holds that when the Government breaches a contract and fails to pay a counterparty who depends on that Government's contractual payment for survival, the Government cannot "take advantage of its own failure to perform a solemn contract obligation in order to exact from the other parties to the contract a surrender of rights which he would not otherwise be compelled to give up." *Id.* at 392.

43. The other cases cited by Starr are not the rule of this Court, and it is "settled law that the mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances." *Fruhauf*, 111 F. Supp. at 951. It is also settled law that an unpleasant choice is still a choice. *See, e.g.*, *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975) ("Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation."); *see also Silliman v. United States*, 101 U.S. 465, 470-471 (1879) (no duress when claimants "yielded to the threat or demand of the department solely because they required,

or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others"); *Qualls v. Rumsfeld*, 412 F.Supp.2d 40, 43-44 (D.D.C. 2006) (no economic duress when agreed to employment to "stave off bankruptcy").

5. AIG Was Not Coerced Into Accepting The Revolving Credit Facility Because AIG's Circumstances Were Not The Result Of Any Coercive Government Action

44. A finding of duress would require "that [AIG's] assent 'was induced by an improper threat'" from the United States, such as threats "that 'would breach a duty of good faith and fair dealing under a contract as well as threats which, though lawful in themselves, are enhanced in their effectiveness in inducing assent to unfair terms because they exploit prior unfair dealing on the part of the party making the threat.'" *Starr I*, 106 Fed. Cl. at 78 (quoting *David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct. Cl. 1981)).

45. There is a strong presumption that public officials act in good faith. Overcoming that presumption requires "well-nigh irrefragable proof." *See, e.g.*, *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) (recognizing strong presumption that public officials act in good faith); *A-Transport Nw. Co. v. United States*, 36 F.3d 1576, 1585 (Fed. Cir. 1994) (same).

46. Starr cites no legal authority for its assertion that the Government's alleged failure to properly regulate can, in whole or in part, establish the "improper threat," "unfair dealing," or wrongful action required for the third element of duress. Starr's argument, if adopted by the Court, would improperly subject the Government to duress claims by any counterparty or shareholder of a counterparty who feels aggrieved by Government policy. It would also require a court to engage in improper second-guessing of Government regulatory policies. The Takings Clause does not "empower . . . courts to substitute their predictive judgments for those of elected

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legislatures and expert agencies." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544 (2005).

47. Offering a monetary benefit — even if it is enticing to the accepting party — is not, in and of itself, coercive. *B&G Enters.*, 220 F.3d at 1325.

48. It is not coercive for the Government to drive a hard bargain. *Wilkie v. Robbins*, 551 U.S. 537, 557 (2007).

6. Starr's Failure To Timely Challenge The Voluntariness Of The Rescue Ratified The Contract, Precluding A Finding Of Duress

49. Economic duress renders a contract voidable, not void, and a party "who accepts the benefits of the contract entered into under economic duress cannot later seek to have the contract rescinded." *Schmidt v. Shah*, 696 F. Supp. 2d 44, 64 & n.14 (D.D.C. 2010) (internal quotation marks omitted); *see also Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976) ("failure to raise a claim of duress soon after fear of its consequences had been removed is compelling evidence that there was no duress in fact") (citations omitted); *John Arborio, Inc. v. United States*, 76 F. Supp. 113, 119 (Ct. Cl. 1948) ("silence and inaction constitute . . . clear proof negating duress").

50. For a litigant claiming that a contract was entered under duress, the law does not countenance a "heads I win, tails you lose" approach "of waiting to see how the arrangement works out and then deciding whether to seek to undo it." *VKK Corp. v. NFL*, 244 F.3d 114, 123 (2d Cir. 2001); *see, e.g., Schmidt*, 696 F. Supp. 2d at 64 (holding that even if duress could be shown, the plaintiff was "precluded from attacking the validity" of an agreement where he sought to retain its benefits).

51. Starr's delay in challenging the voluntariness of AIG's agreement until after Starr had received the full benefit of the rescue deal bars its duress argument. *See VKK Corp.*, 244

F.3d at 122-23 ("The burden on a party seeking to avoid contractual obligations on the grounds of economic duress 'increases proportionately with the delay in initiating suit or otherwise repudiating the contract in question, since it is well established under New York law that a party asserting duress must do so promptly.'"); 3 Restatement (2d) of Contracts § 380(1) ("The power of a party to avoid a contract for . . . duress . . . is lost if, after the circumstances that made the contract voidable have ceased to exist, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.").

B. Starr Cannot Establish A Taking Because Starr Did Not Have A Property Interest In The Shares AIG Provided As Compensation For The Revolving Credit Facility

52. If the Court finds the Government imposed the Credit Agreement on AIG involuntarily — and it did not — the Court must then determine if a taking has, in fact, occurred.

53. There are two types of takings: (1) physical takings caused by the Government's direct appropriation or physical invasion of private property, and (2) regulatory takings resulting from Government regulations that unduly burden private property interests. *Otay Mesa Prop. L.P. v. United States*, 93 Fed. Cl. 476, 484 (2010) (citing *Yee*, 503 U.S. at 522-23, and *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 (Fed. Cir. 2008)).

54. To succeed on either a physical or a regulatory takings claim, a plaintiff must show that the State's action affected a "legally cognizable property interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)); *see also Estate of Hage v. United States*, 687 F.3d 1281, 1286 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 2824 (2013). The threshold inquiry is "whether the claimant has established a 'property interest' for purposes of the Fifth Amendment." *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 -07 (Fed. Cir. 2006) (quoting *Conti v. United States*, 291 F.3d

1334, 1339 (Fed. Cir. 2002). In other words, the relevant question is whether plaintiff's alleged interest is a stick in the bundle of rights plaintiff has acquired. *Colvin Cattle Co.*, 468 F.3d at 806-07 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

55. Starr must identify "a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *See Estate of Hage*, 687 F.3d at 1286 (quoting *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009)); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004); *see also Starr I*, 106 Fed. Cl. at 71 ("To establish a takings claim, a plaintiff must demonstrate as a threshold matter the existence of a legally cognizable property interest."); Pl. Concl. ¶ 16 ("When evaluating whether governmental action constitutes a taking," the Court must first "determine[] whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking.") (internal quotation marks omitted).

56. "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1364-65 (Fed. Cir. 2009) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)). These rules or understandings "focus on the nature of the citizen's relationship to the alleged property, such as whether the citizen had the rights to exclude, use, transfer, or dispose of the property." *Starr I*, 106 Fed. Cl. at 72 (internal quotations marks omitted).

1. The Class Members Did Not Have A Cognizable Interest In AIG's Equity

57. Although holders of common stock have certain rights to use, transfer, dispose of, or exclude others from possessing their own shares, they have no comparable property rights in the "equity" of the corporation whose shares they hold. Put simply, a shareholder only owns his or her shares; she does not have a property interest in the company's other shares, whether held by other individual shareholders, or in the company's vaults, awaiting a date of possible issue. *See, e.g.*, *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007) (numerous transactions may legitimately result in the dilution of present equity holders).

58. The right to exclude is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CA TV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). But it is important to identify what "exclusion" this right entails. The holders of AIG's common stock had no right to exclude others from investing in the corporation, thereby diluting the existing shareholders' equity interest and voting power. Delaware law gives the corporation, not its shareholders, authority to "own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares," including common and preferred stock. 8 Del. C. §§ 151-157, 160.

59. Issuance of shares by the corporation pursuant to this authority may dilute the existing shareholders' percentage ownership and voting power and could result in reducing the value of any individual's shares, but in either event Delaware law provides shareholders no anti-dilution protection. *Feldman*, 956 A.2d at 655 ("Clearly a corporation is free to enter into … numerous transactions, all of which may result legitimately in the dilution [of present equity

holders]. Such a dilution is a natural and necessary consequence of investing in a corporation….") (quoting *Oliver v. Boston Univ.*, No. Civ. A. 16570-NC, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006)); *see* ¶¶ 92, 173, 178-79, *infra*.

60. AIG's certificate of incorporation did not grant the common stockholders any protection against dilution beyond that provided by Delaware law. Pursuant to 8 Del. C. §§ 102(a)(4) & 151, AIG's certificate included a provision expressly permitting AIG's board — without a shareholder vote — to issue "blank check preferred" stock, which could include rights upon liquidation or dilution, super voting rights, priority dividend rights, priority redemption rights, and rights of conversion. *See* American International Group, Inc., Certificate of Incorporation Annual Report (Form 10-K), at Ex. 3(i) (Mar. 28, 1997), available at http://www.sec.gov/Archives/edgar/data/5272/0000950123-97-002720.txt.[1]

61. Where, as here, a company's certificate of incorporation authorizes its board to issue preferred stock that may dilute the equity interest associated with the company's common stock, the common shareholders cannot claim to own a cognizable property interest against such dilution. *See Gaskill v. Gladys Belle Oil Co.*, 146 A.2d 337, 339 (Del. Ch. 1929) ("It is elementary that the rights of stockholders are contract rights."); *see also Ellingwood v. Wolf's Head Oil Ref. Co.*, 38 A.2d 743, 747 (Del. Ch. 1944) ("The Courts of this State have held that the rights of stockholders are contract rights and that it is necessary to look to the certificate of incorporation to ascertain what those rights are.").

62. Because plaintiffs fail to assert a cognizable property interest, their takings claims fail.

[1] Subsequent pre-rescue amendments to AIG's certificate of incorporation did not change this provision. *See* PTX 3 and PTX 4.

63. It is undisputed that the Government did not physically take the plaintiffs' stock. Therefore, even if Starr has described a cognizable property interest — and it has not — it can only be related to the inchoate "economic value and voting power" associated with their shares, because the shares themselves, and the voting rights associated with them, remained with the common shareholders. *See Starr I*, 106 Fed. Cl. at 65. Therefore, to the extent that property interest has been "taken," any injury to Starr must be measured in terms of that limited interest.

C. Starr Cannot Establish A Physical Taking Because The Class Members Did Not Have Their Property Appropriated And Did Not Suffer An Economic Loss

64. Conceding that it cannot establish a taking under *Penn Central, see* Pl. Concl. ¶¶ 15, 50, Starr claims to have suffered a *per se* physical taking as a result of the Government's "direct appropriation" of its property interests, *see* Pl. Concl. ¶¶ 11, 15, 35. Given the alleged property — and the nature of the alleged taking — Starr's takings claim is not properly subject to a *per se* analysis.

1. Starr Has Not Suffered A "*Per Se*" Taking

65. The classic *per se* taking is where the Government "directly appropriates private property or ousts the owner from his domain." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1266-67 (Fed. Cir. 2009) (quoting *Lingle*, 544 U.S. at 539). That did not happen here, and thus the *per se* analysis has no application. As discussed above, the only alleged taking involves a purported reduction in the common shares' economic value and voting power. Governmental actions that merely adjust the value of a plaintiff's still-retained property rights are properly considered under *Penn Central* and *Lucas*. *See Cienega Gardens v. United States,* 265 F.3d 1237, 1248 -49 (Fed. Cir. 2001) (rejecting *per se* analysis for statute that affected plaintiffs' contractual right to prepay their mortgages).

66. In *A & D Auto Sales*, the Federal Circuit considered takings claims raised by auto dealers in connection with the Federal rescue of the domestic automobile industry. The plaintiffs alleged that the termination of their dealership agreements by GM and Chrysler "constituted a taking because the government required them as a condition of its providing financial assistance to GM and Chrysler and/or to the companies that succeeded them in the bankruptcies." *A & D Auto Sales*, 748 F.3d at 1147. The Federal Circuit held that a taking claim of this type should be considered — if at all — under the *Penn Central* or *Lucas* frameworks. *Id.* at 1157. Here, where Starr alleges that the Government's demand for equity constituted a taking because FRBNY required the equity as a condition of its providing financial assistance to AIG, there can likewise be no taking unless the *Penn Central* or *Lucas* tests is satisfied.

67. Because Starr does not allege that FRBNY's rescue loan deprived Starr's common stock of its entire economic value, Starr cannot prove a categorical taking under *Lucas; Penn Central* is, thus, the proper means by which the Court should evaluate any takings claims that satisfy the threshold requirements of Government action and cognizable property interest.

2. There Is No Evidence Of Harm

68. Even when the Government *has* taken a cognizable property right outright, that is not sufficient to establish an unconstitutional *per se* taking. The claimant must still establish harm requiring just compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003). If the claimant's "net loss was zero, the compensation that is due is also zero." *Id.* at 237.

69. In applying this rule, courts must look to the value of the plaintiff's property but for the challenged Government action. *See Brown*, 538 U.S. 216.[2] Starr may not assert that the

[2] As demonstrated below, the rule in *Brown* — that a claimant cannot establish a right to compensation without proving loss as compared to the but-for world — applies regardless of

proper valuation of its takings claim is a loss compared to what it wishes the Government had done, or what the Government did for others. A plaintiff, of course, does not have a property interest in the Government acting or not acting in such a way as will generate profit or benefits for the plaintiff. *Colvin Cattle Co.*, 468 F.3d 803 (rejecting takings claim of lost value of ranch resulting from cancellation of grazing lease in which plaintiff had no property right).

70. In *Brown,* a case involving a *per se* taking, the Supreme Court acknowledged that the plaintiffs had identified private property taken by the Government, namely, the interest generated by the plaintiffs' funds, which the law required be kept in certain interest-bearing accounts. But the Court observed that the plaintiffs had lost nothing because they would not have received any interest even in the absence of the Government program. Because compared to this but-for world, the plaintiffs' "pecuniary loss" was zero, the plaintiffs whose property had been taken were not entitled to any compensation. *Brown*, 538 U.S. at 240-41.

71. This rule stems from the bedrock principle — reflected in the "consistent and unambiguous" holdings of the Supreme Court — that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Id.* at 235-36; *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("Because gain to the taker…may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.") (citations omitted); *United States v. Miller*, 317 U.S. 369, 375 (1943) ("Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker."); *Bos. Chamber of Commerce v. Boston*, 217 U.S. 189, 194-95 (1910) (in determining whether a taking

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how Starr chooses to characterize its claim. *See* Section II.F, ¶¶ 75-103, *infra* (regulatory takings discussion); ¶¶ 169, 172, *infra* (Delaware overpayment law); Section IV, *infra* (illegal exaction).

has occurred, "the question is, What has the owner lost? not, What has the taker gained?").

72. Because plaintiffs can only receive compensation for losses, they have no right to value created by the Government's actions. Even with respect to *per se* takings, the Supreme Court has held that "value which the government itself created" is value that it "in fairness should not be required to pay." *United States v. Cors*, 337 U.S. 325, 333-35 (1949) (plaintiff cannot recover the increase in its property's value created by Government's purchasing needs); *see also United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

73. Increases in value caused by the Government's actions are not compensable even when "loss" is measured by the fair market value approach. *See, e.g.*, *Cors*, 337 U.S. at 333-34 (compensable market value of tugboat taken must be reduced by the increase in market value attributable to Government's need for tugboats during the war); *Miller*, 317 U.S. at 375 ("[S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case. … Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.").

74. Under these settled principles, a plaintiff cannot recover where, as here, it cannot show that its stock holdings would have had greater value but for the Government action. *See, e.g.*, *Brown*, 538 U.S. 216; *see also A & D Auto Sales*, 748 F.3d at 1157.

D. Starr Cannot Establish A Taking Under *Penn Central*

75. Starr disclaims any ability to establish a regulatory taking in this case. *See, e.g.*, Pl. Concl. ¶¶ 15, 50. Starr is correct that it has not stated, and cannot prove, a regulatory taking.

76. There are four types of regulatory takings. *Iowa Assurance Corp. v. City of Indianola, Iowa*, 650 F.3d 1094, 1097-1098 (8th Cir. 2011) (citing *Lingle*, 544 U.S. at 537).

77. The first type is a regulation which "requires an owner to suffer a permanent physical invasion of her property." *Id.* (quoting *Lingle*, 544 U.S. at 538). The second type is a regulation that "completely deprive[s] an owner of all economically beneficial use of her property." *Lingle*, 544 U.S. at 538 (internal quotation marks omitted) (citing *Lucas*, 505 U.S. at 1019). Starr has not alleged that either of these events has occurred to the plaintiffs' property.

78. The third type of regulatory taking occurs when the Government requires an owner to "dedicate" a portion of his property in exchange for a building permit without a sufficient "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The nexus requirement is met if the Government requirement "further[s] the end advanced as [its] justification." *Nollan*, 483 U.S. at 837. The rough proportionality test "does not require a 'precise mathematical calculation,' instead obliging the permitting agency only to make an 'individualized determination' that the condition imposed is 'related both in nature and extent to the impact' of the permittee's activity." *Horne v. U.S. Dept. of Agric.*, 750 F.3d 1128, 1143 (9th Cir. 2014) (quoting *Dolan*, 512 U.S. at 391).

79. The *Nollan*/*Dolan* category of taking applies only to situations in which the Government requires a dedication of real property. *Starr I*, 106 Fed. Cl. at 81 (holding that the *Nollan/Dolan* unconstitutional condition test does not apply). Federal courts have specifically declined to extend those cases' rationale to other factual scenarios. *See, e.g.*, *W. Linn Corp. Park, LLC v. City of W. Linn*, 428 F. App'x 700, 702 (9th Cir. 2011); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) (noting the similarity between development exactions and physical takings and holding that "the 'essential nexus' and 'rough proportionality'

tests are properly limited to the context of development exactions"); *Bamber v. United States*, 45 Fed. Cl. 162, 165-66 (1999). The *Nollan/Dolan* framework is not appropriate for assessing any taking claim by Starr.

80. The fourth type of regulatory taking is any other regulation or Governmental sovereign action which, after considering certain factors relevant to the economic impact upon the plaintiff and the essential character of the Government's action, is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 538-39.

81. Pursuant to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), those factors include the (1) economic impact on the plaintiff's property by the Government's action, (2) interference with the plaintiff's "distinct investment-backed expectations," and (3) the character of the governmental action. *Id.* at 124. Determining whether a regulation goes too far requires a court to engage in "essentially ad hoc, factual inquiries[.]" *Id.* "[T]hese three inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. Starr does not propose any contentions of fact or law that would satisfy these factors.

1. Starr Cannot Demonstrate Economic Impact Because There Is No Evidence That AIG's Common Stock Would Have Been More Valuable Absent The Rescue, And Thus There Is No Proof Of Any Destruction Of Value Because Of A Government Taking

82. The "primary" inquiry under *Penn Central* examines the regulation's economic impact on the claimant. *Id.* at 538-39. A regulatory taking claim will turn on this economic impact, measured by the change, if any, in the fair market value caused by the regulatory

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imposition. *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (citing *Penn Central*, 438 U.S. at 124). The existence of economic injury is indispensable to demonstrating a regulatory taking. *Seiber v. United States*, 364 F.3d 1356, 1370 (Fed. Cir. 2004). "A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property . . . [I]f the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking." *Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999); *see also Fla. Rock Indus.*, 18 F.3d at 1571.

83. To determine the economic impact of a regulatory action, a court must "compare the value that has been taken from the property with the value that remains in the property[.]" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *see also Penn Central*, 438 U.S. at 130-31 ("In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole[.]"). Thus, Starr must prove the economic impact of the alleged Government actions. Because Starr is unable to demonstrate economic loss, the Court should reject Starr's takings claims. *See A & D Auto Sales*, 748 F.3d at 1158.

84. Starr cannot establish that, but for the Government's assistance to AIG, Starr would have been in a better financial position than had the Government not provided any assistance at all.

85. In *A & D Auto Sales*, the Federal Circuit held that the dealers' complaints failed to state a takings claim without "allegations regarding the but-for economic loss of value of the plaintiffs' franchises[.]" *A & D Auto Sales*, 748 F.3d at 1158. The Court reasoned: "Absent an

allegation that GM and Chrysler would have avoided bankruptcy *but for the government's intervention* and that the franchises would have had value in that scenario, or that such bankruptcies would have preserved some value for the plaintiffs' franchises, the terminations actually had no net negative economic impact on the plaintiffs *because their franchises would have lost all value regardless of the government action.*" *Id.* (emphases added).

86. Like the auto dealerships in *A & D Auto Sales*, Starr cannot prove a takings claim due to its failure to establish the "but-for" economic value of AIG's common stock. *See A & D Auto Sales*, 748 F.3d at 1158; *see also Cienega Gardens*, 503 F.3d at 1282-83 (offsetting benefits of the challenged actions must be considered as part of the takings analysis itself and whether there is economic loss, not only part of a just compensation calculation); *Hendler*, 175 F.3d at 1385 (concluding that, without a "negative economic impact on the property, there is no regulatory taking").

87. Indeed, the Federal Circuit in *A & D Auto Sales* rejected the very argument that Starr advances. The plaintiffs in that case argued that they should not have to allege loss compared to a but-for world of bankruptcy because they claimed the Government would not have permitted automakers to fail. *See* Oral Argument at 14:32-18:34, *A & D Auto Sales*, 748 F.3d 1142 (Nos. 2013-5019, 2013-5020), *available at* www.cafc.uscourts.gov/oral-argument-recordings/all/ad.html. The Court did not find such an allegation to be sufficient even at the pleading stage, and instead held that the appropriate "but-for world" would look to the value of the plaintiffs' property in bankruptcy without *any* Government financial assistance. *A & D Auto Sales*, 748 F.3d at 1158.

88. Even if Starr could demonstrate that the rescue package provided to AIG in September, 2008, was — on balance — harmful to AIG's shareholders, it cannot establish

sufficient economic impact to prevail under the *Penn Central* analysis.

89. The courts have consistently required significant economic impact before finding a regulatory taking. "[W]e are aware of no case in which a court has found a taking where diminution in value was less than 50 percent." *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) (internal quotation marks omitted). "[W]hat 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." *Cienega Gardens*, 503 F.3d at 1282 (quoting *Cienega Gardens*, 331 F.3d 1319, 1340 (Fed. Cir. 2003)); *see also Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195 (Fed. Cir. 2004) ("courts have traditionally rejected takings claims in the absence of severe economic deprivation."); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1358 (Fed. Cir. 2003) (13.1% economic impact "weighs against" plaintiff's takings claim); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (46 % diminution insufficient for taking); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (50 percent diminution insufficient for taking); *Walcek v. United States*, 49 Fed. Cl. 248, 271-72 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (59.7 percent diminution insufficient for taking); *Yancey v. United States*, 915 F.2d 1534, 1539 (Fed. Cir. 1990) (regulatory taking found when regulation caused 77 percent reduction in value of turkey flock); *see also Lucas*, 505 U.S. at 1019 n.8 ("in at least *some* cases the landowner with 95% loss will get nothing")(emphasis in original).

2. Starr Cannot Demonstrate That The Revolving Credit Facility Affected Plaintiffs' Reasonable Investment-Backed Expectations

90. *Penn Central*'s second factor — whether the Government's action interfered with distinct, investment-backed expectations — requires courts to consider whether the challenged

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Government conduct affected a plaintiff's "primary expectation concerning the use" of the affected property. *Penn Central*, 438 U.S. at 136.

91. In *Cienega Gardens*, 503 F.3d at 1289, the Court laid out a four-step analysis for considering the reasonable expectations prong. The first step of the analysis is to determine the actual investment made in the property. The second step is to determine the benefits that the owners reasonably could have expected at the time they entered into the investment. The third step is to determine what expected benefits were denied or restricted by the Government action. Finally, the claimant must establish that it actually made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the Government action, rather than the remaining benefits.

92. The Court must consider each individual plaintiff's actual expectations. *Id.* Starr must, but cannot, demonstrate that the members of the Credit Agreement Class actually expected — at the time of their investments — that if AIG faced bankruptcy, the company would obtain a below-market rescue loan that did not dilute the plaintiffs' equity interests. *See Feldman*, 956 A.2d at 656 & n.35 ("Clearly, a corporation is free to enter into … numerous transactions, all of which may result legitimately in the dilution [of present equity holders]. Such a dilution is a natural and necessary consequence of investing in a corporation[.]") (citation omitted). Indeed, given the potential disparity in expectations across the Credit Agreement Class, should Starr attempt to prove a taking under the *Penn Central* analysis, the Court should reconsider its certification of the Credit Agreement Class.

93. Investment-backed expectations are measured at the time the plaintiff acquires the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004).

94. "[A] federal statute or authority can constitute a 'background principle' that inheres in the title to property interests arising after its enactment, therefore precluding a takings claim based on the application of the statute to those property interests." *Bair v. United States*, 515 F.3d 1323, 1329 (Fed. Cir. 2008) (citing *Air Pegasus of D.C.*, 424 F.3d at 1218; *Am. Pelagic*, 379 F.3d at 1379; *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995)).

95. AIG's shareholders cannot have held a reasonable expectation that if AIG faced bankruptcy, AIG would receive a below-market rescue on favorable terms that did not involve the possible dilution of those shareholders' economic interests in AIG. A Federal reserve bank has no obligation to make any loan under Section 13(3) of the Federal Reserve Act; loans are discretionary and the statute is permissive rather than mandatory. 12 U.S.C. § 343.

96. A property owner's distinct investment-backed expectations are "often informed by the law in force in the State in which the property is located." *Ark. Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 522 (2012).

97. Under Delaware law, there is no inherent right against dilution of voting power when new equity is issued. *Zimmerman v. Crothall*, No. 6001-VCP, 2012 WL 707238, at *17 (Del. Ch. Mar. 5, 2012) (citing *Savin Bus. Machs. Corp. v. Rapifax Corp.*, No. 5331, 1978 WL 2498, at *6 (Del. Ch. Feb.15, 1978) ("In the first place 8 Del. C. § 102(b)(3) provides that no stockholder of a Delaware corporation shall have any preemptive right to subscribe to additional issues of stock unless the certificate of incorporation expressly so provides.")).

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3. Starr Cannot Demonstrate That The Character Of The Government's Action Inappropriately Burdened Private Property

98. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (internal citation omitted).

99. The character of the Government action does not suggest there was a taking when the Government required something of an intermediary third party, who then injured the plaintiff. *Huntleigh USA Corp.*, 525 F.3d at 1379 (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923)).

100. "Frustration and appropriation are essentially different things." *Omnia*, 261 U.S. at 513.

101. The character of the Government action implicates whether the plaintiff has been unfairly forced to bear a burden that should be borne by the public. *Maritrans*, 342 F.3d at 1356 (no taking because it is fair to make owner of oil tankers bear costs to improve safety of those ships, because of the risks those ships create).

102. When considering the character of the Government action, the Court must consider "the actual burden imposed on property rights, or how that burden is allocated." *Rose Acre Farms*, 559 F.3d at 1278 (quoting *Lingle*, 544 U.S. at 543). "'The magnitude or character of the burden a particular regulation imposes upon private property rights' is an important consideration." *Id.* (quoting *Lingle*, 544 U.S. at 542).

103. Simply determining that a plaintiff could have suffered a smaller loss if the Government had acted differently does not establish that the character of the Government action

suggests a taking occurred. *Rose Acre Farms*, 373 F.3d at 1194. This is especially true if it is years after the alleged taking before one can determine whether there was a way for the Government to fulfill the same Governmental purpose but harm the plaintiff less. *See id.* at 1194-95 ("Rose Acre repeatedly emphasizes the end result of the regulatory scheme at issue — millions of its healthy eggs were restricted. However, this assertion itself relied on scientific understanding developed after the regulations were imposed . . . . Nowhere does Rose Acre argue (or did it show) that the regulatory means were inconsistent with knowledge the government possessed at the time they were adopted or applied against Rose Acre.").

II. Starr Cannot Establish An Illegal Exaction Of Its Property For The Equity Claim

104. An illegal exaction is a claim "in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" and "the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). Alternatively, illegal exaction cases are "those in which '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'; and we [the Court of Claims] have held that 'suit can be brought in this court to recover (such) exactions said to have been illegally imposed by federal officials (except where Congress has expressly placed jurisdiction elsewhere).'" *Id*. at 1007-08 (citations omitted).

105. As explained above, individual shareholders had no property interest in the 79.9 percent equity AIG provided as compensation for the Revolving Credit Facility, and had no right to avoid the share dilution that would naturally occur as a result of AIG's decision to issue additional preferred or common stock. *See* ¶¶ 52-56, *supra*.

106. Where, as here, no physical shares were taken from plaintiff shareholders and where they suffered no economic loss by reason of the corporation's promising to issue shares, it cannot be said that money or anything else of value (including economic value and voting power under Delaware law) was improperly paid by, or exacted from the plaintiff shareholders.

107. For that reason, Starr has no standing to bring an illegal exaction claim because it cannot show it "suffered a direct and substantial impact to [its] own property rights." *See Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 482 (2013) (*Starr IV*); *see also Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005) ("[A] plaintiff has a claim for an illegal exaction only where the government [action] has direct and substantial impact on the plaintiff asserting the claim.") (quoting *Casa de Cambio*, 291 F.3d at 1364).

A. Because AIG Voluntarily Agreed To The Terms Of The Revolving Credit Facility, There Could Be No Illegal Exaction

108. Absent specific indication of Congressional intent to the contrary, property cannot be illegally exacted when it is conveyed voluntarily by agreement. *United States v. Edmondston*, 181 U.S. 500, 511 (1901). Under the well-established doctrine of voluntary payment, a voluntary payment without protest vitiates the claim, even if the property was conveyed in response to an illegal demand. *Emp'rs Ins. of Wausau v. United States*, 764 F.2d 1572, 1575 (Fed. Cir. 1985). "When a person voluntarily surrenders liberty or property, the State has not *deprived* the person of a constitutionally-protected interest" under the Takings Clause or the Due Process Clause. *L.L. Nelson Enters. v. Cnty. of St. Louis, Mo.*, 673 F.3d 799, 806 (8th Cir. 2012) (citing *Zinerman v. Burch*, 494 U.S. 113, 117 n.3 (1990)).

109. Starr's illegal exaction claim must fail because AIG voluntarily agreed to the terms proposed on September 16, 2008. *See Starr I*, 106 Fed. Cl. at 83 (declining to dismiss

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illegal exaction claims because "existing factual disputes make it inappropriate at this time to resolve the question of whether AIG voluntarily entered into the loan transaction with the Government").

110. A narrow exception to the doctrine of voluntary payment exists where the statute violated was for the benefit and protection of the plaintiff seeking recovery. *See Cessna Aircraft Co.*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997) ("[I]f government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound . . . . However, if the primary intended beneficiary of a statute or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation. . . ."); *Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1017-18 (Ct. Cl. 1980) ("[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.") (citation omitted).

111. The steamship cases on which Starr relies — such as *Suwannee Steamship Co. v. United States*, 279 F.2d 874 (Ct. Cl. 1960) — are consistent with the long-established voluntary payment doctrine. As this Court's predecessor explained, in the "ship-sale" cases, including *Suwanee,* the rule of *Edmondston* was not applied because to do so would be contrary to Congressional intent. *See Rough Diamond Co. v. United States*, 351 F.2d 636, 639-40 (Ct. Cl. 1965) ("In the ship-sale cases, we distinguished *Edmondston* by stressing the difference in the underlying legislation," which the court in those cases had interpreted to intend a non-discretionary "mathematical application of the statutory formula" for approving sales).

112. Moreover, AIG's voluntary agreement to the revolving credit facility is not comparable to the plaintiff's assent to an illegal fee in *Suwanee*. In *Suwanee*, if the plaintiff did

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not assent, the plaintiff would be subject to the Government's regulatory power and restriction of plaintiff's property rights: namely, the plaintiff would not have been permitted to sell its ship. Here, by contrast, "the Government was not exercising preexisting regulatory authority, or anything akin to a state or locality's police powers. . . . [I]f AIG had refused the conditions of the loan agreement, AIG would not have been subject to any ongoing restrictions; AIG simply would not have obtained the loan. In this way, the Government was not in a position to exploit any existing regulatory power to induce the loan transaction." *Starr I*, 106 Fed. Cl. at 82-83.

113. The provisions and restrictions of Section 13(3) were enacted to protect the public interest in the integrity and soundness of the economy and the Federal Reserve System, not to benefit borrowers or their shareholders. *Starr Int'l Co. v. Fed. Reserve Bank of N.Y*, 742 F.3d 37, 42 (2d Cir. 2014) (*Starr V*) (Section 13(3) loans do not encompass a duty to advance the interests of borrowers or their shareholders, because recognizing such a "private duty would present a significant and direct conflict with FRBNY's obligation to act in the public interest as a fiscal agent of the United States"); *Corbin v. Fed. Reserve Bank of N.Y.*, 475 F. Supp. 1060, 1068 (S.D.N.Y. 1979), *aff'd*, 629 F.2d 233 (2d Cir. 1980) ("Loans made by the Federal Reserve are made for a public purpose, they are not intended to serve private interests[.]"); *Lucas v. Fed. Reserve Bank of Richmond*, 59 F.2d 617, 620-21 (4th Cir. 1932) (plaintiff cannot challenge Federal reserve bank's lending against allegedly ineligible collateral because "no one can complain of such action except the government, the sovereign which created and limited its powers") (citations omitted).

114. The only authority cited by Starr in support of its claim of illegality, *Cal. Nat'l Bank v. Kennedy*, 167 U.S. 362 (1897), further reinforces that any limitations on the Federal Reserve's authority are to protect the Federal Reserve System itself, not borrowers or their

shareholders. *Kennedy's* proscription of "dealing in" stocks was intended to preserve the soundness of banks' balance sheets by preventing them from engaging in speculative stock trading, *see First Nat'l Bank of Charlotte v. Nat'l Exch. Bank of Baltimore*, 92 U.S. 122, 128 (1875), not to protect borrowers from being asked to convey equity as consideration for a loan.

115. Therefore, the doctrine of voluntary payment, not the narrow exception of *Suwannee*, applies here.

116. Section 13(3) should not be read to provide protection to individual companies' shareholders, whose interests are already protected by their duly elected board of directors, who may — indeed should — decline a loan if they believe the loan does not serve the interests of the company and its shareholders.

117. AIG's voluntary agreement to the revolving credit facility is not comparable to the plaintiff's assent to an illegal fee in *Suwanee*. In *Suwanee*, if the plaintiff did not assent, the plaintiff would be subject to the Government's regulatory power and restriction of plaintiff's property: namely, the plaintiff would not have been permitted to sell the ship. Here, by contrast, "the Government was not exercising preexisting regulatory authority, or anything akin to a state or locality's police powers. . . . [I]f AIG had refused the conditions of the loan agreement, AIG would not have been subject to any ongoing restrictions; AIG simply would not have obtained the loan. In this way, the Government was not in a position to exploit any existing regulatory power to induce the loan transaction." *Starr I*, 106 Fed. Cl. at 82-83.

118. In *Suwanee*, the Court of Claims interpreted the Shipping Act of 1916 to leave no discretion to the Government, and determined that the Shipping Act's purpose *required* the Government to allow plaintiff to transfer its ship to a foreign registry if the Government officials "concluded, as they must have done, that the transfer would be consistent with the public

interest." 279 F.2d at 877. The Court also determined that the fee imposed had nothing to do with the purpose of the Shipping Act, stating that "[t]here can hardly be a more serious defect in the carrying on of government than allowing matters which have nothing to do with the case to be dragged in, and to affect decisions." *Id.*

119. Section 13(3), by contrast, *permits*, rather than *requires*, the Board of Governors to authorize — and a Federal reserve bank to offer — a loan in certain circumstances, and the decision to condition a loan on an equity kicker is closely related to the Federal Reserve's policy considerations about how to mitigate moral hazard concerns and how to fairly compensate taxpayers for the riskiness of the loan.

120. As described above in Section I.A.2 and in our proposed findings of fact Section V, AIG acted voluntarily and not under duress from the Government when it agreed to the rescue loan.

121. A lender's exercise of contractual rights cannot give rise to an unlawful exaction claim. *Norman*, 429 F.3d at 1095 (illegal exaction claims must be "based upon an asserted *statutory* power") (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996)) (emphasis added). The exercise of "a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take" does not amount to control over the corporation's conduct. *Superior Vision Servs.*, 2006 WL 2521426 at *4-5; *see also In re Bear Stearns Litig.*, 870 N.Y.S.2d at 740 (to determine if a lender controls a company such that it may be liable for breaches of fiduciary duty, it is not "enough to show that the [third party lender] had leverage by virtue of certain contractual rights.").

B. The Equity Term Of The Revolving Credit Facility Was Legal

1. Congress Granted The Board Of Governors The Power To Authorize Loans Conditioned On Equity In the Last Sentence Of Section 13(3)

122. By its terms, Section 13(3) is meant to address extraordinary events: when, because of "unusual and exigent circumstances," Federal Reserve banks may act to provide rescue loans to maintain the stability of the financial system. Federal Reserve Act, 12 U.S.C. § 343.

123. The last sentence of Section 13(3) provides that "[a]ll 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(3) (2008) (emphasis added).

124. Conditioning a Section 13(3) loan on a borrower's agreement to convey equity falls within the plain meaning of a "limitation" or "restriction" on the offering and acceptance of that loan, and Starr makes no argument to the contrary. Indeed, Starr makes no showing that such a condition is not a valid "limitation" or "restriction."

125. This express delegation of authority reflects Congress' intent that the Board of Governors, not the courts, craft appropriate policy and devise terms for specific loans, and that the Board's judgments under "unusual and exigent circumstances" with respect to those terms should not be second-guessed by the courts. *Douglas v. Ind. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012) ("[T]he agency is comparatively expert in the statute's subject matter. And the language of the particular provision at issue here is broad and general, suggesting that

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the agency's expertise is relevant in determining its application.").[3]

126. Federal Reserve bulletins do not state or suggest that interests rates are the only limitations or restrictions the Board of Governors could prescribe in connection with a loan under section 13(3). *See* Feb. 1936 Circular, 22 Fed. Reserve Bulletin no. 2 at 123. To the contrary, they expressly recognized that all discounts were also "subject to such limitations, restrictions, and regulations as the Federal Reserve Board may prescribe," and that "[a]ny Federal reserve bank may prescribe *such additional requirements and procedures* respecting discounts hereunder *as it may deem necessary or advisable*." *Id.* at 123, 124 (emphasis added); Aug. 1932 Circular, 18 Fed. Reserve Bulletin no. 8 at 520. As one bulletin explained: "In view of the fact that the power conferred by this provision can be exercised only in 'unusual and exigent circumstances,' the Federal Reserve Board has not prescribed any formal regulations governing the exercise of this power . . . ." Aug. 1932 Fed. Reserve Bulletin no. 8 at 518.

127. Although Section 13(3) references interest rates, nowhere does the statute prohibit the Board of Governors from conditioning a loan on consideration in addition to interest. "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 696-97 (D.C. Cir. 2014) (quoting *Cheney R.R. Co. v. Interstate Commerce Comm'n*, 902 F.2d 66, 68-69 (D.C. Cir. 1990)). Particularly "when countervailed by a broad grant of authority contained within the same statutory scheme, the canon is a poor indicator of Congress' intent." *Id.* Here, Section

[3] Determining whether Section 13(3) permits the Board of Governors to condition lending on the provision of equity requires only the application of straightforward principles of statutory construction, without any need for resort to *Chevron* deference as Starr has suggested. Nonetheless, the Court should not accept Starr's invitation to disregard the Board's determination of its authority. *See Douglas*, 132 S. Ct. at 1210.

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13(3) ends with a broad grant of authority to prescribe limitations and restrictions on loans. Nothing in Section 13(3)'s reference to interest rates "unambiguously suggests Congress intended to strip [that] broad grant of authority." *Id.* at 696-97.

128. In Section 13(3), reading the term "discount" to mean only the interest rate would ignore that the Federal Reserve Act uses the term "rate" when it means interest rates related to discounts. *See* 12 U.S.C. § 357. "A cardinal doctrine of statutory interpretation is the presumption that Congress's 'use of different terms within related statutes generally implies that different meanings were intended.'" *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1389 (Fed. Cir. 2013) (citations omitted).

129. Precluding the Board from attaching additional "limitations" or "restrictions" to loans on the basis of Section 13(3)'s non-exclusive reference to "rates" of interest would improperly render the entire last sentence of Section 13(3) a nullity.

130. Although this Court's previous decisions cited commentary suggesting that there "is no express authority for the Federal Reserve to purchase . . . equities," that commentary expressly concerned only the purchase of equities as part of the Federal Reserve's open market operations to implement general monetary policy pursuant to Section 14 of the Federal Reserve Act. *Starr I*, 106 Fed. Cl. at 86 (quoting David Small & James Clouse, Limits the Federal Reserve Act Places on Monetary Policy, 19 Ann. Rev. Banking L. 553, 579 (2000)); *Starr Int'l Co. v. United States*, 107 Fed. Cl. 374, 378 (Fed. Cl. 2012) (*Starr III*) (same). That commentary did not describe any limitation on conditioning Section 13(3) rescue lending on the provision of equity as partial consideration to offset credit risk and to take into account moral hazard costs. *See* Small & Clouse, 19 Ann. Rev. Banking L. at 556, 569-74 & n.79. As a result, an examination of other forms of possible consideration allowed under Section 13(3)

rescue lending, particularly in light of the section's last sentence, remains ripe for consideration.

2. Even If The Challenged Loan Terms Were Not Expressly Authorized, They Are Within FRBNY's Incidental Powers

131. Conditioning lending on AIG's agreement to grant equity was also a valid exercise of FRBNY's incidental powers under Section 4(4) of the Federal Reserve Act, which authorizes FRBNY to exercise "all powers specifically granted by the provisions of this Chapter and *such incidental powers as shall be necessary to carry on the business of banking* within the limitations prescribed by this Chapter." 12 U.S.C. § 341 (Seventh) (emphasis added). This reference to "incidental powers" inherently contemplates the recognition of authority to act in ways not specifically enumerated in the statute. *Cf. Sec. Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1044, 1049 (2d Cir. 1989); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972) (all interpreting the National Bank Act, the model for the Federal Reserve Act).

132. Absent a statutory restriction of FRBNY's authority, which Starr cannot identify because it does not exist, the Federal Reserve Act's "incidental powers" authorization also inherently extends the scope of permissible terms and conditions on rescue loans beyond the terms expressly enumerated in the text of Section 13(3). *See NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995) ("incidental powers" provision gave the Comptroller of the Currency "discretion to authorize activities beyond those specifically enumerated" in the National Bank Act); *see also Nat'l Ass'n of Mfrs. v. Secs. & Exchange Comm'n*, 748 F.3d 359, 366 (D.C. Cir. 2014) ("[D]iscretion may be exercised to regulate circumstances or parties beyond those explicated in a statute."). Interpreting the scope of

permissible terms of rescue loans to include only interest would read out of the Federal Reserve Act the last sentence of Section 13(3) and the incidental powers provision of Section 4(4) and improperly render them mere surplusage. *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (statutory provisions should not be rendered superfluous).

133. Starr's interpretation of Section 4(4) as granting only powers necessary effectuate the powers expressly enumerated in the text of Section 13(3) is contrary to the plain meaning of Section 4(4). By its express terms, that provision does not grant powers necessary to effectuate enumerated powers, but rather grants powers "necessary to carry on the business of banking." That those incidental powers also are subject to "the limitations prescribed by this chapter" is unavailing to Starr, because an enumerated power — and in particular the authorization to charge interest on a loan — cannot be fairly characterized as a "limitation."

134. The Board of Governors is charged with the interpretation and enforcement of section 4(4) of the Federal Reserve Act as the supervisor of the Reserve Banks, similar to the Comptroller of the Currency's authority to interpret the National Bank Act. 12 U.S.C. § 248.

135. In *NationsBank*, the Supreme Court confirmed the authoritativeness of a determination by the Comptroller of the Currency regarding the scope of banks' "incidental powers" under an analogous provision of the National Bank Act. 513 U.S. at 258 n.2. As the Court explained, "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *Id.* at 257. Because the Comptroller was charged with enforcement of this provision, the "incidental powers" provision gave him "discretion to authorize activities beyond those specifically enumerated" if the exercise of that discretion remained within "reasonable bounds." *Id*. at 258 n.2; *see Commodity Futures Trading Comm'n. v. Schor*, 478

U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position . . . is therefore due substantial deference.").

136. *California National Bank v. Kennedy* did not *prohibit* conditioning lending on the provision of equity or holding equity, but found only that "dealing in" stock — that is, "engaging in the ordinary business of buying and selling [stock] for profit," *First Nat'l Bank of Charlotte*, 92 U.S. at 128 — was not incidental to national banks' everyday lending activities. 167 U.S. 362, 369 (1897). That holding has no bearing on whether conditioning an exceptional Section 13(3) loan to AIG on the provision of equity was reasonably necessary to effectuate that individual rescue loan given the particular policy considerations inherent in lending to AIG.

137. Starr also cannot reconcile its incorrect interpretation of *Kennedy* with the extensive authority permitting national banks to condition lending on the provision of "equity kickers." *See, e.g.*, O.C.C. Inter. Ltr. No. 992, 2004 WL 1563358, at *2 (May 10, 2004) ("The OCC repeatedly has found that national banks may purchase shares of stock . . . when the acquisition is not for speculative or investment purposes and the stock ownership is intended to facilitate a bank's participation in an otherwise permissible activity . . . .").

138. Starr's attempts to portray this authority as inapplicable to the AIG loan on the basis that national banks purportedly have "greater power . . . to set the consideration for a loan," Summ. J. Opp'n 28 & n.12, Dkt. no. 256, identifies no reason why the Federal Reserve should have less ability to obtain consideration for taxpayers than national banks have for their owners and shareholders.

3. Congress Confirmed That The Board Of Governors Could Authorize FRBNY To Condition Rescue Lending On AIG's Agreement To Provide Equity

139. Just weeks after FRBNY's rescue of AIG and in the wake of considerable public attention to that rescue, Congress ratified the Board of Governors' authorization of a Section 13(3) loan conditioned on the receipt of equity. Specifically, Congress enacted a statute requiring, for the AIG loan and all future loans under Section 13(3), that the Board of Governors report upon the recipients of such consideration "in exchange for" a Section 13(3) loan. 12 U.S.C. § 5235(a), (d). In particular, Section 129(a) of the Emergency Economic Stability Act of 2008 (EESA) provides that the Board of Governors must, thereafter, report the terms and conditions of all Section 13(3) lending assistance, including information as to "the recipient of *warrants or any other potential equity in exchange for*" that assistance. 12 U.S.C. § 5235(a)(2) (October 3, 2008) (emphasis added).

140. Statutory ratification of the Board of Governors' interpretation of Section 13(3) is binding on the Court. As the Supreme Court has repeatedly confirmed, Congress' express or implied endorsement through legislative action of a statutory interpretation amounts to a binding adoption of that interpretation. *See Schor*, 478 U.S. at 846 (where Congress has endorsed an "administrative construction" of a statute, courts "cannot but deem that construction virtually conclusive"); *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 134 (1978) (when Congress "voices its approval" of an administrative interpretation, "Congress is treated as having adopted that interpretation, and this Court is bound thereby"); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (subsequent legislative action demonstrating Congress' approval of an existing interpretation of a statute "is entitled to great weight"). Courts are not empowered to second-guess agency interpretations of their statutory authority that

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Congress has accepted.

141. The 2010 amendments to Section 13(3) reaffirm the Board of Governors' authority to condition lending on the provision of consideration other than interest, by requiring further reporting of "the amount of interest, fees, *and other revenue or items of value received in exchange* for [Section 13(3)] assistance[.]" 12 U.S.C. § 343(3)(C)(ii)(II) (emphasis added).

142. "Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n. 10 (1979)).

143. Under these circumstances, it is evident that Congress effectively ratified the determination that the Board of Governors could authorize Section 13(3) lending conditioned on the provision of equity. *See F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000).

4. Terms Addressing Moral Hazard Concerns are Not Illegal

144. Section 13(3) in no way prevents consideration of taxpayer interests, moral hazard, scale or riskiness of the loan, surrounding market conditions, or other factors that might affect the Board of Governors' judgment.

145. The equity term was not a "penalty" designed for retribution; it was properly intended to address moral hazard concerns. Plaintiffs also have provided no evidence to the contrary indicating that AIG or its shareholders were improperly "targeted" in the sense used by the Federal Circuit in *A & D Auto Sales*.

146. In any event, this Court has already rejected Plaintiffs' Due Process and Equal

Protection claims. *Starr I*, 106 Fed. Cl. at 61; *Starr III*, 107 Fed. Cl. at 376. Plaintiffs' attempt to reargue these claims couched as assertions that the Government had no authority to impose a penalty should be dismissed.

C. The Trust Was Not A "Sham" And Its Use Was Not Illegal

147. It is irrelevant to Starr's claims what entity held the AIG shares. Which entity could or should hold equity is an altogether separate question from whether the Federal Reserve could condition lending on AIG agreeing to convey equity; the second question is the only one for which Starr has standing and which is legally relevant to the harm alleged by Starr. Even if the question of which entity could hold shares were relevant to the harm alleged by Starr, Starr has not established that FRBNY or Treasury was legally prohibited from holding the shares, or that the Trust was prohibited from doing so even if viewed as indistinguishable from FRBNY.

148. Because the Board of Governors and FRBNY could condition a Section 13(3) loan on AIG giving up equity, creating a trust to hold that equity was within the incidental powers granted by Section 4(4) because creating the trust would permit FRBNY to "carry into effect those [powers] which are granted." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924).

149. The Trust was created on January 16, 2009 for the lawful purpose of acquiring, holding, and disposing of the preferred shares that AIG had previously agreed to provide to the Trust pursuant to the Credit Agreement. Trust Agmt. 1-2; *see* McKinney's N.Y. Est. Powers & Trusts Law § 7-1.4 ("An express trust may be created for any lawful purpose."). Pursuant to the New York Estates, Powers and Trusts Law, N.Y. Est. Powers & Trusts Law §§ 1 *et seq.*, the Trust had the power to purchase, receive, hold, vote, and/or sell equity.

150. Starr's contention that FRBNY must have owned the preferred shares prior to

the creation of the Trust because it was the settlor of the Trust and the settlor must initially own the Trust's *res*, Pl. Concl. ¶ 194, is incorrect. The *res* and initial corpus of the Trust at the time it was settled did not include the preferred shares (which did not yet exist) or even the right to the future issuance of those shares, but only, consistent with common corporate practice, a nominal sum provided by FRBNY. Trust Agmt. § 1.02 ("The Trustees . . . acknowledge the receipt of the sum of One Dollar . . . ."). The acknowledgement in the Trust Agreement that the Trust "may otherwise receive" other property in the future, including the preferred shares to be issued by AIG, was not a conveyance of any property owned by FRBNY. *Id.* AIG subsequently issued the preferred shares directly to the Trust. *See* Credit Agmt. § 5.11 ("[T]he Borrower shall issue *to the Trust* Equity Interests . . . ."); Stock Purchase Agreement § 2.1 ("[AIG] shall issue and sell to the Trust, and the Trust shall purchase . . . 100,000 . . . shares of Series C Preferred Stock . . . .").

151. Starr lacks standing to challenge the validity of the Trust because the question of what entity actually held, or could have held, the preferred shares has no relationship to the harm alleged in this case — the alleged dilution of Starr's economic and voting interests resulting from the Federal Reserve's having conditioned the loan to AIG on AIG's agreement to provide a 79.9 percent equity interest. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Even if that were not the case, Starr would independently lack standing because, as a third party that was neither the settlor of the Trust nor a beneficiary, it would not have a pecuniary interest in the subject matter of the Trust sufficient to confer standing. *Cf. In re Malasky*, 290 A.D.2d 631, 632 (N.Y. App. Div. 2002) (third parties with no pecuniary interest in a trust lack standing to challenge the trust's administration).

152. Regardless, the manner in which the trust could be terminated does not render it

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illusory. A trust may be terminated upon application to the court by a settlor who is also the sole beneficiary of the trust, but it is not automatically terminated or treated as legally invalid if the settlor and the beneficiary are the same. *See Bogert's The Law of Trusts and Trustees* § 1004. Additionally, the settlor of the Trust and the beneficiary of the Trust were not the same. Starr offers no authority for its unsupported claim that FRBNY, which is a corporate instrumentality separate from and independent of the United States Government, should be treated as a mere alter ego of, or as having no effective separate existence from, the United States Treasury (that is, the public fisc), which was the Trust's sole beneficiary — not the Treasury Department. Trust Agmt. 1; *id.* § 1.01.

153. Even if the use of a trust structure had the incidental benefit of obviating the need for confirming the full scope of FRBNY's or Treasury's legal authority to hold equity, that incidental benefit does not render the trust invalid. *Cf. Bogert's The Law of Trusts and Trustees* § 211 (explaining that trusts "for which the settlor's *primary purpose*" was to evade the law "may" be invalidated).

154. Starr also lacks standing to challenge the independence of the Trust because that question too has no relationship to the harm allegedly suffered by Starr as a result of AIG's agreement to provide the equity interest. *Cf. Lujan*, 504 U.S. at 560-61. And even if the Trust's independence was legally relevant to its validity — which it is not — that question should be assessed by reference to the provisions of the Trust Agreement, not individual instances of the Trust's daily operations. The validity or invalidity of the Trust cannot come into and out of existence depending on the degree to which the Trust acted independently with respect to any given aspect of its operations.

155. The terms of the Trust Agreement, which were heavily negotiated by the

Trustees' independent counsel, conferred independence on the Trustees in administering the voting and economic rights associated with the Trust's equity interest in AIG. The Trust Agreement provided that the Trustees were to have "absolute discretion and control over the Trust Stock," Trust Agmt. 1-2, including "full discretionary power to vote the Trust Stock . . . ." *Id.* § 2.04(d). The Trust Agreement's precatory and expressly "nonbinding" statement that "it is the FRBNY's view that (x) maximizing the Company's ability to honor its commitments to, and repay all amounts owed to, the FRBNY or the Treasury Department and (y) the Company being managed in a manner that will not disrupt financial conditions, are both consistent with maximizing the value of the Trust stock," *id.*, did not and could not require the Trustees to act at FRBNY's or the Treasury Department's direction.

D. Starr Cannot Recover On Its Claim For Exaction Because Section 13(3) Is Not Money-Mandating

156. The Court's jurisdiction over illegal exaction claims requires that, even in the case of an illegal exaction, a claimant must satisfy the Tucker Act's usual money-mandating requirement. *See Norman*, 429 F.3d at 1095. The "claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Id.* (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

157. Section 13(3) does not expressly provide a monetary remedy, and it is not implicitly money-mandating because it was not drafted to protect borrowers or their shareholders. *Cf. Clevenger Roofing & Sheet Metal Co. v. United States*, 8 Cl. Ct. 346, 353-54 (1985) (statute setting minimum wage requirements on Federal construction projects was not money-mandating because it was not "enacted to benefit contractors") (quoting *United States v.*

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Binghamton Constr. Co., 347 U.S. 171, 176-77 (1954)).

158. Every court that has considered the purpose of the Federal reserve banks' rescue lending has recognized that it is meant to advance the public interest in a stable financial system, not to protect individual borrowers or their shareholders. *See Starr V*, 742 F.3d at 42 (noting that FRBNY has an "obligation to act in the public interest as a fiscal agent of the United States" when acting under Section 13(3)); *Corbin*, 475 F. Supp. at 1068, *aff'd* 629 F.2d 233 (2d Cir. 1980) ("Loans made by the Federal Reserve are made for a public purpose[;] they are not intended to serve private interests[.]"); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 210, 217-19 (E.D.N.Y. 1979) (emergency lending is intended to "preserve the stability of the banking system, to minimize the losses to the public, and to reduce the possibility of grave national and international financial repercussions"); *see also Lucas*, 59 F.2d at 620-21 ("no one can complain of" a Federal reserve bank's allegedly exceeding its authority "except the government, the sovereign which created and limited its powers"); *Raiche v. Fed. Reserve. Bank of N.Y.*, 34 F.2d 910, 915-16 (2d Cir. 1929) (A Federal reserve bank's refusal to extend credit "was not a wrong, because no provision of the [Federal Reserve Act] requires the [reserve bank] to discount unless so ordered by the [Board of Governors].").

159. Congress enacted Section 13(3) to protect the public interest in the integrity and soundness of the economy and to guard against excessive risks to taxpayers. As the Board of Governors recognized in a bulletin promulgated just months after the enactment of Section 13(3), the requirements of the statute were "safeguards" intended to "protect the liquidity of the assets of the Federal reserve banks." Fed. Reserve Bull. (Aug. 1932), at 474. *See also* 12 C.F.R. § 201.4(d) (prohibiting loans under Section 13(3) absent a finding that "failure to obtain such a credit would adversely affect the economy"). *California National Bank v. Kennedy*, 167

U.S. 362, 366 (1897), confirms that any limitations on FRBNY's authority were intended to protect the Federal Reserve System itself, not borrowers and their shareholders. *Kennedy*'s prohibition on "dealing in" stocks was intended to preserve the soundness of banks' balance sheets by preventing them from engaging in speculative stock trading, *see First Nat'l Bank of Charlotte*, 92 U.S. at 128, not to shield borrowers from giving up equity as consideration for loans.

E. Starr Has Not Established That It Suffered Any Injury From The Board of Governors' And FRBNY's Having Purportedly Exceeded Their Authority Under The Federal Reserve Act

160. Starr asserts an illegal exaction that arose as a single term in a complex contract featuring an exchange of consideration. Such a claim requires a determination of whether the contract would have been entered (and if so, what terms it would have had) but for the offending terms.

161. That analysis is fundamentally different from cases where courts have found illegal terms standing independent from bilateral contracts. In those simpler circumstances, the courts have simply excised the illegal terms upon finding a statutory requirement to act on particular terms (and without adding new terms) or if particular conditions were met. *See, e.g.*, *Sprague S.S. Co. v. United States*, 172 F. Supp. 674, 675 (Ct. Cl. 1959) ("Congress, by [the Ship Sales Act], intended that the prices of these ships should be determined, not by negotiation . . . but by arithmetic. Where, as here, the challenged inaction relates to conduct by an agency with discretionary authority to act through negotiated agreements, courts will not simply excise allegedly illegal terms of a bilateral agreement that are beyond an agency's authority if doing so would not comport with the parties' intent in entering the bargain."); *AT&T v. United States*, 307

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F.3d 1374, 1380 (Fed. Cir. 2002); *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 43-44 (Fed. Cl. 2000).

162. In *AT&T*, for example, the Federal Circuit declined to alter the terms of an allegedly illegal negotiated agreement between AT&T and the United States Navy. AT&T, having bargained for and won a fixed-price contract, later argued that the Navy lacked legal authority to enter into a fixed-price contract. *See* 307 F.3d at 1380-81. AT&T sought to reform the contract to be on a cost-reimbursement basis. *Id*. The Federal Circuit refused to alter the agreement's terms to address the asserted illegality, ruling that doing so would "strike[] to the core of the contract bargain" because the Navy might not have agreed to enter into a contract with AT&T on the altered terms. *Id*. The appeals court explained that, "Under a cost-reimbursement scheme . . . the Navy may have refused to assume the risk of AT&T's technical competency. Instead, the Navy might have avoided that risk by awarding the RDA contract to one of AT&T's technically superior competitors . . . . In sum, competition on a cost-reimbursement basis may have taken AT&T out of the game." *Id.*

163. Similarly, in *Northrop Grumman Corp*., the Court of Federal Claims rejected an attempt to reform an allegedly illegal, fixed-price contract into a cost-reimbursement contract. The court refused to alter the contract to address the alleged illegality because the resulting "arrangement would not reflect the intent of the parties" as to the terms on which they would have been willing to enter into such an agreement. *See* 47 Fed. Cl. at 43-44. The court rested its conclusion on the fundamental concern that unilaterally altering the terms of the negotiated agreement so as to be inconsistent with the intent of the parties "would bring a windfall to which [plaintiff] is not entitled." *Id*. at 44. The court held that, "Enforcement as written, regardless of the illegality, brings no unjust result." *Id* at 43.

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164. There is a strong presumption that all of a party's consideration in a contract is intended to be given in exchange for all of the other party's consideration. *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1992) ("There is a presumption that when parties enter into a contract, each and every term and condition is in consideration of all the others, unless otherwise stated."); John Cibinic, Jr., *Formation of Government Contracts* 270 (4th ed. 2011) ("Government contracts involve a number of obligations of or benefits to each party. In general, such contracts are not divided into individual exchanges."); *see also Eden Isles Marina, Inc. v. United States*, 113 Fed. Cl. 372, 490 (2013).

165. As described in Sections I.C.2 and I.D.1 above, Starr cannot establish that it would have been better off but for the Government's and FRBNY's actions in offering the revolving credit facility.

F. Starr Cannot Establish That All Economically Equivalent Alternatives To The Series C Preferred Stock Would Be Invalid

166. In Section 8.12 of the Credit Agreement, AIG and FRBNY agreed that "[i]n the event that any one or more of the provisions contained in this Agreement . . . should be held invalid, illegal or unenforceable in any respect . . . [t]he 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."

167. Thus, even if the Board of Governors and FRBNY had exceeded their legal authority by requiring AIG to provide 79.9 percent of its equity as partial compensation for the loan, Starr would not have suffered any compensable injury because AIG was contractually bound to provide an economically equivalent alternative to 79.9 percent of AIG's common stock.

III. The Court Should Deny Starr's Illegal Exaction Claims Because Starr Accepted The Benefits Of FRBNY's And The Government's Rescue For Years

168. A plaintiff who does not promptly challenge an allegedly illegal agreement waives its right to later undo that agreement on the grounds that the Government exceeded its authority. *See AT&T*, 307 F.3d at 1380-81 ("[T]he proper time for AT&T to have raised the issues that it now presents was at the time of contract negotiation . . . . [E]ven were AT&T to have stated a valid claim . . . this court's case law would require a finding that AT&T waived that claim."); *Whittaker Elec. Sys. v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997) (contractor that failed to timely object to allegedly illegal contractual term waived its right to challenge the agreement's validity); *Northrop Grumman Corp.*, 47 Fed. Cl. at 43-44 (finding waiver over claim that Government exceeded its authority); *see also, e.g., VKK Corp.*, 244 F.3d at 123.

IV. Starr Lacks Standing To Assert A Direct Equity Takings Or Illegal Exaction Claim

169. Starr's equity claim is a "corporate overpayment" claim. *See Starr I*, 106 Fed. Cl. at 62 & n.10; Order (Sept. 27, 2013) at 4.

170. Corporate overpayment claims are normally regarded as exclusively derivative because the corporation is "the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006).

171. In a narrow exception, the Supreme Court of Delaware has recognized a "species of corporate overpayment claim" that may give rise to both a direct and a derivative claim. Such a claim exists where: "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of

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the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Starr I*, 106 Fed. Cl. at 62 (quoting *Rossette*, 906 A.2d at 100) (citing *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007)).

172. To establish that the September 2008 rescue deal involved "a stockholder having majority or effective control caus[ing] [a] corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," *Starr I*, 106 Fed. Cl. at 62, Starr bears the burden of proving each of the following: (1) the Government was a shareholder of AIG at the time of the alleged overpayment; (2) the Government caused or compelled AIG to enter into the rescue deal by exercising control over the company; and (3) in the rescue deal, AIG issued shares of its stock in exchange for Government assets with lesser value.

A. The Government Was Not A Shareholder Of AIG And Did Not Control AIG Or Compel It To Enter Into The September Rescue

173. To establish that the Government was a stockholder of AIG, Starr must prove that the Government held AIG shares at the time AIG agreed to grant the 79.9 percent equity as part of the September 2008 rescue deal. *See Feldman*, 956 A.2d at 657 ("[I]t is clear from [*Rossette* and *Gatz*] that the Delaware Supreme Court intended to confine the scope of its rulings to only those situations where a controlling stockholder exists."). To establish that the Government compelled AIG at that time, Starr must prove that the Government exercised actual control over the business and affairs of AIG. *See In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192 at *6 ("In the absence of majority stock ownership, a plaintiff must demonstrate that the minority shareholder held a dominant position and actually controlled the corporation's conduct.").

174. If AIG's decision to accept the rescue was not compelled, Starr lacks standing to

bring its direct claims. *See* Order, *Starr Int'l Co. v. United States*, No. 11-779C (Fed. Cl. Sept. 27, 2013) at *4-5 (Starr's standing to assert a direct claim turns on "whether the Government used its [alleged] control of AIG to expropriate the economic and voting interests of the then-existing common stock shareholders").

175. Under Delaware law, the business and affairs of AIG fall under the authority of the company's board of directors. *See* ¶¶ 31-32, *supra*. Therefore, Starr must overcome the presumption under Delaware law that the directors were independent and disinterested and acted in the best interest of the company and its shareholders. *See id.* In considering whether a plaintiff has overcome the presumption of directors' independence, the Delaware Supreme Court has directed courts to examine whether the directors were beholden to the alleged controlling party through personal or other relationships, and whether the directors' decision was based on the corporate merits of the subject matter rather than extraneous consideration or influence. Starr must prove that a majority of AIG's directors were each individually controlled by the Government. This cannot be established through the Government's ability to appoint or remove a director, the Government's past relationship with a director, or the Government's monitoring or influencing AIG's decisions.

B. The September Rescue Did Not Involve AIG's Issuing Shares In Exchange For Assets Of Lesser Value

176. It is a mathematical truism that a transaction between a company and a controlling shareholder that results in the issuance of new shares only to the controlling shareholder will necessarily decrease the percentage share of the company owned by minority shareholders ("share dilution") — no matter how much consideration is paid by the controlling shareholder.

177. For that reason, the key test of *Rossette* and *Gatz* is whether a corporate

overpayment has occurred by means of "excessive" shares being exchanged for assets having a lesser value. *See Gentile v. Rossette*, C.A. No. 20213, 2010 Del. Ch. LEXIS 123, at *18 (Del. Ch. May 28, 2010) (fairness of the per share rate at which controlling shareholder debt was converted into shares "forms the core of this case.").

178. An overpayment through the issuance of excessive shares in exchange for assets of lesser value will necessarily result in a decrease in the economic value of the common stock ("economic dilution"). As explained in *Feldman*, "[a] claim for wrongful equity dilution is premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable." 956 A.2d at 655.

179. Where, as here, the value of the minority shares is worth *more* after the share issuance than before, there has been no corporate overpayment; there has been a corporate underpayment. There is no cognizable claim under Delaware law for a corporate underpayment as a claimant cannot show any injury in fact. *See Feldman*, 956 A.2d at 655; *Rossette*, 906 A.2d at 103.

C. Starr Is Unable To Prove Any Separate And Independent Harm Allegedly Suffered By Shareholders

180. The existence of a direct "corporate overpayment" claim also turns on "whether any damages awarded should go to the shareholders instead of the corporation." *Starr Int'l Co. v. United States*, 112 Fed. Cl. 601, 605 (2013) (*Starr III*).

181. The harm for which "public shareholders may seek relief in a direct action" is a "separate and distinct harm . . . to the public shareholders, apart from any harm caused to the corporation." *Gatz*, 925 A.2d at 1274; *In re J. P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) (shareholders must establish a separate injury to bring a direct claim

because it "simply cannot be" that defendants could be "liable to pay both the corporation and its shareholders the same compensatory damages for the same injury"); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) ("The stockholder's claimed direct injury must be independent of any alleged injury to the corporation.").

182. Thus, Starr also bears the burden of proving that AIG's alleged "overpayment" of equity resulted in "harm to the suing stockholders independent of any harm to AIG." *Starr I*, 106 Fed. Cl. at 62; *see Starr IV*, 111 Fed. Cl. at 482.

183. Starr is unable to meet this burden as a matter of law. The only injury claimed by Starr is not and cannot be injury for any "separate and distinct harm" to AIG's shareholders because the amount Starr claims — the asserted value of a 79.9 percent equity interest in AIG based on AIG's publicly-traded share price — corresponds exactly to the amount that Starr previously alleged was due to AIG itself.

184. Under Federal common law principles governing contract formation, a binding agreement requires "an objective manifestation of voluntary, mutual assent" as well as "lack of ambiguity in offer and acceptance." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Under Federal common law, the requirements for formation of a binding contract are: (1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) in the case of a contract with the Government, a Government representative having actual authority to bind the United States in contract. *Id.*[4]

[4] The Term Sheet is evidence of the FRBNY and AIG's intent to be governed by New York law rather than Federal common law, but there is no need for the Court to engage in a choice-of-law analysis, because there is no relevant conflict between New York law and the Federal common law of contracts.

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185. There must be a meeting of the minds as to all material terms of the contract. *See, e.g.*, *Int'l Indus. Park v. United States*, 100 Fed. Cl. 638, 649-50 (2011). "Whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances," *Tex. Instruments v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990); *accord Express Indus. & Terminal Corp. v. New York State DOT*, 93 N.Y.2d 584, 589-90 (1999) (contract formation requires "manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms," and "courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract"); *Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.,* 41 N.Y.2d 397, 400-01 (1977) (in determining the existence of a contract and its terms, "disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain").

186. The fact that an agreement on material terms is, or is intended to be, later superseded by more detailed, formal memorialization does not negate its status as a binding contract. *See, e.g.*, *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991) (agreement may be "sufficiently definite" to constitute a binding contract even if it "specifies that certain terms will be agreed on by future negotiation"); *cf. Singer v. Xipto Inc.*, 852 F. Supp. 2d 416, 424 (S.D.N.Y. 2012) (holding that an expressly "non-binding" term sheet, together with other evidence that the parties intended to be bound, evidenced an enforceable agreement).

187. AIG entered into an enforceable agreement with FRBNY on September 16, 2008, in which FRBNY agreed to provide a loan of up to $85 billion, and AIG agreed to provide 79.9

percent of the company's equity, in a form to be determined. The evidence demonstrates that a contract was formed: the parties have testified that they believed they had a deal on September 16, and their actions confirm it — from AIG voting to approve the deal, to the parties' contemporaneous public announcements that a deal had been made, to both parties' immediate and continued performance of the agreement on September 16 and after.

188. Even if AIG did not enter into an enforceable agreement with FRBNY until September 22, 2008, Starr cannot establish a property interest that was taken or exacted, harm to that property interest, or that AIG acted under duress or under the Government's control on September 22, 2008. Therefore, Starr's claims would still fail even if no contract had formed on September 16, 2008.

<u>The Reverse Stock Split Claim</u>

V. Starr Cannot Establish A Taking Of Its Property For The Reverse Stock Split Claim

A. Starr Cannot Identify A Property Interest Because The Common Shareholders Had No Right To A Class-Only Vote

189. "[A]s a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment." *Am. Pelagic Fishing Co. L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004) (citation omitted). Cognizable property interests are limited by "existing rules or understandings" that stem from a source independent of the Fifth Amendment. *Lucas*, 505 U.S. at 1030 (citation omitted); *see also Air Pegasus of D.C.*, 424 F.3d at 1213.

190. "[A] taking claim cannot be supported by asserting ownership in a property interest that is different and more expansive than the one actually possessed." *Rogers Truck Line, Inc. v. United States*, 14 Cl. Ct. 108, 114 (1987).

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191. Starr alleges that the Government, by way of the reverse stock split, took the Stock Split Class members' "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." Pl. Concl. ¶ 32. The Stock Split Class members' claim therefore turns first on whether "the common shareholders were entitled to a separate class vote on the reverse stock split." *Starr I*, 106 Fed. Cl. at 74.

192. Delaware law does not give common stockholders any class-only voting rights over reverse stock splits that, like this one, leave unchanged the authorized number and par value of a company's shares of common stock. Indeed, Starr has long conceded that the common shareholders had no right under Delaware statutory law to a class-only vote on the reverse stock split that occurred in this case. *See id.* at 73 (citing Tr. 105 (Boies)).

193. Delaware law does give common stockholders a right to a separate class vote on any proposal to change the number of authorized common shares or change their par value. 8 Del. Code § 242(b)(2). But where, as here, neither of these changes occur, the rights of the common stockholders established by Section 242(b) are not implicated. *See Prometheus Radio Project*, 373 F.3d at 428 (citing *Cleveland Bd. of Educ.*, 470 U.S. at 538); *see also Estate of Hage*, 687 F.3d at 1286, *cert. denied*, 133 S. Ct. 2824 (2013).

1. The *Walker* Order Did Not Create A Right To A Separate Class Vote On The Reverse Stock Split

194. The *Walker* litigation Stipulation and Order of Dismissal did not grant any rights to the then-existing common-stockholders beyond those already provided by Delaware statutory law.

195. Although courts may transfer property interests or identify those rights, court holdings do not, themselves, create cognizable property interests and cannot serve as the basis for a takings claim. Under Delaware law, an order from a Delaware court does not create a property interest beyond the statutory language on which the order is based. *See, e.g.*, *Matter of Rehab. of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252, 255-56 (Del. Ch. 1994) ("[T]hat order did not itself affect the scope or nature of the property rights of National Heritage. More particularly it did not create a right of possession to any property to which National Heritage did not have a present right of possession. The court may not create new legal rights (*i.e.*, the right to possession if it did not exist) through its *ex parte* order.").

196. As the United States Supreme Court has explained, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it[,]" because "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

197. In expressly identifying the representations on which it rested, the stipulated order dismissing the *Walker* lawsuit recited only AIG's representation to comply with Section 242(b)(2).

198. Accordingly, the Stipulation and Order of Dismissal did not create any right to a separate class vote beyond that which already existed under Section 242(b)(2). Therefore, no property interest belonging to the shareholder class members was "taken" or "exacted" by AIG's decision not to hold a separate class vote on the reverse stock split proposal.

2. The Reverse Stock Split Was Not A "Backdoor Scheme" To Circumvent Any Separate Class Vote

199. If it were true, as Starr alleges, 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," 2d Am. Compl. ¶ 112 (emphasis in original), that counterfactual scenario would not render the reverse stock split impermissible under Delaware law.

200. Under Delaware's doctrine of independent legal significance, if two provisions of Delaware law authorize alternative paths to the same result, a corporate action validly taken under one provision need not also satisfy the other. *See, e.g., Field v. Allyn*, 457 A.2d 1089, 1098 (Del. Ch. 1983), *aff'd,* 467 A.2d 1274 (Del. 1983) (*per curiam*) ("[I]t is not a valid basis for challenging an act taken under one section to contend that another method of achieving the same economic end is precluded by another section.").

201. Delaware courts have expressly held that a corporation may validly accomplish a transaction in a way that does not require a separate vote of a class of shareholders even if another means of accomplishing the same result would have required such a vote. *See Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 970 (Del. Ch. 1989), *aff'd,* 567 A.2d 419 (Del. 1989) (table) ("[T]he language of 242(b)(2) . . . does not entitle the holders of a class of preferred stock to a class vote in a merger, even if (as we assume here) the interests of the class will be adversely affected by the merger."). Accordingly, shareholders cannot have had a property interest under Delaware law in any expectation that AIG would proceed through any one form of corporate conduct rather than another.

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B. The Evidence Does Not Support A Finding Of Government Action With Respect To The Reverse Stock Split

202. For a takings claim, "a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'" *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (quoting *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995)) (alteration in original).

203. There can be no taking through the actions of a third party where, as here, there is no evidence that the Government caused, required, or even requested the action by the third party that allegedly effected the taking. *See Navajo Nation*, 631 F.3d at 1276; *cf. Lujan*, 504 U.S. at 560-61 (no standing when injuries alleged are "th[e] result [of] the independent action of some third party not before the court") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (alterations in original) (internal quotation marks omitted). Nor can there be a taking when the third party did not act for the benefit of the Government. *See B&G Enters.*, 220 F.3d at 1324 (California did not act as an agent of the United States when it enacted a law because the legislation "was not enacted for the benefit of the federal government").

204. The Government's "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the [Government] responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (discussing state action under the Due Process Clause of the Fourteenth Amendment); *cf. Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 758 (Fed. Cir. 2013) ("cooperation" is not sufficient to hold the government responsible for the actions of another).

205. The Government "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert,

that the choice must in law be deemed to be that of" the Government. *Blum*, 457 U.S. at 1004 (citation omitted). Starr can provide no proof at trial that there was any Government "scheme" to "circumvent" anything.

C. Starr Cannot Demonstrate Any Harm Caused By The Reverse Stock Split

206. Even if Starr could establish that the Stock Split Class members 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," Pl. Concl. ¶ 32, the Stock Split Class members are not entitled to compensation unless they can show that they suffered a loss as a result of the reverse stock split. *Brown*, 538 U.S. at 240 n.11.

207. No loss can be shown where, as here, Starr admits that voting for the reverse stock split proposal to prevent delisting by the New York Stock Exchange was in the common shareholders' interests, that a majority of common shareholders voted in favor of that proposal, that the market value of the shares held by the common stockholders was unaffected by the reverse stock split, that the common shareholders held the same percentage of the economic value and voting rights of the common stock after the reverse stock split as before, and that they held the same percentage of the economic value and voting rights of AIG's total equity after the reverse stock split as before.

208. Even where a reverse stock split makes dilution possible at some point in the future, the shareholders cannot claim to have suffered any compensable loss as a result of the stock split itself.

209. Under Delaware law, a transaction that creates the *potential* for wrongful dilution of common stock is not itself actionable; shareholders can only claim loss when and if dilution in fact occurs. *See Oliver*, 2006 WL 1064169, at *33 (issuance of convertible shares that had the

"potential to dilute the voting power of the common shareholders" was insufficient to show that plaintiffs had "suffered any cognizable dilutive harm to their voting rights" when no shares had been converted).

210. Therefore even if the terms of the January 2011 exchange *were* unfair and dilutive — which they were not — the Stock Split Class members would not be entitled to seek compensation for any loss allegedly experienced as a result of the exchange as opposed to the June 30, 2009 reverse stock split at issue. The only claim that Starr alleged with respect to the exchange was previously dismissed. *Starr I*, 106 Fed. Cl. at 69.

211. Moreover, the terms of the January 2011 exchange were entirely fair and did not result in any loss of value to the common stockholders at that time (or any other time). No possible cognizable loss can be shown where, as here, the price of the common stock increased as a result of the exchange, common shareholders obtained bargained-for benefits to which they would not otherwise have been entitled, and the preferred shareholders gave up specific rights and privileges that the preferred shares enjoyed relative to the common. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 38-39 (Del. Ch. 2013).

212. Starr cannot establish economic loss by the Reverse Stock Split Class members based on the alleged value of any benefit received by the Government as a result of either the stock split itself or the January 2011 exchange.

213. As discussed above, the "consistent and unambiguous" holdings of the Supreme Court dictate that the "'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown*, 538 U.S. at 235-36; *see also Kimball Laundry Co.*, 338 U.S. at 5 ("Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public

obligation to requite for that deprivation."); *Miller*, 317 U.S. at 375 ("Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker."); *Bos. Chamber of Commerce*, 217 U.S. at 194-95 (in determining whether a taking has occurred, "the question is, What has the owner lost? not, What has the taker gained?").

214. Similarly, because Starr cannot prove economic loss based on unique value to the Government, it cannot claim to be owed compensation "based on the payment that the Government would have made," Pl. PFOF § 31.2.2, to secure the plaintiff's compliance in the absence of the alleged taking. Such "hold-up value" does not, as a matter of law, reflect compensable economic loss. *Cors*, 337 U.S. at 334 (value based on "speculation as to what the government can be compelled to pay . . . is a hold-up value, not a fair market value.").

215. If Starr establishes the threshold property interests and Government action necessary to assert a takings claim, Starr must establish the alleged taking under *Penn Central*, and for the reasons discussed above with respect to the equity claim, it cannot do so.

VI. Starr Cannot Establish An Illegal Exaction Of Its Property For The Reverse Stock Split Claim

A. Starr Cannot Identify A Property Right That It Alleges Was Exacted

216. As described above, Starr cannot identify a property right that was actually taken or exacted in the reverse stock split transaction.

B. There Was No Unauthorized Government Action

217. This Court possesses jurisdiction only over illegal exactions that are based upon "an asserted statutory power." *Aerolineas Argentinas*, 77 F.3d at 1574.

218. This Court's jurisdiction for an illegal exaction requires that the Government exact property in excess of the powers conferred by a *Federal* statute, not state law. *See Clapp v.*

United States, 117 F. Supp. 576, 580 (Ct. Cl. 1954) ("[A] claim to recover an illegal exaction made by officials of the Government, which exaction is based upon a power supposedly conferred by a statute, is a claim 'founded upon any Act of Congress.'").

219. Starr has not identified what Federal statute was violated that gives rise to an illegal exaction claim on the reverse stock split claim; therefore, Starr cannot assert an illegal exaction theory for that claim.

220. There can be no illegal exaction when the Government does not directly cause the exaction. *Casa de Cambio Comdiv*, 291 F.3d at 1364 ("[A] plaintiff has a claim for an illegal exaction only where the government has direct and substantial impact on the plaintiff asserting the claim."). For example, a purchaser cannot allege an illegal exaction based upon an excise tax whose cost is passed along to the purchaser from a producer, because the money was not "even extracted by the . . . producers from plaintiff at the direction of the [Government]." *Emerald Int'l Corp. v. United States*, 54 Fed. Cl. 674, 684 (2002) (granting summary judgment for Government).

221. As described above, Starr cannot establish that the Government, rather than AIG, acted to exact anything from the Reverse Stock Split Class members through the reverse stock split.

C. Starr Cannot Establish Any Harm To Establish An Illegal Exaction Claim

222. Also as described above, Starr cannot establish any economic harm from the reverse stock split, or anything that was exacted such that the Government had Starr's "money in its pocket." *Clapp*, 117 F. Supp. at 580.

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VII. To The Extent Starr Argues An Economic Loss Occurred Because The Shareholders Approved The Reverse Stock Split Based Upon A Misleading Proxy, That Loss Cannot Give Rise To A Takings Or Illegal Exaction Claim

223. Even if some aspect of the proxy statement were misleading, that would still not give rise to a taking or illegal exaction claim. A misleading proxy statement might be a basis for a tort claim under the Federal securities laws or under state law, but any such claim lies outside this Court's jurisdiction. *See, e.g.*, *Keene Corp. v. United States,* 508 U.S. 200, 214 (1993) (holding that the Court of Federal Claims lacks jurisdiction over tort claims); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (describing private right of action for material misrepresentation or omission in Federal securities filings); *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) (describing cause of action arising from directors' duty "to provide shareholders with all information that is material to the action being requested").

VIII. The Court Should Decertify The Credit Agreement Class And The Stock Split Class

224. "[U]nder Rule 23(c)(1), courts are 'required to reassess their class rulings as the case develops.'" *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998)); *see also, e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 30 (1st Cir. 2008) ("[A] district court remains free at a later stage to . . . decertify a class if later evidence disproves the plaintiffs' assertions regarding, for example, the predominance of common issues.").

225. In its motion to certify the Credit Agreement Class and the Stock Split Class (together, the "Classes"), Starr represented to the Court that the common issues include "damages issues," *see* Pl. Reply at 6 (Feb. 11, 2013), but Starr did not proffer a model to determine just compensation. *See, e.g.*, *id.* at 7 ("Prof. Rausser is neither serving as a liability nor damages expert . . . ."); *see also, e.g.*, Rausser Tr. at 67:3-67:4 (testimony by Starr's class

expert that "I have not done an analysis of class-wide damages").

226. In an order dated March 11, 2013, the Court certified the Classes under RCFC 23(a) and RCFC 23(b)(2)-(3).

227. The United States Supreme Court subsequently clarified that Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

228. After the Classes were certified, the United States Supreme Court handed down its decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), resolving the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Behrend*, 133 S. Ct. at 1431 n.4.

229. In *Behrend*, the Supreme Court held that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to [the plaintiffs'] theory [of liability]." *Id.* at 1433. Otherwise, the model "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.*; *see also, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) ("No damages model, no predominance, no class certification.").

230. Before the Supreme Court's decision in *Behrend*, "the case law was far more accommodating to class certification under Rule 23(b)(3)." *Rail Freight*, 725 F.3d at 255.

231. After the Classes were certified, Starr for the first time proffered a compensation model, which purports to calculate just compensation on a class-wide basis. *See* Kothari Report ¶¶ 20, 30 (explaining that he is purporting to calculate damages for all members of the Credit Agreement Class and the Stock Split Class). Starr's model is fundamentally unhinged from its

theory of liability.

232. Starr's theory of liability is that the suing AIG shareholders suffered direct harm that was "separate and distinct" from any harm suffered by AIG. *See, e.g.,* 2d Am. Compl. ¶ 231; *see also Starr IV,* 111 Fed. Cl. at 482 (upholding Starr's direct claim because "Starr has pled facts sufficiently alleging a harm to the suing stockholders independent of any harm to AIG"). Starr's model calculates that the September 2008 rescue took $13.16 per share from each member of the Credit Agreement Class. Kothari Report ¶ 22. But AIG's shares opened at only $1.85 per share on September 16, 2008 (the beginning of the Credit Agreement Class period). *Id.* at Ex. IV.B.2. Starr's model also calculates that the reverse stock split deprived members of the Stock Split Class of $1.73 per share, even though AIG common shares opened at only $1.33 per share on June 30, 2009 (the beginning of the Stock Split Class period). Whatever Starr's model is measuring, because the harm to shareholders claimed by Starr exceeds the total value of AIG's shares at the time of the alleged taking or exaction, it is not measuring "harm to the suing shareholders."

233. In another fundamental disconnect between Starr's theory of liability and Professor Kothari's compensation model, the model measures gain to the Government, rather than any economic loss to members of the Classes.

234. As a matter of law, gain to the Government is not a basis for liability to Starr or the Classes. *See, e.g., Brown*, 538 U.S. at 235-36 ("the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain"); *Kimball Laundry Co*, 338 U.S. at 5 ("Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation."); *Miller*, 317 U.S. at 375 ("Since the owner is to

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receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker."); *see also Starr IV*, 111 Fed. Cl. at 482 (Starr's illegal exaction claim requires showing that AIG's shareholders "suffered a direct and substantial impact to their own property rights") (citing *Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005).

235. Because Starr's model thus "fail[s] to measure damages resulting from the particular . . . injury on which [the Government's] liability in this action is premised," the Classes should be decertified. *Behrend*, 133 S. Ct. at 1433.

IX. Even Assuming Liability, Starr Can Only Receive Prejudgment Interest For Its Taking Claim, And Only To Compensate Starr For The Time Value Of Money

236. The Court of Federal Claims may award prejudgment interest only if it finds a taking without payment of just compensation. *Shoshone Tribe of Indians of Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 496 (1937).

237. The purpose of prejudgment interest is to make a plaintiff indifferent to the timing of the award by restoring the plaintiff to the economic position it would have occupied had the award been paid on the date of the taking. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10-11 (1984).

238. Courts have generally recognized the "strong judicial policy in favor of the establishment of a uniform rate of interest applicable to condemnation cases in order to avoid discrimination among litigants." *Miller v. United States*, 620 F.2d 812, 838 (Ct. Cl. 1980) (citations omitted).

239. Prejudgment interest should reflect the time value of money between the time of the taking and the award. The 52-week Treasury bill rate set forth in the Declarations of Takings Act, 40 U.S.C. §§ 1114, 1116, "adequately compensates the plaintiffs" for the delay in payment.

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Textainer Equipment Mgmt. Ltd. v. United States, 99 Fed. Cl. 211, 223 (2011). "Absent special proof, the statutorily-set rate in the [Declarations of Takings Act] shall apply." *Id.*

240. In the context of a class action, a prejudgment interest rate based on the time value of money provides a reliable basis for compensating all class members equally.

241. A plaintiff is not entitled to prejudgment interest or attorney fees on an illegal exaction claim. *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996) (in an illegal exaction case, "[p]laintiff could not recover the pre-judgment interest he requests") (citing *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986) (superseded by statute on other grounds)); *cf. U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1384-85 (Fed. Cir. 2002) (no prejudgment interest on illegal tax which violated the Export Clause, even though Export Clause "requires 'a return of money unlawfully exacted'" because "[w]e are unwilling to import the [Supreme] Court's interpretation of 'Compensation' into the Export Clause where the word 'compensation' does not appear") (citations omitted).

X. The United States Withdraws Its "Hold Harmless" Defense In This Litigation

242. The United States hereby withdraws its "Hold Harmless" affirmative defense to the complaint of Plaintiff Starr and the Classes in this action. *See* Def. Answer to 2d Am. Compl., Dkt. no. 143, at ¶¶ 251-54. The United States and the FRBNY have (and maintain) rights to be indemnified by AIG for any liability to Starr and the classes, and the United States withdraws its affirmative defense as to Plaintiff Starr and the Classes without prejudice as to its and FRBNY's rights against AIG or other parties.

Respectfully submitted,

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