IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S REPLY IN FURTHER SUPPORT OF
<u>DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</u>

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v.	)	No. 11-779C (Judge Thomas C. Wheeler)
UNITED STATES,	)	Filed under seal
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Defendant, the United States, respectfully submits this reply in further support of our motion for summary judgment. Because Starr's claims fail to present a genuine issue of material fact, the United States is entitled to summary judgment as a matter of law under RCFC 56(a).[1]

INTRODUCTION

Starr has made admissions in its opposing brief that, under Federal Circuit precedent, are fatal to its claims. On a case dispositive issue -- whether the $85 billion federal rescue that undisputedly saved AIG from bankruptcy caused any economic loss to AIG's shareholders -- Starr concedes that it cannot prove that AIG's common shares would have been worth more absent the rescue that occurred. Because Starr thus cannot establish that the value of the common shares would have been any greater "but for the government action," Starr cannot establish the economic loss essential to maintain its claim. *A&D Auto Sales v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014). Nor does Starr dispute -- because it cannot -- that the market price for AIG's common shares was higher at the end of the class period, and after the

[1] Defendant can be available for oral argument at the Court's convenience should the Court conclude that such argument would assist it in its resolution of this motion.

announcement of the terms of the Credit Agreement, than at the opening of the class period. In other words, the common shareholders' 20.1 percent equity stake after the rescue was worth more than their 100 percent stake before the rescue.

Starr argues that it need not prove economic loss under its *per se* takings and illegal exaction theories, and, contends instead the Government bears the burden of disproving economic loss. But it is Starr's burden to establish economic loss as an essential element of its claims, however characterized. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 237 (2003) (*per se* taking); *A&D Auto Sales*, 748 F.3d at 1157 (regulatory taking); *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 70 n.17 (2012) (applying just compensation analysis to the illegal exaction theory of Starr's equity claim). Where, as here, the claimant's "net loss was zero, the compensation that is due is also zero." *Brown*, 538 U.S. at 237. Because Starr fails to raise a genuine issue as to economic loss, there is no basis to try Starr's equity claim.

Starr's equity claim fails for the additional reason that Starr cannot establish that AIG's agreement to the rescue deal was involuntary. Starr's arguments that AIG's voluntariness is irrelevant either because the shareholders did not separately agree to the rescue or because voluntariness does not matter for an illegal exaction claim are both wrong as a matter of law. And Starr has not, and cannot, overcome the high bar of establishing its contention that AIG agreed to the rescue under duress.

The Federal Reserve acted within its authority when it conditioned the loan to AIG on the company agreeing to convey 79.9 percent of its equity in return. As shown below, Starr's interpretation of the relevant provisions of the Federal Reserve Act is incorrect. But if there had been any doubt, it was removed on October 3, 2008, when Congress enacted a statute expressly recognizing that "warrants or other potential equity" could be obtained "in exchange for" a

Section 13(3) loan. That statutory endorsement of the Board of Governors' reading of Section 13(3) eviscerates Starr's exaction claim. And, even if the loan AIG accepted had been illegal, Starr cannot show that it, as a shareholder of AIG, has a valid illegal exaction claim.

Last, Starr presents no evidence that would establish the elements of a taking or illegal exaction for the reverse stock split. The uncontroverted evidence reveals no contemporaneous connection between the 2009 reverse stock split done by AIG to avoid delisting of its stock and a conversion or the subsequent 2011 exchange of preferred shares; Starr's contrary conspiracy theory has no evidentiary support. There is no dispute that a majority of common shareholders, Starr included, voted for the reverse stock split, precluding Starr from establishing any harm resulting from a separate class vote not having been held. Starr cannot establish a property interest, or a Government action that took that property interest, or harm.

Although Starr appears to concede, as it must, the discretionary nature of assistance under Section 13(3), its arguments are nonetheless premised on AIG and its shareholders having a right to a rescue on their preferred terms and timing. Starr contends that, because of AIG's size and the damage an AIG bankruptcy likely would have caused, the Board of Governors and FRBNY *had* to make a loan on Starr's preferred terms, no matter the policy implications or moral hazard or risk of loss to the taxpayers.[2] Under Starr's theory, the Government was *required* not only to offer to rescue AIG with better terms than the company could find in the marketplace, but to confer an enormous windfall on its shareholders by ensuring that they gained every benefit from the taxpayers' support. Starr's theory -- which is indistinguishable from the theory recently presented to and rejected by the Federal Circuit in *A&D Auto Sales* -- amounts to an improper

[2] *See, e.g.*, Opp. at 16 (arguing that as lender of last resort under Section 13(3), the Federal Reserve's "duty is to help preserve solvent companies"); *id.* at 43-44 (arguing that the United States had "a responsibility to make a 13(3) loan" on Starr's preferred terms).

request for the Court to substitute its judgment for the discretionary policy decisions of the Federal Reserve in the guise of adjudicating a takings claim, and an attempt to evade this Court's dismissal of Starr's Equal Protection claim.

For these reasons, the Court should enter summary judgment in favor of the United States.

ARGUMENT

THE EQUITY CLAIM

I. Starr's Equity Claim Fails As A Matter Of Law Because Starr Admits There Is No Evidence of Economic Loss

Starr's equity claim must fail because Starr has not demonstrated that AIG's common shares would have been worth more absent the rescue that occurred. Opp. at 41-44. Because Starr cannot establish this necessary element of its claim, the Court need not reach any other issue and should grant summary judgment for the United States on the equity claim.

The uncontroverted evidence shows that, far from extracting value from common shareholders, the Government action -- that is, the rescue loan provided by the FRBNY in September 2008 -- created enormous value for AIG and its shareholders. Starr cannot, and does not try to, offer evidence that AIG's shareholders would have been better off in bankruptcy (the undisputed "but for" world absent a rescue). Indeed, Starr itself claims that the shareholders would have been worse off in bankruptcy, so much so that it asserts the prospect of an AIG bankruptcy should be deemed coercive. Opp. at 22-23, 42-43.

A. The Economic Loss Requirement Applied to Government Rescues In *A&D Auto Sales* Applies to the AIG Rescue

"[P]roving economic loss requires a plaintiff to show what use or value its property would have but for the government action." *A&D Auto Sales*, 748 F.3d at 1157. Starr argues that the “but-for world” test set forth in *A&D Auto Sales* applies only in cases where “the Government receives nothing” and “is not used where (as here) the Government has received property belonging to the claimant.” Opp. at 42. Starr’s argument, however, disregards the Supreme Court’s decision in *Brown*, a foundation of the Federal Circuit’s economic loss holding in *A&D Auto Sales*. In *Brown*, the Supreme Court held that a plaintiff must establish loss even when the Government receives value from the alleged taking. There, the Government had taken and redistributed interest accumulated on plaintiffs’ escrowed funds, but the Supreme Court concluded there was no loss because plaintiffs would not have earned the interest in any event.[3]

In addition, Starr’s attempt to distinguish *A&D Auto Sales* mistakenly asserts that the Government “received property belonging to the claimant” class. The class members did not own the equity interest that AIG agreed to provide in exchange for the credit facility and had no general right to avoid dilution of their ownership interest. 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; see also *Feldman v. Cutaia*, 956 A.2d 644, 656 (Del. 2007) (“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….“). Delaware does recognize a right of minority shareholders to avoid reduction in the value of their shares as a result of a wrongful corporate overpayment. *See Feldman*, 956 A.2d at 655. That right, however, is not

[3] The two cases Starr cites do not support its contention that no showing of loss is necessary to establish a taking if the Government receives something of value; they stand only for the unremarkable proposition once a taking has been established, that the value of the property taken is determined at the time of the taking. *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984); *Nat’l Food & Beverage Co. v. United States*, 103 Fed. Cl. 63, 69-70 (2012).

implicated here because Starr's shares *increased* in value as a result of the transaction. Indeed, the common shareholders' 20.1 percent interest in AIG after the rescue was worth *more* than their 100 percent interest before it. Mot. at 25 n.58. The Government therefore did not "receive[] property belonging to the [plaintiffs];" the plaintiffs lost nothing. This is dispositive. *Brown*, 538 U.S. at 235-36 ("'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain.")

B. Starr Cannot Avoid The Legal Requirements To Establish Economic Harm By Arguing That AIG Was Entitled To A Rescue On Its Preferred Terms

Starr argues that, even if the "but-for world" standard applies, the "but-for world" includes a Government rescue, not an AIG bankruptcy, because the Government would still have rescued AIG to avoid the catastrophic consequences of an AIG failure. This is contrary to the dispositive test, which clearly states that Starr must demonstrate what would have happened "but for the Government's intervention," not what would have happened if the Government had intervened in a different way. 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.[4] 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

[4] *See* Oral Argument at 14:32-18:34, *A & D Auto Sales v. United States*, (Nos. 2013-5019, 2013-5020) (Fed. Cir.), *available at* www.cafc.uscourts.gov/oral-argument-recordings/all/ad.html; Defendant's Supplemental Appendix (Supl. App.) Tab 89 (certified transcription excerpt).

assistance. *A&D Auto Sales*, 748 F.3d at 1158. Starr's incorrect version of the "but-for world" test wrongly implies that AIG had a right to a rescue on terms Starr prefers.[5]

Starr cannot shift its burden of providing evidence of *economic loss* by claiming the Government has to prove "offsetting benefits." Opp. at 43. Although the Government has the right to establish "offsetting benefits" "to rebut the plaintiff's economic impact case," it is always the plaintiff's burden to "establish economic impact" in the first instance. *See CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011).[6] Starr fails to present any evidence of economic loss but for the Government's action.

C. <u>Economic Loss Is A Prerequisite For Liability</u>

Starr's final argument -- without a single supporting citation -- is that economic loss is only relevant after liability has been established. That argument is contrary to *A&D Auto Sales*.

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[5] Even if Starr's position were correct, Starr has moreover failed to raise a disputed issue of material fact that the Federal Reserve would have saved AIG from bankruptcy on other terms. It is uncontroverted that it was AIG's decision whether or not to declare bankruptcy, not the Government's. Starr has suggested no legal mechanism by which the Government could have stopped AIG from declaring bankruptcy had it chosen to do so, and the Court has already recognized that "the Government was not in a position to exploit any existing regulatory power to induce the loan transaction." *Starr*, 106 Fed. Cl. at 82-83. Starr's claims therefore rely entirely on conjecture and must be rejected.

[6] Notably, even though the Government in *CCA* had not persuaded the trial court that there were any offsetting benefits, the trial court held, and the Federal Circuit affirmed, that the economic impact established by the claimant was insufficient to establish a "taking."

Starr's incorrect version of the "but-for world" test also wrongly implies that AIG's shareholders have a right to take all of the value added to AIG by the Government's action. The Fifth Amendment does not allow Starr to recover the value added by the Government's actions. 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, 333-34 (1949)(plaintiff cannot recover property's value increase created by Government's purchasing needs); *see also United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

Further, even when, unlike in this case, the plaintiff's property is directly appropriated, there can be no "taking without just compensation" in contravention of the Fifth Amendment unless there is a harm for which just compensation is due. *Brown*, 538 U.S. at 235. If the claimant's "net loss was zero, the compensation that is due is also zero." *Id.* at 237.

Starr's illegal exaction claim fares no better because Starr cannot make out such a claim without showing that the shareholders "suffered a direct and substantial impact to their own property rights." *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 481 (2013) (citing *Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005)). Even if the Court concludes that exaction jurisdiction exists for a claim based on alleged value or voting power rather than based on money, Starr cannot establish that the value of its shares or voting would have been higher in the absence of the rescue. Starr's failure to show any such adverse economic impact to its alleged property rights[7] is dispositive of its illegal exaction claim.

II. There Is No Basis to Reverse the Court's Ruling that Starr's Claim Relies Upon Whether AIG Voluntarily Agreed to the Rescue Terms

As the Court has previously ruled, Starr's claims rely upon "whether *AIG* voluntarily agreed to the terms proposed on September 16, 2008." *Starr*, 106 Fed. Cl. at 78 (emphasis added). The Court's ruling was a response to Starr's theory that the Government coerced AIG into agreeing to the rescue terms. Because the Government interacted only with AIG, any harm allegedly done to Starr could have been accomplished only by *AIG's* promise to issue equity in return for the company's rescue. As the Court held, Starr can attribute AIG's acceptance of the rescue terms to Government action only if AIG acted involuntarily under duress. *See id.*

[7] *See supra*, at I.A.

It is undisputed that no shareholder approval was required before AIG could agree to the rescue deal. *See Starr*, 106 Fed. Cl. at 76 (Starr's takings theory does *not* rest on any "allegations that any form of shareholder approval was necessary to enter into the loan agreement"). Starr cites no applicable authority for its novel theory that a plaintiff shareholder can assert a claim against a third party because the shareholder did not separately agree to the decision made by the corporation's board of directors – the shareholders' chosen fiduciaries – to enter into a transaction with that third party. *See* Opp. at 12-14, 38. Delaware law requires separate shareholder approval only in limited circumstances, and no such approval was required for AIG's agreement to the terms of the September 2008 rescue.[8]

III. No Taking or Illegal Exaction Occurred Because AIG Voluntarily Agreed To The Rescue Terms

A. A Lack Of Duress Invalidates Both Takings And Illegal Exaction Theories

The Court has already held that property is not "taken" when it is conveyed voluntarily by agreement. *See Starr*, 106 Fed. Cl. at 78 ("to determine whether Starr has stated a cognizable taking claim, the relevant question is whether AIG voluntarily agreed to the terms proposed on September 16, 2008"); *see also, e.g.*, *Norman v. United States*, 429 F.3d 1081, 1089 (Fed. Cir. 2005). Starr does not dispute this holding.

[8] Nor was shareholder approval necessary for AIG to enter into the rescue deal or issue the preferred shares under New York Stock Exchange (NYSE) rules. Those rules do not prevent a company from issuing shares without a shareholder vote, but provide only that if a company does so without following the NYSE procedures, that company's common shares may be delisted from the NYSE. The NYSE rules did not grant AIG's shareholders any rights to block the issuance of the preferred shares. *See, e.g.*, *In re VeriFone Sec. Litig.*, 11 F.3d 865, 870 (9th Cir. 1993) ("It is well established that violation of an exchange rule will not support a private claim"); *Weinraub v. Glen Rauch Sec., Inc.*, 399 F. Supp. 2d 454, 462 (S.D.N.Y. 2005), *aff'd*, 180 F. App'x 233 (2d Cir. 2006).

AIG's voluntary agreement also invalidates Starr's illegal exaction claim. The Supreme Court and the Federal Circuit have made clear that voluntary payment made without protest vitiates a claim for illegal exaction. *United States v. Edmonston*, 181 U.S. 500, 515 (1901); *Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1575 (Fed. Cir. 1985). A narrow exception exists only where the statute violated was for the benefit and protection of the person 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 Service 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.").[9]

[9] The steamship cases on which Starr relies – such as *Suwannee S.S. 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).

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 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*, 106 Fed. Cl. at 82-83.

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.[10] The doctrine of voluntary payment, not the narrow exception of *Suwannee*, applies here.. Therefore, if Starr cannot establish that AIG agreed to the rescue terms under duress, both its takings and its exaction claims must be denied.

B. Starr Has Failed To Establish A Genuine Dispute As To Any Material Fact That Could Establish Duress

As demonstrated in the United States' opening brief, the evidence establishes that AIG did not act under duress when it agreed to the terms of the Federal Reserve's rescue, including the equity term. Starr does not refute our demonstration that Starr cannot satisfy *any* of the three required elements of a duress claim. *See* Mot. at 15 (citing *Bergman v. United States*, 28 Fed. Cl. 580, 585-86 (1993)). Starr instead simply cites facts irrelevant to the dispositive elements of duress or makes factual and legal assertions without evidence or citation.

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[10] *Starr Int'l Co. v. Fed. Reserve Bank of New York*, 742 F.3d 37, 42 (2d Cir. 2014) (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). The only authority cited by Starr in support of its claim of illegality, *California National 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 Starr Int'l Co. v. Fed. Reserve Bank of New York*, 906 F. Supp. 2d 202, 241 (S.D.N.Y. 2012), not to protect borrowers from being asked to convey equity as consideration for a loan.

1. <u>AIG Acted Voluntarily</u>

Starr does not – and cannot – rebut the testimony of AIG's directors that they acted voluntarily because they believed accepting the terms of the Federal Reserve's rescue offer was in the best interests of AIG and its shareholders. *See* Mot. at 9-11, 17-19. In a typical duress case, the allegedly coerced party claims that its free will was overcome, and the court must test that claim. Here, the allegedly coerced parties have testified that their will was *not* overcome, and Starr has introduced no evidence to the contrary. *See Plechner v. Widener College*, 569 F.2d 1250, 1260 (3d Cir. 1977) (law school trustees, who were not the plaintiffs, did not act under duress where "trustee witnesses denied that they were coerced").[11]

Starr's claim that the Government purportedly changed the terms of the rescue between September 16 and September 21 is both factually erroneous and legally inadequate to rebut AIG's and its directors' testimony that they acted voluntarily on *both* dates. As we have established, AIG and its directors viewed the Credit Agreement as an implementation of, rather than a change from, the agreement reached on September 16. Mot. at 10-11. Starr's argument relies upon a false premise that the terms agreed to on September 16 specified warrants, whereas the uncontroverted evidence disproves that contention. The AIG board resolution accepting the rescue terms offered by the New York Fed expressly referred to a "revolving credit facility of up to $85 billion on terms consistent with those described at this meeting, including equity participation *equivalent* to 79.9 percent of the *common stock* of the Corporation on a fully-diluted basis," and the equity term was described to the AIG board as "warrants *or other*

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[11] Starr quotes from an e-mail written by AIG executive Jacob Frenkel saying that the Government "stole at a gunpoint 80% of the company." Opp. at 23. But, Mr. Frenkel was not a director; is not competent to controvert the testimony of AIG's directors, CEO, and 30(b)(6) designee that the AIG board and the company were not coerced, and, in any event, testified that his e-mail did not "describe realities." Frenkel Tr. at 98:16-100:2. Supl. App. Tab 75.

instruments that would give the Federal Government an interest in AIG equal to 79.9 percent of its total equity."[12] Similarly, the term sheet that Mr. Willumstad signed on September 16 provided for "[e]quity participation equivalent to 79.9% of the common stock of AIG on a fully-diluted basis" in a "[f]orm to be determined."[13] Thus, the contemporaneous evidence is unequivocal that the parties did not specify warrants in the agreed equity term.[14] Starr cannot defeat summary judgment by simply making factual assertions contrary to the evidence.[15]

2. AIG Had An Alternative

Starr's position that bankruptcy would have left AIG and its shareholders worse off than the terms of the rescue, Opp. at 23, does not mean filing for bankruptcy was not an alternative. *See* Mot. at 19 (citing, among other AIG directors' testimony, Willumstad's testimony that bankruptcy was a "viable option" for AIG). As we have demonstrated, AIG's directors discussed the option of bankruptcy at length on both September 16 and September 21. Mot. at 9-

[12] Sept. 16, 2008 AIG Board minutes at 5, 13, Def. Mot. App. (App.) 382, 389 (emphasis added).

[13] Sept. 16, 2008 Term Sheet at 2, App. 401-1; AIG 30(b)(6) (Reeder) Tr. 317:7-318:12, App. 51-52.

[14] There is not a shred of evidence supporting Starr's contention, Opp. at 21-22, that the September 16, 2008 agreement included the requirement that FRBNY provide more than $30 billion in addition to the $85 billion financing.

[15] See also 9/18 AIG Board Minutes (PX 221) at 6, App. 0438 (with regard to questions about 'the price and voting rights of the equity interest that was included in the term sheet approved on September 16,' AIG's counsel stated that 'it was not possible to answer the Board's questions on the specifics of the equity interests"). App. A reference in the September 21 minutes to the board having "no choice" but to enter into the Credit Agreement is clearly not literal, as the minutes reflect that the board considered the credit agreement to be a vastly superior option to filing for bankruptcy and that the Credit Agreement implemented the agreement reached on September 16. *See* Mot. at 10-11; *see also, e.g.*, Feldstein Dep. Tr. at 151:4-152:3 (explaining that this comment should not be interpreted literally and confirming that "we had a choice," but that "we believed that, upon bankruptcy, the assets would dramatically lose value" and that "by this point, we had agreed to do the deal five days earlier"). Supl. App. Tab 71.

11. That the directors determined that the terms of the rescue were likely to be superior to filing for bankruptcy because "20 percent of something is better than 100 percent of nothing," in no way renders their election of that option over the alternative of bankruptcy coercive.[16] "[T]he 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); *see Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 219 n.13 (S.D.N.Y. 2012) ("Even a choice between a rock and a hard place is still a choice.").

3. Neither FRBNY Nor the Government "Coerced" AIG into Agreeing to the Rescue Deal

The third element of duress requires wrongful conduct that induces assent by "improper threat." *Starr,* 106 Fed. Cl. at 78 (quoting *Nassif*, 644 F.2d at 12). Starr asserts that Section 13(3) lending is inherently coercive because the Federal Reserve acts as the lender of last resort only when other adequate sources of credit are unavailable. Opp. at 15 n.3, 16 (Section IV.B.2). But 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*, 106 Fed. Cl. at 77 (quoting *Fruhauf*, 126 Ct. Cl. at 52). If Starr were correct, *every* Section 13(3) loan would be coercive and therefore subject to attack years later by any borrowers or shareholders who would have preferred a loan on more

[16] In a footnote, Starr incorrectly suggests that the option of bankruptcy cannot be an alternative at all for purposes of the second prong of the duress theory. Opp. 23 n.6. However, in *Freelander, Inc. v. NCNB* -- a case on which Starr relies -- the court held that "filing a petition in bankruptcy has been held to be a legal option defeating a claim of economic duress." 706 F. Supp. 1211, 1220 (E.D. Va. 1988), aff'd, 921 F.2d 272 (table) (4th Cir. 1990). Starr's reliance on *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382, 392 (Ct. Cl 1969), is also misplaced; it stands only for the proposition that when the Government breaches a contract and fails to pay a counterparty who depends on the Government's contractually required 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."

favorable terms than they received.[17] Nor is it wrongful, as a matter of law, to ”drive a hard bargain,” *Wilkie v. Robbins*, 551 U.S. 537, 558 (2007), and FRBNY did no more.

Nor do Starr's assertions of "regulatory failures" support a finding of wrongful Government conduct that would establish the third element of duress. *See* Opp. at 16-17. Starr cites no legal authority that the Government's alleged failure to regulate can, in whole or in part, establish duress.[18] Starr's other allegations also are unsupported. Starr cannot and does not attempt to show that AIG was eligible for the other programs and assistance it claims it was denied, or that those programs and assistance would have solved AIG's financial problems, and conspicuously fails to provide record citations for its allegations that AIG applied for, or that FRBNY or the Government denied any applications for, such assistance. Opp. 17-18. Starr's related argument that FRBNY or the Government should have offered AIG a rescue on different timing or different terms is merely an improper request that the Court review expert agencies' discretionary policy decisions and substitute its own judgment to declare them "wrongful."

Nor has Starr established a genuine issue with its unsupported claim that FRBNY or the Government wrongfully thwarted potential private sector financing by declining to backstop that financing. That officials made statements indicating that they did not plan to assist AIG demonstrates only that those officials did not intend to lend to AIG at that time. Starr does not dispute that there is a strong presumption that public officials act in good faith, Mot. at 21 &

[17] The Court should similarly not credit Starr's unsupported allegations that AIG's limited time to respond to FRBNY's rescue offer was due to anything other than the company's imminent bankruptcy if it did not receive billions of dollars of assistance that evening.

[18] It is a limitless argument and 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 legislatures and expert agencies." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544 (2005).

n.56, and it has not overcome that presumption by presenting any evidence whatsoever to support its claim that these statements were lies intended to weaken AIG's ability to obtain a private rescue offer. *See* Opp. at 19. Similarly, Starr's allegation that the Government did not act to affirmatively facilitate potential investments by the China Investment Corporation (CIC) or unspecified Middle Eastern investors does not demonstrate that the Government actually prevented any of those entities from providing financing that they otherwise would have provided quickly enough or in an amount sufficient to rescue AIG. To the contrary, the evidence establishes that those potential investors would not have rescued AIG. Because of the "scope of AIG's liquidity problem," there would be no investment by a sovereign wealth fund "without New York Fed assistance." Maurice Greenberg Tr. 197:20-198:9.[19] Supl. App. Tab 72.

4. Ratification Of The Rescue Deal Precludes A Finding Of Duress

Starr's failure to promptly challenge AIG's agreement to provide the equity interest bars its duress argument. *See Abbadessa v. Moore Business Forms*, 987 F.2d 18, 20-21 (1st Cir. 1993) (plaintiff bears the burden of demonstrating the continuing existence of duress between the challenged conduct and the time of suit as an element of its claims).[20] Starr asserts that the

[19] Any contention that sovereign wealth funds' interest in AIG was concealed from the AIG Board makes no sense. The uncontroverted evidence is that CIC's possible interest in investing in AIG was discussed with the AIG Board on September 14, 2008, *see*, *e.g.*, AIGSTARR00386806 (Shannon notes)). Supl. App. Tab 81, and that CIC engaged in direct contact with AIG and its advisors. *See*, *e.g.*, Studzinski Dep. Tr. 51:5-58:8,120:7-123:3 (Blackstone executive testifying that over the weekend of September 13, 2008, CIC was contacted by AIG, but CIC official "had no authority or decision-making power" and was doing nothing "other than receiving" information, and that as of September 15, "CIC had a general interest in the situation but they couldn't be more specific than that in terms of the amount of money or the timing"). Supl. App. Tab 73.

[20] Because establishing duress is an element of Starr's claims, Starr bears the burden of affirmatively proving the existence of duress. *See Abbadessa*, 987 F.2d at 20-21.

United States "controlled" AIG during this period, but it is Starr's failure to act, not AIG's, that amounts to ratification of the terms of the agreement.[21] Starr brought this suit directly and derivatively in November 2011, but nothing prevented Starr from doing so as early as September 2008. Instead, Starr waited until after it had received the full benefit of the rescue deal. Starr has no explanation for not bringing suit earlier, nor any authority supporting its contention that writing letters asking the United States to *voluntarily* reduce the size of the equity interest, rather than bringing suit alleging that AIG's agreement to the equity interest was coerced, fulfilled Starr's legal obligation to timely challenge the terms of the rescue as the product of duress.[22]

IV. Conditioning The Credit Facility On The Provision Of Equity Was Legal And Cannot Constitute An Illegal Exaction

A. Congress Conferred Broad Discretionary Authority On The Board Of Governors

By providing that all Section 13(3) loans "shall be subject to such limitations, restrictions, and regulations as the Board of Governors may prescribe," Congress permitted the Board to set the terms and conditions of individual rescue loans based on policy considerations such as the desirability of mitigating "moral hazard" concerns by avoiding undue windfalls to shareholders and of compensating taxpayers for the value created by and the risks of the rescue. 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 fails to show that such a condition is not a valid "limitation" or "restriction."

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[21] Starr's contention that Starr had no obligation to repudiate AIG's entry into the Credit Agreement because Starr itself was not a party to that contract misapprehends Delaware law, as AIG's board of directors was acting as the duly elected representative of AIG's shareholders.

[22] Mr. Greenberg's statements that he believed the rescue deal was "outrageous," Opp. at 45, are insufficient. *See, e.g.*, *Johnson, Drake & Piper v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976) (plaintiff's letter "vigorously resist[ing]" government action not a sufficient assertion of duress).

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.[23] By contrast, the United States' interpretation of the last sentence of Section 13(3) can readily be reconciled with Section 13(3)'s reference to interest rates by recognizing that Congress conferred on the Board authority to limit offers of individual rescue loans by conditioning them on terms *in addition to* interest.[24]

B. Requiring The Provision Of Equity Was A Valid Exercise Of Incidental Powers

Section 13(3) contains no textual prohibition on forms of consideration other than interest that could serve as a "limitation" on the scope of incidental powers as Starr suggests.[25] Starr's

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[23] "It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or otherwise insignificant." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n. 13 (2004) (quotation marks and citations omitted).

[24] 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 resort to *Chevron* deference as Starr has suggested. Opp. at 29-31. Nonetheless, the Court should not accept Starr's invitation to completely disregard the Board's determination of its authority, particularly in a context where Congress specifically empowered the Board to make ad hoc judgments about the restrictions or limitations to attach to individual rescue loans in the extraordinary circumstances where such assistance appeared to be called for. *See Douglas v. Ind. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012) ("[T]he agency is comparatively expert . . . . And the language of the particular provision at issue here is broad and general, suggesting that the agency's expertise is relevant in determining its application.").

[25] Acceptance of Starr's categorical position that interest is the only permissible form of consideration for a Section 13(3) rescue loan would be irreconcilable with the undisputed validity of the Federal Reserve's other Section 13(3) lending programs, each of which involved consideration other than interest, including non-interest fees. *See, e.g.*, Primary Dealer Credit Facility: Program Terms and Conditions, *available at* http://www.newyorkfed.org/markets/pdcf_terms.html, at "Frequency-Based Fee"; Term Securities Lending Facility: Program Terms and Conditions, *available at* http://www.newyorkfed.org/markets/tslf_terms.html, at "Lending Fees"; Commercial Paper Funding Facility: Program Terms and Conditions, *available at* http://www.newyorkfed.org/markets/cpff_terms.html, at "Pricing." Supl. App. Tabs 83-85.

interpretation of Section 4(4)'s grant of incidental powers as limited to only powers expressly enumerated in the text of Section 13(3) similarly violates settled canons of statutory construction, as it is irreconcilable with that provision's stated purpose of conferring powers *beyond* those enumerated elsewhere in the Act. Mot. at 33-37.[26]

Starr also misplaces its reliance upon the Supreme Court's decision in *California National Bank v. Kennedy*, 167 U.S. 362, 369 (1897). The Court in *Kennedy* did not prohibit conditioning lending on the provision of equity or holding equity, and was concerned instead with whether "dealing in" stock was among the activities "incidental to carrying on the business for which [*national banks*] are established." *Id.* at 366, 369 (emphasis added).[27] 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.[28]

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[26] Starr's interpretation does violence to the plain meaning of Section 4(4) by substituting "necessary to effectuate the thing authorized" (Opp. 27) for "necessary to carry on the business of banking."

[27] The Supreme Court explained previously in *First National Bank of Charlotte*, 92. U.S. 122, 128 (1875) that the statutory "prohibition against trading and dealing [equities] was nothing more than a prohibition against engaging in the ordinary business of buying and selling [stock] for profit, and did not include purchases resulting from ordinary banking transactions." 92 U.S. at 128; *see also Starr Int'l Co. v. Fed. Reserve Bank of New York*, 906 F. Supp. 2d at 241 ("Starr misreads *Kennedy* . . . . *Kennedy* held that national banks could not engage in the speculative purchase of stock. But it absolutely did not hold that such banks were prohibited from holding stock at all. Quite the contrary…").

[28] 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 . . . ."). Starr contends this authority is inapplicable to the AIG loan on the basis that national banks purportedly have "greater power . . .

C. Congress Ratified The Board Of Governors' Exercise Of Its Authority

Starr cannot avoid Congress's unmistakable ratification of the Board of Governors' authority to condition Section 13(3) lending on the provision of equity. Mot. at 31-33. "While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Here, Congress endorsed the Federal Reserve's interpretation of the scope of Congress's broad delegation of Section 13(3) authority as consistent with Congressional intent just two weeks after the AIG rescue, by asking for reports about the recipients of warrants or other forms of equity in *all* Section 13(3) lending, including the loan to AIG. 12 U.S.C. § 5235(a),(d).[29]

Similarly, when Congress amended Section 13(3) in 2010, it left the terms and conditions of lending "subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe," and expressly reconfirmed that the Board could condition lending on the receipt of "other revenue or items of value" as consideration in addition to interest. 12 U.S.C. § 343 (2010). In not precluding conditioning lending on the provision of

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to set the consideration for a loan," Opp. at 28 & n.12, but Starr fails to identify any reason why the Federal Reserve Banks should have less ability to obtain consideration for taxpayers than national banks have for their owners and shareholders.

[29] Mot. at 31-33; *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982); *Cookeville Reg. Med. Ctr. v. Leavitt*, 531 F.3d 844, 848-49 (D.C. Cir. 2008). And Congress' decision in EESA to limit the form of consideration for TARP support *while not* imposing similar restrictions on Section 13(3) lending provides further evidence of Congress's endorsement of the Board's interpretation of its authority. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

equity, Congress reinforced that the Board had "correctly discerned" that equity consideration was within its authority. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982).

D. Starr's Claims Concerning The Trust Are Incorrect And Legally Irrelevant

Starr's contention that the Trust was created to avoid purported prohibitions on FRBNY's and Treasury's authority to hold equity is wrong, and it is legally irrelevant to Starr's exaction claim what entity ultimately held the AIG shares.[30] The only question legally relevant to the harm alleged by Starr, and the only decision Starr has standing to challenge, is whether the Federal Reserve could condition lending on AIG's agreeing to convey equity.

Even if it were relevant, 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 wrongly deemed as indistinguishable from FRBNY. Starr cannot avoid summary judgment by citing irrelevant opinion evidence concerning the legal question of FRBNY's and Treasury's authority to hold equity. Nonetheless, Starr's distortion of the factual record merits correction:

- Starr ignores extensive evidence demonstrating that FRBNY and the Board of Governors carefully considered their authority to condition lending on the provision of consideration other than interest, including equity, during the months before the AIG rescue. As part of that analysis, the Board of Governors concluded in a formal legal memorandum that "Section 13(3) allows the Board to authorize any Federal Reserve Bank to extend credit to any IPC . . . 'subject to such limitations, restrictions and regulations as the [Board] may prescribe.' The Board, therefore, has complete statutory discretion to determine the timing and the conditions of lending under section 13(3)."[31]

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[30] *See* Mot. 37-39.

[31] PX 957, at 12–13; Supl. App. Tab 77; *see* FRBNY-STARR(CFC)-0473616, 0473623 (concluding that Section 13(3) and Section 4(4) permitted conditioning lending on a borrowers' agreement to convey an ownership interest as consideration); Supl. App. Tab 76; FRBNY-STARR(CFC)-0473906, 0473914 (discussing FRBNY's authority to receive consideration other than interest that "closely resembles an equity kicker[,] a typical characteristic of modern lending agreements"); Supl. App. Tab 78; FRBNY-STARR(CFC)-0474394 (concluding that requiring equity was reasonably necessary to effectuate Section 13(3) rescue lending) and FRBNY-STARR(CFC)-0474376 (discussing several bases for authority). Supl. App. Tabs 79-80.

- Starr relies on a statement in an unfinished draft memo despite General Counsel Scott Alvarez's testimony that this draft did not accurately reflect the Board's legal position. Alvarez Tr. 221:6-225:4. Supl. App. Tab 74.

- Starr's characterization of testimony that the Trust was created to address policy and prudential concerns as an *ex post* litigation position is contradicted by contemporaneous documents, including material made publicly available years before any claim of illegality. *See, e.g.*, AIG Credit Facility Trust Agreement, at 2, App. 820 (reciting FRBNY's desire "to avoid any possible conflict with its supervisory and monetary policy functions"); Statement Regarding Establishment of the AIG Credit Facility Trust, *available at* http://www.newyorkfed.org/newsevents/news/markets/2009/an090116.html (same). Supl. App. Tab 82.

In any event, the Trust had the clear effect of placing the authority to vote the AIG shares not with FRBNY or Treasury but with independent Trustees. Starr's assertion that the Trust was not independent of FRBNY, while similarly legally irrelevant to any harm alleged by Starr, is also unsupported by evidence:

- The Trust Agreement provision that Starr cites for the proposition that the Trustees were "required . . . to vote the [Trust] stock in favor of the Government" does not support that the Trustees were required to do FRBNY's bidding as Starr suggests. Opp. at 36 (citing Trust Agmt. § 3.03(a)). To the contrary, the Trust Agreement expressly gave the Trustees "full discretionary power" to vote the AIG shares. *Id.* § 2.04(d). App. 822. Exercising the voting power associated with the preferred shares with the aim of advancing the interests of U.S. taxpayer beneficiaries by strengthening AIG did not in any sense make the Trustees subject to the control of FRBNY or the Treasury.

- Starr claims that the Trustees relied solely on FRBNY for information about AIG, but the document Starr cites states that the Trustees not only engaged their own independent advisors but also met directly with AIG and its advisors. Opp. at 36 (citing 495 at 84).

- Starr asserts that the Trustees were "dependent on" FRBNY because they allegedly discussed AIG with FRBNY, but no evidence shows that the Trustees acted at FRBNY's direction rather than exercising their own independent judgment. *See id.* at 84-89.

E. Starr Cannot Prevail Even If The Federal Reserve Exceeded Its Authority

1. Starr Has Not Demonstrated Harm From Any Purported Illegality

Starr does not contest that to establish a compensable injury it must demonstrate that every possible economically equivalent alternative to the equity interest would have been legally invalid, or that it has not made such a showing. Starr instead asserts without support that all economically equivalent consideration would have been illegal, based only on its position that the only permissible consideration for a Section 13(3) loan is interest. Starr has not identified any legal prohibition limiting the *amount* of total consideration FRBNY and the Board of Governors could seek for the benefit of taxpayers. Starr's legal arguments are directed entirely toward the *form* of that consideration. *See* Opp. 24-36. And Starr has not, because it cannot, establish that AIG could not legally provide another form of consideration economically equivalent to the form Starr now challenges.[32] Starr's unsupported speculation that AIG might have refused to abide by its contractual obligation to provide an economic equivalent alternative is not sufficient to defeat summary judgment.

2. Starr Has Not Established The Violation Of A Money-Mandating Statute

"The U.S. Court of Appeals for the Federal Circuit has indicated that even in the case of an illegal exaction, a claimant must satisfy the usual money-mandating requirement of the Tucker Act." *Starr*, 106 Fed. Cl. at 61; *Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005).[33] Starr has not done so. Nothing in Section 13(3) in any way implies that "the remedy

[32] Although it is Starr's burden to affirmatively demonstrate compensable injury, the United States' expert, Dr. David Mordecai, has identified numerous examples of alternative forms of economically equivalent consideration common in banking and in financing of distressed entities that would have been legally valid even if Starr were to establish that FRBNY and the Board of Governors exceeded their authority in conditioning lending on AIG's conveyance of preferred shares to the Trust. Mordecai Report at ¶ 87. Supl. App. Tab 90. Starr has not demonstrated that any, let alone all, such alternatives would be illegal.

[33] Starr cites decisions in which courts exercised jurisdiction without expressly discussing this requirement where the statutes violated implicitly required the return of money because they were intended to protect the plaintiffs from the loss resulting from the violations. *See, e.g.*, *Figueroa v. United States*, 57 Fed. Cl 488, 496 (2003) (seeking the return of patent fees allegedly higher than permitted by the Patent Clause). Other decisions have more explicitly recognized that money-mandating statutes are required even for illegal exactions claims before proceeding to analyze whether the statutes in question impliedly required the return of money. *See, e.g*,

for its violation entails" the payment of damages to a private borrower or its shareholders. *Norman*, 429 F.3d at 1095; *see also Lucas*, 59 F.2d at 620–21 (dismissing damages action predicated on an asserted violation of the Federal Reserve Act because "no one can complain of such action except the government, the sovereign which created and limited [the federal reserve bank's] powers"); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress."); *Bowen v. Massachusetts*, 487 U.S. 879, 907 n.42 (1988).

3. <u>Starr Waived Its Right To Bring An Exaction Claim</u>

Starr's failure to timely challenge AIG's agreement to provide the equity interest as the product of coercion equally precludes it from now attacking the legality of that agreement. Starr's position that illegal exaction claims are never subject to waiver is incorrect.[34] *See AT&T v. United States*, 307 F.3d 1374, 1380 (Fed. Cir. 2002) (finding waiver over claim that government exceeded its authority); *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 43–44 (Fed. Cl. 2000) (same).[35] Starr's claim that "none of [these cases] involve a contract provision that was illegal" is also incorrect, as both plaintiffs alleged that the United States entered into contracts it did not have authority to enter, in violation of procurement regulations. Starr's characterization of this authority as merely "contract reformation" cases ignores that the Federal Circuit found waiver over precisely the kind of claim Starr advances in seeking to alter

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Wagstaff v. United States, 105 Fed. Cl. 99, 111–12 (2012) (following *Norman* but finding that the statutes allegedly violated necessarily implied a monetary remedy).

[34] Starr's claim is contradicted even by its own authority. *See Am. Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 680 (2007), *aff'd* 551 F.3d 1294, 1302 (Fed. Cir. 2008) (affirming the application of waiver principles to an illegal exaction claim).

[35] *See Cessna Aircraft Co.*, 126 F.3d at 1451-52; *Alyeska Pipeline Service Co*, 624 F.2d at 1017-18, citing *Rough Diamond*, 351 F.3d 636 (Ct.Cl. 1965). Starr has not shown that Section 13(3) was enacted for the benefit of borrowers or their shareholders.

the terms of the Credit Agreement years after the fact on the basis that one of those terms was allegedly illegal. *See AT&T*, 307 F.3d at 1380; *Northrop Grumman*, 47 Fed. Cl. at 43–44.

THE REVERSE STOCK SPLIT CLAIM

V. Starr Cannot Establish A Taking Or Illegal Exaction In Connection With The Reverse Stock Split

A. No Evidence Supports Starr's Claim That The Reverse Stock Split Circumvented The Stock Split Class Members' Rights

As demonstrated in our motion, AIG proposed the reverse stock split to increase its share price, not to facilitate conversion or exchange of preferred shares. Mot. 45-47, 50-51. Starr has not successfully raised a genuine issue of material fact that could defeat our motion.

Starr has failed to identify any evidence that the reverse stock split was meant to "enable[] the Government to transform its Preferred Shares to common stock," Opp. at 48, or to "avoid[]a shareholder vote on dilution," *id.* at 56. Rather, Starr makes assertions with either no citation or citations that do not support Starr's statements, *see* Opp. at 50-51 and nn.27-29:

- The Government reviewing AIG's proxy statement is not evidence of the purpose of the reverse stock split. Def.'s Resp. to 1st RFAs No. 32.4. Supl. App. Tab 86
- Nor is the fact that the stock split had the result of permitting the Trust eventually to exchange its shares. Def.'s Resp. to 1st RFAs No. 32.3. Supl. App. Tab 86.
- Nor is deciding to delay a conversion vote without notifying the Delaware Chancery Court in *Walker*, when the litigation did not purport to have any claims related to the timing of such a vote, evidence of "a deliberate and intentional plan to undermine the [Reverse Stock Split] Class's rights" to a separate class vote on conversion. Opp. at 50.[36] Regardless, the reverse stock split had nothing to do

[36] In any event, Starr mischaracterizes the supposed evidence of such a plan. Starr wrongly suggests that AIG knew it was going to postpone a vote on conversion at the same time it represented to the *Walker* court that there would be a vote. Opp. at 50-51. As the *Walke*r stipulation clearly reflects, AIG told the court that any vote on conversion would be a separate class vote, not that there would be a vote. (Pl.'s Letter to Chancellor Chandler in *Walker v. AIG*, CA No. 4142-CC (Jan. 22, 2008).) App. 825-826. Second, AIG and the *Walker* plaintiff had submitted the stipulation almost two weeks before the message cited by Starr raising

> with conversion or exchange, and the exchange could have taken place even if the shareholders had voted on and defeated conversion (as the exchange of the Series E and F shares, which were not convertible or converted, shows).

Instead, the uncontroverted evidence shows that AIG sought the reverse stock split to increase its trading price to avoid delisting and encourage investment by institutional investors, not to facilitate the Trust's shares' conversion (which still faced a par value obstacle independent of the number of authorized shares) or exchange (which was not considered until months later). Mot. at 50-51.[37] Because no evidence demonstrates any connection between the reverse stock split and the possible conversion of the preferred shares, all of the evidence regarding recognition by AIG, the Government, the Delaware Court of Chancery and others of the necessity of a shareholder vote on any proposal to convert the Series C shares to common shares is simply irrelevant to the reverse stock split claim.

B. The Common Shareholders Were Not Entitled To A Separate Class Vote On The Reverse Stock Split

Starr has conceded that common shareholders had no statutory right to a separate class vote on the reverse stock split. *Starr*, 106 Fed. Cl. at 73 (citing Tr. 105 (Boies)). [38]

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postponement of a vote on conversion. *Compare id.* (parties in *Walker* submitted their stipulation to the Court of Chancery on Jan. 22, 2009) *with* PX 608 (dated Feb. 4, 2009). Pl. Opp. App. Tab 58.

[37] Although Starr invokes case law that summary judgment is inappropriate where a material issue involves weighing conflicting evidence about motive and intent, Opp. at 51 n.30, those cases do not apply where, as here, one party has no evidence of the intent it ascribes to the other party. "Summary judgment should not be denied simply because the opposing party asserts that the movant[']s witnesses are not to be believed." *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158 (Fed. Cir. 2004).

[38] Starr nonetheless attempts to contradict that concession by suggesting, without any analysis, that DGCL § 242(b)(2) is ambiguous. Opp. at 49 n.26. But Starr does not attempt to identify any ambiguity in that provision, and there is none. Indeed, Starr's complaint characterizes that provision as "unequivocal." 2d Am. Compl. ¶ 96. Supl. App. Tab 87 at 1540-1541.

Nor can Starr establish a right stemming from the *Walker* litigation. Starr has not attempted to rebut that, as a matter of law, the scope of the *Walker* consent decree "must be discerned within its four corners." Mot. at 49 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Nor has Starr identified anything in the consent decree that grants a right beyond Delaware law. Instead, Starr quotes entirely uncontroversial statements in which AIG recognized that a separate class vote would be required before the Series C preferred shares could be converted to common shares. There is no dispute about that point, which simply recognized AIG's obligations under DGCL § 242(b)(2). And Starr has not identified any common shareholders right beyond that granted in DGCL § 242(b)(2).[39]

C. <u>Government Action Did Not Cause The Reverse Stock Split</u>

To succeed on its reverse stock split claims, Starr must demonstrate that the Government specifically caused AIG to propose the reverse stock split. Starr cannot meet its burden of proof. The general "control" Starr says existed, which has nothing to do with the reverse stock split, is not enough to establish a taking or illegal exaction.

Even when the Government has sufficient ability to cause a taking or illegal exaction through a third party in certain circumstances, it does not follow that *every act* by that third party constitutes a potential taking or illegal exaction, regardless of whether the Government caused the third party to make that *specific* action. That is, there can be no taking or illegal exaction if

[39] Starr falsely attributes to the Government the argument that "the doctrine of independent legal significance protects its use of the [reverse stock split] in place of a shareholder vote." Opp. at 51. But, as explained above, there is no evidence that the reverse stock split was meant to replace or circumvent a vote on conversion, or was related to a conversion or exchange at all. In our opening brief, we stated that the doctrine of independent legal significance meant "there was nothing impermissible about AIG exchanging its common shares for the Trust's preferred shares, even if that achieved a result similar to a conversion." Mot at 51. That is, Starr and the shareholders were not entitled to a class only vote on the exchange even if they would have been entitled to a class only vote on a proposed conversion. That statement stands unrebutted.

the Government does not actually cause the alleged "private misconduct." *Langenegger v. United States*, 756 F.2d 1565, 1571 (Fed. Cir. 1985) ("[T]he focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists.").

None of the evidence cited by Starr shows that the Government exercised its alleged control of AIG to suggest, seek or shape the reverse stock split proposal. Thus, Starr cannot meet its burden of showing Government action in connection with the reverse stock split.

D. Starr Cannot Demonstrate Economic Loss

Starr cannot establish harm to the common shareholders from not having had a separate class vote on the reverse stock split, because a majority of common shareholders voted in favor of it regardless. Indeed, Starr even admits that voting for the proposal to prevent delisting was in the common shareholders' interests. Opp. at 54. Additionally, after the reverse stock split, the public shareholders held the same percentage of the economic value and voting rights of the common stock as before (100%) and the same percentage of the economic value and voting rights of AIG's total equity (20.1%).[40] Absent evidence of harm, the reverse stock split claim must be denied.

CONCLUSION

For these reasons, we respectfully request that the Court grant the United States' motion for summary judgment.

Respectfully submitted,

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[40] Starr also asserts that the proxy statement was misleading. Opp. at 55 (quoting PX 604 at 99). Starr cites no evidence for this assertion because there is none. To the contrary, AIG testified to the accuracy of the statement quoted by Starr. Mot. at 46-47. Nor does Starr rebut our explanation that a misleading proxy is not the basis for a takings claim. Mot. at 55.

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