**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| STARR INTERNATIONAL COMPANY, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 11-779C |
| | ) | (Judge Wheeler) |
| UNITED STATES, | ) | |
| | ) | |
| Defendant, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN INTERNATIONAL GROUP, INC., a Delaware corporation, | ) | |
| | ) | |
| Nominal Defendant. | ) | |

**DEFENDANT'S MOTION FOR RECONSIDERATION**

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August 9, 2012

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**DEFENDANT'S MOTION FOR RECONSIDERATION**

Pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this motion for reconsideration of the Court's opinion and order of July 2, 2012. *See Starr Int'l Co., Inc. v. United States*, __ Fed. Cl. __, 2012 WL 2512920 (July 2, 2012). We respectfully request that the Court reconsider its denial of our motion to dismiss: (1) plaintiff Starr International Co. (Starr)'s direct claim for lack of standing; (2) Starr's illegal exaction claim for lack of standing, lack of a money-mandating statute, and incorrect conclusion that the Federal Reserve Bank of New York (FRBNY) lacked authority to condition financing upon American International Group (AIG)'s issuance of stock to the Trust; and (3) Starr's claim that it possessed a property interest due to an incorrect interpretation of the Delaware consent order concerning the AIG reverse stock split. For the reasons discussed below, we respectfully request that the Court reconsider its decision to correct these errors of law.

## ARGUMENT

### A. Standard Of Review

Under RCFC 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." "A Court that makes a decision has the power to reconsider it, so long as the case is within its jurisdiction" – that is, "until a judgment is entered." *Exxon Corp. v. United States*, 931 F.2d 874, 877 & 877 n.5 (Fed. Cir. 1991) (emphasis removed). "Courts possess inherent power to modify their interlocutory orders before entering a final judgment." *Fla. Power & Light Co. v. United States*, 66 Fed. Cl. 93, 96 (2005) (citing, among other decisions, *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88 (1922)).

As the Court explained in *Florida Power*, the "strict rules governing motions to amend and alter final judgments under Rule 59" – requiring demonstration of a manifest error of fact or law, intervening change in controlling law, newly discovered or previously unavailable evidence, or manifest injustice – "do not apply . . . [w]ith respect to decisions that are not final judgments." *Id.* at 95; *see also Wolfchild v. United States*, 101 Fed. Cl. 92, 95 (2011) (same). This Court has considered and granted motions for reconsideration based upon incorrect legal conclusions and determined that, in fact, it made an error that it must correct. *See, e.g.*, *Fla. Power*, 66 Fed. Cl. at 97-98.

**B. The Court Should Reconsider Its Denial Of Our Motion To Dismiss Starr's Direct Claim For Lack Of Standing**

We respectfully request reconsideration of the Court's decision denying our motion to dismiss Starr's direct takings claim, which alleges an "expropriation" or "dilution" of the economic value and voting power of Starr's AIG common stock, for lack of standing. *See Starr*, 2012 WL 2512920 at *9. The outcome of this issue could have a significant impact upon the entire case because it will determine the scope and nature of the claims to be litigated. We respectfully submit that the Court erred for two independent reasons. *First*, the Court incorrectly concluded that it was bound to accept Starr's assertion that the Government assumed control of AIG *prior* to the purported taking. Starr's assertion is implausible on its face and the Court should reject it. Instead, the Court may consider the two key contract documents, which we have attached, that Starr references in the Amended Complaint. Those documents demonstrate that the 79.9 percent equity interest was a condition of the deal from the very beginning.

*Second*, even accepting as true Starr's allegation that the Government somehow acquired control of AIG prior to obtaining its contractual right to an equity interest, Starr still does not have standing to pursue a direct dilution claim. Under Delaware law, such a claim can be brought only against a controlling shareholder at the time of the dilution. It is undisputed that the Government was not a shareholder during the relevant time period, on either September 16, 2008, or September 22, 2008. Thus, the Government's alleged taking affected all AIG existing shareholders equally—a clear sign that Starr's claim is solely derivative. The Court's decision to the contrary was unprecedented and contrary to Delaware law, which is the source of the alleged property right in this case. The Court effectively expanded Starr's rights under Delaware law

based upon the Fifth Amendment even though plaintiff's property rights in this case depend upon state law. The Court thus should reconsider its decision and dismiss Starr's direct claim.

**1. The Court Is Not Bound To Accept Starr's Assertion That The Government Assumed Control Prior To The Purported Taking**

Starr contends that its claim is both derivative and direct in character, because the Government took its property through a two-step process: (1) the Government "took control" of AIG; and then (2) the Government purportedly "used that control" to dilute the economic value and voting rights of Starr's equity interest. *See Starr*, 2012 WL 2512920 at *11. Starr relies upon two separate events. On September 16, 2008, the Government "offered AIG access to the discount window on specific terms provided in a 'term sheet.'" *Id.* at *3. On September 22, 2008, the parties formalized the deal by entering into a Credit Agreement, "under which the FRBNY agreed to extend up to $85 billion in credit to AIG on a revolving basis." *Id*. at *4. Starr argues that "the Government gained control of AIG" pursuant to the Term Sheet. *Id.* at *11. And then, six days later, the Government took Starr's "equity interest" and "first voting interest" pursuant to the Credit Agreement. *Id*.

The sequence is critical, because Starr may maintain a direct claim *only* if the Government used its "effective control" to "cause" AIG to dilute Starr's common shares. *Id*. at *10 (citing *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006)). In other words, Starr's theory requires that the Government assumed control of AIG *before* it supposedly "took" the right to an equity interest. If the Government obtained effective control and its right to an equity interest at the same time—for example, when the parties agreed upon the terms of the deal—Starr cannot maintain a direct claim. In its opinion, the Court expressed skepticism about Starr's novel two-step theory, stating that "it is unclear

why, if Starr's position is to be believed, the term sheet was binding as to control but not as to the transfer of the 79.9% equity interest in AIG (or why the former was not simply the result of the latter)." *Starr*, 2012 WL 2512920 at *12.

The Court, however, ultimately concluded that "the question of when the purported dilution occurred is a factual one that cannot be decided definitively at this time." *Id.* The Court reasoned that it "does not have before it the September 16, 2008 term sheet or the September 22, 2008 Credit Agreement and cannot make any conclusive determinations as to what rights the Government obtained pursuant to either agreement." *Id.* As a result, the Court reasoned that, although "the Government maintains that any purported dilution occurred on the same date the Government acquired control of AIG, the Court must accept as true Starr's position to the contrary." *Id.*

In reviewing a motion to dismiss, however, this Court may consider documents that are relied upon in, and are integral to, the complaint, and it need not accept a plaintiff's characterizations of them.[1] In its Amended Complaint, Starr cites extensively to both the Term Sheet and the Credit Agreement. *See, e.g.*, Amended Complaint ¶¶ 55-56, 58-59, 63-67, 75, 78, 83, 88, 120, 123. Accordingly, we have submitted with this Motion the Term Sheet (A001-07) and the Credit Agreement (A008-146).

[1] *See Bell/Heery v. United States*, ___ Fed. Cl. ___, 2012 WL 3104885, at *5 (Fed. Cl. Jul. 31, 2012) ("It is well established that, in addition to the complaint itself and exhibits thereto, the court 'must consider . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'") (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *see also AstraZeneca Pharm. LP v. Apotex Corp.*, 669 F.3d 1370, 1378 n.5 (Fed. Cir. 2012) ("[T]he district court was entitled to examine documents 'integral to or explicitly relied upon in the complaint' in evaluating motions to dismiss.") (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

The interpretation of contracts—and the rights that flow from them—is generally a question of law to be determined by the Court. *See, e.g., George Hyman Const. Co. v. United States*, 832 F.2d 574, 579 (Fed. Cir. 1987) ("The interpretation of a contract is a legal issue reserved for decision by the court."). Moreover, the Court is not bound to accept Starr's legal conclusions merely because they are framed as factual allegations. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation."); *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009) (noting same).

In this case, the contract documents are clear and unambiguous, and they confirm our position. The equity interest in AIG was an integral part of the overall loan transaction from the beginning. It was specified in the Term Sheet and was finalized in the Credit Agreement. More specifically, the Term Sheet expressly provides for a 79.9 percent equity interest, and the Credit Agreement implements this precise arrangement.[2] Nothing in either document supports Starr's theory that the Government somehow used its effective control to modify the deal and to expropriate a 79.9 percent equity interest from AIG's shareholders. Simply stated, the 79.9 percent equity interest was a condition of the deal from the very beginning. Accordingly, we respectfully request that the Court reconsider its decision and dismiss Starr's direct claim.

Alternatively, if the Court declines to dismiss Starr's direct claim because it continues to believe that a factual dispute exists, we would respectfully urge the Court to order limited discovery to address this narrow threshold jurisdictional question, *i.e.*, whether Starr has standing

[2] *See* A002, Term Sheet at 2 ("Equity participation equivalent to 79.9% of the common stock of AIG on a fully-diluted basis. Form to be determined."); A144, Credit Agreement at Exhibit D ("Immediately after the stockholder vote, the Preferred Stock will be convertible into a number of shares of common stock (the 'Initial Number of Shares') equal to 79.9% of that number plus the sum of the common stock then outstanding and the maximum number of shares then reserved for issuance with respect to AIG s Equity Units.").

to maintain a direct dilution claim based upon Starr's theory that the Government had control of AIG when the company agreed to convey 79.9 percent of its equity to the Government. In "deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true only uncontroverted factual allegations in the complaint." *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011).[3] Moreover, when a defendant challenges the factual basis of the court's jurisdiction, the plaintiff "bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).[4]

Starr has not and cannot satisfy its burden of proof for this jurisdictional question. As the Court appears to suggest, Starr's jurisdictional theory is implausible on its face. *Starr*, 2012 WL 2512920 at *12. There is no evidence that the Government used a controlling shareholder's power over AIG to secure its right to an equity interest, to the unique detriment of minority

[3] "If the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, however, the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction. In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion. All other facts underlying the controverted jurisdictional allegations are in dispute and are subject to fact-finding by the district court." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993) (internal citations omitted); *see also Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) ("In determining whether a motion to dismiss should be granted, the Claims Court may find it necessary to inquire into jurisdictional facts that are disputed."); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) ("In deciding such a Rule 12(b)(1) motion, the court can consider, as it did in this case, evidentiary matters outside the pleadings.").

[4] *See also Arunga v. United States*, 465 F. App'x 966, 967 (Fed. Cir. 2012) (nonprecedential) ("As the plaintiff, Mr. Arunga bears the burden of establishing subject matter jurisdiction by preponderant evidence."); *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) ("Trusted Integration, as the plaintiff, bears the burden of establishing the court's jurisdiction over its claims by a preponderance of the evidence.").

shareholders. And the Government disputes that any pleaded or plausible factual basis exists for such a theory.

The outcome of this issue could have a significant impact upon the entire case because it will determine the scope and nature of the claims to be litigated. Also, the relevant time period—between the Term Sheet and the Credit Agreement—is only six days. Accordingly, if the Court concludes that it still cannot dismiss after reviewing the two documents cited in its decision, we respectfully submit that it would serve the interests of judicial economy for the Court to develop whatever factual record, if any, is necessary to decide this threshold jurisdictional issue before allowing the case or any piecemeal part of it to move forward.

**2. Even Accepting As True Starr's Allegation That The Government Acquired Control Of AIG Prior To Obtaining Its Right To An Equity Interest, Starr Still Does Not Have Standing To Pursue A Direct Dilution Claim**

Second, even accepting as true Starr's assertion that the Government somehow acquired control of AIG prior to obtaining its right to an equity interest—a conclusion with which we disagree—this still would not confer direct standing upon Starr. Under Delaware law, a direct dilution claim may arise only from the conduct of a majority or controlling shareholder, when "the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited." *Starr*, 2012 WL 2512920 at *11 (quoting *Gentile*, 906 A.2d at 99).[5] In this case, it is undisputed that the Government was not a shareholder, much less a controlling one, during the relevant time period. *See id.* ("[T]he Government was not a stockholder . . . when the initial dilution purportedly occurred.").

[5] *See also, e.g.*, *Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007) ("[T]he Delaware Supreme Court intended to confine the scope of its rulings to only those situations where a controlling shareholder exists.").

In its opinion, the Court acknowledged this basic requirement of Delaware law. *Id*. at *11-13. Nonetheless, it upheld Starr's claim by creating a new, previously unrecognized legal exception. The Court reasoned that the controlling shareholder requirement "grows out of the principle that a controlling shareholder owes fiduciary duties to the shareholders of the corporation she controls." *Id*. at *13 (quoting *Dubroff v. Wren Holdings, LLC*, C.A. No. 3940-VCN, 2009 WL 1478697 at *11 (Del. Ch. May 22, 2009)). The Court concluded that the Government has an analogous duty, under the Fifth Amendment, "not to appropriate the minority shareholders' property interests." *Id*. Therefore, the Court allowed Starr to pursue a direct claim "irrespective of whether the Government was a stockholder when the purported dilution occurred." *Id*.

We respectfully submit that the Court's reasoning is flawed in several respects. As an initial matter, we are not aware of any court holding that a plaintiff has standing to bring a direct dilution claim against anyone other than the controlling shareholder at the time of the alleged dilution. In fact, Delaware courts repeatedly have rejected direct dilution claims in cases that did not involve controlling shareholders.[6] To the best of our knowledge, the Court's decision is unprecedented.

Moreover, the Court's decision is inconsistent with the precedents distinguishing between direct and derivative claims for dilution of stock value under Delaware law. In *Gentile*, the Delaware Supreme Court distinguished between two types of dilution cases. 906 A.2d at 99. In

[6] *See*, *e.g.*, *Feldman*, 956 A.2d at 657 (holding shareholder's claim that he received inadequate compensation from a merger based on dilutive stock options was derivative); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771–74 (Del. 2006) (holding claim that corporation diluted shareholders by overpaying for acquired corporation in merger was derivative); *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352-53 (Del. 1988) (finding claim that board of directors granted excessive stock options and golden parachutes to management to be derivative).

the first type of case, the harm—the "dilution of the economic value and voting power"—is shared equally by each of the corporation's outstanding shares. *Id*. at 100. These cases are solely derivative. *Id*. In the second type of case, the harm is incurred only by the minority shareholders "to the same extent that the controlling shareholders is (correspondingly) benefitted." *Id*. These cases are both derivative and direct. *Id*.

This case falls squarely in the first category—and is solely derivative—because the alleged harm was suffered not only by Starr, but also by every other then-existing AIG shareholder equally. *Id.*; *see also id.* at 99 ("equal 'injury' to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually"). Stated differently, Starr is not alleging an injury that it, or some subset of AIG shareholders, suffered "uniquely and individually." *See Starr*, 2012 WL 2512920 at *11 (quoting *Gentile*, 906 A.2d at 99). Instead, the Court's decision would have the peculiar effect of allowing each and every then-existing AIG shareholder to pursue a direct claim for an injury that affected *all* shareholders equally—the hallmark of a classic derivative claim.

The Court's decision also would effectively expand Starr's rights under Delaware law based upon the Fifth Amendment. The Takings Clause, however, does not create a property right separate from those already existing under state law. *See*, *e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-64 (1998) ("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.'") (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Starr's property rights as an AIG shareholder are governed and limited by Delaware law. As a shareholder of a Delaware corporation, Starr can bring a direct dilution action *only* against a controlling shareholder who

breached a fiduciary duty. Starr cannot expand this right (to bring a direct claim) by relying upon the Fifth Amendment, which cannot create a property interest where one did not previously exist.

Finally, the Court suggested in its opinion that the Government's current ownership stake in AIG supports Starr's standing to pursue a direct claim—presumably because Starr would not be fully compensated by a derivative award in which the Government would share.[7] *Starr*, 2012 WL 2512920 at *13. This is incorrect. A properly constructed derivative award would compensate AIG for the entire injury suffered by all of its then-existing shareholders. A *pro rata* distribution would fully compensate Starr for its share of the injury; it would be economically equivalent to a direct claim for the alleged loss in value of Starr's own shares. If anything, allowing Starr to pursue both a direct and derivative claim for the same injury creates the risk of a double recovery. The Court of Appeals for the Federal Circuit has cautioned against precisely this scenario:

> Not only do the Individual Plaintiffs not have standing in this case based on their status as shareholders, but we must also be mindful of the possibility that allowing such a suit would create an impermissible double recovery. . . . Since the compensation awarded the corporation flows to its shareholders through the value of their stock, to allow individuals to recover both through the corporation and as individuals would be to allow duplicative recovery.

*S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1332-33 (Fed. Cir. 2005). The Court thus should reconsider its decision.

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[7] The Government's share ownership has steadily declined since the initial rescue. *See* Amended Complaint ¶¶ 100 (92.1 percent share ownership upon completion of January 2011 recapitalization plan), & 165 (77 percent ownership as of filing of complaint); *Starr*, 2012 WL 2512920 at *13 (61 percent ownership as of June 1, 2012 argument).

**C. The Court Should Reconsider Its Denial Of Our Motion To Dismiss Starr's Illegal Exaction Claim For Lack Of Standing, Lack Of A Money-Mandating Statute, And Incorrect Assumption That FRBNY Lacked Authority To Condition Financing Upon AIG's Issuance Of Stock To The Trust**

The Court should reconsider its denial of the Government's motion to dismiss Starr's illegal exaction claim for three reasons. First, the Court incorrectly held that Starr possesses standing to complain about FRBNY's allegedly unauthorized use of its section 13(3) authority, which authorized the Board of Governors, under "unusual and exigent circumstances," to "authorize any Federal reserve bank . . . to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal reserve bank." *See* 12 U.S.C. § 343 (2008).[8] Second, the Court incorrectly denied our motion to dismiss without concluding that Starr cited a money-mandating statute for its illegal exaction claim. And finally, the Court incorrectly concluded that FRBNY lacked authority to condition the provision of exigent financing upon AIG's issuance of stock to the Trust.

First, Starr does not have standing to enforce FRBNY's compliance with section 13(3). Only the sovereign can complain if and when a Federal Reserve bank acts outside of its authority. *See Lucas v. Fed. Reserve Bank of Richmond*, 59 F.2d 617, 620-21 (4th Cir. 1932). In *Lucas*, the Court of Appeals for the Fourth Circuit held that only the Government could complain when a Federal Reserve bank allegedly acts in a manner not authorized by the Federal Reserve Act. The court of appeals held that, "whatever the power of the [Federal Reserve bank to take the challenged action,] . . . no one can complain of such action except the government, the sovereign which created and limited its powers." *Id.* at 621.

[8] 12 U.S.C. § 343 was amended in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 111-203, § 1101(a) (2010).

The court of appeals' holding relied upon the Supreme Court's decision in *Thompson v. St. Nicholas National Bank*, 146 U.S. 240 (1892), in which the Supreme Court held that, "where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." *Id.* at 251. Here, as in *Lucas* and *Thompson*, the provision of the act that allegedly prohibited the conduct in question does not provide for a private remedy. Thus, these decisions establish the controlling principle that only the Government could complain about FRBNY's allegedly unauthorized action in accepting the equity consideration for making the $85 billion loan to AIG.

In contrast to these authorities, this Court held that private litigants "ought to have standing to ensure a Federal Reserve bank's compliance with the rule of law." *Starr*, 2012 WL 2512920 at *35. The Court incorrectly distinguished *Lucas* based upon a false premise, namely that "there is no obvious regulator of a Federal Reserve bank." *Id.* Contrary to this premise, however, the Board of Governors, a Federal agency, has and exercises significant supervisory authority over the Federal Reserve banks.[9] Thus, FRBNY has a regulator and supervisor responsible for ensuring that FRBNY complies with the rule of law. Consequently, only the

[9] *See* 12 U.S.C. § 248(j) (Board of Governors has the power "[t]o exercise general supervision over said Federal reserve banks"); *id.* § 343 (2008) (expressly conditioning Federal Reserve banks' power to provide Section 13(3) lending on an authorizing vote by the Board of Governors, and providing that lending is "subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe"); *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 142 (1984) (Board of Governors is "the agency responsible for federal regulation of the national banking system."); *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 333 (D.C. Cir. 2011) ("[T]he Board exercises significant supervisory authority over the Reserve Banks.").

Government has standing to complain about FRBNY's actions in making the loan to AIG, and Starr's illegal exaction claim should be dismissed.

Second, the Court incorrectly denied the motion to dismiss without concluding that Starr had cited a money-mandating statute, as was required for the Court to possess jurisdiction over Starr's illegal exaction claim. In considering that question, the Court acknowledged that "even in the case of an illegal exaction, a claimant must satisfy the usual money-mandating requirement of the Tucker Act." *Starr*, 2012 WL 2512920 at *9 (citing *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)). The Court also held that, "[s]pecifically, 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 *Norman*, 429 F.3d at 1095); *see also id.* at *36. But the Court did not identify any statute or provision that Starr has alleged both caused an exaction and provides for the remedy of the return of money.[10]

The Court concluded instead "that it is premature at this stage to rule decisively on the issue" of whether any provision of the Federal Reserve Act is money-mandating, "let alone treat it as dispositive for purposes of Starr's illegal exaction claim." *Starr*, 2012 WL 2512920 at *36. But "[t]he requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without

[10] The Court stated that an illegal exaction claim is "an exception to the general rule that the Due Process Clause of the Fifth Amendment is not money-mandating." *Starr*, 2012 WL 2512920 at *9 (citing *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987)). However, the Federal Circuit has held that the Due Process Clause of the Fifth Amendment, standing alone, cannot be interpreted to command the payment of money, and, therefore, cannot support jurisdiction under the Tucker Act. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989). Consequently, Starr must identify a provision other than the Due Process Clause that mandates the payment of money to establish the Court's jurisdiction to entertain Starr's illegal exaction claim.

exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (internal quotations and alteration omitted). Indeed, it is presumed "that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks omitted). Every court therefore has an independent obligation to satisfy itself that jurisdiction exists over the claims presented by the complaint. *S. Cal. Edison v. United States*, 58 Fed. Cl. 313, 317 (2003) (citing *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998)). This legal question must be resolved at the outset. *Cf. Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (*en banc* in relevant part) ("[T]he trial court at the outset shall determine, either in response to a motion by the Government or *sua sponte* (the court is always responsible for its own jurisdiction), whether the Constitutional provision, statute, or regulation is one that is money-mandating."). As neither Starr nor the Court identified a money-mandating statute, this Court's jurisdiction to entertain Starr's illegal exaction claim has not been established. The absence of a money-mandating statute divests this Court of jurisdiction over this matter. Thus, Starr's illegal exaction claim should be dismissed.

Third, the Court incorrectly determined that FRBNY lacked authority to condition its lending to AIG upon the issuance of preferred shares by AIG to the Trust under section 13(3) because the Court incorrectly found that FRBNY had "purchased" stock, which the Court found was contrary to *California National Bank v. Kennedy*, 167 U.S. 362, 369 (1897). *Starr*, 2012 WL 2512920 at *38-39. This determination was incorrect because FRBNY did not "purchase" the stock. Even assuming that FRBNY did "purchase" the stock, it did not "circumvent" such a prohibition by causing AIG to issue preferred shares to the Trust.

The Court's determination that FRBNY could not acquire the stock directly proceeds from a false premise, namely that the stock involved in the section 13(3) lending transaction

could only be either collateral to secure AIG's borrowing or an invalid "purchase" of stock by FRBNY. *Id.* at *36. The Court's analysis overlooks a third option, which FRBNY pursued here, that FRBNY obtained AIG's agreement to transfer the equity interest to the Trust as additional *consideration* for the $85 billion lending commitment. Starr has urged that interest and the pledge of collateral are the only conditions that a Federal Reserve bank can attach to an emergency loan under section 13(3) because they are the only conditions specifically mentioned in that section. But that position disregards that: (1) discounts under section 13(3) are "subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe," 12 U.S.C. § 343 (2008); and (2) the Federal Reserve banks are also provided with all "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.

The Board of Governors possessed express authority under section 13(3) to condition its exigent lending to AIG upon the borrower's provision of an equity interest as part of the consideration for the lending commitment. The Court incorrectly determined, however, that "the only consideration for a loan prescribed by Section 13(3) is an interest rate subject to the determination of the Board of Governors." *Starr*, 2012 WL 2512920 at *37 (internal quotations omitted). The Court focused upon the interest rate language contained in the text of section 13(3), but did not acknowledge the additional grant of authority in the final sentence of the statute, which 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 (2008). This additional section 13(3) authority should be construed as at least broad enough to authorize the Board to limit or restrict a Reserve Bank's extension of credit by requiring conditions on the credit that are similar to types

of conditions found in credit extensions by lenders generally. Thus, this additional grant of section 13(3) authority allowed the Board to limit or restrict FRBNY's $85 billion lending commitment to AIG upon the receipt from AIG of an equity interest as additional consideration. Such a condition, as explained below, is often included in loans made by national banks and is within the incidental powers of a Federal Reserve bank.

The Federal Reserve banks also possess incidental powers similar to the incidental powers possessed by national banks. *See Starr*, 2012 WL 2512920 at *38. It is in fact well-established that national banks may require borrowers to transfer equity as part of the consideration for lending under their incidental powers pursuant to the National Bank Act. In particular, "[a] national bank may take as consideration for a loan a share in the profit, income or earnings from a business enterprise of a borrower." 12 C.F.R. § 7.1006. This consideration "may be taken in addition to, or in lieu of, interest." *Id.* Because national banks may accept equity as consideration, Federal Reserve banks may accept at least as much in consideration as national banks.

Additionally, in delineating the boundaries of these incidental powers, the Comptroller of the Currency has held that national banks are authorized to take warrants and convert those warrants into common stock without running afoul of prohibitions against banks dealing in stock. *See* O.C.C. Inter. Ltr. No. 992, 2004 WL 1563358 (May 10, 2004).[11] In that determination, a national bank sought to convert warrants it received as consideration for a loan into common stock of the borrower. *See id.* at *2. The Comptroller determined that converting the warrants and holding stock was not the equivalent of the bank purchasing stock for its own account

[11] The Comptroller of the Currency has discretion to delineate the incidental powers of national banks, and the Comptroller's interpretations are entitled to deference. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 258 n.2 (1995).

because the bank did not have an "investment motive" in holding stock for itself. *Id.* The Comptroller explained that the prohibition on stock ownership, which was addressed in *Kennedy*, was designed to prevent banks from engaging in speculative activity through stock investment. *Id.* Thus, FRBNY could not have run afoul of that same prohibition, as it never held any stock in AIG, not even for the "instant" approved by the Comptroller's 2004 determination. *Id.* at *1.

These authorities demonstrate that the Court misconstrued the Supreme Court's decision in *Kennedy*, 167 U.S. at 369. *See Starr*, 2012 WL 2512920 at *38-39. The Supreme Court recognized in *Kennedy* that a national bank could acquire stock as an incident to its lending activities. *Kennedy*, 167 U.S. at 369. In the earlier case of *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U.S. 122 (1875), the Supreme Court further explained that "a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions." *Id*. at 128.

Thus, the prohibition against stock ownership by a bank in *Kennedy* is not as broad or all-encompassing as the Court concluded, and has even less relevance when FRBNY never owned the stock at all. Even if *Kennedy* could be interpreted to prohibit FRBNY from holding stock acquired incidentally to its lending activities as consideration for a loan, the establishment of the Trust ensured that FRBNY did not do so. AIG issued the shares directly to the Trust for the benefit of the United States Treasury, and the structure of the Trust meant that FRBNY never had any economic or voting interest in any shares of AIG. FRBNY's actions no more circumvented the holding of *Kennedy* than did the conduct expressly authorized by the Comptroller. The Court thus should reconsider its decision.

**D. The Court Should Reconsider Its Decision That Starr Possessed A Property Interest Due To An Incorrect Interpretation Of The Delaware Consent Order Concerning The AIG Reverse Stock Split**

The Court should also reconsider its decision that Starr has stated a cause of action for a taking based upon the 2009 reverse stock split. The Court predicated its ruling that Starr had adequately alleged a property right (that would not otherwise exist) to a class vote upon a stipulation and order entered in an action in the Delaware Court of Chancery. *See Starr*, 2012 WL 2512920 at *28 n.22 ("[The] obligation to allow the common stockholders to vote as a class on the reverse stock split arose, if at all, from the Delaware Consent Order."). The Court opined that the Delaware court "appears to have sought not only to protect the common shareholders' right to a class vote on any proposal to increase the number of authorized shares, but also to protect the common shareholders from the dilution of their shares generally," and that as a result the "spirit" of the agreement required a class vote on the reverse stock split. *Id*. at *23. The Court reached its conclusion after accepting Starr's characterization of the terms of the Stipulation and Order without independently reviewing the Stipulation itself, but the Court may take judicial notice of the Stipulation's actual content. *See* Stipulation and Order (February 5, 2009) (A147-50).[12] The Stipulation itself does not support the expansive reading relied upon by the Court. The Court thus should reconsider its decision.

[12] The Court may take judicial notice of the content of public records, including court filings from other cases. *See Biomedical Patent Mgmt. Corp. v. Cal. Dept. of Health Servs.*, 505 F.3d at 1328, 1331 n.1 (Fed. Cir. 2007) ("the district court took judicial notice of several court filings from prior litigation between these parties. We also consider these court filings, which are matters of public record, for purposes of this appeal. Neither party argues that the district court improperly took notice of these filings, and we do not find that the district court abused its discretion in doing so."). The Court also possesses authority to review the stipulation and order to find jurisdictional facts in connection with subject matter jurisdiction. *Rocovich*, 933 F.2d at 993; *Indium Corp. of Am.*, 781 F.2d at 884.

The Stipulation provides that "AIG's counsel stated that any amendment to the Restated Certificate of Incorporation to increase the number of authorized common shares or to decrease the par value of the common shares would be the subject of a class vote by the holders of the common stock, and, based on this representation, plaintiff's counsel agreed that the plaintiff's request for an order granting this relief is moot." A148. Accordingly, "AIG publicly disclosed on November 10, 2008, in its Form 10Q filing for the third quarter of 2008, that the holders of the common stock will be entitled to vote as a class separate from the holders of the Series C Preferred Stock on any amendment to AIG's Restated Certificate of Incorporation that increases the number of authorized common shares and decreases the par value of the common shares." *Id.* As a result, the Delaware Chancery Court dismissed the counts of the plaintiffs' complaint alleging a violation of 8 Del. C. § 242(b)(2) and a breach of fiduciary duty. *Id.* Nowhere in the stipulation did AIG promise -- or the Court of Chancery order -- a vote on any other matter, including a reverse stock split. *Id.*

The Stipulation does not support the Court's conclusion that "the Delaware Court of Chancery appears to have sought not only to protect the common shareholders' right to a class vote on any proposal to increase the number of authorized shares, but also to protect the common shareholders from the dilution of their shares generally." *Starr*, 2012 WL 2512920 at *23. Under Delaware's policy of independent legal significance, "different sections of the General Corporation Law have independent significance and . . . it 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."[13]

[13] *Field v. Allyn*, 457 A.2d 1089, 1098 (Del. Ch. 1983), *aff'd*, 467 A.2d 1274 (Del. 1983); *see also Orzeck v. Englehart*, 192 A.2d 36, 38 (Del. Ch. 1963) ("action taken pursuant to and in

As the Court correctly recognized, *see* 2012 WL 2512920 at *22, Delaware statutory law provides that a company can amend its certificate of incorporation in multiple ways, including to change the number of authorized shares or the par value of its shares, or to effect a stock split or reverse stock split, 8 Del. C. § 242(a)(3), but differentiates the kind of vote necessary to accomplish these results. A change in the number of authorized shares or the par value of shares of a particular class of stock requires a majority vote of holders of that class of stock *plus* a vote of all shareholders as a group, *id*. § 242(b)(2), whereas a reverse stock split requires only a vote of all shareholders without a separate class vote, *id*. § 242(b)(1). The different voting requirements attached to different kinds of transactions reflect Delaware statutory policy. Thus, the Court was incorrect to imply an obligation "to protect the common shareholders from the dilution of their shares generally" based upon one particular type of vote. *Starr*, 2012 WL 2512920 at *23.

The stipulation that "any amendment to the Restated Certificate of Incorporation to increase the number of authorized common shares or to decrease the par value of the common shares would be the subject of a class vote by the holders of the common stock" simply tracked the requirements of Delaware law. *See* 8 Del. C. § 242(b)(2). The stipulation did not create new obligations, such as to hold a class vote on a reverse stock split, that were not already required under Delaware law. *See id*. § 242(b)(1). There is no basis to extrapolate from a stipulation that AIG would merely follow a process already required by Delaware law that AIG would instead be required to take on new voting obligations not required under Delaware law.

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accordance with the various sections of the Delaware Corporation Law constitute acts of independent legal significance, and the fact that action pursuant to one section may accomplish the same result as that taken pursuant to another section does not have the effect of rendering the transaction subject to the consequences of such other section."), *aff'd*, 195 A.2d 375 (Del. 1963).

Furthermore, the Court's correct dismissal of Starr's claims relating to the 2011 exchange transaction upon the basis that the dilution Starr was claiming was duplicative of any dilution resulting from the 2008 credit agreement equally compels a conclusion that Starr suffered no harm to its property interests from the reverse stock split. Starr's complaint challenges the reverse stock split because it permitted the 2011 exchange transaction to take place without the need for a separate shareholder vote to increase the number of authorized shares. Even assuming that to be the case, the Court's rejection of Starr's takings claim based upon the 2011 exchange transaction upon the grounds that any purported dilution occurred in September 2008 means that Starr also did not lose any separate property interest as a result of the 2009 reverse stock split. The Court thus should reconsider its decision.

## CONCLUSION

For these reasons, we respectfully request that the Court reconsider its decision and grant our motion to dismiss (1) Starr's direct claim for lack of standing; (2) Starr's illegal exaction claim for lack of standing, lack of a money-mandating statute, and incorrect assumption that FRBNY lacked authority to condition financing upon AIG's issuance of stock to the Trust; and (3) Starr's claim that it possessed a property interest due to an incorrect interpretation of the Delaware consent order concerning the AIG reverse stock split.

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