IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STARR INTERNATIONAL COMPANY, INC., Individually and on Behalf of All Others Similarly Situated, and derivatively on behalf of AMERICAN INTERNATIONAL GROUP, INC.,	:	
Plaintiff,	:	
v.	:	No. 11-00779C (TCW)
THE UNITED STATES OF AMERICA,	:	
Defendant,	:	
and AMERICAN INTERNATIONAL GROUP, INC., a Delaware corporation,	:	
Nominal Defendant.	:	

PLAINTIFF STARR INTERNATIONAL COMPANY, INC.'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

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Plaintiff Starr International Company, Inc. ("Starr") respectfully opposes defendant United States' (the "Government") motion for reconsideration of the Court's July 2, 2012 Opinion and Order on the Government's motion to dismiss Starr's Amended Complaint ("Opinion").

PRELIMINARY STATEMENT

On July 2, 2012, the Court issued a detailed, 49-page opinion, which carefully considered each of the Government's arguments for dismissal of the Amended Complaint. The Government's motion for reconsideration of the Opinion ("Mot."), which the Government filed just one day prior to the Early Meeting of Counsel and commencement of discovery, does not even acknowledge, let alone follow, the governing standard on a motion for reconsideration. The Government identifies no intervening change of law, no newly discovered evidence, and no area of the Court's Opinion that supposedly is "clearly incorrect." Indeed, the terms "clear error" and "clearly incorrect" appear nowhere in the Government's motion.

The Government instead uses its motion to try to obtain a "second bite at the apple" by recycling arguments that the Court has expressly rejected. However, mere disagreement with the Court's ruling is not a proper basis for moving to reconsider, and the Government's arguments are uniformly incorrect. Still worse, the Government asks the Court to reconsider its ruling without even addressing the Court's underlying reasoning regarding core issues such as (i) the Court's analysis of why Delaware law supports a direct claim against the Government for taking shareholder property without just compensation; (ii) the Court's interpretation of a Consent Order entered by the Delaware Court of Chancery; and (iii) the Court's rejection of the Government's

untenable position that "only the sovereign" has the legal authority to challenge an illegal exaction of $25 billion of equity.

Further, the Government raises new, equally invalid arguments that it could have raised, but did not raise, in its initial motion. For example, the Government newly (i) relies on documents that it could have submitted during the briefing process; (ii) asserts that Starr's direct claim will result in a double recovery to the plaintiff shareholder class; (iii) rests on statutory language that it did not previously advance to support its claim that it had the legal authority to demand stock in exchange for a loan; and (iv) relies on the Delaware doctrine of "independent legal significance" to dismiss Starr's claim concerning the reverse stock split. As discussed below, each of these new arguments is insufficient to justify reconsideration of the Opinion, both because it could have been raised in prior filings and because it is factually and legally unsupportable. The motion for reconsideration should therefore be denied, and the case should proceed according to the schedule contemplated by the Court's July 11, 2012 order.

ARGUMENT

I. Standard of Review

The law of the case doctrine, which "provides that a trial court should abide by its own legal rulings during the pendency of the same proceeding," provides the relevant common law standard for reconsideration of interlocutory orders under Rules 54(b) and 59(a)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *Stevens v. United States*, No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. June 4, 2012); *accord Wolfchild v. United States*, 101 Fed. Cl. 92, 95 (2011) (cited by defendant's Mot. at 2) (holding that the Court may reconsider on any ground "consonant with application of the law of the case doctrine" (internal quotation marks omitted)). The doctrine "restricts the

opportunities of unhappy parties to re-litigate issues that have already been decided and avoids requiring satisfied parties to re-litigate the same." *Stevens*, 2012 WL 2021740, at *4.

Accordingly, reconsideration is appropriate only when there are "extraordinary circumstances which justify relief." *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (internal quotation marks omitted). Such extraordinary circumstances are only ever present where "there has been 'discovery of new and different material evidence that was not presented [before], or an intervening change of controlling legal authority, or when the prior decision is clearly incorrect and its preservation would work a manifest injustice,'" meaning the injustice is "apparent to the point of being almost indisputable." *Stevens*, 2012 WL 2021740, at *4 (brackets in original) (internal quotation marks omitted) (quoting *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001)); *accord Corkill v. United States*, No. 07-147T, 2012 WL 251987, at *1 (Fed. Cl. Jan. 6, 2012). A motion for reconsideration should not be granted when the movant "merely reasserts arguments previously made," *Crowley v. United States*, 56 Fed. Cl. 291, 294 (2003), or when used to raise new arguments that could have been raised previously, *see, e.g.*, *Goldman v. Gagnard*, No. 11-cv-8843, 2012 WL 2397053, at *3 (N.D. Ill. June 21, 2012); *Edwards v. Southcrest, L.L.C.*, No. 11-cv-0017, 2012 WL 1752998, at *2 (N.D. Okla. May 16, 2012).

II. The Government's Motion to Reconsider the Court's Decision Upholding Starr's Direct Takings Claim Rests on Previously Available Documents that Are Consistent with the Court's Ruling and Previously Rejected Arguments that Lack Merit.

A. The Government's Belated Submission of the Term Sheet and Credit Agreement Is Not a Basis for Reconsideration.

The Government first reasserts the same argument from its motion to dismiss that Starr has failed to assert a direct claim because, as a factual matter, AIG transferred the control and equity at issue to the Government at the same time, and Delaware law requires the Government to have been a controlling shareholder when the taking occurred. (*See infra* Section II.B.) Although it previously made this argument without submitting to the Court a copy of the Term Sheet or Credit Agreement, the Government now attaches, without any explanation as to why it could not have done so before, both the September 16, 2008 Term Sheet and the September 22, 2008 Credit Agreement.

Even if it were appropriate to rely on previously available documents in a motion for reconsideration, the documents submitted by the Government only confirm that the transfer of control occurred before dilution or, at least, that disputed questions of fact exist. *First*, the Term Sheet required AIG to establish corporate governance arrangements that would be "Satisfactory" to the Government as a "condition precedent" to the formation of any credit facility and transfer of AIG equity, indicating that the Government demanded immediate influence and control over AIG's corporate governance. *See* Mot. Appx. at A003. Two days later, and before the Credit Agreement had been signed, the Government demonstrated its control by unilaterally firing and replacing AIG's CEO. Am. Compl. ¶ 60. The Government-installed CEO then signed the September 22, 2008 Credit Agreement. *Id.* ¶ 64.

Second, the Term Sheet confirms that equity did not transfer on September 16. To the contrary, on September 16 the parties contemplated that the transfer would occur only upon "Shareholder Approval of the increase in authorized shares." Mot. Appx. at A002. Similarly, AIG's Form 8-K announcing the transaction indicated that a warrant permitting the transfer of up to 79.9% of AIG Common Stock was "subject to shareholder approval." AIG Form 8-K (filed Sept. 18, 2008), *available at* www.sec.gov/Archives/edgar/data/5272/ 000095012308011147/y71385e8vk.htm. The Government altered this basic understanding between September 16 and September 22 (when the Credit Agreement was signed) by creating a structure under which the Government first received preferred stock with a 79.9 percent equity interest, stock that could not be converted into AIG Common Stock without approval by existing common shareholders voting separately as a class (a requirement later circumvented by the reverse stock split). The Term Sheet and Credit Agreement are thus consistent with the Court's conclusions.

B. The Government's Effort to Reargue the Court's Ruling that Starr Has Stated a Direct Takings Claim Regardless of Whether the Government Was a Controlling Shareholder When the Dilution Occurred Should Be Rejected.

The Government also offers no basis for reconsidering the Court's conclusion that Starr has stated a direct claim regardless of whether the Government was a controlling shareholder at the time of the dilution. Mot. at 4, 8-11. As explained by the Court:

> In *Gatz* and *Rossette*, it was important that a controlling shareholder existed because only then did a fiduciary duty to the minority shareholders arise. As stated in *Dubroff v. Wren Holdings, LLC*, *Rosette*'s "linkage of equity dilution claims to a controlling shareholder grows out of the principle that a controlling shareholder owes fiduciary duties to the shareholders of the corporation she controls." Here, however, the Government has a preexisting duty under the Fifth Amendment not to take private property for public use without paying just compensation. As in

> *Gatz* and *Rossette*, the Government had an obligation not to appropriate the minority shareholders property interests—*irrespective of whether the Government was a stockholder when the purported dilution occurred*.

Starr Int'l Co. v. United States, --- Fed. Cl. ---, No. 11-779C, 2012 WL 2512920, at *13 (Fed. Cl. July 2, 2012) (emphasis added) (internal citation omitted).

In response, the Government merely summarizes the Court's reasoning without attempting to explain why it was error for the Court to conclude that the existence of a direct claim derives from whether a duty is owed directly to shareholders. Nor does the Government dispute that it owes a duty directly to shareholders under the Fifth Amendment. *See* Mot. at 9. Instead, it re-argues that the Court's decision "would effectively expand Starr's rights under Delaware law based upon the Fifth Amendment" because "Starr's property rights as an AIG shareholder are governed and limited by Delaware law." Mot. at 10. This ignores the fact that the Court's Opinion properly distinguished those elements of Delaware law that are relevant to whether a plaintiff has a property interest — *i.e.*, the elements of *Gatz* and *Rossette* establishing that plaintiff shareholders have a direct interest in the "economic value and voting power associated with their shares of stock" — from those elements relevant only to whether the defendant owes a state common-law fiduciary duty — *i.e.*, whether the defendant is a controlling shareholder at the time of the tortious conduct. *Starr*, 2012 WL 2512920, at *20. The Government's suggestion that the Court has altered Delaware law rests on the erroneous notion that state court holdings can be divorced from their underlying reasoning. There is no basis for reconsidering that Opinion.

The Government also asserts that the claim is derivative "because the alleged harm was suffered not only by Starr, but also by every other then-existing AIG shareholder equally." Mot. at 10. The Delaware Supreme Court, however, has explicitly

rejected the view that "an action cannot be direct if all stockholders are equally affected or unless the stockholder's injury is separate and distinct from that suffered by other stockholders." *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1038-39 (Del. 2004). This Court, relying on *Tooley*, rightly found that the unique and individual nature of this harm to the plaintiff shareholders' "economic value and voting power associated" with their shares of stock and the corresponding benefit to the Government give rise to a direct takings claim. *Starr*, 2012 WL 2512920, at *13. The Government can hardly claim to have identified any error, much less clear error, in the Court's Opinion, which rests squarely on Delaware law.

The Government also argues that permitting both direct and derivative claims to proceed risks double recovery and thus the Court should limit Starr to its derivative claims. The Government argues that a "properly constructed derivative award would compensate AIG for the entire injury suffered by all of its then-existing shareholders," and a "*pro rata* distribution would fully compensate Starr for its share of the injury." Mot. at 11. As an initial matter, Delaware law specifically recognizes "'that the same set of facts can give rise to both a direct claim and a derivative claim'" where as here, a duty is owed both to the corporation and to shareholders. *Gentile v. Rossette*, 906 A.2d 91, 99-100 & n.19 (Del. 2006) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996)). The Court can construct a derivative and direct award to avoid double recovery, but cannot ensure that a derivative award would fully compensate all adversely affected AIG shareholders because any award would have to be made to the corporation, and thus would benefit the Government commensurate with its share of the company, and would only benefit members of the class who remained shareholders. In any event, the

Government's double recovery argument does not change the fact that Starr has properly stated a direct claim.

C. The Court Should Also Reject the Government's Third Attempt to Avoid or Delay the Discovery the Court Has Ordered to Commence.

The Government raises an entirely new argument that the Court should impose various evidentiary burdens on Starr and delay discovery because Starr's ability to bring a direct claim purportedly is a "jurisdictional question." Mot. at 8. The Government has now attempted to delay discovery in this case three times since the Court's Opinion: (i) in its July 10, 2012 Motion for an Enlargement of Time, which the Court granted only in part; (ii) in the present motion; and (iii) in the Government's August 22, 2008 Motion for Stay. The Government should not be permitted to avoid its discovery obligations, including the filing of the Joint Preliminary Status Report, by making repeated motions based on meritless arguments.

For the reasons previously stated, the Government's arguments concerning Starr's ability to bring a direct claim are wrong on their merits. Moreover, the Government's argument goes to the merits of Starr's takings claim, not to the Court's jurisdiction to hear it. *See* Mot. at 10. Whether Starr's "'takings claims will be successful on their merits does not affect the jurisdiction of the Court of Federal Claims to consider those claims.'" *Briseno v. United States*, 83 Fed. Cl. 630, 633 (2008) (internal brackets omitted) (quoting *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008)).

III. There Is No Basis for Reconsidering the Court's Determination that Starr Has Stated an Illegal Exactions Claim.

A. Starr Has Standing to Challenge the Government's Illegal Exaction of $25 Billion of AIG Stock.

The Government first argues that "Starr does not have standing to enforce FRBNY's compliance with section 13(3)" because only "the sovereign can complain if and when a Federal Reserve bank acts outside of its authority." Mot. at 12-13. The Government bases its argument on a single sentence of dictum in *Lucas v. Federal Reserve Bank of Richmond*, 59 F.2d 617, 620-21 (4th Cir. 1932), an inapposite, 80-year-old opinion from a different jurisdiction which relied on precedent interpreting the National Bank Act.

But this Court has already rejected the Government's argument that *Lucas* applies to the facts of this case, holding in "light of the considerable financial requirements that Starr alleges the FRBNY imposed upon AIG, and the lack of an alternative public regulator, Starr has standing to challenge the FRBNY's compliance with Section 13(3) of the FRA." *Starr*, 2012 WL 2512920, at *35. The Government's argument that the Court erred in distinguishing *Lucas* because "the Board of Governors, a Federal agency, has and exercises significant supervisory authority over the Federal Reserve banks" and thus "FRBNY has a regulator and supervisor responsible for ensuring that FRBNY complies with the rule of law," Mot. at 13, cannot justify reconsideration.

First, as alleged by Starr, both the Board of Governors and the U.S. Treasury are complicit in the illegal exactions challenged here, including with respect to the latter by retaining its fruit. The Court thus correctly determined, *Starr*, 2012 WL 2512920, at *35, that, as alleged by Starr, there was no effective regulator of the federal reserve banks in the case at bar.

Second, the Government ignores the Court's distinction of *Lucas* based on "the considerable financial requirements that Starr alleges the FRBNY imposed upon AIG." *Starr*, 2012 WL 2512920, at *35. The plaintiff's interest in *Lucas* was in preventing the Government's ***authorized*** collection of a defaulted loan through the acquisition of allegedly unauthorized collateral. *Lucas*, 59 F.2d at 620. In contrast, Starr's interest here is in preventing the Government's unauthorized acquisition and retention of tens of billions of dollars that the Government had no right to obtain. Nothing in *Lucas* suggests that it limits the ability of a party to recover for an illegal exaction.

Third, even in *Lucas*, the court's single-sentence conclusion as to the plaintiff's standing was dictum inasmuch as the court had already concluded that there was no question that the defendant had the authority to accept the collateral in question as security on the loan. *Id*. at 619.

Fourth, the Government's motion continues to ignore binding precedent subsequent to *Lucas* cited by Starr that establishes plaintiffs' standing to challenge as illegal exactions the Government's acquisition and retention of property that it had no legal right to obtain. *See* Opp. to Mot. to Dismiss at 46-47 (citing *Eastport S.S. Corp. v. United States*, 157 Ct. Cl. 802, 803-04 (1962)).

B. The Government's Effort to Reargue the Issues Regarding the Asserted Absence of a Money-Mandating Statute Provides No Basis for Reconsideration.

The Government asserts that "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." Mot. at 14. This assertion ignores the fact that this Court expressly dealt with this argument when it held that illegal exactions claims are "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. Moreover, for all of the reasons discussed *infra* in Section III.C, the Federal Reserve Act would provide such a remedy even assuming that such a requirement existed.

Indeed, the Government has not identified a single case where a court declined to order the Government to return property that it took and retained in excess of its statutory and regulatory authority. The only case the Government cites in support of its assertion that the Due Process Clause can never be money-mandating involved a claim for monetary damages, not an illegal exactions claim. Mot. at 14 n.10 (citing *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989)). Similarly, the Federal Circuit's statement in *Norman v. United States*, 429 F.3d 1081, 1095-96 (Fed. Cir. 2005), about the need to show a statutory right of action was *dicta*, because the court there concluded that "even if" the Government had violated the statute in question, the statute "was not the instrument through which plaintiffs' property was exacted," and because *Norman* involved plaintiff's efforts to recover damages resulting from a statutory violation.

In contrast, numerous cases establish that a plaintiff may recover money obtained in excess of the Government's statutory authority without identifying a money-mandating statute. For example, the Supreme Court in *United States v. Testan*, 424 U.S. 392, 402 (1976), specifically differentiated between claims for damages and claims for improperly exacted property, holding that only in the former case must the plaintiff identify a money-mandating statute.[1] The Government also selectively excerpts the Court's Opinion, Mot.

[1] The Court of Claims in *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967), similarly distinguished between claims "in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum," in which case no money-mandating statute is required, and claims where "no

at 14-15, to avoid addressing the two cases on point cited by the Court. *See Starr*, 2012 WL 2512920, at *9 n.6 and 36 (citing *Figueroa v. United States*, 57 Fed. Cl. 488, 499 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006) ("In the context of an illegal exaction, the court has jurisdiction regardless of whether the provision relied upon can be reasonably construed to contain money-mandating language."), and *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996) ("In illegal exaction cases, in contrast to other actions for money damages, jurisdiction exists even when the provision allegedly violated does not contain compensation mandating language.")).[2]

C. The Government Lacked Authority to Require the Transfer of Stock in Exchange for a Loan Under Section 13(3) of the Federal Reserve Act.

The Government next asks the Court to reconsider its conclusion that the Government lacked authority under Section 13(3) of the Federal Reserve Act to condition a loan on the transfer of AIG equity to the Trust. Mot. at 15-18. Because these

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such money has been paid" but the plaintiff nevertheless seeks damages, in which case such a statute is required.

[2] Various other courts have reached similar results, including cases decided after *Norman*. *See Am. Airlines v. United States*, 551 F.3d 1294 (Fed. Cir. 2008) (upholding illegal exaction claim based on the unauthorized collection of fees without addressing whether the statute and regulations in question established a private right of action); *O'Bryan v. United States*, 93 Fed. Cl. 57, 66 (2010) (upholding illegal exaction claim with no finding of a private right of action arising out of statute that was erroneously applied); *Mallow v. United States*, 161 Ct. Cl. 446, 454 (1963) (upholding right to recover fine collected pursuant to void judgment without any finding of private right of action); *Suwanee S.S. Co. v. United States*, 279 F.2d 874, 877 (Ct. Cl. 1960) (upholding right to recover fee exacted pursuant to mistaken statutory authority with no finding of private right of action); *GMO Niehaus & Co. v. United States*, 153 F. Supp. 428, 431 (Ct. Cl. 1957) (finding jurisdiction over claim for recovery of property seized pursuant to mistaken statutory authority when statute did not provide for private right of action); *Eversharp, Inc. v. United States*, 125 F. Supp. 244, 247 (Ct. Cl. 1954) (concluding that action taken pursuant to void regulation is sufficient for Tucker Act jurisdiction and upholding recovery of excessive interest collected based on void regulation, with no suggestion that the statute or the regulation provided for private right of action).

arguments were either previously made or previously available, and because they are incorrect, there is no basis for reconsidering the Court's Opinion. The Government argues that the Court ignored the possibility "that FRBNY obtained AIG's agreement to transfer the equity interest to the Trust as additional *consideration* for the $85 billion lending commitment," Mot. at 16, but does not explain how obtaining stock as "consideration" for a loan is any different from "purchasing" stock. Next, the Government relies on two statutory provisions, 12 U.S.C. §§ 341 and 343, neither of which gave the Government the authority it claims.

1. The "Limitations, Restrictions, and Regulations" Provision in 12 U.S.C. § 343 Did Not Authorize the Government To Demand Equity in Exchange For a Loan.

The Government ignores the fact that its own prior filings and argument never mentioned the "limitations, restrictions, and regulations" provision of Section 343 and disregards the text, structure, and history of the statute. The Government's failure to rely on that provision in its motion to dismiss briefing, even as it complains that the Court "did not acknowledge" it in its Opinion, betrays its own recognition of its unhelpfulness.

First, the terms "limitations, restrictions, and regulations," as applied to a loan discount, do not fairly encompass the consideration (or price) charged for a loan. Instead, they envision the type of conditions that the Federal Reserve described in a circular issued shortly after the statute was passed, none of which included the ability to demand additional consideration for a loan discount or suggested an understanding that the Federal Reserve had such authority. *See* Opp. to Mot. to Dismiss at 49 n.27.

Second, the Government's interpretation of Section 343 conflicts with the statutory language authorizing an interest rate set pursuant to 12 U.S.C. § 357, which provides that rates "*shall be fixed with a view of accommodating commerce and*

business." Congress could not have intended to provide that consideration should be fixed to accommodate commerce and business while at the same time empowering the federal reserve banks to extract maximum profit from the institutions to whom they extend loan discounts. As Starr previously argued, the Government's interpretation also contradicts the requirements that loans be fully secured and that the borrower be unable to obtain credit elsewhere. Opp. to Mot. to Dismiss at 50 & n.28.

Third, the Government further ignores the series of cases previously relied on by Starr, and never addressed by the Government, rejecting a similarly expansive construction of a statute. *See* Opp. to Mot. to Dismiss at 51 (discussing *Suwanee S.S. Co*, 279 F.2d at 336).

Fourth, the history of the statute, which was enacted during the Great Depression as part of a remedial statute entitled the Emergency Relief and Construction Act of 1932, confirms the absence of any intent to broadly authorize the federal reserve banks to demand unlimited consideration. *See* Opp. to Mot. to Dismiss at 50-51.

The Government's assertion that the "limitations, restrictions, and regulations" language "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," see Mot. at 16-17, fails to account for any of the foregoing and ignores the considerably broader authority enjoyed by national banks to lend to non-banks. In contrast to the requirement under Sections 343 and 357 that interest rates must be fixed *with a view to accommodating commerce and business*, national banks under 12 U.S.C. § 24 have general authority to lend to non-banks "on personal security" with no specification as to

how the consideration should be set, let alone a specific requirement that the banks "accommodate" business and commerce in setting rates. Moreover, whereas all loans under Section 343 must be fully secured, a national bank's loans need not be so long as the total percentage of such loans does not exceed 15% of its "unimpaired capital and unimpaired surplus." 12 C.F.R. § 215.2. Even if the Government's untimely attempt to rely on the "limitations, restrictions, and regulations" language of Section 343 were considered, it is misplaced and must be rejected on the merits.

2. The Incidental Powers Provision Did Not Authorize the Government to Demand the Transfer of Equity in Exchange for a Loan.

As this Court recognized, *see Starr*, 2012 WL 2512920, at *38 (ellipsis in original), "the U.S. Supreme Court stated" in *California Nat'l Bank v. Kennedy*, 167 U.S. 362, 369 (1897), "that the 'power to purchase or deal in stock of another corporation . . . is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred.'" The Government's attempt to relitigate its argument that FRBNY had the incidental power to demand equity in exchange for a loan, Mot. at 17-18, only succeeds in confirming the limited ability of national banks to acquire stock.

The Government quotes the first sentence of 12 C.F.R. § 7.1006, which provides that 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," and the third sentence, which provides that such consideration "may be taken in addition to, or in lieu of, interest." Mot. at 17. Tellingly, however, the Government omits the middle sentence of the regulation, which provides that a "national bank also may take as consideration for a loan

a stock warrant issued by a business enterprise of a borrower, *provided that the bank does not exercise the warrant*." 12 C.F.R. § 7.1006 (emphasis added).

Similarly, the Government characterizes an opinion of the Office of the Comptroller of the Currency as providing that "national banks are authorized to take warrants and convert those warrants into common stock without running afoul of prohibitions against banks dealing in stocks." Mot. at 17 (citing O.C.C. Inter. Ltr. No. 992, 2004 WL 1563358 (May 10, 2004)). The same opinion, however, states that the "OCC has prohibited banks from exercising such warrants - and thereby converting them into shares of the borrower's stock - on the theory that doing so would be tantamount to a purchase of stock for its own account."[3] O.C.C. Inter. Ltr. No. 992, 2004 WL 1563358, at *2.

Here, in contrast, the Government has held and continues to hold AIG's stock as an investment for years, not an "instant", Am. Compl. ¶¶ 54, 63-70, 100-02, and exercised governing control over the Company throughout that time, *id*. ¶¶ 4, 53-55, 59-65,100-03,107. The Government's argument does not undermine the Court's conclusion that "the issuance of the Series C Preferred Stock to the Trust seems to qualify as the FRBNY dealing for its own account" and that "it is not clear why the Government would use a trust procedure *unless to circumvent the Supreme Court's holding in* California-National." *See Starr*, 2012 WL 2512920, at *39 (emphasis added) (citing *California Nat'l Bank v. Kennedy*, 167 U.S. 362, 369 (1897)). The Government also ignores the

[3] The approval of the transaction in question turned upon the Bank's representation that it would hold the stock "only for the instant in which it takes the borrower's transfer agent to transfer the shares of common stock from the name of the Bank to the name of the selling broker," which meant "the Bank would, as a practical matter, never have the ability to vote the shares of common stock." *Id*. at *1.

allegations related to FRBNY's direct ability to control the shares, see Am. Compl. ¶¶ 68-73, and does not rebut the Court's conclusion that it perceived "no meaningful legal distinction between FRBNY and Trust ownership of the Series C Preferred Stock."[4] *Starr*, 2012 WL 212920, at *39.

IV. There Is No Basis for Reconsidering the Court's Determination that Starr Has Stated a Takings Claim Based on the 2009 Reverse Stock Split.

A. The Court Correctly Interpreted the Delaware Consent Order.

The Government also asks the Court to reconsider its conclusion that Starr has stated a takings claim in connection with the Government's use of a reverse stock split to circumvent common shareholders' right to a class vote to approve the dilution of their shares. The Court based its conclusion in part upon its determination that the Delaware Court of Chancery's February 5, 2009 Consent Order sought "to protect the common shareholders from the dilution of their shares generally." *Starr*, 2012 WL 2512920, at *23. The Government failed to argue previously that the Amended Complaint provides an incomplete account of the "actual content" of the Consent Order. Moreover, the Government's motion does not even address the Court's reasoning, much less establish that it was "clearly incorrect."

The Government's argument that "Nowhere in the stipulation did AIG promise – or the Court of Chancery order – a vote on any other matter, including a reverse stock split," Mot. at 20, is specifically addressed in the Court's Opinion:

> Although the Consent Order required a separate vote to "*increase* the number of *authorized* common shares," (emphasis added) as opposed to *decrease* the number of issued shares (what allegedly occurred here), the order *should be read*

[4] As explained in the prior subsection, the Government also is wrong in asserting, "Because national banks may accept equity as consideration, Federal Reserve banks may accept at least as much in consideration as national banks." Mot. at 17.

> *in light of the fact that the lawsuit also requested appropriate relief based upon the common shareholders' right* "*to reject the dilution of their shares*."

Starr, 2012 WL 2512920, at *23 (last emphasis added). As recognized in the Court's Opinion, the underlying lawsuit in the Court of Chancery did not simply seek the right to a class vote on a particular form of dilution, but rather specifically asked the Court to declare that the Series C Preferred Stock "'*is not convertible into common stock absent a class vote by the common stock to increase the number of authorized common shares*, as well as all relief appropriate in light of the Board of Directors' . . . failure to act in the interests of the common stockholders *who are entitled to reject the dilution of their shares*.'" *Id*. (emphasis added) (quoting Am. Compl. ¶ 85) (ellipsis in Court's opinion). The Government simply disregards the italicized language.

The Court's decision also was manifestly correct. The significance of an agreement and order that a lawsuit is "moot" can only be understood in light of the relief sought. The first paragraph of that order (which the Government also fails to address) provides:

> WHEREAS . . . plaintiff sought, among other things, an order declaring that the Series C Preferred Stock is *not convertible into common stock* absent a class vote by the holders of the common stock to amend AIG's Restated Certificate of Incorporation to increase the number of authorized common shares and decrease the par value of the common shares.

See Mot. App. A147 (emphasis added).[5] The next paragraph provides that "based on" plaintiff's representation that any amendment to increase the number of authorized

[5] The Delaware complaint itself asserted: "Plaintiff is entitled to an order declaring that the conversion feature of the Super Voting Preferred is invalid and unenforceable in the absence of an uncoerced, affirmative vote of the holders of a majority of the common shares, voting as a class, to amend the Restated Certificate of Incorporation to increase the number of authorized common shares and the [sic] decrease the par value of the common shares." *See* Verified Compl., *Walker v. Am. Int'l Group, Inc.* ("*Walker* Complaint"), No. 4142, ¶ 54 (attached as Exhibit 1). Similarly, the prayer

common shares would be the subject of a class vote, "plaintiff's counsel agreed that the plaintiff's request for an order granting this relief is moot." *Id*. at A148.

As detailed in the Amended Complaint, all of the parties' representations and agreements prior to the Court of Chancery order confirmed that any dilution would occur through an increase in the number of authorized shares, and thus a class vote. *See* Am. Compl. ¶¶ 79-93. The Term Sheet attached to the Government's motion likewise references "Shareholder Approval of the increase in authorized shares". Mot. App. A002. The Government simply ignores the content of the Court of Chancery order, as well as the reasoning of this Court's Opinion.

B. Delaware Law Further Confirms the Correctness of the Court's Opinion.

The Government's motion compounds its disregard for the Court's reasoning and the language and context of the Delaware Consent Order by misstating Delaware law both as to the doctrine of "independent legal significance" and as to 8 Del. Code § 242. As an initial matter, the Government has never before relied on the doctrine of independent legal significance, and it cites no basis for its failure to raise the argument previously. It is therefore not a proper basis for a motion for reconsideration.

Further, Starr previously established that "Delaware law prohibits the use of stratagems that are designed (as this one was) to deprive shareholders of their voting rights." Opp. to Mot. to Dismiss at 19 & n.10 (citing *Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994)). Far from overruling *Paramount*

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for relief asked for a declaration "that the conversion of the Super Voting Preferred into common stock without an affirmative class vote of the common stockholders to increase the number of authorized common shares and decrease the par value of the common shares is invalid." *Id*. at 19.

(which followed the cases relied on by the Government by more than a decade), cases addressing the doctrine of independent legal significance reinforce it. In *Uni-Marts, Inc. v. Stein*, Nos. 14713, 14893, 1996 WL 466961 (Del. Ch. Aug. 12, 1996), for example, the Delaware Court of Chancery specifically distinguished the questions of (a) whether the Government violated a *statutory prohibition* by accomplishing the same result through another means, and (b) whether the Government caused the Board to violate its basic fiduciary duties by doing so. As the Court explained, while courts in Delaware employ a formal mode of analysis in assessing whether a statute has been breached, the doctrine of "independent legal significance" does not apply to "the equitable obligation of corporate fiduciaries (*i.e.*, plausible claims of self-dealing in its many guises)." *Id.* at *9-10. Rather, irrespective of statutory technicalities, a fiduciary's duty "remains as the background protection to shareholder interests against arrangements that, while not violating the language of" a statute, nevertheless violate its basic purpose. *Id.*

Defendant also inaccurately asserts that Delaware law imposes "different voting requirements" on increases in authorized shares and reverse stock splits and that these differences "reflect Delaware statutory policy." Mot. at 21.

First, the Government is simply wrong in asserting that "a reverse stock split requires only a vote of all shareholders without a separate class vote". *Id.* (citing 8 Del. C. § 242(b)(1)). To the contrary, Section 242(b)(2) provides that the "holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase *or decrease* the aggregate number of authorized shares of such class". 8 Del. C. § 242(b)(2) (emphasis added).

Second, there is no basis for suggesting that "Delaware statutory policy" somehow supports the Government's circumvention of these express requirements through a reverse stock split that was limited to outstanding shares, rather than all authorized shares. The Government asserts that "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". Mot. at 21 (citing 8 Del. C. § 242(a)(3)). The cited provision, however, specifically contemplates reverse stock splits as occurring only as a form of increasing or decreasing a corporation's authorized shares (for which a class vote is expressly required), *not* as an alternative to it.[6] Nothing in Section 242(a)(3) or any other subsection mentions reverse stock splits that apply *only* to outstanding shares.

Third, the Government offers no theory of why Delaware law would protect shareholders against non-consensual share dilution for votes to increase or decrease the number of authorized shares, while permitting the exact same result through discriminatory reverse stock splits. Indeed, as explained previously, both the Model Business Corporations Act and the Emergency Economic Stabilization Act confirm the "general understanding that reverse stock splits are not appropriately used to circumvent the requirement of a separate class vote to increase the number of authorized shares." Opp. to Mot. to Dismiss at 18 n.8. There is no basis for reconsidering the Court's Opinion.

[6] Section 242(a)(3) provides in pertinent part that a corporation "may amend its certificate or incorporation, from time to time, so as" "(3) To increase or decrease its authorized capital stock or to reclassify the same," by "subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares".

C. The Court Correctly Determined that Shareholders Held a Cognizable Property Interest in the Ability to Exclude the Government From the Pool of Common Stock.

The Government asserts that the Court should reconsider its decision that shareholders lost any property interest via the reverse stock split that they had not already lost through the Credit Agreement. Mot. at 22. Again, the Government fails to address the Court's conclusion that "the Government's argument that voting rights are not property under the Fifth Amendment ignores Delaware case law specifically protecting voting interests." *Starr*, 2012 WL 2512920, at *25.

Moreover, while the precise value of what was lost is a matter for fact and expert discovery, the Government cannot seriously argue that the ability to exclude the Government from the pool of common stock had no independent value. The ability to exchange the Series C Preferred Shares made the Government's stock more liquid and thereby allowed the Government to sell its shares. Indeed, if there truly were no functional difference between the Series C Preferred Stock and Common Stock, the Government presumably would not have gone to such great lengths to exchange its Series C shares for common shares.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that this Court deny the Government's Motion for Reconsideration.

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