IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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 REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

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August 31, 2012

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AMERICAN INTERNATIONAL GROUP, INC.,	)	
a Delaware corporation,	)	
	)	
Nominal Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS 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 reply in support of its 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). The response filed by plaintiff, Starr International Co., Inc. (Starr), does not refute the reasons explained in our motion that the Court should dismiss Starr's direct takings claim and illegal exaction claim. *See* Def. Mot. Recon. (Aug. 9, 2012); Pl. Resp. Def. Mot. Recon. (Aug. 24, 2012). We thus respectfully request that the Court reconsider its decision and dismiss Starr's claims accordingly.

ARGUMENT

I. Starr Misstates The Applicable Standard Of Review

Starr cites the law of the case doctrine as providing that the Court "should abide by its own legal rulings during the pendency of the same proceeding." Pl. Resp. at 2 (quoting *Stevens v. United States*, No. 98-554C, 2012 WL 2021740, at *4 (Fed. Cl. June 4, 2012)). Contrary to

Starr's contentions, the law of the case doctrine "does not limit the tribunal's power" and instead is "addressed to its good sense." *Stevens*, 2012 WL 2021740, at *4 (quotations omitted). It "has long been held not to require the trial court to adhere to its own previous rulings if they have not been adopted, explicitly or implicitly, by the appellate court's judgment." *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991).

Starr contends that "reconsideration is appropriate only when there are 'extraordinary circumstances which justify relief,'" a standard employed for review of post-trial decisions under RCFC 59. Pl. Resp. at 3 (quoting *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004)). However, "[a]t an interlocutory stage . . . the court has power to reconsider its prior decision on *any ground* consonant with application of the law of the case doctrine." *Wolfchild v. United States*, 101 Fed. Cl. 92, 95 (2011) (internal quotations omitted); *see also Fla. Power & Light Co. v. United States*, 66 Fed. Cl. 93, 96 (2005) (finding same).

Additionally, this motion challenges Starr's standing, and thus presents a challenge to this Court's jurisdiction, which may be raised at any time, and to which the standards of RCFC 59 do not apply. *See BLR Group of Am., Inc. v. United States*, 94 Fed. Cl. 354, 364 (2010). Even new arguments that previously could have been made are not waived because they are "jurisdictional in nature." *Id.* at 364 n.10.

Furthermore, we had no prior opportunity to address issues raised by the Court *sua sponte* in its July 2, 2012 opinion. Starr thus is incorrect in seeking to limit the scope of review.

II. Starr Fails To Demonstrate Standing For Its Direct Takings Claim

The Court should reconsider its denial of our motion to dismiss Starr's direct takings claim because the Term Sheet and Credit Agreement rebut Starr's assertion that the Government assumed control prior to the purported taking and because, in any event, Starr's alleged injury is

derivative given that no alleged dilution was caused by a controlling shareholder. Nor does the Fifth Amendment alter the conclusion that Starr has no direct claim. As we have explained, the Fifth Amendment does not create a property right separate from those already existing under state law and Starr fails to demonstrate that it possessed a property interest that the Government took; allegations that Government action adversely affected the value of its property are insufficient. *See* Def. Mot. at 10-11; Def. Mot. Dismiss (Mar. 1, 2012) at 33-38.

A. The Term Sheet And Credit Agreement Rebut Starr's Assertion That The Government Assumed Control Prior To The Purported Taking

The Court premised its denial of our motion to dismiss Starr's direct takings claim upon its conclusion that "the question of when the purported dilution occurred is a factual one that cannot be decided definitively at this time." *See Starr*, 2012 WL 2512920, at *12. Although the Court questioned the plausibility of the two-step process postulated by Starr – under which the Term Sheet supposedly was binding as to control, but *not* as to the transfer of the bargained-for 79.9 percent equity interest – the Court considered itself constrained to accept Starr's characterization without having the Term Sheet and Credit Agreement before it. *See id*. These documents, which are now before the Court,[1] demonstrate that the 79.9 percent equity interest was an integral part of the overall loan transaction between AIG and the Government from the outset. The documents thus rebut Starr's contention that the Government exercised control over AIG to extract additional consideration after the Term Sheet was agreed to. *See* Def. Mot. at 6.

[1] Starr's argument that these documents were not previously submitted to the Court, *see* Pl. Resp. at 4, is undermined by the fact that it was the Court that cited the lack of those documents as the reason it was bound to accept Starr's representations as true, *see Starr*, 2012 WL 2512920, at *12, and that the documents themselves refute Starr's characterizations of them.

Starr does not dispute that the equity interest was an express term set forth in the Term Sheet. Rather, Starr argues that the transfer of control occurred before the signing of the Credit Agreement because of the Term Sheet's provision for "satisfactory corporate governance arrangements" and the post-Term Sheet appointment of a new CEO. Pl. Resp. at 4. But because Starr does not contest that the 79.9 percent equity term appears in both the Term Sheet and Credit Agreement, these arguments do not bear upon whether the equity term in the Credit Agreement was a result of alleged control exercised by the Government after the Term Sheet.

Additionally, Starr argues that control transferred before equity because the equity interest described in the Term Sheet depended upon "Shareholder Approval of the increase in authorized shares," but then the Government "altered this basic understanding" by receiving voting preferred stock under the Credit Agreement. *See* Pl. Resp. at 5 (citing A002 to Def. Mot.). That provision of the Term Sheet, however, merely defined how long FRBNY would receive a "periodic commitment fee" and did not define or limit the amount or form of the equity interest to be provided under the Term Sheet's "equity participation" provision. The "equity participation" provision expressly provided for AIG's provision of "equity participation" that would be "*equivalent* to 79.9% of the common stock of AIG on a fully-diluted basis" in a "[f]orm to be determined." A002 to Def. Mot (emphasis added). Because the "equivalent" equity participation did not need to take a form requiring a shareholder vote, the Term Sheet presents no basis for Starr's conclusion that a shareholder vote was needed.[2]

[2] Similarly, Starr relies upon a September 18, 2008 Form 8-K filed by AIG that suggested that a "transfer of up to 79.9% of AIG common stock" was subject to shareholder approval. Pl. Resp. at 5. But that Form 8-K was inconsistent with the express terms of the Term Sheet, which did not require transfer of common stock but rather equivalent equity participation with form to be determined. Accordingly, AIG accurately corrected that disclosure the next day to state that the form of approval would depend upon the form of equity interest. *See* AIG Form 8-K/A (filed

Because the documents now before the Court show that the Government's rights to equity and control transferred together, Starr cannot maintain a direct takings claim.

B. 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 Takings Claim

Even accepting Starr's premise that the Government acquired control, other than as a shareholder, and then used that control to extract the 79.9 percent equity interest, such a takings claim would be derivative rather than direct. Our motion demonstrated that a takings claim premised upon a property interest in AIG stock that was allegedly diluted is solely derivative absent a transaction with a controlling shareholder. *See* Def. Mot. at 6-11. Starr erroneously argues that this limitation does not apply to a claim that dilution of equity was accomplished other than through a breach of fiduciary duty. *See* Pl. Resp. at 5-8. Starr's argument is untenable under Delaware corporate law and Takings Clause jurisprudence.

Delaware courts have consistently held that dilution claims are solely derivative, except when a controlling shareholder allegedly caused the dilution, because otherwise the nature of the injury is shared equally by all shareholders. *See generally Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007) (*Feldman I*) (exception permitting a direct claim "can only arise when a controlling stockholder, with sufficient power to manipulate the corporate processes, engineers a dilutive transaction whereby that stockholder receives an exclusive benefit of increased equity ownership and voting power for inadequate consideration"), *aff'd*, 951 A.2d 727 (Del. 2008) (*Feldman II*). The Court's incorrect identification of the rationale for the exception as the

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Sept. 19, 2008), *available at* http://www.sec.gov/Archives/edgar/data/5272/000095012308011207/y71432e8vkza.htm ("The summary of terms also provides for a 79.9% equity interest in AIG. The corporate approvals and formalities necessary to create this equity interest will depend upon its form.").

controlling shareholder's "fiduciary duty to the minority shareholders," rather than the nature of the injury, warrants reconsideration.[3] *See Starr*, 2012 WL 2512920, at *13.

Second, Starr mistakenly suggests that the court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), "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 shareholders.'" Pl. Resp. at 6-7 (quoting *Tooley*, 845 A.2d at 1038-39). *Tooley* states, however, that under the "proper analysis," "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039.

Starr also does not acknowledge that the Delaware Supreme Court explained in *Feldman II* – which, unlike *Tooley*, involved a dilution claim – that "[w]here all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman II*, 951 A.2d at 733. Further, "[t]he mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*. In order to state a direct claim [for wrongful dilution], the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large." *Id.*

Nor does the Court's observation that "the Government has a *preexisting* duty under the Fifth Amendment not to take private property for public use without just compensation," *Starr*,

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[3] The Court relied upon *Dubroff v. Wren Holdings, LLC*, C.A. No. 3940–VCN, 2009 Del. Ch. LEXIS 89, at *11 (May 22, 2009), for that conclusion. But *Dubroff* stands only for the proposition that a fiduciary duty is a necessary condition for a direct claim for wrongful dilution. The Chancery Court had no occasion in *Dubroff* to decide whether a fiduciary duty (let alone a duty under the Takings Clause) could substitute for the requirement of "some individualized harm not suffered by all of the stockholders at large." *Feldman II*, 951 A.2d at 733.

2012 WL 2512920, at *13 (emphasis added), rescue Starr's claim. This "preexisting duty" does not distinguish the Government from any other potential defendant, except that the Government is authorized to take property for public use with just compensation. Indeed, private parties have a "preexisting duty" not to take each others' property. But the Fifth Amendment cannot itself be a source of a property right – and thus cannot create an individual cause of action based upon stock dilution of a Delaware corporation that does not exist under the law pursuant to which AIG was chartered without a controlling shareholder causing the dilution. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-64 (1998). Accordingly, granting a stockholder standing to bring a direct takings claim based upon an alleged harm to the corporation cannot be reconciled with this Court's holdings that shareholders generally *lack* standing to directly assert a corporation's takings claims. *See*, *e.g.*, *Bailey v. United States*, 53 Fed. Cl. 251, 257 (2002) (no standing for shareholder to assert direct takings claim); *Page v. United States*, 49 Fed. Cl. 521, 528 (2001) (same); *cf. Johnson v. United States*, 49 Fed. Cl. 648, 651 (2001). Thus, the "preexisting duty" under the Takings Clause is no basis to create direct standing for a shareholder's claim that alleged dilution, which affects all shareholders equally and derivatively of the injury to the corporation, constitutes a taking.[4]

Lastly, Starr's contention that a derivative award would not "fully compensate all adversely affected AIG shareholders," Pl. Resp. at 7, is unavailing. As we previously discussed, Starr would be fully compensated by a properly-constructed derivative award to AIG. *See* Def. Mot. at 11. In the deal between the Government and AIG, all consideration from the

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[4] Similarly, Delaware courts have found that if standing to bring direct dilution claims required no more than an allegation that a non-fiduciary tortfeasor had influence over a corporation when it inflicted its injury, that exception "would swallow the general rule that equity dilution claims are solely derivative." *Feldman I*, 956 A.2d at 657.

Government flowed directly to AIG. If, as Starr asserts, the Government should have paid more, then that payment would have gone to AIG, not to the shareholders who would have benefitted derivatively in proportion to their shareholding after the transaction.

As for Starr's contention that a derivative award would only benefit members of the putative class who remain shareholders, Pl. Resp. at 7, such shareholders are in the same position as plaintiffs whom the Delaware Supreme Court held "lacked standing because derivative claims may be maintained only by stockholders who own shares throughout the litigation." *Feldman II*, 951 A.2d at 730. Moreover, such an argument does not address Starr, which presumably continues to be a shareholder, and the ownership requirement is an *aspect* of derivative standing, not a reason for allowing a direct claim. Also, shareholders who sold their shares after September 2008 already received the present market value of any claim for a taking or illegal exaction, and so there is no rationale for them to receive the value of the claim again. Starr's objection thus does not support its contention that it has a direct claim.[5]

III. Starr Fails To Demonstrate A Legal Basis For Its Illegal Exaction Claim

The Court should reconsider its decision not to dismiss Starr's illegal exaction claim because Starr has not shown that it possesses standing, because Starr has not identified a money-mandating provision, and because the Federal Reserve Bank of New York (FRBNY) possessed authority to accept the equity interest.

[5] Starr also contends that the Court should order discovery, including the filing of the Joint Preliminary Status Report, which the Court has since stayed. *See* Pl. Resp. at 8; Order (Aug. 27, 2012). As we have discussed, if the Court orders discovery, any discovery should be limited to the threshold jurisdictional issue of whether the Government used a controlling shareholder's power over AIG to secure its right to an equity interest. *See* Def. Mot. at 6-8.

A. Starr Lacks Standing to Challenge FRBNY's Acceptance of An Equity Interest As Part of The Consideration For The $85 Billion Lending Facility

Starr lacks standing for its illegal exaction claim because only the sovereign can complain where, as here, it is alleged that a Federal reserve bank acts outside of its authority. Def. Mot. at 12 (citing *Lucas v. Fed. Reserve Bank of Richmond*, 59 F.2d 617, 620-621 (4th Cir. 1932)). *Lucas*'s reasoning is directly applicable here; the Court incorrectly distinguished *Lucas* based upon the incorrect premise that Federal reserve banks have no obvious regulators, when in fact the reserve banks are supervised by the Board of Governors. *See* Def. Mot. at 13 & n.9.

Starr concedes that the Board of Governors regulates the Federal reserve banks, Pl. Resp. at 9-10, and, thus concedes that the Court erred in distinguishing *Lucas*. For this reason alone, Starr's illegal exaction claim should be dismissed. But Starr incorrectly argues that *Lucas* is inapplicable because Starr alleges that: (1) the Board of Governors is not an "effective regulator" in this case; (2) Starr's situation is different due to the "considerable financial requirements" imposed upon AIG; (3) the standing holding in *Lucas* is *dicta*; and (4) there is binding precedent in this circuit contrary to *Lucas*. Pl. Resp. at 9-10.

First, Starr's assertion that the Board of Governors was not an "effective regulator" is not only incorrect, but irrelevant. The Court's decision to disregard *Lucas* depended on a different premise that "there is no obvious regulator of a Federal Reserve bank other than the member banks and associated financial institutions that it serves." *Starr*, 2012 WL 2512920, at *35. The Board of Governors, however, is the public regulator of the reserve banks. Def. Mot. at 13 & n.9.

Second, although the Court said "considerable financial requirements" FRBNY imposed on AIG weighed in favor of finding standing, *Starr*, 2012 WL 2512920, at *35, Starr ignores the

second factor that underpins the Court's holding: "the lack of an alternative public regulator." *Id.* The Court's decision should be reconsidered because the Board of Governors is both an obvious and alternative public regulator "to the member banks and associated financial institutions that [FRBNY] serves." *Id.*

Third, the alternate holding in *Lucas* is not *dicta* but rather the *Lucas* court's articulation of an independent, alternate basis to affirm the lower court's dismissal of that case's second cause of action. *Lucas*, 59 F.3d at 621. Moreover, as the Court correctly noted, *Lucas* is persuasive authority, *Starr*, 2012 WL 2512920, at *35, and *Lucas* should be followed in this case, which presents an analogous standing situation.

Finally, Starr is incorrect that *Eastport S.S. Corp. v. United States*, 157 Ct. Cl. 802 (1962), establishes that Starr possesses standing. Neither *Eastport* nor the cases cited in that opinion address whether a private party can complain about a Federal reserve bank allegedly acting outside of its authority. For these reasons, Starr's illegal exaction claim should be dismissed for lack of standing.

B. Starr's Illegal Exaction Claim Should Be Dismissed Because No Money-Mandating Provision Has Been Identified

Starr continues to fail to satisfy the test recited by the Court that that "the Federal Circuit has indicated that an illegal exaction claim requires a showing that the statute causing the exaction is either expressly or implicitly money-mandating." *Starr*, 2012 WL 2512920, at *36 (citing *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)). To the contrary, Starr contends that no money-mandating statutory provision is required. *See* Pl. Resp. at 10-12. Although purporting to defend the Court's ruling, Starr's position contradicts the basis for it.

The Court ruled that it was "premature" to conclude whether Section 13(3) is money-mandating in light of the "limited briefing" provided by the parties on the money-mandating issue. *Starr*, 2012 WL 2512920, at *36. In its response, despite a full opportunity to brief the question, Starr's vague reference to the Federal Reserve Act does not identify any such money-mandating provision; nor does it demonstrate that either section 13(3) or section 4 satisfies *Norman*. Because Starr fails to demonstrate that any statute mandates the payment of money to Starr or AIG, the Court should dismiss Starr's illegal exaction claim for lack of jurisdiction.

Starr's attempt to avoid the effect of *Norman* fares no better. Contrary to Starr's assertion, the money-mandating requirement set forth in *Norman* is not *dicta*. Although the Court in *Norman* explained in the context of plaintiff's takings claim that there was no statutory violation, that conclusion does not transform into *dicta* the *Norman* court's further holding that the jurisdictional requirement for an illegal exaction claim was not met because the statute at issue "does not, by its terms or by necessary implication, provide a cause of action with a monetary remedy for its violation." 429 F.3d at 1096.

Starr latches onto the Court's statement 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.'" *See* Pl. Resp. at 10-11 (quoting *Starr*, 2012 WL 2512920, at *9). But Starr's reliance upon this statement ignores that the Court explicitly relied upon *Norman* in its discussion of the illegal exaction claim as setting the applicable test. *See Starr*, 2012 WL 2512920, at *9, 36.

Starr also ignores this Court's cases that follow *Norman.*[6] Rather, Starr refers this Court to other cases, all with less authoritative commentary on the money-mandating requirement than

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[6] *See, e.g.*, *Kipple v. United States*, 102 Fed. Cl. 773, 777 (2012); *Elliott v. United States*, 96 Fed. Cl. 666, 669 (2011); *Cencast Services, L.P. v. United States*, 94 Fed. Cl. 425, 451 (2010);

Norman. *United States v. Testan*, 424 U.S. 392, 402 (1976), for example, did not involve an illegal exaction claim; its jurisdictional discussion explicitly carved out illegal exactions, but that does not mean illegal exactions do not carry their own jurisdictional requirements as well. The other cases cited by Starr are less authoritative than *Norman* because they predate the Federal Circuit's statement of the law in *Norman*, are silent about whether a money-mandating provision is required, or are not binding authority.[7]

C. FRBNY Possessed Authority To Accept Equity As Part of The Consideration For The Lending Facility

Both section 13(3) and the incidental powers provision allowed the Board of Governors to approve and FRBNY to accept AIG's offer of an equity interest, issued to the Trust, as part of the consideration AIG exchanged for an $85 billion lending facility. *See* Def. Mot. at 15-18.

1. Section 13(3) Provided Authority To Accept Equity

Starr erroneously contends that FRBNY's acceptance of AIG's offered consideration was illegal upon the grounds that: (1) the "limitations, restrictions, and regulations" language in the text of section 13(3) is not relevant to consideration requirements or limitations; (2) the Board's "limitations, restrictions, and regulations" authority allegedly conflicts with section 14(d) of the

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Pennoni v. United States, 79 Fed. Cl. 552, 561 (2007) ("following *Norman*, a plaintiff claiming jurisdiction based on an illegal exaction must demonstrate that 1) the exaction was directly caused by a misapplication of a statute, and 2) the remedy implicit in the statute is the return of the funds.").

[7] *O'Bryan v. United States*, 93 Fed. Cl. 57, 66 (2010), is a non-binding opinion by this Court and is silent on the money-mandating issue; it simply explains that illegal exactions are within the Court's jurisdiction. *American Airlines v. United States*, 551 F.3d 1294 (Fed. Cir. 2008) does not discuss jurisdiction at all, much less refer to whether a money-mandating provision must be identified; it is not clear that the parties or the Federal Circuit considered the issue. *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003), is a pre-*Norman* opinion from this Court, not the Federal Circuit. *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996), to which the Court in *Figueroa* cited, also predates *Norman* and, unlike *Norman*, is not binding on the Court here. The rest of Starr's citations predate *Norman* by several decades and do not discuss the money-mandating issue at all. *See* Pl. Resp. at 12 n.2 (listing cases).

Federal Reserve Act, 12 U.S.C. § 357, which addresses setting discount rates charged by reserve banks generally; (3) the Court should construe section 13(3)'s text more narrowly than its terms allow, as the Court of Claims curtailed different statutory language in *Suwannee S.S. Co. v. United States,* 279 F.2d 874 (Ct. Cl. 1960); and (4) the history of section 13(3) does not support our reading of the "limitations, restrictions, and regulations" language. Pl. Resp. at 12-15.[8]

Starr's arguments are without merit. First, the text of section 13(3) states that discounts under that provision shall be "subject to such limitations, restrictions, and regulations as the Board of Governors of the Federal Reserve System may prescribe." Def. Mot. at 16 (citing 12 U.S.C. § 343 (2008)). This provision allows the Board of Governors to condition its section 13(3) lending upon the inclusion of equity as part of the consideration, and should be construed as at least broad enough to authorize the Board of Governors to conditions section 13(3) lending on terms similar to those found in commercial credit extensions generally. *See* Def. Mot. at 16-17.

Second, section 357, which provides that discount rates charged by the Federal reserve banks in their ordinary lending function should be set "with a view of accommodating commerce and business," does not expressly or impliedly limit the consideration the Board of Governors can authorize a reserve bank to obtain when the Board authorizes emergency lending under section 13(3). Further, the regulations associated with section 13(3) show that consideration for emergency lending is not limited to ordinary discount rates set under section 357. *See* 12 C.F.R. § 204.1(d) ("Emergency credit will be extended at a rate *above* the highest rate in effect for

[8] Starr incorrectly argues that we failed to raise our textual argument regarding section 13(3), and that the Court thus should not consider it. Pl. Resp. at 13. To the contrary, we asserted in the briefing of our motion to dismiss that nothing in the text of section 13(3) prohibited accepting equity as part of the consideration for the lending facility. *See, e.g.,* Def. Reply Mot. Dismiss (Apr. 26, 2012) at 29.

advances to depository institutions." (emphasis added)). Thus, section 357 does not support the limitation implied by Starr.

Third, the reasoning of the Court of Claims' decision in *Suwannee, see* Pl. Resp. at 14, is inapplicable. *Suwannee* interpreted the power of an administrative board to condition its approval for transactions "upon such conditions as the commission . . . prescribes" as not permitting the board to impose unrelated monetary conditions on approvals it was required to provide by statute. 279 F.2d at 876-77. In contrast, the equity consideration that AIG offered was an integral part of the consideration for undertaking the risk of lending to AIG, a failing institution. Thus, *Suwannee* and its progeny do not require a narrow reading of section 13(3).

Finally, the Board of Governors has interpreted its own authority as allowing it to impose additional requirements on authorizations of emergency lending under section 13(3). Contrary to Starr's assertion, *see* Pl. Resp. at 14, the Board of Governors expressly stated in both its August 1932 and February 1936 Federal Reserve Bulletins that under section 13(3) "[a]ny Federal reserve bank may prescribe such additional requirements and procedures respecting discounts [under section 13(3)] as it may deem necessary or advisable[.]"[9] Thus, the Court should reconsider its decision because section 13(3) granted the necessary authority.

2. <u>Federal Reserve Act Incidental Powers Authorized Equity Acceptance</u>

The Federal Reserve Act's version of incidental powers, 12 U.S.C. § 341, also authorized FRBNY's acceptance of AIG's offer of equity consideration. Starr does not dispute, because it

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[9] *See* 18 Federal Reserve Bulletin at 520 (1932), *available at* http://fraser.stlouisfed.org/docs/publications/FRB/1930s/frb_081932.pdf; 22 Federal Reserve Bulletin at 124 (1936), *available at* http://fraser.stlouisfed.org/docs/ publications/FRB/1930s/ frb_021936.pdf. These interpretations by the Board of Governors of its organic statute are worthy of deference. *Cf. Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 238-39 (2004) (granting deference to Board of Governors' interpretation of Truth in Lending Act).

cannot, that the National Bank Act's prohibition upon any national bank's buying or selling stock "for its own account," 12 U.S.C. § 24 (Seventh), was an amendment limiting that Act's incidental powers, and that it has no correlative in the Federal Reserve Act's "incidental powers" provisions. As the Supreme Court recognized in *NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 258 (1995), "Congress's insertion of the limitation [prohibiting dealing in stocks] . . . makes sense only if banks already *had* authority to deal in securities, authority presumably encompassed within the 'business of banking' language[.]" National banks therefore had the ability to deal in stocks before the prohibition in section 24(Seventh) was enacted. Consequently, Federal Reserve banks must still possess such a power because their section 341 contains no such carve-out. The textual differences in these statutes demonstrate that a limit upon holding stock in the National Bank Act does not apply to FRBNY.

Second, even if FRBNY were subject to the National Bank Act's "incidental powers" provision, Starr's claim still fails. Starr concedes that a bank can accept equity as consideration, in addition to or in lieu of interest for a loan, without running afoul of the prohibition on national banks from dealing in stock. Pl. Resp. at 15-17. Starr thus effectively concedes the Court erred in concluding that FRBNY could not accept equity consideration except as either collateral or as an invalid purchase of stock. *Starr*, 2012 WL 2512920, at *36-37.

Starr contends, however, that the equity component of consideration cannot consist of stock because national bank regulation 12 C.F.R. § 7.1006 and the Comptroller's interpretive letters only address warrants (*i.e.*, derivatives that confer equity exposure and are valued based upon the stock price) and suggest that any other form of equity consideration is prohibited as an equity kicker. Pl. Resp. at 15-17. The Comptroller decision cited by Starr concluded that a national bank may accept an equity kicker in the form of warrants and convert those warrants

into common stock without running afoul of any prohibition of a national bank dealing in stock. *See* O.C.C. Inter. Ltr. No. 992, 2004 WL 1563358 (May 10, 2004). Starr's argument ignores the reasoning behind the Comptroller's decision. The Comptroller concluded that a bank could receive warrants and convert them into common stock without running afoul of the prohibition against dealing in stock because the common stock would be held only temporarily for sale. *See id.*, at *2. The Comptroller's concern was not that an entity separate from the lender (like the trust here) could hold shares, but rather that the bank – the lender – could vote the shares once they were converted. *Id.* Such a concern does not apply here because FRBNY could not vote the AIG shares. Similarly, the restriction upon a national bank exercising warrants in 12 C.F.R. § 7.1006 does not apply here because FRBNY never held any stock or exercised any warrants.

Consequently, FRBNY's $85 billion credit facility to AIG cannot run afoul of any prohibition that would apply if FRBNY were a national bank because the lender, FRBNY, never held either the economic interest or the voting power associated with the equity consideration AIG provided.[10] Although the Court assumed for the purposes of our motion to dismiss that FRBNY established the Trust to avoid any potential legal issues associated with its owning AIG stock directly, even acceptance of that assumption does not establish that the Board of Governors or FRBNY acted beyond their incidental powers. Starr's attempt to disregard the Trust's

[10] Here, the structure of the Trust indisputably separated FRBNY as lender to AIG from ownership of a voting interest in AIG stock, even more than the arrangements the OCC has permitted for national banks, because the Trust rather than FRBNY received all economic as well as voting interests associated with the equity conveyed by AIG. By the complaint's own allegations, the Trust was a separately constituted legal entity, administered by trustees and not by FRBNY. Its economic beneficiary was the public fisc (the "United States Treasury"), and the Trust language encouraging trustee solicitude for the public fisc did not give FRBNY any economic interest in the performance of AIG's stock. All voting was similarly to be accomplished by the trustees, and Starr has not remotely presented allegations sufficient to challenge their independence. *See, e.g., Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

separate legal identity by simply arguing that the "Government" held AIG stock, Pl. Resp. at 16-17, cannot alter the undisputed fact that AIG's counterparty – the lender bank, FRBNY – never held any economic interest in or voting power from even a single share of that stock.

IV. Starr Incorrectly Contends That The Consent Order Grants It A Property Right

The Court should reconsider its decision not to dismiss Starr's takings claim related to the Delaware consent order because the consent order did not seek to protect AIG's common shareholders from all potential forms of dilution, Delaware law does not require a class vote for a reverse stock split, and the consent order did not create a separate property interest.

A. The Consent Order Did Not Seek "To Protect The Common Shareholders From The Dilution Of Their Shares Generally"

Starr's description of the complaint in its Delaware action does not alter the explicitly narrow nature of the stipulation that the parties agreed (and the Delaware Chancery Court accepted) would end the action. The language of that stipulation explicitly said that if AIG sought to achieve an increase in authorized shares to accomplish a conversion, it would hold a class vote of shareholders. *See* Consent Order at 2 (A148 to Def. Mot.). That undertaking was an agreement to abide by Delaware statutory law regarding when class voting would take place. There is no basis for contending that this undertaking expressly or impliedly embraced – or that the court in accepting it required – that a class vote be held for different transactions that do not require such a class vote under the Delaware statute.

The relief sought in the Delaware case – 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," *see* Pl. Resp. at 18 – was not frustrated by the reverse stock split. The Series C Preferred Stock was never converted into common stock, but rather

was exchanged for common stock in the January 2011 exchange that the Court ruled did not constitute a separate taking. *See Starr*, 2012 WL 2512920, at *18. Starr's claim should be read in light of the baseline relief the shareholders were entitled to under Delaware law, which did not include a vote on a reverse stock split. Starr's argument thus fails.

B. Delaware's Policy Of Independent Legal Significance Applies And Does Not Require A Class-Only Vote For A Reverse Stock Split

Starr incorrectly contends the doctrine of independent legal significance does not apply in this case because Delaware courts have in other contexts applied equitable restrictions in the case of fiduciary duty claims. *See* Pl. Resp. at 19-20 (citing *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1994); *Uni-Marts, Inc. v. Stein*, Nos. 14713, 14893, 1996 WL 466961 (Del. Ch. Aug. 12, 1996)). The doctrine of independent legal significance addresses Delaware statutory voting rights, and provides that, "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." *See Field v. Allyn*, 457 A.2d 1089, 1098 (Del. Ch. 1983), *aff'd*, 467 A.2d 1274 (Del. 1983). While the doctrine of independent legal significance does not preclude a claim for breach of fiduciary duty in conjunction with a claim that an action did not satisfy statutory voting requirements, as occurred in the cases cited by Starr, this is not a fiduciary duty breach claim, and thus the cases cited by Starr are inapplicable.

The Court has ruled that any property right relating to the reverse stock split "arose, if at all, from the consent order," rather than a breach of fiduciary duty. *See Starr*, 2012 WL 2512920, at *28 n.22. The consent order explicitly dealt with statutory voting requirements, not a fiduciary duty claim. *See* Consent Order at 2 (A148 to Def. Mot.) Starr's claim thus only addresses statutory voting rights, and falls under the doctrine of independent legal significance.

In the alternative, Starr erroneously contends that, even if the doctrine of independent legal significance applies, the reverse stock split was improper upon the grounds that (1) a vote was required under 8 Del. C. § 242(b)(2); (2) 8 Del. C. § 242(a)(3) does not permit stock splits that apply only to outstanding shares; and (3) the reverse stock was used to "circumvent" the requirement for a class vote. Pl. Resp. at 20-21. All of these contentions are incorrect.

First, Starr's contention that section 242(b)(2) required a separate class vote for the reverse stock split is incorrect. Section 242(b)(2) provides only that a class vote is required for a charter amendment to alter the number of authorized shares. A reverse stock split, however, has no effect upon the number of authorized shares, but only the number of outstanding shares. Starr's argument thus misreads the Delaware statute.

Second, Starr erroneously contends that section 242(a)(3) "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." Pl. Resp. at 21. Section 242(a)(3) permits amendments "to increase or decrease [a corporation's] authorized capital stock or to reclassify the same." An effort to "reclassify" shares may include "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." *Id.* (emphasis added). Section 242(a)(3) thus permits changes to the number of "outstanding" shares, including reverse stock splits, that do not apply to the number of "authorized" shares.

Third, Starr, relying upon the Model Business Corporations Act and the Emergency Economic Stabilization Act, contends that there is a "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." Pl. Resp. at 21. Starr's interpretation does not appear

in Delaware law, and Starr cites no Delaware authorities in support of it. As for Starr's claim that we have presented "no theory" why the reverse stock split should be permitted under this circumstance, our position accords with controlling Delaware law due to the distinction between authorized shares and outstanding shares. Thus, the consent order does not grant Starr a property interest.

C. The Consent Order Created No Separate Property Interest From The Equity Interest Provided For In The September 22, 2008 Credit Agreement

Starr incorrectly contends that the reverse stock split can be the basis of a takings claim even though the Court has already ruled that, "while Starr identifies both the 79.9% equity interest and the over 562 million shares of AIG common stock as protectable property interests, the Court views the taking of AIG equity as occurring, if at all, on September 22, 2008." *Starr*, 2012 WL 2512920, at *20 n.18. The same absence of separate economic interest that led the Court correctly to dismiss the claims based on the 2011 exchange applies equally here.

The only separate property interest Starr alleges as a result of the voting rights involved in the reverse stock split is that 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." Pl. Resp. at 22. But the Court has already ruled that the January 2011 exchange of the shares was not a taking. *See Starr*, 2012 WL 2512920, at *18. Starr alleges that the "precise value of what was lost is a matter for fact and expert discovery," but such discovery would be irrelevant when the Court has ruled that the one transaction facilitated by the reverse stock split was not a taking.

CONCLUSION

For these reasons, we respectfully request that the Court grant our motion for reconsideration.

Respectfully submitted,

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