

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

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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. :

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**PLAINTIFF’S OPPOSITION TO DEFENDANT’S RENEWED MOTION TO DISMISS AND MOTION FOR STAY OF PROCEEDINGS OR, IN THE ALTERNATIVE, MOTION FOR AN ENLARGEMENT OF TIME**

Plaintiff Starr International Company, Inc. (“Starr”) respectfully opposes the renewed motion to dismiss and motion for stay of proceedings or, in the alternative, motion for an enlargement of time made on August 22, 2012 by defendant United States (the “Government”).

**PRELIMINARY STATEMENT**

As AIG has previously stated in its August 20, 2012 response to the Court, AIG and Starr have agreed that Starr (without prejudice to its position that a demand was not required as a matter of law) would make a demand on AIG, and the AIG Board would consider that demand. *See* AIG Stmt. (Dkt. No. 57) at 3-4. Two days later, the Government filed the present motion (“Mot.”) – representing its third attempt to delay

discovery in this action since the Court on July 2, 2012 denied the Government's motion to dismiss. The Government requested:

- (i) dismissal of the derivative claims based on Starr's stated intent to submit the very demand that the Government previously complained was lacking; and
- (ii) a stay that would result in a nearly six-month delay in Starr's ability to conduct discovery on its direct claims in this action.<sup>1</sup>

In the alternative, the Government seeks a 30-day enlargement of time for all deadlines in this action other than the briefing schedule for the Government's pending motion for reconsideration.

None of the Government's requests has merit. The Government's request for dismissal is at odds with the expressly stated views of AIG – the corporation that the demand requirement that the Government invokes is meant to protect. Moreover, the Government's request for a nearly six-month stay of discovery related to those claims would only serve the Government's improper goal of delaying compliance with its discovery obligations.<sup>2</sup> The Government's motion should be denied in its entirety.

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<sup>1</sup> Starr remains committed to setting, and meeting, an efficient discovery schedule in this case: Starr served its First Request for the Production of Documents on August 24, 2012, and its First Set of Interrogatories and First Set of Requests for Admission on August 29, 2012.

<sup>2</sup> Even as the Government seeks to delay discovery, it continues to reap more profit from the transactions at issue in this litigation, as most recently evidenced by its announcement that it has completed its sale of the assets held by Maiden Lane III. The notion that AIG receives one-third of any contingent interests from these sales is illusory, as it ignores the fact that the assets were purchased by Maiden Lane III in large part with \$32.5 billion in AIG collateral that was never repaid to the Company, and because AIG is using what contingent interests it does receive to buy back the over \$25 billion in AIG Common Stock that the Government took without just compensation. See Michael J. De la Merced, *New York Fed Sells Off Last A.I.G.-Related Holdings*, N.Y. Times, Aug. 24, 2012, at B1; Michael Mackenzie and Nicole Bullock, *NY Fed Closes the Door on Maiden Lane*, Fin. Times, Aug. 23, 2012.

## ARGUMENT

### **I. The Court Should Deny the Government's Motion to Dismiss Starr's Derivative Claims.**

The Government renews its motion to dismiss Starr's derivative claims on the basis that Starr's negotiated agreement with AIG, attached hereto as Exhibit A, deprives this Court of jurisdiction over those claims because the agreement "highlights that the requirements of RCFC 23.1 have not been fulfilled." Mot. at 3-5. This is merely a repackaging of the same argument that this Court has previously rejected.

As this Court previously held, the "purpose of the demand requirement is to protect the 'directors' power to manage the affairs of the corporation.'" *Starr Int'l Co., Inc. v. United States*, --- Fed. Cl. ---, No. 11-779C, 2012 WL 2512920, at \*14 (Fed. Cl. July 2, 2012) (quoting *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988)).

AIG does not seek dismissal of the derivative claims. On the contrary, AIG has stated that its negotiated agreement "moots" the Government's demand arguments. AIG Stmt. at 5. It is the Government that seeks to deprive AIG of its power to manage its own affairs by invoking the demand requirement after AIG itself has negotiated an agreed procedure. *See id.* at 3-5; Ex. A to Opp ¶¶ 1-6. The Government cites no case authorizing a third party to invoke the demand requirement in a manner that is directly at odds with the express views of the corporation the defense is designed to protect. The cases cited by the Government on whether dismissal is preferable to the retention of jurisdiction uniformly involve the request for dismissal *by a corporation*, not by a third party.

The Government fails to identify any basis for dismissing the derivative claims. As this Court recognized in deferring the issue of demand futility, the demand requirements are not jurisdictional. *See Starr*, 2012 WL 2512920, at \*14; *see also First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1290 (Fed. Cir. 1999) (holding that the “shareholder derivative standing requirements of Federal Rule of Civil Procedure 23.1 involve *prudential limitations, not constitutional limitations*”) (emphasis added); *LeBoyer v. Greenspan*, No. 03-5603, 2007 WL 4287646, at \*2-3 (C.D. Cal. June 13, 2007) (expressly rejecting the assertion that “demand futility was itself intertwined with the standing issue” and hence was a “jurisdictional question”); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782-83 (Del. 1981) (recognizing that, under Delaware law, shareholder plaintiff can proceed as corporation’s representative even after demand is refused where “despite the board’s refusal to bring suit, it is clear that the board supported” the plaintiff shareholder “in his efforts”); *Charal Inv. Co., Inc. v. Rockefeller*, No. 14397, 1995 WL 684869, at \*4-5 (Del. Ch. Nov. 7, 1995) (concluding dismissal of derivative claims was appropriate only because plaintiff shareholder had not challenged the independence and qualifications of the special committee appointed to investigate the claims, but only of the corporation’s board). The Government does not even attempt to demonstrate the contrary position, despite invoking RCFC 12(b)(1). *See* Def. Mot. at 5 n.2 (acknowledging that courts have retained jurisdiction over derivative claims while the board was considering a shareholder demand).

Nor has the Government identified any practical interest that would be served by disregarding AIG’s views and dismissing the lawsuit. To the contrary, retaining jurisdiction while AIG remains a nominal defendant permits the parties to engage in

discovery on the many issues that are present in both the direct and the derivative claims, and also precludes the need for AIG to re-file its claims in this Court if AIG decides to take over this action. The Government has not identified any burden imposed by the Court's retention of jurisdiction over Starr's derivative claims, given that Starr is still pursuing a direct claim based on many of the same issues and that the agreement stays discovery on issues solely related to the Maiden Lane III claims, other than the service of and response to requests under RCFC 34. *See* AIG Stmt. at 4; Ex. A to Opp. ¶¶ 2-4.

Finally, the Government's argument rests on the mistaken premise that Starr has conceded its demand futility arguments by entering into a negotiated agreement with AIG. The agreement merely seeks "to provide the AIG Board with sufficient time to consider all of the derivative claims in an orderly process and to avoid a preliminary dispute concerning the demand excused issue". Ex. A to Opp. at 2; *see also* AIG Stmt. at 4. Far from waiving Starr's demand futility arguments, the agreement expressly provides that Starr may file an amended complaint alleging that demand was "not required as a matter of law" should the Board refuse the demand. Ex. A to Opp. ¶ 6; AIG Stmt. at 5. None of the cases cited by the Government involved an agreement between the corporation and shareholder plaintiff to make a demand under specified conditions. *See, e.g., Spiegel v. Buntrock*, 571 A.2d 767, 771-72 (Del. 1990); *Stotland v. GAF Corp.*, 469 A.2d 421, 421-22 (Del. 1983); *FLI Deep Marine LLC v. McKim*, No. 4138, 2009 WL 1204363, at \*2 (Del. Ch. Apr. 21, 2009); *Charal*, 1995 WL 684869, at \*2; *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368, 369-70 (Del. Ch. 1983). Moreover, in all of the Government's cases, dismissal of the derivative claims was sought by the

corporation or its board. *Id.* Here, the Government, *not* AIG, asks this Court to dismiss Starr's derivative claims.

## **II. The Court Should Deny the Government's Motion to Stay.**

The Government asks the Court to stay Starr's *direct* claims as well as its derivative claims pending the Court's decision on the Government's motion for reconsideration and pending the AIG Board's decision on Starr's demand. As an initial matter, as set forth in Starr's August 24, 2012 opposition, the Government's motion for reconsideration is meritless and thus does not provide a basis for granting a stay.

The Court should also deny the Government's proposed stay of Starr's claims pending the AIG Board's decision on Starr's demand. No matter what decision is made by the AIG Board on Starr's derivative claims, discovery will proceed on Starr's direct claims. The stay sought by the Government would only delay the ultimate resolution of this action, potentially by nearly half a year, during which time the parties could otherwise make significant progress in discovery.

Such a stay would not serve any legitimate purpose, let alone one that could justify the delay sought by the Government. The Government first argues that "a stay is necessary to protect the power of the directors to manage their own affairs" because allowing Starr to "depose corporate officers and directors" and "demand the production of corporate documents" would interfere with the Board's ability to consider AIG's demand. Mot. at 7.

*First*, the Government cannot support its attempt to use the pendency of a demand in connection with a derivative claim to justify the stay of a *direct* claim. The lone case it cites on this point, *Abbey*, 457 A.2d 368, involved a request for stay of a derivative claim by the *corporation* pending an independent special litigation committee's investigation as to

whether to allow the claim to proceed. *Id.* at 369-71. By staying a second simultaneous investigation into the corporation's affairs by a different party ostensibly representing the corporation's interests, the Court found that a stay advanced the Board's ability to control the investigation of the *corporation's* claims. *See id.* at 375 (explaining that otherwise, "the very justification for the creating of the litigation committee in the first place might well be subverted"). That principle obviously lacks relevance to a direct claim that would proceed regardless of the Board's decision; the *Abbey* ruling is also irrelevant to a motion for stay by a third party.

*Second*, the Government cannot credibly claim that its request for a stay protects AIG's interests. AIG has not joined the Government's request. Moreover, the Government is seeking to protect *itself* from discovery, not AIG's "corporate officers and directors" or "corporate documents" of AIG. Far from advancing AIG's interests, the Government's request would subvert those interests by interfering with AIG's intentions (as expressed in its agreement with Starr, which expressly leaves the direct claims unaffected) and by preventing Starr from pursuing discovery on its direct claims that would eventually benefit AIG in the pursuit of the overlapping derivative claims. *See Ex. A to Opp.* ¶ 2; AIG Stmt. at 4. The only interest that the Government is seeking to advance here is its own, and the desire to avoid an investigation into its actions on claims that the Court has allowed to proceed.

The Government also asserts that until "we know the result of the demand process, we cannot know which facts, witnesses, or documents ultimately will be relevant to the proceedings in this Court. It is therefore impracticable to conduct discovery and other pretrial proceedings before AIG has made its decision." Mot. at 8. There is no

reason that the Government needs the AIG Board's decision in order to respond to discovery requests related to Starr's direct claims. Nor does the Government need the AIG Board's decision to formulate its initial disclosures as to Starr's direct and derivative claims or to draft a Joint Preliminary Status Report ("JPSR") that addresses the litigation of Starr's direct claims and, to the extent necessary, the alternative scenarios that would follow the AIG Board's decision.

*Finally*, the Government inexplicably asserts that a stay of all claims for nearly half a year would *promote* judicial economy by preventing unnecessarily duplicative discovery. It posits that if "Starr proceeds with discovery on its direct claim and AIG subsequently takes control of the derivative claims (and decides to pursue them), then AIG may seek different discovery on the common fact issues, exposing the parties to unnecessarily duplicative, costly, and burdensome discovery." Mot. at 10. As an initial matter, there is no basis for the Government's suggestion that AIG would seek significantly different discovery, and any additional discovery that it does seek would be supplemental, not duplicative. The three pending discovery requests cover the basic ground that is common to both the direct and derivative claims. (To the extent, if any, the Government contends that certain discovery requests are relevant solely to the Maiden Lane III claims, Starr is prepared to meet promptly with the Government to try to resolve such objections.) Moreover, as the Government is aware, but fails to discuss in its motion, Starr has proposed to the Government an initial period that would be exclusively devoted to written discovery, including the production of documents and responses to requests for admissions and interrogatories, before the start of oral depositions. The

speculative possibility that AIG might later seek targeted supplemental discovery does not justify delaying the initial discovery period by many months.

**III. The Government's Alternative Request for a 30-Day Delay of "All Deadlines" Should Be Denied.**

As an alternative to its request for a stay, the Government seeks "an enlargement of time, to and including 30 days following the Court's disposition of this renewed motion to dismiss and motion to stay, for all deadlines in this action, except for the briefing schedule ordered by this Court regarding" the Government's motion for reconsideration." Mot. at 10. The Government attempts to justify its request by arguing that the enlargement would "allow the parties sufficient time to evaluate and incorporate the material change that Starr's agreement to make demand on AIG's board has effected on this litigation." Mot. at 10-11. The Government's request is unjustified for several reasons.

*First*, as discussed *supra* in Section II, the issues posed by AIG's filing are not complicated and do not affect the litigation of Starr's direct claims.

*Second*, presumably the Government has prepared drafts of its initial disclosures. By the time the Government submits its reply brief next week, the Government will have had more than two months to draft its initial disclosures since the Court's July 2, 2012, ruling on the Government's motion to dismiss.

*Third*, the Government cannot excuse its refusal to work with Starr on the JPSR until after the Court's resolution of the Government's motion. Starr has repeatedly made clear to the Government its desire and willingness to finalize the JPSR.

**CONCLUSION**

For the reasons set forth herein, Plaintiff respectfully requests that this Court deny the Government's Renewed Motion to Dismiss and Motion for Stay of Proceedings or, in the Alternative, Motion for an Enlargement of Time.

Dated: Washington, D.C.  
September 5, 2012

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**EXHIBIT A**

**AGREEMENT BY AND BETWEEN STARR INTERNATIONAL COMPANY,  
INC. AND AMERICAN INTERNATIONAL GROUP, INC.**

Starr International Company, Inc. (“Starr International”) and American International Group, Inc. (“AIG”) enter into this Agreement as follows:

WHEREAS, Starr International, a shareholder of AIG, has filed an action against the United States of America in the Court of Federal Claims captioned *Starr International Co., Inc. v. United States*, No. 11-779C (TCW) (the “CFC Action”), containing derivative claims brought on behalf of AIG, as well as a separate action against the Federal Reserve Bank of New York (“FRBNY”) in the Southern District of New York captioned *Starr International Co., Inc. v. Federal Reserve Bank of New York*, No. 11-8422 (PAE) (the “SDNY Action”), based on many of the same events as alleged in the CFC Action and containing additional derivative claims brought on behalf of AIG (the “Actions”);

WHEREAS, the “Stock Claims” refer to claims in the CFC Action and the SDNY Action alleging takings by the Government and alleging breaches of fiduciary duty by FRBNY involving AIG stock and voting power in connection with financial assistance provided by the Government to AIG beginning in September 2008;

WHEREAS, the “ML III Claims” refer to claims in the CFC Action and the SDNY Action alleging takings by the Government and alleged breaches of fiduciary duty by FRBNY involving Maiden Lane III;

WHEREAS, Starr International did not make a demand on AIG’s Board of Directors prior to bringing the Stock Claims or the ML III Claims, but instead has alleged in both Actions that it was not required as a matter of law to make a demand before bringing the Stock Claims or the ML III Claims;

WHEREAS, this Agreement embodies the understanding and agreement reached on August 14, 2012 between Starr International and AIG as set forth in the "AIG-Starr Term Sheet" dated August 14, 2012;

WHEREAS, Starr International and AIG enter into this Agreement in order to provide the AIG Board with sufficient time to consider all of the derivative claims in an orderly process and to avoid a preliminary dispute concerning the demand excused issue;

NOW, THEREFORE, IT IS HEREBY AGREED, by and between Starr International and AIG, as follows:

1. Starr International agrees to make a demand with respect to the Stock Claims (to the extent they are derivative) and the ML III Claims in the CFC Action and the SDNY Action no later than Friday, September 14, 2012. In other words, all derivative claims will be subject to a demand to the AIG Board by Starr International.

2. While the demand is pending before the AIG Board, Starr International agrees to stay the ML III Claims (which, unlike the Stock Claims, are entirely derivative) in the CFC Action and SDNY Action.

3. Notwithstanding the stay of the derivative ML III Claims, discovery relating to the ML III Claims may proceed in the CFC Action, but limited to document requests and objections without the production of documents, unless also related to Stock Claims.

4. Discovery in the SDNY Action is limited in the same manner as in the CFC Action, and is not to begin until after motions to dismiss are decided.

5. AIG's Board will establish an orderly process for considering Starr International's demand, and the process will include presentations by Starr International,

the Government and FRBNY to the Board. These presentations shall focus on the factors the Board is required to consider in assessing a shareholder demand. The demand process shall also include written presentations and replies by Starr International, the Government, and FRBNY to AIG's Board, followed by oral presentations at the Board's January 9, 2013 meeting.

6. If the Board refuses the demand, Starr International may seek to pursue derivative claims in the CFC and SDNY Actions by challenging the Board's decision to refuse the demand by filing amended complaints alleging that the demand was wrongfully refused and/or not required as a matter of law. AIG may respond with any and all arguments.

DATED: September 5, 2012

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