IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FRANK P. SLATTERY, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 93-280C**
	)	**(Senior Judge Smith)**
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S POST-TRIAL BRIEF UPON DAMAGES

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DEFENDANT'S POST-TRIAL BRIEF UPON DAMAGES

Defendant, the United States, respectfully submits this post-trial brief upon damages. For the reasons set forth below and at trial, the Court should deny plaintiffs' damages claims

I. PLAINTIFFS ARE NOT ENTITLED TO ANY RESTITUTION

It is well settled in this Circuit that the purpose of restitution "as an alternative remedy for breach of contract" is to restore the pre-contract status quo, and "not to prevent the unjust enrichment of the breaching party." Acme Process Equipment Co. v. United States, 347 F.2d 509, 530 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966) (emphasis added). Accord Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1380 (Fed. Cir. 2001); California Fed. Bank, FSB v. United States, 245 F.3d 1342, 1350-51 (Fed. Cir. 2001); Landmark Land Co., Inc. v. United States, 256 F.3d 1365, 1372 (Fed. Cir. 2001). "Because the purpose of restitution is to restore the plaintiff to its status quo ante, the award to the plaintiff must be reduced by the value of any benefits that it received from the defendant under the contract, so that only the actual, or net, loss is compensated." Landmark, 256 F.3d at 1373 (emphasis added); LaSalle Talman Bank, FSB v. United States, 317 F.3d 1363, 1376 (Fed. Cir. 2003).

Plaintiffs have not proven entitlement to any restitution claim. Plaintiffs' restitution claims for (a) the liquidation cost purportedly avoided by the Government; and (b) the alleged earnings benefit to the Government upon the avoided liquidation cost, are legally and factually infirm. Plaintiffs' additional restitution claims for (c) purported net assistance payments made by Meritor to the FDIC pursuant to the contract; (d) the "total equity" value of Meritor at the time of seizure by the FDIC in 1992; and (e) the receivership deficit, are similarly flawed and unrecoverable.

A. The Alleged Benefit For The Liquidation Cost Purportedly Avoided By The Government Does Not Reflect Actual Loss To Plaintiffs

Plaintiffs' restitution claim, which is ostensibly premised upon an internal liquidation estimate used by the FDIC when considering PSFS and Dollar's bids, fails both legally and factually. The Federal Circuit has twice rejected restitution claims premised upon avoided liquidation costs because they did not reflect actual losses to the non-breaching parties. Glendale, 239 F.3d at 1381-82; CalFed, 245 F.3d at 1350-52 (quoting Glendale).[1] As in Glendale and CalFed, the estimate here reflects nothing more than a "paper calculation" of a "liability that never came to pass" and "a speculative assessment of what might have been"– not an actual cost. See Glendale, 239 F.3d at 1382; CalFed, 245 F.3d at 1351 (quoting Glendale); Tr. 2723, 2726-29 [Hamm]; see also Tr. 222-23 [Brumbaugh]; Def. Response No. 97.

1/ This Court also has consistently rejected restitution claims based upon the avoided cost of liquidation. See Citizens Federal Bank, FSB v. United States, 52 Fed. Cl. 561, 564-65 (2002); Hansen Bancorp, Inc. v. United States, 53 Fed. Cl. 92, 96 & n.4 (2002); Suess v. United States, 52 Fed. Cl. 221, 229 (2002); Granite Mgmt. Corp. v. United States, No. 95-515C, 2003 WL 22989008 at *5-6 (Fed. Cl. Dec. 16, 2003).

The contemporaneous evidence demonstrates that liquidation, if not foreclosed altogether for mutual savings banks, was a last resort at minimum. Tr. 2690-91 [Hamm]; Tr. 3130-31 [Hamm]; Tr. 1909 [Thakor]; Def. Response 96. As in Glendale and CalFed, the Government also had several options other than liquidation, such as accepting Dollar's bid (Tr. 2704-05 [Hamm]; Tr. 2013 [Thakor]; Tr. 1645 [Gough]; Def. Responses 96, 101-103); providing temporary open bank assistance (Tr. 2716-17 [Hamm]; Def. Response 107); reopening the bidding process, particularly to potential out-of-state bidders (Tr. 2707-09 [Hamm]; Tr. 2013 [Thakor]; see Tr. 1579, 1617-18, 1637-38, 1659, 1664 [Gough]; PX 633, PX 637; DX 3136 at 2; DX 3000; PX 655; Def. Responses 98-100, 108-09); and dividing Western into three parts for merger or sale (PX 634; Tr.1669 [Gough]; see Def. Response Nos. 101, 103, 107, 109).

Plaintiffs' factual argument that the FDIC had no other alternatives to liquidation is erroneous. Plaintiffs' reliance upon the Government's pre-fact discovery admission is overstated and divorced from the facts developed at trial, which are not inconsistent with this admission. See Def. Response No. 105. Plaintiffs' claim that Dollar's bid would have been rejected by the FDIC in favor of liquidation is economically irrational and based upon sheer speculation and innuendo regarding Dollar's size and the cost of its bid; equivocal "sound bite" testimony (Mr. Fritts); and unsupported allegations that further negotiations with Dollar would have been uneventful. Tr. 2704-05 [Hamm]; Tr. 2013 [Thakor]; Tr. 1645 [Gough]. Def. Response Nos. 96, 101-103.

Plaintiffs' additional assertions that the FDIC did not have alternatives with respect to pursuing out-of-state merger partners; providing temporary open bank assistance; or reopening the bidding process is conjectural and conclusory. The FDIC was not foreclosed from pursuing these alternatives, and plaintiffs' suggestion otherwise is pure speculation. Def. Response Nos. 98-100, 106-109; see Tr. 1616 [Gough] (because FDIC received an in-state bid, alterative resolution scenarios not pursued). Plaintiffs' restitution claim based upon the avoided cost of liquidation should be rejected.

Plaintiffs also ignore several other fatal defects in their restitution claim. First, as in Glendale and CalFed, the deposit insurer here, the FDIC, retained "contingent liability" for the combined institution following the merger. Glendale, 239 F.3d at 1382; CalFed, 245 F.3d at 1351 (plaintiffs' claim defeated by contingent liability); Southern Cal. Fed. Sav. & Loan Ass'n v. United States, 57 Fed. Cl. 598, 624 (2003) (same), appeal docketed, Nos. 04-5036, -5038 (Fed. Cir. Dec. 10, 2003); Granite Mgmt. Corp. v. United States, No. 95-515C, 2003 WL 22989008 at *6-7 (Fed. Cl. Dec. 16, 2003); Def. Response Nos. 87, 90-92; Tr. 357 [Brumbaugh]; Tr. 630-31 [Brummett]. Meritor's seizure in 1992 does not alter this fact.

Second, the acquisition cannot be unwound – that is, the Court cannot "'unscramble the egg' and return the parties to the position they would have been in absent the contract." LaSalle Talman Bank, FSB v. United States, 45 Fed. Cl. 64, 77 (1999), aff'd in part, vacated in part, 317 F.3d 1363 (Fed. Cir. 2003); see First Nationwide Bank v. United States, 51 Fed. Cl. 762, 765 (2002), appeal docketed, No. 03-5128 (Fed. Cir. July 14, 2003); Restatement (Second) of Contracts § 384, cmt. a (1981). The contract in this case was performed for approximately six years before the first breach occurred in 1988. The Income Maintenance Agreement ("IMA") was fully performed by both parties before Meritor voluntarily canceled it in 1987. Tr. 799, 804 [Brummett]; Tr. 2189-90 [Hargett]. Meritor cannot return all of the benefits of the IMA it enjoyed or the benefits from the ability to report the Western "goodwill" as a regulatory asset through 1992. The inability to unwind the transaction to return these benefits dooms plaintiffs' restitution claim. See Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 730 (2d. Cir. 1992).

B. Plaintiffs' Claim For "Reinvestment Earnings" Derived From The Alleged Liquidation Cost Avoided By The Government Is Barred

Because plaintiffs are not entitled to recover avoided liquidation costs as a form of restitution, their claim for the earnings that the Government purportedly earned on these avoided costs necessarily fails as well. Citizens, 52 Fed. Cl. at 566 & n.8; California Fed. Bank, FSB v. United States, 43 Fed. Cl. 445, 455 (1999), aff'd in part, vacated in part, 245 F.3d 1342 (Fed. Cir. 2001), cert. denied, 534 U.S. 1113 (2002). Plaintiffs' claim for the FDIC's alleged "reinvestment earnings" also fails because – irrespective of how it is labeled or described – it is a thinly veiled request for unauthorized prejudgment interest on a void restitution claim. Def. Response No. 111; see 28 U.S.C. § 2516(a); see, e.g., Library of Congress v. Shaw, 478 U.S. 310, 314 (1986); International Business Machines Corp. v. United States, 201 F.3d 1367, 1370 (Fed. Cir. 2000), cert denied, 531 U.S. 1183 (2001).

C. Plaintiffs' Claim for "Net Assistance Paid" In The Amount Of $67.341 Million Is Conceptually Flawed

Dr. Finnerty calculates that Meritor made net payments to the FDIC under the assistance agreement in the amount of $67.341 million. Tr. 1052 [Finnerty]. For the reasons stated above, this restitution claim fails as a matter of law and fact. Plaintiffs' calculation also is conceptually flawed. See Def. Response No. 94.

D. Plaintiffs' $112 Million "Total Equity" Claim Is Not Appropriately Recoverable As Restitution

Plaintiffs improperly seek $112.171 million in restitution, which supposedly represents the "total equity" value of Meritor at the time of seizure in 1992. As explained above, restitution is legally and factually foreclosed. Plaintiffs' attempt to recover Meritor's alleged value at the time of seizure also is inappropriate because restitutionary damages are "measured as of the time of performance." Acme, 347 F.2d at 528. Compensating plaintiffs for any benefits allegedly derived by the Government at the date of seizure would restore plaintiffs to their 1992 status quo, not the status quo in 1982. See Tr. 1055 [Finnerty]. In any event, any benefit that the Government purportedly received from Meritor's seizure in 1992 is not a benefit conferred by the contract and, hence, is unrecoverable. And, as we explain below, Dr. Finnerty's calculation of the alleged "total equity" value claim is unduly speculative and uncertain.

E. No Legal Or Factual Basis Exists For The Award Of The Receivership Deficit

Plaintiffs claim they should be awarded the receivership deficit. They offer no evidence, however, that the losses in the receivership were due to anything other than Meritor's poor asset quality. See Def. Response Nos. 136-37. More importantly, this Court has already concluded that any claim for the receivership deficit belongs to the relevant insurance fund (i.e., the United States), not the bank or even the receiver. Statesman Sav. Holding Corp. v. United States, 41 Fed. Cl. 1, 12 (1998); see Castle v. United States, 48 Fed. Cl. 187, 198 (2000)), aff'd in part, rev'd in part on other grounds, 301 F.3d 1328 (Fed. Cir. 2002); Bailey v. United States, 341 F.3d 1342, 1345-47 (Fed. Cir. 2003); Def. Response No. 136; 12 U.S.C. § 1821(a)(5)(C); 12 U.S.C. § 1821(a)(7)(C)(i); 12 U.S.C. § 1821(g).

II. PLAINTIFFS' RELIANCE CLAIM, WHICH TREATS EXCESS LIABILITIES AS AN ACTUAL COST OF PERFORMANCE, IS LEGALLY FORECLOSED

Plaintiffs' cost of performance claim is legally barred because their model admittedly treats the assumption of excess liabilities as an actual, out-of-pocket cost. Glendale, 239 F.3d at 1380-82; LaSalle, 317 F.3d at 1376-77; CalFed, 245 F.3d at 1350.[2] See also Def. Response Nos. 42, 58-61, 115-16.

In plaintiffs' view, Meritor assumed $796 million in net liabilities when it acquired Western, and this assumption was the equivalent of a cash expenditure in 1982 because the liabilities used to fund the acquired assets were supposedly paid over time. Tr. 613-14, 616-17, 3358 [Brummett]. Mr. Brummett agreed that treating the excess liabilities as the equivalent of a cash payment is the underlying assumption that allows him to show a "cash loss" of $386.7 million on Exhibit A.1 of his model. Tr. 616-17 [Brummett]; see also Tr. 522, 3354-55, 3357-58 [Brummett]. Apart from transaction costs, however, there was no actual cash paid by Meritor for Western's assets and liabilities. Tr. 615 [Brummett]; Tr. 2764-66 [Hamm]; Tr. 2802-05 [Hamm] (citing DX 3352).

A. Mr. Brummett's Model Here Is Even More Tenuous, Speculative, And Unreliable Than The Rejected Model In *Glendale*

Plaintiffs fail to distinguish binding precedent regarding cost of performance claims. They incredulously assert that Mr. Brummett's model is distinguishable from Glendale's rejected

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2/ Accord Glendale Federal Bank, FSB v. United States, 54 Fed. Cl. 8, 13 (2002); Anchor Sav. Bank, FSB v. United States, No. 95-39C, 2003 WL 22415878 at *40 (Fed. Cl. Sept. 29, 2003); Southern Nat'l Corp. v. United States, 57 Fed. Cl. 294, 299 (2003); Fifth Third Bank of Western Ohio v. United States, 55 Fed. Cl. 223, 245-46 (2003); Suess, 52 Fed. Cl. at 231 n.11; Granite Mgmt. Corp. v. United States, No. 95-515C, 2003 WL 22989008 at *7-11 (Fed. Cl. Dec. 16, 2003) model in two respects: (1) "Meritor maintained separate records for Western"; and (2) because Meritor was seized, "we know to a moral certainty that the total liabilities assumed in 1982 were discharged." Id. These assertions are wrong.

1. **Mr. Brummett's Analysis Is Speculative Because Meritor *Did Not* Maintain Separate Financial Reporting For Western**

Plaintiffs have it completely backwards. Glendale acquired Broward Federal in 1981 and, thereafter, maintained some separate financial reporting for Broward as part of Glendale's Florida division from 1981 through 1994. See generally Glendale, 54 Fed. Cl. at 11-13. Here, plaintiffs have repeatedly admitted there are no separate historical or financial records for Western post-merger, and it is impossible to track Western's portfolio. Pl. Br. at 11; Tr. 595-96, 437, 537 [Brummett]; Pl. Response No. 62; Pl. Response No. 38; PX 854 at 2.[3]

Thus, shortly after the merger, Western became hopelessly commingled with Meritor's operations and, consequently, it is now impossible to accurately determine the activity in Western's assets, liabilities, and equity from April 1982 to December 1992. See PX 951; Pl. Response No. 117, ¶¶ 2-3 (conceding artificiality); Tr. 2216 [Hargett] (citing DX 3502); Tr. 2228 [Hargett]. The record and plaintiffs' concessions make clear that the futile task of "unscrambling the egg" and tracking the dollars arising from Western's assets and liabilities, including the proceeds of the asset sales, continues to "plague" plaintiffs' model. Pl. Br. at 11.

3/ See also DX 3146 at ESL005 0230; Tr. (L) 3029-31 [Fritts] (citing DX 510 at CSL010 0506); Tr. 2874, 2990 [Hamm]; Tr. 2395, 2232-33 [Hargett]; DX 3517.

2. Plaintiffs' Argument That It Fully Paid Western's Deposit Liabilities Over Time Is An Incorrect Red Herring

Plaintiffs also argue that their model is distinguishable from Glendale's because Meritor fully paid Western's deposit liabilities over time. This argument is incorrect and irrelevant.

First, Mr. Brummett was unable to point to any document conclusively showing that Meritor fully paid Western's deposit liabilities. Tr. 634 [Brummett]. Mr. Brummett also acknowledged that any original Western deposits transferred to Mellon in 1990 and 1992 were not "paid off," since Meritor actually received a premium for the transferred assets and liabilities. Tr. 448, 456 [Brummett]. Thus, we do not know with "reasonable certainty" that Meritor paid off all the original Western deposits.

Second, plaintiffs erroneously suggest their argument is a novel one not addressed in Glendale. Glendale, however, raised a similar argument on remand. Glendale, 54 Fed. Cl. at 12 (citing Glendale's April 10, 2001 Brief for Entry of Judgment at 23). The Court rejected Glendale's claim – premised upon treating the assumption of mark-to-market excess liabilities as principle cost or investment – because it failed to accurately measure "the actual losses Glendale sustained in operating the Florida franchise." Glendale, 54 Fed. Cl. at 13. Here, too, Mr. Brummett's model (as discussed below) does not accurately measure Meritor's true economic, out-of-pocket cost.

Third, plaintiffs' claim that Meritor paid all of Western's deposit liabilities over time is an immaterial "bait and switch." Saying a bank assumed "net liabilities" on a mark-to-market basis is different than saying it paid deposit liabilities over time, which is an everyday function occurring whenever deposits mature or withdraw. Tr. 636-37 [Brummett]. Plaintiffs' argument fails to consider: (1) the Western assets (and assets obtained with the proceeds from the sale of Western assets) appreciated in value significantly as interest rates dropped, providing a source of value for paying off the liabilities, Tr. 2812-14 [Hamm] (citing DX 3357; Tr. 3549-50 [Hamm]; (2) many Western depositors rolled their maturing deposits into new ones; and (3) Western's pre-existing branches generated new deposits. Tr. 637-38, 639-41 [Brummett]; PX 48 at 1; DX 1062 at 0044 (same deposit base level in 1990 as 1982).

These new deposits, which Meritor would not have had but for Western and its pre-existing branches, must be fully credited to Western. Mr. Brummett's model fails to do so because, in his view, "you cannot track any incremental new deposit flow." Tr. 639 [Brummett]. Thus, even if Meritor paid all of Western's original deposit liabilities, that fact, alone, does not indicate whether Meritor had a net gain or loss from its operation of Western over a 10-year period. Glendale, 54 Fed. Cl. at 713.

Fourth, the excess liabilities, which Mr. Brummett treats as a cash expenditure in his model, Tr. 613-14, 616-17, 3358 [Brummett], were not paid and did not have to be paid for several reasons. Interest rates rapidly declined 700 basis points from 1982 until mid-1987. Tr. 643-44 [Brummett]. The imbalance between the market value of Western's assets and liabilities would have disappeared altogether during this time frame had the assets been retained. Tr. 644 [Brummett]; Def. Response No. 11. By selling off all of Western's assets, Meritor recorded a $221 million gain, and it reinvested the proceeds in interest-bearing assets that "substantially" offset "the loss of discount accretion which would have been recorded in income had such assets been held to maturity." DX 3036 at ESL012 1019; Def. Response No. 38.

B. As In *Glendale*, Mr. Brummett's "Cash Flow" Analysis Fails To Reflect The Payment Of Western's Excess Liabilities

The only cash flow statement in evidence for substantive purposes, PX 854, Ex. A.1, shows a total cash outflow or an actual cash loss of negative $386.7 million for 1982. Tr. 561, 605, 3354 [Brummett]. This alleged $386.7 million total cash outflow for 1982 includes a cash loss related to the sale of the Western assets equal to $357.3 million. Tr. 3355 [Brummett]. Mr. Brummett testified that the $357.3 million figure is the cash loss resulting from the sale of the Western assets in 1982 because Meritor's economic basis exceeded the cash receipt by $357 million – i.e., the amount owed by its borrowers exceeded the proceeds by $357 million. Tr. 3354-57 [Brummett]; see also Tr. 514-20, 522, 561, 3312-15 [Brummett]. This argument is baseless primarily because Meritor received a cash inflow and recognized a cash gain when it sold Western's assets, not vice-versa. See Def. Response Nos. 58-61, 115-16.

There is only a $7.3 million difference between Mr. Brummett's accounting and cash costs because, in creating his cash flow statement, Exhibit A.1, Mr. Brummett reversed out of "accounting" the original $822 million discount and the $796 million value ascribed to acquired deposits and FDIC assistance. Tr. 602-04 [Brummett]. Because Exhibit A.1 clearly exposes Mr. Brummett's canard, plaintiffs attempt to obfuscate it by relying exclusively upon demonstratives not in evidence for substantive purposes. See Pl. Response Nos. 58-61, 115. Plaintiffs' attempt at end-running binding precedent is unavailing.

C. Meritor Did Not Assume Net Liabilities Because It Received FDIC Assistance, And Other Intangible Assets, That It Valued At $796 Million

The underlying assumption in Mr. Brummett's model – that Meritor assumed $796 million in excess liabilities – is demonstrably false. The $796 million intangible asset, which Meritor labeled "value ascribed to acquired deposits and FDIC assistance," did not reflect net liabilities assumed by Meritor. Rather, this asset was largely comprised of real assets with identifiable cash flows. Tr. 2202-03 [Hargett] (citing DX 3492, 3503); Tr. 2204-13, 2281 [Hargett].[4]

The determination that the fair market value of Western's liabilities exceeded the fair market value of its tangible assets by $796 million was made before considering the value of the FDIC assistance and the Western deposit base. Tr. 2204 [Hargett] (citing DX 3504; DX 3024 at 15-16). Absent more to the merger, $796 million in goodwill would have been recorded. Id. However, once the FDIC assistance and the Western deposit intangible are taken into account, Meritor did not assume net liabilities of $796 million. These assets had significant value to Meritor and identifiable "cash flows" associated with them that reduced the $796 million net liabilities dollar for dollar. Tr. 2205-06 [Hargett] (citing DX 3503 & 3504); Tr. 2208-09 [Hargett] (citing DX 3505); Tr. 2211-12, 2281 [Hargett]; Def. Response No. 44.

Meritor acknowledged the identifiable nature of the FDIC assistance and Western deposit base by the manner in which it was described (i.e., not labeled "goodwill"), and by internally

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4/ See also, e.g., Tr. (L) 109-110 [Nocella] (citing DX 502 at CSL012 1460); Tr. (L) 234 [Nocella]; Tr. (L) 297-299 [Cooke]; Tr. (L) 302-03 [Cooke], Tr. (L) 304 [Cooke] (Meritor made business judgment that prospective benefits of Western exceeded any potential cost); Tr. (L) 307 [Cooke]; Tr. (L) 307 [Cooke]; Tr. (L) 311-12 [Cooke]; DX 1902 at CSL027 0409; DX 1357 at CSL124 0158, 0161; DX 502 at CSL012 1460; DX 1062 at CSL085 0043.

assigning values which, in the aggregate, indicate that all $796 million of Western's net liabilities were eliminated. Tr. 2205-06 [Hargett] (citing DX 3503 & 3504); Tr. 2207 [Hargett] (citing DX 63 at CSL017 1258); Def. Response Nos. 43-45, 48-50, 56. There also were numerous valuations of the FDIC assistance and the Western deposit base that were performed by, or on behalf of, Meritor during the 1980s. Def. Response Nos. 45, 56. Even under the more conservative range of these valuations, the value of these identifiable assets effectively eliminated the majority of Western's $796 million of net liabilities. Id.; see also Tr. 796-98 [Brummett]; Tr. 2208-09 [Hargett] (citing DX 3505); Tr. 2401 [Hargett]; DX 3424 at 20-21; Tr. 2686-88 [Hamm]; DX 1062 at CSL085 0026, 0043; DX 1357 at CSL124 0142.

D. Plaintiffs Have Not Established Causation

1. The FDIC Assistance Guaranteed Meritor Against Material Loss From The Acquisition Of Western

Other than transaction costs, plaintiffs paid nothing to acquire Western (Tr. 615 [Brummett]), and the FDIC's assistance essentially guaranteed that Meritor would not incur a material loss on the acquired Western portfolio. Tr. 2666, 2767-68, 2775-77, 2783-88, 2852 [Hamm]; Tr. 2169-2213 [Hargett]; see also Def. Response Nos. 13, 34, 41, 58. Meritor was immediately at break-even and, as rates fell, the bank would actually reap substantial gains based upon how the assistance was structured.[5] Def. Response Nos. 10-13, 40-46, 48, 119.

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[5] See also Tr. 2169-70 [Hargett] (citing DX 3491); Tr. 2170-71 [Hargett] (citing DX 3029 at CSL009 0105); Tr. 2171-75 [Hargett] (citing DX 63 at CSL017 1261 and DX 3497); Tr. 2176-77 [Hargett] (citing DX 1357 at CSL124 0161-62); Tr. 2214-15 [Hargett] (citing DX 3507); Tr. 2405, 2407-08, 2311, 2410, 2413-14 [Hargett] (citing DX 1357 at CSL124 0142, 0161-62); DX 1883 at CSL100 0123-24; Tr. 2764-2766 [Hamm] (citing DX 3335); Tr. 2768-69, 2774-76, 2787-93 [Hamm]; Tr. 1650-51 [Gough]; Tr. (L) 109-110 [Nocella] (citing DX 502 at CSL012 1460); Tr. (L) 234 [Nocella]; Tr. (L) 297-299 [Cooke]; Tr. (L) 302-03 [Cooke]; Tr. (L) 304 [Cooke]; Tr. (L) 307 [Cooke]; Tr. (L) 307 [Cooke]; Tr. (L) 311-12 [Cooke]; DX 1902 at CSL027

The guarantee against loss concept is repeatedly mentioned and illustrated in Meritor's contemporaneous documents.[6] A key part of this guarantee was the IMA. The FDIC used IMAs as a merger incentive by guaranteeing a market rate of return on acquired assets. DX 3140 at 72-73; Tr. 3542-44 [Hamm] (citing DX 3066 at 21); Tr. 3546-47 [Hamm]; Tr. (L) 2706-07 [Gough]; Tr. (L) 1527 [Isaac]; see also Def. Response Nos. 12-13.

Thus, Meritor's IMA served two critical functions: (1) provide immediate assistance by subsidizing the net interest income generated by Western's assets and liabilities; and (2) eliminate interest rate risk on Western's portfolio.[7] Def. Response Nos. 12-13, 41. Importantly, however, it did not apply to independent business decisions, such as the sale of Westerns's assets and subsequent reinvestment decisions.[8]

0409; DX 1357 at CSL124 0158, 0161; DX 502 at CSL012 1460; DX 1062 at CSL085 0043.

6/ E.g., DX 386 at 2; Tr. 2172-73 [Hargett] (citing DX 63 at CSL017 1261); Tr. 2175 [Hargett]; Tr. 2170-71 [Hargett] (citing DX 3029 at CSL009 0105); Tr. 721 [High] (citing DX 65 at CSL089 0199); DX 392 at CSL020 1181; DX 394 at CSL089 0112; DX 66 at CSL041 at 0203; DX 1357 at CSL124 0161; Tr. 303-04, 307 [Cooke]; Tr. 2707, 2721-22 [Gough]; DX 423 at 3 ; DX 507 at 2; DX 508 at 1; DX 1886 at 2; Tr. 1650-51 [Gough]; Tr. 3537-38 [Hamm]; Tr. 2170-71 (quoting DX 3029 at CSL009 0105) [Hargett]; Tr. 2169-70 (citing DX 3491) [Hargett]; Tr. 2172, 2175 [Hargett]; Tr. 2214-16 (citing DX 3507 & 3502) [Hargett]; Tr. 2424 [Hargett]; Tr. 714 [High].

7/ Tr. 2181-83 [Hargett] (citing DX 3498 and 3501); Tr. 2189, 2192-94 [Hargett]; Tr. 2194-96 [Hargett] (citing DX 3509); Tr. 2197 [Hargett] (citing DX 392 at CSL020 1130); Tr. 2220 [Hargett] (citing DX 3498, DX 3501 & DX 3508); Tr. 2222-23 [Hargett]; Tr. 2302-03 [Hargett]; DX 1883 at CSL100 0123-24; DX 1357 at CSL124 0162; DX 1062 at CSL085 0037; Tr. 2181-91, 2403-04 [Hargett] (citing DX 3501); Tr. 1348, 1441-42, 1954 [Thakor]; Tr. (L) 2706-07 [Gough]; Tr. (L) 1527 [Isaac]; Tr. 708-09, 749, 753, 785 [High]; Tr. 502, 641-51, 801, 803-05, 866-67, 869 [Brummett]; DX 1357 at CSL124 0089-90; Tr. 2775 [Hamm] (citing DX 3345); Tr. 2783-86 [Hamm] (citing DX 3342); Tr. 2797-98, 2847-48, 3537-38, 3540, [Hamm].

8/ Tr. 1650-51 [Gough]; Tr. 3537-38 [Hamm]; Tr. 2170-71 (quoting DX 3029 at CSL009 0105) [Hargett]; Tr. 2169-70 (citing DX 3491) [Hargett]; Tr. 2172, 2175 [Hargett]; Tr. 2214-16 (citing DX 3507 & 3502) [Hargett]; Tr. 2424 [Hargett]; Tr. 714 [High].

2. **Mr. Brummett Calculates Alleged Costs Incurred By Meritor That Were Not, And Could Not Have Been, Due To The Breaches**

Given the break-even structure afforded by the FDIC's guarantee against loss, Mr. Brummett's attempt to quantify the separate financial results for Western includes costs incurred by Meritor that were not and could not have been due to the breaches. Thus, the results of Mr. Brummett's analysis are neither relevant nor meaningful to measuring Meritor's cost of performance. Tr. 2213-14 [Hargett] (citing DX 3493); Tr. 2796, 2786-87, 2789-93, 2794-96, 2799-98, 2847-49, 3133-35 [Hamm]; DX 3342; see also DX 63 at 10.

Contrary to plaintiffs' evasive and non-responsive answer (see Pl. Response No. 37), witnesses repeatedly testified that Meritor voluntarily and independently sold Western's assets irrespective of the contract or any regulatory supervision. See Def. Response No. 37. Meritor's business judgment to sell all of Western's assets by mid-1986 was unnecessary because the IMA provided an economic structure which insulated Meritor from losses on those assets and, if anything, would have resulted in significant profits had they been retained. See Def. Response Nos. 12, 13, 37, 54. By selling Western's assets prematurely, however, Meritor relinquished this economic guarantee.[9] Thus, even if operating Western resulted in a material loss, as Mr. Brummett claims, the loss resulted from management's independent decisions, rather than from reliance upon the contract with FDIC which included a guarantee against loss on the acquired assets.

9/ Tr. 2169-70 [Hargett] (citing DX 3491); Tr. 2170-71 [Hargett] (quoting DX 3029 at CSL009 0105); Tr. 2217-18 [Hargett] (citing DX 3510); Tr. 2172, 2175, 2228, 2424 [Hargett]; Tr. 2214-16 [Hargett] (citing DX 3507 & 3502); Tr. 2793, 2794-96, 3537-38 [Hamm]; DX 63 at 10; Tr. 1650-51 [Gough]; Tr. 714 [High].

In addition, more than 91 percent of the $687.8 million cash loss that Mr. Brummett calculated for Western is incurred prior to the 1988 MOU. Tr. 910-11 [Brummett]; PX 854 at Ex. A.1; Tr. 356 [Brumbaugh]. Because these alleged expenditures were not lost due to the breach, causation does not exist. See Tr. 2214-15 [Hargett] (citing DX 3507); Tr. 2217-18 [Hargett] (citing DX 3507); Tr. 2228 [Hargett]; Tr. 2786-87 [Hamm] (citing DX 3342); Tr. 2791-97, 2799-2802, 2847-49, 3133-35 [Hamm]; see also Def. Response Nos. 1-2, 9, 51-55.

It is implausible that Meritor could have suffered such an enormous ($630.1 million), pre-breach cash loss and not acknowledged it in public disclosures. Tr. 2216 [Hargett] (citing DX 3507); Tr. 2789-91 [Hamm]; Def. Response Nos. 58-61. The losses that Mr. Brummett has Meritor incurring in the first nine months of the contract are three and a half times all of the income it reported for the preceding five years. Tr. 2789-91 [Hamm]; see also Def. Response Nos. 14, 115. Because Meritor could have calculated the alleged losses from the Western asset sales with exactitude, plaintiffs' model further implies that Meritor elected to incur total losses of nearly $700 million – an unbelievable hypothesis. Tr. 2789-91 [Hamm]; see also Def. Response Nos. 37, 52, 54-55, 58-60.

3. Mr. Brummett's Alleged Costs Are Unrelated To The Contract Because, According To Plaintiffs' Own Analysis, Such Costs Never Would Have Been Recouped Had The Contract Been Fully Performed

The contract, as structured, would not have produced the types of losses described by Mr. Brummett. See §§ I.D.1, I.D.2, above; see also Def. Response Nos. 34, 39. Causation is lacking because plaintiffs' alleged losses are unrelated to the contract or the breach, and the breach did not result in Meritor's failure to recoup the alleged costs.[10] Nonetheless, assuming Mr. Brummett's calculations are accurate (which we dispute),[11] plaintiffs would have incurred these losses even if the FDIC had honored the contract. Dr. Goldstein's supposedly conservative "but for" model projects that Meritor would have suffered another $650.9 million in losses from 1988-91 and a net loss of $241.6 million by 1997. PX 541A at 2 ("Net Income" line).

Dr. Hamm further demonstrated that Meritor, without Western, would have recouped only a small fraction of the costs estimated by plaintiffs, assuming Meritor was able to achieve in the no-breach world what it was unable to achieve in the real world – recurring operating income. Tr. 2835-52 [Hamm] (citing DX 3375, DX 3364A, DX 3372A, DX 1365 at 5); DX 113 at 2; Tr. (L) 682-84 [Hillas]. See also DX 3023 at 93-98.

In response, plaintiffs argue for the first time that Meritor's alleged pre-breach losses would have been recouped "[t]hrough earnings." Pl. Response No. 39. None of plaintiffs'

10/ See Tr. 2214-17 [Hargett] (citing DX 3493, DX 3502 & DX 3507); Tr. 2786-87 [Hamm] (citing DX 3342); Tr. 2791-97, 2799-2802, 2847-49, 3133-35 [Hamm]. See also, e.g., Def. Response Nos. 1-2, 9, 34, 39, 51-55.

11/ See Tr. 910-11 [Brummett]; PX 854 at Ex. A.1.

citations show what Meritor's earnings would have been or how they would have been achieved, however.

E. Plaintiffs Have Not Proven Foreseeability

1. Meritor's Voluntary And Independent Business Decisions Were Unforeseen By The Regulators

First, the loss of the stock market value created in 1983 was unforeseeable in 1982 as the probable result of a future breach, because the decision to engage in an IPO was an independent, unanticipated business decision. Tr. 820-21 [Brummett] (decision to convert in 1983 was voluntary and independent); see California Fed. Bank, FSB v. United States, 54 Fed. Cl. 704, 713-14 (2002); see also Def. Response Nos. 1, 32 (foreseeability standard); DX 1358; DX 1357 at CSL124 0157-63; DX 1359; Tr. 212, 215 [Brumbaugh]; DX 432 at 4; DX 94 at 132; Tr. 1633, 1672 [Gough].

Second, it also was unforeseeable that, in April 1982, Meritor would sell off all of Western's discounted assets, some $2.1 billion by mid-1986, and thus choose to forego $512 million in accretion of purchase discount represented in Mr. Brummett's model as a "cost of performance." See Def. Response Nos. 2, 37; Tr. (L) 99-100 [Nocella]; Tr. (L) 289 [Cooke]; Tr. 3029-31 (L) [Fritts]; Tr. (L) 1512, 1522-23, 1525-26, 1534-35 [Isaac]. The IMA was intended to "try to get them through this high rate climate on that portfolio" until the Western assets recovered their value. Tr. (L) 1517, 1527 [Isaac]; Tr. (L) 2707 [Gough]; see also Tr. (L) 2960, 3030-31 [Fritts]; DX 510 at 9; DX 3 at CSL002 0346; Tr. 652-54 [Brummett].

2. Mr. Brummett's Model Is Wildly Inconsistent With The Expectations Of The Parties At The Time Of Contract Formation

It is inconceivable that the parties, in 1982, so completely misjudged the impact of the acquisition, as Mr. Brummett's model implies. The FDIC and Meritor expected this to be at least a break-even deal for PSFS. See Def. Response Nos. 10, 13, 40, 42, 46. Mr. Brummett nonetheless contends that, after nine months, Meritor had already suffered a $385 million cash loss. Tr. 2789-91 [Hamm]; see also Def. Response Nos. 14, 115. Plaintiffs' suggestion that Western was such an immediate and significant losing proposition is illogical, and tantamount to saying that Meritor threw its hat into the Western bidding ring because it wanted to destroy its own institution.

In reality, Meritor and the regulators anticipated that Western, with assistance, would greatly strengthen the combined association. Like other banks, Meritor was severely affected by high interest rates.[12] Meritor acquired Western because it allowed management, at no cost, to eventually improve Meritor's capital and earnings; rapidly restructure its balance sheet; improve its negative $1.9 billion gap position and moderate its extreme interest rate risk exposure; eliminate a source of competition; and obtain a valuable deposit franchise. The merger accomplished these objectives. See Def. Response Nos. 1-2, 10-13, 15, 37, 41-46, 48-55, 58-61; see also Pl. Response Nos. 9 & 40 (conceding enormous benefits).[13]

12/ E.g., Tr. (L) 198-90 [Nocella]; Tr. (L) 297 [Cooke]; DX 62 at CSL089 0025; DX 62 at CSL089 0024; DX 62 at CSL089 0036; DX 64(a) at CSL089 0120.

13/ See also DX 1883 at CSL100 0123-24; PX 41 at CSL009 0272; DX 3 at CSL002 0383; DX 1902 at CSL027 0409; DX 432 at 4, ¶6; DX 1365 at CSL012 2266; DX 502 at CSL012 1460; DX 395 at CSL012 1459; DX 1357 at CSL124 0158, 0161; DX 1062 at CSL085 0043; DX 63 at CSL017 1249, 1261; DX 3096 at 39; DX 1902 at 4; DX 1883 at 2; DX 65 at 3; PX 25 at 1;

F. Plaintiffs Have Not Proven Their Calculation Of Their Alleged Cost Of Performance With Reasonably Certainty

Plaintiffs' model confuses "paper" costs with economic ones; it selectively identifies certain transactions as costs, while ignoring obvious ways in which Meritor benefitted from the same transactions; and, as indicated, it fails to distinguish among actions required by the contract and independent business decisions. E.g., Tr. 2788-89 [Hamm] (citing DX 3347); Tr. 2788-89 [Hamm] (citing DX 3347); Tr. 2791-93, 2794-96, 2799-2802, 2848-49, 3133-35, 3549-50 [Hamm]; Tr. 1444-45 [Thakor]; Tr. 2214-32 [Hargett] (citing DX 3493), DX 3506-15; Tr. 1651 [Gough]; Tr. 820-21; 3379-80 [Brummett]. Def. Response Nos. 9, 37, 53-54, 117-18. Mr. Brummett's model also is unreliable because it is divorced from the contemporaneous record and real-world market conditions. See Def. Response Nos. 50, 58, 127.

1. Mr. Brummett's Methodology Is Speculative And Fundamentally Inconsistent

Even ignoring that Mr. Brummett's model is contaminated by Meritor's independent business decisions, his methodology is speculative and internally inconsistent.[14]

DX 3096 at 39, lines 5-9; Tr. (L) 76, 99, 109-10, 130-31, 191-92 [Nocella] (citing DX 1358 at 3); Tr. (L) 135 [Nocella] (citing DX 94 at CSL085 0056; Tr. (L) 288, 297-98 [Cooke]; Tr. (L) 302 [Cooke], citing DX 1357 at CSL124 0158; Tr. (L)) 303-04, 307, 311-12 [Cooke]; Tr. (L) 696 [Hillas]; Tr. 694, 927-28 [High]; Tr. (L) 2707, 2721-22 [Gough]; Tr. 1597-98 [Gough]; Tr. 1671-72 [Gough] (citing DX 3001); Tr. 1673 [Gough]; Tr. 502, 621-23, 655-57 [Brummett]; Tr. 862-63, 503-04 [Brummett]; Tr. 796-98, 864-65 [Brummett]; Tr. 745-46, 748-49 [High]; Tr. (L) 914-15 [High]; Tr. 2666, 2696 [Hamm]; Tr. 2767-68 [Hamm] (citing DX 3337); Tr. 2176-77 [Hargett] (citing DX 1357 at CSL124 0161); Tr. 2210 [Hargett] (citing DX 502 at CSL012 1460); Tr. 1444-45 [Thakor].

14/ E.g., Tr. 2231 [Hargett] (citing DX 3491); Tr. 2232-39 [Hargett] (citing DX 3517); Tr. 2788-89 [Hamm] (citing DX 3347); Tr. 2789-91, 2799-2802, 2806-08 [Hamm]; Tr. 2811-12 [Hamm] (citing DX 3351); Tr. 2812-14 [Hamm] (citing DX 3357); Tr. 2816-17 [Hamm] (citing DX 3358); Tr. 2820-21 [Hamm] (citing DX 3358A); Tr. 2821-23, 2848-49, 3133-35, 3555-56 [Hamm].

First, Mr. Brummett's attempt to quantify Western's financial results is inherently speculative because, as noted above, Meritor did not maintain separate financial reporting for Western. Without these records, Mr. Brummett's effort is unavoidably conjectural and assumption-driven. And, even if separate reporting existed for Western, Mr. Brummett has made no attempt to isolate the impact of Meritor's independent business decisions upon Western's financial results. Instead, the fictitious intercompany receivable he uses to undertake numerous allocations produces meaningless results. Tr. 2232-33 [Hargett]; Tr. 2799-2802, Tr. 3555-56 [Hamm].

Second, Mr. Brummett's analysis effectively ignores the full extent to which market conditions impacted the "Western" portfolio. For example, Mr. Brummett attributes $33 million of cash income from the IMA to Western but, because of his flawed methodology, he neglects significant income generated by "Western" after the fall in interest rates. Dr. Hamm and Mr. Hargett explained how plaintiffs' model ignores these additional benefits, including how it fails to capture the appreciation in value of the replacement assets as interest rates came crashing down from 1982-87; how it reinvests proceeds from the Western asset sales at below market rates; and how it does not make adequate allowance for the prepayments on Western's assets that effectively have those assets paying off at par. Tr. 3554-56 [Hamm]; Tr. 2223-28 [Hargett] (citing DX 3511-13).

Third, Mr. Brummett's attempt to reconstruct Western's separate financial results is fundamentally inconsistent because he erroneously credits the non-Western portion of Meritor with billions of dollars of assets it could not have held without Western. Dr. Brumbaugh contends that the ability to leverage regulatory "goodwill" was the primary benefit that Meritor received from the transaction. PX 855 at 30-31. Although this opinion is incorrect, plaintiffs' model nonetheless fails to credit Western for the billions in assets and liabilities that Meritor could not have held without the regulatory capital that Mr. Brummett attributes to Western. That is, plaintiffs have failed to credit Western with what Dr. Brumbaugh contends was the primary benefit from the acquisition. Tr. 2233-34, 2237-38 [Hargett] (citing DX 3517; DX 3521).

______Using plaintiffs' own model, Mr. Hargett determined the dollar amount of assets that Mr. Brummett has inappropriately attributed to the non-Western portion of Meritor. The magnitude of Mr. Brummett's incorrect allocation – e.g., roughly $2.9 billion in missing assets as of December 31, 1985 – is enormous given Western's overall size at that date ($2.978 billion per Mr. Brummett, see PX 854 at Ex. B). Tr. 2236-37 [Hargett] (citing DX 3520).

Fourth, Mr. Brummett's model erroneously depicts non-cash accounting entries as economic costs. Tr. 2802-05 [Hamm] (citing DX 3352 (Line 19)). Given the particular facts and circumstances of this case, the par or book value (upon which Mr. Brummett relies) is irrelevant to determining what the economic impact of the loan sales are because Meritor's economic basis in these loans was considerably less than the par value or their book value; rather, its stake was the marked-to-market value. This is because Meritor received, and acknowledged receiving, financial assistance and other assets with an economic value sufficient to make the balance sheet balance on an economic basis. Id.

2. Certain Of Mr. Brummett's Assumptions Are Overly Simplistic, Arbitrary, And/Or Implausible

Mr. Brummett's model includes certain assumptions that are oversimplified, arbitrary, and/or implausible. His results misrepresent what the financial reporting for Western would have shown, and they uniformly understate Western's income, thereby overstating Meritor's alleged cost. Tr. 2799-2802 [Hamm]; Tr. 2239-54 [Hargett] (citing DX 3522). His more egregious errors include:

- Oversimplified and incorrect reinvestment rates: See Def. Response Nos. 62-64; Tr. 2239-40 [Hargett]; Tr. 537 [Brummett]; Tr. 2816-17 [Hamm] (citing DX 3358); Tr. 2820-21 [Hamm]; Tr. 2241-46 [Hargett] (citing DX 3524 & DX 3526); DX 3024 at ¶57 & Ex. G; Tr. 2799-2802 [Hamm]; Tr. 2816-17 [Hamm] (citing DX 3358); Tr. 2820-21 [Hamm] (citing DX 3358A); Tr. 2823-26 [Hamm] (citing DX 3360 & 3361).
- Unfounded basis for allocating IPO proceeds: See Def. Response Nos. 57, 40, 119.
- Inconsistent allocation of gains/(losses): See Def. Response No. 68.
- Unfounded and arbitrary allocation of synthetic hedging costs: See Def. Response No. 68; Tr. 2249 [Hargett] (citing DX 3522); Tr. 2797-98 [Hamm].
- Overstated and arbitrary G&A expense ratio; See Def. Response Nos. 65-66; Tr. 2249-50 [Hargett] (citing DX 3522); see also DX 3024 at ¶¶ 69-72 & Ex. K; DX 1357 at CSL124 0155; Tr. 2802, 2808, 2811-12, 2816, 2821-22 [Hamm] (citing DX 3351 & DX 3358); Tr. 2821-23 [Hamm].
- Allocation of charge-offs unrelated to Western's assets: See Def. Response No. 68; Tr. 2799-2802 [Hamm]; Tr. 2253-54 [Hargett] (citing DX 3522, 3515); Tr. 2420 [Hargett].
- Overstated CD rates: See Def. Response No. 118; Tr. 2808-09, 3554 [Hamm].

Plaintiffs' methodological errors are significant. As Dr. Hamm demonstrated, when Mr. Brummett's model is corrected for these errors alone, Meritor's "cost" of performance disappears altogether. Tr. 2823-26 [Hamm] (citing DX 3360-61); Tr. 2225-64 [Hargett] (citing DX 3425, 3529); DX 3024 Exs. F & F-1.

III. PLAINTIFFS' EXPECTANCY CLAIMS FAIL AS A MATTER OF FACT AND LAW

A. Dr. Finnerty's 1988 Damage Estimate Fails For Lack Of Causation, Reasonable Certainty, And Foreseeability

The causation test in this Court requires a "direct and inevitable" nexus between the breach and claimed damages. Myerle v. United States, 33 Ct. Cl. 1, 27 (1897); Ramsey v. United States, 101 F. Supp. 353, 357 (Ct. Cl. 1951), cert. denied, 343 U.S. 977 (1952); J.D. Hedin Constr. Co. v. United States, 456 F.2d 1315, 1330 (Ct. Cl.1972). The foreseeability test requires that plaintiffs prove that both the type and amount of damages claimed were, at the time of contract formation, foreseeable consequences, "in the ordinary course of events," of the breach. E.g., Landmark, 256 F.3d at 1378 (citing Restatement (Second) of Contracts § 351(2) and 5 Arthur Corbin, Corbin on Contracts, § 1012 at 88 (1964)). The "reasonable certainty" test requires that both the fact of harm, and quantum, not be speculative. E.g., Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1023-24 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997).

With respect to causation and reasonable certainty, Dr. Finnerty did no modeling or analysis; he simply assumed the loss of every dollar of Meritor's August 1, 1988 value, ex post after the breach between 1988 and 1992, was the result of the breaches. Tr. 1113, 1115-17, 1124 [Finnerty]; Tr. 1435 [Thakor]. On this basis alone, plaintiffs failed to prove their 1988 damages claim.

In addition, Dr. Finnerty's causation assumption implicitly assumes, ex post, that despite the terminal, non-breach obstacles that Meritor faced up to and after the 1988 MOU, the breach caused a decline in value that was 61 percent greater than Meritor's actual August 1, 1988 market capitalization. This assumption is belied by: (1) Meritor's historical performance which declined substantially before the breach, Tr. 2509-10 [Hamm]; Tr. 1437-51 [Thakor]; DX 1909 at CSL055 0438-0443 (High presentation); Tr. (L) 1032-34 [High]; Tr. (L) 3132-36, 3139-40 [Lutz]; Def. Response Nos. 3, 4, 8, 17, 18, 19; see also Suess v. United States, 52 Fed. Cl. at 226-27; (2) Meritor's severely troubled operating condition, and its huge operating losses, both before and after the breach for reasons unrelated to the breach, Tr. 1433-55 [Thakor]; Tr. 2526-28, 2617-29, 3123-25 [Hamm]; Tr. (L) 5618, 5635 [Brumbaugh]. Def. Response Nos. 3, 4, 6, 8, 17-20, 73-75, 80; (3) plaintiffs' concession that Meritor would have massively shrunk by at least $10 billion, and sustained an additional $400 million in losses between 1989-91, absent the breach, PX 541A, Ex. 1 at 1-2 [Goldstein Model]; Tr. 1075-77, 1118, 1123 [Finnerty]; and (4) Meritor's independent business decision to forego capital raising from existing shareholders or new investors, Tr. 1462-68 [Thakor]; DX 1909 at 0445; Tr. (L) 1071:2-16 [High]; Hughes Communications Galaxy, Inc. v. United States, 271 F.3d 1060, 1071 (Fed. Cir. 2001) (independent business decisions break causation chain). Indeed, Meritor's survival for almost four and a half years after the 1988 breach, and the de minimus decline in Meritor's market value after each breach, further indicates other causes were at work. See Tr. (L) 5618, 5635 [Brumbaugh]; Tr. 1456-1472 [Thakor]; DX 3304A. Additionally, external economic conditions caused the performance of Meritor and other banks to deteriorate from May 1988 to December 1992. See Def. Responses to Nos. 5C, 6.

With respect to foreseeability, plaintiffs failed to produce any evidence at trial demonstrating that regulators foresaw, "in the ordinary course of events" at the time of contract formation, that raising Meritor's capital requirements to the extent they did would have resulted in the total loss of Meritor's market value to the tune of $278 million as asserted by Dr. Finnerty. Additionally, plaintiffs' foreseeability assumption is belied by: (1) the failure of the market to recognize significant harm flowing from the breaches, or the branch divestitures; if thousands of sophisticated investors foresaw no harm at the time of the breaches, it necessarily follows that regulators could not have foreseen the type and amount of harm plaintiffs claim at the time of contract formation, Tr. 1456-61 [Thakor]; (2) Meritor itself was economically insolvent on a market value basis at the time of contract formation (Def. Response No.15, 11, 40), precluding the foreseeable loss of $278 million, or $171 million (before gross up); (3) relatedly, Meritor was a mutual, not a stock, institution at the time of the contract, and Meritor's $171 million market capitalization in 1988 was the result of its post-contract conversion and the injection of millions of dollars by new shareholders, which regulators did not foresee, see Tr. (L) 2697, 2699, 2713 [Gough]; and (4) regulators imposed higher capital requirements to make Meritor safer, not to cause its decline and ultimate seizure as claimed by plaintiffs, precluding foreseeability.

In addition, Dr. Finnerty's two adjustments to Meritor's market capitalization – both of which inflate upwards Meritor's pre-breach value – were proven to be without foundation. First, with respect to Dr. Finnerty's "leakage" theory and use of the NASDAQ Bank Index to predict movements in Meritor's stock price between May 19, 1988 and August 1, 1988, the publications he cited for support addressed non-breach issues, not the breach. PX 731, PX 727, PX 868, DX 3129; Tr. 1515-16 [Thakor]; Tr. 1128-30, 1132-38 [Finnerty]. The only basis for using Meritor's average stock price during the 30 days before May 19, 1988 to estimate Meritor's "pristine" stock price, was, according to Dr. Finnerty, because of the possibility of informational leakage. Tr. 1139-40; see also Tr. 1142-43 [Finnerty] (initially deeming it unnecessary to make leakage adjustment). Finally, use of the NASDAQ Bank Index to predict movements in Meritor's stock price between May 19, 1988 and August 1, 1988 was proven to be inappropriate. See Def.'s Response 24; e.g., Tr. 1502-14, 3472-83 [Thakor]; DX 3543.

Second, Dr. Finnerty's application of a control premium to gross up by 50 percent Meritor's market value is unfounded because: (1) the academic research in finance universally concludes that control premiums – which arise from synergies and efficiencies specifically identified in an acquisition – cannot be assumed outside an acquisitions context, and Dr. Finnerty assumes no acquisition of Meritor, see Tr. 3448-72, 1493 [Thakor]; Tr. 2528--36 [Hamm]; DX 3537; DX 3539; Def.'s Responses 7, 21; (2) the fact that no institution sought to acquire Meritor, e.g., Tr. 1157 [Finnerty], let alone at a 50 percent premium, is prima facia evidence that such a premium is unwarranted, and that the market did not understate Meritor's true value, Tr. 2536-40 [Hamm]; see also Def. Responses Nos. 21, 22; and (3) even if plaintiffs established the appropriateness of a control premium, it is precluded legally because it inures to the benefit of shareholders, not the firm on whose behalf plaintiffs brought this derivative suit. Tr. 1499-1500 [Thakor].

Plaintiffs' assertion that control premiums are applied in tax and real estate appraisals is inapposite for numerous reasons, including the fact that no readily observable market values exist in those contexts, unlike here. Tr. 3465-67 [Thakor]. Plaintiffs' hypothetical, posed to Professor Thakor, suggesting an identical control premium for two identical targets is inapposite; one would need to know information about the acquiror to know whether efficiencies and cash flows could be enhanced and, thus, whether a control premium would be paid. Tr. 3517-19 [Thakor].

B. Dr. Finnerty's 1992 Damages Estimate Is Conceptually Flawed And Vastly Overstated

Dr. Finnerty calculates the "actual" value of Meritor based upon the purported net value of its assets to be $112 million as of December 11, 1992. In doing so, he ignores not only evidence of the actual market value of Meritor's assets and liabilities as of that date, but also the actual market valuation of Meritor for any date during the two years prior to December 11, 1992. Tr. 1097-98 [Finnerty]; Tr. 2564 [Hamm]; Tr. 1528 [Thakor]; DX 3304A; see also Def. Response No. 28.

As this Court recognized, "long-term market valuation is often a very reliable indicator of value." Glendale Federal Bank, FSB v. United States, 43 Fed. Cl. 390, 402 n.5, aff'd in part, rev'd & vacated in part, 239 F.3d 1374 (Fed. Cir. 2001). Dr. Finnerty, in both his first and second reports, valued Meritor as of April 5, 1991, in connection with the second breach found by this Court. He calculated the actual market capitalization as of April 5, 1991, as $32 million (prior to his application of a control premium of 40 percent). Tr. 1097 [Finnerty]. As of December 10, 1992, Meritor's market capitalization was $13.7 million. Tr. 1097-98 [Finnerty]. Dr. Finnerty's estimate that Meritor was actually worth $112 million at the end of a very difficult two-year period, see Tr. 1099 [Finnerty] (showing 1991-92 losses), is implausible, given the alleged harm plaintiffs attach to the 1991 breach and that Meritor's average market capitalization had remained far below $100 million for the previous three years, and was one-eighth of the claimed December 11, 1992 value on the previous day. Tr. 1097-98 [Finnerty]; see also Tr. 1528-32 [Thakor].

Dr. Finnerty's concern about informational "leakage" in 1992 of a forthcoming breach, and potential seizure, as justification for abandoning market valuation altogether is without merit because: (1) if there was such leakage as he alleges, he could have dealt with it consistently (albeit erroneously), as he did with his 1988 valuation, by backing up the breach date to the point of alleged public disclosure, Tr. 1532 [Thakor]; (2) selecting any date during the two years before December 11, 1992 still results in a market valuation of less than $50 million, proving the baseless nature of his $112 million valuation, Tr. 1532 [Thakor]; DX 3304A; and (3) Dr. Finnerty failed to establish leakage of a forthcoming breach in 1992, as opposed to the uncertainty surrounding Meritor's economic viability, massive continuing operating losses, and numerous operating problems, Tr. 1532-33 [Thakor].

In addition to being inconsistent with Meritor's market capitalization and Dr. Finnerty's own prior analyses, see Def. Response No. 28, the 1992 estimate is methodologically flawed because: (1) it relies upon book values, which historically overstated true values for thrifts in the late 1980s and early 1990s, Tr. 1521-23 [Thakor]; (2) it improperly relies upon the $181 million premium paid by Mellon to the receivership for a "clean bank" with FDIC guarantees – and without Meritor's severely troubled asset portfolio and high cost liabilities which remained with the receivership, Tr. 1523 [Thakor]; (3) fails to account for interest rate risk upon the value of assets, Tr. 1524-25 [Thakor]; and (4) assumes a loan loss adjustment of $109 without any asset by asset analysis, Tr. 1524-25 [Thakor].

Finally, the FDIC's contemporaneous estimate of the shareholders' value in the receivership, based upon an extensive Asset Valuation Review performed by Price Waterhouse and the assumption that Mellon would absorb $170 million of Meritor's losses, was $40 million, scarcely more than a third of Dr. Finnerty's "conservative" estimate. DX 1022 at 16-18; PX 502B at 48275. Dr. Finnerty's implausible valuation as of December 11, 1992, should be rejected.

IV. PLAINTIFFS' "WOUNDED BANK" DAMAGES ARE IMPLAUSIBLE

Plaintiffs' "wounded bank" claim should be dismissed as highly speculative and contradicted by the historical record. See Def. Responses 73-85. The wounded bank damages for downsizing-related transaction costs and removal of recourse provisions are inconsistent with Meritor's need to downsize massively, regardless of the breaches. PX 541A at 7 & Ex. 1, p. 1 ($10 billion reduction needed); Tr. 1075-77, 1118 [Finnerty]; Tr. 1489-91 [Thakor]; Tr. 2617-29, 3123-25 [Hamm]; DX 68 at 2; DX 1267; see also Tr. (L) 650, 681, 728-29; Tr. (L) 5589; Tr. (L) 720-21; Tr. 1363-65 [Hillas]; DX 3406; DX 3365; DX 3366; Tr. 2633-34 [Hamm] (Hillas: DX 1303 at 2, student loan portfolio and investment advisory business sold for non-breach reasons); Tr. 2654-55 [Hamm]. Meritor would have had to sell the identical assets and branches to achieve this result. Id.; see also Def. Responses 4, 73, 75, 80.

Dr. Brumbaugh also advances a claim for investment banking and financial advisory fees totaling $7.484 million. PX 855 at 26-27. Given that Meritor was in a "very difficult situation in 1989," Tr. (L) 5635 [Brumbaugh]; would have suffered "significant economic difficulties" even in the absence of the breaches, Tr. (L) 5618 [Brumbaugh]; and needed to massively downsize, it is manifest that Meritor would have made roughly the same expenditures for investment banking or financial advice from 1989 forward. Mr. Hillas confirms this: even in the absence of the 1988 MOU, Bankers Trust would have been retained to provide investment advice. Tr. 1312 [Hillas]; see also Tr. (L) 2475-76; 2655 [Finnerty]; Tr. 1355-56 [Hillas]; DX 733; DX 1267 at 366.

Plaintiffs provide no support for the claim that Meritor could have "runoff" $10 billion in deposits within two years without asset sales. Dr. Hamm acknowledged that an institution can control growth through gradual runoff of deposits and assets, not execute a massive shrink of $10 billion in two years without asset sales. Tr. 2829-30 [Hamm]. Dr. Goldstein claimed, without any analysis, that deposits could have been runoff absent branch sales, but did not address the fact that every dollar of "runoff" must be funded with one dollar's worth of assets, and that Meritor had less than $1 billion in liquidity. DX 68 at 27 (1987 Annual Report). In any event, Meritor was free to shrink in this manner notwithstanding the breach, but did not because doing so was untenable. Finally, according to plaintiffs, the "Philadelphia Plan" envisioned a limited $1-2 billion shrinkage – through asset sales and divestitures, see DX 68 at 8 – belying their implausible claim that a $10 billion shrink, which they concede was necessary absent the breach, could have been accomplished absent sales and divestitures.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny plaintiffs' damages claims.

Respectfully submitted,

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