2007-5063, -5064, -5089

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FRANK P. SLATTERY, JR., on behalf of himself and on behalf of all other similarly situated shareholders of Meritor Savings Bank,

Plaintiff-Cross Appellant,

and

STEVEN ROTH,
and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in 93-CV-280, Senior Judge Loren A. Smith.

BRIEF FOR PLAINTIFF-CROSS APPELLANT FRANK P. SLATTERY, JR.

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November 20, 2007

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CERTIFICATE OF INTEREST OF PLAINTIFF - CROSS-APPELLANT
FRANK P. SLATTERY, JR.

Counsel for the plaintiff Frank P. Slattery Jr., certifies the following:

1. *The full name of every party or amicus represented by me is:*

Frank P. Slattery Jr., on behalf of Meritor Savings Bank, for himself and for all other shareholders of Meritor Savings Bank.

2. *The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:*

The named plaintiff brings this action in lieu of the FDIC on behalf of Meritor Savings Bank in the interest of all Meritor shareholders.

3. *All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me.*

X There is no such corporation as listed in paragraph 3.

4. *The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:*

Winston & Strawn LLP (Thomas M. Buchanan, Eric W. Bloom, Peter Kryn Dykema, Robert A. Berger).

Dated: November 20, 2007

By: Thomas M. Buchanan
Thomas M. Buchanan

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for Plaintiff-Cross Appellant ("Plaintiff") states that he is unaware of any other appeals from this civil action that have been before this or any other appellate Court, but that issues raised by this appeal overlap with issues raised in other Winstar cases.

JURISDICTIONAL STATEMENT

The Court of Federal Claims had jurisdiction over this Tucker Act suit under 28 U.S.C. § 1491. The Government's contention that the non-appropriated funds instrumentality ("NAFI") doctrine defeats jurisdiction was correctly rejected by the trial court; moreover, the argument was waived under the reasoning of the Supreme Court in Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

The trial court correctly ruled that it lacked jurisdiction over the claims of Plaintiffs-Cross Appellants Roth, et al. ("Intervenors").

This Court possesses jurisdiction of this timely cross-appeal from a final judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES

The briefs filed by Defendant-Appellant United States ("the Government"), Intervenors, and *Amicus Curiae* Federal Deposit Insurance Corporation ("FDIC") raise the following issues:

1. Whether the NAFI doctrine is applicable to FDIC and whether the Government timely raised the NAFI issue in the first place;

2. Whether the trial court correctly construed the parties' contract;

3. Whether the trial court's factual findings, upon which its contract interpretation is based, are clearly erroneous;

4. Whether the trial court's findings of breaches are clearly erroneous;

5. Whether the trial court abused its discretion, or committed clear error, in calculating Meritor's[1] damages;

6. Whether the trial court correctly ruled that the Government cannot reduce Meritor's damages by forcing Meritor to reimburse the Government for costs incurred in breaching the contract; and

7. Whether the trial court had jurisdiction over Intervenors' claims.[2]

In addition, specific findings made by the trial court present the issues that are the subject of Meritor's cross-appeal, namely:

8. Whether, on the unique facts of this case, Meritor is entitled to disgorgement of the money FDIC saved as a result of the merger;

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[1] We adopt the naming convention of the other parties to the appeal, referring to both Meritor and its predecessor (the Philadelphia Savings Fund Society) as "Meritor."

[2] Intervenors' brief seeks to raise an issue as to the identity of the shareholders to whom FDIC-Receiver should distribute the fruits of this proceeding. We agree with the trial court below, however, that neither it nor this Court can reach the issue presented for want of jurisdiction. See A000004-7.

9. Whether a disgorgement award should include the earnings that the Government realized through the use of the money it saved as a result of Meritor's contract performance.

STATEMENT OF THE CASE – FINDINGS BELOW

Plaintiff supplements the Government's Statement, as follows.

I. Pretrial

This breach of contract case arose out of a 1982 assisted merger in which FDIC promised to allow Meritor to book, as goodwill, the net liabilities of the acquired thrift.[3] Plaintiff's complaint alleged that, during the years that followed, the Government repeatedly broke this promise, ultimately causing Meritor's seizure and liquidation in December 1992. Because FDIC's treatment of Meritor's goodwill was not dictated by statute – unlike the fact pattern in the Winstar cases – resolution of Plaintiff's claims would require the trial court not only to interpret the government's goodwill promise, but also to determine whether the government breached that promise, a question that largely turned on issues of intent. Extensive discovery was devoted to both issues.

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[3] The 1982 agreement provided:

> 3. The difference between the liabilities assumed and the total of the market value of the Western assets, less reserves, may be treated as goodwill and amortized on a straight-line basis up to fifteen (15) years.

A400947.

Prior to trial, the Government moved for partial summary judgment. In briefing that motion, the parties presented contending interpretations of the Government's goodwill commitment. In denying summary judgment, the trial court held, *inter alia*, that "[a]t issue in this case is whether there was an agreement to treat goodwill as an asset as real as cash. This is a factual determination." Slattery v. United States, 35 Fed. Cl. 180, 186 (1996) (A000066).

In its summary judgment papers, the Government also argued, as it does here, "that regardless of whether or not the goodwill was counted, Meritor was in such a 'precarious' and 'progressively grim' financial condition that the FDIC had 'adequate bases' for" taking the actions it did. A000065. Again, the trial court found that triable fact issues were presented: "The government appears to have misunderstood plaintiffs' argument. Plaintiffs are not arguing that FDIC was prohibited from taking any supervisory action in regards to Meritor. They merely contend that any such action must include the counting of goodwill or be a breach of the contract to count such goodwill." Id.

The Government has not appealed the trial court's denial of summary judgment.

II. The Liability Trial

During the four-month liability trial, these two issues – the meaning of the Government's goodwill commitment, and whether the Government breached that commitment – were examined through the testimony of 28 witnesses and well over one thousand exhibits.

A. The Meaning of the Goodwill Commitment

Both parties introduced extensive parol evidence. The trial court summarized: "Through the voluminous testimony presented at the ... trial, a clear record of the intent of the parties as they negotiated the 1982 [Memorandum of Understanding ("MOU")] was presented.... Four of the key negotiators were called as witnesses: William Isaac, then chairman of FDIC; Robert Gough, Deputy Director, Division of Bank Supervision at FDIC; Anthony Nocella, Executive Vice-President-Finance for Meritor; and Robert S. Ryan, partner at Drinker, Biddle & Reath and outside counsel for Meritor. Their testimony paints a vivid picture of the negotiations between Meritor and the FDIC." A000044.

The trial court found that FDIC's goodwill commitment was "[a] key point of negotiation between the FDIC and Meritor..." A000045; see also A000031 (the goodwill commitment was "[t]he key FDIC concession...."). But what did it mean to say that the net liabilities "shall be treated as goodwill"?

Traditionally, FDIC treated intangibles like goodwill as having no value, because they offered no protection for the Bank Insurance Fund ("BIF").[4] The trial court found that FDIC committed to treat Meritor's goodwill differently. Based on the testimony of the negotiators, especially that of FDIC Chairman Isaac, the meaning, the trial court found, was "clear" – FDIC "had an obligation to treat the goodwill as capital for all purposes in [its] analysis of the bank." A000045 (quoting Isaac). "[T]here was no thought but that the goodwill would be treated any differently than any other good sound asset on the books of [Meritor].... " A000046 (quoting Meritor counsel Robert Ryan).

The trial court largely based its finding that the 1982 MOU required "FDIC [to] treat[] the Western goodwill as real capital" (A000046) on two factual determinations. First, and applying the reasoning of this Court and the Supreme Court in Winstar, the trial court found that "it would have been madness for Meritor to merge with Western absent the 1982 MOU and its accompanying treatment of goodwill.... Absent that, Meritor would have been operating in an unsound condition the moment it signed the merger documents." A000044 (citing United States v. Winstar, 518 U.S. 839, 854 (1996)).

Second, the trial court found that the Government's goodwill commitment had a special meaning in the context of FDIC regulation. While capital has many

[4] A102947-48 (Fritts) (prior to 1982, goodwill "was never allowed to be counted toward the minimum capital requirements.")

uses, in the eyes of FDIC, the trial court found, capital requirements serve one paramount purpose – providing financial protection for the BIF: "The overarching concern ... was protection of the limited resources in FDIC's insurance fund." A000048. Thus FDIC's goodwill commitment was a promise to treat Meritor's goodwill as a capital asset providing protection to the BIF no less than any other form of capital.

B. The Government's Breaches

The trial court found that the Government repeatedly breached this promise. The three key breaches were: (a) forcing Meritor to enter an MOU in 1988 that compelled the bank to raise $200 million in tangible capital by selling most of its branch network; (b) imposing a Written Agreement ("WA") in 1991 that imposed elevated capital requirements; and (c) the seizure and sale of the bank in December 1992.

In all cases the Government tried to prove that FDIC's actions were not influenced by the presence of supervisory goodwill on Meritor's books, but were instead motivated by Meritor's financial condition. The trial court found otherwise. In each instance the court found that FDIC would not have taken the action it did but for its view that the goodwill was worthless.

The 1988 MOU. The court found "FDIC would not have imposed the 1988 MOU on Meritor if the FDIC had treated the Western goodwill as real

capital as required by the 1982 MOU...." A000052; see also A000028 (in 1987 and 1988 "FDIC became increasingly uncomfortable with the perceived threat that Meritor's underperforming assets and Western goodwill were to the BIF"); A000033 ("[t]he main purpose of the 1988 MOU was to increase tangible capital at the bank.")

The 1991 WA. The court found that, after 1988, FDIC's "examinations of the bank continued to focus on the Western goodwill and how it would provide no protection to the BIF and should be ignored in violation of the 1982 Memorandum of Understanding (1982 MOU)." A000028. The court concluded that, as in the case of the 1988 MOU, FDIC would not have imposed the 1991 WA but for its concern that the Western goodwill provided no protection to the BIF:

> The 1991 Written Agreement and its high capital requirements were a direct result of the FDIC's concern over the ability of Western goodwill to provide a capital cushion for the BIF. While the overall condition of the bank was troubling, it is clear to the court that the FDIC believed the management team in place was excellent and could turn the bank around.

A000052.

The 1992 Seizure. The court found that "FDIC breached the 1982 MOU when it removed Meritor's FDIC insurance on December 11, 1992, which directly led the Secretary of the [Pennsylvania Department of Banking] to close

the bank." A000057. Prior to the seizure, Meritor had pressed FDIC to explain how it would treat Meritor's goodwill when the FDIC Improvement Act ("FDICIA") took effect on December 19; the trial court found that, at the very moment of seizing the bank, Meritor Chairman Hillas was delivered a letter from FDIC Director Poling explaining that, under FDICIA, the goodwill would be officially discounted. A000055.

The consequences of the Government's Breaches. The trial court found that the Government's breaches directly caused the destruction of the bank:

> The Court finds that absent the increased capital levels in the 1988 MOU, Meritor would not have sold the 54 branches as it did. Further, the court finds that the sale of those branches [led] to the rapid decline in Meritor's capital ratios because the remaining assets earned less income and were riskier than those Meritor had sold.

A000052. "Long term, selling the fifty-four branches to Mellon proved to be critical in Meritor's demise." Id.

The Government tried to prove that FDIC's breaches did not cause Meritor's failure, but the court found otherwise:

> The government ... states the bank's goodwill capital was not the sole reason for any of the regulatory actions it took. The court, however, is unconvinced. But for the FDIC's fixation on Meritor's goodwill levels and its effect on the exposure of the BIF to depositor claims if the bank failed, Meritor would not have been required to enter the 1988 MOU and 1991 Written Agreement. But for the 1988 MOU, the bank would not have been forced to sell the 54 branches in 1989 to raise capital to

> satisfy the requirements of the MOU. But for the severe deterioration of assets that resulted from the sale of the branches and the continued presence of goodwill on Meritor's books, the FDIC would not have required Meritor to increase its capital levels again to a level it could not meet resulting in the closure of the bank in 1992.

A000028.

III. Post-Trial

On April 16, 2001, the Government filed a motion for judgment on the pleadings. After eight years of litigation (subject at times to stay orders) and six months of trial, the Government argued for the first time that FDIC is a NAFI and that the trial court therefore lacked jurisdiction. The trial court rejected the argument, finding that "[t]here is a compelling record to support the proposition that Congress has given the Full Faith and Credit of the Treasury to the FDIC and fully intends to appropriate public money to the FDIC if it becomes necessary." A000040.

IV. The Damages Trial

A one-month trial on damages was conducted in July 2003. Relevant to this appeal, Plaintiff advanced two main damage theories. First, on the basis that the Government's breaches had destroyed the bank, Plaintiff sought to recover the value of the institution immediately prior to the 1988 breach.

Second, Plaintiff sought disgorgement of the savings FDIC realized by not liquidating Western, and the income generated through the investment of those savings.

Subsidiary damage issues included a claim for restitution of monies paid to FDIC by Meritor, "wounded bank" damages, the proper handling of any deficit in the Meritor receivership, and the tax treatment of any damage award.

A. The 1988 Value of the Bank.

To determine Meritor's pre-breach value, Plaintiff's expert, Dr. John Finnerty, adjusted the bank's market capitalization, as of the date of the first breach ($171 million), to account for informational leakage regarding the impending breach. The court found this analysis "sound." A000021. To the resulting adjusted market cap of $197 million, Dr. Finnerty added a 50% control premium. Rejecting the Government's contrary evidence, the court found "that the control premium used by Dr. Finnerty [is] justified." A000022. The court concluded: "Therefore, because the Court finds Dr. Finnerty's analysis persuasive, [t]he Court finds the bank's value to be $276,000,000 in 1988 prior to the breach." A000022.

B. Restitution.

The Government argued at trial that Plaintiff's disgorgement claim was barred by this Court's decision in Glendale Fed. Bank, FSB v. United States, 239

F.3d 1374, 1382 (Fed. Cir. 2001) ("[It is not at all clear that but for Glendale's purchase of Broward the Government would have been called upon to make up that deficit then and there.") The trial court found, however, that Plaintiff had proved that, absent the merger, FDIC would have liquidated Western, and thus "the facts of this case are significantly different from those in Glendale." A000022. In support, the court noted the Government's judicial admission that, had there been no merger, FDIC "would have terminated Western's deposit insurance and that the State of Pennsylvania would have appointed a receiver to liquidate the institution." A300645, A300651. The court found that liquidation was "the only alternative to Meritor's acquisition.... " A000023.

The Government's own 1982 liquidation cost estimate was $696 million. The parties disputed how to calculate FDIC's offsetting merger-related expenses. When it published its $696 million liquidation cost estimate, the Government projected that its merger-related costs would be $294 million. Plaintiff argued, however, that the proper offset should be FDIC's actual merger-related costs, calculated *ex post*. This amount proves to be negative, because the merger-related payments between Meritor and FDIC produced a $67 million net gain for the Government. The court rejected Plaintiff's approach, evidently accepting the Government's argument that if the *ex ante* savings estimate is used, the *ex ante* expense estimate should also be used. The Court therefore found that Meritor's

"assumption of Western's liabilities by Meritor clearly produced [a] $402 million saving." A000023.

Mindful of this Court's holdings in Glendale and similar cases, however, the trial court declined to go further than to lay this factual predicate. Existing precedents, the court observed, created uncertainty, and "it would be presumptuous for the trial court to award restitution in light of this uncertainty." A000023. The court considered certifying the issue for interlocutory review, but decided instead to "allow[] the parties to fully brief and argue the matter before the Federal Circuit" following entry of judgment. A000023.

STATEMENT OF FACTS

The trial court's summary of the facts in its liability decision (A000028-37) provides a concise narrative of the story of Meritor and FDIC. Factual matters that bear upon the issues raised on this appeal will be dealt with in their relevant contexts below.

SUMMARY OF THE ARGUMENT

The Government's argument that FDIC is a NAFI fails for several reasons. First, Congress has repeatedly appropriated funds to support federal deposit insurance. Second, the issue is controlled by the contrary holding in L'Enfant Plaza Props., Inc. v. United States, 668 F.2d 1211 (Ct. Cl. 1982). Third, Congress has repeatedly and formally committed to back up FDIC insurance with

public funds; if the Government is correct here, those commitments were fraudulent. Finally, the Government waived the argument by not raising it until after trial.

The trial court's finding that the contract required FDIC to treat Meritor's goodwill as real capital is compelled by: (a) the subsidiary finding that the primary regulatory value of capital is as a buffer for the FDIC insurance fund; and (b) by the testimony of every single person involved in negotiating the contract, including the then-Chairman of FDIC.

The trial court's findings of breach are amply supported, indeed compelled, by the record evidence. In addition, this Court should decline the Government's tacit invitation to ignore applicable standards of review and re-weigh the evidence.

The trial court's damage award, consisting of Meritor's value pre-breach, together with payments Meritor made to FDIC before the breach, is an entirely appropriate restitutionary remedy, because it accurately measures Meritor's losses under the contract. Including a control premium in assessing the bank's pre-breach value is likewise dictated by both logic and precedent. Certainly, these aspects of the trial court's award cannot be deemed an abuse of discretion.

It is also necessary that the final damage award be increased to cover the receivership deficit, because that deficit represents the Government's cost of breaching for which the victim of the breach cannot fairly be charged. Arguments that the court's order somehow violates the anti-injunction and jurisdictional provisions of 12 U.S.C. § 1821, advanced both by the Government and FDIC, fail because those provisions are inapplicable to suits against FDIC-Corporate. FDIC-Receiver is in any event bound by the judgment, as any corporation is bound by the outcome of a shareholder derivative suit.

Plaintiff is entitled to disgorgement of the money that Meritor saved FDIC. Unlike this Court's prior cases on the subject, in this case: (a) the government formally admitted that, absent a merger, Western would have been liquidated; (b) Plaintiff proved that Meritor was the only viable merger partner; (c) FDIC certified under the Bank Merger Act that, unless the merger was consummated immediately, Western would fail; and (d) overwhelming evidence showed that Western would have failed in a matter of days absent the merger.

Finally, an award of disgorgement should include profits made on the money saved as a result of Meritor's contract performance.

ARGUMENT

I. Standard Of Review

This Court reviews legal determinations by the trial court without deference, Anderson v. United States, 344 F.3d 1343, 1349 (Fed. Cir. 2003), and findings of fact under the clearly erroneous standard. Home Sav. of Am., F.S.B. v. United States, 399 F.3d 1341, 1346 (Fed. Cir. 2005).

The "interpretation of a contract term is a question of law." C. Sanchez and Son, Inc. v. U.S., 6 F.3d 1539, 1544 (Fed. Cir. 1993). But where the trial court considers "extrinsic evidence to establish the parties' intent," the "deferential 'clearly erroneous' standard of review" applies "to subordinate fact finding." Smith, Bucklin & Assocs., Inc. v. Sonntag, 83 F.3d 476, 479 (D.C. Cir. 1996) (citations omitted).

Respecting damages determinations, "the clear error standard governs a trial court's findings about the general type of damages to be awarded," while the methodology used to calculate the award is reviewed for abuse of discretion. Home Sav., 399 F.3d at 1346-47. The clear error standard also applies to damage fact-findings, such as fair market value. Krapf v. United States, 977 F.2d 1454, 1458 (Fed. Cir. 1992); Okerlund v. U.S., 365 F.3d 1044, 1049 (Fed. Cir. 2004).

II. The Trial Court Correctly Held That the NAFI Doctrine Has No Application Here

This Court has recently distilled the NAFI doctrine into a four-part test in AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir. 2004) and Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003). Under this test, a government instrumentality is a NAFI if:

> (1) It does "not receive its monies by congressional appropriation"; (2) It derives its funding "primarily from [its] own activities, services, and product sales"; (3) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and (4) There is "a clear expression by Congress that the agency was to be separated from general federal revenues."

Ains, 365 F.3d at 1342 (internal citations omitted). A government instrumentality must satisfy all four factors to be considered a NAFI. Id. at 1343. The court below focused on the fourth factor.

> The Federal Circuit in [Furash v. United States, 252 F.3d 1336, 1339-40 (Fed. Cir. 2001)] stated that under the L'Enfant Plaza test "what matters is whether the agency's authorizing legislation makes clear that Congress intends for the agency – of the particular activity that gave rise to the dispute in question – to be separated from general federal revenues." Furash. 252 F.3d 1336, 1340 (2001). In Furash, the Federal Circuit stated that "[t]he Court of Federal Claims must exercise jurisdiction absent a clear expression by Congress that it intended to separate the agency from general federal revenues." Furash, 252 F.3d at 1339.

A000039. The fourth NAFI factor, which is a question of Congressional intent, is dispositive here, because Congress has declared its intent in no uncertain terms. Notably, FDIC itself agrees that "the trial court ... properly awarded payment of ... damages from the United States Judgment Fund." FDIC Br. at 2.

A. The Government Cannot Meaningfully Distinguish Between FDIC's Insurance Function and the Contract at Issue

The Government suggests that FDIC's role in facilitating the merger of Meritor and Western represents an activity that is "unrelated" to FDIC's insurance function. Gov't. Br. at 27-28. But later the Government concedes that "the [Deposit Insurance Fund is] the 'activity' involved in this contract." Id. at 29. Only the latter proposition is defensible, because FDIC solicited the merger specifically to avoid paying off Western's depositors. In effect, Meritor assumed FDIC's responsibility to make good on Western's deposit obligations. See Winstar, 518 U.S. at 894 (the essence of supervisory merger agreements was to "convert some of [FSLIC's] financial insurance obligations into responsibilities of private entrepreneurs.")[5] The assistance agreement was thus integral to FDIC's efforts to manage its insurance obligations.

[5] Former FDIC Chairman Isaac explained that the task force he headed developed the idea of assisted mergers, with goodwill commitments as the favored strategy for averting massive BIF payouts. A101509-19.

B. The Dispositive Fact is That Congress Has Repeatedly Declared Its Intent to Make Federal Funds Available to Support FDIC Deposit Insurance

The fourth factor identified in Ains is a question of "congressional intent." Ains, 365 F.3d at 1343. As illustrated by several of this Court's precedents, "enabling legislation and legislative history" are the appropriate grounds for discerning "evidence of Congress's own understanding" of how an agency is intended to operate. Core Concepts, 327 F.3d at 1337. Because Congress originally appropriated funds for FDIC, the necessary inquiry is whether, since that time, Congress has clearly disavowed any financial responsibility for FDIC's insurance-related activities. See McCloskey & Co. v. United States, 530 F.2d 374, 378 (Ct. Cl. 1976) ("In Butz [Engineering Corp. v. United States, 499 F.2d 619, 623 (Ct. Cl. 1974)], the court accepted jurisdiction..., finding that Congress ... had not intended to abandon general financial responsibility for the Postal Service.")

1. Congress's Intent To Appropriate Funds if Necessary is Controlling, as the Court Held in L'Enfant Plaza

The Government incorrectly asserts that "whether or not Congress would enact an appropriation if a self-funding entity were to exhaust its resources is not the correct test to apply to determine jurisdiction." Gov't Br. at 28 (citing Ains, 365 F.3d at 1342). But Ains says nothing of the kind, and the Government's assertion is flatly inconsistent with this Court's often-repeated premise that

"Tucker Act jurisdiction exists unless there is a 'firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts' of the agency.'" Core Concepts, 327 F.3d at 1334 (quoting Furash, 252 F.3d at 1339 (quoting L'Enfant Plaza Props., Inc. v. United States, 668 F.2d 1211, 1212) (Ct. Cl. 1982))); id. at 1336 ("FPI's self-sufficiency as a corporation is not determinative of its NAFI status. More telling are Congress's intentions regarding the nature of FPI's funding...."). Indeed, in L'Enfant Plaza, this Court specifically rested its decision on the ground that "Congress is not statutorily prohibited from appropriating funds to the Comptroller if a deficiency should occur." L'Enfant Plaza, 668 F.2d at 1212; see also Lee by Lee v. United States, 129 F.3d 1482, 1484 (Fed. Cir. 1997) ("The government has not pointed us to any authority holding that the judgment fund could not be used to pay a judgment arising from a contract that the [agency] entered into before appropriated funds became available to support it"); see also El-Sheikh v. United States, 39 Fed. Cl. 1, 5 n.2 (1997), rev'd on other grounds, 177 F.3d 1321 (Fed. Cir. 1999) (where "the authorizing legislation or regulation does not specifically state whether appropriated funds are available... this Court does have jurisdiction over claims against those NAFIs because there is no affirmative preclusion on using appropriated funds.") (citations omitted).

If the Government's argument were valid, the absence of a current appropriation would be the end of the matter, and almost the entirety of this Court's NAFI jurisprudence would be dead letter. Certainly the fourth factor identified in Ains and Core Concepts would be eliminated, and L'Enfant Plaza would be overruled.

2. Congress Has Repeatedly Appropriated Funds to Support Federal Deposit Insurance

Evidence of Congress's intent to provide financial support for FDIC is overwhelming. First, Congress has in fact authorized massive appropriations for the federal bank insurance agencies. FDIC itself was originally funded by federal appropriation. And, as the trial court noted (A000040), nothing in the 1933 legislation suggests that Congress intended to be paid back. See Banking Act of 1935, Pub. No. 305 (Aug. 23, 1935) (Section 12 B (d)). The Government correctly points out that, in Core Concepts, this Court held that an historic appropriation such as this is not dispositive of the NAFI issue. Core Concepts, 327 F.3d at 1335. But FDIC's original appropriation is strong evidence, particularly in light of the fact that FDIC's original scheme for levying fees on banks was not expected to cover the insurance fund's obligations. Reforming Federal Deposit Insurance published by Congressional Budget Office, Sept. 1990 at 20 ("The original premium rate charged by the FDIC was not based on the fund's ability to cover anticipated losses; rather, it was based on the ability of

banks to pay. Despite that basis for funding, federal deposit insurance has been able to handle normal losses for years. This good fortune gave the appearance of a self-sustaining fund.")

And in recent years, Congress has repeatedly appropriated funds to support federal deposit insurance and other bank regulatory functions, as the trial court noted (A000042):

12 USC 1441a(h) (1989)	Backup for Resolution Trust Corporation
12 USC 1821a(c)(1) (1989)	Backup for FSLIC Resolution Fund
12 USC 1821(a)(6)(E)-(F) and (J) (1993)	Backup for SAIF
12 USC 1824(a) (1989)	Treasury is directed to loan money to FDIC if needed up to $30 Billion and FDIC can borrow from BIF members.
12 USC 1825(d) (1989)	Pledging "The Full Faith and Credit of the United States" "to the payment of any obligation issued after August 9, 1989, by the Corporation...."

The Government suggests that Congress's willingness to appropriate billions to back up the SAIF, or the RTC Resolution Fund, sheds no light on its willingness to do so for the BIF or the DIF. Because the DIF is the successor to both the SAIF and the BIF, the distinction is wholly artificial. The only difference between the SAIF and the BIF is that the thrift crisis was worse than the bank crisis and the FSLIC's insurance fund (the SAIF) was therefore harder hit than FDIC's (the BIF). The SAIF received substantial appropriated funds

simply because, as the Court of Federal Claims observed regarding the OCC in L'Enfant Plaza, "a deficiency ... occur[red]...." 668 F.2d at 1212. There is no indication in any of the banking legislation enacted in the last twenty years that Congress considered thrifts (and the SAIF) more its responsibility than banks (and the BIF), and it is impossible to imagine any cogent rationale for its doing so. As the trial court found, the distinction is "arbitrary." A000040.

3. Congress Has Repeatedly Declared its Commitment to Back Up FDIC Insurance With Federal Funds

The Government does not deny that Congress has repeatedly and formally pledged the Full Faith and Credit of the United States to support federal deposit insurance, including the BIF, nor could it. Congress enacted FDICIA upon the understanding that "[i]f the industry cannot ... reimburse depositors in case of failure, the government and taxpayers will have to honor this commitment instead." H.R. Rep. No. 102-330, pt. 1 (1991), 1991 U.S.C.C.A.N. 1901 ("Reduce Taxpayer Exposure to Bank Failure"); Hindes v. FDIC, No. Civ. A. 94-2355, 1995 WL 534248, *3 (E.D. Pa. Sept. 6, 1995), aff'd, 137 F.3d 148 (3d Cir. 1998) ("In passing [FDICIA] ... Congress sought to protect the federal deposit insurance fund 'and minimize future taxpayer expense in resolving failed commercial banks.'") As the trial court found, "[t]here is a compelling record to support the proposition that Congress has given the Full Faith and Credit of the Treasury to FDIC and fully intends to appropriate public money to the FDIC if it

becomes necessary." A000040. See, e.g., Senate Concurrent Resolution 72 (128 Congressional Record-Senate 1530) (Mar. 17, 1982) ("Resolved by the Senate (the House of Representatives concurring), That the Congress reaffirms that deposits, up to the statutorily prescribed amount, in federally insured depository institutions are backed by the Full Faith and Credit of the United States"); Competitive Equality Banking Act of 1987, Public Law 100-86 101 Stat. 552 (Aug. 10, 1987) (Title IX Sec. 901(b)) (" ... it is the sense of the Congress that it should reaffirm that deposits up to the statutorily prescribed amount in federally insured depository institutions are backed by the Full Faith and Credit of the United States.")[6]

Any argument that Congress is in fact determined not to put taxpayer dollars behind the BIF would render these formal Congressional declarations fraudulent.[7]

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[6] As the Government notes (Govt. Br. at 26-27), this Court has rejected the argument that the DIF is a "revolving appropriation." But in light of Congress's repeated appropriations to support federal deposit insurance, and in light of its pledge of the Full Faith & Credit of the United States, the point is without consequence.

[7] The Government notes that Congress limited FDIC's borrowing authority (see 12 U.S.C. 1825(c)(5)) in order to "avoid[] any expense to the Treasury in connection with DIF obligations." Govt. Br. at 32. The argument misleadingly ignores Section 1825(d), which puts the Full Faith & Credit of the Treasury behind any obligations incurred.

These government pronouncements make this case far stronger than that in L'Enfant Plaza, which is otherwise very similar. In L'Enfant Plaza, this Court noted that Congress was not appropriating funds to the OCC "primarily because of the sufficiency of the funds being received from the regulated banks. Congress is not statutorily prohibited from appropriating funds to the Comptroller if a deficiency should occur." 668 F.2d at 1212. Like the OCC, Congress does not now appropriate funds to FDIC's DIF because there is no need. It is equally true that "Congress is not statutorily prohibited from appropriating funds to the Comptroller if a deficiency should occur," id., and numerous Congressional pronouncements make clear that Congress stands ready to fund FDIC's insurance operations just as readily as Congress stood behind the FSLIC.[8]

C. The Government Waived Its NAFI Argument

This Court has often characterized the NAFI doctrine as affecting jurisdiction, and Plaintiff of course acknowledges that lack of subject matter jurisdiction cannot be waived. But we are aware of no case that has squarely raised the issue whether the NAFI doctrine is in fact jurisdictional. As the Supreme Court recently affirmed in Arbaugh v. Y & H Corp., 546 U.S. 500

[8] According to L'Enfant Plaza, the OCC is the "United States" for purposes of the Tucker Act, yet the Government would have this Court hold that FDIC is not, even though the Comptroller of the Currency is, by statute, a permanent member of FDIC Board of Directors. See 12 U.S.C. § 1812(a)(1)(A). Given the Comptroller's role on FDIC Board, it is inconsistent to claim that the OCC may be sued as the United States but FDIC may not.

(2006), prior decisions dismissing claims on grounds of "jurisdiction" (as opposed to dismissals for failure to state a claim) lack precedential weight as jurisdictional rulings unless the distinction – jurisdiction versus failure to state a claim – was an issue for decision. Id. at 511 (Decisions characterizing an issue as jurisdictional, where the issue was not actually presented, "should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit") (quoting Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 91 (1998)). This case therefore presents an issue of first impression. And as noted in El Sheikh, the consequence of a NAFI ruling could be "that [plaintiff] has failed to state a claim upon which the Court of Federal Claims could grant relief" even though "it has become customary to describe these matters as a lack of jurisdiction." El Sheikh, 177 F.3d at 1329 (Plager, dissenting).

In this case, as in Arbaugh, the distinction is important. If a "NAFI defense" entails failure to state a claim under Rule 12(b)(6), rather than lack of jurisdiction under Rule 12(b)(1), it is waived if not asserted before trial. Arbaugh, 546 U.S. at 507.

The NAFI doctrine derives from 28 U.S.C. §2517(a), which requires all judgments under the Tucker Act be paid from appropriated funds. See Kyer v. United States. 369 F.2d 714 (Ct. Cl. 1966). The unavailability of appropriated

funds has nothing to do with the Court of Federal Claims' jurisdiction, which the Tucker Act instead extends to "*any* claim against the United States founded upon... *any* express or implied contract with the United States." 28 U.S.C. § 1491 (emphasis added). Sovereign immunity is thus not implicated, because the Tucker Act broadly waived immunity for all contract claims against the United States. See United States v. Testan, 424 U.S. 392, 400 (1976) (citation omitted); Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999). The effect of 28 U.S.C. § 2517(a), by contrast, is to deny the Court of Federal Claims the practical ability to afford a money judgment against a NAFI, which relates solely to the question whether the plaintiff has stated a claim upon which relief can be granted. See Eastern Band of Cherokee Indians v. U.S., 16 Cl. Ct. 75, 79 (1988) (Where Congress had not made annual appropriation of funds for BIA-operated schools, complaint seeking dispersal of BIA funds "failed to state a claim upon which relief may be granted as funds are not available to satisfy plaintiffs' claim.")

Because a NAFI defense is properly characterized as arising under Rule 12(b)(6), the Government waived the argument by failing to raise it until after trial. Arbaugh, 546 U.S. at 507. Indeed, a clearer instance of waiver would be hard to find, because the argument was not raised until after the passing of eight years of litigation, six months of trial, and several million dollars in legal fees.

III. The Trial Court Correctly Construed The Parties' Contract

The Government's essential argument is that while FDIC promised to count the goodwill as capital, it was free to treat it as worthless capital. Govt. Br. at 44 ("the parties to the goodwill agreement recognized that ... the agency would treat the goodwill as a nonearning, amortizing asset for safety and soundness purposes.") But this issue was the subject of a lengthy trial, and the trial court, upon abundant evidence, found to the contrary. The trial court's reading of the contract is compelled, moreover, both by this Court's precedents and by subsidiary fact findings that the Government does not challenge.

A. The Trial Court's Construction of the Agreement Is Mandated by Its Finding That, for FDIC, Capital's Primary Function Is as a Buffer for the BIF

The Government stresses that the 1982 MOU, read literally, required only that FDIC treat Western's net deficit "as goodwill." The same argument was made, and properly rejected, at trial. See A000044 ("[T]he defendant asserts that there was insufficient evidence presented at trial to indicate that the MOU meant more than the words state. The court, however, disagrees based on the testimony of witnesses who actively participated in the merger and corresponding negotiations.") The record overwhelmingly supports the trial court's conclusion.

The key factfinding underlying the trial court's conclusion that the 1982 MOU required FDIC to treat the goodwill as a liquid asset like cash is the fact

that – as the Supreme Court noted in Winstar – "the whole purpose of the reserve requirements [is] to protect depositors and the deposit insurance fund." Winstar, 518 U.S. at 854. See A000047-48 ("The overarching concern ... was protection of the limited resources in FDIC's insurance fund"). The evidence richly supported this finding. See A105455 (Plaintiff's expert Brumbaugh); A102046, A102072-73 (Plaintiff's expert Mancusi). FDIC Chairman Isaac testified that this focus on capital as providing a buffer for the insurance fund explained why FDIC historically did not count goodwill as regulatory capital. See A101534 ("I think it's fairly clear why the agency didn't like goodwill. The agency is, after all, the insurer of banks, and when a bank fails, the agency is called upon to liquidate the bank ... [T]hat's why the FDIC ... want[s] to be able to know that when they close the bank that they are going to be able to realize that value for sure.")

The preeminent role that capital plays in the view of FDIC – as providing a cushion against losses for the insurance fund – compels the trial court's interpretation of the 1982 MOU as requiring FDIC to count the goodwill as a form of capital that does in fact provide such a cushion. Otherwise FDIC's goodwill promise was essentially meaningless, and Meritor would have been irrational to accept it.[9]

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[9] Like the thrifts in Winstar, Meritor had *negative* capital immediately following the merger unless FDIC treated the Bank's supervisory goodwill as qualifying regulatory capital. See A300055.

B. All Major Participants in the 1982 Negotiations Understood that Goodwill Would be Treated as Real Capital

The chief negotiators of the 1982 MOU included then-FDIC Chairman Isaac; Robert Gough (Deputy Director of FDIC's Division of Bank Supervision); M. Todd Cooke (Meritor Chairman); Robert Ryan (Meritor outside counsel); and Anthony J. Nocella (Meritor CFO). A000029. Every one testified that the 1982 MOU required that goodwill be treated as qualifying capital for *all* regulatory purposes.

FDIC Chairman Isaac testified that Meritor's goodwill "was part of the capital structure of the bank for all purposes. For *all* the purposes that were relevant to the FDIC, we would count it as part of the capital structure of the bank... We would look at it in terms of, *this is real capital*, it's part of the capital structure of the institution." A101530 (emphasis added); see also A101531. Robert Gough testified that, under the 1982 MOU, if Meritor had sought regulatory approval for (e.g.) an expansion, FDIC could not withhold approval on the basis that much of the Bank's capital consisted of supervisory goodwill. A102800. The goodwill had to be treated as a qualifying asset both for purposes of determining compliance with minimum capital requirements, and also in determining whether the bank was solvent. A102731-32, A102790.

Meritor Chairman M. Todd Cooke testified that "for our purposes and the purposes of the agreement, [the goodwill] was as good as cash." A100304; see

also A100275, A100276, A10277-78. Meritor outside counsel Robert S. Ryan testified that "there was no thought but that the goodwill would be treated any differently than any other good sound asset on the books of [Meritor], and as I said, the transaction couldn't go without that. It just would put [Meritor] in a position where it's subject to supervisory control for having entered into the transaction." A100332-33; see also A100341-42; A000044 ("Nobody in their right mind is going to enter into a transaction where the regulator says you can put it in your capital ratios, but... two months from now, they can come down and say, you know, I don't like the goodwill in your capital assets, so I'm going to start treating you as though you don't have enough capital" (quoting Ryan, Meritor counsel). Meritor CFO Anthony J. Nocella testified that goodwill was to be "considered an asset for all purposes, just as any other asset, it would be included in capital for all purposes." A100122-23; see also A100086, A100125.

In denying the Government's pretrial motion for partial summary judgment, the trial court noted that "[a]t issue in this case is whether there was an agreement to treat goodwill as an asset as real as cash." A000066. The Government has not appealed that ruling. The parol evidence, which was all admitted without objection, compellingly supports the trial court's finding that there was such an agreement.

C. The Parties' Course of Performance Refutes, Rather Than Supports, the Government's Interpretation

In arguing that the parties' "course of performance" confirms its reading of the contract, the Government simply ignores the trial record. The Government does not and cannot claim that the following findings are clearly erroneous, which refutes the Government's argument:

1. That Meritor strenuously objected to the first proposed MOU. A000032-33 ("At the end of 1985, the FDIC prepared a draft Memorandum of Understanding.... FDIC, however, withdrew the draft MOU after Meritor argued that the Western goodwill was grandfathered ...). Meritor likewise protested the 1988 MOU for the same reason. See A100426 (McCarron).

2. That Meritor was given no choice but to sign the 1988 MOU, or face more severe regulatory action, such as seizure. A000033 ("The bank reluctantly entered the MOU because the alternative appeared to be stricter regulatory action like an 8(a) action. From the uncontradicted testimony it was clear Meritor had no choice in signing the MOU in 1988.") See also A103233-34. Under these circumstances, Meritor's efforts to comply with FDIC's demands, rather than subject the bank to more severe regulatory sanction, constituted mitigation, not waiver. Westfed Holdings, Inc. v. U.S., 55 Fed. Cl. 544, 561-62 (2003), aff'd in part, rev'd in part, 407 F.3d 1352, 1361 (Fed. Cir. 2005); Citizens Fed. Bank v. United States, 66 Fed. Cl. 179, 186 (2005), appeal dismissed in part, 175 Fed.

Appx. 347 (2006), aff'd, 474 F.3d 1314 (Fed. Cir. 2007) ("The rules of mitigation do not require the nonbreaching party to subject itself to the risk of additional losses.")

3. That Meritor's officers uniformly believed that the 1991 WA was another breach of FDIC's goodwill commitment. A000053 ("Meritor's officers firmly believed the FDIC would not have imposed such high capital standards absent the Western goodwill ...")

The Government's argument also ignores the most salient "course of performance" evidence – FDIC's own reaffirmations that the 1982 MOU required FDIC to treat the goodwill as "*primary* capital" – i.e., as liquid capital cushioning the BIF.[10] FDIC Examiner Robert Valinote affirmed that there had been an "upper level determination in the FDIC" that the goodwill was to be viewed "the same as" tangible capital. A102836-38, A102890. Similarly, in 1985 FDIC confirmed that supervisory goodwill such as Meritor's "shall be counted in full *as a component of primary capital* ...." 12 C.F.R. § 325.50(b) Fed. Reg. 11,128 (Mar. 19. 1985) A400906 (emphasis added). FDIC Regional Director Ketcha

[10] The 1985 regulations defined "primary capital" as "the sum of common stock, perpetual preferred stock, capital surplus, undivided profits, capital reserves, mandatory convertible stock (to the extent of 20 percent of primary capital exclusive of such debt), minority interests in consolidated subsidiaries, net worth certificates issued pursuant to 12 U.S.C. 1823(i) and the allowance for loan and lease losses minus intangible assets other than mortgage servicing rights and assets classified loss." A400902.

acknowledged that Meritor's goodwill (and other "forbearance items") "are allowed as *primary* capital by agreements existing from the 1982 merger of Western Savings Bank." A300099-300102 at A300100 (emphasis added).

FDIC's continuing recognition that it had promised to treat goodwill as the equivalent of the most liquid forms of capital independently refutes the Government's argument here that the parties intended only that FDIC treat goodwill as a non-earning intangible. [11]

IV. The Trial Court's Findings of Breach Are Supported By Abundant Record Evidence

The Government's challenges to the trial court's findings that FDIC breached its goodwill promise in 1988, 1991 and 1992 are simply restatements of: (a) the flawed contention that the goodwill promise left FDIC free to treat the goodwill as worthless capital, and (b) the argument, rejected as a factual matter below, that FDIC's actions in 1988, 1991 and 1992 were motivated not by a concern about Meritor's capital but instead by its other financial difficulties. In this connection it is important to note what the court below did and did not hold.

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[11] The Government's public policy argument simply reformulates an argument that this Court and the Supreme Court have rejected, namely, that the contract should not be construed as restricting FDIC's regulatory authority. Govt. Br. at 42-43. But the Supreme Court in Winstar rejected a similar argument couched in terms of "unmistakeability:" "We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign." 518 U.S. at 883 n. 25 (citation omitted).

The trial court did not hold that the 1982 MOU prevented FDIC from exercising its regulatory powers *except insofar as it required FDIC, in exercising those powers, to treat the goodwill as real capital such as provides protection for the BIF.* The Court's findings of multiple breaches were tightly tied to this specific contractual promise. In each case, the Court found, on abundant evidence, that FDIC would not have taken the actions it did *but for its view that the goodwill was unreal capital that provided no protection for the BIF.*

The Government does not, and could not, seriously contend that the trial court's findings of breach are clearly erroneous. Indeed, the number of defendant's admissions was extraordinary: in literally dozens of instances, FDIC examiners and officials stated that in analyzing the bank they viewed the goodwill as an intangible asset that provided no protection for the BIF. Illustratively, FDIC Examiner Albertson (whose bank examination led to the 1988 MOU) testified that he viewed Meritor's goodwill as "fluff" that he would "immediately deduct" when analyzing Meritor's capital (A100796-97, A100824, A100825) and that other examiners did the same. A100828. Regional Director Lutz made no distinction between GAAP goodwill and regulatory goodwill in analyzing Meritor. A103178-79. Regional Director Fritts specifically instructed his examiners to ignore Meritor's goodwill when assessing the bank's capital notwithstanding the 1982 MOU, which "we [i.e., the Regional Office] didn't

negotiate." A102964-65. Examiner Valinote treated Meritor's goodwill as "fictitious capital." A300076. Dennis Fitzgerald, who examined Meritor repeatedly during its last decade, viewed the goodwill as "worthless" and believed it should be treated just like intangibles at any other bank. A101169, A101174.

Examination Reports likewise routinely disparaged the goodwill. See, e.g., A300058 ("[T]he bank's ... capital ratios are deceptive ... [T]he bank is including ... $559 million of goodwill from the Western Savings Bank merger"); A300066-67 ("the strength of the bank's capital structure must be subjected to serious question because of ... the Western goodwill.... [FDIC's] policy has been to exclude intangibles such as goodwill when determining a bank's equity capital"); A300098 ("[d]etracting further from capital adequacy is the volume of goodwill contained therein.")

The trial court's decision is firmly grounded in this evidence. See, e.g., A000033, A000054.

V. The Law and the Facts Support The Trial Court's Damage Award

A. The Pre-Breach Value of Meritor is an Appropriate Benchmark for Damages.

The Government argues that the trial court erred in using Meritor's pre-breach value to determine damages because this approach overlooks the fact that

Meritor's shareholders continued to "enjoy the benefits of control after August 1988." Govt. Br. at 55. For several reasons the argument fails.

First, as to the value of "continued control" (id.), the Government made no effort below to establish the amount of that asserted offset, and therefore failed to carry its burden of proof. Westfed, 407 F.3d at 1370. Second, even if Meritor somehow did derive some kind of "benefit" during the 1988-1992 period, no offset would be appropriate because any such benefit was appropriated by the government when it seized the bank in violation of the 1982 agreement. Meritor cannot return to the government what the government has already taken. Westfed, 55 Fed. Cl. at 560.

The Government's real point is to revive its argument that Meritor's post-1988 losses were due to factors other than FDIC's breaches. But that issue has been subjected to trial, and the trial court found for Plaintiff. A000022 ("[T]he Government's assertion that Meritor's loss of equity after August 1, 1988 was not caused by the breaches but by poor quality assets, poor liquidity and operating problems, [is] unpersuasive..."). The Government does not claim that these findings were clearly erroneous, as it must if it wants this Court to re-weigh the evidence. Westfed, 407 F.3d at 1364.

The evidence, moreover, amply supports the trial court's findings. The impact of the 1988 MOU (and the 1992 WA) was to force radical self-

liquidation. In less than five years the Bank's assets shrank from $19 billion to $3.5 billion; the workforce shrank from 5,187 to 917; 118 of 145 branch offices were sold. See A105506 ("That kind of shrinkage is unbelievable") (Brumbaugh). The largest single divestiture was the 1990 sale of 54 branches, and matching assets, to Mellon Bank. The record confirms the trial court's finding that "the sale of the 54 branches effectively 'doomed the bank,' led to an asset deterioration, which led to the 1991 Written Agreement, and in turn, led to a 'downward death spiral' for Meritor." A000020 (quoting A000054). FDIC's own witnesses agreed. Lead Examiner Dennis Fitzgerald concluded in 1992 that "[t]he 1990 sale of two-thirds of the branches.... and the PSFS trade name to Mellon Bank, may have effectively doomed the institution." A101178-79; A300202. FDIC Examiner Valinote testified that the sale of the 54 branches and other assets in response to the 1988 MOU constituted a self-destructive "dismantling" and "self-liquidation" of the institution. A102897; A102899; A102900-01; A401177; A102902.

B. The Court's Damage Calculations Are Correct

The Government's challenges to specific components of the trial court's damage calculation lack merit and should be rejected. The trial court's determination of the pre-breach value of Meritor cannot be disturbed unless clearly erroneous, Krapf, 977 F.2d at 1458; Okerlund, 365 F.3d at 1049, and the

trial court's formulation of the full damage award cannot be disturbed unless an abuse of discretion. Home Sav., 399 F.3d at 1346-47. The Government does not even attempt to satisfy these standards.

1. The Trial Court Correctly Included a Modest Control Premium

The Government offers two arguments against the trial court's inclusion of a control premium in its pre-breach valuation of Meritor. First, it argues that the premium is the property of the shareholders, not the corporation, and therefore cannot be awarded in a derivative suit brought on behalf of the corporation. Second, the Government challenges the trial court's factual finding that a control premium is appropriate in the circumstances of this case. Both arguments fail.

a) Law and Logic Support Inclusion of a Control Premium in Determining the Value of the Entire Institution Pre-Breach

The Government concedes that a control premium is appropriately included in ascertaining the value of a franchise. The tax cases the Government cites recognize that "[c]ontrol is an element which must be taken into account for purposes of determining the fair market value of corporate stock, over and above the value attributable to the corporation's underlying assets...." Magnin v. Comm'r, T.C. Memo. 2001-31, 2001 WL 117645 *14 (U.S. Tax Ct. Feb. 12, 2001). The reason is that "the per share value of minority interests is less than the per share value of a controlling interest." Philip Morris, Inc. v. Comm'r, 96

T.C. 606, 629 (1991), aff'd, 970 F.2d 897 (2d Cir. 1992). One proposition for which the government cites these cases – that a company's asset value is less than its franchise value (Govt. Br. at 53) – likewise supports the trial court's damage analysis. Because the Government's breaches caused the total destruction of the Meritor franchise, and not just the loss of its assets, it is appropriate to use franchise value as the measure of damages.

The Government's argument is also counterfactual because it implies that a corporation cannot, itself, sell franchise value. But when Meritor sold 54 branches to Mellon in 1991, it received a $336 million premium above the value of the assets transferred (A000035). (When FDIC sold the remainder of Meritor's assets to Mellon in 1992, it received a $181 million premium. A300235-36.) This premium demonstrates that a company can monetize its own franchise value, and also that the control premium accepted by the trial court – less than $100 million total – was conservative.

And the case law confirms that total franchise value is the best measure of damages "when the breach of contract results in the complete destruction of a business enterprise and the business is susceptible to valuation methods." Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 496 (2d Cir. 1995). Lost business value appropriately "focuses upon the change in worth of a going concern after total or almost total destruction caused by a breach of contract." C.A. May

Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. 1981). In determining the value of Meritor, the trial court did nothing out of the ordinary, merely ascertaining at what price the institution could have been sold had it been sold in its entirety rather than piecemeal, which required consideration of the value of control. Estate of Godley v. Comm'r., 286 F.3d 210, 214 (4th Cir. 2002) ("[T]he amount a willing buyer will pay is often not based solely on asset values or net worth. Often, a discount or premium must be applied to reflect the value an investor places on things such as managerial control.... ").

The Government's argument that a control premium belongs to the shareholders, not the corporation, thus mischaracterizes the trial court's logic. The trial court's aim was not to award a control premium per se, but was, instead, to ascertain the entire value of Meritor immediately prior to the breach that ultimately destroyed that value. To this end, the court quite reasonably accepted Dr. Finnerty's assessment that to exclude the value of control would underestimate the value of the franchise. Otherwise put, excluding a control premium would inappropriately impose a minority discount. See Estate of Bonner v. United States, 84 F.3d 196, 197 (5th Cir. 1996) ("courts have consistently recognized that the sum of all fractional interests in a property is less than the whole"); Alna Capital Assocs. v. Wagner, 758 F.2d 562, 566 (11th Cir. 1985) ("value of a controlling position in a corporation is worth more ... than a

non-controlling interest"); Sutter v. Groen, 687 F.2d 197, 203 (7th Cir. 1982) ("bloc of stock large enough to confer control of the company will usually command a higher price per share than a smaller bloc — the difference in price being the well known 'control premium.'") The trial court's reasoning was fully consistent with the case law. See A000021 ("The stock price reflects only equity in a small portion of the company, but to value the whole company, it is logical to price in the control premium, which would amount to its total value.") The Government cannot claim that this reasoning represents an abuse of discretion.

b) The Evidence Supports the Inclusion of A Control Premium in Valuing Meritor

The Government's argument that the special circumstances of this case preclude a control premium fails unless the trial court's contrary finding is clearly erroneous. It is not.

The trial court accepted a control premium because it found Plaintiff's expert on the subject – Dr. Finnerty[12] – "persuasive." A000022. The arguments that the Government offers here were all presented to, and rejected by, the trial court. Here, as below, "the Government contends that control premiums are

[12] Dr. Finnerty is a Professor of Finance at Fordham University. Since studying economics as a Marshall Scholar at Cambridge University and receiving his Ph.D., Dr. Finnerty worked in the areas of corporate finance for almost 25 years. He has published extensively (55 articles and 8 books) on securities valuation, financial management, financial institutions, and debt valuation. His entire career has been devoted to the financial services industry, and he was both a founder and CFO of College Savings Bank. A300250.

justified only in an acquisition context." A000022.[13] The court disagreed, noting in some detail Dr. Finnerty's rigorous analysis. A000022. It is not for this Court to second-guess the trial court's findings as to the persuasiveness of competing expert testimony. In re Gran, 964 F.2d 822, 827 (8th Cir. 1992).

At any rate, the findings of the trial court (see A00021-22) are abundantly supported by the record. For example, the record shows:

1. Control premiums are almost always paid in sales of a majority interest of a firm.[14]

2. Empirical data establish that under-performing institutions command above-average control premiums.[15]

3. Firms with strong franchise values command higher premiums.[16]

4. Meritor possessed extraordinary depositor loyalty, and thus exceptional franchise value.[17]

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[13] The Government (Govt. Br. at 54) cites Eateries, Inc. v. J.R. Simvlot Co., 346 F.3d 1225, 1232-33 (10th Cir. 2003), in support of the assertion that "if no buyer exists for a firm, no control premium should attach." The case gives the Government no support. In it, the court upheld the award of a control premium even in the case of a "distressed company," and further, upheld a control premium substantially larger than that reflected in an actual offer to purchase a controlling interest. Id.

[14] See A201011-12 (Finnerty); A300507-509, A300538, A3005402 (Finnerty Report); see also A202072-73 (Epstein); A203487-88, A203493 (Thakor).

[15] See A201015-16, A203181-82, A203183-85, A203185-87, A203197-200, A203201-03 (Finnerty); A202075 (Epstein); A202538 (Hamm); see also A300703; A300706; A3007738; A300741; A300748.

[16] See A201015-16 (Finnerty); see also A201798-99 (Epstein).

2. The Court Correctly Included Payments Made By Meritor in Performing the Contract

The trial court awarded, as restitution, the $67 million in net payments made by Meritor to FDIC. The Government argues that these monies are unrecoverable because FDIC's breach was not "total" (Govt. Br. at 61), and because a restitution award is incompatible with the award of Meritor's pre-breach value. Neither argument withstands scrutiny.

a) FDIC's Breach Was Total

The "critical" consideration in determining whether a breach is partial or total is the question whether the breach "substantially impairs the value of the contract to the injured party at the time of the breach." Hansen Bancorp, Inc. v. United States, 367 F.3d 1297, 1311-12 (Fed. Cir. 2004) (quoting Restatement (Second) of Contracts § 243(4)). Otherwise put, "the breach 'must be of a relatively high degree of importance.'" Id. at 1312 (quoting George E. Palmer, The Law of Restitution § 4.5 (1978)).

In light of the trial court's findings it would be difficult to imagine a more "total" breach. First, the underlying promise was critical. A000044 ("both parties

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[17] See A100629 (Hillas) (re premium realized on branches); A100420 (McCarron); see also A104662 (Hammer) ("unbelievable loyalty of the customer base"); A103767-68 (Francisco); A103602 (Hand); A300108 (FDIC ROE); A100401, A100411, A100463 (McCarron); A102398-99 (Finnerty); A100956-57 (High); A104263 (Hartheimer)

knew that the goodwill clause in the 1982 MOU was key to the merger.... "). The Government does not challenge this finding.[18]

The Government cannot plausibly argue that the breach of this promise did not "substantially impair[] the value of the contract to [Meritor] at the time of the breach." Hansen, 367 F.3d at 1311. The purpose of the goodwill promise was to give Meritor extra time to absorb the deficits acquired in the merger, and thus to confer long-term viability. A101525-26; A101527-28 (Isaac). The breach stole this time back, and destroyed the bank. The trial court specifically found that the breach caused the bank's demise, and that, but for the breach, the bank would have survived. A000020. These findings, which the record fully supports, plainly establish that FDIC's breach was "of a relatively high degree of importance.'" Hansen, 367 F.3d at 1312 (citation omitted).

Nor can the Government argue that by doing its best to comply with FDIC's demands and thus save the bank from ruin, Meritor made an election precluding restitution, because that would punish Meritor for trying to mitigate.

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[18] The Government's suggestion that the Income Maintenance Agreement ("IMA") was "the most valuable ... provision" of the Merger Assistance Agreement, Govt. Br. at 62, is therefore flatly contradicted by the trial court's unchallenged factfindings. The assertion that Meritor valued the IMA "as worth more than $400 million," id., is also misleading. The valuation referred to was hypothetical and ex ante; the record proves without contradiction that the total payments under the IMA, before Meritor cancelled it, were $33.746 million *by Meritor to FDIC.* A300503-04, A300578, A300582-86 (Finnerty Report); A201052-54, A201241-42, A201247-53 (Finnerty).

First Nationwide Bank v. United States, 431 F.3d 1342, 1352 (Fed. Cir. 2005) ("[A] non-breaching party is not required to create an even worse situation by abandoning all performance in order to preserve access to remedy. As explained in the Restatement (First) of Restitution § 68, comment b, a non-breaching party does not waive the right to restitution 'where he continues to perform only for the purpose of preserving what he has already invested in the performance.'")

b) There is no Inconsistency in the Trial Court's Compensating Meritor for All of the Losses That Resulted From FDIC's Breaches

The Government's argument that the trial court improperly combined expectancy and restitution damages (Govt. Br. at 60-61) boils down to semantics. While the trial court did characterize the pre-breach value of the bank as constituting expectancy damages, the damage award seeks only to "restore[] to [Meritor] the net loss that [it] suffered as a result of [its] performance under the contract," which is the essence of restitution. Landmark Land Co. Inc. v. FDIC, 256 F.3d 1365, 1372 (Fed. Cir. 2001).

Meritor's loss consisted primarily in the destruction of the bank. As the trial court found, the total value of the bank, prior to the first breach, quantifies that loss. But as the trial court also found, Meritor's "net loss" also includes the net payments it made to FDIC under the contract prior to the first breach. Another way of putting this is simply to note that the value of the bank in 1988

would have been greater than it was had Meritor not made these payments under the contract, and that this difference is part of "the net loss that [Meritor] suffered as a result of [its] performance." Id. Not to add that amount would compensate Meritor for less than it actually lost.

The trial court's damage award is thus best understood as constituting reliance-type restitution damages, the principle of which "is that a party who relies on another party's promise made binding through contract is entitled to damages for any losses actually sustained as a result of the breach of that promise." Glendale, 239 F.3d at 1382. The trial court identified three distinct "losses actually sustained as a result of the breach" – the payments Meritor made to FDIC under the merger assistance agreement; the pre-breach value of the institution; and Meritor's post-breach "wounded bank" damages. We agree with the Government that, if the trial court's award of Meritor's pre-breach value is upheld, the wounded bank damages should be excluded as duplicative. But Meritor's payments to the government, and the loss of the entire value of the institution, are distinct losses. As such, they are proper components of a reliance damage award. As required for reliance damages, the trial court squarely addressed the question "whether regulators foresaw, or should have foreseen, at the time of contract formation, that breaching the 'goodwill' portion of their contract with Meritor would have resulted in a significant or total loss of

Meritor's net worth or market value." A000019; see Landmark Land, 256 F.3d at 1378. That Meritor's $67 million in additional costs under the assistance agreement was likewise foreseeable is not contested by the Government, and could not be, in light of that agreement's explicit creation of mechanisms for payments by Meritor to FDIC. A401156, A401165, A401168.

Finally, the government's complaint that the $67 million represents "cash payments alone" rests upon a canard fully belied by the record. The Government attempted at trial to establish that Meritor, on an *ex ante* basis, put substantial value on the IMA that was part of the merger assistance package. But the trial court's damage award measures Meritor's actual losses, not hypothetical values, and the record proves without contradiction that the total payments under the IMA, before it was cancelled, were $33.746 million by Meritor to FDIC. A300503-04, A300578, A300582-86 (Finnerty Report); A201052-54, A201241-42, A201247-53 (Finnerty). This Court favors real losses. See Westfed, 407 F.3d at 1369 ("[P]otential future obligations ... do not count ... as an actually sustained loss.")

3. The Court Correctly Calculated Wounded Bank Damages

If the trial court's award of Meritor's pre-breach value is upheld, we agree with the Government that post-breach wounded bank damages would be duplicative. We note, however, that the Government has not challenged the trial

court's factfinding regarding the amount and causation of these damages. In the event that this Court adopts a damage theory other than that employed by the trial court, and one with which wounded bank damages are not inconsistent, this element of Plaintiff's damage is therefore law of the case.

VI. Upon the Unique Facts of This Case, Plaintiff Is Entitled to a Restitution Award Reflecting the Financial Benefits Enjoyed By the Government as a Result of Meritor's Contract Performance

In its liability decision the trial court found that "FDIC would have closed Western but for the merger." A000012; see also A000005, A000027, A000031. At the damages trial, the question whether FDIC would have liquidated Western absent the Meritor merger was tried at length. Plaintiff, and the trial court, were well aware of the hurdle posed for this damage theory by Glendale and subsequent decisions. See, e.g., Glendale, 239 F.3d at 1382 ("[It is not at all clear that but for Glendale's purchase of Broward the Government would have been called upon to make up that deficit then and there.") The court concluded that Plaintiff's evidence overcame the challenge:

> This Court believes that the facts of this case are significantly different from those in Glendale.... Here, there does seem to be adequate support, by a preponderance of the evidence, that, but for Meritor's acquisition, the Government ... would have had to pay out $696 million. As a result of Meritor's acquisition, the cost to the FDIC was reduced to $294 million ... The assumption of Western's liabilities by Meritor clearly produced this $402 million saving.

A000022. Mindful that, in Glendale, the FSLIC had alternatives to liquidation, the trial court found that "[i]t is also clear that ... the only alternative to Meritor's acquisition was the liquidation of Western. Thus, the Government clearly saved the $402 million cost and retained the ever accumulating interest on that saving for more than fourteen years." A000023. The Court concluded that "[i]f this were the first case in the Winstar line, the Court would award [restitution] based upon the benefit conferred on the Government." Id. But in light of this Court's decisions and uncertainties in this area of law, the trial court denied the claim in order to "allow[] the parties to fully brief and argue the matter before the Federal Circuit." Id. Hence Plaintiff's cross-appeal.

In the sections that follow we review the evidence supporting the trial court's findings regarding FDIC's avoided liquidation costs. On that basis we ask this Court to reverse the denial of the claim. In seeking reversal, we acknowledge that this Court has rejected disgorgement claims in no less than three Winstar-related cases -- Glendale, 239 F.3d 1374, California Federal Bank, FSB v. United States, 245 F.3d 1342 (Fed. Cir. 2001), and LaSalle Talman Bank, FSB v. United States, 317 F.3d 1363 (Fed. Cir. 2003). But, we submit, the unique facts of this case compel a different result.

A. The Government Admitted that, Absent a Merger, It Would Have Been Forced to Liquidate Western

Plaintiffs' Request for Admission No. 6 asked the Government to admit that, "[i]f the FDIC was unable to find a merger partner for Western in or about the Spring of 1982, the agency recognized that either it or the State of Pennsylvania would have to seize and/or liquidate the institution." The Government responded by admitting that "FDIC, in the hypothetical circumstances stated, would have terminated Western's deposit insurance and that the State of Pennsylvania would have appointed a receiver to liquidate the institution." A300645, A300651.

The matter admitted is "conclusively established." RCFC 36(b); McNeil v. AT&T Universal Card, 192 F.R.D. 492, 494 n.4 (E.D. Pa. 2000) ("Admissions are conclusively binding on parties at trial... "); T. Rowe Price Small-Cap. Fund, Inc. v. Oppenheimer & Co., 174 F.R.D. 38, 44 (S.D.N.Y. 1997) ("Rule 36 responses become, in effect, sworn evidence that is binding upon [a party] at trial").

The government's admission eliminates all but one of FDIC's alternatives, including: (1) allowing Western to continue operations as is; (2) installing new management; (3) open bank assistance; (4) offering a re-bid; or (5) pursuing a purchase and assumption agreement, rather than liquidation, after Western's closure. While this Court has considered cases in which FSLIC had many

options, the Government has acknowledged that those options were unavailable in this case.[19] The only alternative left was another merger partner "in or about the Spring of 1982." A300651.

B. The Record Evidence Amply Supports The Trial Court's Finding That Meritor Was the Only Acceptable Merger Candidate

FDIC shopped Western to several area banks, but received only two bids – one from Meritor, one from Dollar Savings Bank. The record fully supports the trial court's finding that the Dollar bid was unacceptable, a finding inherent in the court's conclusion that "in this case the only alternative to Meritor's acquisition was the liquidation of Western." A000022.

1. FDIC Rejected the Only Other Alternative to Liquidation – the Dollar Bid – as Nonviable

For several reasons the Dollar bid was nonviable.

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[19] In addition to the Government's admission, the record evidence established that none of these options was feasible in the case of Western. Open bank assistance (with or without new management) under section 13(c) of FDIC Act was not possible since Western did not meet the essentiality requirement, A201572 (Gough), and FDIC had made a determination that Western "was not viable and would not be viable after any reasonable period of assistance" and was "not a bank deserving of assistance." A300457, A300459; A300464-65; see also A201569 (Gough) (FDIC determined not to provide financial assistance to Western to let it stay open). And as discussed below, the only purchase and assumption bid received for Western was not viable while a rebid would not have been possible given the State of Pennsylvania's timetable for Western's seizure. See, e.g., A102775 (Gough) (Pennsylvania was ready to close Western immediately "and we would be forced to liquidate it").

First, it was too expensive. Paul Fritts, FDIC's Regional Director, testified that FDIC "had a bid or two" for Western, but that "they wouldn't meet minimum cost standards that FDIC had to meet in order to accept it. [Meritor's bid] was the only one that met the cost test." A102940-41; see also A102940 (Fritts) (Meritor's was the only viable bid that FDIC could accept); A200132-33 (Brumbaugh) ("met the cost test" means that Meritor's was the only bid that was projected to cost FDIC less than liquidating Western). Plaintiff's banking expert, Dr. Brumbaugh, found that Dollar's asset liquidation and credit risk protection provisions "imposed on the FDIC a lengthy and ongoing substantial potential cost that, in my opinion, would have exceeded the liquidation cost estimate." A200117 (Brumbaugh); see generally A200117-18 (Brumbaugh) (explanation of Dollar's bid provisions); A203074-75, A203082 (Hamm); A300751.

Second, Dollar was too small. See A300460 ("[Meritor] is the only mutual savings bank in the state large enough to acquire Western.") A300468. Deputy Director Gough testified that had Dollar tried to acquire Western the "problems would just be too massive for it to absorb it. They are taking on something much bigger than they were, and by size alone, couldn't handle it." A201676-77; see also A300750; A300749; A200110-11, A200112-14 (Brumbaugh).

Third, the government admitted that Western would have been liquidated in the absence of a "merger." A300651. Dollar's operative bid did *not* seek a

merger, but, instead, a purchase of Western after the latter's closure. Compare A300471-76 (original Dollar bid) with A300484-90 (revised Dollar bid); see also A200108 (Brumbaugh) (Dollar bid inconsistent with Admission); A300590, A300605 (FDIC Resolutions Handbook definition of "purchase and assumption agreement"); A200104-07, A200119, A200099, A200124 (Brumbaugh); A201604-05, A201608, A201674-75 (Gough); A201840-41 (Lutz).

C. FDIC's Formal Certifications Under The Bank Merger Act Establish, as a Matter of Law, That Western Would Have Been Liquidated Immediately But For the Merger

Formal certifications made by the FDIC Board of Directors under the Bank Merger Act establish that, as a matter of law, FDIC would have immediately liquidated Western absent the Meritor merger.

The Bank Merger Act, 12 U.S.C. § 1828(c) (1963 ed., Supp. IV), requires that, before approving a bank merger, FDIC solicit opinions from other federal agencies and the Attorney General regarding antitrust implications. This requirement may be waived, but only upon a finding that the agency "must act *immediately* in order to prevent the probable failure of one of the banks or savings associations involved." 12 U.S.C § 1828(c)(4) (emphasis added).

The statute requires that the sister agencies and the Attorney General be accorded 30 days to review a proposed merger, but shortens the period to 10 days in an "emergency." It waives notice altogether where necessary "to prevent the

probable failure of one of the banks involved." See generally Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930); see also S. Rep. No. 196 (86th Cong., April 17, 1959) at 24 ("provision is included for those exceptional cases where immediate action is required ... to prevent the probable failure of one of the merging banks.")

Here, FDIC made the requisite finding that "it must act immediately in order to prevent the probable failure of one of the banks involved." See A102774-75, A102776, A201626-27 (Gough); A300045 (Basis for Corporate Approval); see also A300046 (FDIC Order) (FDIC "dispenses with the solicitation of competitive reports from other agencies" because "action must be taken immediately in order to prevent [Western's] probable failure"); A300047, A300050 (FDIC Board Resolution) (same); A300660 (Admission).

"It is well settled that in order to show bad faith on the part of a Government official, the petitioner must submit 'well-nigh irrefragable proof' to sustain the charge, as it is presumed that Government officials act in an appropriate and lawful manner in the discharge of their duties." McEachern v. Office of Pers. Mgt., 776 F.2d 1539, 1544 (Fed. Cir. 1985) (citation omitted). "'Well-nigh irrefragable' proof ... refers to evidence that 'cannot be refuted or disproved; incontrovertible, incontestable, indisputable, irrefutable, undeniable...'" Am-Pro Protective Agency, Inc. v. United States, 281 F.3d

1234, 1240 (Fed. Cir. 2002) (quoting Oxford English Dictionary 93 (2d ed. 1991)).

The FDIC Board formally certified that FDIC could not comply with the antitrust laws because, unless the merger were consummated, Western would fail "immediately." The structure of the Act demonstrates that "immediately" means a matter of days, because the certification dispenses even with the requirement of 10-days' emergency consultation.[20] Unless the Government contends – and establishes with "well-nigh irrefragable proof" – that this certification was false, it is established as a matter of law that Western would have failed, in a matter of days, absent the Meritor merger. The Government has offered no such contention.

D. The Record Evidence Overwhelmingly Supports the Trial Court's Finding That Absent a Merger, FDIC Would Have Liquidated Western

No other Winstar case of which we are aware involves a sworn government admission that, but for a merger, the Government would have liquidated the failing thrift. And here, the evidence both corroborated that admission, and, further, showed that Meritor was the only possible merger partner. We are aware of no case in which the Government made a formal

[20] Deputy Director Gough confirmed that, under the Bank Merger Act, the 10-day notice prevision could be avoided only in "[a] real emergency," and that "a real emergency" means that FDIC has "less than ten days" to effectuate the merger. A201627.

certification, under the Bank Merger Act, that absent immediate consummation of the merger the failing thrift would have to be liquidated. On these unique facts Meritor is entitled to restitution. Landmark Land, 256 F.3d at 1372-73 (value of benefits conferred on the breaching party is recoverable in restitution) (citations omitted).

E. The Amount of The Government's Savings Is Admitted

In calculating restitution, plaintiffs need only establish a "reasonable basis [to] comput[e]" the savings. Locke v. United States, 283 F.2d 521, 524 (Ct. Cl. 1960) (emphasis added); see also 12 Corbin on Contracts § 1112, at 46-47 (Interim ed. 2002) ("[A] much lesser degree of certainty is required in proving the[] exact amount" of restitution). In addition, any "doubts [about the calculation] must be resolved against the defendant"; 12 Corbin § 1112 at 44; Restatement (Second) of Contracts § 352.

Here, however, it was the Government itself that provided the best estimate of the cost of liquidating Western. The government formally admitted "that the FDIC estimated at or about March or April 1982 that it would cost the agency approximately $696 million in the event [Western] were closed." See A300652, A300665 (Admissions); see also A300052 (FDIC News Release); A300752; A102759-60, A201631 (Gough).

The record established without contradiction that this estimate was the result of the same analysis performed by FDIC every time it resolved a mutual savings bank, A201613 (Gough), and continues to use it today "because it's so reliable." A200262-63 (Brumbaugh). Press releases containing liquidation estimates were reviewed by FDIC's Executive Secretary, among others. A103012 (Fritts); A102756-57, A201627-28 (Gough); A200137-38 (Brumbaugh); A201929 (Thakor); A203106-08 (Hamm). The estimate reflected FDIC's analysis on the merger date, and took into consideration movement in interest rates prior to the merger, as well as projections of rates going forward. A201629, A102757 (Gough); A200369, A200096 (Brumbaugh); cf. A201610 (Gough).

The trial court's acceptance of FDIC's liquidation cost estimate (A000022) was well supported by the evidence.

We disagree, however, with the trial court's use of FDIC's estimate of the likely cost of the merger, for the simple reason that there was no need to rely upon an estimate when historical records allowed a precise accounting of the actual costs incurred. Dr. Finnerty analyzed, on an *ex post* basis, the costs of the assistance provided by FDIC under the 1982 Merger Assistance Agreement and concluded that the net result was a benefit to the government in the amount of $67.341 million. A A300503-04, A300578, A300582-86 (Finnerty Report);

A201052-54, A201241-42, A201247-53 (Finnerty). The government's witnesses did not seriously challenge the accuracy of Dr. Finnerty's figures.[21]

The Government did argue that if the court were to use FDIC's *ex ante* estimate of liquidation costs, it should also use FDIC's *ex ante* estimate of the likely cost of the merger. The trial court evidently accepted this argument, calculating the Government's net savings as $696 million, less $294 million, for a net figure of $402 million. A000022-23.

But Plaintiff's experts properly used more reliable numbers. When available, Dr. Finnerty relied on *ex post* figures because they are factual and accurate. Indeed, the trial court's reliance upon FDIC's projected merger costs, when the actual costs incurred were far less (actually negative), is precluded by this Court's holding in Westfed that "potential future obligations ... do not count ... as an actually sustained loss." Westfed, 407 F.3d at 1369; see also Fifth Third Bank of W. Ohio v. United States, 402 F.3d 1221, 1237 (Fed. Cir. 2005) (rejecting analysis "based.... on hypothetical costs that were never actually incurred").

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[21] Government expert William Hamm did criticize Dr Finnerty's treatment of the Federal Reserve debt, arguing that the FRB repayment should not be counted as a benefit to the government because "there is no identity of interest between the government and the Federal Reserve Bank." A202680-81. But this is wrong. Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 830 (1997) (Federal Reserve banks are "fiscal arms of the federal government" with interests "indistinguishable from those of the sovereign.").

Because FDIC never liquidated Western, an *ex post* calculation of the cost of liquidation was impossible. Dr. Finnerty therefore adopted the government's own time-tested estimate. The asserted inconsistency is therefore theoretical, not practical. To measure the Government's savings, two figures are needed: the cost of liquidation and the cost of the merger. In both cases Dr. Finnerty used the most reliable available data.

F. Plaintiff Is Also Entitled to Disgorgement of The Government's Earnings

Restitution may be measured by "the value of the benefits received by the defendant due to the plaintiff's performance." Landmark Land, 256 F.3d at 1372; see also Glendale, 239 F.3d at 1380-81; Restatement (Second) of Contracts § 344(c) (1981).

The remedy of disgorgement has deep roots. In SEC v. Cavanagh, 445 F.3d 105, 120 (2d Cir. 2006) the federal courts' power to order equitable disgorgement was traced to the Constitution and the Judiciary Act because chancery courts possessed the power in the 18th century. The court cited Cadwallader v. Mason, 1793 Va. Lexis 4 (Mar. 8, 1793), in which a mortgagor who improperly retained possession of land after the mortgage had been satisfied had to "account [to the landowner] for ... after-taken profits." The "rule against unjust enrichment compelled an award equal to the defendant's gain,

regardless of how much money the plaintiff actually would have earned from the land during the mortgagor's wrongful possession." Id. at 120 (citations omitted).

Disgorgement can be appropriate in breach of contract cases. In Hannon Armstrong & Co. v. Sumitomo Trust & Banking Co., 973 F.2d 359, 365 (4th Cir. 1992), the Court stated that "[C]ourts have impressed equitable remedies ... [on] wrongfully obtained profits in a variety of contexts, including breach of fiduciary obligation or breach of contract, e.g., copyright infringement, and patent infringement." (Citations omitted.)

During the damages trial, Dr. Finnerty calculated the earnings the Government realized through the use of the money saved because of the merger -- $2,066,702,000. See A300521-22. This calculation is straightforward, because the Government reports the income generated by the insurance funds each year.

The Court of Claims has held that disgorgement of such earnings would amount to a prohibited award of prejudgment interest, and implicitly so held here. See Glendale Federal Bank, FSB v. United States, 43 Fed. Cl. 390, 397 (Fed. Cl. 1999), aff'd in part, rev'd in part, 239 F.3d 1374 (Fed. Cir. 2001). We respectfully disagree, for reasons best illustrated by the decision in Nickel v. Bank of America Nat'l Trust & Savings, 290 F.3d 1134 (9th Cir. 2002).

In Nickel, Bank of America owed certain trusts restitution for excessive fees charged. The Bank "refunded $24 million of overcharges to the trusts

together with $17.8 million interest for the period of the overcharges." Id. at 1136. The issue before the Court was whether the refund, with interest, represented adequate restitution.

The Court first noted that equity requires restitution when one is unjustly enriched at the expense of another, and that this includes disgorgement of gains realized through the use of moneys wrongfully obtained: "The elementary rule of restitution is that if you take my money and make money with it, your profit belongs to me." 290 F.3d at 1138 (citing Restatement of Restitution § 1 (1937)). The Court then reversed the District Court's decision that refunding the overcharges plus interest was sufficient. The Bank instead was required to disgorge all of the profits it actually made through the use of plaintiff's money. Id. at 1139 ("The money misappropriated from the trusts added directly to what the banks had to loan or to invest or, if not directly loaned or invested, was used to meet expenses, freeing an equal amount for loan or investment.")

The lesson of Nickel is that disgorgement of income generated by money wrongfully obtained is simply not the same as prejudgment interest,[22] even if, by coincidence, the defendant created that income through interest-bearing

[22] The same principle is illustrated by cases holding that a defendant must disgorge profits made, and *also* pay prejudgment interest on those profits. See, e.g., SEC v. First Jersey Secs., Inc, 101 F.3d 1450 (2d Cir.1996); SEC v. Levine, 2007 U.S. Dist. LEXIS 33686 (D.D.C. May 8, 2007); SEC v. Bocchino, 2002 U.S. Dist. LEXIS 22047 (S.D.N.Y. 2002).

investments. If FDIC had invested its 1982 savings in real estate, later selling the real estate at a profit, it would make no sense to argue that that profit is the same as prejudgment interest. The fact that FDIC instead chooses to invest its assets in Treasury Bills does not change the analysis – requiring disgorgement of income earned is not the same as imposing prejudgment interest.

VII. The Trial Court Correctly Ruled That Plaintiff's Damage Award Should Be Paid in Such Amount as Will Fully Compensate Plaintiff for its Losses and Without Forcing Plaintiff to Reimburse the Government for the Costs it Incurred in Breaching

Because this is a derivative suit, and because FDIC-Receiver has succeeded to the rights and obligations of Meritor, FDIC is correct that any final judgment in this case will be paid by the United States to FDIC-Receiver. FDIC Br. at 2-7. FDIC is also correct that the judgment will of necessity come out of the Judgment Fund. FDIC Br. at 7-10. Both FDIC and the Government are incorrect, however, in arguing that the trial court somehow erred in ordering the Government to pay damages in an amount that will make Plaintiffs whole – i.e., net of the existing receivership deficit.[23] That award does not improperly impair

[23] The trial court's December 18, 2006 Order provides:

> The 371,733.059 shall be paid net of any receivership claims. This payment is to be paid outside the statutory distribution scheme as advanced by the Government in 12 U.S.C. § 1821(d)(11). This award is based on basic common law contract damage. The Government caused Meritor to be forced into receivership which it would otherwise not have been forced into and it is well

the receiver's statutory authority, and accords with basic principles of damages. It is certainly not an abuse of discretion.

A. The Trial Court's Damage Award Is Founded Upon the Basic Rule that the Difference Between the Pre-Breach and Post-Breach Values of a Franchise is the Measure of Damages for Destruction of the Franchise

Awarding damages in an amount sufficient to cover both the receivership deficit and the entire amount of Meritor's losses is fully consistent with the law of damages. In cases where a breach of contract causes the destruction of a franchise, the accepted measure of damages is the difference between the value of the franchise before, and after, the breach. Mattingly, Inc. v. Beatrice Foods Co., 835 F.2d 1547, 1559 (10th Cir. 1987) ("The proper measure of recovery for the destruction of a business is the '*difference between the . .. market value of the business before and after the injury*'"), vacated as moot following settlement, 852 F.2d 516 (10th Cir. 1988) (emphasis original) (quoting Sawyer v. Fitts, 630 S.W.2d 872, 874 (Tex.App. 1982)); Taylor v. B. Heller & Co., 364 F.2d 608, 612 (6th Cir. 1966); Waqenheim v. Alexander Grant & Co., 482 N.E.2d 955, 967 (Ohio App. 1983); Lively v. Rufus, 533 S.E.2d 662, 669 (W.Va. 2000).

> settled that a breaching party has to put the party in the same position as it would have been but for the breach. Therefore, the Government is liable for any receivership deficit.

A000002-3.

In this case, the value of Meritor after the breach is negative, as a result of the deficit FDIC has run up. To determine the difference between the before and after value of the bank, the amount of that deficit must therefore be added to Meritor's pre-breach value. According to FDIC, the amount of the deficit as of December 31, 2006, was $31 million. FDIC Br. at 13 & fn. 9. That amount – or whatever the amount of the deficit at the time the Government acts to satisfy the judgment – should be added to the amount of Meritor's damages as finally determined.

B. The Trial Court's Damage Award Does Not Conflict With Any of the Provisions of 12 U.S.C. § 1821

An alternative justification for the trial court's judgment is the fact that FDIC-Corporate's claim against the receiver is invalid because it represents the cost of breaching, for which Meritor cannot in good conscience be held liable.[24]

The Meritor receivership initially enjoyed a surplus, A000028, which was extraordinary because "the forced sale of assets" during this time period "likely resulted in a significant decrease in the value received for those assets." Castle v.

[24] It is remarkable that FDIC-Receiver, having offered no aid to Meritor's shareholders during their 15-year struggle in the Claims Court, should now argue that the trial court's judgment would "allow the Shareholder[s] ... to enrich themselves at the expense of Meritor's creditors" (FDIC Br. at 13) when 93% of the claims of those "creditors" ($27 of $29 million) is FDIC-Corporate's claim, and the entire $29 million represents costs incurred by FDIC-Corporate in illegally destroying the bank. Apparently succumbing to its conflict of interest, FDIC-Receiver is advocating FDIC-Corporate's interests at the expense of the bank whose interests it purports to represent.

United States, 48 Fed. Cl. 187, 198 (2000), aff'd in part and rev'd in part, 301 F.3d 1328 (Fed. Cir. 2002); see also A202001-02 (Thakor)). The current deficit is instead the product of the government operating an FDIC-induced receivership for more than a decade, and the running of interest against the money borrowed from FDIC-Corporate for that purpose.[25] As such, the deficit represents the Government's cost of breaching, which cannot fairly be imposed upon Meritor. Drews Distrib., Inc. v. Leisure Time Technology, 175 F.3d 1014, 1999 WL 183811 at *10 (4th Cir. Apr. 5, 1999) (Breaching party cannot impose on non-breaching party costs incurred as the result of a breach).

Both FDIC and the Government invoke the jurisdictional bars in 12 U.S.C § 1821(d)[26], and the anti-injunction provision of 12 U.S.C § 1821(j), as somehow invalidating the trial court's judgment. To the extent that the judgment simply requires that damages be grossed up to cover the receivership deficit, it cannot violate either provision, because it will allow FDIC-Receiver to make full payment both to the shareholders and to the creditors in accordance with 12 U.S.C § 1821(d), and thus will not constrain the agency in any way.[27] But it is

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[25] FDIC concedes that, of the $29 million deficit, $27 million consists of "claims" by FDIC-Corporate. FDIC Br. at 13.

[26] See 12 U.S.C §§ 1821(d)(11)(A), 1821(d)(13)(D).

[27] FDIC asserts, without authority, that an award sufficient both to retire the receivership deficit and make Meritor whole would be "erroneous." FDIC Br. at 12-13. We find the assertion incomprehensible, because such an award would

also true that a judgment that FDIC-Corporate's claim is invalid complies fully with Section 1821, because that judgment arose from a claim brought against the United States for breaches committed by FDIC-Corporate, to which Section 1821 has no application. Rosa v. Resolution Trust Corp., 938 F.2d 383, 400 (3d Cir. 1991) ("RTC concedes the inapplicability to it of both [12 U.S.C. § 1821(d)(13)(D)] and § 1821(j) because those provisions do not address RTC in its corporate capacity.") Cf. also Abbott Bldg. Corp., Inc. v. U.S., 951 F.2d 191, 194-95 (9th Cir. 1991) (§ 1821(j) does not apply to suit seeking determination as to legality of FSLIC-Receiver's acquisition of realty by foreclosure).

Accordingly, once the appeals have run their course, the judgment in this case will be final and binding. Certainly a judgment that the United States is liable for the receivership deficit will be binding on the United States. FDIC suggests that because it chose not to pursue the claim itself, the judgment will not bind the receiver. FDIC Br. at 10. This is mistaken, because FDIC-Receiver has simply succeeded to the rights of the corporation, and "a judgment on the merits

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not "restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j). We agree with FDIC, however, that the Government's citation to Bailey v. United States, 341 F.3d 1342 (Fed. Cir. 2003) (Govt. Br. at 64) is inapt. In Bailey, the Court rejected the "false assumption that the receivership deficit is an asset available for recovery by FDIC." 341 F.3d at 1345. The trial court's damage award in this case makes no such assumption. Instead, it recognizes that the deficit represents (for the most part) a claim by FDIC-Corporate against FDIC-Receiver – a claim for which Meritor should not be liable, because it represents the Government's cost of breach.

in a [shareholder derivative] action is a binding determination of the corporate right." Wright Miller & Kane, Federal Practice & Procedure: Civil (3d ed. 2007) § 1840 p. 219-20. See Ross v. Bernhard, 396 U.S. 531, 538 (1970) (In a derivative action "the corporation ... is bound by the result of the suit") (citations omitted).

Even if this were not a derivative action, the judgment would be res judicata as to FDIC-Receiver, which resolutely refused to intervene despite repeated requests by Plaintiff that it do so.[28] National Wildlife Fed'n v. Gorsuch, 744 F.2d 963, 970 (3d Cir. 1984) ("National Wildlife ... was aware of the suits from the outset, and made a strategic decision not to intervene ... ") (nonparty precluded from challenging consent decree); Western Shoshone Legal Def. & Educ. Ass'n v. United States, 531 F.2d 495, 502 (Ct. Cl. 1976) (nonparty's claim barred by earlier proceeding) ("the law is developing a critical eye toward persons who... deliberately stay out of that litigation although they could easily enter it") (citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968); Aerojet-General Corp. v. Askew, 511 F.2d 710, 718-20 (5th Cir. 1975); Gambocz v. Yelencsics, 468 F.2d 837 (3d Cir. 1972)). Accordingly, FDIC-Receiver will be fully bound by a final judgment holding that the claim by FDIC-Corporate is invalid.

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[28] A600276-78; A600280-81; A600283-84.

FDIC-Receiver's abstention below also provides additional grounds for finding Section 1821 inapplicable. First, in receiving the judgment and distributing it to the shareholders FDIC-Receiver will not be acting under authority of 12 U.S.C § 1821(d)(11)(A), which only applies to FDIC's disposition of "amounts realized ... by [the] receiver...." The judgment in this case will not have been realized by the receiver, which refused to play any role in this lawsuit. A600276-78; A600280-81; A600283-84. For the same reason, Section 1821(j) does not apply. In Re Lewis, 398 F.3d 735, 740 (6th Cir. 2005) ("In this case, there is no evidence that FDIC has sought to exercise any of its powers vis-a-vis the debtor's property. On this record, therefore, we cannot say that the bankruptcy court's avoidance of Superior Bank's mortgage ... restrained or affected FDIC's exercise of its powers or functions as Superior Bank's receiver in contravention of § 1821(j).")

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court reverse the trial court's denial of Plaintiff's disgorgement claim, and direct entry of judgment in the amount of the Government's avoided costs together with the income derived therefrom. If the Court upholds the denial of Plaintiff's disgorgement claim, Plaintiff respectfully requests that the Court affirm the award of the pre-breach value of the bank ($276,000,000) plus Meritor's net

payments to FDIC ($67,340,000) for a total damage award of $343,340,000. In either event, Plaintiff respectfully requests that this Court affirm the trial court's finding that the judgment be increased by an amount equal to the receivership deficit at the time of payment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 20th day of November, 2007, I caused to be placed in first-class U.S. mail (postage pre-paid) copies of the Brief for Plaintiff-Cross Appellant Frank P. Slattery, Jr., addressed as follows:

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Pursuant to Rules 28.1(e)(2)(B) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this brief contains 16,233 words as calculated by the word processing system used to prepare this brief.

Peter Kryn Dykema