ORIGINAL

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.

REPLY BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION 2

I. The Trial Court Lacked Jurisdiction To Consider Claims Asserted Against A Non-Appropriated Fund Instrumentality 4

A. The Four Requirements For NAFI Status Are Clearly Satisfied 5

1. Congress Intended To Separate This FDIC Activity From Appropriated Fund Activities 6

2. No Exception To The NAFI Doctrine Is Warranted 8

3. Slattery's Untimely "Waiver" Argument Is Unavailing 11

II. The Trial Court's Contract Interpretation Was Erroneous 12

A. The Parties Agree That The FDIC Complied With The 1982 MOU's Plain Language 13

B. The Trial Court's Interpretation Of An Additional Contractual Requirement Is Contrary To Standard Principles Of Contract Interpretation 16

1. The Trial Court Interpreted The 1982 MOU As Barring The FDIC From Raising Meritor's Minimum Capital Level 16

2. The Trial Court's Interpretation Ignores Contract Interpretation Principles 18

3. The Circumstances Of The Parties In 1982 19

4. The Parties' Course Of Conduct Supports The Plain Language Interpretation 20

5. Slattery's Unmistakeability Argument Is Misleading 22

6. Slattery Failed To Address The Regulatory Context 23

7. Slattery's "Strawman" Argument Is Meritless 24

C. The FDIC Did Not Breach A Contractual Duty In 1988 25

III. The Trial Court's Damages Award Is Unsustainable 28

A. The Trial Court Clearly Erred In Awarding A "Control Premium" 28

1. It Is Undisputed That Control Premiums Belong To Shareholders, Rather Than The Corporation 28

2. No Control Premium Is Justified Here 31

B. The Trial Court's Selection Of 1988 To Value Meritor Is Erroneous 32

C. The "Wounded Bank" Damages Are Duplicative Of The Award Of Meritor's 1988 Stock Market Valuation 34

D. The Trial Court's Award Of Partial Restitution For Net Contract Cash Payments Contradicts Its Award Of Expectancy Damages 35

1. Slattery's New Theories Are Unavailing 36

2. The Trial Court Erred In Awarding Partial Restitution 38

IV. Slattery's Cross-Appeal Seeking Restitution Is Meritless 39

A. This Court's Settled Precedent Bars An Award Of Restitution 39

B. The FDIC's Contingent Liability For The Combined Banks Bars Award Of Restitution For The Claimed Liquidation "Savings" 41

C. Liquidation Was An Unlikely Outcome Of Western's Failure 42

D. The FDIC Possessed Several Options To Avoid Liquidation 44

1. FDIC Would Have Turned To Dollar's Bid 45

E. The Cost Of The Hypothetical Liquidation Is Unknown 47

F. The Western Acquisition Cannot Be Unwound For Restitution . . . 48

G. Plaintiffs' Claim For "Reinvestment Earnings" Is Legally Barred . 49

V. The Trial Court's Directive That The Distribution Statute Not Be Followed, And Its Statement That The Government Pay The Deficit, Are Unsupported By Statute And Precedent 50

A. The Trial Court Lacks Authority To Countermand Congress's Enactments 51

B. The Insurance Fund Owns The Claim For The Deficit 52

VI. The Trial Court Correctly Ruled That It Lacked Jurisdiction To Entertain Roth's And Interstate's Claims Against The FDIC-Receiver 54

A. Roth's Interpretation Of The Trial Court's Judgment Is Baseless 55

1. Any Damages Will Be Paid To Meritor's Representative 56

2. Roth's Arguments For A Direct Award To Shareholders As Of 1992 Are Unavailing 58

a. The Court Did Not Intend To Make An Award To Former Shareholders As Of 1992 58

b. No Duplicate Claims Are Possible 60

B. The Trial Court Correctly Ruled That It Lacked Jurisdiction To Entertain Roth's Claims Against The FDIC-Receiver 61

1. This Court's Precedent Does Not Support Jurisdiction 62

2. The FDIC-Receiver Is Not The United States 63

CONCLUSION 67

TABLE OF AUTHORITIES

Page(s)

CASES

Ains, Inc. v. United States,
365 F.3d 1333 (Fed. Cir. 2004) 5, 6, 7

American Capital Corp. v. FDIC.,
472 F.3d 859 (Fed. Cir. 2006) 35, 60, 64

Arthur Pew Const. Co., Inc. v. Lipscomb,
965 F.2d 1559 (11th Cir. 1992) 61

Auction Co. of Am. v. FDIC (Auction I),
132 F.3d 746 (D.C. Cir. 1997) 64, 65

Auction Co. of Am. v. FDIC (Auction II),
141 F.3d 1198 (D.C. Cir. 1998) 65

Bailey v. United States,
341 F.3d 1342 (Fed. Cir. 2003) 50, 52, 53

Bausch & Lomb Inc. v. Bressler,
977 F.2d 720 (2d Cir. 1992) 49

Branch v. United States,
69 F.3d 1571 (Fed. Cir. 1995) 62, 63

Brunswick Bank & Trust Co. v. United States,
707 F.2d 1355 (Fed. Cir. 1983) 9

C.A. May Marine Supply Co. v. Brunswick Corp.,
649 F.2d 1049 (5th Cir. 1981) 31

Cain v. United States,
350 F.3d 1309 (Fed. Cir. 2003) 59

California Fed. Bank v. United States,
395 F.3d 1263 (Fed. Cir. 2005) 35

California Fed. Bank, FSB v. United States,
43 Fed. Cl. 445 (1999) aff'd in part, vacated in part,
245 F.3d 1342 (Fed. Cir. 2001) 49

California Fed. Bank, FSB v. United States,
245 F.3d 1342 (Fed. Cir. 2001) 40, 41

California Hous. Sec., Inc. v. United States,
959 F.2d 955 (Fed. Cir. 1992) 62, 63

Castle v. United States,
48 Fed. Cl. 187 (2000), aff'd in part, rev'd in part
on other grounds, 301 F.3d 1328 (Fed. Cir. 2002) 53

Citizens Fed. Bank, FSB v. United States,
52 Fed. Cl. 561 (2002) 49

Core Concepts of Florida, Inc. v. United States,
327 F.3d 1331 (Fed. Cir. 2003) 6, 7, 10

Denkler v. United States,
782 F.2d 1003 (Fed. Cir. 1986) 6

El-Sheikh v. United States,
39 Fed. Cl. 1 (1997), rev'd on other grounds,
177 F.3d 1321 (Fed. Cir. 1999) 6

Estate of Godley v. Comm'r of Internal Revenue,
286 F.3d 210 (4th Cir. 2002) 31, 32

Everman Nat. Bank v. United States,
756 F.2d 865 (Fed. Cir. 1985) 9

FDIC ex rel. Karnes County Sav. & Loan Ass'n v. United States,
342 F.3d 1313 (Fed. Cir. 2003) 59, 63

Federal Deposit Ins. Corp. v. Hartford Ins. Co. of Illinois,
877 F.2d 590 (7th Cir. 1989) 66

Fifth Third Bank of W. Ohio v. United States,
402 F.3d 1221 (Fed. Cir. 2005) 33

First Hartford Corp. Pension Plan & Trust v. United States,
194 F.3d 1279 (Fed. Cir. 1999) 57, 59, 62

Furash & Co. v. United States,
252 F.3d 1336 (Fed. Cir. 2001) . . . . *passim*

Glendale Fed. Bank FSB v. United States,
239 F.3d 1374 (Fed. Cir. 2001) 40, 41

Granite Mgmt. Corp. v. United States,
Fed. Cir. No. 07-5054, January 8, 2008 Slip Op. 24

Granite Mgmt. Corp. v. United States,
416 F.3d 1373 (Fed. Cir. 2005). 33, 36, 40

Hindes v. FDIC,
137 F.3d 148 (3rd Cir. 1998) 15

Indu Craft, Inc. v. Bank of Baroda,
47 F.3d 490 (2d Cir. 1995) 31

Int'l Bus. Machs. Corp. v. United States,
201 F.3d 1367 (Fed. Cir. 2000) 50

Kachanis v. Dep't of Treasury,
212 F.3d 1289 (Fed. Cir. 2000) 12

Kyer v. United States,
369 F.2d 714 (Ct. Cl. 1966) 10

L'Enfant Plaza Properties, Inc. v. United States,
668 F.2d 1211 (Ct. Cl. 1982) 6, 11

Landmark Land Co., Inc. v. FDIC,
256 F.3d 1365 (Fed. Cir. 2001) 64

LaSalle Talman Bank F.S.B. v. United States,
45 Fed. Cl. 64 (1999), aff'd in part, vacated in part,
317 F.3d 1363 (Fed. Cir. 2003) 49

LaSalle Talman Bank F.S.B. v. United States,
317 F.3d 1363 (Fed. Cir. 2003) 40

Lee by Lee v. United States,
129 F.3d 1482 (Fed. Cir. 1997) 5, 11

Library of Congress v. Shaw,
478 U.S. 310 (1986) 50

Martin v. National Surety Co.,
300 U.S. 588 (1937) 61

McKenzie v. Irving Trust Co.,
323 U.S. 365 (1945) 61

Philip Morris, Inc. v. Comm'r,
96 T.C. 606 (1991), aff'd,
970 F.2d 897 (2d Cir. 1992) 28, 29, 30

Smith Bucklin & Assocs., Inc. v. Sonntag,
83 F.3d 476 (D.C. Cir. 1996) 16

Southern Cal. Fed. Sav. & Loan Ass'n v. United States,
422 F.3d 1319 (Fed. Cir. 2005) 59, 60

Statesman Sav. Holding Corp. v. United States,
41 Fed. Cl. 1 (1998) 52, 53

Texas State Bank v. United States,
423 F.3d 1370 (Fed. Cir. 2005) 11

United Pacific Ins. Co. v. United States,
358 F.2d 966 (Ct. Cl. 1966) 61

United States v. Sherwood,
312 U.S. 584 (1941) 61

United States v. Sweeney,
226 F.3d 43 (1st Cir. 2000) 66

United States v. Winstar Corp.,
518 U.S. 839 (1996) 22

STATUTES, RULES AND REGULATIONS

Federal Deposit Insurance Corporation Improvement Act of 1991
Pub. L. No. 102-242, 105 Stat. 2236 . . . . 8, 9

Pub. L. No. 109-173 § 8(a)(11)(C), 119 Stat. 3611-12 7

12 U.S.C. § 1817(b) 4

12 U.S.C. § 1817(b)(5) 9

12 U.S.C. § 1817(d) 7

12 U.S.C. § 1821(a)(4)(1994) 7, 11

12 U.S.C. § 1821(a)(5)(1994) 7

12 U.S.C. § 1821(a)(6)(D) 7

12 U.S.C. § 1821(d)(2)(A) 52, 57

12 U.S.C. § 1821(d)(6) 66

12 U.S.C. § 1821(d)(11) . . . . *passim*

12 U.S.C. § 1821(d)(11)(A) 52, 54, 65

12 U.S.C. § 1821(d)(13)(D) 51, 65

12 U.S.C. § 1821(j) 52

12 U.S.C. § 1821a(a)(1) 11

12 U.S.C. § 1821a(a)(3) 11

12 U.S.C. § 1823(b) 7

12 U.S.C. § 1824(a) 9

12 U.S.C. § 1824(c) 9

28 U.S.C. § 2516(a) 50

31 U.S.C. § 3727, Assignment of Claims Act 58

Federal Rules of Civil Procedure Rule 23.1 59

MISCELLANEOUS

5 A. Corbin, Corbin on Contracts § 24.25 (rev. 1998) 19

13 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 5978 (2004) 59, 60

House Report No. 102-330 (1991), 1991 U.S.C.C.A.N. 1901, 1908 8

Restatement (Second) of Contracts § 202 19

Restatement (Second) of Contracts § 207 19

Restatement (Second) of Contracts § 384 cmt. a (1981) 49

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UNITED STATES,

Defendant-Appellant.

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

Defendant, the United States, respectfully submits this reply brief in response to the opening briefs filed by plaintiffs-cross appellants Frank P. Slattery, Jr. ("Slattery"), Steven Roth and Interstate Properties ("Roth"), and the amicus brief filed by the Federal Deposit Insurance Corporation ("FDIC") on behalf of the receiver.

INTRODUCTION

In 1982, Meritor Savings Bank's predecessor ("Meritor") merged with Western Savings Fund Society ("Western") in a FDIC-sponsored transaction. FDIC and Meritor entered into several agreements, including a Memorandum of Understanding ("1982 MOU"). In the 1982 MOU, the FDIC promised not to "object" to "certain accounting methods," including that the net Western liabilities assumed by Meritor on a mark-to-market basis "may be treated as goodwill and amortized on a straight-line basis up to fifteen (15) years."

There is no dispute that the Western goodwill was counted as an asset in Meritor's regulatory capital accounting from 1982 to 1992. In 1988, however, Meritor suffered from severe financial problems and, in the absence of raising new capital, it was obvious to all that the bank would be forced to downsize massively to match its rapidly diminishing regulatory capital. Plaintiffs presented expert testimony that, in a no-breach world, Meritor could have downsized from $19 billion to $7.8 billion in assets from 1987 to 1990, losing over $650 million during 1988-91 alone, before potentially returning to profitability.

Regulators, however, were unable to predict the future of this enormous downsizing for one of the country's largest savings banks. The FDIC required Meritor to sign another MOU in 1988. This MOU provided, in part, that Meritor

raise its capital above the minimum level set for healthy banks. The FDIC acted on the basis of safety and soundness policies that pre-dated the 1982 MOU. These policies required that high-risk banks have higher minimum capital levels than healthy banks.

Eight years later, plaintiffs alleged that this regulatory intervention had breached the 1982 MOU. The trial court agreed and awarded the bank's 1988 stock market valuation, as well as a 50-percent "control premium," plus net cash payments made under the 1982 MOU, and so-called "wounded bank" damages.

The trial court erred in that (1) the court lacked jurisdiction over the FDIC insurance fund, which is a non-appropriated fund instrumentality ("NAFI") supported only by member premiums; (2) the court interpreted the contract to require FDIC performance beyond the contract's plain meaning, which was fully satisfied; (3) the court's award was duplicative and unsupported by this Court's precedent and the record; and (4) the court's judgment improperly interfered with receiver operations. Alternatively, the trial court's decision should be affirmed with respect to Roth's and Slattery's cross-appeals, both of which are unavailing.

I. The Trial Court Lacked Jurisdiction To Consider Claims Asserted Against A Non-Appropriated Fund Instrumentality

The trial court erred in determining that it possessed jurisdiction to entertain Slattery's breach of contract claims, as the contract at issue was with a NAFI.

Slattery asserts several arguments against the applicability of the NAFI doctrine, but none is supported by this Court's precedent. Slattery does not dispute our description of the enactments by which Congress structured the funding of the relevant FDIC insurance fund, now the Deposit Insurance Fund ("DIF"), and its predecessors. Congress explicitly separated these funds from appropriated funds and from the FDIC's other insurance funds. As we previously demonstrated, the DIF, its predecessor, the Bank Insurance Fund ("BIF"), and the BIF's predecessor, the Permanent Insurance Fund ("PIF"), have been funded solely by member assessments since the PIF's creation in the 1930's.[1] Govt. Br. at 26-33; 12 U.S.C. § 1817(b). Moreover, although Congress created a potential borrowing capability for the FDIC, that borrowing capability is limited to avoid any expense to the Treasury. Govt. Br. at 31-32.

The FDIC activity at issue here -- the regulation and insurance of state-chartered savings banks -- is, and was at all relevant times, a NAFI activity that

[1] Unless otherwise noted, further reference to the DIF includes its predecessors.

Congress clearly intended to separate from appropriated funds. That same NAFI provided the funding for the contract upon which Slattery bases its breach of contract claims, and FDIC personnel, acting on behalf of, and funded by the PIF or BIF, took all of the actions the trial court held to be breaches.

This Court should reject Slattery's attempt to avoid this congressional prohibition against suits based upon NAFI contracts. It makes no difference that Slattery has named the United States as nominal defendant here and sued in the Court of Federal Claims. It is established beyond cavil that the Court of Federal Claims lacks jurisdiction to entertain claims based upon NAFI contracts and activities. And, as the Court explained in Lee by Lee v. United States, 129 F.3d 1482, 1484 (Fed. Cir. 1997), "the judgment fund cannot be used to satisfy the obligations of non-appropriated fund instrumentalities."

A. The Four Requirements For NAFI Status Are Clearly Satisfied

Slattery questions the applicability of the NAFI doctrine here by emphasizing one of the four requirements for application of the doctrine set forth in Ains, Inc. v. United States, 365 F.3d 1333, 1342 (Fed. Cir. 2004), effectively conceding satisfaction of the other three NAFI tests. Slattery Br. at 17-18. To achieve NAFI status, this Court's precedent requires a conclusion that Congress

clearly expressed its intention to separate the FDIC's DIF from general Federal revenues. Ains, 365 F.3d at 1342. Slattery focuses its arguments upon this prong of the NAFI test.

1. Congress Intended To Separate This FDIC Activity From Appropriated Fund Activities

Slattery cites L'Enfant Plaza Props., Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982), and 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), for the proposition that the Court of Federal Claims possesses jurisdiction to entertain claims against an agency, absent a statutory prohibition against funds being appropriated to the purported NAFI activity. Slattery Br. at 20. This Court in Ains, however, explained that Congress's intention to separate a NAFI from general Federal revenues may be demonstrated in at least four ways:

> In the past, we have found several different statutory ways for Congress to express its intent to separate an agency from the general fund. See, e.g., L'Enfant Plaza, 668 F.2d at 1212 (explicit prohibition from receiving appropriated funds); Denkler [v. United States, 782 F.2d 1003,1004-05 (Fed. Cir. 1986] (absence of language authorizing appropriations); id. at 1005 (explicit statement that agency's funds shall not be construed to be [G]overnment funds or appropriated moneys); Core Concepts [of Florida, Inc. v. United States, 327 F.3d

> 1331, 1336 (Fed. Cir. 2003)] (direction that all monies under the agency's control be deposited into the [United States] Treasury to the credit of that agency).

Ains, 365 F.3d at 1343.

As in Denkler, the statutes establishing the BIF and its successor, the DIF, never provided authorization for the use of appropriated funds. 12 U.S.C. § 1821(a)(5) (1994) (former version); 12 U.S.C. § 1821(a)(4). Indeed, when the Savings Association Insurance Fund ("SAIF") was merged into the DIF, Congress eliminated from the statute the SAIF's limited authorization for appropriated fund backup for fiscal years 1994 through 1998.[2] 12 U.S.C.§ 1821(a)(6)(D) (repealed by Pub. L. No. 109-173, § 8(a)(11)(C), 119 Stat. 3611-12). Moreover, as in Core Concepts, 327 F.3d at 1336, the FDIC must keep its funds as separate depository accounts, within the Treasury or another institution, rather than being deposited to the Treasury's general fund. See 12 U.S.C. § 1823(b). Additionally, the FDIC's funds are not subject to apportionment. 12 U.S.C. § 1817(d). This Court noted, in Furash & Co. v. United States, 252 F.3d 1336, 1341 (Fed. Cir. 2001), that such a limitation was significant to the NAFI analysis.

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[2] Slattery cites no authority for its statement that the SAIF received substantial appropriated funds. Slattery Br. at 22-23.

2. No Exception To The NAFI Doctrine Is Warranted

The DIF's self-funding structure, combined with the absence of any existing or past authorization for appropriated funds to be used to fund the DIF's operations, resolves Slattery's jurisdictional claims. Slattery, however, asserts that an exception to the NAFI doctrine exists because of (1) various congressional pronouncements, and (2) Congress's authorization of appropriated funds for other FDIC activities. This argument is legally unsupported.

Congress has issued reassuring statements from time to time with regard to deposit insurance funding. Slattery Br. at 23-24. Nevertheless, Congress's funding structure for the BIF/DIF is intended to prevent any use of taxpayer funds. As H.R. Rep. No. 102-330 (1991), 1991 U.S.C.C.A.N. 1901, 1908 (cited at Slattery Br. at 23), states of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236:

> Through the reforms included in this legislation, the Committee intends to protect the taxpayers from [a bailout of] the BIF. . . . To help the industry refinance its own insurance fund, this legislation permits the FDIC to increase its Treasury credit limit from $5 billion to $30 billion. Although the FDIC has never used its credit to borrow from Treasury, the insurance fund is running a deficit. This provision would provide emergency funding if needed. The FDIC will repay Treasury

> borrowing – at Treasury security rates – from insurance premium increases dedicated to this purpose. There would be no cap on these special premiums.

Id. (emphasis added). Thus, far from authorizing the funding of the BIF or the DIF with appropriated funds, Congress created a structure to "help the industry refinance its own insurance fund" by providing for the BIF to borrow temporarily from the Treasury, and to repay any such loans with regular and special insurance premiums. Id.; 12 U.S.C. § 1817(b)(5), § 1824(a), (c); see also Furash, 252 F.3d at 1340 (special assessment power found to reflect congressional intent to separate NAFI from general federal revenues: "[a]bsent statutory amendment, there is therefore no situation in which appropriated funds would be used to make up a deficiency.").

Slattery suggests that Congress's provision of Federal credit guarantees disqualifies the DIF from NAFI status. Slattery Br. at 24 n.7. This theory, however, suggests student, agricultural, housing, and other lenders are potential defendants in the Court of Federal Claims, as they are all recipients of Government loan guarantees. See, e.g., Everman Nat. Bank v. United States, 756 F.2d 865, 868 (Fed. Cir. 1985) (Federal livestock production loan guarantee); Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355, 1360 (Fed. Cir.

1983) (Federal business loan guarantee). The fact that the United States guarantees some FDIC obligations, within specified limits ensuring repayment to the Treasury, does not disqualify FDIC from NAFI status.

Slattery also asserts that backup provisions for other FDIC insurance activities bar the DIF from NAFI status. Slattery Br. at 22. This Court, however, focuses upon the funding of the specific activity that enters into the contract at issue. As this Court explained in Core Concepts, 327 F.3d at 1336, the issue is "whether Congress has clearly expressed its intent that the agency, or the particular activity that gave rise to the dispute in question, is to be separated from general federal revenues." See also Furash, 252 F.3d at 1339 (same). Indeed, for decades, this Court and its predecessors have noted that "it is essential that the contract sued on be one which could have been satisfied out of appropriated funds . . . that contract must be one which, in the contemplation of Congress, could obligate public monies." Kyer v. United States, 369 F.2d 714, 718 (Ct. Cl. 1966).

As demonstrated above, Congress always intended that the DIF operates without appropriated funding. Moreover, FDIC's other insurance funds were never available to satisfy any judgment arising out of this contract. Congress required that the assets and liabilities of the former thrift insurance fund belong only to that fund, not to the FDIC, and were to be held separate from the DIF's

assets and liabilities for all purposes. 12 U.S.C. § 1821a(a)(1), (3); 12 U.S.C. § 1821(a)(4) (1994) (former version) (BIF and SAIF funds to be "maintained separately and not commingled").

3. Slattery's Untimely "Waiver" Argument Is Unavailing

Slattery's "waiver" argument is both erroneous and untimely, as it was not raised below.

Slattery erroneously asserts that, rather than jurisdiction, the NAFI issue implicates a defense of failure to state a claim upon which the trial court could grant relief, and that we waived that defense by not asserting it before trial. Slattery Br. at 25-27. This Court, however, has "repeatedly held that the NAFI doctrine precludes the exercise of Tucker Act jurisdiction over contract claims against the United States based upon the contracting activities of NAFIs." Texas State Bank v. United States, 423 F.3d 1370, 1375 (Fed. Cir. 2005); L'Enfant, 668 F.2d at 1212 (trial court's jurisdiction is limited to "cases in which appropriated funds can be obligated."); Furash, 252 F.3d at 1339 (Court of Federal Claims' jurisdictional grant is limited by the requirement that judgments must be paid out of appropriated funds); see also Lee by Lee, 129 F.3d at 1484. Moreover, the FDIC-Receiver's circular argument that any damages will come from the judgment fund, because the trial court only has jurisdiction to award appropriated funds,

FDIC Br. at 7-10, is both incorrect and illogical. If adopted, the FDIC-Receiver's logic would eliminate the NAFI doctrine entirely for any suit brought in the Court of Federal Claims.

Moreover, the lack of jurisdiction was raised and fully litigated below, without Slattery raising this argument. See A000038-43. "This court has long held that appellants may not raise issues on appeal for the first time." Kachanis v. Department of Treasury, 212 F.3d 1289, 1293 (Fed. Cir. 2000). Indeed, the trial court expressly found that "filing this motion after the trial must be allowed because the defense of subject matter jurisdiction is never waived." A000038. Slattery does not challenge the trial court's legal conclusion, and Slattery raises this baseless argument too late to be considered.

Because the trial court lacked jurisdiction to consider plaintiffs' claims against the FDIC, the Court should vacate the trial court's award of damages.

II. The Trial Court's Contract Interpretation Was Erroneous

The trial court's liability decision is based upon an erroneous contract interpretation.

The trial court held that, by requiring an increase in the minimum level of Meritor's regulatory capital in 1988, the FDIC breached an unwritten term of the 1982 MOU. Plaintiffs, however, do not dispute that the FDIC complied with the

1982 MOU's plain language from 1982 to 1992. A600011. Thus, there is no support for the trial court's breach decision. Instead, contract interpretation principles support an interpretation that the FDIC's exercise of its regulatory powers to cope with Meritor's massive economic problems did not breach the parties' agreement.

A. The Parties Agree That The FDIC Complied With The 1982 MOU's Plain Language

Slattery has never disputed that the FDIC complied with the 1982 MOU's plain language. There is also no dispute as to the relevant text of the 1982 agreement, which stated:

> Regarding the use by Bank of certain accounting methods, the FDIC would not object to the following:
>
> . . .
>
> 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. Slattery does not dispute (Slattery Br. at 5-6, 28-36) that the 1982 MOU allowed Meritor to (1) count the mark-to-market deficit in Western's net assets as goodwill in regulatory calculations; and (2) amortize the goodwill on a straight-line basis for fifteen years. See Govt. Br. at 39-41.

The trial court made a number of findings consistent with this plain language interpretation of the 1982 contract. A000028 ("the difference between Western's assets and liabilities would be treated as goodwill on Meritor's books"); A000031 (the 1982 MOU "included an agreement about what accounting methods Meritor would use to calculate its capital for regulatory capital purposes"); id. (Meritor's 1983 Offering Circular described the agreement as the "difference between fair value and book value was being treated as goodwill that could be counted towards regulatory capital"); A000044 (merger "was rational only because goodwill could be treated as capital for accounting purposes"); A000045 ("parties decided Meritor would carry goodwill as an asset that would be amortized over 15 years as part of the merged institution's capital").

As former FDIC head Isaac testified:

> The contract is pretty clear. . . . I didn't see any ambiguity in the language that said that you would be able to amortize -- count the goodwill as part of the asset and the capital structure and you can amortize it over a 15-year period on a straight-line basis, and that to me means what it says.

A101538. Thus, the plain language specified that this agreement covered

"accounting methods" concerning the goodwill, and did not limit the FDIC's supervisory authority, so long as it recognized the goodwill's accounting treatment. A400947.

It is also undisputed that Meritor carried the Western goodwill in full as an asset included in regulatory capital calculations from 1982 to 1992, including large amounts of goodwill written-off for generally accepted accounting principles ("GAAP") purposes. <u>See</u> Slattery's 1st Amen. Compl. (A600011) at ¶ 50 ("[f]rom the time of the 1982 merger until the institution was seized, PSFS/Meritor and FDIC treated the goodwill created from the Western acquisition as an asset for purposes of calculating its regulatory capital"); A400853 (1988 MOU explicitly included the Western goodwill in capital requirements); A300754 (state regulators criticized as "accounting hocus-pocus" FDIC's allowing Meritor to include certain Western goodwill in regulatory calculations, after that goodwill was written-off for GAAP purposes in 1987); <u>see also Hindes v. FDIC</u>, 137 F.3d 148, 153 (3rd Cir. 1998) ("[f]or over ten years, the FDIC and Meritor abided by [the 1982 agreement]").

If the Court interprets the 1982 MOU in accordance with its plain language, the 1988 breach finding is manifestly baseless. Meritor included the unamortized Western goodwill in regulatory capital calculations from 1982 to 1992. A600011.

B. The Trial Court's Interpretation Of An Additional Contractual Requirement Is Contrary To Standard Principles Of Contract Interpretation

The trial court's interpretation of the 1982 MOU as including an additional contract requirement is contrary to accepted contract interpretation principles. This Court reviews the trial court's interpretation de novo.[3]

1. The Trial Court Interpreted The 1982 MOU As Barring The FDIC From Raising Meritor's Minimum Capital Level

The trial court's interpretation of the 1982 MOU included unwritten term outside the MOU's plain language, and upon which the court based its 1988 breach finding. Unfortunately, the court does not clearly explain either the source

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[3] Slattery cites Smith Bucklin & Assocs., Inc. v. Sonntag, 83 F.3d 476, 479 (D.C. Cir. 1996), for a clearly erroneous standard in examining any trial court "subordinate fact finding" regarding "extrinsic evidence." Slattery Br. at 16. That decision, however, actually states:

> [A] question concerning the proper interpretation of the plain language of a contract is a question of law. . . . Only if the contract is sufficiently ambiguous that the district court's consideration of extrinsic evidence to establish the parties' intent was proper do[es the court] obtain the deferential "clearly erroneous" standard of review and then only with respect to subordinate fact finding.

Because neither the parties nor the trial court asserted any ambiguity in the 1982 MOU, Smith Bucklin supports a de novo review of the agreement's "plain language" interpretation.

or nature of this unwritten term. At best, it can be pieced together from the court's references to the alleged breach. See A000033 (court stated that the capital ratio targets in the 1988 MOU were "higher than the regulatory rates"); A000050 (repeats Slattery's assertion that "the capital levels used in the 1988 MOU are excessively high unless the FDIC was ignoring the Western goodwill when it calculated Meritor's capital"); A000052 ("FDIC would not have imposed the 1988 MOU on Meritor if the FDIC had treated the Western goodwill as real capital"); A000058 ("FDIC violated the agreement when it forced Meritor to enter the 1988 [MOU] which required Meritor to obtain higher capital levels than its peers and when it failed to do so, to raise $200 million in tangible capital quickly."). Given these statements, the trial court apparently interpreted the 1982 MOU as barring the FDIC from raising Meritor's minimum capital levels above the level specified for all banks.

Attempting to justify this interpretation, Slattery asserts that the trial court must have concluded the 1982 MOU required FDIC "to treat the goodwill as a liquid asset like cash." Slattery Br. at 28. The trial court nowhere asserts this concept, other than perhaps its unexplained reference to "real capital." A000052. As explained in our opening brief, "real capital" is not a concept with any basis in the regulatory scheme. Govt. Br. at 44.

Slattery further asserts that the FDIC's overarching objective, from 1982 to 1992, was to protect its insurance fund from losses. Slattery Br. at 29. Slattery reasons that this FDIC objective must equate to an additional term of the 1982 contract. Id. Thus, Slattery asserts, because the FDIC allowed goodwill to remain on the regulatory balance sheet, FDIC was effectively agreeing that it would pretend that the goodwill was actually protecting the insurance fund. Id.

No term or phrase in the 1982 MOU can be read to support this interpretation of the contract. Moreover, nothing in the trial court's decision supports Slattery's interpretation of 1982 MOU.

2. The Trial Court's Interpretation Ignores Contract Interpretation Principles

Neither the trial court's nor Slattery's interpretations can be reconciled with accepted contract interpretation principles. Moreover, the Court should reject Slattery's attempts to fill in gaps in the trial court's reasoning and to attack a "strawman" argument.

As we established in our initial brief, the 1982 MOU should be interpreted to discern the parties' intent at the time the contract was signed, considering the surrounding context and circumstances, the course of conduct of the parties, and with a preference for a meaning that serves the public interest. Govt. Br. at 38-39.

See also RESTATEMENT (SECOND) OF CONTRACTS §§ 202, 207; 5 A. Corbin, Corbin on Contracts § 24.25 (rev. 1998). Slattery does not dispute the applicability of these principles. See Slattery Br. at 28-34.

Slattery does not identify anything in the surrounding circumstances, the course of conduct, or the public interest to support the additional contract term the trial court appears to recognize.

3. The Circumstances Of The Parties In 1982

The parties' circumstances in 1982 support the plain language interpretation. Meritor was attempting to broaden its operations in an attempt "to survive." A100297. Meanwhile, the FDIC entered into "goodwill" agreements to resolve a $100 billion interest-rate imbalance problem with an $11 billion insurance fund. A101508; see also A401403-04. The FDIC allowed the use of goodwill because the FDIC knew that it faced a temporary interest rate imbalance, and that acquired institutions' asset values would rise automatically when interest rates fell. A101534-35.

Slattery, however, argues that the FDIC entered the 1982 MOU with a limited ability to raise the resulting bank's minimum capital level even if the bank took on more risk. Slattery contends that the agreement required the FDIC to pretend additional risks were neutralized by the goodwill's existence. See Slattery

Br. at 29. Indeed, Slattery asserts that the FDIC had to pretend that the rapidly amortizing goodwill was the equivalent of cash in the bank's vaults. Slattery Br. at 29-34. Such a deal would have been "madness" for the FDIC, because of the FDIC's expectation that it and the bank's existing problems would be automatically resolved by a drop in interest rates. See A101534-35. Slattery offers no support that the FDIC was undertaking such a course when signing the MOU.

Certainly, the FDIC had no incentive to bind its hands regarding future actions, and did not do so. Beginning with the 1982 MOU, the FDIC required an examiner to do a quarterly report on Meritor with "special attention to future plans and projections and recommendations for any FDIC action needed to protect our investment." A401324 (emphasis added). Thus, the FDIC intended from the beginning to act upon additional risks.

4. The Parties' Course Of Conduct Supports The Plain Language Interpretation

The parties' course of conduct supports a plain language interpretation of the 1982 MOU.

In 1988, the FDIC raised Meritor's capital requirements, yet neither Meritor nor plaintiffs asserted the FDIC's 1988 actions constituted a breach until eight

years later. Govt. Br. at 48. Slattery is unable to identify any contemporaneous claim that a 1988 breach had occurred. Instead, Slattery notes Meritor's objection to a proposed MOU in 1986. Slattery Br. at 32. Otherwise, Slattery claims our assertion -- that no one objected to the 1988 MOU -- is refuted by testimony of Mr. McCarron, Meritor's former general counsel. Id. Mr. McCarron's cited testimony, however, addressed the FDIC's request that Meritor enter the 1991 Written Agreement.[4] A100424-26.

Slattery attempts to obfuscate the fact that the alleged 1988 breach went unnoticed by Meritor personnel for eight years by asserting that Meritor was forced to enter the 1988 MOU. Slattery Br. at 32. Meritor's failure for years to notice or assert that a 1988 breach had occurred, however, provides powerful evidence that the parties did not consider the FDIC's 1988 response to Meritor's

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[4] Mr. McCarron's testimony instead supported the need for the FDIC to take action in 1988. He testified that he had represented to the United States Court of Appeals for the Third Circuit and to the United States Supreme Court that he was a "highly sought-after businessperson recruited by Meritor [in August 1988] to reverse its slides [sic] towards economic failure." A100497-98 (emphasis added); A100500-01 ("McCarron was induced . . . during 1988 to join Meritor and apply his talent to reverse the slide of the troubled institution towards economic failure").

"slide . . . towards economic failure," A100500-01, contrary to the 1982 MOU. Likewise, the record is devoid of any 1988 assertions by Meritor personnel that FDIC personnel had to pretend that the goodwill was a liquid asset.

Indeed, over the course of the 1980s, despite counting the goodwill for regulatory purposes, regulators frequently urged Meritor to raise its level of tangible capital to improve its economic prospects. Meritor personnel never objected, nor did they dispute that Meritor needed more tangible capital in the late 1980s and early 1990s. In their August 18, 1988, response to FDIC's 1987 examination report, Meritor's executives wrote "we agree that the Bank requires more tangible capital. Indeed this has been the overriding focus since mid-year 1987 when we began to develop the restructuring program," A401190; see also A401310 ("Meritor recognizes the importance of tangible equity"); A401281 ("Meritor's earnings have been plagued by . . . [l]ow tangible capital"); A104624-25; A100695-96; A103138-41. Slattery's experts agreed that Meritor's level of tangible capital was important in assessing its condition. A105656; A102297-98.

5. Slattery's Unmistakeability Argument Is Misleading

Slattery erroneously argues that our citation of the precept that contracts should be read to benefit the public interest equates to the unmistakeability defense rejected in United States v. Winstar Corp., 518 U.S. 839, 883 n.25 (1996).

Slattery Br. at 34 n.11. We have not raised the issue as to whether regulators could contract away their ability to change regulatory policies in the future, as Winstar perceived this defense. Instead, we assert that the FDIC, in stating that it "would not object" to the difference in assets and liabilities being "treated as goodwill and amortized" over 15 years, did not yield its then-existing ability to raise Meritor's capital requirements, including the goodwill, if Meritor suffered economic problems. Govt. Br. at 43-46. Thus, Slattery's unmistakeability analysis is irrelevant.

6. Slattery Failed To Address The Regulatory Context

In its brief, Slattery failed to address the significance of the FDIC's policies and regulations in 1988. When the FDIC promulgated regulations and capital policy restating its pre-existing power to raise a bank's minimum capital level as the bank's risk level rose, Meritor's only proposed change to the draft regulations was that, with respect to intangibles such as its Western goodwill, "primary capital shall not be reduced by the unamortized portion of the intangible." A401320-23. Meritor voiced no concerns with respect to the FDIC's restatement of its power to raise minimum capital levels for banks with higher risk levels. Id. Indeed, Meritor's internal policy was to maintain its capital level well above regulatory

minima due to its higher risk assets and potential FDIC increases. A401859-60; A401920. Thus, Meritor recognized that the FDIC could raise its minimum capital level, and that higher-risk required higher capital levels.

7. Slattery's "Strawman" Argument Is Meritless

Slattery attacks a supposed Government interpretation that the FDIC was free, despite the 1982 MOU, "to treat the goodwill as worthless capital." Slattery Br. at 34. We do not contend that the goodwill was worthless. Govt. Br. at 47-48. Indeed, in allowing the creation of such "fictitious assets," Granite Mgmt. Corp. v. United States, Fed. Cir. No. 2007-5054, January 8, 2008 Slip Op. at 7, the FDIC allowed this "accounting fiction" to substitute "for real assets in the calculation of regulatory capital." Id. This 15-year amortization was a concession from an agency previously requiring such goodwill to be immediately written-off. A400890; A101519, A101532-33.

The 1982 agreement and the Western merger allowed Meritor to increase its size immediately by several billion dollars. Further, the merger improved Meritor's ability to raise capital in 1983, A100311-12; "really strength[ened]" Meritor's competitive position, A104580-81, A104684; allowed Meritor to leverage the goodwill so as to reach $19 billion in assets, A000028; and allowed the bank to meet minimum capital requirements for almost all of 1982 to 1992.

As both former FDIC Chairman Isaac and FDIC's negotiator, Mr. Gough, testified, however, the 1982 MOU did not free Meritor from safety and soundness requirements. A101577-78; A101582-84; A102763. When Meritor's risk-taking caused the bank to reach a crisis point in 1987 and 1988, the 1982 MOU did not require the FDIC to view the bank through rose-colored glasses.

C. The FDIC Did Not Breach A Contractual Duty In 1988

The trial court's liability opinion concludes that the 1988 MOU ultimately proved problematic for Meritor, but never explains how that agreement breached the 1982 MOU. A000050-52. The trial court, moreover, never addressed the fact that the FDIC's capital policies, in 1982 and 1988, required higher capital levels for troubled banks. Specifically, those policies required the FDIC to impose higher minimum capital levels upon banks rated 3, 4, or 5, as Meritor was in 1987 and 1988. Govt. Br. at 43-46, 49-51. Slattery's brief fails to address our argument that the trial court erred in not addressing this issue, Govt. Br. at 48-51, and, accordingly, concedes the trial court's error.

To support the claimed breach, Slattery cites negative comments about Meritor's goodwill found in examination reports or testimony. Slattery Br. at 35-36. Slattery argues that the comments are definitive proof of a secret 1988 breach of the 1982 MOU. See id. Meritor's former CEO, Mr. Hammer, however,

acknowledged the validity of regulators' concerns, stating: "[F]rankly, if I were the examiner, I'd be saying the same thing." Mr. Hammer disregarded these comments because he recognized they were accurate analyses of the bank's position. See A104674-75.

Slattery does not dispute the key facts here – that the goodwill generated from the Western acquisition was counted in full as part of Meritor's regulatory capital calculations from 1982 to 1992, A600011; that Meritor leveraged its goodwill to an unsustainable $19 billion in assets, A000028; that Meritor was in economic distress beginning in 1987, Govt. Br. at 50-51; that, in accordance with the 1982 MOU, Meritor's regulatory capital was required to shrink by at least $300 million in 1989, Govt. Br. at 16-17; and that Meritor's regulatory capital, including the Western goodwill, fell below the 5.5 percent regulatory minimum in 1989. A400435.

Slattery repeats the trial court's error of ignoring the bank's financial condition. Slattery Br. at 34-36. Nevertheless, Slattery's own expert, whose report and testimony plaintiffs have never disavowed, projected that, *even without the breach*, Meritor (1) would have had to shrink from $19 billion in assets, A400175, to $7.8 billion from 1987 to 1990, and (2) would have lost over $650 million from 1988 to 1991. A300022-23. Slattery's expert explained that a no-

breach Meritor would have had to downsize massively in those years to match its capital, and in downsizing, would have to sell good assets, putting "increased pressure on earnings." A300019. The FDIC was all too aware of this expected impact of the 1989 repayment of the Western capital notes and $54 million per year in goodwill amortization, a total of more than $300 million in regulatory capital in 1989 alone. A103249-50; A103261. Indeed, Meritor's former CEO, Mr. Hillas, agreed that, when viewed in hindsight, the demand to increase primary capital to 6.5 percent in 1988 was reasonable. A100702-03.

Even if Meritor's goodwill had been cash pledged to be paid out in $54 million increments until 1997, the same downsizing was mandated. Moreover, one of Meritor's strategies in the 1980s had been to increase its holdings of higher yielding, but riskier assets. A104572-73, A104595; A401867. Meritor's regulatory capital was also expected to shrink as it suffered economic losses from the resulting massive number of bad assets. See A300022-23.

Under the interpretations advanced by the trial court and Slattery, the FDIC had to pretend that the Western goodwill was the equivalent of cash available to deal with Meritor's problems, and thus, to pretend that all was well as one of the

nation's largest savings banks lost over $650 million and shrank by almost 60 percent within three years. The public interest necessitates against construing this contract to require such regulatory inaction.

Given the 1982 MOU's plain language, the circumstances surrounding the acquisition, and Meritor's subsequent performance, the Court should conclude that the FDIC did not breach the MOU in 1988.

III. The Trial Court's Damages Award Is Unsustainable

The Court should reject all facets of the trial court's damage award, as they are contrary to the case law and unsupported by the facts.

A. The Trial Court Clearly Erred In Awarding A "Control Premium"

The trial court clearly erred in awarding a "control premium" that increased plaintiffs' damage award by $92 million. See A000021.

1. It Is Undisputed That Control Premiums Belong To Shareholders, Rather Than The Corporation

Slattery does not dispute our cited precedent that any control premium belongs to the shareholders to whom it is paid. See Slattery Br. at 39-42. Thus, in a derivative suit, damages should not include a payment for the shareholders' power to control the corporation. Philip Morris, Inc. v. Comm'r, 96 T.C. 606, 629

(1991) ("voting rights belong to the shareholders, not the corporation. Thus, that portion of a purchase price paid to induce a transfer of shareholder control cannot be considered a payment for a corporate asset."), aff'd, 970 F.2d 897 (2d Cir. 1992).

Slattery attempts to avoid the application of these principles by confusing several concepts. Slattery suggests that a corporation's "franchise value" must include a control premium, because a "company's asset value is less than its franchise value." Slattery Br. at 40. The authority upon which Slattery erroneously relies clearly states that the control premium is not included in any corporate valuation, whether denominated "franchise value" or not. Govt. Br. at 52-53. The tax court explained:

> Thus, in the context of an acquisition of a publicly traded corporation . . . where the preoffer market price of the company's stock is an appropriate indicator of the value of the business, an amount over and above such market price must be paid to its stockholders as a group in order to acquire from them control of the corporation.

Philip Morris, 96 T.C. at 630-31 (emphasis added).

The court went on to explain that "the purchase price paid for the [] stock, when reduced by the amount of the premium paid to the [] stockholders to acquire their right to control the company, approximates the aggregate value of all of [the

corporation's] underlying assets (both tangible and intangible), including goodwill." Id. at 632. Thus, Philip Morris clearly delineated a "control premium" as outside the bounds of any corporate valuation. Id. The court explained that "prior to the introduction into the market of information that control of the target corporation may become the subject of a bid, the market price of the stock generally reflects the value of the corporation's underlying assets." Id. at 630.

Slattery further confuses matters by asserting that Meritor's sale of part of its franchise in 1991, and the FDIC-Receiver's sale of Meritor's remaining branches in 1992, demonstrate that a bank can monetize its franchise value, which Slattery erroneously equates to a control premium. Slattery Br. at 40. This assertion is doubly irrelevant. First, the control premium does not reflect franchise value, as franchise value is included in the corporation's value including intangible and tangible assets. See Philip Morris, 96 T.C. at 630, 632. Second, the quoted 1991 and 1992 sales prices reflect only the value of those portions of Meritor which buyers desired, leaving behind all Meritor's problem assets. A000013. Thus, these sales do not demonstrate that Meritor's shareholders merited a control premium, as no one was ever seriously interested in buying the whole bank. See Govt. Br. at 54-55.

Slattery cites Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 496 (2d Cir. 1995), and C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1053 (5th Cir. 1981) (per curiam), as supportive of a control premium award. Slattery Br. at 40-41. Neither, however, deals with control premiums or is otherwise applicable regarding a stock market valuation award. In Indu Craft, the court approved a method using past earnings to project market value, rather than relying upon the stock price. 47 F.3d at 495-96. In C.A. May, the court affirmed the jury's rejection of a "going concern" valuation and the award of one year's lost profits as damages for breach of contract. 649 F.2d at 1053.

Finally, Slattery cites several decisions to the effect that a control premium is often paid to shareholders for the controlling block of corporate shares. Slattery Br. at 41-42. As noted above, we do not dispute that in an acquisition, controlling shareholders often obtain a premium for their shares, but none of that flows to the corporation. As damages here are based upon a derivative claim for the corporation, amounts that might have been paid to Meritor's shareholders in a hypothetical acquisition are simply not amounts that the corporation could lose.

2. No Control Premium Is Justified Here

There is no evidence to support a hypothetical control premium here. Slattery cites Estate of Godley v. Comm'r of Internal Revenue, 286 F.3d 210, 214

(4th Cir. 2002) ("a discount or premium must be applied to reflect the value an investor places on things such as managerial control"). Slattery Br. at 41. Godley, however, also states that "[a]bsent some explanation of why control has economic value, however, no premium or discount is warranted." 286 F.3d at 215. The trial court here merely reasoned that a "control premium is used in an acquisition because if one were to buy a company, one would then have control of the company. . . . to value the whole company, it is logical to price in the control premium, which would amount to its total value." A000021. The trial court here never explained why control of Meritor in 1988 would be worth anything, much less a 50 percent premium over its stock market valuation. The absence of any potential acquirers in 1988, A401034-35, demonstrates that, in fact, control of Meritor had no economic value above the stock market valuation.

B. The Trial Court's Selection Of 1988 To Value Meritor Is Erroneous

Slattery argues that the trial court properly valued Meritor in 1988 because the bank's later seizure eliminated any value in Meritor's continued operation after the alleged breach. Slattery Br. at 37. The analysis is flawed because it ignores Meritor's financial condition and made the FDIC the guarantor of Meritor's operations from 1988 to 1992.

Despite the 1988 MOU's existence, Meritor's management and board decided among the bank's available options until 1992. Mr. Slattery testified that many of the Meritor directors "felt that outside capital could be obtained" when they signed the 1988 MOU, and Salomon Brothers told the board that they could raise capital at the time. A500007. Meritor's board and management ultimately chose to sell a large proportion of its branches, believing that this would rapidly lead to a profitable Meritor with high capital levels into the indefinite future. A400955-57, A400977, A400995-97.

By valuing damages in 1988, the trial court ignored the bank's inevitable losses. Despite the sale of the branches and the sale premium received, Meritor lost many millions of dollars from 1988 to 1992 because of the risky assets it had acquired earlier. Slattery's own expert projected that a no-breach Meritor would have lost more than $650 million from 1988 through 1991. A300023. The same expert showed that a no-breach Meritor had to downsize by at least $10 billion over a three year period. A300022. The trial court ignored these realities.

This Court has looked with disfavor upon awards that contradict reality. See Granite Mgmt. Corp. v. United States, 416 F.3d 1373, 1381-82 (Fed. Cir. 2005); Fifth Third Bank of Western Ohio v. United States, 402 F.3d 1221, 1237 (Fed. Cir. 2005). The trial court's selection of August 1988 to measure damages is

inconsistent with the reality that Meritor continued to count its goodwill as a regulatory asset until December 1992, faced massive losses from 1988 to 1991, breach or no-breach, and controlled its own fate in deciding how to downsize by at least $10 billion. The Court should hold that trial court erred by measuring damages as of August 1988.

C. The "Wounded Bank" Damages Are Duplicative Of The Award Of Meritor's 1988 Stock Market Valuation

The parties agree that plaintiffs may not receive both Meritor's 1988 stock market capitalization and its so-called "wounded bank" expenditures, all arising after the 1988 "breach." Slattery Br. at 48 ("[i]f 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."). Likewise, we concede that should this Court affirm the trial court with respect to jurisdiction and the existence of a 1988 breach, but set aside the award of Meritor's 1988 stock market valuation, no barrier exists to the award of the so-called "wounded bank" damages.[5]

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[5] Virtually all of the damages awarded flow from the 1988 breach, so we have not appealed the 1991 or 1992 breaches. We reserve the right, however, to challenge those findings of breach should any damages ever be associated with either breach.

D. The Trial Court's Award Of Partial Restitution For Net Contract Cash Payments Contradicts Its Award Of Expectancy Damages

The trial court erred in awarding both partial restitution and expectancy damages.

As we demonstrated in our initial brief, Govt. Br. at 59-61, the trial court improperly awarded both expectancy damages as of 1988, and partial restitution in the form of pre-1988 contract expenditures. The award of the entire bank's stock market valuation alone gave plaintiffs the benefits Meritor expected to receive if the contract had been performed. See California Fed. Bank v. United States, 395 F.3d 1263, 1267 (Fed. Cir. 2005). The additional award of the putative net contract expenditures unwound the contract as if it had not been performed. This duplicative and contradictory award represents a windfall to plaintiff and is thus barred. American Capital Corp. v. FDIC, 472 F.3d 859, 870 (Fed. Cir. 2006).

Slattery does not attempt to defend the court's logic. Instead, Slattery effectively concedes the validity of our argument by speculating that perhaps the trial court intended the entire award to be restitution, or perhaps the award was intended to be "reliance-type restitution damages." Slattery Br. at 46-47 (these "are proper components of a reliance damage award").

1. Slattery's New Theories Are Unavailing

Slattery's new theories do not fit the award.

This Court has explained that restitutionary awards "are designed to restore the non-breaching party to the situation that would have existed had there been no contract and no breach." Granite, 416 F.3d at 1380. Meritor's market valuation in 1988 reflected its condition six years after entering into, and benefitting from, performance of the contract, including Meritor's acquisition of Western's franchise value and customers. The contract's effect upon Meritor cannot be reversed by awarding a market valuation based upon the existence of that same contract, including Western's value.

This Court describes "'[r]eliance' damages [as] cover[ing] the amount a non-breaching party expends in performing the contract in reliance on the other party's anticipated performance." Id. If Meritor's market valuation was an appropriate form of damages, a position with which we disagree, Meritor did not expend that amount "in reliance on the other party's anticipated performance." Id. Instead, the trial court awarded that valuation as lost due to the breach, not expended in any way by Meritor relying upon the FDIC's performance. A000022.

Additionally, the trial court's rejection of Slattery's original reliance claim bars Slattery's attempt to restyle the court's award of expectancy and partial

restitution as reliance damages. Slattery originally asserted that it lost $687.8 million in cash in performance of this contract, which it sought to recover under a reliance theory. A000014. In response, we noted that Slattery's experts had, in combination, projected the performance of Meritor in a "no-breach" world. Mr. Brummett's model showed $630.14 million in losses arising from Meritor's hypothetical Western "portion" before the 1988 "breach" occurred, id., and Dr. Goldstein projected that the entire "no-breach" Meritor would have suffered $650.9 million in losses from 1988 to 1991, with a cumulative net loss of $241.6 million from 1988 to 1997, the remainder of the contract period. A300023. Thus, Slattery's experts presented a classic "losing" contract, in which the "Western" portion of Meritor lost $630.14 million before any breach and, even absent a breach, would lose many millions more during the contract's duration. A000014.

The court concluded that because these purported costs were incurred pre-breach and plaintiffs could not prove the costs would be recovered prior to the contract's expiration, the reliance claim failed. A000014-15. Plaintiffs are not appealing this holding. The $343 million[6] in additional losses that Slattery now seeks to add to its reliance claim would likewise be largely incurred before the

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[6] Slattery excludes the so-called "wounded bank" damages from this new theory as duplicative. Slattery Br. at 47.

breach (the $67.34 million consists of expenditures occurring by 1987, and the bank's value was prior to the first breach) and likewise would not have been recovered by the contract's expiration in a no-breach world. Slattery's revised reliance claim fails for the same reasons as its original reliance claim.

2. The Trial Court Erred In Awarding Partial Restitution

Finally, even if restitution and expectancy damages were not incompatible here, a position with which we disagree, the trial court erred in measuring partial restitution by awarding $67 million in net cash disbursements as equal to the net cost of the contract. A000023. Slattery erroneously asserts that the $67 million represents all net costs of the contract, not just the net cash flows. Slattery Br. at 48.

The trial court erred by ignoring the benefits provided by the Income Maintenance Agreement ("IMA"), which acted as an insurance policy. The IMA fully hedged and insulated the Western portfolio from rising interest rates and ensured the portfolio would break-even with great upside potential. A202775-76; A401451; A202178-82 (IMA created a "situation where Meritor with respect to the Western assets and liabilities is immune if rates go up, and if rates eventually fall far enough, they actually make money"); A203542-44; A401403. Meritor's own documents demonstrate that the IMA essentially converted the fixed-rate

portfolio that had been acquired from Western into a variable-rate portfolio and largely insulated it from interest rate risk. A202193-94 (citing A401341, A401557); A401356-57.

Indeed, Meritor did not terminate the IMA's coverage until 1987, despite having been required to pay the FDIC from 1985 forward due to the drop in interest rates. A202292-93. The trial court's focus upon only the cash aspects of the Western transaction ignores the massive insurance benefit the IMA provided Meritor, and the partial restitution award is a windfall to plaintiffs rather than a measurement of any actual Meritor loss.

IV. Slattery's Cross-Appeal Seeking Restitution Is Meritless

The trial court correctly rejected Slattery's restitution claim as barred by this Court's precedent.

In its cross-appeal, Slattery fails to overcome the various rationales by which this Court has rejected such awards of hypothetical accounting savings, and fails even to address the FDIC's continuing contingent liability for the combined savings banks.

A. This Court's Settled Precedent Bars An Award Of Restitution

Slattery seeks restitution based upon the hypothetical $696 million cost of liquidating Western, plus the FDIC's purported "earnings" upon the saved

liquidation costs of $2,066,702,000. Slattery Br. at 59, 61. This Court, however, has unequivocally rejected restitution claims premised upon hypothetical liquidation costs "saved" by the Government because the purported accounting savings did not reflect actual benefits conferred upon the breaching parties. See Granite, 416 F.3d at 1380-81 (rejecting a restitution claim based upon an agency's liquidation estimate as too speculative and indeterminate); Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1381-82 (Fed. Cir. 2001); California Fed. Bank, FSB v. United States, 245 F.3d 1342, 1351 (Fed. Cir. 2001) (quoting Glendale).

As in Glendale and CalFed, the liquidation estimate here reflects nothing more than a "paper calculation" of a "liability that never came to pass" and "a speculative assessment of what might have been"– not an actual cost. See Glendale, 239 F.3d at 1382-83; CalFed, 245 F.3d at 1351; A202723, A202726-29; see also A200222-24; LaSalle Talman Bank, FSB v. United States, 317 F.3d 1363, 1376 (Fed. Cir. 2003) ("the calculation of restitution damages based on the treatment of assumed 'goodwill' liabilities as a cost of performance was generally resolved in Glendale, 239 F.3d at 1382-83, where this court held that damages are not properly keyed to 'a liability that was at most a paper calculation.'") (emphasis added).

B. The FDIC's Contingent Liability For The Combined Banks Bars Award Of Restitution For The Claimed Liquidation "Savings"

This Court's precedent states that the deposit insurer's contingent liability over the newly combined institutions bars restitution claims premised upon saved liquidation costs. Glendale, 239 F.3d at 1382; CalFed, 245 F.3d at 1351 (finding contingent liability defeated plaintiffs' claim).

In exchange for Meritor's acquisition of Western, the FDIC guaranteed Meritor against loss relating to that acquisition. A401157; A202170-72 (quoting A401375). The FDIC also continued guaranteeing the insured deposits of the combined institution. A400818. As noted in Glendale, 239 F.3d at 1382, had interest rates continued to rise and the combined institutions failed, the hypothetical "savings" provided by the acquisition would have evaporated immediately. Indeed, the FDIC's contingent liability increased throughout the 1980's as Meritor expanded massively and took on new risks. A101060-61; A401920; A000028. Moreover, the FDIC's efforts to avert Meritor's slide "towards economic failure," A100500-01, starting six years after the merger, are the basis for the damages award in this case.

C. Liquidation Was An Unlikely Outcome Of Western's Failure

The trial court's sole factual finding does not mandate an award of the hypothetical savings alleged. The trial court, based solely upon a pre-fact discovery admission by the Government, concluded that in the absence of Western's merger with another financial institution, state and Federal regulators would have collaborated to close Western and liquidate it. A000022-23. The contemporaneous evidence demonstrates that liquidation, if not foreclosed altogether for mutual savings banks, was a last resort.

During the early 1980's, FDIC policy had ruled out the liquidation of mutual savings banks, A202690-91; A203130-31; A201909; see also A200227, which could undermine the confidence of depositors. A202688-90. In fact, no insolvent mutual savings bank has been liquidated by the FDIC since 1938, A202695-96; A200225, despite a number of mutual savings banks that failed during the thrift crisis of the 1980s. A202692; see also A401450; A201861.

As Mr. Isaac testified: "we decided that we would merge those that we had to deal with into stronger institutions, and try to sell the franchise and get some

value out of it and not have to liquidate the assets. That was another very important part of our program, was to not liquidate people but to merge them out." A101512. He explained further:

> We didn't want to have to liquidate them, because . . . we felt certain that interest rates would not remain at 21 percent forever, and that we would be better off dealing with those asset sales and the like in a lower rate climate. And a lot of the savings banks, if you gave them time and interest rates came down, they would actually recover and be able to rebuild their capital and their earnings.

Id.

The trial court's finding, A000022, and our admission, leave open a number of alternative courses to liquidation by the FDIC in 1982, as in Glendale and CalFed. In our admission, we acknowledged that, if a merger partner were not found for Western "in or about the Spring of 1982," the FDIC would have terminated Western's deposit insurance and the state "would have appointed a receiver to liquidate Western." A300651. Thus, our admission allowed for an acquisition of Western until at least June 21, 1982, months after the actual merger, before any regulatory action would be taken.

Moreover, Pennsylvania's Secretary of Banking would have had to make the decision to close the bank, and the state regulator's actions could not be

predicted. A201615-16. Indeed, the Secretary of Banking asserted in February 1982, weeks before the merger, that he wanted Western to remain independent. A300764-69. Although the state regulator typically closes a bank when it is insolvent, A201657, as part of the April 1982 agreement with Meritor, the FDIC represented that Western was solvent on a book basis. A401160-61. Thus, the timing of the state regulator's actions was unknown.

Accordingly, the Court should conclude that liquidation was an unlikely outcome of Western's failure, and deny Slattery's cross-appeal.

D. The FDIC Possessed Several Options To Avoid Liquidation

Meritor's acquisition of Western did not save FDIC the expense of liquidating the failed bank. During that spring of 1982, FDIC could have (1) accepted the bid of Dollar Savings Bank ("Dollar"), which competed with Meritor to acquire Western, A202704-05; A202013; A201645; A201655-57; (2) provided temporary open bank assistance, A401746-47; (3) reopened the bidding process, particularly to potential out-of-state bidders, A202707-09; A202013; see A201618; A201659; A201664-66; A300759; A300762; A300770; A401444; or (4) divided Western into three parts for merger or sale. A300469-70; A201669.

1. FDIC Would Have Turned To Dollar's Bid

Slattery's claim that Dollar's bid would have been rejected by the FDIC in favor of liquidation is economically irrational and based upon sheer speculation and innuendo regarding Dollar's size and the cost of its bid; a single witness's recollection of whether one or two bids met the FDIC's cost standards in 1982, A102939-40; and unsupported allegations that further negotiations with Dollar would have been uneventful. A202702-05; A201645.

Following Dollar's initial bid on March 26, 1982, the FDIC requested that Dollar improve its bid to lighten the initial burden on the deposit insurance fund. The continued negotiations indicate that the FDIC did not foreclose Dollar as a potential acquirer because of its size. A202698-99. FDIC's negotiator, Mr. Gough, testified that he was aware of several other instances where smaller banks, such as Dollar, took over bigger ones. A201620-21. With regard to his deposition testimony about the possibility of Western's problems overwhelming a smaller bank, Mr. Gough had clarified that a smaller thrift like Dollar might not be overwhelmed, so much as it might need more assistance than Meritor required. A201676-77.

Slattery's assertion that Dollar's bid was too expensive is incorrect and irrelevant. If the FDIC had not accepted Meritor's bid, the FDIC could have

approached Dollar to negotiate an acceptable deal. A202696-97; A201665-66. Neither party advanced any evidence of the actual cost of the second bid from Dollar, though Dollar estimated the present value cost of its first proposal at $358 million, A300771, well within the FDIC's parameters. Indeed, Dollar's second proposed bid, revised pursuant to FDIC request, was restructured to reduce the immediate burden upon the deposit insurance fund. A202698-99: A202702; A401738-39; A300484.

As Slattery notes, FDIC personnel had recommended in 1981 against providing long-term support for Western. Slattery Br. at 52 n.19. By 1982, however, the FDIC faced a potential $100 billion in mutual savings bank insolvencies, with only $11 billion in its insurance fund. A101526. The FDIC's goal was "to deal with these institutions, if we had to, at a much later date, when interest rates were much lower." A101534-35. The FDIC concluded that "what we needed to do was to get through this period, and eventually rates would come down and a lot of these institutions would get a lot stronger." A101522-23. Thus, absent Meritor's bid, rather than resolving Western immediately through liquidation, the FDIC would have been motivated to keep Western operating, at least temporarily, so that interest rates would decline and the value of assets would rise automatically. A101535.

The FDIC acknowledged that direct assistance for Western would have been less costly than liquidation, and actually somewhat less than the cost of the Meritor transaction. A401746-47. As Mr. Gough testified "[w]e never got to the other scenarios of the other alternatives," one of which could have been propping up Western until a merger could have been arranged. See A201616.

E. The Cost Of The Hypothetical Liquidation Is Unknown

For its restitution claim, Slattery erroneously relies upon an overstated estimate of the expected cost of liquidation. Slattery argues that it is entitled to $696 million in restitution based upon a liquidation estimate the FDIC created in 1982. Slattery Br. at 59. This estimate, however, was likely based upon an assumed immediate liquidation of all assets, pay off of depositors, and elimination of the bank's franchise value. As explained above, in 1982, the FDIC expected that interest rates would fall, raising Western's value. Thus, the FDIC, if appointed receiver, would not have raced to liquidate Western. Indeed, there is no evidence as to how the liquidation of a mutual savings bank would have been conducted or how quickly assets might have been sold, given the FDIC's anticipation of an increase in asset values. See A202722; A202678-79.

Certainly, sales of all or part of Western to other institutions would likely have been similar in cost to the Meritor merger. Girard Bank had expressed

considerable interest in acquiring Western, even on an unassisted basis, prior to Meritor's offer. A201579, A201618, A201659; A300759; A300762. The FDIC had also contacted other commercial banks regarding Western's acquisition. Id. Moreover, FDIC personnel had mistakenly informed a Western director and Girard's Chairman that no FDIC assistance was likely for a merger of Western with a commercial bank. A201644-45; A300760. Still, Girard Bank was a potential acquiror. Finally, merging parts of Western in three separate transactions was considered feasible, albeit not preferred. A201669; A300469-70.

All of these scenarios, vastly more likely than an unprecedented liquidation of all Western's assets and deposits, would have been less costly than the liquidation estimate relied upon by Slattery. Accordingly, the trial court properly rejected Slattery's restitution claim.

F. The Western Acquisition Cannot Be Unwound For Restitution

The Court should reject Slattery's restitution claim because the transaction cannot be properly unwound.

The contract in this case was performed by both parties for approximately six years before the alleged 1988 breach. The IMA was fully performed by both parties before Meritor's 1987 termination. A200799, A200804; A202189-90. Meritor cannot return all of the IMA's benefits it enjoyed or the benefits from the

ability to report the Western "goodwill" as a regulatory asset through 1992. Indeed, Meritor's senior officers considered the amount of the Western goodwill as equivalent to the value received by Meritor as part of the transaction, including the IMA and the transferred value of the Western franchise. A100233-34; A100303-04; A401316.

Restitution is only available when the Court can "'unscramble the egg' and return the parties to the position they would have been in absent the contract." LaSalle Talman Bank, FSB v. United States, 45 Fed. Cl. 64, 77 (1999), aff'd in part, vacated in part, 317 F.3d 1363 (Fed. Cir. 2003); see RESTATEMENT (SECOND) OF CONTRACTS § 384, cmt. a (1981). The inability to unwind the transaction to return these benefits dooms plaintiffs' restitution claim. See Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 730 (2d. Cir. 1992).

G. Plaintiffs' Claim For "Reinvestment Earnings" Is Legally Barred

Because plaintiffs are not entitled to recover avoided liquidation costs as a form of restitution, their claim for the earnings that the Government purportedly earned on these avoided costs necessarily fails as well. Citizens Fed. Bank v. United States, 52 Fed. Cl. 561, 566 & n.8 (2002); California Fed. Bank, FSB v. United States, 43 Fed. Cl. 445, 455 (1999), aff'd in part, vacated in part, 245 F.3d

1342 (Fed. Cir. 2001). Plaintiffs' claim for the FDIC's alleged "reinvestment earnings" also fails because – irrespective of how it is labeled or described – it is a thinly veiled request for unauthorized prejudgment interest on a void restitution claim. See 28 U.S.C. § 2516(a); see, e.g., Library of Congress v. Shaw, 478 U.S. 310, 314 (1986); International Business Machines Corp. v. United States, 201 F.3d 1367, 1370 (Fed. Cir. 2000).

V. The Trial Court's Directive That The Distribution Statute Not Be Followed, And Its Statement That The Government Pay The Deficit, Are Unsupported By Statute And Precedent

In our initial brief, Govt. Br. at 63-64, we established that the trial court (1) did not possess authority to order the FDIC-Receiver to disregard the distribution scheme set forth in 12 U.S.C. § 1821(d)(11), and (2) erred in awarding the receivership deficit amount to the derivative plaintiffs, as the deficit claim did not belong to Meritor. Bailey v. United States, 341 F.3d 1342, 1345 (Fed. Cir. 2003) (receivership deficit is a claim held by the insurance fund, not by the receiver on the thrift's behalf). FDIC-Receiver's and Slattery's arguments to the contrary are erroneous.

A. The Trial Court Lacks Authority To Countermand Congress's Enactments

Because Congress has dictated how the FDIC-Receiver distributes the proceeds of a receivership, the trial court erred in ordering that the judgment "is to be paid outside the statutory distribution scheme as advanced by the Government in 12 U.S.C. § 1821(d)(11)." A000002. Slattery offers no support for the trial court's extra-jurisdictional award. Instead, Slattery asserts the trial court merely intended to award the receivership deficit to plaintiffs as damages. Slattery Br. at 66. Slattery further suggests that the judgment declares invalid the FDIC-Corporate claim against the receivership. Id. at 67-68. The trial court's decision offers no support for this assertion. Specifically, the trial court never asserts or concludes that FDIC-Corporate's claim against the receivership is invalid. A000002-03. Indeed, 12 U.S.C. § 1821(d)(13)(D) explicitly bars the trial court's jurisdiction to entertain such a determination of "any claim . . . with respect to, the assets of any depository institution for which the Corporation has been appointed receiver."

To avoid the clear meaning of 12 U.S.C. § 1821, Slattery asserts that FDIC-Receiver is not acting under that statute's authority, because the FDIC-Receiver did not "realize[]" the amount of the judgment here by bringing suit. Slattery Br.

at 69. This case, however, is a derivative suit, brought on behalf of Meritor, which the FDIC-Receiver now represents. 12 U.S.C. § 1821(d)(2)(A). The statute provides for the FDIC-Receiver to distribute "amounts realized from the liquidation or other resolution of any insured depository institution." 12 U.S.C. § 1821(d)(11)(A). As Meritor's representative, the proceeds of any derivative lawsuits brought on the bank's behalf will be "realized" by FDIC-Receiver, and Slattery's argument is unavailing. Ultimately, the trial court's judgment is barred as "an action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j). This Court should reverse the trial court's instruction that the statutory distribution scheme not be followed.

B. The Insurance Fund Owns The Claim For The Deficit

Both FDIC-Receiver and Slattery err in urging this Court to disregard its prior decision in Bailey, 341 F.3d at 1345, and allow the trial court to award the amount of the receivership deficit to plaintiffs.

FDIC-Receiver asserts that Bailey applies only where the FDIC had succeeded the RTC and acquired its claims. FDIC Br. at 12. This Court in Bailey did not so limit its decision. 341 F.3d at 1345. The Court explained that a theory of damages based upon the deficit fails "because it is premised on the false

assumption that the receivership deficit is an asset available for recovery by the FDIC for [the thrift]." Id. This Court noted that the deficit simply represented a debt owed to the relevant insurance fund. Id. This Court's decision was logical, and consistent with various trial court decisions considering the issue. Statesman Sav. Holding Corp. v. United States, 41 Fed. Cl. 1, 12 (1998) ("Because any damage suffered as a result of the receivership deficit has been suffered by the [insurance fund], not [the bank], this element of plaintiff FDIC's claim must be dismissed."); see also Castle v. United States, 48 Fed. Cl. 187, 198 (2000) ("the various components of the receivership deficit – the payment to the depositors, the interest on that amount, and the subsequent expenses incurred in resolving the receivership estate – are ultimately claims against the bank, not claims belonging to the bank"), aff'd in part, rev'd in part on other grounds, 301 F.3d 1328 (Fed. Cir. 2002).

Slattery asserts that the deficit represents the breaching party's costs of breaching, which cannot be imposed upon Meritor, as it was the non-breaching party. Slattery Br. at 66. Slattery's argument fails because the FDIC-Receiver, which incurred the costs in liquidating Meritor, is not the alleged breaching party. Instead the FDIC-Corporate took the actions found to be breaches. A000058-59. The FDIC-Receiver, as Meritor, incurred the debts represented by the receivership

deficit, and the fact that the FDIC-Receiver borrowed that money from the insurance fund, rather than a third party, does not render the debts into costs of breaching. Thus, the Court should reverse the trial court's decision awarding the debts of the receivership as damages.

VI. The Trial Court Correctly Ruled That It Lacked Jurisdiction To Entertain Roth's And Interstate's Claims Against The FDIC-Receiver

Because the trial court correctly ruled that Roth had asserted claims outside the court's jurisdiction, the Court should reject Roth's cross-appeal.

The trial court allowed Roth to amend his complaint several times. Roth's second amended complaint asserts four claims for relief. One count alleges a taking of Roth's property by FDIC-Receiver in violation of the fifth amendment; one count alleges that FDIC-Receiver has retained for itself Roth's proportionate share of a "surplus" remaining from a payment of $181.3 million received from Mellon Bank funds, in apparent violation of 12 U.S.C. § 1821(d)(11)(A); one count asserts a third-party beneficiary theory; and one count seeks (1) a declaratory judgment that 12 U.S.C. § 1821(d)(11)(A) created an entitlement in Roth to a portion of any surplus from the Meritor receivership at the time of

Meritor's seizure on December 11, 1992, which entitlement bars subsequent purchasers of their stock from any recovery, and (2) a constructive trust of Roth's proportionate share of any such surplus. A000005-06.

Roth conceded that the trial court had already denied the third-party beneficiary claim. A000006. Therefore, the trial court dismissed Roth's complaint for lack of jurisdiction after ruling that the remaining counts sought relief against the FDIC-Receiver, a party other than the United States. A000007.

Roth does not appeal the trial court's holding that individual shareholders lacked standing as third-party beneficiaries. Thus, Roth's cross-appeal seeks to have this Court (1) interpret the trial court's judgment as awarding all damages upon Slattery's derivative claim to shareholders as of 1992, rather than current shareholders; and (2) to reverse the trial court's judgment that Roth's claims – against the FDIC as receiver – were outside of the trial court's jurisdiction. Neither ground for appeal is valid.

A. Roth's Interpretation Of The Trial Court's Judgment Is Baseless

The trial court awarded damages upon a derivative basis for Meritor's breach of contract claim. A000008. Specifically, the court held that the FDIC "caused Meritor to be forced into receivership which it would otherwise not have

been forced into and it is well settled that a breaching party has to put the [non-breaching] party in the same position as it would have been but for the breach." Id. (emphasis added).

Roth, however, asserts the trial court's judgment is ambiguous regarding its direction that damages be paid "outside the statutory distribution scheme as advanced by the Government in 12 U.S.C. § 1821(d)(11)" and that "the Government [wa]s liable for any receivership deficit." Roth Br. at 8 (quoting A000002-03), 13. Roth asserts that these statements signify the trial court's intent to pay the derivative judgment for Meritor directly to shareholders. Thus, Roth asserts that this Court first must interpret to which shareholders the derivative judgment will be paid. Roth's assertions are baseless.

1. Any Damages Will Be Paid To Meritor's Representative

Any judgment upon Meritor's derivative claims must be paid to the FDIC-Receiver. Indeed, Slattery and FDIC-Receiver agree that any damages remaining after appeal will be paid to FDIC-Receiver, as Meritor's representative, for distribution. Slattery Br. at 63; FDIC Br. at 1-2.

Roth, however, asserts that the "underlying entity whose rights Slattery has sought to enforce no longer exists." Thus, Roth reasons that the Court must select some other "group" to receive the damages. Roth Br. at 15. This theory is

inconsistent with this Court's precedent regarding derivative claims. See First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1293 (Fed. Cir. 1999) (holding in similar circumstances that "the only claim that can be heard is the corporation's contract claim against the government and the only beneficiary of any relief will similarly be the corporation"). Moreover, under 12 U.S.C. § 1821(d)(2)(A), the FDIC-Receiver "succeed[s] to (I) all rights, titles, powers, and privileges of the insured depository institution." Thus, any damages upon Meritor's derivative claims must be paid to the FDIC-Receiver. Indeed, as FDIC notes, FDIC Br. at 4, the trial court previously indicated that any damages would go through the receivership. A700016.

The only reasonable interpretation of the judgment is that the trial court intended to award any damages upon Meritor's derivative claim to the FDIC-Receiver as representative of Meritor, with a direction that the FDIC-Receiver not comply with the statutory distribution scheme. A000008. As we demonstrated in our initial brief, the trial court's direction – that the FDIC-Receiver, in distributing any damages awarded, disregard the distribution scheme established by Congress in 12 U.S.C. § 1821(d)(11) – was beyond the court's authority. Govt. Br. at 63-64.

2. Roth's Arguments For A Direct Award To Shareholders As Of 1992 Are Unavailing

Even if the trial court intended to disregard this Court's holding in First Hartford, the trial court gave no indication that it intended only to benefit certain shareholders. Roth suggests that because the trial court could not award damages to the purportedly non-existent Meritor, the court must have intended for the judgment to be paid directly to Meritor's shareholders as of 1992. Roth Br. at 15. Roth asserts that: (1) the trial court intended to compensate shareholders in existence when Meritor was seized; (2) such a distribution is consistent with the public policies underlying the Assignment of Claims Act, 31 U.S.C. § 3727; and, (3) this would avoid the risk of duplicative recovery against the United States. Roth Br. at 10. None of these putative rationales stands up to scrutiny.

a. The Court Did Not Intend To Make An Award To Former Shareholders As Of 1992

Roth's assertion that the court intended to award damages only to shareholders as of the time of seizure is without legal or factual basis.

The bulk of the trial court's damages are based upon Meritor's stock market valuation as of 1988. A000022. Had the court intended to provide a remedy to a particular group of shareholders, the court would appear to favor shareholders as

of 1988. The trial court awarded no damages for the December 1992 breach, when the institution's stock market valuation was approximately $20 million. A102512; A102594.

Roth is equally erroneous in urging the Court to recognize a rule that derivative suits in Winstar-like cases should differ from those allowed in derivative claims brought under Rule 23.1 of the Federal Rules of Civil Procedure ("F.R.C.P."). Roth urges a different rule because "the injured parties in a Winstar action are the persons and entities that held shares of a seized bank as of the date of its seizure and liquidation." Roth Br. at 16. This argument ignores this Court's decisions affirming the dismissal of shareholder claims for lack of standing. See Southern Cal. Fed. Sav. & Loan Ass'n. v. United States, 422 F.3d 1319, 1331-33 (Fed. Cir. 2005); Cain v. United States, 350 F.3d 1309 (Fed. Cir. 2003), and FDIC ex rel. Karnes County Sav. & Loan Ass'n v. United States, 342 F.3d 1313, 1319 (Fed. Cir. 2003) ("Karnes").

Derivative claims brought in the trial court are similar to those brought under the F.R.C.P. See First Hartford, 194 F.3d at 1293. F.R.C.P. 23.1 refers to shareholders, not "former shareholders," in discussing who may bring a shareholder derivative suit. Moreover, a "shareholder loses standing to maintain a derivative proceeding upon the transfer of his or her shares." 13 W. Fletcher,

Fletcher Cyclopedia of the Law of Private Corporations, § 5978 (2004). This Court should not countenance Roth's request for a "former shareholder" derivative theory that could not exist in other circuits. Indeed, none of the Winstar-related opinions is believed to have concerned claims by a "former" shareholder who has transferred his or her shares. Moreover, Roth's suggestion that the Court adopt a similar rule used in takings cases, Roth Br. at 17, ignores the fact that no taking was found here.

b. No Duplicate Claims Are Possible

Roth also asserts that interpreting the judgment to benefit 1992 shareholders (1) accords with the Assignment of Claims Act and (2) would avoid the risk of duplicative recoveries against the United States. Roth Br. at 17-20. This ignores the lawsuit's derivative nature, and Roth's failure to appeal the trial court's finding that only derivative claims could proceed. Meritor's derivative breach of contract claim has already been tried. Damages have been awarded to derivative plaintiffs. No further duplicative suit upon this same claim would be allowable. Southern Cal., 422 F.3d at 1332-33 ("a wronged party is typically not allowed to recover twice for the same harm."); American Capital, 472 F.3d at 866.

Roth cites the Assignment of Claims Act, but the "provisions of the statute governing assignments of claims against the Government are for the protection of

the Government and not for the regulation of the equities of the claimants as between themselves." McKenzie v. Irving Trust Co., 323 U.S. 365, 369 (1945) (citing Martin v. National Surety Co., 300 U.S. 588, 594-95 (1937)); Arthur Pew Const. Co., Inc. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992); United Pacific Ins. Co. v. United States, 358 F.2d 966, 969-70 (Ct. Cl. 1966).

Thus, the Assignment of Claims Act does not affect the validity of Roth's transfer of shares and any potential claims to another party for value in September 1993, absent objection by the FDIC-Receiver. Roth lacks standing to bring such claims now.

B. The Trial Court Correctly Ruled That It Lacked Jurisdiction To Entertain Roth's Claims Against The FDIC-Receiver

The trial court correctly ruled that it lacked jurisdiction to entertain Roth's claims against the FDIC-Receiver.

Because Roth asserts his individual taking claims against FDIC-Receiver, a defendant other than the United States, this Court lacks jurisdiction. United States v. Sherwood, 312 U.S. 584, 588 (1941) ("if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court").

1. This Court's Precedent Does Not Support Jurisdiction

Roth identifies several decisions by this Court as supporting jurisdiction over its claim against the FDIC-Receiver. These decisions, however, do not provide a basis for bringing a claim in the trial court against the FDIC-Receiver for withholding or taking the receivership "surplus." Roth cites First Hartford, 194 F.3d at 1287-88, for the proposition that, if the FDIC fails to distribute any receivership surplus to shareholders, it commits a taking in violation of the fifth amendment. Roth Br. at 21. The takings claims considered in First Hartford, however, revolved around assertions that the FDIC, as a regulator, took the thrift's "contractual right to amortize its goodwill," and gave "direction or recommendation that the [state regulator] seize [the thrift]." First Hartford, 194 F.3d at 1284. This Court held that a shareholder possessed standing to bring these corporate claims based upon its property interest in the receivership surplus "that would result if the corporation received compensation." Id. at 1287-88.

Thus, in First Hartford and the two cases upon which it relied, California Housing Securities, Inc. v. United States, 959 F.2d 955 (Fed. Cir. 1992), and Branch v. United States, 69 F.3d 1571 (Fed. Cir. 1995), the Court's rationale was

that a shareholder had standing to assert the corporation's claims because of the shareholder's interest in increasing the size of the surplus if the corporation's claims were successful.

In California Housing, this Court resolved that the shareholder could sue the Office of Thrift Supervision ("OTS") for appointing the Resolution Trust Corporation ("RTC") as conservator and receiver of a thrift and sue RTC "on behalf of [the thrift]" for "a permanent occupation and physical taking of [the thrift's] property in violation of the fifth amendment's taking clause," without deciding whether the shareholder could bring a derivative action. California Housing, 959 F.2d at 957 & n.2. This Court adopted this theory in Branch, stating the "same analysis [as in California Housing] is applicable here. Because the complaint can be construed as an action by the trustee of BNEC to recover assets for that corporation, the Court of Federal Claims had jurisdiction over the action . . . ." Branch, 69 F.3d at 1575 (emphasis added). Here, Roth sues only upon his own behalf, so these cases are inapplicable.

2. The FDIC-Receiver Is Not The United States

Roth erroneously cites several decisions of other circuits to the effect that, in certain circumstances, the FDIC as receiver may be the United States. Roth Br.

at 22-25. These decisions, however, do not provide jurisdiction for the Court of Federal Claims to entertain claims against the FDIC-Receiver.

This Court has treated the FDIC-Receiver consistently as a party other than the United States throughout the course of the Winstar-related litigation. Rather than exclude the FDIC-Receiver as a plaintiff because it was identical to the United States, this Court has instead rejected FDIC-Receiver's complaint upon other grounds. See Karnes, 342 F.3d at1318 (no case or controversy exists where the amount of money sought by the FDIC-Receiver as plaintiff does not exceed the FDIC-Receiver's indebtedness to the insurance fund); Landmark Land Co. v. FDIC, 256 F.3d 1365, 1380-82 (Fed. Cir. 2001) (same); American Capital, 472 F.3d at 869-70 (dismissing FDIC-Receiver's claim for thrift's equity value for lack of standing, because thrift did not own its own stock).

Roth cites Auction Co. of Am. v. FDIC, 132 F.3d 746, 749 (D.C. Cir. 1997) ("Auction I"), which found that whether the FDIC-Receiver should be treated as the United States depends upon the context. The Auction I court ultimately concluded that, in a breach of contract case asserted against the FDIC-Receiver, the statute of limitations in actions against the United States in district court would apply where the agency "act[ed] within its statutory authority to carry out [the Government's] purposes." Id. at 749 (internal citations omitted).

Roth's complaint, however, does not allege that FDIC-Receiver acted in accordance with its statutory distribution scheme to carry out the Government's purposes. Instead, Roth's second amended complaint alleges "[r]ather than making a distribution to shareholders [as required by 12 U.S.C. § 1821(d)(11)(A)], the FDIC has retained for itself the entire surplus generated by the liquidation of Meritor." A600103. In three separate counts, Roth alleged takings by FDIC in retaining the surplus for the FDIC's own use, rather than distributing the surplus to shareholders, and in indicating that the FDIC does not intend to distribute any surplus in future. A600118-20. Thus, under the logic of Auction I, because Roth alleges the FDIC-Receiver is in pursuit of its own interests, not those of the United States, his suit is not against the United States.

Indeed, Roth's argument is further repudiated by Auction Co. of Am. v. FDIC, 141 F.3d 1198, 1199 (D.C. Cir. 1998) ("Auction II"), which clarified that its decision in Auction I, 132 F.3d at 750, did not establish Tucker Act jurisdiction over the FDIC as Receiver: "such jurisdiction depends also on there being no specific statutory bar to Tucker Act jurisdiction." Auction II, 141 F.3d at 1199. The Auction II court continues by noting that 12 U.S.C. § 1821(d)(13)(D) states in relevant part:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver . . . or
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Auction II, 141 F.3d at 1200.

The sole exception to this jurisdictional bar, 12 U.S.C. § 1821(d)(6), provides for an administrative claim followed by adjudication in district court, not the trial court. Id. Thus, 12 U.S.C. § 1821(d)(13)(D) bars Roth's claim for payment from Meritor's assets. Rather than supporting Roth's appeal, the Auction line of cases instead suggest an alternative basis for affirming the trial court's finding.

Roth's other citations, Roth Br. at 23-24, are also unavailing. In Federal Deposit Ins. Corp. v. Hartford Ins. Co. of Illinois, 877 F.2d 590, 592 (7th Cir.1989), the circuit court, after noting in dictum that subject-matter jurisdiction existed whether the FDIC-Receiver was determined to be the United States or not, ultimately decided that venue had to be based upon a statute applicable only to the FDIC as receiver. Id. at 592-93. Likewise, in United States v. Sweeney, 226 F.3d

43, 45-46 (1st Cir. 2000), the circuit court did not decide whether the FDIC-Receiver acted as the United States or not, merely concluding that the "state of the law is murky." Id. at 46.

Because the trial court could not have had jurisdiction over Roth's claims, the Court should affirm the trial court's dismissal of Roth's complaint.

CONCLUSION

For the foregoing reasons, we respectfully request that the trial court's judgment be reversed and vacated for lack of jurisdiction; alternatively, that the trial court be reversed and that the trial court be directed to enter judgment for the United States. With respect to the cross-appeals of Slattery and Roth, we ask that those be denied.

Respectfully submitted,

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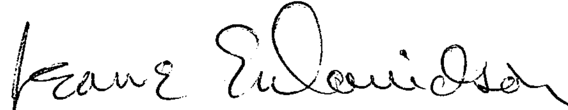

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January 30, 2008

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 30th day of January, 2008, I caused to be placed in the United States mail (postage pre-paid) copies of "REPLY BRIEF FOR DEFENDANT-APPELLANT" addressed as follows:

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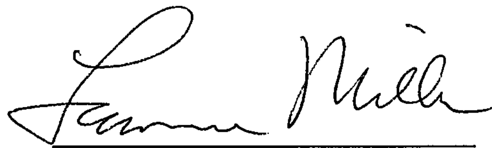

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28.1(e)(2)(A) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this brief contains 13,927 words (exclusive of caption and signature block) as calculated by the word processing system used to prepare this brief.