2007-5063, -5064, -5089

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**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.**

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

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

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**MISCELLANEOUS**

Plaintiff-Cross Appellant respectfully submits this Reply Brief in Support of his Cross Appeal seeking reversal of the trial court's denial of plaintiff's disgorgement claim. As shown below, the Government's argument that disgorgement is not available relies on a misreading – and overstatement – of this Court's precedent, and simultaneously ignores the trial record below.

## ARGUMENT

### I. THIS COURT'S PRECEDENT SUPPORTS PLAINTIFF'S DISGORGEMENT CLAIM.

Contrary to the Government's arguments, Federal Circuit precedent supports, rather than precludes, Slattery's disgorgement claim. First, the Court has repeatedly observed that disgorgement of benefits received under a contract by a defendant is an available restitutionary remedy. See Am. Capital Corp. v. FDIC, 472 F.3d 859, 870 (Fed. Cir. 2007) ("[r]estitution is an equitable remedy whereby the plaintiff can recover 'any benefit that he has conferred on' the repudiating party 'by way of part performance or reliance'") (quoting Mobile Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 608 (2000) (citing Restatement (Second) of Contracts § 373)); see also Hansen Bankcorp, Inc. v. United States, 367 F.3d 1297, 1314 (Fed. Cir. 2004) ("restitution may be measured by . . . 'the *value of the benefits* received by the defendant due to the plaintiff's performance'") (emphasis in original) (quoting Landmark Land Co.,

Inc. v. FDIC, 256 F.3d 1365, 1372 (Fed. Cir. 2001)). Indeed, in American Capital, this Court bluntly held that the Court of Federal Claims *erred* when it held that disgorgement is unavailable in Winstar cases. Am. Capital, 472 F.3d at 870. As this Court noted in Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1380-81 (Fed. Cir. 2001):

> Restitution is sometimes described in terms of taking from the breaching party any benefits he received from the contract and returning them to the non-breaching party. See Restatement (Second) of Contracts § 344(c) ("[The judicial remedies serve to protect the promissee's restitution] interest in having restored to him any benefit that he has conferred on the other party."). That requires determining what benefit from the contract the breaching party has received, and restoring that to the nonbreaching party.[1]

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[1] The leading authorities on damages agree. See E. Allan Farnsworth, 3 Farnsworth on Contracts § 12.19 (2d ed. 1998):

> In contrast to cases in which the court grants specific performance or awards damages as a remedy for breach, the effort is not to enforce the promise by protecting the injured party's expectation or reliance interest, but to prevent unjust enrichment of the party in breach by protecting the injured party's restitution interest. The objective is not to put the injured party in as good a position as that party would have been in if the contract had been performed, nor even to put the injured party back in the position that party would have been in if the contract had not been made. It is, rather, to put the party in breach back in the position that party would have been in if the contract had not been made.

Accordingly, the Court of Federal Claims has consistently interpreted this Court's decisions in Winstar cases as leaving open a disgorgement remedy on the precise facts of this case – "where plaintiff 'prove[s] . . . that liquidation was defendant's only alternate method of disposal to the acquisition by plaintiff.'" Granite Mgmt. Corp. v. United States, 58 Fed. Cl. 766, 772 (2003) (quoting WestFed Holdings, Inc. v. United States, 55 Fed. Cl. 544, 561 (2003)); see also LaSalle Talman Bank F.S.B. v. United States, 45 Fed. Cl. 64, 118 n. 87 (1999), aff'd in part, vacated in part, 317 F.3d 1363 (Fed. Cir. 2003) ("To recover avoided liquidation costs, plaintiff would need to show that, absent the supervisory merger, FSLIC more probably than not would have liquidated the thrift (or thrifts) acquired. See Restatement (Second) of Contracts § 374 cmt. b.") (citation omitted).

This conclusion is clearly supported by the fact that in those Winstar decisions in which disgorgement has been rejected the plaintiffs had failed to prove that the Government would in fact have liquidated the ailing thrift had the plaintiff not acquired it. For example, in Glendale, this Court noted that "it is not at all clear that but for Glendale's purchase of Broward the Government would have been called upon to make up that deficit then and there. Glendale was only

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See also Dobbs, Law of Remedies § 12.7(1) at 160 ("restitution award focuses on the breacher and seeks to prevent his unjust enrichment by forcing restitution of gains he received under the contract").

one of a number of potential acquirers of Broward. Alternatively, rather than approve a merger, the Government had open to it the option of hiring new and better management to run Broward and make a go of it, just as Glendale itself did." Glendale, 239 F.3d at 1382.

Similarly, in California Fed. Bank, F.S.B. v. United States ("Cal. Fed. I"), the Court of Federal Claims found that "[t]he Government had not made a decision to liquidate Brentwood or Southeast at the time of contracting with CalFed. It had several alternatives to liquidation available." Cal. Fed. I, 43 Fed. Cl. 445, 455 (1999), aff'd in part, vacated in part, 245 F.3d 1342 (Fed. Cir. 2001). Echoing this theme, this Court observed in Granite Mgmt. Corp. v. United States, 416 F.3d 1373, 1381 (Fed. Cir. 2005) (citations omitted), that "[t]he trial court determined that the government had other ways to deal with the problem, such as arranging for the sale of the thrifts to another buyer." And, finally, the Court of Federal Claims found in LaSalle Talman Bank, 45 Fed. Cl. at 118, that it need not decide the question at all "because the parties have not litigated this precise issue."

Not only has the Government systematically misconstrued, or overstated, the holdings of this Court, but it has also failed to consider the factual circumstances of the cases actually decided. This Court has considered the disgorgement remedy predicated upon the Government's avoided liquidation

costs only with respect to merged institutions that *survived* the Government's breach; this Court has never addressed the disgorgement theory with respect to a thrift that was *seized* as a result of the breach. As this Court has noted, the Government continues to carry a contingent liability in the case of surviving institutions. See Glendale, 239 F.3d at 1382 ("It is important to remember that, even after Glendale's merger with Broward, the Government was not free of potential liability for the failing thrift."); see also Cal. Fed. I, 43 Fed. Cl. at 455 ("Plaintiff could have failed and FSLIC would have been responsible for paying off deposits for Cal Fed, Brentwood and the Southeast institutions"); Granite Mgmt., 58 Fed. Cl. at 773 ("the government in this case, as in other *Winstar*-related cases, retained a contingent liability") (citing Glendale, 239 F.3d at 1382, and S. Cal. Fed. Sav. & Loan Ass'n v. United States, 57 Fed. Cl. 598, 624 (2003)).

While the Government parrots its arguments from the earlier cases, see Govt. Reply at 41 ("FDIC's contingent liability increased throughout the 1980's as Meritor expanded massively and took on new risks"), the Government appears to have forgotten that the combined institution in *this* case *did* fail (as a result of the Government's breaches), that there is no longer any "contingent liability," that in fact the "cost" of liquidating Meritor yielded a *profit*, A000013; A105455,

A105688-89, A200206-07 (Brumbaugh), and that the contingencies that argued against the disgorgement remedy in other cases are absent here.

The cases relied upon by the Government are distinguishable in yet another, equally fundamental, respect. In each case, the Court rejected the assertion that the plaintiff's assumption of liabilities necessarily constituted either a "cost" to the plaintiff or a "benefit" to the Government. See Glendale 239 F.3d at 1382 ("[T]he action taken by the purchasing S&L in acquiring the failing thrift did not result in the Government, specifically the FSLIC, saving the dollar value of the net obligations of the thrift."); Granite Mgmt., 416 F.3d at 1380 (approving Court of Federal Claim's observation that "'assumed liabilities . . . are not a usable measure of either cost to the thrift or benefit to the government' when calculating damages"); see also California Fed. Bank, F.S.B. v. United States ("Cal. Fed. II"), 245 F.3d 1342, 1531 (Fed. Cir. 2001); LaSalle Talman Bank F.S.B. v. United States, 317 F.3d 1363, 1376 (Fed. Cir. 2003).

In this case, Slattery did not seek a disgorgement remedy based on Meritor's assumption of liabilities. Instead, plaintiff sought to recover the *actual* costs that the Government itself admitted it would have incurred absent the merger. At trial, plaintiff proved to the trial court's satisfaction that liquidation of Western would in fact have occurred but for the Meritor merger. Given this fact, together with the Government's admission (discussed more fully below),

plaintiff has proven the amount by which the Government has benefited from the contract. Under these circumstances, Glendale and its progeny do not bar this claim.

## II. THE EVIDENCE ADDUCED AT TRIAL COMPELLED THE TRIAL COURT'S FACTUAL FINDING THAT FDIC WOULD HAVE LIQUIDATED WESTERN ABSENT THE MERITOR MERGER.

The Government emphasizes that the only specific evidence cited by the trial court in support of its finding that liquidation would have occurred absent the Meritor merger is the Government's binding admission. Govt. Reply at 42. The admission is in fact virtually dispositive, but it is misleading to suggest that it is the only evidence the trial court considered in reaching its conclusion. On the contrary, in post-trial briefing, the trial court specifically requested that the parties address several issues going to the question whether there was any realistic alternative to liquidation absent the Meritor merger. See A600473-74, A600482-90, A600493-98 (Pl. Answers to Court's Question Nos. 90, 96-103, 105-109). The evidence adduced on this question, which the Government's Reply Brief largely ignores or mischaracterizes, is overwhelming. Because the trial court's factfinding cannot be disturbed unless clearly erroneous – a standard the Government's Reply Brief nowhere even mentions, let alone tries to satisfy – the issue is settled.

### A. The Government's Certifications Under The Bank Merger Act Conclusively Establish That Absent The Meritor Merger FDIC Would Have Liquidated Western.

As Slattery demonstrated in his initial brief (pp. 58-60), the Bank Merger Act, 12 U.S.C. § 1828(c) (1963 ed., Supp. IV), required FDIC, before approving a bank merger, to solicit opinions from other federal agencies and the Attorney General regarding antitrust implications. The Act nonetheless permitted FDIC to waive the requirement, but only upon first finding that the agency "must act *immediately* in order to prevent the probable failure of one of the banks or savings associations involved." 12 U.S.C. § 1828(c)(4) (emphasis added). Here, FDIC made the requisite finding that "it must act immediately in order to prevent the probable failure of one of the banks involved." See A102774-75, A102776, A201626-27 (Gough); A300045 (Basis for Corporate Approval); see also A300046 (FDIC Order); A300047, A300050 (FDIC Board Resolution); A300660 (Admission). As the Government's own witness confirmed, FDIC considers the term "immediately" to mean that failure will occur in a matter of days.[2]

FDIC did not have months, or even weeks, to find an alternative to merger. Because the Government is presumed to have acted lawfully, FDIC's

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

certifications under the Bank Merger Act establish the absolute imminence of liquidation but for the Meritor merger. FDIC responds to this argument with silence.

### B. Dollar Savings Bank Was The Only Other Potential Acquirer Of Western.

The Government argues that FDIC had several viable alternatives to the Meritor merger. The argument is uniformly and categorically refuted by the record evidence.

*Girard Bank.* The Government's argument that Girard Bank was a potential acquirer[3] was conclusively disproved at trial. Girard, at most, expressed "some interest" in acquiring Western back in 1981, A300759; A201618 (Gough), but, even then, only assuming that "satisfactory arrangements could be made with the FDIC." A300762; A201592 (Gough). However, and dispositive of the issue, when Girard was solicited by FDIC to submit a bid for Western in the Spring of 1982, Girard *declined*, A201590-91 (Gough), A200199 (Brumbaugh), even though FDIC expressly invited "bids . . . based on Fixed Bid Options, Income Maintenance Options . . . or any alternative proposed by the acquiring

[3] Govt. Reply at 46-47 ("Girard Bank had expressed considerable interest in acquiring Western, even on an unassisted basis, prior to Meritor's offer. A201579, A201618, A201659; A300759; A300762. . . . 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.")

institution," i.e., on any basis the potential acquirer might desire. A300809; A200129-30 (Brumbaugh); A201582 (Gough). Girard thus made clear that it had no interest in acquiring, and would not have acquired, Western at the time in question.

Additionally, the Pennsylvania Secretary of Banking would have had to close Western prior to any acquisition by an in-State commercial bank such as Girard. A300800 at n.1; A300762; A201592 (Gough). Such a transaction is conclusively precluded by the Government's admission that, absent an open bank "merger," the Government's only alternative was the liquidation of Western. A300651, A200104-05 (Brumbaugh) (purchase following closure is not a "merger").

Finally, FDIC could not have approved any hypothetical acquisition of Western by Girard because such an acquisition would have failed to satisfy FDIC's "least cost test" because, as estimated by FDIC, the cost of a post-closure purchase of Western would have exceeded the cost of both a pre-closure merger (such as the acquisition of Western by Meritor) *and* the cost of liquidation. A200108-10; A200116-17; A200257-58 (Brumbaugh).

*Direct Assistance to Western.* The Government's argument that open bank assistance to Western was a viable alternative[4] was conclusively disproved at trial, because FDIC had concluded that: (1) open bank assistance was legally barred, and (2) the bank was not viable, with or without bank assistance.

Under Section 13(c) of the FDIC Act, direct FDIC assistance could not be provided absent a finding that the bank was "*essential* to provide adequate banking service to the community." 12 U.S.C. § 1823(c) (1950) (emphasis added); see also A200100-04 (Brumbaugh); A203085-86 (government expert Hamm) (FDIC could not legally provide direct assistance without a finding of essentiality); A300642 (FDIC Resolutions Handbook) ("as provided in the FDIC Act, the FDIC could grant open bank assistance only if the institution's continued operation was deemed 'essential'"). FDIC did consider open bank assistance for Western but specifically and expressly determined that it was *legally foreclosed* by the so-called "essentiality" requirement of Section 13(c) of the FDIC Act. 12 U.S.C. § 1823(c). Deputy Director Gough testified that Western "did not meet the essentiality" requirement and FDIC determined *not* to provide assistance to

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[4] Govt. Reply at 44 ("FDIC could have ... provided temporary open bank assistance, A401746-47"); id. at 45 ("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.")

Western. A201572, A201569; see also A300770 (according to FDIC Chairman Isaac, "a viable proposal for direct assistance [to Western] within the limitations of the present statutes was not found" and that even under "the most likely proposals for revised rules, it is unlikely that [Western] would qualify"); A300797-99 (essentiality not established).

The Hamm report cited by the Government (Govt. Reply at 44) completely ignores the contemporaneous documents and testimony establishing that Western failed to meet the statutory requirements for open bank assistance. Even so, Dr. Hamm's testimony on that subject was *excluded at trial* as being "way beyond the scope of what the hearsay rule allows or what's probative for the Court." A202716-19.

In addition to determining that Western was not "essential" and was therefore legally ineligible for open bank assistance, FDIC also concluded that open bank assistance to Western could not be granted on grounds of economic feasibility because Western did not satisfy "the financial test of viability." A300799. To the contrary, FDIC determined that Western "was not viable and would not be viable after any reasonable period of assistance," was "not a bank deserving of assistance" and that "providing open bank assistance to this particular bank [would be] a classic example of sending good money after bad." A300459; see also A300793 at Item 9 ("no reasonable amount of assistance will

make the bank viable"); A300802 (Pennsylvania Secretary of Banking "dismayed to learn that even if the 'Regulators' Bill' was passed, it would be extremely unlikely that any type of capital infusion would be considered in" Western's case).[5] Additionally, as even Dr. Hamm conceded, the cost of such assistance could have substantially exceeded Western's deficit net worth at the time, or approximately $800 million, well in excess of the projected cost of Western's liquidation. A203110.

There was also no possibility of "propping up Western [for some unspecified time] until a merger could have been arranged," Govt. Reply at 44, given FDIC's certification under the Bank Merger Act, 12 U.S.C. § 1828(c), that "it must act immediately in order to prevent the probable failure" of Western, A102774-75, A102776, A201626-27 (Gough); A300045-46, A300050, and Mr. Gough's testimony that the Pennsylvania regulators were ready to seize Western within days had the Meritor merger not been completed. A102773-75.

[5] The Government's Reply does not mention, much less address, the statutory bars to providing direct assistance to Western. And the Government's assertion that FDIC would have been free to provide direct assistance in 1982 to keep Western operating in hopes that interest rates might come down, Govt. Reply at 46, is further contradicted by Chairman Isaac's conclusion, as expressed in a March 3, 1982 letter to the Pennsylvania Secretary of Banking, that "[a] viable proposal for direct assistance [to Western] within the limitations of the present statutes was not found." A300770.

*Reopening the Bidding to Out-of-State Bidders.* Again, the Government's argument[6] has been disproved. Pennsylvania law absolutely *prohibited* interstate bank acquisitions. A200126-28, A200269 (Brumbaugh); A201614-15 (Gough). There is no evidence that either the Pennsylvania Department of Banking or the Pennsylvania legislature was inclined to change the law. Indeed, the evidence adduced at trial was to the contrary. A300767 (letter from PA Secretary of Banking to FDIC Chairman Isaac stating that "the statutes prohibiting interstate mergers are just as much law as the essentiality provisions"); A300769 (letter from PA Secretary of Banking to FDIC Chairman Isaac stating that the "Pennsylvania Department of Banking will no doubt object to any bidders outside the State"); A201657 (Gough) (Secretary of Banking made it clear that he wanted bids from in-state mutuals, then in-state commercial banks and that laws of Pennsylvania did not permit bids from out-of-state banks); A200271, A200275-76 (Brumbaugh). Mr. Gough admitted that he had no plans to "lobby anybody" to get the law changed and had no idea what the Pennsylvania Secretary of Banking would have done had an in-State bid not been received. A201615-16 (Gough); see also A200277-278 (Court noting that question of

[6] Govt. Reply at 44 ("FDIC could have ... reopened the bidding process, particularly to potential out-of-state bidders, A202707-09; A202013; see A201618; A201659; A201664-66; A300759; A300762; A300770; A401444").

whether Pennsylvania legislature would have changed the law requires speculation).

Even if the Government had offered evidence that the Pennsylvania legislature would have entertained amending the ban on interstate mergers (which it did not), the legislative process would have taken far longer than the time available to FDIC to resolve Western. In the only instance identified by the Government where a State legislature (Minnesota) had changed its law to permit an out-of-state acquisition, it took eleven months from the time the bill was introduced until the first vote on it occurred. A203402-03 (Brumbaugh). But FDIC had only a matter of days to resolve Western, as certified by the need for "immediate action," under the Bank Merger Act, to prevent Western's "probable failure," as FDIC determined on April 2, 1982. A300045-46, A300050; see also A102773-75 (Pennsylvania regulators were ready to seize Western within days if the merger with Meritor had not been completed).

*Splitting Up Western.*[7] The Government's assertion that a re-bid for parts of Western would have been feasible is flatly contradicted by FDIC's contemporaneous certification that "immediate action" to resolve Western was necessary. FDIC did not have months; it had *days*. The Government's re-bid

[7] Govt. Reply at 44 ("FDIC could have ... divided Western into three parts for merger or sale. A300469-70; A201669"); id. at 48 ("Finally, merging parts of Western in three separate transactions was considered feasible, albeit not preferred. A201669; A300469-70.")

suggestions are also flatly contradicted by the Government's binding admission in this case that FDIC would have liquidated Western if unable to find a merger partner in the Spring of 1982. The admission did not allow for a rebid. Just as critically, the Government offers no evidence suggesting that a re-bid would have yielded any new or better bidders. The record evidence is to the contrary because, given FDIC's extensive out-reach efforts, the first round of bidding had likely produced all interested bidders meeting the statutory requirements and because a re-bid, by definition, tells the bidding community that FDIC is having difficulty selling the franchise. As a result, second round bids tend to yield bids that are less favorable, not more. A200119-20, A200122-25 (Brumbaugh); A300965; A300901-06.[8]

### C. Dollar Savings Bank Was Not A Viable Merger Partner.

At trial, the Government sought to prove that Dollar Savings Bank ("Dollar") could have merged with Western. On appeal, the Government resurrects that argument (Govt. Reply at 44-46), though only by completely

[8] In November 1981, FDIC counsel was asked to address "from the antitrust perspective" the "less desirable option" of selling Western piecemeal, having previously expressed concern about the antitrust implications of selling Western to any Pennsylvania bank deemed large enough to acquire all of Western. A300468. The resulting memorandum cited by the Government, Govt. Reply at 44, 48, does not, as the Government claims, find a piecemeal sale "feasible." Instead, the memorandum simply "assum[ed] it was practicable" to sell Western. There is nothing in the document analyzing the feasibility of a split sale, suggesting that the FDIC pursue a split sale, or otherwise comparing the cost of a split sale versus the cost of liquidation. A300468-70.

ignoring: (1) the trial court's rejection of the argument; (2) the abundant record evidence that disproved the argument; and (3) the fact that the trial court's finding must stand unless clearly erroneous.

*Dollar Was Too Small.* FDIC itself determined that Dollar was too small to acquire Western. A300460 ("Philadelphia Savings Fund Society is the only mutual savings bank in the state large enough to acquire Western"). As for Pennsylvania commercial banks, FDIC concluded only three were "large enough ... to be capable of acquiring Western," A300468, all of which had total assets in excess of $4.2 billion (while Meritor had total assets of $7.4 billion). In contrast, Dollar had total assets of only $1.4 billion. A300805-06; A200112-13; A300749. The relative size of an acquirer was important because "it goes to the ability of the institution to absorb the [acquired] institution" and "demands on integrating such a large bank into a small bank ... were at the time by regulators considered too great a problem." A200110-11 (Brumbaugh). Accordingly, FDIC concluded that if Western, with assets of over $2 billion, "were to be purchased by Dollar ... or one of the smaller savings banks, problems would just be too massive for it to absorb it. They were taking on something much bigger than they were, and just by size alone, couldn't handle it." A201676-77 (Gough). Additionally, a small institution such as Dollar was also likely to require "a great deal more assistance" than a larger institution such as Meritor. A201677 (Gough).

*Dollar's Bid Was Too Expensive and Required a Closed Bank, Not a Merger.* Dollar initially submitted a bid to acquire Western on either an open or closed bank basis. A300772.[9] FDIC, however, *rejected* Dollar's bid, A201621 (Gough), and Dollar accordingly "took it ... off the table." A200243-44 (Brumbaugh).

Dollar submitted a second bid, but this time proposed the purchase and assumption of Western on a *closed* bank basis, thereby requiring FDIC to seize the institution prior to the acquisition. A300485 ("This bid assumes that Western had been placed in a receivership prior to Dollar's purchase of the assets and assumption of certain of the liabilities of Western"); A201604-05 (Gough) (second Dollar bid "was on a closed bank basis"). Acquisition of a closed institution, again, is *not* a "merger," and thus is an option precluded by the Government Admission. A200106-07 (Brumbaugh). Moreover, despite purporting to "reduce[] the impact on the insurance fund," A300484, the cost of Dollar's second bid actually was "substantially greater" than the cost of Dollar's original bid, A200250-51 (Brumbaugh), and "would have imposed on the FDIC a lengthy and ongoing substantial potential cost that ... would have exceeded the liquidation cost estimate." A200117-18, A200252 (Brumbaugh). Indeed, using

[9] Although, as the Government notes, see Govt. Reply at 46, Dollar estimated that the present value cost of its initial bid was $358 million, such bidder estimates typically understated the bid cost to make it more attractive and were therefore considered unreliable by FDIC. A200241-42 (Brumbaugh).

FDIC's formula to price closed bank purchase and assumption transactions (i.e., value of liabilities assumed minus value of assets purchased minus premium), the cost of Dollar's second bid would have been in excess of $696 million. A300602 (FDIC Resolutions Handbook); A200137-38, A200259-60, A200262-64 (Brumbaugh).

The contemporaneous documentary evidence is consistent with former Regional Director Fritts' recollection that (1) the Meritor bid "was the only viable alternative that we could accept"; (2) while FDIC "had a bid or two" for Western, "they wouldn't meet the minimum cost standards that the FDIC had to meet in order to accept [any such bids]"; and (3) [Meritor's bid] was the only one that met the cost test," A102940-41 (Fritts); see also A200133 (Brumbaugh) (under the "cost test," the cost of a bid had to be "less than the FDIC's cost of liquidation and deposit payoff").

As Regional Director with responsibility for both Western and Meritor, Mr. Fritts was in a position to know the results of FDIC's bid analysis. A201868-69 (Lutz); A102763 (Gough). In contrast, the record lacks any evidence that FDIC could have considered, much less accepted, a bid from Dollar (or any other entity) that would have been more expensive to FDIC than the cost of liquidating Western.

### D. There Is Little, If Any, Doubt That The Pennsylvania Department of Banking Would Have Closed and Liquidated Western.

The Government asserts that liquidation of Western was not the necessary alternative to the Meritor merger because "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." Govt. Reply at 43-44. According to the Government, "the timing of the state regulator's actions was unknown." Id. at 44. In support, the Government cites the testimony of FDIC Deputy Director Gough. But Mr. Gough's testimony contradicts the Government's position:

- "[T]he secretary of banking would have to make the decision to close the bank and he had talked to our regional office and our Washington office that he was in a position to do that." A201657.

- "Q Okay. Weren't you aware that Western was within days of being seized by the Commonwealth of Pennsylvania?

  A I don't recall specifically what the time frame was, but -- but the state of Pennsylvania was going to do something, yes.

  Q When you say they were going to do something, that something was –

  A They were going to seize it." A102773.

- Q Could you turn to page 29 of your deposition, and if you look at line number 1:

  "Question: "In the second paragraph of the order, there was a reference to a finding that action must be taken immediately in order to prevent its, i.e., Western's probable failure."

  And the answer is: "Uh-huh."

  "Question: Is that finding on which the waiver of

participation by the other federal agencies is based?

"Answer: Yes. I think that is the way the statute reads, too, that if the agency has to act immediately, if there is any probability of failure, we can waive that requirement.

"Question: In this context, what is meant by immediate?

"Answer: ***Immediate, in the state of Pennsylvania, would close Western and we would be forced to liquidate it.***

***"Question: Within what time frame?***

***"Answer: I think immediately.***

***"Question: Within a matter of days or weeks?***

***"Answer: Days. We could not do anything like this unless Pennsylvania was prepared to close the bank immediately, and they were."***

Do you recall that being your testimony under oath at that time?

A Okay.

Q Does that help you refresh your recollection as to what you testified to?

A Okay.

Q You would agree with that?

A Yes. A102774-75 (emphasis added).[10]

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[10] The Government's assertion that "[a]lthough the state regulators typically close a bank when it is insolvent . . . as part of the April 1982 agreement with Meritor, the FDIC represented that Western was solvent on a book basis" is also unavailing given FDIC's many statements, cited above, that Western was not viable and likely to fail. Additionally, Pennsylvania Secretary of Banking McEnteer expressly certified on April 2, 1982 that "an unsafe and unsound condition to transact business exists or will exist in the near future with respect to Western." A300792; see also A300808 (FDIC Bid Solicitation) (FDIC had been warned by Pennsylvania Commissioner of Banking that Western was "in danger of failure" and bids were being solicited "as an alternative to a statutory payout to insured depositors.").

## III. PLAINTIFF PROVED THE AMOUNT OF THE GOVERNMENT'S SAVINGS.

In yet another tactical decision to steer the analysis away from the trial court record, the Government interprets this Court's decisions in Glendale, Cal. Fed. and Granite Mgmt. as announcing a per se rule prohibiting the award of restitution based on avoided liquidation costs. See Govt. Reply at 40-41. But this Court has repeatedly declined, despite many opportunities, to invoke the Government-proposed absolutist rule. This Court has instead made fact-specific determinations as to the appropriateness of restitution awards. See discussion supra at 1-3.

The Government, relying on Glendale and Cal. Fed., asserts that 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' — and not an actual cost." Govt. Reply at 40. But in making this cut-and-paste argument, the Government fails again to appreciate that (i) there is no speculation as to "what might have been" in light of its judicial admission *and* because of the contemporaneous documents that support that admission, (ii) plaintiff seeks disgorgement of benefits conferred, *not* damages, and (iii) the estimate of savings is both reliable and determined by the Government itself.

*Judicial Admission and Contemporaneous Documents*. However much the Government wishes it away, the Government *did* offer in this case a binding

admission that the regulators would have liquidated Western had FDIC not found a merger partner for it in the spring of 1982. Gone is the possibility that Western would have received open bank assistance. Gone is the possibility that FDIC would have permitted Western to limp along in the hope that an improved economy might allow it to survive. Gone also is the possibility that FDIC would have ushered in new management at Western or otherwise would have permitted Western's then-existing management yet another chance to save the bank.

Put simply, this case does not present this Court with a myriad of possibilities that rendered the no-breach world "speculative" as in other cases. Nor have the other cases presented anything even resembling the substantial trial record establishing that FDIC had rejected the only other interested bidder for Western because it was too small and because its bid would have failed the "least-cost test."

*Plaintiff Has Proven Amount of Benefit Conferred.* The Government claims that "Slattery erroneously relies upon an overstated estimate of the expected cost of liquidation." Govt. Br. at 47. To the contrary, Slattery has relied on the best available estimate — as affirmed, again, by the Government itself.

"The government admits that the FDIC estimated at or about March or April 1982 that it would cost the agency approximately $696 million in the event

the institution were closed." A300652; see also A300052. The Government's 1982 estimate was validated at trial. As noted in plaintiff's initial brief, the estimate reflects FDIC's cost conclusion as of the date of merger, and takes into consideration any movement in interest rates prior to that time, as well as projections of interest rates going forward. A201627-28, A201629, A102757 (Gough); A200096, A200369 (Brumbaugh). FDIC performed this type of analysis every time it was resolving a mutual savings bank, see A201613 (Gough), an analysis "that the FDIC continues to use . . . because it's so reliable." A200262-63 (Brumbaugh). According to Mr. Gough, FDIC's News Release regarding the PSFS-Western merger would have been "sent to all interested parties" within FDIC, of which Mr. Gough was one, "for any corrections, modifications," before being finalized. A102756-57 (Gough).

To be sure, a plaintiff does not need to prove damages with "exactitude." Bluebonnet Sav. Bank, FSB v. United States, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (plaintiffs need not prove the amount of loss with "absolute exactness or mathematical precision"); LaSalle Talman, 317 F.3d at 1374 ("when damages are hard to estimate, the burden of imprecision does not fall on the innocent party. 'If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery.'") (quoting Locke v. United States, 151 Ct. Cl. 262, 283 F.2d 521, 524 (1960) (citing Story Parchment Co. v. Paterson

Parchment Paper Co., 282 U.S. 555 (1931)). Here, plaintiff relied on the Government's own contemporaneous analysis that was considered, reviewed and vetted thoroughly. More pointedly, the Government has offered no better estimate of the cost of liquidation.

*It Was Not FDIC's Policy to Gamble on Interest Rates.* The Government is left little choice but to engage in an after-the-fact challenge of its own analysis, arguing that FDIC's "liquidation estimate ... was likely based upon an assumed immediate liquidation of all assets, payoff of depositors, and elimination of the bank's franchise value," and that, because FDIC "expected that interest rates would fall" FDIC would "not have raced to liquidate Western." See Govt. Reply at 47. The Government goes so far as to assert that there was "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." Id. The Government's assertion fails. There was abundant evidence that FDIC would have liquidated Western promptly, because doing anything else was expressly contrary to FDIC's policy against speculating on interest rate movements.

The Government ignores the following evidence:

- PX 610 (internal FDIC document): "FDIC should not be speculating on interest rates. We can lose as well as win – rates can go either way. We should not be doing what we criticize banks for doing. Solve today's problems today." A300793 at Item 7.

- Government expert Hamm: FDIC "certainly wanted to avoid speculating on interest rates." A203091.

- FDIC Regional Director Lutz: It generally was not FDIC's policy to "speculate ... and say interest rates may come down and therefore I'm going to hold onto assets a little bit longer." A101880.

The Government's argument is also counter-factual. Mr. Gough specifically testified that FDIC considered various interest rate scenarios, including a "low interest rate, high interest rate, or steady." A102724. The interest rate scenario used by FDIC to assess both the cost of liquidating Western and the viability of the post-merger institution was "a steady rate scenario as it was at the time," A102723-24, A201597 (Gough), and *not* predicated on an assumption that "interest rates would decline and the value of assets would rise automatically." Govt. Reply at 46. Interest rates had already come down by more than 300 basis points from September 3, 1981 through March 18, 1982. See 28 U.S.C. 1961. In fact, more than half of the Western assets acquired by Meritor were sold by Meritor by June 1982 — before interest rates dropped significantly. See, e.g., 28 U.S.C. § 1961 (reflecting a T-bill rate of 14.03 percent for March 18, 1982, compared to a T-bill rate of 13.79 percent as of July 8, 1982); see also A300876 (reflecting sale of $700 million of assets valued marked to market, thus demonstrating the sale of just over 50% of Western's assets in the first quarter from the time of the acquisition); A300818 (reflecting that Western

had assets with a book value of $2.1 billion as of the date of merger, but that Western's assets as of June 30, 1982 were reduced to approximately $1 billion, excluding $827,000 of "value ascribed to the acquired deposits and FDIC assistance").

There is no evidence in the record to suggest that FDIC would have acted any differently than Meritor. To the contrary, Mr. Lutz testified that it is not "generally the FDIC policy to speculate" on interest rates and therefore hold onto acquired assets longer than needed. A201880.

## IV. PLAINTIFF IS ENTITLED TO DISGORGEMENT OF THE GOVERNMENT'S EARNINGS.

The Government does not dispute that FDIC earned more than $2 billion of investment income on the funds that would have been used to liquidate Western but for the breached 1982 contract. See A300520 (Finnerty Report) at ¶¶ 82-83; A201238, A201056-57 (Finnerty). Investment income earned by FDIC should be disgorged under this Court's repeated pronouncement that restitution can be measured by "the value of the benefits received by the defendant due to the plaintiff's performance." Landmark, 256 F.3d at 1372; see also Glendale, 239 F.3d at 1380-81; Restatement (Second) of Contracts § 344(c) (1981); see discussion supra at 1-3.

The Government does not deny that it benefited from such income, nor, importantly, does the Government dispute that it specifically sought this benefit

from the Western transaction. See A300794 (including calculation of "interest income foregone by FDIC 1981-5" in estimating cost of direct assistance requested by Western). Instead, the Government simply claims that these restitution damages are the equivalent of pre-judgment interest. But neither case cited by the Government actually has reached this issue. To the contrary, the plaintiff in Library of Congress v. Shaw, 478 U.S. 310 (1986), sought an increase in the payment of attorneys' fees to compensate him for delay, with the Court concluding that compensation to a nonbreaching party for delay constitutes "interest,"[11] while this Court in Int'l Bus. Machines Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000), focused on whether the Water Resources Act of 1986 permitted interest on a tax refund where the tax was declared unconstitutional. Neither case addressed whether the Government may affirmatively invest, and profit from, funds to which it was not entitled.

Tellingly, the Government fails to address the principal case addressed in plaintiff's initial brief, Nickel v. Bank of Am. Nat'l Trust & Sav., 290 F.3d 1134 (9th Cir. 2002), nor, for that matter, any of the other cases relied upon by plaintiff for the same proposition in footnote 22 of its same brief. In each of these cases, the respective courts ordered disgorgement not only of certain overcharges plus

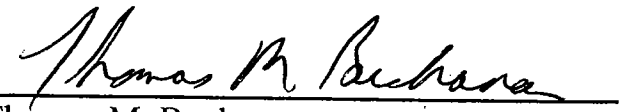
[11] "Interest ... [is] designed to compensate for the belated receipt of money." Library of Congress, 478 U.S. at 322. Plaintiff here is not seeking compensation for delay, but rather, disgorgement of funds the wrongdoer should not have earned and has no basis to retain.

interest, but also of *all profits the defendant made through the use of plaintiff's money*. Id. at 1139 ("The money misappropriated from the trusts added directly to what the banks had to loan or to invest or, if not directly loaned or invested, was used to meet expenses, freeing an equal amount for loan or investment."). In none of these cases did the courts consider the wrongdoer's profits "interest." To the contrary, the respective courts ordered disgorgement of the "benefits conferred" on the defendant based on the "elementary rule of restitution ... that if you take my money and make money with it, your profit belongs to me. " Nickel, 290 F.3d at 1138 (citing Restatement of Restitution § 1 (1937)).

## CONCLUSION

Based on the foregoing, plaintiff respectfully requests that the Court reverse the trial court's denial of plaintiff's disgorgement claim, and direct entry of judgment in the amount of the Government's avoided costs together with the income derived therefrom. As noted in plaintiff's initial brief, if the Court upholds the denial of plaintiff's disgorgement claim, plaintiff respectfully requests that the Court affirm the award of the pre-breach value of the bank ($276,000,000) plus Meritor's net payments to FDIC ($67,340,000) for a total damage award of $343,340,000. In either event, plaintiff respectfully requests that this Court affirm the trial court's finding that the judgment be increased by an amount equal to the receivership deficit at the time of payment.

Respectfully submitted,



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March 10, 2008

## CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 10th day of March, 2008, I caused to be placed in first-class U.S. mail (postage pre-paid) copies of the Reply Brief for Plaintiff-Cross Appellant Frank P. Slattery, Jr., addressed as follows:

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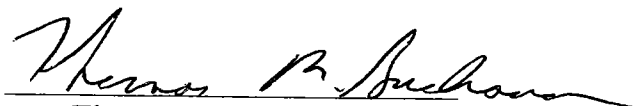

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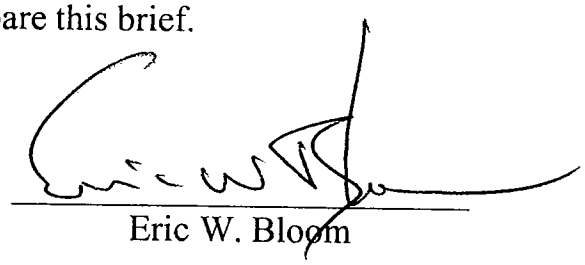
## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28.1(e)(2)(B) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this brief contains 6906 words as calculated by the word processing system used to prepare this brief.



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