April 30, 2010

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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.

# *EN BANC* BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES

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## INTRODUCTION

Defendant-appellant, the United States, respectfully submits this brief in response to the Court's Order of March 19, 2010, granting our petition for rehearing *en banc*, vacating the Panel decision, and directing further briefing concerning the three issues addressed below.

## QUESTIONS PRESENTED

1. Is the Federal Deposit Insurance Corporation ("FDIC") a non-appropriated fund instrumentality ("NAFI")?

2. If the FDIC is a NAFI, what is the effect upon the jurisdiction of the Court of Federal Claims over this suit against the United States?

3. What is the appropriate standard for determining whether an entity is a NAFI?

## FACTUAL BACKGROUND

### I. The 1982 Merger

The transaction at the heart of this lawsuit was a 1982 merger between Philadelphia Savings Fund Society ("Meritor")[1] and Western Savings Fund Society ("Western"), Pennsylvania state savings banks. See A400793-94. Meritor and Western were regulated primarily by the Commonwealth of Pennsylvania, and the FDIC – rather than the Federal Home Loan Bank Board ("FHLBB") or the Federal Savings and Loan Insurance Corporation ("FSLIC") – insured the deposits of each institution, and was thus the primary Federal regulator. Slattery v. United States, 53 Fed. Cl. 258, 263-64 (2002) ("Slattery II"). Meritor and the FDIC entered into an assistance agreement and executed a memorandum of understanding ("1982 MOU") in which the FDIC agreed that it would not object, for "accounting" purposes, to Meritor's treatment of the difference between the liabilities assumed and the market value of Western's assets, less reserves, as goodwill.[2] A400947; A401015-16.

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[1] Philadelphia Savings Fund Society was renamed Meritor Savings Bank ("Meritor") in 1986.

[2] This matter is different from the so-called "Winstar cases" (United States v. Winstar, 518 U.S. 839 (1996)), because the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"), did not affect the treatment of the goodwill created in the transaction. Instead, Meritor was permitted to include the goodwill from the transaction in regulatory capital until the day it was seized in December 1992.

By 1988, Meritor's asset quality had deteriorated significantly. Meritor's weakened operating condition, compounded by its management's poor strategic decisions, led to increased regulatory scrutiny by the FDIC. As a result, in 1988, the FDIC and Meritor entered into a new memorandum of understanding ("1988 MOU"). The 1988 MOU required Meritor to elevate its capital ratio by the close of 1988, or to increase its tangible capital by the end of March 1989. A000033-34.

Meritor did not achieve either of these goals and fell below its minimum regulatory capital requirement. The FDIC encouraged Meritor to raise capital and, to that end, approved Meritor's sale of two-thirds of its branches and deposits in early 1990. A000035. As Meritor's condition did not improve materially, in 1991 the FDIC and Meritor entered into an agreement ("1991 Agreement") setting Meritor's minimum regulatory capital ratios as much as 2.5 percent greater than that required by regulations. A000052.

After the 1991 Agreement, Meritor continued to perform poorly. Meritor was unable to propose an acceptable capital plan to the FDIC, and as a result, the FDIC revoked Meritor's Federal deposit insurance. Pennsylvania state authorities seized Meritor on December 11, 1992. A000013.

## II. The Lawsuit In The Court Of Federal Claims

In 1993, Meritor's shareholders, through representative Frank Slattery, sued on behalf of the institution. Slattery's derivative suit alleged various costs associated with a purported breach – in 1992 – of the 1982 contract between the FDIC and Meritor. In essence, Slattery alleged that (1) the Government had entered into a contract with Meritor in connection with its acquisition of Western; (2) the alleged contract promised that Meritor could record goodwill and amortize the goodwill over 15 years; and (3) Meritor's seizure in 1992 breached the alleged contract.

### A. The Trial On Liability

In 1994, the Court of Federal Claims (1) ruled that the shareholders had standing to bring a derivative claim on Meritor's behalf; and (2) set trial to determine whether Meritor's seizure breached an agreement between the FDIC and Meritor. Slattery v. United States, 35 Fed. Cl. 180, 183-86 (1996) ("Slattery I"). Slattery amended his claims in 1996 to allege that the FDIC's 1988 and 1991 demands that Meritor raise its minimum capital levels also breached the 1982 agreement. A600016.

The Court of Federal Claims held a trial on liability between October 1999 and February 2000.

On April 9, 2001, before a decision had been rendered upon liability, we filed a motion for judgment on the pleadings, asserting that Slattery's complaint should be dismissed because the Court of Federal Claims lacked jurisdiction to entertain Slattery's breach of contract claims. We explained that the alleged contract and breach involved the FDIC acting in its capacity as an insurer of state-chartered savings banks. We explained that, thus, the FDIC had acted as a non-appropriated fund instrumentality ("NAFI"), and was therefore outside Tucker Act jurisdiction. A600084.

In an August 2002 opinion, the trial court denied our motion to dismiss for lack of jurisdiction. The court reasoned that when Congress created the FDIC in 1933, the legislature appropriated funds to the FDIC to buy stock. The court concluded that this reflected Congress's intent that the Bank Insurance Fund ("BIF") – the instrumentality at issue in this case – be a continuing appropriation. Slattery II, 53 Fed. Cl. at 272-74. The court also relied upon (1) resolutions suggesting that Congress would appropriate funds if BIF funds were exhausted; and (2) Congress's creation of statutory backup appropriations for other FDIC insurance funds. The court concluded that this reflected Congress's contemplation that appropriated funds would be used for the BIF if needed. Id. The trial court held, therefore, that it possessed jurisdiction. Id. at 274.

Turning to the merits of the liability trial, the court concluded that the 1982 agreement had been breached. The FDIC had counted Meritor's goodwill for regulatory capital purposes from 1982 until the savings bank was seized by state authorities in 1992. Nevertheless, the court held that the FDIC's requirement – specified in the 1988 MOU and the 1991 Agreement – that the bank maintain higher minimum regulatory capital than regulations required of financially healthy banks constituted breaches of contract. The court then held that Meritor's 1992 seizure by Pennsylvania state authorities constituted a third breach. Slattery II, 53 Fed. Cl. at 290.

**B. The Trial On Damages And Post-Damages Proceedings**

After a trial on damages, the trial court awarded (1) expectancy damages of $276 million for Meritor's purported stock market valuation at the time of the 1988 breach; and (2) $28,393,059 in "wounded bank" damages, which included claims for transaction costs for various restructuring transactions. Slattery v. United States, 69 Fed. Cl. 573, 579-81, 585-86 (2006) ("Slattery III"). The trial court rejected Slattery's restitution claims for the FDIC's hypothetical savings resulting from the avoided liquidation costs and earnings upon those savings, but awarded $67,340,000 as "non-overlapping" restitution damages, purportedly being the net amount of various payments provided by the parties to each other or as repayment of a loan to

the Federal Reserve. Id. at 586-87.

On October 11, 2006, the trial court issued its final order on damages, ordering that the $371 million "shall be paid net of any receivership claims." Slattery v. United States, 73 Fed. Cl. 527, 531 (2006) ("Slattery IV").

We sought reconsideration of the court's failure to dismiss Count II of Slattery's complaint (alleging that the 1991 Agreement "proximately caused" the state of Pennsylvania to seize the bank) and clarification of the judgment's receivership and tax "gross-up" provisions. The trial court denied the motion for reconsideration, but revised its final order by declaring Count II moot. A000003. As to the motion for clarification, the court stated that (1) because the receivership's tax liability upon the damages award was unknown, Slattery could file a motion under Rule 60(b)(6) of the Rules of the Court of Federal Claims later if the receiver ultimately paid taxes; and (2) it intended for the $371 million in damages "to be paid outside the statutory distribution scheme as advanced by the Government in 12 U.S.C. § 1821(d)(11)." A000002-03.

## ARGUMENT

# I. The FDIC Is A NAFI

## A. The Law Of NAFI

The law of non-appropriated instrumentalities emerges from two core tenets of American jurisprudence. The first is that, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). A "waiver of sovereign immunity must be unequivocally expressed in statutory text," Lane v. Pena, 518 U.S. 187, 192 (1996), and "strictly construed, in terms of its scope, in favor of the sovereign." Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); see also Aleyska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 256-57 (1975); Library of Congress v. Shaw, 478 U.S. 310, 321 (1986). Absent such a waiver, the Government is "immune" from suit. Shaw, 478 U.S. at 314; see also Marathon Oil Co. v. United States, 56 Fed. Cl. 768, 770 (2003) ("money damages cannot be recovered against the United States unless the government has waived its sovereign immunity.").

The second tenet relates to the first and is germane to the Court of Federal Claims' jurisdiction. The Tucker Act confers jurisdiction in the Court of Federal Claims "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491 (a)(1). Jurisdiction under the Tucker Act is "limited, however, by the general requirement that judgments awarded against the government be paid out of appropriated funds." Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331, 1334 (Fed. Cir. 2003) (citations omitted); see 28 U.S.C. § 2517 ("Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor[.]"); see also Williams v. United States, 289 U.S. 553, 562-63 (1933) (discussing Congress's creation of the Court of Claims with the qualification that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury").

These considerations manifest when suit is brought against Government activities that receive no Federal appropriations. See, e.g., Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484-85 (1942) (the "government assumes none

of the financial obligations of the [Army and Air Force Exchange Service]"). If Congress did not stipulate that Federal funds may be used to pay a judgment against a Government instrumentality, the Court of Federal Claims does not possess jurisdiction to hear the claim. See Wolverine Supply, Inc. v. United States, 17 Cl. Ct. 190, 192-93, n.4 (1989) (reading Congress's 1970 amendment to the Tucker Act as a reflection that Congress "intended that sovereign immunity was to remain as to all [NAFIs] except for military exchanges"). "The theory has been that, since [Court of Claims'] judgments are paid only from appropriated funds, in order to be actionable here the transaction sued upon must be one which, in the contemplation of Congress, can obligate public monies." Interdent Corp. v. United States, 488 F.2d 1011, 1013 (Ct. Cl. 1973). "In other words . . . if the underlying obligation was unfunded, Congress did not intend to waive sovereign immunity from a suit based upon a breach of that obligation." El-Sheikh v. United States, 177 F.3d 1321, 1324 (Fed. Cir. 1999).

Thus, no jurisdiction vested in the Court of Federal Claims for lawsuits against Government instrumentalities such as the Federal Housing Finance Board, Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001), the United States Mint, Ains, Inc. v. United States, 365 F.3d 1333 (Fed. Cir. 2004), Federal Prison Industries, Core Concepts, 327 F.3d at 1335-37, and the Board of Governors of the Federal Reserve

System, Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), because Congress did not appropriate funds to pay judgments rendered against these entities.

The Supreme Court first addressed the law of NAFI in 1976. See United States v. Hopkins, 427 U.S. 123, 125 n.2 (A NAFI is an instrumentality "which does not receive its monies by congressional appropriation."); see also Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733-34 n.4 (1982). In Hopkins, the Court considered the status of the Army and Air Force Exchanges ("AAFES"), which were privately funded and yet considered Government entities. The Court observed that, "[t]he non-appropriated fund status of exchanges places them in a position whereby the Federal Government, absent special legislation, does not assume the obligations of these exchanges in the manner that contracts entered into by appropriated fund agencies are assumed." Hopkins, 427 U.S. at 127; see Keetz v. United States, 168 Ct. Cl. 205 (1964); Kyer v. United States, 369 F.2d 714 (1966).

This Circuit and the Court of Federal Claims shaped and refined this core principle of NAFI doctrine. These approaches were encapsulated in Ains, 365 F.3d at 1333, where this Court set forth a test for NAFI status: an activity is a NAFI if (1) it does "not receive its monies by congressional appropriation[;]" (2) it derives its funding "primarily from [its] own activities, services, and product sales[;]" (3) it could not be funded by appropriated funds, absent a statutory amendment; and

(4) there was "a clear expression by Congress that the agency was to be separated from general federal revenues." 365 F.3d at 1340-41.

### B. The FDIC And The Bank Insurance Fund

Congress created the FDIC in 1933 to restore public confidence in the banking system. See http://www.fdic.gov/bank/historical/brief/brhist.pdf at *1, 21-32. The FDIC's initial insurance fund, the Permanent Insurance Fund ("PIF"), was established by the 1935 Banking Act ("1935 Act"), 49 Stat. 694. See 12 U.S.C. § 1821(a)(5)(B).

The instrumentality at issue in this case is the Bank Insurance Fund ("BIF").[3] In 1989, the BIF was created and acquired all of the PIF's assets and liabilities. See 12 U.S.C. § 1821(a)(5)(B) (1994); see also Pima Fin. Servs. Corp. v. Intermountain Home Sys., Inc., 786 F. Supp. 1551, 1557-58 (D. Col. 1992) (discussing 1989 changes). The BIF supports the FDIC when it insures state-chartered banks, among

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[3] The BIF was the instrumentality before the Court of Federal Claims when it considered the NAFI issue. See Slattery II, 53 Fed. Cl. at 272. Subsequent to the trial court's decision, section 2101 of the Federal Deposit Insurance Reform Act of 2005 (Pub. L. 109-171) required the FDIC to merge the BIF and SAIF into the Deposit Insurance Fund ("DIF") by July 1, 2006. The merger occurred on March 31, 2006. See 71 Fed. Reg. 20524 (Apr. 21, 2006). The merger does not alter or otherwise affect the arguments presented here, however, as the DIF (like its predecessors the PIF and BIF) has never received a Congressional appropriation. For purposes of clarity and consistency, in this brief we use name of the instrumentality addressed by the trial court – the BIF.

other institutions. Meritor was a state-chartered bank that was insured by the FDIC, and plaintiff has sued the FDIC in this capacity.

Important for the purpose of this appeal is the understanding that Congress has established separate funding activities to support other financial insurance accounts. FIRREA directed that the FDIC insure institutions, or successors to institutions, that were formerly insured by the FSLIC, in addition to institutions traditionally insured by the FDIC. FIRREA also stipulated that BIF banks included those depository institutions whose accounts were insured by the FDIC on the day before August 9, 1989 (when FIRREA was enacted). In other words, these institutions' deposits were insured by the BIF. 12 U.S.C. § 1817(l)(3)(A), (*l*)(4). By contrast, savings associations whose accounts were insured by the FSLIC on the day before August 9, 1989, on that date became members of the Savings Association Insurance Fund ("SAIF"). 12 U.S.C. §§ 1814(a)(2), 1817(l)(3)(B), (*l*)(5). The BIF and the SAIF are funded by assessments paid by BIF and SAIF members, respectively. See 12 U.S.C. § 1817(b).

Congress has enacted statutory Treasury backup provisions for other funds managed by the FDIC (as well as funds managed by other regulatory agencies) relating to institutions that were insured by the FSLIC prior to FIRREA's enactment. See 12 U.S.C. § 1441a(h) (backup for Resolution Trust Corporation ("RTC"));

12 U.S.C. § 1441b(e)(7)(E) (backup for Resolution Funding Corporation ("RFC")); 12 U.S.C. § 1821(a)(6)(D) (limited backup for SAIF); 12 U.S.C. § 1821a(c)(1) (backup for FSLIC Resolution Fund ("FRF")). By contrast, Congress established no such Treasury backup provision for the BIF.

### C. The FDIC Is A NAFI Under The Extant Test

The FDIC is a NAFI. As the Court of Federal Claims' jurisdiction is limited to "cases in which appropriated funds can be obligated," it does not extend to suits arising from NAFI transactions. Applying the standard set forth in Ains, the FDIC acted as a NAFI in this instance because (1) it did "not receive its monies by congressional appropriation[;]" (2) it derived its funding "primarily from [its] own activities, services, and product sales[;]" (3) there is no situation in which appropriated funds could be used to fund the FDIC; and (4) there was "a clear expression by Congress that the agency was to be separated from general federal revenues." 365 F.3d at 1340-44.

#### 1. The BIF Does "Not Receive Its Monies By Congressional Appropriation"

At no time since the FDIC's inception has Congress appropriated funds for the FDIC to pay breach of contract claims. At no time since the FDIC's inception has Congress authorized payment from the Treasury for this purpose.

The legislation that established the FDIC – section 8 of the 1933 Act, as amended by section 101 of the Banking Act of 1935 ("1935 Act") -- provided an initial capitalization of the FDIC through stock subscriptions by the Treasury and the Federal Reserve Banks. 48 Stat. 168, 168-69, 49 Stat. 686, 687-89. This was not a permanent appropriation, however. Congress initially provided funds solely to permit the FDIC to acquire its own stock. Pub. L. No. 363, 61 Stat. 773 (1947). Fifteen years later, the proceeds of this subscription had been reimbursed to the Treasury, pursuant to Public Law Number 363, 61 Stat. 773 (1947). As this Court has explained, Congress's initial provision of funding to an instrumentality is "of no consequence to [NAFI] analysis" because "it says nothing of Congress's intentions concerning the funding of [that activity's] operations." Core Concepts, 327 F.3d at 1335-36.

Congress prescribed that the FDIC's permanent source of funding be derived from deposit insurance premiums assessed against insured institutions. 48 Stat. 179; 49 Stat. 687-89. The FDIC's financing, from its inception until the enactment of the Federal Deposit Insurance Act of 1950, 64 Stat. 873 ("1950 Act"), is described in a report of the House Committee on Banking and Currency:

> The initial capital of the [FDIC] was provided by funds subscribed by the Federal Reserve banks in the amount of $139,299,556.99 and by the Treasury in the amount of $150,000,000. Under the 1935 act, insurance of bank deposits was established on a basis to be supported by the insured banks through the payment of insurance premiums. The surplus thus built up throughout the years together with income and profits from investments had exceeded expenses and net losses of the Corporation to such an extent by 1947 that the Congress approved the recommendation of the Directors of the [FDIC] that steps could safely be taken to retire the stock of the Corporation when the surplus of the Corporation exceeded $1,000,000,000. Accordingly, under Public Law 363, approved August 5, 1947, the Corporation was directed to retire its capital stock by paying to the Treasury the amount originally advanced in the form of capital subscriptions by the Federal Reserve banks and the Treasury. Pursuant to such direction, the retirement of the capital stock aggregating $289,299,556.99 was completed on August 30, 1948[.] Aside from the organization period in 1933, the Corporation in each year has operated at a substantial profit[.]

H. Rep. No. 2564, 81st Cong. 2d Sess., reprinted in 1950 U.S. Code Cong. Serv. 3765, 3766-67; see also S. Rep. No. 1821, 86th Cong. 2d Sess., reprinted in 1960 U.S. Code Cong. & Ad. News 3234, 3236.

Pursuant to the 1950 Act, the FDIC continued to be funded by premia paid by its insured member institutions. See id., § 7, 64 Stat. 876. This source of funding continued under subsequent amendments, and remains the case under the current statute. See 12 U.S.C. § 1817(b) (1994).

**2. The BIF Derives Its Funding "From [Its] Own Activities, Services, And Product Sales"**

As discussed above, the FDIC draws its funding through assessments from its member banks. See 12 U.S.C. § 1817(b); id. § 1817(b)(2)(B)(ii) (covering "case resolution expenses"). In fact, the FDIC's operational statute expressly recognizes that its funding is derived from its membership: Congress has provided that the FDIC may levy "Emergency Special Assessments" on its members "if necessary . . . to provide sufficient assessment income to repay amounts borrowed from the Secretary of the Treasury[.]" 12 U.S.C. § 1817(b)(5) (emphasis supplied).

During the past two years, the United States has experienced a significant financial crisis involving the failure of numerous FDIC-insured institutions. Nevertheless, the FDIC has not sought, received, or borrowed a single dollar of taxpayer funds to resolve these failed institutions. Instead, in response to "its need for cash to pay for projected failures," rather than seek Treasury funds, the FDIC recently required its member institutions to pre-pay three years of premia to replenish the DIF. See 74 Fed. Reg. 59056 (Nov. 17, 2009).

**3. There Is No Situation In Which Appropriated Funds Could Be Used To Fund The BIF**

Congress has not appropriated funds for the FDIC to utilize in its capacity as insurer of BIF members, nor has Congress otherwise authorized payment from the

Treasury for this purpose, even as a backup to funds obtained from assessments. There have been statutory Treasury backup provisions for various other funds managed by the FDIC, relating to institutions that the FSLIC insured before Congress enacted FIRREA. See 12 U.S.C. § 1441a(h) (RTC backup); 12 U.S.C. § 1441b(e)(7)(E) (RFC backup); 12 U.S.C. § 1821(a)(6)(D) (SAIF backup); 12 U.S.C. § 1821a(c)(1) (FRF backup). That Congress enacted no backup fund for the BIF evinces that it did not intend public funds to be used to support this activity.

This sentiment is further buttressed by the fact that the BIF and the SAIF were established in contiguous subsections of the Title 12 – sections 1821(a)(5) and (6). These subsections are preceded by a provision requiring that these funds be "maintained separately and not commingled." 12 U.S.C. § 1821(a)(4). This underscores the fact that even those limited Treasury backup funds available to the SAIF were not available to the BIF, directly or indirectly.

As it does with other independent entities, Congress has provided that the Treasury may lend funds to the BIF, "such funds as in the judgment of the Board of Directors of the Corporation are from time to time required for insurance purposes, not exceeding in the aggregate $100,000,000,000 outstanding at any one time[.]" 12

U.S.C. § 1824(a).[4] These borrowings are predicated upon an agreement containing a repayment schedule and demonstrating that the FDIC's income from assessments will permit timely repayment of principal and interest. See 12 U.S.C. § 1824(c).

Further, the FDIC may borrow from other sources through the issuance of notes, debentures, bonds, and other obligations. 12 U.S.C. § 1825. This borrowing authority seeks to shield the Treasury from BIF and SAIF obligations. Specifically, the FDIC may not issue or incur any obligation which would cause the BIF's private obligations to exceed the value of the cash and other assets held by that fund. See 12 U.S.C. § 1825(c)(5).

In sum, although the FDIC does possess the ability to borrow money from the Government, the FDIC must repay any funds it borrows, and must pay interest upon those funds. See 12 U.S.C. § 1817(a)(1). This demonstrates an absence of common interest between these entities. Borrowings are not "appropriations," as the word "appropriate" means "to take exclusive possession of." Webster's Ninth New Collegiate Dictionary 98 (1990). Indeed, paying interest upon borrowings results in

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[4] To the extent the Court deems this statute's legislative history relevant, one senator observed that, "[i]t is important to note that this borrowing authority is not coming from taxpayer dollars. The levies and the assessments that are made on the participants in the financial industry themselves, the depository institutions, are the source of the dollars that would cover this loan authority." 155 Cong. Rec. S5093 (daily ed. May 5, 2009).

a net loss to the FDIC. This, of course, further undermines the notion that the Government intended to fund the BIF.

**4. There Was "A Clear Expression By Congress That The [BIF] Was To Be Separated From General Federal Revenues"**

This Circuit has opined that an entity is a NAFI if "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." Core Concepts, 327 F.3d at 1336. The BIF's funding structure reflects Congress's clear intent to segregate the BIF from Treasury funds.

Congress prohibited BIF funds from being commingled with other accounts. 12 U.S.C. § 1821(a)(4)(A)(ii). The FDIC draws its funding through assessments from its member banks. See 12 U.S.C. § 1817(b). With respect to these assessments, Congress directed that, "[n]otwithstanding any other provision of law, amounts received pursuant to any assessment under this section and any other amounts received by the Corporation shall not be subject to apportionment for the purposes of chapter 15 of Title 31 or under any other authority." 12 U.S.C. § 1817(d). No law permits the FDIC to use appropriated funds to perform or satisfy contracts with former BIF members such as Meritor.

With respect to the BIF, Congress used language identical to that which it

used in segregating funds of other NAFIs from Federal funds. In Furash, 252 F.3d at 1339, this Court considered whether the Federal Housing Finance Board ("Finance Board") was a NAFI. The Court concluded that the Court of Federal Claims did not possess jurisdiction because, "there has been a clear expression by Congress that the Finance Board's operations are to be funded through assessments against federal home loan banks, not from general fund revenues[.]" Id. at 1339-40. The operative statute in Furash was section 1422b(c) of Title 12. It stated that Finance Board funds "shall not be construed to be Government Funds or appropriated monies, or subject to apportionment for the purposes of chapter 15 of Title 31, or any other authority." In Furash, this Court relied upon this language to conclude that Congress intended the Finance Board's funds to be separated from general Federal revenues, and that therefore, the Finance Board was a NAFI. 252 F.3d at 1341.

In this case, section 1817 of Title 12 reflects Congress's intent that FDIC funds were to remain separated from general Treasury funds. Section 1817(d) employs the same language used in the operative statute in Furash.

There exists no statutory expression providing that Treasury funds will be used to pay the FDIC's obligations as insurer of banks. Congress's silence with respect to these obligations, viewed in conjunction with statutes which expressly provide that the BIF will be funded by payments of its member banks, demonstrates

that Congress intended that judgments against the FDIC as insurer of banks would continue to be paid out of funds gathered from its member banks.

Indeed, if Congress intended that the Government would be liable for judgments against the FDIC in its capacity as insurer of banks, it would have made that obligation clear – as it did when it established the FRF to fund judgments against the FSLIC in Winstar-related litigation. See 12 U.S.C. § 1821(a)(6) (SAIF); 12 U.S.C. § 1821a(c) (FRF). Congress's appropriations to the SAIF and the FRF illustrate that when Congress does intend to commit funds to support an FDIC activity, and intends to waive sovereign immunity, this expression is unequivocal. See 12 U.S.C. §§ 1821(a)(6), 1821a, 1817(*l*). The absence of any such provision reflects Congress's clear intention that the BIF be segregated from Federal funds.

Alternatively, if Congress had intended that the FDIC could be sued in the Court of Federal Claims, it would have amended the Tucker Act as it did in 1970 with respect to AAFES and NASA when it "amended the Tucker Act and the judgment fund statute, 31 U.S.C. § 1304, to give the Court of Federal Claims jurisdiction over actions against those non-appropriated fund instrumentalities." Furash, 252 F.3d at 1339 (citing McDonald's Corp. v. United States, 926 F.2d 1126, 1129-31 (Fed. Cir. 1991)); see also H.R. Rep. No. 91-933 ("Under the [bill as enacted] the sovereign immunity of the United States would be removed only with

respect to the post exchange types of operations which are conducted within the Defense Department and [NASA]").

Finally, the trial court was mistaken in its reliance upon Congressional expressions to conclude that "Congress has given the full faith and credit of the Treasury to the FDIC and fully intends to appropriate public money to the FDIC if it becomes necessary." A000040. As the dissent to the Panel opinion in this appeal pointed out, (1) the referenced commitments of "full faith and credit" did not relate to the BIF, but instead related to the FDIC acting in its receivership capacity; and (2) sovereign immunity has not been waived because the statutory scheme does not permit appropriated funds to be used for the FDIC's expenses. Slattery v. United States, 583 F.3d 800, 831-32 (Fed. Cir. 2009) (opinion vacated March 19, 2010).

## II. Because The FDIC Is A NAFI, The Court Of Federal Claims Possessed No Jurisdiction Over This Lawsuit

In this case, "since the Government had assumed no liability for the [FDIC's] financial obligations it could not be said to have consented to a suit designed to vindicate such obligations." See Hopkins, 427 U.S. at 125. Because the FDIC, as insurer of financial institutions, does not receive public appropriations, the Court of Federal Claims did not possess jurisdiction to hear Slattery's claim against it. See Core Concepts, 327 F.3d at 1335-37. The appropriate remedy in this instance is a

suit against the FDIC in a United States district court, pursuant to the "sue and be sued" and Federal jurisdiction clauses contained in 12 U.S.C. § 1819(a), (b)(2)(A). See Far West Fed. Bank, FSB v. Director, Office of Thrift Supervision, 930 F.2d 883, 888-89 (Fed. Cir. 1991). Accordingly, this action must either be dismissed or, in the alternative, transferred to a district court pursuant to 28 U.S.C. § 1631.[5]

That the judgment in this case would be paid out of BIF funds derived from premiums charged to member banks is consistent with FDIC and industry practice. Indeed, all insurance companies ultimately pay out judgments from accounts comprised of premia paid in by those that they insure, and the FDIC is no different. The FDIC's member banks, including Meritor, well understood that the FDIC would pay out judgments from accounts supported by member premia. In fact, the BIF has paid out multiple judgments based upon the FDIC's role as insurer of state banks. See, e.g., Spawn v. W. Bank Westheimer, 989 F.2d 830, 832 (5th Cir. 1993) (describing FDIC's payment of claim filed in district court); Adagio Inv. Holding Co. v. FDIC, 338 F.Supp. 2d. 71, 84, n.24 (D.D.C. 2004) (describing payment of claim for underpayment of deposit insurance). Member banks nonetheless continued payment of premia to the BIF, as they viewed the benefits associated with FDIC

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5 If transferred, the Court of Federal Claims' findings would not constitute the law of the case, as the court did not possess jurisdiction over these claims. See Christopher Village, L.P. v. United States, 360 F.3d 1319, 1333 (2004).

insurance as greater than any disadvantages.

## III. The Law Of NAFI Should Be Clarified

Given the BIF's operation and funding, Congress did not intend that public monies be used to fund the FDIC's obligations as insurer of banks. Accordingly, the law of NAFI in this Circuit dictates that the FDIC in this case is a NAFI, and that this matter be dismissed because the Court of Federal Claims possessed no jurisdiction to hear this claim. See Ains, 365 F.3d at 1340-41.

Nonetheless, we respectfully submit that the law of NAFI in this Circuit is problematic. The Court should clarify the law so that it will sit at better ease upon the Supreme Court's decision in Hopkins.

### A. The Extant NAFI Test In This Circuit Is Problematic

The principle of NAFI set forth by the Supreme Court in Hopkins was clear: "[t]he non-appropriated fund status of exchanges places them in a position whereby the Federal Government, absent special legislation, does not assume the obligations of these exchanges in the manner that contracts entered into by appropriated fund agencies are assumed." Hopkins, 427 U.S. at 127. By this statement, the Supreme Court recognized (1) that the Government will not be liable for the obligations of entities that do not receive appropriations, and (2) Congress may overcome this bar by enacting legislation which renders the Government liable for these obligations.

The Hopkins standard was unambiguous: where Congress does not expressly appropriate funds for a Government instrumentality, that instrumentality may not be sued in the Court of Claims.

Notwithstanding Hopkins' clarity, in L'Enfant Plaza Props. Inc. v. United States, 668 F.2d 1211 (Ct. Cl. 1982) ("L'Enfant"), the Court of Claims "moved beyond the Hopkins test." Ains, 56 Fed. Cl. at 529. L'Enfant declared that the fact that Congress had established no funding mechanism for an instrumentality was not dispositive of Congressional intent. In other words, that an activity "was "financially self-sufficient [was] not enough to make it a NAFI." Id. at 529. Instead, L'Enfant placed an additional burden upon the Government to demonstrate an entity was entitled to NAFI status. Specifically, under L'Enfant, the Government had to demonstrate that the "authorizing statute prohibited the agency from receiving appropriated funds." Id. at 530 (emphasis supplied). Thus, the Court of Claims effectively imposed upon Congress an obligation to state not only for what activities Treasury funds may be used, but for those activities these funds may not be used.

L'Enfant thus shifted the jurisdictional burden. Rather the plaintiff carrying the burden of establishing jurisdiction by finding an "unequivocal express[ion]" that Congress intended to waive sovereign immunity, Lane v. Pena, 518 U.S. 187, 192 (1996), L'Enfant held that "the Court of Federal Claims must exercise jurisdiction

absent a clear expression by Congress that it intended to separate the agency from general federal revenues." Furash, 252 F.3d at 1339 (emphasis supplied, citing L'Enfant, 668 F.2d at 1212). In the event the authorizing statue is silent on the question of funding – i.e., it identifies no funding mechanism for the instrumentality, and does not affirmatively state that the instrumentality may not be funded by appropriation – L'Enfant construes this silence as a waiver of sovereign immunity. See L'Enfant, 668 F.2d at 1212 (requiring a demonstration that Congress "intended that the activity resulting in the claim was not to receive or be funded from appropriated funds").

By reading Congressional silence on appropriations as a waiver of sovereign immunity – and by its concomitant requirement that Congress expressly state that an instrumentality may not receive Federal funding – the Court of Claims in L'Enfant departed from the long-established axiom that a waiver of sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign." Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999).

Further, L'Enfant's modification of the NAFI standard, to include an affirmative expression that appropriated funds may not be used, did not make the standard more reliable. To the contrary, from the standpoint of the drafting legislature, such language is counterintuitive. One Congress cannot bind the hands

of a future Congress. See Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932). Thus, legislators have no reason to include statutory language providing that an instrumentality may not be funded by appropriated funds, as this would have no effect upon a subsequent legislature. As the additional step adopted in L'Enfant seeks an expression that contravenes Congressional authority, it is unhelpful.

Indeed, this Court has observed that applying the extant test can be problematic. Of the four-pronged NAFI test, "[t]he third factor can be particularly challenging, because it is always difficult to prove a negative[.]" Ains, 365 F.3d at 1344. This Court described the fourth factor as "the least obvious; congressional intent is not always explicit in statutory language." Id. at 1343.

### B. This Court Should Restore The Law Of NAFI Articulated In *Hopkins*

For reasons described above, the law of NAFI in its current state is problematic and conflicts with the venerable precept that a "waiver of sovereign immunity must be unequivocally expressed in statutory text." Lane, 518 U.S. at 192.

We propose that the test articulated by the Supreme Court in Hopkins be restored: a NAFI is an instrumentality "which does not receive its monies by congressional appropriation." See Hopkins, 427 U.S. at 125 n.2. In other words, absent an express statutory provision establishing that the instrumentality will be

funded by public monies, Congress has not "unequivocally expressed" an intent that the instrumentality may be sued in the Court of Federal Claims. See Lane, 518 U.S. at 192. Accordingly, the instrumentality is a NAFI.

Notably, the test we offer, applied retrospectively, would not likely have altered any prior outcome in NAFI case law. Nor would the test alter the result in this case: the FDIC is not a NAFI in this case under either the Ains four-part test, or the test we propose here.

The standard we propose would, however, provide clarity and instruction to the Court of Federal Claims when contemplating whether an activity is a NAFI. Equally as important, it would dramatically simplify the inquiry. Rather than mining legislative statements, non-binding resolutions, and other legislative history for rhetoric relating to the funding of an activity, and divining whether such rhetoric meant that Congress intended that public funds might not be used to fund that activity, a court would merely look to the express text of the statute for an affirmative statement that the entity would be funded by public monies. Absent such an "unequivocal[] express[ion]," that public funds would be used to sustain the activity, Lane, 518 U.S. at 192, the activity would be deemed a NAFI.

Apart from its added clarity, this proposed test would render the doctrine consistent with the standard articulated in Hopkins, the law of sovereign immunity,

and the long-held principle that it is plaintiff's burden to establish that the Court of Federal Claims possesses jurisdiction, and not the Government's burden to demonstrate that the Court does not possess jurisdiction.

## CONCLUSION

For the reasons stated above, we respectfully request that this Court reverse the judgment of the Court of Federal Claims, and dismiss the complaints in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this 30th day of April, 2010, I caused to be sent by overnight mail copies of "*EN BANC* BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES," addressed as follows:

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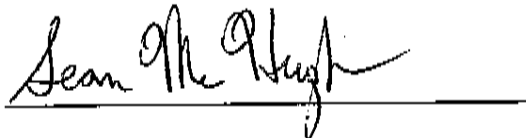

## CERTIFICATE OF COMPLIANCE

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 6,586 words (exclusive of caption and signature block) as calculated by the word processing system used to prepare this brief.