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 PLAINTIFFS-CROSS APPELLANTS, STEVEN ROTH AND INTERSTATE PROPERTIES

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May 28, 2010

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for plaintiffs-cross appellants Steven Roth and Interstate Properties hereby certifies the following:

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

   Steven Roth and Interstate Properties.

2. The names of the real parties in interest represented by me are:

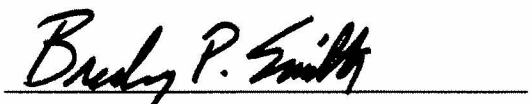
   Steven Roth and Interstate Properties.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party represented by me are:

   Steven Roth is an individual. Interstate Properties has no parent corporation and no publicly held company owns more than ten percent of Interstate Properties' stock.

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

   Richard J. Urowsky (partner), Karen Patton Seymour (partner), Steven W. Thomas (former partner), Jennifer L. Murray (former associate), SULLIVAN & CROMWELL LLP, 125 Broad Street, New York, New York 10004.



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1. Given Congressional expressions of intent to support the Federal Deposit Insurance Corporation ("FDIC") with the full faith and credit of the United States Treasury, is the FDIC properly characterized as a non-appropriated fund instrumentality ("NAFI")?

2. Even if the FDIC is a NAFI, did the Court of Federal Claims (the "Claims Court") have jurisdiction to hear the claims-in-intervention brought by plaintiffs-cross appellants Steven Roth and Interstate Properties (collectively, "Roth")?

PRELIMINARY STATEMENT

Although the Government has been fighting tooth and nail for the last 17 years to avoid liability for the seizure of Meritor Savings Bank ("Meritor"), it has never raised the NAFI doctrine as a defense against Roth's claims-in-intervention. Indeed, the Government does not even mention Roth's claims in its recently-filed *en banc* brief. There is good reason for this. If properly invoked, the NAFI doctrine can prevent the Claims Court from exercising jurisdiction over a breach of contract claim. Roth's claims, however, are *not* for a breach of contract. Rather, they arise from his property interest in any receivership surplus resulting from the FDIC's liquidation of Meritor or from successful litigation brought against the United States based on the wrongful seizure of Meritor. As this Court recognized in *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279 (Fed. Cir. 1999) ("*First Hartford*"), that property interest gives rise to a takings claim under the Fifth Amendment to the Constitution.

In its *en banc* brief, the Government appears to recognize that the NAFI doctrine is focused on contractual claims, as opposed to claims arising from the FDIC's conduct as the receiver for an insolvent financial institution. This distinction is particularly relevant with respect to Roth's claims. This Court unequivocally concluded in *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356 (Fed. Cir. 2005) ("*Lion Raisins*"), that the NAFI doctrine poses no obstacle to a

Fifth Amendment takings claim. The Claims Court thus has jurisdiction to hear Roth's claims, even if the FDIC is a NAFI.

In its separately-filed *amicus curiae* brief, the FDIC seeks to supplement the Government's arguments by asserting – for the very first time in this litigation – that the NAFI doctrine bars Roth's claims. Yet, the FDIC does not even mention, let alone quarrel with, this Court's decisions in *First Hartford* or *Lion Raisins*. Instead, the FDIC makes the novel argument that it must be a NAFI because the Meritor receivership does not and (allegedly) cannot contain any Congressionally-appropriated funds. That argument is mistaken for two reasons. First, to the extent that this Court affirms the judgment obtained by plaintiff Frank P. Slattery ("Slattery"), the Meritor receivership *will* contain Congressionally-appropriated funds. Second, the FDIC is simply incorrect in its assumption that Roth merely seeks a portion of the Meritor receivership surplus. To be sure, Roth is entitled to a portion of that surplus. But what Roth seeks in this litigation is a judgment against the United States – and compensation from the United States – for the FDIC's *failure* properly to distribute funds from the Meritor receivership. The NAFI doctrine does not bar such claims.

BACKGROUND

This case arises from the Government's failure to abide by its obligations to Meritor, which prompted the seizure of Meritor and the appointment

of the FDIC as Meritor's receiver in December 1992. (*See Slattery* v. *United States*, 73 Fed. Cl. 527 (2006) ("*Slattery IV*") at A000005; *Slattery* v. *United States*, 53 Fed. Cl. 258 (2002) ("*Slattery II*") at A000029; A000058.) Thereafter, the FDIC approved the assumption of Meritor's assets, as well as its deposits, by Mellon Bank, N.A. ("Mellon"). (*Slattery IV* at A000005; *Slattery II* at A000058.) Mellon paid a premium of $181.3 million for the right to receive the deposits and certain of Meritor's assets, but the FDIC has failed to distribute to Roth or to any other shareholder of Meritor the liquidation surplus created by the receipt of funds from Mellon. (*Slattery IV* at A000005; 6000103.) Instead, the FDIC has retained these funds for its own use. (*Slattery IV* at A000005; A600103.)

In May 1993, Slattery began this action in the Claims Court. (*Slattery* v. *United States*, 35 Fed. Cl. 180 (1996) at A000061.) Slattery alleged, both derivatively and on behalf of a direct class, that the FDIC's seizure of Meritor constituted a breach of contract and a taking of property in violation of the Fifth Amendment, entitling him to recover damages. (*Slattery II* at A000037.) Roth intervened and alleged in his Second Amended Complaint, *inter alia*, that, as a shareholder of a bank seized by the FDIC, Roth had a property interest in the surplus arising from the FDIC's liquidation of Meritor. Roth sought (i) just compensation from the United States for its unconstitutional taking of Roth's pro-rata portion of the Meritor liquidation surplus; (ii) monetary relief from the United

States for the FDIC's failure to distribute a portion of the Meritor liquidation surplus to Roth in violation of its statutory obligations under 12 U.S.C. § 1821(d)(11)(A); and (iii) declaratory relief concerning Roth's right to his pro-rata share of any judgment on Slattery's breach of contract claims and imposition of a constructive trust on that share. (*Slattery IV* at A000005-6; A600102-24.) The Government moved to dismiss Roth's claims, and the Claims Court granted the motion on jurisdictional grounds, holding that Roth's claims had not been properly alleged against the United States as required by the Tucker Act, 28 U.S.C. § 1491. (*Slattery IV* at A000004; A000007.)

On August 14, 2002, the Claims Court found the Government liable on Slattery's breach of contract claim (*Slattery II* at A000058-59); and on February 10, 2006, the Claims Court ruled that the Government owed damages in the amount of $371,733,059. (*Slattery* v. *United States*, 69 Fed. Cl. 573 (2006) at A000023.) Accordingly, on October 12, 2006, the Claims Court entered Judgment awarding Slattery $371,733,059 and dismissing Roth's Second Amended Complaint. (A000001.) The Claims Court issued an Amended Order clarifying the Judgment on December 18, 2006. (A000002-3.)

Roth appealed the Judgment of the Claims Court on two grounds: (i) that the Judgment was ambiguous and should be construed to require the damages awarded by the Claims Court to be paid to the shareholders actually

injured by the FDIC's breach of contract (*i.e.*, the shareholders of Meritor at the time of its seizure), rather than current Meritor shareholders; and (ii) that the Claims Court erred in holding that it did not have jurisdiction over Roth's claims arising from the FDIC's failure to distribute Meritor's receivership surplus. (Roth's Br. at 11-28; Roth's Reply Br. at 2-11.)

On September 29, 2009, the Panel reversed the Claims Court's dismissal of Roth's claims-in-intervention. (Panel Op. at 45-52.)[1] The Panel rejected the Claims Court's holding that the FDIC, in its capacity as receiver, is not "the United States" and, therefore, cannot be sued under the Tucker Act. (Panel Op. at 46-49.)[2] The Panel separately upheld the Claims Court's ruling that the FDIC is not a NAFI and, therefore, that the Court had jurisdiction under the Tucker Act to hear Slattery's breach of contract claim. (Panel Op. at 11-18.) The Panel also affirmed the Claims Court's liability findings and, in substantial part, the damages award obtained by Slattery. (Panel Op. at 19-43.)

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[1] The Panel declined to rule on Roth's first ground for appeal. (*See* Panel Op. at 42 n.9.)

[2] The Panel also rejected an "alternative" basis for upholding the dismissal of Roth's claims, which the Government suggested for the first time in its reply brief. (*See* Panel Op. at 49-52.) The Government argued that 12 U.S.C. § 1821(d)(13)(D) bars the Claims Court from exercising jurisdiction over Roth's claims. (Panel Op. at 49.) The Panel disagreed, holding that "the statute is not directed to the FDIC's actions in liquidating the bank." (Panel Op. at 50.)

ARGUMENT

I.

THE FDIC, AS MERITOR'S RECEIVER, IS NOT A NAFI, AND THE UNITED STATES IS NOT IMMUNE FROM SUIT UNDER THE TUCKER ACT FOR THE FDIC'S MISCONDUCT.

In *Ains, Inc.* v. *United States*, 365 F.3d 1333 (Fed. Cir. 2004), this Court articulated a four-part test for determining whether an entity is a NAFI and thus immune from Tucker Act suits predicated on breach of contract:

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

Id. at 1342 (internal citations and quotations omitted).

The Panel here concluded that "[i]n the context in which the FDIC was formed, and the continuing governmental affirmations of monetary support, the only reasonable interpretation is that the legislative intent was to assure payment of the FDIC's obligations." (Panel Op. at 18.) Accordingly, the Panel held that "[t]he Court of Federal Claims correctly ruled that the FDIC does not meet the fourth factor of the *Ains* test, and that the FDIC is not a NAFI." (*Id.*) The Panel was correct.

A. As the Government Virtually Concedes, the FDIC Is Not a NAFI with Respect to Claims Arising from Its Actions As Receiver.

The Government's *en banc* brief focuses exclusively on whether the NAFI doctrine bars the Claims Court from hearing Slattery's breach of contract claims. (*See, e.g.*, Gov't *En Banc* Br. at 14 ("At no time since the FDIC's inception has Congress appropriated funds for the FDIC *to pay breach of contract claims*.") (emphasis added); *id.* at 20 ("No law permits the FDIC to use appropriated funds to *perform or satisfy contracts* with former BIF members such as Meritor.") (emphasis added).) The Government does not mention Roth or his claims-in-intervention, which are directed toward the actions of the FDIC as Meritor's receiver. While Roth concurs with Slattery that the FDIC is not a NAFI in any capacity, the FDIC plainly is not a NAFI with respect to claims arising from its failure properly to distribute a receivership liquidation surplus.

The Government argues in its *en banc* brief that the Claims Court and Panel incorrectly concluded that the FDIC fails to meet the *Ains* NAFI test, because "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.'" (Gov't *En Banc* Br. at 23.) Yet, the Government bases its argument, in part, on the contention that "the referenced commitments of 'full faith and credit' did not relate to the [Bank Insurance Fund], but instead related to the

FDIC *acting in its receivership capacity*." (Gov't *En Banc* Br. at 23 (emphasis added).) The Government thus appears to concede that Congress has expressed an intent to place the full faith and credit of the Treasury behind the FDIC with regard to claims arising from its conduct as a receiver, even if the FDIC is a NAFI with regard to breach of contract claims arising from the FDIC's pre-receivership conduct.

As the Panel recognized, in "*First Hartford* this court held that a shareholder of a bank that had been seized by the FDIC had a property interest in the liquidation surplus from the sale of the seized bank's assets. The court concluded both that the Court of Federal Claims had jurisdiction to hear claims directed to this property interest, and that the shareholder had standing to pursue such claims." (Panel Op. at 46-47.) The Government has not argued that *First Hartford* should be overruled; nor is there any reason to do so given that the FDIC is not a NAFI in its capacity as Meritor's receiver.

B. The FDIC's *Amicus* Brief Misconstrues the Nature of the Relief Sought by Roth.

The FDIC argues in its *amicus* brief that it is a NAFI with respect to Roth's claims, because the "FDIC as receiver does not receive any funds by Congressional appropriation. There are no appropriated funds in the Meritor receivership estate, and there will be no appropriated funds in the Meritor receivership estate." (FDIC *En Banc Amicus* Br. at 7.) The FDIC's argument –

which has never previously been raised in this litigation – misses the point. The relevant question is not whether the FDIC receives appropriated funds in its capacity as receiver, or whether the Meritor receivership contains appropriated funds. The relevant question is whether the FDIC passes the *Ains* NAFI test. It does not.[3]

As a factual matter, the FDIC is incorrect that there "will be no appropriated funds in the Meritor receivership estate." (FDIC *En Banc Amicus* Br. at 7.) To the extent that the Court affirms the Claims Court's damages award obtained by Slattery, the judgment would be satisfied with funds paid by the United States from a general appropriation. Indeed, the FDIC notes in its *en banc*

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[3] Though ostensibly addressing only the questions asked by this Court *en banc*, the FDIC essentially seeks to dispute the Panel's separate determination that the FDIC is subject to suit as the "United States" under the Tucker Act for claims founded on a shareholder's property interest in a liquidation surplus. (*See* FDIC *En Banc Amicus* Br. at 6 ("The trial court correctly found that FDIC in its capacity as receiver was not the United States.").) In support of its argument, the FDIC attempts to distinguish several decisions by the U.S. Court of Appeals for the D.C. Circuit. Respectfully, this Court did not request further briefing on questions not related to the NAFI doctrine. Roth thus refers the Court to the briefs that Roth submitted to the Panel and re-filed for *en banc* consideration on April 30, 2010, which contain a complete discussion of the cases cited by the FDIC in its *amicus* brief. (*See* Roth's Br. at 20-27; Roth's Reply Br. at 8-11.) The FDIC also attempts to raise, in a footnote, another issue that also is outside the scope of the Court's request for additional briefing: whether 12 U.S.C. § 1821(d)(13)(D) should be construed to deprive Roth of any forum in which to bring his claims. (*See* FDIC's *En Banc Amicus* Br. at 8 n.9.) Roth respectfully refers the Court to the discussion of this issue in prior briefs as well. (*See* Roth's Br. at 10 n. 4; Roth's Opposition to Government's Petition for Rehearing at 8-15.)

brief that "[t]he [Meritor] receivership remains open pending the conclusion of this litigation" – a clear acknowledgment that the Meritor receivership may be affected by any judgment entered against the United States in this action. (FDIC *En Banc Amicus* Br. at 3.)

The FDIC also mischaracterizes Roth's claims as having been "asserted . . . against the FDIC in its capacity as receiver of Meritor, and seek[ing] an order directing the distribution of assets of the Meritor receivership to the Roth shareholders." (FDIC *En Banc Amicus* Br. at 2.) In truth, Roth's claims are asserted against *the United States*, acting through the FDIC, and a judgment in Roth's favor would be paid through appropriated funds, even if those funds must be routed through the Meritor receivership. *See* 28 U.S.C. § 2517. Indeed, in the *amicus curiae* brief that it originally submitted to the Panel, the FDIC explicitly recognized that any money judgment rendered in this case would come from appropriated funds:

> [P]ayment of any damages awarded in this case must come not from the bank-funded DIF but from the United States, as the trial court ordered. This conclusion is supported not only by the clear language of Section 2517(a), and by the language used by the trial court, but also by the case primarily relied upon by the trial court to support its finding of jurisdiction. In that case, the Court of Claims (this Court's predecessor) found that it had jurisdiction to entertain a contract claim against the Office of the Comptroller of the Currency, even though the agency had not received Congressionally-appropriated funds since 1947. *L'Enfant Plaza Properties, Inc.* v. *United States*, 229 Ct. Cl. 278, 668 F.2d 1211 (Fed Cir. 1982). In so finding, the court

> stated that "[j]urisdiction under the Tucker Act must be exercised absent a firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts of the Comptroller." 668 F.2d at 1212. . . . Similarly, in this case, any damages award will come from the Judgment Fund, not from the DIF or any other FDIC fund.

(FDIC *Amicus* Br. at 9-10.) In light of these statements, the FDIC cannot credibly claim that Roth is merely seeking non-appropriated "receivership" assets.

II.

EVEN IF THE FDIC IS A NAFI, THE CLAIMS COURT HAS JURISDICTION TO HEAR ROTH'S CLAIMS.

As this Court recognized in *First Hartford*, Roth's "direct interest in a liquidation surplus is a cognizable property interest the taking of which by the federal government gives rise to standing to sue." 194 F.3d at 1283. Roth's claims are based on this property interest and are wholly unaffected by the NAFI doctrine. That is because the Tucker Act provides the Claims Court with jurisdiction to hear claims arising under the Constitution and Acts of Congress, even in circumstances where a breach of contract claim against a NAFI could not proceed. In *Lion Raisins*, this Court expressly and unequivocally "reject[ed] the government's contention that the Tucker Act's jurisdictional grant does not extend to claims against the United States for takings effected by NAFIs." 416 F.3d at 1365.

The court reasoned, in part:

> The language of the Tucker Act provides, with respect to contract claims, that the jurisdiction of the Court of Federal

> Claims exists over any "claim against the United States founded . . . upon any express or implied contract with the United States." The theory of the NAFI cases is that NAFIs are separate entities (although they are agents of the United States). Such separate entities may make contracts that bind the entities themselves, but the Tucker Act does not authorize suits against those entities. It authorizes suits only against the United States, and then only based on contracts "with the United States" . . . . NAFIs are not recipients of appropriated funds, and thus cannot contractually obligate the United States . . . . This reasoning simply has no application to takings claims, where the United States does have the responsibility for the actions of its agents.

Id. at 1366 (internal citations omitted). Ultimately, the Court concluded in *Lion Raisins*:

> [W]e see no basis in the text of the Tucker Act itself; the legislative history of the 1970 amendments; or in the decisions of the Supreme Court or this court, for limiting the scope of the jurisdictional grant over claims 'against the United States . . . founded upon the Constitution' to exclude takings claims against the United States based on actions by NAFIs. If there is a taking, the claim is founded upon the Constitution and within the jurisdiction of the Court of Claims to hear and determine. The [NAFI at issue] is an agent of the United States, and the United States may properly be sued in the Court of Federal Claims for any takings that are allegedly consummated by the actions of its agents.

Id. at 1367-8 (internal citation and quotation omitted).[4]

The Government seems to recognize that Roth's claims do not implicate the NAFI doctrine. Indeed, none of the cases cited by the Government

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[4] The Court affirmed dismissal of the takings claims on other grounds. *See id.* at 1369-73.

suggest that the NAFI doctrine should be extended to preclude Roth's non-contract claims. *See Fusaro* v. *United States*, 84 Fed. Cl. 712, 715 (Cl. Ct. 2008) ("The limitations of the NAFI doctrine apply to *contract* claims against NAFIs, not other claims that are based on Acts of Congress, like the FLSA, or the Constitution, like takings claims.") (emphasis in original); *see also Ains, Inc.*, 365 F.3d at 1335 (contract case); *Core Concepts of Florida, Inc.* v. *United States*, 327 F.3d 1331 (Fed. Cir. 2003) (contract case); *Furash & Co.* v. *United States*, 252 F.3d 1336 (Fed. Cir. 2001) (contract case). While the FDIC acknowledges that Roth has asserted a claim founded on the Fifth Amendment (FDIC *En Banc Amicus* Br. at 3-5), it does not address *Lion Raisins* or its implications here.

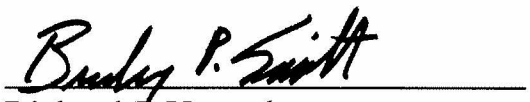
This Court's decision in *Lion Raisins* is fully consistent with the Supreme Court's takings jurisprudence. The Supreme Court has consistently recognized that the United States is liable under the Fifth Amendment for takings effected by its agents. *See, e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440-41 (1982); *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21-22 (1940); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931). As this Court observed in *Lion Raisins*, "[t]here is also no question that NAFIs are agents of the United States. The Supreme Court has repeatedly recognized that NAFIs are 'arms of the government' deemed essential for the performance of governmental functions.'" 416 F.3d at 1363 (citing *Standard Oil* v. *Johnson*, 316

U.S. 481 (1942); *United States* v. *Hopkins*, 427 U.S. 123, 124 (1976); *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 733 (1982)). *Lion Raisins* thus establishes that, regardless of whether the FDIC is a NAFI, Roth's claims are jurisdictionally cognizable under the Tucker Act.

CONCLUSION

For the foregoing reasons, as well as those stated in Roth's briefs submitted to the Panel and re-filed for *en banc* consideration, Roth respectfully requests (i) that the Judgment of the Claims Court with respect to Slattery's breach of contract claim be affirmed and be interpreted to award damages to those who owned Meritor stock on the date that Meritor was seized; and (ii) that the Judgment of the Claims Court dismissing Roth's claims-in-intervention for lack of jurisdiction be reversed.

Respectfully submitted,



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May 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2010, I served true and correct copies of the *En Banc* Brief of Plaintiffs-Cross Appellants, Steven Roth and Interstate Properties on:

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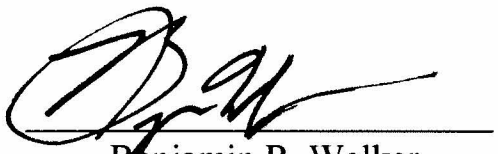

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