2007-5063, -5064, -5089

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

Plaintiff-Cross Appellant,

and

STEVEN ROTH,
and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

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

REPLY IN SUPPORT OF *EN BANC* BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES

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INTRODUCTION

Defendant-appellant, the United States, respectfully submits this reply brief.

In our opening brief, we explained that the Court of Federal Claims did not possess jurisdiction over claims against the Federal Deposit Insurance Corporation ("FDIC") in this case because the FDIC activity and fund at issue – the Bank Insurance Fund ("BIF") – is a non-appropriated fund instrumentality ("NAFI"). We demonstrated that the BIF (1) does not receive appropriations; (2) derives its funding from its own member-bank assessments; (3) cannot receive appropriated funds under the current statutory structure; and (4) is required statutorily to segregate its funds from general Federal revenues. Gov.*EnBanc*Br.13-24.

We also explained that the trial court erred by concluding that the BIF was not a NAFI; Congress has never appropriated funds for the BIF; and Congress has directed the FDIC to sustain the BIF by assessments upon FDIC member banks. The trial court mistakenly relied upon the FDIC's initial funding that was fully reimbursed. The court compounded this error by invoking non-binding congressional "expressions" that were neither accompanied by any commitment of funds nor directed toward the activity at issue in this case.

Our initial brief also proposed that the Court refine NAFI law so that it more clearly conforms with Congress's intent and the Supreme Court's decision in United States v. Hopkins, 427 U.S. 123 (1976). A litigant may misread this Circuit's current

NAFI test as requiring a congressional statement that an instrumentality can never receive appropriated funds. Congress, however, cannot make this statement because one legislature may not bind a future legislature. The extant NAFI test should be clarified so that NAFI status is overcome only by Congress's direction that the instrumentality receive appropriated funds.

The responses of plaintiff-cross appellant Frank Slattery, Jr. ("Slattery") and plaintiffs-cross appellants Roth and Interstate Properties ("Roth") do not directly address these proofs, but instead offer arguments that are predicated upon an unprecedented reading of the Tucker Act and the law of NAFI.

Slattery's arguments are moored in two fundamental errors of law and fact. First, Slattery's interpretation of NAFI law turns the Tucker Act on its head. Slattery announces that the Court of Federal Claims' jurisdictional grant operates as a universal waiver of sovereign immunity for "any contract actions against the United States." Slattery Brief ("SBr.") 2. Slattery's reading of the Tucker Act, however, cannot be reconciled with the 1970 Tucker Act amendments, established Federal Circuit precedent, the Supreme Court's opinion in Hopkins, or the purpose and history of the Court of Federal Claims. Nevertheless, it is upon this flawed foundation that Slattery seeks to build an argument that this Circuit may abolish NAFI law *en toto*. Second, Slattery's description of the FDIC has little basis in fact

or law. Slattery fails to account for statutes that expressly delineate the FDIC's multiple functions and activities. Instead, Slattery conflates the BIF and separate financial activities. This error results in Slattery's erroneous claim that Congress's appropriations to separate activities were directed to the BIF.

Roth's *en-banc* analysis is also deeply flawed. NAFI law has no applicability to Roth's claims, which are directed against the FDIC as receiver for the failed bank ("FDIC-R"). The FDIC-R is not the United States, and the Court of Federal Claims therefore cannot hear Roth's claims. Even assuming that Roth's claims were construed as against the United States, the Court of Federal Claims lacked jurisdiction because (1) the FDIC-R is a NAFI; (2) Roth did not pursue statutorily mandated remedies; (3) the Court of Federal Claims does not possess jurisdiction to hear claims challenging the FDIC's receivership management; and (4) takings claims by shareholders based upon losses of their financial institution are barred by law.

ARGUMENT

I. Slattery's Argument Rests Upon Fundamental Misconceptions Of Law And Fact

Because Slattery misconstrues the Tucker Act and fails to understand the FDIC's functions and organization, the Court should reject Slattery's NAFI analysis.

A. Slattery's Interpretation Of The Tucker Act Is Unprecedented And Misunderstands The Purpose Of The Court Of Federal Claims

The premise underlying Slattery's argument – that the Tucker Act "waives sovereign immunity for all entities of the United States, NAFI or otherwise[,]" SBr.15 – misunderstands the Tucker Act and its jurisdictional limits. With this assumption, Slattery proposes that an affirmative congressional statement is needed to "rescind[] the Tucker Act's waiver of sovereign immunity as to a particular federal entity." SBr.19. These arguments misread the Tucker Act, contradict this Court's settled precedent, and misunderstand why Congress created a Federal claims court.

1. Slattery's Argument Betrays The History And Purpose Of The Tucker Act And The Courts Of Claims

Slattery's argument misconstrues the Tucker Act and ignores the history of this Court's predecessors. Long before the Tucker Act was passed in 1887, Congress had sought to create an adjudicatory system to hear private money claims against the United States. See W. Cowen, P. Nichols, & M. Bennett, The United

States Court of Claims, A History, 216 Ct. Cl. fwd. at 13 (1978). Before 1855, Congress faced an onslaught of private claims presented, *ex parte,* to congressional committees. Congress recognized the efficiency of having a judicial body entertain claims against the United States, in lieu of these individual bills. Cong. Globe 109 (Dec. 21, 1854).

Congress also understood that it alone had authority to expend public funds. The Constitution's Appropriations Clause, Art. I, § 9, cl. 7, stipulates that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Thus, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). This Clause ensured that "public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not to the individual favor of Government agents or the individual pleas of litigants." Richmond, 496 U.S. at 428.

Accordingly, Congress understood that, although a new body was necessary to adjudicate claims against the Government, Congress alone could authorize payments for judgments rendered against the Government – contractual or otherwise. Id. at 432. When Congress created the court in 1855, Congress required the court to prepare reports and propose bills so that Congress could weigh the merits of each

judgment. 10 Stat. 613 (1855).

As inefficiencies continued to burden Congress after the court's creation in 1855, Congress expanded the court's jurisdiction and no longer required the court to propose bills for each successful claim. 12 Stat. 766 (1863). Yet, Congress retained exclusive control over the Treasury by requiring that any judgment against the Government be "paid out of any general appropriation made by law for the payment and satisfaction of private claims." 12 Stat. 766; see Cong. Globe 304 (Jan. 14, 1863). Because judgments could only come from appropriated funds, the nation could not face a judgment that exceeded the United States' budget.

The court's jurisdiction shifted to some degree after 1863. Congress enacted the Tucker Act in 1887, and it amended it again in 1970. Congress still never departed from the Constitution's requirement that Congress alone possessed authority over public funds. Thus, the current judgment statute resembles its predecessors: "[E]very final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor." 28 U.S.C. § 2517(a).

By creating a court to adjudicate claims, and authorizing general bills to pay that court's judgments (instead of requiring specific bills for each successful claimant), Congress did not relinquish its authority to exercise exclusive control over

public funds. To the contrary, Congress ensured that the court would not, and could not, obligate public funds that Congress itself did not intend. This was achieved by ensuring that judgments were paid only by appropriations specifically for that purpose.

This background makes clear, contrary to Slattery's *ex-cathedra* declaration, that the creation of a fund to pay Court of Federal Claims judgments "does not create an all-purpose fund for judicial disbursement." Richmond, 496 U.S. at 432. To waive sovereign immunity for a contract claim, Congress must first authorize the entity entering into the contract to obligate public funds: "[a] contract made by a separate entity is a contract with the United States . . . only if the separate entity has the authority to obligate appropriated funds[.]" Lion Raisins, 416 F.3d at 1366. In sum, the jurisdictional limitation embodied in NAFI law is a core, constitutive feature of the Court of Federal Claims.

That Congress assumed none of an entity's obligations, and therefore did not waive sovereign immunity for these obligations, is a bedrock precept of Tucker Act jurisdiction. By contrast, Slattery's reading of the Tucker Act to "waive[] sovereign immunity for all entities of the United States," SBr.15, if accepted, would signal a sea-change in Court of Federal Claims jurisdiction.

2. Slattery's Reading Of The Tucker Act Is Unsupported And Conflicts With This Circuit's Established Precedent

Ignoring the Tucker Act and history, Slattery instead assumes that the Tucker Act "waives sovereign immunity for all entities of the United States, NAFI or otherwise." SBr.15. This is not the law and has never been the law. It is not supported by any case cited by Slattery, and flatly contradicts this Circuit's established precedent.

This Court's identification of the requisites for Court of Federal Claims jurisdiction has been unambiguous: the Tucker Act is "limited . . . 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); Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1366 (Fed Cir. 2005) ("the Tucker Act does not authorize suits against [non-appropriated] entities."). Thus, when the Government assumes no liability for a Federal entity, the United States cannot have consented to suit against that entity. The Tucker Act, accordingly, provides no jurisdiction to hear complaints against such an entity. AINS, Inc. v. United States, 365 F.3d 1333, 1337 (Fed. Cir. 2004). The Supreme Court has opined 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." Williams v. United States, 289 U.S. 553, 562-63 (1933). Slattery's reading of the Tucker Act neither accounts for these binding precedents nor explains how they can be distinguished.

Instead, Slattery argues that (1) the NAFI doctrine is a "narrow exception" to the Tucker Act's waiver of sovereign immunity, SBr.14; (2) the doctrine "elevates presumed congressional intent over plain statutory text," SBr.16; and (3) the determinative question is whether "Congress has *rescinded* its own broad waiver" in the Tucker Act. SBr.18. These erroneous predicates lead Slattery to the erroneous conclusion that the Court of Federal Claims should always exercise jurisdiction absent the "clearest intent" from Congress to the contrary. SBr.16.

Slattery reverses the presumption: It is not that NAFIs are excepted from the Tucker Act's waiver of sovereign immunity. Rather, it is that the Tucker Act applies only to entities that can obligate public funds, and therefore does not authorize suits against NAFI. Lion Raisins, 416 F.3d at 1366. As explained in our opening brief, this presumption aligns with the axiom that "authorizations for suits against the Government must be strictly construed in its favor." OPM v. Richmond, 496 U.S. 414, 432 (1990). Absent a waiver of sovereign immunity "unequivocally expressed in statutory text," Lane v. Pena, 518 U.S. 187, 192 (1996), and "strictly construed . . . in favor of the sovereign," Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 261

(1999), this Court must dismiss the case for lack of jurisdiction. Put simply, there is no presumed waiver of sovereign immunity.

B. Slattery's Description Of The FDIC Mischaracterizes Its Many Statutory Functions

This Court should reject Slattery's argument that the FDIC is not a NAFI because the argument is predicated upon a fundamental misunderstanding of the FDIC's functions and history.

First, Slattery alludes to "Congress's past appropriation of funds to the FDIC in prior financial crises, such as the savings and loan crisis of the 1980s." SBr.3. Slattery further intimates that the FDIC "has received billions of dollars in appropriated funds." SBr.24. These statements, untethered to any trial court finding, are simply wrong. In fact, Congress has never appropriated money to the FDIC; appropriations during the savings and loan crisis were directed to separate entities. See Gov.*EnBanc*Br.13-15 & n.3.

Second, Slattery asserts that the FDIC "ignored the goodwill accounting to which Meritor had originally agreed," and that "the government breached its contract with Meritor by reneging on its promise to treat Western's liabilities as goodwill capital." See SBr.7, 8-9. In fact, Meritor was permitted to count goodwill as capital until Pennsylvania seized Meritor in 1992. The alleged breach in this case related to

memoranda effected in 1988 and 1991 – not the loss of goodwill. See Gov.*En-BancBr*.3-4 & n.2.

Third, Slattery repeatedly misreads congressional statements relating to commitments to protect depositors as promises to pay for the obligations of the FDIC as contractor. SBr.3, 9, 24-28. In fact, Congress has stated the direct opposite, through its express directives that the FDIC be supported by its member banks' assessments and by Congress's decision not to appropriate funds to the BIF.

Fourth, Slattery wrongly asserts that the FDIC is backed by the full faith and credit of the United States, SBr.24, and has received appropriations. SBr.29-32. The FDIC, instead, performs a number of distinct roles. Congress has separately considered each function and determined which to fund with appropriations. This Court's NAFI jurisprudence properly requires a look at the particular instrumentality at issue, rejecting the simplistic presumption that Federal agencies are single-purpose entities. Specifically, the issue is "whether Congress has clearly expressed its intent that the agency, or the particular activity that gave rise to the dispute in question, is to be separated from general federal revenues." Core Concepts, 327 F.3d at 1336.

Contrary to Slattery's depiction, the FDIC has a number of separate responsibilities. It serves as a bank regulator, monitoring the financial soundness of state-chartered banks that are not members of the Federal Reserve – like Meritor.

12 U.S.C. § 1813(q)(3), § 1818, § 1820. It acts as an insurer, administering the BIF. 12 U.S.C. § 1821(a)(2), (f)(1). Separately, the FDIC functions as receiver of failed institutions. 12 U.S.C. § 1821(d). After FIRREA, it managed funds of FSLIC-insured, savings-and-loan institutions. 12 U.S.C. § 1821a.

The 1982 contract upon which Slattery's claims are based was funded by the BIF and involved only the regulation and insurance of state-chartered savings banks. Congress has not appropriated funds to the FDIC as insurer of BIF members. That the FDIC performs other functions about which members of Congress have made statements is irrelevant to the question whether the BIF was a NAFI with regard to the Meritor contract. This Court does not undertake NAFI analysis based upon generalizations, but instead considers each "specific activity" for which Congress provided an individualized financial scheme. Furash & Co. v. United States, 252 F.3d 1336, 1341 (Fed. Cir. 2001). Moreover, the Court recognizes that an appropriation to one activity does not suggest Congress's intent to fund another. Id.

1. Appropriations

Slattery's claim, that the FDIC's initial funding means that the FDIC can never be a NAFI, runs counter to this Court's jurisprudence. See, e.g., Dupo v. Office of Pers. Mgmt., 69 F.3d 1125, 1127 n.1 (Fed. Cir. 1995). An initial appropriation of an entity is irrelevant to NAFI analysis because "it says nothing of Congress's

intentions concerning the funding of . . . operations[.]" Core Concepts, 327 F.3d at 1336.

In addition, the FDIC repaid its initial capitalization to the Treasury by 1948, long before the parties executed the allegedly breached contract. See Pub. L. No. 80-363, 61 Stat. 773 (1947). Although Slattery describes this fact as "immaterial" to NAFI status, he acknowledges that this Court reached the opposite conclusion in Core Concepts. SBr.30 n.8. There, an original appropriation did not preclude the Court's designation of the entity as a NAFI. Core Concepts, 327 F.3d at 1335.

Slattery also claims that, during the savings and loan crisis of the 1980's, "Congress appropriated billions of dollars to the FDIC to 'put the Federal deposit insurance funds on a sound financial footing." SBr.30. To support this claim, Slattery cites an appropriation to back up the SAIF. Id. Slattery's claim is misleading. First, the "appropriations" were not to the BIF. Second, the back-up funds provision was made before the BIF was merged with the SAIF. Third, the SAIF never included appropriated funds because such funding proved unnecessary. See www.fdic.gov/about/strategic/report/2005annualreport/appendix_a118.html. Fourth, although FIRREA authorized funds to capitalize the SAIF, no such funding was ever needed. Id. In sum, Slattery's claim that the DIF contains appropriated funds because it now includes the SAIF, SBr.31-32, is unfounded.

In an attempt to equate savings-and-loan funds with the BIF, Slattery asserts that the only difference between the BIF and savings-and-loan funds is that, "[b]ecause the thrift crisis was worse than the bank crisis, Congress appropriated funds for thrifts." SBr.31. Slattery's statements are unsupported by citation, and conflict with the uncontroverted fact that Congress has not appropriated a single dollar to support the FDIC. Slattery's speculation that Congress may, at some future time, change the law and appropriate funds to the FDIC, SBr.32 n.11, does not alter the fact that Congress has expressed no intent to appropriate funds to the BIF, and has instead directed that the BIF be supported by its member-banks' assessments. 12 U.S.C. §§ 1821 (a)(4)(D) & 1817 (c)(2)(A).

Nor is there merit in Slattery's efforts to interpret Congress's authority to lend money to the FDIC as Congress's intent to appropriate money to the FDIC. SBr.33-35. Slattery declares that Congress's increase of the FDIC's borrowing authority "effectively shifted the risk of insolvency from the FDIC to the Treasure." id. at 33. Slattery then dismisses, *ipse dixit*, the fact that the FDIC must repay these funds as "of little consequence." SBr.34-35. As explained in our opening brief, Gov'tEnBancBr.18-21, borrowings are, by definition, not appropriations. Any FDIC borrowings must be repaid with interest,12 U.S.C. § 1824(c), from "the levies and the assessments that are made on the participants in the financial industry

themselves, the depository institutions[.]" 155 Cong. Rec. S5093 (daily ed. May 5, 2009). Equally unsupported is Slattery's contention that "in every case where Congress has given a self-funded entity authority to borrow from the public fisc . . . the entity has not been deemed a NAFI." SBr.35. As discussed below, the cases Slattery cites each turn upon an express statutory provision that the activity would rely upon Treasury funds.

Slattery also claims – again, through bare assertions of counsel – that Congress's decision to merge the SAIF into the BIF to create the DIF demonstrates that Congress saw no distinction between the two funds. SBr.31. At the time of this merger, Congress eliminated the unused, SAIF appropriated-fund backup. This extinguishes the suggestion that Congress intended to appropriate funds to the DIF. Pub. L. No. 109-173, § 8(a)(11)(C), 119 Stat. 3611-12. In any event, the SAIF never received appropriated funds.

2. Full Faith And Credit

The Court should discount Slattery's cites to congressional rhetoric suggesting that Congress intended to "back the FDIC with the full faith and credit of the United States." SBr.25-26 & n.6. These congressional pronouncements are irrelevant because they (1) related to protecting depositors, not the BIF, and (2) never found their way into a statutory guarantee of the BIF or DIF.

National State Bank of Newark v. United States, 357 F.2d 704 (Ct. Cl. 1966) ("Newark") illustrates this point. Slattery characterizes this as a case in which "funds of a similar insurance entity" – the Housing Insurance Fund ("HIF") administered by the Federal Housing Administration ("FHA") – "were backed by the full faith and credit of the United States," resulting in a finding that the HIF was not a NAFI. SBr.26. Newark, in fact, bolsters our position. In Newark, the court's opinion turned upon the fact that statutory language provided for a debenture scheme in which the Treasury would pay the principal and interest of the debentures if the HIF did not. 357 F.2d at 711-12. Newark is instructive, as the case involves a clear statutory provision for Treasury payment. There is no such Treasury provision for the BIF.

The Panel-dissent correctly noted that Congress's full-faith-and-credit statements "are specific to FDIC deposits." Slattery v. United States, 583 F.3d 800, 831 (Fed. Cir. 2009) (opinion vacated Mar. 19, 2010).[1] Statements relating to Congress's pledge to protect insured bank deposits do not support, or relate, to Congress's commitment to apportion general funds for separate activities, such as paying for contract judgments against the FDIC. The Court should reject Slattery's

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[1] In our initial brief, we incorrectly characterized the panel-dissent's discussion of Congress's "full faith and credit" statements. Gov't*EnBanc*Br.23.

reading of statements made about possible backing of deposits of failed banks to mean that Congress will pay for the FDIC's obligations here, as a contractor for the service of managing a failing institution. For purposes of Congress's intent to fund FDIC activities, there is no meaningful nexus between these two FDIC functions.

Further, absent an explicit statutory appropriation, congressional statements "should be given little, if any, weight because they do not necessarily reflect the intent of the members of Congress who originally enacted the statutory language." United States v. Knox, 32 F.3d 733, 749 n.14 (3d Cir. 1994) (citations omitted).

C. Slattery Misstates The Law Of NAFI

Slattery errs in his description of the extant NAFI standard.

As a starting point, Slattery invokes a series of cases to carve out limits upon the application of NAFI standards. See SBr.21-22 (citing McCarthy, 670 F.2d 996 (Ct. Cl. 1982), United States v. General Electric Corp., 727 F.2d 1567 (Fed. Cir. 1984), and Breitbeck v. United States, 500 F.2d 556 (Ct. Cl. 1974)). These decisions, all of which preceded the Court's articulation of NAFI law in AINS, 365 F.3d at 1340-41, are inapposite because they involve statutes different from that governing the FDIC in this case. In each of these cases, the agencies used Treasury funds, and there was "no such clear cleavage between the [agency's] own funds and those of the United States that one can say that Congress wished to cut the agency

entirely loose from the Treasury or from appropriated funds." See Breitbeck, 500 F.2d at 559 ("treasury funds . . . were expected to be used"); McCarthy, 670 F.2d at 1002 (entity not a NAFI because the statute specifically allowed for appropriations to the entity); General Electric, 727 F.2d at 1570-72 (same). By contrast, the BIF funds at issue in this case were segregated from general Federal revenues, and Congress expressed no intent to appropriate funds to the BIF. See Gov't*EnBanc*Br.21-23.

Beyond his reliance upon inapposite cases, Slattery repeatedly misstates NAFI law, announcing that Congress must "disclaim financial responsibility" before an entity may qualify as a NAFI. SBr.12, 32. Slattery argues that NAFI status "requires an assurance not only that appropriated funds have not been used in the past, but also that there is no likelihood that Congress "could appropriate funds if necessary" in the future. SBr.16. This is plainly not the law. To the contrary, this Court set forth the relevant inquiry in AINS: i.e., whether there was "a clear expression by Congress that the agency was to be separated from general federal revenues." 365 F.3d at 1340-41. AINS did not (and could not) require that Congress "disclaim financial responsibility." Apart from being vague and unhelpful, this purported requisite would exceed Congress's authority: "[O]ne legislature cannot abridge the powers of a succeeding legislature." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

D. Slattery's Proposal To Abolish NAFI Standards Is Contrary To Congress's Intent and Supreme Court Precedent

Slattery's effort to abolish NAFI doctrine contravenes established Supreme Court and Federal Circuit precedent, and Congress's legislative actions.

Slattery contends that, even if this Court were to find that the FDIC is a NAFI, the Court would still possess jurisdiction over this case because the "NAFI doctrine subverts the plain language of the Tucker Act, conflicts with the Supreme Court's approach to the Act, and differs dramatically from this Court's application of the Act in similar contexts." SBr.38. Slattery's proposal sits at odds with Supreme Court precedent, Congress's ratification of NAFI doctrine in the Tucker Act's 1970 amendments, and the reason behind the creation of the Court of Federal Claims.

1. Congress Did Not Appropriate Funds Or Waive Sovereign Immunity For NAFIs When It Enacted The Tucker Act

Underlying Slattery's effort to abolish NAFI doctrine is the premise that the Tucker Act waived sovereign immunity as to all NAFIs' contractual liabilities, and that courts somehow carved an exception into that broad waiver. See SBr.38-40. According to Slattery, jurisdiction should vest in the Court of Federal Claims if "the actions of any given federally-created entity are those of the United States." SBr.38. As discussed above, this argument is fundamentally flawed, as it misapprehends the Tucker Act's purpose and the law of sovereign immunity.

Slattery next asserts that because takings claims may be brought in the Court of Federal Claims against "an agent of the United States acting within its authority," SBr.38 (citing Lion Raisins, 416 F.3d at 1368), the same rule should apply for contract claims brought against the United States. Id. By this reasoning, Slattery confuses the jurisdictional bases for takings and contract claims in the Court of Federal Claims.

Acts of a Government agent may create takings liability for the Government, and the "United States may properly be sued in the Court of Federal Claims for any takings that are allegedly consummated by the acts of its agent." See Lion Raisins, 416 F.3d at 1368. This liability is derived from the Constitution's Fifth Amendment. Id. The Constitution, however, provides no right to sue for the Government's breach of contract. Slattery overlooks this distinction: whereas takings claims against the United States emerge from the Constitution, contract claims against the United States are rooted in Congress's unequivocal waiver of sovereign immunity. Thus, Slattery's effort to extend the reasoning behind the Court of Federal Claims takings jurisdiction into contract cases is misguided.

2. The Tucker Act's 1970 Amendments Confirm Congress's Intent That NAFIs Cannot Sue In The Court Of Federal Claims

When it amended the Tucker Act in 1970, Congress (1) provided the Court of Federal Claims with jurisdiction to hear claims against a set of identified NAFIs, and (2) reaffirmed that the Court of Federal Claims would not possess jurisdiction over suits brought against NAFIs not named in the amendments.

The question of whether a NAFI could sue in the Court of Claims was squarely before Congress when it amended the Tucker Act in 1970. Hopkins, 427 U.S. at 125-26. Notwithstanding perceived injustices associated with NAFI doctrine, id., Congress did not abolish or otherwise alter the treatment of NAFIs. Rather, Congress created an exception to NAFI doctrine within the Tucker Act: the legislature permitted AAFES and NASA entities to be sued in the Court of Claims. Contracts with those named NAFIs were statutorily designated an "express or implied contract with the United States." 28 U.S.C. § 1491(a)(1).

In taking this approach, Congress considered and rejected a Senate version of the bill that would have waived sovereign immunity to suits arising from all NAFI contracts. H.R. Rep. No. 91-933, at 3 (1970). Congress thus ratified NAFI doctrine and chose to keep in place "the protective basis of sovereign immunity" against all but the named entities. See AINS, 365 at 1339. Nevertheless, Slattery argues that

Congress's "failure to fully eliminate the NAFI doctrine does not bind this Court." SBr.42. This analysis is misguided: Slattery's reading of the Tucker Act amendments renders superfluous the exceptions to NAFI law enumerated in these amendments.

Slattery strains to diminish the import of the 1970s amendments. SBr.41-43. He implies that the amendment was driven by Congress's "concern that it could make the United States liable for entities that were not agents of the United States at all[.]" SBr.43. In fact, Congress identified two other bases for the changes. It was unsure (1) that NAFIs not named in the amendment would reimburse taxpayers for any judgments or settlements; and (2) how many NAFIs existed. H.R. Rep. No. 91-933, at 3 (1970). The first concern – that taxpayers would become responsible for a NAFI's contractual obligations – is the premise underlying NAFI doctrine.

3. The Supreme Court Has Recognized And Endorsed NAFI Doctrine

Slattery's attempt to extinguish NAFI doctrine also contradicts Supreme Court precedent.

The Supreme Court has recognized the basis for NAFI doctrine and endorsed the doctrine's continued existence. The Court first addressed the existence of NAFIs in Standard Oil Co. of Cal. v. Johnson, 316 U.S. 481 (1942), where the Court

recognized that Congress may create Government agents to transact business with private entities without subjecting taxpayers to the entity's fiscal responsibilities. The Court endorsed NAFI doctrine in Hopkins, 427 U.S. at 124-126. Although no challenge to NAFI doctrine was before the Supreme Court in Hopkins, the Court (1) acknowledged doctrine's existence, and (2) concluded that the plaintiff fell within the 1970 Amendments' enumerated exceptions to NAFI doctrine. If the Court believed that NAFI doctrine was invalid, or was not endorsed by the 1970 Tucker Act amendments, the Court would have had no reason to assess the breadth of the exceptions to the 1970 amendments. NAFI law was plainly before the Supreme Court in Hopkins, was endorsed by the Court in Hopkins, and Slattery's arguments to the contrary are erroneous.

Slattery reliance upon Preseault v. ICC, 494 U.S. 1 (1990), is also misplaced. SBr.46-47. Preseault addressed a taking of private property and not a contract claim. 494 U.S. at 11-12. Slattery, however, did not appeal the trial court's failure to endorse his takings claim.

E. Slattery's Effort To Carve Out A "Waiver" Of Sovereign Immunity Misunderstands The Limits Of This Court's Authority

The Court should reject Slattery's waiver argument. Slattery contends that even if the FDIC is a NAFI, this Circuit should nonetheless obtain jurisdiction over

this lawsuit because "the Government waived its right to use the shield of sovereign immunity in this case." SBr.52. Slattery points out that the NAFI issue was raised after trial, and cites to cases recognizing that a state may elect to waive its Eleventh Amendment sovereign immunity defense. Id.

Slattery's argument that we somehow "waived" the NAFI jurisdictional challenge is meritless. "The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006). The Court recently emphasized this point, stating that, "any party may challenge, or the court may raise *sua sponte*, subject matter jurisdiction at any time." Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1346 (Fed. Cir. 2008).

Slattery errs by his assumption that a party may bestow jurisdiction upon another party. It is beyond the authority of any executive branch agency to "waive[] sovereign immunity." SBr.51. To the contrary, "only Congress can grant waivers of sovereign immunity; parties may not by contract bestow jurisdiction on a court." Pacrim Pizza Co. v. Pirie, 304 F.3d 1291, 1294 (Fed. Cir. 2002).

> [P]arties may not collude to vest jurisdiction in a court, in a case over which its jurisdiction is otherwise lacking . . . . Judicial jurisdiction, of course, depends upon constitutional and statutory grants, which obviously cannot be altered by litigants.

General Dynamics Corp. v. United States, 558 F.2d 985, 990 (Ct. Cl. 1977) (citations omitted).

Further, contrary to Slatttery's waiver contention, it would be beyond this Court's authority to assume jurisdiction absent congressional authorization. As the Supreme Court long ago explained, this limitation contours a court's authority:

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379, 382 (1884) ("Mansfield"). Slattery's contention that the Government may "waive" immunity is, thus, without support and contravenes these basic precepts.

Similarly unhelpful is Slattery's comparison of Eleventh Amendment immunity to that at issue here. The Eleventh Amendment prohibits suits in Federal courts against state governments by a states' citizens, citizens of another state, or

citizens of foreign countries. U.S. CONST. AMEND. XI. Slattery points to instances wherein a state did not invoke the defense in Federal court and was deemed to have waived its immunity. SBr.51-53. He then claims that these principles "apply with as much force to the federal government under the Tucker Act as they do to state governments under the Eleventh Amendment." SBr.53.

Slattery misapprehends Eleventh Amendment immunity and its distinction from the sovereign immunity at issue here. State sovereign immunity, unlike Federal sovereign immunity, does not inhere in a court's original jurisdiction. Indeed, the Eleventh Amendment was ratified only after publication of Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), over concerns that states would be sued to collect pre-revolutionary war debts. See J. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History 7, 22-23 (1987). Unlike Federal sovereign immunity, Eleventh Amendment immunity does not destroy a court's original jurisdiction. See Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 388-89 (1998). To the contrary, it was, and always has been, elective: a litigant state may choose not to invoke immunity, and "[u]nless the State raises the matter, a court can ignore it." Id. at 389.

Slattery's effort to have this Court create a "waiver" of sovereign immunity by drawing upon the Eleventh Amendment misunderstands these distinctions.

Congress's waiver of sovereign immunity in this case is an indispensable antecedent to Court of Federal Claims jurisdiction, Lane, 518 U.S. at 192, and may not be "waived" by a party or ignored by the Court. Mansfield, 111 U.S. at 382.

II. Roth's Argument Is Contrary To Law

In large part, Roth's arguments lie beyond the Court's *en-banc* order. As their claims are directed at alleged conduct of the FDIC, as receiver of a failed bank, Roth's claims are not brought against United States. Accordingly, the Court of Federal Claims did not possess jurisdiction in the first instance, and Roth's discussion of NAFI doctrine is inapt: NAFI doctrine could not apply to parties that did not raise claims against the United States.

That said, in the event the Court entertains Roth's arguments, we address them below. First, Roth's reliance upon Lion Raisins is misplaced because Roth is not an agent of the United States. Second, with respect to Roth's claims that, *arguendo*, could be characterized as brought against the United States, they are barred because (1) the FDIC-R is a NAFI; (2) Roth did not pursue these claims through the statutorily-required route; (3) the FDIC's jurisdictional statutes make clear that no Court possesses jurisdiction to hear claims challenging the FDIC's stewardship of receivership proceeds; and (4) takings law bars claims of shareholders based upon a seizure of their financial institution.

A. NAFI Law Does Not Apply To Roth In This Case

Roth contends that we did not direct our NAFI arguments toward their claims. RBr.8. To do so was plainly unnecessary: in our original appellate briefs before the Panel, we detailed the trial court's lack of jurisdiction over Roth's claims. Gov'tReply Br.61-67. Given this lack of jurisdiction, the Court need not reach the question of whether the FDIC, in its role as receiver ("FDIC-R"), is a NAFI.

B. Because Roth's Claims Are Not Against The United States, The Court Of Federal Claims Did Not Possess Jurisdiction

Although Roth maintains that their claims are "against the United States, acting through the FDIC," Roth Brief ("RBr.") 11, in fact they are directed at the FDIC as receiver of a failed financial institution ("FDIC-R"). As FDIC-R, the FDIC is not the United States. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994). Rather, the FDIC-R "step[s] into the shoes" of the failed thrift. Id. at 86; accord Glass v. United States, 258 F.3d 1349, 1355-56 (Fed. Cir. 2001).

The trial court lacks jurisdiction to consider claims brought against a party other than the United States. United States v. Sherwood, 312 U.S. 584, 588 (1941). Accordingly, the NAFI issue does not apply to Roth's claims.

C. Roth's Invocation Of *Lion Raisins* Is Inapt

Roth asserts that, under Lion Raisins, 416 F.3d at 1356, their takings claims would survive a determination that the FDIC is a NAFI. Roth Brief ("RBr.") 12-15. This Court's Lion Raisins decision, which declined to apply NAFI doctrine to a takings claim, hinges upon an assumption that all NAFIs are agents of the United States. 416 F.3d at 1363. This supposition does not hold when the FDIC acts as receiver because it is not the United States. O'Melveny, 512 U.S. at 85. Thus, Lion Raisins does not apply here, as the FDIC-R is not an "agent" of the United States.

D. Even If The FDIC Could Be Characterized As The United States, The Court of Federal Claims Would Not Possess Jurisdiction To Hear These Claims

Even if the Court were to characterize the FDIC-R as the United States, no court possesses jurisdiction over claims against FDIC as "manager" of Meritor's receivership. Congress expressly stated that, "no court shall have jurisdiction over any claim relating to any act or omission of . . . the Corporation as receiver." 12 U.S.C. § 1821(d)(13)(D). These statutes make clear that, except as provided in 12 U.S.C. § 1821(d)(6), no court possesses jurisdiction to hear challenges relating to management of receivership proceeds.

Accordingly, the trial court could not possess jurisdiction over Roth's claims because Roth did not exhaust statutorily-mandated administrative remedies. "Tucker

Act review of takings claims is precluded where Congress has provided 'a specific and comprehensive scheme for administrative and judicial review.'" Lion Raisins, 416 F.3d at 1372 (citations omitted). Section 1821(d)(6) of Title 12 provided a remedy for such claims, and Roth's failure to adhere to this statute bars this claim. E.g., McCarthy v. FDIC, 348 F.3d 1075, 1081 (9th Cir. 2003). Thus, a second jurisdictional bar exists for Roth's claims, and the Court need not reach the NAFI issue.

Roth asserts that First Hartford Corp. Pension Plan & Trust v. United States , 194 F.3d 1279 (Fed. Cir. 1999), allows them to present takings claims, and that we have not argued that First Hartford should be overruled. RBr.9. This argument was unnecessary, however, as our original brief addressing Roth's cross-appeal explained that First Hartford is inapplicable to Roth's claim. Gov'tReplyBr.62-63. First Hartford held that a shareholder may assert the corporation's claims because the shareholder possessed an interest in the surplus if the corporation's claims were successful. First Hartford does not apply, as Roth is not litigating on behalf of the corporation.

Roth's shareholder claims are instead governed by this Circuit's precedent addressing shareholder taking claims relating to the seizure of a financial institution. See Cal. Housing Secs., Inc. v. United States, 959 F.2d 955 (Fed. Cir. 1992), and

Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (describing "an action by the trustee of BNEC to recover assets for that corporation"). Such takings claims are barred by law: As stockholders in a financial institution, Roth chose to invest in a highly-regulated entity. Roth cannot claim, therefore, that their investment-backed expectations were betrayed. Branch, 69 F.3d at 1578-83. Roth's claims are therefore barred independent of NAFI law.

E. Roth's Claim Is Barred Because The FDIC-R Is A NAFI

Even if the FDIC-R could be characterized as the United States – a position with which we disagree – the trial court would lack jurisdiction because the FDIC-R is a NAFI. The FDIC-R operates solely from the failed institution's assets and proceeds of the receivership, 12 U.S.C. §§ 1821(d)(2), *et seq.*, not from any appropriations. See Maher v. United States, 441 F.3d 522, 525-26 (7th Cir. 2006). The FDIC-R, therefore, is a NAFI.

Roth's claim that the FDIC-R is not a NAFI rests solely upon their assertion that the FDIC-R will eventually possess appropriated funds because the judgment in this case will be paid out of the general appropriation. RBr.10-12. The Court should reject this argument for the same reasons that Slattery's argument should fail. See supra § I.A. In any event, jurisdiction – and NAFI status – must be determined based upon the status of an entity at the outset of litigation, not the possibility that an

appropriation for a judgment may occur after judgment. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4 (1992).

CONCLUSION

For the reasons stated above, as well as those in our prior briefs, 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 11th day of June, 2010, I caused to be sent by overnight mail copies of "REPLY IN SUPPORT OF *EN BANC* BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES," addressed as follows:

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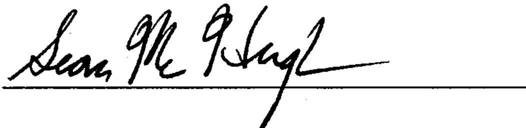

CERTIFICATE OF COMPLIANCE

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 6,930 words (exclusive of caption and signature block) as calculated by the word processing system used to prepare this brief.