IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FRANK P. SLATTERY, JR., et al.,)
)
Plaintiffs,)
)
v.) No. 93-280C
) (Chief Judge Smith)
THE UNITED STATES,)
)
Defendant.)

DEFENDANT'S POST-TRIAL BRIEF

Defendant, the United States of America, respectfully requests the Court to enter judgment against plaintiffs Frank P. Slattery, Jr., et al. Plaintiffs have been fully heard concerning their breach claims against the United States, and in light of all the evidence, judgment for the United States is appropriate with respect to those claims.

INTRODUCTION

As we demonstrate below, the Court should enter final judgment for the Government regarding plaintiffs' breach claims. In doing so, the Court must interpret the simple language of the parties' contract, and determine whether the FDIC acted contrary to its terms. The relevant language is as follows:

> Regarding the use by Bank of certain accounting methods, the FDIC would not object to the following:
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> . . .
>
> 3. The difference between the liabilities assumed and the total of the market value of the Western assets, less reserves, may be treated as goodwill and amortized on a straight-line basis up to

fifteen (15) years. [DX 665; PFOF 35 (Emphasis added)].[1]

The Court's task has been simplified by plaintiffs' clarification of their breach allegation during the trial. Plaintiffs' counsel explained on October 19, 1999, that "[o]ur position is not the fact that if they mention tangible capital, it is a breach of the contract. It's that they used tangible capital to govern the supervision and regulation of the institution in lieu of the contract." Tr. at 690. The record is clear that plaintiffs have failed to establish any such breach.

The Government's position, to the contrary, is that tangible capital, the measure of the surplus of tangible assets over liabilities, did not govern the FDIC's regulation of Meritor, although it was relevant to that task. Tangible capital is potentially available to be redeployed into higher earning assets to overcome the drag of non-performing or non-earning assets on the balance sheet or high overhead, all of which were problems Meritor had in the period 1982-92. Thus, tangible capital is, and was as to Meritor, an important indicator of financial condition to both the financial markets and to regulators. Regulators naturally would have had to consider the relative level of tangible assets, among a number of other factors, in

[1] "DX" refers to defendant's trial exhibits, while "JE" refers to Joint Exhibits. "Tr." refers to the trial transcript at the referenced page. "PFOF" refers to defendant's proposed findings of fact, submitted under separate cover.

making any regulatory decision, regardless of the level of regulatory capital. PFOF 372-80.

Furthermore, the 1982 Memorandum of Understanding did not address the issue of how the goodwill would be considered as to capital adequacy. The FDIC's witnesses testified that evaluation of capital adequacy is a multi-faceted inquiry based upon a variety of factors relating to an institution's financial condition. PFOF 63, 152. To the extent that <u>meeting</u> the FDIC's minimum required <u>capital ratios</u> is a part of determining capital adequacy, the goodwill would clearly be included in such a calculation as an asset. However, in determining capital <u>adequacy</u>, capital ratios in and of themselves were never the sole criterion.

FDIC policy since at least 1981 has provided that regulators, in determining capital adequacy, would examine the "type and quality of assets" as well as earnings, risk, market depreciation, and other measures. DX 442; PFOF 60-62. In such a review, the evidence has shown that the FDIC would consider the goodwill as a non-earning, amortizing intangible asset. PFOF 37, 44-48, 52, 56, 87. For example, plaintiffs' witnesses have conceded that the goodwill would be regarded as a non-earning asset in determining whether lack of earnings demanded a higher capital level. PFOF 66-68, 274. The evidence overwhelmingly demonstrates that, with respect to capital adequacy, regulators included the goodwill in capital ratios but, at the same time,

properly examined all aspects of Meritor's performance, including the non-earning, amortizing characteristics of goodwill as an asset, as well as the relative level of tangible assets available to help solve the bank's massive and steadily increasing problems. PFOF 65, 77-94, 148-53, 163-64, 263-67, 275, 294, 299, 318, 331-33, 372-80.

The record manifests that the FDIC regulated Meritor on the basis of its regulatory capital from 1982 to 1992. As is demonstrated below, had the FDIC been regulating Meritor on the basis of its tangible capital ratio alone, the FDIC would likely have taken earlier and more severe enforcement actions including the termination of insurance under § 8(a) of the FDIC statute, and could have done so at any time during the ten-year period after 1982. Indeed, the FDIC carried out its "safety and soundness" responsibilities--looking at the actual financial condition of the institution, including examining the level of its tangible capital--without any contemporaneous objection from Meritor. PFOF 77-78, 81-87, 93-94, 131, 147, 149, 151 (Tr. 4674-75 [Hammer]: "if I were the examiner, I'd be saying the same thing [about tangible capital]"). Virtually every witness agreed that tangible capital is an important indicator of any financial institution's health and future prospects, and even former Meritor personnel were virtually unanimous in agreeing that the institution needed more tangible capital from at least 1988

through 1992. PFOF 87-91, 125, 131-134, 136, 151, 179-80, 300, 372-80.

Subsequent to the execution of the 1982 MOU, Meritor's financial condition deteriorated significantly. PFOF 74, 76. Mr. Fred Hammer, Meritor's chairman starting in the middle 1980s, later concluded that Meritor was effectively insolvent the day he joined it. He ultimately concluded that he would need 4-7 years to turn around the bank's performance. Tr. 4576-77; DX 430 at 19; PFOF 115. Meritor's condition manifestly deteriorated from 1985 to 1988, during which period regulators perceived that various Meritor actions had "mortgaged" its future. PFOF 119, 135, 140, 154, 156, 158. At the end of 1987, Mr. Hammer informed shareholders that Meritor was unable "to achieve sustained operating earnings under its existing structure" apparently due to the "weaknesses in [Meritor's] financial infrastructure." DX 68 at 2; PFOF 127.

In light of Meritor's massive problems in 1988 and 1991, the parties voluntarily entered into the 1988 MOU and the 1991 Written Agreement, neither of which had any adverse effect upon Meritor. Moreover, as plaintiffs' counsel recognized in 1994, the consensual nature of these agreements (which modified the 1982 MOU) acted as a waiver of any inconsistencies with the 1982 MOU, and the FDIC fully complied with its 1982 agreement. PFOF 94, 176. Furthermore, Meritor's non-compliance with the terms of the 1991 Written Agreement excused any alleged breach by the FDIC

in late 1992. Finally, the statute of limitations had expired with respect to the 1988 MOU before plaintiffs reversed position and claimed that it constituted a breach of contract.

In 1992, when all concerned recognized the bank's lack of viability, one indicator of which was its almost total absence of excess tangible assets, the FDIC initiated a withdrawal of the bank's deposit insurance. PFOF 289-90, 301-05, 307-30, 325-42. Pennsylvania banking authorities, although taking the action in coordination with the FDIC, independently decided that Meritor was no longer viable and that it needed to be closed, and actually closed the bank under the authority of Pennsylvania law, without any challenge by Meritor officers, shareholders, or employees. PFOF 350-54, 357-58, 370-71.

STATEMENT OF THE CASE

Nature Of The Case

Plaintiff Frank P. Slattery, Jr. ("Slattery") brings suit on a derivative basis[2] on behalf of all similarly situated shareholders for several alleged breaches and takings related to an agreement or agreements between the Federal Deposit Insurance Corporation ("FDIC") and the Philadelphia Savings Fund Society ("PSFS"), later known as Meritor, concerning certain accounting

[2] Mr. Slattery also brought suit on a class action basis, but at the suggestion of the Court, the parties deferred any proceedings relating to the class allegations until it has been resolved whether or not any liability or damages exists. Feb. 11, 1997 Hearing at 19-20. A finding of no liability for the Government would render the class allegations moot.

treatments. Mr. Slattery alleges that Meritor and its stockholders are entitled to compensation because of purported breaches of a 1982 agreement and a 1991 agreement and related takings, and to rescission of the 1982 agreement and stockholder investments, with return of any investment.[3]

There are certain similarities between the issues raised in this action, and the issues addressed by the Supreme Court in

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[3] For the reasons cited in the recent decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999), plaintiffs' count requesting rescission of stockholders' 1983 (or later) investments in PSFS is no longer tenable and should be dismissed, as neither the FDIC nor the United States were parties to the contracts by which any shareholders purchased their shares.

Furthermore, as plaintiffs failed to respond to our arguments with respect to count II (alleging breach of the 1991 written agreement) in the summary judgment briefing, they have conceded that there is no potential for Government liability under that count. Failure to respond to a summary judgment argument implicitly concedes the argument. See Finch v. Hughes Aircraft Corp., 926 F.2d 1574, 1576-77 (Fed. Cir. 1991); Brewer v. Purvis, 816 F.Supp. 1560, 1579 (M.D. Ga. 1993) ("Summary judgment is appropriate since Plaintiff failed to respond to [defendant's] argument on this issue."), aff'd, 44 F.3d 1008 (11th Cir.), cert. denied, 115 S. Ct. 1965 (1995); Southern Nevada Shell Dealers Ass'n v. Shell Oil, 725 F. Supp. 1104, 1109 (D. Nev. 1989) ("The plaintiffs, by failing to respond to Arco's [the defendant's] argument in their opposition paper, have implicitly conceded that . . . [defendant's argument] . . precludes liability."); Swedish Am. Hosp. v. Midwest Operating Engineers Fringe Benefit Funds, 842 F. Supp 1039, 1043 (N.D. Ill. 1993); Valluzzi v. United States Postal Service, 775 F. Supp 1124, 1125 (N.D. Ill. 1991).

Finally, for the reasons set forth in Def. Mot. for Summ. Judg. at pp. 43-49, which are incorporated here by reference, plaintiffs' taking claims should also be dismissed.

United States v. Winstar, 518 U.S. 839 (1996). Both involve the use of goodwill by regulated financial institutions.

Winstar involved transactions between savings and loan institutions and their regulating agencies, specifically the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), in which supervisory goodwill was created. In those cases, the plaintiffs asserted that FIRREA's legislatively-mandated phase-out of supervisory goodwill as regulatory capital was a breach of contract.

In this action, the relevant transaction involved a merger between in-state savings banks, which differ somewhat from savings and loan institutions, although both are regulated financial institutions. In particular, PSFS/Meritor and Western Savings Bank, acquired by PSFS in 1982, were regulated primarily by the Commonwealth of Pennsylvania. The FDIC (rather than the FHLBB or the FSLIC) insured the deposits of each institution and was thus the primary Federal regulator.

Thus, the enactment of FIRREA did not affect the treatment of the goodwill created in the 1982 transaction in this case. However, as an extensively regulated financial institution (justified by the deposit insurance provided by the FDIC), the operations of Meritor were examined and subject to further regulation depending upon the institution's performance.

As detailed below, the undisputed facts demonstrate that the financial performance of Meritor was abysmal over an extended

period. Within three years of acquiring Western, PSFS (later known as Meritor) sold virtually all of the marked-to-market assets for the gains (almost $200 million) made possible by falling interest rates. After reinvesting the proceeds of those sales and $369 million raised by a conversion from the mutual form of ownership to a stockholder-owned institution in the early 1980s, Meritor suffered massive losses on the investments it actually made, and also incurred enormous operating expenses in expanding its (ultimately unsuccessful) operations. The bank's persistent, extensive losses and shortcomings were due to its own actions and, although unrelated to the regulators' treatment of the goodwill arising out of the 1982 transaction, necessarily captured the attention of state and Federal government regulators. By the end of 1990, Meritor's stock issued in 1983 at over $11 per share was virtually worthless. In 1992, Pennsylvania and the FDIC had concluded that Meritor was no longer a viable institution. Pennsylvania banking authorities, acting upon their own statutory authority and their sole discretion to do so, closed the institution soon after the FDIC's decision to initiate the process of deposit insurance termination.

Statement Of Facts

For our statement of facts, we rely upon our proposed findings of fact, filed under separate cover, as well as the entire trial record.

ARGUMENT

I. Summary Of The Argument

Plaintiffs have claimed that the regulators' actions raising the level of Meritor's required minimum capital in 1988 and 1991 and initiating the removal of its deposit insurance in 1992 were contrary to the 1982 MOU, into which the FDIC and Meritor's predecessor had entered. This argument is unavailing for a number of reasons, detailed below. Most importantly, Meritor was never required to phase-out FDIC-approved goodwill as regulatory capital and, in fact, was permitted by regulators to fully leverage its capital (calculated with the inclusion of the Western goodwill) over most of the 1980s and early 1990s. PFOF 80, 153. Accordingly, there is no basis upon which to conclude that the Government breached the 1982 MOU with Meritor.

In fact, any contract between the parties was, at most, limited to counting goodwill arising out of PSFS's acquisition of Western Savings Bank in 1982 as an asset in calculating PSFS/Meritor's compliance with regulatory capital minima. As the Supreme Court explained, this was a primary reason for the accounting "gimmick" known as "supervisory goodwill":

> Supervisory goodwill was attractive to healthy thrifts for at least two reasons. First, thrift regulators let the acquiring institutions count supervisory goodwill toward their reserve requirement . . .

United States v. Winstar, 518 U.S. 839, 850 (1996). Plaintiffs' complaint admits that the "Western" goodwill was so treated until the time of Meritor's seizure by the Pennsylvania Department of Banking in 1992. 1st Amen. Compl. at ¶ 50.

Further, the 1988 MOU and 1991 Written Agreement, which are asserted as the basis of two of the breach claims, explicitly included the remaining Western goodwill as an asset in the elevated levels of regulatory capital required by those agreements. PFOF 159, 252. Moreover, plaintiffs have previously conceded that these two regulatory agreements were entered into on a consensual basis and thus acted as waivers of any inconsistency with prior contractual undertakings. PFOF 176.[4] Also, as asserted below, these agreements modified the 1982 MOU's provisions.

Therefore, from 1982 until December 11, 1992, PSFS/Meritor received that for which it had bargained. And, as detailed below, remedial actions by FDIC and Pennsylvania regulators in seeking a higher level of capital because of the enormous problems of the institution, as well as actions by the FDIC to initiate a withdrawal of Meritor's deposit insurance when the institution was no longer viable, were fully consistent with any

[4] Mr. Slattery's deposition testimony that Mr. Lutz was "very accommodating and very helpful" in these negotiations and flexible on the terms of the 1988 MOU confirm plaintiffs' 1994 concession that this agreement was consensual. JE 10 at 68-69, 215-16; PFOF 175.

agreement between the parties. Furthermore, plaintiffs have not proven any injury with regard to the alleged breaches in 1988, 1991, and 1992. Finally, the statute of limitations bars plaintiffs from pursuing any breach claim as to the 1988 MOU. The Government is therefore entitled to final judgment as to all breach counts.

II. Plaintiffs' Expansive Interpretation Of The Contract Is Not Supported By the Record

A. Plaintiffs Have Not Proven That The Contract Goes Beyond The Plain Language Of The 1982 Agreement

The evidence to date fails to prove that the contract entered into in 1982 goes beyond the plain language of the 1982 MOU.

Contract interpretation begins with the plain terms of the agreement. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991). "'[T]he plain meaning of the contract is binding upon the court unless the contract by its very terms is inherently ambiguous.'" Neal & Co. v. United States, 19 Cl. Ct. 463, 471 n.4 (1990), aff'd, 945 F.2d 385 (Fed. Cir. 1991) (quoting Opalack v. United States, 5 Cl. Ct. 349, 359 (1984)). This is so because, "[w]here a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations to determine such meaning." Perry & Wallis, Inc. v. United States, 427 F.2d 722, 725 (Ct. Cl. 1970); accord Community Heating &

Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993). The principal objective in determining the meaning of contractual language is to discern the parties' intent at the time the contract was signed. Winstar Corp. v. United States, 64 F.3d 1531, 1540 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996).

The evidence of intent developed by the parties has indicated at most only an agreement to count the Western goodwill as an asset for minimum capital requirements. The evidence has established that PSFS was insolvent on a market basis at the beginning of 1982, was seeking to broaden its operations in order to survive in the early 1980s, and feared that its losses in 1982 (ultimately $144 million, excluding merger-related income items) would be worse than those of 1981 due to a widening negative interest rate spread. PFOF 1, 24-26, 30.

The proposed merger with Western Savings Bank offered PSFS opportunities to increase its deposit and customer base, obtain new branches, prevent the entrance of a new competitor into the Philadelphia market and, as a result of the use of purchase accounting, would give PSFS the unilateral option of restructuring its balance sheet to reduce its interest rate risk or of retaining the marked-to-market assets to term. PFOF 27, 29, 53-54, 72.

However, state-regulated savings banks such as PSFS were being held by the FDIC to a minimum capital ratio of five percent in the early 1980s. If savings banks fell below that ratio, the

FDIC restricted their growth, the riskiness of their assets, and the deposit interest rates they offered. PFOF 2-3. Furthermore, if savings banks fell below zero regulatory capital in the early 1980s, the FDIC merged them into another financial institution. PFOF 5. An additional factor that PSFS had to consider in 1982 was that historically, the FDIC was hostile to the very concept of goodwill as an asset and had generally forced merging banks to charge any goodwill against retained profits. PFOF 11-13. The concern at PSFS in 1982 was whether the FDIC would force the institution to write the goodwill off its books immediately after the transaction, not only placing it below the minimum five percent capital ratio required by the FDIC, but rendering it insolvent by any measure. PFOF 2-3, 37, 44-52, 55-57, 66-68.

The 1982 MOU manifests that these concerns were addressed by the plain language selected by the parties, who jointly drafted the document. PFOF 35-36. In relevant part, the MOU stated that:

> Regarding the <u>use by Bank of certain accounting methods</u>, the FDIC <u>would not object</u> to the following:
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> . . .
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> 3. The difference between the liabilities assumed and the total of the market value of the Western assets, less reserves, <u>may be treated as goodwill</u> and amortized on a straight-line basis up to fifteen (15) years. [Emphasis added].

The plain language allows the bank, without an objection by the FDIC, to use certain accounting methods and to treat the difference between the market value of Western's assets and liabilities on its books as goodwill, which is a non-earning asset, and amortize the goodwill over a period of up to fifteen years. There is no question that the express terms of this agreement were satisfied by the parties between 1982 and 1992. PFOF 77-88, 91, 93-94, 131, 147-51, 163-64, 263-66, 299, 331-33.

The only reasonable implication of this language is that the FDIC would not object to goodwill remaining on PSFS's books as an asset over a period of up to fifteen years. Thus, its regulatory capital would not have to be reduced by the unamortized amount of the goodwill. This, in connection with the treatment accorded the capital notes addressed by the same document, would ensure that PSFS would not soon fall below the FDIC's five percent minimum ratio and would not be insolvent as a result of the transaction. This treatment responded to the primary concern voiced by PSFS.

When the FDIC promulgated capital regulations in 1985, the Western goodwill was included as an asset in the calculations of primary capital. PFOF 104. Mr. Nocella's comments upon the proposed FDIC capital regulations in 1984 further clarify that not subtracting goodwill from primary capital would be adequate to continue the parties' agreement. PFOF 101-02. Mr. Ryan, PSFS' legal adviser in 1982, further conceded that it would not

be inconsistent with the 1982 MOU for the FDIC to raise Meritor's minimum capital ratios due to its financial history and condition. Tr. 368, 378-79 [Ryan]; PFOF 68.

Plaintiffs' witnesses have established beyond doubt that the only agreement here was to treat the goodwill as an amortizing, non-earning asset. PFOF 37, 44-48, 52, 68, 87, 274. They also testified that there was no agreement to treat the goodwill as if it were cash, an earning asset, or tangible capital. Id.

When the assets acquired from Western were marked-to-market, they were placed on the PSFS balance sheet at current market value, with the over $804 million of goodwill "filling the hole" on the asset side of the balance sheet. The $811 million of loan and investment discounts created were recorded as a "contra-asset" that would accrete into the bank's income stream in full by the time those assets were repaid at face value. PFOF 71. As a result of the fact that the accretion of discount is the "mirror image" of the amortization of goodwill, the use of purchase accounting would normally have prevented the deal from having any significant impact on the balance sheet; given the 15 year amortization period, the two accounting devices would, in effect, cancel each other out. PFOF 65, 71-72; see United States v. Winstar, 518 U.S. 839, at 851-53 (1996).

PSFS's sale immediately after the merger of large quantities of discounted assets acquired from Western ensured, however, that amortization of the Western goodwill would significantly exceed

accretion of the loan discount (created by the same transaction) in the later years of the agreed-upon amortization period. Id. Had the management retained those marked-to-market assets to term, the accretion of the discount and remaining discount clearly would have been items considered in any analysis of capital adequacy. PFOF 62-63. Meritor's sale of those acquired assets thus eliminated all of their "upside potential" from consideration with the Western goodwill, largely eliminating any beneficial role the goodwill might have played in future analyses of capital adequacy or of Meritor's financial condition. PFOF 65. As former Regional Director Lutz put it, at that point, the goodwill on the balance sheet placed increased pressure on the other assets to perform well. Tr. 3146-47; PFOF 152. Ultimately, those other assets failed to do so. However, per the 1982 MOU, Meritor was still entitled to have that goodwill counted for purposes of complying with regulatory capital minima. PFOF 65. This benefitted Meritor by allowing them to leverage their capital to the extent it exceeded required minimum ratios. PFOF 80, 153.

Plaintiffs' assertion that Meritor was being regulated on the basis of its tangible capital alone suggests an additional term to the plain language of this agreement--that the FDIC could not analyze the composition of PSFS's capital accounts in determining possible solutions for its enormous economic problems, nor suggest that Meritor needed a higher level of

tangible assets to solve some of those problems. The proposed addition is without any basis in the contemporaneous record, the circumstances of the transaction, or in the manner in which the parties interpreted this agreement over time. PFOF 1-16, 19-30, 33-69, 73, 77-94, 96, 101-04, 112-13, 131, 147-53.

Mr. Cooke, who headed PSFS at the time of the transactions, pointed out that FDIC personnel may have drawn a distinction in 1982 between the various types of capital, but asserted that these distinctions did not make their way into the contract language. Tr. 273-77; PFOF 47.

It is equally true that no restraints upon the FDIC's power to regulate the institution made their way into the agreed-upon language of the parties. PFOF 35. Mr. Isaac, the chairman of the FDIC in 1982, testified that this agreement did not cede any of the regulatory authority of the FDIC. Tr. 1578, 83; Tr. 2763 [Gough](same); PFOF 39. Mr. Isaac also testified that if PSFS were "performing miserably, losing lots of money" following the merger, then he would expect the FDIC to take action to correct the problems regardless of whether their capital ratio was above required minima. Tr. 1577, 1582-83; PFOF 38. To the extent that additional tangible capital was necessary to correct the negative earnings and massive levels of non-performing assets of Meritor, the 1982 MOU clearly did not bar such a remedial action. PFOF 38-39, 45-48, 55-56, 66-68, 274. In fact, within months of the merger, the FDIC's lead negotiator instructed the Philadelphia

regional office to appoint a senior examiner to make quarterly visits "to protect [the FDIC's] investment" of almost $300 million in assistance. The examiner was also to suggest any "formal or informal FDIC action . . . necessary to ensure that the assisted institution continues to operate in a safe and sound manner." DX 896; Tr. 2760-63 [Gough]; PFOF 40-42.

The situation after the parties entered into the 1988 and 1991 agreements is even more straightforward. In those agreements, Pennsylvania banking authorities and the FDIC reserved their rights to take further action against Meritor if needed. PFOF 167, 254.

The evidence also indicates that the 1982 MOU did not modify (as to PSFS) the FDIC's published policy regarding capital adequacy. Certainly, nothing in the contractual language derogates from the policy. Moreover, Mr. Nocella testified that the FDIC's capital adequacy analysis has always been subjective in examining individual institutions. Tr. 181-83; DX 442; PFOF 66. He conceded that there was no discussion in 1982 as to how the FDIC's 1981 capital adequacy policy would be applied to PSFS. He also did not think that PSFS was going to be viewed differently as to capital adequacy as a result of the Western transaction. Tr. 184, 240; PFOF 66. Thus, the record shows that, in determining the adequacy of PSFS/Meritor's capital beginning in 1982 (in accordance with the published policy), the FDIC made a qualitative evaluation of critical variables that

directly bore upon an institution's overall financial condition, including the quality and type of assets, current and historical earnings, market depreciation in asset portfolios, management and risk. PFOF 60-61. In doing so, the goodwill was counted as an asset, but as a non-earning, amortizing intangible asset. PFOF 37, 44-48, 52, 56, 66-68, 87. As the management of PSFS expected the bank to be profitable as a result of the merger (PFOF 9, 21, 69, 70), this straightforward agreement--to allow the goodwill to remain on the balance sheet and thus be counted towards minimum required capital ratios -met their needs.

Thus, the evidence indicates that any agreement in this case was limited to the purpose of similar goodwill agreements involving other agencies, as construed by the Supreme Court and the Federal Circuit. See Winstar Corp. v. United States, 64 F.3d 1531, 1536 (Fed. Cir. 1995) ("The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years."), aff'd, 518 U.S. 839 (1996); see also United States v. Winstar, 518 U.S. 839, 850 (1996).

The Federal Circuit's comments concerning one Government argument as to Winstar are instructive as to the limits of their decision:

> Winstar, like other thrifts, was bound to keep in compliance with banking regulations and laws regarding capital levels except to

> the extent the Bank Board expressly agreed to forbear from enforcing its regulations against it. This stipulation by Winstar to maintain its regulatory net worth at whatever level the regulators set does not, however, eclipse the government's own promise that Winstar could count supervisory goodwill in meeting the regulatory requirements with which it had promised to comply.

Winstar Corp. v. United States, 64 F.3d at 1544. Thus, the appellate court viewed the promise as only requiring the counting of goodwill towards "whatever" minimum capital ratio the regulators set, as opposed to plaintiffs' arguments here that counting the goodwill toward such minimum ratios was not enough to comply with the alleged agreement. In fact, no court has interpreted a "goodwill" contract as having the effect of barring unfettered regulator examination and analysis of the financial condition of the resulting entity. See decisions cited above.

In effect, plaintiffs would create a breach out of the regulators' purported attitudes towards the Western goodwill, rather than whether or not the goodwill was counted for compliance with regulatory capital minima, which plaintiffs admit was always done. 1st Amen. Compl. at ¶ 50 ("[f]rom the time of the 1982 merger until the institution was seized, PSFS/Meritor and FDIC treated the goodwill created from the Western acquisition as an asset for purposes of calculating its regulatory capital."). However, the Supreme Court emphasized the limited nature of goodwill agreements in United States v. Winstar, 518 U.S. 839, 868 (1996):

> It is important to be clear about what these contracts did and did not require of the Government. Nothing in the documentation or the circumstances of these transactions purported to bar the Government from changing the way in which it regulated the thrift industry. Rather, what the Federal Circuit said of the Glendale transaction is true of the Winstar and Statesman deals as well: "the Bank Board and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected" in the agreements between the parties.

Plaintiffs here claim a contract that goes beyond that, with much less documentation.[5]

The evidence has established that the limitations upon regulatory action suggested by plaintiffs' witnesses were not a part of the original 1982 MOU. Moreover, contract terms should be interpreted without "regard . . . to the probable changes which [the parties] would [have] made in their contract, had they foreseen certain contingencies." William W. Story, _A Treatise On The Law Of Contracts_ S 639, at 562 (2d ed. 1847), _cited in_ _Conoco, Inc. v. United States_, 35 Fed. Cl. 309, 323 (1996) ("The facts show that only after passage of [a later statute] did

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[5] The Supreme Court held that Glendale's integration clause, which incorporated into the assistance agreement the Bank Board's resolutions and letters expressing current regulatory policies, made them part of the agreement rather than statements of current background rules which could be changed. _United States v. Winstar_, 518 U.S. 839, 862-63 (1996). The 1982 agreement contained no integration clause that would have incorporated then current FDIC regulatory policies as part of the agreement, nor would such an incorporation of policies help plaintiffs in any event.

defendant broaden its interpretation of the scope of the lease agreements' conditions."), rev'd on other grounds, Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999); petition for cert. granted, Marathon Oil Co. v. United States, 1999 WL 618968, 68 USLW 3129; and in Nicholson v. United States, 29 Fed. Cl. 180, 191 (1993).

Plaintiffs lack any evidence that the parties intended the 1982 MOU to address either (1) higher capital levels to address future unexpected problems; or (2) possible closure (other than perhaps upon the basis of insolvency alone). Nor would such issues have been addressed; the parties expected that, once interest rates declined, the acquiring institution would return to prosperity because the portfolio of acquired assets did not have quality problems and would automatically rise in value. PFOF 5-9, 13, 15, 20-21, 70. Avoiding immediate insolvency was the overriding issue in 1982 and the agreement specifically addresses it. PFOF 35-36, 41, 44-45, 48-52, 56-57. As PSFS expected the transaction to be profitable, there were naturally no discussions of whether the goodwill would stay the hand of the FDIC in the future if PSFS were solvent but troubled or no longer viable.

Plaintiffs now wish to portray that agreement as somehow limiting the FDIC's ability to initiate the withdrawal of insurance in 1992 and to demand higher capital levels in 1988 and 1991, when the institution's existence and the insurance fund

were both threatened by Meritor's continued losses and high level of non-performing assets. Plaintiffs, however, may not now change the contract to provide for this contingency.

Finally, in choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred. Restatement of Contracts 2d § 207; see Beck Park Apartments v. HUD, 695 F.2d 366, 377 (9th Cir. 1982) (consideration of a "regulatory agreement" against the backdrop of agency's underlying statute).

Here, plaintiffs appear to argue that, while the regulation allowed the FDIC to demand higher capital levels to redress Meritor's negative income and very high level of non-performing assets, the FDIC could not analyze the makeup of Meritor's assets to determine if it needed more tangible assets--those capable of generating earnings--in determining what levels of capital to demand. This makes no sense from the standpoint of the FDIC's intentions in entering into the 1982 transaction, nor does it accord with the public interest in safety and soundness of banks.

The FDIC entered into the 1982 transaction and invested large amounts of financial assistance in the surviving institution to create an institution that had a very good chance to be viable for the indefinite future. PFOF 7, 20-22, 28, 33. The FDIC would not have, and could not have, accepted an agreement limiting its oversight of PSFS over a fifteen-year period. Plaintiffs, in effect, argue that the FDIC, in addition

to agreeing to inject hundreds of millions of dollars of cash assistance into the surviving entity of the PSFS-Western merger, including a continuing unlimited obligation to pay millions of dollars in income maintenance to PSFS for ten years after the merger, agreed to limit its future examination and analysis of Meritor by not analyzing the type and nature of its assets in accordance with its published policy. Logic suggests that, rather than agreeing to limit its oversight post-merger, the FDIC would have intended a heightened level of examination and analysis to protect its massive investment in PSFS. In fact, as noted above, the FDIC directed that a senior examiner, after making a quarterly visit to the bank, report "recommendations for any FDIC action needed to protect our investment." DX 896 [emphasis added]; PFOF 40-42.

Indeed, even in the absence of this huge investment, regulators would not have limited their safety and soundness powers over a large thrift in this manner. As the Supreme Court noted in United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 329-30 (1963), the banking agencies "maintain virtually a day-to-day surveillance of the American banking system" through "frequent and intensive" examinations and detailed periodic reports, with the FDIC having the power to revoke deposit insurance for unsafe and unsound acts. As the D.C. Circuit noted in Investment Company Inst. v. FDIC, 815 F.2d 1540, 1550 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987),

> Congress intended to delegate a substantial degree of authority to the agency by the use of this [unsafe and unsound] language. See Investment Company Institute v. FDIC, 728 F.2d 518 (D.C. Cir. 1984); Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1169 (D.C. Cir. 1979). Authority to determine what constitutes an "unsafe" or "unsound" banking practice is firmly committed to the agency. [citation omitted]

Similarly, the Third Circuit noted the breadth of this "safety and soundness" power:

> Thus, courts have generally interpreted the phrase "unsafe or unsound practice" as a flexible concept which gives the administering agency the ability to adapt to changing business problems and practices in the regulation of the banking industry. See Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978) ("The phrase 'unsafe or unsound banking practice' is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.").

In re Seidman, 37 F.3d 911, 927 (3d Cir. 1994). Thus, the FDIC would not have given up its ability to analyze fully the composition of the balance sheet of Meritor over a fifteen-year period, because that would have had the effect of nullifying its "day-to-day surveillance" and ability to recognize an "unsafe and unsound" condition at Meritor arising at some point over the same time period. See PFOF 375.

Plaintiffs' interpretation would unjustifiably eviscerate the FDIC's extensive statutory and regulatory powers and

responsibilities, which it certainly had no intention or authority to waive by <u>not objecting</u> to the limited forbearance on goodwill. Indeed, the Supreme Court has noted that "[s]afety and soundness of banking practices are . . . critical factors in any banking system." <u>United States v. Philadelphia Nat'l Bank</u>, 374 U.S. at 374.[6]

In an analogous situation, the Supreme Court, in <u>United States Trust Co. v. New Jersey</u>, 431 U.S. 1, 25 (1977), noted that contractual "financial" promises by a state would not be construed as barring the reservation of certain state powers, stating: "a revenue bond might be secured by the state's promise to continue operating the facility in question; yet such a promise could not be validly construed to bind the state never to close the facility for health or safety reasons." Certainly, the FDIC would have to be concerned about maintaining the stability of the entire banking system in Philadelphia, as to which the failure of Meritor would be a very negative event, and would never give up its power to monitor Meritor's condition. <u>See</u> Tr. 4862-63 [Ketcha]; JE 13 at 95 ("the purpose of the FDIC [is] to promote confidence in the system.") [Ketcha]; DX 444 at 2; PFOF 110. Indeed, as Mr. Cooke testified, PSFS was concerned in 1982

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[6] Such safety and soundness concerns are wide-ranging by nature: "Bank safety and soundness supervision . . . is extensive in that bank examiners concern themselves with all manner of a bank's affairs" <u>In re Subpoena Served Upon the Comptroller of the Currency</u>, 967 F.2d 630, 633-34 (D.C. Cir. 1992).

that the failure of Western could cause a loss of depositor confidence in Philadelphia. See Tr. 298; PFOF 27.

In fact, the testimony in this case has established that regulators were not motivated by any improper intent to overturn the 1982 MOU between the parties, but rather sought continually to strengthen the institution from an economic, as well as regulatory, point of view that was within the simple, clear parameters of that 1982 agreement. Plaintiffs have been unable to provide any meaningful evidence that the FDIC personnel made any decision in order to offset or overcome those straightforward provisions. Indeed, Mr. Cooke, Meritor's CEO in the early 1980s, testified that, if a report of examination contained a blatant abrogation of the 1982 MOU, then Meritor would have challenged it. Tr. 307-08; PFOF 87. However, he noted that "examiners bring a somewhat different outlook to their work, quite properly. So, I don't think we would have felt obligated to question any implications that might run contrary to the agreement." Id. Thus, Mr. Cooke indicates that comments upon the level of tangible assets by regulators were not seen as an abrogation of the 1982 MOU, because Meritor never responded to such except to agree that it needed more tangible capital. PFOF 77-78, 87-88, 93-94, 131, 145, 147, 149. Indeed, Mr. Slattery testified that he never challenged alleged negative comments about the value of the Western goodwill by Mr. Lutz and Mr. Ketcha "so long as it

showed up in the examiner's report that they were still counting it." Tr. 1453, 1477; PFOF 234.

No one disputes that Meritor encountered such significant problems due to its expansion in the mid-1980s that it needed more capital in the period from 1988 to 1992. In its response to the 1991 Report of Examination, Meritor noted that "its capital problems have been well publicized since at least early 1988, and . . . it has made no attempt to conceal this very real and apparent fact." DX 1788 at 11; PFOF 337. Mr. Hillas, chief executive from 1988 to 1992, testified that the bank needed more tangible capital throughout this period. Tr. 695-96; PFOF 179. Even the plaintiff, Mr. Slattery, concurred that viewed from the present, Meritor needed more tangible capital in 1988, even though he didn't realize it then. JE 10 at 64-65; PFOF 180. In its response to the 1987 Report of Examination, Meritor's management stated "we agree that the Bank requires more tangible capital. Indeed this has been the overriding focus since mid-year 1987 when we began to develop the restructuring program." DX 228 at 9; PFOF 131.

The actions of the FDIC--in demanding more capital to address the institution's problems and ultimately in deciding to initiate proceedings that might have eventually resulted in the withdrawal of deposit insurance--were amply justified by Meritor's staggering and undisputed economic problems. An interpretation that would have construed the agreement with

PSFS/Meritor as barring such remedial actions would not serve the public interest and is thus inappropriate as a matter of law. As to the public interest in the initiation of action to remove Meritor's deposit insurance, plaintiffs' expert Dr. Brumbaugh testified that, as a matter of public policy, banks should routinely be closed when they run out of tangible capital. Tr. 5509, 5642, 5696; PFOF 375, 380.

In sum, the appropriate interpretation of the 1982 MOU is the simplest one based upon its straightforward terms; the goodwill would be counted towards the bank's required capital minima, which plaintiffs concede was always the case. The 1988 MOU and the 1991 WA make explicit the parties' interpretation, as well as reserving the regulators' options to take further action if needed. PFOF 159, 167, 252, 254.

As noted above, the parties are in agreement that the FDIC always counted the Western goodwill as a regulatory asset from 1982 to the date upon which Pennsylvania closed the institution. PFOF 94. The evidence does not indicate that the 1982 MOU required more than that. Accordingly, plaintiffs' breach claims must fail in light of the FDIC's compliance with the limited agreement of the parties in 1982.

III. Even If Plaintiffs' Interpretation Of The 1982 MOU Were Correct, That Agreement Was Modified By The 1988 MOU And The 1991 WA

Even if plaintiffs were correct in believing that the agreement in 1982 prevented the regulators from analyzing the nature of Meritor's assets, the modifications to that agreement entered into by the parties in 1988 and 1991 narrowed the scope of that agreement, such that no breach occurred in 1988, 1991 or 1992.

The 1982 Merger Assistance Agreement, into which the MOU was incorporated by reference, could only be modified by written agreement subscribed by the parties or their authorized representatives. PFOF 34. The entire Meritor board of directors signed the 1988 MOU--negotiated by Mr. Slattery with the assistance of counsel skilled in regulatory matters--as did the FDIC's Deputy Regional Director. PFOF 165, 168, 172. The 1991 WA was signed by Mr. Hillas as Chairman of the Board and President of Meritor, by Ms. Hargrove as Secretary of the Pennsylvania Department of Banking, and by John Stone, the FDIC's Director of the Division of Supervision. PFOF 252.

A subject addressed by the 1982 MOU, the 1988 MOU, and the 1991 WA was whether the Western goodwill would be included in various regulatory minima. While the latter two agreements did not address the amortization period, they did specifically address in which regulatory minima the Western goodwill must be included. The 1988 MOU specified that the unamortized balance of the Western goodwill would be included in "total assets" and in "primary capital." DX 401; PFOF 159. The 1991 WA specified that

the Western goodwill would be included in the numerators of the "Primary Capital Ratio" and the "Risk-Based Capital Ratio." DX 557 at 2; PFOF 252-53.

Thus, if plaintiffs were correct that the Western goodwill were to be included in any ratios computed with regard to Meritor, regardless of whether they were regulatory capital minima, the later agreements, voluntarily entered into by Meritor, limited this requirement to specific capital ratios. PFOF 176, 271. More importantly, however, both the later agreements reserved the rights of both Pennsylvania and the FDIC to take "such further supervisory action" as was "appropriate under the circumstances." DX 401 at 6; DX 557 at 6; PFOF 167, 254. Therefore, so long as the goodwill were included in those specified ratios and further supervisory action was appropriate in the circumstances, no breach occurred.

Further, while "[a]lteration of some details of a contract, while leaving undisturbed its general purpose, constitutes a mere modification of the original contract, and the latter remains in force as modified," City of Tacoma v. United States, 28 Fed. Cl. 637, 647 (1993), aff'd, 31 F.3d 430 (Fed. Cir. 1994), quoting Stinnett v. Damson Oil Corp., 648 F.2d 576, 582 (9th Cir. 1981), here (after the cancellation of the Income Maintenance Agreement in 1987 and the repayment of the capital notes in 1989) it appears that the only extant provision of the 1982 Merger Assistance Agreement in 1991 was the "goodwill" provision. Thus,

it appears that when Meritor entered into the 1991 WA, the 1982 MOU (other than the amortization period) was totally subsumed in its provisions.

IV. Even If Plaintiffs' Interpretation Were Correct, Meritor's Pre-existing Breach Excused Any 1992 Breach By The FDIC

In general, a party cannot maintain an action for breach of contract where that party committed a prior material breach of that contract. See Malone v. United States, 849 F.2d 1441, 1445-46 (Fed. Cir.), modified, 857 F.2d 787 (Fed. Cir. 1988) (upon prior material breach of a party, the other party has the right to discontinue performance); Cities Serv. Helex, Inc. v. United States, 211 Ct. Cl. 222, 227 (1976) (same); Airco, Inc. v. United States, 205 Ct. Cl. 493 (1974) (same).

Moreover, where a plaintiff materially breaches a contract to which he is a party, defendant's actions may be excusable if they, too, are found to be in breach, since they are subsequent to plaintiff's breach, thereby precluding plaintiff from recovering damages. Erwin v. United States, 19 Cl. Ct. 47, 56 (1989); see also Restatement (Second) of Contracts § 237, Cmt. (a) (1979) (noting that, in general, "[a] material failure of performance by one party has the effect of preventing performance of the other party's duties"). Accordingly, leading commentators have observed:

> Substantial performance [of a contract] is the antithesis of material breach. If it [is] determined that a breach is material, it

> follows that substantial performance has not been rendered.

Calamari & Perillo, Contracts §§ 11-18 at 461-62 (3d ed. 1987) (emphasis added).

To determine whether a prior breach is "material," the United States Court of Appeals for the Federal Circuit has stated that the court must consider "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." Stone Forest Indus., Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992); see also Farmers Grain Co. of Esmond v. United States, 33 Fed. Cl. 298, 300 (1995); Acme Inv., Inc. v. Southwest Tractor, Inc., 911 F. Supp. 1261, 1273 n.9 (D. Neb. 1995) (citing Restatement (Second) of Contracts §§ 237, 241 for proposition that "material" provision is "central to the deal"), aff'd, 105 F.3d 412 (8th Cir. 1997).

Any "breach" by the FDIC in 1992 was excused by the pre-existing material breach of Meritor with respect to the capital-related agreements of the parties, embodied in their final form of the 1991 WA. Meritor was obligated under the 1991 WA to maintain its primary and total risk-based capital ratios at specified minima, which included the remaining Western goodwill. This capital maintenance requirement, which Meritor had agreed to, was to be met "at all times during the term of this agreement." DX 557 at 2; PFOF 252. It is undisputed that,

beginning in 1991, Meritor fell out of compliance with this provision at all times up until December 1992, although the parties dispute whether Meritor reached the regulatory minima specified in the 1991 WA upon the sale of Meritor's Florida branches in December 1992. PFOF 277, 287, 307.

It is also undisputed that this failure to comply with the capital ratios in the 1991 WA was a material breach. Meritor noted in its "Offer to Purchase" of July 8, 1991, that "[f]ailure to comply with the [1991 Written] Agreement could result in Meritor being put into receivership by the regulators." DX 736 at 3; PFOF 282. The WA's terms indicate that they were agreed upon "in order to induce" the FDIC not to take action under 8(a) or otherwise "for so long as the Bank is in compliance with the provisions of this Agreement." DX 557 at 1-2; PFOF 252. Finally, Meritor's auditors noted in a January 31, 1992 letter that Meritor's "[f]ailure to meet the capital requirements as defined in the written agreement could result in the imposition of regulatory sanctions . . . The aforementioned situation raises substantial doubt about Meritor's ability to continue as a going concern." DX 72 at 27; PFOF 287. The FDIC's Notification to Primary Regulator of Findings indicates that this violation of a Written Agreement was material enough to the regulators to be listed as one of the bases for initiating action under § 8(a). PFOF 381-82; <u>see</u> PFOF 325.

Thus, the prior material breach of the modified "goodwill" agreement, as embodied in the 1991 WA, bars Meritor, and its shareholders suing on its behalf, from pursuing its claim for any breaches occurring in 1992.[7]

V. <u>The Evidence Does Not Support Plaintiffs' Breach Allegations</u>

A. Plaintiffs' Assertion That PSFS/Meritor Was Regulated <u>On A Tangible Capital Basis Is Fatally Flawed</u>

Even assuming that plaintiffs' proposed interpretation is correct, the evidence does not support the breach that the plaintiffs assert. In light of plaintiffs' clarification of its breach theory at trial, the question is whether Meritor was regulated on the basis of its tangible capital ratio alone rather than on the basis of capital ratios that included the unamortized Western goodwill at some point during the period of 1982-92. The evidence is clear that it was not.

The earliest event plaintiffs have identified as inconsistent with the 1982 MOU was the 1984 denial of PSFS's request to buy back two million of its shares. Plaintiffs elicited testimony from Mr. Isaac that this denial on the basis of a low tangible equity was inconsistent with the 1982 MOU. Plaintiffs did not present the document setting forth the FDIC's denial to Mr. Isaac, so he never explained the inconsistency between his testimony regarding the meaning of the 1982 MOU and

[7] The WA explicitly terminated the 1988 MOU, PFOF 252, and modified the provisions of the 1982 MOU, making it the sole "goodwill" contract at the time it was entered into in 1991.

the fact that the order denying the stock buyback was approved by the FDIC board of directors, of which he was Chairman. DX 554; PFOF 91. However, Mr. Isaac did testify that the FDIC would have summarily disapproved such a buy back during that time period regardless of the rationale, so certainly the initial denial does not prove that PSFS was being regulated on a tangible capital basis. Tr. 1547-48; PFOF 91.

Meritor's tangible capital ratio was far below the required minimum regulatory capital ratio of five percent in the early 1980s. PFOF 81-82. The FDIC's policy during the early 1980s had been to restrict any growth, risk and deposit rates of institutions falling below a five percent capital ratio. PFOF 2-3. Thus, if PSFS had been regulated on the basis of its tangible capital ratio prior to 1985, at the very least its growth would have been restricted as a result. Instead, the institution was allowed to grow from $11.6 billion to $15.7 billion in assets from 1983 to 1985. PFOF 81-82.

Under the FDIC's 1985 capital regulations, were Meritor's primary capital level below 3.0 percent, it would be deemed to be operating in an unsafe and unsound condition for purposes of initiating removal of its deposit insurance under section 8(a). PFOF 108. Meritor's primary capital ratio, on a tangible basis, fell under 3.0 percent in 1985 and 1987. PFOF 82, 84. However, rather than moving to withdraw Meritor's deposit insurance under Section 8(a) the FDIC did not interfere with Meritor's continued

growth to $19.6 billion in assets by late 1987. PFOF 83-84. Additionally, the 1987 Report of Examination concluded that Meritor was under regulatory minimum, even including the goodwill. PFOF 129.

However, rather than more drastic action, the FDIC asked Meritor to enter into an MOU--the least stringent regulatory action available to the FDIC. PFOF 169, 171. That MOU required Meritor to use its best efforts to reach 6.5 percent primary capital, only one percent above regulatory minimum for institutions with no significant problems, and only 0.5 percent above Meritor's own internal policy minimum, by the end of the year. PFOF 106-07, 112-13, 159, 168. Even Mr. Hillas considered the demand reasonable in light of later events, and Meritor's outside counsel, a former senior FDIC lawyer, had predicted that the ratio demanded by the FDIC would be at least seven percent, and could have been eight percent. PFOF 168, 179. If Meritor failed to reach the specified 6.5 percent ratio, it agreed to inject $200 million by the end of March 1989. PFOF 159.

Shortly before signing the MOU, Meritor and the FDIC agreed that an accounting transaction that would swap certain Income Capital Certificates ("ICCs") owed to the FSLIC for preferred stock would furnish more than half of the required "injection." PFOF 165. Of the remainder of the $200 million to be raised, virtually all was expected to be used for restructuring to enhance Meritor's condition. PFOF 160. Furthermore, Mr.

Slattery and plaintiffs' experts Dr. Brumbaugh and Mr. Mancusi testified that the $200 million may have been required as a direct replacement for the over $250 million in capital notes that had to be repaid in the spring of 1989, which would reduce Meritor's capital by around 25 percent. Tr. 1238-39 [Slattery]; Tr. 2310-12 [Mancusi]; Tr. 5594-95 [Brumbaugh]; PFOF 160-61. Mr. Lutz confirmed that the $200 million was required due to the pending maturation of those capital notes. PFOF 156, 162.

By the end of 1988, the examiner noted that the primary capital ratio would be 1.68 percent without the Western goodwill and notes (which were to be repaid within a few months) and that tangible capital was less than $50 million. PFOF 85. This would leave Meritor far below the 3.0 "unsafe and unsound" primary capital minimum, but again the FDIC made no move to withdraw its insurance at that point.

In early 1989, the examiner who had been making quarterly visits to Meritor for years concluded that "it is doubtful that Meritor can survive as an independent bank in its present financial condition." DX 1604 at 3; PFOF 187. Prior to selling its suburban branches, Meritor had fallen below regulatory minimums in 1989, even including the Western goodwill. PFOF 186. Even after selling 54 branches, Meritor only achieved a 2.41 percent tangible capital ratio, below the minimum three percent capital ratio required by the regulations. PFOF 86. However, the 1991 Written Agreement did not require Meritor to raise its

existing capital levels. The agreement merely required Meritor to maintain its capital levels at the lowest level specified by Meritor's own projections. PFOF 272. Instead, Meritor fell out of compliance with those ratios, and by November 1991, tangible equity capital had fallen to 0.83 percent. PFOF 86. However, the FDIC did not demand higher capital levels (other than compliance with the Written Agreement) or move to remove Meritor's deposit insurance for another year. PFOF 366. In light of the enormous economic problems Meritor was suffering throughout this period, the FDIC was without question regulating the institution upon the basis of its capital ratios including the Western goodwill and, until 1989, the Western capital notes. As Mr. Lutz noted, if he had not been counting the Western goodwill, he would have been seeking much more than a 6 ½ percent primary capital ratio and would have been considering a Cease & Desist order rather than an MOU. Tr. 3166-67 [Lutz]; PFOF 163.

B. Plaintiffs' Evidence As To Regulatory Motivations Is Inadequate To Overcome The Documentary Record

The evidence has established beyond any doubt that regulatory actions taken in 1988, 1991, and 1992 were fully justifiable under FDIC policy and regulations by the economic problems of Meritor during the corresponding time periods. PFOF 106-07, 109-11, 114-15, 119-31, 133-42, 152, 154-58, 164, 170, 172-73, 198-99, 241-52, 257-62, 264, 266, 270, 274-75, 279, 288-98, 301-05, 307-09, 317-33, 336-38, 340-42, 346-49, 381-88, 410-

17. However, plaintiffs seek to establish breaches of the 1982 MOU in 1988, 1991 and 1992 by asserting that, even if the FDIC actions were fully supportable under existing FDIC policy and regulations, the underlying motivation of FDIC personnel in taking such actions was their conclusion, using a capital measure which did not include goodwill, that Meritor's capital was inadequate. In effect, plaintiffs argue that, <u>but</u> <u>for</u> the large amount of Western goodwill on Meritor's balance sheet, the FDIC would not have taken the remedial actions of demanding higher capital levels in 1988 and 1991, nor would the FDIC have begun the process of removing Meritor's deposit insurance in 1992.

Plaintiffs' evidence can not credibly support a conclusion that the primary (or but for) motivator for FDIC personnel from 1988-92 was the high level of Western goodwill. This evidence is insufficient to overcome the legal presumption that Mr. Lutz, Mr. Ketcha, and the remainder of the FDIC staff were acting in good faith in compliance with the agency's contract with Meritor and in accordance with lawful FDIC regulation. The FDIC's capital regulations as of 1985 required that the Western goodwill be included in primary capital in full, and only provided for raising Meritor's minimum capital levels on the basis of bad assets, poor current or historical earnings, risk, or other enumerated factors, none of which included the amount of goodwill on the balance sheet. PFOF 104-07.

The law requires "irrefragable proof" that the FDIC did not act in accordance with its own regulations and in good faith. The evidence presented by plaintiffs is simply not credible, and certainly does not rise even to the level of a preponderance of the evidence, much less irrefragable proof that FDIC personnel acted contrary to their own regulations and the terms of the contract into which their agency had entered in 1982. In T & M Distributors, Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit recently reaffirmed the strong presumption that Government officials are presumed to act in good faith, and "it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing," citing Kalvar Corp. v. United States, 211 Ct.Cl. 192, 543 F.2d 1298, 1301-02 (1976). In Haley v. Department of the Treasury, 977 F.2d 553, at 558 (Fed. Cir. 1992), cert denied, 508 U.S. 950 (1993), the appellate court noted:

> "There is a strong presumption in the law that administrative actions are correct and taken in good faith." Sanders v. United States Postal Serv., 801 F.2d 1328, 1331 (Fed.Cir.1986). More specifically, "[i]t is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations and the burden is on the plaintiff to prove otherwise." Parsons v. United States, 670 F.2d 164, 166 (Ct.Cl.1982) (citing United States v. Chemical Found., Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)).

See also Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 795 (Fed. Cir. 1993) ("'[T]here is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations....' ... And this presumption stands unless there is 'irrefragable proof to the contrary.'" (quoting Parsons v. United States, 670 F.2d 164, 166, 229 Ct. Cl. 335 (1982) and Torncello v. United States, 681 F.2d 756, 770, 231 Ct. Cl. 20 (1982))).

This presumption applies here. Individual members of the FDIC had no motivation not to comply with any existing agreements and the FDIC's own regulations. It is inconceivable that both Regional Directors would, (1) decide to act contrary to their own agency's regulations and previous contractual arrangements and (2) tell a director of the bank involved that they were doing so. Further, plaintiffs have not presented any evidence that could establish such conduct.

Plaintiffs' witnesses' testimony concerning their own and regulator conduct is simply not credible. Mr. Slattery testified he was told by the FDIC's Regional Director, Mr. Lutz, before signing the 1988 MOU, that the higher capital levels were required because of the large amount of Western goodwill on Meritor's books. PFOF 229-30. Mr. Slattery also claimed that the entire amount of the Western capital notes to be repaid in 1989, which constituted between 20-25 percent of Meritor's regulatory capital, was to be written off for regulatory purposes

immediately upon the signing of the MOU in mid-1988, but he was unable to explain why Meritor's annual reports indicated otherwise. PFOF 231.

Mr. Slattery testified that he returned to Meritor, investigated this assertion and the underlying agreement as to the goodwill and the capital notes with Meritor's counsel and others in management and on the board, then did nothing. PFOF 232, 234. Neither he, nor anyone at Meritor he told about this conversation, ever wrote a letter complaining that the FDIC's Regional Director was taking a position that both abrogated the 1982 MOU and violated FDIC capital regulations, which provided that the Western goodwill was to be fully counted towards primary capital. PFOF 234-35. Mr. Slattery testified that Meritor's silence regarding these conversations with Mr. Lutz, as well as nearly identical conversations (which would also have violated existing regulatory and contractual principles) with Mr. Ketcha, the next Regional Director, were never the subject of any correspondence because Meritor wanted "to let sleeping dogs lie." Tr. 1453, 1477; PFOF 234-35. Thus, Mr. Slattery (and any Meritor officers or directors he claims to have told of these conversations) chose to ignore alleged regulator comments indicating that they were no longer counting up to two-thirds of Meritor's regulatory capital, which in 1988 supported approximately $12 billion of Meritor's assets. PFOF 85, 235.

The facts that neither Mr. Slattery nor anyone at Meritor (including its lawyers) ever made a written record of such alleged conversations with Mr. Lutz and Mr. Ketcha, that Mr. Slattery did not assert these conversations took place until eight years later (when he amended his complaint in 1996), and that Mr. Slattery did not claim the 1988 MOU or the 1991 Written Agreement to be breaches of the 1982 MOU until 1996, all strongly suggest that these conversations did not take place as described.[8] See PFOF 269. This does not rise to the level of irrefragable proof, or even credible testimony.

Mr. Nocella's testimony was even less convincing. He testified that Mr. Lutz had indicated to him sometime in 1986 or 1987 that Mr. Lutz did not think the Western goodwill should be counted as an asset, but conceded that this was more in the way of a general criticism rather than any action plan for the institution, and that Mr. Lutz never took any action to implement this viewpoint. Tr. 137-38, 148-49; PFOF 144-45.

Mr. Lutz credibly denied that these conversations took place as alleged, noted that he was on Mr. Isaac's staff when the FDIC's "goodwill" transactions were entered into, and testified that it was his job to carry out the 1982 MOU "as it was drafted." PFOF 144, 148-49, 163, 174. Mr. Hammer confirmed that

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[8] Indeed, Meritor's management attributed the reason for the 1988 MOU as "the deterioration in Meritor's condition" in a 1991 offering. DX 736 at 2; PFOF 181.

Mr. Lutz recognized the FDIC's commitment to Meritor and that "Mr. Lutz understood my views of the contract." Tr. 4673-74, 4684; PFOF 150.

Plaintiffs also elicited testimony from Mr. Mancusi as to purported regulatory motivations, but even Mr. Mancusi conceded that regulators might have required the $200 million in 1988 due to the need to replace the over $250 million in maturing capital notes, that regulators might have raised capital ratios in 1991 due to Meritor's financial condition even in the absence of the goodwill issue, that he had never regulated an institution that had lost money for as many years in a row as Meritor had by 1992, and that regulators in 1992 could have reasonably concluded that Meritor was in an unsafe and unsound condition due to its financial condition from 1987 to 1992. PFOF 160, 250, 274, 324, 348. None of this evidence is adequate to overcome the presumption that Mr. Lutz, Mr. Ketcha, and the remainder of the FDIC was properly following the organization's regulations and complying in good faith with the agreements with Meritor.

Indeed, given previous statements by plaintiffs' counsel, the witness' statements set forth above are simply not tenable. As late as 1994, plaintiffs' counsel conceded in several submissions to this Court that (1) the 1988 MOU and the 1991 Written Agreement were consensual in nature, and thus acted as a waiver of any potential inconsistency with the 1982 MOU, and (2)

that the FDIC complied with the 1982 MOU at all times prior to December 9, 1992. PFOF 94, 176.

C. Plaintiffs Have Failed To Prove Any Injury Due To The Alleged Breaches In 1988 And 1991

Plaintiffs have failed to establish that any injury flowed from the breaches alleged in 1988 and 1991. Plaintiffs' assertion that it was injured by downsizing and that the sale of 54 suburban branches was due to the 1988 MOU ignores the contemporaneous evidence that Meritor chose downsizing, which ultimately involved the branch sale, because its major shareholders would not accept the dilution to be expected from a sale of equity in 1988. This decision to downsize was taken even though Meritor's management anticipated that downsizing would put a serious strain on earnings, and many directors felt that capital could be raised. PFOF 157, 183-85. Plaintiffs' evidence of injury due to the downsizing ignores this fundamental internal decision, from which all else flowed. Indeed, Mr. Hammer concluded that the "only way" Meritor "could have remained viable" was to raise more capital and dilute the owners. When the major shareholders decided instead to "gamble" on Roger Hillas, Mr. Hammer later concluded "we really didn't have a chance." As he noted with respect to the shareholders' hope of Mr. Hillas' turning around the bank without such an infusion, "you can't make [a] silk [purse] out of a sow's ear. I mean,

he's a very very smart fellow, but obviously he's not a magician." DX 430 at 20 [emphasis added]; Tr. 4639-40; PFOF 185.

Dr. Goldstein's testimony as to injury was simply not credible. PFOF 209-27. Most importantly, Dr. Goldstein's testimony of what could have happened if Meritor had acted differently in the absence of the 1988 MOU and 1991 Written Agreement, including not selling any branches, ignores Mr. Hillas's testimony that Meritor might have sold 27 branches in the absence of the 1988 MOU to begin the process of cleaning up its balance sheet, and might have taken many of the actions actually taken but at a slower pace. PFOF 196, 201, 280. Indeed, Mr. Slattery testified that he would not have had any objection to a sale of all the branches. Tr. 1459-60; PFOF 204. Dr. Goldstein's assumptions also proved unreasonable with respect to the growth rates of loans and deposits in the Philadelphia banking market after 1992. PFOF 221-22.

Mr. Hillas testified that the branch sale was a "compromise transaction" that would begin the process of dealing with an annual drag of $170 million on the Meritor balance sheet while also raising some tangible capital. Tr. 721; PFOF 196-202. Those drags would otherwise have led to the economic demise of the institution. PFOF 197-99. Plaintiffs have provided no testimony of how those terminal drags upon the balance sheet would be dealt with in the absence of the branch sale. Indeed, Meritor proposed selling 54 of its branches in its 1989 capital

plan despite an assumption that the ICC exchange would provide $118 million of the required net increase in tangible capital. PFOF 202. Thus, tangible capital needed to be raised only $7 million by the branch sale to achieve compliance with the 1988 MOU, after $75 million was consumed by restructuring. PFOF 160, 165. Instead, Meritor achieved a premium of $337 million by selling 54 branches. PFOF 193. This was <u>four times</u> the $82 million needed (along with the $118 million expected from the ICC exchange) to comply with the $200 million tangible capital target.

The fundamental purpose of selling the branches, therefore, was to accomplish restructuring of the Meritor balance sheet to extend the life of the institution. PFOF 201-02. Both Mr. Slattery (Tr. 1439) and Mr. Hillas (Tr. 761-62) testified that the anticipated return to profitability after the sale of the branches was reasonable at the time. PFOF 204. Injury due to the 1988 MOU, as opposed to the negative economic conditions that prevailed in the early 1990s, has not been demonstrated. Plaintiffs' expert Dr. Brumbaugh testified that "[t]hey were in a very difficult situation in 1989" prior to selling the branches and that Meritor would have suffered from significant economic difficulties even in the absence of the 1988 MOU and 1991 Written Agreement. Tr. 5635, 5618; PFOF 203, 279.

As to the 1991 Written Agreement, the institution's intention to maintain its capital levels significantly above

regulatory minimums was documented in its August 1989 capital plan and in subsequent financial projections. PFOF 206, 241. In fact, plaintiffs' evidence was to the effect that the 1991 Written Agreement incorporated Meritor's own projected minimum capital ratios. PFOF 272-73. The vague testimony of Mr. Hillas that some things were sold that would not otherwise have been sold does not establish any injury due to the institution being held to its own plans, especially given the projection in the 1989 capital plan that downsizing would continue even after a return to profitability. PFOF 191, 278. As to the sale of Meritor, FA in 1992, this sale had been a goal of Meritor from 1987 on and thus was not due to the 1991 WA. PFOF 278.

Given plaintiffs' failure to demonstrate any injury from the breaches alleged in 1988 and 1991, the Court should grant final judgment to defendant as to those counts.

VI. The FDIC Caused No Injury To Meritor In December 1992

Plaintiffs were not injured by the closing of Meritor in 1992, and the FDIC was not legally responsible for the closure.

Expert trial testimony indicated that it would have been virtually impossible for Meritor, as constituted, ever to return to profitability after December 1992. PFOF 320, 374-75, 385-88, 394. Contemporaneous statements by both Meritor's chairman and

regulators that Meritor lacked viability confirm the experts' views. PFOF 289-90, 301-05, 317-19, 339-42.[9] The FDIC's reported experience in seeing institutions go from strongly capitalized to zero capital in a year clearly supports the appropriateness of moving against Meritor in light of the level of its problems. PFOF 335. Furthermore, plaintiffs' expert Dr. Finnerty's assumptions, interpretations, and conclusions in projecting that Meritor would have quickly returned to profitability after 1992 were refuted by various contemporaneous documents and trial testimony, all of which he appeared to have been unaware of at the time he testified. PFOF 388-410. Thus, plaintiffs suffered no injury in Meritor's seizure by Pennsylvania.

Moreover, even assuming that the seizure constituted a breach of contract or was otherwise an actionable wrong, there is no basis for holding the Government liable for the seizure. The evidence has shown that state regulators made an independent decision to close Meritor in December 1992, albeit in consultation with the FDIC. PFOF 350-54, 357, 359-60, 363-64. Furthermore, the seizure was performed by the Pennsylvania regulators, not the FDIC, as the FDIC had no power to seize a savings banks on December 11, 1992. PFOF 358, 370-71.

[9] FDIC action is usually prompted by concerns about the viability of an institution, as opposed to the point when a bank reaches insolvency and must be closed. PFOF 57, 268, 326, 333.

Plaintiffs have not proven how or under what authority the FDIC could "direct" the state authorities to seize a state-chartered thrift such as Meritor. And, even assuming that the FDIC did somehow induce Ms. Hargrove, Pennsylvania's chief banking regulator, to seize Meritor, this does not give rise to a cause of action against the United States. See In re Southeast Banking Corp. v. First Union Corp., 93 F.3d 750 (11th Cir. 1996).

The plaintiff in Southeast Banking was the bankruptcy trustee for the holding company of Southeast Bank, which was closed by Federal and state regulators and placed under the receivership of the FDIC. The trustee sued First Union Corporation for breach of contract, alleging that the closure of Southeast Bank was precipitated by First Union's disclosures to Federal regulators of confidential information that First Union had obtained from Southeast Bank in the course of earlier merger discussions, and that the disclosure violated the agreement pursuant to which First Union was given access to this information. The court held, however, that First Union could not be held liable for the closure of the bank, because the decision to close the bank was made by the Comptroller of the Currency. The court explained:

> The claim was that, after forcing Southeast Bank into receivership, First Union, acting on superior information, could acquire the bank. While there was a contractual relationship between First Union and the Holding Company, the Holding Company's injury, if any, was the result of the

> Comptroller of the Currency's decision to close Southeast Bank. . . . <u>The Comptroller's decision is not an act for which First Union can be held liable</u>. . . .

<u>Id.</u> at 751 [emphasis added].

Similarly, as the Third Circuit noted in <u>Hindes v. FDIC</u>, 137 F.3d 148, 162-63 (3d Cir. 1998), the 8(a) Notification to Ms. Hargrove was merely:

> 'The first step in a multi-step statutory procedure which must be followed when FDIC-Corporate considers terminating an institution's deposit insurance.' . . . After such a notification is issued, to terminate an institution's deposit insurance, the FDIC also, inter alia, must give notice of a hearing and conduct a hearing pursuant to statutory requirements. See 12 U.S.C. § 1818(a). In the context of this statutory procedure, the issuance of the Notification does not represent the FDIC's definitive statement regarding the termination of a financial institution's insurance status. . . . the action that had legal effect was the Secretary's decision to close the bank, not the FDIC's issuance of the Notification.

Many 8(a) proceedings, which are usually intended as a remedial action, do not result in the withdrawal of deposit insurance, and they have been known to last as long as two years. PFOF 365. Thus, Ms. Hargrove's personal decision to seize Meritor subsequent to the issuance of an 8(a) Notification is not an act for which the United States can be held liable.

VII. This Court Has No Jurisdiction To Entertain The 1988 "Breach," As The Events Set Forth As To 1988 Are Beyond The Statute Of Limitations

Mr. Slattery's testimony fully delineated the Government's statute of limitations defense as to 1988. As noted above, Mr. Slattery testified that he investigated the assertions made by the Regional Director immediately with counsel, reviewed the agreement as to goodwill, and then chose to take no action to raise Meritor's or his own claim, or even to complain about an apparent violation of FDIC regulations and the 1982 contract, for eight long years. PFOF 229-30, 232, 234-35, 237. As a result, plaintiffs' claim arising out of a purported 1988 "breach" is barred by the statute of limitations.

The statute of limitations set forth in section 2501 of Title 28 of the United States Code bars actions against the United States that are filed more than six years after the cause of action arose. Because plaintiffs' first amended complaint raising its 1988 breach claim was filed more than six years after that claim accrued in 1988, the Court lacks jurisdiction to entertain this action with respect to that "breach."

Section 2501 states as follows:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereto is filed within six years after such claim first accrues.

28 U.S.C. § 2501. This six-year statute of limitations upon claims filed against the United States is jurisdictional and is an express limitation upon the waiver of sovereign immunity that may not be waived. Hart v. United States, 910 F.2d 815, 818-19

(Fed. Cir. 1990). The statute of limitations should be strictly applied, without exception. Id.; Collins v. United States, 14 Cl. Ct. 746, 751 (1988).

The 1988 "breach" claim that Mr. Slattery now seeks to assert in its first amended complaint cannot relate back to the original complaint. RCFC 15(c) provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." As this Court has recognized, "'[I]t is still the rule that an amendment which states [an] entirely new claim for relief . . . will not relate back . . . .'" White Mountain Apache Tribe v. United States, 8 Cl. Ct. 677, 682 (1985), quoting 3 Moore's Federal Practice, ¶ 15.15[3], at 15-196 (2d ed. 1984).

The test for determining whether a claim arose out of the "conduct, transaction, or occurrence" set forth in the original pleading is "whether the general fact situation or the aggregate of the operative facts underlying the claim for relief in the first petition gave notice to the government of the new matter." Creppel v. United States, 33 Fed. Cl. 590, 594 (1995), quoting Vann v. United States, 190 Ct.Cl. 546, 557 (1970). The rule thus requires the Court to compare the original complaint to the amended version to determine whether the first pleading gave adequate notice of the new claim. Id.

Mr. Slattery's 1996 claims that actions of the FDIC in 1988 constituted a breach of its 1982 "contract" are outside the general fact situation and operative facts related to the 1992 seizure of Meritor by Pennsylvania set forth in the original complaint. 1st Amen. Compl. at paras. 72-73. In that original complaint, Mr. Slattery's factual allegations discuss events in 1986 and 1991, with no mention of any significant events occurring during the interval. His description of events in 1992 covers four pages (12-15) of that pleading, with two full paragraphs (43-44) addressing the 1991 Written Agreement. Virtually the entire document is devoted to alleging an agreement in 1982, and events in 1992 which purportedly breached that 1982 agreement. Plaintiffs cannot seriously claim that the Government's purposes in requiring enhanced capital ratios in the 1988 MOU are within the general fact situation and operative facts of the original complaint. Indeed, as we have noted, over a year after filing the original complaint, Mr. Slattery's counsel conceded that the 1988 MOU was consensual and thus acted as a waiver of any inconsistencies with the 1982 MOU. Also in 1994, the year the statute of limitations expired for this claim, Plaintiffs' Opp. to Def.'s Mot. to Dismiss at 3, dated April 15, 1994,, admitted that "[f]rom the date of the [1982] merger until December 9, 1992, the FDIC honored the terms of the Assistance Agreement and the executed Memorandum of Understanding." PFOF 94, 176.

Further, as this Court stated in White Mountain, in order for a claim to relate back, adequate notice must exist in the original pleading. White Mountain Apache Tribe v. United States, 8 Cl. Ct. at 682. Mr. Slattery did not provide such notice. In fact, rather than providing any notice to the Government of this claim during the six years after Mr. Slattery first would have become aware of its existence in 1988, his counsel's statements noted above indicated to the Government that there had been no breach other than that alleged as to 1992 as late as 1994. PFOF 94, 176.

It is clear that the 1988 breach claim accrued in 1988. "A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action." Wrona v. United States, 40 Fed. Cl. 784, 787-88 (1998), quoting M.R.K Corp. V. United States, 15 Cl.Ct. 538, 544 (1988). "The clock starts as soon as the plaintiff is put on notice that inquiry into a possible claim is called for." Wrona v. United States, 40 Fed. Cl. 784, 788 (1998), quoting L.E. Cooke Corp. v. United States, 27 Fed. Cl. 753, 754 (1993). Plaintiff Slattery believed before signing the 1988 MOU that it was required because of Meritor's lack of tangible capital and thus was somehow inconsistent with the 1982 MOU, yet for eight years he did not raise this claim. PFOF 229-30, 232, 234-35, 237.

Mr. Slattery practiced law for several years prior to his extensive career in business, and thus would have understood the significance of his belief about the basis for the 1988 MOU, even if he had not consulted counsel at the time. PFOF 228, 232. Yet his original 1993 complaint made no allegations about that agreement.

The Court noted, at the time the propriety of this amendment to the pleadings was argued in 1997, that to resolve the statute of limitations question it would have to determine whether there were any independent damages that flowed from the 1988 MOU. If there were none, then the statute of limitations would not be relevant. [Feb 11, 1997 hearing transcript at 21-29]

Plaintiffs have now proffered evidence that Meritor, in fact, was injured separately by the 1988 "breach." Dr. Goldstein, one of plaintiffs' four experts, has purported to model Meritor's economic performance in the absence of the 1988 MOU and the 1991 Written Agreement.[10] That model appears to have no other purpose than to prove to this Court that the 1988 MOU resulted in significant damage to Meritor. His model suggests GAAP positive <u>earnings</u> could have occurred in 1991 and 1992, rather than the actual GAAP <u>losses</u> of over $60 million in 1991 and over $60 million as of the end of November 1992, thus

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[10] However, as the 1991 Written Agreement merely required Meritor to maintain capital at levels it had already achieved in the course of complying with the 1988 MOU, the model would appear to reflect merely the effect of the 1988 MOU. PFOF 272, 277.

indicating a potential injury claim due to the 1988 "breach." PFOF 240. In addition, the testimony that the 1988 MOU allegedly forced Meritor to sell its most valuable assets (54 suburban branches) appears designed in part to show injury to Meritor resulting from the 1988 MOU. PFOF 236.

Furthermore, defendant has been prejudiced by plaintiffs' tardiness in advancing this claim. Maurice Henderson, the review examiner who probably drafted the 1988 MOU, and thus would have been the best source of information as to the purpose of its capital-related provisions, died four months after plaintiffs first raised their 1988 breach claim, and thus was unavailable as a witness to either party. PFOF 239.

As the Supreme Court noted in United States v. Kubrick, 444 U.S. 111, 117 (1979), statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them,'" quoting Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944). "Statutes of limitation are designed specifically to prevent dilatory plaintiffs from pressing stale claims. RCFC 15(c) properly is read as a supplement to, and not a circumvention of, the jurisdictional boundaries established by the statute of limitations." Creppel v. United States, 33 Fed. Cl. 590, 598 (1995). Mr. Slattery may not now advance a claim of which he had

knowledge (and in fact investigated) in 1988, but failed to raise until late in 1996, well after the statute of limitations had expired.

CONCLUSION

Plaintiffs' purported interpretation of the 1982 MOU is not supported by the evidence of the parties' actions over the years, contemporaneous documentation, or by the law. Even if it were, plaintiffs have failed to establish that the FDIC acted inconsistently with that agreement, either in its original form or as modified, so as to establish a breach of contract. Further, plaintiffs' breach of the 1991 Written Agreement excuses any purported breach by the FDIC in 1992. Finally, plaintiffs have failed to establish any injury caused by the FDIC with regard to the alleged breaches and have failed to establish this Court's jurisdiction with respect to the 1988 breach allegation, which was raised more than six years after the claim accrued.

For these reasons, we respectfully request the Court to enter final judgment for the Government regarding plaintiffs' breach claims.

Respectfully submitted,

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May 3, 2000

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 3rd day of May 2000, I caused to be placed in the United States mail, postage prepaid) copies of "DEFENDANT'S POST-TRIAL BRIEF" addressed as follows:

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