No. 2013-5005

United States Court of Appeals for the Federal Circuit

ANCHOR SAVINGS BANK, FSB,

Plaintiff-Appellee,

and

STEPHEN ROSENBAUM, FRANK E. WILLIAMS, JR., COMPASS POINT PARTNERS LLC, and LEGAL ALPHA LLC, on behalf of themselves and on behalf of all other similarly situated holders of Litigation Tracking Warrants of Dime Bancorp,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal From The United States Court of Federal Claims
In Case No. 95-CV-0039, Judge Lawrence J. Block

CORRECTED BRIEF FOR PLAINTIFF-APPELLEE ANCHOR SAVINGS BANK, FSB

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Cross Appellee certifies the following:

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

   Anchor Savings Bank, FSB

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   JPMorgan Chase Bank, N.A.

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

   JPMorgan Chase & Co.

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

   Jones Day: George T. Manning, Donald B. Ayer, Peter F. Garvin, Adrian Wager-Zito, Edwin L. Fountain, Gregory A. Castanias, Geoffrey S. Irwin, Debra S. Clayman, and Anthony J. Dick

   No longer with Jones Day: C. Thomas Long, Stefanie F. Roemer, Thaddeus J. Burns, and Erin M. Fishman

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STATEMENT OF RELATED CASES

A previous appeal and cross-appeal in this action were before this Court in *Anchor Savings Bank, FSB v. United States*, Nos. 2008-5175, 2008-5182 (Newman, Rader, & Bryson, JJ.) (decided Mar. 10, 2010), reported at 597 F.3d 1356. Counsel is unaware of any other case, in this or any other court, that would be directly affected by the Federal Circuit's decision in this appeal.

JURISDICTIONAL STATEMENT

Although the Court of Federal Claims had jurisdiction to entertain the motion to intervene, that Court would lack subject-matter jurisdiction over Appellants' proposed complaint in intervention under the Tucker Act, 28 U.S.C. § 1491(a)(1), because the Appellants were not in privity of contract with the United States. *See infra*, Part II.

STATEMENT OF ISSUES

1. Whether the Court of Federal Claims abused its discretion in denying the Appellants' motion to intervene under Rules 24(a) and 24(b) of the Court of Federal Claims.

STATEMENT OF THE CASE

This case is the last remaining *Winstar*-related case. It was filed more than 18 years ago, in January 1995, and eventually proceeded to trial in 2005, and to judgment in 2008. *Anchor Sav. Bank, FSB v. United States*, 81 Fed. Cl. 1 (2008). In 2010 this Court affirmed the trial court's $356 million judgment in favor of plaintiff Anchor Savings Bank, and remanded for consideration of additional damages. *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356 (Fed. Cir. 2010). The case has been awaiting a decision on remand for three years. Appellants ("Proposed Intervenors") would delay the case still further by interjecting a new dispute, which involves new parties, and which has no relation

to the original cause of action and no bearing on the narrow issues remaining before the trial court. [1]

Between 1982 and 1985, plaintiff Anchor Savings Bank acquired four failed savings & loan institutions in "supervisory mergers" arranged by the government. As part of the transactions, the government promised Anchor that it could use more than $550 million in so-called "supervisory goodwill" in calculating its regulatory capital, and that it could amortize that supervisory goodwill over periods of 25 to 40 years. *Anchor Savings*, 597 F.3d at 1359. In 1989, the enactment of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") and its implementing regulations terminated the favorable treatment of supervisory goodwill that Anchor had been promised. *Id.* Anchor, and dozens of similarly situated institutions, brought breach of contract suits against the United States, which came to be known as "*Winstar*-related cases" after the liability test case of that name. *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Anchor filed its suit in 1995.

After a lengthy stay, a subsequent discovery period, and separate summary judgment proceedings on liability and damages, the case proceeded to a damages trial in 2005. Three years later, in July 2008, the Court of Federal Claims awarded

[1] The official caption issued by the Clerk's Office describes the Proposed Intervenors as "Plaintiffs-Appellants," but because the Proposed Intervenors were denied intervention, they do not have party status as "plaintiffs."

Anchor $356 million in expectancy damages. The parties cross-appealed. On March 10, 2010, this Court affirmed the damages award, but remanded to the trial court to consider Anchor's assertion that the trial court had erred in calculating one portion of Anchor's damages. *Anchor Savings*, 597 F.3d at 1373-74.

In the meantime, in September 2008, Anchor's successor-in-interest, Washington Mutual Bank, failed and was seized by the federal Office of Thrift Supervision ("OTS"). The OTS placed Washington Mutual Bank in receivership and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver. The FDIC-Receiver executed a Purchase & Assumption Agreement ("P&A Agreement"), whereby it sold substantially all of the assets and liabilities of Washington Mutual Bank to JPMorgan Chase Bank, N.A. *In re Washington Mutual, Inc.* 464 B.R. 656, 660 (Bankr. D. Del. 2012) ("*In re WMI*"). Shortly after the OTS put Washington Mutual Bank in receivership, the bank's publicly-traded holding company, Washington Mutual, Inc. ("WMI"), initiated Chapter 11 bankruptcy proceedings. *Id.*

On remand in this case, the parties have fully briefed the issue of whether Anchor is entitled to additional damages. Also on remand, the defendant United States moved to dismiss the case in its entirety, based on its contention that the FDIC-Receiver did not convey the *Anchor* judgment to JPMorgan through the

P&A Agreement. Anchor has opposed that motion. The trial court took both matters under advisement following a hearing on September 14, 2011. A.37.

Separate proceedings, meanwhile, were taking place in the WMI bankruptcy case. WMI had issued certain "litigation tracking warrants," or LTWs. Upon final payment of the *Anchor* judgment, holders of the LTWs would receive, collectively, a number of shares of WMI common stock equal in value to 85% of the damages award (net of litigation costs and taxes). The LTW holders, as a class, filed an adversary action in the WMI bankruptcy case, claiming that they were entitled to recover a portion of any judgment that might be entered in the *Anchor* case. Proposed Intervenors were members of that class. The WMI bankruptcy court ultimately held that the LTWs constituted equity interests in WMI, *In re WMI*, 464 B.R. at 666, and that "the LTWs do not entitle the LTW Holders to an interest in the Anchor Litigation itself. They are only entitled to the issuance of common stock in WMI." *Id.* at 671.

Unhappy with that result, the Proposed Intervenors filed a motion to intervene in this case on May 12, 2012. Citing the bankruptcy court's decision, the Court of Federal Claims denied their motion on August 31, 2012, holding that "the warrant holders have no property interest sufficient to require intervention under RCFC 24(a)." A.3, *Anchor Sav. Bank, FSB v. United States*, Opinion and Order (Oct. 18, 2012) at 3. The court further held that it lacked jurisdiction over

Proposed Intervenors' claims because they "amount to nothing less than a collateral attack on a bankruptcy court's judgment." A.3. Proposed Intervenors filed a timely notice of appeal.

STATEMENT OF FACTS

Proposed Intervenors are holders of so-called "litigation tracking warrants" (LTWs) issued by Washington Mutual, Inc. ("WMI"), the publicly traded holding company of Washington Mutual Bank. Washington Mutual Bank was at one time the successor in interest to the plaintiff in this case, Anchor Savings Bank. Once the judgment is finally paid, the LTWs would have been exercisable for additional shares of common stock in WMI. Before that could happen, however, Washington Mutual Bank failed, was seized by its regulators, and was placed under the receivership of the FDIC. Soon thereafter, WMI filed for Chapter 11 bankruptcy. The LTW holders, as a class, filed an adversary action in the WMI bankruptcy case. The bankruptcy court rejected their claims, and the class representatives subsequently negotiated a settlement whereby the LTW holders were offered valuable consideration, in the form of cash and shares of the newly reorganized WMI, in exchange for releasing their claims. More than two-thirds of the LTW holders executed those releases and accepted the settlement.

The Proposed Intervenors, who did not accept the settlement, subsequently moved to intervene directly in this case. In order to invoke the jurisdiction of the

Court of Federal Claims, they have alleged breach of contract and takings claims against the FDIC, which has never been a party to the *Anchor* case. In short, the Proposed Intervenors are requesting to intervene based on putative claims involving new plaintiffs (the LTW holders) and a new defendant (the FDIC), and based on transactions involving the warrants that have no relationship to Anchor Savings Bank's claim against the United States.

A. Ownership of the *Anchor* claim through the chain of corporate succession.

The supervisory merger agreements at issue in this case were executed between 1982 and 1985, and the government breached them in 1989.

Previously, in 1987, Anchor Savings Bank had converted from mutual to stock form, and Anchor became a subsidiary of a newly formed, publicly traded holding company, Anchor Bancorp. *Anchor Savings*, 81 Fed. Cl. at 33. At no time did Anchor Savings Bank assign the merger agreements to its parent, Anchor Bancorp, so when the government breached its contracts with Anchor Savings Bank, the resulting cause of action belonged to the bank, not the holding company. At no time thereafter did Anchor Savings Bank convey ownership of the cause of action to Anchor Bancorp.

In January 1995, Anchor Savings Bank filed this lawsuit. Shortly thereafter, Anchor Bancorp merged with Dime Bancorp, another savings & loan holding company. *Id.* at 50. The operations and assets of Anchor Savings Bank were

merged with those of Dime Savings Bank, the thrift subsidiary of Dime Bancorp. The Proposed Intervenors acknowledge that "when Anchor Savings Bank merged with Dime Savings Bank, ownership of the Anchor litigation transferred to Dime Savings Bank." Brief for Plaintiffs-Appellants at 3 ("App. Br."); *id.* at 7 ("Dime Savings Bank succeeded to Anchor Savings as the owner of the *Anchor* litigation.").

In 2002, Dime Bancorp in turn was acquired by WMI, another bank holding company, and Dime Savings Bank merged into Washington Mutual Bank, the thrift subsidiary of WMI. 81 Fed. Cl. at 51. The Proposed Intervenors again acknowledge that "Washington Mutual Bank (WMB) succeeded to Dime Savings as the owner of the *Anchor* litigation." App. Br. 9.

In each transaction, there was a merger of the publicly traded holding companies, and a separate merger of the subsidiary thrifts. Ownership of the *Anchor* cause of action remained at all times with the successor thrift, and was never conveyed upstream to the holding company. Thus when this Court entered judgment on behalf of Anchor in June 2008, the judgment became an asset of Washington Mutual Bank.

On September 25, 2008, the Office of Thrift Supervision, the agency that regulates federal savings and loans, seized Washington Mutual Bank and appointed the FDIC receiver. The *Anchor* judgment thus became an asset of the FDIC as

receiver of the bank. *See* App. Br. 4 ("the FDIC . . . became the new owner of the *Anchor* litigation").

That same date, the FDIC entered into a Purchase & Assumption Agreement ("P&A Agreement" or "PAA") with JPMorgan Chase Bank, N.A. ("JPMorgan"), whereby the FDIC conveyed to JPMorgan substantially all of the assets of Washington Mutual Bank. A.843-886; *see* A.855, § 3.1. The *Anchor* judgment was one of the assets transferred to JPMorgan, which now stands as the successor-in-interest to Anchor Savings. *See* App. Br. 4 ("It is undisputed that the PAA included the Anchor litigation among the assets transferred to JPMorgan.").

On September 26, 2008, the day after its principal asset was seized and placed into receivership, WMI filed for Chapter 11 bankruptcy. Pertinent proceedings in the WMI bankruptcy are recounted in section C below.

B. The Litigation Tracking Warrants.

Anchor Savings sought almost $1 billion in damages in this case. While the case was pending, this claim represented a material, yet speculative, contingent asset, which complicated efforts to value the bank for purposes of a merger or other strategic transaction. Accordingly, in December 2000 Dime Bancorp issued a prospectus for the issuance of "litigation tracking warrants." A.757-800.

The Dime prospectus announced the distribution to shareholders of record of one tracking warrant ("LTW") for each share of common stock held. A.767. The

warrants would be tradable separately from Dime Bancorp common stock. A.761. Upon payment of the judgment in the *Anchor* case, Dime would issue to LTW holders, collectively, a number of shares of common stock worth 85% of the value of the judgment (net of taxes and litigation and LTW expenses). A.774-75.[2]

Upon the merger of Dime Savings Bank with Washington Mutual Bank, WMI assumed the obligations to LTW holders under identical terms. WMI's obligations were set forth in a Warrant Agreement, a separate agreement that WMI executed with the warrant agent after WMI assumed the LTW obligations. A.888-914.

The Proposed Intervenors assert that they own "a share in the economic value of the Anchor judgment," App. Br. 6, and that the LTWs provide "a direct claim to 85% of the net economic value of the *Anchor* damages award," *id.* 7.[3] By characterizing their claim as an entitlement to a portion of the "net economic value" of the judgment, the Proposed Intervenors carefully refrain from asserting that they are entitled to direct recovery of the damages award in this case, a distinction that bears on their asserted right to intervene in this case.

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[2]The value of the distribution to LTW holders is referred to in the prospectus as the "adjusted litigation recovery." A.775.

[3]*See also, e.g.*, App. Br. 5 ("they are holders of 85% of the net economic value of the underlying litigation"); *id.* 15 ("third party beneficiaries to 85% of the net damages of the *Anchor* litigation"); *id.* ("holders of 85% of the net economic value of the award").

The Dime prospectus and the WMI warrant agreement confirm that the LTW holders have no claim on the actual judgment proceeds in the *Anchor* case. The warrant documents also make clear that the LTW holders never had a claim on the bank, but rather had a claim only on the holding company.

The Dime prospectus was emphatic that any judgment proceeds would belong to the bank, not to the LTW holders. Under the heading "Rights of LTW Holders," the prospectus stated that the litigation proceeds would belong solely to the bank:

> We will retain control of the litigation against the government and will retain 100% of the proceeds of any recovery of damages from our litigation. The litigation will remain an asset of Dime Savings.

A.779 (emphasis added); *see* A.764 ("Any damages we recover in our litigation will be paid by the government to Dime Savings (the actual plaintiff in our case)."). Dime Savings would in turn "distribute" the damage award to Dime Bancorp as a capital dividend. A.764.

Similarly, the Warrant Agreement provides that "The Bank will retain sole and exclusive control of the Litigation and will retain 100% of any recovery from the Litigation. The Holders will not have any right to control or manage the course or disposition of the Litigation or the proceeds of any recovery therefrom . . . ." A.909, § 6.3 (emphasis added).

The WMI bankruptcy court likewise concluded that "The Warrant Agreements also confirm that the Anchor litigation belonged to the bank, not to the LTW Holders. Thus, any settlement or judgment paid would go to the bank, not the LTW Holders." *In re Washington Mutual, Inc.*, 464 B.R. 656, 660-61 (Bankr. D. Del. 2012) ("*In re WMI"*) (record citations omitted).

The LTW holders thus had no right to any portion of the judgment proceeds. Nor did they have any claim on the bank. Rather, they were merely entitled to additional shares of common stock in the bank's holding company, in an amount determined by the value of the judgment. The prospectus plainly stated that LTW holders had only a right to obtain additional shares of common stock in Dime Bancorp:

> The LTWs are securities that represent the right to purchase, upon the occurrence of the trigger, shares of our common stock having a total value equal to 85% of the net after-tax proceeds, if any, from our pending lawsuit against the United States government.

A.760 (emphasis added).[4] (Shares would be purchased at the nominal price of $0.01 per share. A.762.) Likewise, Section 3.1 of the Warrant Agreement provided that "Each Warrant will . . . entitle the Holder thereof to purchase . . . shares of Common Stock." A.899, § 3.1. *See In re WMI*, 464 B.R. at 661 (the

[4]The "trigger" referred to in the excerpt above occurs upon receipt of final recovery in the litigation, calculation of the "adjusted litigation recovery" (after payment of taxes), and receipt of regulatory approvals for issuance of shares of common stock. A.761-62. Because the judgment has not yet been paid, the trigger has not yet occurred.

LTW documents "plainly state that the LTWs are warrants representing the right to purchase shares of common stock"); *id.* at 659 ("the LTW Holders were entitled to receive common stock of WMI").

The Proposed Intervenors have acknowledged that the LTW obligations were obligations of WMI, the parent holding company, and not the subsidiary bank, Washington Mutual Bank. In their brief in this Court, the Proposed Intervenors write that "WMI agreed that the Dime LTWs would survive the merger of WMI and Dime Bancorp," and that "WMI agreed to honor all of Dime's contractual obligations to the Dime LTW holders." App. Br. 9 (emphasis added).

Citing provisions of the Warrant Agreement, Proposed Intervenors assert that "if stock were unavailable due to a merger, reorganization or the like, then *alternatively* the LTW holders would be able to monetize the value of their warrants by exchanging the warrants into securities, cash or other property, but in any case always equal to 85% of the net economic value of the Anchor litigation." App. Br. 20 (original emphasis). However, none of the provisions cited by the Proposed Intervenors apply here, and none of them would give the LTW holders any claim against Washington Mutual Bank, much less any right to share in the *Anchor* judgment proceeds. Sections 4.1(a) and 4.2(a) provided that LTW holders would receive additional shares of WMI stock—not cash—in the event that WMI undertook any "reclassification, redesignation or reorganization of the shares of

Common Stock" (A.903, § 4.1(a)), or in the event WMI entered any "Combination," defined as a merger of the company or a sale of its property and assets (*id.*, § 4.2(a)). In either event, the LTW holders would be entitled only to additional shares of WMI stock, not to cash, much less a direct recovery of a portion of the *Anchor* judgment. While Section 4.2(c) did provide that LTW holders could receive cash "[i]n the event of a Combination where consideration is payable to holders of Common Stock in exchange for their shares solely in cash," no such event ever occurred, and the eventual payment of the judgment in this case would not constitute such an event. A.904, § 4.2(c).[5]

Section 4.4 of the Warrant Agreement does provide that "If any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable . . . then the Board may make . . . such adjustments to the terms of this Article IV, in accordance with such essential intent and principles, as will be reasonably necessary, in the good faith opinion of such Board, to protect such purchase rights as aforesaid." A.904, § 4.4 (emphasis added). Although the Proposed Intervenors re-draft this provision to assert that the board "must" protect

[5]The Dime LTW prospectus similarly stated that "in case of certain reclassifications, redesignations, reorganizations or changes in our common stock or consolidations or mergers in which we are involved or the sale of all or substantially all of our assets . . . each LTW will be exercisable into the right to receive the kind of shares of stock or other securities or property into or for which our common stock was converted or exchanged or which was distributed to our stockholders in such transaction or event." A.778 (emphasis added).

the rights of the LTW holders (App. Br. 20), this section is in fact expressly permissive ("the Board may make"), not mandatory.[6] And as Proposed Intervenors acknowledge, it is "the Board of the Holding Company" that would bear such obligation (*id.*), not the bank.

The prospectus did not guarantee any recovery for LTW holders in the event that the bank was seized by regulators and placed in receivership, or in the event the holding company entered bankruptcy. To the contrary, in its list of "risk factors," the prospectus warned LTW holders that "Dime Savings . . . may not make any capital distributions to its parent company, Dime Bancorp, that would cause Dime Savings to become 'undercapitalized,'" and that accordingly "[t]he value of the LTWs and our common stock may be affected if Dime Savings is unable to distribute the damage award to Dime Bancorp . . . ." A.764. And as the WMI bankruptcy court stated, "[l]ike stockholders, the LTW Holders' rights . . . are contingent on the financial solvency of the corporation." 464 B.R. at 666; *see id.* at 669 (once in bankruptcy, WMI was "precluded by its fiduciary obligations to the creditors from taking any action to prefer equity holders, such as the LTW Holders").

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[6]*See In re WMI*, 464 B.R. at 669 ("[S]ection 4.4 is permissive, not mandatory, and cannot form the basis for a claim of breach of the Warrant Agreement.").

Thus no provision of the Warrant Agreement purported to create for the LTW holders any right to recover a portion of the *Anchor* judgment proceeds. Just as importantly, the obligations of the Warrant Agreement were obligations of the holding company WMI, and were redeemable in shares of WMI stock. They were not obligations of WMI's subsidiary, Washington Mutual Bank.

C. Proceedings in the WMI bankruptcy court.

As noted above, after the seizure and receivership of Washington Mutual Bank, WMI initiated Chapter 11 bankruptcy proceedings on September 26, 2008. *In re WMI*, 464 B.R. at 660. The LTW holders, recognizing that their claim was against the holding company and not the bank, sought relief in the WMI bankruptcy court.

1. The LTW holders' adversary action and settlement.

On April 12, 2010, an LTW holder commenced an adversary proceeding in the WMI bankruptcy court, seeking a ruling that the LTW holders were creditors of WMI. *In re WMI*, 464 B.R. at 660; *see* A.1183, Recital O.[7] On September 3, 2010, an amended complaint was filed on behalf of a putative class of all LTW holders, A.1184, Recital R, and the bankruptcy court certified the adversary action

[7] This citation, and similar ones in this section, are to the Stipulation and Agreement Between the Debtors and Class Representatives of the LTW Holders dated January 10, 2012. The Stipulation was incorporated as Exhibit 1 to an order of the WMI bankruptcy court approving the settlement dated February 11, 2012, which in turn was attached to a Form 8-K filed by the WMI Liquidating Trust on April 17, 2012. *See* A.1166-93.

as a class action, 464 B.R. at 660. A second amended complaint was filed on March 1, 2011, and a third amended complaint was filed on June 8, 2011. A.1186-87, Recitals X and AA. The bankruptcy court conducted a trial on the LTW holders' complaint in September 2011, and issued its decision on January 3, 2012. A.1187, Recitals BB and DD. The bankruptcy court granted judgment in favor of WMI, concluding, "based on all of the documents and testimony, that the LTWs are equity, not debt." *In re WMI*, 464 B.R. at 666. Accordingly, the LTWs constituted equity interests in, rather than claims against, WMI, and under the Bankruptcy Code the LTWs must be subordinated to the level of WMI's common stock. A.1187, Recital DD; *In re WMI*, 464 B.R. at 669-70.

WMI subsequently reached a settlement with the LTW class, whereby the LTW holders were offered a distribution of cash as well as a percentage of the common stock of the reorganized WMI that would emerge from Chapter 11. The LTW plaintiffs stipulated that all claims asserted by the LTW holders in the adversary action "shall be deemed dismissed, with prejudice." A.1189, ¶ 6. Distributions of cash and shares of common stock of the reorganized WMI were made on April 17, 2012, to "those LTW holders who executed and delivered releases." A.1167. LTW holders owning approximately two-thirds of the outstanding warrants have executed releases and received their distributions. The

releases included releases of all claims by the executing LTW holders against WMI, the FDIC, and JPMorgan.

2. The Global Settlement.

WMI listed its assets in a "Statement of Financial Affairs" submitted to the bankruptcy court. WMI's list of "Suits and Administrative Proceedings" included another *Winstar* case, *American Savings Bank v. United States*, but did not include the *Anchor Savings* case. *See* A.648. While WMI participated actively in the *American Savings* litigation, it has never sought to appear or intervene in *Anchor*.

After WMI filed for bankruptcy, WMI, the FDIC and JPMorgan litigated the disposition of numerous Washington Mutual assets, including, *inter alia*, several billions of dollars in deposits that were held by the bank, and several billions of dollars in pending tax refunds. WMI, the FDIC, and JPMorgan subsequently entered a Global Settlement Agreement ("GSA") resolving their disputes.

Among other things, the GSA provided that WMI and the FDIC released "any" rights that they "may have in the Anchor Litigation." A.208, § 2.13(b) (emphasis added). The GSA does not establish that WMI had any rights in the *Anchor* case; rather, as the bankruptcy court noted, it merely resolved any potential dispute as to who owned the litigation. *In re WMI*, 464 B.R. at 669. Indeed, section 8.2(b) of the GSA specifically provided that "None of this Agreement . . .

(i) is or may be deemed to be or may be used as an admission or evidence of the validity of any claim, or any allegation made in the Actions . . . ." A.237, § 8.2(b).

D. Proceedings in intervention.

The Proposed Intervenors were members of the LTW class that proceeded in the WMI bankruptcy case. Proposed Intervenors state that they did not execute releases of any claims they might have against WMI, the FDIC, or JPMorgan. App. Br. 14. On May 12, 2012, Proposed Intervenors filed a Motion to Intervene in the Court of Federal Claims. Attached to their motion was a proposed Class Action Complaint against the United States (A.733-51), based on actions of the FDIC (A.737, ¶ 11), purporting to assert claims for breach of contract, declaratory judgment, takings, and interference with prospective economic advantage (A.747-50). The Court of Federal Claims denied the motion on August 31, 2012 (A.1-4), and this appeal followed.

SUMMARY OF ARGUMENT

The court below properly denied intervention because it would have lacked jurisdiction over Proposed Intervenors' claims. First, the Court of Federal Claims lacks jurisdiction to overturn a bankruptcy court decision made after a full hearing and consideration of evidence. Second, Proposed Intervenors invoke the jurisdiction of the Court of Federal Claims to hear breach of contract claims against the United States, but Proposed Intervenors are not parties to, nor third-

party beneficiaries of any contract with the United States, and thus the Court of Federal Claims lacks jurisdiction over their complaint.

Furthermore, Proposed Intervenors are not entitled to intervene as of right under Rule 24(a). Proposed Intervenors have no interest in the supervisory merger agreements that gave rise to this case, and they have no claim on any portion of the damages that have been awarded in this case. At most, Proposed Intervenors have a derivative claim on Washington Mutual, Inc. for the issuance of shares of WMI common stock based on a formula that includes the value of the *Anchor* judgment. Because they have at best an indirect, "economic interest" in the *Anchor* case, because they will not gain or lose by the direct legal operation and effect of the *Anchor* judgment, and because they remain free to pursue their claims in another forum (and in fact have already done so), Proposed Intervenors have no protectable interest in the case to support intervention as of right.

Proposed Intervenors are also not entitled to permissive intervention under Rule 24(b), because their claims, which are based on a warrant agreement executed in 2002 and a P&A Agreement executed in 2008, have no legal or factual relationship to the award of damages to Anchor Savings Bank based on a breach of contract that occurred in 1989.

Finally, Proposed Intervenors' motion is untimely, as they waited more than two years to bring their motion, and did so only after pursing their claim and losing

in the WMI bankruptcy proceedings. Permitting intervention and the resulting further delays in the case would be prejudicial to Anchor Savings Bank, which has already waited 24 years to recover its damages from the government's breach.

ARGUMENT

Under Rule 24 of the Court of Federal Claims, an applicant may seek to intervene either by right, under Rule 24(a), or by permission, under Rule 24(b). Proposed Intervenors asserted both grounds, and the trial court properly rejected each argument.

I. STANDARD OF REVIEW

This Court has to date not identified the standard to be applied when reviewing a trial court's denial of a motion to intervene as of right. *Wolfsen Land & Cattle Co. v. Pacific Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1314-15 (Fed. Cir. 2012). The Supreme Court has, however, referred to the "discretionary nature" of a district court's order on a motion to intervene, *NAACP v. New York*, 413 U.S. 345, 364 (1973), indicating that the standard should be abuse of discretion. Regardless, Anchor submits that the denial of intervention as of right in this case was clearly correct and should be affirmed under either standard of review.

Denial of a motion for permissive intervention is reviewed for abuse of discretion. *Chapman v. Manbeck*, 931 F.2d 46, 48 (Fed. Cir. 1991).

II. THE COURT OF FEDERAL CLAIMS PROPERLY DENIED INTERVENTION BECAUSE IT WOULD HAVE LACKED JURISDICTION OVER PROPOSED INTERVENORS' CLAIMS.

The court below properly declined to allow intervention because it would have lacked jurisdiction over Proposed Intervenors' claims. This holding is correct for two reasons. First, as the court below recognized, it lacks jurisdiction to entertain a collateral attack on the judgment of the WMI bankruptcy court, which has already held that Proposed Intervenors have no direct interest in the *Anchor* litigation. Second, the Court of Federal Claims lacks Tucker Act jurisdiction over Proposed Intervenors' claims.

A. The Court of Federal Claims cannot entertain a collateral attack on a bankruptcy judgment.

The court below held that Proposed Intervenors' claims "amount to nothing less than a collateral attack on a bankruptcy court's judgment," and that "[t]his court does not have jurisdiction over such claims." A.3. The court was correct. This Court has held that "the Court of Federal Claims [does] not have jurisdiction over a . . . claim requiring a determination of whether a bankruptcy judgment was correctly decided." *Vereda, Ltd. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (citing *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed. Cir. 2001)). As the Court has recognized, "[t]o permit collateral attacks on bankruptcy court judgments would 'seriously undercut the orderly process of the law.'" *Allustiarte*, 256 F.3d at 1352 (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995)).

Even though the Proposed Intervenors "do[] not ask this Court to overturn" the bankruptcy court's decision as a formal matter, they do ask the Court to "find that the [bankruptcy] court reached a wrong decision." *Innovair Aviation Ltd. v. United States*, 632 F.3d 1336, 1342 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 999 (2012). In their proposed complaint, the Proposed Intervenors ask the court below to award them "an amount not less than 85% of the $356,000,000 in net contract damages awarded in this case." A.750-51, Prayer for Relief, ¶ 63(G). Such an award would contravene the WMI bankruptcy court's express rejection of the LTW holders' request for "a declaratory judgment that they are entitled to receive 85% of the Anchor Litigation in cash." 464 B.R. at 670. To the contrary, the bankruptcy court held, "based on all of the documents and testimony," that any judgment paid in the *Anchor Savings* case "would go to the bank, not the LTW Holders," and that "the LTW holders . . . are only entitled to the issuance of common stock in WMI." *Id.* at 660-61, 666, 671.

Proposed Intervenors contend that the court below failed to consider arguments that were not presented to the bankruptcy court, namely, "the argument that the PAA created a new contract for the benefit of LTW holders." App. Br. 31. But even the Proposed Intervenors do not suggest that the P&A Agreement created new rights for the LTW holders. Rather, as the Proposed Intervenors recognize, the FDIC merely succeeded to Washington Mutual Bank's obligations as they

"exist[ed] prior to insolvency." App. Br. 10. As the WMI bankruptcy court held, those obligations "do not entitle the LTW holders to an interest in the Anchor Litigation itself." *In re WMI*, 464 B.R. at 671.

Awarding the Proposed Intervenors a portion of the *Anchor* damages award would "require[] the court to scrutinize the actions of another tribunal." *Vereda*, 271 F.3d at 1375 (internal quotation marks omitted). In short, because the court below is bound to accept the findings of the bankruptcy court, it is powerless to adjudicate claims that contradict those findings. *See In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994) (noting that "collateral estoppel . . . does not include any requirement that the claim (or cause of action) in the first and second suits be the same," but rather "centers around whether an issue of law or fact has been previously litigated").

B. The Court of Federal Claims lacks jurisdiction because the Proposed Intervenors have no contractual relationship with the United States.

A party seeking to intervene must first show "an interest in the transaction in suit that would be vindicable in its own right under the court's existing jurisdiction." *441 4th Street Limited Partnership v. United States*, 26 Cl. Ct. 1233, 1234 (1992). The court can only grant a motion to intervene if the court possesses independent jurisdiction over the intervenor's asserted claims. *Id.*; *Hamilton Secs. Advisory Servs., Inc. v. United States*, 60 Fed. Cl. 161, 164 (2004) ("to the extent

that [intervenor] seeks monetary damages directly from [the plaintiff], this court has no jurisdiction to entertain such a claim"). *See also Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1563 (Fed. Cir. 1989) ("[T]he Claims Court by statute has a narrowly limited jurisdiction. Thus, a right to sue or intervene in district court does not, by itself, establish a right to sue or intervene in the Claims Court."); *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645, 648 n.3 (2004), *aff'd*, 143 F. App'x 317 (Fed. Cir. 2005) ("this court's intervention rules must be interpreted within the specific context of this court's jurisdiction").

As the sole basis for jurisdiction, the Proposed Intervenors assert that the Court of Federal Claims "had jurisdiction under the Tucker Act, 28 U.S.C. § 1491 for a breach of contract claim against the United States." App. Br. 1. This jurisdictional allegation fails because Proposed Intervenors are not parties to, nor third-party beneficiaries of any agreement executed by the United States.

The Tucker Act waives sovereign immunity and grants the Court of Federal Claims jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The Tucker Act "extends only to contracts either express or implied <u>in fact</u>, and not to claims on contracts implied <u>in law</u>." *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (emphasis added); *accord Lumbermens Mutual Casualty Co. v. United States*, 654 F.3d 1305, 1316 (Fed. Cir. 2011). This means that government

contracts cannot be implied to "arise by operation of law in order to prevent an injustice," but must be "founded upon a meeting of the minds . . . inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Lumbermens*, 654 F.3d at 1316. Thus, a plaintiff invoking Tucker Act jurisdiction must demonstrate the existence of an actual contract "between the plaintiff and the government." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). "In other words, there must be privity of contract between the plaintiff and the United States." *Id.*

Proposed Intervenors do not suggest they are in privity of contract with the United States. Obviously they were not parties to the underlying supervisory merger agreements formed between Anchor and the United States in the 1980s, nor are they parties to the P&A Agreement executed between the FDIC and JPMorgan.

Instead, Proposed Intervenors appear to claim that they are third-party beneficiaries of the P&A Agreement. *See* A.736, ¶ 4 ("the Dime LTW holders belong to the designated class of third party creditor beneficiaries intended to benefit from the PAA"); App. Br. 10 ("The FDIC . . . create[d] a new contract for the benefit of the Dime LTW Holders."). But reliance on the P&A Agreement fails to establish jurisdiction in the Court of Federal Claims, because the Proposed Intervenors are not third-party beneficiaries of the P&A Agreement.

The right to sue as a third-party beneficiary is an "exceptional privilege" that should not be granted liberally. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). Parties do not obtain third-party-beneficiary status "merely because the contract would benefit them." *FDIC v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003). Rather, a party "must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Flexfab, LLC v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (emphasis added). In other words, in order to waive its sovereign immunity and consent to third-party suit under the Tucker Act, the government must manifest its intent to confer an enforceable benefit on a non-contracting party, which would allow that party to bring suit directly against the government. *See Castle v. United States*, 301 F.3d 1328, 1337-39 (Fed. Cir. 2002); *Glass v. United States*, 258 F.3d 1349, 1353-55 (Fed. Cir. 2001).

The P&A Agreement does not reflect that manifest intent, and in fact reflects exactly the opposite. As two other Circuits have already recognized, the P&A Agreement disclaims any intent to confer enforceable rights on third-party beneficiaries. *See Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927 (11th Cir. 2013); *GECCMC 2005-C1 Plummer St. Office LP v. JP Morgan Chase Bank*, 671 F.3d 1027, 1030-31, 1033-34 (9th Cir. 2012). Those

courts based their decisions on Section 13.5 of the P&A Agreement, which provides:

> Except as otherwise specifically provided in this Agreement, nothing expressed or referred to in this Agreement is intended or shall be construed to give any Person other than the Receiver, the Corporation, and the Assuming Bank [*i.e.*, the FDIC and JPMorgan] any legal or equitable right, remedy or claim under or with respect to this Agreement or any provisions contained herein, it being the intention of the parties hereto that this Agreement, the obligations and statements of responsibilities hereunder, and all other conditions and provisions hereof are for the sole and exclusive benefit of the Receiver, the Corporation and the Assuming Bank and for the benefit of no other Person.

A.876, § 13.5. Proposed Intervenors base their supposed status as third-party beneficiaries on a general clause in the P&A Agreement providing for transfer of Washington Mutual Bank's assets to JPMorgan "subject to all liabilities for indebtedness collateralized by Liens affecting such Assets." App. Br. 17 (quoting P&A Agreement, A.855, § 3.1). This general clause does not "specifically provide[]" that third-party lienholders can bring suit under the P&A Agreement. *See Interface Kanner*, 704 F.3d at 933; *GECCMC*, 671 F.3d at 1034-35.

Moreover, even if Proposed Intervenors could somehow establish that they are third-party beneficiaries of the P&A Agreement, their arguments would at most establish that they have third-party standing to sue JPMorgan—not the FDIC, as would be required to establish jurisdiction under the Tucker Act. *See* App. Br. 11 ("Under the PAA, whoever owns the *Anchor* litigation must pay 85% of the net

economic damages to the Dime LTW holders as third party beneficiaries."); *id.* ("Under the PAA, JPMorgan agreed to assume the assets of Washington Mutual Bank and all related liabilities, whatever they may be . . . .").

JPMorgan disputes the contention that Proposed Intervenors have any claims against it relating to the *Anchor* litigation, for the reasons set forth below. *See infra* Part III. But even if they did, the purported transfer to JPMorgan of any obligations associated with the *Anchor* litigation would not confer Tucker Act jurisdiction on the Court of Federal Claims, because it would not provide the basis for a breach of contract claim against the FDIC itself. In short, this theory would establish Proposed Intervenors' right to enforce the P&A Agreement against JPMorgan, but "no rights to enforce the contract against the United States." *Maher v. United States*, 314 F.3d 600, 606 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1355).

III. PROPOSED INTERVENORS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT.

Rule 24(a)(2) provides a right of intervention when an applicant "[1] claims an interest relating to the property or transaction that is the subject of the action, and [2] is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, [3] unless existing parties adequately represent that interest." RCFC 24(a)(2). *See American Maritime*, 870 F.2d at 1560; *Chippewa Cree Tribe v. United States*, 85 Fed. Cl. 646, 654 (2009).

"An applicant must demonstrate the existence of each factor. If an applicant fails to demonstrate any one of these factors, the application to intervene of right is denied." *Chippewa Cree Tribe*, 85 Fed. Cl. at 654 (citation omitted). *Accord John R. Sand & Gravel*, 59 Fed. Cl. at 652.

"Although 'the requirements for intervention are to be construed in favor of intervention,' courts routinely deny motions to intervene." *Chippewa Cree Tribe*, 85 Fed. Cl. at 653 (citation omitted). *See, e.g.*, *American Maritime*, 870 F.2d at 1563 (affirming denial of motion to intervene because applicant "ha[d] not claimed an interest recognized under Rule 24(a)"). "Despite the label 'intervention of right,' courts exercise some discretion in weighing a motion to intervene under Rule 24(a)(2)." 6 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 24.03[5][a], at 24-51 (3d ed. 2002).

A. The Proposed Intervenors have no protectable interest in this case.

A would-be intervenor must clear a high bar of establishing a protectable legal interest in the underlying litigation. A protectable legal interest "require[s] something more than merely an economic interest." *American Maritime*, 870 F.2d at 1562 (citing *New Orleans Public Serv. v. United Gas Pipe Line*, 732 F.2d 452, 464 (5th Cir. 1984)). Thus, "[t]he interest of an applicant non-party having no privity claim in a contract . . . has not been recognized as legally protectable, even when the outcome of the contract action is almost certain to have a significant and

immediate economic impact on the applicant." *Id*. The asserted interest cannot be "indirect or contingent," *id*. at 1561, but must be "'of such a *direct and immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment.'" *Id.* (quoting *United States v. American Tel. & Tel.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980)).

1. The Proposed Intervenors are not entitled to recover a portion of the *Anchor* judgment.

The requirements of directness and immediacy are fatal to Proposed Intervenors' asserted interest. To begin with, they have no interest in "the property or transaction that is the subject of the action." In breach of contract cases, a would-be intervenor generally has no legally protectable interest when he is not a party to the contract in suit. *Osage Tribe v. United States*, 85 Fed. Cl. 162, 171 (2008) (citing cases); *see Getty Oil Co. v. Dep't of Energy*, 865 F.2d 270, 276 (Temp. Emer. Ct. App. 1988) ("Since appellants herein were not parties to the Agreement, they can claim no legally protectable interest pursuant to that Agreement.").

Here, the warrant holders were not parties to, or even third-party beneficiaries of, the contracts between Anchor and the government that are at issue in this case. Those contracts were executed between 1982 and 1985, whereas Anchor did not even become a publicly held bank until 1987, and the warrants were not created until 2000. And as this Court has repeatedly held in the *Winstar*

cases, shareholders of a corporation have no standing to assert a corporation's cause of action—much less shareholders of the corporation's holding company, who are even further removed. *E.g.*, *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011); *see also Thomas Funding Corp. v. United States*, 15 Cl. Ct. 495, 499-501 (1988).

Nor did the subsequent warrant documents give the LTW holders any third-party interest in Anchor's case against the United States. Rather, the LTWs represented nothing more than a contingent promise by the holding company that if the bank subsidiary obtained a judgment in this case, then the LTW holders would indirectly benefit by receiving shares of holding company stock in an amount pegged to the value of the judgment.[8] As the court below held, adopting the reasoning of the bankruptcy court, "the LTWs do not entitle the LTW holders to an interest in the Anchor Litigation itself. They are only entitled to the issuance of common stock in WMI." A.2-3 (quoting *In re WMI*, 464 B.R. at 671).[9] The

[8]The warrant agreement did provide that LTW holders might receive cash rather than additional shares in one narrow circumstance, but the eventual payment of the judgment in this case would not constitute such an event. *See supra* 13.

[9]While the court below reached its own independent conclusion, the ruling of the bankruptcy court is entitled to preclusive effect, *Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006), and, as noted above, the Court of Federal Claims lacks jurisdiction to review determinations of a bankruptcy court. *Supra* Part II.A. As the court below stated, the proper way for Proposed Intervenors to attack that determination is through a direct appeal from the judgment entered against them in the bankruptcy court. A.3.

Proposed Intervenors were entitled to nothing more than the prospect of receiving additional shares of WMI stock, and this limited, indirect interest cannot be converted into a direct claim against the proceeds of the *Anchor* litigation.

Proposed Intervenors acknowledge that Dime never intended to part with "the bank's ownership interest in the litigation as such, but rather its *economic* interest in the Anchor judgment." App. Br. 19. This amounts to a concession that the Proposed Intervenors have no right to intervene in the case, because they admittedly claim only an "economic interest" in the judgment, whereas Rule 24(a) "require[s] something more than merely an economic interest." *American Maritime*, 870 F.2d at 1562.

To the extent the Proposed Intervenors claim, based on a separate contract, that they are entitled to some benefit that is derivative of the *Anchor* judgment, they can litigate that claim separately, but not as part of the *Anchor* case itself.

2. The Proposed Intervenors have no claim against the FDIC.

The Proposed Intervenors seek to change the subject from the terms of the prospectus and the warrant agreement by focusing on rights purportedly established by the P&A Agreement. They assert, for instance, that "the PAA . . . separately ratified LTW holders' claim to a share in the economic value of the Anchor judgment." App. Br. 6; *see id.* 31 ("the PAA created a new contract for the benefit of LTW holders"). They go on to assert that "[t]he Dime LTW holders'

claim to 85% of the net economic damages in the *Anchor* litigation attached to the litigation asset pursuant to" the P&A Agreement, such that "[u]nder the PAA, whoever owns the *Anchor* litigation must pay 85% of the net economic damages to the Dime LTW holders as third party beneficiaries." *Id.* 11. They appear to claim that the FDIC breached the P&A Agreement by "refus[ing] to acknowledge that the Plaintiff-Intervenors are the intended beneficiaries of 85% of the net damages in the *Anchor Savings* litigation," and by "conspiring . . . to deprive Plaintiff-Intervenors of their claim." A.748-49, ¶¶ 54-55.

But even the Proposed Intervenors recognize that the P&A Agreement could not create any rights greater than those created under the warrant agreement. *See* App. Br. 10 ("the FDIC succeeded to WMBs assets and liabilities subject to the rights and equities existing prior to insolvency"). Proposed Intervenors' argument thus fails for two reasons. First, as discussed above, because the LTW holders had no right under the warrant agreement to recover a portion of the *Anchor* judgment, the P&A Agreement could not confer such a right on them, or impose related obligations on the FDIC (or JPMorgan).

Second, the Proposed Intervenors ignore Section 2.1 of the P&A Agreement, whereby JPMorgan assumed only "the liabilities <u>of the Failed Bank</u>," *i.e.*, Washington Mutual Bank. A.854, ¶ 2.1 (emphasis added); *see* A.847 (defining "Failed Bank"). The LTW holders had no claim on Washington Mutual Bank, but

rather on its holding company, WMI, which assumed the obligation to issue additional shares of WMI stock to LTW holders. Washington Mutual Bank could not have assumed such an obligation, because it was not a publicly traded entity. When the government's seizure sundered the bank from the holding company, the obligation to issue stock remained with WMI, and did not travel with the bank or attach to the receivership. Because Washington Mutual Bank never had any obligation to LTW holders in the first place, necessarily no such obligation transferred to the FDIC as the bank's receiver (or in turn to JPMorgan).[10]

Whatever claims the LTW holders have, they are claims against WMI, and must be enforced against WMI. The LTW holders did in fact seek to do so, in the WMI bankruptcy court. *See supra* 15-16. The Proposed Intervenors may be disappointed with that court's ruling, but their disappointment does not confer on them a protectable legal interest in this case.

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[10] The *Hillside Metro* and *Weichsel Farm* cases cited by the Proposed Intervenors (App. Br. 17-18), which apply the P&A Agreement to hold JPMorgan liable for certain leases, are inapposite, because there was no dispute that those leases were obligations of the bank, as opposed to the holding company. The *Cyr* and *Monroe* cases cited (App. Br. 18) are likewise inapplicable, because they involve the question of whether an asset sale conveys the seller's tort liabilities to the purchaser. The issue here is not whether JPMorgan succeeded to the liabilities of Washington Mutual Bank, but whether Washington Mutual Bank was liable for the obligations of its parent holding company, WMI, in the first place.

3. Any claim or interest the Proposed Intervenors have does not confer a right to intervene in the *Anchor* case.

In short, the FDIC as receiver never assumed any obligation to LTW holders. But that is beside the point for purposes of this appeal, because any claim the Proposed Intervenors might have against the FDIC depends on resolution of a dispute other than the one being litigated in the *Anchor* case. Courts have consistently denied motions to intervene brought by applicants who claim to be indirect beneficiaries of the proposed judgment, because such applicants have only "indirect and contingent" interests that will not be affected by the "*direct* legal operation and effect of the judgment," as required by Rule 24(a). *American Maritime*, 870 F.2d at 1561.

The facts here are analogous to those in the *Chippewa Cree Tribe* case, where the would-be intervenors—much like the Proposed Intervenors here—claimed they had been wrongly excluded from the class of individuals who would ultimately share in the judgment proceeds. "Proposed Intervenors in this case fear that, absent court intervention, they will never gain recognition as beneficiaries of the [judgment fund]." 85 Fed. Cl. at 654-55. The Court of Federal Claims denied their motion to intervene, concluding that "'the direct result of a judgment in favor of the plaintiff in this case would only be a monetary award from the government to the plaintiff,'" and would have "no immediate consequence for Proposed

Intervenors," because their claim against the plaintiffs was independent of the plaintiffs' claim against the government. *Id.* at 655 (citation omitted).

Similarly, in *Osage Tribe v. United States*, 85 Fed. Cl. 162 (2008), the movants had interests in a pro rata share of the proceeds of the mineral estate at issue, and any damages awarded to the plaintiff tribe would eventually flow to the movants. The Court of Federal Claims found that the movants had no right to intervene because the real party in interest was the tribe, not the movants: "the fact that the ultimate distribution of any funds awarded to [plaintiffs] will be placed to the credit of the [movants] does not in itself create a legal right enforceable in this action." *Id*. at 171; *see id*. at 173 ("any possible consequences that may arise as a result of this court's rulings are contingent upon actions and events involving intra-tribal determinations that lie outside the scope of this court's authority").

Other courts have likewise denied motions to intervene where the would-be intervenor claimed that the plaintiff had a contractual or other obligation to remit the judgment proceeds to the intervenor. In *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815 (5th Cir. 2003), plaintiff TCL had filed suit to enforce an arbitration award. Two individuals moved to intervene in order "to litigate the issue of whether they are the proper owners of" TCL. *Id.* at 817. The Fifth Circuit found that the intervenors "wish to pursue a cause of action wholly separate and apart from the underlying cause of action. . . . They wish to

litigate an issue much different from the issues defined by the initial pleadings in this case, which concerns the enforcement of an arbitration award." *Id.* The court stated that although "[a]s shareholders in TCL, they have an economic interest in the award, . . . this is not direct and substantial as required under Rule 24." *Id.* at 823. Accordingly, intervention was not appropriate, because the "asserted intervention on the issue of corporate ownership is not a cause of action against" the defendant in the case. *Id.*

Similarly, in *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 153 F.R.D. 69 (S.D.N.Y. 1994), the would-be intervenors were former shareholders of the plaintiff company. When they sold their shares of the company, they retained a right to share in any damages that the company might obtain in the underlying copyright action. *Id.* at 170. The district court denied their motion to intervene in order to contest the terms of a settlement entered by the company. *See also Getty Oil*, 865 F.2d at 276 (a party's "interest in some ultimate restitutionary benefit under a remedial plan" that was the subject of the underlying litigation "does not confer a legal right to intervene in the public enforcement action"); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975)

(refusing to grant nonparties to a consent decree the right to enforce the decree, "even though they were intended to be benefited by it").[11]

B. Denial of intervention will not impair the interest of the Proposed Intervenors.

Even if Proposed Intervenors had a protected interest in the *Anchor* judgment, their absence from the Court of Federal Claims litigation would not "as a practical matter impair or impede [their] ability to protect its interest." RCFC 24(a)(2).

Proposed Intervenors invoke the potential *stare decisis* effect of any judgment in this case (App. Br. 25), and indeed "[t]he potential *stare decisis* effect of a decision often supplies the 'practical impairment' required by Rule 24(a)." *Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 882 (1999); *see also Freeman v. United States*, 50 Fed. Cl. 305, 309 (2001). In this case, however, Proposed Intervenors have no reason to fear *stare decisis* from any ruling the court below may make. In the proposed complaint that Proposed Intervenors attached to their motion to intervene, they assert claims against the United States based on actions of the FDIC in connection with its receivership of Washington Mutual

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[11] Proposed Intervenors cite *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968), to support their assertion that they have an interest in the transaction and the funds that are the subject of the main action. App. Br. 24-25. In that case, in contrast to the cases cited above, the intervenors in fact had a direct interest in the transaction at issue in the case, which involved the allocation of a brokerage commission owed by the defendant, which the plaintiff and the intervenors both laid claim to. 415 F.2d at 675-76.

Bank, including the sale of the bank's assets to JPMorgan. A.741-44, ¶¶ 28-32. The only remaining task in the *Anchor* case, however, is to fix the amount of damages resulting from a breach of contract that occurred in 1989. No ruling on the amount of contract damages to be awarded in *Anchor* can have any bearing on Proposed Intervenors' rights under the warrant agreements, which were executed in 2000 and 2003, or under the P&A Agreement executed in 2008. And no ruling will in any way affect the Proposed Intervenors' claims against the FDIC, which involve different contracts, different causes of action, and different damages. *See Chippewa Cree Tribe*, 85 Fed. Cl. at 657 ("This court can only determine whether plaintiffs are entitled to compensation. The court cannot determine issues related to the identity of proper individual beneficiaries.").

Proposed Intervenors assert that if they are not allowed to intervene, then the damages award in this case will go to either the FDIC or JPMorgan. App. Br. 24. But nothing precludes the Proposed Intervenors from pursuing their breach of contract claim against the FDIC in an independent proceeding. Should the Proposed Intervenors prevail, they could obtain money damages from the FDIC. Anchor stresses that it does not believe the LTW holders have any such claim against the FDIC. But the dispositive point here is that the Proposed Intervenors need not intervene in this case to pursue any claim they have against the FDIC. *See Cities Service Co. v. Dep't of Energy*, 715 F.2d 572, 574 (Temp. Emer. Ct.

App. 1983) (per curiam) ("The outcome of the instant case, an agency enforcement action brought by DOE, will in no way affect Cities' private right to sue Pennzoil directly for damages."); *Payne v. Block*, 714 F.2d 1510, 1521 (11th Cir. 1983) ("these would-be intervenors are not necessarily precluded by today's ruling from filing an independent action."). *Cf. NAACP*, 413 U.S. at 368 ("there were no unusual circumstances warranting intervention since . . . appellants would not be foreclosed from challenging congressional and state legislative redistricting plans").[12]

"Numerous courts have found intervention to be inappropriate where relief is available elsewhere." *Osage*, 85 Fed Cl. at 173 (citations omitted). *See also Chippewa Cree Tribe*, 85 Fed. Cl. at 657 ("The availability of alternative venues is a pivotal consideration in the intervention context."); *Anderson Columbia*, 42 Fed. Cl. at 882 ("A prospective intervenor is also not likely to suffer impairment of its interests where it is free to assert its rights in a separate action."). "Moreover, the mere inconvenience caused by requiring the prospective intervenor to litigate the matter separately does not constitute the impairment required by Rule 24(a)." *Anderson Columbia*, 42 Fed. Cl. at 882. *See also* 7C Wright & Miller, FEDERAL

[12]Similarly, while JPMorgan disputes that the LTW holders have any claim against it, such a claim could be brought independently, and in fact would have to be brought in a separate action, as the Court of Federal Claims lacks jurisdiction over disputes between private parties. 28 U.S.C.§ 1491; *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

PRACTICE & PROCEDURE. § 1908.2 (3d ed.) ("Wright & Miller") (courts will deny a motion to intervene where "the court finds that the would-be intervenor could protect its interest in a separate action; the practical disadvantage of filing a separate suit and perhaps duplicating some of the efforts in the ongoing action are not sufficient to meet the criteria of the rule").

Again, the facts of the *Chippewa Cree Tribe* and *Osage Tribe* cases are analogous. *Chippewa Cree* involved the creation of a judgment fund that would be distributed to descendants of two tribes of Indians as compensation for lands ceded to the United States. 85 Fed. Cl. at 650-61. The proposed intervenors asserted that they were entitled to be beneficiaries of the judgment fund, but that they had been wrongly excluded. *Id.* at 652-53. The Court of Federal Claims denied their motion to intervene, finding that "Proposed Intervenors have alternative venues to contest the exclusion of their ancestors from the 1917 Roll used by defendant [to determine who would share in the tribal award]." *Id.* at 656-57. "Proposed Intervenors can protect their interest by contesting in another forum any prior congressional or tribal actions that Proposed Intervenors regard as unjust, as well as any per capita distributions which occur subsequent to the judgment in this case which Proposed Intervenors perceive to be inequitable." *Id.* at 657.

Similarly, in *Osage*, applicants were tribal members who had pro rata interests in the proceeds of a mineral estate belonging to the tribe. They argued

that their interest would be impaired because of the potential for inequitable allocation of the judgment. The court found this argument unpersuasive, holding that "the fact that the ultimate distribution of any funds awarded to the [plaintiffs] will be placed to the credit of the [applicants] does not in itself create a legal right enforceable in this action." 85 Fed Cl. at 171. The court continued:

> While it is possible to speculate that Proposed Intervenors may be impaired in some way by having to dispute the allocations they ultimately receive, . . . [they] can protect their interest by contesting in another forum any inequitable allocations that occur subsequent to the judgment in this case.

Id. at 173. The Court went on to hold that it "can only determine whether plaintiff is entitled to compensation; it cannot determine whether the Tribe must pay headright holders any particular portion of any judgment the court may grant in this case." *Id.*[13]

C. Proposed Intervenors' legitimate interests in this case are adequately protected by the plaintiff.

Because the Proposed Intervenors' only interest in this case is in maximizing the amount of damages, their interest is coextensive with that of Anchor Savings Bank, and thus is adequately represented by Anchor. In *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844 (5th Cir. 1973) (per curiam), plaintiff

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[13]Proposed Intervenors' statement that they, "and for that matter, all class members, would be left in the untenable position of having to pursue individual causes of action" if intervention is denied (App. Br. 24-25) is itself untenable. If Proposed Intervenors can bring a class claim in this case, as they propose to do, A.744-47, they can do so in a separate action, under either RCFC 23 or FRCP 23.

Ordnance had assigned the proceeds of certain contracts in suit to the intervenor, CF&I Steel Corp., as security for a promissory note issued by Ordnance to CF&I. The court denied the assignee leave to intervene in the underlying breach of contract action, finding that "since the ultimate objectives of both Ordnance and CF&I—recovery against Sperry Rand on the contract claims—are identical, the presumption is that the interests of CF&I will be adequately protected by Ordnance." *Id.* at 845. *See also Osage Tribe*, 85 Fed. Cl. at 172 ("Both plaintiff and Proposed Intervenors share an interest in maximizing the damages awarded for the breach of trust duties alleged in this action.").

Accordingly, the court below did not err in denying the motion to intervene as of right.

IV. PROPOSED INTERVENORS ARE NOT ENTITLED TO PERMISSIVE INTERVENTION.

Rule 24(b) provides for permissive intervention when an applicant has a "claim or defense that shares with the main action a common question of law or fact." RCFC 24(b)(1)(B).

In this case, the only question remaining in the "main action" is the resolution of a narrow issue regarding the calculation of one component of Anchor's damages award. Those damages flow from the government's breach of contracts that Anchor entered between 1982 and 1985 with the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank Board, and a

breach of those contracts in 1989 resulting from the FIRREA legislation and subsequent implementing regulations adopted by the Office of Thrift Supervision. The merits of that claim have been resolved by this Court, and all that remains is to fix the final damages amount.

The Proposed Intervenors, by contrast, seek to assert a brand new cause of action, against a different federal agency (the FDIC) that has never been present in the *Anchor* litigation, based on the FDIC's alleged breach of a completely different contract that did not exist until September 2008, well after the trial court had rendered judgment in this case.

If, as here, the would-be intervenor's claim contains no question of law or fact that is raised also by the main action, then permissive intervention should be denied. Wright & Miller, § 1911. "Rule 24 does not contemplate intervention when an entirely new issue will be introduced." *Jefferson County Sav. Bank v. Caparra Gardens Highland Dev. Corp.*, 53 F.R.D. 178, 179 (D.P.R. 1971) (denying second mortgage holder's motion to intervene in action to foreclose on first mortgage where movant's claim raised a question of mortgage priority that was not an issue in underlying action).

Rule 24(b) goes on to state that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." The prejudice to Anchor from allowing the further

delay in this case that would be necessary to litigate these brand-new claims is addressed in the following section, in the context of the motion's untimeliness.

V. PROPOSED INTERVENORS' MOTION WAS NOT TIMELY.

Although not reached by the court below, the issue of timeliness is a threshold determination under both Rule 24(a) , governing intervention as of right, and Rule 24(b), governing permissive intervention. *NAACP*, 413 U.S. at 365; *Northeast Military Sales, Inc. v. United States*, 100 Fed. Cl. 100, 101 (2011). "If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness." *NAACP*, 413 U.S. at 365. *See also Getty Oil Co. v. Dep't of Energy*, 890 F.2d 425, 428 (Temp. Emer. Ct. App. 1989).

"Timeliness is to be determined from all the circumstances." *NAACP*, 413 U.S. at 366. In evaluating timeliness, a court should consider three factors: (1) the length of time the applicants knew or reasonably should have known of their rights before moving to intervene; (2) whether the prejudice to existing parties by allowing intervention outweighs the prejudice to the applicants by denying intervention; and (3) whether unusual circumstances exist that militate either for or against a determination that the application is timely. *Belton Indus., Inc. v. United States*, 6 F.3d 756, 762 (Fed. Cir. 1993); *accord Northeast Military Sales*, 100 Fed. Cl. at 101; *John R. Sand & Gravel*, 59 Fed. Cl. at 649. *See* Wright & Miller,

§ 1911 (court should consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights").

A. Proposed Intervenors waited two years before seeking to intervene.

First, Proposed Intervenors waited too long to move to intervene, and they did so only after their claims were rejected by the WMI bankruptcy court. Proposed Intervenors assert that they "could not have intervened in the CFC while the *Anchor* litigation was on appeal to the Federal Circuit," on the ground that this Court was divested of jurisdiction, "at least until the Mandate issued and was lodged with the Clerk of the CFC." App. Br. 27. But this Court's mandate issued before the LTW class action began. This Court issued its mandate on May 3, 2010, and the Court of Federal Claims held an initial status conference to deal with issues on remand on June 8, 2010. *Id*. The first LTW class action complaint in the WMI bankruptcy court, however, was not filed until three months later, on September 3, 2010. *Supra* 15; A.1184, Recital R.[14]

The Proposed Intervenors waited until May 2012, two years after this case was remanded, before moving to intervene in the court below. There is no reason

[14]Proposed Intervenors suggest that they were forced to intervene in the WMI bankruptcy because the FDIC and JPMorgan used the Global Settlement Agreement in that proceeding to divest the LTW holders of their interest in the *Anchor* litigation. App. Br. 13-14, 27. But the Global Settlement Agreement was not executed until May 21, 2010 (App. Br. 12), which again was after this Court's mandate issued.

they could not have done so sooner. Instead, the Proposed Intervenors chose to pursue relief in the WMI bankruptcy court, based on a claim properly brought against WMI, the issuer of the LTWs. Only after they lost in the bankruptcy court did the Proposed Intervenors come to the Court of Federal Claims for a do-over, against a new defendant. Their motion was thus untimely. *See, e.g.*, *Trans Chem. Ltd.*, 332 F.3d at 823 (delay of more than one and a half years made motion to intervene untimely); *John R. Sand & Gravel*, 59 Fed. Cl. at 650-51 (would-be intervenors "failed to intervene within a reasonable time period" when they waited 16 months before filing motion to intervene).

B. Allowing intervention at this late stage of the case would cause undue prejudice by prolonging this case even further.

Second, "[t]he unreasonableness of intervenor-applicants' delay is underscored by the prejudice to plaintiff resulting from intervenor-applicants' delay." *John R. Sand & Gravel*, 59 Fed. Cl. at 650-51. In this regard, courts have routinely denied motions to intervene where the litigation has proceeded past a "preliminary stage." *See, e.g.*, *John R. Sand & Gravel*, 143 F. App'x at 319 (affirming Court of Federal Claims' denial of motion to intervene where the court had already decided a summary judgment motion and only five months remained before trial); *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999) ("substantial engagement by the district court with the issues in a case 'weighs heavily against allowing intervention as of right'") (citation omitted); *Brink v. Da Lesio*, 88 F.R.D.

610 (D. Md. 1980) (strong showing is required of applicant who seeks to intervene after action has gone to judgment), *aff'd in part, rev'd in part*, 667 F.2d 420 (4th Cir. 1981).

In *Smith v. Marsh*, the court of appeals found prejudice to the parties from the fact that the case "had progressed substantially by the time [applicants] sought to intervene," coupled with the fact that the applicants "sought to inject new issues and matters that are well beyond the scope" of the claims and defenses of the parties, "thus expanding the scope of the litigation and causing delay." 194 F.3d at 1051. The court affirmed that "introducing these additional issues at such a late stage in the proceedings would cause undue delay." *Id. See also Payne v. Block*, 714 F.2d 1510, 1521 (11th Cir. 1983) ("the proposed intervention would inject into this case numerous issues not heretofore considered").

The *Anchor* case has proceeded far beyond its "preliminary stages," and has been delayed enough. Summary judgment motions have been resolved, the case has been tried, judgment entered, appeals argued, and the case remanded. All that remains is for the trial court to resolve one narrow issue regarding the amount of damages. And the case has experienced too much delay already. Indeed, *Anchor* is the only *Winstar*-related case still pending. It has been 30 years since Anchor Savings Bank and the government executed the contracts at issue in this case, more than 23 years since the breach of those contracts, 18 years since this suit was

brought, eight years since the damages trial, and five years since the trial court entered the initial judgment. Since this Court's decision affirming that judgment, the case has already been pending on remand for another three years.

The Proposed Intervenors, however, would initiate a brand new class action, on behalf of new plaintiffs, against a new defendant (the FDIC), based on new causes of action involving a contract that did not even exist until 2008. While the Proposed Intervenors would like it to be a foregone conclusion that they are entitled to relief, that question is hardly undisputed. Permitting the Proposed Intervenors to appear in this case to litigate their claims against the FDIC would result in—at a minimum—further motions practice, class certification proceedings, discovery, summary judgment motions, trial, post-trial briefing and argument, and appeal. Such litigation would take years. This Court should not countenance any further delay in this case.

C. The unavailability of prejudgment interest is a special circumstance militating against intervention.

Anchor is not entitled to prejudgment interest on its claim against the United States, 28 U.S.C. § 2674, which means that its damages award "is grossly inadequate in view of the damages actually suffered." *Suess v. United States*, 52 Fed. Cl. 221, 232 (2002). Since Anchor mitigated its damages in 1997, inflation

has eroded the value of its $356 million damages award by more than 30 percent.[15] During that time the value of the judgment has inexorably decreased because of the unavailability of pre-judgment interest. *See Ambase Corp. v. United States*, 58 Fed. Cl. 32, 52 (2003) (denial of prejudgment interest makes damages awards "particularly inadequate"). "This, of course, is a recurring problem in the *Winstar*-related cases, because parties who are harmed, even when able to prove damages in these difficult and novel cases, will not be made fully whole." *Suess*, 52 Fed. Cl. at 232. In *Glendale Fed. Bank v. United States*, 43 Fed. Cl. 390, 410 (1999), the court noted that it was a "troubling feature" of the case that, as of 1999, the government "has had the benefit of using money that constitute plaintiff's damages for 10 years." Since that observation, fourteen more years have passed.

Anchor's inability to collect prejudgment interest on its damages award, coupled with the substantial and ongoing delays in the payment of the judgment in this case, and the further delay that intervention would cause, constitutes a special circumstance militating against intervention. It is time for the Court of Federal Claims to fix the amount of damages, order the United States to pay the judgment, and finally resolve this case.

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[15] As calculated on http://www.usinflationcalculator.com/.

CONCLUSION

For these reasons, the Court should affirm the trial court's denial of the motion to intervene.

Dated: April 18, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2013, the foregoing CORRECTED BRIEF FOR PLAINTIFF-APPELLEE ANCHOR SAVINGS BANK, FSB was served through this Court's electronic filing system (ECF) on all counsel registered to receive electronic notices.

I also hereby certify that, upon this Court's acceptance of the electronic version of the foregoing CORRECTED BRIEF FOR PLAINTIFF-APPELLEE ANCHOR SAVINGS BANK, FSB, the Plaintiff-Appellee will file six (6) paper copies of this brief by hand delivery, in the Office of the Clerk, United States Court of Appeals for the Federal Circuit.

/s/ Edwin L. Fountain
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B), because it contains 12,342 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point font.

Dated: April 23, 2013

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