APPENDIX

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United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
Suite 115
NEW ORLEANS, LA 70130

June 04, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-20761 Jay Renobato v. Bureau of the Fiscal Service
USDC No. 4 : 17-CV-3904

Enclosed is an order entered in this case.

Sincerely,
LYLE W. CAYCE, Clerk

By: /s/ Angelique B. Tardie
Angelique B. Tardie, Deputy Clerk
504-310-7715

Ms. Andrea E. Belgau
Mr. Jay Nolan Renobato

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20761

A true copy
Attest:
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Christina Gardner
Deputy 7/1/19
New Orleans, Louisiana

JAY NOLAN RENOBATO,
Plaintiff-Appellant

v.

BUREAU OF THE FISCAL SERVICE,
formerly known as Bureau of the Public Debt,
Defendant- Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

(X) No member of this panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not

disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
Suite 115
NEW ORLEANS, LA 70130

March 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-20761 Jay Renobato v. Bureau of the Fiscal Service
USDC No. 4 : 17-CV-3904

Enclosed is an order entered in this case.

Sincerely,
LYLE W. CAYCE, Clerk

By: /s/ Angelique B. Tardie
Angelique B. Tardie, Deputy Clerk
504-310-7715

Ms. Andrea E. Belgau
Mr. Jay Nolan Renobato

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20761

JAY NOLAN RENOBATO,
Plaintiff-Appellant

v.

BUREAU OF THE FISCAL SERVICE, formerly known as
Bureau of the Public Debt,
Defendant- Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, ELROD, and ENGLEHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that appellee's opposed alternative motion to file a brief out of time is DENIED as unnecessary.

A true copy
Attest:
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Christina Gardner
Deputy 7/1/19
New Orleans, Louisiana

IT IS FURTHER ORDERED that appellee's opposed alternative motion for an extension of time to file a brief until 30 days after denial of the motion to dismiss the appeal is DENIED as unnecessary.

IT IS FURTHER ORDERED that appellant's motion to strike appellee's out of time responsive pleading work products is DENIED.

IT IS FURTHER ORDERED that appellant's motion to vacate the judgment of the district court is DENIED.

IT IS FURTHER ORDERED that appellant's motion to remand the case to this District Court for the Southern District of Texas is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. H-17-3904
	§	
Bureau of the Fiscal Service, et al.,	§	
Defendants.	§	

FINAL JUDGMENT

Plaintiff's claims are dismissed. Plaintiff shall take nothing on his claims against defendant.

Signed at Houston, Texas this 10 day of October 2018.

/s/ David Hittner

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY ATTEST:
DAVID J. BRADLEY, Clerk of the Court
By /s/ H Lerma
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. H-17-3904
	§	
Bureau of the Fiscal Service, et al.,	§	
Defendants.	§	

ORDER OF ADOPTION

On September 19, 2018 Magistrate Judge Peter Bray issued a Memorandum and Recommendation (Dkt. 34) Plaintiff filed objections (Dkt. 36) The objections are denied.

After due consideration of the entire record and applicable law, the Court hereby ADOPTS the Memorandum and Recommendation as this Court's Memorandum and Order. It is therefore

ORDERED that defendant' motion to dismiss (Dkt. 21) is granted.

The Court will issue a separate final judgment.

Signed at Houston, Texas this 10 day of October 2018.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY ATTEST:
DAVID J. BRADLEY, Clerk of the Court
By /s/ H Lerma
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY NOLAN RENOBATO,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-17-3904
	§	
BUREAU OF THE FISCAL SERVICE,	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court is Defendant's Motion to Dismiss. (Docket Entry No. 21.) This motion was referred to the magistrate judge for findings and recommendation pursuant to 28 U.S.C. § 636(b)(1). (Docket Entry No. 31.) Having considered the motion, filings, and applicable law, the court recommends that this case be dismissed for lack of subject-matter jurisdiction.

Jay Nolan Renobato filed suit against the Bureau of the Fiscal Service on December 28, 2017. The Bureau of the Fiscal Service, among other functions, borrows the money needed to operate the federal government through the sale of Treasury bills, bonds, and notes, and accounts for the resulting debt, provides government-wide accounting and reporting services, and manages the collection of delinquent debt owed to the government. The Bureau also operates Treasury Direct, a financial services website that facilitates buying and redeeming Treasury securities directly from the U.S. Department of the Treasury in paperless electronic form.

Renobato's thirty-four page complaint includes claims against the United States for violations of various provisions of federal law, including

- the Fourth and Fourteenth Amendments to the United States Constitution,
- 7 U.S.C. §§ 4, 5, 6a, 6b, 6c, 9, 13b, 25 (relating to commodities exchanges),
- 12 U.S.C. §§ 221, 283 (relating to the Federal Reserve system),
- 15 U.S.C. §§ 1, 2, 13, 78i, 78j, 78q-1 (concerning monopolies and combinations in restraint of trade),
- 18 U.S.C. §§ 31, 1001 (concerning fraudulent statements),
- 12 C.F.R. §§ 220.2, 220.6 (concerning credit by brokers and dealers),
- 17 C.F.R. §§ 240.10b-10, 240.15c3-1, 402, 240.11Ac1-3 (concerning manipulative and deceptive securities trade practices), and
- 31 C.F.R. §§ 306, 306.1, 306.15, 309.1, 309.2, 309.3, 357.0, 357.22, 357.28, 357.29, 3104, 3121, 3333, 3572.20 (regulating U.S. securities).

It appears that Renobato's main complaint is that the Bureau refuses to exchange each of his twenty-three Treasury bills, each of which he purchased for one thousand dollars, for Treasury bills valued at one million dollars each, Renobato states as follows in his complaint:

> Briefly over the past two (2) years Plaintiff, whose repurchase instructions of Form 3905 were failed to be followed by Defendant causing economic injury, bought and sold twenty three (23) 90-day Treasury bills [Series 912796] in cash forward trades generating millions of dollars in gross revenue on paper for the arbitrage business of such beneficial owner, and simultaneously producing millions of dollars in mint seignorage [sic] to the benefit of the Department of the Treasury and/or any number of its subsidiary entities... (Docket Entry No. 1 at 5-6)

Renobato appears to believe that he is entitled to a 1,000 percent return on his investment based on his submission of a Form 3905, which appears only to be a form permitting the exchange of government securities in different denominations. Renobato alleges that

> upon receipt of Form 3905, since BFS had ample time to process and handle the transaction requests electronically in a situation where the customer sells a security through or to a securities intermediary, BFS did then and there break its promises to make denominational exchanges of Plaintiff's T-bills... (Docket Entry No. 1 at 11-12.)

Under the Little Tucker Act and the Tucker Act, this court has jurisdiction of claims "against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). This court does not have jurisdiction over any such claim exceeding $10,000; rather, the Court of Federal Claims has exclusive jurisdiction over those claims. 28 U.S.C. § 1491(a)(1).

Renobato's claim is covered under the Tucker Act even as he has framed it, because it is based on the Constitution, various Acts of Congress, regulations, and express or implied contracts with the United States. He has alleged essentially a contract claim, however. 'The particular characterization or title that the plaintiff gives to the claim at issue is not controlling." *Contango Operators, Inc. v. United States*, No. CV H-11-0532, 2011 WL 13130834, at *2 (S.D. Tex. Oct. 26, 2011)(Lake, J.) In determining whether a claim is contractual, a court should consider "the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought." *Id.* (citing *United States v. J & E Salvage Co.*, 55 F.3d 985, 989 (4th Cir. 1995)); *see also Trader Properties, LLC v. United States*, No. CIV.A.G-14-254, 2015

WL 1208983, at *2 (S.D. Tex. Mar. 16, 2015) (citing *J & E Salvage Co.*, 55 F.3d at 989, and noting that the relevant inquiry is whether the plaintiff has alleged "at heart a contract case.").

The only relief Renobato seeks is based on the United States' alleged failure to fulfill its obligations to him under various statutes and regulations governing the issuance and exchange of Treasury bills. (Docket Entry No. 1 at 11-30.) Government bonds and Treasury bills are generally viewed as contracts between the government and the owners. *See Zellman v. Gregg*, 16 F.3d 445, 446 (1st Cir. 1994) (construing claims based on Treasury bonds as breach of contract claims). Renobato seeks "principally... money damages," which is further characteristic of a contract claim. (Docket Entry No. 1 at 5.) But for the government's alleged failure to fulfill its promises under the Treasury Bills he purchased, he has no claim at all.

The Little Tucker Act's jurisdictional amount-in-controversy ceiling of $10,000 is exceeded in this case. Renobato alleges "[a]ctual money damages" of "$22,977,000 in total or $999,000 per transaction." (Docket Entry No. 1 at 31.) He also alleges punitive damages and "Opportunity Cost" damages, totaling alleged gross damages of one billion dollars. (Docket Entry No. 1 at 32.) He does not contest that his claim is for more than $10,000, and in fact affirmatively alleges that his claim is for more than $75,000 for jurisdictional purposes. (Docket Entry No. 26 at 7.)

Given the novel nature of Renobato's claims, the court also considers that the

total purchase value of Renobato's bonds, $23,000, independently exceeds the Little Tucker Act's jurisdictional ceiling. *See Zellman*, 16 F.3d at 447 (affirming the district court's dismissal of a suit in which the plaintiff did not argue that the claims may be disaggregated). Renobato's breach of contract claim, though involving twenty-three T-bills, is based principally on the Bureau's alleged breach with respect to Renobato's transaction request, the "Form 3905." Renobato alleges that he submitted to the Bureau a "Form 3905" listing those "registered securities" he deemed "eligible for denominational exchange...before the due date on which the securities mature." (Docket Entry No. 1 at 11-12) (alleging that the Bureau, "upon receipt of Form 3905...did then and there" breach its obligations). "[R]ecovery on each bond" listed on Renobato's transaction request "would rise and fall on the same facts and legal arguments." *See Glaskin v. Klass*, 996 F.Supp. 67 (D.Mass. 1998) (finding "that the bonds included in each application form the basis for a single cognizable claim").

The Court of Federal Claims has exclusive jurisdiction over contract claims against the United States for more than $10,000. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). No request has been made to transfer this case to the Court of Federal Claims. *See Zellman*, 16 F.3d at 446 (affirming district court's decision to dismiss suit for lack of jurisdiction rather than transfer to the claims court, noting that no party had requested transfer). Moreover, transfer is only appropriate if in the interests of justice. 28 U.S.C. § 1631. Considering the nature of Renobato's claims in this case

and other courts' orders concerning his prior similar claims, the court finds it is not in the interests of justice to transfer the case. *See e.g. Renobato v. Merrill Lynch & Co.*, 153 F. App'x 925, 929 (5th Cir. 2005) (ordering clerk of court not to accept further filings). This is not the first lawsuit Renobato has filed alleging similar causes of action. *See Renobato v Bureau of the Public Debt*, CV H-00-425 (S.D. Tex. May 23, 2000) (dismissing Renobato's claims alleging "various torts as well as breach of contract... related to the purchase of Treasury bills"), *aff'd* 250 F.3d 739 (5th Cir. 2001) ("Even on the merits, Renobato's appeal is without arguable merit and is frivolous.").

Accordingly, the court finds that it does not have subject-matter jurisdiction over Renobato's claims and that Renobato's complaint should be dismissed.

Conclusion

The court recommends Renobato's complaint be dismissed. The parties have 14 days from service of this Memorandum and Recommendation to file written objections. Failure to timely file objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* 28 U.S.C. § 636(b)(1)(c); Fed.R.Civ.P. 72.

Signed at Houston, Texas on September 19, 2018.

/s/ Peter Bray

United States Magistrate Judge

TRUE COPY I CERTIFY ATTEST:
DAVID J. BRADLEY, Clerk of the Court
By /s/ H Lerma
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:17-CV-3904

ORDER FOR CONFERENCE AND DISCLOSURE OF INTERESTED PARTIES

1. Counsel shall appear for an initial pretrial and scheduling conference before:

United States Magistrate Judge Stephen Wm. Smith
On February 14, 2018 at 1000 AM
Courtroom 703, 7th Floor
515 Rusk Avenue
Houston, Texas

2. Counsel shall file with the clerk within fifteen days from receipt of this order a certificate listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation. If a group can be specified by a general description, individual listing is not necessary. Underline the name of each corporation whose securities are publicly traded. If new parties are added or additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, then each counsel shall promptly file an amended certificate with the clerk.

3. Fed.R.Civ.P. 4(m) requires defendant(s) to be served within 90 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 90 days after the filing of the complaint may result in dismissal of this action by the court on its own initiative.

4. After the parties confer as required by Fed.R.Civ.P. 26(f), counsel shall prepare and file not less than 10 days before the conference a joint discovery/case management.

5. The court will enter a scheduling order at the conference.

6. Counsel who file or remove an action must serve a copy of this order with the summons and complaint or with the notice of removal.

7. Attendance by an attorney also has authority to bind the party is required at the conference.

8. Counsel shall discuss with their clients and each other whether alternative dispute resolution is appropriate and at the conference shall advise the court on the results of their discussions.

9. A person litigating pro se is bound by the requirements imposed upon counsel in this Order.

10. Failure to comply with this Order may result in sanctions, including dismissal of the action and assessment of fees and costs.

By Order of the Court

UNITED STATES DISTRICT COURT *** SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
Plaintiff,	§	
vs.	§	Civil Action H-17-3904
	§	
Bureau of the Fiscal Service, et al.,	§	
Defendants.	§	

RULE 16 SCHEDULING ORDER

The following schedule shall be followed. All communications concerning the case shall be directed in writing to Ellen Alexander, Case Manager for United States District Judge David Hittner, P.O. Box 61010, Houston, TX 77208.

1. June 1, 2018 NEW PARTIES shall be joined, with leave of court, by this date. The attorney causing such joinder shall provide copies of this ORDER to the new parties.

2A. July 1, 2018 PLAINTIFF shall designate EXPERT WITNESSES. Designation shall be in writing to opponent. Expert reports shall be served within 60 days of the designation.

B. August 2, 2018 DEFENDANT shall designate EXPERT WITNESSES. Designation shall be in writing to opponent. Expert reports shall be served within 60 days of the designation.

3. June 1, 2018 AMENDMENTS to pleadings, with leave of court, shall be made by this date.

4. November 1, 2018 DISCOVERY shall be completed by this date.

5. December 3, 2018 MOTION CUT-OFF. No motion, including motions to exclude or limit expert testimony under Fed.R.Evid. 702, shall be filed after this date except for good cause shown. See LR 7.

6. February 22, 2019 The JOINT PRETRIAL ORDER shall be filed on or before this date notwithstanding that a motion for continuance may be pending. Parties shall exchange all trial exhibits on or before this date notwithstanding that a motion for continuance may be pending. NO LATE EXCHANGES OF EXHIBITS WILL BE PERMITTED. All motions in limine shall be submitted with the pretrial order. Failure to file timely a joint pretrial order, motion in limine, or exchange all trial exhibits may result in this case being dismissed or other sanctions imposed, in accordance with all applicable rules.

7. March/April 2019TRIAL TERM. Cases will be set for trial at a docket call, conducted prior to the trial term or by order of the Court. Your position on the docket will be announced at that time.

Jury / Non Jury ETT: 1 day .

All documents filed must be 14 point font, double spaced with not less than one inch margins.

SIGNED on March 28, 2018.

/s/ Stephen Wm. Smith
Stephen Wm Smith
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
	§	
	§	
V.	§	Civil Action No. 4:17-3904
	§	
Bureau of the Fiscal Service,	§	
	§	

ORDER

Pending before the Court is the Plaintiffs Pro Se Motion for Reconsideration of Order of Adoption and Notice of Deferred Exhibit Delivery (Document #39.) Having considered the motion and the applicable law, the Court determines the foregoing motion should be denied. Accordingly the Court hereby

ORDERS that the Motion for reconsideration of Order of Adoption and Notice of Deferred Exhibit Delivery (Document #39) is DENIED.

SIGNED on the 26 day of October, 2018

/s/ David Hittner

David Hittner
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
	§	
	§	
V.	§	Civil Action No. 4:17-3904
	§	
Bureau of the Fiscal Service,	§	
	§	

ORDER

Pending before the Court is Plaintiff's Motion for Stay of Judgment Pending Appeal (Document #43). Having considered the motion and applicable law, the Court determines the foregoing motion should be denied. Accordingly, the Court hereby

ORDERS that Motion for Stay of Judgment Pending Appeal (Document #43) is DENIED.

SIGNED on the 19 day of December, 2018

/s/ David Hittner

DAVID HITTNER
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Jay Nolan Renobato,	§	
	§	
	§	
V.	§	Civil Action No. 4:17-3904
	§	
Bureau of the Fiscal Service,	§	
et al,	§	

ORDER

Pending before the Court is Plaintiff's Motion for Issuance of Writ Mandating Simultaneous Vacatur and Reversal of Judgment (Document #50). Having considered the motion and applicable law, the Court determines the foregoing motion should be denied. Accordingly, the Court hereby

ORDERS that Motion for Issuance of Writ Mandating Simultaneous Vacatur and Reversal of Judgment (Document #50) is DENIED.

SIGNED on the 21 day of March, 2019

/s/ David Hittner

David Hittner
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JAY NOLAN RENOBATO	§	
PO BOX 9771	§	
THE WOODLANDS, TX. 77387	§	CIVIL ACTION No.17-cv-3904
PLAINTIFF	§	
v.	§	
	§	▸ JURY TRIAL DEMANDED ◂
BUREAU OF THE FISCAL SERVICE	§	FED.R.CIV.P. 38
f.k.a. BUREAU OF THE PUBLIC DEBT	§	
401 14th STREET SW	§	
WASHINGTON, DC. 20227	§	
DEFENDANT	§	

AFFIDAVIT OF PLAINTIFF'S
DESIGNATED LEGAL EXPERT

STATE OF NEVADA	)
	)
COUNTY OF CLARK	)

BEFORE ME the undersigned authority, on this day personally appeared one

Romeo R. Perez , who a person known to me, and who stated on his oath as follows:

1. I, Romeo R. Perez, am over twenty-one (21) years of age and am fully competent to execute this Affidavit and have direct knowledge of the matters stated herein.

2. That I am a practicing lawyer with 20 years experience, and currently maintain a business address at 1621 E Flamingo Road #15A in Las Vegas, Nevada. 89119

3. That my practice consists of Family Law, Criminal Law, Business Law, and Personal Injury Law in Las Vegas, Nevada.

4. That I am familiar with the facts and issues to be presented by Plaintiff in the instant case as they have been explained to me. My understanding is that this case pertains to issues in a federal case that takes up payment of debt securities/commodity obligations written between Jay Nolan Renobato a sole proprietor and Bureau of the Fiscal Service a government entity.

5. That I have spoken with Renobato in general terms on the subject of 90-day T-

bill *TRADES*. I have also asked Renobato to assist me in my firm's litigation over the years, most recently my own business law case in Las Vegas dealing with a closely held corporation and the Securities Exchange Commission. I was impressed with Renobato's research skills, and knowledge of the Securities Industry. Renobato's abilities in producing legal work product is highly skilled and proficient.

6. That I have reviewed the pleadings in this case and reviewed Renobato's analysis on this issues. I understand that this case was brought or filed under the federal antitrust acts 15 U.S.C. Ch.1 whereas the amount in controversy claimed is well in excess of the minimum $75,000 statutory amount. I further understand that Bureau of the Fiscal Service has locations in Washington D.C. and Parkersburg West Virginia. I was provided sections of Title 31 Code of Federal Regulation which Renobato says applies to the issue and sale of 90-day Treasury bills. Therefore, based on the information provided to me by Renobato, it is my opinion Renobato's has sufficiently invoked subject matter jurisdiction.

7. That, upon Renobato's request, I reviewed 31 C.F.R. § 309.3. This regulation on its face, seems to mean what is says in that "exchanges from higher to lower and lower to higher denominations of the same series bearing same issue and maturity dates will be permitted at the Bureau of the Fiscal Service" clearly enacting the legality of what that section labels as "Denominations and exchange;" whereas 31 C.F.R. § 306.15 expressly prescribes "Form PD 3905 or Form PD 1827 as appropriate may be used" for "Transfers, exchanges, and reissues." In other words, and noting that I am not a securities lawyer, I have nonetheless formed an on the construction and meaning of denominational exchange provisions of Title 31 Code of Federal Regulations.

8. That this is my opinion only and does not attempt to substitute for that of the Fact Finder or this Court. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge, and which are not. Those that are within my own knowledge, I confirm to be true. The opinions I have expressed represent my true and complete opinions on the matters to which they refer.

9. FURTHER DEPONENT SAYETH NOT.

By: /s/ Romeo R. Rerez
Romeo R. Perez

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this 4th day of September, 2018 to certify which witness my hand and seal of office.

Pearl Almazan
Notary Public – State of Nevada
APPT NO.05-101446-1
My Appt. Expires 09-22-2020

/s/ Pearl Almazan
Notary Public *in and for*
THE STATE OF NEVADA

- *Official Seal* -

THE CONSTITUTION OF THE UNITED STATES

WE the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for a common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Sec. 1. ALL legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Sec. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

When vacancies happen in the representation from any state, the Executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall chuse their Speaker and other officers; and shall have the sole power of impeachment.

Sec. 3. The Senate of the United States shall be composed of two senators from each state, for six years; and each senator shall have one vote.

ARTICLE II

Sec. 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows.

ARTICLE III

Sec. 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their respective office during good behavior, and shall at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sec. 2. The judicial power shall extend to all cases, in law and in equity, arising under this constitution, the laws of the United States, and treatise made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a state and citizens of another state, between citizens of different States, between citizens of the same state claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and as to fact, which such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in the case of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

ARTICLE IV

Sec. 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Sec. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

AMENDMENTS TO THE CONSTITUTION

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several states, pursuant to the fifth Article of the original Constitution.

BILL OF RIGHTS

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II]

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE [III]

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, Warrant but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived, life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI]

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have then previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE [VII]

In suits in common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [VIIII]

The enumeration in the constitution, of certain, rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE [X]

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, or reserve to the states respectively, or to the people.

AMENDMENTS

ARTICLE [XI]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE [XII]

The executors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the united States,

directed to the president of the senate, the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the forth day of March next following, then the vice-president shall act as president as in the case of the death or other constitutional disability of the president. [The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed and if no person have a majority then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally or eligible to the office of president shall be eligible to that of vice-president of the United States.

ARTICLE [XIII]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole numbers of persons in

each state, excluding Indians, not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participants in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken and oath, as a member of congress, or as an officer of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof but congress may buy a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United State nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the Unites States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The congress shall have power to enforce by appropriate legislation the provisions of this article.

ARTICLE [XV]

Section 1. The rights of citizens of the Unites States to vote shall not be denied or abridged by the United States or by any state on account or race, color, or previous condition of servitude.

Section 2. The congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XVI]

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and

without regard to any census or enumeration.

ARTICLE [XVII]

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

When vacancies happen the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to effect the election or term of any senator chosen before it becomes valid as a part of the constitution.

ARTICLE [XVIII]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the Unites State and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to be states by the congress.

ARTICLE [XIV]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation.

Title 28 UNITED STATES CODE
Chapter 85- District Courts; Jurisdiction

§ 1330 Action against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under sections 1608 of this title.

(c) For purposes of section (b), an appearance of a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatise of the United States.

§ 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 exclusive of interests and costs, and is between:

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign State;

(3) citizens of different States and in which citizens or subjects of a foreign State are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff wh files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the

defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the territories, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 1333 Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

§ 1334 Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining

from hearing a particular proceeding arising under title 11 or arising or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim, or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in section (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

§ 1337 Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies; Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interests and costs.

(b) Except when express provision therefore is otherwise made in a statute of the United states, where a plaintiff who files the case under section 11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the defendant.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

ABA MODEL CODE OF JUDICIAL CONDUCT

PREAMBLE

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

RULE 1.1 Compliance with the Law.

A judge shall comply with the law, including the Code of Judicial Conduct.

RULE 1.2 Promoting Confidence in the Judiciary.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE

IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1 Giving Precedence to the Duties of Judicial Office.
The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

RULE 2.2 Impartiality and Fairness.
A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

RULE 2.3 Bias, Prejudice and Harassment.

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

RULE 2.4 External Influences on Judicial Conduct.

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

RULE 2.5 Competence, Diligence, and Cooperation.

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

RULE 2.6 Ensuring the Right to Be Heard.

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

RULE 2.7 Responsibility to Decide.

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law

RULE 2.8 Decorum, Demeanor, and Communication with Jurors.

RULE 2.9 Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

CANON 3
A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

Magna Carta Excerpts (1215)

Sec. 28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefore, unless he can have postponement thereof by permission of the seller.

Sec. 30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

Sec. 31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

Sec. 39. No free man shall be seized or imprisoned, or stripped of his rights or nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Blackstone's Commentaries on the Laws of England (1765)

So great,,, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road,,, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.

ZACHARY D. BICKFORD, Plaintiff,

v.

BOERNE INDEPENDENT SCHOOL DISTRICT, Defendant.

No. 5:15-CV-1146-DAE.

United States District Court, W.D. Texas,
San Antonio Division.

April 8, 2016.

Attorney(s) appearing for the Case
Zachary D. Bickford, Plaintiff, represented by William N. Allan, IV, Allan, Nava, Glander & Holland, PLLC & Troy A. Glander, Allan, Nava & Glander, PLLC.
Boerne Independent School District, Defendant, represented by Donald Craig Wood, Walsh Gallegos Trevino Russo & Kyle P.C. & Stacy Tuer Castillo, Walsh, Anderson, Brown, Gallegos and Green P.C..

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

DAVID A. EZRA, District Judge.

Before the Court is Defendant Boerne Independent School District's ("BISD") Motion for Protective Order to Stay Discovery. (Dkt. # 14.) Plaintiff Zachary Bickford timely filed a Response (Dkt. # 15), and Defendant filed a Reply (Dkt. # 16). Pursuant to Local Rule 7(h), the Court finds the matter suitable for disposition without a hearing. For the reasons that follow, the Court GRANTS Defendant's Motion for Protective Order to Stay Discovery. (Dkt. # 14.)

BACKGROUND

On November 15, 2012, Bickford was a stage tech in a BISD theatre production of Grease when a large prop fell on him, allegedly causing severe injuries. (Dkt. # 6 ¶ 5.) Bickford brought suit against BISD on December 22, 2015 (Dkt. # 1), and filed an Amended Complaint against BISD on February 10, 2016, alleging causes of action under 42 U.S.C. § 1983 for deprivation of his constitutional right to be free from bodily injury, and for negligence. (Dkt. # 6 at 6.) On February 23, 2016, BISD filed a Motion to Dismiss, raising the defense of sovereign immunity. (Dkt. # 8.) Bickford filed a response on March 8, 2016 (Dkt. # 11), and a hearing is set on the

Motion for June 21, 2016 (Dkt. # 12). On March 15, 2016, Bickford served written discovery on BISD, and indicated that it intends to depose approximately fourteen witnesses. (Dkt. # 14 ¶ 2.) BISD filed the instant motion for a protective order to stay discovery pending the Court's ruling on the Motion to Dismiss. (Dkt. # 14.)

DISCUSSION

"A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). A district court properly exercises this discretion to stay discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Good cause exists when the party from whom discovery is sought shows that it would suffer "annoyance, embarrassment, oppression or undue burden or expense" absent a stay. Id. To determine whether a stay is appropriate a district court "must balance the harm produced by the delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997); *see also Von Drake v. Nat'l Broad. Co., Inc.*, No. 3-04-CV-0652-R, 2004 WL 1144142, at *1 (N.D. Tex. May 20, 2004) (staying discovery "may be appropriate where the disposition of a motion to dismiss 'might preclude the need for the discovery altogether thus saving time and expense'" (quoting *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990))).

BISD argues that there is good cause to stay discovery until this Court rules on the Motion to Dismiss, because its right to immunity would be harmed if the Plaintiff is allowed to conduct discovery and the Court ultimately determines that it is qualified to immunity. (Dkt. # 14 at 3-4.) Without commenting on the merits of BISD's Motion to Dismiss, the Court notes that if it does grant the Motion on immunity grounds, the need for discovery would be eliminated.

A stay of discovery is not appropriate when it could prevent a party from "having a sufficient opportunity to develop a factual base for defending against a dispositive motion." *See e.g., Kutilek v. Gannon*, 132 F.R.D. 296, 298 (D. Kan. 1990). Here, Plaintiff does not argue that discovery is necessary to develop facts to help defend against Defendant's Motion to Dismiss for lack of jurisdiction. In fact, Plaintiff filed his response to the Motion to Dismiss before Defendant filed the instant motion. Bickford argues that qualified immunity is inapposite here, where he sued the school district itself rather than a particular official working within the District. (Dkt. # 15 at 4.) Bickford further argues he will be prejudiced by a stay of discovery, because a stay will interfere with scheduling order deadlines set by this Court, including the May 2, 2016 deadline for parties to submit written orders of settlement and the November 4, 2016 deadline to complete discovery. (Dkt. # 15 at 5.)

This Court will reach the merits of BISD's immunity defense after the Motion to Dismiss hearing and does not evaluate it here. Any deadlines which may be hindered by a stay of discovery may be reset by a joint motion by the parties, should the need arise. When balancing the harm produced by a temporary stay against the harm that could result if BISD is found to be immune from the instant suit, this Court finds that a temporary stay is appropriate.

CONCLUSION

For the reasons stated above, BISD's Motion for Protective Order to Stay Discovery is GRANTED (Dkt. # 14). All discovery is STAYED pending this Court's decision on the Motion to Dismiss, which will be issued shortly after the hearing scheduled for June 21, 2016. The stay is automatically lifted at the time this Court issues its order on the Motion to Dismiss.

IT IS SO ORDERED.

DEN NORSKE STATS OLJESELSKAP AS,
Plaintiff-Appellant,

v.

HEEREMAC VOF; Heerma Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott, Inc.; J. Ray McDermott, SA; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston LLC; McDermott-ETPM, Inc.; Saipem SPA; Saipem International BV; Saipem UK Limited; Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA,
Defendants-Appellees.

United States Court of Appeals, Fifth Circuit.

No. 99-20763

Decided: February 05, 2001

Before JOLLY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

Arthur R. Miller (argued), Cambridge, MA, Jacob Dweck, Rebecca L. Hirsch, Sutherland, Asbill & Brennan, Washington, DC, James R. McGibbon, Sutherland, Asbill & Brennan, Atlanta, GA, Craig Barkell Glidden, Patricia Hall Webb, Jeffrey Alan Kaplan, McFall, Glidden, Sherwood & Breitbeil, Houston, TX, for Plaintiff-Appellant. Jonathan D. Schiller, William A. Isaacson, Boies, Schiller & Flexner, Washington, DC, for Heeremac Vof, Heerma Marine Contractors, Heerema Offshore Services U.S., Inc., Heerema Offshore Constr. Group, Inc., Meek and Heerema. William J. Linklater, Michael A. Pollard, Baker & McKenzie, Chicago, IL, Jacks C. Nickens, Clements, O'Neill, Pierce, Nickens & Wilson, Houston, TX, for Heerma Marine Contractors, Heerema Offshore Services U.S. Inc., Heerema Offshore Construction Group Inc., Jan Meek and Pieter Heerema. Charles Alan Gilman (argued), Patricia Farren, Cahill, Gordon & Reindel, New York City, Innes A. Mackillop, White, Mackillop & Boham, Houston, TX, for McDermott Intern., Inc., McDermott, Inc., J. RayMcDermott SA, J. Ray McDermott Inc., J. Ray McDermott Gulf Contractors Inc., McDermott Engineers & Constructors (USA) Inc., McDermott Engineering Houston LLC and McDermott-ETPM Inc. Robin C. Gibbs, Kathy Dawn Patrick (argued), John Albert Basinger, Gibbs and Bruns, Houston, TX, for Saipem

SPA, Saipem Intern. BV, Saipem UK Ltd. And Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA.

This appeal requires us to interpret the scope of the United States antitrust laws and their application to foreign conduct. The plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea. It seeks redress under the United States antitrust laws against the defendants for an alleged anticompetitive conspiracy that supposedly inflated the plaintiff's operating costs in the North Sea. Supreme Court precedent makes clear as a general proposition that United States antitrust laws "do not regulate the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). More specifically, today we are bound by the plain language of the Foreign Trade Antitrust Improvements Act (FTAIA). Thus, even though the plaintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect. Accordingly, we find that the district court properly dismissed the plaintiff's antitrust claims for lack of subject matter jurisdiction. It follows that we affirm the court's determination that the plaintiff lacked antitrust standing to bring these claims in United States federal court.

I

We begin with the basics. Sections 1 and 2 of the Sherman Act prohibit restraints of trade and monopolization. Section 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. 15 U.S.C. § 1.

Section 2 of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony 15 U.S.C. § 2.

The FTAIA, enacted by Congress in 1982 to clarify the application of United States antitrust laws to foreign conduct, limits the application of such laws when non-import foreign commerce is involved. The FTAIA states that the antitrust laws will not apply to non-import commerce with foreign nations unless the conduct at issue has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and "such effect gives rise to a claim under" the antitrust laws.[1]

II

The plaintiff, Den Norske Stats Oljeselskap As ("Statoil"), is a Norwegian oil company that owns and operates oil and gas drilling platforms exclusively in the North Sea. The defendants are providers of heavy-lift barge services in the Gulf of Mexico, the North Sea, and the Far East. Only six or seven heavy-lift barges exist in the world. These immense vessels have cranes capable of hoisting and transporting offshore oil platforms and decks weighing in excess of 4,000 tons. During the 1993-1997 time frame, which is at issue in this suit, the three defendants controlled these barges.[2] Between 1993 and 1997, Statoil purchased heavy lift barge services from the HeereMac and Saipem defendants in the North Sea.

Statoil alleges that the defendants conspired to fix bids and allocate customers, territories, and projects between 1993 and 1997. Under the alleged arrangement, the defendants agreed that HeereMac and McDermott would have exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem would receive a higher allocation of North Sea projects in exchange for staying out of the Gulf. The defendants also allegedly agreed to submit embellished bids on heavy-lift projects. As a result of this conspiracy, Statoil contends that it paid inflated prices for heavy-lift barge services in the North Sea.[3] Statoil further argues that the conspiracy compelled it to charge higher prices for the crude oil it exported to the United States.[4] Finally, Statoil asserts that purchasers of heavy-lift services in the Gulf of Mexico were forced to pay inflated prices for those services because of the conspiracy.[5]

III

By way of background, it should be noted that in December 1997, the United States Department of Justice filed a criminal complaint against defendants HeereMac and Jan Meek, one of HeereMac's managing directors.

The complaint alleged that the defendants conspired "to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere."[6] HeereMac and Meek submitted to United States jurisdiction and pled guilty to the charges. They agreed to pay fines of $49 million and $100,000, respectively.

Following the guilty pleas, numerous companies across the globe filed suit in United States federal court seeking redress for injuries stemming from defendants' conduct. The first of these suits was filed in the Southern District of Texas in June 1998 by Phillips Petroleum Company and three of its foreign-based subsidiaries.[7]

On January 22, 1999, the court dismissed Phillips's claims for injuries sustained by its foreign subsidiaries relating to projects in foreign waters but allowed those claims asserting injury from projects in United States waters to proceed. While the court acknowledged the worldwide nature of the alleged conspiracy in its order, it nonetheless held that subject matter jurisdiction did not exist for those claims pled by

foreign-based subsidiaries for injuries allegedly sustained on foreign platforms.[8] Specifically, the court determined that those claims did not fall within the ambit of the United States antitrust laws because the claims did not arise from a direct and substantial effect on United States commerce.[9]

Statoil filed this suit in the same court in December 1998. The court dismissed Statoil's complaint against the defendants on July 12, 1999.[10] In its order, the court relied heavily upon its decision in the Phillips case and found no subject matter jurisdiction over the claims because "Statoil's damages arise from its projects in the Norwegian sector of the North Sea"; thus, the FTAIA's requirement that the effect on domestic commerce "gives rise" to the antitrust claim was not satisfied. See 15 U.S.C. § 6a(2). The court also held that the defendants' conspiracy "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce" under the FTAIA. See 15 U.S.C. § 6a(1). Finally, the court determined that "Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress."[11] Statoil timely appealed the judgment.

IV

The issue presented to us is primarily one of statutory interpretation. Specifically, this appeal requires us to interpret the relevant provisions of the FTAIA to determine whether the defendants' conduct and Statoil's injury in the North Sea presents a justiciable claim in the federal courts of the United States.

It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act. The history of this body of case law is confusing and unsettled.[12] However, as far as this appeal is concerned, our work is simplified by Congress' passage in 1982 of the FTAIA, which specifically exempts certain foreign conduct from the antitrust laws. This circuit has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury.[13] Today, we take on this task, and make no claim that it is an easy one.

V

A

We review de novo a district court's ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[14] *See Hebert v. United States*, 53 F.3d 720, 722 (5th Cir.1995). In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996). Nevertheless, we must

accept all factual allegations in the plaintiff's complaint as true. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.1981).

We first outline Statoil's argument that United States antitrust jurisdiction encompasses the conduct and injury in its complaint.

B

Statoil argues that the FTAIA does not preclude the district court's jurisdiction over its antitrust claims. Specifically, Statoil argues that the FTAIA was enacted exclusively to ensure that the conduct providing the basis of the plaintiff's claim have the requisite domestic effects, and was not intended to preclude recovery to foreign plaintiffs based on the situs of the injury.[15] Moreover, Statoil contends that Section 2 of the FTAIA was inserted only to ensure that the effect on United States commerce that provides jurisdiction is itself a violation of the antitrust laws; that is, the statute simply requires that there be some anticompetitive, harmful effect in this country-not just a positive or neutral domestic effect.[16]

Addressing specifically the FTAIA's requirement that the domestic effect "gives rise" to its antitrust claim, Statoil primarily argues that, because the defendants operating in the Gulf of Mexico were able to maintain their monopolistic pricing only because of their overall market allocation scheme (which included agreements regarding operations in the North Sea), Statoil's injury in the North Sea was a "necessary prerequisite to" and was "the quid pro quo for" the injury suffered in the United States domestic market. Statoil alleges that the market for heavy-lift services in the world is a single, unified, global market; therefore, because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, "gives rise" to any claim that is based upon this conspiracy.[17]

C

We must disagree with Statoil's arguments based on our reading of the antitrust statutes. Although we are controlled by the plain language of the statutes, we also find that the legislative history of the FTAIA and applicable case law supports our determination that the district court lacked jurisdiction over Statoil's claims.

We begin with an analysis of the relevant statutes and the plain language contained therein.

1

The Supreme Court has explained that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). We are thus bound by the plain, ordinary meaning of the language used in the antitrust statutes and, in particular, the FTAIA.

We begin by first noting that the Sherman Act itself applies only to conduct in "trade or commerce with foreign nations." 15 U.S.C. §§ 1,2 (emphasis added). The

commerce that gives rise to the action here-the contracting for heavy lift barge services in the North Sea-was not United States commerce with foreign nations, but commerce between or among foreign nations-that is, between or among Statoil (a Norwegian corporation), Saipem (England), and HeereMac (The Netherlands). Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act .[18]

As we have noted, the FTAIA states that the antitrust laws will not apply to non-import foreign conduct unless

(1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim.[19] The conduct of these defendants is foreign conduct that falls within the general parameters of the FTAIA and, thus, Statoil must show that the two specific requirements of the statute are met to establish subject matter jurisdiction over its claims.[20]

We accept the contention that Statoil has sufficiently alleged that the defendants' conduct-that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices-had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil alleges that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-competitive prices for oil.[21] These allegations are sufficient to satisfy the first requirement of the FTAIA.

However, Statoil fails to show that this effect on United States commerce in any way "gives rise" to its antitrust claim.[22] Based on the language of Section 2 of the FTAIA, the effect on United States commerce-in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico-must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf. We find no evidence that this requirement is met here. The higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil's claim that it paid inflated prices for HeereMac and Saipem's services in the North Sea. This is not to say that any antitrust injury suffered by customers or competitors of McDermott that arose from the anticompetitive effect in the Gulf of Mexico cannot be addressed.[23] This means only that, while we recognize that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a "close relationship" between the domestic injury and the plaintiff's claim; it demands that the domestic effect "gives rise" to the claim.[24]

Statoil asks that we interpret the requirement of Section 2 that the domestic "effect " give rise to a claim under the antitrust laws as merely requiring that the

defendants' domestic "conduct " (here, for example, agreements relating to the Gulf of Mexico) give rise to a claim. This interpretation is not true to the plain language of the FTAIA. Moreover, under such an expansive interpretation, any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.[25] Such an expansive reading of the extraterritorial application of the antitrust laws was never intended nor contemplated by Congress. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (noting that "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citation omitted).

In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.[26] Although the plain language of the relevant statutes is clear and controlling, we nonetheless turn now to address briefly the legislative history of the FTAIA to illustrate how that history reinforces our interpretation of the extraterritorial reach of the antitrust laws.

2

Before analyzing the legislative history of the FTAIA, we reemphasize that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." *Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir.1988) (citation omitted). We are thus "not free to substitute legislative history for the language of the Act." *Id.*

The FTAIA House Report states that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities" and to ascertain "the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R.Rep. No. 97-686, at 5, 8.[27] Moreover, the relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants, from the reach of United States antitrust laws:

A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not. *Id.* at 10.

Thus, the legislative history of the FTAIA, while not controlling, reinforces our conclusion that a foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce "gives rise" to its antitrust claim.[28]

We now turn to address briefly applicable case law and its effect on our interpretation of the FTAIA.

3

Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect "gives rise" to the plaintiff's antitrust claim, very little case law exists to aid our inquiry. Our interpretation of the FTAIA's requirements, however, is entirely consistent with prior case law defining the jurisdictional reach of the antitrust laws. Furthermore, those decisions illustrate that our interpretation of Section 2 is not a novel reading of the statute.

To begin, we note that the only three federal courts that have addressed the narrow question before us interpreted Section 2 exactly as we have. *See Kruman v. Christie's Int'l PLC, et al.*, 129 F.Supp.2d 620 (S.D.N.Y.2001) (holding that the FTAIA permits jurisdiction "only where the conduct complained of had 'direct, substantial and reasonably foreseeable' effects in the United States and the effects giving rise to jurisdiction are the basis for the alleged injury."); *In re Microsoft Corp.*, 2001 U.S. Dist. LEXIS 305, at *37 (holding that, under the FTAIA, "foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim."); *Sumitomo*, 117 F.Supp.2d 875, 876 (holding that "it is plain from the language of this act and bolstered by the legislative history that a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury.").

We further note that we have found no case in which jurisdiction was found in a case like this-where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market.[29] In those cases where the domestic effect on commerce did not give rise to the plaintiff's claim, courts have found subject matter jurisdiction lacking. *See, e.g., S. Megga Telecomm. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413 (D.Del. Feb.14, 1997) (anticompetitive domestic effect of higher prices for United States consumers did not "give rise" to plaintiff's claim for lost sales to defendant); *The "In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494 (M.D.N.C.1987) (anticompetitive domestic effect (lost exports of United States exporters) did not "give rise" to plaintiff's claim for lost sales in France due to marketing sales agreement with defendant); *de Atucha v. Commodity Exch., Inc.*, 608 F.Supp. 510 (S.D.N.Y.1985) (conspiracy's effect on

silver prices on United States exchange did not "give rise" to plaintiff's injury on London exchange).

On the other hand, in every case where jurisdiction has been found, the substantial effect on United States commerce has "give[n] rise" to the plaintiff's injury and claim under the antitrust laws. *See, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3rd Cir.2000) (anticompetitive effect on domestic rug market "gives rise" to plaintiff's injury); Caribbean, 148 F.3d 1080 (monopolization of United States market for advertising in the Caribbean "gives rise" to plaintiff's claim of being blocked from that market); Nippon Paper, 109 F.3d 1 (collusion amongst fax paper producers resulted in higher prices for fax paper in the United States, which "gives rise" to the United States' claim); *Hartford Fire*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (conspiracy's effect on the United States insurance market "gives rise" to the plaintiffs' injury, the inability to obtain certain types of coverage in that market).

Finally, we note that none of the cases cited by Statoil in support of its interpretation of the FTAIA cast doubt upon our plain language interpretation of Section 2. Statoil cites *Pfizer v. India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), for the proposition that antitrust jurisdiction exists over foreign conduct like the commerce between Statoil and defendants in this case. Pfizer, however, was decided four years before enactment of the FTAIA, and the court's holding was limited to the question of whether a foreign government qualified as a "person" under the Sherman Act. *Id.* at 320, 98 S.Ct. 584.[30] Statoil further maintains that *Caribbean Broadcasting*, 148 F.3d 1080, requires that jurisdiction be found over its claims. Initially, that case looks similar to today's case in that both the plaintiff and the defendant were foreign, and the defendant's international conspiracy had anticompetitive effects both inside and outside the United States. The critical difference, however, is that the effect on United States commerce in that case (that is, limiting to one radio station potential advertisers in the United States who wished to advertise in the Eastern Caribbean radio market) gave rise to the injury suffered by the plaintiff, a competing radio station-that is, exclusion of the plaintiff from the market for United States advertising dollars. *Id.* at 1082, 1086. As previously explained, that is simply not true with Statoil's claims.[31] Similarly, Statoil's reliance on *Nippon Paper*, 109 F.3d 1, is misplaced because the global conspiracy in that case had the domestic effect of raising fax paper prices in the United States, which gave rise to the government's claim under the antitrust laws. *Id.* at 2.

Simply put, Statoil has cited no case law to support an interpretation of Section 2 of the FTAIA different from the one we now adopt. This absence of such precedent, when considered with the plain language of the statute and evidence of congressional intent in enacting the FTAIA, reinforces our conclusion in this case.

VI

In sum, we find that the district court did not err when it dismissed Statoil's antitrust claims for lack of subject matter jurisdiction. Any reading of the FTAIA authorizing jurisdiction over Statoil's claims would open
United States courts to global claims on a scale never intended by Congress. Without subject matter jurisdiction, United States federal courts are without power to entertain Statoil's claims.[32] The judgment of the district court is therefore AFFIRMED.

FOOTNOTES

[1.] 15 U.S.C. § 6a. In full, the FTAIA reads: Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-(1) such conduct has a direct, substantial, and reasonably foreseeable effect-(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.[Proviso] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

[2.] The first group of defendants, HeereMac v.o.f. and its subsidiaries, a foreign corporation with its principal place of business in The Netherlands, controlled four or five of the barges. Saipem S.P.A., a British company, controlled one heavy-lift barge. McDermott, Inc., an American corporation, apparently controlled the last barge.

[3.] Statoil does not allege that it purchased any heavy-lift services in the United States or that the contracts it entered into included agreements to apply United States law.

[4.] Statoil asserts that it has exported an average of 400,000 barrels of oil a day into the United States over the past three years. Statoil does not, however, allege any injury to itself derived from its export of oil to the United States.

[5.] Statoil does not allege that it owns, operates, or commissions any oil exploration platforms within United States waters, or that it conducted business with any of the defendants incorporated in the United States.

[6.] The plea agreement separately addressed issues related to commerce affected by defendants' conduct in the Gulf of Mexico and commerce affected by defendants' activity in the North Sea and Far East.

[7.] A group of about forty plaintiffs brought a second suit against defendants in the Northern District of Texas.

[8.] The court determined it did have subject matter jurisdiction over the alleged conspiracy and injury "relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico."

[9.] The court stated that "the claims of the foreign-based [subsidiaries] regarding injuries sustained in relation to the foreign platforms" were not justiciable in United States courts because "the primary injury to that party must be caused in the United States and substantially affect United States commerce."

[10.] The defendants filed motions to dismiss based on lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim under the Sherman Act (Rule 12(b)(6)).

[11.] The court then declined to exercise supplemental jurisdiction over the remaining common law claims pursuant to 28 U.S.C. § 1367(c)(3).

[12] The first case to consider the extraterritorial application of United States antitrust law was *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). In that case, Justice Holmes announced that the Sherman Act could have no application to conduct that occurred outside of the United States. *Id.* at 357, 29 S.Ct. 511. However, as the United States became increasingly involved in foreign commerce in the years following American Banana, the Supreme Court relaxed its previous stance and held that the Sherman Act authorized jurisdiction over foreign defendants so long as domestic commerce was affected and some conduct occurred within the United States. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). In 1945, the Second Circuit laid the groundwork for what became known as the "effects test" to determine antitrust jurisdiction over foreign conduct. In *United States v. Aluminum Company of America ("Alcoa")*, 148 F.2d 416 (2d Cir.1945), Judge Learned Hand determined that a United States court would have jurisdiction over the conduct of foreign corporations where that conduct was intended to, and actually did, affect United States commerce. *Id.* at 443-44. The Alcoa effects test has been gradually adopted by most federal courts, albeit in various forms. The already confused effects test was even more imprecise following the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir.1976). In that case, the court introduced a balancing test that considered principles of comity in addition to domestic effects when determining the scope of antitrust jurisdiction over foreign defendants. The Fifth Circuit adopted a similar comity-informed approach. *See American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408, 413 (5th Cir.1983). Most recently, in 1993, the Supreme Court confirmed that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

[13] In fact, no circuit appears to have interpreted the critical portion of the FTAIA at issue in this case-the requirement that the domestic effect on commerce "gives rise" to the antitrust claim. 15 U.S.C. § 6a(2).

[14] It is true that the defendants filed 12(b)(6) motions along with their 12(b)(1) motions. However, the district court's order establishes that the court dismissed the claims for lack of subject matter jurisdiction rather than failure to state a claim under the antitrust laws:[T]he court orders that Defendants' motions to dismiss for lack of subject matter jurisdiction are granted and that this case is dismissed without prejudice. All remaining pending motions are moot.

[15] Statoil refers to the legislative history of the FTAIA to support its interpretation: The Committee did not believe that the bill reported by the subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States.H.R.Rep. No. 97-686, at 12.

[16] Statoil cites additional legislative history in support of this interpretation of the FTAIA: [T]he domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a beneficial effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind. H.R.Rep. No. 97-686, at 12 (1982) (citation omitted).

[17] In addition to its statutory interpretation arguments, Statoil cites a number of cases in an attempt to support its proposition that subject matter jurisdiction exists under the Sherman Act so long as the conspiratorial conduct had an affect on United States commerce. *See Caribbean Broad. Sys., Ltd. v. Cable and Wireless PLC*, 148 F.3d 1080 (D.C.Cir.1998); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir.1997); *Hartford Fire*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612; *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). However, none of these cases interpret the relevant provision of the FTAIA (15 U.S.C. § 6a(2)) and, therefore, none of these cases inform our inquiry into the proper interpretation of the "gives rise to" requirement.

[18] This interpretation is further strengthened by the limits placed on Congressional power in the Constitution. Article I, § 8 of the Constitution gives Congress the authority only to regulate interstate commerce and "commerce with foreign nations" (emphasis added). Thus, even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause.

[19] The dissent, like Statoil, argues that Section 2 should be read to require only that the domestic effect give rise to any antitrust claim, not necessarily the plaintiff's claim. This interpretation contradicts the explicit intent of Congress to require that the effect must give rise to the particular injury claimed by the plaintiff in the suit: [T]he full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. H.R.Rep. No. 97-686, at 12 (emphasis added). The dissent asserts that reading Section 2 as requiring that the domestic effect give rise to the plaintiff's claim renders the FTAIA's proviso redundant. Although giving the statute a clear understanding is difficult, we disagree with the dissent's reading. We read Section 1(B) to provide that the export commerce covered under the exception must be conducted by a person who is engaged in that export business in the United States. Section 2 provides that the defendant's antitrust effect on this export commerce described in Section 1(B) must give rise to the plaintiff's cause of action. The proviso, in turn, states that the recovery for injuries resulting from the conduct described in Section 1(B), which gives rise to the plaintiff's antitrust claim in Section 2, is limited to injuries occurring in the United States. Therefore, we fail to see the redundancy to which the dissent refers. *See In re Copper Antitrust Litigation v. Sumitomo Corp.*, 117 F.Supp.2d 875, 884 (W.D.Wis.2000) (holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market.").

[20] Specifically, Statoil's claim falls under Section 6(a)(1)(A) and not Section 6(a)(1)(B), because defendants' conduct had no substantial effect on export trade with foreign nations.

[21] Statoil's complaint alleges that the defendants' conspiracy adversely affected at least $165 million in United States commerce during the 1993-97 period.

[22] Statoil repeatedly frames the inquiry as whether a plaintiff can suffer injury abroad, or whether the injury itself must be suffered in the United States. This approach is an incorrect formulation of the threshold question and reflects a misreading of the FTAIA. We recognize that many federal courts, including the district court in these proceedings, might have chosen to frame the analysis in this manner. However, the proper inquiry to make here is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce? *See, e.g., Caribbean*, 148 F.3d 1080 (identifying that, while the situs of the injury was overseas, the claim arose from the conspiracy's effects on the United States (advertising market).

[23] The dissent notes with disapproval that our interpretation of the FTAIA means that "a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce." However, our reading produces the precise result intended by

Congress-that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do." H.R.Rep. No. 97-686, at 10-11.

[24.] Statoil argues that, had the district court accepted its allegation of a worldwide conspiracy as true, the requirements of the FTAIA would be satisfied and subject matter jurisdiction would exist. We cannot agree. Regardless of the nature of the conspiracy, Statoil must allege an injury that falls within the scope of the antitrust statutes. The assumed existence of a single, unified, global conspiracy does not relieve Statoil of its burden of alleging that its injury arose from the conspiracy's proscribed effects on United States commerce. This principle was stressed by the Supreme Court in *Matsushita*. Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy-whether there is one conspiracy or several respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. 475 U.S. at 584 n. 7, 106 S.Ct. 1348 (emphasis added).

[25.] The dissent repeatedly emphasizes that the antitrust laws have always contemplated foreign plaintiffs recovering for their injuries. We do not disagree. We simply read the FTAIA to provide that, if individuals conspire to restrain trade such that an American market is harmed, the United States antitrust laws can provide redress to any person injured by the domestic effects of the conspiracy, even if the injured party is located overseas. *See Sumitomo*, 117 F.Supp.2d 875, 885 ("On the other hand, the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a foreign market even if the same defendants engage in price-fixing affecting an American market.").

[26.] Statoil alleges that it paid inflated prices for heavy-lift services in the North Sea. This injury, however, does not arise from the alleged effect on United States commerce-that is, the higher prices paid by United States consumers for heavy-lift services in the Gulf of Mexico. While Statoil also asserts that the conspiracy had the effect of raising crude oil prices in the United States, Statoil alleges no injuries to itself occurring in the market for crude oil or arising from this domestic effect.

[27.] The dissent seems to imply that the sole purpose of the FTAIA is to "exempt exporting from antitrust scrutiny." Although this is clearly a primary goal of the legislation, the dissent ignores the second purpose behind the FTAIA-to resolve "possible ambiguity" in the extraterritorial reach of antitrust jurisdiction. *Id.* at 4-5.

[28.] The dissent argues that our decision in this case is contrary to the statement in the legislative history that "[a] course of conduct in the United States would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic." Again, we do not assert that foreign purchasers of domestic products can never sue in United States federal court. We only hold that the FTAIA requires that a foreign plaintiff show that its injuries arise from a United States market. This is not a novel reading of the FTAIA:[T]he legislative history [of the FTAIA] reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in the United States. Any doubt on that score is resolved by the sentence which states that "foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do."
Nothing is said about protecting foreign purchasers in foreign markets. *In re Microsoft Corp. Antitrust Litigation*, 2001 U.S. Dist. LEXIS 305, at *37 (M.D.Md. Jan. 12, 2001).

[29.] *See Sumitomo*, 117 F.Supp.2d 875, 883 ("So far as can be determined, the issue [of interpreting the language of Section 2] never came up. In the reported cases, the courts had no occasion to address the same effects requirement because in each case, the plaintiffs' injuries arose out of the same effects experienced by the markets.").

[30] The dissent relies heavily upon *Pfizer* in asserting that Statoil's claim should be cognizable in United States federal court. The *Pfizer* court, however, did not analyze the requisite elements that must be present before a foreign entity can sue under the United States antitrust laws. Indeed, *Pfizer 's* narrow holding was "only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* (emphasis added).

[31] The dissent asserts that we "struggle" to reconcile Caribbean Broadcasting with our holding in the case before us. However, the court in Caribbean Broadcasting, for whatever reason, completely ignored Section 2 of the FTAIA in its analysis. Given that a decision in the case before us requires an interpretation of that provision, we find *Caribbean Broadcasting* unhelpful to any resolution of Statoil's claim. Indeed, we fail to understand how *Caribbean Broadcasting* provides any meaningful support for the dissent's interpretation of Section 2, given that the plaintiff's claim in that case arose from the anticompetitive effects on the domestic market for radio advertising in the Caribbean. *See* 148 F.3d at 1086.

[32] As Statoil has no claim under the United States antitrust laws, we affirm the district court's finding that Statoil lacked standing to bring its claims. Based on *Associated Gen'l Contractors Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the determination of Statoil's standing to bring its claims is dependent upon our finding of subject matter jurisdiction. Thus, in concluding that the FTAIA bars Statoil's claims against defendants under the Sherman Act, we have perforce found that Statoil's injury is not of the type that the antitrust statute was intended to forestall.

DISSENT

I agree that this is not an easy case, but I have no hesitation in concluding that the Foreign Trade and Antitrust Improvements Act does not here divest the federal courts of jurisdiction and that the plaintiff has standing.

With deference to my colleagues, I am persuaded by the plain text of section 6a, as well as its statutory context, legislative history, and purpose.

The claim is that defendants allocated the market for hundreds of millions of dollars of commerce- an allocation that placed United States markets at the mercy of monopoly charges in an industry vital to national security. The charged conspiracy was no foreign cabal whose secondary effects only lapped at United States shores. The impact of the conspiracy was direct and substantial. Indeed, the participation of American business in the market allocation scheme was critical to its success. The plaintiff here is a foreign company, true enough, but it was injured by the same acts of defendants that injured American plaintiffs whose right to seek recovery of their losses the district court recognized in this litigation.

With the Foreign Trade and Antitrust Improvements Act, Congress set out to insulate United States business from its antitrust laws for certain business conducted outside the country. Its central purpose was to assist American business in competing abroad. This pass from antitrust restrictions did not extend to all conduct outside the United States. It stopped short of insulating conduct having direct and substantial

effects upon American commerce and causing antitrust injury to that commerce sufficient to support a claim for treble damages.

I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly. I would reverse and remand for further proceedings.

I

A

Interpretation of a statute must begin with the text of the statute itself. Section 6a states in its entirety:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-

(1) such conduct has a direct, substantial, and reasonably foreseeable effect-

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

[Proviso:] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[1]

Section 6a(1) requires an effect on (A) domestic or import commerce of the United States or (B) the export commerce of a person in the United States.[2] Section 6a(2) requires that this effect "give[s] rise to a claim under the provisions of sections 1 to 7 of this title, the Sherman Act, other than this section." The majority reads section 6a(2) to require that the effect "give[s] rise to" the plaintiff's claim. It does not say that. It does say that the effect must "give[s] rise to a claim."[3] In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.[4]

The literal text of the statute supports this conclusion. It reads, "gives rise to a claim." The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to say "the claim" instead of "a claim," they certainly would have.[5]

The reference to "a" claim makes clear that the "effect" described by section 6a(1) must violate the Sherman
Act-that is, harm competition. Section 6a(1) requires that the conspiracy have an effect on United States commerce; section 6a(2) requires that this effect either monopolize commerce or restrain trade in the United States, thereby giving rise to a Sherman Act claim. Section 6a(2) removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign, even if they restrain competition in other parts of the world. That an injury that "gives rise to" an antitrust claim must be an injury caused by harm to competition is no light notion. It is a well established and fundamental tenet of antitrust law.[6] Termed "antitrust injury," it is frequently encountered in enforcement action under the Clayton Act, by which Congress enlisted private enforcement in supplementation of governmental enforcement of the Sherman Act.[7]

Thus, the literal text does not require that the effect on United States commerce give rise to the plaintiff's claim. At worst, the text is sufficiently ambiguous to allow for both the construction the majority offers and the construction I believe is correct. At the least, the majority cannot find support in a plain text argument.

Accepting that the text of the FTAIA compels neither the majority's reading or mine, we must enlist other aids in determining the meaning of the statute. In doing so, I conclude that the textual conclusion that "a" means "a" is supported by the statutory context of the FTAIA, which describes the function of the FTAIA and its animating purpose, and by the purposes of the antitrust laws in general; by the legislative history of the FTAIA; and by the sparse case law that interprets the FTAIA.

B

The FTAIA was enacted as Title IV of Public Law 97-290, entitled "Export Trading Company Act of 1982."[8] Title I contains the congressional findings. Every single congressional finding relates to the importance of export business and the need to encourage export activity by American business.[9] The statute then states: "It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by modifying the application of the antitrust laws to certain export trade."[10] It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce.[11]

The text of the FTAIA implements this purpose perfectly. The Sherman Act, prior to the enactment of the FTAIA, applied to conduct that affected domestic, import, and export commerce. Recall that section 6a(1) limiting the reach of the Sherman Act applies to conduct that affects (1) domestic commerce; (2) import commerce; or (3) export commerce, but only to the extent that American exporters are affected. One

class of conduct is excluded: conduct that affects only foreign purchasers of American exports. This is the function of the FTAIA: to protect American exporters who monopolize or conspire to restrain export trade that does not harm United States commerce.

The purpose of the FTAIA offers no support for the majority's reading of the statute. It is undisputed that if proved, the conspiracy in this case would have direct, substantial, and reasonably foreseeable effects upon United States commerce. No American exporters are implicated by this suit. American exporting business can only be harmed by the alleged conspiracy in this case.

Indeed, interpreting the FTAIA as the majority wishes will impair the competitiveness of American exporters.

Under the majority's view, an American cartel that fixes prices worldwide will be subject to Clayton Act suits by plaintiffs from around the world,[12] but a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce. This interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States.

With respect to my colleagues, I fear that their reading of the FTAIA will hinder its purposes and reduce the effectiveness of the antitrust laws. Nothing in the text of the FTAIA, or the Export Trading Company Act of 1982 as a whole, or its legislative history, casts doubt on the importance of deterring restraints of trade that affect United States commerce. The Supreme Court has repeatedly recognized that the accent of the Sherman and the Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners. For example, in *Illinois Brick Co. v. Illinois*,[13] the Supreme Court noted the importance of "vigorous private enforcement of the antitrust laws" and "deterring violators" and recognized that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation."[14]

The Supreme Court in *Pfizer, Inc. v. Government of India*[15] addressed a situation somewhat analogous to this case. The government of India sued several American pharmaceutical manufacturers under the Clayton Act for damages caused by a price-fixing conspiracy. Like Statoil, the government of India alleged a worldwide conspiracy that raised prices in the United States and abroad. Unlike in this case, in *Pfizer* the sales were made in the United States.[16] In holding that foreign governments could recover under the Clayton Act, Justice Stewart observed: "Treble-damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers [A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."[17]

The logic underlying this conclusion is straightforward. Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United

States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

It is no rejoinder that conspirators would simply choose to exclude the United States from any price-fixing conspiracy as long as American plaintiffs could sue. In at least some cases, including the United States in a price-fixing conspiracy is necessary to generate monopoly profits. Otherwise, arbitrage would rapidly equalize unequal prices around the globe as speculators resold goods purchased in the United States to buyers in high-price regions.[18] Thus, a cartel may find it impossible to fix prices anywhere without a worldwide conspiracy. The Sherman Act can only deter these violations if it protects all parties injured by such a conspiracy.

Justice Stewart succinctly made this argument in Pfizer:

The conspiracy operated domestically as well as internationally. If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[19]

C

The legislative history also supports this reading of the statute and undermines the majority's interpretation of section 6a(2). The Committee Report on the House bill that became the FTAIA states that the FTAIA does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States-e.g., price fixing not limited to the export market-would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.[20]

This statement explicitly refers to plaintiffs who "suffer economic injury abroad." The majority's interpretation of the statute is contrary to this statement in the legislative history. The "effect" on United States commerce is the injury suffered by purchasers in the United States; this effect does not give rise to the injury suffered by the foreign plaintiffs. Yet the legislative history contemplates such plaintiffs recovering under the Sherman Act. The scenario described in this statement is virtually identical to the instant case: a conspiracy sells to buyers in the United States and abroad, and each of the buyers is injured. All are injured by the same

conspiracy, and it is a conspiracy that has been injurious to competition in the United States.

The majority, however, chooses to rely on the following statement in the same House Report:

A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.[21] That American ownership alone should not create jurisdiction over a wholly foreign conspiracy is not controverted, controversial, or relevant to this case. What is relevant is that the language omitted from the quotation above states that if a conspiracy between two foreign firms, regardless of American ownership, does have an effect on domestic commerce, there is jurisdiction.[22]

D

I recognize that there is little precedent to guide our analysis of this question. Of the case law that does exist, there are no appellate court cases supporting the majority's holding. To the contrary, the majority must reconcile or distinguish the only other circuit court decisions interpreting the FTAIA, because all of them find jurisdiction present.

The majority opinion struggles, and I believe fails, to reconcile *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,[23] which involved a foreign plaintiff alleging monopolization in radio advertising in the Caribbean by a competing radio station. The defendant was also a foreign entity. Consistent with the reasoning of this dissent, the D.C. Circuit held that the FTAIA did not preclude jurisdiction, because the plaintiff showed that the foreign defendants' conduct had the effect of harming United States purchasers of advertising. It stated: "the alleged injury is to advertisers in the United States."[24] Thus, based on the injury to advertisers in the United States, the court found jurisdiction over a suit by a radio broadcaster in the Caribbean. The D.C. Circuit did not require that the injury to American advertisers "give[s] rise to" the plaintiff's cause of action; its determination that the injury gave rise to "a" claim was sufficient.

E

Finally, the majority's attempt to enlist the aid of the Commerce Clause and the canon of construction that creates a presumption against extraterritoriality is mistaken.

The majority suggests that the interpretation of the FTAIA that I espouse is beyond the power of Congress to regulate commerce.[25] The Supreme Court itself has recognized-in the context of the Sherman Act-that Congress has intended to regulate, and constitutionally has regulated, foreign conduct that affects United States

commerce.[26] And it has been decades since any court has taken so cramped a view of the Commerce Clause in any context.[27]

The majority is correct to note that the courts' historical willingness to apply the Sherman Act extraterritorially is not dispositive of this appeal, since the FTAIA, and not the courts' earlier interpretations of the Sherman Act, is controlling here.[28] But precisely because the FTAIA applies here, the majority's reliance on the canon against extraterritorial application of statutes is misplaced. This canon operates when Congress has not clearly spoken on the issue of extraterritoriality.[29] The FTAIA, however, explicitly addresses nothing other than extraterritoriality. We must be careful not to use such a canon when Congress is speaking directly to the relevant issue. Make no mistake: such canons reflect substantive presumptions about the content of laws.

If courts apply substantive canons of construction against statutes that do speak to an issue, then it is the courts, not Congress, who are making the policy choices that form the content of legislation.[30]

II

Because I disagree with the majority's interpretation of the FTAIA, I would reach the standing inquiry. It is straightforward; this court has restated the test for standing under the Clayton Act as "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit."[31]

Statoil has standing. First, it has suffered injury-in-fact. It paid inflated prices directly to the defendants.

Second, Statoil has suffered antitrust injury. Antitrust injury requires that the injury to the plaintiff not merely show "injury causally linked to an illegal presence in the market" but injury "attributable to an anticompetitive aspect of the practice under scrutiny."[32] This element of standing excludes plaintiffs, primarily competitors, harmed by increased, rather than decreased, competition.[33] Statoil's injury was the direct result of the alleged price-fixing conspiracy and consequent restraint of trade.[34]

Third and finally, Statoil is a proper plaintiff. In determining whether a party is a proper plaintiff, it should examine "such factors as (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment."[35]

First, neither Statoil's injuries, nor their connection to the defendants, is speculative. The injuries arise from the defendants charging Statoil monopoly prices. Second, other parties have not been harmed more directly than Statoil. Statoil was a purchaser in the market for heavy-lift barge services, the market in which the

defendants fixed prices. Third, allowing Statoil to sue would not risk duplicative recoveries or the like. There is no suggestion that any unnamed party can seek to recover for the same damages Statoil suffered.

III

The antitrust laws have always given federal courts jurisdiction over conspiracies that adversely affect competition in the United States. The FTAIA limits that jurisdiction; but it does so by exempting American export conspiracies, not foreign conspiracies that injure American competition.

The majority opinion expresses concern that foreign litigants will flock to the United States for redress of their injuries in distant lands. The majority opinion, and the district court opinions it cites, seem to fear that the interpretation of the FTAIA that Statoil advocates makes the Sherman Act an antitrust regulation of foreign economies throughout the entire world, a paternalistic lawmaking enterprise that ignores the adequacy of foreign tribunals. But Congress has enacted no such thing. Congress enacted the FTAIA to serve the United States' narrow interest in vigorous domestic competition.

The text of the FTAIA may be inelegant, but it serves the selfish national interests of the United States: the FTAIA excludes from antitrust liability all conduct that has caused no antitrust injury to the United States economy;[36] but it enlists all injured parties-foreign or domestic-to assist the Department of Justice in deterring conduct that does harm the forces of competition in the United States. When a conspiracy causes a direct and substantial injury to competition in the United States, the Clayton Act recruits private parties to supplement the efforts of the Department of Justice in ending the conspiracy. The FTAIA ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers brought to bear by the Clayton Act. Thus, treble damages suits by parties who suffer antitrust injury from a conspiracy that has a direct and substantial harmful impact on United States commerce serve a single function: the protection of United States commerce. The FTAIA threatens no parade of horribles-it does nothing more than zealously protect competition in the United States while sparing from the docket of American courts suits involving conspiracies that affect only foreign economies.

In sum, I believe the FTAIA does not divest the federal courts of jurisdiction over suits by plaintiffs who suffer antitrust injuries from a conspiracy that also harms competition in United States commerce. Whether the harm felt in the United States is the source of the injury to the plaintiff is irrelevant; it is the effects on the United States that creates jurisdiction. Under the facts of this case, I would conclude that the district court had jurisdiction over the suit and that Statoil had standing to sue the defendants under the Clayton Act. I respectfully dissent.

E. GRADY JOLLY, Circuit Judge:

FOOTNOTES

[1] 15 U.S.C.A. § 6a (1997).

[2] For brevity, I herein refer to the effects required by section 6a(1) as effects on "United States commerce."

[3] 15 U.S.C. § 6a(2) (emphasis added).

[4] The effect must cause "antitrust injury." The "effect" described by section 6a(1) can be beneficial, neutral, or injurious. Section 6a(2) requires that this effect be injurious and, further, that the injury be caused by reduced, not increased, competition.

[5] Courts will not presume that statutory language is redundant or surplusage. The majority's interpretation, however, makes the proviso at the end of section 6a redundant. Section 6a(1)(B) states that the Sherman Act applies to conduct with effects on "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The proviso limits the applicability of the Sherman Act under section 6a(1)(B) "to such conduct only for injury to export business in the United States ." Thus, while (1)(B) requires only that the conduct affect a person engaged in export trade in the United States, the proviso limits recovery under the Sherman Act to such persons. The majority's reading of 6a(2) renders this proviso redundant, since it requires that the effect on the exporter in the United States "give[s] rise to" the plaintiff's claim-in other words, that the person engaged in export trade be the plaintiff.

[6] Courts have long held that private plaintiffs "must prove the existence of 'antitrust injury' " to recover under section 4 of the Clayton Act. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court noted that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Id.* at 584 n. 7, 106 S.Ct. 1348. The Court explained that a "cognizable injury" is an "antitrust injury." *Id.* at 586, 106 S.Ct. 1348.

[7] The Clayton Act requires that the plaintiff suffer antitrust injury. The FTAIA, by contrast, requires that the United States suffer antitrust injury. Compare Clayton Act, 15 U.S.C.A. § 15(a) (providing cause of action to anyone "injured in his business or property by reason of anything forbidden in the antitrust laws") (emphasis added), with FTAIA, 15 U.S.C.A. § 6a(2) ("gives rise to a claim under the [Sherman Act]") (emphasis added). When a private plaintiff wishes to sue under the Clayton Act, the Clayton Act and FTAIA erect complementary requirements: the plaintiff must suffer antitrust injury, and persons in United States commerce must suffer antitrust injury. The majority opinion, on the other hand, appears to conflate these two concepts.

[8] Export Trading Company Act of 1982, Pub.L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

[9] Export Trading Company Act of 1982 § 102, 96 Stat. at 1233-34.

[10] § 102(b), 96 Stat. at 1234. The Third Circuit has recently cited this language in concluding that "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir.2000).

[11] Because the language of the statute is clear, we need not resort to its legislative history to discern its purpose. In any case, the legislative history only reiterates this single, motivating purpose. *See*

H.R.Rep. No. 97-686, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 2487, 2487 (describing the legislation as "the bill to exclude from the application of [the antitrust laws] certain conduct involving exports" and "one of several bills that seek to promote American exports"). The excerpt of legislative history upon which the majority relies, that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities," is certainly a true statement, but it expresses the purpose of the law at a level of generality that offers us no guidance on the narrow question we face. What the majority has overlooked is that Congress has spoken with much more particularity as to the purpose of this law: the purpose of the FTAIA is to promote exports by exempting American exporting activity from the antitrust laws.

[12] This cannot seriously be disputed. The FTAIA does not alter the holding of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), which allowed foreign governments to sue an American cartel that charged supra-competitive prices for pharmaceuticals worldwide. The legislative history approves of *Pfizer*. *See* H.R.Rep. No. 97-686, reprinted in 1982 U.S.C.C.A.N. 2487, 2495.

[13] 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

[14] *Id.* at 745-46, 97 S.Ct. 2061, *quoting id.* at 760, 97 S.Ct. 2061 (Brennan, J., dissenting).

[15] 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[16] Because of this, *Pfizer* is distinguishable from this case, since one can argue, as the majority does, that the injury to the foreign plaintiff occurred in the United States. But there is nothing in the reasoning of *Pfizer* that suggests that the facts of *Pfizer* define the outer limit of the antitrust laws. Further, even if we assume that the plaintiffs in *Pfizer* were injured in the United States, they were injured as buyers in an export transaction from the United States. Under section 6a(1)(B) and the majority's reading of the section 6a(2), injuries to buyers of American exports do not create jurisdiction under the antitrust laws. Yet the legislative history of the FTAIA cites *Pfizer* with approval. *Pfizer* maintains its force after the FTAIA because the conspiracy in *Pfizer* also affected Americans in domestic commerce. This is why section 6a(2) states "gives rise to a claim" and not "gives rise to the plaintiff's claim."

[17] *Id.* at 314-15, 98 S.Ct. 584.

[18] For a real-life example of an arbitrage attempt, *see Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102, 1104 (S.D.N.Y.1984) (describing how antitrust plaintiff attempted to arbitrage pharmaceuticals by repackaging drugs purchased in England for sale in Germany).

[19] 434 U.S. at 315, 98 S.Ct. 584 (footnote omitted).

[20] H.R.Rep. No. 97-686, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 2487, 2495 (emphasis in original), citing *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[21] *Id.* at 2494-95.

[22] *Id.* ("Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions-that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.").

[23] 148 F.3d 1080 (D.C.Cir.1998).

[24] *Id.* at 1086.

[25] *See* Majority Op. at 426 n. 18.

[26] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

[27] *See, e.g., United States v. Lopez*, 514 U.S. 549, 552-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (recounting the development of Commerce Clause jurisprudence in the domestic context).

[28] *See* Majority Op. at 423-24.

[29] *See E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("This 'canon of construction is a valid approach whereby unexpressed congressional intent may be ascertained.' In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage [extraterritorially].' ").

[30] In any case, when Congress enacted the FTAIA, is was legislating against a backdrop of extraterritorial application of the Sherman Act; thus we cannot presume that Congress treated non-extraterritoriality as the default condition. *See Hartford Fire Ins.*, 509 U.S. at 796, 113 S.Ct. 2891 ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States ."); *id.* at 814, 113 S.Ct. 2891 (Scalia, J., dissenting) ("[I]t is now well established that the Sherman Act applies extraterritorially."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

[31] *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir.1997). For further discussion, *see McCormack v. NCAA*, 845 F.2d 1338, 1341 (5th Cir.1988); *see also Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

[32] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990), quoting *Brunswick*, 429 U.S. at 489, 97 S.Ct. 690.

[33] *See Atlantic Richfield*, 495 U.S. at 334, 337-38, 110 S.Ct. 1884; *Brunswick*, 429 U.S. at 488-89, 97 S.Ct. 690.

[34] Appellees rely heavily on the antitrust injury requirement in arguing that Statoil lacks standing. Their argument that Statoil's injury was not caused by high prices charged to U.S. consumers misconstrues the antitrust injury requirement. Antitrust injury does not limit standing to U.S. consumers but to anticompetitive injuries. *See Doctor's Hospital*, 123 F.3d at 305-06; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).

[35] *McCormack*, 845 F.2d at 1341.

[36] Indeed, the fact that the FTAIA protects American exporters from antitrust liability for conduct that restrains export trade indicates that the FTAIA is not concerned with regulating foreign economies.

Victor Zelman and Betty Zelman,
Plaintiffs, Appellants,

v.

Richard L. Gregg, Commissioner of the Public Debt, et al.,
Defendants, Appellees,

U.S. Court of Appeals for the First Circuit
16 F.3d 445 (1st Cir. 1994)

Submitted July 7, 1993. Decided Feb. 17, 1994

Victor Zelman and Betty Zelman on brief pro se.

Stuart E. Schiffer, Acting Asst. Atty. Gen., Jay P. McCloskey, U.S. Atty., Barbara C. Biddle and Deborah Ruth Kant on brief, for defendants, appellees.

Before CYR, BOUDIN and STAHL, Circuit Judges.
BOUDIN, Circuit Judge.

This is a suit by the owners of federal savings bonds that were allegedly stolen and redeemed without the owners' permission. The district court dismissed the suit on the ground that it had been brought in the wrong court. With certain clarifications, we affirm.

In this case Victor and Betty Zelman, a husband and wife residing in Maine, brought suit pro se in district court against the Secretary of the Treasury and the Commissioner of the Public Debt. Their complaint alleged that six series E bonds issued to one or both of the Zelmans, currently worth (in total) more than $10,000, had been stolen from them and that the government was now refusing to issue replacements. [1] Claiming that the government had breached the contractual rights reflected in the bonds, the Zelmans sought an injunction to require the issuance of replacements.

Prior to bringing suit, the Zelmans had requested replacements from the Bureau of Public Debt which administers the savings bond program for the Treasury. In reply the Bureau told the Zelmans the following: first, government records showed the bonds to have been redeemed more than ten years ago; second, government

regulations create a presumption that redeemed bonds have been properly paid if no claims have been filed within ten years of redemption; and third, since the government now retains no other records after ten years has elapsed following redemption, "no details regarding ... redemption [of the Zelmans' bonds] can be furnished."

Broadly speaking and with certain qualifications, government bonds are viewed as contracts between the government and the owners, whose terms are fixed by statutes, regulations and offering circulars. *Estate of Curry v. United States*, 409 F.2d 671, 675 (6th Cir. 1969); *Wolak v. United States*, 366 F. Supp. 1106, 1111-12 (D. Conn. 1973) (collecting and quoting numerous cases). In response to the Zelmans' suit, which explicitly alleged a breach of contract, the U.S. Attorney asserted that the district court lacked subject matter jurisdiction over the suit. This is so, the U.S. Attorney argued in a motion to dismiss, because contract claims against the United States for amounts of over $10,000 may be brought only in the Claims Court. 28 U.S.C. §§ 1346(a) (1), 1491(a) (1).

The district court agreed with the government, stating that "since this is an action for breach of contract and more than $10,000 is at stake, the Tucker Act provides that jurisdiction exists only in the ... Claims Court...." Noting that no request for such a transfer had been made, see 28 U.S.C. § 1631, the district court dismissed the case for want of jurisdiction and without prejudice to a new action in a court with jurisdiction. The Zelmans have sought review in this court, arguing that the dismissal was improper and that redress apart from damages should be afforded to them.

On appeal, the Zelmans first argue that each bond should be treated as a separate contract and that, individually, each such claim in this case is under $10,000 and within the jurisdiction of the district court. The government responds that there is "some authority" for the proposition that separate claims for under $10,000 should not be aggregated;[2] but it says that the district court still "lacked jurisdiction" to afford the only remedy sought by the Zelmans in this case, namely, an injunction directing re-issuance of the bonds. Indeed, we have held that "[f]ederal courts do not have the power to order specific performance by the United States of its alleged contractual obligations." *Coggeshall Development Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989).

One could argue about whether "jurisdiction"--a term with many shades of meaning—is lacking if the complaint has asserted a colorable claim (in this case, for breach of contract) but named an unavailable remedy. But the Zelmans did not argue

to the district court that the claims may be disaggregated (although two sentences in their memorandum hinted at such an argument) and even now the government does not quite concede the point. We are reluctant to overturn the district court in a civil suit based on a disaggregation theory not raised in that court. Indeed, the government does not confess error on this issue and may dispute or hope to distinguish the disaggregation precedents.

Accordingly, we are disposed to affirm the district court but without prejudice to the Zelmans' filing of a new suit in the same district court if they wish to pursue their disaggregation theory. We say "if" because the Claims Court has unquestioned jurisdiction, assuming that the Zelmans are now prepared to accept damages as their relief. The Zelmans might prefer to refile their suit in the Maine district court or they might conclude that the Claims Court, although more distant, is a preferable forum in order to avoid another possible round of jurisdictional controversy. The initial choice is theirs.

But we have something more to say about the course of this matter. The pages of correspondence between the Zelmans and the Treasury's Bureau of the Public Debt will be familiar, at least as a prototype, to anyone who has ventured to assert a money claim against a public body. Although the Bureau's letters to the Zelmans (and later to their senator) may well be accurate in a literal sense, most lay readers would likely believe that the Bureau had determined the Zelmans' claim to be without merit. The critical sentences, repeated in several of the letters, are these:

[T]he regulations governing savings bonds provide that bonds for which no claim has been filed within 10 years of the recorded date of redemption will be presumed to have been properly paid. At that time, the payment records of such bonds are destroyed and from then on there is no data available from which photographs or other details regarding the redemption can be obtained. The critical phrase, "presumed to have been properly paid," is taken verbatim from the current Treasury regulations, 31 C.F.R. Sec. 315.29(b), although the regulation in question is not cited in the letters. The word "presumed" has more than one meaning but it quite often refers to a rebuttable presumption; that is, when the predicate fact is proved (here, that the bonds were redeemed by someone over ten years ago), then some other "presumed" fact (here, that the bonds were redeemed by their real owners) will be taken to be true--unless and until the party disputing the presumed fact offers substantial countervailing evidence. *See* Fed.R.Evid. 301; 2 J. Strong, McCormick on Evidence Sec. 342 (4th Ed.1992).[3]

Assuming for purposes of discussion that the regulation refers to a rebuttable presumption, then quite likely the Zelmans have the burden of offering evidence to establish that the bonds were stolen from them and if redeemed were redeemed without their permission. They might have such a burden even without the presumption. The Zelmans may be hindered because the Bureau has apparently disposed of the records of redemption apart from recording the fact of redemption. Still, a factfinder might well believe the Zelmans, especially if they can corroborate the theft of the bonds. Stolen bonds are unlikely to have been redeemed by their rightful owner.

If the Bureau regards the presumption as rebuttable, one might expect at least one of its letters to say this to the Zelmans in plain language and, further, to tell them what process (a review board, a court) is available to get a decision on the factual issue. If instead the Bureau thinks that the regulation creates an irrebuttable presumption--a kind of ministatute of limitations--then it ought to have said so plainly to the Zelmans. To leave the matter in a state of confusion is not an attractive posture for an agency that must face this very issue with some frequency.

The government is a huge body employing millions of people, and needs to use regulations, routines and form letters. It is also right that its servants should be chary about claims against the Treasury, claims that are often ill-founded and sometimes dishonest. But it is not too much to ask that the Bureau of the Public Debt give a plain statement of its position--and even useful directions--to those citizens who have lent the government money, seek repayment, and have very little idea how to navigate through the forest of rules and procedures.

The Zelmans' filings, both in the district court and in this court, argue variously that case law supports equitable relief; that it is a violation of the due process clause to apply regulation Sec. 315.29(b) as a statute of limitations to bonds sold before the regulation was promulgated; and that the records concerning the redemption should not have been destroyed since without them the Zelmans cannot prove their case. These arguments do not alter our view that the district court should be affirmed.

The Zelmans' argument for equitable relief rests on the ground that the government had an obligation, under the law as it existed when the bonds were purchased, to replace stolen bonds that have been improperly redeemed. This argument is difficult to appraise because the text of the provisions relied upon by the Zelmans is not quoted by the Zelmans, and the statutes and regulations to which the Zelmans cite do not clearly set forth the obligation that the Zelmans impute.[4]

Whether such an obligation might be made out, however, is an issue we need not determine.

On the Zelmans' own version of the matter, the obligation on which they rely existed under statutory or regulatory language that has since been repealed. Although their position is not clearly explained, they may be arguing that the procedures and remedies that applied in 1968 and 1969 were incorporated into the bond contracts by implication or by the offering circular (which is not, however, quoted or cited). *See generally Wolak*, 366 F. Supp. at 1113-14. If this is their argument, then the Zelmans are back to arguing that the government has breached its contract and that equitable relief should be afforded for this breach.

The difficulty is that it is settled in this circuit that equitable relief cannot be obtained on contract claims against the government, *Coggeshall*, 884 F.2d at 3, with very narrow statutory exceptions that are not here relevant. 28 U.S.C. §§ 1491(a) (2), (3). This rule may not be followed everywhere and it can be especially hard to apply where contract claims are mingled with other claims not dependent on contract. *See, e.g., Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992). However, the rule remains the law of this circuit and may not normally be reconsidered except by the court en banc.[5]

The Zelmans' next argument is that it violates due process for the government to impose, through regulation 315.29, a ten-year statute of limitations (measured from an illegal redemption) on requests by rightful owners for replacement or payment of their stolen bonds. No such regulation existed, say the Zelmans, when their bonds were purchased; and (they say) their bonds have been extended by the Treasury for thirty years past their original maturity so the Zelmans had no earlier reason to inquire into their theft or illegal redemption.

It will be time enough for the courts to consider such a constitutional attack on the regulation if and when the government endorses the reading of the regulation as a statute of limitations and if and when the courts accept that reading. As we have already noted, the regulation on its face is susceptible to a quite different reading, namely, that it creates a rebuttable presumption (starting ten years after a redemption) that the bonds were lawfully redeemed. This in turn would leave it open to the rightful owner to show that the bonds were lost or stolen and were not redeemed by the rightful owner.

The Zelmans, appearing pro se, may misunderstand what is entailed in a showing of this kind. It would not be their automatic obligation to establish the

details of the theft or identify the party who wrongfully redeemed the bonds. One might expect them to shed some light on where the bonds were kept, how they might have been purloined, why it took so long to discover the loss, whether the loss was reported to the police, and what investigations were made; but these are matters that go to plausibility and corroboration. If the Zelmans tell a plausible story, nothing prevents the trier of fact from accepting it.

As for the details of the redemption, all that a trier of fact would likely demand from the Zelmans is testimony that they did not redeem the bonds, did not authorize anyone to do so, and have no idea who did redeem the bonds. The fact that the government has destroyed the records is more likely to inconvenience it rather than the Zelmans, assuming that they have a plausible story to tell. Of course, we are proceeding on the arguendo premise that the regulation is not a statute of limitations; but if it is a statute of limitations, the destruction of the records is probably irrelevant anyway.

We do not know whether the Zelmans will refile their contract claim lawsuit in the district court or in the Claims Court. But we trust that, once a forum with jurisdiction is chosen, government counsel will pay some mind to the question whether the Zelmans have a valid claim against the government or how to get this issue decided at minimum expense and without further delay. Thus far, this case is not much of an advertisement for savings bonds.

The judgment of the district court is affirmed without prejudice to the filing of a new suit for damages either in the Claims Court or in the district court (subject to resolution of the disaggregation issue). No costs.

NOTES

[1.] The series E bonds assertedly stolen from the Zelmans appear to have been registered bonds rather than bearer bonds. See 31 C.F.R. Sec. 315.5 ("Savings bonds are issued only in registered form.... The registration is conclusive of ownership, except as provided in Sec. 315.49 [relating to correction of error in registration].")

[2.] *See e.g., Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983); *United States v. Louisville & Nashville R.R.*, 221 F.2d 698, 701-03 (6th Cir. 1955); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851-52 (1st Cir. 1947); *see also* 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Sec. 3647 at 287 (2d ed. 1985)

[3.] Occasionally the term "presumption" is used to indicate that the presumed fact is conclusively or irrebuttably presumed and the opponent will not be allowed to show the contrary. *See e.g., Stanley v. Illinois*, 405 U.S. 645, 656-57, 92 S. Ct. 1208, 1215-16, 31 L. Ed. 2d 551 (1972) (voiding irrebuttable statutory presumption); 2 *McCormick* at 451. And, to make matters even more confusing, the term is sometimes used to refer to a mere permissible inference. *See County Court of Ulster County v. Allen*,

442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979) (referring to "an entirely permissive inference or presumption, which allows--but does not require"--an inference of one fact from proof of another)

[4.] Former 31 U.S.C. § 738a(a) provided that the Secretary of the Treasury, when it is "clearly proved to the satisfaction of the Secretary" that non-bearer securities of the United States have been lost or stolen, "shall" re-issue a security "which has not matured or become redeemable" and shall make payment on one that "has matured or become redeemable." This section was supplanted in 1971 by one that said that the Secretary had authority to grant relief for loss or theft of government securities, 85 Stat. 74; the current comparable version is 31 U.S.C. § 3125(b) (The Secretary ... may provide relief ...)

[5.] As already noted, the Zelmans have not pointed to any law currently in force that gives them a statutory right to reissuance of the bonds (as opposed to damages based on breach of contract). Thus we have no occasion to consider whether or when--despite the Tucker Act--a district court might be able to grant injunctive relief, with monetary implications, based on statute rather than contract. Compare *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989); *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985)