No. 04-786

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENDALE FEDERAL BANK, FSB

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether otherwise fraudulent conduct consisting of the submission at different times of inconsistent statements in support of a claim against the government under 28 U.S.C. 2514 is excused because the later, false set of statements were due to "hindsight."

2. Whether Glendale Federal Bank (Glendale) was entitled to an award of $381 million in damages despite the findings of the courts below that Glendale had not proven a necessary predicate of its claim.

3. Whether Glendale was entitled to a reliance award, which is based on the costs Glendale incurred in reliance on the contract, without an offset for benefits that Glendale admittedly received from the contract.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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The Acting Solicitor General, on behalf of the United States, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. Although we respectfully suggest that the Court should deny the petition in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, if the Court grants that petition, it should also grant this cross-petition. If the Court denies that petition, it also should deny this cross-petition.

OPINIONS BELOW

The first opinion of the court of appeals on damages (04-626 Pet. App. 22a-38a) is reported at 239 F.3d 1374. The second opinion of the court of appeals, reviewing the trial court's remand decision on damages (04-626 Pet. App. 1a-9a), is reported at 378 F.3d 1308. The trial court's first decision on damages (04-626 Pet. App. 39a-79a) is reported at 43 Fed. Cl. 390. The trial court's decision on remand (04-626 Pet. App. 10a-21a) is reported at 54 Fed. Cl. 8.

This case was previously before this Court in a consolidated appeal of three cases concerning liability. This Court's decision is reported at 518 U.S. 839. The court of appeals' previous decision concerning liability is reported at 64 F.3d 1531. The trial court's previous liability decision is reported at 26 Cl. Ct. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. The petition for a writ of certiorari in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, was placed on this Court's docket on November 10, 2004. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 28 U.S.C. 2514, which provides that "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."

STATEMENT

This is one of more than 40 *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) currently pending in the Court of Federal Claims and the Federal Circuit. The petition in No. 04-626, filed by Glendale Federal Bank, FSB (Glendale), seeks review of the court of appeals' rejection of Glendale's claims for recovery of an additional $528 million in damages. This cross-petition seeks review of the court of appeals' rejection of the government's claims that Glendale was not entitled to the $381 million in damages that were awarded.

1. As a result of high interest rates and inflation in the late 1970s and early 1980s, a number of federally insured savings and loan associations found themselves holding long-term, fixed-rate mortgages with low interest rates, while they were forced to pay high rates to attract depositors.

Winstar, 518 U.S. at 845 (plurality opinion). One of the institutions in that situation was the First Federal Savings and Loan Association of Broward County, Florida (Broward). By 1981, Broward had liabilities that exceeded its assets by more than $734 million. Cross-respondent Glendale, a federally insured thrift institution operating in California, submitted a proposal to the Federal Home Loan Bank Board, the thrift regulatory agency, to acquire Broward. The Board approved that proposal, and Glendale acquired Broward. *Id.* at 861.

Federally insured thrifts had always been required to maintain minimum amounts of capital reserves, ordinarily expressed as a percentage of their assets. This Court in *Winstar* held that the transaction in which Glendale acquired Broward included a contractual undertaking by the government to permit Glendale to recognize what came to be known as "supervisory goodwill"—*i.e.*, the excess of Broward's liabilities over its assets—as capital for purposes of satisfying the federal capital standards, subject to amortization over a period of 40 years. *Winstar*, 518 U.S. at 861-864; see *id.* at 919 (Scalia, J., concurring in the judgment).

Faced with widespread and increasing losses by thrifts in the late 1980s, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which substantially overhauled the structure of thrift regulation. FIRREA also required thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts, including Glendale, to count supervisory goodwill as capital for federal regulatory purposes. 04-626 Pet. App. 26a.

Glendale was able to continue to operate, notwithstanding FIRREA's new requirements, and it sold Broward in 1994. *Id.* at 46. Nonetheless, Glendale brought suit in the Court of Federal Claims, alleging that it was entitled to an award of damages as a result of the breach. This Court held in *Winstar* that the government was liable to Glendale for breach of contract. 518 U.S. at 910 (plurality opinion); see *id.* at 919 (Scalia, J., concurring in the judgment). This case concerns Glendale's claims for damages for that breach.

2. At the damages trial, Glendale pursued three different theories of damages: expectancy, reliance, and restitution.

a. *Expectancy.* The primary damages theory that Glendale presented at trial was an expectation theory based on a claim of lost profits. Because thrifts are required to maintain a particular amount of capital as a percentage of total assets, the amount of capital a thrift possesses establishes a ceiling on the assets it can hold. If the thrift loses capital, it must either replace it or shrink its assets. 04-626 Pet. App. 27a. Glendale's expectation theory was based on its claim that it lost capital when, after FIRREA, its supervisory goodwill was phased out as capital, and it therefore shrank its assets from $25.6 billion to $14.4 billion to remain in capital compliance. Glendale asserted that it lost profits it would have earned on the increased assets. 04-626 Pet. App. 27a.

Having more assets, however, does not always equate to earning more profits. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 851 (1996) (plurality opinion) ("[T]he treatment of supervisory goodwill as regulatory capital was attractive because it inflated the institution's reserves, thereby allowing the thrift to leverage more loans (and, *it hoped*, make more profits.") (emphasis added). Additional profits depend upon whether additional assets, when funded with additional liabilities, would produce a positive cash flow. See *Bank United of Texas, FSB* v. *United States*, 50 Fed. Cl. 645, 655 (2001) ("Even under plaintiffs' theory and models, no profits could have been lost unless and until Bank United would have—but was unable to [*sic*] as a result of lost leverage capacity—actually used the leverage capacity by borrowing, reinvesting and achieving a positive rate spread."), aff'd in part and rev'd in part, 80 Fed. Appx. 663 (Fed. Cir. 2003) (table), cert. denied, 125 S. Ct. 33 (2004); *Columbia First Bank* v. *United States*, 60 Fed. Cl. 97, 112 (2004).

In an effort to show that its shrinkage caused it to earn lower profits, Glendale initially introduced statements and pleadings contending, as the trial court explained, that "the breach of the goodwill provision forced Glendale to restructure and exit out of higher risk-weighted lines of business." 04-626 Pet. App. 55a. Specifically, from 1991 through 1993, Glendale filed sworn affidavits from its top officers and a "Statement of Remedy Claims" with the trial court and the court of appeals, stating that the phase-out of goodwill forced Glendale to terminate all high-risk lending, 99-5103 C.A. App. A3000133-34,[1] A3000171-72, and "to focus almost exclusively on [lower risk-weighted] mortgages on single family residences," *id.* at A3000036, A3000040, A3000041, A3000052; A3000001-82, resulting in lost profits.

By the time the trial on damages was held, however, it had become clear that the 1990s marked what Glendale described as "the worst real estate recession in Southern California since the great depression," 03-5136 C.A. App. A1000107, and that "exiting the high-risk business lines was beneficial to Glendale," 99-5103 C.A. App. A4000159 at ¶ 19 (Glendale's Reply to the Government's Special Plea in Fraud). That recession would have made Glendale's continuing (and increased) participation in high-risk lending distinctly unprofitable. Accordingly, at the damages trial, Glendale's pretrial affiants now testified "that Glendale was planning to exit these same lines of [higher risk] business for

[1] Citations to 99-5103 C.A. App. are to the Joint Appendix in Nos. 99-5103 and 99-5113, the first damages appeal that was decided in the opinion reproduced at 04-626 Pet. App. 22a-38a. Citations to 03-5136 C.A. App. are to the Joint Appendix in Nos. 03-5136 and 03-5139, the second damages appeal that was decided in the opinion reproduced at 04-626 Pet. App. 1a-9a.

reasons unrelated to the breach." 04-626 Pet. App. 55a. Glendale now presented a new lost profits claim, asserting that, in the absence of the breach, rather than focus upon high-risk assets, Glendale would have increased its investment in low-risk investments. Glandale alleged that its loss of assets precluded it from earning the profits it would have made on those lower-risk investments. *E.g.*, 99-5103 C.A. App. A3000094-95 at ¶ 15; see 04-626 Pet. App. 46a (Glendale claimed it "would have earned at least 1.1% return on its foregone assets.").

Presented with Glendale's irreconcilable sworn statements, the government asserted a special plea in fraud pursuant to 28 U.S.C. 2514, which provides for forfeiture of any "claim against the United States * * * by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." The trial court recognized that the sworn statements of Glendale's managers from 1991 through 1993 that "the breach of the goodwill provision forced Glendale to restructure and exit out of higher risk-weighted lines of business" were "not consistent with statements made by [the same Glendale managers] during trial * * * that Glendale was planning to exit these same lines of business for reasons unrelated to the breach." 04-626 Pet. App. 55a. The court also found that, of the two sets of inconsistent statements, it was the later ones that were "not credible," because "the contemporaneous affidavits suggest that Glendale believed at the time [of the breach] that it should continue to invest in higher risk-weighted lines of business." *Id.* at 56a.

The trial court nonetheless held that the differences between the two sets of statements "do not rise to the level of a showing of fraud." 04-626 Pet. App. 56a. The court did not accept Glendale's explanations that its earlier affidavits were "inadvertently inaccurate"—that Glendale's attorneys and officers "were confused generally about causation" or that one of its affiants "was insufficiently attentive at the time the original affidavits were offered." *Ibid.* Instead, the court refused to apply Section 2514 on the ground "that Glendale cannot help but think about what it would have done with the benefit of hindsight" and that "*post hoc* reconstructions," such as Glendale's later submissions, "are likely to be colored by knowledge of what actually happened." *Ibid.*

On the merits of Glendale's claim for expectancy damages, the court held that Glendale's "lost profits model contains several serious infirmities, which, for reasons similar to [the inconsistencies in Glendale's testimony], make it unreliable and the lost profits too remote and speculative to be granted." 04-626 Pet. App. 57a; see *id.* at 54a ("serious defects"), 57a n.3 (itemizing "infirmities"), 13a (Glendale's model "implausible").

b. *Reliance.* In addition to its lost profits claim, Glendale asserted what it characterized as a claim for "wounded bank damages," which the trial court classified as a form of reliance damages. 04-626 Pet. App. 74a. Glendale became a "wounded bank," it claimed, when it fell from capital compliance in 1992 (three years after the breach) and began to incur increased costs of funds (*i.e.*, the need to pay higher rates on deposits and borrowings). *Id.* at 75a. At trial, Glendale sought those costs as damages, tracing them to the contract by attempting to show that, absent the phase-out of goodwill, it would have earned sufficient profits to maintain capital compliance and avoid the "wounded bank" costs. See *id.* at 74a.

The trial court accepted Glendale's assertion that it "would not have fallen out of [capital] compliance but for its entry into this contract and the subsequent breach," 04-626 Pet. App. 74a, and that "the government's breach ultimately forced Glendale out of capital compliance," *id.* at 75a. The court awarded Glendale $335.4 million in "wounded bank" reliance damages. *Ibid.* The court did not address the contradiction between its earlier finding that Glendale's plan, absent the breach, was to invest in high-risk lines of business that would have been unprofitable and would have therefore contributed to a lack of capital, and its finding that the breach, which saved Glendale money by forcing it to abandon those high-risk investments, forced Glendale out of capital compliance. In addition to the "wounded bank" reliance damages, the court awarded miscellaneous reliance damages to Glendale of $56.7 million for other increased costs alleged to have been caused by Glendale's fall from capital compliance. *Id.* at 75a-76a. The total award of reliance damages was $381 million.

c. *Restitution.* Glendale also requested recovery under a restitution theory, contending that, by purchasing Broward, Glendale had saved the Government the net liabilities of Broward and that it was entitled to recovery of that benefit conferred on the government. The trial court awarded Glendale approximately $510 million on the restitution claim. 04-626 Pet. App. 76a. That amount consisted of the $798.2 million amount by which Broward's liabilities exceeded its assets at the time Glendale acquired it, *id.* at 67a, 76a, minus $288.37 million in profits and other benefits Glendale obtained as a result of the acquisition, which included $243 million in profit Glendale realized when it sold Broward in 1994, *id.* at 76a; see *id.* at 7a. The trial court also awarded Glendale $18.24 million on a separate restitution claim, which was the amount Glendale paid the government under an "interest rate shifting" provision of the contract. *Id.* at 71a-72a; see *id.* at 76a.

3. The court of appeals affirmed the trial court's initial damages decision in part and reversed it in part. 04-626 Pet. App. 22a-38a. Glendale did not appeal the trial court's denial of expectancy damages.

With respect to the special plea in fraud, the court noted that Glendale's officers' "statements made earlier in this protracted litigation conflict with statements they made more recently in support of Glendale's damages theories." *Id.* at 29a. Nonetheless, the court affirmed the trial court's rejection of the government's invocation of Section 2514. The court stated that fraud had to be proven by "clear and convincing evidence, *ibid.*, and concluded that the trial court's finding that the facially contradictory statements of Glendale executives were driven by "the benefit of hindsight," rather than fraud, was "not clearly erroneous." *Id.* at 30a.

The court of appeals reversed the award of restitution. The court concluded that "the action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government * * * saving the dollar value of the net obligations of the thrift." 04-626 Pet. App. 34a; see *id.* at 3a (restitution theory "basically flawed" because government's supposed benefits were "speculative and indeterminate"). That was in part because "it is not at all clear that but for Glendale's purchase of Broward the Government would have been called to make up th[e] [$798.2 million] deficit then and there," but rather could have pursued other options. *Id.* at 34a. The court further reasoned that the government did not receive a benefit in that amount, because in any event "the Government was not free of potential liability for the failing thrift." *Id.* at 35a. The government continued to insure Glendale's deposits (including the deposits it acquired from Broward) after the acquisition and, if conditions worsened, the government "would have had to step in * * * and assume the very losses that Glendale now claims were benefits the Government received." *Ibid.*

Finally, the court of appeals did not rule on the government's challenges to the reliance damage award. Instead, it remanded for a calculation of total reliance damages in light of its disposition of Glendale's restitution claim. 04-626 Pet. App. 35a-38a.

4. On remand, the trial court reinstated its earlier award of "wounded bank" and related damages, on the ground that "there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages." 04-626 Pet. App. 20a. The court again did not address the inconsistency between that award of damages based on the post-breach costs to Glendale of its falling out of capital compliance and the court's earlier rejection of Glendale's theory that the breach caused it to fall from capital compliance by depriving it of opportunities to make low-risk investments. In addition, the court in its first damages opinion had found that Glendale received a $243 million profit on the sale of Broward that it then deducted from the award of restitution. See p. 8, *supra*; 04-626 Pet. App. 76a. The court now declined, without comment, to deduct that amount from the reliance damages award, which was supposed to be based on the net costs Glendale incurred in reliance on the contract.

Finally, the trial court rejected Glendale's claim for additional reliance damages. The court explained that Glendale's theory once again "relies on treating the assumption of Broward's liabilities as a cost, or initial investment," while in fact neither party "was called upon to pay the potential losses" and Glendale's model "does not show that [Glendale] actually had to expend this amount in reliance on the contract." 04-626 Pet. App. 18a.

5. The court of appeals affirmed the trial court's remand judgment in its entirety, rejecting the government's arguments that the $381 million award for reliance and related damages was erroneous and Glendale's claim for additional reliance damages. 04-626 Pet. App. 1a-9a.

With respect to the government's appeal, the court correctly noted that the "wounded bank" damages award was based on the theory that "three years after, and as a result of, the breach, Glendale fell out of capital compliance," which, in turn, made "depositors and * * * others nervous about placing funds" with Glendale and therefore required the bank "to pay more interest to attract depositors * * * and * * * to pay higher fees for deposit insurance." 04-626 Pet. App. 5a. The court also noted the government's arguments that Glendale's conclusion that the breach caused Glendale to fall out of capital compliance "relied upon the same model [Glendale] presented in support of its earlier claim for lost profits under the now-discredited expectancy damages theory"; that because Glendale "did not offer any other evidence" that the breach caused it to fall out of capital compliance, "it failed to prove that it would have remained in capital compliance in the absence of the breach"; and that "in any event, Glendale actually benefited, rather than was hurt, by acquiring the Florida thrift." *Ibid.* Without specifically addressing those arguments, however, the court simply stated that it was "unpersuaded that the trial court's factual findings and conclusions * * * are clearly erroneous." *Id.* at 6a.

The court of appeals also rejected the government's argument that, "even if Glendale is entitled to reliance/ 'wounded bank' damages of $381 million, the Government is entitled to an offset of $243 million," representing the "amount that Glendale incorporated as a gain * * * in its accounting for losses when it sold the Florida division." 04-626 Pet. App. 7a. The court concluded that "[t]he trial court did not deduct the $243 million from its final award to Glendale, and we see no reason that we should do so." *Ibid.*

With respect to Glendale's appeal, the court affirmed the trial court's finding that Glendale's expert's report "reflected an absence of an accurate accounting of the actual losses"

Glendale suffered to support its claim for increased reliance damages. *Id.* at 6a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Although this case resulted in a huge and unwarranted damages award for Glendale, the question whether the court of appeals correctly resolved the damages issues in this particular case—notwithstanding the large sum of money involved—does not appear to be sufficient general importance to warrant this Court's review. If, however, the Court grants Glendale's petition for certiorari to consider whether the court of appeals correctly ruled on Glendale's claim to $528 million in additional, restitution damages, the Court should consider all issues relevant to the proper calculation of damages and also grant this cross-petition. In that way, if the Court determines that the damages issues in this case are sufficiently important to warrant its review, the Court would be able ultimately to arrive at the correct resolution of those issues. In particular, if the Court grants Glendale's petition, the Court should also consider three reasons why the award of $381 million in so-called "wounded bank" damages already vastly overcompensates Glendale for any harm caused by the phase-out of goodwill.

A. The Courts Below Erred By Reading A "Hindsight" Defense Into 28 U.S.C. 2514

Section 2514 requires the forfeiture of the entire claim, including those portions which would have been awarded absent the fraud, if "any fraud is practiced or attempted to be practiced in proving, establishing or allowing a claim." *Kamen Soap* v. *United States*, 124 F. Supp. 608, 620 (Ct. Cl. 1954); see also *Brown Constr. Trades, Inc.* v. *United States*, 23 Cl. Ct. 214, 216 (1991); *O'Brien Gear & Mach. Co.* v. *United States*, 591 F.2d 666, 667-668 (Ct. Cl. 1979) ("the primary issue concerns the honesty of the records presented by the plaintiff, on the pretrial and trial of the case"); *Globe Works* v. *United States*, 45 Ct. Cl. 497, 504-505 (1910) (similar). To obtain a forfeiture under Section 2514, the United States must prove that the plaintiff presented a statement known to be false or fictitious, with an intent to deceive the government concerning the validity of the claim. *McCarthy* v. *United States*, 670 F.2d 996, 1004 (Ct. Cl. 1982). Fraud may be established through circumstantial evidence, *ibid.*, including evidence of conflicting and evasive testimony. *E.g.*, *UMC Electronics Co.* v. *United States*, 43 Fed. Cl. 776 (1999).

The court of appeals added to the settled body of law a "hindsight"-based exception to Section 2514, which justifies otherwise fraudulent conduct. That holding, which finds no support in the language or history of Section 2514, could substantially limit the effectiveness of that provision. A wrongdoer could claim that false statements made in an effort to succeed on a claim against the government were merely the result of an after-the-fact perception of events, *i.e.*, "hindsight." That is particularly true in a situation like this, in which the common thread between the two versions is that they both would maximize recovery at the time they were made.

1. In 1989, at the time of the breach, nearly half of Glendale's $25 billion in assets consisted of high credit risk loans, which were then its most profitable investments. 99-5103 C.A. App. A1020190-91, A3000171-72 at ¶ 39. Glendale concedes that continued (and expanded) use of such high-risk investments in the 1990s would have led to huge losses. See 03-5136 C.A. App. A1002177, A1002181-82 (Trafton); see also 99-5103 C.A. App. A4000159 at ¶ 19 (Plaintiff's Reply to Defendant's Special Plea in Fraud).[2]

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[2] As Glendale's Chairman and Chief Executive Officer Stephen Trafton testified at the damages trial:

Accordingly, if the contract (and the breach) caused Glendale to curtail those high-risk investments, then it in fact *saved* Glendale money and could not justify "wounded bank" reliance damages. On the other hand, if Glendale's plan was to curtail its high-risk investments in any event, then the breach could have cost Glendale money by curtailing *other* potentially profitable investment activities and, potentially, some "wounded bank" damages could have been justified. Thus, central to evaluating Glendale's claim for damages in this case was the question of its business intentions in the early 1990s concerning high risk investments—specifically, whether the breach caused Glendale to curtail those investments. Yet, at critical junctures in this litigation, Glendale officials at the highest corporate levels, in sworn statements, submitted to the courts and the head of a federal agency two wholly incompatible factual versions of their business intentions with respect to high-risk investments at the time of the breach.

a. In 1991, in support of its summary judgment motion on liability, Glendale submitted the affidavit of Kathryn Snyder, its treasurer, who stated that "Glendale has had to cease originating loans on multi-family residential properties with over 37 units as well as commercial/industrial loans," and that it did so "as a result of the government's exclusion from regulatory capital of the goodwill Glendale acquired in the Broward merger." 99-5103 C.A. App. A3000133-34 at ¶¶ 3-

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Q: And sir, exiting the higher-risk businesses and entering the lower-yielding ones, the lower risk ones, turned out to be economically beneficial to Glendale, didn't it?

A: In retrospect, yes, it turned out to be economically beneficial for the reasons we got out of it. The credit risk aspect of the portfolio were too high.

03-5136 C.A. App. A1002181-82 (Trafton).

4. In 1992, Glendale submitted to the court of appeals a 27-page affidavit from its Chairman and Chief Executive Officer, Stephen J. Trafton, in support of its request for expedited appellate review. Mr. Trafton repeated Ms. Snyder's claim:

> The following transactions are illustrative of those [capital-enhancing strategies] Glendale completed following the Strategic Plan *in an effort to compensate for the disallowed goodwill*:
>
> * * * * *
>
> (c) *Glendale has had to sell off millions of dollars of loans in high risk-weighted categories*, such as 37-plus unit apartment loans, and has ceased originating loans altogether *in other high risk-weighted categories, even though the types of loans involved historically have been very profitable*. These transactions have cost, and continue to cost, Glendale many millions of dollars each year.

Id. at A3000171-72 at ¶ 39 (emphasis added).

In January 1993, as part of the damages proceedings, Glendale submitted a 77-page Statement of Remedy Claims, signed by its counsel, to the trial court. The Statement of Remedy Claims represented a "forecast [of] where [Glendale] would have been but for the Government's alleged breach." 99-5103 C.A. App. A3000079 n.56.[3] The Statement asserted:

> To replace (or otherwise compensate for) the excluded goodwill, *Glendale was forced* not only to implement

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[3] See also 99-5103 C.A. App. A4000004, A4000007, A4000013, A4000015, A4000017-18, A4000020, A4000027-28, A4000030-34, A4000038-40 (Nov. 10, 1992, Hearing); *id.* at A4000049, A4000054-56 (Feb. 2, 1993, Hearing); *id.* at A4000089, A4000100-04 (Feb. 17, 1993). Mr. Trafton attended each of the hearings in 1993.

> additional massive restructuring transactions, but also *to exit higher risk-weighted business lines* and to focus almost exclusively on mortgages on single-family residences.

Id. at A3000036 (emphasis supplied). Glendale repeated those assertions numerous times. See, *e.g.*, *id.* at A3000040 (Glendale "exited whole business lines which generated higher risk-weighted assets"), A3000043 (Glendale in 1991 "was forced to eliminate other higher risk-weighted lines of business"), A3000052 (Glendale has "undergone radical changes," such as "exit[ing] lines of lending business," disposing of certain assets, and "concentrat[ing] its remaining portfolios in lower risk-weighted, lower-yielding assets," that "would have been unthinkable—and would not have occurred—but for the government's breach of contract"), A3000061 ("If Glendale were well-capitalized, it would not have restructured its balance sheet so radically and thus would have retained many of the higher risk-weighted, higher-yielding loans and other assets it was forced to sell or replace with lower risk-weighted, lower-yielding alternatives.").[4]

All of those submissions were made with the aim of obtaining money from the United States. Snyder and Trafton made their statements under oath. Moreover, the statements were made at a time when emphasizing the high-risk (but high-yield) nature of the investments foregone would have maximized the damages claim. In each of the submissions, Glendale officials at the very highest levels and its authorized representatives continuously and deliberately asserted that, had the goodwill rules not changed, they

[4] In 1995, Glendale addressed a letter to the Director of the Office of Thrift Supervision (OTS) in support of its damages claims, cautioning OTS about its litigation risk in this case and attaching the Statement of Remedy Claims to show its damages. 99-5103 C.A. App. A3000111-32; A1002189-200 (Trafton).

would have pursued a business plan directed towards higher risk, higher yielding loans.

b. With the passage of time and changes in economic conditions, it became clear that the strategy described by Glendale's officers would have resulted in overwhelming losses. 03-5136 C.A. App. A1002177, A1002181-82 (Trafton); see also 99-5103 C.A. App. A4000159 at ¶ 19 (Plaintiff's Reply to Defendant's Special Plea in Fraud). Accordingly, before the commencement of the damages trial in 1997, Glendale jettisoned its earlier claims and switched to a wholly contrary theory of damages. The Glendale managers who earlier had complained that the breach had "forced" Glendale out of high credit risk lending and into low-risk lending now testified extensively that they *always* had an "aversion" to high credit risk investments and would have disposed of those lines of business even absent the breach of contract.[5] They now testified that, absent the breach, the thrift would have increased its investment in *low*-risk investments. *E.g.*, 99-5103 C.A. App. A3000094-95 at ¶ 15. Describing Glendale's business strategy after the enactment of FIRREA, Mr. Trafton testified that, in the absence of the breach, Glendale would have pursued low-risk investments:

> [T]he bank, *with or without FIRREA*, would have restructured those balance sheets and would have, certainly under my guidance and management, would have gone forward and invested in what it did invest in, which was secondary market standard 1 to 4 family loans and to a large extent, wholesale loans purchased from other banks under mortgage backed securities.

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[5] *See, e.g.*, 99-5103 C.A. App. A1001786 (Trafton) ("[W]e would not have added those same types of [higher-risk] assets that we were desperately trying to get out of, that we had shut off."; "I would have loved to have gotten rid of all the noncore [high-risk] bank the first day I got there."); *id.* at A1001787, A1020273 (Trafton).

99-5103 C.A. App. A1000720 (emphasis supplied). Mr. Trafton now insisted that he took a "harsh view of credit risk" and described his tolerance of high credit risk as "approximately zero." *Id.* at A1001691; see also *id.* at A1020273 (describing his "allergy" to credit risk). Shown the contrary statements in his 1992 affidavit, Mr. Trafton could only say: "I don't know what I had in my mind." *Id.* at A1020292-93, A1020617-20.[6]

Ms. Snyder similarly disavowed her prior affidavit, which she now described as incorrect. 99-5103 C.A. App. A1004130-34. Like Mr. Trafton, she now insisted that "the vast majority" of forgone assets "would have been purchased assets," which are extremely low credit risk investments. *Id.* at A1004139.

c. The trial court recognized that the later statements were "not consistent" with the earlier ones. 04-626 Pet. App. 55a; see *id.* at 56a (noting "discrepancies" between two sets of statements). And it found that the later statements were "not credible" because "the contemporaneous affidavits [from the early 1990s] suggest that Glendale believed at the time that it should continue to invest in higher risk-weighted lines of business." *Ibid.*

The court also rejected Glendale's explanations for its inconsistent statements. The court noted Glendale's arguments that at the time of the earlier statements Glendale's "counsel and officers did not appreciate the distinction between events caused by the breach-related provisions of

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[6] Mr. Trafton stated that what he and other Glendale officials had sworn in their earlier statements was wrong. Describing the Statement of Remedy Claims, he admitted:

> [T]he statement that we were forced to exit high risk weighted business lines and focus almost exclusively on mortgages and single family residences *is incorrect*.
>
> We had already started exiting those lines * * *.

99-5103 C.A. App. A1002156 (emphasis added).

FIRREA and those caused by non-breach related provisions," that Glendale's officers and counsel in the early 1990s "were confused generally about causation," and that Mr. Trafton, in particular, "was insufficiently attentive at the time the original affidavits were offered." 04-626 Pet. App. 56a. Those explanations, however, were foreclosed by the trial court's finding that the earlier statements were in fact the credible ones. The trial court also rejected Glendale's attempt to pin the blame on confusion about causation, concluding instead that "[w]hat Glendale believed was profitable"—and therefore what it intended to invest in—"is irrelevant to any causation problems." *Ibid.* Nonetheless, the trial court excused Glendale's attempt to manipulate its claims against the government and the judicial process by holding that it was "more likely" that Glendale "cannot help" but think about what it would have done with the benefit of "hindsight." *Ibid.*

d. The court of appeals affirmed. 04-626 Pet. App. 29a-30a. Relying on its own past precedent, the court initially held that fraud under Section 2514 must be proven by "clear and convincing evidence." *Id.* at 29a (quoting *Commercial Contractors, Inc.* v. *United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998)). The court then concluded that "[t]he trial court's findings are not clearly erroneous and the trial court's resolution of the issue is affirmed." *Id.* at 30a.

2. The court of appeals erred in its disposition of the fraud issue. As an initial matter, this Court's decisions under other civil fraud provisions suggest that fraud may be proven by a preponderance of the evidence, not the "clear and convincing" evidence that has been required by the Federal Circuit under Section 2415.[7] See *Grogan* v. *Garner*,

[7] The court of appeals in this case relied on earlier circuit precedent applying a "clear and convincing" standard. See 04-626 Pet. App. 27a (quoting *Commercial Contractors*, 154 F.3d at 1362); [other citations to fed cir. re clear and convincing].

498 U.S. 279, 286-287 (1991); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-390 (1983). The preponderance standard is presumptively applicable in civil actions, and that standard would "reflect[] a fair balance between th[e] conflicting interests," *Grogan*, 498 U.S. at 287, of the claimant and the government under Section 2514, and would protect the integrity of the presentation of claims.

In any event, the proof of fraud in this case was sufficient to satisfy either standard of proof. The courts below nonetheless erroneously recognized an exception to Section 2514 that would excuse fraudulent conduct undertaken in establishing a claim against the government when that conduct was the result of "hindsight." To be sure, "hindsight" may well be the *explanation* for why Glendale's managers decided to alter the position they set forth in sworn submissions in the early 1990s, after events showed that those earlier submissions could not support their inflated damages claim. It would equally explain why someone claiming he would have invested funds in Internet stocks in 1997 would have stated a few years later that his plan was only to invest in safe bonds. But the fact that Glendale had a "good" reason to want to change its earlier story does not provide an excuse for the knowingly false statements made in the late 1990s. Nor could that testimony plausibly have been a mere accident or careless misrecollection about events long past; the later testimony of each of the Glendale managers was identical, and it dealt with important matters in a lawsuit about which those same individuals and others had previously testified extensively and made other representations. Indeed, Glendale argued that the later testimony was true; it never argued that it was some kind of mistake or joint delusion.

In short, the fact that "hindsight" showed that the early 1990s position, if maintained, would have harmed Glendale's litigation interests is not a legally valid excuse for fraudulent conduct. The court of appeals accordingly erred—and opened up a potentially significant loophole in the protection provided by Section 2514—in concluding that the trial court's conclusion that "hindsight" was the explanation for Glendale's false statements was the sort of factual finding that could be sufficient to avoid the bar of Section 2514. Had the court ruled correctly, Glendale would have been entitled to no damages.

B. The Lower Courts Erroneously Relieved Glendale Of The Obligation To Present Affirmative Evidence Of Its Alleged "Wounded Bank" Damages

Glendale's claim for so-called "wounded bank" and related damages depended upon a showing that it was actually "wounded"—*i.e.*, fell from capital compliance—as a result of the contract and subsequent breach. That claim depended on a showing that, three years after FIRREA, Glendale fell from capital compliance as a result of the breach. The courts below rejected Glendale's sole factual support for that conclusion. They nonetheless held that Glendale was entitled to $381 million in "wounded bank" damages. In doing so, they departed from traditional damages principles, uniformly applied in other circuits, requiring a plaintiff to present affirmative evidence of damages.

1. Reliance damages are awarded to protect "[plaintiff's] interest in * * * being put in as good a position as he would have been in had the contract not been made." 04-626 Pet. App. 36a (quoting Restatement (Second) of Contracts § 344(b) (1981)). Accordingly, to obtain reliance damages, a plaintiff must show that the costs for which it claims reimbursement were the result of the contract (and breach), rather than some other factor.

Glendale's claim for "wounded bank" reliance damages largely consisted in its claim that it "lost an historical cost advantage over its competitors" in interest rates it had to pay depositors "because the government's breach ultimately forced Glendale out of capital compliance." 04-626 Pet. App. 75a. The greatest part of its damages claim was for reimbursement for those higher rates. See also *id.* at 75a-76a (other "wounded bank" costs). Because the costs for which Glendale claimed reimbursement were the result of its fall from capital compliance, it was critical to Glendale's claim that the contract and breach—rather than its own high-risk investment practices—caused that fall.

The courts below rejected Glendale's proof on that critical point. Glendale argued at trial in 1997-1998 that, absent the breach, it would have "exit[ed]" the "higher risk-weighted lines of business" in which it had been heavily involved, and it would therefore have made substantial profits in lower-risk investments that would have kept it in capital compliance. 04-626 Pet. App. 55a. As explained above, however, the trial court found that claim "not credible," *id.* at 56a, instead crediting Glendale's representations in the early 1990s that, far from "exit[ing]" the higher-risk investments, it would, absent the breach, have increased those investments. See *id.* at 56a (Glendale's earlier statements "seriously challenge the credibility of [Glendale's] trial testimony about the balance sheet structure of Glendale's foregone assets," and "the contemporaneous affidavits suggest that Glendale believed at the time that it should continue to invest in higher risk-weighted lines of business"). In short, as the court of appeals explained, "[i]n response to the phase-out of goodwill [*i.e.*, the breach], Glendale * * * ceased most high credit-risk lending," and "shrinking *reduced* its losses." 04-626 Pet. App. 27a (emphasis added).

It was undisputed that increasing Glendale's higher-risk investments would have turned out to be disastrous. See p. 16, *supra*; *infra*; 03-5136 C.A. App. A1002177, A1023269. Accordingly, far from proving that the breach caused it to fall from capital compliance, the credible evidence accepted by the trial court, and affirmed by the court of appeals, showed that Glendale's capital position was, if anything, *improved* by the breach.

2. Despite the rejection of Glendale's sole evidence supporting its claim that the contract caused it to fall from capital compliance, the trial court justified its award of "wounded bank" damages on the ground that "[Glendale] provided credible evidence, through its highly qualified and perceptive expert Dr. Paul Horvitz, that Glendale would not have fallen out of compliance but for its entry into this contract and the subsequent breach by the government." 04-626 Pet. App. 74a. Dr. Horvitz constructed a model purporting to show that acquiring Broward created "a negative of $500 million in impact on Glendale," and that "Glendale never fell out of capital compliance by $500 million, so it's quite clear that in the nonbreach situation, * * * there's no way to argue that Glendale would have been out of capital compliance." 03-5136 C.A. App. A1021095.

Dr. Horvitz's model fails to demonstrate that, given the high-risk investment strategy that Glendale would have pursued in the absence of the breach, Glendale would not have fallen out of capital compliance in any event. Reliance on Dr. Horvitz's model also contradicts the trial court's statement on remand that Glendale "has failed to persuade the court that its reliance damage model"—*i.e.*, Dr. Horvitz's model—"shows any 'actual losses sustained by the plaintiff as a result of the Government's breach.'" 04-626 Pet. App. 18a. The court of appeals in turn sustained the trial court on that issue. *Id.* at 6a. It noted in that regard the trial court's recognition that "the framework for the calculation of reliance damages" under circuit precedent "focuses on actual out-of-pocket losses, not paper calculations of losses," and that "much of Broward's paper deficit was eliminated by the reduction in interest rates." *Ibid.* Dr. Horvitz's model therefore is insufficient to plug the gap in Glendale's evidence in this case.

3. The court of appeals said nothing in its first opinion about the "wounded bank" claim, except that it should be reconsidered on remand in light of the court's guidance concerning reliance damages. 04-626 Pet. App. 37a. On remand, the trial court did not address the government's arguments that it already had rejected the only evidence presented in support of Glendale's claimed "wounded bank" damages. Instead, the court simply stated that "there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages," and it summarily found that the reliance damages it had awarded "are actual, ascertainable damages suffered by plaintiff as a result of the breach." *Id.* at 20a.

In its ultimate decision, the court of appeals too did not address the gap in the evidence caused by the rejection of Glendale's argument that it would have exited its high-risk investment business even absent the breach and the other flaws in Dr. Horvitz's model that it acknowledged in the very same decision. Instead, the court stated that it was "unpersuaded that the trial court's factual findings and conclusions regarding reliance damages, based on the earlier record, are clearly erroneous." 04-626 Pet. App. 6a. The court of appeals did not explain its conclusions, nor could it have, given that the only evidence Glendale presented in support of its contention that the breach caused it to fall from capital compliance and become a "wounded bank" was its rejected lost-profits model, and the only factual finding the trial court actually made with regard to Glendale's contemporaneous business plan was that, absent the phase-out of goodwill, Glendale would have continued to invest in high- risk assets, a course of action that Glendale now admits would have been disastrous. See 03-5136 C.A. App. A1002177, A1023269.

4. In affirming the award of $381 million in "wounded bank" damages despite its rejection of the basic premise underlying that claim, the court of appeals committed a basic error. It is a fundamental principle of damages law that a plaintiff bears the burden of demonstrating its claimed damages with affirmative proof. Despite the simplicity of that requirement, the courts of appeals have found it necessary to "repeat previous reminders to the bench and bar * * * that proof of damages requires—proof." *Bucklew* v. *Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 933 (7th Cir. 2003). As the Seventh Circuit has observed:

> For years we have been saying, without much visible effect, that people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence. *Post hoc ergo propter hoc* will not do; nor the enduing of simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of the concept of expert knowledge.

Schiller & Schmidt, Inc. v. *Nordisco Corp.*, 969 F.2d 410, 415 (1992) (citations omitted); accord *Hillside Enter.* v. *Carlisle Corp.*, 69 F.3d 1410, 1414 (8th Cir. 1995) ("While the amount of lost profits need not be shown to a high degree of certainty under Oklahoma law, a party must demonstrate their existence."). The award of $381 million contravenes the requirement applied in every other circuit that any award of damages, and certainly one for $381 million, be supported by affirmative proof, as opposed to a discredited theory.

C. Any Reliance Damages Should Have Been Offset By The Benefits Glendale Admittedly Received From The Contract

Even if the award of some "wounded bank" and related damages were justifiable, the award directly conflicts with the rule that this Court established long ago: a non-breaching party "[i]s not entitled to be put in a better position by the recovery than if the [defendant] had fully performed the contract." *Miller* v. *Robertson*, 266 U.S. 243, 260 (1924).

1. In *Miller*, this Court articulated the fundamental contract damages principle that a breach-of-contract plaintiff "is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract." 266 U.S. at 257; see 5 Arthur Linton Corbin, *Corbin on Contracts* § 992, at 5 (1964); 3 Dan B. Dobbs, *Law of Remedies* § 12.2(1), at 763 (2d ed. 1993); 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.3, at 157 (2d ed. 1998); Charles T. McCormick, *Damages* § 137, at 561 (1935); Restatement (Second) of Contracts § 344, comment a (1979). The Court also announced in *Miller* a natural corollary to that rule: that a plaintiff is "not entitled to be put in a better position by the recovery than if the [defendant] had fully performed the contract." *Miller*, 266 U.S. at 260; see *DPJ Co.* v. *FDIC*, 30 F.3d 247, 250 (1st Cir. 1994); *Freund* v. *Washington Sq. Press, Inc.*, 314 N.E.2d 419, 421 (N.Y. 1974); 3 *Farnsworth on Contracts*, *supra*, § 12.16, at 279. The award to Glendale of $381 million violates those principles.

2. A portion of Glendale's "wounded bank" claim was based on the contention that the phase-out of goodwill and the fall from capital compliance forced Glendale to sell Broward. Glendale's argument proceeded as follows: the deposits it held in its Florida franchise provided a low-cost source of funds, and when it sold that franchise, it had to replace that funding source with higher-cost "wholesale" borrowings. See 03-5136 Pet. App. A1007180-81. The difference in the funding costs (retail deposits versus wholesale borrowings), Glendale contended, constituted damages.

Glendale, however, did not simply give away its Florida franchise. Rather, Glendale, by its own admission, received a $243 million premium from the purchaser of the Florida franchise, *i.e.*, the amount of liabilities (deposits) it passed on to the buyer was $243 million more than the amount of money that it gave the buyer. See 03-5136 C.A. App. A2005052.[8] Under Glendale's own theory, it would not have received the $243 million premium in the absence of the breach, since it would not have sold its Florida franchise. Accordingly, any reliance damages Glendale is awarded should be reduced by that amount.

Any other result would conflict with *Miller*, because the award of damages would place Glendale in a far better position than it would have occupied in the absence of the breach. If there had been no breach, Glendale would either have kept the Florida franchise, in which case it would have avoided the higher cost of funds but also lost the $243 million premium; or it would have sold the Florida franchise, in which case it would have still had a higher cost of funds but would also have obtained the premium. Permitting it to obtain the damages based on its higher cost of funds *and* to keep the $243 million premium would therefore put it in a better position than it would have been in had there been no breach.

3. The trial court initially found that the premium Glendale obtained when it sold Broward should indeed be an offset, albeit against the amount the court awarded Glendale as restitution damages. 04-626 Pet. App. 76a.[9] At that time,

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[8] When one institution purchases deposits from another, it demands assets to balance the deposit liabilities. Depending upon the intangible value of the particular deposits acquired—the customer relationships, the location of the branches holding the deposits, *et cetera*—an acquirer of deposits may not demand assets with a value equal to the face value of the deposits. In such a case, the difference is known as a deposit premium. See *Globe Sav. Bank* v. *United States*, 59 Fed. Cl. 86, 89 (2003) (describing such a transaction).

[9] The trial court calculated the offset at $288.37 million, which included the $243 million deposit premium plus some additional offsets not at issue here. 04-626 Pet. App. 76a; see *id*. at 48a (listing additional benefits).

Glendale itself agreed that the benefits had to be offset; it argued only that benefits should not be offset both against the restitution award *and* against the reliance award. *Id.* at 48a; see 03-5136 C.A. App. 4001716 ("The government cannot get credit for that sum twice.") The court of appeals, however, reversed the restitution award. *Id.* at 35a. Nothing in the court of appeals' reversal cast doubt on the need to offset the $243 million premium against the damages award. Accordingly, the $243 million should have remained available, after the court of appeals' decision, as an offset to any damages award that the trial court would make on remand.

On remand, the trial court simply reinstated its award for $381 million in "wounded bank" damages. 04-626 Pet. App. 20a. The court neither applied the $243 million offset nor gave any explanation of why it refused to do so.

4. On the renewed appeal, the court of appeals did expressly refer to the government's argument that a $243 million offset should have been applied. The court stated that "to prove an offset against the awarded reliance damages the Government would have to show that Glendale received a net benefit from its Florida franchise." 04-626 Pet. App. 7a. But that gets it backward. The point is not that Glendale obtained a net benefit, but that it can only recover its *net* loss. The court never explained why Glendale's admitted receipt of a $243 million deposit premium was insufficient to show that it received a benefit that must be offset in calculating its net loss. The court simply stated that "[t]he trial court did not deduct the $243 million * * * and we see no reason that we should do so." *Ibid.*

The court's ruling was erroneous and resulted in an enormous windfall for Glendale. Glendale admitted that it received a $243 million premium from the sale of Broward, the government agreed with that proposition, and the $243 million should therefore have been offset against any reliance damages awarded to Glendale.[10] It is settled law that, when calculating reliance damages, whatever benefits the non-breaching party received as a result of the contract must be offset against the costs it incurred in reliance on the contract. See 3 *Law of Remedies*, *supra*, § 12.3(1), at 51-52; *Damages*, *supra*, § 142, at 584. Otherwise, the recovery would put the non-breaching party in a better position than it would have occupied if the contract had been fully performed—in contravention of *Miller* and of settled principles governing reliance damages.

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[10] The court of appeals did state that "Glendale's calculation of its denied claim for losses regarding the Florida division [its excess liabilities/ restitution claim] is not determinative of its other operational losses as a result of the breach." 04-626 Pet. App. 7a. That statement is inapposite, however. The manner in which Glendale calculated damages under theories that were rejected should not affect the courts' resolution of the only remaining damages theory. If the restitution claim, having been rejected by the courts, is no longer available to be offset by the $243 million, then that offset should be applied to any reliance damages that are awarded, in accord with the settled principles cited in text.

CONCLUSION

If the Court grants the petition for a writ of certiorari in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, it should also grant this cross-petition for a writ of certiorari.

Respectfully submitted.

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