2010-5100, -5101

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CCA ASSOCIATES,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in case no. 97-CV-334, Judge Charles F. Lettow

# REPLY BRIEF OF DEFENDANT-APPELLANT AND RESPONSE TO THE BRIEF OF PLAINTIFF-CROSS APPELLANT

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## SUMMARY OF ARGUMENT

Our opening brief identified significant errors in every part of the trial court's Penn Central analysis: the court failed to consider statutory benefits in addressing economic impact and character of the Government action; it created a "fourth" Penn Central factor that double counts the significance of regulatory duration; and it erroneously treated the Preservation Statutes as a permanent restriction when

assessing investment-backed expectations. CCA declines to defend the trial court's approach. Instead, CCA plows ahead with its own arguments.

CCA essentially contends that Preservation Statutes worked a physical invasion and, therefore, that character alone is sufficient to establish a taking. This Court rejected such an approach nearly 10 years ago. Cienega Gardens v. United States, 265 F.3d 1237, 1248-49 (Fed. Cir. 2001) ("Cienega VI"). Furthermore, CCA maintained physical control of the Chateau Cleary complex at all times. It was able to expel trespassers, evict tenants for cause, turn away prospective tenants, select the tenants to whom it would rent, and even allow apartments to stand vacant. The "physical invasion" claimed by CCA simply did not occur.

Under Penn Central, CCA's regulatory taking claim should fail. The Preservation Statutes worked an economic impact of only five percent. The Preservation Statutes did not interfere with the expectation of reasonable investors for dramatic tax benefits from a highly-leveraged investment. The cost of preserving affordable housing under the Preservation Statutes was borne by the public. And CCA's inability to charge market-rate rents for a short period is akin to rent control, which does not have the character of a taking.

CCA's cross-appeal concerns a breach of contract claim that was not asserted at trial in 2006 or mentioned on appeal in 2007. The claim is barred by waiver and

the mandate rule. Additionally, it cannot succeed under binding circuit present. Cienega Gardens v. United States, 194 F.3d 1231 (Fed. Cir. 1998) ("Cienega IV"), cert. denied, 528 U.S. 820 (1999).

## ARGUMENT

### I. The Trial Court Erred In Applying The *Penn Central* Test

CCA alleges a temporary regulatory taking governed by Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). As explained in our opening brief, the trial court made several significant errors in assessing CCA's claim. When properly analyzed, none of the Penn Central factors favor CCA. CCA's taking claim should therefore be rejected.

#### A. The Modest Economic Impact Of The Preservation Statutes On Chateau Cleary Weighs Decisively Against CCA

##### 1. CCA Has Failed To Establish A Severe Economic Loss Under *Penn Central*

The mandate on remand directed the trial court to apply Cienega Gardens v. United States, 503 F.3d 1266 (Fed. Cir. 2007) ("Cienega X"). CCA Associates v. United States, 284 Fed. Appx. 810, 811 (Fed. Cir. 2008). Cienega X, in turn, held that (1) the economic impact of the Preservation Statutes must be based upon the property as a whole, and that (2) both economic detriments and benefits conferred by the Preservation Statutes must be taken into account. 503 F.3d at 1280-87.

When evaluated using these principles, the economic impact in this action is five percent. JA1122-23.[1] Even when statutory benefits are disregarded, economic impact is only 18 percent. JA1120-21, 1147-48.

No court has found a regulatory taking under Penn Central where economic impact did not exceed 50 percent. Br. 19; see also Brace v. United States, 72 Fed. Cl. 337, 357 (2006) (diminutions in value "well in excess of 85 percent" are generally necessary to sustain a regulatory taking claim), aff'd, 250 Fed. Appx. 359 (Fed. Cir. 2007). CCA does not claim otherwise, see Resp. 44-45, and the impact of the Preservation Statutes on CCA does not come close to this level. Economic impact, therefore, weighs decisively against CCA's taking claim.

CCA attempts to use colorful adjectives and rejected legal arguments to paper over this deficiency. CCA first describes the stipulated diminution-in-value in terms that connote a physical seizure. Resp. 43 (asserting that the Government "confiscated" a "full 18%" of the Chateau Cleary project's "lifetime value"). However, nearly 10 years ago, this Court held that the Preservation Statutes did not effect a seizure or physical occupation. Cienega VI, 265 F.3d at 1248-49.

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[1] We cite the Government's opening brief as "Br. __," CCA's response and cross-appeal brief as "Resp. __," the addendum to the Government's brief as "A__," and the parties' joint appendix as "JA."

CCA next proffers the discredited return-on-equity approach to economic impact. Resp. 43. This very methodology was rejected in Cienega X as unsound and contrary to Supreme Court jurisprudence. 503 F.3d at 1280. CCA offers no grounds for revisiting Cienega X.[2] See Resp. 43.

Lastly, CCA asserts that the cumulative reduction in income due to the Preservation Statutes was "more than $700,000" and that an effect of this magnitude supports its claim. Resp. 43-44. CCA's reliance on a simple dollar figure is unsound. The use of a dollar figure does not assess economic impact in comparison to the property as a whole as required by Cienega X. 503 F.3d at 1282. In addition, taking claims with much greater monetary impacts have regularly been rejected. See, e.g., Bass Enterprises Production v. United States, 54 Fed. Cl. 400, 404 (2002) (no taking where economic impact was approximately $1.1 million), aff'd, 381 F.3d 1360 (Fed. Cir. 2004); Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 311 F. Supp. 2d 972, 994-95 (D. Nevada 2004) (no taking under Penn Central despite plaintiff's allegation that zoning law represented a confiscation of over $100 million dollars). As this Court

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[2] CCA fails to acknowledge the holding in Cienega X. Rather, CCA states that "the 'return-on-equity' methodology [was] expressly endorsed by this Court in both Cienega VIII and Chancellor Manor." Resp. 43. In light of CCA's ethical obligation to identify directly contrary, binding precedent, this failure is difficult to understand.

explained in Rose Acre, "[a]lthough the [$3.5 million] monetary loss to Rose Acre was not insignificant, it did not even approach the level of severe economic harm" necessary to support Rose Acre's taking claim. Rose Acre Farms v. United States, 559 F.3d 1260, 1268, 1275, 1283 (Fed. Cir. 2009).

### 2. CCA's Taking Claim Is Undercut By 35 Years Of Regulatory Takings Jurisprudence

We explain in both our opening brief, and above, that no court has found a taking under Penn Central where economic impact did not exceed 50 percent. Br. 19; p. 4, supra. CCA argues that in so doing we are attempting to erect a per se barrier to recovery. Resp. 44. CCA misses the point.

Since the Supreme Court's seminal decision in Penn Central nearly 35 years ago, courts have developed a substantial body of jurisprudence that informs the ad hoc inquiry under Penn Central. This jurisprudence creates the backdrop for regulatory takings analyses. It is appropriately invoked by litigants. Moreover, the ability to utilize this jurisprudence provides guidance, certainty, and consistency to judicial decision making. See Rose Acre, 559 F.3d at 1268-69.

The United States does not contend that some "magic number" cuts off regulatory taking claims. See Br. 19-20. Yet, the fact remains that in the nearly 35 years since Penn Central was decided courts have commonly rejected claims where economic impact is less than 80 to 90 percent, and no court has found a

regulatory taking where economic impact did not exceed 50 percent. See Brace, 72 Fed. Cl. at 357; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992). Thus, "[w]hat has evolved in the caselaw is a threshold requirement that plaintiffs show 'serious financial loss' . . . to merit compensation." Cienega X, 503 F.3d at 1282.

The economic effect of the Preservation Statutes on CCA (5 to 18 percent) does not come close to the impact that courts have deemed necessary to prevail in other regulatory taking cases. Therefore, consistent with this jurisprudence, CCA's taking claim should fail.

### 3. The Court Should Reject CCA's Contention That A Relaxed Standard Applies Where The Regulatory Restriction Is Temporary

CCA argues that cases addressing permanent restrictions are inapposite. Resp. 44. However, in First English, itself a temporary takings case, the Supreme Court explained that temporary takings "are not different in kind from permanent takings." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). Likewise, Cienega X, another temporary takings case, held that "[t]he Penn Central test is the same whether the regulation is permanent or temporary in nature." 503 F.3d at 1279.

CCA suggests that the Court relax the showing required to establish a temporary regulatory taking because, otherwise, temporary takings will be too difficult to establish. Resp. 44-45 (contending that an 18 percent economic impact should support its regulatory taking claim because the restriction was temporary). Because CCA failed to present this argument below, it has been waived.[3] Fresenius USA, Inc. v. Baxter Int'l, Inc., 582 F.3d 1288, 1296 (Fed. Cir. 2009). Moreover, CCA provides no basis for adopting a relaxed standard. See id. It is unclear why a taking should more readily be found with respect to brief moratoria or temporary regulations, than for permanent regulatory restrictions. Common sense suggests the reverse should hold true. Additionally, if a lower threshold were created for temporary taking claims, liability could arise when the Government eliminated unneeded (permanent) restrictions. An approach that creates such a nonsensical outcome should be rejected.

In any event, the issue has already been resolved in this circuit: "The Penn Central test is the same whether the regulation is permanent or temporary in nature,

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[3] CCA makes assertions based on numerical analyses that were not presented to the court below, are not in the record, and to which the United States has had no opportunity to respond. For instance, CCA claims a five year restriction can never cause an 80 percent diminution in value. Resp. 45. CCA compounds the problem when it acts as if that such evidence was before the Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). See Resp. 45-46. These arguments are not properly before the Court.

although, in the latter situation, the court must carefully consider the duration of the restriction under the economic impact prong." Cienega X, 503 F.3d at 1279. Accordingly, CCA's request that the Court lower the bar for temporary taking claims to enable it to prevail in this action should be rejected.

#### 4. Economic Impact Is A Fundamental Consideration In All Regulatory Taking Cases

Arguing that "the character of the government action alone may establish a taking, without regard to the specific quantum of economic impact," CCA urges the Court to simply disregard economic impact. Resp. 46; see also Resp. 47 (the "character of the governmental action alone compels the finding of a taking"). Because this action is governed by Penn Central, economic impact is necessarily a central consideration. E.g., Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

The Supreme Court has recognized two categories of cases that generally will be deemed *per se* takings: one where the Government requires the owner to suffer a permanent physical invasion of her property, Lingle, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); a second where a Government regulation completely deprives the owner of "all economically beneficial use" of her property, id. (quoting Lucas v. Sought Carolina Coastal

Council, 505 U.S. 1003, 1019, 1026-32 (1992) (emphasis in original)). "Outside these two relatively narrow categories" regulatory taking challenges "are governed by the standards set forth in Penn Central." Id. "Primary among the factors" established in Penn Central are: (1) the "economic impact" of the regulation on the claimant, and (2) "the extent to which the regulation has interfered with distinct investment-backed expectation." Id. at 538-39. "In addition, the character of the governmental action . . . may be relevant in discerning whether a taking has occurred." Id. at 539. Thus, "the Penn Central inquiry turns in large measure, albeit not exclusively, upon the magnitude of the regulation's economic impact." Id. at 540.

CCA has not asserted or established a permanent physical occupation or a total regulatory taking. Resp. 23 n.8. Therefore, CCA's claim is governed by Penn Central and turns "in large measure" on "the magnitude of the regulation's economic impact." Lingle, 544 U.S. at 540.

CCA cites several cases – none of which support the contention that a regulatory taking can be established "without regard to the specific quantum of economic impact." See Resp. 46-47. In Hodel v. Irving, the Court specifically addressed economic impact and described it as "substantial." 481 U.S. 704, 714 (1987). Thus, a taking was not found without regard to economic impact. Id.

The remaining cases are not regulatory taking actions against the United States. In Kaiser Aetna v. United States, the United States itself filed suit to determine whether Kaiser Aetna's dredging at Kapua pond had converted the pond to a navigable water of the United States such that Kaiser Aetna was required to obtain authorization for future construction, excavation, and filling activities, and was precluded from denying public access to the pond. 444 U.S. 164, 168 (1979). The Court explained that Kapua pond was private land under state law and that opening the pond to the public at large would constitute "an actual physical invasion of the privately owned marina." Id. at 180. For this reason, the Government was required to use the power of eminent domain and pay just compensation if it wanted to make Kapua pond into a public aquatic park. Id. Because Kaiser Aetna addresses a potential, permanent physical occupation, it does not inform the regulatory takings analysis under Penn Central. See Tahoe-Sierra, 535 U.S. at 323.

Eastern Enterprises v. Apfel addressed the constitutionality of certain provisions of the Coal Industry Retiree Health Benefits Act. 524 U.S. 498 (1998). A majority of justices in Eastern agreed that the case was not properly analyzed under the Takings Clause of the Fifth Amendment. See 524 U.S. at 539, 547 (Kennedy, J., concurring); id. at 554 (Breyer, J., dissenting). This was because

Eastern identified no property interest allegedly taken by the act and, therefore, the requisite analysis under Penn Central could not be performed. Id. at 540-41. Consequently, Eastern also fails to further CCA's claim that economic impact can be disregarded.[4]

Penn Central and its progeny clearly establish the fundamental importance of economic impact. CCA's untenable assertion that economic impact can be disregarded is driven not by caselaw, but by CCA's own recognition that the modest economic impact in this action should be fatal to its claim.

### 5. CCA's Claim Is Even Weaker When Statutory Benefits Are Considered As Required By *Cienega X*

Cienega X rejected the return-on-equity metric and held that economic impact must take into account both benefits and detriments conferred by the Preservation Statutes. 503 F.3d at 1280, 1287. Although the evidence presented by CCA at the 2006 trial did not comply with this ruling, CCA was given the opportunity to present additional evidence on remand. CCA, 284 Fed. Appx. at 811. CCA opted to present no additional evidence about economic impact. As a

[4] CCA also cites Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944), a Federal rate making case decided more than 30 years before Penn Central that necessarily provides no guidance about application of the Penn Central standard.

result, CCA failed to carry its burden with respect to economic impact and its taking claim should be rejected.

### a. CCA Bears The Burden Of Proof

CCA asserts, without elaboration, that the Government had the burden of quantifying benefits conferred by the Preservation Statutes. Resp. 50. However, as explained in our opening brief, it is well-established that the plaintiff in a regulatory taking action bears the burden with respect to each Penn Central factor. Br. 21 (citing Forest Properties v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999), and Cienega X, 503 Fed. at 1288). CCA makes no attempt to distinguish either Forest Properties or Cienega X. See Resp. 50.

This allocation of the burden – apart from being dictated by circuit precedent – makes perfect sense. ELIHPA and LIHPRHA were comprehensive statutory schemes that established an administrative process, imposed certain restrictions on prepayment, and provided direct benefits specifically designed to ameliorate the effect of those restrictions. Cienega X, 503 F.3d at 1283. Statutory restrictions and benefits went hand in hand. Only owners with property subject to the Preservation Statutes were eligible for benefits. See ELIHPA §§ 233(1), 235; 12 U.S.C. §§ 4101, 4119(1). Furthermore, both benefits and restrictions were tied directly to the property itself. See, e.g., ELIPHA § 224(b); 12 U.S.C. §§ 4109-10 (authorizing

increased rents, Government insured equity take-out loans, and market rate sales). It would facilitate a gross distortion to allow property owners to present economic impact figures that disregard benefits directly conferred on their properties by the very statutes that allegedly effected a taking.

### b. The "Sale Option" Under ELIPHA Was Available To CCA

Despite the fact that CCA bore the burden of proof, the United States presented unrebutted testimony that economic impact was only five percent. JA1123. This was predicated upon a sale of Chateau Cleary under ELIPHA.[5] JA1121-23.

CCA brazenly insists that "ELIPHA provided no sale option at all." Resp. 54. However, ELIPHA itself, ELIPHA's implementing regulations, the Federal Register, unrebutted trial testimony, the court below, other caselaw, and even CCA's own notice of intent, unequivocally establish the availability of a sale option under ELIPHA. ELIPHA § 224(b)(7) (permissible incentives under ELIPHA include "actions . . . to facilitate a transfer or sale of the project"); 24 C.F.R. § 248.231(g) ("The Commissioner may agree to one or more of the

[5] There is no dispute that CCA (1) was eligible to proceed under ELIPHA, ELIPHA § 233; JA1082, (2) could have begun the administrative process under ELIPHA one year before it was eligible to prepay, ELIPHA § 232(2), and (3) was actually aware of the option to sell under ELIPHA in 1990, JA538-39, 653-56.

following incentives: . . . (g) Other actions to facilitate a transfer or sale of the housing."); 53 Fed. Reg. 11,229 (Apr. 5, 1988) (same); JA1082 (one option available to owners under ELIPHA was sale at the project's appraised value); CCA Associates v. United States, 75 Fed. Cl. 170, 174 (2007) (one incentive under ELIPHA was "the sale of the property to a non-profit organization, a public agency, or a tenant cooperative"), aff'd in part, vacated in part, 284 Fed. Appx. 810 (Fed. Cir. 2008); Cienega Gardens v. United States, 67 Fed. Cl. 434, 467 (2005) ("both ELIPHA and LIHPRHA" provided owners the option to sell to a "purchaser who would continue to provide affordable housing"), rev'd on other grounds, 503 F.3d 1266 (Fed. Cir. 2007); JA653-55 (informing HUD that CCA intended to either seek incentives or pursue ELIHPA's sale option).

CCA next suggests the "absence of any procedure" by which sales could be accomplished under ELIPHA.[6] Resp. 54-55. Once again, CCA simply disregards the record. ELIPHA established an administrative process through which owners could request and receive statutory incentives. ELIHPA §§ 223-25. The process was commenced when the owner filed a notice of intent. ELIPHA § 222; JA653-

[6] HUD has long allowed owners to transfer their project. See JA502-16. The physical assets of Chateau Cleary itself were transferred from the Norman Brothers to CCA Associates in 1985. A11; JA02A. During the early 1990's, HUD regulations required payment a "50 cent per thousand dollar" transfer fee in conjunction with an owner's application to transfer physical assets. 24 C.F.R. § 221.506b (1991).

56. After HUD confirmed the owner's eligibility, the owner submitted a plan of action that identified the incentives being sought. ELIHPA § 223, JA1082. Thus, within the parameters of allowable incentives, the owner was able to choose the course to follow. JA1082. And one allowable course under ELIPHA was an expedited, HUD-facilitated sale. ELIPHA § 224(b)(7); 24 C.F.R. § 248.231(g); JA1082. Numerous owners selected a preservation sale, obtained incentives from HUD, and closed the sale under ELIPHA. JA1082-83; see also Cienega X, 503 F.3d at 1286 (37 percent of eligible owners in California pursued a preservation sale).

In its brief, CCA contrasts the detail of ELIHPA and LIHPRHA. Resp. 55. CCA also objects that two internal HUD memoranda from 1988 do not detail HUD procedures for ELIPHA sales. Resp. 56; JA1095. CCA's purpose is unclear. CCA might be suggesting that the sale process under ELIPHA was illusory or non-existent. Any such suggestion is rebutted by the fact that numerous sales under ELIHPA actually occurred. JA1082-83, 1094. Alternatively, CCA might be suggesting that it did not receive adequate notice of the sale option under ELIPHA. In our opening brief, we explained that CCA is charged with knowledge of Federal statutes and regulations. Br. 26-27 (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947)). CCA makes no attempt to explain why this principle

does not apply with respect to ELIPHA's sale option. In any event, CCA had actual knowledge of the option to sell under ELIPHA. CCA was not only approached by the representative of an interested non-profit purchaser in 1990, it submitted a notice of intent to HUD stating that it might pursue a preservation sale under ELIPHA.[7] JA538-39, 653-56.

Even if ELIPHA's sale option were disregarded, economic impact still would be substantially less than 18 percent. CCA concedes that LIHPRHA had a well-defined option for sale at fair market value. Resp. 55. Furthermore, CCA acknowledges that a LIHPRHA-sale could have closed in October 1994.[8] Resp. 53. A LIHPRHA sale would have allowed CCA to exit the program 18 months before prepayment restrictions were lifted by the HOPE Act, see Cienega X, 503 F.3d at 1274, thereby shortening the period that CCA was subject to the Preservation

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[7] Mr. Norman testified that CCA did not pursue the sale option because he did not want to sell the Chateau Cleary project – not because he lacked information about the sale option. JA20-21.

[8] This assumes a conservative 30-month period for completing the sale process. See Resp. 53. Kevin East, HUD's Director for Preservation Processing, testified that a sale under LIHPRHA would ordinarily be accomplished in 18 to 24 months. JA1096 ("Prior to my leaving the program [in 1995], plans of actions for sales to priority purchasers typically did not take three years. They took much less, I would say 18 months to two years tops."). Sales under ELIPHA were simpler and occurred even more quickly. JA1093 (15 to 18 months). The 41-month sale cited by CCA, Resp. 53, was the maximum period for a sale and does not reflect actual HUD practices and experience. JA1095.

Statutes by 30 percent. A commensurate (30 percent) reduction in economic impact corresponds to an impact of 13 percent.

### c. CCA's Argument That Sale Under The Preservation Statutes Was "Too Speculative" Was Rejected In *Cienega X* And Rebutted By Evidence At Trial

The Cienega X court ruled that the sale option conferred "considerable benefits" on project owners and that such "benefits must be taken into account" in assessing economic impact. 503 F.3d at 1286, 1287. The mandate in this action directed the trial court to apply Cienega X. CCA, 284 Fed. Appx. at 811. The trial court was not therefore free to disregard the statutory sale option as speculative.

In its brief, CCA likewise fails to acknowledge the mandate to apply Cienega X. Resp. 57-58. Instead, it offers four reasons that the sale option supposedly is speculative. Id. Each is unsound and unsupported by the trial record.

First, CCA contends that there might not have been an interested buyer. Resp. 57. However, numerous preservation sales were consummated throughout the United States and CCA was actually approached by an interested buyer in November 1990. A45, JA19-20, 538-39, 648, 650-52, 938, 1082-83, 1094. CCA introduced no evidence that any owner, anywhere in the United States, failed to obtain a bona fide offer during the early 1990s. See Resp. 57. Kevin East, HUD's national director of preservation processing, was unaware of any instance where a

purchaser could not be found. JA1083. Similarly, in Cienega X, this Court cited "testimony by Richard Mandel, from the California Housing Partnership Corporation, that he was not 'aware of any [properties involved in the sale process] that did not receive a bona fide offer.'" 503 F.3d at 1286 (brackets in original). Evidence establishing the prevalence of interested buyers could hardly be stronger.

Second, CCA asserts that HUD funding for a preservation sale might not have been available. Resp. 57. CCA was eligible to begin the sale process in May 1990. JA1147-48. There was no shortage of HUD funding and HUD funded all approved plans of action during the early 1990s. JA1082, 1094-95. Funding shortfalls did not arise until 1995, JA1097-98, long after any sale of Chateau Cleary would have been completed, JA1093 (ELIPHA sales took 15 to 18 months); JA1120-23, 1536-42 (using a November 1992 sale date).

Third, CCA questions whether it would have received fair market value under ELIPHA. Resp. 58. The sale price under ELIPHA was based upon the property's appraised value. JA1082. Furthermore, CCA would have selected the appraiser to determine Chateau Cleary's value. Id. The ELIPHA appraisal process, therefore, led to a fair market value sale.

Lastly, CCA asserts that land values could change between the time of the appraisal and the sale. Resp. 58. Although this is a potential criticism of the

Government's methodology, it does not somehow render the sale option speculative.[9] CCA was free to offer evidence about changed land values (if any change actually occurred) during the remand trial. However, having offered no such evidence, CCA cannot invoke its absence as a basis for challenging on appeal Dr. Dickey's economic impact determination. Fresenius, 582 F.3d at 1296.

### B. CCA Declines To Defend Of The Court's Use Of A "Fourth" *Penn Central* Factor

The trial court erred in treating regulatory duration as a "fourth" Penn Central factor. Br. 27-29. The duration of the restriction is properly taking into account under the economic impact prong. Cienega X, 503 F.3d at 1279.

CCA declines to defend the trial court's erroneous use of duration as a fourth factor under Penn Central. Accordingly, the trial court's decision should be reversed.

### C. The Trial Court Incorrectly Analyzed Reasonable Investment-Backed Expectations

The second criterion used to evaluate an alleged regulatory taking under Penn Central is reasonable investment-backed expectations. Neither the trial court nor

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[9] According to CCA, the Government's expert testified that "any attempt" to value statutory options would be "speculative." Resp. 51. This is not so. Dr. Dickey explained that it would be "difficult, perhaps speculative," to use a Black-Scholes type of analysis. JA1123, 1131-32. However, the simpler analysis he performed on remand was based on a solid foundation and was not speculative. Id.

CCA properly address this criterion. CCA's discussion of the criterion is muddled because CCA forgets several fundamental precepts:

- Reasonable investment-backed expectations are judged as of the time of the initial investment. Cienega X, 503 F.3d at 1289; Rith Energy, Inc. v. United States, 247 F.3d 1355, 1364 (Fed. Cir. 2001).

- Reasonable investment backed expectations must be shown by record evidence, rather than attorney argument or speculation. Estee Lauder Inc. v. L'Oreal, S.A., 129 F.3d 588, 595 (Fed. Cir. 1997).

- The owner's subjective belief is irrelevant.[10] Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc); see also Chancellor Manor v. United States, 331 F.3d 891, 904 (Fed. Cir. 2003); Cienega VIII, 331 F.3d at 1346 n.42.

Cienega X provided additional guidance with respect to alleged takings based upon the Preservation Statutes:

- In assessing interference with reasonable investment-backed expectations, "the precise scope of benefits denied" must first be ascertained because the Preservation Statutes did not entirely deny the right to prepay. Cienega X, 503 F.3d at 1290.

- "In determining whether expectations of prepayment were reasonably investment-backed, it is necessary to inquire as to the expectations of the industry as a whole." Cienega X, 503 F.3d at 1290.

- Contemporaneous offering memoranda provide "reliable evidence of industry expectations with respect to the general prepayment right

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[10] This Court has considered an owner's subjective belief on the limited question of whether the owner actually had an expectation that was investment-backed. Cienega Gardens v. United States, 331 F.3d 1319,1346 n.42 (Fed. Cir. 2003) ("Cienega VIII").

(though even those do not consider the possibility of the limited restrictions imposed by the statute)." Cienega X, 503 F.3d at 1291.

When these principles are applied, CCA fails to establish interference with reasonable investment-backed expectations.

### 1. Both CCA And The Trial Court Mistakenly Treat The Preservation Statutes As Effecting A Permanent Restriction On Prepayment

In Cienega X, this Court emphasized the importance of determining "the precise scope of the benefits denied" in assessing whether the Preservation Statutes interfered with reasonable investment-backed expectations. 503 F.3d at 1290. This is because "the claimant must establish that it made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the government action, rather than the remaining benefits." Id. at 1289.

The record is clear: the Preservation Statutes pushed back the date that CCA could prepay by about five years.[11] JA1147-48. In our opening brief, we showed that the trial court erred in treating this temporary restriction as permanent. Br. 31-32. CCA commits the same error throughout its own brief. See Resp. 42.

[11] The significance of prepayment was that it enabled the owner of a section 221(d)(3) project to exit the program after 20 years. Chancellor Manor, 331 F.3d at 902-03. The Preservation Statutes actually delayed CCA's exit from the program by 18 months or less. JA1122 (explaining that CCA could have exited through the sale option, at which point CCA would have been free to invest in some other property); JA1093 (ELIPHA sales generally were completed in 15 to 18 months).

CCA argues that the trial court was free to disregard Cienega X because "there are no set rules" in regulatory taking actions. Resp. 42. This is not the law. Decisions of the Federal Circuit are binding on the Court of Federal Claims. E.g., Principal Mut. Life Ins. Co. v. United States, 50 F.3d 1021, 1025 (Fed. Cir. 1995). Furthermore, the trial court was explicitly directed to apply Cienega X. CCA, 284 Fed. Appx. at 811.

CCA also misstates the United States' position. According to CCA, the United States maintains that enactment of the HOPE Act is relevant to investment backed expectations in 1971. Resp. 42. However, it is not the HOPE Act, but "the precise scope of benefits denied" that has significance. Cienega X, 503 F.3d at 1290. It is undisputed that the restriction on prepayment with respect to Chateau Cleary was not permanent; it lasted only five years. JA1122. The particular mechanism that resulted in the five-year restriction – whether a sunset clause, a moratorium, or a regulatory repeal – is immaterial. Id.

In the alternative, claiming that it "would not have gone forward with the Chateau Cleary transaction" if it had known that prepayment would be delayed for five years, CCA argues that the trial court's error was harmless. Resp. 42. CCA misapprehends the nature of the trial court's error. The United States does not challenge the trial court's finding that for CCA the opportunity to prepay was of

particular importance. See A31. However, CCA points to no evidence supporting the conclusion that a 5-year delay in prepayment would have been significant for a reasonable investor, much less that it would have been the "but for" or "primary" consideration for such an investor. Resp. 42; see also Cienega X, 503 F.3d at 1290. CCA's subjective belief is irrelevant to this independent inquiry. Chancellor Manor, 331 F.3d at 904; Cienega VIII, 331 F.3d at 1346 n.42; Commonwealth Edison, 271 F.3d at 1348.

In sum, because the trial court mistakenly treated prepayment as "permanently restricted" by the Preservation Statutes, and because the record contains no evidence establishing that a 5-year delay in prepayment interfered with the primary expectation of a reasonable investor, the decision below should be reversed.

### 2. CCA Failed To Establish Interference With Reasonable Investment-Backed Expectations Even If The Restriction On Prepayment Is Treated As Permanent

#### a. CCA Proffered No Objective Evidence About Investment-Backed Expectations

At the 2006 trial, CCA presented no expert to testify about investment-backed expectations and introduced no documents showing the expectations of reasonable investors in a section 221(d)(3) project in the early 1970s. The only evidence tendered by CCA came from Ernest Norman, the project's current owner,

who attempted to recall the subjective expectations of his father and uncle 35 years earlier. See JA00C, 24A-24B .

On remand, in light of Cienega X's directive to evaluate "the expectations of the industry as a whole," 503 F.3d at 1290, CCA was given the opportunity to supplement the record. See CCA, 284 Fed. Appx. at 811. Still, CCA presented no evidence pertaining to reasonable investment-backed expectations. CCA merely recalled Mr. Norman, who elaborated on his earlier testimony about the subjective beliefs of his father and uncle. JA1069. Having offered no evidence about reasonable investment-backed expectations, CCA failed to carry its burden. See Chancellor Manor, 331 F.3d at 904; Forest Properties, 177 F.3d at 1367.

### b. Prepayment Was Of Little Significance To Reasonable Investors

At trial, the United States presented (1) unrebutted expert testimony from Ken Malek – an accountant and expert on low-income housing investments – about the section 221(d)(3) program, (2) six private placement memoranda from the late 1960s and early 1970s, and (3) a learned treatise about moderate- and low-income housing published in 1972. This evidence established that in the early 1970s the option to prepay after 20 years was of little importance to industry participants.[12]

[12] In a two-sentence aside, CCA notes the intra-family shuffling of ownership interests that took place in 1985. Resp. 42-43. Below, CCA did not explain why 1985 would be the proper point to assess investment-backed

Mr. Malek discussed the section 221(d)(3) program utilized by CCA in detail. The program enabled owners to obtain a below-market, Government-insured loan, which provided financing for 90 percent of the project's replacement cost. JA56. Not only was this low-risk, high-leverage financing superior to what was available from banks for conventional projects, HUD provided an additional credit called the Builder's and Sponsor's Profit and Risk Allowance ("BSPRA") that further reduced the initial cash investment. JA56. For Chateau Cleary, the total cash outlay was a mere 1.8 percent of the project cost. JA54. This was far smaller than the outlay needed to finance a comparable conventional project. JA54-57. Moreover, the financial structure of the section 221(d)(3) program generated dramatic tax benefits through accelerated depreciation. JA56. Although accelerated depreciation was also available for conventional real estate projects, because of the high leverage of the HUD program, the tax benefits generated by HUD projects were far greater than those generated by comparable conventional projects. JA61-62. Based upon financial analyses and his own experience, Mr. Malek concluded that tax benefits were the primary economic return expected from an investment in a section 221(d)(3) project, whereas the ability to prepay after 20 years was not material to reasonable investors in section 221(d)(3) properties. JA67-67A, 1099

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expectations when the original investment occurred in 1971. Consequently, the argument has been waived. Fresenius, 582 F.3d at 1296.

The Edson & Lane treatise likewise explains that tax benefits were the first and foremost incentive for participation in moderate- and low-income housing programs. See, e.g., JA1632 ("Accelerated depreciation, the high leverage available in government-assisted housing projects, and the possibility of favorable capital gains treatment have all combined to create a tax shelter which is quickly becoming a center of attention in the investment community."); JA1633 ("potential tax savings in the first year may be as large as the total cash investment") (emphasis in original). In fact, Edson & Lane devotes an entire chapter to tax benefits before discussing any other potential gains. See JA1632. In contrast, the ability to profit from rising market values is relegated to sixth position in the treatise's chapter on "other opportunities for profit." See JA1639. Even then, Edson & Lane cautions that there were "several reasons" than an owner might not realize a profit from prepayment. Id. Accordingly, the ability to profit from residual value after 20 years was not the primary or "but for" cause for participation according to Edson & Lane.

The primacy of tax benefits and the insignificance of prepayment is confirmed by prospectuses for other moderate- and low-income housing projects. Under Federal securities laws such prospectuses are required to be truthful and, as the Court explained in Cienega X, "are particularly reliable." 503 F.3d at 1291

(citing 15 U.S.C. § 77l(a)(2)). The six prospectuses admitted at trial each identify tax benefits as the principal source of expected returns from the property, and project a nominal profit (typically $1) to be generated from prepayment. JA1102, 1104-09, 1159, 1196. The contemporaneous prospectuses are thus consistent with Edson & Lane and Mr. Malek's expert testimony.

The record is devoid of contrary evidence. CCA points out that investing on the basis of tax benefits carried certain risks, such as the risk of tax code changes, and that accelerated deprecation would eventually generate a tax detriment. Resp. 35. The fact that the anticipated tax benefits were not risk free did not alter the nature of industry expectations. Indeed, the risks cited by CCA were noted in the respective prospectuses, which nonetheless identified tax benefits as an investor's principal return. See, e.g., JA1150-73, 1311.

CCA cherry picks from Edson & Lane the unremarkable statement that a project in a growing area "may increase in value" thus creating "substantial residual profits." Resp. 36. However, the subsection on the "residual value of the project" – the sixth subsection in the "other opportunities for profit" chapter – makes clear that this is not the principal basis for an investment in moderate- or low-income housing:

> Normally, a developer of real estate hopes to make a profit on the sale of the property sometime in the future.

> He hopes that the property's "residual value" will be such that he is able to recover his total equity investment (after retiring his outstanding mortgage and paying income taxes and other costs arising with the sale), plus an additional profit by reason of appreciation. There are several reasons why in the normal course this expectation might not be realized in federally assisted housing.

JA1639 (emphasis added).

CCA also asserts that the prospectuses indicate that residual value was a "considerable benefit." Resp. 36-37. Even if this were true, it would not follow that residual value was more important than tax benefits. See, e.g., JA1159 ("most of the financial benefits . . . will be in the form of income tax savings"). Moreover, the prospectuses place a nominal value ($1) on residual value. JA1102, 1104-09. The prospectuses would violate Federal securities laws if residual value had a material impact on anticipated returns that was not disclosed to potential investors. Cienega X, 503 F.3d at 1291; 15 U.S.C. § 77l(a)(2)). Residual value was simply a $1 lottery ticket that might or might not have value 20 years down the road.

CCA touts the location of the Chateau Cleary project. Resp. 37-38, 41. However, according to CCA's own real estate expert, who made his career studying the New Orleans market, the value of a project 20 years in the future is unknowable:

> Q. [I]f CCA could have sold at its market value in 2011, . . . that would have some value back in 1991, wouldn't it?

A. [I]f the hypothetical is, is it possible to sell the property after -- in 2011, the answer is yes, it is. At what value? I have no idea or reasonable way to tell you. Could that value be significantly different from zero? I have no idea.

* * *

Q. And is that because it is 20 years out?

A. Yes, sir. I know what I don't know sometimes. And one of the things I know I don't know is that I can't opine on what will be true or not true 20 years from now. But can I tell you that there will be a substantial value to this asset beyond its land value 20 years from now? No. It is possible that what we have is a teardown 20 years from now and we have a land reversion. What will that land reversion be? I don't know that.

When the market in New Orleans experiences flooding events, which are altering the landscape of how property values look, I don't know. I don't think anybody can tell you that.

JA42-43.

CCA cites the trial court's statement that "Chateau Cleary was similar to projects where long-term results, not short-term gains, were the basis of owners' expectations." Resp. 39. We pointed out in our opening brief that the record contains no evidence that a second class of owners eschewed tax benefits in favor of "long-term enhancement," Br. 33, and CCA identifies none its response, see Resp. 38-39, 41.

Nor does CCA offer evidence that the location of projects in the admitted prospectuses, which rely on tax benefits as the principal return, were any less promising than the location of Chateau Cleary. See Resp. 38-39, 41. The Skyline View property, for instance, was located in South San Francisco on a ridge between the Pacific Ocean and San Francisco Bay. JA1428; Cienega IX, 67 Fed. Cl. at 451. It was situated "just south of San Francisco, close to the airport, shopping centers, and schools, and feature[d] recreation rooms, playgrounds, gyms, and covered parking." 67 Fed. Cl. at 451. The property was aesthetically attractive and well-maintained. Id. Even so, the Skyline View prospectus cited anticipated tax benefits as the principal return to investors. JA1107-08.

The Chancellor Manor property, like Chateau Cleary, was located in a rapidly growing suburban area. Cienega IX, 67 Fed. Cl. at 453. It was "close to a shopping center" and a local ski area, "as well as to the intersection of a major road with Interstate 35, which leads to the core of Minneapolis and St. Paul." 67 Fed. Cl. at 453. The project featured "surface and enclosed garage parking, and amenities such as playground areas." Id. The Chancellor Manor prospectus also cited anticipated tax benefits – not property appreciation or prepayment – as the principal return to investors. JA1108, 1455.

Thus, the principal expectation of reasonable investors in section 221(d)(3) projects such as Chateau Cleary was a small equity investment and significant tax benefits. The ability to prepay 20 years in the future was akin to a $1 lottery ticket that, at most, was a minor consideration. The reasonable investment-backed expectation prong of Penn Central does not, therefore, support CCA's taking claim.

### D. The Trial Court Misapplied The "Character Prong" Of The *Penn Central* Test

The third criterion in Penn Central is the character of the Government action. "This is the precise action that the government has taken and the strength of the governmental interest in taking that action." Cienega X, 503 F.3d at 1279.

Significant factors considered in evaluating the character of the Government action are: (1) the nature of the interest the Government pursued in implementing the regulation; and (2) whether the Government sought to shift the public's burden on to the shoulders of a few. See Bass Enterprises Production Co. v. United States, 381 F.3d 1360, 1369-70 (Fed. Cir. 2004); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994).

CCA argues that the Preservation Statutes unfairly placed the burden of providing affordable housing on owners, rather than on taxpayers as a whole. Resp. 28-29. The record does not support this view. The Preservation Statutes did not merely promote the Government objective of providing affordable housing, they

placed the cost of achieving that objective on the public fisc. Thus, the Government's actions do not have the character of a taking.

### 1. The Preservation Statutes Were Enacted To Further An Important Public Interest

The United States' national housing policy is based upon the long-established national commitment to decent, safe, and sanitary housing for every American. 42 U.S.C. § 12702. Ensuring that a wave of mortgage prepayments did not leave thousands of low income families homeless was a significant Government concern falling directly within the ambit of national housing policy. See Bass Enterprises Prod. Co. v. United States, 54 Fed. Cl. 400, 403 (2002), aff'd, 381 F.3d 1360 (Fed. Cir. 2004).

In the late 1980s, Congress and housing experts had become concerned that a large number of 221(d)(3) and 236 projects might prepay and exit the HUD programs, thus reducing the supply of low-income housing throughout the country. See S. Rep. No. 101-316 at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5867. In 1986 and 1987, the House Committee on Banking Finance and Urban Affairs held hearings on the potential loss of units due to the prepayment of insured mortgages. H. Rep. No. 100-122, reprinted in 1987 U.S.C.C.A.N. 3317, 3351. According to the Committee, "[t]he facts clearly indicate to the Committee that elderly and low income tenants have no alternative but to be thrown in the street

without further action by Congress." 1987 U.S.C.C.A.N. at 3370; see also ELIHPA § 202(a)(4). Congress enacted ELIHPA to provide an "interim solution to this very serious problem" while further investigation was performed and a long-term solution developed. 1987 U.S.C.C.A.N. at 3317, 3351; see also ELIHPA § 202(a)(10). In enacting ELIHPA, "every attempt was made to balance the contract rights of owners with the need to try to preserve the existing stock of housing for low income persons." 1987 U.S.C.C.A.N. at 3353. Thus, HUD was given discretion to allow project owners to exit Government low-income housing programs, ELIHPA § 225(a), and to use public funds to ensure that owners remaining in the programs received "a fair return on the investment," ELIHPA §§ 224, 225(b).

Following passage of ELIHPA, Congress determined that preserving the existing inventory of housing for low- and moderate-income tenants should be a significant component of national housing policy and that a Federal preservation strategy was, by far, the most cost-effective approach to "protect[] the interests of the owners, the tenants and the communities in which the housing is located." 1990 U.S.C.C.A.N. 5763, 5867-68. Thus, in 1990, Congress passed LIHPRHA to alleviate the anticipated crisis in the availability of low-income housing while

protecting the pecuniary interest of private-sector, project owners. Id.; 12 U.S.C. §§ 4109-10.

In sum, both ELIHPA and LIHPRHA were enacted to further the Government's important, long-standing commitment to promote an adequate supply of low-income housing. At the same time, Congress provided publicly-funded benefits to ameliorate the impact on moderate- and low-income housing owners. Cienega X, 503 F.3d at 1283.

### 2. The Trial Court Erred In Failing To Consider Statutory Benefits

The trial court erred in refusing to consider the existence of statutory benefits under the Preservation Statutes in evaluating the character of the Government action. Br. 35-38 (citing Cienega X, 503 F.3d at 1282-83). CCA does not attempt to justify the trial court's stunted analysis. Resp. 29-31.

There simply is no basis in logic or law for disregarding those parts of the Preservation Statutes that benefit project owners. Congress provided many millions of dollars to ameliorate the effect of the regulatory restrictions on owners like CCA. See 12 U.S.C. § 4124(a) ($638 million for fiscal year 1993). CCA is free to argue that the Government nevertheless shifted a public burden on to property owners. However, the availability and magnitude of statutory benefits, which were to have

been taken into account below, contradict such a claim. Cienega X, 503 F.3d at 1282-83.

CCA responds that Cienega VIII has already established that the character of the Preservation Statutes is that of a taking. Resp. 29-30, 31. As explained in greater detail below, the Cienega VIII decision was based on "a partial record and limited arguments;" it does not foreclose different conclusions based upon different arguments and the different record in this action. See pp. 39-40, infra; Cienega X, 503 F.3d at 1276. CCA's attempt to wield Cienega VIII as a sword that precludes the United States' arguments is without merit. CCA must prove its own case.

Citing Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1176 (Fed. Cir. 1991), CCA argues that the "government's reference to statutory benefits only confirms that the Preservation Statutes worked at taking." Resp. 30. Whitney Benefits, however, concerned a fundamentally different statutory scheme. The Surface Mining Control and Reclamation Act ("SMCRA") at issue in Whitney Benefits established a coal exchange program. Unlike benefits conferred by the Preservation Statutes, this exchange program was an optional mechanism for providing just compensation under a statute that envisioned "government acquisition of interests in land." Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1559 (Fed. Cir. 1985); see also Whitney Benefits, 926 F.2d at 1176. As this

Court explained in Cienega X, the Preservation Statutes do "not involve a transfer of new property to the owner as in Whitney Benefits, but rather an amelioration of the restrictions imposed on the existing property." 503 F.3d at 1283. As a result, statutory benefits under ELIPHA and LIHPRHA "must be considered as part of the takings analysis." Id.

### 3. The Alleged Forced Occupation Of Chateau Cleary Is A Fiction

Under the Preservation Statutes, CCA maintained physical control of the Chateau Cleary complex and continued to manage the property just as it had for the previous 20 years. JA00A-00B, 10-10A. CCA was able to expel trespassers, evict tenants for cause, turn away prospective tenants, select the tenants to whom it would rent, and even allow apartments to stand vacant. JA01, 26-27, 35, 1071, 1083-84. The Preservation Statutes simply limited CCA's ability to unilaterally raise rents.

The forced occupation of Chateau Cleary that CCA alleges is a fiction. Resp. 20. CCA relies first and foremost on the Cienega VIII decision. Resp. 21. However, Cienega VIII was "based on a partial record and limited arguments made by the government." Cienega X, 503 F.3d at 1275 (discussing Cienega VIII). As a result, it stands only for three distinct propositions: (1) a regulation need not dispossess the owner or appropriate the owner's title to constitute a compensable

taking; (2) owners need not establish that prepayment restrictions denied them "all economically beneficial use" of their property to state a viable taking claim; and (3) owners had no reason to expect that the right to prepay their HUD-insured mortgages would be eliminated simply because they had entered into a highly regulated field. Id. at 1275-76. "In other respects, the holdings of Cienega VIII [are] unique to the four model plaintiffs and based on the particular arguments that the government made." Id. at 1276. The Cienega X court took pains to explain that Cienega VIII does not "preclude a different result for [other] plaintiffs based on different arguments and a different record." Id. CCA nevertheless invokes Cienega VIII's findings about the model plaintiffs – findings unique to those plaintiffs and the arguments made in that action. CCA is not free to ride on the model plaintiffs' coattails. See Cienega X, 503 F.3d at 1276.

CCA also complains that under the Preservation Statutes it could not evict all existing tenants, board up the project, and let it sit vacant. Resp. 22. CCA was indeed unable to evict tenants without good cause. However, this had nothing to do with the Preservation Statutes and everything to do with the lease agreements that CCA executed with its tenants. See JA1071. On the other hand, when a lease expired and the tenant moved out, CCA was free to let the apartment stand vacant. JA1083. CCA argues otherwise, Resp. 22, but fails to provide legal or factual

support for its argument. Estee Lauder, 129 F.3d at 595 ("arguments of counsel cannot take the place of evidence lacking in the record").

CCA's claim that the Preservation Statutes effected a physical occupation should fail for an additional reason: CCA identifies no tenant it was forced to house against its will.[13] See Resp. 22-23. CCA was in the business of leasing apartments. It advertised, maintained a waiting list of prospective tenants, and voluntarily executed leases with tenants. JA01. CCA thus chose to maintain Chateau Cleary at or near full capacity. Id. Moreover, when it prepaid, exited the HUD program, and converted its apartments to market-rate rents, CCA sought Government housing assistance vouchers to keep current tenants in place. JA24. This is hardly the action of an owner being forced to suffer an unwanted physical occupation.

Apart from alleging a physical occupation, CCA complains that the Preservation Statutes prevented various actions that CCA actually had no interest in taking. CCA objects, for instance, that it was prevented from tearing down Chateau Clary to make some other use of the land. Resp. 20. CCA does not identify this "other use of the land" and did not actually take this course after prepayment in 1998. JA19, 1075. Moreover, CCA has not attempted to show that a prohibition on

[13] CCA cites several "rules" in a HUD Handbook. Resp. 22-23. In contrast to statutes and regulations, the guidance provided by the handbook was not mandatory and could be waived upon request. JA1084. CCA identifies no tenant that it housed as a result of these handbook provisions.

some other use would have had any economic impact or would have interfered with reasonable investment-backed expectations.[14] Therefore, this alternative claim is properly rejected. Forest Properties, 177 F.3d at 1367 (placing the burden on plaintiff); Seiber v. United States, 364 F.3d 1356, 1370 (Fed. Cir. 2004) (proof of economic injury is essential in regulatory taking cases).

CCA contends that it was unable to sell Chateau Clary "at a price of its choosing to a buyer of its choosing without HUD approval." Resp. 20. CCA does not disclose the hypothetical buyer or hypothetical sale price. Id. Nor does CCA contend that HUD approval would have been denied. Id. In any event, the Preservation Statutes did not preclude sale. Quite the contrary, Chateau Cleary could have been sold under the Preservation Statutes at its fair market value. See pp. 15-18, supra; JA1082-83; ELIPHA § 224(b)(7); 12 U.S.C. § 4110. HUD would have even facilitated the sale using taxpayer dollars. Id. Therefore, this alternative claim should likewise be rejected.

Lastly, CCA objects that the rent it could charge for units at Chateau Cleary was limited and that it was unable to rent for the going market rate. Resp. 20. CCA

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[14] The stipulated diminution in value (18 percent) is premised on Chateau Cleary's use as a market-rate, multi-family housing complex. JA1147-48. This was the property's highest and best use. JA05A, 75A, 75C. If the property would have been put to a different (lesser) use but for the Preservation Statutes, a lower diminution-in-value would necessarily result.

is correct. However, this is precisely why the character of the Preservation Statutes is akin to standard rent control measures. See Br. 38.

#### 4. CCA's Discussion Of The Character Of The Government Action Confuses Distinct Standards For *Per Se* And Regulatory Takings

CCA states that it is "proceed[ing] under Penn Central, not a per se theory." Resp. 23 n.8. Yet, in addressing the character of the Government action, CCA relies almost exclusively on physical takings jurisprudence.[15] See Resp. 23-27. CCA inappropriately conflates two distinct bodies of law. See Tahoe-Sierra, 535 U.S. at 323 ("Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking.'").

At the same time, CCA describes the character inquiry as dispositive. See, e.g., Resp. 23 (the character of the Preservation Statutes "singularly supports" a taking). This is so only in per se taking cases. Lingle, 544 U.S. at 538. Here, because this action is governed by Penn Central, character is but one factor to be

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[15] CCA even includes a discussion of Loretto – the landmark Supreme Court case that removes permanent physical occupations from the Penn Central framework. Resp. 23. In Cienega VI, this Court rejected the argument that ELIPHA and LIHPRHA could effect a per se taking under Loretto. 265 F.3d at 1248-49. Loretto is inapposite.

considered. Id. at 538-39. Indeed, even when a Government action is properly described as a physical invasion, character alone is not dispositive. See, e.g., Penn Central, 438 U.S. at 421 (a taking "may more readily be found when the interference with property can be characterized as a physical invasion by the government") (emphasis added).

Relying on Hodel v. Irving, 481 U.S. 704 (1987), CCA argues that "extraordinary" Government action will effect a taking where it implicates fundamental property rights. Resp. 24. The holding in Hodel was much more narrow. In Hodel, the Supreme Court considered the "escheat" provision of the Indian Land Consolidation Act. 481 U.S. at 706. This provision, which was enacted to address the serious problem of fractionated ownership of certain Indian lands, abolished the passing of small ownership interests by both descent and devise. Id. The Court addressed each Penn Central factor and found a taking based upon the "extraordinary" nature of the government action and its "substantial" economic impact. Id. at 714, 716-17. The Court neither found character to be dispositive, nor held that government could not interfere with fundamental property rights. See id. The Court simply found it inappropriate "to take the extraordinary step of abolishing both descent and devise of [fractionated] property interests even when the passing of the property to the heir might result in consolidation of

property." Id. at 718 (emphasis added). The Preservation Statutes do not regulate or affect decent or devise. Consequently, Hodel has no significance here. See A27 (describing Hodel as "not analogous").

CCA also invokes Kaiser Aetna. Resp. 25. The pertinent issue in Kaiser Aetna was whether the United States could open a privately-owned pond to the public at large without paying just compensation. 444 U.S. at 179-80. The Court described this as "an actual physical invasion of the privately owned marina" and found that compensation would be required. Id. at 180. Although the case predated Loretto by two years, the Court treated Kaiser Aetna as a per se claim about a permanent physical occupation. See id. (conducting no analysis of economic impact or investment-backed expectations); see also Lingle, 544 U.S. at 539 (identifying Kaiser Aetna as addressing a per se taking claim).

In any event, this action is unlike Kaiser Aetna. As the trial court explained, "[t]his is not an instance of the government creating a public easement on plaintiff's property." A24. The Preservation Statutes did not open Chateau Cleary to the general public. Rather, the complex's apartments were occupied by tenants with whom CCA had chosen to sign leases. JA02B, 1071-72, 1083. CCA's Kaiser Aetna analogy is inapt.

According to CCA, the Eleventh Circuit's decision in Cable Holdings is instructive. Resp. 26 (discussing Cable Holdings of Ga., Inc. v. McNeil Real Estabte Fund VI Ltd., 953 F.2d 600 (11th Cir 1992)). Once again, however, CCA invokes a per se takings case. Cable Holdings concerned whether a cable television company was entitled to install its own cable, contrary to the owner's wishes, because the owner had allowed other companies to install cable, telephone, and electric lines. Id. at 602-03, 605. The circuit court explained that, like Loretto, the installation of cable television wiring and equipment, without the property owner's permission, would likely constitute a permanent physical invasion. Id. at 604-05.

CCA tries to analogize Cable Holding and this action. This action, of course, does not concern a per se taking claim. Resp. 23 n. 8; Cienega VI, 265 F.3d at 1248-49. Nor did the Preservation Statutes allow new tenants to "piggyback" on the leases of old tenants. When an apartment was vacated, CCA remained free to decline to enter into a new lease. JA1083. Not surprisingly, CCA chose not to follow this economically dubious course. But the economic disadvantage of vacancies is immaterial: CCA voluntarily chose to execute leases that gave tenants the right to occupy apartments at Chateau Cleary. Consequently, this action does not concern an unauthorized physical invasion.

CCA's real complaint is not that its apartments were occupied by undesirable tenants; it is that the Preservation Statutes prevented CCA from increasing rents to market rate during a five-year period in the early 1990s. See JA04, 1071. Consequently, the character of the Preservation Statutes is analogous to rent control, which does not have the character of a taking. Yee v. City of Escondido, 530 U.S. 519 (1992).

## II. The Court Of Federal Claims Erred When It Awarded Compensation Based Upon An *Ex Post* Valuation Of Lost Cash Flows

In defending the trial court's award of just compensation, CCA glosses over the fundamentally flawed methodology applied by the court. A50 (determining just compensation as of the end of the temporary takings period). The court's methodology violates the settled principle that the proper date for valuing property taken by the Government action is the date on which the taking occurred. Br. 41 (citing cases); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803(Fed. Cir. 1993) ("Compensation is always measured from the time the taking occurs."). This is true regardless of whether the taking is permanent or temporary.[16]

[16] Both the Supreme Court and this Court have rejected the notion that temporary takings and permanent takings are subject to different rules. In First English, the Supreme Court made clear that temporary takings "are not different in kind from permanent takings" and referred to "the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking," 482 U.S. at 318, 320. Similarly, this Court explained in Yancey v.

The gist of CCA's critique seems to be that the Government's approach measures lost market values instead of lost rental income. Resp. 61. The change-in-value approach advocated by the Government is in fact based upon the difference in rental income, but properly measures that difference on an ex ante basis at the time of the alleged taking.[17] This is because the market value of an income-producing property is determined by the rental income the property is expected to generate. JA75B. The Government's appraiser essentially estimated market rents for each year of the alleged taking and subtracted the rents that the property was expected to earn under the HUD program. JA75C-75D. He then discounted the difference back to the valuation date, i.e., the date of prepayment eligibility. Id. In this way, the Government's approach determines the amount a willing buyer would have paid, at the time the governmental restrictions were imposed, to acquire rights to CCA's property for the duration of the takings period. See Kimball Laundry Co. United States, 915 F.2d 1534, 1543 (Fed. Cir. 1990), that "[f]air market value under the Fifth Amendment is normally ascertained at the date the governmental restrictions are imposed, which is the date of the taking."

[17] The trial court asserts that the Government's approach "is not a true ex ante approach." A50. This criticism fails to consider what compensation is "just" in a temporary taking context. It is entirely appropriate to take into account that CCA's right to prepay was reinstated in April 1996. As this Court explained in Independence Park v. United States, 465 F.3d 1308, 1311 (Fed. Cir. 2006), where a permanent taking is cut short by Government action, compensation for the resulting temporary taking should be the same as the compensation due for that part of the permanent taking that actually occurred.

v. United States, 338 U.S. 1, 7 (1949) (market value should be determined at the time of the taking).

CCA's reliance upon Kimball Laundry and Yuba to support the trial court's flawed methodology is misplaced. Kimball Laundry is not analogous because there the United States wholly appropriated the plaintiff's laundry business for temporary use. Likewise, in Yuba Natural Resources v. United States, 904 F.3d 1577 (Fed. Cir. 1990), the Government took over the plaintiff's mineral mining rights and the plaintiff was not permitted to mine the property during that period. Thus, both of the cases involved situations where the plaintiffs' property was completely taken over by the Government, not the situation where, as here, the owner remained in possession of its property and had an ongoing use affected by Government regulation.

Citing Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994), CCA suggests that just compensation should be determined as of the end of the alleged takings period. Resp. 61. CCA's reliance upon Creppel is misplaced. Not only did Creppel concern the running of the statute of limitations, rather than an award of just compensation, the Court's statement about the distinction between temporary and permanent takings was dicta that has not been followed by subsequent Federal

Circuit decisions.[18] See Caldwell v. United States, 391 F.3d 1226, 1234-1235 (Fed. Cir. 2004); see also Co-Steel Raritan, Inc. v. International Trade Com'n., 357 F.3d 1294, 1307 (Fed. Cir. 2004) ("statements made in dicta [are not] binding authority").

## III. CCA's Cross-Appeal Is Without Merit

CCA's cross-appeal concerns a breach of contract claim that it declined to present at trial in 2006 and never mentioned in the course of the 2007 appeal. CCA's belated assertion of this breach of contract claim is barred by waiver and the mandate rule. In addition, it runs headlong into contrary binding present. See Cienega Gardens v. United States, 194 F.3d 1231 (Fed. Cir. 1998) ("Cienega IV"), cert. denied, 528 U.S. 820 (1999).

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[18] In Creppel, landowners alleged a temporary regulatory taking from 1976 to 1984. 41 F.3d at 631. During the 1970s and 1980s, the landowners litigated the propriety of the underlying Government action in district court, but waited to file a takings action in the Court of Federal Claims until 1991. Id. at 630. Consequently, this Court held that the landowners' temporary taking claim was barred by the six-year statute of limitations. Id. at 634. Although the Court stated that the landowners' claim did not ripen until the end of the alleged temporary taking, id. at 632, the claim was untimely whether it accrued at the beginning or end of the alleged taking. Because the Court's statement was not essential to the disposition of the temporary taking claim, it was dicta. Smith v. Orr, 855 F.2d 1544, 1550 (Fed. Cir.1988).

### A. CCA's Breach Of Contract Claim Is Not Properly Before This Court

#### 1. CCA Waived Its Breach Of Contract Claim When That Claim Was Not Presented At Trial In 2006 Or Mentioned In The Appeal To This Court In 2007

CCA's complaint contained both breach of contract and regulatory taking counts. CCA, 75 Fed. Cl. at 182. However, CCA asserted no claim for breach of contract at trial in 2006. Notably, both CCA's pre-trial and post-trial briefs make no mention of a breach of contract claim. See JA1653-745. The trial court's lengthy opinion likewise fails to address a claim for breach by CCA. See CCA Associates v. United States, 75 Fed. Cl. 170 (2006). CCA's breach of contract claim was thereby waived. Harris Corp. v. Ericsson Inc., 417 F.3d 1241, 1262 (Fed. Cir. 2005) (an argument is waived when not presented below); Sage Products, Inc. v. Devon Industries, Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("this court does not 'review' that which was not presented to the [trial] court.").

CCA's silence continued during the first appeal to this Court. CCA did not cross-appeal on a breach of contract theory. JA1910-84. Nor did CCA's appellate brief indicate that a claim for breach of contract was being asserted. Id. Even on remand, CCA did not seek to litigate a breach of contract claim. JA1039-41 (proposing that remand proceedings be limited to additional briefing on CCA's regulatory taking claim). It was only at the trial court's behest that a claim for

breach was ultimately presented. See JA1044 ("[t]he contract claim in this case is not fully explored. The Court proposes to remedy that.").

Because CCA failed to assert a breach of contract claim in earlier trial and appellate proceedings, the claim has been waived. Doe v. United States, 463 F.3d 1314, 1327 (Fed. Cir. 2006); Harris, 417 F.3d at 1262; see also United States v. Husband, 312 F.3d 247, 250-51 (7th Cir.2002) (after a first appeal, "any issue that could have been but was not raised on appeal is waived"). CCA's breach of contract claim is not, therefore, before the Court as a part of this appeal.

### 2. The Trial Court Violated The Mandate When It Resurrected CCA's Breach Of Contract Claim On Remand

The trial court violated this Court's mandate when, on its own initiative, it resurrected CCA's breach of contract claim on remand. See JA1039-45. The 2006 trial before the Court of Federal Claims addressed a single claim: whether the Preservation Statutes effected a temporary regulatory taking. CCA, 75 Fed. Cl. at 171-72. The 2007 appeal was likewise limited to that claim. JA1910-84. When Cienega X was decided in the midst of briefing, CCA argued that the decision should be disregarded. This Court disagreed:

> CCA urges that we not follow *Cienega X*, and that the Court of Federal Claims' conclusion that a taking occurred should be affirmed. We disagree. On the merits of the takings analysis, *Cienega X* requires that we vacate the judgment here and remand for further consideration in

> accordance with *Cienega X*. Here, as in *Cienega X*, the Court of Federal Claims "should allow both sides to supplement the record with additional relevant evidence if they wish to do so." Id. at 1291

CCA, 284 Fed. Appx. at 811 (emphasis added). Thus, in remanding, the Court directed the trial court to undertake a new Penn Central analysis in accordance with Cienega X. Id.

The trial court disregarded this straightforward directive. It used the instruction to "supplement the record with additional relevant evidence" as an excuse to expand the scope of remand. A58; JA1044. That instruction, however, was directed to CCA's takings claim. It followed immediately on the heels of the Court's directive that "further consideration in accordance with Cienega X" be given to "the merits of the takings analysis." CCA, 284 Fed. Appx. at 811. Additionally, supplementation was to proceed "as in Cienega X," which had merely allowed supplementation for "a new Penn Central analysis under the correct legal standard." Cienega X, 503 F.3d at 1291. The scope of remand did not, therefore, allow a new breach of contract claim.

The result would be no different if the scope of the remand order were unclear. "[W]hen an appellate mandate has issued, the mandate rule forecloses litigation of issues decided by the [trial] court but foregone on appeal or otherwise waived, for example because they were not raised in the [trial] court." Doe, 463

F.3d at 1327 (quoting United States v. Bell, 5 F.3d 64, 66 (4th Cir.1993)); Tronzo v. Biomet, Inc., 236 F.3d 1342, 1347-48 (Fed. Cir. 2001); see also Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co., 510 F.3d 474, 481 (4th Cir. 2007) (Under the mandate rule, "a remand proceeding is not the occasion for raising new arguments or legal theories."). CCA could have raised its breach of contract claim as an alternative argument in proceedings prior to remand, but chose not to, electing to base its case solely upon a regulatory takings theory. The breach CCA now asserts is therefore outside the scope of the mandate. Doe, 463 F.3d at 1327; Tronzo, 236 F.3d at 1347-48.

Allowing CCA to belatedly advance a breach claim not only opens a claim properly foreclosed by the judicial mandate, but undermines fundamental fairness, judicial economy, and the proper working relationship between trial and appellate courts. See United States v. Rivera-Martinez, 931 F.2d 148 (1st Cir. 1991). While a plaintiff is entitled to the opportunity to fully develop all claims, CCA had that opportunity. As litigation moves forward, the proper progression is for the legal issues before the court to become narrower, not for the litigation to broaden on remand and restart at square one. There exists no reason a breach claim could not have been asserted in the first trial and, if necessary, resolved on the first appeal.

Accordingly, CCA's breach of contract claim has been waived and is barred by the mandate rule. It is not properly before the Court.

### B. CCA's Breach Of Contract Claim Should Be Rejected

If the Court reaches CCA's breach of contract claim, it should be rejected because the regulatory agreement between CCA and United States contained no contractual right to prepay, and the United States was not otherwise in privity with CCA.

#### 1. This Court's Decision In *Cienega IV* Controls This Action

As the trial court acknowledged, A26, CCA's breach of contract claim is controlled by Cienega IV, 194 F.3d at 1246 (holding that because there was no privity of contract between HUD and the plaintiff with respect to prepayment of the deed of trust notes, HUD could not be liable to the plaintiff for breach of contract).

The material facts in Cienega IV and this action are indistinguishable in all material respects. As here, the plaintiffs in Cienega IV all had executed HUD-insured mortgages and participated in the Section 221(d)(3) program. 194 F.3d at 1234. Each of the Cienega IV plaintiff's transactions included the same documents as the transaction here: a secured note executed between the owner and the lender; a mortgage agreement securing the payment of the note between the owner and the lender; and a regulatory agreement between HUD and the owner.

Id. at 1234-35. As here, the right to prepay the mortgage was expressly set forth in the secured note, id. at 1235, HUD endorsed the note as part of its mortgage insurance commitment, id. at 1234, all transactional documents were printed on forms approved by HUD, id., and all documents were signed contemporaneously, id. at 1236. The plaintiffs' regulatory agreements in Cienega IV, like CCA's regulatory agreement here, did not incorporate any other agreement, nor did they mention prepayment of the mortgage. Id. at 1242; JA502-16. In short, CCA cannot point to a single distinguishing factor between the transactional documents in this action and in Cienega IV.

Not only is Cienega IV factually indistinguishable, it is legally indistinguishable. CCA argues that the separate documents executed by HUD, CCA, and the lender as a part of the same transaction should be treated as a single contract. Resp. 66. In overturning the trial court's decision, this Cienega IV court specifically rejected the Court of Federal Claims' conclusion that the multiple agreements should be read as one, holding that parties to the regulatory agreement (HUD and the owners) were not bound by prepayment terms in a mortgage note executed by different parties (the owners and the lenders). Cienega IV, 194 F.3d at 1244.

The Federal Circuit in Cienega IV also rejected the contention – parroted by CCA here, Resp. 65 – that HUD involvement in the transactions somehow created privity with respect to the prepayment right in the secured note. Cienega IV, 194 F.3d at 1244 (HUD's involvement "did not, as a matter of law, give rise to privity of contract with respect to the right to prepay the mortgage loans."). Because Cienega IV is indistinguishable, the trial court correctly concluded that it was bound to follow Cienega IV and reject CCA's breach of contract claim.

### 2. The Common Law Of Contracts Does Not Support CCA

CCA uses flawed logic to imply a contractual right to prepay between CCA and the Government. According to CCA, the regulatory agreement between CCA and HUD, the mortgage agreement between CCA and its lender, and secured note between CCA and the lender should be read together to form a single contract, despite the fact that they are separate writings executed by different parties. Resp. 65. When the writings are merged to form a single contract, CCA argues that privity is established because all three parties are now bound by a single instrument. Resp. 65-67.

CCA relies upon the common law principle that separate writings that are executed as a part of the same transaction should be interpreted together. See, e.g., Restatement (Second) of Contracts § 202. However, CCA goes too far. In Lurline

Gardens v. United States, 37 Fed. Cl. 415 (1997), which involved mortgage insurance transactions and breach-of-contract claims similar to those of CCA, the court succinctly explained the flaw in CCA's reasoning:

> The principle that writings are to be interpreted together merely ensures that the transaction as a whole be properly and consistently understood, not that all the obligations of a party to one writing be ascribed to all the parties to the other writing. Nothing in defendant's reading of the contracts creates any inconsistency between the individual writing or makes the transaction as a whole internally inconsistent. That is, defendant's interpretation leaves no portion meaningless.

37 Fed. Cl. at 420 (footnote omitted). The Lurline court correctly concluded:

> In sum, there simply is no contract between the plaintiffs and [HUD] in which [HUD] agreed to permit prepayment after twenty years, and the court shall not infer such a contract from agreements that easily could have been, but were not, written to include such an obligation. That the [regulatory agreement] and mortgage note should be read together or consistently as part of a concurrent transaction does not mean that an obligation in the latter should be incorporated in the former.

Id. at 421. Simply put, the principal of construction that instruments executed at the same time should be interpreted together does not create new contractual obligations or merge distinct instruments into a single contract. See Cienega IV, 194 F.3d at 1244.

### 3. Circumstances Surrounding The Execution Of Documents Cannot Change The Plain Meaning Of The Documents Or Otherwise Establish Privity

CCA attempts to make much of the fact that the regulatory agreement, mortgage, and secured note were signed at the same time in a HUD conference room. Resp. 65. But this circumstance has no bearing on privity. If anything, it supports an absence of privity: each of the parties to the separate contracts were aware of their respective obligations, and each written contract stated precisely what the respective signatories intended. Lurline, 37 Fed. Cl. at 421. If HUD had wished to create a contractual right to prepay the HUD-insured mortgage, it could have done so by putting such a right directly into the regulatory agreement with CCA, id.; Cienega IV, 194 F.3d at 1244, or by expressly incorporating the mortgage note by reference,[19] Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 826 (Fed. Cir. 2010). It did not. JA502-16. Furthermore, the existence of a written contract precludes the existence of an implied contract on the same subject matter. Roedler v. Dept. of Energy, 255 F.3d 1347, 1353-54 (Fed. Cir. 2001) (holding that an express contract prevents any implied-in-fact contract upon the same subject matter, even with a separate party); see also Aetna Casualty and Surety Co. v.

[19] The fact that mortgage incorporated the regulatory agreement between HUD and CCA is of no moment. HUD was not a party to the mortgage and clearly two private parties cannot establish privity with the Government by the simple expedient of incorporating an agreement to which the Government is a party.

United States, 655 F.2d 1047, 1553 (Ct. Cl. 2001) (holding that HUD's agreement to insure a project's mortgage did not create an express or implied contract between HUD and the owner's construction company). Thus, even if the Court were to credit Mr. Norman's hearsay testimony that unnamed HUD officials "touted" the availability of prepayment to his father and uncle as an incentive to enter into the Section 221(d)(3) program, such statements do not create an implied-in-fact contract between HUD and CCA. Id.

CCA's reliance upon Home Savings of Am., FSB v. United States, 399 F.3d 1341 (Fed. Cir. 2005), is misplaced. In Home Savings, this Court concluded that privity of contract existed between the Government and a subsidiary thrift institution based upon a written contract between the Government and the thrift's holding company. Id. at 1348-49. The written contract included an integration clause that expressly incorporated Government resolutions issued by the Federal Home Loan Bank Board requiring the subsidiary thrift to maintain a certain net worth. Id. at 1349. The Court held that the resolutions were binding as to the subsidiary thrift specifically upon the grounds that the resolutions were part of the "entire agreement" as defined in the written agreement's integration clause. Id. In this case, the regulatory agreement – the only agreement to which the Government is a party – contains no such integration clause. Cf. Precision Pine, 596 F.3d at 826

(incorporation must be clear and express). As the Court noted in Cienega IV, the regulatory agreement did not incorporate the secured note, nor did it mention prepayment of the mortgage loan, or incorporate any agreement or provision addressing prepayment. Cienega IV, 194 F.3d at 1242.

Finally, CCA's post-hoc contention that the Norman Brothers understood that the note, mortgage, and regulatory agreement formed three parts of one agreement, Resp. 66, cannot be the basis for inferring privity of contract. Cienega IV, 194 F.3d at 1244 ("after-the-fact view of various parties cannot create a contractual relationship between HUD and the owners with respect to prepayment terms, where the contractual documents themselves fail to evidence such a relationship."). The subjective beliefs of Mr. Norman's father and uncle – even if taken to be true – cannot alter the clear and unambiguous language of the respective contracts. In this case and in Cienega IV, the right to prepay the mortgage was expressly set forth in the secured note. Id. at 1235. The plaintiff's regulatory agreement here, like the regulatory agreements in Cienega IV, did not incorporate any other agreement or address mortgage prepayment. Id. at 1242; JA502-16.

#### 4. Arguments Based On The Purported Sale Of CCA's Mortgage To Ginnie Mae Are Waived

In its appellate brief, CCA alleges for the first time that its original lender sold the Chateau Cleary mortgage to the Government National Mortgage

Association ("Ginnie Mae"). Resp. at 65-66. CCA has waived any argument based upon this purported sale.

CCA introduced no documents or testimony about Ginnie Mae's alleged purchase of the mortgage on remand, nor did CCA advance any argument in its pre or post-trial briefs suggesting that a sale would have any relevance to its breach of contract claim. JA1985-2066. As a consequence, no evidence establishes whether, and on what terms, the purported sale occurred, when the purported sale occurred, whether some subsequent sale of the mortgage occurred, or who the owner of the mortgage was at the time of the alleged breach. Moreover, because CCA did not raise the argument below, the Government had no reason to present its own evidence. CCA should not be permitted to offer new arguments in this action's second appeal. Harris, 417 F.3d at 1262.

CCA cannot in any event establish privity. The record contains no evidence establishing whether Ginnie Mae purchased the mortgage or merely took over the servicing of the mortgage. Moreover, the record contains no evidence establishing whether the loan was retained, sold to another institution, or bundled with other loans and sold as a mortgage-backed security.

In sum, CCA's breach of contract claim is without merit and is properly rejected.

## CONCLUSION

For these reasons, and the reasons given in our opening brief, the United States respectfully requests that this Court reverse and enter judgment in favor of the United States.

Respectfully submitted,

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December 13, 2010

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this 13th day of December, 2010, I caused to be placed in the U.S. Mail (postage prepaid) copies of the "REPLY BRIEF OF DEFENDANT-APPELLANT AND RESPONSE TO THE BRIEF OF PLAINTIFF-CROSS APPELLANT," addressed as follows:

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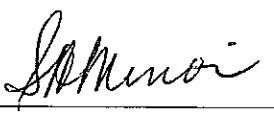

**CERTIFICATE PURSUANT TO RULE 32(A)(7)(C)**

I, David A. Harrington, an attorney in the Department of Justice, Civil Division, Commercial Litigation Branch, certify that this brief, which used Times New Roman font with 14 point type, contains 13,940 words (relying upon the Corel Word Perfect word count feature of the word processing program used to prepare this brief) and complies with the type-volume limitation contained in Rule 32(a)(7)(B).

David A. Harrington