NOMINATIONS

WEDNESDAY, MAY 4, 2022

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
SUBCOMMITTEE ON EUROPEAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:04 p.m., in Room SD–419, Dirksen Senate Office Building, Hon. Jeanne Shaheen presiding.

Present: Senators Shaheen [presiding], Menendez, Kaine, Markey, Booker, Van Hollen, Risch, Johnson, Young, and Barrasso.

Also Present: Senator Schumer.

OPENING STATEMENT OF HON. JEANNE SHAHEEN, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. This hearing of the Senate Foreign Relations Committee's Subcommittee on European Affairs will come to order, and I apologize for being a little late this afternoon.

As you may have heard, there is a lot going on. We have about 28 votes that are starting at 2:30. So I think we will probably pass the gavel back and forth so that we can try and continue the hearing while the votes are going on, and in the interest of expediting my remarks to get to each of you, I am going to submit my opening statement for the record and just start by welcoming three important nominees to advance America's foreign policy: Ambassador Jane Hartley, who has been nominated to the Court of St. James in the United Kingdom; Constance Milstein nominated to the Republic of Malta; and Alan Leventhal nominated to the Kingdom of Denmark.

Welcome to each of you. This hearing will also review the nomination of Dr. Bruce Turner to serve as U.S. representative to the Conference on Disarmament.

Again, we are delighted to be able to hear from each of you today and to have a chance to ask you some questions about what we hope will be soon-to-be confirmed posts.

Let me, again, submit my remarks for the record along with a statement from Senator Coons, who is not going to be able to be here but also wanted a statement entered into the record, and turn it over to the ranking member, Senator Johnson.

PREPARED STATEMENT OF HON. JEANNE SHAHEEN

I would like to call this hearing of the Senate Foreign Relations Committee to order. This hearing will review the nominations of three important nominees to advance America's foreign policy: Ambassador Jane Hartley to the Court of St James

in the United Kingdom, Constance Milstein to the Republic of Malta and Alan Levanthal to the Kingdom of Demark. This hearing will also review the nomination of Dr. Bruce Turner to serve as U.S. Representative to the Conference on Disarmament.

Today, more than ever, our diplomats are critical in advancing U.S foreign policy and national security interests amid the most seismic shifts of our global security landscape in 80 years.

Putin is trying to rewrite history by rebuilding the Soviet Union—challenging the international values, laws and institutions that have kept our world safe since World War 2.

The bloodshed and senseless violence that Putin is waging upon the Ukrainian people—as well as the Ukrainian people's unrelenting resolve to protect their country—has captured the hearts of communities around the entire world. Putin must be held accountable for his egregious crimes.

But we can't do it alone. And that's why our relationships with our partners and allies—especially through our alliances—are so important to hold Putin to account.

But for Putin to feel the full weight of consequences of his actions, we must have ambassadors in place to coordinate our response. And we can maximize our bilateral cooperation by confirming ambassadors to further strengthen that coordination.

Just two weeks ago, I was in the Western Balkans on a Congressional delegation with Senator Murphy and Senator Tillis. We had the opportunity to meet three very recently confirmed Ambassadors. It was clear from our meetings that our diplomatic impact is sustained by the dedicated public servants of the Foreign Service but can truly be transformed with confirmed Ambassadors on the ground.

I am pleased to see that Leader Schumer is here to introduce Ambassador Jane Hartley and Constance Milstein, but I'd like to mention why the position of Ambassador to the United Kingdom is so important, as it has a special connection to my home state of New Hampshire.

In March 1941, former Governor of New Hampshire John Winant was appointed Ambassador to the United Kingdom at a critical moment for UK-U.S. relations. Great Britain was suffering from relentless bombings from Nazi Germany and sought support from the United States to push back against Hitler—not just for the sake of Great Britain but for the future of Europe.

Ambassador Winant played a critical role in implementing the Lend-Lease program and, once the United States formally entered the war, played an integral role in maintaining close coordination between Churchill and Roosevelt in planning the Allied response. Ambassador Winant is an overlooked figure in World War II history but his efforts put the word 'special' in this bilateral relationship. And this is precisely why—and how—our Ambassadors are so essential in bolstering our bilateral relationships.

I have no doubt that Ambassador Hartley's experience and background has prepared her to also add value to the bilateral relationship to our relations with the United Kingdom. Ambassador Hartley previously served as Ambassador to France and Monaco during a critical tenure in U.S.-France relations—coordinating responses to the terrorist attacks at the Bataclan, the Charlie Hebdo attacks and the migrant crisis of 2015.

In recognition of her contributions to U.S.-France relations, she received the Legion of Honor from the French Government.

Ms. Hartley's appointment comes at a transformative moment for the UK, which is redefining its role in the world after voting to leave the European Union in 2015.

I have been impressed by the UK's leading response to the Ukraine crisis, providing critical lethal assistance to Ukraine and closely aligning with the United States within NATO and the UN to condemn and punish Putin for his belligerent actions.

Although there is strong interest in the Senate to advance a trade agreement with the UK, it must be said that we are also closely watching the situation in Northern Ireland.

We wish to see continued implementation of the Good Friday and Stormont House Agreements to ensure lasting peace in Northern Ireland. Significantly, next year the UK will honor the 25th anniversary of the Good Friday Agreement, providing an opportunity to celebrate an extraordinary achievement and recommit to peace, stability and prosperity in Northern Ireland.

I am also pleased to see Constance Milstein nominated to the position of Ambassador to Malta. Ms. Milstein has long supported important philanthropic causes in support of young people around the world, and I applaud her lifelong commitment to supporting our service members and their families.

Her nomination comes at an important time for our continued collaboration with Malta on resisting Russia's malign influence in Europe. I welcomed Malta's an-

nouncement that it would end so-called "golden passports" for Russian and Belarusian nationals in response to Russia's illegal and unprovoked invasion of Ukraine.

The U.S. Senate remains committed, in a bipartisan fashion, to supporting Ukraine against the Kremlin's bloody campaign and resisting Russia's attempts to destabilize Europe and the free world. Expeditiously confirming Ms. Milstein to Malta is an important part of that support.

I am glad to see Alan Levanthal today, nominated to be the U.S. Ambassador to Denmark. Mr. Levanthal has been the Chairman and CEO of Beacon Capital Partners since its founding in 1998. He has a long history working on international issues in the public and private sector. And the timing of his nomination is also important for our relations with Denmark.

I welcome Denmark's decision to significantly increase its defense budget to meet its two percent defense spending commitment by 2033, though I would note that a more expedited timeline might be required given the significant threat that Russia poses. I also note that Denmark seeks to become independent of Russian natural gas.

It is in America's interest to help advance and accelerate America's energy diversification strategy and reduce its reliance on Russian gas.

Last, I welcome Dr. Bruce Turner, nominated to be U.S. Representative to the Conference on Disarmament. Dr. Turner has a distinguished record of service with the Department of State that will enhance U.S. presence at the Conference on Disarmament, a crucial body supporting arms control and disarmament.

These issues are all the more pressing given the new threats to democratic security around the world, including from Russia, China and North Korea.

All appointments come at an important moment for global security, as the U.S. faces new threats from our adversaries, including Russia.

So without further ado, I'd like to hand it over to the ranking member for his opening remarks. We will then turn to the nominees for their opening statements.

PREPARED STATEMENT OF HON. CHRISTOPHER A. COONS

I am proud and honored to have the opportunity to introduce a dear friend, Connie Milstein, who has been nominated by President Biden to serve as our Ambassador to the Republic of Malta.

I would be remiss if I didn't also thank her family for their unwavering support of Connie in helping her achieve her goals, particularly her husband Said and her daughters, Abigail and Joanna.

I first met Connie when I was a New Castle County Executive, and she was involved in the Democratic Leadership Council. She was one of my earliest supporters.

As an attorney, business leader, philanthropist, and political force, Connie has made important contributions to strengthening our democracy.

She possesses the rare talent and passion for seeking out and lifting up young elected officials working in state and local government in an effort to drive principled American leadership. I am one of many who have benefited from her work, which transcends party lines.

In addition to her work in politics, Connie has served the Secretary of the Army and has tirelessly worked to support our troops throughout her career. She is a founding board member of Blue Star Families, the nation's largest support organization for military spouses and children. She also started Dog Tag Bakery, a company, whose mission is to use its profits to transform the lives of veterans with service-connected disabilities, their military spouses, and their caregivers through investment in their higher learning.

Connie is a proud American, an internationalist, and an incredibly capable individual to take this post.

I look forward to supporting her in this work and urge my colleagues to support her nomination.

STATEMENT OF HON. RON JOHNSON, U.S. SENATOR FROM WISCONSIN

Senator JOHNSON. Thank you, Madam Chair. I will follow your fine example. I also ask my opening statement be entered into the record.

I also want to welcome the nominees and thank them for their past service but also for their willingness to serve in these capac-

ities as well. So I am looking forward to hearing from your testimony.

And thank you, Madam Chair.

PREPARED STATEMENT OF HON. RON JOHNSON

Thank you Senator Shaheen.

I would like to thank each of the nominees, as well as their families, for their service. If confirmed, our nominees will be preforming important diplomatic service at a critical time for Europe and the world. You would be working to advance our national interests in Denmark, Malta, and the United Kingdom, as well as at the Conference on Disarmament. You would be responsible not only for representing America there, but you will also need to ensure that you keep America informed as to those countries views back here at home, especially by keeping members of this committee and our staffs updated on the situation on the ground. If the vision for a Europe 'whole, free and at peace' is ever to become a reality, we must work in close coordination with our European allies and partners, leveraging our position in international institutions, to reject and combat Russia's illegal and unprovoked atrocities and war crimes in Ukraine, as well as other malign activities by America's adversaries.

The United Kingdom and Denmark are both stalwart NATO allies, and very close bilateral partners of the U.S. As we work together to counter Russia's latest attack on Ukraine and to strengthen NATO, we should also seize the moment to reach deeper levels of friendship, including strengthening trade and defense cooperation. While Malta is not a NATO member, it has been an active U.S. partner in a number of ways, including combatting transnational crime in the Mediterranean. Given Malta's strategic location, opportunities to develop a more robust partnership should be pursued. All three countries have committed to enforcing sanctions against Russia, with the United Kingdom and Denmark also taking the important step of providing weapons and other types of support to the Ukrainian people.

I look forward to hearing from all the witnesses and am grateful to them for appearing today.

Senator SHAHEEN. Thank you, Senator Johnson.

Let me also recognize the ranking member of the full committee, Senator Risch. We are glad that you are here as well, and I know we are waiting for Senator Schumer, who we think is going to come to do introductions of Ambassador Hartley and Ms. Milstein.

But in the meantime, I am going to ask, Senator Markey, if you would like to introduce Mr. Leventhal.

STATEMENT OF HON. EDWARD J. MARKEY, U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you. Thank you, Madam Chair. It is my honor to be here today to introduce Alan Leventhal, nominated to be the United States Ambassador to the Kingdom of Denmark.

Joining Alan today are his wife, Sherry, and his son, Alexander, and it is a proud day for the Leventhal family, which has had a long, rich history in the city of Boston, transforming it.

He is a son of the Commonwealth. In his highly successful business, academic, and nonprofit endeavors, he has left his mark on Boston and beyond. First, in the literal sense, his company has made downtown Boston's financial districts bustling as a destination, and it was also behind the revitalization of the Boston Harbor through the construction of Rowes Wharf and, really, opening up Boston Harbor to the city of Boston for the first time in 50 years.

And, more importantly, Alan has left his mark in improving the lives of those in his community in the fight against cancer. He funded the sharpest minds as chair of the Damon Runyon Cancer

Research Service. Their track record was impressive. Twelve of the individuals they funded ended up winning the Nobel Prize.

He has also left his mark in education, which he considers his true passion. He served on the governing board at MIT, which dedicates $2 billion every year on research funding to tackle the top challenges our country faces.

Alan jokes that he may be the only one in his family that does not have a degree from Boston University. But through his transformational work as chair of the board of trustees at BU, he created greater opportunities for tens of thousands of proud BU graduates during his tenure.

He will assume his post in Copenhagen at a time of great turmoil in the European continent. Denmark plays an outsized role in supporting U.N. peacekeeping operations and the counter ISIS campaign.

Unsurprisingly, Denmark has, again, risen to the challenge in Europe's response to Russia's illegal invasion of Ukraine, including by weaning itself off of Russian fossil fuels. As Ambassador, Alan will play a key role in building upon that unified response to Russian aggression.

It is a country of just 6 million people but it has few peers when it comes to the global fight against climate change, Alan knows, because his buildings are the best buildings in terms of energy efficiency that can be constructed.

He and Boston brought together business and civic leaders through the Boston Green Ribbon Commission to show that clean energy is good for our economies and for our planet.

We are very proud of him in Massachusetts, but it is his lifetime of work in combating the scourge of cancer, the climate crisis, and training the next generation of American leaders that makes Massachusetts not just the Bay State but the brain state, and we are proud to have him as someone who represents our state.

The diversity of his experience also makes him a fantastic choice to be our top diplomat to the Kingdom of Denmark at a moment of great consequence for our country and the planet.

I urge his swift confirmation by the Foreign Relations Committee and by the United States Senate.

I thank you, Madam Chair.

Senator SHAHEEN. Thank you very much, Senator Markey.

I understand that Senator Schumer is only a few minutes away. So with your indulgence, I would like to introduce Dr. Bruce Turner, and then we will start testimony from Dr. Turner, headed towards Ambassador Hartley, and hope that before we get too far along Senator Schumer will be here.

And, Senator Markey, I know that you may have to leave and feel free to do that whenever you are ready.

Senator MARKEY. I thank you. Thank you, Madam Chair.

Senator SHAHEEN. Dr. Bruce Turner has been nominated to be U.S. Representative to the Conference on Disarmament. Dr. Turner has a distinguished record of service with the Department of State that will enhance U.S. presence at the Conference on Disarmament, which is a crucial body supporting arms control and disarmament, and, as we know, these issues are even more pressing

right now, given the new threats to democratic security around the world, including from Russia, China, and North Korea.

All of these appointments today come in a moment, an important moment, for global security as the U.S. faces new threats from our adversaries, including Russia.

So while we continue to await Senator Schumer, I will ask Dr. Turner if you would like to begin your testimony.

Thank you.

STATEMENT OF DR. BRUCE I. TURNER OF COLORADO, NOMINATED TO BE U.S. REPRESENTATIVE TO THE CONFERENCE ON DISARMAMENT IN GENEVA, WITH THE RANK OF AMBASSADOR DURING HIS TENURE OF SERVICE

Mr. TURNER. Thank you, Madam Chair, Ranking Member Johnson, and distinguished members of the committee.

It is the honor of a lifetime to appear before you as the President's nominee to be the U.S. Permanent Representative for the Conference on Disarmament, or CD, in Geneva. I am also grateful to Secretary Blinken and Under Secretary Jenkins for their support of this new opportunity for me to serve the American people.

My parents understood what it meant to serve our country during World War II. Likewise, my wife, Veronique, has been at my side every step of our State Department journey and our two children grew up in the Foreign Service family. Diplomacy has been my life's work and I cannot think of anything I would rather have done.

In seeking confirmation for this position, I am acutely aware of the CD's illustrious history in producing the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, the Chemical Weapons Convention, and the Comprehensive Nuclear Test Ban Treaty.

I am also aware that we have failed to gain the support of critical countries for negotiations on a fissile material cut-off treaty, the next logical step. Moreover, some of the arms control treaties negotiated in the CD are, effectively, under assault.

Most recently, Russia, a state's party that has used chemical weapons and that has an offensive program, is making unfounded accusations that Ukraine plans to use chemical weapons in Russia's unprovoked war against Ukraine.

Russia's nuclear rhetoric and threats in connection with its invasion of Ukraine are also recklessly escalatory and hard to reconcile with President Putin's endorsement of the statement in January by the leaders of the P5—the five nuclear weapon states that are permanent members of the U.N. Security Council—that a nuclear war cannot be won and must never be fought.

Growing strategic competition, encompassing Russia's history of arms control violations, and China's repeated unwillingness to engage meaningfully in arms control discussions as it builds up its own nuclear forces has caused some to question the value of such agreements. It is true that achieving consensus on such matters has become increasingly elusive and difficult.

Russia's most recent actions and the PRC's tacit and, in some cases, overt support for them have rendered the challenge even

more daunting. These developments only underscore the continuing need for American engagement and leadership.

Given the stakes, we can only redouble our efforts as we continue to protect our security and that of our allies and partners. Russia is still complying with the New START Treaty. Through the P5, the PRC acknowledged the need for engagement with the United States on risk reduction and a dialogue to strengthen stability.

I believe the coming year does offer further opportunities to exert U.S. leadership. If confirmed, I would hope to contribute to a positive outcome of the Nuclear Non-Proliferation Treaty Review Conference later this year.

Non-proliferation remains a core national security interest. It is the key to peaceful uses of nuclear energy and the basis for pursuing the eventual goal of a world without nuclear weapons, understanding that progress must take into account today's challenging security conditions and that it can only proceed through progressive steps subject to effective verification.

If confirmed, I will also seek to contribute to our successful efforts in the U.N. General Assembly's First Committee to reinforce and strengthen international arms control and non-proliferation cooperation, including increased international support for development of norms of behavior in space.

The United States is already leading the way through Vice President Harris' announcement of a commitment not to conduct destructive direct ascent anti-satellite missile tests.

I would also seek to build upon the Geneva diplomatic platform offered by the Standing Delegation to the CD, which has supported a variety of arms control and international security efforts to include those of Deputy Secretary Sherman and Under Secretary Jenkins in the U.S.-Russia Strategic Stability Dialogue.

The Senate Foreign Relations Committee has a distinguished and successful history of supporting arms control efforts on a bipartisan basis. If confirmed, I commit to be available to consult closely with this committee and other members of Congress as well as their staffs.

In working to achieve our long-term nuclear disarmament and other arms control objectives, I believe the CD remains an essential multilateral institution. If confirmed, I will do all that I can to make the CD an active contributor to international peace and security while always protecting the security interests of the United States and its allies and partners.

Thank you, again, so much for the opportunity to come before you today. I look forward to any questions you may have.

Thank you, Madam Chair.

[The prepared statement of Mr. Turner follows:]

PREPARED STATEMENT OF DR. BRUCE I. TURNER

Thank you, Madam Chair and members of the committee.

It is the honor of a lifetime to appear before you as the President's nominee to be the U.S. Permanent Representative to the Conference on Disarmament, or CD, in Geneva. I am also grateful to Secretary Blinken and Under Secretary Jenkins for their support of this new opportunity to serve the American people.

My parents understood what it meant to serve our country during World War II. Similarly, my wife Veronique has been at my side every step of our State Depart-

ment journey, and our children, Hadrien and Alixe, grew up in the Foreign Service family.

In seeking confirmation for this position, I am acutely aware of the CD's illustrious history in producing the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, the Chemical Weapons Convention, and the Comprehensive Nuclear-Test-Ban Treaty. I am also aware that we have failed to gain the support of critical countries for negotiations on a Fissile Material Cutoff Treaty—the next logical step. Unfortunately, some of the arms control treaties negotiated in the CD are effectively under assault. Most recently, Russia—a States Party that has used chemical weapons and has an offensive program—is making unfounded accusations that Ukraine plans to use chemical weapons in Russia's unprovoked war against Ukraine. Russia's nuclear rhetoric in connection with its invasion of Ukraine is recklessly escalatory and hard to reconcile with President Putin's endorsement of the statement by the leaders of the P5—the five nuclear-weapon states that are permanent members of the U.N. Security Council—in January that "a nuclear war cannot be won and must never be fought."

Growing strategic competition—encompassing Russia's history of arms control violations and China's repeated unwillingness to engage meaningfully in arms control discussions as it builds up its nuclear forces—has caused some to question the value of such agreements. Russia's most recent actions and the PRC's tacit, and, in some cases, overt support for them, have rendered the challenge even more daunting. These developments only underscore the continuing need for American engagement and leadership.

Given the stakes, we can only redouble our efforts, as we continue to protect our security and that of our allies and partners. Russia is still complying with the New START Treaty. Through the P5, the PRC acknowledged the need for engagement with the United States on risk reduction and a dialogue to strengthen stability.

I believe the coming year does offer further opportunities to exert U.S. leadership. If confirmed, I would hope to contribute to a positive outcome of the Nuclear Non-Proliferation Treaty (NPT) Review Conference later this year. Nonproliferation remains a core national security interest. It is the key to pursuing the eventual goal of a world without nuclear weapons, understanding that progress must take into account today's challenging security conditions, and that it can only proceed through progressive steps, subject to effective verification.

If confirmed, I will also seek to contribute to our successful efforts in the U.N. General Assembly's First Committee to reinforce and strengthen international arms control and nonproliferation cooperation, including increased international support for development of norms of behavior in space. The United States is already leading the way through its ban on anti-satellite testing.

I would also seek to build upon the Geneva diplomatic platform offered by the standing delegation to the CD, which has supported a variety of arms control and international security efforts, to include those of Deputy Secretary Sherman and Under Secretary Jenkins in the U.S.-Russia Strategic Stability Dialogue.

The Senate Foreign Relations Committee has a distinguished and successful history of supporting arms control efforts, on a bipartisan basis. If confirmed, I commit to be available to consult closely with this committee and other Members of Congress, as well as their staffs.

In working to achieve our long-term nuclear disarmament and other arms control objectives, I believe the CD remains an essential multilateral institution. If confirmed, I will do all that I can to make the CD an active contributor to international peace and security, while always protecting the security interests of the United States and its allies and partners.

Thank you so much for the opportunity to come before you today. I look forward to any questions you may have.

Thank you.

Senator SHAHEEN. Thank you very much, Dr. Turner.

Senator Schumer, we have been waiting for you. We are delighted you made it.

STATEMENT OF HON. CHARLES E. SCHUMER, U.S. SENATOR FROM NEW YORK

Senator SCHUMER. Thank you very much, Madam Chair, and to all the members of the committee, thank you for the honor of introducing two exceptional nominees, both whip smart, both accomplished, both experienced women who hail from New York—Jane

Hartley to be Ambassador to the United Kingdom of Great Britain and Northern Ireland, and Connie Milstein, our next Ambassador to Malta. It is an honor to introduce both of you.

Jane is here today with her husband, Ralph, who I hear is having his retirement party today. Congratulations, Ralph, on all of your hard work. Jane's children, Kate and Jamie, who actually went to school with my daughter, Allison, could not be here today but I am sure they are cheering their mother on from home.

I am really proud to have urged President Biden to nominate Jane Hartley as our Ambassador to the UK. She would be only the second woman to ever serve as UK Ambassador and the first in nearly half a century.

Only the second woman ever to serve as the UK Ambassador and the first in nearly half a century. It is amazing, and I cannot think of a more qualified person to do it than my friend, Jane Hartley.

This is not the first ambassadorship that Jane would hold. In 2014, she was appointed U.S. Ambassador to France under President Obama, where her time coincided with the horrible Paris terrorist attacks of 2015. It was an extremely difficult period for both of our countries, and Jane represented the U.S. with great distinction.

In the aftermath of these attacks, she dedicated her time as ambassador to strengthening U.S.-French counterterrorism cooperation and was awarded the Legion of Honor from the president of France in the recognition of her efforts.

Jane has served our country in other ways for decades, in the Carter administration as CEO of the G–7 Group, and most recently, as CEO of the Observatory Group, a major global firm based in New York.

The bottom line is this. She would bring to this ambassadorship a depth of experience, a love of democracy and democratic institutions, and a deep loyalty to the values both the United States and the UK hold dear.

I cannot think of a better person—I have known Jane for decades—to be Ambassador to our longtime ally, the United Kingdom.

It is also my honor to introduce another proud New Yorker, Connie Milstein, whom President Biden has nominated to be the next U.S. Ambassador to Malta. Connie is joined here by her husband, Said, and even though they are not in attendance, I want to acknowledge Connie's daughters, Abby and Joanna, as well as her wonderful granddaughter, Sara. I know they are all proud today.

Connie comes from a longtime New York family. Her grandfather was the founder of a successful business in New York prior to World War II, and her father, a World War II vet, started his first company in Newbury, New York. Their roots in the Empire State run very deep.

Connie comes before this committee as a deeply experienced attorney, businesswoman, and advocate for international affairs. She will make an exceptional U.S. Ambassador because her career has been completely focused on the skills and values necessary to any diplomatic post.

Among her experiences, she has dedicated her career to looking out for veterans, creating successful profits like the Dog Tag Bakery to help veterans with disabilities, served on the Global Progress

Initiative at the Center for American Progress meeting with world leaders to discuss today's pressing geopolitical problems, and also served on the board of trustees of one of the great universities of New York and America, NYU, and she expanded the university's global reach.

She also served on Nobel Peace Laureate Kailash Satyarthi's foundation and worked with him to end childhood slavery and trafficking.

In short, Connie is both a proud New Yorker but also a true citizen of the world. She brings a wide range of depth and experience to the post and I know she will carry out her responsibilities with distinction, and I am proud to introduce her today.

Finally, I want to acknowledge two other individuals who are coming before the committee. The first is Alan Leventhal, who I have known for a very long time. I notice Senator Markey was here.

He has been nominated to serve as U.S. Ambassador to the Kingdom of Denmark and he is one of Boston's top business people.

And, second, I also want to recognize Bruce Turner, who you just heard from, a longtime member of the Foreign Service Committee—Foreign Service, rather, who has been nominated as representative to the Conference on Disarmament. They will both represent the U.S. with distinction.

I thank the members of the committee, congratulate all of today's outstanding public servants for their nominations, and yield back the rest of my time.

Senator SHAHEEN. Thank you very much, Senator Schumer, and we know you have to get to the floor. So feel free to leave whenever you are ready.

And I am going to continue down the dais if that is all right with our nominees and ask Mr. Leventhal if he would like to offer his testimony after he says hello to Senator Schumer, although, Senator Schumer, you cannot claim Mr. Leventhal. I know he is from Boston. So——

Senator SCHUMER. Right. I cannot claim him. You are right.

Senator SHAHEEN. He is closer to me.

Senator SCHUMER. He is probably even a Red Sox fan.

[Laughter.]

Senator SHAHEEN. Go ahead, Mr. Leventhal, and I should have said this before you offered your testimony, Dr. Turner. Feel free to introduce any family members or friends that you have here with you today.

STATEMENT OF ALAN M. LEVENTHAL OF MASSACHUSETTS, NOMINATED TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO THE KINGDOM OF DENMARK

Mr. LEVENTHAL. Chairwoman Shaheen, Ranking Member Johnson, and distinguished members of the committee, it is a privilege to appear before you.

I am honored to be the nominee for U.S. Ambassador to the Kingdom of Denmark, and I thank President Biden and Secretary Blinken for their confidence in me.

I would like to acknowledge my wife, Sherry, who has been such a source of strength and has supported me in all my endeavors, and I would also like to acknowledge my son, Alex, who is here representing his sisters and brothers.

I would like to remember my parents, who instilled in me the importance of service to community and country. This has led me to leadership roles in organizations that have had meaningful impact on the world.

As Senator Markey mentioned in his introduction, I served for 10 years as chair of Damon Runyon Cancer Research Foundation, which is known as the venture capital of cancer research. Thirteen of the individuals we funded later won the Nobel Prize.

I am a member of the governing board of MIT, one of the top-rated research institutions in the world. Its mission is to help solve the great global challenges including climate, health, cancer, water.

In my business, I have led transformational developments to improve the urban environment. My companies have created thousands of affordable housing units for working families.

In each of these endeavors, I have worked with smart people who bring diverse views, backgrounds, and experiences. I approach each challenge by listening and treating my colleagues with dignity and respect.

If confirmed, I hope to use these skills to successfully advance U.S. interests and values in the Kingdom of Denmark.

If confirmed, my first priority would be to ensure the safety and security of U.S. citizens in the Kingdom of Denmark. My second priority will be to advance our shared security interests, especially in light of Russia's brutal and unprovoked war against Ukraine.

As the only country that is a member of NATO, the EU, and the Arctic Council, Denmark partners with the United States on many issues. Denmark currently leads the NATO mission in Iraq and is a close global partner on security issues.

If confirmed, I will work to ensure Denmark's commitment to stability and security as well as meeting its NATO defense spending commitments.

My third priority is to strengthen our economic relationships, promoting bilateral exports and recovery from COVID–19, as well as expanding Danish investment in the United States in order to create good-paying jobs for working families.

Denmark has some of the world's leading companies working on global issues like climate change. My own company, Beacon Capital Partners, has been a leader in sustainability, receiving EPA's Energy Star Partner of the Year award for 11 consecutive years.

If confirmed, I would draw on my experiences to promote mutual exchanges and investment between the United States and the Kingdom of Denmark, including the Faroe Islands and Greenland.

My final priority, if confirmed, will be to promote and strengthen the ties of our best academic and research institutions with their counterparts in the kingdom.

Denmark's renowned research institutions recently marked the 100th anniversary of both the founding of the Niels Bohr Institute and the awarding of the Nobel Prize in physics to Niels Bohr.

To ensure our relations are as strong in the future as they are today, I would engage with the people of Denmark, the Faroe Is-

lands, and Greenland to expand people-to-people ties through exchange programs and robust public diplomacy efforts.

If confirmed, I look forward to supporting the safety and morale of mission Kingdom of Denmark, both at the Embassy in Copenhagen and our consulate in Nuuk. I also look forward to working with Congress to further U.S. priorities in the Kingdom of Denmark, one of our closest European allies.

I would like to highlight that today, at this very moment, the people of Denmark are lighting candles in their windows at home for today marks Denmark's liberation from Nazi occupation on May 4th, 1945.

It underscores that Danes have experienced brutal, unprovoked aggression. It underscores they have experienced occupation and it speaks to how much they value their freedom. It is fitting that President Zelensky chose today to address Denmark.

It would be the greatest honor to represent my country to the Kingdom of Denmark. Thank you for your time and consideration. I look forward to your questions.

[The prepared statement of Mr. Leventhal follows:]

PREPARED STATEMENT OF ALAN M. LEVENTHAL

Chairwoman Shaheen, Ranking Member, and distinguished members of the committee, it is a privilege to appear before you. I am honored to be the nominee for U.S. Ambassador to the Kingdom of Denmark, and I thank President Biden and Secretary Blinken for their confidence in me.

I would first like to acknowledge my wife, Sherry, who has been such a source of strength and has supported me in all my endeavors. I also want to acknowledge my son Alexander who is representing his sisters and brothers today. I also would like to remember my parents who instilled in me the importance of service to community and country.

This has led me to leadership roles in organizations that have meaningful impact on the world. I served for 10 years as Chair of Damon Runyon Cancer Research Foundation—which is known as the venture capital of Cancer Research. Thirteen of the individuals we funded later won the Nobel Prize. I am a member of the governing board of MIT—one of the top-rated research institutions in the world. MIT's mission is to help solve the great global challenges including climate and health. In my business I have led transformational developments to improve the urban environment. My companies have created thousands of affordable housing units for working families.

In each of these endeavors I have worked with smart people who bring diverse views, backgrounds, and experiences. I approach each challenge by listening and treating my colleagues with dignity and respect. If confirmed, I hope to use these skills to successfully advance U.S. interests and values in the Kingdom of Denmark.

If confirmed, my first priority would be to ensure the safety and security of U.S. citizens in the Kingdom of Denmark.

My second priority will be to advance our shared security interests, especially in light of Russia's brutal and unprovoked war against Ukraine. As the only country that is a member of NATO, the EU, and the Arctic Council, Denmark partners with the United States on many issues. Denmark currently leads the NATO mission in Iraq and is a close global partner on security issues. If confirmed, I will work to ensure Denmark's commitment to stability and security, as well as meeting its NATO defense spending commitments.

My third priority is to strengthen our economic relationships, promoting bilateral exports and recovery from COVID–19 and expanding Danish investment in the United States, in order to create good paying jobs for working families. Denmark has some of the world's leading companies working on global issues like climate change. My own company—Beacon Capital Partners—has been a leader in sustainability, receiving EPA's Energy Star Partner of the Year Award for 11 consecutive years. If confirmed, I would draw on my experiences to promote mutual exchanges and investment between the United States and the Kingdom of Denmark, including the Faroe Islands and Greenland.

My final priority, if confirmed, will be to promote and strengthen the ties of our best academic and research institutions with their counterparts in the Kingdom. Denmark's renowned research institutions recently marked the 100th anniversary of both the founding of Niels Bohr Institute and the awarding of the Nobel Prize in Physics to Niels Bohr. To ensure our relations are as strong in the future as they are today, I would engage with the people of Denmark, the Faroe Islands, and Greenland to expand people-to-people ties through exchange programs and robust public diplomacy efforts.

If confirmed, I look forward to supporting the safety and morale of staff at the Embassy in Copenhagen and our Consulate in Nuuk. I also look forward to working with Congress to further U.S. priorities in the Kingdom of Denmark, one of our closest European partners.

We are stronger when working with our allies to advance our shared security, prosperity, and values.

It would be the greatest honor to represent my country to the Kingdom of Denmark. Thank you for your time and consideration. I look forward to your questions.

Senator SHAHEEN. Thank you very much, Mr. Leventhal.

I will now ask Ms. Milstein if she would like to give her testimony.

STATEMENT OF CONSTANCE J. MILSTEIN OF NEW YORK, NOMINATED TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO THE REPUBLIC OF MALTA

Ms. MILSTEIN. Thank you, Madam Chair.

Madam Chair, Ranking Member, distinguished senators of this esteemed committee, I am humbled and honored to appear before you today. I am deeply grateful to the president, Dr. Biden, and Secretary Blinken for the confidence they have placed in me to serve as the United States Ambassador to the Republic of Malta.

I would like to acknowledge my husband, Said Abu-Kaud, my children, Abby and Joanna, their husbands, Rick and Bjorn, and my granddaughter, Sara, who have all shown me unwavering love, support, and patience in my endeavor to follow my lifelong dream to serve our country and to continue my passionate advocacy for fairness, justice, and democracy.

I would also like to remember my parents, Seymour and Vivian, who taught me the values of respect, responsibility, and giving. Their service to others was an inspiration to me to lead a life of purpose.

My father was a proud veteran of World War II who returned to the United States in 1945 on a hospital plane. Everyone on that plane signed a dollar bill, which my dad carried in his wallet until he died.

I, too, am proud to have had opportunities for service. For decades, I have worked on programs and initiatives dedicated to military service members, disabled veterans, their families, and caregivers.

I have always maintained a strong interest in foreign affairs and I have been active in public policy and global education. My varied experiences as an attorney and businesswoman will empower me to steward our important relationship with the Republic of Malta.

Three priorities will guide my work. First, promoting peace and security. If confirmed, my top priority will be to ensure the safety and welfare of U.S. citizens living in or traveling in Malta.

Furthermore, I will prioritize the promotion of peace, security, and regional stability. Malta may be the smallest country in the

European Union but it has great strategic importance based on its location adjacent to the Mediterranean Sea's principal shipping routes and at the crossroads of Europe, North Africa, and the Middle East.

I believe in growing the bilateral partnership between our two nations as we come together to face regional security challenges, transnational crime, and illicit financing.

Promoting peace and security in the region also means encouraging inclusiveness, the protection of human rights, the rule of law, and fundamental freedoms.

Second, promoting prosperity, trade, and people-to-people ties. If confirmed, I will increase U.S. and Maltese economic ties. Malta aspires to lead small island nations in sustainable development.

Therefore, I will capitalize on our shared goals of promoting prosperity, trade, and people-to-people ties through U.S. innovation and commercial interests in Malta.

Third, tackling corruption and impunity. The assassination of Daphne Caruana Galizia, an important Maltese investigative journalist, in October of 2017 showed the danger of corruption in Maltese politics and society.

If confirmed, I will champion rule of law efforts and an open and free press. Rule of law reforms regarding anti-money laundering and countering the financing of terrorism are also critical to Malta's efforts to fully implement the Financial Action Task Force action plan to remove Malta as a jurisdiction for increased monitoring.

In order to fully implement these reforms, Malta will need a stronger financial regulatory environment, which will serve to strengthen and benefit Malta's economic institutions and reputation for the future.

If confirmed, I would work with Malta to make these reforms sustainable for the long term. It would be an honor to be a member of the outstanding Embassy Valletta team and, if confirmed, I am committed to working with the members of this committee.

Thank you for this opportunity to appear before you. I am happy to answer your questions.

[The prepared statement of Ms. Milstein follows:]

PREPARED STATEMENT OF CONSTANCE J. MILSTEIN

Madam Chair, Ranking Member, and distinguished Senators of this esteemed committee, I am humbled and honored to appear before you today. I am deeply grateful to the President, Dr. Biden, and Secretary Blinken for the confidence they have placed in me to serve as the United States Ambassador to the Republic of Malta.

I would like to acknowledge my husband Saïd Abu-Kaud, my children Abby and Joanna, their husbands Rick and Bjorn, and my granddaughter Sara, who have all shown me unwavering love, support, and patience in my endeavor to follow my lifelong dream to serve our country, and continue my passionate advocacy for fairness, justice, and democracy. I would also like to remember my parents Seymour and Vivian who taught me the values of respect, responsibility, and giving. Their service to others was an inspiration to me to lead a life of purpose.

My father was a proud veteran of WWII who returned to the United States in 1945 on a hospital plane. Everyone on that plane signed a dollar bill, which my dad carried in his wallet until he died. I too am proud to have had opportunities for service. For decades, I have worked on programs and initiatives dedicated to military service members, disabled veterans, their families, and caregivers.

I have always maintained a strong interest in foreign affairs, and I have been active in public policy and global education. My varied experiences as an attorney and businesswoman will empower me to steward our important relationship with the Republic of Malta. Three priorities will guide my work:

First, promoting peace and security. If confirmed, my top priority will be to ensure the safety and welfare of U.S. citizens living in or traveling in Malta. Furthermore, I will prioritize the promotion of peace, security, and regional stability. Malta may be the smallest country in the European Union, but it has great strategic importance based on its location adjacent to the Mediterranean Sea's principal shipping routes and at the crossroads of Europe, North Africa, and the Middle East. I believe in growing the bilateral partnership between our two nations as we come together to face regional security challenges, transnational crime, and illicit financing.

Promoting peace and security in this region also means encouraging inclusiveness, protection of human rights, the rule of law, and fundamental freedoms.

Second, promoting prosperity, trade, and people-to people ties. If confirmed, I will increase U.S. and Maltese economic ties. Malta aspires to lead small island nations in sustainable development. Therefore, I will capitalize on our shared goals of promoting prosperity, trade, and people-to-people ties through U.S. innovation and commercial interests in Malta.

Third, tackling corruption and impunity. The assassination of Daphne Caruana Galizia (an important Maltese investigative journalist) in October of 2017 showed the danger of corruption in Maltese politics and society. If confirmed, I will champion rule of law efforts and an open and free press.

Rule of law reforms regarding anti-money laundering and countering the financing of terrorism are also critical to Malta's efforts to fully implement the Financial Action Task Force Action Plan to remove Malta as a jurisdiction for increased monitoring. In order to fully implement these reforms, Malta will need a stronger financial regulatory environment, which will serve to strengthen and benefit Malta's economic institutions and reputation for the future.

If confirmed, I would work with Malta to make these reforms sustainable for the long term.

It would be an honor to be a member of the outstanding Embassy Valletta team, and if confirmed, I am committed to working with the members of this committee.

Thank you for this opportunity to appear before you. I am happy to answer your questions.

Senator SHAHEEN. Thanks very much, Ms. Milstein.

Ambassador Hartley?

STATEMENT OF HON. JANE D, HARTLEY OF NEW YORK, NOMINATED TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTH IRELAND

Ambassador HARTLEY. Madam Chair, Ranking Member, and distinguished members of the committee, it is a privilege to appear before you.

I am honored to be the nominee for the U.S. Ambassador to the United Kingdom of Great Britain and Northern Ireland, and I thank President Biden for his confidence in me.

The sense of history with our closest ally is, certainly, not lost on me. I follow in the footsteps of many great Americans, including John Adams, John Quincy Adams, and Martin Van Buren.

I am also thrilled, as Senator Schumer has just said, to be the second woman in history to be nominated to this role, and I salute Anne Armstrong for leading the way.

First, though, I would like to thank my family—my children, who are the light of my life—Chuck mentioned earlier—Kate and Jamie. Whatever I do in life, my most important title will always be mom. And, of course, my husband who is with me today, and partner of 39 years without whose support none of this would be possible.

My parents taught me that we were lucky to live in the greatest country on Earth and that the highest honor was to serve our nation. From my early life, I have believed this strongly and public service has been very important to me.

My time as Ambassador to France coincided with the terrible surge in terrorism that shook our two nations. The extraordinary staff at Embassy Paris performed their duties with grace and strength in the face of terror and loss.

It emphasized to me that dedicated American and local staff of our overseas missions and everywhere in our Government advance our interests and protect our security every single day. It was another reminder how critical public service is to our nation.

The UK and the United States are two great countries bound by history, friendship, and especially now a shared commitment to the universal values of freedom and liberty.

During the ongoing crisis in Ukraine we have seen the strength of the UK response and the many ways also in which the British public has volunteered in support of Ukrainians.

If confirmed, it will be my mission to strengthen America's special relationship with the UK and I hope to focus on four overarching goals.

First, protect Americans and deepen bilateral security cooperation. My top priority will be the safety and security of Americans. As the recent events in Europe have made very clear—crystal clear, frankly—we have no more capable partner in defending against threats to international security than the UK.

If confirmed, I will build on these decades of close bilateral security cooperation. I will also work tirelessly to uphold the Belfast Good Friday Agreement, which has been the bedrock of peace and stability and prosperity in Northern Ireland for 25 years.

Second, I will broaden economic ties and expand technology and innovation and collaboration. If confirmed, I will focus on reinvigorating bilateral trade, broadening job opportunities for American workers, and addressing the climate crisis. Increasing collaboration supports prosperity for both the United States and the United Kingdom.

Third, I will promote and defend our shared values of democracy and freedom. If confirmed, I will seek to strengthen bilateral cooperation, to rebuild public faith in democracy, combat authoritarianism wherever it may be, and ensure that our liberty is never ever taken for granted.

Fourth, I will capitalize on the strong ties between our people to guarantee the strength of our enduring alliance. To deepen connections between our people, I will encourage exchanges between our two peoples and ensure citizens from across the United Kingdom, particularly young people, are exposed to the full diversity of our country.

None of this is possible without the dedicated and extraordinary talented teams and their family at Embassy London and at our consulates in Hamilton, Edinburgh, and Belfast.

I intend to build on their successes, promote American interest, and advance our shared goals together with our closest ally, the United Kingdom.

It is my honor to be considered to represent the United States as Ambassador to the United Kingdom of Great Britain and Northern Ireland. I look forward to partnering with Congress to further priorities in the UK.

And now I would be happy to answer any questions.

[The prepared statement of Ambassador Hartley follows:]

PREPARED STATEMENT OF HON. JANE D. HARTLEY

Madam Chair, Ranking Member, and distinguished members of the committee, it is a privilege to appear before you. I am honored to be the nominee for U.S. Ambassador to the United Kingdom of Great Britain and Northern Ireland, and I thank President Biden for his confidence in me.

The sense of history with our closest ally is certainly not lost on me. I follow in the footsteps of many great Americans including John Adams, John Quincy Adams, and Martin Van Buren. I am also thrilled to be the second woman in history to be nominated to this role, and salute Anne Armstrong for leading the way.

I would like to thank my family. First my children, who are the light of my life. My most important title will always be "Mom." And of course, my husband and partner of 39 years, without whose support none of this would be possible. My parents taught me that we were lucky to live in the greatest country on earth, and that the highest honor was to serve your nation.

From my early life, public service has always been important to me.

My time as Ambassador to France coincided with a terrible surge in terrorism that shook our two nations, but the extraordinary staff at Embassy Paris performed their duties with grace and strength in the face of terror and loss. It emphasized to me the dedicated American and local staff of our overseas missions—and in our Government—advance our interests and protect our security every day. It was another reminder of how critical public service is to our nation.

The UK and the United States are two great countries bound by history, friendship, and especially now, a shared commitment to the universal values of freedom and liberty. During the ongoing crisis in Ukraine, we have seen the strength of the UK response and the many ways in which the British public has volunteered in support of Ukrainians.

If confirmed, it will be my mission to strengthen America's special relationship with the UK, and I hope to focus on four overarching goals.

First, protect Americans and deepen bilateral security cooperation. My top priority will be the safety and security of Americans. As recent events in Europe have made clear, we have no more capable partner in defending against threats to international security than the UK. If confirmed, I will build on these decades of close bilateral security cooperation. I will also work tirelessly to uphold the Belfast/Good Friday Agreement, which has been the bedrock of peace, stability, and prosperity in Northern Ireland for nearly 25 years.

Second, broaden economic ties and expand technology and innovation collaboration. If confirmed, I will focus on reinvigorating bilateral trade, broadening job opportunities for American workers, and addressing the climate crisis. Increasing collaboration supports prosperity for both the United States and the UK.

Third, promote and defend our shared values of democracy and freedom. If confirmed, I will seek to strengthen bilateral cooperation to rebuild public faith in democracy, combat authoritarianism, and ensure our liberty is never taken for granted.

Fourth, capitalize on the strong ties between our people to guarantee the strength of our enduring alliance. To deepen connections between our people, I will encourage exchanges between our two peoples and ensure citizens from across the United Kingdom, particularly young people, are exposed to the full diversity of our country.

None of this is possible without the dedicated and extraordinarily talented teams and their families at Embassy London, and at our Consulates in Hamilton, Edinburgh, and Belfast. I intend to build on their successes, promote American interests, and advance our shared goals together with our ally, the United Kingdom.

It is my honor to be considered to represent the United States as Ambassador to the United Kingdom of Great Britain and Northern Ireland. I look forward to partnering with Congress to further U.S. priorities in the UK and would be happy to answer your questions.

Senator SHAHEEN. Thank you very much, Ambassador Hartley, and thank you to each of you for your testimony and for your willingness to serve the country at this critical time.

We have lost Senator Johnson to another committee but Senator Barrasso will be coming back shortly to—on the side of the ranking member, and we will have five-minute questioning rounds. I will begin and we will alternate between Republican and Democrat on the committee.

I would like to ask each of the ambassadorial nominees about an issue that I have been following closely and am very concerned about.

I am sure you have all seen the reports of directed energy attacks that have affected our Government employees around the world, and I want to be clear that each of you are sufficiently prepared to respond accordingly should anything happen in the Embassy that you would be representing.

I understand that the State Department includes a briefing on this as part of the ambassadorial seminar that you are required to attend. But can I ask each of you, if confirmed, will you commit to attending that seminar on AHIs and seek a classified briefing with the State Department?

Ambassador Hartley?

Ambassador HARTLEY. Yes, I will, and I already did attend that seminar and will be seeking a classified briefing, and London is very important because there is a huge medical facility at the Embassy.

So I want to make sure we are totally informed of everything that has happened and I promise you I will have the briefings and I take this issue very seriously.

Senator SHAHEEN. Thank you very much.

Ms. Milstein?

Ms. MILSTEIN. Yes, Senator. I also have taken the course and have learned about the AHI situation. I know at the Embassy in Valletta there have been no cases, at least not so far. But I take this matter very seriously.

Senator SHAHEEN. Thank you.

And Mr. Leventhal?

Mr. LEVENTHAL. Senator Shaheen, I understand the seriousness of the issue. I am committed to taking the course and, if I am confirmed, to work diligently and if I become aware of an issue to notice people in the appropriate channels and deal medically with the issue to the best extent possible.

Senator SHAHEEN. Thank you very much.

And, Dr. Turner, I assume as a career member of the Foreign Service you are very aware of this issue?

Mr. TURNER. Indeed, I am. I am very aware of it and it occurred in a couple of the posts that I was dealing with very closely while I was still in the State Department and including the city to which I may be assigned. So very aware of this issue. Thank you.

Senator SHAHEEN. Thank you.

Ambassador Hartley, I would like to begin my questions with you—general questions—and you pointed out some of the notable Americans who have preceded you as Ambassador to the United Kingdom.

I would just point out that there is a very close tie with the state of New Hampshire because former New Hampshire Governor John Winant served as Ambassador to the United Kingdom during most of World War II and is very decorated, somebody most Americans do not know a lot about—Governor Winant.

But he was a Republican who was nominated by President Roosevelt and served very honorably as Ambassador. So we know you will follow in his footsteps.

You talked a little bit about the challenges of the war in Ukraine and what a great ally the United Kingdom has been, of course, not just in this war but throughout so much of American history.

One of the challenges that I have heard from some representatives of Great Britain are the overseas territories that have in the past been havens for corruption and for Russian money.

Can you talk about what priorities we might initiate and how we can engage Great Britain to look at those overseas territories and see how we can cooperate more closely on those as we are looking at how do we hold oligarchs and those responsible for the war in Ukraine accountable?

Ambassador HARTLEY. Senator Shaheen, I should tell you Governor Winant was in my testimony. He is a role model for me. And, unfortunately, the State Department thought it was too long so he was eliminated. But——

Senator SHAHEEN. They should never eliminate Governor Winant when I am chairing the hearing.

[Laughter.]

Ambassador HARTLEY. I know. I should tell them that.

Listen, I think your question is very important. I have been very impressed with what the UK has been doing since the Ukraine situation, invasion, war.

I think they have been leaning forward tremendously in terms of sanctions on individuals and on institutions. I think at this point they have sanctioned approximately 1,500.

They have also—there is a piece of legislation that I think has just made its way through Parliament kind of talking about one of the things you are mentioning, which is—it is called dirty money. That is not the official title. But they are looking to get at investment, especially in shell companies in the United Kingdom and for the first time, really, to try to both sanction and open up the books.

I think both in terms of territories and in terms of what is happening in London right now, I think this is something that is a huge priority for the Government and I salute them for how aggressively they are pursuing this.

Senator SHAHEEN. Thank you. My time is up.

Senator Kaine?

Senator KAINE. Thank you, Madam Chair, and how delightful to see all of you here. I am very, very, very happy to be at this hearing with you and I congratulate you on your nominations.

Ambassador Hartley, let me begin with you. On May 5, voters go to the polls in Northern Ireland to elect the Assembly. Sinn Fein is the former political wing of the Irish Republican Army and they are projected to become the biggest political bloc in the Assembly, which would be the first time a party devoted to unification of Ire-

land would be the dominant political party in that fractious—often fractious region.

Uniting Ireland is not on the ballot but the potential historic shift comes 24 years after the Good Friday Accord ended three decades of sectarian bloodshed.

Even though Brexit has exacerbated some of the political and economic challenges within Northern Ireland, the UK and Ireland remain very, very committed to the continued functioning and implementation of the Good Friday Accord.

Should you be confirmed, what might you do to make sure that this accord, which the U.S. also invested such significant diplomacy to achieve, would continue to move forward in a harmonious way?

Ambassador HARTLEY. Senator, I totally agree with you. I think the most important thing is to make sure the Good Friday Belfast Agreement stands. It has created peace and prosperity and stability in Northern Ireland for approximately 25 years.

I think the Congress and President Biden has made that clear, and if confirmed as Ambassador, I would continue to not only make it clear but make sure both the UK and Northern Ireland knew—the Government in Northern Ireland knew this was a priority for us.

I will say also there has been an executive where there has been a power-sharing arrangement in Northern Ireland and, frankly, that has worked quite well and that is part of what has helped bring both economic prosperity and stability to the Government there.

I would hope, depending on what happens in the elections this week, both parties continue to talk to each other because it really has worked quite well for the people of Northern Ireland.

Senator KAINE. It is very important. I will admit some bias. Seven of my eight great grandparents were born in Ireland and the eighth was born in Scotland to an Irish mother and so I am about as Irish as it gets.

The Good Friday Accord is not only important in bringing peace to that region but we cite it all the time as reason not to be pessimistic about other regions that have not yet found the path to peace.

If it can be done in Ireland and Northern Ireland it can be done, and so there is a lot of reason to make sure that we continue to put our shoulder to forward progress.

Ms. Milstein, really good to see you and I wanted to ask you a question about the topic of the day that is important all around the world, including in Malta.

Golden passports, formerly known as citizenship by investment, are programs that grant citizenship to foreign investors who buy expensive real estate or other assets and make sizable investments in countries.

Thousands of those passports have gone to Russia's elite in recent years, including many well-known oligarchs, amid concerns that the program enables money laundering and other financial schemes.

Malta has been under some pressure from the EU and they have put its golden passport scheme on hold for Russians and Belarusians and they are considering ending it altogether.

Obviously, that is domestic politics for Malta. According to Forbes, more than 40 percent of the 111 Russian-born billionaires have at least one other passport and nearly half of the 35 sanctioned billionaires have dual citizenship.

How can the U.S. work with Malta to place additional pressure on Russian oligarchs and Putin's allies?

Ms. MILSTEIN. Thank you, Senator Kaine, for that question. It is, indeed, a problem in Malta and the Maltese Government is aware of this situation.

As you mentioned, they have upped their vetting process of applicants, particularly since the situation with Russia has increased in seriousness.

The Russians and the—I know of two instances where, as you mentioned, the residency of a Russian national as well as a Belarusian national they were both pulled, and if confirmed, I will work with Malta on rigorously vetting applicants to prevent any loopholes and eroding any kind of sanctions and restrictions.

Senator KAINE. Thank you for that, Ms. Milstein.

One other thing I will just say to you is that Malta has been a pretty valuable partner in dealing with refugees. Often refugees coming through the Mediterranean have needed to come to Malta for safe haven and Malta has been—Malta and many NGOs in Malta have been really helpful in dealing with some of these significant humanitarian challenges and I would hope, if you are confirmed, you will do what you can from the U.S. Embassy there to be a good ally in those efforts and, knowing you, I do not have any doubt that you will be.

So with that, Madam Chair, I yield back.

Senator SHAHEEN. Thank you, and I want to follow up on that a little bit, Ms. Milstein, because, obviously, one of the challenges is the Russian influence in Malta, and as we look at what is happening in Ukraine do we have any sense that Russia's invasion of Ukraine has changed how some of the residents of Malta and the officials feel about Russia and potential for Russia to gain influence in the country? And also, how might we use this period to take better advantage of the opportunity to counter that Russian influence in Malta?

Ms. MILSTEIN. Thank you, Senator, for that question.

It has, indeed, been an issue in Malta and I know of media reports that Malta has, as I said, taken steps to strip Maltese citizenship and residencies from at least the sanctioned Russian nationals.

They are further working toward doing what they can as far as the citizen—the general citizenship by investment program in terms of being much more particular in terms of their vetting process, and I think this is extraordinarily important.

Senator SHAHEEN. I, certainly, agree with that and think that this is a period where it is very clear who is on the side of good and who is on the side of evil, and for those people around the world who are watching what is happening in Ukraine this is an opportunity to remind them that most people do not want to be on the side of what Russia is doing in Ukraine.

Mr. Leventhal, again, the war in Ukraine has really overshadowed so much of what is going on in the world right now. Can

you talk about what Denmark's view is of how the war affects European security and do you know if Denmark supports expanding participation to Finland and Sweden in NATO?

Mr. LEVENTHAL. Senator Shaheen, thank you for the question. Denmark has been a very close ally of the U.S. and a partner in Afghanistan and Iraq, a very strong voice against Russian aggression.

It has sent arms to the Baltic, to Estonia. It has sent troops to Latvia, sending a battalion of F–16s to Lithuania. So it partners with the U.S. and has been a very strong ally.

In fact, Denmark has talked about the U.S. being its security partner of choice. Denmark is very supportive, number one, of the open door policy of NATO, that any country has a sovereign right to put in an application. The prime minister of Denmark, Mette Fredriksen, has actually stated that she supports the membership of Finland and Sweden to NATO.

I think Denmark is a very important partner in a time of great upheaval and great change and great concern and, if I am confirmed, I will work to further our security priorities with the Kingdom of Denmark.

Senator SHAHEEN. Thank you, and I was pleased to see Denmark commit to meeting its 2 percent defense spending requirement for NATO by 2033. That seems like a long time away, especially given the urgency of what is happening right now.

Can you comment on whether there is any room to move that deadline up earlier and what are the barriers that might be prohibiting Denmark from trying to increase its defense spending sooner?

Mr. LEVENTHAL. Senator Shaheen, I think it was an important step that Denmark now has committed to meeting its Wales pledge of getting to 2 percent of GDP. It is true 2033 sounds a long time from now. They have increased their current budget by a billion dollars. Part of that is defense. Part of it is humanitarian aid, part diplomacy.

If I am confirmed, I will work with the Danish Government to see if that commitment can be accelerated earlier than the 2033 date.

Senator SHAHEEN. Great. Thank you.

Senator Barrasso?

Senator BARRASSO. Thank you very much, Madam Chairman.

Ms. Milstein, it is critically important that people serving our nation as Ambassadors demonstrate professionalism and good judgment. With that in mind, I want to bring up your campaign actions in Wisconsin in the year 2000.

You were an adult in your 50s campaigning for the presidential campaign of Al Gore. During the campaign you were involved in something called "smokes for votes" and it turned out to be a scandal in Wisconsin.

The Milwaukee district attorney at the time explained that it appeared between 15 and 20 homeless men were given tobacco products in exchange for filling out absentee ballots for candidate Al Gore.

Media reports noted that you, specifically you, were caught on tape handing out cigarettes to homeless men from the Milwaukee Rescue Mission in exchange for their votes—as a doctor, I would

point out that smoking causes cancer—while the executive director of one of the three shelters, Patrick Vandenburgh, was reported as saying that you and six other Gore volunteers approached the homeless men and they initially did not want to register. This executive director went on to say that they went only after you and the volunteers held up packs of cigarettes to entice them.

A Milwaukee Rescue Mission employee told reporters he had to ask Democratic campaign volunteers, you, to leave the property after he caught them trying to bribe potential voters with cigarettes.

The campaign for Al Gore distanced themselves from you and your actions. A representative of the Gore campaign in Wisconsin issued this statement about your activities, quote, "This kind of activity described by Channel 12"—it made the news—"is not the kind of help we asked for and it is the kind of help we flat out reject."

In Wisconsin what you did was illegal and you, ultimately, paid a fine of $5,000 for your illegal activities in the campaign. To me, this action raises considerable concerns about your nomination and the vetting process of this administration.

So I would like to give you the opportunity for the committee and others so you can address your involvement with this scandal.

Ms. MILSTEIN. Thank you, Senator, for your question. As you mentioned, this incident happened more than 20 years ago. I do not recall the full details that you are reciting at the present time. I am happy to take your question back for the record and provide you with all the necessary information.

Senator BARRASSO. The record is clear you did pay a $5,000 fine and I will be happy to hear—get your written response to that because I think this calls into question the nomination as well as the vetting process.

MS. MILSTEIN'S ADDITIONAL RESPONSE TO SENATOR BARRASSO'S QUESTION

Answer. In November 2000, I participated as a volunteer in get-out-the-vote efforts in Milwaukee in support of the Gore campaign. I was a smoker at the time, and I gave cigarettes to some of the individuals that I helped bring to the polls. It was subsequently alleged that I had exchanged those cigarettes for votes. To be very clear—I never exchanged cigarettes, packs of cigarettes, or anything else for votes. The Milwaukee County District Attorney thoroughly investigated those allegations, and did not charge me or anyone else with trading cigarettes or anything else for votes in connection with this incident. His investigation did not find anything improper about the votes cast by the voters that I helped turn out—they were merely Milwaukee voters who lawfully exercised their right to vote.

There was an ancillary question of whether I inadvertently violated a since-repealed civil campaign finance law on permissible election-related disbursements by providing cigarettes to those voters. Although I was advised at the time that there were strong arguments I had not violated that campaign finance provision, I ultimately chose to avoid further proceedings and litigation costs and settled the matter in Milwaukee County Small Claims Court for a $5,000 civil penalty in May 2001.

Thank you again and please let me know if you have any additional questions about the foregoing or if you would like to have a call to discuss.

Ms. Hartley, if I could ask you now, the United Kingdom is an important trade and economic partner to the United States. In 2020, the United Kingdom was the world's fifth largest economy. Bilateral investment between our two countries is the largest in the world.

Given the potential for market access and to align regulations, there is a lot of interest in a trade agreement between the United States and the United Kingdom. That would reaffirm our longstanding alliance, build upon our strong economic relationship. The U.S. and UK conducted five rounds of negotiations on a bilateral free trade agreement two years ago.

Could you please outline the potential benefits for the United States in having a free trade agreement with the United Kingdom?

Ambassador HARTLEY. Yes, Senator. Thank you for the questions.

I agree with you. The UK is a critically important trade partner for the UK—for the U.S. I think between our bilateral trade it creates about a million jobs. We are their biggest source of foreign direct investment and we are their biggest trading partner.

So I could not agree more. They also have a market that is particularly a positive for the U.S. Same language, well trained educated workforce, the rule of law, strong financial systems.

So I agree with you that it is a very important trade partner and I am happy to see, as you probably know, there have been quite a few conversations recently in terms of a trade dialogue by—with Ambassador Tai and their Minister for Trade.

I think we have had two most recently and there will be another one in Boston in a couple of weeks talking about small and medium businesses.

Senator BARRASSO. Thank you. One last question and that is for Dr. Turner, because our time is limited.

There are concerns that Russia might deploy nuclear weapons to neighboring countries. In February, Belarus approved a new constitution renouncing its nonnuclear status. U.S. Acting Permanent Representative to the Conference on Disarmament addressed the issue in March.

She stated, "Any movement of Russian nuclear weapons into Belarus would be dangerously provocative and further destabilize the region. We call on Belarus"—this is her speaking—"to reject Russia's policies of nuclear threat and intimidation."

So do you agree with the statement and is there any indication that you have seen that Russia has moved nuclear weapons into Belarus?

Mr. TURNER. Thank you, Senator, for that question.

I have not seen any indication that that is the case. I mean, this is one of the many kinds of threats—reckless threats, escalatory threats—that Russia is issuing at this time, obviously, something that, if confirmed, we would want to continue to follow very, very closely and work with our allies and friends to decide how to deal with that kind of an issue.

Mr. TURNER. Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Thank you. Let me congratulate all of you on your nominations. I am pleased that we are considering nominations for critical posts, including some of our key European allies and partners.

Over the past few months, we have been reminded of just how critical the transatlantic alliance and relationship is and the importance of strengthening partnerships with those who share our commitment to fundamental democratic values.

That unity remains paramount as we work to provide Ukraine everything that it needs to counter Russia's brutal and unprovoked war. Every country has a part to play—I just met with a whole slew of parliamentarians from Europe—and we need ambassadors in place to support these efforts, strengthen ties, and maintain that unity.

I, personally, look forward to advancing your nominations as quickly as possible, assuming I get the right answers.

Let me start off with Ambassador Hartley. It is good to see you again. I am a believer in our special relationship with the United Kingdom and I am deeply grateful for the United Kingdom's efforts to support Ukraine and stand up for democracy across the globe.

However, the United States also has an important role to play as a guarantor of the Good Friday Agreement, protecting peace on the island of Ireland.

I want to ask you, will you commit to using your voice to protect and push for the full implementation of the Good Friday Agreement, including through measures like a bill of rights for Northern Ireland, the Irish Language Act, and the establishment of a civic forum?

Ambassador HARTLEY. Yes, Senator, I will. Senator Kaine had asked me that question previously——

The CHAIRMAN. Okay.

Ambassador Hartley:—and I think this administration and this President has made it very clear that the Good Friday Belfast Agreement has been critically important to Northern Ireland in bringing peace, stability, and economic stability as well, and that we have to make sure that nothing ever happens to jeopardize that.

I did also say, because Senator Kaine brought up the elections that are happening later this week, that I think the executive and the power sharing agreement that has been happening in Stormont is also very, very important to progress in Northern Ireland. I would absolutely make sure both parties are communicating with each other and I commit to you, yes, that I will.

The CHAIRMAN. Thank you. I did not want to be redundant. I was not being able to view the hearing while I was with these parliamentarians but I am glad to hear your answer. This is the same points I pressed with Prime Minister Boris Johnson when he was here visiting with us not too long ago.

One other question on Ireland. The British Government has reportedly been considering proposals to include a statute of limitations for all prosecutions during the troubles up to April of 1998 as well as the creation of an information recovery body.

I am a firm believer that there can be no peace in Ireland without justice and I am concerned that new bodies floated in the Government command paper would be less effective than those that were agreed to in the Stormont House Agreement, which was actually a British document that, ultimately, got agreed to.

Will you commit to standing up for the rights of those in Northern Ireland to seek accountability for trouble, errors, crimes and to advocate for the full implementation of the Stormont House Agreement?

Ambassador HARTLEY. Yes, I will.

The CHAIRMAN. Thank you. Let me turn to—now, Ms. Milstein, I caught the tail end of Senator Barrasso's concerns and my understanding—and please correct me if I am wrong—you were a volunteer in the Gore campaign in 2000. That is 22 years ago, by the way, and the question was about in the process of giving rides to voters whether you offered them some cigarettes, and at the end of the day, the Milwaukee district attorney investigated, found no wrongdoing or evidence that cigarettes were provided in exchange for votes.

If that is the case, I can assure you that we have had nominees here, especially from the previous administration, nominees who were, clearly, under investigation by the IRS presently who, ultimately, got indicted, and members of this committee voted for that individual.

So 22 years ago for something that the Milwaukee district attorney said was no violation of criminal law is something I do not quite understand being an impediment to moving forward in your nomination. But I look forward to your response to Senator Barrasso in your written response.

I do have a concern about money laundering as it relates to Malta. The Financial Action Task Force has assessed that Malta needs to do more to support law enforcement efforts to address money laundering.

As you—as we work to expose and rid our systems of malign foreign and oligarchic influence, will you work with Malta to promote greater transparency in its financial systems?

Ms. MILSTEIN. Thank you for that question, Senator Menendez.

It would be a great honor for me and I look forward to working with Malta to try to get them removed from the jurisdictions which are under scrutiny and by FATF.

This is an international body, as well you know, and the United States is always given more credit than it really has in terms of turning things around. But I am happy to report to you that the prime minister is working to do what he can to get Malta removed from that list as well.

The CHAIRMAN. All right.

And then, Mr. Leventhal, Denmark has announced plans to boost gas output in an effort to become energy self-sufficient and bolster European energy security. How large of a role do you think Denmark can play in helping wean Europe off of Russian fossil fuels and is there a role for the United States in supporting Denmark's efforts?

Mr. LEVENTHAL. As I am sure you are aware, Senator, Denmark has played a leading role in climate change and leading in moving from a fossil fuel economy. They lead in windmill production across the world, about 25 percent of production. I think Denmark has an important role to play.

The CHAIRMAN. I hope we will help them. I understand that Senator Booker is actually joining us virtually so let us call upon him.

Senator Booker?

[No response.]

The CHAIRMAN. Now it is the problem of Madam Chair here to figure it out. So——

[Laughter.]

The CHAIRMAN. Booker was supposedly on. Thank you for your answers.

Senator SHAHEEN [presiding]. All right. He has got to be here in person. Okay. No one is in line for questions. I do have a couple more, if you will indulge me.

I do not know, Senator Barrasso, if you are finished. But, Dr. Turner, I wanted to ask you a little bit about where we are with our engagement on non-proliferation because I do think it is very important for the United States to lead in the world, and I wonder if you can talk about the ways in which the United States can substantively reengage with the Conference on Disarmament and what the implications are for our policy if we are not able to improve international engagement.

Mr. TURNER. Thank you for that question. It is a very complicated one, I think, in a number of ways. The United States is, obviously, engaged in these institutions, as in many institutions.

Unfortunately, over the past several years, in terms we have gone from an era of cooperation to lots of competition now among great powers and contestation as well of policies that are being put forward.

This is a very real challenge. There is very little political will to reach agreement on some of these issues. It is, nonetheless, important for us to fight the good fight.

We are a responsible nuclear power that is pushing to reduce the role of nuclear weapons while maintaining our deterrence relationships and progressing according to the NPT treaty, progressing toward the eventual goal of a world without nuclear weapons by pursuing negotiations in good faith on effective means, and the question is on effective means.

And, unfortunately, as we all know, Russia is currently violating any number of agreements. It has revealed itself to be an irresponsible nuclear power weapons state, unlike the United States, France, and the UK.

China has more or less tried to avoid responsibility in this area, preferring to leave everything to the United States and Russia. But we will continue to fulfill our goals. We want to use the Review Conference to strengthen the NPT regime.

We are working hard to persuade China to engage with us bilaterally on risk reduction measures, more transparency, to start acting like the responsible global power that it claims that it is.

The Russian problem is a separate issue for the moment. We do have the New START Treaty, which we have extended now for another five years. We had started the Strategic Stability Dialogue to talk with Russia about things we might do in the future.

Our goal, obviously, is to capture all of those theater nonstrategic nuclear weapons that Russia is directly or indirectly threatening to use at this very moment, and then with China to get—again, to put in place some mechanisms that will lead to strategic risk reduction.

So the NPT Review Conference in August is going to be very important to that end. We have had some success in the U.N. First Committee in pushing norms of behavior in space. There is an open-ended working group that will go for a couple of years and that is also something that we can build on.

And, finally, at the very end of the year, there will be a review conference for the Biological Weapons Convention to which we have appointed a special envoy and the idea there is to break the deadlock, which is—has gone on now for about 20 years.

We do not want to have a full negotiation of a protocol but we are looking at ways to strengthen the regime, perhaps through the creation of an expert group that would meet for a couple of years and try to come up with some practical measures.

Thank you.

Senator SHAHEEN. Thank you. I am particularly interested in what is happening looking at space because this is a new frontier, really, in terms of the potential to put weapons in space.

And can you talk a little more about the progress that that review committee is making?

Mr. TURNER. Excuse me.

When it comes to space, recently we had the Vice President which—who stated that we ourselves would no longer conduct anti-satellite—direct ascent anti-satellite destructive tests in space. So there is that problem.

The Russians, as you know, conducted a test in mid November, which put many thousands of pieces of debris into space and which endangered the Space Station. So that is the sort of thing that we do not want to do.

Over many, many years, Russia and China have put forward different kinds of treaty proposals that called for no first placement of weapons in outer space at the very same time that they are now sending satellites into space, which are capable of maneuvering behind other satellites, which have fired projectiles into space, and then they have their direct ascent test.

So the fact of the matter is is that countries are developing weapons for use in space with the intent of denying the United States use of space or denying us some use of space over a long period of time.

We depend more on space than many of—they do for our communications purposes. So this is a very serious issue. The proposal to develop norms of behavior in space is to develop something that would be parallel to what we have in the oceans or commercially in the air, which would—again, it will not solve the problem of what is happening in space but it will at least make it manageable.

It will make it possible to distinguish commercial satellites from military satellites and, perhaps, develop some measures that you keep a certain distance from other satellites in order to avoid putting yourself into a situation where that is perceived as a threat.

Senator SHAHEEN. Thank you very much. I look forward to hearing more about the progress there.

Ambassador Hartley, my last question is for you, and I think you have a unique perspective on this, having served as Ambassador to France and now looking at the position at the United Kingdom.

As you know, we have a new security agreement with Australia, the United Kingdom, and the United States. It is known as AUKUS, and it takes a look at the opportunities for us to have an allied response to the growing threat from China and North Korea in the Indo-Pacific.

Can you talk about how important that is and what further opportunities we have to collaborate with AUKUS?

Ambassador HARTLEY. I agree, Senator. I think AUKUS is an incredibly important agreement. It deepens our already strong relationship in terms of Five Eyes, particularly with the UK.

But it also strengthens—gives us depth and ability to understand more about what is happening in the Indo-Pacific. UK recently, in their last integrated review, said that there was going to be a tilt in their government toward the Indo-Pacific, and we see them spending both more money and they have had various warships there over the last months.

I think, for us, working with the UK and Australia will be very important and especially the technology component and, once again, I am not confirmed so I do not have a lot of information on this. But the technology component of this deal is going to be very, very important for us.

Senator SHAHEEN. Thank you.

Senator Barrasso, you have no further questions, and I do not think there is anyone else waiting to come. So with that, I would like to thank all of our nominees today for your testimony and, again, for your willingness to serve the country.

I look forward to working with each of you, should you be confirmed, and I know that we are all hoping that these nominations will move forward as expeditiously as possible because one of the lessons from the war in Ukraine is just how important it is for us to have ambassadors on the ground who can represent American interests. We do hope to be able to move these as quickly as possible.

For the information of all senators, the record of this hearing will remain open until close of business tomorrow, Thursday, May 5th. To my colleagues on the committee, I hope that they will submit any questions during that time.

And to the nominees, if you have any additional questions I urge you to answer those as fully and expeditiously as possible so that we can move forward with your nominations.

With that, the hearing is adjourned and congratulations to all of you.

[Whereupon, at 3:22 p.m., the hearing was adjourned.]

Additional Material Submitted for the Record

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO DR. BRUCE I. TURNER BY SENATOR JAMES E. RISCH

Question. Just this January, Russia publicly affirmed that, "a nuclear war can never be won and must never be fought." Since then, Russian leaders have issued more than a dozen threats of nuclear use against nations supporting Ukraine. Was Russia lying in January? Or are its current threats hollow?

Answer. Russia's rhetoric on nuclear use is inconsistent with the January P5 joint statement and totally unacceptable. At the same time, the United States has not seen any evidence that Russia is preparing to launch a nuclear attack. It is in all of our interests to maintain the 76-year plus record of non-use of nuclear weapons, and Russia should put into practice the sentiments of the January statement.

Question. The administration believes China may be willing to engage in arms control discussions with the United States in order to protect its reputation. Do you

agree, given China's tacit support of Russia in its unprovoked, unjustified war in Ukraine?

Answer. While making the case that arms control that advances stability and predictability is in Beijing's security interest, the United States will simultaneously marshal support from U.S. partners to impose diplomatic and reputational pressure on the People's Republic of China (PRC) that counters its self-serving narrative about the "benign nature" of its nuclear build-up. Alone, reputational costs are unlikely to force Beijing to the table. But together with a commitment to advance U.S. capabilities to defend against a range of PRC threats and maintain a credible and strong deterrent, the United States will help ensure Beijing understands that there is no benefit to be gained from refusing to engage.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO DR. BRUCE I. TURNER BY SENATOR MARCO RUBIO

Question. The Outer Space Treaty, which entered into force in 1967, prohibits the placement of nuclear weapons or weapons of mass destruction in space, and prohibits the use of the moon or other celestial bodies for military purposes, but does not limit conventional armaments from being placed in orbit. In recent years, militaries around the world have been preparing for future conflicts in space with the proliferation of space technologies such as anti-satellite weapons being developed and tested, most notably by Russia and China. That's why this year I introduced the DEBRIS Act, which would help the United States enforce the provisions of the Outer Space Treaty through sanctions.

- Do you support my DEBRIS Act of 2022 (S. 3925)?

Answer. I share your concern regarding Russia's and China's development of anti-satellite capabilities. One of my priorities, if confirmed, will be to develop norms of responsible behavior to address security threats in outer space. I would build upon Vice President Harris's April 18, 2022, announcement that the United States will not conduct destructive direct-ascent ASAT missile tests, such as the one Russia conducted in November 2021, and seek to establish this as an international norm.

I understand that the administration is continuing to analyze your legislation. If confirmed, I would welcome the opportunity to work with you and your staff to strengthen the international response to anti-satellite tests and to develop tools to deter or hold to account those who carry out such tests.

Question. How can the United States prevent space from becoming a war-fighting domain?

Answer. The United States recognizes that states such as China and Russia increasingly see space as a warfighting domain. The military doctrines of competitor nations identify space as critical to modern warfare and view the use of counterspace capabilities as a means both to reduce U.S. military effectiveness and to win future wars. Confrontation or conflict, however, is not inevitable. If confirmed, I look forward to working with U.S. interagency, including the Department of Defense and Intelligence Community, to engage diplomatically with allies, partners and strategic competitors in order to enhance security and stability in outer space, including through the development of norms of responsible behavior.

Question. Last year, the U.S. Department of Defense estimated that the People's Republic of China (PRC) is dramatically accelerating expansion of its nuclear arsenal. It is now on track to amass 700 nuclear warheads by 2027 and 1,000 by 2030, which is double the estimates from last year. Unlike the old Soviet Union, the PRC is not restricted by arms control treaties with the United States. If we want to compel the PRC to stop this dangerous pursuit of a large nuclear arsenal, we need to negotiate from a position of strength. President Biden's decision to stop modernizing of our nuclear arsenal and his apparent intention to implement a "no first use," "sole use" or similar policy is the exact opposite of the approach we need.

- Given the President's nuclear policy, what leverage does the United States have to negotiate an arms control treaty with the PRC?

Answer. The President recently approved the 2022 Nuclear Posture Review, which emphasizes maintaining a safe, secure, and effective nuclear deterrent and strong and credible extended deterrence commitments. Beijing should understand that there is no benefit or leverage to be gained from refusing to engage with us on reducing risks. If confirmed, I commit to consulting Congress at an appropriate time on potential measures to be pursued with the PRC.

Question. If confirmed, what actions will you take through the conference on disarmament to encourage international action to stop the PRC's nuclear weapons build-up?

Answer. If confirmed, I will ensure that the member states of the Conference on Disarmament understand the facts behind the PRC's buildup, the threat it poses to international security, and how this nuclear expansion stands in stark contrast with Beijing's responsibility to work with all states to create a security environment more conducive to progress on disarmament. I will also continue to press for commencement of negotiations on a Fissile Materials Cut-off Treaty (FMCT) and press for all states, including the PRC which has not done so, to declare and maintain moratoria on production of fissile material for use in nuclear weapons or other nuclear explosive devices.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO ALAN M. LEVENTHAL BY SENATOR JAMES E. RISCH

Human Rights, Trafficking in Persons, and Religious Freedom

Question. In the State Department's 2021 Trafficking in Persons report, Denmark remained on Tier 2 due to a continued lack of prosecutions and convictions of suspected human traffickers for a second year.

- What is your assessment of this issue, and how can you encourage the Danish Government to increase their efforts to prosecute and convict suspected traffickers?

Answer. The State Department's 2021 Trafficking in Persons Report placed Denmark on Tier 2, noting that the Government does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. The Government did not meet minimum standards in several areas. However, the Danish Government works closely with the U.S. Government to address these issues. If confirmed, I will engage with the Danish Government to combat trafficking in persons and address the recommendations in the Report, including as they relate to prosecutions and convictions and victim protection, and the lack of a non-punishment provision, which has resulted in some authorities prosecuting victims, including children, for unlawful acts traffickers compelled them to commit.

Question. In the State Department's 2020 International Religious Freedom report, it was noted that there were 61 percent more religiously motivated crimes in the last reporting period compared to the year before in Denmark. The majority of these crimes were committed against Muslims and Jews.

- What is your assessment of religious freedom and societal/governmental respect for religious freedom in Denmark?

Answer. The increase in religiously motivated crimes is of great concern and unfortunately something observed throughout Europe. The Government and people of Denmark generally have a high level of respect for religious freedom, and the Danish constitution guarantees the right of individuals to worship according to their beliefs. If confirmed, I would engage the Danish Government, members of parliament, religious leaders, and others to encourage an environment that respects the law and the rights of individuals.

Question. If confirmed, how will you work with the Danish Government to address crimes against religious minorities?

Answer. If confirmed, I would regularly engage with the Danish Government to discuss crimes against religious minorities, through meetings and outreach with my counterparts in the Government and throughout society. I would also ensure the Embassy regularly engages on this issue.

Question. If confirmed, do you commit to personally meeting with members of civil society to discuss the importance of religious freedom?

Answer. Yes. If confirmed, I commit to personally meeting with members of civil society on a regular basis to underscore the importance of religious freedom.

Question. In the State Department's 2020 Human Rights Report, Denmark was named has having no reports of significant human rights abuses. Despite the positive human rights environment, if confirmed, how can you continue to engage with civil society to bolster human rights and human rights defenders in country?

Answer. Denmark is a strong partner of the United States in promoting human rights globally; the United States and Denmark regularly meet and coordinate on

human rights issues. The U.S. Embassy in Denmark engages with civil society in Denmark as part of its daily work. If confirmed, I would continue this engagement through regular outreach, meetings, and discussions with human rights defenders to advance shared values, including respect for human rights. Denmark has recently adopted a policy which would return Syrian refugees to Syria despite potential dangers posed to them.

Question. How will you engage the Government to ensure that refugees who are still in fear of persecution are not returned to Syria?

Answer. Denmark's decision to revoke the residency permits of certain Syrian asylum seekers from Damascus is very concerning, though I understand that Denmark has not forcibly returned anyone to Syria at this time. If confirmed, I will work closely with Denmark on refugee policy to promote protection for Syrian refugees, and to help ensure they are treated fairly, and with dignity. I understand the U.N.'s assessment is that conditions inside Syria are not conducive to refugee returns at this time.

Question. The Office of Multilateral Strategy and Personnel (MSP) in the State Department's bureau of International Organizations is leading a whole-of-government effort to identify, recruit, and install qualified, independent personnel at the U.N., including in elections for specialized bodies like the International Telecommunications Union (ITU). There is an American candidate, Doreen Bodgan-Martin, who if elected would be the first American and first woman to lead the ITU. She is a tough race that will require early, consistent engagement across capitals and within the U.N. member states.

- If confirmed, do you commit to demarching the Danish Government and any other counterparts necessary to communicate U.S. support of Doreen?

Answer. Yes. If confirmed, I commit to engaging the Danish Government and relevant counterparts as necessary to communicate U.S. support of Doreen Bogdan-Martin's candidacy to lead the International Telecommunications Union and to vigorously delivering all official demarches in support of her.

Question. If confirmed, how can you work with the International Organizations (IO) bureau and other stakeholders to identify, recruit, and install qualified Americans in positions like the Junior Program Officer (JPO) program at the U.N.?

Answer. If confirmed, I would coordinate closely with and engage the International Organizations Bureau at the Department of State to ensure that the United States is readily able to identify, recruit, and install qualified Americans at the U.N. and in other specialized international bodies.

Defense

Question. Denmark announced it will gradually raise its defense spending over the next 10 years with the goal of reaching the 2 percent GDP threshold required for NATO members.

- How will you work with the Danish Government to improve this timeline?

Answer. The United States expects all Allies to fulfill their commitments under the Pledge on Defense Investment, as decided at the Wales NATO Summit in 2014 and reaffirmed by Allied leaders several times since. Denmark announced a "national compromise on Danish security" March 6. In this compromise, Denmark announced it would spend two percent of GDP on defense by 2033. If confirmed, I will engage regularly to encourage Denmark to more rapidly meet its goal to reach the two percent GDP threshold for all NATO members.

Question. How will you advise the Danish Government so that it spends its new defense funding on materiel and capabilities that provide maximum benefit to NATO's collective defense.

Answer. Denmark is a stalwart NATO Ally whose security is dependent on close transatlantic cooperation and the U.S. mutual security guarantee. Denmark and the United States already enjoy a very close and effective relationship in the military sphere. If confirmed, I would continue this close cooperation and coordination with the Government of Denmark through regular engagement with all appropriate counterparts to encourage uses of Denmark's new defense funding that will provide maximum benefit to NATO.

Ukraine

Question. Denmark has sent humanitarian and military assistance to Ukraine, and has even begun accepting Ukrainian refugees.

- How will you urge Denmark to continue its humanitarian and military assistance to Ukraine?

Answer. Danish leaders have strongly condemned Russia's unprovoked and unjustified war against Ukraine and voiced support for Ukraine's sovereignty and territorial integrity. Denmark has announced over $71 million in humanitarian assistance and considerable military assistance to Ukraine. Denmark has said that over 100,000 Ukrainian citizens could seek refuge in Denmark; already, over 25,000 Ukrainian citizens have applied for temporary residency. Denmark has provided legal frameworks for Ukrainian citizens to be able to work and study while in Denmark. If confirmed, I would work daily with the Government of Denmark to ensure that Denmark continues its considerable assistance to Ukraine and that its assistance is coordinated for maximum benefit.

Greenland

Question. Greenland, the traditionally neutral country that is under Danish sovereignty, has faced more and more encroachment from Russia and China as they impose their interests in its area.

- How will you work to promote U.S. and allied interests in Greenland in the North Atlantic with regard to Russian and Chinese expansionism?

Answer. The reopening of the U.S. Consulate in Nuuk in 2020 after a 67-year hiatus is emblematic of the U.S. desire to broaden engagement with Greenland and to promote and protect U.S. and allies' interests in the North Atlantic. The Kingdom of Denmark is clear-eyed about the People's Republic of China (PRC) and Russia. The Governments of Denmark and Greenland have taken action to stave off problematic PRC investment activities in Greenland. Both Denmark's and Greenland's approach to Russia reached a turning point following Putin's premediated, unprovoked, and unjustified war against Ukraine. At the same time, the U.S. Consulate in Nuuk is actively engaged with the Government of Greenland to promote U.S. interests in Greenland and the North Atlantic, from promoting trade and investment to enhancing people-to-people ties.

If confirmed, I would expand our engagement with Greenland through regular contacts with the Government and people of Greenland to further U.S. interests and combat problematic Russian and PRC activities in the region.

Question. If confirmed, do you commit to visiting Greenland and the new U.S. consulate in Nuuk, and making regular trips there?

Answer. Yes. If confirmed, I commit to making regular trips to Greenland and to the U.S. Consulate in Nuuk to broaden and enhance the relationship between the United States and Greenland.

China

Question. To what extent and in what respects do you believe Danish industries are economically vulnerable in China?

Answer. Denmark has one of the most advanced economies in the world and is highly dependent on foreign trade with exports comprising the largest component of GDP. Denmark adopted investment screening legislation in 2021 to prevent threats to national security or public order in Denmark. Denmark is clear eyed about People's Republic of China (PRC) economic practices; it has labeled the PRC a "systemic rival" and welcomed increased U.S. engagement in Asia. If confirmed, I would regularly work with the Government of Denmark to address joint concerns about the PRC.

Question. How will you engage with your Danish counterparts in areas such as addressing economic vulnerabilities, increasing economic resilience, and risks posed by China to shared economic security between the United States and Denmark?

Answer. If confirmed, I would engage regularly with the Government of Denmark, business representatives from Denmark and other partner nations, and civil society to address risks that the PRC poses to shared economic security. Further, I would encourage increased investment in the United States, not only to enhance our economic security, but also to provide good paying jobs for American citizens.

Question. Researchers failing to disclose ties to the Chinese military, as well as universities transferring sensitive technology to China, are major problems in both the United States and European countries, including Denmark. Last year, the University of Copenhagen found that one of its professors failed to disclose ties to BGI Group and worked with a People's Liberation Army laboratory.

- If confirmed, will you commit to prioritizing China-Denmark technology and defense partnerships that could undermine U.S. interests?

Answer. Yes. If confirmed, I commit to prioritizing U.S. interests with respect to People's Republic of China (PRC) and Denmark technology and defense partnerships that could undermine U.S. interests.

Syrian Refugees

Question. Denmark, which has taken in over 30,000 Syrian refugees, has determined in some cases that Syria is safe for them to return, are revoking their refugee status and repatriating them.

- Do you agree with the Danish Government's assessment that Syrian refugees are safe to return home?

Answer. Denmark's decision to revoke the residency permits of some Syrian asylum seekers from Damascus is very concerning, though I understand Denmark has not forcibly returned anyone to Syria at this time. I understand that the U.N.'s assessment is that conditions inside Syria are not conducive to refugee returns at this time.

Question. How will you work with the Danish Government to ensure the Syrian refugees' interests and safety are prioritized?

Answer. If confirmed, I will engage closely with the Government of Denmark and civil society organizations to promote protection for Syrian refugees, and to help ensure they are treated fairly and with dignity.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO ALLAN M. LEVENTHAL BY SENATOR RON JOHNSON

Question. On Feb. 7, 1997, the Wall Street Journal published a report "How Clintonites Built Fund-Raising Machine," which suggested a $200 million contract between your company Energy Capital Partners and the Department of Housing and Urban Development (HUD) was connected with significant donations you and others made to President Clinton's reelection campaign. HUD cancelled the contract several days later and Energy Capital Partners sued for breach of contract, eventually recovering over $10 million in damages for lost profits.

A subsequent August 25, 2000, article in *The Washington Post* reported the following regarding the Energy Capital Partners-HUD dispute:

a. HUD officials said an "internal review concluded that the deal had been agreed to under improper circumstances in which political pressure was placed on career staff to give their assent. An inspector general report also said the structure of the program was illegal."

b. Former HUD deputy general counsel Howard Glaser, said that career officials had in fact been pressured to agree to the Energy Capital Partners deal.

c. A March 1998 internal HUD report said "tremendous pressure was brought to bear by political appointees on career employees."

d. Glaser described the contract as "an unprecedented giveaway done with no competition and no bidding."

- Were you aware then or are you aware now of any political pressure placed on HUD officials to approve Energy Capital Partners (Energy Capital) Affordable Housing Energy Loan Program (AHELP) contract with HUD? If yes, was any of this pressure carried out at your behest or the behest of someone acting on your behalf?

Answer. There is critical factual context required for a full and accurate understanding of this historical matter. Reference is made to two articles, the first in the *Wall Street Journal,* the second in *The Washington Post.* Significantly, the first referenced article was substantially corrected by the *WSJ* three days after it was published. Based upon the initial, incorrect *WSJ* article referenced above, HUD terminated the contract/agreement you have asked about. HUD then subsequently admitted its liability for breach of the contract/agreement in a lawsuit Energy Capital Partners filed against HUD.

The second article referenced above (*Washington Post*) was published after the U.S. Federal Court of Claims issued a 48-page decision entering judgment against HUD for over $10 million because of its admitted breach of the contract/agreement you have asked about. To my knowledge *The Washington Post* did not do any independent investigating in doing its reporting. It simply quoted a non-career, HUD appointee and longtime associate of Secretary Cuomo who shared direct responsibility for directing HUD's conduct, claiming that the Court's decision would be overturned

on appeal. The Federal Circuit Court of Appeals affirmed HUD's liability. Copies of both federal court decisions are attached.

With this context, I confirm that I was not aware at the time, or now, of any political pressure placed on HUD officials to approve Energy Capital Partners' Affordable Housing Energy Loan Program contract with HUD, nor, specifically, am I aware, now or then, of any pressure carried out at my behest or the behest of someone acting on my behalf.

Question. Did you discuss AHELP with President Clinton prior to securing the contract with HUD? If so, please describe what was said.

Answer. No.

Question. If nothing unethical had taken place, why did HUD cancel the contract with Energy Capital only days after the Feb. 1997 *Wall Street Journal* article?

Answer. The reason stated by HUD for termination was the *WSJ* article referenced in Question 1 above. As noted above, that HUD termination letter failed to acknowledge the *WSJ* correction published three days after the article appeared, and as further noted above, HUD admitted its liability for breach of contract. See attached federal court decisions.

Question. The contract allowed Energy Capital to include in its energy efficiency loans to HUD-managed properties what was referred to as a "springing subordinated lien" and a "cross-default provision," whereby Energy Capital would be allowed to recover before the Federal Housing Administration in the event of a default. Please explain how Energy Capital secured such a beneficial program structure? Was there any precedent for such a mechanism in this type of government contract? If so, please provide other instances.

Answer. Those provisions, and the reasons for them, are fully explained in the attached decision of the Court of Federal Claims, at pp 7-9. I note that before being made part of the contract/agreement you have asked about, the provisions were the subject of fifteen months of negotiation, required by Fannie Mae, and reviewed by numerous federal lawyers and officials. As reflected in my understanding of the decision of the Court of Claims the arrangement solicited and negotiated by HUD was intended by HUD to address its then unique requirements and HUD did not rely upon any precedents, one way or another, as the arrangement was not one based upon a standard form.

Question. Please explain why you decided that detrimental reliance damages were insufficient in this case and instead sought damages for lost profits, which cost the American taxpayer over $10,000,000?

Answer. Energy Capital Partners pursued the remedies to which it was entitled by law. The Court's decision, attached, fully explains all the reasons for which all damages were awarded by the federal court. The Court's decision states clearly how it arrived at a final judgment against HUD for $8.8 million (see Court of Appeals decision below).

Energy Capital Corp. v. *The United States*—United States Court of Federal Claims. No. 97-293C. Decided August 22, 2000.[1]

Westlaw

47 Fed.Cl. 382
47 Fed.Cl. 382
(Cite as: 47 Fed.Cl. 382)

United States Court of Federal Claims.
ENERGY CAPITAL CORP., as General Partner of Energy Capital Partners Limited Partnership Plaintiff,
v.
The UNITED STATES, Defendant.
No. 97-293 C.

Aug. 22, 2000.

Lender that agreed to provide loans to make Department of Housing and Urban Development (HUD) housing more energy efficient brought suit for breach of contract after HUD terminated the agreement. The Court of Federal Claims, Damich, J., held that: (1) lost profits of a new venture may be obtained from the United States in a breach-of-contract case if the plaintiff establish causation, foreseeability and reasonable certainty, and (2) lender established its entitlement to lost profits in the amount of $8,787,000.

Judgment for plaintiff.

West Headnotes

[1] **Damages 115 ⇐40(2)**

115 Damages

115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k40 Loss of Profits 115k40(2) k. Breach of Contract. Most Cited Cases
Lost profits damages serve to provide a plaintiff with those earnings that it would have realized absent a breach of contract.

[2] **Damages 115 ⇐40(2)**

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k40 Loss of Profits 115k40(2) k. Breach of Contract. Most Cited Cases
In order to recover lost profits as damages for breach of contract, three elements are necessary: (1) the loss is the immediate and proximate result of the breach; (2) loss of profits in the event of breach was within the contemplation of the contracting parties; and (3) a sufficient basis for estimating the amount of profits lost with reasonable certainty.

[1] Court records submitted by Alan M. Leventhal to expand upon his response to questions posed by Senators Johnson and Barrasso.

[3] United States 393 ⇨74(15)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery
393k74(15) k. Loss of Profits. Most Cited Cases
Lost profits of a new venture may be obtained from the United States in a breach-of-contract case if the plaintiff establishes causation, foreseeability and reasonable certainty.

[4] Damages 115 ⇨40(2)

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k40 Loss of Profits 115k40(2) k. Breach of Contract. Most Cited Cases
Causation prong for recovery of lost profits in breach of contract case requires the injured party to demonstrate that the defendant's breach was a substantial factor in causing the injury.

[5] United States 393 ⇨74(15)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery
393k74(15) k. Loss of Profits. Most Cited Cases
Lender that brought suit against the government for breach of contract to provide loans to make Department of Housing and Urban Development (HUD) housing more energy efficient established that the government's breach was a "substantial factor" in causing it to lose profits inasmuch as HUD's termination of the loan program prevented the lender from originating any loans and from receiving any income based on the agreement.

[6] Damages 115 ⇐40(2)

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k40 Loss of Profits 115k40(2) k. Breach of Contract. Most Cited Cases
To recover lost profits for breach of contract, it must be established that loss of profits in the event of breach was within the contemplation of the contracting parties either (1) because the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all circumstances to have foreseen it; or (2) if the breach resulted in lost profits because of some special circumstances, those circumstances must have been known to the defaulting party at the time the contract was entered into.

[7] United States 393 ⇐74(15)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery
393k74(15) k. Loss of Profits. Most Cited Cases
Lender that brought suit against the government for breach of contract to provide loans to make Department of Housing and Urban Development (HUD) housing more energy efficient established foreseeability prong for the recovery of lost profits; at the time HUD entered into the contract, HUD must have understood that if it terminated the contract, then lender could not make any loans, and if lender could not make any loans, it could not earn any profits.

[8] Damages 115 ⇐117

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 k. Mode of Estimating Damages in General. Most Cited Cases
To calculate lost profits as an element of damages, expenses are subtracted from revenue.

[9] United States 393 ⇐74(11)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(11) k. Weight and Sufficiency of Evidence. Most Cited Cases
Lender that brought suit against the government for breach of contract to provide loans to make Department of Housing and Urban Development (HUD) housing more energy efficient established the amount of its lost profits resulting from termination of the program with reasonable certainty.

[10] Damages 115 ⇐117

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 k. Mode of Estimating Damages in General. Most Cited Cases
Present value discounting, to the date of judgment, rather than the date of breach, is appropriate for those breach of contract damages that would have been earned in the future when viewed from the perspective of the date of judgment.

[11] Damages 115 ⇐117

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 k. Mode of Estimating Damages in General. Most Cited Cases

Future lost profits recoverable for breach of contract should be discounted to present value as of the date of judgment, not the date of breach.

[12] **Damages 115 ⟹163(4)**

115 Damages
115IX Evidence
115k163 Presumptions and Burden of Proof
115k163(4) k. Amount of Damages. Most Cited Cases
Burden of proof is on the defendant to establish the appropriate discount rate in discounting future damages to present value; reduction to present value lessens or mitigates the damages paid by the defendant, and since the defendant benefits from the discounting procedure, it is fair to place on it the burden of presenting the evidence to the court.

[13] **Damages 115 ⟹95**

115 Damages
115VI Measure of Damages
115VI(A) Injuries to the Person
115k95 k. Mode of Estimating Damages in General. Most Cited Cases
Appropriate rate for discounting future damages to present value is the rate of return on conservative investment instruments, and Treasury securities are "conservative investment instruments" for that purpose.

[14] **Evidence 157 ⟹18**

157 Evidence
157I Judicial Notice
157k18 k. Weights, Measures, and Values. Most Cited Cases
The rate of return on Treasury securities is a subject for which judicial notice is appropriate.

[15] **Damages 115 ⟹117**

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 k. Mode of Estimating Damages in General. Most Cited Cases
Appropriate discount rate for discounting future lost profits in breach of contract case to present value was 5.90 percent, representing the rate of return on Treasury securities.

[16] **Evidence 157 ⟹18**

157 Evidence
157I Judicial Notice
157k18 k. Weights, Measures, and Values. Most Cited Cases
Court can take judicial notice of the formula for calculating the present value of future damages.

[17] **Damages 115 ⟹62(4)**

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k62 Duty of Person Injured to Prevent or Reduce Damage
115k62(4) k. Breach of Contract. Most Cited Cases
A nonbreaching party has a duty to attempt to mitigate its damages following another party's breach of contract; as such, the nonbreaching party may not recover those damages which could have been avoided by reasonable precautionary action on its part.

[18] **Damages 115 ⟹163(2)**

115 Damages
115IX Evidence
115k163 Presumptions and Burden of Proof
115k163(2) k. Mitigation of Damages and Reduction of Loss. Most Cited Cases
The party relying on the doctrine of mitigation of damages bears the burden of proving that the nonbreaching party failed to take reasonable precautions to limit the extent of the damage.

[19] **United States 393 ⟹74(12.1)**

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery

393k74(12.1) k. In General. Most Cited Cases
Government did not establish that lender could have mitigated its breach of contract damages arising from government's termination of loan program to make Department of Housing and Urban Development (HUD) housing more energy efficient by pursuing similar programs with states that subsidize housing.

[20] United States 393 ⟸74(15)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery
393k74(15) k. Loss of Profits. Most Cited Cases
Lender that prevailed in suit against the government for breach of contract to provide loans to make Department of Housing and Urban Development (HUD) housing more energy efficient did not establish that it was entitled to lost profits on loans that would have been generated after the $200 million limit of the agreement was exceeded, on theory that the program would have been so successful that HUD would have agreed to another contract.

[21] Damages 115 ⟸36

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k36 k. In General. Most Cited Cases

Damages 115 ⟸45

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k41 Expenses
115k45 k. Breach of Contract. Most Cited Cases
Reliance damages in breach of contract cases are limited to those expenses incurred after an agreement has been reached.

***384** Michael S. Gardener, Boston, MA, counsel of record for plaintiff. R. Robert Popeo, Beth I.Z. Boland, and Laurence A. Schoen, Boston, MA, of counsel.

Mark L. Josephs, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant, with whom were David W. Ogden, Assistant Attorney General; David M. Cohen, Director; and Jeffrey A. Belkin and Allison A. Page, of counsel. Carole W. Wilson, Angelo Aiosa, and Kathleen Burtschi, Department of Housing and Urban Development, of counsel.

OPINION AND ORDER

DAMICH, Judge.
The central issue in this case is the difficult question of whether lost profits of a new venture may be obtained from the United States in a breach-of-contract case. In the Court's view, precedent does not preclude, as a matter of law, this Court from awarding lost profits when the Plaintiff was involved in a new venture, and it does not preclude awarding lost profits in the context of a new venture, when the Defendant is the United States. True, lost profits are rarely awarded against the United States. "Rarely," however, is not the same as "never." The Court finds that this is one case where the Plaintiff is entitled to an award of lost profits. Therefore, the Court awards $8.787 million as the present value for the Plaintiff's lost profits.

The contract permitted the Plaintiff to originate up to $200 million in loans for energy-efficiency improvements for government-assisted housing. The Defendant conceded that it breached this contract by terminating it.

Even when the Plaintiff is involved in a new venture and when the Defendant is the United States, the Court's inquiry is the same: An award of lost profits is appropriate when the Plaintiff has established causation, foreseeability, and reasonable certainty. The Plaintiff has met its burden of proof for these elements by showing that the new venture would have succeeded.

In making the award, the Court finds that the Plaintiff could not mitigate its damages because the government's active

consent to the program was a fundamental requirement for success. The amount of lost profits, however, is adjusted to discount the amount to a present value.

Although the Plaintiff is entitled to the award of lost profits, in order to promote judicial efficiency, the Court finds in the alternative that the appropriate measure of reliance damages is $876,567.09.

The Court's findings and analysis are presented in the following sections of the opinion:

***386 I. Background**

A. Multifamily Housing Industry

The Department of Housing and Urban Development ("HUD") subsidizes and regulates a significant portion of the multifamily housing industry. The Federal Housing Administration ("FHA"), a section within HUD, provides financial assistance to various types of housing programs. The types of programs are named for various sections of the Housing Act of 1959. In this case, the parties are concerned with properties with loans insured under Section 236, under Section 221(d)(3), and under Section 221(d)(4), collectively referred to as the "Field Notice" properties. In addition, Section 202 properties are in issue.

The Field Notice properties share many common features. All of the eligible Field Notice properties have a mortgage that was insured by FHA. The mortgage and accompanying FHA regulations restrict the owners' rights in using the properties.

The regulations inhibit the owners' ability to encumber the property beyond the HUD-insured mortgage. Tr. 2364.[FN1] Because owners could not place an additional mortgage on their property, owners had difficulty raising capital to make

physical improvements to the property. Without a security interest, lenders were unwilling to risk their money in a loan to a property with an FHA-insured mortgage.

> FN1. The following abbreviations are used: "Tr." for trial transcript, "PX" for Plaintiff's Exhibit, and "DX" for Defendant's Exhibits. Although the AHELP Agreement was PX 1 and DX 1, for simplicity the Court cites it by section number.
>
> The Court's citation to a particular passage in the transcript or to a specific exhibit is not intended to imply that the evidentiary support is found only in that location. Other testimonial or documentary evidence may supplement the evidence cited in the opinion.

As even the Defendant admits, the multifamily housing in HUD's portfolio consumed an inefficient amount of energy. Many HUD properties were constructed during the late 1960's or early 1970's when neither the government nor the builder was concerned with long-term energy costs. HUD housing was frequently built under the most stringent cost restraints. A consequence of these budgetary limits is that HUD housing is commonly heated with electric baseboard resistance heating. This type of heating is very cheap to install, but very expensive to operate currently. The Department of Energy ("DOE") and HUD have recognized the need for improved energy efficiency in HUD's multifamily portfolio in several publications.

In particular, the FHA regulations discouraged improvements in the energy efficiency of multi-family housing in HUD's portfolio. The regulations interfere with a lender's ability to have a security interest in the property. This restriction caused lenders to charge a higher interest rate or to not offer a loan at all. Neither was a good alternative to the owner of the property. Thus, very little HUD-insured housing received any financing for energy efficiency during the 1980's and 1990's.

Section 202 properties are in issue because like the Field Notice properties, they needed improvements for energy efficiency but had difficulties obtaining capital because of the *387 regulations. Section 202 properties are properties owned by non-for-profit entities for the benefit of either elderly or handicapped residents.

B. History of Energy Capital Partners

The multifamily housing sector was not the only industry beset with problems of energy inefficiency. As interest in improving energy efficiency became more widespread, Energy Capital Partners was formed in the middle of 1994, to take advantage of a perceived financial opportunity to market energy-efficiency improvement measures. Energy Capital provided financing to allow various institutions to optimize their energy consumption. For example, Energy Capital provided financing to college dormitories and to commercial office buildings.[FN2] Energy Capital originated approximately $250 million in loans in these sectors.

> FN2. The Plaintiff and the Defendant, however, dispute whether commercial and institutional lending is analogous to residential lending, which is the concern of the contract here.

During the course of its business, Energy Capital discovered a possible opportunity to make loans for the HUD-insured portfolio. Energy Capital recognized that there was a significant need for energy improvements within this type of property and that the primary obstacle to making a loan was the regulatory barriers, as mentioned. Energy Capital believed that if it could solve the regulatory problem, then it could originate a significant amount of loans. Energy Capital's efforts eventually became the Affordable Housing Energy Loan Program, which is known by its acronym AHELP.

To promote its efforts with AHELP, Energy Capital assembled a team of consultants to assist it. These included Recapitalization Advisors, Energy Investments, Housing Partners, and several law firms.

Recapitalization Advisors, which was founded by David Smith, has extensive knowledge about the properties within the HUD-assisted portfolio. Since these properties were going to be the customers for Energy Capital's AHELP business, Recapitalization Advisors explored the potential scope of the marketplace.

Energy Investment is an engineering consulting company specializing in assisting building owners to identify, to design, and to implement capital improvements to reduce the energy costs of their buildings. Energy Investment has the technical knowledge about energy-efficiency measures.

Housing Partners, Inc. is a consulting firm for the affordable housing industry. Its clients include public sector and private sector institutions in Massachusetts. Several of its principals administered a program to increase the energy efficiency of apartments owned by the Massachusetts Housing Finance Administration (MHFA). Energy Capital hoped to use Housing Partners' expertise with government agencies in working with HUD.

II. AHELP

A. General Explanation of the Agreement

On September 3, 1996, Nick Retsinas, the Assistant Secretary for Housing and the Federal Housing Commissioner, signed the AHELP Agreement. The agreement between Energy Capital Partners and HUD followed approximately 15 months of negotiations. Under the AHELP Agreement, Energy Capital could originate loans for 3 years or until a cap of $200 million in loan originations was reached. In exchange, HUD promised to treat AHELP loans in ways that gave Energy Capital, as a lender, a security for its loan and also that gave the property owners an incentive to apply for the loan.

To understand the issues in this case, several different aspects of the AHELP Agreement must be kept in mind. These provisions relate to: (1) the type of energyefficiency improvements that could be made; (2) the eligibility of Section 202 properties; (3) the cross-default and springing subordinated lien; (4) HUD's ability to review loans; (5) the treatment of debt service on the AHELP loan; (6) the interest rate on an AHELP loan; and (7) the testing of energy-improvement measures.

***388 1. The Type Of Energy-Efficiency Improvements**

The AHELP contract expressly refers to five core improvements for which Energy Capital could make loans. HUD's approval of any loans for these five core measures was given in the AHELP contract; individual review of loans for these improvements was not necessary. The AHELP Agreement also provided that HUD could approve loans for other types of energyefficiency improvements on a case-by-case basis.

2. Section 202 Properties

The AHELP Agreement also envisioned that Section 202 properties would also be eligible. Section 202 properties are owned by not-for-profit entities whose mortgage is held by HUD. The opinion discusses this issue in more detail in Section VII.C.3., below.

3. Cross-Default And Springing Subordinated Lien

The AHELP Agreement's innovative solution to the regulatory obstacles was the cross-default provision and the springing subordinated lien. The cross-default provision required that if the property owner defaulted on the energy efficiency loan, then the first mortgage, which is the FHA-insured mortgage, would also go into default. Without a cross-default provision, property owners could have used all their savings to pay only the loan insured by FHA. Through this cross-default provision, property owners would have an incentive to pay both the energy improvement loan and the principal loan.

The springing subordinated lien gives Energy Capital, as a lender, security that its loan would be paid off. If there were a default under the first mortgage, the first mortgagee may file a claim with the FHA for payment. (The FHA typically pays approximately 95 to 99 cents on the dollar.) After the first mortgage is assigned to HUD and the FHA Fund reimburses the mortgagee, Energy Capital's loan "springs" into first position and has a priority ahead of the FHA mortgage. If there were a default, Energy Capital had the property as a security interest. It should be noted that Energy Capital's agreement with Fannie Mae required that the AHELP loan contain the springing subordinated lien provision and the cross-default provision.

4. HUD's Review

The AHELP Agreement also provided that HUD had the authority to review the initial 6 AHELP loans. Beside the review of the initial 6 loans, HUD could also review 5 of the next 50 AHELP loans. Finally, HUD could review as many as 15 AHELP loans in the next 150 AHELP loans. The HUD review was to ensure that Energy Capital was complying with the AHELP Procedures Manual. These reviews included the possibility of a more detailed audit review.

HUD also established three national processing centers to review AHELP loans in a more streamlined fashion. For these AHELP loans, the processing center had 10 days to complete its review. By limiting HUD's review to only 10 days, Energy Capital hoped to avoid problems with the HUD bureaucracy, which was notoriously slow in responding to owners' requests. Casimir Kolaski, a former HUD official who was to lead the national processing center in Boston, testified that this review was a "checklist." Tr. 775. By providing for only a "checklist" review, AHELP effectively assigned the responsibility of processing and underwriting the AHELP loans to Energy Capital.

5. The Treatment of Debt Service

Another important innovation in the AHELP Agreement was that HUD agreed that the debt service on an AHELP loan would be a normal operating expense. The AHELP Agreement also provided that the application fees paid by the owners could be paid for out of revenues received for operating the property. Tr. 2367. These provisions ensured that the owner would not have to contribute any of its own money to apply for the AHELP loan.

6. Interest Rate

The AHELP Agreement set the interest rate at which Energy Capital would lend ***389** money at the Treasury rate plus 3.87 percent. Energy Capital had agreed in principle to obtain capital from Fannie Mae at the Treasury rate. As the AHELP loans were repaid, Fannie Mae would be repaid at the Treasury rate plus 1.87 percent. Energy Capital would keep the remaining 2 percent over Treasury rate as its profit on the loan. Energy Capital refers to this 2 percent (the difference between its capital inflow and capital outflow) as its "spread." The spread formed the basis of Energy Capital's revenue.[FN3]

> FN3. In addition to income from this spread, Energy Capital would receive certain incidental fees for processing the loan.

The loans were designed to improve the net operating income ("NOI"). Energy Capital would structure the loan, considering the interest rate, the cost of installing the energy improvement, and the expected savings in utilities expenditure, to cover 110 percent of the annual loan payment, so that the energy loan would pay for itself and give the owner an additional savings. The energy loans were generally restricted to a maximum term of 12 years. Since the term was set at a maximum of 12 years and the debt service coverage had to equal 110 percent, an energy improvement generally had to have a payback of 5.5 years or less.[FN4] The improved NOI would be the incentive for owners to participate in the AHELP Program. Further, it was anticipated that the improved NOI would be an incentive for private holders of first mortgages to consent to an AHELP loan.[FN5]

> FN4. The payback period depends, in part, on the interest rate. With hindsight, the parties recognize that after the AHELP Program was agreed to, the interest rates declined. The decline in interest rates meant that projects with a payback of 5.9 years could also comply with the debt service coverage requirement of 110 percent. The difference between 5.5 years and 5.9 years is immaterial.

> FN5. The willingness of owners and first mortgagees to participate in the AHELP Program is discussed in great detail in Section VII.E., below.

7. The Testing Of Energy-Improvement Measures.

The AHELP Agreement also provided for testing of the energy-efficiency equipment to determine whether it was operating correctly. The first test was made immediately following installation. After 3 years, an engineer would again test the energy-efficiency equipment. Energy Capital was required to escrow money into a fund, which the parties called the downstream verification fund, to correct any deficiencies in operating efficiencies. In checking the efficiency of the equipment, the verification procedure is tantamount to a manufacturer's warranty. It is especially important to note that the downstream verification protocol did not guarantee savings or compare utility bills.[FN6] The Program Agreement provides that Energy Capital will verify either all or a sample of the installed equipment.

> FN6. The parties debate the significance of the failure to guarantee energy savings. The Plaintiff contends that (a) it was impossible to guarantee savings because savings depended upon utility rates which varied, and that (b) the industry's practice was to guarantee operational efficiency, not to guarantee savings. In contrast, the

> Defendant contends that owners would be less interested in participating in the AHELP Program without a guarantee of utility savings.

B. Process to Originate an AHELP Loan

Originating an AHELP loan consisted of 3 separate phases. Phase 1 began when Energy Capital received an application called the Property Eligibility Checklist ("PEC"), and ended when Energy Capital issued a preliminary acceptance. Phase 2 began with the issuance of a preliminary acceptance and concluded when Energy Capital issued a commitment. Phase 3 began with the owner's acceptance of the commitment and concluded with the post-closing activities of Energy Capital. Within each of the phases just described, there were discrete smaller steps.

Phase 1 starts with the receipt of a PEC from the owner. The PEC contains certain information about the physical structure and energy systems of the property. Based upon this preliminary data, Energy Capital determines whether an AHELP loan was viable. "Viable" means that the proposed improvement would generate enough savings to pay ***390** for itself within the payback time period. If the property were viable, the owner selects an Energy Service Company to conduct an energy audit. The energy audit would confirm the usefulness, from an engineering perspective, whether it was appropriate to install the energy-efficiency measure. After the energy audit was received by Energy Capital, Energy Capital could accept the energy audit, request additional information or decline to proceed with the project. Concurrent with the energy audit, the owner submits a pre-application package. The pre-application package was used to investigate the financial stability of the property. Once this information was confirmed by Energy Capital, Energy Capital issues a preliminary acceptance. Assuming that the property was accepted, the pre-screening phase is completed.

After the property received this initial approval, the property owner submits a formal AHELP application with an application fee. During this second phase, Energy Capital conducts a more detailed review of the information provided in the pre-screening stage. At any point during this application review, Energy Capital could request additional information or reject the property. Concurrently, an owner could withdraw from the process at anytime. Phase 2 concludes in Energy Capital issuing an AHELP commitment when Energy Capital and the property owner have agreed to a loan.

Phase 3 is devoted to the actual financing. Most of the steps within Phase 3 are pointed towards closing the loan. Before a loan can actually close, Energy Capital submits the loan to HUD for a limited review as provided by the contract. See AHELP Agreement, Section 3.3(d) (restricting loan review to 10 days). After the loan is closed, Energy Capital provides the appropriate documentation to HUD. Energy Capital also arranged to sell the loan to Fannie Mae. After loan closing, Energy Capital will continue to service the loan, including overseeing the construction, administering the loan proceeds, and receiving the payments of the loan.

III. Performance Under and Termination of AHELP

The parties executed the AHELP Agreement in September 1996. Its maximum duration was 3 years. HUD terminated the AHELP Program on February 14, 1997, approximately 5 1/2 months later. In those 5 1/2 months, Energy Capital did not originate any loans. Notwithstanding this fact, Energy Capital asserts that its progress towards originating $200 million of loans was remarkable. The United States disputes Energy Capital's characterization of its accomplishments. Regardless of the disputed characterizations, the parties agree with certain facts related to Energy Capital's performance under AHELP.

Shortly after execution of the AHELP Agreement, HUD issued a notice to the HUD field staff for multifamily housing, and owners and managing agents of HUDinsured and HUD-assisted properties. In this Field Notice, HUD reviewed the need for energy-efficiency measures and the obstacles to financing those improvements with subsidies from the federal government. The notice listed funding mechanisms other than the federal government. This list included the AHELP Program and announced that the Department had "endorsed" the AHELP Program. The Field Notice suggests that interested staff or property owners could contact representatives of Energy Capital for information regarding AHELP. The Field Notice was signed by Retsinas.

A training program for HUD officials and staffers in the HUD field offices was one of the earliest events in implementing the AHELP Program. This training occurred on October 31, 1996, approximately 2 months after the signing of the AHELP Agreement. Witnesses from Energy Capital testified that HUD had asked that Energy Capital

train its field office representatives before marketing the AHELP Program to building owners, so that the field staff would be knowledgeable and capable of responding to inquiries from the property owners. This training program was directed mostly to the people working in the regional processing centers.

Kolaski, who was to lead the Boston regional processing center, arranged to have a second training program at the Northeast Matrix Leadership Conference on November ***391** 18. Kolaski believed that the HUD properties in the Northeast would especially benefit from the AHELP Program because of high heating costs. Kolaski was so confident in the Program's usefulness that he expected that his regional processing center alone would originate loans totaling $200 million-the total maximum allowed under the AHELP Agreement.

After the training programs for HUD staff members, Energy Capital began to market the AHELP Program to property owners and managers. In particular, Energy Capital focused on the two largest owners of multifamily housing in HUD's portfolio: Insignia and National Housing Partners ("NHP").[FN7] Together, these two entities controlled nearly 1000 properties in the HUD portfolio. Energy Capital representatives and David Smith from Recapitalization Advisors presented the AHELP Program to representatives from Insignia and NHP at two different meetings in November 1996. A representative from Insignia, Michael Bickford, and a representative from NHP, Eleanor Zampone, testified at trial. Both testified that their organizations were very interested in the AHELP Program. A more detailed recounting of the reactions of these two owners is set out below in Section VII.E.1.

> FN7. Energy Capital was following an implementation plan developed by Recapitalization Advisors. PX 37.

In addition to making presentations for Insignia and NHP, Energy Capital also made sales presentations to other owners/managers in the Boston area. These presentations prompted owners to apply for AHELP loans by submitting PECs.

In conjunction with its activities directed to owners, Energy Capital also developed its internal resources to support the AHELP Program. For example, Energy Capital retained a search firm to hire a chief operating officer, a chief underwriter, a head of sales, and a sales force. Energy Capital selected Energy Investment, Inc. as the engineering firm that would evaluate the properties for it. As Energy Capital had already received PECs, it retained six Energy Service Companies ("ESCOs") to conduct energy audits.

By January 7, 1997, Energy Capital had received 63 PEC forms. Energy Capital determined that 46 of the 63 PECs were for properties located in cold climates. Of the 46 properties in cold climates, 29 (or 63 percent of cold weather properties) were heated by electricity. Energy Capital determined that 25 properties were energy viable. The remainder of the properties were not appropriate for the AHELP Program.[FN8]

> FN8. Some properties, for example, requested improvements that were not core improvements. Energy Capital explained that it was soliciting information about interest in non-core improvements to gather data to return eventually to HUD. Energy Capital expected that HUD would approve AHELP loans for non-core improvements.

In February 1997, shortly before the AHELP Program was terminated, Energy Capital had received 123 PECs.[FN9]Energy Capital completed the pre-screening process for approximately 22 properties. A contractor to perform the energy audit was chosen on 6 properties.

> FN9. The data contained in these 123 PECs is the foundation for the report prepared by the expert witnesses. This data was supplemented by information received by Energy Capital after termination.

The property leading in the progression of steps was a property known as Pine Estates II, which was owned by an investor in Energy Capital. Because of Energy Capital's close relationship with the owner, Energy Capital was using Pine Estates II as a prototype. This property was the only property to undergo an energy audit, performed by an energy service company, Energy USA. Energy Capital's independent engineer, Energy Investment, rejected the energy audit twice.

The parties draw different conclusions from the two rejections. According to the Plaintiff, ESCOs follow different standards and different procedures in performing energy audits. Energy Capital hoped to avoid variations by

establishing a standard procedure using the Pine Estates II property as a model. Energy Capital's concern for a universal form led it to review the energy audit slowly and vigorously. In contrast, according ***392** to the United States, the time-consuming process of submitting the energy audit of Pine Estates II shows that the AHELP loan origination process was cumbersome and inefficient. It is not disputed that the energy audit was not completed successfully before the AHELP Program was terminated.

On February 7, 1997, *The Wall Street Journal* published an article on the front page that stated Energy Capital Partners received the contract to make HUD properties more energy efficient in exchange for significant fundraising efforts for President Clinton by principals of Energy Capital. On Monday, February 10, 1997, *The Wall Street Journal,* in its Corrections & Amplifications Section, noted that the first article failed to state that "no one has said that HUD officials knew that the two men were major Democratic fund-raisers."

Before the publication of *The Wall Street Journal* article, HUD did not contemplate terminating the AHELP Agreement. HUD admits that Energy Capital did not breach the AHELP Agreement before the publication of *The Wall Street Journal* article.

Late in the afternoon on Friday, February 14, 1997, Retsinas sent, via fax, a letter to Energy Capital terminating the AHELP Agreement. Because of an intervening holiday, Energy Capital did not actually learn of the termination until Tuesday, February 18.

The AHELP Agreement provided that if Energy Capital were in default under the AHELP Agreement, HUD would provide a notice to cure the defect. Energy Capital expected to have 30 days to cure any such defect before the contract was terminated. Notwithstanding this provision, the February 14 termination was effective immediately. It should be noted that the AHELP Agreement did not have a termination for convenience clause.

Also on February 14, 1997-but before the termination letter was faxed-Energy Capital suggested that HUD take an appropriate amount of time to review the negotiation of the AHELP Agreement. Energy Capital believed that this investigation would prove that there was no improper political influence. After the termination, Energy Capital again proposed that HUD review the circumstances leading up to the AHELP Agreement. Energy Capital asked that HUD reinstate the AHELP Agreement. There was no response to these offers from HUD.

After HUD terminated the AHELP Agreement, Energy Capital began to wind up the AHELP business. Fannie Mae's commitment as a source of capital was contingent on the springing subordinated lien and cross-default provision. Because Energy Capital had lost HUD's agreement on these vital issues, Fannie Mae would not participate with Energy Capital in the Program. The AHELP business ended.

Consequently, Energy Capital instituted the present lawsuit seeking damages.

IV. Parties' Position During Litigation

Primarily, Energy Capital seeks to recover the lost profits that it would have earned but for the breach of the AHELP Agreement by HUD. Energy Capital is pursuing lost profits based on two different projections. Under the first, Energy Capital assumed that the AHELP Program would sell out completely, that is, all $200 million worth of loans would be originated. Under the second, Energy Capital also assumed that the AHELP Program would sell out $200 million worth of loans. Plus, the AHELP Program would be so successful that Energy Capital and HUD would enter into additional agreements to provide more loans. The second model assumes that the universe of HUD-assisted properties that could benefit from energy-efficiency measures was almost unlimited. The lost profits would be restricted primarily by the entry of other competitors into the market for lending money.

For its part, the Defendant admits its liability for breach of contract. The Defendant contends that it is liable only for reliance damages, those damages that Energy Capital incurred while performing under the contract. The United States rejects the claim for lost profit on the ground that the profits are too speculative to be awarded. Each of these approaches is discussed in the following sections. ***393 V. General Law for Lost Profits**

[1][2] "Lost profits are a form of expectancy damages and serve to protect a plaintiff's interest 'in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.' Restatement (Second) of Contracts § 344(a) (1981). Lost profits damages thus serve to provide a plaintiff with those

earnings that it would have realized absent the breach." *LaSalle Talman v. United States,* 45 Fed.Cl. 64, 87 (1999).

In order to recover lost profits as damages for breach of contract, it must first appear that such loss is the immediate and proximate result of the breach. It must also be established that loss of profits in the event of breach was within the contemplation of the contracting parties either (1) because the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all the circumstances to have foreseen it; or (2) if the breach resulted in lost profits because of some special circumstances, those circumstances must have been known to the defaulting party at the time the contract was entered into. Finally, there must be established a sufficient basis for estimating the amount of profits lost with reasonable certainty.

Chain Belt Co. v. United States, 115 F.Supp. 701, 714, 127 Ct.Cl. 38, 58 (1953).

Thus, within this circuit, there are three elements to a recovery of lost profits: (1) causation, (2) foreseeability, and (3) reasonable certainty. *Id.* These elements are discussed in the opinion below. But, before analyzing each element, the Court will address two precedents on lost profits in this circuit.

[3] The Defendant argues that because Energy Capital was engaged in a new business, any measure of lost profits is unreliable and speculative. The Defendant relies on the first decision by the Court of Claims in *Neely v. United States,* 285 F.2d 438, 443, 152 Ct.Cl. 137, 146 (1961).

[P]rofits are uncertain; they depend on so many contingencies, especially in a new enterprise, that it is, in most cases, impossible to say that the breach was the proximate cause of the loss of them, or that a profit would have been realized, in any event; nor is there any basis to determine what they might have amounted to. This is especially true where the breach occurred before operations had begun.

* * * * * *

Suffice it to say that almost always, in the case of a new venture, the fact that there would have been a profit, had there been no breach, is too shrouded in uncertainty for loss of anticipated profits to form a reliable measure of the damages suffered.

Id.

Although the United States accurately quotes the passage from *Neely,* the United States downplays the subsequent history in *Neely.* The Court of Claims held that sufficient evidence existed, albeit not in the existing record, that "would furnish some basis for a fairly reliable estimate of what the plaintiff's profits would have been." *Id.,* 285 F.2d at 443, 152 Ct.Cl. at 147. The Court of Claims, then, remanded the case back to the trial commissioner for additional fact-finding.

After remand, the trial commissioner awarded lost profits to the Plaintiff. The Court of Claims affirmed this decision. *Neely v. United States,* 167 Ct.Cl. 407, 1964 WL 8619 (1964). *Neely II* permitted an award of lost profits because a third party performed the contract under assignment from the Plaintiff. Therefore, the Court of Claims could determine what lost profits the Plaintiff would have made by assuming that the Plaintiff would have made as much profit as the third-party assignee.

To the United States, *Neely I* and *Neely II* are exceptional cases in that a Plaintiff recovered lost profits only because another party actually performed the contract. The subsequent performance distinguishes these cases from all other cases in which Plaintiffs have claimed lost profits.

The Court does not read *Neely I* and *Neely II* so narrowly. In *Neely I* and *Neely II,* the Plaintiff had the advantage of being able to introduce very persuasive evidence of how it would have performed under the contract. The evidence was the performance of ***394** a third party. *Neely I,* 285 F.2d at 443, 152 Ct.Cl. at 147. This evidence met the legal requirement, as established in *Chain Belt Co. v. United States,* 115 F.Supp. at 714, 127 Ct.Cl. at 58, that lost profits be calculated with "reasonable certainty." *Neely I* and *Neely II* did not establish a rule that the only legally sufficient way of establishing "reasonable certainty" would be to introduce evidence of subsequent performance by a third party under the exact same contract.

Together, *Neely I* and *Neely II* refute the argument that lost profits for a new venture are absolutely unavailable. The example from these cases, however, cautions that the proof of these damages is difficult. *See California Federal Bank*

v. United States, 43 Fed.Cl. 445, 458 (1999) (discussing *Neely I* and *Neely II*).

The Defendant argues that because AHELP was a new venture, it is impossible to measure lost profits with reasonable certainty. To the Defendant, the newness of AHELP warrants a categorical denial of lost profits. The Plaintiff recognizes that AHELP, because of its springing subordinated lien and cross-default provisions, was a new program. Before AHELP, no program systemically attacked the problem of energy viability within HUD's multifamily portfolio. These innovations make AHELP a new venture.

A new venture must establish its entitlement to lost profits by showing the same elements that any business shows: (1) causation, (2) foreseeability, and (3) reasonable certainty. A new business will probably encounter more difficulty in establishing that its lost profits were reasonably certain. But, this difficulty is a matter of evidence as explained in Robert L. Dunn, *Recovery of Damages for Lost Profits* (5th Ed.) § 4.3.

Most recent cases reject the once generally accepted rule that lost profits damages for a new business are not recoverable. The development of the law has been to find damages for lost profits of an unestablished business recoverable when they can be adequately proved with reasonable certainty.... What was once a rule of law has been converted into a rule of evidence.

Id.

When the law is understood in this way, the other cases on which the Defendant relies are distinguishable. Although non-binding cases from the Court of Federal Claims (or its predecessor, the Claims Court) have relied on *Neely I* to deny recovery of lost profits, the analysis from these cases show an absence of proof. *See Northern Paiute Nation v. United States,* 9 Cl.Ct. 639, 646 (1986) (stating "the problem of speculation is insurmountable"); *L'Enfant Plaza Properties, Inc. v. United States,* 3 Cl.Ct. 582, 590-91 (1983) (describing problems of establishing whether the Plaintiff would have earned any profits). *White Mountain Apache Tribe of Arizona v. United States,* 10 Cl.Ct. 115, 118 (1986), follows the approach taken by *Neely,* but *Neely,* as explained above, does not prohibit the recovery of lost profits absolutely.

In addition to its argument about the incompatibility of lost profits and new ventures, the Defendant also contends that lost profits are particularly limited against the United States. Because Energy Capital, before closing any loan, would have to engage in transactions with other parties (Fannie Mae, property owners, first mortgagees, etc.), the United States characterizes lost profits as a type of "remote and consequential damage."

" '[R]emote and consequential damages are not recoverable in a common-law suit for breach of contract ... especially ... in suits against the United States.' " *Wells Fargo Bank, N.A. v. United States,* 88 F.3d 1012, 1021 (Fed.Cir.1996), quoting *Northern Helex Co. v. United States,* 524 F.2d 707, 720, 207 Ct.Cl. 862, 886 (1975) (alterations in original). The United States, however, implicitly admits that lost profits are available when the Plaintiff overcomes a "difficult burden." Defendant's Amended Proposed Findings of Fact and Conclusions of Law, filed October 19, 1999, page 58.

The restriction to not award "remote and consequential damages" from *Wells Fargo* does not prevent an award of lost profits to Energy Capital here. "*Wells Fargo* stands *395 for the unremarkable proposition that gains which do not flow proximately out of the undertaking of the contract itself are too speculative." *LaSalle,* 45 Fed.Cl. at 88. Energy Capital's claim for lost profits are the profits that it would have made from the loans that are expressly the purpose of the AHELP Agreement. Energy Capital's claim, therefore, is analogous to the Plaintiffs' claims in *LaSalle* and *Glendale v. United States,* 43 Fed.Cl. 390, 397-98 (1999), where those Plaintiffs sought lost profits that "arise from the very subject of the breached portion of the contract." *LaSalle,* 45 Fed.Cl. at 88.

Therefore, since awarding lost profits against the United States in the context of a new venture is not precluded by the cases cited by the Defendant, the Court returns to the issues: whether Energy Capital has established causation, foreseeability and reasonable certainty.

VI. Causation and Foreseeability

A. Causation

1. Law

[4] "Because often many factors combine to produce the result complained of, the causation prong requires the injured party to demonstrate that 'the defendant's breach was a "substantial factor" in causing the injury.' " *California Federal Bank v. United States,* 43 Fed.Cl. 445, 451 (1999) (quoting 5 Arthur L. Corbin, *Corbin on Contracts* § 999 at 25 (1964)).

Citing *Ramsey v. United States,* 101 F.Supp. 353, 357, 121 Ct.Cl. 426, 433 (1951), the Defendant argues for a more strict test for causation. The Defendant proposes that "the cause must produce the effect inevitably and naturally, not possibly nor even probably." *Id.*

The Court holds that *Ramsey* restricts damages only in those cases where the Plaintiff seeks lost profits on "independent and collateral undertakings." *Id.,* 101 F.Supp. at 357-58, 121 Ct.Cl. at 434-35. Analyzing *Ramsey* and other cases, *Wells Fargo,* 88 F.3d at 1022-24, distinguishes between cases where the lost profits were claimed under other contracts and cases where lost profits were claimed directly under the contract with the United States. Because in this case Energy Capital seeks lost profits flowing from the breach of the contract with the United States, *Ramsey* does not impose a high burden with regard to causation.

Although the United States accurately quotes *Ramsey, Ramsey* does not seem to have been cited for this proposition by other cases. For example, the Court of Claims quotes *Ramsey* as stating "the natural and probable consequences of the breach complained of [are recoverable,] damages remotely or consequently resulting from the breach are not allowed." *Olin Jones Sand Co. v. United States,* 225 Ct.Cl. 741, 742-43, 1980 WL 13211 (1980) (alternations in original).

The understanding of *Ramsey* expressed in *Olin Jones Sand Co.,* seems typical. *Ramsey* relied on *Myerle v. United States,* 33 Ct.Cl. 1, 1800 WL 2024 (1897). Yet, *Locke v. United States,* 283 F.2d 521, 526, 151 Ct.Cl. 262, 270 (1960), a case decided after *Ramsey,* also relied on *Myerle* and did not restrict damages to only those damages are "inevitably" caused by the breach. *Locke* states that "[t]he injury may be only indirectly produced but it yet must be capable of being traced to the breach with reasonable certainty." *Id.* By discussing causation with the word "indirectly," *Locke* expands the category of damages that are "caused" by a breach.

For these reasons, this Court rejects the Defendant's argument, based on *Ramsey,* that the Plaintiff must prove that the breached caused its losses "inevitably." Instead, the Court will require the Plaintiff to prove that the breach was a "substantial factor" in causing its losses, the test in the majority of jurisdictions.

2. Analysis

[5] Energy Capital has established that the Defendant's breach was a "substantial factor" in causing it to lose profits. The termination of AHELP prevented the Plaintiff from originating any loans and from receiving any income based on the Agreement.

***396** The Defendant is correct that originating loans depended on the actions of various other parties, including property owners, energy service companies and first mortgagees. Nevertheless, because of the government's termination of AHELP, Energy Capital was not permitted to perform long enough to obtain the necessary agreements. Without the HUD's ongoing support and without an existing contract, contacting third parties was pointless.

Arguments about what third parties would have done if AHELP was not terminated are discussed in more detail under "reasonable certainty." *See* Section VII.E., below.

B. Foreseeability

1. Law on Foreseeability

[6] Compared to the other elements of lost profits, stating the law for foreseeability is much easier. Both parties agree that the controlling case is *Chain Belt Co. v. United States,* 127 Ct.Cl. 38, 58, 115 F.Supp. 701, 714 (1953).

It must also be established that loss of profits in the event of breach was within the contemplation of the contracting parties either (1) because the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all circumstances to have foreseen it; or (2) if the breach resulted in lost profits because of some special circumstances, those circumstances must have been known to the defaulting party at the time the contract was entered into.

Id.; see also California Federal Bank v. United States, 43 Fed.Cl. at 451 (quoting *Chain Belt*). "[T]he test is an objective one based on what [the breaching party] had reason to foresee." Restatement (Second) of Contracts, § 351 cmt. a. (1981); *see also* California Federal Bank v. United States, 43 Fed.Cl. at 451 (quoting Restatement).

2. Analysis

[7] Energy Capital has established that its loss of profits was foreseeable. The purpose of the AHELP Agreement was to permit Energy Capital to loan money to HUDsupported housing. These loans were conditioned on HUD's approval.

At the time HUD entered into the contract, HUD must have understood that if it terminated the contract, then Energy Capital could not make any loans. If Energy Capital could not make any loans, it could not earn any profits. Additionally, at the time HUD entered into the contract, HUD must have expected that Energy Capital planned to earn a profit.

The Defendant's only attempt to argue against this finding is rather weak. The Defendant offers that because the AHELP Agreement does not provide any remedy in the case of breach, the parties did not contemplate a recovery of lost profits.

As discussed above, the test for foreseeability is objective. Here, even though the AHELP Agreement does not discuss the recovery of lost profits, HUD officials could foresee that a breach by the government would prevent Energy Capital from recovery lost profits.

Accordingly, Energy Capital has established the foreseeability prong. The remaining prong is reasonable certainty.

VII. Reasonable Certainty: Part I-Amount of Loans Originated

A. Introduction

[8][9] To calculate lost profits, expenses are subtracted from revenue. *Sure-Trip, Inc. v. Westinghouse Eng. and Instr. Serv. Div.*, 47 F.3d 526, 531 (2d Cir.1995); *Blackman v. Hustler Magazine, Inc.*, 800 F.2d 1160, 1163 (D.C.Cir.1986). The revenue for Energy Capital is derived from the loans that it originates plus certain incidental fees for processing the loan applications. The more loans that Energy Capital originates, the greater the income to Energy Capital. The expenses for Energy Capital are those costs incurred for originating the loans. For this case, the Defendant does not challenge the accuracy of Plaintiff's proposed projections about its expenses. Thus, the emphasis is on whether the Plaintiff has convincingly proved how many loans it would originate.

*397 Another consideration is the cash flow or income stream from the loans. AHELP loans were expected to have a 12-year term. Throughout the 12 years, Energy Capital would be receiving a portion of the repayment of the loan with interest.

For the cash-flow projection, the parties presented the opinions of two different experts who reached different conclusions. The main reason for the different conclusions is that each expert assumed that Energy Capital would generate a different number of loans. Accordingly, the Court will now turn to this most contentious point.

B. Overview of Plaintiff's Model

The parties used the same model to predict how many loans would be originated under the AHELP Agreement. (David Smith, from Recapitalization Advisors, first proposed this model, which has four steps.) Step 1 is determining the number of units eligible for an AHELP loan. Step 2 is determining the percentage of properties that would benefit from a technological and economic perspective from increased energy efficiency. The parties refer to this step as determining a property's "energy viability." Step 3 is calculating the percentage of properties that have a willingness to participate. Step 3 is perhaps the most controversial aspect of the model because it estimates the willingness of owners to participate and estimates the willingness of first mortgagees to consent to the AHELP Program. Step 4 is calculating the average loan size. The four numbers are multiplied together to arrive at a product that represents the total amount of loans originated under the AHELP Agreement. Each step in the model is independent of every other step and is considered separately below.

C. Step 1: Eligible Units

In theory, it might be expected that the number of eligible units would not be disputed. A property is either eligible or not eligible. Once all the eligible properties are identified, count them.

This expectation does not hold true for two reasons. First, the parties dispute whether some properties were eligible. The disputed properties are those with tenant-paid utilities and Section 202 properties. (Section 202 properties are those for which the mortgage is actually held by the United States.) Second, even when the parties agree that the properties are eligible, the parties have different amounts.

1. The number of properties agreed to be eligible

The parties agree that the Field Notice properties [FN10] were eligible. The Plaintiff determined that 7,782 properties were eligible. The Defendant, in contrast, determined that 8,846 properties were eligible.[FN11] The Court will use 7,782-the lower figure.

FN10. The Field Notice properties are those with more than 25 units that were under the Section 221(d)(3), 221(d)(4) with 50 percent or more of Section 8 and Section 236.

FN11. The parties used different sources of information to determine the number of eligible units. The source for the Plaintiff's information was HUD's publicly available web site. The Defendant, however, used information provided by the HUD and FHA database. This difference is not significant because the Plaintiff used the lower (more conservative) number.

2. Tenant-paid utilities

Within the group of Field Notice properties, some apartments have utilities that are paid for by tenants. The parties dispute whether AHELP anticipated that loans would be made to properties with tenant-paid utilities. Apartments that are heated by electric heat typically have tenant-paid utilities.[FN12] Therefore, since Energy Capital intended to focus its lending to properties that have electric heat, Energy Capital could lend to a greater number of properties if properties with tenant-paid utilities were eligible.

FN12. Metering electrical usage on a perapartment basis is relatively simple. In contrast, measuring the amount of gas used per apartment is not practicable. Since converting to gas heat from electric heat was a core improvement in the AHELP Program, the parties expected that there would be necessarily a change in that owners would have to pay for the gas.

But, if the tenants-not the owners-receive the benefits of any energy-improvement measure, as the tenants would when ***398** they pay the utility expenses, the owners would have no reason to take on the energy loan, since the incentive for an owner to undertake the obligations of an AHELP loan is to receive the benefit of improved net operating income, which results from energy savings.

The Court rules that properties with tenant-paid utilities were eligible to participate in the AHELP Program. The AHELP Agreement itself says nothing about the eligibility of properties with tenant-paid utilities, but Section II.A of the AHELP Procedures Manual, which is an exhibit to the AHELP Program Agreement, defines the eligible properties and states that "all" "Field Notice" properties are eligible. Because "all" properties is not qualified by a statement that properties with tenant-paid utilities are not eligible, this omission supports the inference that the Procedures Manual means what it says: all properties are eligible.

The Defendant's main argument for excluding properties with tenant-paid utilities is that rent increases were not permitted under the AHELP Agreement. The Defendant argues that if rent increases were not permitted, it is likely that the AHELP Agreement did not intend to include properties with tenant-paid utilities, since property owners would not otherwise have an incentive to obtain AHELP loans.

There are two problems with this argument. First, the AHELP Agreement does not expressly forbid rent increases. Although the HUD employees who negotiated the AHELP Agreement testified that they believed that properties with tenant-paid utilities were not eligible, the Agreement itself does not restrict the eligible properties. The Court cannot rewrite the AHELP Agreement to include unilateral expectations previously unexpressed. *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1576 (Fed.Cir.1996); *Southern Pac. Transp. Co. v. United States,* 596 F.2d 461, 466, 219 Ct.Cl. 540, 548 (1979)

Second, to the extent that HUD expressed its intentions, a limited form of rent increase is consistent with these expectations. Understanding why rent increases were consistent requires an understanding of how rents are set in some HUD-assisted housing.

The cost of living in a particular apartment unit includes the cost for the physical space of the unit plus the cost of the utilities to support the unit. The term "gross rent" includes both elements. The gross rent includes the "contract rent" which is the amount of money received by the owner for use of the physical space. In Section 8 subsidized housing, HUD pays some portion of the contract rent and the tenant pays some portion of the contract rent. For apartments with tenant-paid utilities, the tenant is responsible for paying the utility costs. To pay for at least some part of the utility expenses, the Section 8 tenant also usually receives a subsidy, which is known as the personal benefit expense ("PBE").

Readjusting the balance between contract rent and the utility expense is possible and the AHELP Procedures Manual sets out a method of changing the utility allowance. If the owner started to pay for the utility expenses, the contract rent could be increased. Simultaneously, if the tenant did not have to pay for utilities, the PBE could be decreased by the same amount as the rent increase. After these changes, the owner could reap the benefits of energy savings because the owner would be paying for the utilities. In other words, an owner of Section 8 housing with tenant-paid utilities would have an incentive to take out an AHELP loan, because the owner, having taken over the payment of utilities, would realize the same energy savings, and would recover the amount of the PBE, which is based on the pre-energy savings utilities costs, through an increase in contract rent.

Furthermore, HUD would not be disadvantaged. Although HUD would pay for a greater amount of contract rent, this increase would be offset by a decrease in the PBE. The "gross rent" (the total sum expended by HUD for a particular apartment) would not increase. Thus, HUD's expectation that there would be no rent increase would be fulfilled.

In addition, the Court notes that Energy Capital received PECs from property owners ***399** with tenant-paid utilities. Energy Capital did not reject these PECs out of hand. This contemporaneous conduct shows that Energy Capital believed, during its performance, that properties with tenant-paid utilities were eligible to participate in the AHELP Program. *See* *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed.Cir.1983) (stating "A principle of contract interpretation is that the contract must be interpreted in accordance with the parties' understanding as shown by their conduct before the controversy."). Although this factor is not decisive, it does support the Court's finding that the parties intended to include properties with tenant-paid utilities in the AHELP Program.

Finally, it is unlikely that HUD would have found the AHELP Program attractive if properties with tenant-paid utilities were excluded, since excluding properties with tenant-paid utilities would reduce the number of eligible properties by 25 percent. Albert Sullivan, a former HUD official in charge of multifamily housing, testified that within the portfolio of AHELP-eligible properties, more properties had utilities paid by the owner than paid by the tenant. Tr. 3025. This opinion was confirmed by David Smith. DX 62 states that 75 percent of properties with electric heat are tenant paid. Of all the eligible properties, 33 percent had electric heat. Accordingly, per this exhibit, about one quarter of all eligible properties had tenant-paid utilities. A figure of 25 percent is consistent with the testimony of Zappone. She estimated that 20 percent of the properties owned by NHP, and eligible for the AHELP Program, had tenant-paid utilities.

3. Section 202

Turning to whether Section 202 properties are eligible for the AHELP Program, the Court holds that they are.

As has been noted, the primary difference for this case between the Section 202 properties and the Field Notice properties is that the mortgage for Section 202 properties is actually held by the United States, therefore, there is no third party first mortgagee. Without the complication of a first mortgagee, the financing arrangements for Section 202 properties should be easier than for a Field Notice property. For example, the provisions for cross-default and springing subordinated liens, which were intended to keep Energy Capital on par with the first mortgagee, were not necessary for Section 202 properties.

Section 2.1(c) of the AHELP Agreement makes Section 202 properties eligible for an AHELP loan. The text of Section 2.1(c) is set out in the footnote below.[FN13]

> FN13. Section 2.1(c) provides:
>
> > Notwithstanding any other provision of this agreement, to the contrary, FHA and the lender hereby agree that eligible Developments for AHELP Transactions shall include developments financed under Section 202 of the Housing Act of 1959, as amended .... Because Section 202 ... developments have either direct loans or capital grants from HUD rather than FHA-insured loans, certain elements of this Agreement, the AHELP Loan Documents and the AHELP Procedures Manual must be modified to reflect the structure of 202 ... transactions. Prior to initiating an AHELP transaction for a Section 202 ... development, the Lender shall submit document modifications to FHA for review and approval.

Although the AHELP Agreement on its face states that Section 202 properties are eligible for the AHELP Program, the United States argues that Section 202 properties should not be included because Energy Capital could not make loans to these properties at the time of termination, because, before any loans to Section 202 properties could be made, new legal documents had to be drafted.

When the AHELP Agreement was executed, the documentation for Section 202 properties had not been finalized; nevertheless, Energy Capital evinced a consistent intent to make loans to owners of Section 202 properties. In a letter dated September 27, 1996, Energy Capital sent an introductory letter to HUD about some concerns with the Section 202 properties. Energy Capital submitted a more detailed letter on January 22, 1997.

To support its argument for excluding Section 202 properties, the United States points out that HUD's Office of General Counsel ("OGC") needed to approve any modifications to the AHELP documents. The Court finds ***400** that this approval would have been obtained in a short amount of time and was not truly an obstacle to including the Section 202 properties.[FN14] It is unlikely that OGC would have found a problem with the AHELP Program for Section 202 properties because the arrangements are simpler than the arrangements already approved by a different part of OGC. In addition, because Retsinas, the Assistant Secretary for HUD, was interested in seeing the Program succeed, it was unlikely to founder because of legal technicalities.

> FN14. A different section of OGC approved the AHELP Agreement for the Section 221(d)(3), 221(d)(4) and Section 236 properties. The Defendant did not present any testimony from an attorney from OGC about legal complications for having Section 202 properties be eligible for AHELP. Based on this inference, the Court concludes that there was no serious legal impediment to including Section 202 properties in the AHELP universe.

The Court's holding that Section 202 properties are eligible is consistent not only with the plain language of the AHELP Agreement but also with the Defendant's duty to act in good faith. Once the United States commits in the AHELP Program Agreement that Section 202 properties are eligible, the Defendant has an obligation to make this promise a reality. Accordingly, the Court holds that Section 202 properties are eligible for the AHELP Program.[FN15]

> FN15. For completeness, the Court notes that like the number of Field Notice properties, the number of Section 202 properties is also disputed. The Plaintiff submitted evidence to show that there were 2,955 Section 202 properties. Information from the Defendant shows that there were approximately 4,500 Section 202 properties. Again, this difference seems minimal.

D. Step 2: Energy Viability

Having determined which properties are eligible, the next step is determining what percentage of the eligible properties would realize utility bill savings through improved energy efficiency, such that the savings would cover the cost of the improvements. The parties refer to this as "energy viability." "Energy viability" combines technological and economic feasibility. The Plaintiff has presented three overlapping methods of determining energy viability.

1. First Method

The first method was a study conducted by Joseph DeManche of Energy Investments, Inc.[FN16] DeManche attempted to identify the percentage of properties that

would "benefit" by converting from electric to gas heat. "Benefit" in this context means that the energy improvement would save enough money to pay for itself during the course of the loan. The amount of energy savings depends on the cost of the improvement, the amount of energy used, and the difference in price between electric heat and gas heat.

> FN16. The Defendant waived any *Daubert* challenge to DeManche's testimony. *See* Tr. 1209.

The first step in DeManche's analysis was to identify those states that have the coldest weather. DeManche identified these states by using data on heating degree days from the Department of Energy (DOE). Geographic areas are designated as belonging to zones 1 to 5, depending upon the number of degree days. The properties with the highest number of degree days, that is, the properties that have the coldest weather, are classified as zone 1 properties. DeManche focused on states within zones 1 and 2. He focused on the properties in coldweather climates because Energy Capital intended to emphasize electric-to-gas-heat conversions. This conversion is more feasible economically in a property that spends a great amount of money on heat.

The next step was to identify the average number of heating degree days for a particular state. To do this calculation, DeManche relied on the U.S. military weather installations.[FN17]

> FN17. In cross-examination, the Defendant pointed out that DeManche used a straight line average. DeManche did not weigh the data to reflect that New York City, where more HUDeligible properties are located, has a lower average degree day total than Utica. The Defendant suggested that a weighted average would be a more accurate measure.
>
> In redirect, DeManche established that the Defendant's point was academic. DeManche recalculated the number of average degree days using only the number of degree days for the largest metropolitan area. This approach was actually more conservative than the weighted average approach proposed by the Defendant.
>
> The change in average degree days did not affect DeManche's analysis.

***401** DeManche then calculated the average annual heat load, which is measured in millions of BTU's. An established formula was used to convert heating degree days into average annual heat load. The Defendant did not challenge these calculations.

The next step was to identify the average electric price. The main source of DeManche's information was the October 1998 issue of Energy User News. This publication reprinted prices from March 1998.

In the next step DeManche identified the average natural gas price for each state. The source of information again was the October 1998 Energy User News.[FN18]

> FN18. On cross-examination, the Defendant suggested that DeManche may have skewed the data by relying on the October, rather than the August, publication. On redirect, DeManche showed that the October data for electricity was the same as, or more conservative than, the August data in nearly half the states. For the natural gas price, the October data was the same as, or more conservative than, the August data in approximately three-quarters of the states.
>
> When DeManche used an average of the October and August data, the change in data had no effect on DeManche's analysis.

The final and most important step in DeManche's analysis was calculating the payback period. The payback formula is a complicated, but well-established, formula. Simple payback is the length of time it takes for an energyconservation improvement to pay for itself. Simple payback equals the cost of the improvement divided by the yearly savings.

A critical component of the formula for simple payback is the cost of conversion. DeManche used $3,500 as the basic cost for converting an apartment unit from electric heat to gas heat, a figure that is conservative. The AHELP Procedures Manual states that the range of cost for an electric-to-gas conversion is $2,500 to $3,500. This number was based on industry cost data published by the

R.S. Means Company. It specifically includes the cost of a performance bond that an ESCO was required to provide.

Based on the $3500 figure, DeManche calculated the payback period. DeManche believed that when a state had a conversion payback of 5.9 years or less, all properties in that state would be energy viable. By analyzing properties on a state-wide level, DeManche's method of including or excluding all properties has the potential to be both overinclusive and under-inclusive. Any property within a state with an average payback of less than 5.9 years was assumed to be energy viable, although an analysis of a particular property could show that that one property was not actually energy viable. Likewise, DeManche also assumed that all properties in a state with an average payback period of greater than 5.9 years would not be energy viable. However, individual properties in states with a payback period greater than 5.9 years could be energy viable if properties were analyzed individually. Despite this limitation, DeManche's method is sound and reasonably accurate because most properties in a given state share the characteristics of other properties in that same state.

The next step was to identify the number of units in a particular state that are energy viable. The source of this data was the information from Recapitalization Advisors, which was discussed in the preceding section of the opinion.

For the final step, DeManche attempted to identify the percentage of properties that were heated with electric heat. This step is obviously important because only those properties heated with electric heat would benefit from an electric-to-gas conversion. DeManche proposed using 44.5 percent.

The Court finds that this figure substantially overestimates the percentage of HUD properties that could benefit from a conversion from electric heat to gas heat. DeManche relied on a 1995 study by the Department of Energy. PX 17. This study states that in multifamily properties with five or more units that are rented, 44.5 percent are heated with electricity.

This same study, however, breaks down the 44.5 percent into different components. Of all multifamily properties with five or more units that are rented, 15.3 percent have built-in electric units, 19.7 percent have a ***402** central warm-air furnace, 7.7 percent have a heat pump and 1.8 percent have some other source of electrical heat. The most important category is built-in electric units. The undisputed evidence is that most of the HUD-assisted properties were built under cost constraints. Electric baseboard heating, which is resistance heating similar to the mechanism in a toaster, is the cheapest form of heating to install. Thus, electric baseboard heating is prevalent in HUD-supported housing.

The other types of electrical heating systems are not as feasible for an electric-to-gas conversion. For example, it would not be practicable to convert any system using ducted heat if that system also had air conditioning because the cooled air also moved through the ducts. Accordingly, the Plaintiff's number of 44.5 percent is not accurate. The more accurate base number is 15.3 percent, which is the percentage of properties with more than 5 rented units that have built-in electric units.

Although 15.3 percent is a better baseline than 44.5 percent, 15.3 percent understates the number of HUDassisted properties with electric resistance heating. The Department of Energy study, the source for this information, examines all multifamily properties with five or more rental units. Because not all of these properties were built with the same cost restraint, it is fair to assume that the HUD properties have a greater percentage of electric resistance heating. For example, Bickford from Insignia stated that electric resistance heating systems were common. Tr. 1684. Furthermore, because many of the older HUD-assisted properties do not have air conditioning, these properties are unlikely to have a ducted system.

The Court finds that 35 percent is a reasonably accurate number. During the time for performance under AHELP, Recapitalization Advisors estimated that between 32 and 35 percent of the AHELP-eligible properties have electric heat. *See* DX 62. The Court finds this opinion especially persuasive because (a) it is a number between 15 and 44 percent and (b) it is a number formed during the course of performance and is untainted by the influence of litigation.

Accordingly, the first method used by the Plaintiff to calculate the percentage of energy-viable properties, the DeManche method, needs a revision. The number of properties with electric heat must be reduced. When this modification is made, about 16 percent of the Field Notice properties were energy viable.

2. Second Method

The second method used by the Plaintiff to calculate the percentage of energy-viable properties was done by David Smith and is called the heat approach. This method is similar to the method undertaken by DeManche, except that Smith includes conversions from not just electric but also oil and older inefficient gas to newer gas furnaces. This approach repeats the same mistaken assumption that approximately 44 percent of the HUD-assisted properties have electric resistance heating. When Smith's approach is corrected using the Court's figure of 35 percent, the number of energy-viable properties decreases. The new number is 121,212 energy-viable properties. This figure is approximately 15 percent of the total number of Field Notice properties.

3. Third Method

The third approach taken by the Plaintiff is an alternative approach proposed by David Smith, which the parties call the "consumption" approach. Under the consumption approach, Recapitalization Advisors analyzed the utility consumption per apartment. The theory is that the more money an apartment spends on electricity, the more likely the apartment is to benefit from energy-efficiency measures.

The Court finds the consumption approach is generally accurate. The Court, however, finds that Smith overestimated the percentage of energy-viable apartments that have utility bills of less than $1,250 per year. Apartments that spend little on utilities are unlikely to have enough savings from energy-efficiency measures to meet AHELP's required debt ratio. Accordingly, the Court has revised Smith's figures.

***403** Under the revised figures, the number of energyviable apartments in the consumption approach is 128,910. This figure is approximately 16 percent of the total number of eligible Field Notice properties.

4. Summary on Energy Viability

After revising the three different approaches to energy viability, the numbers are generally consistent, ranging from 15 to 16 percent. Accordingly, the Court finds that 16 percent of the properties that are eligible for the AHELP Program are also viable from a technological and energy-efficiency perspective.

E. Step 3: Willingness to Participate

Step 3 attempts to estimate the number of eligible and energy viable properties that would participate in the AHELP Program. Participation depends upon the consent of two different groups: the owners and the first mortgagees. The consent of first mortgagees is necessary before the property owners further encumber the property with the AHELP loan.

1. Owner Interest

To gauge owner interest, the Plaintiff relied on Recapitalization Advisors, its consultant on the AHELP Agreement. As has been noted, Recapitalization Advisors has extensive knowledge about the properties within the HUD-assisted portfolio. Recapitalization Advisors estimated that 34 percent of the owners would not be willing to participate.

The Defendant's expert, David Hisey, also used this factor in his analysis. The Court finds that eliminating 34 percent of the properties for owners unwilling to participate is a reasonable estimate.

Persuasive testimony from owners confirmed Smith's opinion that owners would be interested in AHELP loans. The two largest owner/managers of properties in this portfolio were Insignia and National Housing Partners (NHP). The Plaintiff called Michael Bickford, a former vice-president of Insignia, and Eleanor Zappone, a former asset manager for NHP, to testify at trial. The Defendant called one representative, Robert Sampson, Jr., from an owner at trial. Sampson's testimony suggested that owner interest was ambivalent. Sampson's own company submitted properties to Energy Capital for evaluation. Tr. 3169, 3610. Thus, on balance, Sampson's testimony helps the Plaintiff.

Bickford explained that Insignia was very attracted to the AHELP Program. Insignia went so far as to ask David Smith to reserve $55 million of the $200 million for Insignia properties. According to Bickford, Insignia believed that AHELP would be so successful that the $200 million would be consumed completely.

Insignia expected that the AHELP Program would serve its need for energy improvements. Insignia was spending an increasing proportion of its money on energy costs. Yet, because of the HUD regulations, only a handful (less than 5 percent) of HUD-assisted properties in Insignia's portfolio received any energy-efficiency improvements. Insignia was concerned that operating expenses could expand beyond its control.

By providing a means to finance energy-efficiency improvements, AHELP promised a wonderful opportunity to Insignia. Insignia was aware of some of the potential risks to participating in the program such as the lack of guaranteed energy savings, the need to obtain first mortgagee consent, and the interest rate in repaying the AHELP loans. Tr. 1718-20. Even with these factors, Insignia was strongly interested in the AHELP Program. In regard to the interest rate, Bickford testified that Insignia was not very sensitive to the interest rate because AHELP was "the only game in town." Insignia's desire to participate is displayed by its submission of approximately 43 PEC's before the AHELP Program was terminated.

NHP, according to Zappone, was also very interested in the AHELP Program. Investigating whether every property in NHP's portfolio would benefit from an AHELP loan was the goal of Zappone, who eventually was appointed to lead NHP work with the AHELP program.

Zappone's testimony showed that NHP shared the same assessment of AHELP with ***404** Insignia. Like Insignia, NHP worried that energy consumption was draining more cash flow. But NHP had not been able to solve this problem. Because large scale energy improvements were too expensive to pay for with routine operating expenses, less than 10 percent of NHP properties had undergone improvements to improve their energy efficiency.

Again, like Insignia, NHP remained very attracted to the AHELP Program, despite NHP's awareness of the potentially adverse consequences of accepting an AHELP loan. Zappone specifically testified about the application fees, the lack of guaranteed savings, the requirement of first mortgagee consent and the interest rate. None of these caused enough concern to make NHP question its commitment to the program.[FN19] Tr. 2164-2168.

> FN19. NHP, however, experienced one problem in applying for AHELP loans. Zappone struggled with another employee over who would lead the program. This administrative infighting delayed the submission of PEC's. The delay, however, was caused by reasons unrelated to the attractiveness or worthiness of the AHELP Program.

Together Bickford and Zappone show that owners were attracted to the AHELP program. Owners were willing to accept the proposed interest rate and to incur the obligations associated with a second loan on their properties because AHELP offered an opportunity to restrain energy consumption. The willingness of owners is especially important because owners would risk their *entire* investment in the property.

2. Other Disqualification

After assessing ownership interest, Energy Capital continues its assessment of the participation rate by identifying a second group, which it calls "other disqualification." This category itself comprises two subgroups. The first is a general group, which the Court calls Energy Capital evaluation, accounts for Energy Capital's discretion to reject applicants. The second is the issue of first mortgagee consent.

a. Energy Capital Evaluation

In analyzing the AHELP applications, Energy Capital intended to assess the creditworthiness of the applicant and property. That is, even if a property were willing to participate in the AHELP Program, Energy Capital retained discretion to reject the property. David Smith eliminated 11 percent of the potentially eligible properties under the Field Notice group because of problems with either the property or the owner, or both the property and owner. The Court accepts this figure as reasonably accurate.

b. First Mortgagee Consent

First mortgagee consent is problematic, first, because, in general, a second loan *could* increase the chance of default on the first loan, and second, because, as previously noted, under the cross default provision, the owner's default on the AHELP loan would put the mortgage into default as well, depriving the first mortgagee of its anticipated cash flow during the term of the mortgage, although in the case of HUD assisted housing, the FHA would pay virtually all of the remaining principal of the first mortgage.

There are two distinct groups of first mortgagees: Fannie Mae and "others." Fannie Mae holds approximately 40 percent of the first mortgages on the Field Notice properties. Other entities own the remaining percentage.[FN20]

FN20. The number of different entities that own the first mortgage was not provided. Testimony showed that the mortgagees usually delegate the servicing of the mortgage to "mortgage service companies." There are about 10 mortgage service companies that dominate the industry.

The interest of mortgage service companies and first mortgagees align perfectly. Accordingly, the Court will use "first mortgagees" generically to refer to not only first mortgagees but also to mortgage service companies.

(1) Fannie Mae

The first issue is whether Fannie Mae, as first mortgagee, would consent to an AHELP loan. Both the Plaintiff's expert, David Smith, and the Defendant's expert, David Hisey, assume that Fannie Mae would consent to an AHELP loan. Although its expert treated Fannie Mae's consent the same as the Plaintiff's expert, the Defendant contests whether the Plaintiff has proven that Fannie Mae would consent to having loans placed on *405 properties where it held the first mortgage. The resolution of this factual dispute is made considerably more difficult because neither the Plaintiff nor the Defendant called a witness from Fannie Mae.

The most probative evidence before the Court on Fannie Mae's consent is the term sheet between Energy Capital and Fannie Mae. Fannie Mae promised to fund up to $200 million of loans and also to purchase the same loans back from Energy Capital. The Plaintiff argues that the Court should infer that Fannie Mae would be willing to consent because Fannie Mae has risked its own money in support of the program.

The Defendant, in contrast, argues that Fannie Mae's consent as a first mortgagee has not been established. It argues that an inference is not warranted because Fannie Mae could have been willing to lend money and to purchase loans only for those properties where it was not the first mortgagee.

The Court resolves this factual dispute in favor of the Plaintiff and finds that Fannie Mae would have consented to loans being placed on properties where it was the first mortgagee. Because increasing energy efficiency is consistent with Fannie Mae's goals, it is reasonable to conclude that it would tolerate some risks to its capital.

Significantly, Fannie Mae agreed to finance the AHELP Program and to purchase AHELP loans despite some risks. The term sheet between Energy Capital and Fannie Mae alerts Fannie Mae that the AHELP loan would have a priority over the FHA-insured mortgage after the assignment (and payoff) of that mortgage.[FN21] PX 4. Fannie Mae, therefore, was well-aware that its interest, as a first mortgagee, could be jeopardized by consenting to an AHELP loan. Nevertheless, Fannie Mae agreed to participate in the program. These facts support a finding that Fannie Mae would have consented.

FN21. Energy Capital's agreement with Fannie Mae required that the AHELP loan contain the springing subordinated lien provision and the cross-default provision.

Accordingly, the Court finds that Fannie Mae would have consented to second mortgages (to secure the AHELP loan) being placed on properties where it holds the first mortgage. Fannie Mae would have consented whenever Energy Capital wanted to originate the loans because Energy Capital was committed to underwriting loans at the standard approved by Fannie Mae. Thus, Fannie Mae's consent was for 100 percent of loans where it was the first mortgagee, which is 40 percent of the properties.

(2) Other First Mortgagees

Whether first mortgagees would consent to AHELP loans being placed on their properties is even more problematic than Fannie Mae, since there is less direct evidence for other first mortgagees than for Fannie Mae. Again, the issue is complicated because neither party presented testimony from a first mortgagee. Instead, the parties presented facts that would be incentives or disincentives for first mortgagees to consent. Smith and Hisey, the two experts on this topic, also presented their opinions. Smith believed that 90 percent of all first mortgagees (including Fannie Mae) would consent. This means that slightly more than 83 percent of the non-Fannie Mae first mortgagees would consent. For the Defendant, Hisey believes that zero percent of first mortgagees would consent.

First mortgagees make money by having their loans repaid with interest. A default [FN22] for any first mortgagee causes the first mortgagee to lose the interest income it would earn for several years into the future. Although HUD, acting through the FHA Fund, insures almost the entire loan, upon default the FHA Fund pays only the principal.[FN23]

FN22. More precisely, the first mortgagee is paid off (and loses its payment stream) after the assignment of the mortgage to HUD, which is after the default. Tr. 2642.

FN23. Hindsight shows that during the time AHELP loans would have been originated, interest rates declined. This decline in interest rates meant that first mortgagees would be especially wary of defaults. Although after a default, the first mortgagee has additional capital to make a new loan, this replacement loan would be at a lower interest rate.

The parties agree that first mortgagees want to avoid default. The question, however, *406 is whether an AHELP loan increases or decreases the chance of default.

Although in general a second loan would increase the chance of default, the Plaintiff argues that an AHELP loan increases the financial stability of the property. The AHELP loan is designed so that the energy savings will cover 110 percent of the debt service of the loan. The extra 10 percent is improved cash flow that could be used to pay other expenses of the property. Energy Capital contends that the potential savings, beyond what is required to repay the AHELP loan, would convince first mortgagees to consent to an AHELP loan.

Furthermore, Energy Capital was willing to pay first mortgagees a fee equaling 10 basis points to consent to a loan.[FN24] Robert Brozey from Energy Capital testified that it was standard practice to purchase the consent of first mortgagees. Brozey deposition, which was submitted into evidence, page 81; *see also* Tr. 1032 (Cohen testimony). Zappone from NHP confirmed that her company, which frequently negotiated with first mortgagees, usually could obtain the consent of first mortgagees if the first mortgagees were paid. Tr. 2171.

FN24. *See* Tr. 607 (Siegel testimony).

The Defendant emphasizes that the energy savings are speculative and not guaranteed. Although Energy Capital may try to structure the AHELP loan to have debt service coverage of 110 percent, the savings depends on utility rates. Because utility rates in the future are not known, the savings are unpredictable. Furthermore, Energy Capital in the AHELP Agreement does not guarantee a particular energy savings. The speculative savings must be compared to the absolute obligation to repay the AHELP loan. With or without any energy savings, the property owner must repay the AHELP loan. The government reasons that because repaying the AHELP loan takes away money that would otherwise be available for repaying the primary loan, first mortgagees would be unwilling to risk a default and therefore refuse to consent to an AHELP loan.

Historically, the rate of default for these properties is extremely low. Tr. 2643. Both the Plaintiff and the Defendant use this fact to support its position. The Plaintiff argues that the historically low default rate means that first mortgagees should have less fear about a default. The Defendant argues that the historically low default rate means that first mortgagees have less reason to take steps necessary to improve the cash flow of the secured property because the property is already succeeding.

As mentioned previously, neither party called a witness from any first mortgagee. Both the Plaintiff and the Defendant listed David Carey and Thomas White from Fannie Mae on their lists of proposed witnesses submitted before trial. The Defendant also listed Robert Gould, whom the Defendant identified as being employed by a company that held the first mortgage on a significant percentage of properties eligible for AHELP. (The Plaintiff did not list any first mortgagees, other than representatives from Fannie Mae.)

Although there is authority to the effect that an adverse inference may be drawn against a party that knows about a witness with information on a material issue and fails to call that witness, here, the Court declines to use the adverse inference against either party, because "[a]n unfavorable inference may not be drawn from the lack of testimony by one who is equally available to be called by either party." *A.B. Dick Co. v. Burroughs*, 798 F.2d 1392, 1400 n. 9 (Fed.Cir.1986) (citing *Johnson v. Richardson*, 701 F.2d 753, 757 (8th Cir.1983)).[FN25] Both parties listed representatives of first mortgagees. Therefore, the Court concludes that these potential witnesses were equally available to the Plaintiff and to the Defendant.[FN26]

FN25. *See also* *Day and Zimmermann v. United States*, 38 Fed.Cl. 591, 602 (1997). As the fact finder, this Court has discretion about whether an adverse inference is appropriate. *A.B. Dick Co. v. Burroughs*, 798 F.2d 1392, 1400 (Fed.Cir.1986).

FN26. The Court notes that no one has argued that these people were somehow "unavailable."

From the arguments and evidence (or lack thereof) presented by the parties, the Court ***407** initially finds that it is as likely that first mortgagees would consent as not. Expressing this mathematically as a 50 percent consent rate, the court adds a percentage to account for incentives to consent. These include: (a) first mortgagees are likely to follow the example of Fannie Mae, the largest holder of first mortgages, (b) first mortgagees are likely to be influenced by HUD, the insurer of its mortgages, and (c) a payment to first mortgagees would increase the likelihood of obtaining their consent.[FN27] As a result, the Court finds that two-thirds of the non-Fannie Mae first mortgagees would consent to an AHELP loan.

FN27. Energy Capital's cash flow model does not account for these payments.

Although this figure has the attraction of being between the Defendant's estimate of zero and the Plaintiff's estimate of 83 percent, it is more compelling when it is viewed as the average number (66 percent) between two "reasonable" estimates, which are 50 percent and 83 percent.

The Defendant did not offer a reasonably low estimate. The number used by the Defendant, zero percent, is far too low.[FN28] That number ignores that the AHELP Program offers some benefits to first mortgagees. While the Court expects that the experts will differ in their opinions, the Court expects that both opinions should be reasonable.

FN28. The Defendant explains that Hisey was not opining on the number of first mortgagees that would consent. Instead, Hisey was conducting a "sensitivity analysis." According to the Defendant, the purpose of the sensitivity analysis was to show that if one variable changed, then the final result would change. Tr. 3484-91, 4424 (closing)

The import of the sensitivity analysis is not clear. It is axiomatic that changing one variable in an equation will change the result of the equation. An expert is not required to testify to such a common sense proposition.

To have any validity, sensitivity analysis must make "reasonable" substitutions. For the issue of whether non-Fannie Mae first mortgagees would consent, Hisey used "zero," a figure that is not justified. Using numbers that lack any rational basis will change the result dramatically. But a significant change in result is unwarranted when the factors used to reach the result are arbitrarily selected. Thus, this Court does not credit Hisey's estimate. *See* *Burns v. Secretary DHHS*, 3 F.3d 415, 417 (Fed.Cir.1993) (affirming fact finder's rejection of expert's opinion where the underlying facts were not substantiated by the record); *Loesch v. United States*, 645 F.2d 905, 915, 227 Ct.Cl. 34, 46 (1981) (stating "opinion evidence is only as good as the facts upon which it is based.")

The Court is also skeptical about the number used by the Plaintiff, 83 percent. This number is slightly too high because the Plaintiff's estimate fails to consider that the risk of default even without an AHELP loan is relatively minimal. Although the number is too high for the Court to accept as a "fact," the estimate is within the reasonable range.

Thus, the average number between the "reasonable" estimates of 50 percent and 83 percent is accurate. The Court finds that 66 percent of non-Fannie Mae first mortgagees would consent.

(3) Summary of First Mortgagee Consent

The Court finds that Fannie Mae would consent to AHELP loans being placed on properties where it was the first mortgagee. The Court additionally finds that Fannie Mae holds the first mortgages on 40 percent of the Field Notice properties.

Additionally, the Court finds that 66 percent of non-Fannie Mae first mortgagees would consent. These nonFannie Mae first mortgagees collectively hold 60 percent of the first mortgages.

Consequently, the Court finds that overall approximately 80 percent of first mortgagees would consent. This figure is lower than the number proposed by the Plaintiff's expert, which was 90 percent.

3. Summary of Willingness to Participate

For Field Notice properties, the consent of first mortgagees is one of three mutually exclusive factors that comprise the category "willingness to participate." Owner interest, which is discussed in Section a, above, eliminates 34 percent of the properties. A decision by Energy Capital to reject the properties excludes an additional 11 percent.

When these three factors are considered jointly, the total exclusion is 53 percent. The ***408** participation rate is 47 percent for Field Notice properties.

The analysis for Section 202 properties is slightly different because Section 202 properties do not have the issue of first mortgagee consent. (Or, viewed differently, because HUD was the first mortgagee for Section 202 properties and HUD endorsed the AHELP Program, 100 percent of first mortgagees would consent.) When only "owner interest" and "Energy Capital's disqualification" are considered, the result is 59 percent.

Accordingly, the participation rate for Section 202 properties is 59 percent.

F. Analysis of Quantity of Loans Originated

Having evaluated the number of eligible properties, the percentage of properties that are energy viable, and the percentage of properties that would participate in the Program, the Court can find the number of loans that would be originated, as indicated on the table below.

Number of Loans Originated

Type of Property	Number of Properties	Subtotal Energy Viability (%)	Participation Rate (%)	
Field Notice	7,782	16	47	585
Section 202	2,955	16	59	279
Total				864

But this number does not reflect a dollar amount. Although it is theoretically possible for Energy Capital to make 864 loans, the dollar amount per loan is important because the AHELP Agreement was limited to $200 million. Therefore, the Court turns now to the question of the average loan size.

G. Step 4: Average Loan Size

The parties approach the issue of average loan size dramatically differently. Both approaches are flawed. After compensating for the errors, the Court finds that the average loan size is $2,800.

The Plaintiff's expert, David Smith, focused on the average cost of the core improvements. The AHELP Agreement approves five energy-efficiency measures, which the parties call the "core improvements." The Procedures Manual sets out a price range for each of the five. The most expensive improvement was a conversion from electric to gas heat. The price range for this improvement was $2,500 to $3,500 per apartment unit. Each of the other four improvements cost less than $1,000.

Smith assumed that a property would want to install all five core measures. Smith added the average price for each core improvement. This sum is $3,900. Smith then added an extra 15 percent for "soft costs." [FN29] Smith also reduced the figure by about 11 percent to present a more conservative, and therefore more reliable, figure. Smith's final number was $4,000.

> FN29. "Soft costs" are the amount of money that it costs to get the loan. The parties do not dispute the estimate of 15 percent for soft costs.

The Court finds an error in Smith's analysis. Smith assumed that all properties would have an electric-to-gas improvement. This assumption cannot be sustained because the Court has found that only 35 percent of the eligible housing had electric resistance heating. *See* Section VII.D., above.

The Defendant's expert, David Hisey, focused on those improvements that property owners had requested in their PECs. Hisey specifically limited his search to PECs from

properties in cold weather climates because Energy Capital was focusing on cold weather states. One hundred PECs came from cold weather states. For whatever improvement was requested on these 100 PECs, Hisey used the average cost of that improvement (which was the same average cost used by ***409** Smith). Hisey looked at what owners were requesting; he did not assume that property owners would want all improvements. Hisey also added 15 percent for soft costs. Hisey's evaluation concludes that the average loan size was $2,000.

Hisey's method is seriously flawed by including loans for zero dollars. When a property owner requested an improvement other than a core improvement, Hisey said that the loan was for zero because Energy Capital could not make loans for non-core improvements without additional authorization for HUD. Seventeen of the 100 PECs requested non-core improvements. But instead of removing these properties from the pool of properties used to calculate average loan size, Hisey added them in as loans for zero dollars. By doing so, Hisey has unfairly skewed the average loan size in an unreasonable and unwarranted way. Simple business sense indicates that Energy Capital would not make a loan for zero dollars.

Hisey's explanation for his approach lacks justification. Hisey contended that he could have either (a) entered a zero amount for the loan or (b) deleted this property from the eligible properties in some other category. Quite clearly, entering a zero amount for loans overemphasizes the significance of these properties. When seventeen properties are considered in a set of 100 properties, those seventeen properties are seventeen percent. If these same 17 properties were considered in a set of all eligible Field Notice properties, which is 7,782 properties, those 17 properties are only two tenths of one percent. It is simply unfair and unreasonable to consider properties that were ineligible for the AHELP Program in the category for average loan size.[FN30]

> FN30. On cross-examination, the Plaintiff pointed out other errors in Hisey's analysis. These mistakes affect the average loan size in small amounts:
>
> > Hisey mischaracterized two properties (Centreville Commons and Woodside Village.)
> >
> > Hisey also included Energy Capital as making loans for less than $100 per apartment. For the reasons explained above, Energy Capital would not make loans for such a small amount. Accordingly, these properties should not be factored into the average loan size.

The Court has corrected Hisey's errors. After recalculating the average loan size and including soft costs for 15 percent, the average loan size is $2,585.

This figure is a valid baseline. The Court increases it by about 10 percent, because Hisey's methodology fails to consider that Energy Capital would try to make loans for the largest amount possible. The most lucrative loans are those loans that include an electric to gas conversion. Although Smith's analysis overstates the number of properties that would benefit from an electric to gas conversion, it would be equally unwarranted to ignore Energy Capital's sensible strategy of focusing on these properties. If a large proportion of loans included electric to gas conversions, then the average loan size would increase. A proper calculation of average loan size should

Total Loan Dollars Originated

recognize this fact.

Accordingly, the Court finds that the average loan size is slightly greater than the baseline figure established by Hisey's analysis. The average loan size is $2,800 per unit.

H. Total Revenue Generated

After establishing the number of properties eligible for AHELP and the average loan size per unit, the final step is to determine the total amount of loans that Energy Capital could have made.

Preliminarily, the Court needs to establish the average number of units per property. Using information from Smith, the average number of units for the "Field Notice" properties is about 102.[FN31] The parties agree that ***410** the average number of units for Section 202 properties is 73.

> FN31. Smith assumed that the average number of units per property is 130. Although Smith was cognizant that a strict mathematical averaging of

the "field notice" properties yields the number 101.8, Smith stated that he was attempting to calculate the average number of units per property *where Energy Capital would close a loan.* The Court understands that trying to close a loan on a property with a greater number of units makes sense from a business perspective. The Court, however, was given no factual foundation to justify an increase from 101.8 to 130. Thus, the Court will use 102 units per property.

This decrease has a significant effect on the total size of a loan per property. While Smith calculated the average loan size per property as $520,000 ($4,000 per unit multiplied by 130 units per property), the Court calculates the average loan size per property as $285,600 ($2,800 per unit multiplied by 102 units per property).

Property	Eligible Properties	per Property	per Unit	
Type of		Number of Subtotal	Average Units	Loan Average
Field Notice	585	102	2,800	167,076,000
Section 202	279	73	2,800	57,027,600
Total	864			224,103,600

As indicated in the table above, the potential total loan revenue generated is $224,103,600, which is about 12 percent more than the $200,000,000 maximum amount allowed under AHELP. Consequently, the Court finds that Energy Capital would have originated the full amount.

The Court finds that this estimate is reasonable because each of the component steps is reasonable. The Court has reached this number after modifying the numbers proposed by each party. In doing so, the Court has *not* given any credit to the Plaintiff for the discrepancy in the number of Field Notice properties and Section 202 properties. *See* footnote 11 and 14, above. Because the Defendant actually proposed numbers that were higher than the Plaintiff's numbers, the Court's conclusion, which is based on the Plaintiff's number of properties, is partial to the Defendant.

Accordingly, the next step is to analyze the cash flow models. These models place the income stream to be derived from the loans into the context of an ongoing business that also incurs expenses.

VIII. Reasonable Certainty: Part 2-Profitability

A. Cash Flow Models

The Plaintiff retained Jerry Arcy, an accountant from PriceWaterhouseCoopers, to testify about the cash flow Energy Capital would have had if it had originated $200 million in loans. Arcy used a set of assumptions in calculating the income and expenses of Energy Capital's AHELP line of business. The Defendant did not retain a separate expert for this part; David Hisey also testified about the cash flow.

Arcy and Hisey approached the cash flow with the same model. Each started with a particular loan volume, deducted the estimated expenses, and determined the profit. This process produced an amount of lost profits to which Energy Capital was entitled.[FN32] These approaches are set out in the following chart:

FN32. Of course, the Defendant, through Hisey, does not concede that Energy Capital is entitled to lost profits. Instead, the Defendant contests the award of lost profits and proposes Hisey's figure only as an alternative.

Summary of Parties' Positions on Cash Flows

	Plaintiff-Arcy	Defendant-Hisey [33]
Loan Volume (dollars)	200,000,000	55,500,000
Total Cash Inflow (dollars)	342,261,000	100,542,616
Total Cash Outflow (dollars)	317,633,000	96,777,593
Net Cash Flow (dollars)	24,628,000	3,765,023

FN33. The Court reproduces Hisey's analysis for the Field Notice properties and Section 202. Hisey also examined the Field Notice properties without including the Section 202 properties.

***411** This chart summarizes a considerable amount of information and many details are eliminated. The following sections bring out these details.

B. Net Cash Flow

Simply put, the "Net Cash Flow" is the "Total Cash Inflow" minus the "Total Cash Outflow." The most important variable in calculating the net cash flow is the total loan volume. The total loan volume determines how much income is received and also affects how much money is expended.

1. Total Loan Volume and Number of Loans

For total loan volume, Arcy and Hisey differ by almost a factor of five. In the preceding section, the Court found that Energy Capital will originate $200 million in loans. Thus, Arcy's model starts at the same place the Court does: $200 million in total loan volume.

In addition to total loan volume, another important variable is the number of loans needed to reach that volume. Although Arcy correctly assumes that Energy Capital would make $200 million in loans, Arcy wrongly figures that Energy Capital could reach this ceiling with only 385 loans.

Arcy relied on the work of Recapitalization Advisors, a consultant to Energy Capital on the AHELP Program, for the average loan size. The preceding sections of this opinion extensively discuss the accuracies and inaccuracies in the Recapitalization Advisors report. The most critical error in this report is that it overestimates the average loan per unit and overestimates the average number of units per properties. Thus, the average loan size is wrong. *See* footnote 31, above.

The Court has determined that Energy Capital could make loans to 864 properties. These loans would generate a total of $224,103,600. Because this figure is above the maximum amount, Energy Capital would not actually make loans to 864 properties. Instead, Energy Capital would make loans to 771 properties, which, coincidentally, is almost exactly double 385.[FN34]

> FN34. The Court did not choose to nearly double 385 to arrive at 771. It arrived at the figure of 771 by calculating the weighted average total loan and then dividing that number into $200 million. The result is 771.

2. Total Revenue

Total revenue to Energy Capital remains almost the same, although the number of loans doubles. This constancy is because Energy Capital's primary source of income is the repayment of the AHELP loans with interest and these proceeds are independent of the number of loans. In other words, if $200 million is loaned, the total revenue will be $200 million plus interest, regardless of the number of loans.[FN35] Therefore, Arcy's model for revenue is reasonably correct, because Arcy's model starts with the correct total amount of loans: $200 million.

> FN35. It is mathematically true that, all other factors remaining constant, ten loans of $10 will earn as much interest as one loan of $100. Assuming a loan volume of $200 million, the number of loans does not affect the total proceeds from borrowers. Tr. 2234, 2288.

Both Arcy and Hisey agree that the repayment of the AHELP loan with interest is the main source of income. In both models, the proceeds from borrowers is nearly 97 percent of the total income for Energy Capital.

The remaining 3 percent of Energy Capital's income has two different components. One component is certain fees associated with the loan applications. Because there is a fee for each loan, the amount of fees increases as the number of loans also increases. The increase in fee revenue offsets, somewhat, the increased expenses, described in the following section. The other component of the remaining three percent is the recovery of money from certain funds that Energy Capital was required to set up as security. The increase in the number of loans does not affect the recovery from these funds.

***412** Thus, although the Court has found that Energy Capital would need to generate nearly double the number of loans to reach $200 million, the Court also finds that the total inflow to Energy Capital is almost exactly the same as proposed by Arcy. Arcy's model remains predominantly accurate.

A problem, however, with Arcy's model concerns the pace of loan origination. Arcy assumed that the first loan would

close in April 1997 and the last loan would close in October 1998. During these 19 months, there was a gradual increase in the number of loans closed per month.

The Court finds that the first loan would not close in April 1997. No property was close enough at the time of termination to close so soon. By the middle of February 1997, Pine Estates II (the prototype property) had progressed, with some difficulties, to the stage of having an energy audit conducted. The energy audits that had been done were not acceptable. Even after the energy audit was approved, there were several remaining steps. Energy Capital's own documents predict that 7 weeks would pass from the completion of the energy audit to the loan closing. *See* DX 255/2; *see also* PX 75 (estimating on February 14, 1997 that the first loan would not close for 45 days). Further, although Energy Capital's estimate of 7 weeks may be a reasonable estimate for the average property, it is likely that the first property would take approximately twice as much time as Energy Capital estimated.[FN36] Thus, the Court finds that the first loan would close July 1, 1997.

> FN36. For example, Pine Estates II stayed in the energy audit stage longer than expected because Energy Capital was establishing procedures to be used for other properties.

Energy Capital's receipt of any loan proceeds would be delayed by about three months. This shift would affect, in a very small way, Arcy's cash in-flow model. The effect is minimized because Arcy assumed that the borrowers would pay equal amounts of principal and interest each month, that is, Arcy "straightlined" the profits. In doing so, Arcy's model is conservative because the receipt of interest is somewhat delayed. If the AHELP Program had actually proceeded, the borrowers would have repaid a greater amount of interest in the beginning of the loan and less interest at the end of the loan. (This repayment structure is like a typical repayment on a home mortgage.) Since Arcy already delayed the receipt of interest throughout the course of a 12-year loan, a further 3-month delay in the commencement of the interest payments will not change the cash flow significantly.

In summary, for the revenue side of the ledger, Arcy's model is reasonably accurate. The two corrections (number of loans and origination date of the first loan) would have minimal effect. The Court will use
$342,261,000 as the total revenue.

3. Total Expenses

According to Arcy's model, total expense has the following components: (1) repayment of money to Fannie Mae, (2) payments to different escrow funds, (3) payments for salaries and employee benefits, (4) miscellaneous fees, and (5) payments to first mortgagees. The parties do not dispute that these are the components of outflow, but their figures are different

The Court finds that Arcy's total expense model is reasonably accurate. This is true even when the necessary adjustments are made to account for the inaccuracies in the number of loans and payments to first mortgagees that the Court found. Arcy's model remains reasonably accurate even after these corrections, because the main outflow, repayment to Fannie Mae, is not affected.

Energy Capital's source of funding was Fannie Mae. Fannie Mae loaned capital to Energy Capital and Energy Capital, in turn, loaned money to property owners. When the loan is repaid, the flow of capital reverses. Property owners repay Energy Capital. While keeping some profit for itself, Energy Capital repays Fannie Mae.

Thus, the main expense in the AHELP Program was repaying Fannie Mae. Arcy estimated that this expense was 94 percent of total expenses. For Field Notice properties, Hisey estimated this expense as nearly 90 percent and for Field Notice and Section 202 properties as 91 percent. (Hisey prepared ***413** different cash flow models for just the Field Notice properties and the Field Notice properties with the Section 202 properties.)

For the reasons explained in the section on total inflow, above, the number of loans does not affect the repayment. Regardless of whether Energy Capital makes 385 loans or 771 loans, Energy Capital will need to repay Fannie Mae $200 million (plus some interest). Accordingly, it is very important to understand that at least 90 percent of Fannie Mae's expenses are constant. Only within the remaining 10 percent is there room for any change.

Another expense that does not depend on the number of loans is payments to different escrow funds. Energy Capital is required to set aside money for certain potential misfortunes such as an equipment failure or a default, but since Energy Capital sets aside a percentage for each loan, the number of loans does not affect this fund. In other

words, as long as Energy Capital generates $200 million in loans, it must fund these other accounts with the same amount of money. Payments to these various accounts are 1.9 percent for Arcy and 1.7 (Field Notice) and 1.4 percent (Field Notice and Section 202) for Hisey. The fact that these expenses remain constant further shrinks the proportion of expenses that are variable to about 8 percent.

While repayment of Fannie Mae and payments to different funds, which account for 92 percent of total outflow, do not depend on the number of loans, the largest expense of the remaining 8 percent of total outflowpaying salaries and benefits for Energy Capital employees-is affected. Arcy has this category as 1.8 percent of all expenses. Hisey has salaries and benefits as 3 percent (Field Notice) and 3.6 percent (Field Notice and Section 202). The smaller percentage for Arcy can be attributed to a certain economy of scale. The important point is not the exact percentage, but rather the relatively insignificant size.

Under the Court's findings, Energy Capital would have to originate double the number of loans to place $200 million in loans. A doubling for the number of loans suggests that the sales force and support staff must increase, perhaps double, to accomplish this additional work.

The other expenses would also have to grow to accommodate the increased number of loans. These expenses include the fees for closing the loans, rent, legal services and other professional fees. Again, although these fees would increase, the increase is relatively trivial for the size of the AHELP Program.

For purposes of calculating the net profit, the Court estimates that all these expenses would double. This increase is somewhat imprecise to the Plaintiff's detriment because it is likely that expenses would not actually double. Economies of scale and increased efficiencies suggest that twice as much work is not required to produce twice as much revenue. Regardless of the imprecision, it is still reasonable that a sum of $23,264,000 as variable expenses should replace the sum that Arcy used, $11,632,000.

Because of the disagreement between the Court and Arcy on payments to first mortgagees, this component will also have to be adjusted. Arcy assumed that Energy Capital would not pay first mortgagees anything as an incentive to consent to AHELP loans being placed on their properties. Tr. 2217. This assumption is false for nonFannie Mae first mortgagees because as the Court previously discussed first mortgagees would be more agreeable if they receive financial compensation for their cooperation. Tr. 2171. In the Court's model, roughly 310 properties need consent from the first mortgagee. Payments to the first mortgagee would be about $885,000. This sum must be subtracted from Arcy's model as well.

When these two changes are made, the total cash outflow is $330,150,000. After deducting this amount from the total cash inflow, the net profit is $12,111,000 before discounting.

4. Analysis of Cash Flow

The preceding two sections have analyzed, in great detail, the potential inflows and outflows. It is possible that details have distracted from the larger picture.

***414** The Court has found that Energy Capital would have placed loans for $200 million. *See* Section VII. Assuming that Energy Capital would have placed loans for $200 million, the next question is what is the profit on those loans. The profit comes from the spread, the difference between how much it costs Energy Capital to get the capital and how much Energy Capital sells the capital. This spread is 1.87 percent. The 1.87 percent spread on $200 million in loans is the gross profit for the loans.

From the gross profit, the Court must subtract the expenses associated with placing the loans. As discussed, some expenses vary with the number of loans. These expenses are reasonably estimated, although the Court admittedly is using an estimate different from the number used by the Plaintiff's expert.

The Court finds that Energy Capital has established that it would have earned a net profit of $12,111,000 on the AHELP loans, which have a duration of about 12 years. Since this profit would have been realized in the future, the Court must discount the figure to the present day to prevent a windfall for the Plaintiff.

C. Summary of Reasonable Certainty Analysis

The Court's finding that Energy Capital's lost profits were proven with reasonable certainty fits into the pattern of precedents about lost profits, starting with *Neely v. United States,* 285 F.2d 438, 443, 152 Ct.Cl. 137, 146 (1961) and *Neely v. United States,* 167 Ct.Cl. 407, 167 Ct.Cl. 407

(1964) a case where lost profits were awarded. The lease in *Neely* permitted the Plaintiff to mine coal from a 2,000 acre plot of land. *Neely I,* 285 F.2d at 439, 152 Ct.Cl. at 139. The Plaintiff could, then, sell the ore to purchasers for a profit. The Court of Claims found that the Plaintiff established the amount of lost profit by introducing evidence of how much profit the Plaintiff's assignee earned when after actually mining the ore. *Neely I,* 285 F.2d at 443, 152 Ct.Cl. at 147. Although the United States emphasizes that the Court of Claims affirmed the award of lost profits because of the performance by another party, *Neely* is not necessarily so limited.

When viewed from one perspective, the facts here compare to the facts in *Neely*. The Plaintiff in *Neely* had the right to use a specific resource --- the plot of land and the coal beneath it. The quantity of coal was finite and easily established. The amount of coal was an outer boundary on the Plaintiff's income. After all the coal was extracted, the Plaintiff could not generate any more income from this contract.

Likewise, Energy Capital had a chance to use a specific resource. The sum of $200 million is like the quantity of coal. Each loan Energy Capital originates is like extracting some of the ore. When the $200 million is depleted, Energy Capital cannot earn any more revenue from the contract. Therefore, this case is analogous to *Neely* in that the source of revenue is easily established.

In cases where lost profits were too speculative to be awarded, the revenue is unpredictable. For example, the Plaintiff in *L'Enfant Plaza Properties* sought lost profits for its inability to lease Washington D.C. office building space for 15 years. The Court found that evidence that the office space could be leased was insufficient, in part, because of the vagaries of the market for office space. *L'Enfant Plaza Properties, Inc. v. United States,* 3 Cl.Ct. at 590-91. *L'Enfant Plaza Properties,* therefore, represents a situation where the Plaintiff could not establish its source of revenue with certainty.

Similarly, in *Northern Paiute Nation,* the source of revenue was uncertain. The Plaintiff sought lost profits it would have earned by charging for access to an irrigation system that the United States had promised to construct for the Plaintiff. *Northern Paiute Nation v. United States,* 9 Cl.Ct. at 645-46. The court found that the Tribe could not establish the amount of money it could have

Summary of Parties' Positions on Discounting

earned because how the Tribe would have charged for access to this resource was undetermined. Accordingly, the court denied an award of lost profits. *Id.*

This case differs from *L'Enfant Plaza Properties* and *Northern Paiute Nation* in that Energy Capital proved that within 3 ***415** years of signing the AHELP Agreement, it would have completely consumed its source of revenue and reached the $200 million cap on loan origination. Thus, lost profits are reasonably certain. The AHELP loans, however, would have been repaid over the course of 10-12 years. Since Energy Capital would earn these lost profits in the future, the Court will address the issue of discounting.

IX. Discounting to Present Value

A. Introduction

As a consequence of finding that lost profits should be awarded, the Court must discount the sum of the lost profits to a present value.[FN37] The Court does so because the value of a particular sum of money presently held is greater than the value of the same sum of money to be received in the future. *LaSalle Talman Bank, F.S.B. v. United States,* 45 Fed.Cl. 64, 109 (1999). The Court's analysis is somewhat hampered because "[t]here is relatively little authority respecting the discount rate that should be used in reducing prospective damages to present value in actions for breach of contract." 8 Proof of Facts 2d, Discount Rate, § 8-1. *See also,* Peter Schulman, *Economic Damages: Discounting Concepts and Alternatives,* 28 Colo. Law. 41, 45 (1999).

> FN37. The Court believes that issues about discounting are separate from issues about reasonable certainty. The Plaintiff's accuracy in discounting does not affect whether it has calculated its lost profit damages with reasonable certainty.

In regard to discounting, the parties argue over two issues: the date to which lost profits are discounted and the discount rate. Their competing positions are presented in the chart below. The Court resolves these issues in favor of the Plaintiff.

	Plaintiff-Arcy	Defendant-Hisey
Net Cash Flow (dollars)	24,628,000	3,765,023
Discount Rate (percent)	10.5	25.0
Date of Discount	October 1, 2000	January 1, 1999
Total Lost Profits (Present Value) (dollars)	13,700,000	2,700,133

B. Date of Discounting

The Plaintiff argues that damages should be discounted back to the date of judgment. This is also referred to as discounting to the date of trial. "The concept of discounting future damages to the date of trial is sometimes referred to as 'ex-post' discounting." Peter Schulman, *Economic Damages: Discounting Concepts and Alternatives,* 28 Colo. Law. 41, 43 (1999). In contrast, the Defendant urges this Court to discount the damages back to the date of breach, which is February 14, 1997. "The concept of discounting future damages to the date of breach is sometimes referred to as 'ex-ante' discounting." *Id.*

The Court of Federal Claims has recently analyzed the law regarding the date to which a damage award is discounted within the context of a claim for replacement capital in a *Winstar* [FN38] case:

> FN38. In *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), the Supreme Court held that the United States breached contracts with financial institutions when Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Since that opinion, the Court of Federal Claims has issued opinions in several different cases about the amount of damages to which the financial institution is entitled.

The law in this circuit is that expectancy damages on an ongoing contract are not discounted to the date of breach. Instead, post-breach damages prior to the date of judgment are not discounted, and future damages (as of the date of judgment) are discounted by the rate of return on "conservative investment instruments." *LaSalle,* 45 Fed.Cl. at 108-09 (citing ***416***Northern Helex Co. v. United States,* 634 F.2d 557, 564, 225 Ct.Cl. 194, 205 (1980); *Northern Helex Co. v. United States,* 524 F.2d 707, 722, 207 Ct.Cl. 862, 890 (1975)).[FN39]

> FN39. "Ongoing contract" means one, as in this case, in which damages would have accrued on an ongoing basis over the course of the contract, absent the breach. That is, the Plaintiff would have earned money after the date of judgment.

With one clarification, this Court agrees with the holding of *LaSalle* because of the persuasiveness of the underlying reasoning, which is worth quoting:

> The general rule in this circuit is that "[t]he time when performance should have taken place is the time as of which damages are measured." *Reynolds v. United States,* 141 Ct.Cl. 211, 220, 158 F.Supp. 719, 725 (1958). In many cases, the appropriate date for calculation of damages is the date of breach. *See Estate of Berg v. United States,* 231 Ct.Cl. 466, 469, 687 F.2d 377, 380 (1982); *Cavanagh v. United States,* 12 Cl.Ct. 715, 718 (1987); *Northern Paiute Nation v. United States,* 9 Cl.Ct. 639, 643 (1986); ***see also*** *Northern Helex II,* 524 F.2d at 721 (holding that an offset to lost profits based upon the excess value of a physical plant is determined by measuring the fair market value of the plant at the time of breach). But that rule does not apply to anticipated profits or other expectancy damages that would have accrued on an ongoing basis over the course of the contract, absent the breach. In these circumstances, damages are measured throughout the course of the contract. To prevent unjust enrichment of the plaintiff, the damages that would have arisen after the date of judgment must be discounted to the date of judgment. *See Northern Helex III,* 634 F.2d at 564 (discounting the portion of anticipated profits that would have arisen after the date of judgment).
>
> *LaSalle,* 45 Fed.Cl. at 108-09 n. 66.

This Court agrees with *LaSalle's* interpretation of *Northern Helex III,* 634 F.2d at 564, 225 Ct.Cl. at 205, a decision of the Court of Claims, which is binding precedent. *Northern Helex III* discounted the amount of $34,175,989 to October 31, 1980 at a rate of 9 percent and arrived at a figure of $33,457,400. *Northern Helex III,* 634 F.2d at 564, 225 Ct.Cl. at 204-05. It is apparent that the undiscounted sum ($34,175,989) represented lost profits for 13 years from 1970 to 1983. The lost profits for approximately 3 years (from 1980 to 1983) were "future" lost profits in that the profits would have been earned after the date of final judgment.

LaSalle accurately states the law from *Northern Helex* in regard to future lost profits: these damages must be discounted to the date of judgment.

This Court clarifies one small point that is implicit in *LaSalle*. Discounting is required only when the Plaintiff is recovering money it would have earned after the date of judgment.[FN40] *LaSalle* says as much, although in slightly different terminology, when it says discounting is used for "expectancy damages that would have accrued on an ongoing basis over the course of the contract, absent the breach." *LaSalle*, 45 Fed.Cl. at 108-09 n. 66.

> FN40. Discounting is based on a premise that a dollar possessed today is worth more than a dollar paid tomorrow. When the Plaintiff is not seeking "tomorrow's dollars," discounting is not necessary because the Plaintiff will not receive a windfall.

[10] This passage could create confusion when the Plaintiff is seeking "past" lost profits. "Past" lost profits are those profits that would have been earned after the breach but before the date of judgment. Past lost profits are damages that would fit within *LaSalle's* language because they would "accrue on an ongoing basis over the course of the contract." *Id.* Past lost profits cannot be "discounted" to the date of judgment because that would be mathematically impossible. But, past lost profits could be discounted to the date of breach. Some jurisdictions call for discounting to the date of breach when prejudgment interest is also awarded. ***See, e.g.,*** *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 538 n. 22, 103 S.Ct. 2541, 2551 n. 22, 76 L.Ed.2d 768, 784 n. 22 (1983); *Navistar International Transportation Corp. v. Pleasant*, 887 P.2d 951, 959 (Alaska 1994) ("[i]f future damages were discounted back to the time of injury, it would be appropriate to allow prejudgment interest on future***417** damages so discounted."). But this Court is not aware of any cases in the Federal Circuit that require discounting to the date of breach. Accordingly, this Court understands *LaSalle* to say that discounting, to the date of judgment, is appropriate for those damages that would have been earned in the future when viewed from the perspective of the date of judgment.[FN41]

> FN41. *LaSalle*, itself, recognizes that in *Northern Helex* "[n]o discount was applied to lost profits for the period from the breach through the date of judgment." *Id.* at 109 n. 67.

The efforts by the United States to argue against discounting to the date of judgment and against *LaSalle* are unpersuasive. First, the United States notes that *LaSalle* discusses the date of discount in the context of the cost of replacement of capital after specifically rejecting the Plaintiff's claim for lost profit. Although it is true that *LaSalle* discusses the discount date in this context, the United States presents no argument why this fact makes any difference. *LaSalle* establishes when the date on which future damages are discounted. *LaSalle's* rule applies with equal force regardless of whether the damages are for lost profits or for the cost of replacement capital.

The United States also makes a second argument that *LaSalle's* comments should not be followed because they are dicta. The United States, again, is partially correct in that *LaSalle* did not actually award any damages for the cost of replacement capital. But, this outcome does not affect the strength of *LaSalle's* reasoning. *LaSalle* examines the binding precedent and its analysis is persuasive. This Court sees no reason to deviate from *LaSalle's* statement of the law, except for the small point discussed with regard to past lost profits.

[11] Accordingly, the Court holds that the future lost profits [FN42] should be discounted to the date of judgment, not to the date of breach.

> FN42. According to Arcy's model, the Plaintiff would not make profit for a year until 1999. Thus, almost all profits are future lost profits.

C. Rate for Discount

1. Parties' Arguments

Another issue related to discounting, but separate from the date of discounting, is the rate of discounting. The discount rate reflects the concept that the money awarded today will accumulate interest and grow to approximate the money that the Plaintiff would have earned in future lost profits over the course of the contract.

The parties endorse different rates. The Plaintiff, itself, has advanced two different theories. At trial, the Plaintiff presented Arcy's model that used a discount rate of 10.5 percent. In post-trial briefing, the Plaintiff argued that *LaSalle* used a risk-free rate of return, which *LaSalle* suggested was the current rate of interest on Treasury

securities. *LaSalle,* 45 Fed.Cl. at 109, n. 69. The Defendant contended that the discount rate must account for some element of risk and proposed that the discount rate should be 25 percent.

2. Burden of Proof on Rate of Discount

[12] The law as to whether the burden of proof is on the Plaintiff or Defendant is unsettled. *See, e.g.,* *Gorniak v. National R.R. Passenger Corp.,* 889 F.2d 481, 486 (3rd Cir.1989) (placing burden on Plaintiff); *Alma v. Manufacturers Hanover Trust Co.,* 684 F.2d 622, 626 (9th Cir.1982). Two recent state court decisions squarely addressed this issue. Both placed the burden on the Defendant. *Wingad v. John Deere & Co.,* 187 Wis.2d 441, 523 N.W.2d 274, 278 (App.1994); *CSX Transp., Inc. v. Casale,* 247 Va. 180, 441 S.E.2d 212, 216 (1994) (relying on *Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485, 489, 36 S.Ct. 630, 631, 60 L.Ed. 1117 (1916)).

The Court agrees with the reasoning in the cases that place the burden on the Defendant. The reduction to present value lessens (or mitigates) the damages paid by the Defendant. Since the Defendant benefits from the discounting procedure, it is fair to place the burden of presenting the evidence to the court on the Defendant. *CSX Transp.,* 441 S.E.2d at 216.

***418 3. Court's Ruling**

[13] The Court holds that the appropriate discount rate is the rate of return on "conservative investment instruments." *Northern Helex III,* 634 F.2d at 564, 225 Ct.Cl. at 205; *see also* *LaSalle,* 45 Fed.Cl. at 109 (quoting same).

The statement in *Northern Helex III* that equates the discount rate with the return on conservative investment instruments remains binding on this Court. Although the Court of Claims does not explain its reasoning, its decision is clear and must be followed. Given that the discount rate should equal the return on conservative investment instruments, the question is what is the return on conservative investment instruments? In its discussion of *Northern Helex III, LaSalle* accepted the premise that "conservative investment instruments" are Treasury securities. *LaSalle,* 45 Fed.Cl. at 109. Unlike the situation in *LaSalle,* neither party presented this evidence.

[14][15] The Court holds that the rate of return on Treasury securities is a subject for which judicial notice is appropriate. *Levan v. Capital Cities/ABC, Inc.,* 190 F.3d 1230, 1235 n. 12 (11th Cir.1999) (taking judicial notice of prime interest rate); *Havens Steel Co. v. Randolph Engineering Co.,* 813 F.2d 186, 189 (8th Cir.1987) (stating "[a] prevailing rate of interest is a proper subject of judicial notice."); *See also, Alcea Band of Tillamooks v. United States,* 87 F.Supp. 938, 954, 115 Ct.Cl. 463, 518 (1950) (taking judicial notice of low interest rates during 1930's), *rev'd on other grounds,* 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738 (1951). The Court finds that this rate of return is 5.90 percent. *See* "Key Interest Rates," *The Wall Street Journal,* August 15, 2000, at C20 (listing interest rate for 10-year Treasury notes with constant maturity.) This rate reflects a risk-free rate of return, as required by *Northern Helex III.*

Notwithstanding *Northern Helex III,* the Defendant presents a cogent argument for why the discount rate should consider the riskiness of the endeavor. Undoubtedly, the Defendant will present its argument to the Federal Circuit, a court with the authority to overrule *Northern Helex III.*

The Federal Circuit may determine that, as a matter of law, trial courts should consider the riskiness of the project in establishing the discount rate. The Defendant cites *In re Lambert,* 194 F.3d 679, 681 (5th Cir.1999); *Douglass v. Hustler Magazine, Inc.,* 769 F.2d 1128, 1143 (7th Cir.1985); and *Schonfeld v. Hilliard,* 62 F.Supp.2d 1062, 1074 n. 6 (S.D.N.Y.1999), all cases where the discount rate was affected by the risks. This Court believes that the assessment of the riskiness of the investment is a question of fact. Hence, the Court will make findings of fact related to this issue. These findings, however, are useful only if the Federal Circuit holds that the discount rate is something other than the rate on conservative investment instruments.

4. Court's Alternative Findings of Fact

If the discount rate should reflect the riskiness in the AHELP Program, then the discount rate should be 10.5 percent. This is the discount rate proposed by the Plaintiff's expert, Arcy. The Court expressly rejects the discount rate (25 percent) offered by the Defendant's expert, Hisey.

Once the Court does not have to set the discount rate equal to the return on conservative investment instruments, the discount rate is a question of fact. *Gallaspy v. Warner,* 324

P.2d 848, 853 (Okla.1958). In determining the discount rate, the Court will examine all pertinent facts, including the riskiness of the Plaintiff's business.

Certain risks independent of the Defendant's breach existed when the Defendant breached the contract.[FN43] Investors in 1997 ***419** (before the breach) would be unlikely to invest money in the AHELP Program at a rate of return equal to the Treasury rate, which was approximately 5.5 percent. This trepidation is justified because the investors would fear that the Program would not succeed. Thus, there is a risk that the investors would lose all their money. Further, if the investors were content to earn only 5.5 percent interest, the investors would select Treasury notes because Treasury notes are "risk free." In short, a potential profit rate higher than that of conservative investments is necessary to attract investors to AHELP because AHELP has risks of failure.

FN43. In acknowledging the presence of risks, the Court might be understood as saying that profits were unlikely. This meaning is not intended.

> The Court has found, in Section VII and Section VIII, above, that the Plaintiff has established its claim for lost profits with "reasonable certainty." This requirement is based on reasonableness, not absoluteness.
>
> One example is the issue of first mortgagee consent. At the time of termination, there was a risk that zero first mortgagees would not consent. If this risk came to fruition, then the AHELP Program for Field Notice properties would fail. This risk, however, is small and does not prevent the Court from finding that it is reasonably certain that most first mortgagees would consent.

The Court finds that a discount rate of 10.5 percent is appropriate. This rate is based on Arcy's analysis of mortgage REITs.[FN44] Using mortgage REITs as a baseline is appropriate because a mortgage REIT would be interested in acquiring the AHELP Program. During the appropriate time, the average dividend yield for mortgage REITs was approximately 8.5 percent. Tr.2054. Arcy then added 2 percent to account for the debt component and profit component.

FN44. A "real estate investment trust" ("REIT") is a legal entity recognized by the Internal Revenue Code. A mortgage REIT is a REIT that chooses to own mortgage interests in real estate, as opposed to owning the real estate directly. Tr.1981.

The approach taken by Hisey, in contrast, was not persuasive. Hisey considered the AHELP Program to be a form of specialized lending. Hisey, accordingly, averaged the returns of five specialized lending companies.

Hisey's opinion was far from credible because: first, the selection of specialized lending companies, and second, the method of selecting the particular companies within the specialized lending industry. Tr. 3804 et seq.

The AHELP Program is not analogous to the specialty lending industry. Therefore, Hisey's comparison is flawed. Specialty lenders, predominantly, lend to consumers, not commercial ventures. Some consumer loans are "sub-prime," that is, the loans reflecting a higher degree of credit risk. Because the lending risk to consumers is greater than the risk in lending to commercial entities, these lending companies offer the potential for greater returns. AHELP, itself, was a commercial venture and therefore a comparison to consumers is not appropriate.

Even more problematic than the use of the field of "specialty lending" was Hisey's selection of the particular lenders within this field. Hisey picked only five companies, although the Specialty Lender Yearbook, listed industry medians. PX 147. The five companies, also, had the highest returns of any companies within their particular category of consumer specialty lenders. The combined force of using only five companies and then using only the companies with the highest return strongly suggests that Hisey was not analyzing the situation dispassionately. Instead, the Court is left with a strong impression that Hisey distorted these numbers to achieve a result. In this regard, the Plaintiff's cross-examination of Hisey was very effective.

Since Hisey's method is discredited and Arcy's method is reasonable, the Court accepts the discount rate proposed by Arcy. Thus, if the discount rate needs to consider the riskiness of the venture, the cash flows should be discounted by 10.5 percent.

5. Conclusion on Discount Rate

The Court believes that discounting the future damages to a present value is necessary to avoid a windfall recovery to the Plaintiff. The Court does so even though the party with the burden of proving the discount rate, the Defendant, has failed to present credible evidence of the discount rate.

Several factors justify the use of a discount rate. Fundamentally, the law requires discounting of future damages. *Northern Helex III,* 634 F.2d at 564, 225 Ct.Cl. at 205. Almost as importantly, the values of fairness and equity suggest that the Plaintiff should not receive more than it deserves simply because the Defendant erred in a small respect.***420** [FN45] Finally, the parties themselves agreed that discounting was appropriate; the parties differed only with respect to the discount rate. Therefore, the present case is not comparable to those cases where the Defendant's failure to produce *any* evidence about the need to discount future damage awards waived its right to discounting. ***See, e.g.,*** *Wingad v. John Deere & Co.,* 523 N.W.2d at 278; *Alma v. Manufacturers Hanover Trust Co.,* 684 F.2d 622, 626 (9th Cir.1982).

> FN45. The Court, roughly, took this same approach when it recalculated the Plaintiff's lost profits despite the Plaintiff's erroneous estimate of its expenses.

In sum, the Court will discount at a rate of 5.9 percent.

D. Calculating Present Value

1. Procedural Posture

The Court has now reached a dilemma. The Court has found the three variables for calculating the present value: total cash flow, the date of discount, and the discount rate. Accountants, like Arcy or Hisey, (or the computer spreadsheet used by accountants) could easily take the three variables and calculate the present value to the penny. The Court, however, does not have the benefit of this precision.

As part of the post-trial briefing, the Court requested that the parties address the issue of whether the Court has the authority to find facts and then to instruct the parties to present their calculations of damages. The Plaintiff cited the following cases as examples when courts have required the parties to re-calculate damages based on different assumptions: *Gargoyles, Inc. v. United States,* 37 Fed.Cl. 95, 109-10 (1997) (after conducting a bench trial on damages, court issued findings of fact and ordered parties to calculate the amount of damages in accordance with the court's findings, and then file a stipulation of judgment in that amount within twenty days); *Kit-SanAzusa, J.V. v. United States,* 32 Fed.Cl. 647, 650 (1995) (after evidentiary record on damages was closed, Court of Federal Claims issued preliminary findings and directed parties to "attempt to agree on a calculation of the precise amount of the judgment necessary to effectuate the opinion"; when parties were unable to reach such an agreement, the remaining issues were briefed and argued and court adopted plaintiff's post-trial calculation of damages), *aff'd in part and modified in part on other grounds,* 86 F.3d 1175 (Fed.Cir.1996) (table); and *United California Bank v. Eastern Mountain Sports, Inc.,* 546 F.Supp. 945, 973 (D.Mass.1982) (parties ordered to confer to determine if they could reach agreement on the amount of the judgment to be entered in conformity with the court's findings and rulings; if no agreement could be reached, each side required to submit to the court its proposed calculation of the judgment to be entered).

The Defendant did not assert a position as to whether this Court has the authority to return the case to the parties for additional damages calculations. (Although given an opportunity, the Defendant did not directly address the cases cited by the Plaintiff and listed above.) Rather, the United States contends that it would be prejudiced by having to recalculate the damages. The United States sees that it could have to incur the additional cost of retaining an expert (presumably, Hisey) to recalculate the damages, of deposing the Plaintiff's expert (presumably, Arcy) on his recalculation of damages, and of presenting this information to the Court.

Also as part of the post-trial briefing, the Court requested that the parties address the issue of a court's ability, in a bench trial, to estimate damages when the Court rejects the assumptions used by the parties. The Defendant argued that the Plaintiff has failed to present any evidence for the Court to calculate lost damages based on a partial acceptance of its evidence. (For example, the Defendant contends that the Plaintiff should have presented evidence of lost profit on a "per loan" basis.) Since the Plaintiff presented an "all or nothing" case and the Plaintiff is not entitled to "all," according to the Defendant, the Plaintiff is entitled to "nothing."

The Court rejects the Defendant's argument as far too harsh. The law has advanced***421** beyond a stage where a single small slip would cause the Plaintiff's case to fail entirely. For example, in *White Mountain Apache Tribe of Arizona v. United States,* 11 Cl.Ct. 614, 663-67 (1987), the court analyzed the reports of experts from both sides. "Neither side was able to persuade the court to adopt its measure of damages in its entirety, because both presentations suffered to some extent from shortcomings in their underlying assumptions." *Id.* at 663. Utilizing "the jury method," the court overcame these shortcomings and awarded $3,627,000 in damages. *Id.* at 666-67. *White Mountain Apache* demonstrates that this Court has the authority to evaluate damages and to calculate damages differently than either party.

Accordingly, the Court will undertake the task of discounting the future lost profits to a present value. With the aid of a standard computer spreadsheet, the Court can do so even without an accountant. In doing so, the Court does not address the issue as to whether the Court has the authority to instruct the parties to calculate damages in accordance with certain factual findings.

2. Calculations

[16] The Court notes that through Arcy, the Defendant introduced the formula for discounting to present value. *See* Tr. 2100-01. Moreover, the Court can take judicial notice of the formula for calculating the present value.[FN46] *In re Eagle-Picher Industries, Inc.,* 189 B.R. 681, 692 (Bankr.S.D.Ohio 1995) (setting out formula); *Osborne v. Bessonette,* 265 Or. 224, 508 P.2d 185, 187 (1973).

> FN46. Although the Defendant argued, in closing argument, that the Plaintiff had the burden of proving the discount rate, the Court holds that the burden is actually on the Defendant. *See* Section IX.C.2, above. While the Court has tried to be as accurate as possible, the fact that the Court is discounting at all is to the Defendant's benefit.

The Court's method for calculating the present value is set forth in detail in Appendix A, which is attached to and incorporated into the opinion. By using a "reasonable computation from actual figures," the Court has avoided resorting to a "jury verdict method." *See Dawco Const., Inc. v. United States,* 930 F.2d 872, 880 (Fed.Cir.1991) (stating the jury verdict method is not favored), *overruled in part on other grounds, Reflectone, Inc. v. Dalton,* 60 F.3d 1572, 1578 (Fed.Cir.1995).

The Court finds that the approximate present value of $12.11 million at a discount rate of 5.9 percent is $8.787 million. When the discount rate is 10.5 percent, the approximate present value is $7.132 million.

X. Mitigation of Damages

A. Introduction

A final issue to be addressed in the context of lost profits is mitigation of damages. The Defendant contends that the Plaintiff could have mitigated its damages by pursuing other programs like the AHELP Program with states, notably New York, that subsidize housing. The Court finds that the mitigation of damages was not possible and rejects the Defendant's argument.

B. Law

[17] "It is clear that a nonbreaching party has a duty to attempt to mitigate its damages following another party's breach of contract .... As such, the nonbreaching party may not recover those damages which could have been avoided by reasonable precautionary action on its part." *Quiman, S.A. v. United States,* 39 Fed.Cl. 171, 185-86 (1997) (internal quotation marks and citations omitted).

[18] "It is well established that the party relying on the doctrine of mitigation of damages bears the burden of proving that the nonbreaching party failed to take reasonable precautions to limit the extent of the damage. *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank,* 611 F.2d 465 (3d Cir.1979); *T.C. Bateson Constr. Co. v. United States,* 162 Ct.Cl. 145, 188, 319 F.2d 135, 160 (1963)." *Midwest Indus. Painting of Florida, Inc. v. United States,* 4 Cl.Ct. 124, 134 (1983). *See also*Restatement (Second) of Contracts § 350, cmt. c (placing burden on breaching party to show substitute transaction was possible).

***422 C. Background Facts Related to Mitigation**

[19] While Energy Capital was developing the AHELP Program, even before the AHELP Agreement was signed, Energy Capital was planning to involve state housing agencies. Recapitalization Advisors identified 10 states

(Connecticut, Massachusetts, Pennsylvania, Wisconsin, Illinois, Michigan, Rhode Island, Maryland, New York and Virginia) as being possible participants in the AHELP Program.

New York was a potentially promising market for a program like AHELP. Unlike the other states mentioned above, New York created some housing agencies before HUD was established. The apartments regulated by New York operate free of HUD regulation. David Smith estimated that there are 102,000 such units, in 248 properties. Many New York apartments suffer from energy inefficiencies that would make them candidates for an energy-improvement loan.

After the AHELP Agreement was signed, Energy Capital began exploring whether the State of New York would be receptive to a program to finance energy-efficiency improvements in housing that was assisted by New York. Energy Capital called this program NYHELP. Neither party presented any evidence as to how far Energy Capital progressed in convincing New York to be its partner in NYHELP.

HUD terminated the AHELP Agreement in February 1997, following the adverse publicity in *The Wall St. Journal*. Energy Capital abruptly stopped its efforts to establish NYHELP shortly after HUD terminated the agreement. Fred Seigel, the president of Energy Capital, believed that further work with New York would be pointless for two reasons. First, *The Wall St. Journal* article and HUD's reaction to the article, which could be viewed as confirming the article, tainted Energy Capital's reputation. Second, Andrew Cuomo, the Secretary of HUD, is the son of Mario Cuomo, the former governor of New York. Many New York government officials, according to Energy Capital, would be reluctant to conduct business with a company that had caused difficulty for the son of their former boss. Accordingly, since Energy Capital believed that New York officials would be unlikely to agree to NYHELP, Energy Capital ceased its efforts to start a program for New York properties exclusively.

D. Arguments and Analysis

The Defendant argues that the NYHELP Program could have replaced the AHELP Program and allowed Energy Capital to mitigate its damages. The proof offered on this point is woefully deficient.

First, and most importantly, the Defendant did not contradict Energy Capital's explanation of why it did not pursue the NYHELP Program. Energy Capital's decision to stop its efforts was reasonable. The Court agrees that New York officials would not agree to the NYHELP Program. The Defendant did not present any evidence, such as a witness from a New York housing agency, that New York was interested in NYHELP after HUD terminated the Agreement. This omission, by itself, is enough to justify the Court's finding that mitigation was not possible.

Second, the amount of money Energy Capital could have earned in the NYHELP Program was never established. In his expert report, David Smith opined that Energy Capital could generate about $57 million in loan revenue. This opinion is based on the same assumptions used for his estimates of loan revenue for the Program in general.[FN47] The Defendant challenged many of these assumptions and the Court, to some extent, changed the assumptions. When the Court's own findings are substituted, the NYHELP Program would generate only $21.5 million in loan revenue.[FN48]

> FN47. These assumptions were that 24 percent of the properties were energy viable, an owner participation rate of 53 percent, and an average loan size of $4,400.
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> FN48. The Court finds, elsewhere in this opinion, that 16 percent of the properties were energy viable, an owner participation rate of 46 percent, and an average loan size of $2,800.

The Defendant also submitted deposition testimony from Smith in which he predicts that Energy Capital could have generated $175 million in loans. This assumption is ***423** based on an average loan size of $5,000 and 35,000 properties participating. For 35,000 properties out of 102,000 properties participate, the *total* for energy viability and owner participation would need to be about 66 percent. This figure is significantly higher than all other estimates (about 3 times the estimate in Smith's report and about 4.5 times the estimate in the Court's findings) and no justification for such high participation is presented. Accordingly, the Court rejects Smith's deposition testimony, which is not in his expert report, that the loan volume would have amounted to $175,000,000.

Even if the loan volume were established, the Defendant did not take the next step to establish Energy Capital's earnings. As the Court's opinion indicates in Section VIII, above, loan volume is not the same as earnings. The Defendant's suggestion that Energy Capital could have generated $175 million (or $57 million or $21.5 million) completely overlooks expenses. To justify its own claim for lost profits, Energy Capital used Arcy to develop a cash flow model that accounts for income and expenses. The United States offered nothing like that.[FN49]

Accordingly, the Court cannot calculate how much Energy Capital would have gained from the NYHELP Program.

> FN49. Although the Court could be asked to assume that Energy Capital's expenses for NYHELP would equal its expenses for AHELP, this assumption is not warranted. NYHELP was not an existing agreement. Energy Capital would have to incur expenses to create NYHELP. The Court has no basis to estimate these start-up costs.

In sum, the Court finds that Energy Capital could not have mitigated its damages by pursing the NYHELP Program. Energy Capital's damages, therefore, do not have to be reduced by the amount of mitigation.

XI. Recovery of Lost Profits beyond $200 million limit

A. Introduction

[20] In addition to seeking damages based on the assumption that Energy Capital would sell all loans available under AHELP, Energy Capital presented a theory that the AHELP Program would be so successful that HUD would agree to another contract. This theory provides a method for the Plaintiff to recover lost profits on loans that would have been generated after the $200 million limit was exceeded.

The Plaintiff presented some evidence to support its contention that it and HUD would enter into another AHELP-type agreement after AHELP itself expired. As described in some detail in the earlier sections of this opinion, Energy Capital believed that the market for energy-efficiency loans within the government-assisted multifamily housing universe was almost unlimited. Indeed, Retsinas himself testified that the $200 million was merely the tip of the iceberg. Parties from both sides testified that each anticipated that, if the Program were successful, then the Program might be extended.

During trial, the Court, however, found that the Plaintiff's evidence was insufficient to authorize an award on this theory. Accordingly, the Court declined to award any damages that would expand the scope of the AHELP Agreement beyond the $200 million limit. The next sections explain the Court's decision.

B. Procedural Setting

At the close of the Plaintiff's case in chief, the Defendant made an oral motion under R.C.F.C. 52(c). The United States contended that the Plaintiff had failed to establish that it could recover lost profits beyond the $200 million limit in AHELP.

Before addressing the Defendant's Rule 52(c) motion, the Court resolved a preliminary procedural point in favor of the United States. The Plaintiff contended that the Rule 52(c) motion was not proper. During the Plaintiff's casein-chief, the Defendant moved for the admission of one document into evidence during cross-examination of a witness called by the Plaintiff. The Court, without objection, admitted the document and the Defendant was permitted to elicit substantive testimony from the witness. In a motion to strike the Rule 52(c) motion, the Plaintiff contended that once the Defendant has introduced evidence, the Defendant cannot***424** seek a Judgment on Partial Findings under Rule 52(c).

The Court denied the Plaintiff's Motion to Strike. The Defendant may file a Rule 52(c) motion any time after the Plaintiff has rested even if the Defendant has introduced evidence.

The text of Rule 52(c) states, in part: "If during a trial a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim." R.C.F.C. 52(c). The only restriction in Rule 52(c) is that the opposing party must be "fully heard." In this case, the Plaintiff completed it case in chief. Therefore, the Defendant's motion was procedurally correct.

A comparison to the Federal Rules of Civil Procedure supports the Court's interpretation of R.C.F.C. 52(c). With respect to only the issue of the timing of the motion,

R.C.F.C. 52(c) is analogous to Fed. R. Civ. Proc. 50(a)(1), which permits judgment as a matter of law in jury trials.[FN50] Fed. R. Civ. Proc. 50(a)(1) states, in part: "If during a trial by jury *a party has been fully heard on an issue* and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine that issue against that party." Fed. R. Civ. Proc. 50(a)(1) (emphasis added). The italicized language is almost verbatim the language in the Rule of the Court of Federal Claims.

> FN50. Because there are no jury trials at the Court of Federal Claims, the Rules of Procedure for the Court of Federal Claims omit this rule.

Under Fed. R. Civ. Proc. 50(a)(1), a party may file this motion after the close of all evidence. *See Moore's Federal Practice* (3d Ed.) § 50.20 [2][e]. Since a party may file a motion under Fed. R. Civ. Proc. 50 after it has presented all its evidence, it is logical to permit that same party to file the motion after it has presented only some of its evidence. The decisive consideration is whether the non-moving party has been fully heard. When the nonmoving party has been fully heard, as in this case, a motion under R.C.F.C. 52(c) is appropriate.

C. Standard for Rule 52(c)

Cooper v. United States, 37 Fed.Cl. 28 (1996), sets forth the standard for ruling on a motion for judgment partial findings pursuant to R.C.F.C. 52(c):

In the Court of Federal Claims, the judge serves as both the trier of fact and the trier of law. Accordingly, R.C.F.C. 52(c) envisions a different role for the judge than does Fed.R.Civ.P. 50(a). *See Persyn v. United States,* 34 Fed.Cl. 187, 194-95 (1995). A judge ruling on a Rule 52(c) motion does not evaluate merely whether the plaintiff has put forth a prima facie case. Instead, R.C.F.C. 52(c) permits the judge to weigh the evidence and does not require that the judge resolve all credibility determinations in favor of the plaintiff. *Howard Indus., Inc. v. United States,* 126 Ct.Cl. 283, 289-90, 115 F.Supp. 481, 484-85 (1953); *Cities Serv. Pipe Line Co. v. United States,* 4 Cl.Ct. 207, 208 (1983) (discussing former RUSCC 41(b)), *aff'd,* 742 F.2d 626 (Fed.Cir.1984). As the United States Court of Claims explained:

> The so-called *prima facie* case rule governing the action of judges in jury trials rests upon the established division of functions, in such proceedings, between jury and judge, whereby the jury tries the facts and the judge determines the law ....
>
> But in an action tried without a jury the judge is the trier of both the facts and the law. This fundamental distinction between jury and non-jury trials should not be ignored .... When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to dismiss under Rule 41(b) [precursor to RCFC 52(c)], to determine merely whether there is a prima facie case... sufficient for the consideration of a trier of the facts when he is himself the trier ***425** of the facts. *** * *** A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a prima facie one in the jury trial sense of the term.
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> *Howard Indus.,* 126 Ct.Cl. at 289-90, 115 F.Supp. at 48586 (quoting *United States v. United States Gypsum Co.,* 67 F.Supp. 397, 417-18 (D.D.C.1946), *rev'd on other grounds,* 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).
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> *Cooper v. United States,* 37 Fed.Cl. 28, 35 (1996).

D. Findings and Analysis

The parties agreed to one contract, the AHELP Agreement. This contract states that the Agreement is limited to either 3 years or $200 million in loans, whichever occurs first.

HUD officials, in particular Retsinas, did not agree to expand the AHELP Program past the $200 million limit. It is undisputed that Retsinas was the only person within HUD with the authority to enter into the AHELP Agreement. Retsinas testified that he could see that if the AHELP Program were successful in the initial $200 million, then HUD would be interested in continuing to contract with Energy Capital because the portfolio of properties that needed energy assistance exceeded $200 million. Tr. 1827, 1838.

The Plaintiff's arguments that it is entitled to lost profits beyond $200 million limit are not sustainable. The Plaintiff argues that the test is whether the parties could reasonably foresee the damages when the contract was made. The Plaintiff argues that its evidence shows that Energy Capital expected to enter into a series of AHELPlike contracts. Thus, to the Plaintiff lost profits from these future contracts are reasonably foreseeable from the breach of the AHELP Agreement.

This argument eviscerates the terms of the AHELP Program. The express terms restrict the contract to $200 million. If the parties were bound only by their expectations, then the cap would be unnecessary and worthless. The Court should avoid construction of a contract that renders any term meaningless. *T. Brown Constructors, Inc. v. Pena,* 132 F.3d 724, 730-31 (Fed.Cir.1997).

The Plaintiff's unilateral expectations, when it entered into the AHELP Agreement, about the possibility that it would have another contract with HUD differ from its expectations for the AHELP Agreement itself. One difference is that there was a contract. The AHELP Agreement is a foundation for the Plaintiff's hopes for the events under the AHELP Agreement, which are not those events after the AHELP Program is completed. In contrast, nothing anchors the Plaintiff's expectations for events after the AHELP Program is completed.[FN51] The parties could not "foresee" (as that term is used in a legal sense) that the breach of the AHELP Agreement would result in the loss of profits on a subsequent contract.

> FN51. Whether the Plaintiff's expectation is based on a contract distinguishes this case from *Smokey Bear, Inc. v. United States,* 31 Fed.Cl. 805 (1994), a case on which the Plaintiff relies. In *Smokey Bear,* the licensing agreement, which the Defendant allegedly breached, "was renewable after the initial three-year term." *Id.* at 806. In denying a motion to dismiss, the Court permitted the Plaintiff to introduce evidence of its lost profits. *Id.* at 808.
>
> A licensing agreement that contains a renewable provision differs from a contract with a set termination. The Plaintiff in *Smokey Bear* could state a claim that the breach of the licensing agreement prevented it from renewing the agreement. Here, Energy Capital cannot expect that it would have another contract.

Besides foreseeability, the Plaintiff failed to established causation. Many other steps could have interfered with the formation of an agreement subsequent to AHELP. For example, HUD intended to evaluate the success of the AHELP Program. HUD may have decided, for whatever reason, that the Program was not worth continuing. The Court says this, even after finding that AHELP would have "succeeded," in that, property owners would have sought energy improvement loans, first mortgagees would ***426** have consented to the loans being placed on their properties, and Energy Capital would have earned a profit. Even if the AHELP Program would have accomplished all these goals, HUD retained the right to examine whether it would want to continue the Program. HUD, not this Court, determines whether it will enter into a contract. *See Parcel 49C Limited Partnership v. United States,* 31 F.3d 1147, 1153-54 (Fed.Cir.1994). Based on the record before the Court, this Court cannot say that HUD would have agreed to another AHELP-like contract absent the breach.

In sum, the Court finds that the Plaintiff failed to present evidence, during its case in chief, to support an award of lost profits for contracts beyond the $200 million cap for several reasons. Principally, the AHELP Agreement is limited to $200 million. Secondarily, the Plaintiff has not established foreseeability and causation.[FN52]

> FN52. The reasons given in the opinion suffice to deny the Plaintiff's claim for lost profits. The Court has not commented on the Plaintiff's evidence for "reasonably certainty." This silence is not intended as a statement, in favor of either party, as to the sufficiency of this evidence.

XII. Reliance Damages

As an alternative to its claim for expectancy damages, measured by lost profits, the Plaintiff also claims reliance damages.[FN53] The Defendant contends that reliance damages are the correct approach to measuring the Plaintiff's damages, but questions some components of the Plaintiff's list of costs.

> FN53. The Plaintiff did not seek "restitution" damages. Restitution would not be an appropriate measure of damages because the Plaintiff had not

yet conferred any measurable benefit to the United States at the time of termination.

A. Law for Reliance Damages

California Federal Bank v. United States, 43 Fed.Cl. 445 (1999), states the basic principles of reliance damages:

Reliance damages seek to place the plaintiff "in as good a position as he would have been in had the contract not been made." Restatement (Second) of Contracts § 344(b) (1981). Reliance damages include expenditures made "in preparing to perform, in performing, or in foregoing opportunities to make other contracts." Restatement (Second) of Contracts § 344 cmt. a (1981). This relief is awarded on "the assumption that the value of the contract would at least have covered the outlay." Charles T. McCormick, Handbook on the Law of Damages § 142, at 586 (1935). Normally, the plaintiff seeks reliance damages when unable to prove expectancy with reasonable certainty because "failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure." [*United States v.*] *Behan*, 110 U.S. [338,] 345, 4 S.Ct. 81, [28 L.Ed. 168 (1884)].

California Federal Bank v. United States, 43 Fed.Cl. 445, 450 (1999); ***see also*** John D. Calamari & Joseph H. Perillo, *The Law of Contracts* § 14.9. (4th ed.)

Within this sphere of "reliance damages," the Plaintiff argues that it is entitled to recover expenses incurred before the contract was signed, but incurred in preparation for its performance under the contract. For this proposition, the Plaintiff cites *Dolmatch Group, Ltd. v. United States*, 40 Fed.Cl. 431, 439 (1998) (stating "a plaintiff can recover reliance damages as an alternative; this includes expenditures in preparation and part performance.").

The Court believes that the Plaintiff's argument goes too far. The Plaintiff in *Dolmatch Group* sought "to recover expenses incurred while *operating* under the alleged agreement." *Id.* (emphasis added.) Thus, when the passage on which the Plaintiff relies is placed in context, it is clear that *Dolmatch Group* does not say that reliance damages can be awarded for those expenditures made *before* the contract was signed.

[21] The general rule appears to be that reliance damages are limited to those expenses incurred after an agreement has been reached. ***See, e.g.,*** *Autotrol Corp. v. Continental Water Systems Corp.*, 918 F.2d 689, 695 (7th Cir.1990); *Moore v. Lewis*, 51 Ill.App.3d 388, 9 Ill.Dec. 337, 366 N.E.2d 594, 599 (1977); ***see also*** J.E. Macy, Annotation, ***427** *Right to Recover in Action for Breach of Contract, Expenditures Incurred in Preparation for Performance*, 17 A.L.R.2d 1300, Section 7, 1951 WL 7345 (1951).

Moreover, this restriction is especially important in cases against the United States. In the Tucker Act, the United States waived its sovereign immunity for breach of express or implied contracts. 28 U.S.C. § 1491. If this Court were to accept the Plaintiff's argument that it can recover, as reliance damages, those expenses incurred before the contract were signed, the Court would blur the distinction between contracts (whether express or implied) and statements that lead to contracts. The Court of Federal Claims lacks authority to award damages for contracts implied at law. *Hercules v. United States*, 516 U.S. 417, 424, 116 S.Ct. 981, 985-86, 134 L.Ed.2d 47 (1996); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1324-25 (Fed.Cir.1997). This Court cannot transform any statements made during negotiations into a contractual duty that warrants an award of reliance damages.

Thus, the Court will examine the evidence in support of reliance damages and will exclude any expenses incurred before the contract was signed.

B. Evidence for Reliance Damages

The Plaintiff claims about $1.3 million in expenses. Energy Capital presented evidence of invoices, canceled checks, and/or ledger entries to support its claim that these expenses were incurred in reliance on the AHELP Agreement. This figure includes costs incurred before the AHELP Agreement was signed.

Besides those pre-agreement costs, the Defendant challenged very few items. Before trial began, Energy Capital provided copies of its documentary support to the United States. The United States, in turn, made this information accessible to its accounting expert, David Hisey, and his team. Hisey admits that $754,831.57 was documented as expenses incurred after the contract was signed.

In addition, the Court finds that Energy Capital established other expenses were related to the AHELP Program and

were adequately documented. These expenses amount to $121,735.52 for a total amount of $876,567.09. For several expenses, updated information was provided to the United States, but Hisey did not receive the updated information. Hisey was forced to admit, when confronted during cross-examination, that his analysis failed to account for this information. Because the United States challenged these expenses only on the ground that the documentation was insufficient and Energy Capital effectively demonstrated that the documentation was sufficient, the Court will include these expenses in the award for reliance damages. As stated previously, the expenses where the extent of documentation was disputed came to $121,735.52.[FN54]

FN54. The Court deducted $3,500 for one expense that was paid to a law firm in connection with Energy Capital's efforts to create a program like AHELP for New York State. Other than this item, the Defendant did not persuasively contest Energy Capital's evidence that the expenses were incurred while performing the AHELP Agreement.

Accordingly, as an alternative to the lost profit award, the Court finds that Energy Capital's reliance damages total $876,567.09.[FN55]

FN55. Finally, the Court has also considered whether Energy Capital has documented its costs incurred before the contract was signed. The Court makes this finding in case its holding about the Plaintiff's entitlement to pre-agreement damages is challenged on appeal.

A total of $424,441.82 in pre-agreement expenses were adequately documented. To develop the AHELP Program and to convince HUD to agree to it, Energy Capital retained several independent consultants including Recapitalization Advisors, Housing Partners, Summit Advisors, Energy Investments, and its lawyers. These expenses were adequately documented. Yet, because a portion of the bills from these entities were incurred before the AHELP Agreement was signed, the Court cannot award damages.

XIII. Conclusion

The Court acknowledges that few cases have awarded lost profits against the United States. Yet, the factual circumstances of this case support such an award. Here, there ***428** was a contract of limited duration (3 years), limited amount ($200 million) and for a specific purpose (to finance energy-efficiency improvements in HUDassisted housing). Further, the market for the service available under the contract, represented by the owners and first mortgagees, was easily identifiable and willing to pay for this service. These facts provide the evidentiary basis for finding that the Defendant's breach caused the loss of profits, that the loss of profits was foreseeable, and that the amount of lost profits was reasonably certain.

Pursuant to R.C.F.C. 54(b), inasmuch as there appears to be no just reason for delay, the Clerk's Office is directed to enter judgment in favor of the Plaintiff in the amount of $8,787,000 on Count 1, the breach-of-contract count.[FN56]

FN56. Earlier in this litigation, the Court stayed resolution of Count 2, a count alleging deprivation of constitutional rights. The Court orders the Plaintiff to file a status report within 2 weeks of this order proposing whether it is necessary to proceed with this count. If the Plaintiff wishes to proceed, the Plaintiff should specify what form of relief would be available that has not been awarded in this opinion.

The Plaintiff can submit any request for costs after the conclusion of the entire case, that is, after resolution of Count 2.

Appendix A: Calculation of Present Value

To calculate the present value using the figures for discount date, discount rate, and sum to be discounted, the Court used different numbers and a slightly different method than the experts.[FN57] To explain how this calculation was done, the Court will first explain Arcy's method.

FN57. Arcy and Hisey used the same method. For simplicity, the Court uses Arcy as an example, although a similar analysis could be done with Hisey.

Arcy had several steps. First, Arcy found the profit (or loss) for each month.[FN58] Second, the profit for the 12 months in a year was then summed. The figure for a particular year was presented in a chart in Arcy's expert report, which was admitted into evidence. (The figure for each month was not presented in any form to the Court.) The profit for each year varied. For 9 of the 12 profitable years, the undiscounted profit ranged from just above $2.0 million to just below $2.3 million. The number of loans being repaid mostly caused the fluctuation in profit.

FN58. The opinion, in Section VIII.C.3., explains why Arcy's estimate of expenses is too low. Thus, his profits are too high.

Third, each year's figure was discounted, at a rate of 10.5 percent, to October 1, 1999, a date that Arcy estimated would be the "date of judgment." The final step was that the undiscounted and discounted yearly figures were totaled. Arcy calculated the undiscounted amount as $24.628 million and the discounted amount as $13.692 million.

The Court, admittedly, cannot replicate every step in Arcy's process exactly. Prominently, the Court cannot calculate the profit for each year individually. However, the Court can divide the total profit, which the Court found to be $12.111 million into equal annual amounts. This step is justified because the per-year amounts in Arcy's model were approximately equal.

The Court tested to see whether this approach was fairly accurate. Using a computer spreadsheet program, the Court calculated the present value of $24.628 million with equal annual payments. The purpose of this step was to compare the Court's method (equal annual payments) with Arcy's method (variable annual payments). The Court kept the other numbers in Arcy's calculation constant: 10.5 percent discount rate, and a discount date of October 1, 1999.[FN59] The Court's method produced a result of $14.29 million. This figure closely approximates Arcy's estimate. Therefore, the Court's method functions as a reliable substitute.

FN59. The Court also assumed the last loans would be repaid on June 30, 2011. Arcy did not explain when, in 2011, the income stream would stop. The Court selected June 30, 2011 as the midpoint of the year.

Having identified a method, the calculation of present value was relatively simple. The Court assumed that the future income payments would total $12.111 million through June 30, 2011. The Court also assumed that *429 the discount rate was 5.9 percent and that the date of discount was August 21, 2000. This results in a figure of $9.127 million.

Finally, for sake of completeness, the Court also calculated the present value when the discount rate was 10.5 percent. As explained in the opinion, this discount rate is based on an alternative finding. The present value under these circumstances is $7.444 million.

The following chart presents this information.

Calculation of Present Value

Line	Annual Amounts	Discount Rate	Date of Discount	Sum for Discounting (millions)	Present Value (millions)
1	variable	10.5	Oct. 1, 1999	24.628	13.692
2	equal	10.5	Oct. 1, 1999	24.628	14.29
3	equal	5.9	Aug. 21, 2000	12.111	9.171
4	equal	10.5	Aug. 21, 2000	12.111	7.444

Comparing lines 1 and 2 shows that although the Court's method is more than 95 percent accurate, the Court's method serves to inflate the present value by about 4 percent. The figures in lines 3 and 4, therefore, should be reduced by a corresponding amount. When $9.127 million is reduced, the result is $8.787 million and when $7.444 million is reduced, the result is $7.132 million.

Adjusting Present Value

True Method	13.692

Court's Method 14.290 Ratio (true over court)
0.958 Line 3 from previous 9.171
chart
After Ratio is applied 8.787 Line 4 from previous 7.444
chart
After Ratio is applied 7.132

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Energy Capital Corp. v. *The United States*—United States Court of Appeals, Federal Circuit. No. 01-5018. Decided August 14, 2002.[2]

No. 01-5018
United States Court of Appeals, Federal Circuit

Energy Capital Corp. v. U.S.

302 F.3d 1314 (Fed. Cir. 2002)
Decided Aug 14, 2002

No. 01-5018.

Decided: August 14, 2002.

1315Appeal from the Court of Federal Claims, Edward J. Damich, Chief District Judge. *1315

Michael S. Gardener, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., of Boston, MA, argued for plaintiff-appellee. With him on the brief was Laurence A. Schoen.

Mark L. Josephs, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief were Jeffrey A. Belkin and Allison A. Page, Trial Attorneys. Also of counsel on the brief were Carole W. Wilson, Associate General Counsel; and William Lane, Trial Attorney, Office of General Counsel, Department of Housing and Urban Development, of Washington, DC.

Before CLEVENGER, SCHALL, and LINN, Circuit Judges.

1316*1316

SCHALL, Circuit Judge.

The United States appeals from the final decision of the United States Court of Federal Claims that awarded Energy Capital Corp. ("Energy Capital") $10,082,000 in lost profits in its suit against the United States for breach of contract. *Energy Capital Corp. v. United States,* 47 Fed. Cl. 382 (2000), *amended by Energy Capital Corp. v. United States,* No. 97-23C (Fed.Cl. Dec. 19, 2000). After holding that Energy Capital had established its entitlement to lost profits, the court computed Energy Capital's damages award by discounting its anticipated lost profits to present value as of the date of judgment using a risk-free discount rate. We see no error in the court's award of lost profits damages and its reduction of the award to present value as of the date of judgment. We conclude, however, that under the circumstances of this case, use of a risk-adjusted discount rate was required in arriving at the present value of the damages award. Accordingly, we affirm-in-part, reverse-in-part, and remand.

BACKGROUND

The Court of Federal Claims made detailed findings of fact in a thorough and well-reasoned opinion. We recite here those facts necessary for an understanding of the case.

[2] Court records submitted by Alan M. Leventhal to expand upon his response to questions posed by Senators Johnson and Barrasso.

A. The Lack Of Financing For Improvements To Reduce The Cost Of Heating HUD Properties

The Department of Housing and Urban Development ("HUD") subsidizes and regulates a significant portion of the multifamily housing industry in the United States. *Energy Capital Corp. v. United States,* 47 Fed. Cl. at 386. The Federal Housing Administration ("FHA"), which is part of HUD, provides financial assistance to various types of housing programs. *Id.*

1317 A continuing problem for HUD has been the fact that the multifamily housing in its *1317 portfolio consumes an inefficient amount of energy. The reason for that is that many HUD properties[1] were constructed during the late 1960s and early 1970s when neither the government nor the builder was concerned with long-term energy costs. HUD housing frequently was built under stringent cost restraints. Consequently, the housing commonly was heated with electric baseboard resistance heating — a type of heating that is inexpensive to install, but very expensive to operate. *Id.*

[1] For purposes of this opinion, the terms "HUD properties" and "HUD housing" refer to multifamily housing properties that are subsidized, in whole or in part, by HUD through the FHA and that are subject to some form of regulation by HUD.

Most of the HUD properties at issue in this case are referred to as "Field Notice" properties. Typically, a Field Notice property was financed by the Federal National Mortgage Association ("Fannie Mae") or one or more private lenders, with repayment of the resulting indebtedness being secured by a first mortgage on the property and the mortgage being insured by FHA. The mortgage and accompanying FHA regulations restricted the owner's ability to encumber the property beyond the first mortgage. Because owners could not place additional mortgages on their properties, they had difficulty raising capital to make physical improvements to their properties, including improvements to reduce heating costs. *Id.* Consequently, very little HUD housing received any financing to reduce energy costs during the 1980s and 1990s. *Id.*

B. Energy Capital And The AHELP Agreement

Energy Capital was formed in the middle of 1994. Thereafter, it provided financing to allow various institutions to optimize their energy consumption. For example, Energy Capital provided financing for improvements to college dormitories and to commercial office buildings. In that capacity, it originated approximately $250 million in loans.[1] *Id.*

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[1] A lender who makes a loan to a borrower and then resells the loan obligation to a third party is said to have "originated" the loan to the borrower.

Eventually, Energy Capital came to recognize that there was a significant need for energy improvements in HUD properties and that the primary obstacles to financing loans for such improvements were the regulatory restrictions noted above. Energy Capital believed that if it could solve the regulatory problem, it would be able to originate a significant number of loans that would provide financing for improvements to reduce energy costs in HUD properties. *Id.*

Over a period of approximately 15 months, Energy Capital negotiated an agreement with HUD to eliminate the regulatory barriers to financing energy improvements in HUD properties. The agreement became known as the

Capital, as a lender, security for its loans. Specifically, the AHELP agreement allowed Energy Capital to include in its energy efficiency loans to Field Notice properties what was referred to as a "springing
1318 subordinated lien" and a "cross-default *1318 provision." *Id.* Pursuant to these provisions, if a property owner defaulted on an energy efficiency loan originated under the AHELP agreement, then the first mortgage on the property, which was the FHA-insured mortgage, would also go into default. At the same time, Energy Capital's energy efficiency loan would "spring" into the senior mortgage position, ahead of the loan secured by the FHAinsured mortgage. *Id.* at 388. Of course, before Energy Capital could make such a loan, it would have to obtain the consent of the holder of the first mortgage on the property (the "first mortgagee") to the springing subordinated lien and cross-default provisions. *Id.* at 389.

Energy Capital agreed to structure loan payments so that, in the case of each loan, the anticipated savings in utility costs due to the energy improvements being financed would cover 110% of the annual loan payment. Thus, it was contemplated that the energy loan would pay for itself and would give the property owner additional savings in the form of reduced energy costs. The AHELP agreement also set the interest rate at which Energy Capital would lend money: the Treasury rate plus 3.87 percent. Energy Capital agreed in principle to obtain capital from Fannie Mae at the Treasury rate for the loans that Energy Capital would be originating. As the AHELP loans were repaid, Fannie Mae would be repaid at the Treasury rate plus 1.87 percent. Energy Capital would keep the remaining 2 percent over Treasury rate as its profit on the loan. In a separate agreement, Fannie Mae promised Energy Capital that it would fund up to $200 million in AHELP loans and would purchase the loans back from Energy Capital. *Id.*

The process for originating an AHELP loan was to begin when Energy Capital received an application, called a "Property Eligibility Checklist" ("PEC"), from a property owner. The PEC would contain certain information about the physical structure and energy systems of the property. Based upon this preliminary data, Energy Capital would determine whether an AHELP loan was viable. "Viable" meant that the proposed improvement would generate enough savings to pay for itself within the loan repayment period. *Id.* at 389-90. If the property appeared viable, an energy service company ("ESCO") would conduct an energy audit to confirm the usefulness of the contemplated energy efficiency measure from an engineering perspective. *Id.* at 390. Energy Capital would also evaluate the financial stability of the property, and it was expected that it would submit some of the loans to HUD for a limited review. The HUD review was limited to 10 days by the AHELP agreement. After loan closing, Energy Capital would oversee construction and would continue to service the loan by administering the loan proceeds and receiving payments on the loan. *Id.*

C. Execution And Then Termination Of The AHELP Agreement

FHA and Energy Capital executed the AHELP agreement in September of 1996. Its maximum duration was 3 years. Shortly thereafter, HUD issued a notice to the HUD field staff for multifamily housing and to owners and managing agents of HUD properties. In the notice, HUD reviewed the need for energy efficiency measures and announced that the Department had "endorsed" the AHELP program. The notice suggested that interested staff or property owners could contact representatives of Energy Capital for further information. *Id.*

1319 Approximately two months after the AHELP agreement was signed, two training *1319 programs were held for

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"Affordable Housing Energy Loan Program" ("AHELP") agreement. Under the AHELP agreement, Energy Capital could originate loans to owners of HUD properties for 3 years, or until a cap of $200 million in loan originations was reached. *Id.* In exchange, HUD promised to treat AHELP loans in a way that gave Energy

HUD officials and for staffers in HUD field offices in connection with the AHELP program. Witnesses from Energy Capital testified at trial that HUD had asked that Energy Capital train its field office representatives before marketing AHELP to building owners, so that the field staff would be knowledgeable and capable of responding to inquiries from the property owners. *Id.* at 390-91.

Following the training programs, Energy Capital began to market AHELP to property owners and managers. In its marketing efforts, Energy Capital focused in particular on the two largest owners of multifamily housing in HUD's housing portfolio: Insignia and National Housing Partners. Together, these two entities controlled nearly 1,000 properties in the HUD portfolio. Energy Capital representatives presented AHELP to representatives from Insignia and National Housing Partners at two different meetings in November of 1996. *Id.* at 391.

In addition to making presentations to Insignia and National Housing Partners, Energy Capital made sales presentations to various property owners/managers in the Boston, Massachusetts area. These presentations prompted owners to apply for AHELP loans by submitting PECs. *Id.* In conjunction with its activities directed to owners, Energy Capital also developed its internal resources to support AHELP. For example, it retained a search firm to hire a chief operating officer, a chief underwriter, a head of sales, and a sales force. In addition, it selected an energy consulting company as the engineering firm that would evaluate properties for energy viability. As Energy Capital had already received PECs, it retained six ESCOs to conduct energy audits. By February of 1997, Energy Capital had received 123 PEC forms and had completed the pre-screening process for approximately 22 properties. *Id.*

However, on February 7, 1997, there appeared on the front page of The Wall Street Journal an article stating that Energy Capital had received the AHELP contract in return for significant fund-raising efforts for President Clinton by certain principals of the firm. *Id.* at 392. On Monday, February 10, 1997, The Wall Street Journal, in its Corrections Amplifications Section, noted that the February 7 article had failed to state that "no one has said that HUD officials knew that the two men were major Democratic fund-raisers." *Id.*

HUD terminated the AHELP agreement on February 14, 1997, approximately 5½ months after it had been signed. In those 5½ months, Energy Capital had not completed the process of originating any loans. The AHELP agreement did not have a termination for convenience clause. *Id.*

D. Energy Capital's Action in the Court of Federal Claims

Energy Capital filed a complaint in the Court of Federal Claims on April 21, 1997, and an amended complaint on November 24, 1997. In its suit, Energy Capital sought to recover damages from the United States for breach of contract. After the government conceded liability for breach of contract, a trial was held on damages. The proceedings focused on the parties' differing views as to the measure of recovery to which Energy Capital was entitled. Energy Capital took the position that it was entitled to lost profits damages, while the government 1320urged that it should only be required to pay reliance damages. *Id.* *1320

The Court of Federal Claims started from the premise that in order to demonstrate entitlement to lost profits, Energy Capital was required to establish the elements of (1) causation, (2) foreseeability, and (3) reasonable certainty. *Id.* at 393. In addition, the court took the position that because AHELP was a new venture, Energy Capital would have a difficult burden establishing that its lost profits were reasonably certain. *Id.*

Following a trial, the court concluded that Energy Capital had carried its burden of proving that its lost profits were reasonably certain. *Id.* at 414-15. In reaching this conclusion, the court resolved various fact issues relevant to the proper measure of damages. On appeal the government does not challenge any of the court's findings of fact. We note the court's pertinent findings as follows:

(i) *Eligibility of Properties with Tenant-Paid Utilities*

The first issue addressed by the Court of Federal Claims was whether properties having apartments with tenantpaid utilities would have received AHELP loans. *Id.* at 397. The government argued that owners of such properties would have had no incentive to apply for AHELP loans because they would not have stood to benefit from any reduced utility expenses. *Id.* at 397-98.

The court rejected the government's argument for several reasons. First, it noted that there was nothing in the AHELP agreement or the AHELP Procedures Manual[3] that expressly excluded properties with tenant-paid utilities. *Id.* at 398. Second, the court found that owners of such properties could have taken over from their tenants the obligation of paying utility charges. In that event, the owners would have had an incentive to apply for AHELP loans, since the owners then would have benefited from decreased utility bills.[4] *Id.* Third, the court noted that before the AHELP agreement was terminated by HUD, Energy Capital had received PECs from property owners with tenant-paid utilities and had not rejected these PECs out of hand. *Id.* at 398-99. The court concluded that this contemporaneous conduct was indicative of the parties' understanding of the AHELP agreement. *Id.* at 399. Fourth, the court determined that it was unlikely that HUD would have found the AHELP Program attractive if properties with tenant-paid utilities were excluded, since excluding such properties would have reduced the number of eligible properties by 25 percent. *Id.*

[3] The AHELP Procedures Manual is an exhibit to the AHELP agreement; it sets forth the procedures that Energy Capital was to follow when originating AHELP loans.

[4] The court also found that the property owners would have been able to raise rents in conjunction with assuming the payment of utility bills. As a result, the tenants' total monthly payments (utilities plus rent) would have remained roughly the same.

(ii) *Eligibility of Section 202 Properties*

The next issue addressed by the Court of Federal Claims was whether, in addition to Field Notice properties, so-called "Section 202" properties were eligible to receive AHELP loans. A "Section 202" property takes its name from Section 202 of the Housing Act of 1959. Housing Act of 1959 § 202, 12 U.S.C. § 1701q (1994). A Section 202 property carries a first mortgage that is owned directly by FHA, rather than being insured by FHA.
1321 The AHELP agreement specified that Section *1321 202 properties were eligible for AHELP. At the time when the AHELP agreement was executed, however, the documentation and procedures for issuing AHELP loans to Section 202 properties had not yet been finalized. *Energy Capital,* 47 Fed. Cl. at 399. The agreement therefore stated that "certain elements of this Agreement, the AHELP Loan Documents and the AHELP Procedures Manual must be modified to reflect the structure of 202 . . . transactions. Prior to initiating an AHELP transaction for a Section 202 . . . development, the Lender shall submit document modifications to FHA for review and approval." *Id.* at 399 n. 13. The government argued that Section 202 properties should not be included in the damages calculation because, before any loans to Section 202 properties could have been made, new legal documents would have had to have been drafted and approved by FHA. *Id.* at 399.

The Court of Federal Claims disagreed. First, it pointed out that the AHELP agreement stated on its face that Section 202 properties were eligible for AHELP loans. *Id.* Second, it noted that prior to HUD's termination of the AHELP agreement, Energy Capital sent two letters to HUD that evinced a consistent intent to make loans to owners of Section 202 properties. *Id.* Third, the court found that FHA's approval of a modification of the AHELP documents to reflect the structure of Section 202 loans would have been obtained in a short amount of time because the financing arrangements for Section 202 properties were actually simpler than for Field Notice

properties. *Id.* at 399-400. Fourth, HUD Assistant Secretary Nick Retsinas testified at trial that he was interested in seeing the AHELP program succeed. Based upon that testimony, the court concluded that it was unlikely that AHELP would have foundered by reason of legal technicalities. Finally, the court determined that once FHA stated in the AHELP agreement that Section 202 properties were eligible for AHELP loans, the government had a duty of good faith to make this promise a reality. For all of these reasons, the court concluded that Section 202 properties were eligible to receive AHELP loans. *Id.* at 400.

(iii) *Number of Energy Viable Properties*

The Court of Federal Claims next addressed the issue of the number of eligible properties that were "energy viable", *i.e.* the number of properties that would have realized sufficient utility bill savings through improved energy efficiency to cover the cost of converting from electric heat to gas heat. The court relied on three overlapping methods provided by Energy Capital's experts to determine the number of such properties. *Id.* Although the court determined that there was an error in each of the three methods, it concluded that the overall analysis of each method was reliable. The court was able to correct for the error in each approach using the evidence in the record. After correction, all three methods produced a number in the range of 15 to 16 percent. Accordingly, the court found that 16 percent of the eligible properties were viable from a technological and energy-efficiency perspective. *Id.* at 403.

(iv) *Willingness Of HUD Property Owners To Obtain AHELP Loans*

An important evidentiary issue addressed by the Court of Federal Claims was the extent to which owners of
1322 HUD properties would have been willing to participate in AHELP. In that regard, Energy *1322 Capital presented the testimony of David Smith. Mr. Smith was the founder of Recapitalization Advisors, a consulting firm that Energy Capital had retained during the development of AHELP on account of its extensive knowledge of HUD's housing portfolio. Mr. Smith testified that he estimated that just 34 percent of the owners of HUD properties would not have been willing to participate in AHELP. The court found his testimony to be credible and accepted his estimate as reasonable. *Id.*

The court found that Mr. Smith's estimate was supported by the testimony of owners of HUD properties. Their testimony confirmed Mr. Smith's opinion that most owners would have been interested in AHELP loans. *Id.* As mentioned previously, the two largest owners/managers of properties in the HUD portfolio were Insignia and National Housing Partners. A former vice-president of Insignia and a former asset manager for National Housing Partners testified at trial. Both stated that their respective organizations would have been very interested in participating in AHELP despite some of the potential risks, such as lack of guaranteed energy savings, the need to obtain first mortgagee consent, and the interest rate in repaying the AHELP loans. Both Insignia and National Housing Partners were concerned that energy consumption was draining too much cash flow, but they had found that large scale energy improvements were too expensive. Thus, AHELP was very attractive to them. Insignia's desire to participate was further supported by its submission of approximately 43 PECs before the AHELP agreement was terminated. The court noted that the willingness of property owners to participate in AHELP was especially important because owners would risk their entire investment in the property. In other words, if property owners were willing to participate, then other entities, such as first mortgagees, who had less to lose (as discussed below) also would have been likely to participate. *Id.* at 403-04.

(v) *Energy Capital's Evaluation of Creditworthiness*

David Smith testified that Energy Capital would have rejected 11 percent of the potentially eligible Field Notice properties because of the lack of creditworthiness of the owner or the low quality of the property. Finding Mr. Smith to be credible, the court accepted his estimate as reasonably accurate. *Id.*

(vi) *First Mortgagee Consent*

The Court of Federal Claims also considered the question of first mortgagee consent. The court noted that it was possible that first mortgagees would have been reluctant to consent to an AHELP loan because, in general, a second loan could increase the chance of default on the loan secured by the mortgage they held. Furthermore, under the cross-default provision contemplated by the AHELP agreement, a property owner's default on the AHELP loan would put the first mortgage into default as well, depriving the first mortgagee of its anticipated interest payments during the term of the mortgage.[5]

[5] In the case of such a default, the first mortgagee would have recovered most of the principal of the loan because the loan was insured by FHA. 47 Fed. Cl. at 404. In the case of an insured loan, FHA typically pays approximately 95 to 99 cents on the dollar. *Id.* at 388.

1323 Neither party presented testimony from a first mortgagee. Instead, the parties *1323 presented evidence of incentives or disincentives for first mortgagees to consent. The court decided not to draw an adverse inference against either party for failing to call a witness because both parties had first mortgagee witnesses equally available but declined to call them. *Id.* at 406.

With regards to Fannie Mae, which held approximately 40 percent of the first mortgages on Field Notice properties, the Court of Federal Claims found that the most probative evidence was Fannie Mae's promise to fund up to $200 million of AHELP loans and also to purchase the loans back from Energy Capital. *Id.* at 405. The court found that Fannie Mae would have consented to second mortgages (to secure AHELP loans) being placed on all of the properties where it held the first mortgage, because it had risked its own money in support of the program. Furthermore, the court found that because increasing energy efficiency was consistent with Fannie Mae's goals, it was reasonable to conclude that Fannie Mae would have tolerated some risk to its capital. Thus, the court concluded that Fannie Mae would have consented to AHELP loans on 100% of the properties where it was the first mortgagee, which amounted to 40 percent of the total number of properties at issue. *Id.*

With regards to other first mortgagees, David Smith estimated that slightly more than 83 percent of the nonFannie Mae first mortgagees would have consented to the AHELP program. The government's expert, David Hisey, testified that zero percent of non-Fannie Mae first mortgagees would have consented. *Id.*

The Court of Federal Claims noted that first mortgagees risked losing the future interest income on their loan in the event of a default. *Id.* at 406. The court also noted, however, that the energy savings provided by AHELP energy improvements were designed to exceed the cost of the loan, thereby potentially providing the property owner with increased income. The court noted that this could potentially reduce the probability of default, although the court recognized that energy savings were not guaranteed and that utility rates were unpredictable. *Id.*

The court concluded, based on the evidence, that two-thirds of the non-Fannie Mae first mortgagees (66 percent) would have consented to AHELP loans. *Id.* at 407. The court arrived at this figure by initially finding that it was as likely as not that first mortgagees would consent. Expressing this mathematically as a 50 percent consent rate, the court added a percentage to account for the following incentives to consent: (i) first mortgagees were likely to follow the example of Fannie Mae, the largest holder of first mortgages; (ii) first mortgagees were likely to be influenced by FHA, the insurer of its mortgages; and (iii) Energy Capital was willing to pay a fee to first mortgagees to purchase their consent, a standard practice. The court noted that the 66 percent number was further compelling because it was the average number between two "reasonable"

estimates of 50 percent and 83 percent (proposed by Energy Capital's expert). The court dismissed the government's estimate of zero percent, finding it unreasonable. *Id.*

(vii) *Determination of the Amount of Lost Profits*

Based on its findings, the Court of Federal Claims determined that the total dollar amount of loans that would 1324have been originated by Energy Capital had the AHELP agreement not been breached *1324 would have been $224,103,600, which was more than the $200,000,000 maximum amount allowed under the agreement. *Id.* at 410. Consequently, the Court found that Energy Capital would have originated the full amount of $200,000,000. *Id.*

Based on this figure, the court then determined Energy Capital's total revenue and deducted Energy Capital's expenses to arrive at a value of lost profits in the amount of $12,111,000, to be earned over 12 years. *Id.* at 414. The court then discounted the damages award to present value. The government argued that the court should (i) discount the damages award to the date of breach; and (ii) use a risk-adjusted discount rate. The court rejected this approach, concluding that precedent mandated (i) discounting to the date of judgment; and (ii) using a riskfree discount rate. Following this approach, the court arrived at a final discounted damages award of $8,787,000. *Id.* at 421.

After the court issued its decision, Energy Capital moved to alter or amend the judgment pursuant to RCFC 52(b) and 59(d), arguing that the court should correct two mathematical computations contained within the opinion. *Energy Capital v. United States,* No. 97-23C, slip op. at 1 (Fed.Cl. Dec. 19, 2000). The court granted Energy Capital's motion with respect to one of the computations and denied the other. After recalculating and discounting to present value, the court determined that Energy Capital's lost profits amounted to $10,082,000. *Id.* at 8.

The government timely appealed the trial court's decision. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

In reviewing a decision of the Court of Federal Claims following a trial, we review findings of fact for clear error and conclusions of law *de novo. Bd. of County Supervisors v. United States,* 276 F.3d 1359, 1363 (Fed. Cir. 2002). The government asserts that it "does not seek to overturn the lower court's factual findings." Rather, the government argues that the trial court "engaged in a degree of speculation that is not permitted as a matter of law." According to the government, the Court of Federal Claims made three errors of law: (i) awarding damages in the form of lost profits in the case of a new venture that never was performed; (ii) engaging in speculation in concluding that the AHELP agreement would have yielded profits for Energy Capital; and (iii) applying a risk-free discount rate and discounting future profits to the date of judgment rather than to the date of the government's breach of contract. We address each of these contentions in turn.

A. Whether Lost Profits May Be Awarded For A New Venture

The government urges us to adopt a per se rule that lost profits may never be recovered for a new business venture that was not performed. For the reasons explained below, we decline to adopt such a rule.

"One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred." *Glendale Fed. Bank, FSB, v. United States,* 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement (Second) of Contracts § 344(a) (1981)). "The benefits that were expected from the contract, `expectancy damages,' are often equated with lost profits, although they can include other damage elements as

well." *Id.* (citing Restatement (Second) of Contracts § 347). To recover *1325 lost profits for breach of contract, the plaintiff must establish by a preponderance of the evidence, *see Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.,* 72 F.3d 190, 204 (1st Cir. 1995), that: (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty. *See Chain Belt Co. v. United States,* 115 F.Supp. 701, 714, 127 Ct.Cl. 38, 58 (1953); Restatement (Second) of Contracts § 351(1) (1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."). *See also California Fed. Bank v. United States,* 245 F.3d 1342, 1349 (Fed. Cir. 2001) (" *Cal Fed*") ("Lost profits are `a recognized measure of damages where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of the profit can be made.'") (quoting *Neely v. United States,* 152 Ct.Cl. 137, 285 F.2d 438, 443 (1961) (" *Neely I*")).

The government contends that because Energy Capital was engaged in a new business that had never been performed, the Court of Federal Claims' award of lost profits was speculative and erroneous as a matter of law. In making this argument, the government relies on *Neely I.* In that case, the government breached its agreement to allow the plaintiff to strip-mine certain leased lands for coal, and the plaintiff sought lost profits damages. The government quotes the following passage from *Neely I:*

> [P]rofits are uncertain; they depend on so many contingencies, especially in a new enterprise, that it is, in most cases, impossible to say that the breach was the proximate cause of the loss of them, or that a profit would have been realized, in any event; nor is there any basis to determine what they might have amounted to. This is especially true where the breach occurred before operations had begun.
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> * * * * * *
>
> Suffice it to say that almost always, in the case of a new venture, the fact that there would have been a profit, had there been no breach, is too shrouded in uncertainty for loss of anticipated profits to form a reliable measure of the damages suffered.

Id.

Although the above excerpt articulates the principle that lost profits are difficult to establish in the case of a new venture, the subsequent history of *Neely* is not helpful to the government, as was noted by the trial court. The *Neely I* court, after explaining that lost profits are rarely available for a new venture, went on to make it clear that, in fact, lost profits damages could be recovered by the plaintiff. The Court of Claims noted that the plaintiff eventually assigned the lease at issue to a third party, who was allowed to mine the property. *Id.* The court stated that "the profit realized from these operations [by the third party], if, indeed, there were profits, would furnish some basis for a fairly reliable estimate of what plaintiff's profits would have been." *Id.* The court remanded the case to the Trial Commissioner for additional fact-finding regarding the profits earned by the third party. After remand, the Trial Commissioner awarded lost profits to the plaintiff and the *1326 Court of Claims affirmed the decision. *Neely v. United States,* 167 Ct.Cl. 407, 1964 WL 8619 (1964) (" *Neely II*").

The government argues that the present case is distinguishable from *Neely* because in *Neely* a third party actually performed the contract at issue, whereas in the present case the lower court did not have evidence of any entity ever having engaged in AHELP lending. As far as the factual differences between *Neely* and this case are concerned, the government is correct. Where we disagree with the government is in our conclusion that *Neely* is not limited to circumstances where the contract has been performed by another party. We recently

rejected an argument similar to the government's in *Cal Fed.* There, the Court of Federal Claims held that enactment of the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"), breached the government's promise to Cal Fed bank to allow a favorable accounting treatment in return for the acquisition of failing thrifts. Before trial, the court denied Cal Fed's claim for lost profits on summary judgment, concluding that profits would be too speculative as a matter of law. 43 Fed. Cl. 445, 458 (1999). The court distinguished *Neely* by noting that, in *Neely,* another party actually performed the contract which thereby provided "such precise information [as to] permit a determination of damages through simple mathematical calculations." *Id.* The court also distinguished *Chain Belt,* which was relied upon by Cal Fed. The court stated that, in *Chain Belt,* there was "detailed damages information available to the court [that was] striking by comparison" to the evidence before the court in *Cal Fed.* 43 Fed. Cl. at 459.

We vacated the summary judgment and remanded for trial on the issue of lost profits, holding that the lower court had erred in ruling at the summary judgment stage that proof of lost profits would be too speculative. We stated: "Both the existence of lost profits and their quantum are factual matters that should not be decided on a motion for summary judgment if material facts are in dispute." *Cal Fed,* 245 F.3d at 1350. We noted that "Cal Fed submitted considerable evidence, including documents and expert testimony, that more than sufficed to create a genuine issue of material fact as to the existence and quantum of lost profits." *Id.* We concluded that "`[i]f a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery.'" *Id.* (quoting *Locke v. United States,* 283 F.2d 521, 524, 151 Ct. Cl. 262 (1960)).

The government argues that *Cal Fed* is distinguishable from the present case because it did not involve a "new venture." The government reiterates its position that because AHELP was a new venture and because no evidence was presented of historical performance of a type of business similar to AHELP, it is impossible to measure lost profits with reasonable certainty.

We do not agree that lost profits should be precluded as a matter of law for new ventures that have not previously been performed by a third party. Whether or not one considers AHELP to have been a "new venture" or merely an extension of Energy Capital's existing loan business, Energy Capital was required to demonstrate its entitlement to lost profits by showing the same elements that any business must show: (1) causation, (2) foreseeability, and (3) reasonable certainty. *See Chain Belt,* 115 F.Supp. at 714, 127 Ct.Cl. at 58.
1327 While the nature of a new venture may make it difficult to recover lost profits *1327 by establishing all of the elements of the general rule, such damages are not barred as a matter of law. This is consistent with the weight of modern authority, as explained in Robert L. Dunn, *Recovery of Damages for Lost Profits* § 4.3 (5th ed. 1998):

> Most recent cases reject the once generally accepted rule that lost profits damages for a new business are not recoverable. The development of the law has been to find damages for lost profits of an unestablished business recoverable when they can be adequately proved with reasonable certainty. . . . What was once a rule of law has been converted into a rule of evidence.

Id. In a similar vein, the Seventh Circuit has quoted approvingly the following statement by the Alabama Supreme Court:

> [T]he weight of modern authority does not predicate recovery of lost profits upon the artificial categorization of a business as "unestablished," "existing," or "new" particularly where the defendant itself has wrongfully prevented the business from coming into existence and generating a track record of profits. Instead the courts focus on whether the plaintiff has adduced evidence that provides a basis

> from which the jury could with "reasonable certainty" calculate the amount of lost profits. . . . [T]he risk of uncertainty must fall on the defendant whose wrongful conduct caused the damages.

Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1366 (7th Cir. 1996) (quoting *Super Valu Stores, Inc. v. Peterson,* 506 So.2d 317, 327-30 (Ala. 1987)); *see also DSC Communics. Corp. v. Next Level Communics.,* 107 F.3d 322, 329-30 (5th Cir. 1997) (affirming award of profits based on expert testimony regarding projected sales of "revolutionary new product" yet to enter market); *In re Merritt Logan, Inc.,* 901 F.2d 349, 357-59 (3rd Cir. 1990) (affirming award of profits for new venture, based on plaintiff's contemporaneous projections of expected sales and expert testimony that forecasts were reasonable); *Computer Sys. Eng'g, Inc. v. Qantel Corp.,* 740 F.2d 59, 67 (1st Cir. 1984) (affirming award of profits to new business based on expert testimony).

The cases cited by the government do not stand for the proposition that a *per se* bar exists for lost profits for new ventures. Rather, they simply represent instances in which the claimant failed, as an evidentiary matter, to establish entitlement to such profits. *See L'Enfant Plaza Properties, Inc. v. United States,* 3 Cl.Ct. 582, 590-91 (1983) (finding that the evidence was insufficient to show all three prongs of reasonable certainty, causation, and foreseeability); *Northern Paiute Nation v. United States,* 9 Cl.Ct. 639, 646 (1986) (stating that "the problem of speculation is insurmountable"); *see also Bluebonnet Savings Bank, F.S.B. v. United States,* 266 F.3d 1348, 1358 (Fed. Cir. 2001) (affirming the Court of Federal Claims' decision not to award lost profits because "the evidence was insufficient to determine the quantum of . . . damages to a reasonable certainty.")

Similarly, the cases cited by the government from other circuits also do not establish a *per se* bar to lost profits for new ventures, but merely recite the presumptive rule that lost profits are difficult to establish for new ventures. *See Computrol, Inc. v. Newtrend, L.P.,* 203 F.3d 1064 (8th Cir. 2000) (affirming the district court's post-trial ruling denying lost profits damages to the plaintiff because (i) a limitation of liability clause in the
1328 contract precluded recovery of lost profits; and (ii) *1328 evidence of lost profits presented was unduly speculative); *Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.,* 180 F.3d 583, 588 (4th Cir. 1999) (affirming the district court's judgment as a matter of law denying lost profits damages to the plaintiff because there was no evidence by which to estimate damages); *Hollywood Fantasy Corp. v. Gabor,* 151 F.3d 203, 213 (5th Cir. 1998) (holding that a jury verdict awarding lost profits as damages was not supported by substantial evidence, because "there was no evidence at trial that [plaintiff] had `firm' reasons to expect a profit.")

In this case, the Court of Federal Claims properly recognized that while the evidentiary hurdles to recovering lost profits for a new venture are high, such profits may be recovered if the hurdles are overcome. Because the court found as a matter of fact that Energy Capital had established causation, foreseeability, and reasonable certainty, and because the government does not challenge the court's findings of fact, we will not disturb the court's holding that Energy Capital is entitled to recover lost profits.

B. Whether Energy Capital Showed That It Would Have Realized Profits From The AHELP Venture

The government further argues that the Court of Federal Claims erred as a matter of law by engaging in "rampant" and "unsupported" speculation in arriving at its determination that Energy Capital would have realized profits from the AHELP venture. The government contends that speculative expectancy damages may not be awarded against the United States, citing *Wells Fargo Bank N.A. v. United States,* 88 F.3d 1012, 1021 (Fed. Cir. 1996) ("remote and consequential damages are not recoverable in a common-law suit for breach of contract . . . especially . . . in suits against the United States for the recovery of common-law damages.").

The government asserts that, before Energy Capital could have closed an AHELP loan, a number of steps would have had to have been completed and a number of parties (e.g. HUD, the first mortgagees, and property owners) all would have had to agree to the transaction. The government thus argues that the trial court's prediction that each of these steps would have occurred amounted to a level of speculation that was erroneous as a matter of law.

We do not agree that the Energy Capital's lost profits were overly remote and speculative as a matter of law. According to *Wells Fargo,*

> [i]f the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. . . . But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

88 F.3d 1012, 1022-23 (Fed. Cir. 1996) (quoting *Ramsey v. United States,* 101 F.Supp. 353, 121 Ct.Cl. 426 (1951)).

In the present case, Energy Capital's anticipated profits flowed directly from the AHELP agreement and not
1329 from "other independent and collateral undertakings." *1329 As the Court of Federal Claims found, the express purpose of the AHELP agreement was to permit Energy Capital to make up to $200 million worth of loans to HUD-assisted property owners. *Energy Capital,* 47 Fed. Cl. at 385. When the government breached the AHELP agreement, Energy Capital was no longer able to issue those loans, and its resulting loss of profits flowed directly from the government's breach. *See Cal Fed,* 245 F.3d at 1349 (distinguishing *Wells Fargo* by pointing out that the government's promise to provide favorable regulatory treatment to Cal Fed was "a central focus of the contract and the subject of the government's breach," and stating that "profits on the use of the subject of the contract itself, here, supervisory goodwill as regulatory capital [were] recoverable as damages.").

To the extent that a decision to award lost profits could be so remote and speculative as to be incorrect as a matter of law, we do not have such a case here. What we have before us is a case in which the trial court drew reasonable inferences based upon the evidence, not a case in which the trial court engaged in unsupported speculation. *See Locke v. United States,* 283 F.2d 521, 524, 151 Ct.Cl. 262, 267-68 (1960) ("Certainty [of damages] is sufficient if the evidence adduced enables the court to make a fair and reasonable approximation of the damages. In circumstances such as these we may act upon probable and inferential as well as direct and positive proof." (citations omitted)).

When asked at oral argument to name the most egregious example of speculation by the Court of Federal Claims, counsel for the government cited the issue of first mortgagee consent. Counsel pointed out that (i) Energy Capital presented no testimony from first mortgagees; (ii) Fannie Mae never consented to any AHELP loans in its capacity as first mortgagee — Fannie Mae had simply agreed to provide the funding for the AHELP loans; (iii) the government's expert, David Hisey, testified that virtually none of the first mortgagees would consent to participate in the AHELP program; and (iv) Energy Capital's testifying expert had a financial stake in the AHELP program.

Counsel's argument seems to be an indirect attack on the sufficiency of the evidence, rather than a legal argument. In any event, we conclude that the Court of Federal Claims drew reasonable inferences based on all

of the evidence — discussed at length above — to arrive at its finding that 66 percent of first mortgagees would have consented to AHELP loans. The trial court also reasonably inferred that if Fannie Mae had agreed to fund AHELP, it also would have consented to allow AHELP loans on those properties for which it was first mortgagee.

As for the consent of the non-Fannie Mae first mortgagees, the Court of Federal Claims took into account the various incentives and disincentives to consent, including the fees that Energy Capital was willing to pay to first mortgagees to purchase their consent. Although Energy Capital failed to provide any witnesses from first mortgagees, it did present the testimony of David Smith, who was intimately familiar with the properties in the HUD portfolio. As for the relative weight given to the testimony of both sides' expert witnesses, we accord the trial court broad discretion in determining credibility because the court saw the witnesses and heard their testimony. *See Commercial Contractors, Inc. v. United States,* 154 F.3d 1357, 1369 (Fed. Cir. 1998).

1330 For the above reasons, we do not find the trial court's finding that 66 percent *1330 of first mortgagees would have consented to AHELP loans to be clearly erroneous. Nor do we find the court's overall determination that Energy Capital was entitled to lost profits to be speculative as a matter of law.

C. The Computation of Damages

Finally, the government contends that the Court of Federal Claims made the following two errors when it discounted the damages award: (i) discounting damages to the date of judgment instead of the date of breach of contract; and (ii) using a risk-free discount rate rather than a risk-adjusted discount rate.

(i) *Date of Discounting*

The government argues that by discounting to the date of judgment, the trial court effectively awarded prejudgment interest against the United States — a practice which is prohibited by *Library of Congress v. Shaw,* 478 U.S. 310, 314, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), unless there has been an explicit waiver of sovereign immunity. We disagree.

"The time when performance should have taken place is the time as of which damages are measured." *Reynolds v. United States,* 158 F.Supp. 719, 725, 141 Ct.Cl. 211, 220 (1958). In many cases, the appropriate date for calculation of damages is the date of breach. *See Estate of Berg v. United States,* 687 F.2d 377, 380, 231 Ct.Cl. 466, 469 (1982). That rule does not apply, however, to anticipated profits or to other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract. In those circumstances, damages are measured throughout the course of the contract. To prevent unjust enrichment of the plaintiff, the damages that would have arisen after the date of judgment ("future lost profits") must be discounted to the date of judgment. *See Northern Helex Co. v. United States,* 634 F.2d 557, 564, 225 Ct.Cl. 194, 205 (1980) (discounting anticipated profits to the date of judgment). Discounting future lost profits to the date of judgment merely converts future dollars to an equivalent amount in present dollars at the date of judgment; it is not an award of prejudgment interest and does not violate sovereign immunity.

Almost all of Energy Capital's lost profits would have been earned after the date of judgment. *Energy Capital,* 47 Fed. Cl. at 417 n. 42. Accordingly, we hold that the trial court did not err in discounting Energy Capital's lost profits to the date of judgment instead of the date of breach.

(ii) *Discounting for Risk*

The government also argues that the trial court incorrectly applied a risk-free discount rate of 5.9 percent, the rate of return on 10-year Treasury notes with constant maturity. The government contends that the discount rate

represents the return an investor would require in order to risk investing capital in a particular venture and that such a rate must incorporate any risk that cash flows would not be realized.

Before deciding this issue, we review the pertinent evidence presented at trial. Energy Capital retained an expert, Jerry Arcy, to calculate the damages suffered by Energy Capital as a result of HUD's termination of the AHELP agreement. At the time of trial, Mr. Arcy was a partner with the accounting firm of Price Waterhouse 1331 Coopers, where he was in charge of *1331 corporate finance and corporate value consulting for all financial service entities in North America. Mr. Arcy testified based upon his experience in the valuation of cash flows relating to various types of mortgage instruments and portfolios of loans.

Mr. Arcy prepared an expert report and testified at trial about the value of the AHELP venture prior to the breach. To calculate this value, he used what is referred to as the "discounted cash flow" ("DCF") method. The DCF method is currently in wide use in the analysis of capital stock, acquisition candidates, capital projects, financial instruments, and contract rights. The DCF method measures the value of a business by forecasting its anticipated net cash flows. Such cash flows are then discounted to present value to account for both: (i) the time value of money; and (ii) business and financial risks.

In applying the DCF method, Mr. Arcy began by calculating that the AHELP venture would have produced $24.6 million in profits absent the breach. Mr. Arcy then discounted the $24.6 million amount to present value using a risk-adjusted discount rate. He determined that the most appropriate risk-adjusted discount rate was based on the average rate of return on mortgage real estate investment trusts ("REITs"). An REIT is a legal entity recognized by the Internal Revenue Code. A mortgage REIT is a REIT that chooses to own mortgage interests in real estate, as opposed to owning the encumbered real estate itself.

Mr. Arcy relied on mortgage REITs because a mortgage REIT would be interested in acquiring AHELP loans. During the appropriate time, the average dividend yield (i.e. the rate of return) for mortgage REITs was approximately 8.5 percent. Mr. Arcy then added 2 percent to that rate in order to account for the debt component and profit component, thereby arriving at a risk-adjusted discount rate of 10.5 percent.[6]

[6] Mr. Arcy testified that the DCF method calculates the present value of a venture that is anticipated to produce a stream of profits by using a risk-adjusted discount rate. The risk-adjusted discount rate represents the rate of return that an investor would require in order to purchase the venture (i.e. purchase the stream of anticipated profits), considering the riskiness of the venture. The higher the risk, the higher the rate of return an investor would require.

The government presented its own accounting expert, David Hisey, who also testified regarding the value of the AHELP venture prior to the breach. Mr. Hisey agreed with Mr. Arcy that a risk-adjusted discount rate was appropriate, but opined that a higher risk-adjusted discount rate of 25% should be used. Mr. Hisey considered the AHELP Program to be a form of specialized lending. Mr. Hisey, accordingly, averaged the returns of five specialized lending companies.

In post-trial briefing, Energy Capital backed away from a portion of the valuation method used by its own expert, Mr. Arcy. Specifically, Energy Capital objected to the use of a risk-adjusted discount rate; Energy

Capital argued instead that *LaSalle Talman Bank v. United States,* 45 Fed. Cl. 64, 109 n. 69 (1999), mandates the use of a risk-free rate of return, which *LaSalle* suggests is the current rate of interest on Treasury securities.[2]

1332*See Energy Capital,* 47 Fed. Cl. at 417. *1332

The Court of Federal Claims, relying on *Northern Helex,* 634 F.2d at 564, agreed with Energy Capital that the appropriate discount rate was the rate of return on "conservative investment instruments." *Energy Capital,* 47 Fed. Cl. at 418. The court thereby took judicial notice of the rate of return on 10-year Treasury notes with constant maturity on the date of judgment (5.9%) and discounted the damages award to present value using this conservative discount rate. The court also stated, however:

> Notwithstanding *Northern Helex,* the Defendant presents a cogent argument for why the discount rate should consider the riskiness of the endeavor. Undoubtedly, the Defendant will present its argument to the Federal Circuit, a court with the authority to overrule *Northern Helex.*
>
> The Federal Circuit may determine that, as a matter of law, trial courts should consider the riskiness of the project in establishing the discount rate. The Defendant cites *In re Lambert,* 194 F.3d 679, 681 (5th Cir. 1999); *Douglass v. Hustler Magazine, Inc.,* 769 F.2d 1128, 1143 (7th Cir. 1985); and *Schonfeld v. Hilliard,* 62 F.Supp.2d 1062, 1074 n. 6 (S.D.N.Y. 1999), all cases where the discount rate was affected by the risks. This Court believes that the assessment of the riskiness of the investment is a question of fact. Hence, the Court will make findings of fact related to this issue. These findings, however, are useful only if the Federal Circuit holds that the discount rate is something other than the rate on conservative investment instruments.

Id.

The court proceeded to make alternative findings of fact as to an appropriate risk-adjusted discount rate. The court found that, If the discount rate should reflect the riskiness of the AHELP venture, then the discount rate should be 10.5 percent, the rate proposed by Energy Capital's expert, Mr. Arcy. *Id.* The court expressly rejected the discount rate (25 percent) offered by the government's expert, Mr. Hisey, because it found his methodology "far from credible." *Id.* We hold that Mr. Arcy's proposed risk-adjusted discount rate of 10.5 percent is the appropriate discount rate to be used in this case.

The appropriate discount rate is a question of fact. *See, e.g.,* Robert L. Dunn, *Recovery of Damages for Lost Profits* § 6.25 (5th ed. 1998) ("The applicable discount rate is a fact question that should be raised."); *Monessen Southwestern Railway Co. v. Morgan,* 486 U.S. 330, 341, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988) (holding that when discounting an injured employee's award under the Federal Employers' Liability Act, "the present value calculation is to be made by the `trier of fact'"); *Olson v. Nieman's, Ltd.,* 579 N.W.2d 299 (Iowa 1998) (discount rate of 19.4% approved for future hypothetical patent royalties based on expert's testimony as to 14.4% rate of return for publicly-held corporations plus 5% for market risk); Robert L. Dunn and Everett P. Harry, *Modeling and Discounting Future Damages,* 193 J. Acct 49, 51 (Jan. 2002) (discussed in footnote 9 below).

The purpose of the lost profits damages calculation is to put Energy Capital "in as good a position as [it] would have been in had the contract been performed." Restatement (Second) of Contracts § 344(a). To arrive at the appropriate damages figure, both sides presented expert certified public accountant witnesses who calculated

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[2] The lower the discount rate used, the higher the present value of the damages award. It was therefore in Energy Capital's interest to advocate as low a discount rate as possible.

1333 the value of the AHELP venture prior to *1333 the breach. Both experts had a great deal of experience in valuing mortgage portfolios, and neither expert advocated using a risk-free discount rate. Both experts advocated using risk-adjusted discount rates, albeit different ones.

Energy Capital argues that once the Court of Federal Claims determined that its profits were reasonably certain, no further consideration of risk was appropriate, because risk already had been considered in determining whether there would have been profits. We disagree. A venture that is anticipated to produce $1 million in profits and that has a 95% chance of success is obviously more valuable than a venture that is anticipated to produce $1 million in profits with only a 90% chance of success — and yet, both ventures would most likely be determined to have a reasonable certainty of producing profits. Therefore, the fact that the trial court has determined that profits were reasonably certain does not mean that risk should play no role in valuing the stream of anticipated profits. In other words, by finding that Energy Capital's lost profits were reasonably certain, the trial court determined that the probability that the AHELP venture would be successful was high enough that a determination of profits would not be unduly speculative. The determination of the amount of those profits, however, could still be affected by the level of riskiness inherent in the venture.[8]

[8] When the Court of Federal Claims determined the amount of Energy Capital's lost profits, it inherently accounted for a number of risks, such as the risk that not all first mortgagees and property owners would consent to the AHELP agreement. However, other risks were not accounted for by the court, such as the risk that borrowers would default on their AHELP loans. Even though Energy Capital itself was not going to provide funding for AHELP loans, its profits still would have been reduced by any defaults on the part of property owners. That is because its profits were dependent on receiving a percentage of the stream of loan payments from the owners.

Energy Capital argues that the sole purpose in discounting is to account for the time value of money. Again, we disagree. When calculating the value of an anticipated cash flow stream pursuant to the DCF method, the discount rate performs two functions: (i) it accounts for the time value of money; and (ii) it adjusts the value of the cash flow stream to account for risk. *See* Richard A. Brealey and Steward C. Myers, *Principles of Corporate Finance,* p. 244 (6th ed. 2000) (explaining that when valuing an anticipated cash flow, "if the cash flow is risky, the normal procedure is to discount its forecasted (expected) value at a risk-adjusted discount rate. . . . The risk-adjusted discount rate adjusts for both time and risk.")

We do not hold that in every case a risk-adjusted discount rate is required. Rather, we merely hold that the appropriate discount rate is a question of fact. In a case where lost profits have been awarded, each party may present evidence regarding the value of those profits, including an appropriate discount rate.

Northern Helex did not mandate that a conservative discount rate is always required as a matter of law when calculating lost profits. In *Northern Helex,* the Court of Claims rejected the methodology used by the Trial Judge in calculating a lost profits damages award. After correcting the Trial Judge's methodology, the court arrived at a new figure for lost profits and then discounted to present value using "conservative investment instruments." 634 F.2d at 564. Significantly, the court made no mention of any evidence presented at trial

1334 pertaining to a risk-adjusted discount rate. When there is no evidence *1334 in the record pertaining to the discount rate to be used when discounting a damages award, it certainly is appropriate for a court to apply a

risk-free conservative discount rate to discount a damages award to present value. That does not mean, however, that a conservative discount rate is legally mandated in every case.[3]

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[3] There are other situations where a risk-free discount rate may also be appropriate. For example, in some cases the calculation of the anticipated stream of lost profits may be adjusted for risk prior to discounting. As explained in Robert L. Dunn and Everett P. Harry, *Modeling and Discounting Future Damages,* 193 J. Acct 49 (Jan. 2002): "CPA expert witnesses frequently testify in court about damages assessments when a plaintiff alleges future economic losses because of a defendant's wrongdoing." The Dunn and Harry article then explains that there are two methods typically used by CPA experts to account for risk when calculating the value of a stream of anticipated profits. According to the first method, the CPA expert (i) estimates the plaintiff's hoped-for income stream (i.e. the anticipated profits); (ii) reduces the value of the hoped-for income stream to account for risks; and (iii) discounts the risk-adjusted income stream to present value using a conservative (relatively low) discount rate. According to the second method, the CPA expert (i) estimates the plaintiff's hoped-for income stream; and (ii) discounts the value of the hoped-for income stream

using a risk-adjusted (higher) discount rate. The authors of the article prefer the first method because, according to the authors, it is "easier for judges and juries to understand," and it produces a more accurate damages value when there is a short, finite damages period. *Id.* at 49.

In a given case, it is for the factfinder to determine the method of adjusting for risk which most closely represents the value of damages. In the case before us, both parties presented CPA experts who agreed that a risk-adjusted discount rate was appropriate. Neither expert suggested that using a risk-free discount rate would accurately represent the value of the AHELP venture. Because the trial court found that Mr. Arcy's discount rate was more credible, we hold that 10.5% is the appropriate discount rate in this case.

CONCLUSION

The Court of Federal Claims did not err in awarding Energy Capital lost profits from the AHELP venture. Neither did the court err in reducing the award to present value as of the date of judgment. In those respects, the decision of the Court of Federal Claims is affirmed. We do conclude, however, that in the circumstances of this case, the present value of the damages award should have been calculated using a risk-adjusted discount rate. In that limited respect, the court's decision is reversed. The case is remanded to the Court of Federal Claims for determination of a final damages award based upon the risk-adjusted discount rate of 10.5 percent found in the alternative by the court. Accordingly, the court's decision is affirmed-in-part, reversed-in-part, and remanded.

AFFIRMED-IN-PART, REVERSED-IN-PART and REMANDED.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO ALAN M. LEVENTHAL BY SENATOR TODD YOUNG

Question. As Finland and Sweden discuss closer cooperation with NATO, how do you view the role of Denmark within the NATO alliance?

Answer. As a founding member of NATO, Denmark is a staunch and actively engaged NATO Ally. Denmark was a valued contributor to NATO's Resolute Support Mission in Afghanistan and currently leads NATO Mission Iraq. Closer to home, Denmark participates in the collective defense of the Alliance, including through training and exercises with Allies across NATO. Denmark also has long-standing cooperation through the Nordic Defense Cooperation (NORDEFCO) framework that includes Finland and Sweden. Prime Minister Frederiksen has publicly stated that Denmark would support Finland and Sweden if they were to seek NATO membership. If confirmed, I will work to further cooperation with Denmark to enhance our engagement on security issues.

Question. What is your assessment of the strategic value of cooperation with Denmark on security and regional stability?

Answer. Denmark is the only country that is a member of NATO, the EU, and the Arctic Council. As such, Denmark plays a vital role on security and regional stability, with influence from the Arctic to Southern Europe. Denmark also contributes to security across the globe; it currently leads NATO Mission Iraq and stood beside us in Afghanistan. Denmark has said the United States is its security partner of choice and in February, Denmark announced its readiness to begin negotiating a Defense Cooperation Agreement with the United States that would further deepen our security cooperation. If confirmed, I would continue this close coordination as we cooperate on security and regional stability.

Question. What do you view are China's interests in Greenland? How should the United States respond?

Answer. The People's Republic of China (PRC) has exhibited interest in Greenland, particularly Greenland's critical minerals and strategic transportation infrastructure such as airports and ports. The Governments of Greenland and Denmark are clear eyed about PRC economic practices and have taken action to stave off problematic PRC investment activities in Greenland. If confirmed, I would continue to coordinate closely with the governments of Greenland and Denmark to ensure that we remain aware of PRC activities and plans and to encourage investment in Greenland by U.S. companies as an alternative to problematic PRC investments.

Question. Are there opportunities to further expand our relationship with Greenland through the new U.S. Consulate in Nuuk opened under President Trump?

Answer. The reopening of the U.S. Consulate in Nuuk in 2020 after a 67-year hiatus is emblematic of the U.S. desire to deepen engagement with Greenland. The United States also relaunched the Joint Committee with Greenland in 2021 to structure cooperation. The Consulate in Nuuk is fully operational and is moving the relationship forward through engagement that encourages trade and investment, promotes sound mining and energy sector governance, increases collaboration on global challenges like climate change, and seeks to strengthen educational and people-to-people ties. If confirmed, I would ensure that our engagement with Greenland through the Consulate in Nuuk remains robust as we deepen our relationship with Greenland.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO CONSTANCE J. MILSTEIN BY SENATOR JAMES E. RISCH

Question. In the State Department's 2021 Trafficking in Persons report, Malta remained on Tier 2 due to a continued lack of identification of victims, as well as a lack of prosecutions and convictions of suspected human traffickers.

- What is your assessment of this issue, and how can you encourage the Maltese Government to increase their efforts to prosecute and convict suspected traffickers?

Answer. Malta does not fully meet the minimum standards for the elimination of trafficking, pursuant to the Trafficking Victims Protection Act (TVPA). While Malta is making significant efforts to do so, if it is to make real progress, a whole-of-government approach—resulting in appreciable progress in protection, prosecution, and prevention—will be required.

If confirmed, I will encourage the Government of Malta to take concrete steps to address the recommendations from the 2021 Trafficking in Persons Report. Specifically, I will encourage the Government to increase their efforts to hold traffickers accountable, including complicit officials, implement effective and dissuasive penalties for traffickers, and address gaps in victim identification and protection.

Question. In the State Department's 2020 International Religious Freedom report, societal and governmental respect for religious freedom was lacking, including the Government prolonging a request to build a new church for two years. In addition, religious minorities struggle to find equitable space to practice their religion.What is your assessment of religious freedom and societal/governmental respect for religious freedom in Malta?

Answer. Freedom of religion and belief are important principles for me. Malta's constitution establishes Roman Catholicism as the state religion but provides for freedom of conscience and religious worship and prohibits religious discrimination.

I understand that in response to calls for access to cremation from religious minorities in Malta, including the Hindu community, Malta passed a law legalizing cremation services in 2019. However, to date, the Maltese Government has failed to license a crematoria for the Hindu community's use. In July 2021, the Government announced plans to include a crematorium in an upcoming cemetery extension project. I also understand the Government has not acted on a Russian Orthodox application, pending since 2017, to build a church, and that the Maltese Government has not implemented past proposals to offer voluntary Islamic religious education in state schools.

Question. If confirmed, how will you work with the Maltese Government on these issues?

Answer. If confirmed, I will work with the expertise and support of Embassy Valletta to engage across the Maltese Government to promote respect for freedom of religion and belief and ensure continued progress on ensuring the rights of members of religious minority groups. I will also continue Embassy Valletta's work to promote freedom of religion or belief through broad-based engagement with religious and civil society actors, opinion pieces in the media, and outreach on social media.

Question. If confirmed, do you commit to personally meeting with members of civil society to discuss the importance of religious freedom?

Answer. If confirmed, I am committed to personally working with civil society to advocate for freedom of religion and belief for members of all religious groups and supporting efforts of all faith communities to collectively advocate on religious freedom issues. Embassy Valletta has an important role to play in ensuring robust engagement with civil society on religious freedom. Embassy officials regularly meet with representatives from a wide variety of religious groups to broaden understanding of and messaging on freedom of religion and belief.

Question. In the State Department's 2020 Human Rights Report, Malta was noted for having significant human rights abuses including unlawful detention and high-levels of corruption.If confirmed, how will you engage with the Maltese Government on these issues?

Answer. The United States and Malta work closely together to improve human rights and rule of law in the country. Specifically, this includes judicial reform and transparency in the financial sector, press freedom, and the treatment of migrants. We also work together to counter transnational crime, gender-based violence, and trafficking in persons.

An independent public inquiry on the 2017 murder of Daphne Caruana Galizia, an important Maltese investigative journalist, revealed a culture of impunity supported by individuals in positions of significant power. Impunity fuels corruption. The newly elected Government of Malta's acceptance of the findings of the inquiry and commitment to implement the inquiry's recommendations to address the culture of impunity through legal action and rule of law reforms are good signs, but more work remains.

If confirmed, I will encourage Malta to continue to seek justice for Daphne Caruana Galizia and rebuild trust in its legal system. I will also continue U.S. support for Malta's rule of law reforms and implement programs focused on press freedom.

Question. If confirmed, how can you continue to engage with civil society to bolster human rights and human rights defenders in country?

Answer. If confirmed, I will continue Embassy Valletta's engagement with civil society to support human rights and human rights defenders across the country. I will

also continue Embassy Valletta's work to emphasize the importance of a free and independent press, to support the work of independent journalists, and to strengthen their profile as anti-corruption advocates.

Question. In this report, there were allegations that the Maltese Government delayed safe disembarkation of refugees at sea and then forcibly returned them to Libya. If confirmed, do you commit to encouraging the Maltese Government to not commit refoulément of refugees?

Answer. If confirmed, I commit to encouraging the Maltese Government to uphold its international non-refoulement obligations. Although migrant arrivals by boat have dropped since 2019, Malta continues to highlight this issue and its potential impact on the country. If confirmed, I will continue to work with the Maltese Government, international organizations, and NGOs to humanely address issues associated with irregular migration.

Question. The Office of Multilateral Strategy and Personnel (MSP) in the State Department's bureau of International Organizations is leading a whole-of-government effort to identify, recruit, and install qualified, independent personnel at the U.N., including in elections for specialized bodies like the International Telecommunications Union (ITU). There is an American candidate, Doreen Bodgan-Martin, who if elected would be the first American and first woman to lead the ITU. She is a tough race that will require early, consistent engagement across capitals and within the U.N. member states.

- If confirmed, do you commit to demarching the Maltese Government and any other counterparts necessary to communicate U.S. support of Doreen?

Answer. Doreen Bogdan-Martin is a forward-looking, inclusive, and globally recognized leader, and would be the right leader at the right time for the ITU. She is already leading efforts as Director of ITU's Telecommunication Development Bureau to transform the global digital landscape to improve connectivity, close gaps in infrastructure, elevate youth voices, and make the digital future more inclusive and sustainable for all. If confirmed, I will work closely with the Bureau of International Organizations (IO) to support Ms. Bogdan-Martin's candidacy and encourage Malta to vote for her for ITU Secretary-General.

Question. If confirmed, how can you work with the International Organizations (IO) bureau and other stakeholders to identify, recruit, and install qualified Americans in positions like the Junior Program Officer (JPO) program at the U.N.?

Answer. If confirmed, I will prioritize working with all stakeholders to promote the employment of qualified U.S. citizens who are able to advance American priorities such as innovation, ethical standards, transparency, and accountability at international organizations, while bringing important skills and specializations. I believe the JPO program offers a unique opportunity for the United States to invest in the career development of qualified young Americans and will make needed progress in expanding the number and distribution of Americans working in international organizations. If confirmed, I will actively support efforts by the Department of State to identify opportunities for JPOs.

Question. How do you plan on leading the fight against corruption in Malta within the U.S. Embassy?

Answer. Corruption inflicts substantial costs upon the economy, society, and security of a country and undermines rule of law and citizens' faith in their Government. This directly impacts U.S. national security, economic, and foreign policy interests. If confirmed, I will work with Embassy Valletta, our partners throughout the U.S. Government, and the Maltese Government to combat corruption and promote the rule of law.

On December 22, 2021, the State Department publicly designated two former senior Maltese officials, Keith Schembri, Chief of Staff to the former Prime Minister, and Konrad Mizzi, former Minister for Energy and the Conservation of Water, under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021, prohibiting them and their immediate family members' travel to the United States, due to their involvement in significant corruption. These publicly announced designations reinforce the U.S. Government's commitment to combatting corruption globally and send a strong signal that the United States will continue to act against corruption.

I am pleased that the Government of Malta has outlined the specific goals of fighting corruption, including increasing transparency of ultimate beneficial owners, ensuring the integrity of public officials, and implementing a national anti-fraud and corruption strategy as part of its Summit for Democracy commitments. If con-

firmed, I will work closely with the Government to support these important efforts to counter corruption.

Question. What can the United States do to support anti-corruption efforts in Malta?

Answer. If confirmed, I will continue U.S. support for Malta's rule of law reforms and implement programs focused on tackling corruption in all its forms. This includes supporting the work Embassy Valletta is doing with our partners in the Maltese Government and civil society to promote systemic rule of law reform focused on countering corruption.I also understand that the Department of State is using all available tools to promote accountability for corruption globally, including Section 7031(c) visa restrictions and, in consultation with the Department of Treasury, financial sanctions authorities such as Global Magnitsky Act. If confirmed, I will fully support the U.S. Government's use of all appropriate tools to combat global corruption.

Question. How will you encourage the Maltese Government to ensure its economy is not used as a haven for ill-gotten gains and money laundering?

Answer. In June 2021, the Financial Action Task Force (FATF), an international standard-setting body focused on anti-money laundering and combating the financing of terrorism (AML/CFT), placed Malta on its list of Jurisdictions Under Increased Monitoring (also known as the grey list), for reasons including its flawed approach to ultimate beneficial ownership information and insufficient investigations into and prosecutions of financial crimes including tax evasion.

I understand that Embassy Valletta has welcomed Treasury, Department of Justice (DOJ), State Department Bureau of International Narcotics and Law Enforcement (INL), and U.S. law enforcement experts' assistance to address Malta's rule of law deficiencies. This assistance aided in Malta's continued implementation of the FATF Action Plan, and helped improve Malta's financial regulatory, investigative, policing, and prosecutorial mechanisms to tackle evolving money laundering and illicit finance related risk. I also understand that a U.S. Department of Justice regional legal advisor embedded at Embassy Valletta worked with the Maltese authorities to draw up a roadmap for improving criminal justice procedures, streamlining critical evidentiary procedures, building capacity, and implementing new measures to deter money laundering.

If confirmed, I will lead Embassy Valletta's work harnessing the U.S. Government interagency to work with our partners in the Maltese Government and civil society to promote systemic rule of law reform to strengthen Malta financial regulatory environment and improve Malta's efforts to counter money laundering.

Question. Wealthy Chinese, Russian, and other nationals continue to purchase citizenship in Malta, despite protestations from the EU. What are your views on this issue, and how would you engage with the government with Malta on it?

Answer. The potential for abuse by bad actors is concerning. While the EU has lodged objections, the Government of Malta insists its citizenship by investment program is a matter of national sovereignty and has thus far been unwilling to end the program.

It is my understanding that Malta has recently taken several important steps to prevent bad actors from using this program. Specifically, I understand Malta has reworked the program, increasing the vetting of applicants and raising the financial bar for investment. In response to Russia's war of aggression against Ukraine, Malta also publicly announced suspension of applications for citizenship and residency by applicants who are nationals of the Russian Federation or Belarus. I also understand that Malta has taken steps to strip Maltese citizenship from a Russian Federation dual national sanctioned by the United States.

If confirmed, I would work with the Government of Malta to highlight the evolving risks of its citizenship by investment program and encourage the most rigorous vetting possible of citizenship applicants. This includes preventing Russia's elites and their family members with ties to the Putin regime or anyone involved in supporting Russia's unprovoked and unjustifiable war against Ukraine from seeking loopholes to evade sanctions or other restrictions.

Question. Malta has not been very forthcoming in offering assistance to Ukraine, which was recently invaded by Russia.

- Why do you believe that Malta has not undertaken to support Ukraine more?

Answer. I understand that Malta has supported strong EU sanctions and taken other independent measures to isolate Putin's regime in response to Russia's unjustified and unconscionable war against Ukraine. In addition, I understand Malta is providing humanitarian aid to Ukraine, including medicines and medical equip-

ment, and welcoming refugees from Ukraine to Malta in accordance with EU commitments and in line with the neutrality clause outlined in their constitution.

Question. If confirmed, what actions will you take to persuade Malta to contribute more to the international effort to support Ukraine?

Answer. If confirmed, I will work with the Maltese Government to ensure that all diligence is taken to prevent anyone involved in supporting Russia's unprovoked and unjustifiable war against Ukraine from evading sanctions or other restrictions. I would also encourage Malta to offer as much humanitarian assistance as possible to help the people of Ukraine.

Question. Malta continues to be a safe haven for Russian oligarchs who seek to evade the international sanctions regime against Russia, Putin, and his crony oligarchs. How do you plan to engage with the Maltese Government to increase its focus and resources on sanctions implementation and enforcement?

Answer. I understand that Malta has supported strong EU sanctions and taken other independent measures to isolate Putin's regime in response to Russia's unjustified and unconscionable war against Ukraine.

If confirmed, I will work with the Maltese Government to ensure that all diligence is used to prevent anyone involved in supporting Russia's brutal, unprovoked, and unjustifiable war from evading sanctions or other restrictions. I would ensure that Embassy Valletta engages with the U.S. interagency to ensure that we can provide Malta with the support it needs to vigorously enforce sanctions against Russia.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO CONSTANCE J. MILSTEIN BY SENATOR MARCO RUBIO

Question. Malta is one of the few countries to maintain a "golden visa" program, where Maltese citizenship is conferred to anyone who invests at least 750,000 euros in the Maltese economy. For the millionaires and billionaires that prop up the regimes in Moscow and Beijing or the leaders of transnational criminal organizations, this is very small sum to pay to enjoy all the benefits democracies confer. Immigration into the United States is much easier for Maltese citizens than it is for Russian and Chinese citizens. Without serious vetting and oversight, golden visa programs mean that war criminals and corrupt businessmen could be living here in the United States.

- Do you have concerns with Malta's golden visa program and its abuse by corrupt actors and organized crime? Why or why not?

Answer. The potential for abuse by corrupt actors and organized crime is concerning. While the EU has lodged objections, the government of Malta insists its citizenship by investment program is a matter of national sovereignty and has thus far been unwilling to end the program.

It is my understanding that Malta has recently taken several important steps to prevent bad actors from using this program. Specifically, I understand Malta has reworked the program, increasing the vetting of applicants and raising the financial bar for investment. In response to Russia's war of aggression in Ukraine, Malta publicly announced suspension of applications for citizenship and residency by Russian and Belarusian applicants. I also understand that Malta has taken steps to strip Maltese citizenship from a Russian dual national sanctioned by the United States.

If confirmed, I would work diligently with our partners in the Maltese Government and civil society to champion rule of law to fight corruption.

Question. If confirmed, what steps will you take to protect the United States so that individuals who have taken advantage of the golden visa system are unable to immigrate here?

Answer. If confirmed, my top priority would be to ensure the safety and security of U.S. citizens and of the United States. I would continue our strong coordination efforts with our partners in the Maltese Government to ensure U.S. consular officers and U.S. law enforcement officials have the right information to effectively vet all individuals seeking to enter the United States from Malta. I understand that the United States has a strong relationship with Maltese law enforcement. If confirmed, I would seek to deepen these partnerships.

Any foreign citizen seeking to enter the United States, whether to visit or to immigrate, must meet strict legal requirements and pass extensive security vetting.

Question. If confirmed, how would you encourage Malta to reform its golden visa system?

Answer. If confirmed, I would work with the Government of Malta to highlight the evolving risks of its citizenship by investment program and ensure the most rigorous vetting possible of citizenship applicants. This includes preventing Russia's elites and their family members with ties to the Putin regime or anyone involved in supporting Russia's unprovoked and unjustifiable war from seeking loopholes to evade sanctions or other restrictions.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO HON. JANE HARTLEY BY SENATOR JAMES E. RISCH

Question. If confirmed, will you commit to working with our UK partners to ensure sufficient burden sharing in response to historic levels of food insecurity and for advancing the global health security of our respective citizens and partners?

Answer. The United States has made clear global food security is a top priority issue, including for the United States' May presidency of the U.N. Security Council. This issue is even more urgent in light of Russia's unconscionable war against Ukraine. I understand Secretary Blinken will chair a Security Council open debate on May 19 to examine the nexus between conflict and food security. While much more remains to be done to end the COVID–19 pandemic and manage its impacts, the UK spent over $2 billion in 2020 and 2021 on COVID–19 response, and in 2022 made new commitments and hosted the Global Pandemic Preparedness Summit, raising over $1.5 billion for CEPI. If confirmed, I will work with our UK partners to ensure burden sharing that enables a robust response to food insecurity around the world, and to advance the global security of our citizens and partners.

Question. In the State Department's 2021 Trafficking in Persons report, the United Kingdom was again ranked as Tier 1 due to serious and sustained efforts to meet the minimum standards to eliminate trafficking. However, there were some instances in which the Government penalized victims for unlawful acts traffickers compelled them to commit.

- If confirmed, how will you work with the UK Government to address these issues?

Answer. The UK prioritizes the protection of human rights and introduced The Modern Slavery Act in 2015 to strengthen laws to prosecute and convict human traffickers, increase protections for survivors, and impose reporting requirements to prevent forced labor in organizations' operations and supply chains. The annual Trafficking in Persons report makes clear, however, that countering human trafficking around the world requires ongoing effort and progress. The 2021 recommendations to the UK include ensuring victims are not penalized for unlawful acts their traffickers compelled them to commit, and if confirmed I would work with UK legislators, law enforcement, and immigration authorities to encourage continued improvement on this and the other recommendations in the TIP report to combat human trafficking and work to create a more fair, equitable world.

Question. In the prioritized recommendations for the UK, the Department emphasized robust prosecutorial and conviction efforts of suspected traffickers, especially in Scotland and Northern Ireland. If confirmed, do you commit to raising the prioritized recommendations with the local governments in Scotland and Northern Ireland to increase their prosecutorial efforts?

Answer. The Embassy in London and the Consulates General in Edinburgh and Belfast have regular contact with both national and local officials. If confirmed, I commit to raising the prioritized recommendations with appropriate national and local officials across the UK, including in Scotland and Northern Ireland, to urge them to increase their prosecutorial efforts.

Question. In the State Department's 2020 International Religious Freedom report, the U.S. Embassy in the UK had robust engagement with government officials, political parties, and religious groups to advance religious freedom issues. The 2020 report also observed the first decline in religiously motivated hate crimes in England and Wales in roughly the last ten years.

- What is your assessment of religious freedom and societal/governmental respect for religious freedom in the UK?

Answer. It is encouraging to see a decline in religiously motivated hate crimes in England and Wales in 2020. However, according to the 2020 International Religious

Freedom Report, rates of religiously motivated hate crimes remained higher than in recent previous years, indicating a need for continued efforts to promote religious tolerance. If confirmed as Ambassador, I would work with the UK Government to ensure continued progress to advance both societal and governmental respect for religious freedom in the UK.

Question. If confirmed, how will you work with the UK Government on these issues?

Answer. The UK is a strong partner on advancing religious freedom issues, and in July 2022 will host a ministerial to promote freedom of religion and belief. If confirmed, I would work with the expertise and support of the staff of Mission UK, to engage across the UK Government, including with the Prime Minister's Special Envoy for Freedom of Religion or Belief, the Independent Advisor on Antisemitism, and the Equality and Human Rights Commission to advance religious freedom issues and ensure continued progress on issues such as reducing religiously motivated hate crimes.

Question. How can you build upon this work to ensure robust engagement with civil society?

Answer. The U.S. Mission to the UK has an important role to play to ensure robust engagement with civil society on religious freedom matters. Embassy officials regularly meet with representatives from a wide variety of religious groups to broaden understanding of and messaging on freedom of religion and belief. If confirmed, I will work with civil society to advocate for religious freedom for members of all religious groups, and support efforts of all faith communities to collectively advocate on religious freedom issues.

Question. If confirmed, do you commit to personally meeting with members of civil society to discuss the importance of religious freedom?

Answer. In my previous post as Ambassador, I made it a priority to personally meet with members of faith communities and civil society to discuss the importance of religious freedom and gain a broad understanding of views across the country, including through hosting events for significant religious holidays. If confirmed, I commit to personally meeting with members of civil society to discuss the importance of religious freedom.

Question. In the State Department's 2020 Human Rights Report, the UK had no reports of significant human rights abuses and there were mechanisms in place to identify and punish officials who may commit them.

- Despite the positive human rights environment, if confirmed, how can you continue to engage with civil society to bolster human rights and human rights defenders in country?

Answer. The UK is a committed leader on the protection and promotion of human rights. For example, the UK is the current co-chair of the Equal Rights Coalition, a grouping of 42 countries that work on rights of LGBTQI+ persons and will host a global conference on rights of LGBTQI+ persons in in June 2022. However, as current events around the world make clear, we cannot take human rights for granted. If confirmed, I will continue to engage with the UK Government and with civil society across the UK to bolster human rights and human rights defenders across the country including engaging with NGOs to counter discrimination and hate crimes.

Question. The Office of Multilateral Strategy and Personnel (MSP) in the State Department's bureau of International Organizations is leading a whole-of-government effort to identify, recruit, and install qualified, independent personnel at the U.N., including in elections for specialized bodies like the International Telecommunications Union (ITU). There is an American candidate, Doreen Bodgan-Martin, who if elected would be the first American and first woman to lead the ITU. She is a tough race that will require early, consistent engagement across capitals and within the U.N. member states.

- If confirmed, do you commit to demarching the UK Government and any other counterparts necessary to communicate U.S. support of Doreen?

Answer. Doreen Bogdan-Martin is a forward-looking, inclusive, and globally recognized leader, and would be the right leader at the right time for the ITU. She is already leading efforts as Director of ITU's Telecommunication Development Bureau to transform the global digital landscape to improve connectivity, close gaps in infrastructure, elevate youth voices, and make the digital future more inclusive and sustainable for all. If confirmed, I will commit to supporting her candidacy wholeheartedly on behalf of the United States, including demarching the UK Government and other counterparts as necessary to communicate U.S. support for her candidacy.

Question. If confirmed, how can you work with the International Organizations (IO) bureau and other stakeholders to identify, recruit, and install qualified Americans in positions like the Junior Program Officer (JPO) program at the U.N.?

Answer. It is imperative the officers of the U.N. maintain strong commitments to the U.N.'s founding principles, including respect for the international order, resolution of disputes by peaceful means, and respect for human rights and fundamental freedoms. If confirmed, I would coordinate closely with the IO bureau and other stakeholders to support efforts to identify, recruit, and install qualified Americans at the U.N., including in positions like the Junior Program Officer program.

Question. How will you coordinate U.S. and UK responses to the war in Ukraine with regard to: security assistance, sanctions, humanitarian aid, refugees, and diplomacy?

Answer. The United States has engaged in robust cooperation with the UK and other close partners, including bilaterally and multilaterally through NATO and the G7 to garner support for and coordinate strong united responses to Putin's brutal war in Ukraine. On security assistance, the UK has led two separate donor conferences for defense colleagues to corral and coordinate assistance and combine the U.S. and UK has provided billions of dollars in security assistance. On sanctions, the United States and the UK share common views and approaches on many sanctions, and the UK has made more than 1,400 designations since the beginning of Russia's invasion of Ukraine. If confirmed, I will work with the Department and Mission UK to continue close coordination between U.S. and UK security assistance, sanctions, humanitarian aid, refugees, and diplomacy in response to Moscow's war against Ukraine.

Question. Russian oligarchs and officials hold large amounts of wealth in the UK. How can the UK limit the Russian influences embedded in its economy?

Answer. I have seen how the UK has been in lockstep with the United States on exacting military, economic, and political costs for Putin's war in Ukraine, including taking significant steps to root out Russian illicit finance and sources of revenue for Putin in the UK. The UK Government also has imposed severe financial sanctions on President Putin, his inner circle, Russian oligarchs, and all who enable and fuel this war of choice—more than 1400 designations. In March, the UK enacted the Economic Crimes Act, making it easier to sanction groups of corrupt individuals, and harder for them to hide their money in the UK, particularly in real estate. Also in March, the UK announced it would phase out all imports of Russian oil by the end of 2022. There remains more work to be done, and if confirmed, I will advocate strongly for further measures to limit Russian influence in the UK economy, such as through robust use of the UK's new investment screening law.

Question. How can the U.S. urge or help the UK to identify and appropriately freeze or seize Russian assets in their jurisdiction?

Answer. While I am not privy to the specifics, I understand the United States and the UK maintain robust law enforcement cooperation multilaterally, including through the Five Eyes partnership, and bilaterally on a broad range of law enforcement matters. In March the G7, including the UK, launched the Russian Elites, Proxies, and Oligarchs (REPO) Task Force to identify and seize assets, including boats, planes, helicopters, real estate, and potentially art or other property. Each member jurisdiction uses its respective national authorities to collect and share information to enable U.S. and partner actions. If confirmed, I will work to maintain and develop cooperation, including through the law enforcement agencies represented at Mission UK, to provide the appropriate information to help the UK identify and appropriately freeze or seize Russian assets in their jurisdiction.

Question. How can we message that although the UK has made great contributions to counter Russia, it still needs to confront the difficult problem of the vast Russian wealth in its economy?

Answer. The UK has made incredible contributions to the effort to counter Putin's unjustified and brutal war in Ukraine. UK Prime Minister Johnson recognized in his May 3 speech to the Ukrainian parliament the West had been "too slow" to grasp the threat, acknowledging more needed to be done. If confirmed, I will engage directly with senior UK officials to advocate for continued and amplified efforts to root out illicit Russian finance in the UK through tools such as the Economic Crimes Act and to enforce strong protections against undue foreign influence, such as through the UK's investment screening law, the National Security and Investment Act.

Question. Brexit has necessitated changes in U.S.-UK relations as the UK is longer part of the EU. What challenges do you anticipate in maintaining consistency between U.S.-UK and U.S.-EU relations?

Answer. Transatlantic peace, security, and prosperity are best served by a strong UK, a strong EU, and the closest possible relationship between the two. The United States has a special relationship with the UK and an indispensable partnership with the EU, and if confirmed I will work to ensure these allies will continue to be the United States' partners of first resort on a range of shared priorities. If confirmed, I will work closely with UK officials and with Washington to maintain consistency on U.S.-UK relations, which continue to provide new opportunities for growth resulting from the UK's internationally focused "Global Britain" policies. While the U.S. Ambassador to the EU will lead on U.S.-EU relations, I will consult closely with him to support his efforts to maintain consistency in the transatlantic relationship. If confirmed, I look forward to working to address the range of global challenges as the UK and the EU continue to adjust to their new post-Brexit relationship.

Question. How will you coordinate diplomatic strategy with the U.S. Ambassador to the EU?

Answer. Close cooperation and coordination between the U.S. Embassy in London, U.S. Consulate General in Belfast, and U.S. Mission to the European Union are vital to ensure the Department of State and the U.S. Government are speaking with one voice and understand the complexities of a changing UK-EU relationship and its implications for transatlantic relations more broadly. If confirmed, I will consult closely and regularly with U.S. Ambassador to the EU Mark Gitenstein on these issues and encourage the Embassy team to maintain close contact at all levels with their colleagues at the U.S. Mission to the EU.

Question. The fate of the Northern Ireland Protocol is still uncertain, how will you work with the UK's foreign ministry to protect U.S. interests in the Irish-UK trade relationship?

Answer. If confirmed, I will work with Her Majesty's Government to encourage all parties to prioritize political and economic stability and to resolve their differences through continued dialogue. I would emphasize the need to ensure any steps taken do not undermine the progress made since the Belfast/Good Friday Agreement. The United States has a special relationship with the UK and an indispensable partnership with the EU, and if confirmed I will work to ensure both continue to be the United States' partners of first resort on a range of shared priorities.

Question. How will you coordinate diplomatic strategy with the U.S. Ambassador to Ireland?

Answer. If confirmed, I will work with my counterpart at the U.S. Embassy in Dublin on a range of issues, including supporting the Belfast/Good Friday Agreement. I will also coordinate with the U.S. Ambassador to the EU on issues such as the Northern Ireland Protocol.

Question. Britain is facing a severe energy crisis, which has only been compounded by the recent decision to phase out Russian imports.

- What are the greatest problems the UK currently faces due to energy?

Answer. Domestic issues in addition to the spike in energy demand as the UK economy opened after the pandemic and disruptions to the global energy market caused by Putin's invasion of Ukraine have contributed to rising energy prices in the UK. The UK's energy policy is driven by its commitment to reaching net zero greenhouse gas emissions by 2050 and it has made significant investments in renewable energy, including offshore wind. The UK is a net importer of crude oil and natural gas and has announced it will stop most overseas oil and gas project financial support and advocacy. In March, the UK announced it would phase out all imports of Russian oil by the end of 2022. With this established, the UK is better positioned than most in the region as it only imports five percent of its natural gas supplies from Russia. Further, approximately eight percent of UK oil imports came from Russia in 2021. While better positioned to phase out Russian oil and natural gas, this will not mean the UK is insulated from price shocks or demand spikes across the region. Additionally, more than half of the UK's operating nuclear reactors are reaching the end of their operating life and are set to close by mid-2024, removing a large share of zero emissions power generation.

Question. How can the U.S. help the UK solve this crisis?

Answer. The UK has been a leader in efforts to mobilize private finance for renewable and net-zero energy, including through their leadership of COP26. Further,

on the UK's aging nuclear fleet, Her Majesty's Government (HMG) plans to approve a new reactor each year until 2030, with the aim of having all operational by 2050. They will be looking for international partners. If confirmed, I will work with Mission UK and Her Majesty's Government to continue to identify opportunities to mobilize financing for energy generation and identify and support alternate sources of energy.

Question. How will you balance your messaging to Britain on the need to invest in clean energy while also maintaining energy stability and security?

Answer. The UK's April 2022 Energy Security Strategy identifies the need balance investment in clean energy and maintaining energy stability and security. If confirmed, I will work with the UK to identify avenues to support additional and expedited investment in clean energy and to improve energy stability and security.

Northern Ireland

Question. There have been reports that the UK will seek to abandon the Northern Ireland Protocol as there has so far been no success in creating a sustainable solution to trade in the region.

- As Ambassador, how will you protect U.S. trade interests as they relate to Ireland and the UK?

Answer. The U.S. priority remains protecting the gains of the Belfast/Good Friday Agreement, and peace, stability, and prosperity for the people of Northern Ireland. I understand the UK is concerned about the implementation of the Northern Ireland Protocol and recognize this is a bilateral issue between the UK and EU. If confirmed, I will encourage all parties to prioritize political and economic stability and to resolve their differences through continued dialogue. I would emphasize the need to ensure any steps taken do not undermine the progress made since the Belfast/Good Friday Agreement.

Question. How will you work to uphold the Northern Ireland Peace Process throughout any Brexit and NI Protocol related negotiations?

Answer. Northern Ireland has made tremendous progress since the 1998 Belfast/Good Friday Agreement. I understand the United States has encouraged the EU and UK to continue engaging in dialogue that will enhance the prospect for long-term and provide positive solutions that give Northern Ireland businesses and people the confidence to continue to improve their economy. If confirmed, I will do the same.

Question. What is the status of the W93 warhead program, and its relationship with British nuclear modernization?

Answer. Although I am aware of the W93 modernization program and our cooperation with the UK on strategic nuclear deterrence, I am not a government official and have not been briefed on the latest information. If confirmed I will promote continued close defense cooperation with the United Kingdom.

Question. Russia is increasing its nuclear threats against the UK, to include a recent threat on state television to employ the Poseidon nuclear drone to cause a radioactive flood across Ireland, the UK, and coastal France. How is the U.S. supporting the UK in countering such threats? Does U.S. policy guidance to "reduce the role of nuclear weapons in our strategy," and budget requests to divest capabilities such as the submarine-launched cruise missile—nuclear (SLCM-N) in effect reward such threats, and embolden Russia to deliver more?

Answer. The fundamental role of U.S. nuclear weapons is to deter nuclear attack on the United States, U.S. allies, and partners, including the United Kingdom. Our alliances are a tremendous source of strength and a unique advantage for the United States; the administration is reinvesting in them. Provocative nuclear rhetoric is dangerous, adds to the risk of miscalculation, and should be avoided. If confirmed I would work closely with UK officials to coordinate against this threat in a manner that continues to demonstrate the transatlantic unity.

Question. The UK has led the world in pushing to assertively support Ukraine, and in doing so has implicitly downplayed the threat of Russian escalation. Have they struck the right balance between supporting Ukraine and mitigating the threat of escalation? What does this imply for other allies and partners?

Answer. The United Kingdom's strong support has bolstered Ukraine's ability to defend against Russia. UK support includes a May 3 announcement of €300 million to fund electronic warfare equipment, heavy lift drones, a counter battery radar system, GPS jamming equipment, night vision devices, Brimstone anti-ship missiles, and Stormer anti-aircraft systems. At the same time the UK has been an active par-

ticipant at G7, NATO, and trans-Atlantic Quad meetings at which it has publicly underscored the importance of trans-Atlantic unity as a deterrent against an escalation by Russia. If confirmed I will coordinate with UK officials to continue making clear to Russia that it will face a swift and strong response to any escalatory actions it may take.

Question. What does the U.S. need from the UK in the event of Chinese aggression against Taiwan, the South China Sea, or the East China Sea?

Answer. The United States and UK continue to deepen cooperation in the Indo-Pacific region. The UK's renewed focus in the region, outlined in the 2021 Integrated Review, provides ample opportunity to increase our cooperation and presence in the region. For example, in 2021 the UK sent a joint carrier strike group with U.S. and Dutch participation to demonstrate freedom of navigation and interoperability. If confirmed I will work with UK officials to strengthen our cooperation in the Indo-Pacific region to deter any PRC aggression.

Question. What are the practical barriers to progress for increased cooperation in the Advanced Capabilities portion of AUKUS? How can the U.S. best address those barriers?

Answer. I understand that AUKUS partners have made strong progress in the four advanced capabilities that the President and Prime Ministers identified in September 2021, and have recently initiated work in four additional areas. The expanded the list of projects now includes hypersonics and counter-hypersonics, electronic warfare capabilities, information haring, and innovation. These initiatives will add to our existing efforts to deepen cooperation on cyber capabilities, artificial intelligence, quantum technologies, and additional undersea capabilities. The goal of these efforts is to foster deeper integration of security and defense-related science, technology, industrial bases, and supply chains. I have not been briefed on the classified details of these programs or barriers to further cooperation; if confirmed, I will work closely with UK officials to ensure a smooth and prompt implementation of AUKUS advanced capabilities projects.

Question. The UK joined Russia, China, France and the U.S. earlier this year in declaring the "a nuclear war can never be won and must never be fought." Given Russia's nuclear threats since then, does the UK believe Russia was lying when it signed on to that statement? Or does the UK believe that Russia has changed its stance since January?

Answer. While I have not been part of bilateral discussions and cannot know what the UK believes regarding Putin's trustworthiness, I can commit to working closely with UK officials, if confirmed, in order to sync our deterrence strategies to prevent nuclear war.

Question. What do you view as the overarching priority areas of the United Kingdom's policy towards China, and what are the top areas within which the United States and the United Kingdom should cooperate with respect to China?

Answer. The U.S. and UK approaches are closely aligned on policy toward the PRC. The UK—like the United States—seeks to counter, compete, or cooperate as needed with the PRC. The UK's overarching approach to the PRC, as characterized in its Integrated Review, is a systemic challenge, and identified the need to do more to adapt to the PRC's growing impact. The UK has undertaken measures to address Xinjiang forced labor and human rights concerns and has played a leadership role in condemning repeated PRC attempts to undermine Hong Kong's autonomy as guaranteed in the Sino-British Joint Declaration. During its presidency of the G7, the UK was a stalwart supporter of "open societies" and "open economies" through its promotion of democratic values and free and fair trade. If confirmed, I will deepen the already close U.S-UK coordination on the PRC and will seek to strengthen our efforts to defend the rules-based international order and our respective national security interests and our values.

Question. Last month, a Chinese investment group received Whitehall's approval to purchase one of Britain's few remaining semiconductor manufacturing plants.

- What are the risks posed by this purchase, and how should the United States respond?

Answer. The President has identified semiconductors and their supply chains as critical to national security. To my knowledge, the purchase occurred last year, and Whitehall has referred the case to Secretary of State for Business, Energy and Industrial Strategy Kwasi Kwarteng for review under new investment screening authorities provided by the National Security and Investment Act that took effect at the beginning of this year. If confirmed, I will work closely with UK officials to sync

our efforts to protect critical supply chains for foreign interference or economic coercive practices.

Question. Britain's commissioner for biometrics and surveillance cameras has asked the British Government's to clarify its policy with respect to purchasing equipment from China's Hangzhou Hikvision Digital Technology. Hikvision was blacklisted by the U.S. Government in 2019 over Beijing's treatment of Uyghur Muslims and other ethnic minorities in Xinjiang.

- What are your views on this issue, and how would you engage with United Kingdom on matters related to technology and human rights?

Answer. The United States has made clear, and I concur entirely, that it is essential to support respect for the human rights of members of minority groups in the PRC and elsewhere, and to ensure that the U.S. financial system and American investors are not facilitating PRC Government efforts to persecute ethnic and religious minorities. If confirmed, I would work with UK counterparts to develop and promote democracy-affirming technologies and to mitigate the risks of authoritarian governments using technology to track, intimidate, or repress.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO HON. JANE HARTLEY BY SENATOR MARCO RUBIO

Question. Russia's current invasion of Ukraine has caused a severe oil shortage in Europe and the world. In the United States, gas prices have increased 44 percent since the start of the invasion, while they have increased much more in other countries, including the United Kingdom.

- If confirmed, how would you work with the British Government to address the inflation and supply chain crisis caused by Putin's war?

Answer. Domestic issues in addition to the spike in energy demand as the UK economy opened after the pandemic and disruptions to the global energy market caused by Putin's invasion of Ukraine have contributed to rising energy prices in the UK. President Biden has issued an executive order to bolster resilient, diverse, and secure supply chains. If confirmed, I will work with the UK, one of our closest economic partners with approximately $240 billion in trades and services, to align our supply chain strategies. Additionally, if confirmed I will work closely with our UK partners to find economic solutions bilaterally and multilaterally that continue to hold the Kremlin to account while ensuring Putin's war of aggression against Ukraine has minimal impact on the American people.

Question. If confirmed, would you recommend that the British Government increase oil production in the North Sea?

Answer. The UK's energy policy is driven by its commitment to reaching net zero greenhouse gas emissions by 2050 and it has made significant investments in renewable energy, including offshore wind. The UK is a net importer of crude oil and natural gas and has announced it will stop most overseas oil and gas project financial support and advocacy. To that end, if confirmed I would work closely with our British counterparts to address the energy security needs of both our countries, particularly as we confront the impact of Putin's war of aggression against Ukraine on shared energy priorities and security.

Question. Do you think that increase U.S. oil and gas exports to Europe can more immediately counter rising prices than promoting long-term investments in renewable energy?

Answer. The United States is working simultaneously on short-term and long-term responses to counter Russian attempts to use energy as a weapon. The U.S. Government has been engaging U.S. LNG companies and working with partners around the world to diversify natural gas supply to Europe to address the near-term need and replace volumes that would otherwise come from Russia. The President launched a task force with the EU in March that prioritizes efforts to increase LNG volumes for Europe. This will help replace Russian gas to Europe—decreasing Europe's dependence on Russia and Putin's ability to use energy as a tool of coercion. The United States is working over both the short- and long-term to also reduce the overall demand in Europe for natural gas by ramping up energy efficiency measures and accelerating renewable and other clean energy deployment.

Question. The enablers of Putin's regime in Russia—senior government officials and oligarchs—all keep their money abroad in banks in London and New York. If

we really want to punish Putin and his regime for the crimes they're committing in Ukraine, then we need to target these accounts.

- To date, what is your assessment of the UK's to target and seize these assets?

Answer. While I am not privy to the specifics, I understand the United States and the UK maintain robust law enforcement cooperation multilaterally, including through the Five Eyes partnership, and bilaterally on a broad range of law enforcement matters. In March, the G7, including the UK, launched the Russian Elites, Proxies, and Oligarchs (REPO) Task Force to identify and seize assets, including boats, planes, helicopters, real estate, and potentially art or other property. Each member jurisdiction uses its respective national authorities to collect and share information to enable U.S. and partner actions. If confirmed, I will work to maintain and develop cooperation, including through the law enforcement agencies represented at Mission UK, to provide the appropriate information to help the UK identify and appropriately freeze or seize Russian assets in their jurisdiction.

Question. If confirmed, how would you work with the British Government and the sanctions offices here to form a coordinated sanctions strategy targeting these Russian oligarchs?

Answer. If confirmed, I would maintain our already robust cooperation on sanctions. Since the start of Russia's war against Ukraine, more than 30 Allies and partners have joined the United States in rolling out sanctions on more than 2,100 Russian and Belarusian targets. Our Allies and partners have shown an unprecedented, shared commitment to work together to impose costs on Russia. The UK is a leader in this group, having introduced the Economic Crime (Transparency and Enforcement) Act, which allows the UK to immediately designate individuals and entities that have been designated by the UK's allies.

Question. Similarly, how would you combat dirty money coming from the Chinese Communist Party?

Answer. I am heartened by the continued coordination between the United States and the UK to hold corrupt regimes accountable and ensure our jurisdictions do not serve as havens for illicit finance. If confirmed, I am committed to working with our partners in London to ensure our two financial systems are not a safe haven for oligarchs, government officials and political party members—from any country—who empty the public coffers of their citizens for their own gains.

Question. The U.S.-UK transatlantic market is one of the most important aviation markets in the world. This is a market dominated by airline joint ventures that have immunity from the U.S. antitrust laws. U.S. airlines, especially new entrants to the transatlantic market, are having significant difficulty securing access at London-area airports thus limiting competition in this important market.

- What are your views on competition in the transatlantic aviation market, and will you commit to help such airlines grow in the UK and ensure that they are treated fairly by the UK Government?

Answer. American consumers benefit from an open and transparent transatlantic aviation market. If confirmed, a key priority of mine would be to work with Department of Transportation and Department of Commerce colleagues to promote opportunities for American companies, including in the commercial aviation sector.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED TO HON. JANE HARTLEY BY SENATOR TODD YOUNG

Question. If confirmed, how would you view your role in promoting and strengthening trade ties between the United Kingdom and the United States?

Answer. The UK is one of the United States' strongest trade and investment partners. If confirmed, it will be one of my top priorities to promote and strengthen trade ties between the United States and the UK and to see that economic bonds continue to grow and create American jobs. The United States and the UK have resolved numerous trade disputes over the past year, including on a June 2021 "cooperative framework" for large civil aircraft production and a March 2022 agreement to remove U.S. Section 232 tariffs for certain volumes of UK steel and aluminum products. The Section 232 tariff agreement also strengthens trade by countering unfair PRC practices that harm our industries and workers. If confirmed, I intend to work with the UK, across the interagency, and in consultation with Congress, to advance free, fair, and balanced trade between the United Kingdom and the United States.

Question. If confirmed, how would you operationalize the New Atlantic Charter signed in 2021 that emphasizes "open and fair trade?"

Answer. The New Atlantic Charter, released by President Biden and UK PM Johnson on the margins of the June 2021 G7 Leaders' Summit pledges to deepen cooperation on democracy and human rights, defense and collective security, science and innovation, and inclusive economic prosperity, and renew joint efforts to tackle the challenges posed by cybersecurity, climate change, biodiversity loss, and emerging threats. If confirmed I would work with the interagency and with Congress to strengthen trade with the UK that reflects the Biden-Harris administration's commitment to prioritizing America's working families. That includes supporting ongoing efforts to promote and strengthen trade ties, such as the recent U.S.-UK Dialogue on the Future of Atlantic Trade, which explored with a diverse group of stakeholders how we can collaborate to advance our shared trade priorities and promote a worker-centered, fair, and responsible global economy. I would also work to further strengthen our already close cooperation with the UK on addressing new and old challenges, as outlined in the Charter, and to counter the efforts of those who seek to undermine our values, alliances, and institutions.

Question. If confirmed, what would you see as your role as Ambassador in furthering AUKUS, the trilateral security pact between Australia, the UK, and the United States?

Answer. A free and open Indo-Pacific region is critical to the security and prosperity of the American people, and the AUKUS partnership will help defend and promote U.S. interests there for generations. I see my role as Ambassador, if confirmed, as working to fulfill our commitment to work with our closest ally to sustain peace and stability in the Indo-Pacific region. As Ambassador, I would work to promote efforts to strengthen trilateral security cooperation among Australia, the UK, and the United States through AUKUS and leverage the combined resources of these allies to direct more diplomatic, military, economic, and other resources to the region, including by further enhancing our cooperation on advanced capabilities.

Question. One of the elements of this AUKUS partnership is advanced capabilities, such as AI, cyber, and quantum technologies. In your view, how does this partnership with the UK further U.S. leadership in emerging technology?

Answer. Partnership with the UK and Australia on advanced capabilities, such as AI, cyber, and quantum technologies, will further U.S. leadership on emerging technology by enhancing our joint capabilities, interoperability, and fostering deeper information and technology sharing with our closest allies. AUKUS partners have made strong progress in the four advanced capabilities that the President and Prime Ministers identified in September 2021 and have recently initiated new trilateral cooperation on hypersonics and counter-hypersonics, and electronic warfare capabilities, as well as taken steps to expand information sharing and to deepen cooperation on defense innovation. Our cooperation will promote deeper information and technology sharing and foster further integration of security and defense-related science, technology, industrial bases, and supply chains. The United States and the United Kingdom both benefit from a firm foundation to help grow our economies through high-skill, high-paying jobs. Each nation also benefits from research centers through shared scientific breakthroughs and testing of next-generation military capabilities - combining our efforts to help the United States as well as its partners stay at the leading edge of technology advances. If confirmed, I look forward to representing U.S. interests as a leader in emerging technology.