NO. 05-20808

In The United States Court Of Appeals
For The Fifth Circuit

FEDERAL DEPOSIT INSURANCE CORP.,
As manager of the FSLIC Resolution Fund,
Plaintiff - Appellant,

v.

MAXXAM, INC.,
Intervenor Plaintiff - Appellee,

v.

CHARLES E. HURWITZ, et al.,
Defendants,

CHARLES E. HURWITZ, et al.,
Defendant - Appellee,

FEDERATED DEVELOPMENT CO.,
Intervenor Defendant - Appellee.

Appeal from the United States District Court, Southern District of Texas
(U.S.D.C. No. 4:95-CV-3956)

BRIEF OF APPELLEES

NICKENS, KEETON, LAWLESS, FARRELL & FLACK, L.L.P.
Jacks C. Nickens
600 Travis, Suite 7500
Houston, TX 77002
(713) 571-9191
(713 571-9652 (Fax)

ANDREWS & KURTH LLP
David P. Griffith
600 Travis, Suite 4200
Houston, TX 77002
(713) 220-4725
(713) 220-4285 (Fax)

BECK, REDDEN & SECREST, L.L.P.
David J. Beck
Russell S. Post
Keith A. Jones
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

ATTORNEYS FOR APPELLEES

NO. 05-20808

In The United States Court Of Appeals
For The Fifth Circuit

FEDERAL DEPOSIT INSURANCE CORP.,
As manager of the FSLIC Resolution Fund,
Plaintiff - Appellant,

v.

MAXXAM, INC.,
Intervenor Plaintiff - Appellee,

v.

CHARLES E. HURWITZ, et al.,
Defendants,

CHARLES E. HURWITZ, et al.,
Defendant - Appellee,

FEDERATED DEVELOPMENT CO.,
Intervenor Defendant - Appellee.

Appeal from the United States District Court, Southern District of Texas
(U.S.D.C. No. 4:95-CV-3956)

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:

Federal Deposit Insurance Corporation,
as manager of the FSLIC Resolution Fund

Counsel for Appellants:

Richard J. Osterman, Jr.,
Colleen J. Boles
Lawrence H. Richmond
Robert J. DeHenzel, Jr.
Douglas H. Jones (Acting General Counsel)

James A. Brown
Gene W. Lafitte
LISKOW & LEWIS, PLC

F. Thomas Hecht
Kathleen Holper Champagne
UNGARETTI & HARRIS LLP

Randolph D. Moss
Paul R.Q. Wolfson
Jonathan G. Cedarbaum
Kelley Brooke Snyder
WILMER CUTLER PICKERING HALE AND DORR, LLP

Appellees:

Charles E. Hurwitz
MAXXAM Inc.
Federated Development Company

In accordance with FED. R. APP. P. 26.1(a) and 5th Cir. R. 28.2.1, counsel certifies that no publicly held corporation owns 10% or more of the stock of either MAXXAM Inc. or Federated Development Company.

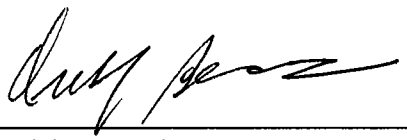
Substantial shareholders in MAXXAM with an indirect financial interest in the outcome of this case include Charles E. Hurwitz and his wife, trusts and other family-owned entities for their benefit, and a group of unrelated investors composed of Christian Leone, LCG Holdings, LLC, Luxor Capital Group, LP, Luxor Capital Partners, LP, Luxor Management, LLC and Luxor Capital Partners Offshore, Ltd.

Counsel for Appellees:

David J. Beck
Russell S. Post
Keith A. Jones
John S. Adcock
BECK, REDDEN & SECREST, L.L.P.

David P. Griffith
ANDREWS & KURTH LLP

Jacks C. Nickens
Richard P. Keeton
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.



David J. Beck
Attorney for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that oral argument would aid the decisional process.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTION

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

The ultimate question is whether the district court abused its discretion by sanctioning the FDIC for litigating in bad faith and for an improper purpose. That ultimate question presents several subsidiary questions, including:

1. Did the district court possess inherent power to sanction the FDIC for initiating and prosecuting this litigation in bad faith?

2. Did the district court possess authority under Rule 11 to sanction the FDIC for filing pleadings and prosecuting this litigation for an improper purpose?

3. With respect to either basis for sanctions, are the district court's factual findings of sanctionable conduct clearly erroneous?

4. Are the district court's factual findings concerning the amount of the sanction award legally inadequate or clearly erroneous?

5. In fashioning a monetary sanction, was the district court entitled to consider costs the FDIC imposed through its indirect pursuit of the Appellees in a related administrative proceeding?

6. May a federal court imposing sanctions on a government agency pursuant to its inherent power include compensation for the delay caused by the lost use of funds without the need for a waiver of sovereign immunity?

7. If a waiver of sovereign immunity is required as a precondition to an award of prejudgment interest against a government agency, under inherent power or Rule 11, does the sue-and-be-sued clause in the FDIC charter effect such a waiver?

STATEMENT OF THE CASE

Nature of the Case

This is a sanctions case involving litigation filed and prosecuted in bad faith and for an improper purpose. When it was filed, the case involved three claims by the Federal Deposit Insurance Corporation (FDIC) against Charles Hurwitz. DE 1. The FDIC claimed Hurwitz was liable for over $250 million in losses related to the failure of United Savings Association of Texas (USAT). *Id.*

The FDIC soon amended its pleadings to abandon all but one claim, DE 123, and after years of litigation it eventually abandoned that claim as well. DE 382. But in the interim, Hurwitz moved for sanctions on the ground that the suit was brought in bad faith and for an improper purpose. DE 197-98, 312, 322, 344, 378. The district court imposed sanctions on the FDIC once the astonishing story behind the litigation was exposed. DE 508, 529.

Course of Proceedings

The FDIC filed this lawsuit in 1995. DE 1. Following the failure of USAT, the Federal Savings and Loan Insurance Corporation (FSLIC) was named receiver and acquired the right to bring claims against those responsible for USAT's losses. Those rights were assigned to FSLIC in its corporate capacity. DE 1 at ¶¶ 4-10. Under the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), FSLIC was abolished and replaced by the FDIC. DE 1 at ¶ 10.

In its original complaint, in which the FDIC asserted claims it had acquired from FSLIC by virtue of FIRREA, the FDIC alleged that Hurwitz had acted as a "de facto director" of USAT and had thereby acquired a fiduciary duty to USAT—even though Hurwitz was not an officer, director, or shareholder. DE 1 at ¶ 11. Based on this novel premise—which had no support in Texas fiduciary duty law—the FDIC alleged that Hurwitz should be held liable for USAT's failure because he (1) failed to require two other companies to maintain USAT's regulatory net worth, DE 1 at ¶¶ 19-29, and (2) allowed USAT to invest in mortgage-backed securities. *Id.* at ¶¶ 30-54. The FDIC ultimately abandoned these claims, but not before the Appellees spent millions of dollars defending against them.

Soon after suit was filed, the FDIC caused the Office of Thrift Supervision (OTS) to file an administrative proceeding asserting substantially similar claims. That proceeding was filed at the behest of (and with funds provided by) the FDIC. *See* pp. 23-28, *infra*. The respondents named in the OTS case included Hurwitz, five individuals the FDIC viewed as his "core group," and two corporate entities—MAXXAM Inc. and Federated Development Company. R 27490-86, 29516.

Soon after the OTS proceeding was filed, the FDIC moved to stay this case. DE 37, 44. The district court refused. DE 42. Again, the FDIC moved for a stay. DE 65. Again, the district court refused. DE 111. MAXXAM and Federated were allowed to intervene in this case. DE 50, 115, 116, 122.

At that point, the FDIC filed an amended complaint that abandoned its mortgage-backed securities claims and recast the only remaining claim in a manner that made it contingent upon the outcome of the OTS case. DE 123. By doing so, the FDIC effectively granted itself the stay the court had denied it.

Hurwitz moved to dismiss the case and requested sanctions on the ground that the FDIC had filed this suit in bad faith and for political reasons. DE 197-98. As time passed, facts emerged that confirmed Hurwitz's suspicions. The FDIC had filed this lawsuit, despite *knowing* it had no legitimate grounds to sue Hurwitz, to serve a political agenda. The truth was exposed in three distinct venues.

First, the OTS proceeding exposed the vacuous nature of the FDIC's claims. At the end of a 119-day trial, an administrative law judge for the OTS dismissed all of the agency's claims on the merits and in doing so harshly criticized the OTS for making wholly unwarranted allegations of fact and presenting arguments having no legal basis whatsoever. R 27490-235 [RE 16].

Second, Congress took an interest in the FDIC's abusive litigation tactics, convening a special investigation. A Staff Report issued by the Committee on Resources of the U.S. House of Representatives disclosed documents that exposed the improper motivation driving this litigation. R 15540-493.

Third, the district court in this case issued a series of discovery orders compelling the FDIC to divulge the basis for its complaint. The FDIC vigorously fought discovery at every turn, but finally the truth came out: The FDIC had sued for an improper purpose, knowing it had no legitimate claim, and it tried for years to cover up that fact. *See* pp. 7-22, 28-31, *infra*. These revelations made it obvious that the FDIC had abused both Hurwitz and the district court.

Hurwitz renewed his motion for sanctions in light of all these disclosures. DE 378. MAXXAM and Federated joined the motion for sanctions. *Id.*

In 2004, the district court held a two-day hearing on the sanctions motion. 1st Supp. R 7-8. The district court ultimately issued a 133-page order detailing the evidence and sanctioning the FDIC based on its factual findings that the litigation was legally and factually frivolous, brought in bad faith for an improper purpose, and conducted in an abusive and dishonest manner. DE 508, 529.

STATEMENT OF FACTS

Introduction

This sanctions case arises out of a poorly conceived and politically inspired attempt by the FDIC to pin more than $1 billion in liability on Charles Hurwitz for the failure of a thrift despite the undisputed fact that Hurwitz was never an officer, director, or shareholder of that institution.

Appellant is the FDIC, which filed the original lawsuit, DE 1, abandoned it, DE 123, 382, and is now ordered to pay the Appellees' costs and fees as a sanction. Appellees are Charles Hurwitz, MAXXAM Inc., and Federated Development Co. Hurwitz was the defendant in the original suit. DE 1. MAXXAM and Federated were defendants in the related administrative proceeding orchestrated by the FDIC, and they intervened in this litigation. DE 50, 115, 116, 122.

Because the FDIC's case arose from the ashes of the savings and loan crisis, the underlying claims in this case involved complex banking and regulatory issues. But the real story of the case is neither complex nor unique to the banking industry. It is a story of litigation brought without any substantial factual or legal foundation to serve an improper political agenda. It is a story, moreover, that does not depend on inference or innuendo; the record contains objective proof that the FDIC *knew* its claims were baseless but pursued them—at great financial and emotional cost—in a misguided and futile attempt to achieve blatantly political goals.

Debt for Nature

The story of this case begins in the early days of the Clinton Administration. At that time, environmental activists were urging the administration to take action to preserve the California Headwaters, a redwood forest. Near the end of 1993, Representative Dan Hamburg proposed legislation to buy the Headwaters outright.[1] But the price was too high and the government lacked the cash to buy it.[2]

Unable to obtain the redwood forest with a carrot, the environmental lobby went looking for a stick. The forest was owned by Pacific Lumber Company. Pacific Lumber, in turn, was owned by MAXXAM.[3] Because MAXXAM's CEO, Charles Hurwitz, was an investor in the savings and loan industry, environmental lobbyists looked to the fallout from the savings and loan crisis for their stick.

The environmentalists conceived an idea that they called "debt for nature," in which the FDIC would threaten Hurwitz with ruinous liability for the failure of United Savings Association of Texas (USAT)—a thrift in which he had indirectly held a financial stake—and would use that threat as a stick to induce Hurwitz to trade the redwood forest in settlement.[4]

---

[1] R 34101; Headwaters Forest Act, H.R. 2866, 103d Cong. (1993).
[2] R 34116; R 29207; R 29606 [RE 5].
[3] R 30269.
[4] *E.g.*, R 29918-17 [RE 1]; R 29915 [RE 2]; R 29776-75, 29749-47 [RE 4]; R 29604-591 [RE 6].

Environmental activists clamored insistently for prosecution of Hurwitz and MAXXAM, bringing pressure to bear at several levels of the federal government.[5] By 1994, this political agenda began to bear fruit. Representative Henry Gonzalez, the chair of the Congressional oversight committee with authority over the FDIC, admonished the FDIC that evaluating potential claims against MAXXAM was "particularly critical" given "the prospect of payment" for the Headwaters.[6] Internal FDIC documents confirm that the FDIC got the message: "Evidently, [FDIC] is supposed to pursue" potential claims against MAXXAM and Hurwitz.[7] Accordingly, the FDIC reviewed the debt-for-nature strategy and "assured" interested politicians it would "follow this issue closely."[8]

In early 1994, FDIC representatives met with Representative Hamburg, sponsor of the Headwaters bill, to discuss the prospect of bringing suit against MAXXAM and Hurwitz as a way to create leverage to acquire the Headwaters. The FDIC assured Representative Hamburg that it was considering claims of the "most optimistic dreams" and suggested that, if Hurwitz could be convinced that the FDIC had a "claim worth $400 m[illion] & they want to settle," the claim could create leverage as "a hook into" MAXXAM.[9]

---

[5] *Id.*
[6] R 34101; R 29962-961.
[7] R 29938-925.
[8] R 29918-917 [RE 1]; R 29915 [RE 2].
[9] R 29913 [RE 3]; R 34099.

The very next day, the FDIC took two steps to set the hook. First, the FDIC wrote to officials of the Office of Thrift Supervision (OTS) to solicit its assistance. (As the federal regulatory agency responsible for regulating savings and loans, OTS has authority to bring claims in its regulatory capacity that the FDIC is unable to bring in its capacity as an insurer or receiver.) The FDIC acknowledged that it lacked a viable claim of its own but reported the debt-for-nature political agenda and the interest of powerful elected officials.[10] Within one month, OTS requested "a more in-depth analysis" and advised the FDIC that, because it could not afford such a prosecution itself, it would have to be paid by the FDIC.[11]

Second, the FDIC legal staff turned to the FDIC legislative affairs office for political advice about the best outside counsel to hire for the Hurwitz investigation. FDIC legislative affairs officers advised the legal staff that the FDIC "would catch less political heat" if it hired an outside firm with "environmental connections."[12] The FDIC followed that advice and retained an environmentally connected firm, which "step[ped] up pressure against" Hurwitz even as "senior members of Congress kept up pressure on the FDIC."[13]

---

[10] R 34099-098; R 29906-9897.
[11] R 34097; R 29888-887.
[12] R 29895.
[13] R 34098-97; R 33285; R 33253; R 33247; R29892; R 29882; R 29831-29.

As 1994 went on, the FDIC found itself facing "an intense lobbying effort" to manufacture (and trade) "FDIC and OTS claims" for the Headwaters forest.[14] Representative Hamburg's aide said, "The more pressure the government puts on" Hurwitz through the FDIC, "the better our hopes of saving those forests become."[15] The FDIC took note, and this pressure spurred the FDIC into action. By summer, the FDIC was pursuing an unprecedented strategy to "develop an aggressive and high profile damages case" as "a bargaining chip" for "the redwoods."[16]

The FDIC was unable to identify a sufficiently threatening claim of its own, so it "develop[ed] a new strategy for pursuing" Hurwitz and MAXXAM by using OTS as a cat's paw to bring regulatory claims in an administrative proceeding—which the FDIC considered "the most advantageous" venue.[17] According to the FDIC's own documents, the FDIC conceived this two-pronged offensive so that "issues involving the redwood forests might be brought into play."[18] As a result, Hurwitz and MAXXAM would now "confront two agencies in different venues," "add[ing] significant pressure," because "combining FDIC & OTS claims—**if** they all stand scrutiny—is more likely to produce a large recovery/the trees than a piecemeal approach."[19]

---

[14] R 29604 [RE 6].
[15] R 34097-096; R 29882.
[16] R 34096-096a; R 29597 [RE 6].
[17] R 29559-558; R 28032-031.
[18] R 29865.
[19] R 33292; R 29872-871 (emphasis in original).

FDIC Investigations Reveal No Viable Claim Against Hurwitz

This debt-for-nature agenda placed Hurwitz squarely in the FDIC's sights, but 1994 was hardly the first time the FDIC had heard of Charles Hurwitz. Indeed, by the time of these fateful events, the FDIC had been examining (and rejecting) potential claims against Hurwitz for years.

Hurwitz had come to the attention of the FDIC as a result of his involvement with USAT even though he was never a USAT officer, director, or shareholder. His relationship to USAT was indirect: Hurwitz owned 52% of MAXXAM, which owned 24.9% of United Financial Group (UFG), which owned 100% of USAT.[20] Hurwitz was CEO of MAXXAM, and he served as chairman of UFG for five years ending in early 1988.[21]

USAT became embroiled in the savings and loan crisis that swept the nation, and especially Texas, during the 1980s. The story of the savings and loan crisis is well known, and USAT's difficult experience was not unusual. In the early 1980s, rising interest rates created dramatic imbalances with fixed-rate 30-year mortgages, the primary investment vehicle of savings and loans. As a result of this imbalance, USAT was losing millions.[22]

---

[20] R 34119.
[21] R 20988.
[22] R 34114; R 21091, 21083; R 21034.

At the beginning of the crisis, neither Hurwitz nor MAXXAM was involved. In 1983, MAXXAM acquired nearly 25% of UFG and Hurwitz joined its board.[23] MAXXAM was interested in purchasing a greater stake in UFG, but as a condition, regulators insisted that MAXXAM guarantee maintenance of USAT's net worth. Unwilling to shoulder that obligation, MAXXAM refused to increase its stake.[24] Nonetheless, MAXXAM's limited investment in USAT enthused the regulators, who considered MAXXAM a "source of strength" and regarded Hurwitz as a "smart businessman."[25]

As the savings and loan crisis deepened, USAT diversified by investing in mortgage-backed securities, high-yield bonds, and other fixed-income securities.[26] Understanding the details of those strategies is not crucial now; what is important is that regulators "credit[ed]" USAT as "one of the stronger financial institutions" in the region because profits on its investment portfolios offset its loan losses.[27] But USAT's strategy of diversification could not overcome the larger forces at work in the economy. Like 3000 other savings and loans, USAT ultimately failed. The failure of USAT (and its parent, UFG) resulted in multi-million-dollar losses to MAXXAM and, indirectly, to Hurwitz.[28]

---

[23] R 34119; R 34114-13; R 30214; R 29482.
[24] R 30210; R 30196, 30187-186; R 29897.
[25] R 30339; R 30118-117.
[26] R 34110; R 30108-106.
[27] R 34110; R 30119.
[28] R 34113; R 30709; R 30695; R 30582; R 30212; R 30182; R 28135; 28132-131.

After the failure of USAT, the FDIC investigated Hurwitz and MAXXAM (as it did many participants in failed savings and loans) but found no wrongdoing. The investigation revealed no "fraud, gross negligence, or patterns of self-dealing." At worst, the FDIC learned, there had been merely "poor business judgment."[29] Specifically, the investigation found:

- "no direct evidence of insider trading, stock manipulation or theft of corporate opportunity . . . ."
- Given "reliance on outside auditors, it will be hard to prove gross negligence or breach of duty unless there was actual fraud and we have been unable to find such evidence."
- "The proof indicates more than anything else that the directors and senior management found themselves trying to keep the institution afloat . . . ."[30]

It is common knowledge that outside FDIC counsel conducting such investigations "always want to sue."[31] But in this case they concluded the probability of success was less than 50%, indicating that the FDIC should *not* sue.[32]

The FDIC forwarded its initial analysis to OTS and continued to update OTS about potential claims for three years (while the FDIC investigation continued).[33] But OTS showed no interest.[34] In 1994, however, political pressure persuaded both agencies to take another look.

---

[29] R 30576.
[30] R 30569, 30567-566.
[31] R 29872.
[32] R 33251-250; R 30569, 30566, 30546; R 25953; *see also* R 33320-316 [RE 10].
[33] R 28461; R 30602-0586; R 29906-9897.
[34] R 34101.

Having promised the political powerbrokers that it would develop a claim for use as leverage in the debt-for-nature swap, the FDIC faced "2 basic issues." On one hand, the FDIC legal staff felt a "high level of discomfort on the merits." But on the other hand, the FDIC was now under "subst[antial] political attention" from a "wholesale barrage" of debt-for-nature overtures.[35] The political pressure was reaching critical mass: The FDIC noted that 34 of the 132 House sponsors of the Headwaters legislation were serving on "Committees dealing with FDIC."[36] From the other end of Pennsylvania Avenue, the White House added its influence: Because budgetary realities prevented "outright federal purchase" of the redwoods, the White House took the view that a debt-for-nature swap was "worth pursuing."[37] As an internal FDIC document euphemistically put it, the FDIC was finding that an "overlay of political issues . . . must be considered."[38]

In search of a viable claim, the FDIC turned to environmentalists for advice. FDIC lawyers consulted with an environmental group called the Rose Foundation, which provided a barrage of materials and legal advice about the potential claims.[39] (Before taking seriously the FDIC's boasts about its "independent investigation," the Court should examine the materials attached at Record Excerpts 4-6.)

---

[35] 1st Supp. R 8:179; R 34095.
[36] R 29840-837.
[37] R 29606 [RE 5].
[38] R 33314-313.
[39] R 29776-75, 29749-47 [RE 4]; R 29604-591 [RE 6]; R 34092-91; R 29840-37; R 29825-778; R 29749-45; R 29743-38; R 29700-694; R 28331.

As 1994 turned into 1995, the FDIC continued to search for a viable claim. FDIC representatives continued to receive information from the Rose Foundation, analyzed potential claims, and conducted "forest valuation options."[40] In addition, FDIC representatives continued to meet with advocates of a debt-for-nature swap, like "a group closely associated with the Rose Foundation" that was "conducting much of the lobbying effort" in support of the debt-for-nature political agenda.[41] The FDIC described this process as "exploring creative options" to, in its words, "induce a settlement involving the...redwoods in the FDIC/OTS case."[42]

The FDIC investigation came to a head in August 1995, when an imminent statute of limitations deadline forced the FDIC into a decision on debt-for-nature. As the deadline approached, the White House tried to dictate the FDIC's decision: Department of the Interior representatives told the FDIC, "Admin[istration] wants to do deal" so the FDIC must "find way to make it happen."[43]

Still, the FDIC legal staff resisted. After a six-year, $5 million investigation, the FDIC legal staff concluded the risk of summary dismissal was "at least" 70%—and even if it was not dismissed, the case was "marginal at best."[44] Consequently, the FDIC legal staff's "final" decision was not to sue.[45]

---

[40] R 29776-738; R 29700-694; R 28190.
[41] R 34090; R 29602-601 [RE 6].
[42] R 34088; R 29586.
[43] R 34086; R 29572-570 [RE 9].
[44] R 34086-085, 34013; R 33252; R 30037; R 29522.
[45] R 34086-084; R 33320-316 [RE 10]; R 29547; R 27074-073.

Political Pressure Leads the FDIC to Reverse Course

The staff decision not to sue would "ordinarily close out the investigation."[46] There was nothing unusual about the legal staff's recommendation in this instance; as a matter of policy, the FDIC does not sue unless its odds are better than 50%.[47] By its own independent assessment, the FDIC's potential case against Hurwitz did not even approach that threshold. That should have been the end of the matter.

Nevertheless, the FDIC legal staff knew that this case had a "high profile," as "evidenced by numerous letters from Congressmen and environmental groups." Accordingly, the FDIC staff took (in their words) the "unusual step" of briefing FDIC Chairman Ricki Helfer about their recommendation not to sue.[48] That day, Helfer called the FDIC general counsel alone into her office and instructed him to "take another look." The FDIC legal staff understood that Helfer had "decided" to sue Hurwitz and had "directed" them to reverse their recommendation.[49]

Their independence compromised, the legal staff faced a moment of truth. Internal FDIC documents confirm that they knew, if suit was filed against Hurwitz, there was a very real chance that the FDIC would be "[h]it for dismissed suit."[50] But failing to sue would "attract media coverage and considerable criticism."[51]

---

[46] R 34086-084; R 33320-316 [RE 10]; R 29566; R 29547; R 27074-073.
[47] R 29575-574; R 28130; R 27987-889; R 26554-420.
[48] R 34085; R 33320 [RE 10]; R 31501; R 29568; R 29566; R 29547; R 27554-553; R 27074.
[49] 1st Supp. R 6:265-66; R 34084-082; R 33322; R 27549, 27548; R 27177, 27175; R 27084.
[50] R 29568, 29565.
[51] R 29557.

The FDIC legal staff knew that the White House, members of Congress, the media, and "Tree people" were "seriously interested in pursuing" a debt-for-nature swap, and these various constituencies were counting on the FDIC to create the debt.[52] As a result, the FDIC staff felt there was pressure from Congress to do the deal, recognizing that "[i]f we drop suit, will undercut everything."[53]

The FDIC caved to the pressure. With the statute of limitations about to run, the legal staff rewrote its recommendation in one day—now recommending suit.[54] The new Authority to Sue memorandum (which the parties call the "ATS memo") was an odd document with Jekyll-and-Hyde characteristics: Because it originally had been written to support one result and then hastily revised to support the opposite result, the memo's conclusions were often divorced from its reasoning.[55] Moreover, the new ATS memo invented new potential claims out of whole cloth, such as an admittedly "unconventional" fiduciary duty claim conceived for the sole purpose of keeping the case alive after the conventional claims were dismissed.[56] Although Hurwitz was never a fiduciary of USAT, he was targeted for this claim—even though the FDIC had declined to sue USAT's real fiduciaries.

---

[52] R 34089; R 29882; R 29566; R 29533-532.
[53] R 29572 [RE 9]; R 26191-189.
[54] R 34082-081; R 29540-457.
[55] *See* R 29540-457.
[56] R 29907-9897; R 29567-566; R 27550-549; R 27128-127; R 27076; R 24596, 24593; *compare* R 33321-316 [RE 10].

With the ATS memo freshly rewritten, the FDIC board met August 1, 1995, just one day before a tolling agreement extending limitations was set to expire.[57] No one informed the board of the legal staff's initial decision *not* to sue. Instead, Helfer repeatedly referred to the ATS memo as "the staff's recommendation," concealing that she had trumped the staff's independent professional judgment.[58]

In presenting the ATS memo to the board, a member of the FDIC legal staff candidly conceded that sustaining a case against Hurwitz would be "difficult."[59] "It presents, in my view, one of the . . . most difficult problems the Professional Liability Section has presented to the Board."[60] The staff presented three claims: two alleging that Hurwitz should be held individually responsible for losses related to USAT's mortgage-backed securities portfolios, and a third based on the theory that Hurwitz was a "de facto" director of USAT owing an informal fiduciary duty to cause *other* companies (to whom he indisputably owed formal fiduciary duties) to shore up the net worth of the failing thrift in its death throes.[61]

---

[57] R 34081-076; R 29361-308. The FDIC invites the Court to listen to the audio recording of the board meeting, FDIC Br. at 60, and the Appellees agree. The audio recording is in the record, 1st Supp. R Ex. 123A, and an excerpt was played during the sanctions hearing. 1st Supp R 7:77. The audio recording breathes life into the events recounted here, and it gives a full picture of the "nervous laughter" discussed in the district court's opinion. R 34076-79.

[58] *E.g.*, R 29335 [FDIC RE 5 at 26]; R 29333-31 [FDIC RE 5 at 28-29].

[59] R 29439 [FDIC RE 5 at 12].

[60] R 29439.

[61] R 29354-29351 [FDIC RE 5 at 7-10].

With respect to the mortgage-backed securities claims, the FDIC legal staff acknowledged that the FDIC would confront "statute of limitations problems."[62] These MBS claims would cover, at most, only the tail end of USAT's operations, because "the statute of limitations in Texas will make it virtually impossible to recover on the prior claims."[63] Similarly, with respect to the claim that Hurwitz owed a fiduciary duty to subsidize the failing thrift with assets of other companies for whom he was an officer or director, the legal staff advised the FDIC board that "we think that this is a very difficult claim. . . ."[64]

Nevertheless, as the legal staff explained to the board, the debt-for-nature political strategy had made this case "a very visible matter."[65]

> It is visible for something having no direct relationship to this case, but having some indirect relationship. Mr. Hurwitz, through Maxxam, purchased Pacific Lumber. Pacific Lumber owns the largest stand of virgin redwoods in private hands in the world, the Headwaters. That has been the subject of . . . considerable environmental interest, including the picketing downstairs of a year or so ago. It has been the subject of Congressional inquiry and press inquiry. So we assume that whatever we do will be visible.
>
> [Y]ou should also be aware the Department of Interior is trying to put together a deal to get the Headlands [sic], trade property, and perhaps our claim. . . . [S]taff of the FDIC has indicated that we would be interested in working with them to see whether something's possible.[66]

---

[62] R 29353 [FDIC RE 5 at 8].
[63] *Id.*
[64] R 29352 [FDIC RE 5 at 9].
[65] R 29350 [FDIC RE 5 at 11].
[66] R 33386-385 [FDIC RE 5 at 11-12].

In summary, the FDIC legal staff warned the board "there is a very high risk, we estimate 70 percent, that the mortgage backed securities claims would eventually be lost on statute of limitations grounds, whether on motion or at trial," and although the statute of limitations problem did not afflict the net worth claim, "i[t] is a very difficult claim on the merits."[67]

The potential claims were discussed at length. In response to questions about the limitations issue, FDIC legal staff explained that controlling Fifth Circuit precedent made that barrier insuperable. "The Fifth Circuit, in the *Acton* decision a couple of months ago, said gross negligence is not enough [to toll limitations]. You must have fraud or intentional self-dealing and, on that basis, we don't believe we can meet that standard in this case. We don't believe we can win a tolling argument in the Fifth Circuit, in this case."[68]

Then, in an extraordinary exchange, the FDIC legal staff advised the board that filing suit would invite a Rule 11 motion: "[W]e expect, if we bring this claim, we will see Rule 11 motions."[69] The legal staff opined that the potential claims "should" survive a Rule 11 motion, but "I don't warrant that they will."[70] Candidly, the FDIC legal staff told the board, "It's possible we'd lose it."[71]

---

[67] R 29348 [FDIC RE 5 at 13].
[68] R 29344-43 [FDIC RE 5 at 17-18].
[69] R 29341 [FDIC RE 5 at 20].
[70] R 29335 [FDIC RE 5 at 26].
[71] R 29341 [FDIC RE 5 at 20].

Looking past the prospect of sanctions on the statute of limitations issues, the staff resisted efforts by Chairman Helfer to paint a rosier picture of the merits: "I'm not going to argue that there is a better than 50 percent chance of recovery."[72] Following a full discussion of these issues, none of the FDIC directors was willing to make a motion to file suit.[73]

But Chairman Helfer again refused to let the misbegotten case die. Instead, she requested legal advice about whether she could move to file the lawsuit herself. After being told that she could do so, Chairman Helfer moved to file the lawsuit—but no director was willing to second the motion.[74]

One director noted that this situation was unprecedented: "I've never seen this before."[75] Helfer pleaded with the other three directors for a "recorded vote." "So I ask for a second to my motion so we can have a recorded vote on whether to institute suit."[76] Finally, the vice chairman agreed to second the chair's motion—but only after being assured that he could vote against the motion on the merits.[77] The vote was not to sue.[78]

---

[72] R 29334 [FDIC RE 5 at 27].
[73] R 29331 [FDIC RE 5 at 29].
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] R 29330 [FDIC RE 5 at 30].
[78] R 33363-360. Though the vote was recorded as being 2-2, the reality was even more negative. Chairman Helfer was actually the only vote in favor of suit; two members voted not to sue and the fourth voter (a proxy) abstained. After a delay prompting laughter, the proxy member said, "I think I would defer to the Chair in this case and in the first request vote with the Chair." *Id.*

Once again, the FDIC would not let the case die. This time, FDIC director Jonathan Fietcher—the acting director of the OTS, with whom the FDIC was now collaborating in its pursuit of Hurwitz—moved to "revisit" and "reconsider."[79] Chairman Helfer urged the board to authorize suit, expressing optimism based on "my own . . . greater experience at the appellate level in the Fifth Circuit, admittedly with one of the sounder judges of the Circuit, which are not the ones that we seem to come before."[80] Finally, the vice chairman said "the economics of the thing still doesn't make sense. But, in the sense of collegiality, if – if the Chairman is interested in having this go forward, I'm willing to let it go forward."[81] And with that less than rousing endorsement, the FDIC voted to file suit.[82]

The FDIC Files Suit and Procures the OTS Administrative Case

On August 2, 1995, the FDIC sued Hurwitz for $250,000,000.[83] Publicly, the FDIC stated it was "open" to settling the case with a "debt-for-nature" swap.[84] Privately, the FDIC was more explicit: The lawsuit would serve as legal leverage to accomplish a "'political' goal."[85]

---

[79] R 29330-29 [FDIC RE 5 at 30-31].
[80] R 29312 [FDIC RE 5 at 48].
[81] R 33374, 33371, 33365-364, 33340, 33336, 33332-331.
[82] R 29309-08 [FDIC RE 5 at 51-52].
[83] R 0022-0001.
[84] R 29294-292; R 29283-282; R 29277-273; R 29100-097.
[85] R 34064-059; R 33242-241 [RE 14]; R 29290-289.

The FDIC lawsuit was simply the first step in a concerted two-part strategy. Recall that when the debt-for-nature strategy had begun to percolate a year earlier, the FDIC had tried to interest OTS in bringing a regulatory action against Hurwitz and MAXXAM. At that time, OTS was unwilling to file such a claim because it would be expensive and it would not meet agency guidelines. *See* pp. 9, 13, *supra*. To overcome this reluctance, the FDIC agreed to pay for the "services" of OTS (*i.e.*, subsidize the OTS case) in exchange for the financial rewards of the action.[86] The FDIC took this unusual course because, in its words, "FDIC's claims alone" were too weak "to cause Hurwitz to offer the Headwaters." The OTS claims could "fill the gap bet[ween] forest value & FDIC claims."[87]

In December 1995, months after the FDIC suit was filed, OTS followed suit. OTS sued for $835,101,405 of "restitution," which would be paid to the FDIC.[88] The claim dwarfed MAXXAM's market capitalization, threatening its existence.[89] The combined FDIC/OTS claim thus created an amount in controversy exceeding $1 billion—which offered a convenient bargaining chip for the $499-million forest, because the FDIC believed banking claims could be settled for 50¢ on the dollar.[90]

---

[86] R 34096a; R 29888-887; R 29869-867; R 29863-558; R 28032-031.
[87] R 29212; R 28981; R 29119. The FDIC could not sue MAXXAM on its own claims because the statute of limitations had expired and the FDIC had no tolling agreement with MAXXAM. But OTS enjoyed a longer statute of limitations.
[88] R 28962-881.
[89] R 29458; R 29305; R 28941, 28917, 28894-893, 28818-816.
[90] R 34059; R 29056.

The FDIC Seeks to Avoid Judgment Day in District Court

Even before Hurwitz answered the lawsuit, the FDIC already was planning for the need to explain "the good faith basis of the allegations of the Complaint (i.e. a Rule 11 challenge) . . . ."[91] As the FDIC legal staff had correctly anticipated, Hurwitz promptly moved to dismiss.[92] The FDIC did not want to invite scrutiny of its claims by the district court, but it needed to keep the lawsuit alive because it knew that the "risk of litigation is what's driving" the debt-for-nature agenda and "if FDIC loses the pressure is off."[93]

Twice, the FDIC moved to stay this case in favor of the administrative case. Both times, the district court refused.[94] So the FDIC abandoned its first two claims (based on the mortgaged-backed securities) and repleaded the one remaining claim (the net worth maintenance claim) to be contingent on the result of the OTS case, effectively abating this case until after the conclusion of the administrative case.[95] Internal documents suggest that the FDIC wanted the OTS case to "go first" because it preferred the "Admin. proceeding" to "Federal Dist. Ct."[96]

---

[91] R 33256-254.
[92] R 0371; R 0391.
[93] R 34060, 34056, 34051, 34037-36, 34020-015; R 29207 [RE 13].
[94] R 2591; R 1907-1757; R 1378; R 1132-128, 1137-133.
[95] R 34056-055; R 2657-647.
[96] R 28983-981.

The OTS Case Is Rejected in a Critical Opinion

Here, the story diverges. Hurwitz sought discovery in federal district court to expose the groundless nature of the FDIC's allegations. The FDIC, meanwhile, pursued Hurwitz and MAXXAM in the administrative case through the OTS—paying OTS millions of dollars to prosecute that case.[97] Both stories are important; we will turn first to the OTS administrative proceeding.

Discovery in the OTS case consumed four years and millions of dollars. The OTS case included Hurwitz, MAXXAM, Federated, and five individuals who the FDIC had targeted as "Hurwitz's core group."[98] These five individuals were "pressured to make untruthful statements" in order "to implicate Hurwitz."[99] (FDIC/OTS later released them for a fraction of their legal fees.[100]) Along the way, the parties spent 169 days taking depositions and two million pages of documents were produced. When the trial finally arrived, it lasted 119 days over two years.[101] The OTS proceeding imposed defense costs rivaling the largest fines in the history of U.S. banking enforcement, and it accomplished the FDIC's "'political' goal" of having Hurwitz "feel some pain."[102] But it accomplished little else.

---

[97] R 29890-887; R 29731; R 28071; R 27800-799, 27748; R 27218.
[98] R 34050-049; R 29519-517, 29497; R 28962-8881, 28880-810.
[99] R 33283, 33281-280.
[100] R 34050-049; R 28100-092; R 27024-6886.
[101] R 34005-004; R 33512-442; R 31493-491; R 29457; R 28147-138: R 28129-122.
[102] R 33242-241 [RE 14].

After a 119-day trial, an administrative law judge employed by the OTS found the OTS claims had no merit.[103] The FDIC and OTS presented 13 claims in the OTS case, including the net worth maintenance and mortgage-backed securities claims that ultimately formed the basis of the FDIC's lawsuit against Hurwitz.[104] Early in the administrative case, the ALJ gave his agency the benefit of the doubt and refused to recommend dismissal of the claims. But after hearing the evidence, the ALJ ridiculed them.

The ALJ denied the claims in a 248-page opinion that deserves close study. The ALJ rejected the net worth maintenance claim as "singularly unpersuasive."[105] The mortgage-backed securities claims had "no plausible basis" and "not a scintilla of evidence," resting on "implausible assumption" and "specious" contentions.[106] The ALJ found that OTS had merely "search[ed] the records for roads not taken" and "with the benefit of hind-sight, then ascribed fault to those who made decisions without knowledge of what the outcome would be." In the final analysis, these allegations amounted to "little more than unseemly name-calling . . . ."[107]

---

[103] R 27490-233.
[104] R 27478-459 (net worth maintenance claims); R 27450-405 (MBS claims).
[105] R 27454.
[106] R 27438, 27434, 27431.
[107] R 27438, 27434, 27432-431, 27417.

The ALJ was no more charitable to the other claims, many of which likewise suffered from "a complete failure of proof"[108] and lacked any "plausible basis," leading him "to the ineluctable conclusion" that OTS was "fashioning criticisms" solely to "impos[e] liability on Respondents."[109] In sum, the ALJ concluded that the claims rested on a "distortion" of the truth. By any fair reading of the facts, "the record amply demonstrates that [Hurwitz's] activities at UFG and USAT were intended for their benefit, not their detriment, though ultimately his effort did not save the institution from failure."[110]

This opinion, rendered by an officer of the very agency pressing the claims, undercuts the FDIC's harsh assessment of the judge who imposed these sanctions. The ALJ found that his agency, having "a rather unrestrained view of [its] powers" and ignoring governing legal principles that could not "creditably be contested," had taken positions that were "inconceivable" for "any regulatory agency."[111] Although the government may demand that citizens "turn square corners" with it, "It is no less good morals and good law that the Government should turn square corners in dealing with the people . . . ."[112] The full ALJ opinion is attached in the Appellees' Record Excerpts, and it reinforces the district court's factual findings about the merits of the underlying claims.

---

[108] R 27465, 27456, 27454, 27450.
[109] R 29479, 27401, 27397.
[110] R 27415.
[111] R 27480-479, 27443, 27421, 27415, 27398.
[112] R 27480-479, 27443, 27421, 27415, 27398.

After the ALJ rendered his opinion, OTS had 90 days to finalize its decision in the administrative case.[113] But the OTS failed to act on the ALJ opinion. Finally, 400 days after the ALJ had rendered his opinion, MAXXAM agreed to settle the billion-dollar case for nuisance value of $206,000.[114]

The Sanctions Proceedings

Following its ignominious defeat in the OTS case, the FDIC abandoned its lawsuit against Hurwitz for nothing—but not before forcing him to endure years of financial and personal torment.[115] While the case was still ongoing Hurwitz sought discovery to clear his name and to expose the reasons he had been made to suffer, but the FDIC resisted discovery bitterly—and with good reason. Once the truth became known, it was damning.

It is unnecessary to recount the discovery proceedings in detail at this stage. For present purposes, there is one crucial fact: Most of the incriminating evidence about the debt-for-nature strategy and the politics motivating this suit was hidden, and the FDIC struggled mightily to keep it secret. When the facts became known, it became apparent that not only Hurwitz, but also the court, had been the victim of the FDIC's abusive litigation tactics.

---

[113] 12 C.F.R. § 509.40(c)(2).
[114] R 34047, 34003; R 24850-844.
[115] R 21119-118.

For example, the record reveals a litany of abusive tactics designed to hide the debt-for-nature agenda and the true facts from Hurwitz and the district court:

- FDIC swore there were no preliminary drafts of the ATS memo—when, in fact, there were drafts recommending against suit;[116]
- FDIC withheld documents—silently at first and then with massive, tardy privilege logs based on unfounded privilege claims;[117]
- FDIC "lost" presumably adverse documents, even those it logged.[118]
- FDIC failed to disclose critical documents until Hurwitz uncovered them by independent means, then shuffled its documents within its warehouses to render the document indices obsolete;[119] and
- FDIC refused to produce documents in the possession of OTS despite the fact that the FDIC had statutory and contractual rights to the documents and was paying OTS millions to litigate its claims.[120]

Most of the FDIC's discovery abuses were not exposed until an investigation was convened by Congress about this very case. As a result of that investigation, the House Committee on Resources released a Staff Report condemning the FDIC and OTS for their conduct in this litigation and disclosing the critical documents. According to that report:

---

[116] 2nd Supp. R 1 Ex. 358; R 34031-030; R 33320-316 [RE 10]; R 31585-503; R 29560-541; R 29281-278; R 29195; R 24599-553.
[117] R 34034-028; R 28752-749; R 28742-740; R 28735-734; R 28725-724; R 28469-192; R 2645; R 1960-956, 2105-1961; R 249-195.
[118] R 34029; R 29222-220; R 28809-807; R 28803-800; R 28489-487; R 28484-482; R 28391-390, 28335; R 2099-098.
[119] R 34036-035; R 29970-964; R 29222-216; R 29091-089; R 288806-800; R 28761-753; R 28748-743; R 28739-736; R 28733-730; R 2100-099, 2095; R 1960-956; R 238.
[120] R 34036-034; R 30598; R 29864-859; R 29673-670; R 28486-85; R 28071; R 27873; R 27858-55; R 2397-396; 12 U.S.C. §1821(a)(1)(B) & (o).

> **While many of the documents and records disclosed may be quite embarrassing to the bank regulators, embarrassment is no basis for keeping the information about the unauthorized redwoods debt for nature scheme secret.** Some sunshine will expose the unauthorized redwoods agenda of the bank regulators in this case and sanitize the system in the future.[121]

The release of those documents was a watershed event, confirming Hurwitz's suspicions about the origins of this case.

The revelations of the Congressional task force also exposed the FDIC's lack of candor in discovery. The FDIC presented Jeff Williams, its senior attorney on USAT, as its official corporate representative in accordance with Rule 30(b)(6). Williams unequivocally testified, under oath, that the FDIC did not "consider" the debt-for-nature agenda or "spend[] any time at all evaluating," "discussing," or "analy[zing]" it "in any way whatsoever."[122] In his deposition, he assured Hurwitz and the district court that the FDIC had behaved as it does in "every other" case,[123] swearing the FDIC had sued because it found "egregious wrongdoing occurred."[124] But Williams did not reveal the real political agenda or the fact that the legal staff had originally recommended *against* suit. The subsequent document disclosures revealed that the FDIC had hidden the truth and Williams had lied under oath:

---

[121] R 15537-36 (emphasis in original).
[122] R 34025-023; R 27740, 27737.
[123] R 27737.
[124] R 27737.

- Williams *himself* knew "the case has provoked considerable press and other interest, primarily because of Hurwitz and his control of Pacific Lumber. . . . [T]here is an overlay of political issues which must be considered," including evaluating "various 'creative' legal claims against Hurwitz and his companies" and "the so-called 'debt for trees' . . . ."[125]

- Williams *himself* had talked to five debt-for-nature lawyers and had offered, "There is a lot to be explored" and "perhaps it could work."[126]

- Williams *himself* had received information from persons he called "enviros" and had the "environmental developments" evaluated.[127]

- Williams *himself* had "explor[ed] creative options" to "induce a settlement involving the sequoia redwoods in the FDIC/OTS case."[128]

- FDIC had internally "review[ed] a suggestion by 'Earth First' that . . . FDIC trade its claims against Hurwitz for 3000 acres of redwood forests."[129]

- FDIC had assured politicians that it "closely" followed and "thorough[ly] examin[ed]" the debt-for-nature strategy.[130]

The FDIC did not simply stonewall the district court. The FDIC also barred its own Inspector General from investigating its conduct in this litigation because "the IG's unvarnished opinion" could confirm "Hurwitz's allegations" in this case. Such an investigation might allow Hurwitz to "gain access to some inartful words" that give "credence to Hurwitz's arguments and fuel[] Judge Hughes' suspicions," which would "embolden him to decide motions . . . for sanctions."[131]

---

[125] R 33314-313.
[126] R 29779.
[127] R 29605-591 [RE 6]; R 27888-884.
[128] R 29586; R 29119.
[129] R 29917.
[130] R 29916-915; R 29843-842.
[131] R 34054-051; R 28105-101; R 28070-057; R 28080-076; R 28048-047; R 28054-052.

The Sanctions Award

The district court conducted a two-day hearing on the motion for sanctions, based almost entirely on an extensive record of objective evidence—not testimony. The court ultimately issued a 133-page opinion imposing sanctions on the FDIC and explaining the grounds for its decision. That opinion, which is consistent in all particulars with the 248-page opinion of the OTS administrative law judge and the findings of the Congressional task force, casts disgrace on the FDIC.[132]

The district court recounted the evidence in detail, making express findings that the FDIC had engaged in sanctionable misconduct.[133] Relying on both Rule 11 and its inherent power to safeguard the judicial process, the district court awarded sanctions for the costs MAXXAM had incurred to defend all the Appellees during a decade of persecution. "When sanctionable conduct infects the entire litigation, as it has here, it causes the entirety of the expenses of the opposing party . . . ."[134] The out-of-pocket expenses were $35,243,966.24,[135] plus costs of delay amounting to $37,011,181.27 for the lost use of those funds,[136] resulting in a total sanction of $72,255,147.51.[137]

---

[132] R 34120- 33992 [FDIC RE 4].
[133] *See* R 34014-008 [FDIC RE 4 at 109-115].
[134] R 34008 [FDIC RE 4 at 115].
[135] R 34008, 33997-96 [FDIC RE 4 at 115, 126-27].
[136] R 33996 [FDIC RE 4 at 127].
[137] *Id.*

SUMMARY OF ARGUMENT

Hurwitz, MAXXAM, and Federated agree with the FDIC about one issue: This is "one of the most extraordinary awards ever to come before this Court."[138] But the reason is not, as the FDIC implies, because the district court has erred. The reason is because the FDIC's decision to bring this lawsuit was unprincipled, its abusive litigation tactics were unrestrained, and the financial burden it imposed on the defendants and the federal courts was unprecedented. Due to these factors, this case involves several features that make it extraordinary.

First, the case involves a willful decision by a federal government agency, made in response to political pressure, to sue an American citizen for $1 billion in an effort to extort ownership of property unrelated to the subject matter of the suit. As a result, this case is probably the most extraordinary example of litigation filed in bad faith and for an improper purpose in this Court's history.

Second, the case involves a decision by a politically-appointed agency head to overrule the independent professional judgment of the agency's legal staff under circumstances that the legal staff later admitted to be unprecedented. As a result, this is not a case about isolated misconduct by a few low-level federal employees, but a case about misconduct that reaches to the top of the agency.

---

[138] FDIC Br. at 1.

Third, the case involves a strategy by the agency to hire another agency, with the use of appropriated funds, to do its bidding in an administrative action designed to maximize the pressure by pursuing the citizen in two different venues. As a result, this is a case of misconduct that extends beyond the court and stretches the limits of the federal rules, implicating the inherent power of the federal courts to protect the integrity of the judicial process.

Fourth, the case involves a strategy of delay and obfuscation in discovery designed to cover up the agency's political agenda and its role in the related case, culminating in evidence that the agency's corporate representative lied to the court. As a result, this is a case in which a federal agency used the federal courts and its unlimited resources for improper political purposes, covered up its misconduct, and was caught in circumstances that prove the agency itself lied to the courts.

Fifth, the case involves internal documents that confirm all of these facts, allowing the court to see the telltale signs of a government bureaucracy run amok. As a result, this is not a case in which the court must rely on subjective guesswork; the critical facts are established by objective, internal, documentary evidence—correspondence, handwritten notes, and legal memoranda—that expose the truth. The nature, quality, and quantity of that evidence are unprecedented.

In sum, this case is extraordinary not because of what the district court did, but because of what the FDIC did.

Inherent power sanctions exist precisely for extraordinary cases like this one. A court may impose sanctions in an exercise of its inherent power "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). That standard fits this case. The FDIC hopes to hide from inherent power, deferring it to the end of the brief and insisting it is reserved for cases in which the "temple of justice" is "defiled." If the "temple" is not "defiled" in this case, that ideal is an empty platitude.

Upholding the sanctions on the basis of inherent power simplifies the case, because a court exercising its inherent power is entitled to assess sanctions for the full cost of the litigation and may reach conduct occurring beyond the courtroom. In addition, out of respect for the constitutional doctrine of separation of powers, inherent power is not confined by considerations of immunity. For these reasons, inherent power simplifies the decision tree and provides the most appropriate basis to decide this case.

Alternatively, Rule 11 also provides a proper ground to sanction the FDIC. This Court's en banc decision in *Whitehead* squarely holds that a district court may impose sanctions for pleadings filed with an improper purpose, such as harassment. If the "improper purpose" prong of Rule 11 is not satisfied by the facts of this case, Rule 11(b)(1) is a mere parchment barrier and *Whitehead* is a dead letter.

Regardless of the legal authority for the sanction, the evidence is sufficient. The FDIC's brief wages an all-out assault on the district court's factual findings, but to no avail. There is ample evidence to support the district court's findings and those findings are not clearly erroneous. Indeed, given the unusual evidence that came to light in this case, there is no room for serious debate about those findings. The FDIC *knew* its claims were futile before it filed suit, but it prosecuted the case in bad faith to serve an unrelated political agenda.

To uphold this judgment, it is not necessary for the Court to conclude that the FDIC's claims were without *any* basis in law and fact. As the ALJ's opinion makes plain, the FDIC's claims were meritless—even though their vacuous nature only became apparent after extensive litigation exposed the FDIC's case as a sham. But even if there was a scintilla of legal and factual support for the FDIC's claims, that is no defense to sanctions assessed under inherent power and *Whitehead*. Those authorities authorize sanctions for conduct taken in "bad faith" or for an "improper purpose," and the FDIC's misconduct here breathes life into those rules. The claims here were so weak that no responsible lawyer would have filed them, and the FDIC's legal staff recommended against bringing them for just that reason. But the FDIC's political leaders overruled that judgment, filing and prosecuting the claims in bad faith and for improper purposes. Federal courts must have authority to protect themselves from such abuse. The judgment should be affirmed.

STANDARD OF REVIEW

A district court's imposition of sanctions under either its inherent power or Rule 11 is reviewed solely for an abuse of discretion. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990); *Thomas v. Capital Security Serv., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc). "A court abuses its discretion to impose sanctions when a ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Matta v. May*, 118 F.3d 410, 413 (5th Cir. 1997). Under this standard, the judgment below should be affirmed unless either (1) as a matter of law the district court lacked the power to impose sanctions for the FDIC's misconduct or (2) the court's factual findings of sanctionable misconduct were clearly erroneous. Neither basis for reversal is available here.

The FDIC has elected a frontal assault on the district court's factual findings. Its 87-page brief is largely an unrepentant effort to relitigate its version of the facts, as if the district court is entitled to no deference. Yet a finding is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The FDIC's brief, which ignores contrary evidence and gives no deference to the district court, does not satisfy that demanding standard.

ARGUMENT

I. The District Court Properly Exercised Its Inherent Power.

In imposing sanctions on the FDIC, the district court explicitly invoked its "inherent power to sanction."[139] That power was properly exercised. Notably, although the district court's inherent power formed an evident basis for the award, the FDIC is reluctant to confront the question of inherent power squarely. Instead, the FDIC defers its discussion of inherent power to page 83 of its brief and devotes just two pages to this central issue. That avoidance is no accident.

A. The Court Had Inherent Power to Impose Sanctions for Litigation Filed and Prosecuted in Bad Faith.

A court has inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). In exercise of that inherent power, a court may order "outright dismissal of a lawsuit." *Id.* at 45. "Consequently, the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id.*

The litigant guilty of abusive misconduct in this case was an agency of the federal government, but that did not deprive the district court of its inherent power. On the contrary, the extraordinary betrayal of public trust committed by the FDIC illustrates that inherent power sanctions must be available as a check and balance to protect the federal courts from being exploited as pawns in political games.

---

[139] R 34014, 34011-10.

This Court has squarely held that federal courts have inherent power to award sanctions against government actors for misconduct in litigation. When the United States itself litigates in an abusive and inappropriate manner, a district court "pursuant to its inherent power . . . should impose sanctions upon the government." *Bradley v. United States*, 866 F.2d 120, 128 (5th Cir. 1989).

Without so much as mentioning this Court's controlling decision in *Bradley*, the FDIC relies on First Circuit authority for the notion that federal courts should be "wary" of imposing sanctions for governmental misconduct.[140] That view is not the law in this Circuit, and with good reason: It would allow the executive branch, through deliberate misconduct in the course of litigation, to impair the functioning of its co-equal judicial branch with impunity. That error would "gravely impair the role of the courts under Art. III," *United States v. Nixon*, 418 U.S. 683, 707 (1974), violating the central constitutional doctrine of separation of powers.

Power to regulate the conduct of litigants is a core component of the judicial authority of Article III courts. *See United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997). As a consequence, restricting "a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine." *Chilcutt v. United States*, 4 F.3d 1313, 1327 (5th Cir. 1993).

---

[140] FDIC Br. at 84 (citing *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994)).

For these reasons, when the government causes financial injury to a party by engaging in abusive misconduct in litigation, compensatory monetary sanctions are both appropriate and constitutionally permissible. In calculating such sanctions, "the court may consider, for example, requiring the government to compensate the [injured litigants] and their counsel for their expenses attributable to the government's conduct." *Bradley*, 866 F.2d at 128. Such expenses may include "out-of-pocket costs and attorney's fees." *Id.* at n.13. The sanctions in this case—an award of attorney's fees and expenses—are carefully modeled on this Court's opinion in *Bradley* and they are well within the district court's inherent power.

B. The Court's Findings of Fact Support the Sanction Award.

This Court has conditioned the exercise of inherent power to impose sanctions upon "a specific finding of bad faith." *Toon v. Wackenhut Corr. Corp.*, 250 F.3d 950, 952 (5th Cir. 2001). In this context, the phrase "bad faith" serves not as a talisman but as convenient shorthand for a range of abusive misconduct. As the Supreme Court has explained, "a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers*, 501 U.S. at 45-46 (citation omitted). Thus, "if a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party." *Id.* at 46 (quoting *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946)).

Inherent power sanctions should be based on specific factual findings of misconduct involving bad faith, oppression, fraud, or abuse of the judicial process, *i.e.*, abusive misconduct that "constituted or was tantamount to bad faith." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). In *Chambers* itself, where the district court found that the defendant "(1) attempted to deprive this Court of jurisdiction by acts of fraud . . . , (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance," *Chambers*, 501 U.S. at 41, the Supreme Court upheld the imposition of sanctions even though the finding had not formally invoked the phrase "bad faith" in so many words.

This Court, as a matter of course, follows that same practice. For example, in *Maguire Oil Co. v. City of Houston*, 143 F.3d 205 (5th Cir. 1998), the Court held a finding that a party "deliberately concealed . . . information pertinent to [its] jurisdiction" satisfied the requirement of a specific finding of bad faith. *Id.* at 211; *see also Natural Gas Pipeline Co. v. Energy Gathering, Inc.* 2 F.3d 1397, 1410 (5th Cir. 1993) ("evasiveness and intransigence justified sanctions").

In the present case, the district court made an explicit finding of bad faith: "Objectively and subjectively, the FDIC sued in bad faith."[141] But the Court is not limited to that ultimate finding. It may consider the full scope of the findings.

---

[141] R 34009.

Accordingly, the Court should consider the district court's numerous and detailed findings of misconduct in the inception and prosecution of this litigation. Those findings fully satisfy the need for a judicial determination of "bad faith." The district court determined that the FDIC's entire case, from beginning to end, was steeped in falsity, deceit, "and general obstructionism."[142] For example:

- The FDIC sought, quoting its own documents, to tie up Hurwitz with "lengthy depositions" and "aggressive discovery" in order to make him "feel some pain."[143]

- The FDIC's witnesses and lawyers—including its Rule 30(b)(6) corporate representative—deliberately made false representations to the court.[144]

- The FDIC grossly abused the discovery process by engaging in a flagrant and unseemly "shell game": it failed to identify relevant documents, misrepresented documents, concealed and withheld documents, moved, mislabeled, and hid documents, wrongfully refused to produce unprivileged documents, and, finally, lost or destroyed crucial documents.[145]

- The FDIC engaged in "continual flouting of orders."[146]

Based on this record, the district court reasonably concluded that the FDIC's "egregious" manipulation of the legal process "screams abuse of civil litigation – beyond vexatious – and betrayal of the public trust."[147]

---

[142] R 34017, 34013-011.
[143] R 34057, 34055, 34010.
[144] R 34098, 34097, 34096a, 34060, 34058, 34046, 34041, 34031-030, 34028, 34027, 34026-023, 34022-021, 34017, 34011.
[145] R 34035-034, 34030, 34029, 34008.
[146] R 34012.
[147] R 34057, 34010.

Far worse than these specific instances of misconduct in the litigation itself, the district court also found the FDIC guilty of "malfeasance" for filing and maintaining the case against Hurwitz for a fundamentally "improper purpose."[148] The FDIC was trying to enlist the courts in a cynical scheme of extortion:

- "[t]he purpose of the suit was . . . to bring the forces of the national government to bear on a citizen in order to achieve a result that the agency had no authority to accomplish: extorting the redwoods."[149]

- Throughout, the FDIC was engaged with other "federal conspirators" in a "concerted, systematic, unlawful effort to obtain the redwoods."[150]

- In alleging damages, the FDIC "simply picked a number to force Hurwitz to hand over the trees."[151]

- In bringing this suit, the FDIC was "[a]rbitrary, dishonest, exploitive, extortionate, and abusive."[152]

In sum, "[t]he record overwhelmingly shows that (a) the FDIC claims lacked merit, (b) the FDIC knew it, (c) the debt-for-nature campaign drove the FDIC's suit."[153]

This was a truly sordid tale of governmental overreaching and bad faith. Under the decisions of both this Court and the Supreme Court, the district court's factual findings amply support severe monetary sanctions. Indeed, those findings, which cast deep shame on the FDIC, demand the very harshest sanctions.

---

[148] R 34028, 34009.
[149] R 34063.
[150] R 34058, 34015.
[151] R 34054.
[152] R 34014.
[153] R 34037.

C. The Court's Factual Findings Are Not Clearly Erroneous.

1. The district court's factual finding that the FDIC's claims were meritless is not clearly erroneous.

The FDIC's brief repeats at length, and in excited and self-righteous prose, the allegations it made in seeking to impose liability of $1 billion on Hurwitz. FDIC Br. 39-53. Anyone interested in the truth of this matter should study the administrative law judge's constrained, dispassionate, and objective evaluation of those same allegations. In a detailed and exceedingly thorough 248-page opinion, the ALJ refuted each and every one of the FDIC's arguments, concluding that the FDIC had failed to offer any evidence supporting its claims.[154] The ALJ decision, which the FDIC largely ignores, deserves careful attention. It cuts through the FDIC's contentions to unmask the essential poverty of the case.

The FDIC (and OTS as its stalking horse) advanced two principal claims: that Hurwitz, MAXXAM, and Federated were responsible for the losses incurred by USAT in the management of its portfolio of mortgage-backed securities (MBS); and that they violated a legal duty to inject additional capital into USAT when it failed to meet regulatory net worth requirements. The ALJ correctly determined, and the district court agreed, that each of these claims was meritless.[155]

---

[154] R 27490.

[155] *See* R 27478-397 (ALJ); R 34068-064, 34050-047 (district court).

(a) The "de facto director" allegation was meritless.

As a threshold matter, both of the FDIC's claims against Hurwitz depended on the premise that Hurwitz was a "*de facto* director" of USAT and that, as such, he owed fiduciary obligations to the failing thrift. Without owing a fiduciary duty, Hurwitz could not be liable for the management of USAT's investment portfolios or its failure to maintain its regulatory net worth. But it is undisputed that Hurwitz was neither an officer nor a director of USAT, as the FDIC's brief concedes.[156] Thus, the FDIC pleaded the *de facto* director allegation as a predicate.[157]

That allegation was without any substantial foundation, factually or legally. Fiduciary duties fall upon corporate officers and directors. *See Meyers v. Moody*, 693 F.2d 1196, 1209 (5th Cir. 1982) (applying Texas law). *De facto* directors are individuals who have been elected or appointed to a formal position as a fiduciary, but whose authority to act for the corporation suffers from a technical invalidity. The doctrine "applies only to third parties who deal with the corporation and are unaware of the *de facto* director's true status." *Hoggett v. Brown*, 971 S.W.2d 472, 484 n.7 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *accord Austin Lake Estates Recreation Club, Inc. v. Maberry*, 638 S.W.2d 649, 650 (Tex. App.—Austin 1982, writ ref'd n.r.e.). That doctrine has no application here.

---

[156] FDIC Br. at 11.

[157] R 0018 (de facto allegation), 0012 (net worth maintenance claim), R 0006 (MBS claim).

In this instance, USAT was a corporation with properly elected directors. Obviously, the FDIC knew USAT had elected (and held out) duly-elected directors who owed the fiduciary obligation to manage the thrift.[158] The FDIC, however, did not bring any fiduciary duty claims against USAT's actual board members.[159] Moreover, the *de facto* director doctrine operates for the benefit of third parties who justifiably rely on the understanding that a particular individual is a director. The FDIC was not such a third party; it had stepped into the shoes of USAT. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86-87 (1994). For several reasons, therefore, the FDIC knew the *de facto* director doctrine was inapt.[160]

The FDIC admits as much, insisting that the *de facto* director doctrine is "not the one relied upon by FDIC."[161] The original complaint suggests otherwise, alleging that Hurwitz was "a *de facto* director and senior officer of USAT."[162] Nonetheless, the FDIC contends that its claims "rested on the well-settled principle that someone who avoids the formal position of an officer or director, but who in fact directs and controls a corporation, owes fiduciary duties *to the corporation*."[163] Perhaps that allegation can be extracted from the complaint, liberally construed, but the legal principle upon which the FDIC relies is hardly "well-settled."

---

[158] R 30415a; R 1120, 1116, 0664-659; R 0249-195.
[159] R 1120, 1116, 664-659; R 354-195.
[160] 1st Supp. R 7:145; R 34069-068; R 33276; R 29543.
[161] FDIC Br. at 42-43.
[162] R 0018; *see also* R 0001, 0006, 0011.
[163] FDIC Br. at 43.

The FDIC claims its "well-settled" rule is "firmly rooted" in Texas statutes, federal regulations, and the "common law."[164] But notably, the FDIC does not cite any Texas cases to support its assertion that a "controlling force" of a corporation owes a fiduciary duty.

In fact, the legal staff's memorandum detailing the FDIC's pre-suit analysis reveals the lack of legal support for a "controlling force" theory of fiduciary duty. In the memorandum, this allegation was treated simply as another way to state the *de facto* director theory: "By virtue of his position as a *de facto* officer and director and controlling person of USAT, Hurwitz owed to USAT a duty of loyalty and a duty to protect and care for the interests of the institution."[165] The FDIC realized it would face a serious challenge on this point, noting that "Hurwitz will assert that he cannot be held liable because he was never an officer or director of USAT."[166] Nevertheless, based on the factual allegation that Hurwitz was "actively involved" in the management of USAT, the FDIC concluded "we have a reasonable chance to overcome this defense."[167] But the FDIC cited *no* legal support for that position, anywhere in the 80-page memorandum.[168] The legal authorities cited in the brief are after-the-fact contrivances in an effort to rewrite history.

---

[164] FDIC Br. at 41-43.
[165] R29486.
[166] R29460.
[167] R29459.
[168] *See* R 29539-29457.

Examination of those supposedly "well-settled" authorities proves the point. First, the FDIC relies on two Texas statutes that authorized the state to regulate persons acting in a leadership capacity on behalf of a bank or savings and loan.[169] Those statutes merely defined the regulatory reach of the relevant state authorities; they said nothing about the scope of fiduciary duties owed to a financial institution. The FDIC cites no case, and we are aware of none, in which either statute has been construed to create a fiduciary duty in the absence of an official fiduciary position. The statutes are correctly read simply to reach persons acting *officially* for such an institution regardless of their title; that non-controversial rule does not apply here. The FDIC's view of Texas law stretches the law beyond any previous boundary.

The FDIC also cites certain provisions of the Code of Federal Regulations for the proposition that federal law may impose a fiduciary duty on persons other than officers and directors.[170] Again, these regulatory provisions simply extended federal regulatory power to the official agents of an institution, regardless of title; they did not purport to expand the scope of fiduciary duties owed under state law. The FDIC cites no case, and we are aware of none, in which a person with no official position in a regulated financial institution has been held civilly liable for a state-law breach of fiduciary duty based on these federal regulations.

---

[169] *See* FDIC Br. at 41 (citing former TEX. CIV. STAT. Art. 342-102 and 852a § 8.04 (repealed)).
[170] *See* FDIC Br. at 41-42 (citing former 12 C.F.R. §§ 561.31-32, 571.9).

Indeed, the notion that these federal regulations could form the basis of a state-law fiduciary duty claim is difficult to accept. At the time the FDIC made its decision to file this suit, the ink was barely dry on *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994), which held that state law—not federal law—controls claims of tort liability brought on behalf of failed financial institutions. *Id.* at 83-89.

In this case, the FDIC sued Hurwitz for breach of fiduciary duty—a claim governed by Texas law. The FDIC cannot contend the federal regulations created a federal common law claim for fiduciary duty, as that would be "plainly wrong." *O'Melveny & Myers*, 512 U.S. at 83. Nor is there any authority for the implication that the federal regulations preemptively expanded the state law of fiduciary duty. Texas fiduciary duty law does not conflict with the federal regulations and the regulations themselves do not provide a private cause of action. Hence the content of the fiduciary duty claim is "left subject to the disposition provided by state law." *Id.* at 85; *see also F.D.I.C. v. McFarland*, 243 F.3d 876, 888 (5th Cir. 2001).

Finally, the FDIC cites cases from other states for the proposition that a shareholder who has actual control over a corporation may owe a fiduciary duty.[171] Those cases are legally immaterial, because this case was governed by Texas law. But in any event, Hurwitz could not be held liable as a "controlling shareholder" because he was not a shareholder of USAT *at all.* These cases are inapposite.

---

[171] FDIC Br. at 42.

The factual basis for the FDIC's *de facto* director claim was equally flimsy. The FDIC asserts that Hurwitz was part of "USAT's senior management" who made "policy," that he "was in control of the institution" and "call[ed] the shots," and that he attended board meetings.[172] But the evidence supporting these claims makes it apparent that the witnesses were actually discussing "USAT or UFG."[173] And it is undisputed that the meetings were "*joint* UFG/USAT Board meetings."[174] This distinction is essential because Hurwitz was chairman of UFG, and as such, he exercised control over UFG and owed fiduciary duties to UFG—*not* USAT. The FDIC's theory was basically an attempt to disregard the corporate separateness of USAT and UFG and transfer fiduciary duties from one to the other.

Finally, the FDIC claims Hurwitz "personally approved major investments for USAT," but the cited evidence proves only that Hurwitz suggested investments to USAT in his capacity as a director of UFG.[175] Merely suggesting investments to the directors of a corporation does not make one a fiduciary of that corporation—formal, "de facto," or otherwise.

Without a valid legal or factual basis to impose a fiduciary duty on Hurwitz, the FDIC had no basis to sue him under any theory. The district court's findings to that effect are not clearly erroneous.

---

[172] R 23681; R 23678-677; FDIC Br. at 11, 44.
[173] *Id.*
[174] FDIC Br. at 11 (emphasis added).
[175] R 27416; R 6812; FDIC Br. at 12, 44.

(b) The MBS claims were meritless.

Even if the FDIC could have overcome the hurdle posed by the absence of a fiduciary duty, its mortgage-backed securities (MBS) claims were utterly meritless. They suffered from at least three fatal defects. *First*, the claims were time-barred. *Second*, there was no evidence that Hurwitz had participated in management of the MBS portfolios. And *third*, there was no legitimate basis for a contention that the MBS portfolios had been mismanaged.

First, the primary MBS claims related to losses sustained in 1985 and 1986, but those claims were plainly barred by the Texas two-year statute of limitations. The FDIC did not deny the applicability of the two-year statute; its only hope was to toll the statute under the rule of adverse domination, "a common law doctrine used to toll limitations on a corporate action while the corporation is controlled by those culpably involved in the wrongful conduct on which the action is based." *F.D.I.C. v. Henderson*, 61 F.3d 421, 425-26 (5th Cir. 1995).

But the FDIC knew that Fifth Circuit precedent foreclosed that argument. Just months before the FDIC voted to file suit, this Court had held in *RTC v. Acton*, 49 F.3d 1086, 1091-92 (5th Cir. 1995), that to invoke the adverse domination rule "the FDIC must establish that the culpable directors are guilty of more than mere negligence or even gross negligence; it must show that they have actively participated in fraud or other intentional wrongdoing." *Henderson*, 61 F.3d at 426.

At the time it filed suit, the FDIC knew it could not meet the *Acton* standard. There was no evidence that Hurwitz was guilty of fraud or intentional misconduct. At the board meeting in which the FDIC voted to file suit, the FDIC legal staff notified the board of *Acton*: "You must have fraud or intentional self-dealing and, on that basis, we don't believe we can meet that standard in this case. We don't believe we can win a tolling argument in the Fifth Circuit, in this case."[176] Thus, the FDIC had no viable basis for most of its MBS claims.

The FDIC does not deny that the portfolios were established in 1985-1986, nor does it deny that those claims were subject to the two-year statute.[177] Instead, the FDIC argues only that "USAT continued to pour money into" the portfolios "during 1987 to 1988—years for which the statute of limitations had not run."[178] But no evidence supports that assertion; the FDIC cites only its lawyers' memories, and they do not recollect more money pouring in, only USAT "fail[ing] to unwind" the portfolios.[179] The FDIC cites no legal authority to support its suggestion that either a "continuing violation" theory or a "failure to unwind" theory would have escaped this Court's *Acton* rule, and it offers no excuse for its disregard of *Acton* except an optimistic hope that the Court would reconsider the rule or certify it to the Texas Supreme Court—requests it never preserved in the district court.

---

[176] R29344-43 [FDIC RE 5 at 17-18].
[177] R 34066-4064; R 30115-30051; R 30525-474.
[178] FDIC Br. at 45.
[179] R 29353, 27546.

Second, the assertion that Hurwitz could be held liable for the management of the USAT MBS portfolios was far-fetched because Hurwitz had played no role in management of the MBS portfolios. The ALJ expressly found that "[t]here is no evidence to support this bald assertion, and it is refuted by credible testimony."[180] To be sure, Hurwitz "supported the strategic change in direction" from traditional mortgage loans to other investments such as mortgage-backed securities, but his "principal activity was directed to obtaining competent people to manage the new investments."[181] He was "not at all interested in the mortgage securities" and he "had little or no involvement in the management of USAT's MBS portfolios."[182] USAT experts, who consulted outside experts, managed the MBS portfolios.[183] Accordingly, the FDIC had no legitimate basis to hold Hurwitz liable for the performance of the MBS portfolios.

Third, as the ALJ also recognized, the question of the extent of Hurwitz's involvement was something of a red herring, for there was no underlying basis for any liability at all: There had been "no culpable conduct in the management of the questioned investments."[184]

---

[180] R 27422.
[181] R 27429, 27411.
[182] R 27422, 27411, 27297.
[183] R 30115-30051, 30525-474; R 1116-115, 0562-556; R 0248.
[184] R 27429.

The administrative law judge first noted that investment in an MBS portfolio was perfectly appropriate for a thrift institution such as USAT:

> MBS were clearly an accepted investment vehicle for savings and loan institutions. These investments had certain advantages over individual home mortgages in that they had virtually no credit risk, they were diversified and liquid, and entailed comparatively nominal origination costs.
>
> The manner in which USAT financed these investments – using short-term liabilities hedged with swaps, and other derivatives – was also acceptable. Regulators at the time furnished approving and encouraging articles on the subject.[185]

In actuality, long after USAT had otherwise become insolvent, the MBS portfolios kept the failing thrift afloat—and if the government had not later liquidated them, USAT's MBS portfolios would have *made* millions going forward. [186]

The FDIC now tells this Court that "USAT's MBS investments were . . . recklessly and incompetently handled."[187] That assertion is manifestly untrue. USAT adopted its MBS strategy "after consulting with leading investment bankers who were pioneers in the development of MBS."[188] The ALJ heard the evidence on these allegations in detail and he found the claims had "no plausible basis" and "not a scintilla of evidence," resting on "specious" contentions.[189]

---

[185] R 27449.
[186] R 34114, 34110; R 33508-442; R 30380-79; R 30337-31; R 30328-27; R 30119; R 30108-06; R 29526; R 21034; *see also* R 28120-106 (going forward).
[187] FDIC Br. 44.
[188] R 27308.
[189] R 27438, 27434, 27431.

At bottom, in criticizing the MBS portfolio the FDIC was simply engaging, "with the benefit of hind-sight," in second-guessing the expert portfolio managers' well-informed and well-intentioned business judgments.[190] As the ALJ concluded, there was "no showing" of any "unsafe and unsound practice," nor was there any evidence of either unjust enrichment or reckless disregard for the law.[191] In short, there was not the slightest hint of a factual or legal basis for the FDIC/OTS claims. As the ALJ pointedly observed, "denigration of these professionals amounts to little more than unseemly name-calling for advocacy purposes."[192]

The FDIC's brief does little to refute that harsh assessment. The FDIC's criticisms of the MBS portfolios largely reduce to after-the-fact second-guessing, exactly the type of judgments "with the benefit of hind-sight" that provoked the ire of the administrative law judge.[193] There is no evidence of any wrongdoing.

The district court based its sanctions award on all three of these defects, emphasizing that (a) the MBS claims were time-barred; (b) there was no evidence that Hurwitz participated in management of the MBS portfolios; and (c) there was no evidence of wrongdoing by anyone in management of the MBS portfolios.[194] Those factual findings conform perfectly to the findings of the ALJ, and they are not clearly erroneous in any respect.

---

[190] R 27432.
[191] R 27442, 27434, 27429.
[192] R 27417.
[193] R 27432.
[194] R 34066-064, 34013.

(c) The net worth claims were meritless.

The FDIC's eleventh-hour theory that MAXXAM and Federated had a duty to maintain USAT's net worth—and its "unconventional" allegation that Hurwitz, as a *de facto* director of USAT but a formal director of MAXXAM and Federated, owed USAT a fiduciary duty to make MAXXAM and Federated support USAT—was nothing but an exercise in wishful thinking. The net worth maintenance claim foundered on several levels. *First*, neither MAXXAM nor Federated owed such a maintenance obligation to USAT. And *second*, even if they had owed such a duty, Hurwitz could not be liable to USAT for failing to force such an investment.

First, as the ALJ framed the issue, "[t]his claim hinges on the allegation that . . . MAXXAM and Federated . . . [held] more than 25 percent of UFG's stock."[195] According to the FDIC, UFG controlled USAT while MAXXAM and Federated, in turn, controlled UFG. But it is undisputed that unless MAXXAM and Federated controlled 25% of UFG's shares, no net worth maintenance obligation arose.[196] The evidence is overwhelming that those two corporations scrupulously avoided acquiring a 25% stake in UFG. Thus, the essential premise for the FDIC's theory was missing—and conclusively so.

---

[195] R 27457.

[196] *See* FDIC Br. at 49-50.

In 1983 MAXXAM and Federated, which together owned 23.2% of UFG, applied to the Federal Home Loan Bank Board (FHLBB) for approval to purchase another 10% of UFG.[197] The FHLBB approved, but subject to the condition that MAXXAM and Federated would maintain USAT's net worth on a pro rata basis.[198] "MAXXAM and Federated could not agree to the net worth maintenance condition . . . because of the effect it would have on their ability to raise funds in the capital markets."[199] The two corporations "never agreed to this condition" and, as a result, declined to acquire the additional shares.[200] That fact is undisputed.[201]

Unable to satisfy the 25% requirement directly, the FDIC now contends it had a "good faith basis" to allege that MAXXAM and Federated controlled more than 25% of UFG by virtue of an option contract with Drexel Burnham Lambert.[202] The FDIC's briefing on this issue might be read to imply that Hurwitz and Drexel had developed a "quid pro quo" relationship in which Hurwitz purchased Drexel junk bonds in exchange for preferential financing from Drexel. That is not true, and in discovery, the FDIC specifically disavowed any such claim.[203] Accordingly, the option contract must be viewed strictly as an arms-length bargain.

---

[197] R 27483.
[198] R 27482.
[199] R 27371.
[200] R 27477, 27350.
[201] R 29897.
[202] FDIC Br. 15-16, 50-51.
[203] *See* 1st Supp. R Ex. 307 at 257-58; *see also* R 34112 (district court opinion finding no support for such a contention); R 33293 (internal FDIC analysis finding no evidence of a quid pro quo).

With this important caveat established, it is readily apparent that there is no substance to the FDIC's reliance on the option. The option was executed in 1985, and beginning no later than January 1986, "MAXXAM, UFG and USAT disclosed [its] existence and terms . . . in numerous filings and communications with federal and state thrift regulators and with the Securities and Exchange Commission."[204] Accordingly, it is undisputed that the facts relating to the option were well known to federal regulators throughout the critical 1986-88 period. Yet during that time, when USAT's net worth was becoming significantly impaired, federal regulators never suggested that the option contract boosted MAXXAM's and Federated's ownership interest in UFG above the crucial 25% mark and thus triggered a duty of net worth maintenance.[205]

Regulators refrained from taking that position because it had no legal merit. Under the FHLBB's regulations, in determining ownership of stock subject to an option contract the agency "first would look to who owned the stock and who had the right to vote it."[206] It is undisputed that Drexel, not MAXXAM or Federated, owned the stock, retained the voting rights, and "did not consult with MAXXAM how to vote the optioned shares."[207] The FDIC's brief ignores that fact.

---

[204] R 27362; *see also* R 34068-066 (discussing the option contract).
[205] R 27362-350; R 34113-112; R 30705; R 30372; R 30170-127; R 30124; R 30092.
[206] R 27354.
[207] R 27365.

"Secondarily, the FHLBB [would look to whether the option was] immediately convertible, and, [whether] MAXXAM paid more than 50 percent of the total price of the shares."[208] It is equally undisputed that the option was not immediately convertible and that MAXXAM had paid "substantially less than 50 percent of the purchase price of the underlying shares."[209] Again, the FDIC's brief ignores that fact.

In sum, the option contract was contemporaneously disclosed to regulators, who never suggested that it triggered a net worth maintenance obligation because it did not meet the regulatory standard for ownership.[210] As a matter of both fact and federal thrift law, therefore, MAXXAM and Federated never owned more than 25% of UFG stock, and never acquired a legal duty to maintain its net worth.[211] There was (and is) no legitimate basis for the FDIC's argument to the contrary.

Second, there was likewise no legitimate basis for the FDIC's novel claim that Hurwitz had breached an imagined fiduciary duty to USAT by failing to cause MAXXAM and Federated to maintain USAT's net worth. The district court correctly determined that this claim, which it noted had been invented by the FDIC on the spur of the moment, "is specious."[212]

---

[208] R 27354-353.
[209] R 27353.
[210] 2nd Supp. R 1 Ex. 359; R 34113-12; R 30372; R 30124; R 30092; R 27465-31; R 20897-41.
[211] R 27354.
[212] R 34083.

UFG had agreed to maintain USAT's net worth, but UFG's shareholders, directors, and officers did not shoulder a personal obligation to do so. In late 1987, USAT warned federal regulators that it "will be going below its regulatory net worth either during 1987 or early 1988."[213] In response to this looming crisis, UFG's Executive Committee, on which Hurwitz served, twice "approved making a capital contribution if one were necessary."[214]

Hurwitz resigned from the UFG board in February 1988.[215] Months later, the FHLBB notified UFG that USAT had failed to meet its regulatory capital requirement but it did not request "that UFG actually infuse capital into USAT" until December 1988.[216] By then, UFG was insolvent and Hurwitz was no longer a member of the UFG board.[217]

The FDIC seeks to overcome Hurwitz's resignation from the UFG board by claiming "considerable evidence" that he continued to have "effective control."[218] That "considerable" evidence proves only that Hurwitz attended, without speaking, *two* investment committee meetings and received *one* letter to UFG shareholders. That paltry proof is no evidence of control, "considerable" or otherwise.[219]

---

[213] R 27343.
[214] R 27345-344; R 30767; R 30472-471; R 30343-342; R 20988.
[215] R 27343.
[216] R 27339, 27333.
[217] R 27332.
[218] FDIC Br. at 48.
[219] R 25699-698; R 25292-248; R 6773-72.

Even if Hurwitz had remained on the UFG board, there is nothing more he could legitimately have done in that capacity to stave off USAT's net worth crisis. At bottom, the FDIC's argument against Hurwitz is that he should have transferred funds to USAT by diverting monies from MAXXAM and Federated, to whom he unquestionably owed fiduciary duties. That argument, frankly, is just plain silly. It can hardly be advanced in good faith.

Absent an explicit agreement, even a true owner (which Hurwitz was not) would have no legal obligation to use personal wealth to shore up a failing thrift. And as the district court correctly held, it would have been an obvious violation of Hurwitz's fiduciary duty to MAXXAM and its shareholders to plunder the assets of a publicly-held company for the benefit of USAT.[220] Notably, the FDIC never explains how investing in a failing thrift would conform to Hurwitz's unquestioned fiduciary obligations to MAXXAM. *See F.D.I.C. v. Wheat*, 970 F.2d 124, 129 (5th Cir. 1992); *Meyers v. Moody*, 693 F.2d 1196, 1210-11 (5th Cir. 1982). In fact, the FDIC expressly embraces for the first time on appeal the necessary import of its net worth claim: The net worth claim was founded on the FDIC's premise that Hurwitz's alleged *de facto* duty to USAT trumped his *real* duty to MAXXAM.[221] That theory is insupportable.

---

[220] R 34067-066.
[221] R 34067-066; FDIC Br. at 43.

2. The district court's factual finding that the FDIC knew its claims were meritless is not clearly erroneous.

The wanton nature of the FDIC's claims would be offensive in its own right, but what sets this case apart from other unfounded litigation is the stunning fact that the FDIC *knew* its claims were meritless but elected to pursue them anyway. The district court made detailed findings supporting its conclusion that the FDIC knew its claims were baseless, and those findings are not clearly erroneous.[222] Because the evidence supporting those findings has been extensively discussed in the Statement of Facts, we will not belabor the point. But it is important to recall the extraordinary dynamics of the FDIC's decision to sue.

The FDIC legal staff "originally recommended that the agency not sue."[223] Even the legal staff's revised recommendation, prepared at the last-minute urging of the FDIC Chairman, conceded that there was at least a 70% chance that the MBS claim would be dismissed on statute of limitations grounds and no better than a 50% chance that the MBS and net worth claims would succeed on the merits.[224] These projections did not satisfy the FDIC's rules for professional liability suits, which stated that "the claim must be sound on its merits, and the [FDIC] must be more than likely to succeed in any litigation necessary to collect on the claim."[225]

---

[222] R 34009-008.
[223] R 34013.
[224] R 245550, 24541-40, 24533, 24770; R 34085, 34082, 34080.
[225] R 28136 [RE 15].

In fact, the final legal staff recommendation grossly overstated the FDIC's actual chances of success, as the staff must have been aware. Neither at the time of the recommendation nor during the years of litigation that followed did the FDIC ever adduce any evidence to support its claim with respect to the MBS portfolio. And as explained above, the statute of limitations was an insuperable obstacle to such a claim—a fact that the FDIC legal staff acknowledged to the FDIC board. *See* pp. 19-20, above. And the net worth maintenance claim, which first surfaced in the revised recommendation dictated by the FDIC Chairman, was "invented . . . from the one the [legal staff] had concluded that it had no authority to bring."[226] That new claim never had any legal basis.[227]

3. The district court's factual finding that the FDIC sued in bad faith to extort the redwoods is not clearly erroneous.

Finally, the meritless nature of the claims and the FDIC's actual knowledge of its legal and factual defects bring into sharp relief the true story of this case: The district court found the FDIC initiated and prosecuted this case in bad faith to extort ownership of the redwoods, and those findings are not clearly erroneous.[228] Such flagrant abuse of the legal process is the sort of litigation taken in "bad faith, vexatiously, wantonly, or for oppressive reasons," *Chambers*, 501 U.S. at 45-46, that warrants the harshest sanctions.

---

[226] R 34083, 34068; *compare* R 33320-16 [RE 10].
[227] R 34099 ("no viable claim").
[228] R 34101-076.

Under normal circumstances, this case would not even have been considered by the FDIC board; because the claims were so lacking in merit, "the staff would ordinarily close out the investigation under delegated authority."[229] In this case, however, the FDIC Chairman overruled the legal staff's objective recommendation and instructed the legal staff to manufacture a claim. The staff reluctantly did so, deferring to the Chairman's wishes "because of the high profile nature of this case (evidenced by numerous letters from Congressmen and environmental groups)."[230] The Chairman allowed the political and environmental debt-for-nature campaign to override the merits, then she prodded the board to authorize suit, which it did.[231]

Once the suit was filed, the FDIC abused both Hurwitz and the district court. The district court's opinion explores at length the facts exposing the FDIC's abuse of the legal process, which culminated in perjury by its corporate representative during a failed attempt to cover up the fact that the FDIC brought this suit to exert "significant pressure" and make Hurwitz "feel some pain" in an effort to leverage "a large recovery/the trees."[232] That story is told fully in the Statement of Facts, and we will not repeat it here. Given these extraordinary facts, the district court's imposition of inherent power sanctions was fully justified.

---

[229] R 34084.
[230] *Id.*; *see also id.* at R 34095 (staff noted "high level of discomfort on the merits of the claim" but also "the subst[antial] political attention focused on this claim").
[231] R 34084-076.
[232] R 33292, 33242-241; R 29872-871.

The FDIC tries to overcome that conclusion with two factual propositions, neither of which can be squared with the standard of review. First, the FDIC argues it was Hurwitz, not the FDIC, who proposed the debt-for-nature swap.[233] But in light of the documentary evidence, that notion cannot be taken seriously. The FDIC's fingerprints were on the debt-for-nature agenda *before* suit was filed, and there is extensive evidence that a debt-for-nature swap was the ultimate goal. *See* pp. 7-17, above. No contemporaneous document shows Hurwitz participating in debt-for-nature discussions *before* the litigation; on the contrary, the documents reveal that the FDIC planned to approach him only *after* the OTS case was filed.[234] That Hurwitz was willing to discuss such a swap, under the duress of litigation, proves only that the FDIC nearly succeeded in achieving its improper purpose. That is no more a defense to sanctions than a victim's capitulation to extortion is a defense to prosecution. The success of the extortion is an element of the *offense*—it is not a *defense*. The debt-for-nature swap originated with the FDIC.

Along similar lines, the FDIC defies the standard of review by criticizing the district court for disbelieving its witnesses. But the FDIC has only itself to blame; its contumacious conduct gave the district court ample grounds for distrust.

---

[233] FDIC Br. at 22, 30-31, 66-68.

[234] *See* R 33989-775; R 33329; R 33322-316; R 33286-285; R 33238-236; R 31498-494; R 29938-923; R 29918-9897; R 29872-871; R 29851; R 29840-837; R 29779-778; R 29692-674; R 29604-9591; R 29586-584; R 29575-565; R 29559-446; R 29360-308; R 29290-289; R 29282; R 29276-273; R 29213; R 29119; R 29102; R 29099-092; R 29087; R 29054-050; R 28982-981; R 26192-189; R 25784-782.

According to the FDIC, "[e]very FDIC official and attorney who addressed the issue in a deposition stated that the trees were not the reason for the suit."[235] But the FDIC does not discuss the suspicious and obstructionist tactics used in those depositions—and throughout discovery—to conceal the debt-for-nature facts. The FDIC repeatedly tried to evade and frustrate depositions in which its witnesses could be compelled to testify about the factual and legal basis for its claims.[236] When the depositions finally proceeded, the FDIC witnesses were coy.

For example, Hurwitz sought to depose former FDIC Vice Chair Skip Hove, who received debt-for-nature briefings and participated in the decision to sue.[237] Implausibly, Hove professed total ignorance of FDIC's funding of the OTS case and refused to say whether FDIC discussed debt-for-nature when it sued Hurwitz. He even pretended not to recall that the board had decided to sue.[238]

Hurwitz also sought to depose former FDIC Chair Ricki Helfer. She, too, claimed to be unfamiliar with the case, professed ignorance about debt-for-nature, and tried to explain away her decision to overrule the legal staff's recommendation in a manner that conflicts with the contemporaneous documents.[239]

---

[235] FDIC Br. at 57.
[236] R 53; R 29203-197; R 137; R 34028-26; R 29042, 29040, 29038, 29019-17, 29006.
[237] R 33392, 33383-382, 33369, 33361, 33347, 33332; R 29963-961; R 29924-915; R 29886-84; R 29858-853; R 29526; R 28788-768; R 28162-158; R 9631-628.
[238] R 34026; R 28155-153.
[239] R 34023-021; R 33322; R 23901-901a, 23880, 23873a.

Hurwitz also sought to depose FDIC Deputy General Counsel Jack Smith, who had been responsible for retaining OTS to assist in the FDIC's prosecution. Smith swore his decision to retain OTS was independent of any political motive, though it came just one day after his fateful meeting with Representative Hamburg (sponsor of the Headwaters bill).[240] Days before the sanctions hearing, Smith filed a declaration attempting to "spin" the facts that had been disclosed in discovery.[241] He was impeached at the sanctions hearing, and he admitted under oath that a reversal of a staff recommendation, as it occurred here, is unprecedented.[242]

But most important, by far, was the Rule 30(b)(6) deposition of the FDIC. Under Rule 30(b)(6), an official representative is selected by the corporation and "the corporation appears vicariously through that agent." *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993). Because the corporation selects its own representative, this procedure "presents a potential for abuse." *Id.* As detailed above, the FDIC's corporate representative repeatedly perjured himself (and the FDIC) in an effort to cover up the FDIC's agenda. *See* pp. 30-31, above. When the truth was exposed, the district court had every right to disbelieve the FDIC witnesses and to conclude "'the very temple of justice has been defiled.'" *Chambers*, 501 U.S. at 45-46. Inherent power sanctions are appropriate.

---

[240] R 34098; R 27223.
[241] R 33073-067; 1st Supp. R 6:224-29, 239-58; R 34020.
[242] 1st Supp. R 6:213-69; *see also id.* at 265-66 (reversal of staff recommendation).

II. The Court Properly Awarded Sanctions Under Rule 11.

The district court independently based its sanctions award on Rule 11.[243] That rule authorizes sanctions if a pleading is signed in violation of Rule 11(b). Signature of a pleading constitutes a certification that the document—

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b)(1)-(4). Courts may impose "an appropriate sanction" on "parties that have violated subdivision (b) or are responsible for the violation." FED. R. CIV. P. 11(c). As recounted above, the conduct at issue was not limited to the FDIC's counsel, but was driven by the FDIC Chairman and Board of Directors. Accordingly, the district court was well within its power to find the FDIC itself "responsible for the violation," *id.*, and the FDIC does not suggest otherwise.

---

[243] R 34014-12.

A. The District Court Properly Exercised Its Discretion to Sanction the FDIC Under Rule 11(b)(1) for Litigation Brought for an "Improper Purpose."

The FDIC's claims in this lawsuit represent, as the district court determined, an exceptional case of pleadings filed for an "improper purpose, such as to harass." FED. R. CIV. P. 11(b)(1). Yet the FDIC contends the district court lacked authority to impose sanctions on the ground that the FDIC sued for an "improper purpose." That argument is flatly contradicted by the plain language of Rule 11(b)(1) and by this Court's authoritative decision construing and applying that language.

1. The district court had authority to impose sanctions for pleadings filed with an "improper purpose."

The key precedent on this question is this Court's recent en banc decision in *Whitehead v. Food Max of Mississippi*, 332 F.3d 796 (5th Cir. 2003) (en banc). *Whitehead* was a watershed ruling, and it forecloses the FDIC's position.

In *Whitehead*, the en banc Court resolved a dispute about whether Rule 11 sanctions may be imposed solely for pleadings filed with an "improper purpose," without regard to whether those pleadings had any plausible legal or factual basis. The Court held the subparts of Rule 11 provide "independent bases for sanctions," *Whitehead*, 332 F.3d at 803, and a district court may base Rule 11 sanctions solely on a finding of "improper purpose." *Id.* at 804-06.

The FDIC's entire legal position under Rule 11 is obsolete after *Whitehead*. The FDIC insists courts may not impose sanctions for an improper purpose under Rule 11(b)(1) without also finding the pleading lacked any legal or factual merit.[244] But *Whitehead* squarely holds otherwise: "Each obligation must be satisfied; violation of either justifies sanctions." *Id.* at 796. Thus, district courts may impose sanctions based solely on a finding of an improper purpose "in exceptional cases, such as this, where the improper purpose is objectively ascertainable." *Id.* at 805. If ever there were an "exceptional case," it is this one.

The FDIC relies on a litany of older Fifth Circuit cases to support its view, finding in them a subtle distinction between complaints and other pleadings.[245] Neither the text of Rule 11 nor the *Whitehead* rationale supports such a distinction. *Whitehead* disapproved the analytical approach the FDIC extracts from these cases, explaining that they were "decided under the previous version [of Rule 11] under which these bases were not separated into specific, enumerated subparts . . . . this case law does not support [a] view of subparts (b)(1) and (b)(2) as intertwined. The structure of the current rule (as amended in 1993) belies such a notion." *Whitehead*, 332 F.3d at 804 n.4. Indeed, the position advanced by the FDIC is the position urged by the *losing party* and the *dissent* in *Whitehead*. *Id.* at 804, 809-14 (dissenting op.). The FDIC's position is not the law in this Circuit.

---

[244] FDIC Br. at 54-55.
[245] *Id.*

2. The district court based its "improper purpose" findings on objective evidence.

Whitehead specifies that sanctions may be awarded under Rule 11(b)(1) "where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose." *Whitehead*, 332 F.3d at 805.

That test is readily satisfied in this case. The district court's opinion relies on a wealth of objective evidence—primarily internal FDIC documents regarding the debt-for-nature political agenda that the FDIC struggled mightily to conceal—exposing the improper purpose motivating this litigation. That documentary record is more extensive than the videotape *Whitehead* held to be "objective evidence." *Id.* at 807. Just as the losing party in *Whitehead* was "'[h]oist on his own petard'" by a videotape of his conduct, *id.*, the FDIC is condemned by its own documents. That objective evidence is recounted in detail in the Statement of Facts, and need not be repeated.

The FDIC now makes much of the fact that only one witness testified live at the sanctions hearing. But that fact proves the strength of the district court's order. This order is not founded on speculation and subjective judgments about motives; it is founded on thousands of pages of objective evidence that reveal the FDIC's motives with damning clarity. The district court had ample documentary evidence to conclude that the FDIC's improper purpose was "objectively ascertainable." *Whitehead*, 332 F.3d at 805.

3. The district court's factual findings that the FDIC acted with an "improper purpose" are not clearly erroneous.

In *Whitehead*, this Court took pains to emphasize that the standard of review governing Rule 11 sanctions is "very deferential." *Whitehead*, 332 F.3d at 802. Deference is warranted for two reasons. First, as in most fact-bound situations, "the district court is better situated than the court of appeals to marshal the pertinent facts and *apply the fact-dependent legal standard mandated by Rule 11.*" *Id.* (emphasis in original). But in addition, sanctions carry special significance: The district judge is "independently responsible for maintaining the integrity of judicial proceedings in his court and, concomitantly, must be accorded the necessary authority." *Id.* at 803. Because of the important policies of Rule 11, therefore, the abuse of discretion standard is especially deferential in this context. As *Whitehead* emphasized: "'Generally, an abuse of discretion only occurs where *no reasonable person* could take the view adopted by the trial court.'" *Id.* at 803 (quoting *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575 (5th Cir. 2002)) (emphasis in *Whitehead*). That test cannot be met here.

The district court's findings and the evidence supporting its conclusion that the FDIC brought suit for an improper purpose, with the objective of harassing Hurwitz into a settlement that surrendered the redwoods, have been fully detailed. Those findings are not clearly erroneous, and the imposition of sanctions for this improper purpose was within the district court's wide discretion.

B. Even if the FDIC's Suit Had Some Legal or Factual Foundation, the District Court Properly Exercised Its Discretion to Sanction the FDIC Under Rule 11(b).

The FDIC's wooden approach to Rule 11 would emasculate district courts, disabling them from performing their "independent duty to maintain the integrity of the judicial process." *Whitehead*, 332 F.3d at 808. That approach is unsound, for the reasons we have explained, because it would prevent federal judges from guarding the federal courts against being used as pawns for an improper purpose. But even under the FDIC's view of the law, the sanction award in this case would be eminently defensible.

The older cases upon which the FDIC relies do not, as the FDIC suggests, require courts to turn a blind eye to an improper purpose simply because a pleading has some basis in law or fact. On the contrary, as the dissenting opinion in *Whitehead* correctly acknowledged, even under the older cases sanctions could be imposed for an otherwise legitimate pleading "'under unusual circumstances.'" *Whitehead*, 332 F.3d at 810 (dissenting op.) (quoting cases); *id.* at 811-15 (explaining the older framework). In this case, the district court's detailed findings about the absence of any substantial basis in fact or law for the FDIC's pleadings, coupled with its detailed findings of an illegitimate purpose to extort the redwoods, would support Rule 11 sanctions under that standard. If any case would meet the "unusual" or "exceptional" circumstances test, it is this one.

C. The FDIC's Defenses to Rule 11 Sanctions Are Unavailing.

Aside from its frontal assault on the district court's various factual findings, the FDIC offers two defensive arguments that, it claims, shield it from sanctions under Rule 11. First, the FDIC contends it conducted a reasonable investigation. Second, the FDIC contends the fact that its claims were not summarily dismissed is a defense to sanctions. Neither proposition is correct.

1. The FDIC's investigation, which was corrupted and later disregarded for political purposes, offers no defense.

The FDIC repeatedly tries to take shelter behind its pre-suit investigation, congratulating itself for its "extensive" pre-filing investigation and contending that the investigation immunizes it from Rule 11 sanctions.[246] That is a *non sequitur*, because even a reasonable investigation would not be a defense to pleadings filed for an "improper purpose" under Rule 11(b)(1). *Whitehead*, 332 F.3d at 796, 803. But the FDIC's theory fails even on its own terms. Far from providing a defense, the corrupted "investigation" proves our point.

First, as noted above, the FDIC manipulated its own internal investigation in response to political pressure from the environmental lobby. *See* pp. 8-15, above. An investigation that is compromised by a political agenda distinct from the merits cannot be "reasonable" within the meaning of Rule 11, and none of the authorities cited by the FDIC contemplates such interference with the investigative function.

[246] FDIC Br. at 1, 4, 9, 37-40.

Second, when even that highly politicized investigation failed to bear fruit, the FDIC refused to accept its outcome. The FDIC now claims its outside counsel found evidence that "could" form the basis of a lawsuit.[247] But the FDIC fails to disclose the independent advice given to the FDIC by those same outside counsel. Taking into account all of the evidence, they concluded "we cannot estimate the probability of success being greater than 50%."[248] The FDIC rightly understood that conclusion as a recommendation from its outside counsel *not* to sue.[249]

After considering the recommendations of its outside counsel and the fruits of its $5 million investigation, the FDIC legal staff ultimately concluded the risk of summary dismissal was "at least" 70% and the case was "marginal at best."[250] Consequently, the FDIC legal staff's "final" decision was not to sue.[251] But instead of deferring to the judgment of the professional staff, the FDIC Chairman ordered their recommendation rewritten to justify suit. *See* pp. 16-17, above. As a result, the FDIC filed suit on the basis of a manipulated recommendation that did not reflect the actual conclusions of its investigation. *See* pp. 18-22, above.

The FDIC cites no authority for the notion that a corrupted, then discarded, investigation can be a defense to Rule 11. In anything, the FDIC's refusal to honor the conclusions of its investigation highlights the egregious nature of this case.

---

[247] FDIC Br. at 9, 38.
[248] R 33251-250; R 30569, 30566, 30546; R 25953; *see also* R 33320-316 [RE 10].
[249] *Id.*
[250] R 34102, 34086-085, 34013; R 33252; R 30037; R 29522, 29457.
[251] R 34086-084; R 33320-316 [RE 10]; R 29566; R 29547; R 27074-073.

2. The protracted OTS proceedings offer no defense.

The FDIC also seeks shelter from Rule 11 sanctions based on the premise that the OTS did its own "extensive independent examination" of these facts and the ALJ presiding over the OTS proceeding did not summarily dismiss the case, "which amply demonstrates the nonfrivolous nature of the claims."[252] The notion that the OTS proceeding—bought and paid for by the FDIC—was "independent" has been addressed elsewhere and cannot be taken seriously. *See* pp. 23-28, above. As for the suggestion that the absence of a summary disposition may be a defense, that assertion is both legally and factually unfounded.

First, as a matter of law, denial of summary judgment is not a *per se* defense to an ultimate determination that the claims were groundless. This Court rejects that simplistic proposition, holding that a "court's decision to carry over a motion to trial when the trial preparation has been completed and the trial is ready to begin is hardly sufficient to infuse a vapid claim with life." *Barrios v. Pelham Marine*, 796 F.2d 128, 133 (5th Cir. 1986). "All courts addressing this issue have concluded that mere survival of a summary judgment motion, in which all facts are construed in the non-movant's favor, does not insulate the party from sanctions if it is later determined that all factual claims were groundless." *Lemaster v. United States*, 891 F.2d 115, 121 (6th Cir. 1989) (citing authorities).

---

[252] FDIC Br. at 27, 40.

If that is the rule for Article III judges who have the power to dismiss a case, it is even more so for administrative law judges who do not have such authority. The ALJ had no power to summarily dismiss the case; he could only recommend a disposition to the OTS director. Hence his failure to summarily dismiss the case is no evidence that the case had merit. It is simply proof that the ALJ felt constrained to give his own agency enough rope to hang itself—which it did.

In the beginning, the ALJ gave his agency the benefit of the doubt and assumed that its claims had a reasonable foundation. That was understandable; prior to this case, no OTS ALJ had ever ruled for a solvent corporate respondent.[253] But as the ALJ noted in his opinion, the claims kept morphing as facts disproving them were exposed, "creat[ing] endless difficulty for the decision-maker."[254] Finally, after enduring 119 days of trial, it was plain that his trust had been abused. The ALJ denounced the OTS case in unusually harsh language, using a selection of adjectives rarely found in administrative decisions by an employee of the agency. *See* pp. 25-27, above. If anything, the ALJ's patience during the OTS case and his stern opinion at its conclusion are the best evidence that the claims were vacuous—and they are also proof that the amount of the sanction, which is directly tied to the financial damage done by this long-running and wide-ranging prosecution, is fair. We turn now to that issue.

---

[253] R 34049.
[254] R 27448.

III. The District Court Did Not Abuse Its Discretion in Assessing the Amount of Monetary Sanctions.

The FDIC argues that the monetary sanctions imposed by the district court "are excessive on their face."[255] To be sure, the sanctions are large. But their size simply reflects a portion of the financial pain the FDIC inflicted on the Appellees as part of its scheme to force a settlement that would divest them of the redwoods. The monetary sanctions compensate the Appellees for out-of-pocket defense costs resulting from the FDIC's ongoing misconduct during the course of this litigation. That compensatory award, which does not even fully restore the Appellees to the financial status quo ante,[256] properly reflects the dual goals of sanctions doctrine: compensation of the injured party and deterrence of further wrongdoing. As such, the award is neither factually nor legally excessive.

A. District Courts Are Entitled to Considerable Deference in Fixing the Amount of Monetary Sanctions.

Challenges to monetary sanctions on excessiveness grounds are disfavored. A district court's determination of the amount of a monetary sanction is reviewed only for abuse of discretion. *Chambers*, 501 U.S. at 55. "Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *Friends for Am. Free Enter. Ass'n*, 284 F.3d at 578.

---

[255] FDIC Br. at 80.

[256] The district court noted that the award does not compensate the Appellees for approximately $10 million in other costs related to this controversy. R 33996.

Because abuse of discretion "is a deferential standard . . . a party who seeks to overturn a monetary sanction on grounds of excessiveness bears a heavy burden." *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 344 F.3d 16, 19 (1st Cir. 2003). This is appropriate, for "the imposition of sanctions is essentially a judgment call, and as such, seems best left to the judicial officer most familiar with the case." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990). Consequently, the settled rule is that "so long as a sanction is reasonably proportionate to the offending conduct, the trial court's quantification of it ought not to be disturbed." *Goya Foods*, 344 F.3d at 20 (citing *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947); *Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000); *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1426-27 (1st Cir. 1992)).

B. The Court's Order Properly Reflects the Costs Actually Incurred and the Injury Suffered by the Appellees as a Result of the FDIC's Abusive Misconduct.

1. Monetary sanctions may appropriately be measured by the costs and injury inflicted by a litigant's abusive misconduct.

A central aim of monetary sanctions "is to compensate the aggrieved party for harm suffered in consequence of the sanctioned party's acts." *Goya Foods*, 344 F.3d at 20 (citing *United Mine Workers*, 330 U.S. at 304). Because such sanctions are largely compensatory in nature, they are appropriately measured by the actual losses sustained by the victimized opposing party. *Id.*

The district court adhered to that guiding principle. Here, as in *Chambers*, the court uncovered a "sordid scheme of deliberate misuse of the judicial process" designed to subject the opposing party to "harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Chambers*, 501 U.S. at 57. In these circumstances, it was well "within the court's discretion to . . . compensate [the defendants] by requiring [the FDIC] to pay for *all* attorney's fees." *Id.* (emphasis added). Moreover, such sanctions need not be limited to attorney's fees. As this Court stated in *Bradley*, when the government abuses the judicial process it is fully appropriate to require "the government to compensate the [defendants] and their counsel for their expenses attributable to the government's conduct." *Bradley*, 866 F.2d at 128.

The monetary sanctions imposed by the district court followed the path marked by *Bradley,* awarding sanctions to compensate the Appellees for the direct legal fees and expenses they incurred to defend against the FDIC's misconduct.[257] In addition, the district court would have been entitled to include a punitive award. "Sanctions are necessary not just to compensate the [defendants], but to ensure that the government's conduct does not go unpunished." *Bradley*, 866 F.2d 128. Here, however, the district court exercised its discretion not to add a punitive component. Thus, if anything, the sanctions imposed in this case were restrained.

---

[257] As noted, those sanctions did not include all the financial injuries suffered by the Appellees, and thus did not fully restore the financial status quo ante. *See* n. 269, *supra*.

2. The court's factual findings of the costs incurred are tied to the misconduct and amply supported by the evidence.

The district court received evidence of MAXXAM's out-of-pocket costs, totaling $35,243,966.24.[258] Because MAXXAM paid these legal fees and expenses over ten years while borrowing funds—with the associated interest on the loans—its real costs totaled $72,255,147.51.[259] The FDIC incurred comparable expenses, which represent a mere fraction of the FDIC's total resources of $50 billion.[260]

Contrary to the FDIC's suggestion, these figures were fully documented. MAXXAM submitted boxes of detailed invoices, which were fairly summarized by two memoranda and a 40-page spreadsheet.[261] The FDIC acknowledged it had "all the access" necessary "to verify the reasonable accuracy of the summaries," and it did "not challeng[e] the accuracy of the summary."[262]

The district court's findings regarding the amount of fees and costs incurred by the Appellees are adequately detailed. No further allocation was necessary. "When sanctionable conduct infects the entire litigation, as it has here, it causes the entirety of the expenses of the opposing party."[263] The district court had discretion to make such an award, *see Chambers*, 501 U.S. at 55-57, and it did so properly.

---

[258] R 34008-002, 33996; R 33772-660.
[259] R 34001, 33997-994.
[260] R 34001.
[261] 1st Supp. R 6:282; R 33772-729; R 33714-705; R 22795-539.
[262] 1st Supp. R 6:282-83. The court made changes to the summary. R 33996.
[263] R 34008; *see also* R 33997-96 (detailing amount of sanctions).

In this respect, it is appropriate to place in context the district court's reference to other instances in which the FDIC has been sanctioned to no effect. The FDIC faults the district court for basing its sanctions order on a history of sanctionable conduct in prior cases,[264] but the FDIC has misconceived the order. Courts assessing sanctions are commanded to consider "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. CIV. P. 11(c)(2). Hence it was proper for the district court to take note of the FDIC's history of abusive tactics and the ineffectiveness of lesser sanctions.[265] In 1999, for example, the D.C. Circuit confronted conduct remarkably similar to that which moved the Court to uphold "improper purpose" sanctions in *Whitehead*. In that case, the FDIC engaged in abusive post-judgment enforcement proceedings "for leverage in settlement discussions," which raised a "legitimate question" of "bad faith." *F.D.I.C. v. Bender*, 182 F.3d 1, 7 (D.C. Cir. 1999). This case bears the hallmarks of that same improper purpose, but on a much larger scale.

---

[264] FDIC Br. at 78.

[265] *See, e.g., F.D.I.C. v. Fidelity & Deposit Co.*, No. Civ. 97-1068TW(AJB), 2000 WL 1175626 (S.D. Cal. Aug. 2, 2000) (unpub.); *F.D.I.C. v. Hodges*, 812 F. Supp. 1256, 1260-61, 1274-75 (D.D.C. 1993); *In re Selected Somersworth Bank Cases*, 148 F.R.D. 1, 2-6 & n.1 (D. Me. 1993); *In re Lincoln N. Assocs.*, 163 B.R. 403, 410 (D. Mass. 1993); *F.D.I.C. v. Park Side Investors*, No. 6:92CV273 (M.D. Fla. Feb. 9, 1993) (unpub.) (R 33999); *Abney v. Patten*, 696 F. Supp. 570, 572-75 (W.D. Okla. 1987). Even when the sanctions have been reversed, the FDIC's conduct has not been exonerated. *See F.D.I.C. v. Day*, 148 F.R.D. 160 (N.D. Tex. 1993), *rev'd sub. nom. F.D.I.C. v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994); *RTC v. Schuchmann*, No. 93-1024LB/RLP, 2000 WL 34012866 (D.N.M. Dec. 18, 2000) (unpub.) (R 27617-06), *rev'd*, 319 F.3d 1247 (10th Cir. 2003).

There is nothing to be gained from a detailed recitation of the circumstances in all the prior cases, which may aptly be summarized in the words of one judge who directed that his order be delivered personally to Chairman Helfer, neé Tigert:

> Chairman Tigert is invited and encouraged to review this matter internally and with care, to determine—in an environment now free of any possible fear of prosecution or other severe sanctions imposed by the courts—whether the conduct of FDIC officials and attorneys has conformed to applicable professional standards. While the court entertains few doubts that the FDIC behaved improperly in the instances described above, the court has not been able to make—and has not made—any assessment of individual culpability, and the court intimates no view as to which of the individual respondents may have borne responsibility for the various questionable actions taken by and in behalf of the FDIC. It is enough to say that the record reveals a most unattractive portrait of behavior by agents of an important public agency.

Hirsch v. F.D.I.C., 1994 WL 760662, *8 (D. Conn. 1994) (unpublished). Within a few months, Helfer pushed the FDIC to file its baseless complaint in this case.

In sum, the FDIC is not being sanctioned for its misconduct in other cases, but a record of recidivism is a legitimate factor in fixing an appropriate sanction. This Court has granted the FDIC leniency in the past despite "miscreant" behavior, *F.D.I.C. v. Conner*, 20 F.3d 1376, 1382 (5th Cir. 1994), and in the absence of a sufficient basis to find that futile claims were brought "for an improper purpose." *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1300 (5th Cir. 1994). This record is unique and the time for leniency is past. Lesser sanctions have proven to be ineffective. Awarding anything less than full compensation would be an injustice.

Finally, the FDIC labors to create the impression that this sanction award, which is certainly substantial, represents a windfall to MAXXAM. Nothing could be further from the truth. The sanctions simply compensate out-of-pocket losses suffered by the shareholders of MAXXAM—a publicly-held company—who have spent millions defending the company. The ultimate question presented, therefore, is whether the FDIC or the shareholders of MAXXAM should bear the burden of this misguided and politically motivated litigation.

3. Because the OTS proceeding was part and parcel of the FDIC's misuse of the judicial process, the costs associated with that action were properly assessed against the FDIC.

The FDIC contends the sanctions award is excessive because it includes the legal fees and expenses incurred by the Appellees during the OTS proceeding.[266] On the contrary, it is well-settled that the inherent power to safeguard the integrity of the judicial process "extends to the full range of litigation abuses," and it "reaches both conduct before the court and that beyond the court's confines." *Chambers*, 501 U.S. at 44, 46. The petitioner in *Chambers* likewise contended that "a court may sanction only conduct occurring in its presence," *id.* at 57, but the Supreme Court disagreed. "As long as a party receives an appropriate hearing," the Court explained, "the party may be sanctioned for abuses of process occurring beyond the courtroom . . . ." *Id.* at 57.

---

[266] FDIC Br. at 72-75.

Inherent power might not extend to conduct that is wholly "unconnected" or "collateral" to proceedings before the court, but there should be no question that "defiant, bad-faith conduct" in an effort to evade the court falls within that power. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 794 (5th Cir. 1993) (discussing *In re Case*, 937 F.2d 1014, 1023-24 (5th Cir. 1991)); *see also Conner v. Travis County*, 209 F.3d 794, 800 (5th Cir. 2000) (same). In the present case, the FDIC filed suit in federal court and then attempted to structure its litigation to evade the jurisdiction of that court while it pursued a politically-motivated agenda in a related administrative proceeding. That conduct falls comfortably within the reach of the *Chambers* rule.

The facts recounted above establish that the FDIC used OTS as its agent to do its bidding. The FDIC "chose the OTS venue" and paid OTS millions of dollars to pursue "FDIC's claims."[267] The FDIC helped to prepare the case for OTS.[268] The FDIC would benefit from any recovery.[269] Little wonder that the FDIC itself said it "combin[ed] FDIC & OTS claims" and formed the "FDIC/OTS claim(s)," an "FDIC/OTS case," and "FDIC/OTS debt."[270] The district court was entitled to fashion a sanction that reached the FDIC's use of OTS as a stalking horse to pursue the Appellees in its preferred forum for improper reasons.

---

[267] R 29686-684, R 29677, 29618-617; R 29558; R 28351, 28330, 28268, 28249; R 28031; R 29890-887; R 29731; R 28071; R 27800-799, 27748; R 27218.
[268] R 34046-044; R 33643; R 33358-357; R 33286-285; R 28207.
[269] R 29677; R 29535.
[270] R 33317 [RE 10]; R33242-241 [RE 14]; R 29872-871; R 29586; R 29565; R 29550.

The district court had good reason to find all of this conduct sanctionable. For one thing, the FDIC's authority to hire another agency with appropriated funds to do its bidding was controversial; the two agencies found it necessary to paper the file with memoranda defending their ability to collaborate in this litigation.[271] But that controversy is beside the point—the two agencies did, in fact, collaborate, with OTS acting as the FDIC's agent. Moreover, the FDIC attempted to conceal this arrangement from the district court, insisting it had simply "coordinat[ed]" with a wholly "independent" OTS to avoid "duplication, confusion and delays."[272] When he found he had been deceived, the district judge had reason to be offended. Thus, the district court had ample basis to conclude that the fees and expenses incurred in the OTS case were part and parcel of the FDIC's bad faith, oppression, and abuse of the judicial process. *Chambers*, 501 U.S. at 45-46.

The FDIC also suggests that attorneys' fees from the OTS proceeding cannot be awarded because MAXXAM released *OTS* from a claim for sanctions and fees. That argument was anticipated and foreclosed in the release, which by its terms did "not" release the "FDIC"—the party subject to this sanctions award.[273]

---

[271] Appropriated funds cannot be used for an unauthorized purpose. *See* U.S. CONST. art. I, § 9; 31 U.S.C. § 1301(a); *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *see also* 2 Op. Off. Legal Counsel 302, 305 (1978) ("Clearly, when one Department is given sole responsibility for a type of activity, the appropriation of another Department may not properly be used to cover the cost of that activity."). Judge Hughes found the arrangement unlawful. R 34115, 34046-037.
[272] R 29053; R 28031; FDIC Br. at 17-19, 40.
[273] R 24845-844; FDIC Br. at 73.

4. The sanctions award does not rest on tangential concerns, and as such, any complaint about the court's opinion on those matters would be harmless error.

The FDIC takes issue with certain portions of the district court's opinion—namely, its discussion of the irregularities in composition of the FDIC's board and the FDIC's efforts to hide information regarding this litigation from Congress and the OTS' Inspector General—that do not form the basis of the sanctions award.[274] The district court was entitled to consider the full context of the FDIC's conduct. For example, the FDIC's reluctance to allow its own Inspector General to review its investigation sheds some light on the FDIC's *real* opinion of its work product. But in any event, the amount of the sanction does not rest on these grounds.

As stated above, the conduct for which the district court imposed sanctions was the FDIC's initiation and prosecution of this litigation for an improper purpose despite the lack of genuine merit for its claims, not these tangential considerations. And the amount of the sanction was based on the expenses incurred by Appellees in defending against the FDIC and OTS actions; no amount of the sanction is attributable to these two aspects of the district court's opinion. For these reasons, the FDIC's complaints about these portions of the opinion are purely academic, and any error in those discussions would be harmless. *See* FED. R. CIV. P. 61.

[274] FDIC Br. at 76-78.

C. Including the Cost of Delay in the Sanction Award Was Proper.

In determining the amount of monetary sanctions, the district court included a delay factor computed in the manner of prejudgment interest. The FDIC argues that sovereign immunity protects it from the inclusion of prejudgment interest in a monetary sanction, but its argument fails for two independent reasons.

1. When exercising its inherent power to preserve the integrity of the judicial process, the district court could appropriately include the costs of delay in assessing monetary sanctions.

A court's inherent power to preserve the integrity of the judicial process is as broad as may be necessary to serve that purpose. When a court invokes that power to assess monetary sanctions against a private litigant, it may, as a matter of course, include prejudgment interest to achieve full compensation to the injured party. *See Goya Foods, Inc. v. Wallack Management Co.*, 290 F.3d 63, 79 (1st Cir. 2002). The situation is no different when the party guilty of abusive misconduct is an agency of the federal government.

As discussed in detail above, agencies of the federal government enjoy no immunity from monetary sanctions imposed pursuant to a court's inherent powers. A federal agency is subject to the same full range of sanctions as a private litigant, because to confine "a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine." *Chilcutt*, 4 F.3d at 132.

Accordingly, this Court has recognized that a district court may impose sanctions under its inherent power even on an agency of the federal government. *See Bradley*, 866 F.2d at 128; *see also United States v. Woodley*, 9 F.3d 774, 782 (9th Cir. 1993) ("Sovereign immunity does not bar a court from imposing monetary sanctions under an exercise of its supervisory powers. These powers are judicially created to remedy a violation of recognized statutory, procedural, or constitutional rights, and to 'deter future governmental misconduct and protect the integrity of the judicial process.'"). A federal court's inherent power to safeguard the judicial process simply cannot be cabined by concepts of immunity.

Because private litigants may be subjected to sanctions that include a measure of prejudgment interest, a court may, in the exercise of its inherent power, subject a governmental agency like the FDIC to a similarly constituted sanction. Thus, the district court below acted within the scope of its constitutional authority when it included an interest component in the sanctions award.

The facts, moreover, justified inclusion of a factor compensating for delay. Given that a court exercising its inherent power has wide discretion to select the manner in which a monetary sanction is calculated, the district court could have reached the same sanction without characterizing any part of the award as interest. *See Chambers*, 501 U.S. at 55; *Goya Foods*, 344 F.3d at 20. Thus the award itself, however it may be characterized, was within the court's discretion.

2. In any event, the FDIC's immunity has been waived.

Although it is unnecessary for the Court to search for a waiver of immunity, the waiver nonetheless is supplied by the sue-and-be-sued clause in the FDIC's organic statute. *See* 12 U.S.C. § 1819(a).

In arguing to the contrary, the FDIC relies on *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which articulated what is known as the "no-interest rule." That rule stands for the proposition that, "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Id.* at 314. Courts applying the no-interest rule are charged to follow the usual rule that waivers of immunity are to be strictly construed, with the added admonition that the no-interest rule "provides an added gloss of strictness upon these usual rules." *Id.* at 318.

But the legislation at issue in *Shaw* did not include a sue-and-be-sued clause. In *Loeffler v. Frank*, 486 U.S. 549, 554-55 (1988), the Supreme Court reaffirmed its longstanding rule that a sue-and-be-sued clause effects a "broad" waiver of sovereign immunity, including a waiver of immunity from prejudgment interest. Such sue-and-be-sued clauses are to be "liberally construed," *id.* at 554, and "[e]ncompassed within this liberal-construction rule is the principle 'that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings,'" such as prejudgment interest. *Id.* at 555 (citation omitted).

In this case, the FDIC's enabling act contains a sue-and-be-sued clause. Thus, under the rationale of *Loeffler*, the FDIC's immunity has been fully waived. Appellees recognize the contrary holding in *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 836 (5th Cir. 1993), which held the sue-and-be-sued clause in the FDIC's organic statute did not waive immunity from prejudgment interest awards (when the FDIC acts in its corporate capacity as a deposit insurer). In so holding, *Spawn* viewed *Loeffler* as limited to circumstances in which a government agency "has embarked upon an essentially commercial venture which aspires to profitability." *Id.* Because the Court believed the FDIC did not meet that test, *Spawn* held that the FDIC's immunity was not waived.

But a subsequent Supreme Court decision requires that *Spawn* be revisited. One year after *Spawn*, the Court decided *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994). *Meyer* calls into doubt the "commercial enterprise" gloss on which *Spawn* is based, clarifying that the rule of *Loeffler* controls this case. In *Meyer*, the Court construed the sue-and-be-sued clause in the FSLIC's enabling act, which is "nearly identical" the FDIC's enabling legislation. *Id.* at 475 & n.3. The Court reaffirmed that such a sue-and-be-sued clause effects a broad waiver of immunity, *id.* at 475, and that "such sue-and-be-sued waivers are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (citations omitted).

Unlike the rule for other legislation, where the no-interest rule imposes an "added gloss of strictness," *Shaw*, 478 U.S. at 318, a sue-and-be-sued clause reverses the presumption. Thus, the Court explained, a sue-and-be-sued clause cannot be limited unless there is a "clear showing" of one of three exceptions. *Meyer*, 510 U.S. at 480. "Absent such a showing, agencies 'authorized to 'sue and be sued' are presumed to have *fully* waived immunity.'" *Id.* at 481 (quoting *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 86 n.8 (1991)) (emphasis added).

In *Meyer*, the FDIC tried to avoid that conclusion by relying on the language in prior decisions "suggesting that federal agencies should bear the burdens of suit borne by private entities," *id.* at 481, citing precisely the same cases upon which *Spawn* and earlier Fifth Circuit cases had based the "commercial enterprise" gloss. But the Court rejected this effort to cabin the effect of the sue-and-be-sued clause: "When read in context, however, it is clear that [those earlier cases] do not support the limitation FDIC proposes." *Id.* at 481. The Court said, "nothing in these decisions suggests that the liability of a private enterprise should serve as the *outer boundary* of the sue-and-be-sued waiver. . . . When we determined that the particular suit or incident of suit fell within the sue-and-be-sued waiver, we looked to the liability of a private enterprise as a *floor* below which the agency's liability could not fall." *Id.* at 482 (emphasis in original) (citations omitted).

In short, *Meyer* confirms that a sue-and-be-sued clause—standing alone—fully waives a government agency's immunity, including immunity from interest under the *Loeffler* rule. The gloss adopted by *Spawn* and earlier Fifth Circuit cases is no longer binding precedent, and none of the exceptions noted in *Meyer* applies. Thus, there is no basis to avoid the rule of *Loeffler*: The sue-and-be-sued clause in the FDIC's enabling act effects a full waiver of sovereign immunity from interest. Thus, the district court would have been entitled to include such calculations in its sanctions award even if it had invoked only Rule 11 and not its inherent power.

IV. It Is Unnecessary to Consider Other Bases for Lesser Sanctions.

Finally, the FDIC argues that the award is not tailored to particular events of misconduct under Rule 11 and inherent power, and it notes that the sanction award could not be affirmed on the basis of FED. R. CIV. P. 37 or 28 U.S.C. § 1927.[275] That is correct; the court's order reflects its view that the entire financial injury suffered by Appellees should be recovered because the suit was rotten to its core. But if the Court were to reverse the existing sanction award, the district court would be entitled to fashion a lesser sanction under any of these legal grounds. *See, e.g., Mendoza v. Lynaugh*, 989 F.2d 191, 197 (5th Cir. 1993); *Batson v. Neal Spelce Assoc., Inc.*, 765 F.2d 511, 517 (5th Cir. 1985). If the order is not affirmed, therefore, the case should be remanded for further proceedings.

---

[275] FDIC Br. at 78-82.

CONCLUSION

The district court was correct, and its judgment should be affirmed.

Respectfully submitted,

BECK, REDDEN & SECREST, L.L.P.

By: _____

David J. Beck
Russell S. Post
Keith A. Jones
1221 McKinney, Suite 4500
Houston, Texas 77010
Telephone: (713) 951-3700
Facsimile: (713) 951-3720

Jacks C. Nickens
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK, L.L.P.
600 Travis, Suite 7500
Houston, Texas 77002
Telephone: (713) 571-9191
Facsimile: (713) 571-9652

David P. Griffith
ANDREWS & KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
Telephone: (713) 220-4725
Facsimile: (713) 228-7376

ATTORNEYS FOR APPELLEES
CHARLES HURWITZ, et al.

CERTIFICATE OF SERVICE

I certify that on December 21, 2006, the undersigned counsel served two copies of this Brief of Appellees in paper form and one copy on an electronic computer readable 3½-inch disk in Portable Document Format by certified mail, return receipt requested, on counsel of record, as follows:

Gene W. Lafitte
James A. Brown
LISKOW & LEWIS, PLC
701 Poydras Street, Suite 5000
New Orleans, LA 70139

F. Thomas Hecht
Kathleen Holper Champagne
UNGARETTI & HARRIS LLP
3500 Three First National Plaza
Chicago, IL 60602

Randolph D. Moss
Paul R.Q. Wolfson
Jonathan G. Cedarbaum
Kelley Brooke Snyder
WILMER CUTLER PICKERING
HALE AND DORR LLP
1899 Pennsylvania Ave., NW
Washington, DC 20006

Douglas H. Jones
Richard J. Osterman, Jr.
Colleen J. Boles
Lawrence H. Richmond
FEDERAL DEPOSIT INSURANCE
CORPORATION
3501 Fairfax Drive, D-7014
Arlington, VA 22226

Attorneys for Appellant,
Federal Deposit Insurance Corporation

In addition, on December 21, 2006, the undersigned counsel forwarded the foregoing Brief of Appellees in paper and electronic form to the Clerk of the Fifth Circuit by Federal Express overnight courier.

David J. Beck

CERTIFICATE REGARDING TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. The undersigned certifies that he has this date filed with the Court a Motion for Leave to Exceed Word-Volume Limitation requesting leave to file a brief containing 22,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002(XP) in Times New Roman 14 pt. font.

David J. Beck
Attorney for Appellees

Dated: December 21, 2006