UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WESTERNBANK PUERTO RICO, plaintiff intervenor, v. FRANK C. STIPES GARCÍA, *et al*.,	CIVIL ACTION NO. 11-02271 (GAG) RE: DECLARATORY JUDGMENT

THE D&OS'[1] MOTION TO CLARIFY THE COURT'S JULY 3, 2012 ORDER REGARDING ADVANCEMENT OF DEFENSE COSTS

On December 17, 2010, the FDIC made a written demand (served also to AIG and three excess insurers) on the D&Os for $367 million dollars in damages arising from its April 30, 2010 takeover of Westernbank (the "Bank"). As a matter of law and fact, the FDIC claims were made on December 17, 2010. Ten days later, on December 27th, the D&Os gave notice to the same insurers of the FDIC's claims on their 2009-2010 policies (AIG had issued the primary policy, and the excess policies followed form). AIG took the lead in responding, and denied coverage. Negotiations proved fruitless. AIG wouldn't budge, forcing the D&Os, at their own expense, to prepare to defend a massive lawsuit. When an FDIC lawsuit became imminent, the D&Os filed a declaratory judgment action to determine coverage. When the FDIC lawsuit was filed, AIG refused to advance defense costs, forcing the D&Os to seek an advancement order.

The Court declared that the insurers were obligated to advance the D&Os' defense costs on July 3d, 2012,[2] finding that "PR law requires insurers to advance defense costs if there is even

[1] The D&Os are Frank C. Stipes García, Juan C. Frontera García, Héctor Del Río Torres, William Vidal Carvajal, César Ruiz, and Pedro R. Domínguez Zayas. Jose Biaggi is also a D&O for purposes of this motion.
[2] *See* D&Os' Motion to Advance Defense Costs (D.E. # 147) (the "Advancement Motion") and D.E. # 211 (the "July 3d Order").

a remote possibility that a claim ultimately will be covered." The Court also awarded the D&Os their fees, because "[l]itigating [the advancement question] . . . was unnecessary," and AIG's conduct in denying coverage was obstinate.[3] The D&Os now face a different form of obstinacy, which threatens to shut down their ability to mount a defense, and is impeding settlement.

The insurers for the 2009-2010 policy period (the "2009-10 Insurers") have unilaterally purported to decide that all seven of the loan transactions for which the FDIC claims the D&Os acted in a "grossly negligent" fashion, somehow "relate back" to unrelated claims made during the 2006-2007 policy period, even though:

(1) Private plaintiffs—not the FDIC—triggered the prior claims in 2007 and 2008, by filing lawsuits arising from the Bank's loan relationship with, and borrower fraud by, a borrower named Inyx, Inc;

(2) ***Only one*** of the FDIC's ***eight separate claims*** involves the Inyx transaction;

(3) The FDIC ***expressly declined to sue*** the D&Os on the Inyx loan; and

(4) None of the seven loan transactions for which the FDIC *did* sue the D&Os have ***any logical, much less causal, relationship*** to the Inyx loan or any prior lawsuits. Everything is different—the defendants, plaintiffs, divisions responsible for underwriting the loans, policies governing the divisions, committees responsible for approving the loans, and most importantly, the theories of liability and alleged damages.

Despite the obvious "unrelatedness" of these claims to any prior Inyx-related cases, the Insurers, after obstinately refusing to advance *any* defense costs and forcing the D&Os to litigate the issue, unilaterally decided to advance defense costs from policies issued for the 2006-2007 policy period (which had been depleted by defense of the previous Inyx-related actions). The goal of this gambit is obvious—the 09-10 Insurers hope to escape their contractual liability for claims made under the 2009-2010 policies by unilaterally tacking seven of the eight claims in this action, which have nothing whatsoever to do with Inyx, onto a 2006-07 policy period and

[3] *See* D.E. #316 (Order Granting the D&Os' Motion for Attorneys' Fees and Costs Regarding the D&Os' Motion to Advance Defense Costs).

policies that (1) the Inyx actions substantially depleted, and (2) include an excess insurer that, incredibly, claims it can deny coverage altogether for want of notice.

Consequently, the D&Os again are forced to seek the Court's assistance to prevent manifest injustice, by asking the Court to clarify its July 3d Order. The FDIC made claims against the D&Os during the 2009-2010 policy period, claims that plainly arose under the Insurers' 2009-2010 policies. The D&Os timely gave notice of those claims. After AIG denied coverage, the D&Os moved for an order declaring the insurers' obligation to advance defense costs from its 2009-2010 policy. *See* D.E. 147 at 1, n. 2. AIG argued that no advancement was required. It never remotely suggested that advancement should come from some earlier policy for an earlier policy period. The July 3d Order granted the D&Os' motion, and the First Circuit affirmed that order today. On its face, that Order applies to AIG's 2009-2010 primary policy and to the excess policies that follow form for that policy period. Sadly, and consistent with their course of obstinate conduct in this case, the Insurers ignored the ineluctable result of what was sought, fought for, and ordered by the Court.

In responding to the Court's July 3d Order, the Insurers wrongfully exercised a power they didn't possess, to "rule" that the FDIC lawsuit "related back" to the prior Inyx cases, *an argument they waived by not raising it* in opposition to the Advancement Motion. Moreover, even if the Insurers had not waived this argument, their belated attempt to deny coverage based on a "relatedness" theory would be, and is, subject to the same "remote possibility" standard that applied to the Advancement Motion. In short, there is at least a "remote possibility" that the FDIC's claims—which it made under the 2009-2010 policies—do not "relate back" to prior Inyx-related claims. Thus, we respectfully request the Court rule that:

(1) Its July 3d Order applies to the 2006-2007 primary policy, the 2009-2010 primary policy, and all excess policies for those policy periods;[4] and

(2) There is at least a "remote possibility" that all seven of the FDIC's claims *against the D&Os* do not "relate back" to the prior Inyx-related cases, and that the 09-10 Insurers should advance defense costs from the 2009-2010 policy period.

This clarification will prevent manifest prejudice to the D&Os, and will facilitate efforts at settlement. In support of this motion, the D&Os state as follows:

BACKGROUND

A. The Policy Periods

W Holding, Inc. ("W Holding"), bought insurance policies covering certain claims made from 2006 to 2007 and 2009 to 2010, for which it paid the Insurers millions of dollars in premiums. The "09-10 policy period" includes policies issued by the primary insurer, AIG, the first excess insurer—XL Specialty Insurance Company ("XL Specialty"), the second—Liberty Mutual Group ("Liberty"), the third—AIG, and the fourth—ACE Insurance Company ("ACE"). The "06-07 policy period" includes policies issued by the primary insurer, AIG, the first excess insurer—Liberty, the second—XL Specialty, and the third—Arch Specialty Insurance Company ("Arch"). Each policy period has a coverage limit of 50 million dollars.

B. The FDIC's Eight Distinct Claims

On December 17, 2010, the FDIC demanded that the D&Os pay it $367 million for alleged "gross negligence" based on 15 alleged loan transactions. Each allegation of "gross negligence" was a claim made on a "claims made" policy for the 09-10 policy period. The D&Os timely forwarded the demand letter to the Insurers in the precise manner required by AIG. The FDIC then downsized its demand by filing a lawsuit on January 20, 2012, which it amended two

[4] AIG and the other 06-07 Insurers are estopped by their conduct to deny the existence of a remote possibility of coverage for the Inyx-related claim against Mr. Vazquez and Ms. Fuentes under the 2006-2007 policies. In a rational world, the 06-07 Insurers' conduct would make it unnecessary for the Court to speak to this issue, but to leave no doubt, we respectfully request that the Court clarify the July 3d Order in this respect as well.

times.[5] *See* Second Amended and Restated Complaint in Intervention (the "Complaint") (D.E. 182). The FDIC lawsuit challenges eight (8) separate loan transactions, with a different theory of liability and damages for each. *Id*. at ¶79. Only one of the claims has anything to do with Inyx, and relates to the way officers of the Bank's asset-based division managed the Inyx loan. *Id*. at ¶80(C). The other seven claims (1) relate to loans that were originated by the Bank's construction and commercial real-estate divisions, and (2) challenge the underwriting and administration of those loans. *Id*. at ¶80(A)-(H). Those seven loans are Intercoffee,[6] Sabana (I and II), Plaza CCD, Yasscar Caguas, Yasscar Development, and Museum Towers.

We shall refer herein to all eight of the challenged loan transactions as the "FDIC's Claims," and to the seven non-Inyx related loan transactions—the ***only transactions for which the FDIC attempts to subject the D&Os to liability***—as the "FDIC's Non-Inyx Claims."

C. The Prior, Inyx-Related Claims to which the 09-10 Insurers Argue that all of the FDIC's Claims "Relate Back"

Long after the D&Os gave notice to the 09-10 Insurers pursuant to AIG's policy, the 09-10 Insurers began asserting that the FDIC's Claims "related back" to four prior actions arising from the Inyx borrower fraud. The four purportedly "related" actions are *Samuel Hildenbrand v. W Holding Company, Inc., et al.*, case no. 07-1886 (GAG) (D.P.R. 2007) ("*Hildenbrand*"); *Josefina Saavedra v. W Holding Company, Inc., et al.*, case no. 07-1931 (GAG) (D.P.R. 2007) ("*Saavedra*"), *Hunter Wylie v. Frank C. Stipes, et al.*, case no. 08-1036 (GAG) (D.P.R. 2008) ("*Wylie*"), and *Jack Kachkar, et al. v. Westernbank Puerto Rico*, case no. 08-2427 (BJM) (D.P.R. 2008) ("*Kachkar*") (collectively referred to as the "Inyx Lawsuits").

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[5] Under Section 7(b) of the Policies, the January 20th complaint, including any subsequent amendment, is treated as if it were made on December 17, 2010.

[6] While the Intercoffee loan was originated by the Bank's asset-based lending division, it subsequently was split up and transferred to the construction division. The FDIC's allegations of "gross negligence" relating to the Intercoffee loan are not based on the D&Os' management of the asset-based division and primarily are based on appraisals of the real property that the borrowers pledged as collateral for the loan.

The Inyx Lawsuits had nothing to do with commercial and construction lending, and everything to do with (1) the Inyx loan relationship, (2) the Bank's asset-based division, and (3) the speed with which certain officers and directors discovered Inyx's fraud. In *Hildenbrand* and *Saavedra*, shareholders alleged that one of the D&Os committed securities fraud by signing false and misleading financial statements in his role as a director of W Holding. *See* D.E. 556-4 at ¶¶2-4. These two cases were later consolidated into what has since been referred to as "*Hildenbrand,*" a case centered on when the defendants knew the Inyx loan was impaired, and certain statements they made about the "strength" of the bank's asset-based division. *See id*. This Court is intimately familiar with *Wylie*, in which certain W Holding shareholders brought derivative claims alleging that certain of the D&Os breached fiduciary duties by not discovering Inyx's fraud on Westernbank more quickly. *Wylie v. Stipes*, 595 F. Supp. 2d 179, 184 (D.P.R. 2009). Finally, in *Kachkar*—a case over which Judge McGiverin presided—the Inyx borrowers sued the Bank and one of the D&Os for a purported breach of the Inyx loan agreement. *Westernbank Puerto Rico v. Kachkar*, 2009 WL 6337949, at *1 (D.P.R. 2009).

In contrast, the FDIC's Non-Inyx Claims allege that certain construction and commercial real estate loans shouldn't have been approved because of purported violations of loan-to-value ratios and pre-sale requirements, supposedly inadequate financial analysis of guarantors, and an allegedly improper funding of interest reserves. None of these issues were presented in the Inyx Lawsuits, and none could have been, because the allegations of the FDIC's Non-Inyx Claims are inherently specific to the Bank's construction and commercial real estate divisions, and have nothing to do with its asset-based division. Moreover, the FDIC expressly disclaims even the remotest implication that any of the D&Os are subject to liability for the Inyx loan.

D. The Court Finds a "Remote Possibility" of Coverage

As the Court is aware, AIG denied coverage and refused to advance defense costs, forcing the D&Os to sue for a declaration of coverage in commonwealth court (the "Coverage Action"). Before a decision was rendered, the FDIC intervened in the Coverage Action, removed it here, and filed its lawsuit on January 20, 2012. The D&Os then filed the Advancement Motion, expressly arguing that advancement was required because there was at least a "remote possibility" of coverage under the 09-10 policies. In its July 3d Order, the Court granted that motion, holding that "PR law requires insurers to advance defense costs if there is even a remote possibility that a claim ultimately will be covered." The First Circuit affirmed that order today.

E. The 09-10 Insurers Unilaterally "Rule" that the FDIC's Claims "Relate Back" to the Inyx Lawsuits

In its July 3d Order, the Court did not specify which policy period supported a "remote possibility" of coverage, which should not have been necessary, because the Advancement Motion expressly sought a decision regarding advancement under the 09-10 policies. Persisting in their mule-like obstinance despite facts and logic, the 09-10 Insurers unilaterally "ruled" that the FDIC's Non-Inyx Claims would be treated as if the FDIC had made them in 2007, even though none of the 09-10 Insurers ever made this argument in opposing the Advancement Motion. This conduct is prejudicing the D&Os' efforts to prepare for trial, as well as obstructing settlement efforts.

By the time the FDIC sued in 2012, the Inyx Lawsuits had substantially depleted the primary policy for the 06-07 policy period. The defense and settlement of *Hildenbrand* alone exhausted more than half of the $20 million AIG primary policy. Considered in the context of demonstrated obstinacy by the Insurers, it may not surprise the Court to learn that AIG—the 06-07 primary insurer—championed the "relatedness" theory, evidently hoping to avoid being

called on to honor its contractual obligations on the 09-10 policy. Even more outlandish is the conduct of Arch, which issued the final layer of excess insurance for the 06-07 policy period. Incredibly, Arch claims that it can deny coverage because it never received notice of the FDIC lawsuit, even though AIG and the 09-10 Insurers were required to notify Arch that its 06-07 policy would be implicated the minute they conjured up their "relatedness" position. AIG says it never gave Arch notice, and the FDIC says it didn't, either. The D&Os subpoenaed documents from Arch to resolve this issue, but Arch very recently succeeded in quashing that subpoena in the Southern District of New York by arguing that producing documents *whose mere existence is evidence of notice* would be "unduly burdensome" because it's not a party here.

Defense costs in this case are substantial and will increase as the parties prepare for trial. The FDIC might have alleged a less complex and costly case to defend, but it chose not to. It brought a massive case against 36 defendants, challenging large and complicated loan transactions, one of which—Inyx—already had been litigated from every angle in four prior actions. Relitigating the Inyx loan has required counsel for Ms. Fuentes and Mr. Vazquez to review millions of pages of documents and prior transcripts in order to mount a defense. With the costs of defense mounting, we recently were advised that the second to last layer of excess insurance for the 06-07 policy period soon will be exhausted.

Unless the July 3d Order is clarified to leave no wiggle room regarding its application to the 09-10 policy year, the D&Os and other defendants soon will be forced to seek advancement from the last layer of 06-07 excess insurance. As noted above, that policy was issued by Arch, which is not a party to this lawsuit, claims nobody gave it timely notice, and so far has frustrated the D&Os' efforts to obtain evidence that would disprove that claim. The FDIC could cure any purported notice problem by suing Arch, but has refused to, despite the D&Os' having asked it to

do so a number of times. Absent clarification of the July 3d Order, it won't be long before the D&Os are unable to mount any defense, all because of the 09-10 Insureds' post-hoc "ruling" on "relatedness," a "ruling" they had no power to make, which flies in the face of the July 3d Order. Unless the Insurers' obstinacy is curtailed, there will be no trial or settlement.

THE COURT SHOULD CLARIFY ITS JULY 3d ORDER

A. The Court Should Clarify That Its July 3d Order Applies to all Policies That Provide a Remote Possibility of Coverage, Including the 2009-2010 Policies

The July 3d Order granted a motion that expressly sought advancement under the 2009-2010 policies, and held that advancement was required by Puerto Rico law because a remote possibility of coverage exists. Thus, by necessary implication, the Order found at least a "remote possibility" of coverage under the 2009-2010 primary policy (and the excess policies that followed form). The Court should clarify that the July 3d Order found a "remote possibility" of coverage under the 2009-2010 policies, including all excess policies.

B. The Court Should Clarify That There is at Least a "Remote Possibility" of Coverage under the 2009-2010 Policies for the FDIC's Seven Claims That are Not Based on the Inyx Loan

The July 3d Order did not address the Insurers' newly minted "relatedness" argument, because the Insurers never made it in opposing the Advancement Motion, and used it after the Court granted that motion to obstruct the effect and efficacy of the July 3d Order. By not making this argument on the Advancement Motion, the Insurers waived it, and it has been nothing more than a wrongful excuse for denying (or limiting) advancement ever since. But even if the Insurers had timely argued that the FDIC's seven claims *not* based on the Inyx loan "related back" to the Inyx Lawsuits as a matter of fact, they never could have demonstrated it as a matter of law, and there still would remain at least a "remote possibility" that those claims would be covered by the 2009-2010 policies, entitling the D&Os to advancement under those policies.

(a) The FDIC's Claims are eight separate and distinct claims

As a threshold matter, it is important to understand that "the concept of 'claim' within the meaning of insurance policies is textual rather than procedural," and the mere existence of "multiple claims within a single action does not render them a single claim." *Kilcher v. Cont'l Cas. Co.*, 2013 WL 1330193, at 5 (D. Minn. 2013); *accord Cont'l Cas. Co. v. Orr*, 2008 WL 2704236 (D. Neb. 2008) ("the term 'claim' is not synonymous with "complaint," and a single lawsuit may contain multiple claims."). In other words, a lawsuit is not necessarily a single "claim" for insurance purposes, and may present multiple "claims." *Home Ins. Co. of Illinois (New Hampshire) v. Spectrum Info. Tech., Inc.*, 930 F. Supp. 825, 846-47 (E.D.N.Y. 1996) (A "'suit' may contain several discrete 'claims.'"); *Exec. Risk Indem., Inc. v. Integral Equity, L.P.*, 2004 WL 438936, at *8 (N.D. Tex. 2004) ("Using this interpretation of the word "Claim,"-the only reasonable interpretation under the Policy-a lawsuit could contain several Claims.").

Ignoring this hornbook principle, *after* the Court issued its July 3d Order, the 09-10 Insurers unilaterally decided to pretend that the FDIC Lawsuit presents a single claim, which, they maintain, "relates back" to the 06-07 policy period because of the Inyx loan transaction, even though the FDIC's Inyx-related claim is merely one of one of eight distinct claims. Taking this position after the July 3d Order, to deny and limit advancement (and coverage) is further evidence of the Insurers' bad faith, obstinate conduct. That conduct continues to prejudice the D&Os' efforts to defend themselves, while it also impedes settlement efforts. The D&Os *are not defendants* with respect to the FDIC's Inyx-related claim, and the Non-Inyx Claims have no relation whatsoever to *any of the prior Inyx Lawsuit*s. The law required the 09-10 Insureds to fairly assess whether the FDIC's Non-Inyx Claims "related back" to the prior Inyx Lawsuits. Because they did not, we have been forced to file this motion, and demonstrate below that there

is at least a "remote possibility" that those claims do not "relate back," and at least a remote possibility of coverage for these "claims made" under the 2009-2010 policies.

(b) There is at least a "remote possibility" that the FDIC's Non-Inyx Claims are unrelated to the Inyx Lawsuits

The 2009-2010 policies state that a claim will be treated as if it were made under a policy for a prior policy period *only if* a "Claim which is subsequently made against an Insured and reported to an Insurer [1] alleg[es], arise[s] out of, [is] based upon or attributable to the facts alleged in the Claim for which such notice has been given, or [2] alleg[es] any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given . . . ." *See, e.g.,* 2009-2010 Policy at Section 7(b) at D.E. # 5-1 at 9. Like their "Insured v. Insured" exclusion argument, the Insurers' "relation back" argument is nothing more than a means for attempting to deny coverage for "claims made" under the 2009-2010 policies. Accordingly, and as far as advancement is concerned, the "remote possibility" standard applies to the Court's determination whether the Non-Inyx Claims "relate back" to the Inyx Lawsuits. *E.g., Ryan v. Nat'l Union Fire Ins. Co. of Pittsburgh PA*, 692 F.3d 162, 168 (2d Cir. 2012) (applying the duty to defend / advancement standard where an insurer attempted to deny coverage based on a claim's purported "interrelatedness" with a prior claim).

(1) There is at least a "remote possibility" that the FDIC's Non-Inyx Claims do not "arise out of" and are not "based upon or attributable to the facts alleged in" the Inyx Lawsuits

As we demonstrated above, each challenged loan transaction in the FDIC lawsuit is a separate claim for coverage purposes, and when the D&Os gave timely notice of the FDIC Claims, the 09-10 Insurers had a duty to assess whether Section 7(b), above, could apply to each individual claim. If that assessment had been made in good faith, the 09-10 Insurers would have concluded that the FDIC's Non-Inyx Claims against the D&Os arise under the 2009-2010

policies, because that they have nothing to do with the previous Inyx Lawsuits. But the Insurers demonstrated nothing remotely resembling good faith regarding coverage for the FDIC's Claims.

Saying anything to deny coverage, the 09-10 Insurers immediately rolled out all of their exclusion arguments, and also advised the D&Os that they would characterize all eight claims in the FDIC lawsuit as "relating back" to the prior Inyx Lawsuits, even though seven of them had never before been articulated by anybody, anytime, anywhere.[7] Disingenuously playing only one card at a time, the 09-10 Insurers opposed the D&Os' motion for advancement of defense costs only on their "Insured v. Insured" exclusion theory, expecting to pocket its other exclusion theories for later use. We will doubtless see them again, frivolous as they are.

Even less forthcoming was the 09-10 Insurers' conduct in not saying a word about its "relation back" theory on the D&Os' motion for advancement, which expressly sought advancement of defense costs under the 2009-2010 policies. Of course, the July 3d Order had no reason to address an argument the Insurers never made, and they waived that argument by not making it. Moreover, the Insurers' post-Order conduct amply demonstrates that the plan was to keep their mouths shut and, if they lost, act as if they were entitled to "rule" that advancement could be made from policies other than the ones that actually were at issue on the Advancement Motion, grudgingly advance defense costs from policies that were depleted by prior litigation, then throw up their hands and, once again, force the D&Os to drag them back into Court.

So, here we are, again forced to waste precious time and resources on demonstrating the obvious, this time, that the non-Inyx Claims have absolutely nothing to do with the Inyx

[7] The minute the 09-10 Insurers took this "relation back" position, it had a duty to notify the other 06-07 Insurers that its theory would implicate their policies in the coverage action. Those excess insurers include Arch, whose magic blinders apparently are uniquely able to keep one in the dark, even in bright sunshine.

Lawsuits or any previous litigation relating to the Inyx loan.[8] The Non-Inyx Claims, *the only Claims* alleged against the D&Os, all are based on construction and commercial real-estate loans and issues. Those loans and issues weren't even raised, much less put in dispute, in any of the Inyx Lawsuits, which means that the FDIC's Non-Inyx claims are, *as a matter of law*, new claims that were made in, and arise under, the 2009-2010 policies. Of course, the D&Os did not need to demonstrate a certainty of coverage under the 2009-2010 polices in order to obtain advancement under them. Our burden was, and is, at the other end of the certainty spectrum, "a mere possibility" of coverage.

That burden is carried by the simplest application of the policy language, which makes clear that the non-Inyx Claims cannot "relate back" to the 2006-2007 policies unless they "arise out of, are based upon or are attributable to the facts alleged in" the Inyx Lawsuits. If the Court were to decide that those words' meaning isn't plain as day, the policy language would have to be deemed ambiguous, construed against the drafter and in favor of coverage, compelling the conclusion that the seven Non-Inyx Claims are claims made on the 2009-2010 policies. In some other case, a court might have to conduct a "remote possibility" of "unrelatedness" analysis from the ground up, guided by the principle that a claim is "based" on another only if there is "substantial overlap in the second complaint with the facts underlying or alleged in the first complaint." *Fed. Ins. Co. v. Raytheon Co.*, 426 F.3d 491, 500 (1st Cir. 2005). Here, the Non-Inyx Claims have nothing in common with the Inyx Lawsuits, much less "substantial overlap."

The only one of the seven that even bears a look is the Intercoffee loan, because, unlike the other six, and like the Inyx loan, it was made by the Bank's asset-based lending division. However, the resemblance ends there. The Intercoffee loan was not the basis of any prior claim

[8] The D&Os reserve all rights to seek appropriate sanctions for Insurers' obstinance, including the fees and expenses of this motion, which, like the advancement motion before it, was necessitated by that obstinance.

in any of the Inyx lawsuits, and in the FDIC lawsuit it is alleged to have been improperly approved because of purportedly inaccurate appraisals of real property that was pledged as collateral. The FDIC's Intercoffee claim has everything to do with real estate and nothing to do with the Bank's asset-based lending division, not the way it was run, or the way it was managed.[9] Its commonality lies with the other six Non-Inyx Claims, all of which are about purported deficiencies in the approval of real estate loans, including property appraisals.

The Plaza CCD, Sabana, Yascar and Museum Tower loans were construction and commercial real estate loans that were originated and approved by divisions and committees different from those that originated, approved and managed the Inyx loan. Examining the gravamen of the prior, purportedly "related" claims reveals just how unrelated they are. *Hildenbrand* and *Saavedra* were Rule 10b-5 securities fraud actions, and, like the *Wylie* derivative action, concerned the speed with which certain directors discovered Inyx's fraud and what they said about it. The *Kachkar* action was for a purported breach of the Inyx loan agreement, brought by those who committed the fraud on the Bank. One doubts that the words "construction" and "commercial real-estate" were used in any of these complaints, and even if they were, those words would have been surplusage. Thus, there is at least a "remote possibility" that the FDIC's Non-Inyx claims do not "relate back" to the Inyx Lawsuits because there is no "substantial overlap" between the FDIC's Non-Inyx Claims and the prior Inyx Lawsuits. The only things they have in common are that they arise out of the Bank's operations and some of the Inyx Lawsuits named some of the same defendants.

[9] Even if the Intercoffee loan were found to relate back to the 06-07 policy period, the remaining six claims would still have to be treated as claims made on the 09-10 policy period.

(2) None of the seven Non-Inyx Claims alleges a "Wrongful Act" that "is the same as or related to any Wrongful Act" that was at issue in the Inyx Lawsuits

The policies fail to define what is meant by a "wrongful act" that is "the same or related to any wrongful act" alleged in a prior lawsuit, and we demonstrated above that there is at least a "remote possibility" that "sameness" and "relatedness" are lacking if this phrase is accorded its natural meaning. For the 09-10 Insurers to contend otherwise would render the phrase ambiguous, and require it to be construed in favor of coverage. Once again, if the Court were to do a ground-up analysis, the dictionary defines "related" as a "logical or causal connection between" two events, and courts recognize that this connection cannot be "so stretch[ed] . . . that it renders the term meaningless or unreasonable." *Kilcher* 2013 WL 1330193, at *7-8.

It is not, and never was, the D&Os' burden to demonstrate no connection at all between the Inyx Lawsuits and the FDIC's Non -Inyx Claims, *only a "remote possibility" of "no substantial overlap."* That we have done. It makes no difference that the past and present claims have *something* in common at the highest level of generality, namely that Westernbank approved and issued the underlying loans. Everything else is different—the parties, the divisions that underwrote, issued and managed the loans, the policies governing those divisions, the committees responsible for approving the loans, and most importantly, the theories of liability.

Thus, there is at least a "remote possibility" that the seven Non-Inyx claims do not allege a "[w]rongful [a]ct" that "is the same as or related to any [w]rongful [a]ct" at issue in the Inyx Lawsuits. Moreover, there will remain at least a "remote possibility" of *no"substantial overlap"* between the FDIC's non-Inyx claims and the prior Inyx lawsuits. *See Raytheon Co*., 426 F.3d at 500. As such, the July 3d Order should be clarified to leave no doubt that the D&Os are entitled to advancement of defense costs under the 2009-2010 policies.

CONCLUSION

The D&Os will not be able to prepare for or defend themselves at trial, and this case will have no chance of settlement, if the Insurers' obstinacy continues. The July 3d Order granted the D&Os' advancement motion because the Court found that a remote possibility of coverage exists. The 2009-2010 policies were the *only policies at issue* on the D&Os' advancement motion, and the Insurers have flouted the July 3d Order ever since. The Court should clarify that the July 3d Order requires advancement of defense costs pursuant to all policies at issue, because there is at least a "remote possibility of coverage" of the FDIC's seven non-Inyx Claims under the 2009-2010 policies, even if the FDIC's Inyx Claim might "relate back" to the 2006-2007 policies. Accordingly, the D&Os respectfully request that the Court clarify the July 3d Order and find that:

(1) The July 3d Order applies to the 2006-2007 primary policy, the 2009-2010 primary policy, and all excess policies for those policy periods;

(2) There is at least a "remote possibility" that all seven of the FDIC's non-Inyx Claims, its *only claims* against the D&Os, do not "relate back" to four prior Inyx Lawsuits and, consequently, the 09-10 Insurers should advance the D&Os' defense costs, subject to recoupment, from the 2009-2010 policies.

RESPECTFULLY SUBMITTED in San Juan, Puerto Rico, on March 31, 2014.

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CERTIFICATE OF SERVICE

I CERTIFY that on March 31, 2014, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record either by transmission of Notices of Electronic Filing generated by CM/ECF or by U.S. Mail.

s/Andrés Rivero
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