Nos. 12-11161-FF & 12-15457

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COQUINA INVESTMENTS,

Plaintiff-Appellee/Cross-Appellant,

v.

TD BANK, N.A.,

Defendant-Appellant/Cross-Appellee.

On Appeal From The United States District Court
For The Southern District Of Florida

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT COQUINA INVESTMENTS

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Coquina Investments v. TD Bank, N.A.
Eleventh Circuit Docket No. 12-11161-FF

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Appellee/Cross-Appellant Coquina Investments has no parent corporation, subsidiaries, or affiliates whose listing is required by Federal Rule of Appellate Procedure 26.1 or this Court's Rule 26.1-1.

Pursuant to this Court's Rule 26.1-1, the undersigned counsel certifies that to the best of counsel's knowledge, the certificate of interested persons contained in the Amended Brief of Appellant/Cross-Appellee TD Bank, N.A. is complete.

DATED: August 19, 2013

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court gave no good reason to deny Coquina leave to amend its RICO claims to conform to the evidence and the court's own shifting view of the law. And no good reason existed. Although Coquina's original complaint applied the "closed ended" label to TD Bank's pattern of racketeering activity, its RICO claims alleged the full breadth of the conspiracy, which spanned four years and defrauded 400 investors out of more than a billion dollars. The district court upheld those broad allegations at the pleading stage, putting TD on notice of the scope of the RICO claims it would have to defend. When the court abruptly reversed field on the eve of trial—announcing unexpectedly that it would consider only a small slice of the scheme Coquina had pleaded—Coquina immediately sought permission to amend in order to align its pleadings with the facts previously alleged and since bolstered by additional evidence.

Given those exceptional circumstances, the district court's denial of leave to amend was a rare abuse of its discretion. Its only stated reasons for denying leave—that Coquina waited too long to amend its allegations, and that TD would be prejudiced (in ways the court did not identify) by an amendment—were not supported, but contradicted, by the facts. Leave to amend was warranted then, and—given TD's deliberate efforts to derail the truth-seeking process, fully revealed only after trial—it is plainly appropriate now.

Seeking to avoid meeting the merits of Coquina's RICO claims, and thus evade the full consequences of its since-adjudicated fraud, TD rushes to defend the district court's unjustified ruling. But its arguments come up empty. The bank ghost-writes analysis to prop up the court's unexplained reasons, and invents entirely new ones—never pressed or passed upon below—to support the same outcome. And, as it has done throughout this litigation, TD paints itself as an innocent victim and points the finger at others—now, at Coquina, which it implausibly accuses of mounting a serial-litigation strategy to wear TD down.

The excuses TD offers as a substitute for the reasoned analysis that the district court failed to supply simply do not wash. Like its other unsuccessful attempts to shift blame to others—first to its codefendant Rothstein and his inside man, Spinosa, then to its own lawyers—TD's latest efforts fail to grapple with its own acts and omissions. Having repeatedly withheld relevant evidence from Coquina, the court, and its own counsel—acts the district court unearthed only after trial in its painstaking investigation, D.E.911:6-28—TD cannot credibly fault Coquina for failing to discover it sooner. And having hindered Coquina from uncovering all the facts earlier and been put on notice at the outset of the scope of Coquina's RICO allegations, TD cannot complain of unfair prejudice. The new theories TD advances on appeal to show that amendment would be futile are equally contrived—and, having been waived below, should be ignored.

Like its efforts to evade responsibility for its actions before, TD's latest attempt to duck the merits of Coquina's claims is a sham. This Court, like the jury and district judge before it, should put an end to the bank's abuse.

ARGUMENT

COQUINA SHOULD HAVE BEEN PERMITTED TO AMEND ITS RICO CLAIMS.

The district court faced immense challenges overseeing this case, which was "litigated to the extreme" and required the court to intervene in contentious discovery and other disputes "almost daily." 05/17/2012 Tr. 33, 142-43. Given those difficulties, which were greatly exacerbated by TD's deliberate litigation abuse throughout the case, D.E.911:6-28, the court's resolution of most of the many complicated substantive issues that arose and its efficient management of innumerable procedural aspects of the litigation were admirable. Indeed, the district court made just one material mistake that warrants correction by this Court.

Although it concluded at the outset that Coquina's RICO claims—the centerpiece of its case from the start—were legally viable and allowed them to proceed, the district court abruptly reversed course only days before trial was scheduled to start and determined that those claims were not cognizable after all. And when Coquina promptly moved, just two days later, to amend its complaint to cure the putative deficiency and conform its allegations to since-uncovered supporting evidence, *see* D.E.562, the court provided only the most cursory

explanation for rejecting the motion—grappling neither with controlling precedent construing the Federal Rules' liberal standard governing amendment of pleadings nor with the unique facts warranting amendment here. *See* D.E.563; D.E.567. Indeed, the court even refused Coquina's request (D.E.562:5) to brief the leave-to-amend issue.

As Coquina explained in its opening brief, the district court's ruling was erroneous at the time it was rendered. *See* Coquina Br. 74-78. And any doubts whether Coquina should be allowed to amend have been eliminated by subsequent events, including TD's since-revealed efforts to obstruct discovery and to deprive Coquina, the court, and the jury of critical evidence. *See id.* Coquina had ample cause for seeking to amend when it did, and the district court did not identify any adequate reason to deny that request. By doing so anyway, the court abused its discretion.

TD's attempt to rationalize the district court's unexplained decision does not come to grips with the law or the facts. Its anemic defense of the conclusory justifications the district court did provide—tellingly buried at the end of its argument, TD Reply Br. 54-55—only confirms that the court's conclusion rests on sand. And the new grounds TD asserts for the first time on appeal to shore up the court's ruling—namely, its contentions that the amendment would be futile because even Coquina's amended claims could not succeed—are much too little,

and far too late. None of TD's proffered reasons for precluding Coquina from pursuing its central claims can bear the weight the bank piles upon them here. But even if this Court concludes that any might have merit, the proper course would be to vacate and remand the leave-to-amend question for the district court to assess it—taking into account all of the circumstances as they now stand—in the first instance.

A. Leave To Amend Coquina's RICO Claims Was Warranted When The District Court Ruled And Is Even More Appropriate Now.

1. TD's Claims Of Undue Delay And Prejudice Are Baseless.

The district court's denial of Coquina's request for leave to amend rested on one simple but inaccurate premise: Coquina, the court stated, "did not timely amend its Complaint … to allege an open-ended pattern of racketeering activity," and allowing such an amendment "would unduly prejudice TD Bank." D.E.567:2. That conclusion, contained in two sentences without authority or elaboration, was the crux of the court's ruling. Its rejection of Coquina's request to amend its complaint in other respects—including to reflect new evidence showing that "TD Bank received a significant monetary benefit from its participation in Rothstein's scheme"—was explicitly predicated on the court's determination that Coquina waited too long to plead an open-ended RICO pattern. *Id.* But that central premise was both legally irrelevant and entirely unfounded.

a. As this Court and many others have made clear, delay alone is not a basis to foreclose amendment. "'The mere passage of time, without anything more, is an insufficient reason to deny leave to amend.'" *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001) (per curiam) (citation omitted). Absent "prejudice to the defendants or bad faith on the part of the plaintiffs," even "lengthy" delay "does not justify denying the plaintiffs the opportunity to amend their complaint." *Id.* Indeed, "[a]mendment can be appropriate even at trial or after trial," and "[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (Former 5th Cir. Nov. 1981); *see*, *e.g.*, *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 75 (5th Cir. 1961) (reversing denial after judgment of leave to amend in light of Federal Rules' "emphatic" "policy" favoring amendment absent strong reason to deny leave).

The relevant issue is whether Coquina had "good cause" for seeking leave when it did, Fed. R. Civ. P. 16(b)(4), and it made that showing in spades. Coquina had uncovered new evidence relevant to its amendment, and it could hardly be faulted for not finding that evidence sooner—given TD's since-revealed strategy of withholding crucial evidence until caught red-handed attempting to conceal it—or for not seeking permission earlier to amend its allegations that the district court had already held were sufficient as originally pleaded. Coquina Br. 75-76.

An amendment was necessary because the district court had suddenly and unpredictably switched its view of the legal standard. Coquina Br. 76-77. In January 2011, well before the discovery and dispositive-motions deadlines, *see* D.E.42, the court held that Coquina's complaint—which, as the court noted, pleaded only a "'closed ended'" theory of RICO continuity, D.E.547:20 (citation omitted); *see* D.E.1:18—"adequately alleged a pattern of racketeering activity," D.E.87:8. In so holding, the court relied on Coquina's allegations concerning the *entire* fraud scheme that TD and Rothstein orchestrated, which Coquina "asserted … was fraudulent from its inception," "was perpetuated over a period of four years," and "involved approximately 400 investors, about $1.2 billion, and losses over $400 million." *Id.* Yet nine months later—long after discovery had closed and the time for amending pleadings had expired, *see* D.E.42, and less than a week before the trial's scheduled start—the district court changed its mind. The court announced that, in evaluating Coquina's closed-ended claim, it would consider only the alleged events occurring between April and September 2009—not the full four-year period alleged in the complaint, as the court had previously concluded—and that Coquina's closed-ended theory therefore was not cognizable after all. D.E.547:21-22.

Those circumstances readily establish good cause to allow Coquina's prompt request to amend its pleading in light of the district court's newly announced view

of the law. As a district court recognized in another case against TD involving the same scheme, Rule 16's good-cause requirement is readily satisfied where the need for amendment arises only when a court rejects some aspect of the plaintiff's original legal theory. *See Emess Capital, LLC v. Rothstein*, No. 10-60882, D.E.216:15-16 (S.D. Fla. May 2, 2012) (allowing amendment and noting that, "[h]ad the Court found Emess' arguments persuasive and denied TD Bank's Motion to Dismiss in its entirety, there may have been no need to amend Counts I and II of the Complaint"). In *Emess*, the court granted leave where the plaintiffs moved to amend six weeks after the district court's ruling. *See id.* Here Coquina sought leave just *two days* after a decision that drastically departed from the district court's prior rulings.

The district court's terse order denying leave to amend, D.E.567; *see also* D.E.563—and refusing Coquina's request for further briefing, D.E.562:5—did not address any of these issues. And while TD defends that ruling, its attempt to supply reasoning the district court omitted adds nothing to the analysis. The bank brushes aside the fact that the district court's prior ruling squarely *rejecting* TD's challenges to Coquina's closed-ended RICO claims made seeking leave to amend earlier unnecessary. Its trite but inapposite observation that judicial "error[s]" do not "vest a right" in the party favored by the ruling (TD Reply Br. 54-55) misses the point. Neither Rule 15's liberal amendment standard nor even Rule 16's "good

cause" caveat require plaintiffs to demonstrate some freestanding legal *right* to amend their pleadings; indeed, construing the Rules to do so would impermissibly render their language superfluous. Properly construed, Rule 15 requires only that the movant's delay be not "undue," *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962), not that it is legally *privileged*. Likewise, Rule 16's good-cause requirement demands only that the party seeking to amend acted with "diligence," *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (per curiam) (internal quotation marks omitted), not that he has an independent absolute *entitlement* to amend his allegations. *See also* Fed. R. Civ. P. 16 advisory committee's note (1983) ("good cause" standard selected instead of more stringent requirement of showing either "substantial hardship" or "manifest injustice").

In any event, the district court's prior ruling upholding the legal theory underlying Coquina's original claim amounted to much more than "advice." TD Reply Br. 55 (internal quotation marks omitted). It was instead a binding ruling from the court overseeing the case, regarding the viability and scope of the claims to be litigated. Coquina was assuredly entitled to take that ruling at face value, unless and until modified by the district court itself or a higher court. The contrary rule proposed by TD would disruptively and counterproductively require plaintiffs to ignore district-court rulings rendered at the pleading stage, and to amend their

complaints to account for legal challenges to their claims that the court had decisively rejected.

TD likewise attempts to dismiss the additional information Coquina had uncovered, asserting without analysis or citation that none of it "bolster[ed] [Coquina's] RICO claim." TD Reply Br. 54. But, as Coquina demonstrated in its motion to amend, new evidence it had already unearthed bore directly on the aspects of Coquina's claim that the district court found lacking in its eve-of-trial summary-judgment ruling. *See* D.E.562:4-5. And even for material the bank had previously produced, its foot-dragging had "rendered it impossible for Coquina to review and analyze all of TD Bank's last-minute discovery and late discovery," and "prevented Coquina from taking necessary follow-up discovery." *Id.* at 3. One untimely produced email, for example, revealed that Rothstein was sending new lucrative business to the bank in exchange for its assistance defrauding Coquina through issuance of the lock letter. *See* D.E.562:5, Ex.B. Such evidence, moreover, was only the tip of the iceberg. As Coquina could not have known then, the bank had withheld a wealth of additional material, *see*, *e.g.*, D.E.911:6-28; D.E.846; D.E.895, even from its own attorneys, D.E.911:27. Yet the district court—which had not yet unearthed TD's strategy of willfully obstructing discovery—denied Coquina's request to conduct additional discovery and analyze

tardy material, and even Coquina's alternative request (D.E.562:5) for the chance to brief the issue.

b. Because the purported delay alone could not justify denying leave to amend, the district court could not deny Coquina's amendment absent proof that the amendment was sought in "bad faith" or would cause "prejudice to the defendants." *Bryant*, 252 F.3d at 1164. There can be no suggestion that Coquina acted in bad faith; to the contrary, it was caught off-guard by the district court's sudden about-face and had been hamstrung by TD's stonewalling tactics. *See* D.E.562:3-5. Thus, only a properly supported finding of prejudice to TD could justify the court's ruling. But while the district court purported to find prejudice, and TD defends the court's ruling on that basis, TD Reply Br. 54-55, the court's conclusory, one-sentence assessment is insufficient on its face and cannot be squared with the facts.

As this Court has held, a district court's finding of prejudice cannot rest on *ipse dixit*. *See Bryant*, 252 F.3d at 1165. Absent actual "*evidence* that allowing an amendment at this stage would prejudice the defendants, the district court should … allo[w] the plaintiffs to amend their complaint." *Id.* (emphasis added). But the district court identified no such evidence. It simply stated, without explanation, that "allowing Coquina to amend its Complaint at this late stage of litigation would unduly prejudice TD Bank." D.E.567:2. As in *Bryant*, the court

here "did not give any reason, other than the mere passage of time, to support its conclusion that allowing the plaintiffs to amend their complaint would prejudice the defendants." 252 F.3d at 1165. That alone warrants reversal. *See id.* (reversing "with instructions to grant the plaintiffs leave to amend").

TD echoes the district court's unexplained finding of prejudice in this Court, TD Reply Br. 54, but it too fails to identify, much less substantiate, any specific prejudice it would have suffered. Like the district court, TD relies entirely on the timing of Coquina's request, made after the court's summary-judgment ruling, without explaining why that timing put the bank at a disadvantage. Indeed, the Federal Rules direct that amendments even *at trial* to present new evidence should be "freely permitt[ed]" where they will "aid in presenting the merits," as they indisputably would do here, *unless* the defendant affirmatively demonstrates some particular prejudice that the amendment will cause to its "defense on the merits." Fed. R. Civ. P. 15(b)(1). In other words, the Federal Rules *presume* that allowing amendment of the plaintiff's claims to facilitate a full presentation of the merits will not prejudice the defendant, even if the trial already has begun, and they place the burden on the defendant to demonstrate otherwise. *A fortiori*, where trial has not yet started, the defendant bears a heavy burden of proving prejudice.

TD did not and cannot carry that burden. After all, until the district court's summary-judgment ruling, rendered days before trial was slated to begin, the bank,

like Coquina, had been preparing to try the case *including* Coquina's RICO claims. *See*, *e.g.*, D.E.461:1-10 (joint pretrial stipulation describing, inter alia, RICO claims). Indeed, the very day of the district court's ruling, the parties jointly proposed jury instructions addressing the RICO claims in detail. D.E.539:24-112. Nor could TD claim unfair surprise regarding the scope of Coquina's RICO claims. Although initially pleaded under a closed-ended rubric, Coquina's original RICO claims already encompassed all or nearly all of TD-Rothstein's broader scheme, which included defrauding hundreds of investors of more than a billion dollars over a "period of four years." D.E.87:8. In effect, Coquina thus merely sought to "conform [its pleadings] to the evidence," which the Rules expressly allow even *after* trial. Fed. R. Civ. P. 15(b)(2).

Allowing Coquina to amend its claims to conform to the district court's revised legal determination would pose no real impediment to TD at all. But even if TD could credibly have shown that its "defense on the merits" would have been hindered by allowing Coquina's proposed amendment, Rule 15 makes clear that the appropriate remedy would not be to bar the amendment outright, which would preclude the jury from deciding the case's full merits. The solution instead would be to continue the trial, if already begun—or if not, to delay its start—"to enable the objecting party to meet the evidence," Fed. R. Civ. P. 15(b)(1), just as Coquina requested here, *see* D.E.562:5-6. The district court's ruling did not explain why

that well-considered approach specifically contemplated by the Federal Rules would not eliminate any possible prejudice here, and TD does not attempt to do so even now.

In any event, whatever claim of prejudice TD might have asserted when Coquina sought leave to amend nearly two years ago has since been obliterated by the bank's subsequently revealed efforts to thwart the truth-seeking process and prevent Coquina from uncovering or presenting to the jury the full extent of the bank's involvement in Rothstein's massive scheme. As the district court found after extensive post-trial proceedings, TD deliberately short-circuited the discovery process and "acted willfully in failing to comply with its discovery obligations and assist its outside counsel to properly litigate this case in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence." D.E.911:23. It engineered its own outside counsel's failure to fulfill the bank's discovery obligations on its behalf, "compartmentaliz[ing] its groups of attorneys and segregat[ing] information from the trial attorneys"—concealing from them even such critical facts as an outside investigation of bank practices that "went to the heart of this litigation," *id.* at 26—and knowingly "fail[ed] to rectify" its counsel's misleading representations and omissions, *id.* at 24. And when called to account for its conduct by the court, instead of accepting responsibility and making amends, TD "hi[d] behind" its outside lawyers and tried to "wash its hands clean of

any involvement" in the discovery process, offering an array of excuses that the district court found "defie[d] credulity." *Id.*; *see id.* at 24-28.

Even now, in this Court, TD continues to manufacture excuses. As it did below, it quibbles over the district court's willfulness finding (even though that finding was unnecessary to the measured sanction the court imposed), TD Reply Br. 36-37, 40-42; it attempts to show that its shocking misconduct was not really that bad, *id.* at 37-40; and it tries yet again to pin the blame on its outside lawyers, *id.* at 42-45—ignoring the district court's findings that the bank set its outside counsel up to fail and shirked its *own* obligation to correct its counsel's glaring mistakes, *see* D.E.911:24, 26. Those familiar, repackaged excuses are as strained and unbecoming as they sound. They offer nothing to refute the district court's findings on this issue—which, in contrast to its uncharacteristically superficial leave-to-amend analysis, were painstakingly thorough and detailed.

More fundamentally, regardless of whether TD succeeds in challenging some particular aspect of the district court's sanctions, or even evading punishment for its misdeeds altogether on technical grounds, it cannot seriously contend, in light of its continual failure to fulfill its own discovery-related duties, that allowing Coquina to amend its pleadings under the circumstances would be unfair to the bank. Just as "'a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to

complain that they cannot be measured with the same exactness and precision as would otherwise be possible,'" *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir. 1973) (quoting *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 405 (1927)), so too a defendant who has willfully frustrated his opponent's efforts to uncover the full extent of the defendant's culpability cannot complain when its own obstruction causes delay by preventing the plaintiff from uncovering key evidence sooner.

TD's contentions that Coquina unfairly seeks a second bite at the apple, and that allowing leave to amend here will encourage future abuses, TD Reply Br. 55, are thus entirely unfounded. Coquina would have been perfectly content to try this case only once, had the bank not deprived Coquina, the district court, and the jury of a complete and accurate record on which to present and assess Coquina's claims. And far from incentivizing future plaintiffs to sandbag their opponents, allowing Coquina to conform its RICO allegations to the evidence here—so that the district court can determine the federal-law consequences of TD's already-adjudicated fraud—will merely make clear to litigants that they may not obstruct and delay discovery and then ambush the other side after the time for amending pleadings and gathering evidence has expired. TD's woebegone self-portrayal as the hapless victim of an endless war of attrition waged by Coquina, which TD compares to imperial Roman legions (*id.* at 55 n.15), is, in short, entirely

untethered to reality. Any complaint by a global bank with $800 billion in assets[1]—especially one that, as the district court noted with concern, fielded an army of "[o]ver 200" attorneys, D.E.911:2—that it has been oppressed in a Roman-style conquest by a tiny Texas partnership that was represented at trial by a husband-and-wife law firm is the very definition of chutzpah, and should be greeted with laughter, not alarm.

2. TD's Tardy Attempt To Show That Amendment Would Be Futile Has No Merit.

Unable to defend the district court's denial of leave to amend on the grounds the court did give, TD resorts to two new theories—both predicated on the supposed futility of any amendment, but neither pressed or passed upon below—to avoid meeting the merits of Coquina's RICO claims. *First*, the bank contends that Coquina could not establish the requisite continuity under RICO, even based on the open-ended theory it sought leave to plead in an amended complaint. *See* TD Reply Br. 48-51. *Second*, TD argues that Coquina's RICO claims are barred by a provision of the Private Securities Litigation Reform Act ("PSLRA"), 18 U.S.C. § 1964(c), which precludes RICO claims based on "conduct that would have been actionable as fraud in the purchase or sale of securities." *Id.*; *see* TD Reply Br. 51-54. Raised as they are for the first time in this Court, neither one can justify

[1] TD Bank Group, *Annual Report 2012*, at 1, 8 (2012), *available at* http://www.td.com/document/PDF/ar2012/AR2012_Complete_E.pdf.

foreclosing Coquina's prompt effort to amend. But even if they had been properly preserved, both of TD's *post hoc* justifications still would be inadequate.

a. This Court need not and should not entertain either of TD's newly asserted reasons for barring Coquina's prompt amendment for the simple reason that TD waived both by failing to raise them below. It is blackletter law that arguments not pressed in the district court are deemed "waived," and ordinarily will not be considered for the first time on appeal. *Mesa Air Grp., Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009); *see*, *e.g.*, *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1115 n.5 (11th Cir. 2008); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1140 (11th Cir. 2007); *Grossfeld v. CFTC*, 137 F.3d 1300, 1301 n.2 (11th Cir. 1998) (per curiam). Fairness to both opposing litigants and lower courts counsels against permitting a party "to argue a different case from the case [it] presented to the district court." *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them.").

That commonsense principle forecloses TD's late-raised futility arguments here, neither of which was asserted or adjudicated below. Although TD challenged the closed-ended theory raised in Coquina's initial complaint, *see* D.E.20:16-17, D.E.225:12-14, it nowhere argued—in response to Coquina's motion to amend or

otherwise—that the *open*-ended theory Coquina sought leave to plead could not pass muster. The bank, in fact, did not file any written opposition to Coquina's motion to amend at all.

Likewise, while TD devotes three pages of its brief in this Court attempting to show that Coquina's RICO claims—premised on TD's and Rothstein's scheme to defraud investors by inducing them to lend money to Rothstein's fictional clients—are really federal securities claims in disguise, TD Reply Br. 51-54, it never developed that argument below. Indeed, even though that argument, if meritorious, would have been available to TD from the *inception* of this litigation, TD did not assert it in seeking dismissal of Coquina's complaint or in moving for summary judgment. The closest the bank came was an oblique reference in a single footnote of its motion to dismiss, wherein it asserted that "*[t]o the extent Plaintiff is claiming* the structured settlements" that backed Coquina's loans to Rothstein "were securities, Plaintiff's RICO claim[s] would be … barred." D.E.20:11 n.13 (emphasis added). Coquina, however, did not and does not claim

that its loans or the settlements underlying them are securities. And despite ample opportunity, TD never attempted to show the contrary.[2]

TD chose not to present either of its late-raised objections to amendment in the district court, which never addressed either. Having withheld those arguments below, precluding the district court from addressing them, and depriving this Court of the benefit of the lower court's analysis, TD should not be heard to raise these arguments for the first time now.

b. Even if TD's untimely arguments were not barred by waiver, they still could not justify precluding Coquina's proposed amendment because neither demonstrates that the complaint as amended would be futile. The Supreme Court has made clear that Rule 15's "mandate" that "leave to amend 'shall be freely given when justice so requires' … is to be heeded." *Foman*, 371 U.S. at 182, 83 S. Ct. at 230 (citation omitted). Consistent with that command, this Court and others have recognized that leave to amend should not be denied on the basis that any amendment would be futile unless it is clear that "the complaint, as amended,

[2] TD's passing reference in a pretrial stipulation to the issue whether Coquina's claims were really securities-fraud claims as one it *intended* to argue later, at trial (D.E.539:36)—unaccompanied by any actual effort to substantiate that argument—was plainly insufficient to preserve the point. *See McGraw v. Comm'r*, 384 F.3d 965, 975 n.3 (8th Cir. 2004) ("passing reference" to "'issue' without any further discussion" in Tax Court "insufficient" to avoid waiver); *see also United States v. Alisal Water Corp.*, 431 F.3d 643, 659 (9th Cir. 2005) ("brief, conclusory statements made with no supporting legal argument" "insufficient to preserve" point for appeal).

would necessarily fail." *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815, 822 (11th Cir. 1999); *see also United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011) ("Under futility analysis, [d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." (internal quotation marks omitted) (alteration in original)); *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004) ("Unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss."). As TD's own cases explain, denying leave to amend is unwarranted unless the amended pleading would "be immediately subject to summary judgment for the defendant." *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam); *see* TD Reply Br. 48. Neither of TD's arguments satisfies that stringent standard.

i. TD first contends that any amendment would be futile because Coquina could not establish the continuity required to prove a "pattern of racketeering activity." 18 U.S.C. § 1962(c). But each of its arguments is irrelevant or insubstantial. The bank's assertion (TD Reply Br. 49-50) that Coquina could not prove a sufficient *closed*-ended period of continuity has no bearing on the

amendment Coquina actually sought leave to make to its complaint—which, as the district court recognized, would plead an *open*-ended theory. D.E.567:2.

TD's further contention that Coquina could not adequately allege an open-ended theory (TD Reply Br. 50-51) is equally specious. The bank's argument rests on the obvious fact that Coquina's claim concerned a Ponzi scheme, and the truism that "Ponzi schemes collapse." *Id.* at 50. Those observations do not begin to explain why Coquina's RICO claim was inescapably doomed. *Most* criminal enterprises eventually come to an end, yet the Supreme Court has made clear that RICO claims based on open-ended patterns of racketeering *are* cognizable. What matters, the Supreme Court has explained, is whether a threat of future racketeering activity remains, or whether the predicate acts reflect "part of an ongoing entity's regular way of doing business." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242, 109 S. Ct. 2893, 2902 (1989). Thus, as other courts have recognized, it is entirely possible for Ponzi-scheme victims to prove that one or both of those prerequisites is satisfied. *See*, *e.g.*, *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) (holding that plaintiff asserting RICO claim stemming from Ponzi scheme presented "sufficient evidence to establish open-ended continuity").

Coquina sought leave to amend precisely for the purpose of pleading just such allegations. When the district court issued its summary-judgment ruling,

Coquina immediately sought permission to plead an open-ended theory satisfying those requirements, and to supplement its allegations based in part on new evidence it already had uncovered. *See* D.E.562. And "[i]n the meantime, in accordance with the Local Rules," Coquina also supplied a proposed amended complaint that identified the outlines of the revised claim it sought to pursue, *id.* at 6—which specifically alleged that TD had engaged in "related and continuous predicate acts that amounted to, or threatened the likelihood of, continued criminal activity projecting into the future," D.E.562, Ex.C:22. That allegation by itself was sufficient to meet the standard described by TD. *See* TD Reply Br. 50-51. Moreover, had Coquina possessed then the voluminous evidence of TD's unscrupulous practices that came to light only many months later, *see*, *e.g.*, D.E.846; D.E.895, it might have pleaded also that such practices were indeed the bank's "'regular way of doing business.'" TD Reply Br. 50 (quoting *H.J.*, 492 U.S. at 242, 109 S. Ct. at 2902).

TD's real argument is that (in its view) Coquina cannot *prove* the claims it sought leave to plead because "Rothstein sowed the seeds of his own destruction," and his "scheme ended" when he could not find new victims. TD Reply Br. 50. The bank's assertions on that score are doubly irrelevant. Whether Coquina ultimately can prove its allegations is beside the point in this posture; the only merits inquiry before the district court in ruling on Coquina's motion for leave to

amend was whether the amended claim Coquina sought leave to plead could possibly succeed, or "would necessarily fail" on its face as a matter of law. *St. Charles Foods*, 198 F.3d at 822.

In any event, as other circuits have explained, "[s]ubsequent events are irrelevant to the continuity determination … because 'in the context of an open-ended period of racketeering activity, the threat of continuity must be viewed at the time the racketeering activity occurred.'" *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 410 (6th Cir. 2012) (citation omitted). Indeed, even Rothstein's eventual arrest and his firm's bankruptcy do not foreclose Coquina's claims. As the Sixth Circuit held in *Heinrich*, "'[t]he lack of a threat of continuity of racketeering activity cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict.'" *Id.* (citation omitted).

ii. TD similarly overreaches in arguing (at 51-54) that Coquina's RICO claims based on loans that TD and Rothstein induced Coquina to make in exchange for fictional litigation settlements are barred by the PSLRA. The PSLRA prohibits RICO suits that "rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). But the premise of TD's argument—its assertion that "Coquina could have brought this case under the banner of securities fraud," TD Reply Br. 51—is false.

It is far from clear that the settlements in which Coquina invested are "securities" within the PSLRA's meaning. *Cf. Stone*, 998 F.2d at 1536-40 (holding that purchases of "enhanced automobile receivables"—"basically car loans purchased from automobile dealers and resold on the secondary market in a package"—were not "securities").[3] Yet even if the settlements at issue here were securities, the PSLRA still would not bar Coquina's RICO claims in this case. A critical part of Coquina's claims here involves TD's aiding and abetting of Rothstein's fraud. Coquina Br. 4-5, 9, 14. The jury specifically found TD liable for aiding and abetting, D.E.748:4-5, and (by TD's lights) *only* conduct underlying that aiding-and-abetting claim could account for at least part (perhaps all) of Coquina's damages, *see* Coquina Br. 57-58. But although that conduct constitutes cognizable predicate acts for RICO, it would not be actionable under the securities laws. The Supreme Court has made it emphatically clear that private plaintiffs

[3] Additionally, the settlements here were not "securities" because Coquina did not "'inves[t] … money in a common enterprise with profits to come solely from the efforts of others.'" *SEC v. Edwards*, 540 U.S. 389, 393, 124 S. Ct. 892, 896 (2004) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 1104 (1946)). By the time Coquina invested, the work required to secure the supposed profits already had been done; there were no "efforts" left to expend. *See SEC v. Life Partners, Inc.*, 87 F.3d 536, 547-48 (D.C. Cir. 1996) (holding that settlements involving acquisition of interest in life-insurance policies, acquired before victims invested, were not securities, and explaining that "pre-purchase services cannot by themselves suffice to make the profits of an investment arise predominantly from the efforts of others"). Coquina recognizes that this Court has disagreed with *Life Partners* in *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 742-45 (11th Cir. 2005), and raises this point solely to preserve it for further review.

may not sue for aiding and abetting under Section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j(b). *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172-78, 114 S. Ct. 1439, 1445-48 (1994); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S. Ct. 761, 768 (2008). Much of TD's conduct here—and plainly enough to support Coquina's RICO claim—thus would not have been "actionable" as securities fraud in a private suit. 18 U.S.C. § 1964(c).

TD is thus left to argue that the PSLRA bars RICO suits regardless of whether any *private plaintiff* could assert securities claims for the same conduct, so long as *any* party—even only a government agency in an enforcement action—could maintain a case based on the same underlying activity. TD Reply Br. 52 (citing *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277, 280 (2d Cir. 2011)). That view—which other courts have derived largely from the legislative history, *see MLSMK*, 651 F.3d at 278-80, but which this Court has never embraced—makes no sense as a matter of statutory construction. The relevant sentence of Section 1964(c) provides in full:

> *Any person* injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person* may rely upon any conduct that *would have been actionable* as fraud in the purchase or sale of securities to establish a violation of section 1962.

18 U.S.C. § 1964(c) (emphases added). The italicized phrases, read in context, make clear that the provision's focus is on private suits: The statute allows private persons to sue for violations of Section 1962, but then carves out an exception where the plaintiff could have sued instead under the federal securities laws. The phrase "would have been actionable" makes sense only in reference to the suit the private plaintiff might have brought.

That reading also aligns with the provision's apparent purpose. Construing Section 1964(c)'s carve-out consistent with its text to bar only claims the plaintiff himself could have asserted makes perfect sense as a means to prevent private parties from proceeding under RICO when federal law already provides them a more appropriately tailored remedy. In contrast, interpreting the exception more expansively as barring any claim under RICO if *anyone else* could bring its own action—even only a government agency with neither the resources nor interest to pursue every claim it possibly could under the securities laws—would serve no rational objective. Without RICO's potent remedial mechanism, many cases that regulators cannot or choose not to bring will never see daylight, and the victims of securities-related conspiracies will perversely be left empty-handed.

B. At Minimum, The Leave-To-Amend Issue Should Be Remanded For Renewed Consideration In Light Of Subsequent Events.

As demonstrated above, none of the arguments TD advances—neither those the district court invoked but failed to explain or substantiate, nor those TD injects

for the first time on appeal—remotely establishes an adequate basis for denying Coquina's prompt request to amend its pleadings. But even if any of those reasons presented a close question, the appropriate course would be to vacate the district court's denial of leave to amend and remand for that court to consider the issues in the first instance.

So far as its decision reflects, even at the time of its ruling the district court did not analyze the considerations that the Supreme Court's and this Court's controlling precedent make paramount. It never addressed the appropriateness of amendment in light of its own change of view, and its cursory treatment of the purported prejudice (if any) that TD would suffer if the proposed amendment were allowed suggests it failed adequately to consider that key factor. Moreover, given the post-verdict and post-judgment timing of the revelations of much of TD's extensive discovery misconduct, the district court never had the opportunity to reevaluate the fairness to TD of allowing the amendment, or to consider the unfairness to Coquina of precluding the amendment given the bank's deliberate efforts to preclude Coquina from proving its case. Given the district court's familiarity with the litigation and its extensive post-trial inquiry into TD's misdeeds, if any further evaluation were needed, it should be done by the district court.

Similarly, to the extent the Court has any doubt that TD's newly asserted grounds for denying leave to amend are meritless, those issues too should be remanded for the district court to consider in the first instance. Whether, for example, any possible allegation that Coquina could assert could sufficiently allege an open-ended theory of continuity under RICO is intrinsically fact-bound, and any detailed analysis of that issue would be performed most efficiently by the district court already familiar with the case.

The district court's own too-swift rejection of Coquina's request for leave to amend and circumstances beyond the court's control prevented it from considering that request fully the first time around. At a minimum, that court should be permitted and directed to address those issues now before what was the heart of Coquina's lawsuit is foreclosed forever.

CONCLUSION

For these reasons and those stated in Coquina's principal brief, Coquina respectfully requests that the district court's order denying Coquina leave to amend its complaint be reversed, or else vacated, but that the district court's judgment and all other rulings be affirmed in all other respects.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 28.1(e)(2)(C), because this brief contains 7,000 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4; and

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