Nos. 12-11161 & 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

BRIEF OF APPELLEE/CROSS-APPELLANT COQUINA INVESTMENTS

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

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: May 3, 2013

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee/Cross-Appellant Coquina Investments respectfully requests oral argument. The case presents an array of legal, factual, and procedural issues with respect to which counsel may be able to assist the Court.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiff-Appellee/Cross-Appellant Coquina Investments' RICO claims under 28 U.S.C. § 1331 and 18 U.S.C. §§ 1964-1965, and jurisdiction over Coquina's state-law claims under 28 U.S.C. § 1332(a)(1). The district court entered judgment against Defendant-Appellant/Cross-Appellee TD Bank, N.A. on January 26, 2012. While post-trial motions filed by TD were pending, TD Bank filed a notice of appeal from that judgment on February 23, 2012. On August 3, 2012, the district court issued an order sanctioning TD Bank for discovery misconduct, and on September 28, 2012, the district court denied TD Bank's pending post-trial motions. TD Bank filed an amended notice of appeal on October 3, 2012, incorporating the district court's sanctions order and its rulings on TD's post-trial motions. *See* Fed. R. App. P. 4(a)(4)(A), (a)(4)(B)(ii). On October 19, 2012, Coquina timely filed a notice of cross-appeal. *See* Fed. R. App. P. 4(a)(3).

As Coquina explained in its response to the Court's jurisdictional questions, this Court has jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

Scott Rothstein orchestrated a billion-dollar Ponzi scheme that fleeced hundreds of innocent investors through an elaborate web of fraud. TD Bank, N.A. and its employees aided the fraud at every step and ultimately joined in it.

TD was much more than Rothstein's preferred bank for funneling victims' funds. With TD's help, Rothstein conducted what TD officers called "investor shows," choreographed performances to lure in unsuspecting victims to invest in fictional structured settlements. Rothstein's right-hand man inside the bank—Frank Spinosa, TD's regional vice president—met with victims, including Coquina Investments, at his TD office and by phone, reassuring them that Rothstein was a valued TD customer and that the money they invested was safe. Spinosa even sent letters on TD letterhead, assuring Coquina that its funds in TD's vaults were protected.

Rothstein's supposed investments proved to be fake, and Spinosa's promises to investors were a sham. By the time the truth was revealed, Rothstein and millions of dollars of his victims' money were en route to Morocco. The blindsided investors, including Coquina, were left to pick up the pieces.

Ever since being called to account for its role in the massive fraud scheme, TD has portrayed itself as an innocent bystander, swept up in this litigation only by dint of having deep pockets. After a two-month trial, however, the jury was not

fooled. It found that TD intentionally defrauded Coquina and aided others in doing so as part of Rothstein's Ponzi scheme. It concluded, in fact, that TD's misdeeds warranted not only $32 million in compensatory damages, but also $35 million in punitive damages.

Yet even the trial and verdict did not uncover all of TD's fraud. As the district court found, TD willfully withheld critical evidence that makes its culpability even clearer, including that another senior bank employee repeatedly provided false testimony under oath. That the jury found TD liable even *without* such evidence is a testament to the mountains of proof supporting TD's guilt. And while TD sought yet again to shift the blame—this time to outside counsel—the district court correctly concluded that TD's own employees were primarily responsible. To prevent the unfairness to Coquina of allowing TD to take advantage of its intentional discovery misconduct by claiming (incorrectly) on appeal that the case was close, the court imposed a carefully calibrated sanction deeming established two facts that TD contested but had wrongfully (and unsuccessfully) attempted to prevent Coquina from proving.

Undeterred and unrepentant, TD now asks this Court to overturn the verdict and the district court's sanction, and to pretend that the trial, TD's efforts to undermine it, and verdict never happened. The district court, like the jury, correctly rejected TD's arguments. Indeed, had the extent of TD's misconduct

surfaced sooner, the district court likely would have avoided the *only* error that this Court should correct. Just before trial, the district court dismissed Coquina's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and denied Coquina's prompt request to amend its claims to track newly uncovered evidence. Especially given TD's since-revealed discovery abuses, that ruling should be reversed; at minimum, the leave-to-amend ruling should be vacated and the district court directed to reconsider it. TD's attack on the jury's verdict and its effort to evade responsibility for its misdeeds should be rejected, and Coquina's RICO claims allowed to proceed.

STATEMENT OF THE ISSUES

1. Whether Coquina, which was fraudulently induced by TD and others to invest in a Ponzi scheme, has Article III standing to recoup its losses.

2. Whether the district court abused its discretion in concluding that alleged evidentiary errors did not result in a verdict against the great weight of the evidence warranting a new trial regarding TD's liability.

3. Whether the jury's damages award (a) should be reduced on the ground that Coquina cannot recover money it actually invested in the Ponzi scheme, because those losses were initially recouped before being clawed back by a bankruptcy trustee in a settlement, or (b) should be vacated and a damages-only retrial held because the jury supposedly awarded duplicative recovery.

4. Whether the district court clearly erred in finding that TD's repeated discovery misconduct was willful, or abused its discretion in fashioning an appropriate sanction.

5. Whether the district court erred in denying Coquina leave to amend the RICO claims in its complaint.

STATEMENT OF THE CASE

A. Proceedings Below

Coquina filed this lawsuit against TD and Scott Rothstein on May 12, 2010, asserting both RICO and state-law fraud claims. D.E.1.[1] The district court denied TD's motion to dismiss, D.E.87, but subsequently granted partial summary judgment dismissing Coquina's RICO claims, D.E.547.

Coquina's remaining claims—for fraudulent misrepresentation, and aiding and abetting fraud—were tried to a jury. The trial was marred by TD's consistent refusal to fulfill its discovery obligations, prompting sanctions by the court, *e.g.*, D.E.660. Yet after more than two months of trial, D.E.625, D.E.747, the jury returned a special verdict finding TD liable on both counts, D.E.748. For each claim, it awarded Coquina $16 million in compensatory damages and $17.5 million

[1] The district court entered a default against Rothstein on November 8, 2010, D.E.52; he is not a party to this appeal. In this brief, citations in the form "D.E.X:Y-Z" refer to district-court docket entry X at pages Y-Z.

in punitive damages. *Id.* The district court accordingly entered judgment against TD for $67 million. D.E.754.

While TD's post-trial motions were pending, Coquina learned that TD had engaged in additional, more serious discovery-related misconduct before and during trial. Coquina moved twice for sanctions, D.E.791, D.E.846, and TD's then-outside counsel (Greenberg Traurig) admitted that "certain statements" sworn by TD employees could not be "relied upon," D.E.825. After extensive evidentiary hearings, the district court found that TD had engaged in willful misconduct and imposed sanctions. D.E.911. After another hearing, the district court denied TD's post-trial motions. D.E.943.

B. Statement Of Facts

1. Coquina's Investments In The Rothstein-TD Scheme

Coquina is a Texas investment partnership, established well before the events in this case to facilitate collective investments. 11/14/2011 Tr. 21, 40; D.E.943:1. In March 2009, Coquina investor George Hawn learned from another Coquina investor, Melvyn Klein, about an opportunity with Florida lawyer Scott Rothstein involving the purchase of structured litigation settlements. 12/1/2011 Tr. 168. Coquina partners Kathleen White and Barrie Damson led the group's effort to investigate the opportunity, collecting and reviewing information about Rothstein, the bank through which Rothstein handled transactions (TD), and the

underlying settlements. D.E.943:6; 12/1/2011 Tr. 170-78. Other partners, including Klein, conducted additional due diligence. 11/14/2011 Tr. 13-32, 35-39; 11/28/2011 Tr. 45; 12/1/2011 Tr. 179.

Satisfied that Rothstein and TD could be trusted, Coquina made its first investment—$600,000—in April 2009. D.E.943:6; 11/14/2011 Tr. 39-40. Coquina pooled funds from its investors and made a single investment by wire transfer from its bank account. D.E.943:6; Ex.P-561A; Ex.P-529; Ex.P-807A; Ex.P-807B. After the first scheduled repayment from Rothstein arrived the next month, Coquina decided to make additional investments. 12/14/2011 Tr. 46; 12/1/2011 Tr. 189. Although Coquina's investors could elect whether to participate in specific transactions—by contributing funds in exchange for a portion of the profit from the collective investment—all of the investments were made by and in the name of Coquina. D.E.943:6-8; *see*, *e.g.*, Ex.P-528S; *see also* Ex.P-561A; Ex.P-529; Ex.P-807A; Ex.P-807B.

Coquina significantly expanded its investments after August 17, 2009. That day, Rothstein sent Coquina a "lock letter"—endorsed by TD Regional Vice President Frank Spinosa—directing that funds held by TD for Coquina could be distributed only to Coquina, and only at Rothstein's direction. Ex.P-561A. The same day, Damson spoke with Rothstein and Spinosa, with Klein listening, and Spinosa confirmed he had signed the lock letter and that TD held $22 million of

Coquina's invested funds. 11/14/2011 Tr. 61-63, 67-68, 85-87. Relying on those representations, Coquina made several additional, much larger investments. *Id.* at 87; Ex.P-807D. It made still more after receiving a second "lock letter" in September 2009—this one on TD letterhead, signed by Spinosa—and after Coquina representatives witnessed a supposed settlement-purchase transaction and then met with Rothstein and Spinosa at TD's offices. 11/14/2011 Tr. 90; 12/1/2011 Tr. 213-24; 12/2/2011 Tr. 9; Ex.P-561B; Ex.807D. By the end of September 2009, Coquina had invested $37.7 million. Ex.P-807D.

2. The Rothstein-TD Scheme's Collapse

Rothstein and TD's scheme proceeded without incident until September 2009, when he missed a scheduled payment to Coquina. 12/1/2011 Tr. 228-29. Days later, Coquina received a letter signed by Spinosa, on TD letterhead, apologizing for the missed payment, which he attributed to a technical problem at the bank (later corrected), assuring Coquina that there was no reason for alarm. *Id.*; 01/11/2012 Tr. 37-39; Ex.D462.

In reality, there was immense cause for concern. Unbeknownst to Coquina, the structured-settlement investments were a sham—part of a massive Ponzi scheme through which Rothstein and TD swindled Coquina and many others collectively out of hundreds of millions of dollars. And contrary to TD's denial that "any of its employees, Spinosa included," even "knew of Rothstein's scheme,"

Br. 8, the evidence showed that Spinosa and others played an active, indispensable role. The lock letter Spinosa signed for Coquina and his verbal assurance in August 2009 that Coquina's funds were safe were crucial to keep Coquina investing, but both were works of fiction: Neither the letter nor anything else stopped Rothstein from siphoning money from investors' accounts, *see* 11/29/2011 Tr. 181-85, and Coquina's actual balance when Spinosa reported it was not $22 million, but *zero*, 12/09/2011 Tr. 53. Nor was Spinosa the only TD employee knee-deep in the fraud. Testimony and surveillance video revealed that bank officers helped Rothstein put on what they called "investor shows," delivering false account statements and cover letters to Rothstein to deceive visiting victims. *See*, *e.g.*, 11/18/2011 Tr. 57-58, 63-64; 11/29/2011 Tr. 97-103, 141-42; 12/01/2011 Tr. 83-84, 91-92.

By the time the truth came to light, however, it was far too late. Rothstein had already fled for Morocco and wired millions of his victims' dollars to an account for his own benefit. D.E.547:11; Ex.P-406. He later pleaded guilty to a litany of federal crimes and is serving a 50-year sentence. D.E.547:11; *see United States v. Rothstein*, No. 09-60331 (S.D. Fla. 2010) (D.E.290). His law firm ("RRA") was forced into bankruptcy by other creditors. *In re Rothstein Rosenfeldt Adler, PA*, D.E.1, No. 09-34791 (Bankr. S.D. Fla. Nov. 10, 2009).

Although Rothstein's arrest and conviction ended the Ponzi scheme, Coquina had lost millions. Despite having invested $37.7 million, Coquina never saw $6.7 million again. But that was only the beginning of Coquina's losses. Ex.P-807D. Rothstein initially repaid the remaining $31.1 million, but in May 2010 the trustee for RRA's bankruptcy estate ("Trustee") sent Coquina a letter demanding those funds' return pursuant to the Bankruptcy Code. Ex.D-947.[2] If the Trustee successfully reclaimed the entire $31.1 million in transferred funds, Coquina's total losses would equal the full amount invested: $37.7 million.

3. Coquina's Lawsuit And TD's Obstruction

A week after the Trustee sent his demand letter, Coquina filed this suit against TD and Rothstein to recover the millions Coquina had lost. D.E.1. Coquina made clear immediately that it had invested $37.7 million in the Rothstein-TD scheme, some of which it never recovered, and that the Trustee sought to claw back all amounts that Rothstein had repaid. *See* D.E.16:5. Coquina asserted claims under the federal RICO statute, 18 U.S.C. § 1962(c)-(d), and under Florida law for fraudulent misrepresentation and aiding and abetting fraud. D.E.1.

From the outset of this suit, TD refused to cooperate fully with discovery. It failed to produce requested documents, prompting orders compelling production. *See*, *e.g.*, D.E.133. It also persuaded the court to excuse TD from turning over

[2] The Trustee also asserted that it was entitled to recover the repaid funds plus a premium under Florida usury law.

crucial electronic evidence in native form, which Coquina requested to prevent data distortion or manipulation. D.E.170; 07/12/2011 Tr. 23; *cf.* D.E.911:23. And, as the court and Coquina later discovered, TD withheld numerous key documents, some of which surfaced only during or after trial.

4. Coquina's RICO Claims

In response to TD's motion to dismiss, the district court held that Coquina's RICO claims sufficiently alleged a "closed-ended" pattern of racketeering activity involving a scheme executed "over a period of four years." D.E.87:8-9. But nine months later, and only days before trial was to begin, the court granted partial summary judgment dismissing those claims, concluding that the closed-ended pattern was not sufficient after all, and that the relevant period for measuring the pattern was not four years, but five months—the span in 2009 when Coquina itself was in contact with Rothstein and TD. D.E.547:21-23.

Coquina moved immediately to amend its complaint in light of this ruling and new evidence that had recently surfaced—much of it after discovery had closed—that bolstered Coquina's claims. D.E.562. The district court denied the motion, eliminating a central component of Coquina's suit on the eve of trial.

5. The RRA Trustee's Demand And Settlement

As Coquina promptly informed TD and the court, the Trustee sought to claw back the partial repayments—approximately $31.1 million—that Rothstein had

made. *See*, *e.g.*, D.E.16:5. The Trustee claimed that nearly all of the transfers to Coquina could be avoided as preferential transfers made within 90 days before the bankruptcy began, and all could be reclaimed on other theories. Ex.D-947.

Shortly before trial, Coquina and the Trustee reached an agreement to avoid costly litigation (the "Settlement"). Ex.P-896. The Trustee agreed to accept $12.5 million up front plus a percentage of any recovery Coquina might obtain from TD in this case: The Trustee would get 75% of the first $8 million recovered by Coquina, and 25% of any recovery above that, until the Trustee's total share (including the $12.5 million) reached the $31.1 million that Coquina received from Rothstein. *Id.* In exchange, the Trustee granted Coquina a garden-variety release of any claims the Trustee might have, extinguishing (as releases routinely do) all claims arising since "the beginning of time" against Coquina and its agents, partners, and other related persons and entities. *Id.* at 2-3.

TD was aware of the Settlement before it was entered, and had ample opportunity to object. It was (and is) an interested party in the bankruptcy proceeding, entitled to be heard before the Settlement was approved.[3] Indeed, TD's counsel attended the hearing at which the Settlement was approved, but

[3] *See* 11 U.S.C. § 1109(b); *see also In re Rothstein Rosenfeldt Adler, P.A.*, D.E.65, No. 09-34791 (Bankr. S.D. Fla. Nov. 30, 2009); *In re Rothstein Rosenfeldt Adler, P.A.*, D.E.3506, No. 09-34791 (Bankr. S.D. Fla. Oct. 11, 2012).

neither objected nor sought permission to cross-examine the Trustee about the Settlement. D.E.943:11 n.6; D.E.574-1:5-6, 16-17.

Once the bankruptcy court approved the Settlement, Coquina promptly moved to amend its damages calculation in this case to include the portion of its original $37.7 million outlay that Rothstein repaid but that the Trustee would claw back through the Settlement. The court allowed Coquina to include those damages in its calculation, but ordered Coquina to provide additional discovery to TD concerning the Settlement. D.E.570.

6. Jury Trial And Verdict

In the district court's words, "[t]his was a case that was litigated to the extreme." 5/17/2012 Tr. 142-43. The jury trial, which began in November 2011, spanned more than two months. *Id.*; D.E.625, 747. TD's in-house counsel actively participated in the litigation: At least eleven in-house lawyers and more than a hundred other bank employees played a part in the bank's defense, D.E.883:26-27 & n.11, and at least one bank representative was present "[e]very day" of trial, 05/17/2012 Tr. 43-44.

Coquina presented numerous fact witnesses and two experts who explained the Coquina partnership, its contact with Rothstein and TD, its investments, and TD's internal systems. D.E.943:2-3. Given the extensive, crucial role played by Spinosa in the execution of the fraud, Coquina called him to the stand. 11/8/2011

Tr. 9. Invoking the Fifth Amendment, Spinosa refused to answer almost every substantive question. 11/10/2011 Tr. 19-119. The district court accordingly instructed the jury regarding the inference that it was permitted, but was not required, to draw from his silence. *Id.* at 19-20. Yet even without inferences drawn from Spinosa's silence, the evidence—including lock letters he signed, *e.g.*, Ex.P-561A, Ex.P-561B—amply demonstrated that he and others knowingly deceived, and helped Rothstein deceive, Coquina.

TD's central defense was that it did not intentionally further the fraud scheme, but instead "did everything that was appropriate and required under its own regulations and any other regulations." 05/17/2012 Tr. 142 (district-court characterization). TD argued that "there was no evidence that this particular account was doing anything that one would consider unusual" and "no alerts on [Rothsein's] account that anyone would consider unusual." *Id.*

Coquina's efforts to prove its case and counter TD's defenses were hampered by TD's discovery misconduct, which continued even once trial was underway and prompted continual discovery disputes. The district court found it "hard … to describe in words the difficulty throughout this trial … related to issues of documents and discovery. It was almost daily." 5/17/2012 Tr. 33. Two weeks into trial, for example, TD produced more than a hundred pages of additional relevant documents, prompting the court to order emergency discovery. D.E.660.

That discovery led to revelations that TD had a number of procedures and policies for investigating suspicious activity, collectively called the Standard Investigative Protocol ("SIP"). The SIP fell squarely within Coquina's earlier document-production requests, yet no such document or policies were produced. D.E.911:12; 05/17/2012 Tr. 204-07. When Coquina moved to compel, TD flatly denied the document's existence. Two senior TD officials submitted sworn declarations assuring the Court that the SIP was a fiction. D.E.727 Ex.B, Ex.C. The district court, taking TD at its word, dropped the issue.

Despite these difficulties, Coquina proved its case. D.E.748. The jury found TD liable on both of Coquina's remaining claims—fraud, and aiding and abetting fraud—and awarded $16 million in compensatory damages and $17.5 million in punitive damages on each count, for a total of $67 million. *Id.*

7. TD's Discovery Misconduct

TD filed two post-trial motions challenging the verdict. D.E.759, D.E.760. Before the court could rule, however, extensive misconduct by TD came to light:

- Three months after the verdict, TD's then-counsel notified the court that earlier sworn "statements [by TD employees] that [the SIP] did not exist," and related representations by outside counsel, were "withdrawn" and "should not be relied upon." D.E.825:1-2.

- Coquina's counsel learned during discovery in another case that an internal record that TD produced here—the bank's Customer Due Diligence ("CDD") form—was grossly distorted. The authentic document declared in a bright red, all-capital-letters banner that TD deemed RRA's account "HIGH RISK," contradicting a key plank in the bank's defense. D.E.791 Ex.2; 05/17/2012 Tr. 39. The document TD produced and the jury saw replaced the red banner with opaque gray bars that concealed the "HIGH RISK" warning. D.E.911:6-7, 24; *see* Ex.P-912. Yet while a TD representative was in the courtroom "every day," 05/17/2012 Tr. 43-44, the bank never mentioned the distortion.
- Coquina also learned from other litigation of undisclosed but highly relevant emails between Spinosa and TD's Florida President, Kevin Gillen, another trial witness. D.E.911:21-22. At trial, Gillen claimed that he first saw the lock letters signed by Spinosa when the bank's counsel showed them to him at a March 2011 deposition. 11/15/2011 Tr. 122; D.E.911:27-28. As the emails reveal, that was not so: Gillen had received them in fall 2009, as the scandal was breaking, from Spinosa himself. D.E.911:21; D.E.909-1. Another email revealed that Gillen rebuffed Spinosa's plea to help salvage Spinosa's reputation precisely because Gillen understood that Spinosa's conduct was wrongful. As Gillen's suppressed email noted, Spinosa "did in

fact author, sign and issue" the lock letters that induced reliance by Rothstein's victims, including Coquina. D.E.895 Ex.1.

- Coquina discovered another internal document referring to a large number of internal alerts the bank investigated in connection with Rothstein's accounts. Although TD had represented that only 100 alerts were generated, the withheld document (which Coquina will not describe in detail because TD maintains it is privileged) contradicted that assertion. TD, however, failed to produce the document even to its then-*outside counsel*, Greenberg Traurig. D.E.911:19-20.

Coquina sought sanctions for TD's misconduct, and the court itself ordered the bank and its counsel to show cause why they should not be held in contempt.

After evidentiary hearings spanning three days and extensive supplemental briefing, the district court issued a 30-page opinion detailing its findings and sanctioning TD. D.E.911. The court found that TD willfully violated its obligations to the court and to Coquina, especially by withholding the SIP and authentic CDD, and that Greenberg had acted negligently. *Id.* As a sanction, the court deemed two facts established—TD's knowledge of the fraud, and the unreasonableness of its monitoring systems—which it concluded would "prevent further prejudice to Coquina in an eventual appeal" by TD. *Id.* at 28.

8. Post-Trial Motions

Following another hearing and more briefing, the district court denied TD's motions for judgment as a matter of law and for a new trial or remittitur. D.E.943. It rejected TD's contention that Coquina lacked standing to sue, finding that "the partnership, rather than the individual investors, made the investments in Rothstein's structured settlements, and suffered a loss as a result." *Id.* at 7.

The court also upheld the jury's verdict awarding damages incurred in connection with the Settlement. D.E.943:11-14. Based on the evidence regarding Coquina's payments to Rothstein, the amount he initially paid back, the Trustee's claim and Coquina's potential liability, and the Settlement formula, the court concluded that the jury could find the Settlement-related losses reasonable. It also rejected TD's claim that it was disabled from effectively challenging the Settlement. *Id.* at 22-24.

The district court likewise rejected TD's other grounds for a new trial. The court reaffirmed its decision to permit Spinosa to invoke the Fifth Amendment on the stand, and the procedure and instructions it had employed. D.E.943:15-21. And it concluded that, even if Spinosa's testimony or alleged hearsay statements in the Settlement were improperly admitted, neither was sufficiently prejudicial to warrant a new trial. *Id.* at 21, 24-27. Finally, the court held that TD failed to

demonstrate that the jury's damages awards on Coquina's two claims were duplicative. *Id.* at 35-37.

C. Standards Of Review

This Court reviews *de novo* a district court's conclusion that a plaintiff has standing, *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005), and upholds factual determinations underlying such conclusions "'unless clearly erroneous,'" *United States v. Weiss*, 467 F.3d 1300, 1308 (11th Cir. 2006) (citation omitted).

Evidentiary rulings and jury instructions are reviewed for abuse of discretion, *Equity Lifestyle Props., Inc. v. Fla. Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1243 (11th Cir. 2009); *Gowski v. Peake*, 682 F.3d 1299, 1310 (11th Cir. 2012), as are a district court's conclusions that evidentiary or instructional errors do not warrant a new trial, *Gowski*, 682 F.3d at 1310; *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001).

Denial of judgment as a matter of law—based on the district court's determination that, drawing all inferences in favor of the non-movant, a reasonable juror could find for the non-movant—is reviewed *de novo*. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1167 (11th Cir. 2008).

A district court's determination that damages are not duplicative is reviewed for clear error. *St. Luke's Cataract & Laser Inst., PA v. Sanderson*, 573 F.3d 1186, 1200 n.17 (11th Cir. 2009).

Review of Rule 37 sanctions orders "'is sharply limited to a search for abuse of discretion and a determination that the findings of the trial court are fully supported by the record.'" *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1313 (11th Cir. 2011) (citation omitted).

Denial of leave to amend the complaint is reviewed for abuse of discretion. *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1239 (11th Cir. 2011).

SUMMARY OF ARGUMENT

I. Coquina has Article III standing. As the jury found, Coquina was fraudulently induced by TD and others whom TD assisted to make investments with Rothstein. Coquina could and did invest in its own name, paid for the investments and received putative returns, and entered the Settlement with the Trustee. Coquina's internal organization and business decisions are irrelevant; Coquina was injured by the bank's fraud and may sue. TD's arguments, in fact, do not implicate constitutional standing at all, but *prudential* standing and Rule 17's real-party-in-interest requirement—arguments TD forfeited.

II. TD's claimed evidentiary errors regarding TD's liability are meritless. The district court did not err, much less abuse its discretion, in permitting Spinosa to invoke the Fifth Amendment in court, or instructing the jury that it could (but need not) infer from his refusal to answer specific questions, together with other evidence, that his answers would be adverse to TD. Nor did the court err in concluding that the admission of recitals in the Settlement regarding Coquina's and the Trustee's own views, with no indication that the bankruptcy court endorsed them, did not substantially prejudice TD. The district court certainly did not abuse its discretion in concluding that neither ruling, even if erroneous, yielded a verdict against the great weight of the evidence.

III. TD's claimed errors regarding the damages award are equally unfounded. TD, not Coquina, bore the burden of proof regarding the reasonableness of the Trustee Settlement because TD's argument is an affirmative defense—mitigation of damages. Even if Coquina bore the burden, the court did not err in concluding that the evidence of the Settlement's reasonableness, drawing all inferences in Coquina's favor, was sufficient to sustain the verdict. Nor did the court's discovery, evidentiary, and jury-instruction decisions preclude TD from effectively challenging that evidence, let alone skew the resulting verdict so severely as to warrant a new trial.

TD's duplicative-damages claim likewise does not warrant a new trial. The bank waived its challenge to the verdict form by failing timely to raise it. Moreover, TD cannot demonstrate that the damages yielded a double recovery. As the district court found, the total award did not exceed the damages Coquina proved at trial. That the jury awarded identical damages on each count does not prove that the awards are duplicative; the jury may apportion damages among claims and had ample basis to do so here.

IV. The district court's careful, measured sanctions order should stand. TD's attempt to show that it did not act willfully is both immaterial—willfulness is not necessary for the sanctions imposed—and incorrect. The record squarely supports the district court's findings that TD concealed key documents and was not forthright with the court. TD cannot shift the blame to outside counsel: Its *own* employees misled the court. Nor did the court abuse its discretion in fashioning a sanction to punish and deter fraud discovered *after* TD lost at trial. The court correctly recognized that TD should not be permitted to exploit its misconduct by arguing, on appeal, that the record it intentionally distorted was insufficient to support the jury's findings, and it appropriately deemed established two facts that TD unsuccessfully attempted to conceal.

V. Coquina should be allowed to amend its RICO claims to comport with evidence uncovered since filing suit. Although the district court faulted Coquina

for failing to seek leave to amend at an earlier stage, the court's motion-to-dismiss ruling had made amendment unnecessary. Moreover, when the district court denied leave to amend, the full extent of TD's severe discovery misconduct—which prevented Coquina from uncovering new evidence sooner—had not yet surfaced. Allowing Coquina to replead its RICO claims would not unduly prejudice TD; it previously anticipated the theory Coquina sought to plead, and its own recalcitrance prevented Coquina from moving to amend earlier.

ARGUMENT

I. COQUINA HAS STANDING TO RECOUP ITS INVESTMENTS.

TD seeks to evade liability for defrauding Coquina by contending that Coquina lacks Article III standing. That contention borders on the frivolous. TD's argument bears at best on *prudential* standing, codified by Rule 17's real-party-in-interest requirement. But the bank forfeited that defense by not timely raising it below. TD's attempt to shoehorn its argument into Article III fails because, as the jury found, TD's actions injured Coquina.

A. Coquina Has Standing Because It Made The Investments And Suffered Losses.

The evidence amply demonstrated that Coquina suffered injury at TD's hands. Coquina accordingly has a "Cas[e]" or "Controvers[y]" (U.S. Const. art. III, § 2, cl. 1) with TD. Indeed, Coquina suffered the type of "wallet injury"

(Br. 18) that unquestionably qualifies as a "'concrete and particularized' invasion of a 'legally protected interest.'" *Sprint Commc'ns v. APCC Servs., Inc.*, 554 U.S. 269, 273, 128 S. Ct. 2531, 2535 (2008) (citation omitted).

1. Coquina is a Texas investment partnership, created years before the investments here began. *See* 11/14/2011 Tr. 21, 40; 11/28/2011 Tr. 38; 12/16/2011 Tr. 27; D.E.943:1, 6. Coquina has its own tax-identification number and files returns in its own name. 11/14/2011 Tr. 40; *see*, *e.g.*, D.E.700 Ex.D. Because Texas has "'unequivocally embrace[d] the entity theory of partnership'"—under which "'a partnership is an entity distinct from its partners'" and can act in its own name, including holding property and filing lawsuits, and "'[a] partner is not a co-owner of partnership property,'" *In re Allcat Claims Serv., LP*, 356 S.W.3d 455, 464 (Tex. 2011) (citation omitted)—Coquina was perfectly capable of investing in its own name (and suffering losses).[4]

There is no question that Coquina itself made the investments here. Coquina's investors chose to have the partnership make a single, collective investment, in which "Coquina Investments would be the investor," instead of separate investments by each individual. 11/14/2011 Tr. 40-41; 12/1/2011 Tr. 181. It was therefore Coquina, and Coquina alone, that paid Rothstein for the

[4] Florida follows the same theory. *See Larmoyeux v. Montgomery*, 963 So. 2d 813, 819 (Fla. Dist. Ct. App. 2007); Fla. Stat. § 620.8201(1).

investments and thereby acquired a right to the putative returns. Ex.P-529; Ex.P-807A; Ex.P-807B.

The investment documents Rothstein created and signed reflect this: They name "Coquina Investments, a Texas General Partnership," as the entity entitled to repayment. *E.g.*, Ex.P-528S:2, 18. Correspondence between Rothstein and Spinosa confirms that "Coquina Investments" was the entity purchasing the (fictional) settlements and entitled to the supposed proceeds. Ex.P-561A; Ex.P-561B; Ex.P-529. A cover letter signed by another TD officer and forwarded to Coquina with a fraudulent account statement references the "Cocuina" (*sic*) account. Ex.P-535. Indeed, even in emails between themselves, Rothstein and Spinosa recognized that they were dealing with Coquina. Ex.P-147. Coquina was the investor, and when the funds it invested were not repaid (or returned but clawed back), Coquina was injured.

2. TD claims that Coquina nonetheless lacks standing because it is supposedly a "conduit," and it was individuals who ultimately felt the financial sting. Br. 18. But whether and how Coquina's losses ultimately redounded to others is irrelevant. Coquina, a legal entity, paid funds for a right to repayment; when it was swindled, *Coquina* was harmed and acquired a right to sue. TD's claim, moreover, proves too much. If an entity lacks standing solely because its profits and losses are passed on to someone else, then no business owned by

others—especially wholly owned subsidiaries, like TD, *see* TD Br. C-5—could *ever* sue in federal court.

TD's only authorities lend no support to that illogical outcome. The named plaintiff in *E.F. Hutton & Co. v. Hadley* "admittedly [was] asserting claims" that belonged to *others*, and had no interest of its own in the property at stake. 901 F.2d 979, 985-86 (11th Cir. 1990). Likewise, in *W.R. Huff Asset Management Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008), and *Indemnified Capital Investments, SA v. R.J. O'Brien & Associates, Inc.*, 12 F.3d 1406, 1409 (7th Cir. 1993), the plaintiffs did not even *allege* that they were injured.

3. TD's claim that Coquina lacks standing to recoup funds Rothstein initially repaid but the Trustee clawed back is similarly baseless. Coquina was the sole party to the Settlement besides the Trustee. Ex.P-896. The Settlement was signed only by Coquina's managing partner. *Id.* And while the Settlement released potential claims not only against Coquina, but also against its investors, this boilerplate language—included in any well-drafted general release—simply makes clear that the Settlement extends to any claim since "the beginning of time" that the plaintiff has or might have against the defendant, its agents, and other related persons or entities. Ex.P-896:2-3.[5] Far from proving that the Settlement

[5] *See* Richard A. Rosen et al., *Settlement Agreements in Commercial Disputes: Negotiating, Drafting, and Enforcement* § 9.02(B) (2000 & 2012 supp.); *see*, *e.g.*, *McKissick v. Yuen*, 618 F.3d 1177, 1181-82 (10th Cir. 2010).

encompassed separate claims unrelated to Coquina's injuries, that provision prevented the Trustee from circumventing the agreement; without it, the Trustee could attempt to end-run the Settlement by seeking from Coquina's investors to whom Coquina distributed proceeds—*e.g.*, as subsequent transferees, 11 U.S.C. § 550(a)—the funds it agreed not to seek from Coquina.

Yet TD takes its argument even further, claiming (at 18-19) that the Trustee had no valid claim against Coquina itself. But that would mean that Coquina voluntarily settled with the Trustee—agreeing to pay $12.5 million up front, regardless whether it recovered anything here—for *nonexistent* liability. That is facially implausible. In any event, the Trustee likely could reclaim some or all of the repaid funds from Coquina under the Bankruptcy Code simply because Coquina received them from Rothstein. *See* Ex.D-947.

In re Chase & Sanborn Corp., 848 F.2d 1196 (11th Cir. 1988), is inapposite. It held that a bank receiving wire transfers from another bank into one of its depositors' accounts was not an "initial transferee" under the Bankruptcy Code, from whom a bankruptcy trustee could claw back the transferred funds. *See id.* at 1200-01. Here, in contrast, Coquina *itself* was the investor entitled to repayments from Rothstein. *See supra* Part I.A.1. And, as TD admitted, Rothstein did not remit the proceeds to individuals (directly or "care of" Coquina) but paid them to

Coquina; Coquina, "as an entity, made the payments to the individual investors" in proportion to their contributions. 12/16/2011 Tr. 41.

4. TD has no answer to this, so it attempts to shift the focus from *whether* Coquina made the investments and suffered losses, to *how* Coquina decided to do so. Br. 19-23. Helping itself to a skewed version of the record, TD portrays as true supposed "facts" that the district court rejected based on ample record evidence, and which cannot be reconciled with the jury's verdict for Coquina. Contrary to TD's claim, for example, the evidence supports the district court's conclusion that Klein and Damson (along with White, managing partner Patricia Wallace, and others) were partners in Coquina. D.E.943:2; 11/28/2011 Tr. 41-42; 12/2/2011 Tr. 16. Indeed, TD itself introduced into evidence one of Klein's Schedule K-1 forms identifying him as a Coquina partner. Ex.D-46; 11/28/2011 Tr. 41.[6] The evidence also confirmed that Coquina's investors conducted due diligence *collectively*, for the group's benefit, delegating tasks to particular participants based on their experience and expertise. 12/1/2011 Tr. 170-81; 12/5/2011 Tr. 39, 41-43. TD likewise mischaracterizes the decisions they made. None made investments independently of the group; Coquina simply allowed them to decide whether to participate in investments the group was making, by choosing

[6] Both Klein and White explained why Klein was not listed on the partnership agreement: It was executed in 2007, two years before Klein became involved, and was amended because everyone involved understood that a written agreement was not required. 11/28/2011 Tr. 40; 12/2/2011 Tr. 16.

whether and how much to contribute toward the collective investment. 12/2/2011 Tr. 18-20.

More fundamentally, how Coquina structured its internal affairs is irrelevant. What matters is that Coquina, the partnership, made the investments. However a partnership makes decisions—by consensus, committee vote, delegating decisions to certain partners or agents, or otherwise—and whatever division of labor it adopts in evaluating opportunities, investments made by the partnership belong *to the partnership*. Likewise, the flexibility Coquina offered—letting its investors opt in or out of specific investments, not requiring all to participate in every project—and how it raised funds and from whom, are matters of purely internal concern. "The partnership" had the "right to distribute how they want." 12/2/2012 Tr. 27; *see also* D.E.943:8. But to the outside world, Coquina was one entity—and to Rothstein and TD, one victim. Regardless how Coquina accumulated capital and how its investors "chose to do their business internally," "everything they did with Rothstein they did as Coquina," and "[t]he returns on the investment, even though we now know they were fraudulent, were returned" to Coquina. 12/2/2012 Tr. 26-27. TD's attack on Coquina's Article III standing has no basis in law or fact.

B. TD Forfeited Any Prudential-Standing Or Real-Party-In-Interest Argument.

Even if TD's argument that Coquina itself ultimately bore no losses and is asserting claims belonging only to its investors were well-founded, it would not

bear on Coquina's *constitutional* standing at all. The principle that a plaintiff ordinarily cannot assert the "legal rights and interests of third parties" is *not* an element of Article III standing. *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010). It is a "non-constitutional, non-jurisdictional, policy-based limitatio[n]"—a component of *prudential* standing, *id.*; *see also Sprint*, 554 U.S. at 289-90, 128 S. Ct. at 1544—that is "codifi[ed]" by Federal Rule of Civil Procedure 17(a)'s real-party-in-interest requirement, *RK Co. v. See*, 622 F.3d 846, 851 (7th Cir. 2010).

The difference is critical because, unlike Article III standing, defendants *can* forfeit the defense that a plaintiff is asserting third parties' rights and is not the real party in interest. *See RK*, 622 F.3d at 851. And TD did forfeit that defense by not timely raising it below. It did not argue that only Coquina's investors were injured in its motions to dismiss or for summary judgment, nor did it request before trial that they be joined or substituted as parties under Rule 17. Instead, it waited until *five weeks into trial* to raise the issue. That was far too late. *See id.*; *see also First Union Discount Brokerage Servs., Inc .v. Milos*, 997 F.2d 835, 842 n.12 (11th Cir. 1993) (collecting cases). Moreover, the only prejudice that TD claims—the supposed failure of each individual investor to prove reliance—is precisely the type of "defect" that could have been cured with testimony by Coquina's investors

if TD had bothered to raise the issue (if it had merit) on a timely basis. TD's tardy attempt to evade liability for its fraud fails for this additional reason.[7]

II. TD'S CLAIMS OF EVIDENTIARY ERROR ARE MERITLESS AND DO NOT JUSTIFY A NEW TRIAL ON LIABILITY.

TD tried to derail the truth-seeking process by concealing evidence and misleading the district court and Coquina. But the jury found the bank liable nonetheless, and found its conduct so reprehensible that it awarded punitive damages. Having failed to fool the jury, TD now seeks a do-over: Despite the jury's findings that the bank intentionally defrauded Coquina and knowingly aided others in doing so, D.E.748:2-5, TD demands a new trial because the jury should have heard even *less* evidence regarding the bank's liability, *see* Br. 25.

TD grounds its new-trial demand on the district court's decision to permit former TD Regional Vice President Frank Spinosa's live testimony, its instructions to the jury concerning that testimony, and its ruling admitting the Settlement into evidence. Each of those matters is committed to the district court's "broad discretion." *Equity Lifestyle*, 556 F.3d at 1243 (evidentiary rulings); *see also Gowski*, 682 F.3d at 1310 (instructions). To obtain a new trial, moreover, TD must show not only that the district court's rulings and instructions were abuses of

[7] Even if TD had not abandoned the argument, and even if Rule 17 required Coquina's investors to ratify, join, or substitute themselves as parties, that would not matter. Rule 17 provides that "[a]fter ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). All that would change is the caption.

discretion, but *also* that the court further abused its discretion in determining that none of the alleged errors affected the outcome so severely as to require a new trial. *See Gowski*, 682 F.3d at 1310; *Lipphardt*, 267 F.3d at 1186. None of TD's claims overcomes these hurdles.

A. The District Court Properly Handled The Testimony Of Former TD Regional Vice President Frank Spinosa.

Spinosa had the greatest knowledge of and involvement in Rothstein's scheme, and the most direct contact with Coquina. It is hardly surprising, therefore, that Coquina sought to question Spinosa at trial on his role in the Ponzi scheme. Yet because Spinosa invoked the Fifth Amendment in response to any substantive questions, TD claims that the district court abused its discretion in permitting his testimony. TD is incorrect.

1. The District Court Did Not Abuse Its Discretion By Allowing Coquina To Question Spinosa In Open Court.

TD's claim (at 27-29) that Spinosa should not have taken the stand *at all* starts from the false premise that adverse inferences drawn from nonparties' Fifth Amendment invocations in civil cases are categorically forbidden. There is no basis for that wooden approach.

In civil cases, unlike criminal cases, adverse inferences can be drawn from a *party*'s invocation of the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-19, 96 S. Ct. 1551, 1558 (1976). "Silence," after all, "is often evidence

of the most persuasive character." *Id.* at 319, 96 S. Ct. at 1558. And nothing in the Fifth Amendment's text or this Court's cases suggests a different rule when *nonparty* witnesses take the Fifth. To the contrary, the circuits that have addressed the issue uniformly reject any bright-line ban on permitting nonparty witnesses to invoke the Fifth Amendment in front of the jury, instead committing the issue to the district court's case-by-case discretion. *See FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 977-78 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1480-81 (8th Cir. 1987); *RAD Servs., Inc. v. Aetna Cas. & Surety Co.*, 808 F.2d 271, 275-77 (3d Cir. 1986); *Brink's, Inc. v. City of New York*, 717 F.2d 700, 708-10 (2d Cir. 1983); *see also LiButti v. United States*, 107 F.3d 110, 121-23 (2d Cir. 1997).

TD is therefore left to argue that the district court abused its discretion by allowing Spinosa to invoke the Fifth Amendment at trial. TD relies almost entirely on the fact that the district court had earlier disallowed an adverse inference from Spinosa's Fifth Amendment invocations at his *deposition*. But the court emphasized that it never intended that earlier ruling to govern *trial*. *See* D.E.943:16 n.8. Indeed, following its initial ruling, the court received extensive additional briefing and heard argument on this issue, including proper application of the "non-exclusive factors" that the Second Circuit "suggest[ed]" in *LiButti*, 107 F.3d at 123; *see also* D.E.600:2-15.

TD does not attempt any reasoned application of the *LiButti* factors, undoubtedly because they point decidedly toward allowing Spinosa to testify. The "most significant" factor—the relationship between the party and nonparty-witness, 107 F.3d at 123—strongly suggests that Spinosa's silence bears on the bank's culpability as well. TD paid Spinosa's legal fees while he remained a high-level executive at the bank, and continued to do so long afterward, apparently even *at trial*. 11/10/2011 Tr. 18; D.E.600:7; D.E.271 Ex.A. And Spinosa's attorney offered to answer TD's questions in aid of the bank's internal investigation. *See* D.E.600:7 & Ex.1. That Spinosa was no longer employed by the bank when he testified does not undermine the inference; otherwise, any employer could "stymie the discovery process" and shield itself from liability "by discharging those potentially responsible for the alleged wrongdoing." *RAD*, 808 F.2d at 276.

There also was ample basis to conclude that Spinosa's and TD's interests closely aligned. *See LiButti*, 107 F.3d at 123. Spinosa was responsible for much of TD's involvement in Rothstein's scheme. *See*, *e.g.*, D.E.943:2-3. The inference that information he withheld about his actions would have been adverse to him thus extends also to TD. Nor is it plausible that Spinosa, having some axe to grind with TD, stood silent in the hope that the jury would draw inferences against his erstwhile employer. Aside from the evidence that the bank continued to pay for his defense, "a witness truly bent on incriminating his former employer would likely

offer damaging testimony directly, instead of hoping for an adverse inference from a Fifth Amendment invocation." *RAD*, 808 F.2d at 276. TD fails to show that the district court abused its discretion by allowing Spinosa to take the stand.

2. The District Court's Procedural Rulings And Instructions Were Appropriate.

TD argues that, because an adverse inference must be supported by independent evidence, the district court should have pre-screened Coquina's questions, allowing only those for which Coquina's counsel already possessed record evidence. Br. 30-31 & n.10. But TD cites no authority for this procedure. Instead, the caselaw requires only that counsel have a good-faith basis or a "'well reasoned suspicion'" for questions—even if they are based on material that itself would be inadmissible. *See* D.E.943:20 (quoting *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980)). Here the court determined that Coquina's counsel *did* have a good-faith basis for the questions TD challenged. *Id.* at 20-21.

In any event, as the court explained, its instructions ensured that the jury would not draw an adverse inference based only on Spinosa's silence. D.E.943:18-19. They instructed the jury that "Spinosa's assertion of his Fifth Amendment privilege alone … is *not* a proper basis for finding TD Bank liable in this case" and emphasized that, only "*in conjunction with other evidence to be presented*, Mr. Spinosa's assertion of his Fifth Amendment privilege may be considered by you in

determining TD Bank's liability in this case." *Id.* (quoting 11/10/2011 Tr. 20) (omission in original).

TD claims those instructions were erroneous because they did not direct the jury to find independent evidence for each *particular* inference it drew. Br. 33. But TD again cites no authority requiring that degree of specificity, particularly given district courts' "wide discretion as to the style and wording employed," *Gowski*, 682 F.3d at 1310. The court, moreover, considered this issue after trial and concluded—"[r]eading the instruction as a whole," D.E.943:19, as this Court's precedents *do* require, *Pate v. Seaboard R.R., Inc.*, 819 F.2d 1074, 1077 (11th Cir. 1987)—that the instruction did not misstate the law, nor warrant a new trial, especially because TD itself emphasized to the jury that independent evidence supporting each inference was necessary. *See* D.E.943:19-21 & n.9.

TD further complains that the instructions invited the jury to draw *any* inference it pleased, "up to and including 'finding TD Bank liable,'" instead of inferring only "the specific fact at issue in a particular question." Br. 33 (citation and emphasis omitted). But the instruction that, when "a past TD employee refuses to answer questions," the jury "may infer, but [did] not need to find that *the answers* would have been adverse to TD Bank's interests," 1/17/2012 Tr. 30 (emphasis added), plainly permitted only inferring an answer *to the question asked*. *See also* 11/10/2011 Tr. 20. The instructions did not suggest that the jury could

leap from a specific answer to a finding that TD was liable, and indeed cautioned the jury that "[a] TD Bank employee's assertion of the Fifth Amendment privilege alone is *not* a proper basis for finding TD Bank liable in this case." 1/17/2012 Tr. 30 (emphasis added). Spinosa's questioning does not justify a new trial.

3. A New Trial Is Not Warranted Because The Verdict Was Not Against The Great Weight Of the Evidence.

Even if the district court did abuse its discretion, any error regarding Spinosa's Fifth Amendment invocations or related jury instructions would not warrant a new trial. As the district court concluded, TD failed to show that the verdict was against the great weight of the evidence. D.E.943:21. That was especially true insofar as Spinosa's testimony bore on TD's knowledge of the fraudulent scheme, given the court's sanction deeming the bank's knowledge established. *Id*. TD does not grapple with the district court's assessment, much less demonstrate that the court abused its discretion. That should end the inquiry. *See Gowski*, 682 F.3d at 1310; *Lipphardt*, 267 F.3d at 1186.

B. The District Court Did Not Abuse Its Discretion By Admitting The RRA Settlement.

After concluding that Coquina could seek to recover amounts initially recovered from Rothstein but clawed back by the Trustee in the Settlement, the district court correctly allowed Coquina to introduce the Settlement itself into evidence. 11/14/2011 Tr. 184-85. As the court explained, the Settlement was

"clearly relevant" to the amount and validity of Coquina's damages. D.E.943:26. TD argues that the court should have excluded the Settlement nevertheless because it contained two passing hearsay statements: It recited that "Coquina and its counsel ha[d] represented to the Trustee" that neither Coquina nor its investors were complicit in Rothstein's scheme, and that the Trustee knew of no "indication" to the contrary. Ex.P-896.

TD's hearsay argument, however, does not *mention*, much less refute, the district court's dispositive finding that "admission of the settlement agreement did not substantially prejudice TD." D.E.943:26; *cf. id.* at 5 (citing *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004)). The challenged recitals "merely state[d] the representations that the parties made to each other and their personal knowledge of the facts," and did not reflect "any ultimate findings on liability or innocence" by anyone else. *Id.* And TD's only discussion of prejudice merely rehashes arguments the district court soundly rejected. It asserts that the Settlement "bore the imprimatur of the bankruptcy court," Br. 35, but the bankruptcy-court order approving the Settlement was *not* admitted; the jury knew only that the agreement had been approved—a fact TD *stipulated*. D.E.943:26; 12/9/2011 Tr. 20. Nor did the Settlement suggest that the bankruptcy court endorsed the parties' stated views; unlike *U.S. Steel, LLC v. Tieco, Inc.*, therefore, there was no risk here that the jury would give "undue weight" to statements of

fact in a prior judicial opinion. 261 F.3d 1275, 1287-88 (11th Cir. 2001). Indeed, it was "obvious from the [S]ettlement," the district court found, "that any statements contained therein reflected the parties' understanding of the facts, not the [bankruptcy] judge's." D.E.943:26.

The district court also correctly rejected TD's argument (Br. 35-36) that references to the Settlement by Coquina's counsel at closing required a new trial. D.E.943:26-27. Most of those references related to the jury's determination of damages. *Id.* The court acknowledged one "isolated remark" on which TD now seizes, but concluded that, "in the context of a two-hour-long closing argument," the stray statement did not "substantially prejudice" TD. *Id.* at 27. TD offers no basis to second-guess the district court's assessment. It thus cannot show it deserved a new trial in the first instance, much less that the district court abused its discretion in concluding otherwise.

III. TD'S ATTACKS ON THE JURY'S DAMAGES AWARD ARE BASELESS.

Unable to impugn the jury's liability findings, TD attacks two aspects of the damages award. It first contends that Coquina could not recover damages stemming from Settlement because it did not prove those damages were reasonable. TD also argues that the jury awarded an improper double recovery—based solely on the fact that the damages awarded on Coquina's two claims were

identical. Both of TD's assertions that its victim, Coquina, was overcompensated warrant skepticism, to put it mildly. And, indeed, both are wrong.

A. The District Court Properly Allowed Coquina To Recover Its Losses Under The RRA Settlement.

1. The Jury Properly Considered The RRA Settlement In Calculating Coquina's Damages.

The district court allowed Coquina to seek as damages the amounts it received as repayments from Rothstein but that the Trustee clawed back through the Settlement, effectively undoing Rothstein's partial repayments. As the court recognized, under Florida law Coquina could recover "'all damages which are a natural, proximate, probable or direct consequence'" of TD's acts. D.E.943:13 (citation omitted). TD does not dispute that principle nor deny that Coquina paid Rothstein $37.7 million.

Coquina, however, managed to reduce the amount of its loss by negotiating the Settlement, which allowed Coquina to repay *less* than the full amount the Trustee could have clawed back in the bankruptcy proceeding. Because Coquina could claim as damages here any amounts the Trustee clawed back, the Settlement also reduced the damages that TD itself would owe. TD insists that Coquina failed to prove the amount of the Settlement was reasonable. But this is, in effect, an argument that Coquina should have reduced (*i.e.*, mitigated) its damages *further*, by negotiating a better settlement or not settling at all. And failure to mitigate is an

affirmative defense on which TD bears the burden of proof. In any event, there *was* sufficient evidence to conclude that the Settlement was reasonable.

a. TD Bank Bore The Burden To Establish The Settlement's Supposed Unreasonableness.

TD's assertion that Coquina did not prove the Settlement was reasonable fails because the bank gets the burden of proof backwards. The trial evidence showed that Rothstein and TD defrauded Coquina into investing $37.7 million. D.E.943:36. Some of that—approximately $6.7 million—disappeared forever. *Id.* at 7. Rothstein initially repaid the remaining $31 million, but the Trustee sought to "'claw back'" those payments by avoiding the transfers to Coquina, which would bring Coquina back to square one—*i.e.*, a total loss of $37.7 million. *Id.* Instead of standing by while the Trustee reclaimed that entire sum—which would leave TD on the hook for that entire loss—Coquina negotiated a structured settlement to *limit* what the Trustee recouped.

TD's basic theory is that Coquina could have limited its losses *further* by settling for less (or perhaps not at all). Br. 37. TD claims, in essence, that it should not bear losses that Coquina supposedly could have avoided. That is a familiar claim: Defendants often assert that plaintiffs were required to mitigate their damages and cannot recover reasonably avoidable losses. Mitigation of damages, however, is a *defense*, and in Florida (as elsewhere) the *defendant* bears the burden of proving it. *See*, *e.g.*, *Timmy Woods Beverly Hills, Ltd. v. Greenwald*,

475 So. 2d 256, 258 & n.3 (Fla. Dist. Ct. App. 1985); *see also Tenn. Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 933 (5th Cir.) (burden of proving "fail[ure] to minimize … damages rests with the wrongdoer"), *amended*, 604 F.2d 13 (5th Cir. 1979); *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1183 (11th Cir. 2010) (same).

TD asserted mitigation of damages as an affirmative defense. D.E.94:12-13. To prove it, TD was required to demonstrate that it was unreasonable for Coquina to settle, or that it should have settled for less. It was not Coquina's burden to *disprove* TD's defense preemptively. TD's assertions about the supposed absence of proof on reasonableness are therefore irrelevant.

TD cites *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755 (11th Cir. 1987), but that case provides no support for requiring a plaintiff to prove that it mitigated damages. *GAB* addressed the distinct context of *indemnity* claims, where the plaintiff must prove that the defendant's conduct caused the plaintiff's liability to a third party. *See id.*[8] In that context, a plaintiff who settles with the third party, and seeks to recoup the settlement cost from the defendant, must show the settlement amount "was reasonable … and a consequence of [the defendant's] breach of duty," *id.* at 761, because the plaintiff's harm exists *only* because of the settlement it entered to compromise liability (which it believes the defendant

[8] *See also Parfait v. Jahncke Serv., Inc.*, 484 F.2d 296, 305 (5th Cir. 1973); *Atl. Richfield Co. v. Interstate Oil Transp. Co.*, 784 F.2d 106, 112 (2d Cir. 1986).

should bear). The settling plaintiff is effectively standing in for the defendant who *actually* caused the third party's injury, and therefore must settle for a reasonable figure.

That principle has no bearing here. Coquina did not claim that it faced and settled liability for injuring someone else for which TD is to blame. Instead, Coquina alleged and proved that *it* was harmed when *it* was defrauded of $37 million it invested, minus the small portion that it has recovered that was not clawed back. TD's argument bears on whether Coquina could have kept *more* of what it initially recovered, not whether TD caused Coquina to injure a third party.

The only other case from this Court TD cites to justify foisting its burden of proof onto Coquina—*In re Prudential of Florida Leasing, Inc.*, 478 F.3d 1291 (11th Cir. 2007)—is even further afield. TD's selective quotation (at 39) of *Prudential*'s holding omits that the "equitable valuation" requirement *Prudential* addressed derived from a Bankruptcy Code provision, 11 U.S.C. § 550(d), applicable only when a bankruptcy court determines what portion of a settlement entered by a trustee to allow as a setoff against the trustee. *See* 478 F.3d at 1302 ("section 550(d) requires a bankruptcy court to arrive at an equitable valuation"). The Court did not address the parties' burdens in demonstrating the reasonableness of settlements with third parties.

TD thus cannot overturn the jury's damages award based on the supposed absence of proof corroborating the Settlement's reasonableness. It had to demonstrate the *opposite*—that Coquina acted *unreasonably* in limiting its losses. TD did not do so, and its attack on the Settlement therefore fails.

b. The Record Demonstrates That Coquina's Settlement Was Reasonable.

Even if TD could shift its burden of proof regarding the Settlement's reasonableness onto Coquina, that is irrelevant because TD fails to show that the evidence was insufficient to support the verdict. To secure judgment *as a matter of law* reducing Coquina's damages by the amount of the Settlement, TD must show that no reasonable juror could have found the Settlement reasonable. *Alvarez Perez*, 515 F.3d at 1167. TD does not come close.

i. TD undisputedly had notice of the Settlement; indeed, its counsel was present in court when the Settlement was approved. *See supra* at 11-12. Even on TD's theory, therefore, Coquina had to establish only that the Settlement amount was reasonable vis-à-vis Coquina's *potential* (not actual) liability to the Trustee. *See GAB*, 809 F.2d at 760-62. The evidence at trial showed that Coquina settled for no more—indeed, significantly less—than the Trustee could have clawed back.

Rothstein's aggregate repayments to Coquina—which the Trustee claimed authority to avoid as preferential or fraudulent transfers, *see* 11 U.S.C. §§ 547-548—totaled $31,126,666.65. Ex.P-807D; 12/8/2011 Tr. 130. As Coquina's

expert explained, the Settlement capped Coquina's payment to the Trustee at that amount: Coquina agreed to pay $12.5 million plus a percentage of any recovery from TD in this case, up to a combined total of $31,126,666.65. Ex.P-896:2-3; 12/8/2011 Tr. 150-54. Thus, Coquina could pay *no more* than it received from Rothstein—and (depending on its recovery here) likely much less. A rational juror, drawing every inference in Coquina's favor, could find this Settlement reasonable.

ii. TD suggests that the Settlement formula was too generous because the Trustee could avoid as preferential transfers under 11 U.S.C. § 547 only repayments that Rothstein made within 90 days before the bankruptcy case was filed, and that Rothstein's transfers to Coquina during that window totaled only $28.1 million, not $31 million. Br. 46 & n.15; *see* Ex.D-947. But as TD itself emphasizes, Br. 39, the Trustee *also* sought to reclaim the funds under 11 U.S.C. § 548, to which the 90-day limitation does not apply.

Moreover, even assuming the jury could have determined that *only* $28.1 million of the Settlement was reasonable, that is immaterial because the jury's award yields the Trustee even less. Coquina's expert explained in detail how any award here would affect what Coquina owed the Trustee. 12/08/2011 Tr. 150-54. The jury was therefore aware, and Coquina's counsel emphasized at closing, that a compensatory-damages award of approximately $32 million would, under the

Settlement formula, net the Trustee $25 million—less than the $28.1 million that TD admits the Trustee could reclaim under Section 547. 1/17/2012 Tr. 93. A reasonable juror could well have concluded that the amount the Trustee *actually* would receive based on the jury's award was reasonable even considering only the preferential-transfer claims.

iii. TD's remaining arguments why the jury could not find the Settlement reasonable lack merit. It claims that the jury could not award damages based on the Settlement because the Trustee asserted, and the Settlement extinguished, other claims for clawing back Rothstein's transfers to Coquina, and that the jury had to allocate the Settlement among the Trustee's various claims but lacked sufficient evidence to do so. Br. 39-40. But all of the Trustee's claims against Coquina ultimately are premised on (and effectively seek to unwind) transfers Coquina received only because TD (or others TD assisted) fraudulently induced Coquina to invest with Rothstein. There was no need to allocate damages among claims that all sought the same thing.

The Trustee did assert a usury claim, which sought both the principal Rothstein had repaid plus twice the interest. But at most, that claim (if meritorious) would net the Trustee only an additional $2 million. Ex.D-947. Moreover, the bare fact that the Trustee included this claim in his demand does not mean it had any bearing on the Settlement amount. It is hardly uncommon for a

party in pre-suit negotiations to assert an array of claims—some meritorious, some marginal, and some hopeless. There is no reason to assume that every claim alleged has equal (or any) monetary value in a resulting settlement. Indeed, the Settlement made clear that Coquina entered the Settlement "in recognition of its potential exposure for the avoidance and recovery of preferential transfers," not the Trustee's strained allegations that Ponzi-scheme victim Coquina strong-armed Rothstein into paying unlawfully high interest rates. Ex.P-896.

TD also repackages its meritless standing argument as a damages issue, claiming that only Coquina's investors, not the partnership, could recover from TD for payments to the Trustee. Br. 38. But only *Coquina* was directly threatened with the Trustee's claims and entered to the Settlement. Ex.P-896. The releases Coquina obtained for its investors simply prevented the Trustee from circumventing the Settlement by collecting from individuals the same funds the Trustee agreed to forgo. Similarly, TD's claim that Coquina *itself* could not be liable to the Trustee for the avoidable transfers is incorrect. *See supra* at 26-27.

TD's conjecture that Coquina might recover in the bankruptcy proceeding ignores the evidence that, to the extent Coquina is made whole here, it will not obtain duplicative relief in the bankruptcy case. *See* 12/9/2011 Tr. 37-38. Coquina also had ample incentive to minimize the Trustee's recovery regarding the pro rata share of any recovery in this case: Coquina was agreeing to forfeit a significant

share of an eventual jury verdict, which beyond compensating Coquina for the Settlement would *also* recompense other losses Coquina suffered, including the $6.7 million that Rothstein never repaid and to which the Trustee had no claim. Coquina was not bargaining with someone else's money, but with its own.

iv. Even if Coquina was required but failed to prove the Settlement's reasonableness, the remedy would not be a damages reduction as a matter of law, as TD argues, but a new damages-only trial. TD claims that the jury did not determine whether the Settlement was reasonable because the district court previously ruled that Coquina *could* recover its Settlement-related damages, and declined to give the specific instruction that TD requested. Br. 44-46. If TD were correct, those rulings made further proof by Coquina unnecessary. Otherwise, Coquina would have presented further evidence of the Settlement's reasonableness, and the jury could have made the supposedly necessary specific finding. On TD's own theory, because Coquina's purported "failure to introduce the necessary evidence" of reasonableness is "due in part to an erroneous ruling" below, the remedy is at most a new trial on damages. *GAB*, 809 F.2d at 762.

2. TD Was Not Precluded From Challenging The Reasonableness Of The Settlement.

TD alternatively claims that it was "hobbled" (Br. 44) in attempting to prove the Settlement was unreasonable by various discovery and trial rulings. This fallback assertion is equally unfounded. TD's claims of error are incorrect, and the

court's ultimate conclusion that none warranted a new trial was not an abuse of discretion.

a. The District Court Appropriately Limited Discovery Regarding The Settlement.

The district court allowed TD to take specific, relevant discovery bearing on the Settlement's reasonableness. D.E.570:2-3. It ordered Coquina to tender for deposition its expert whose report explained the Settlement damages, and to produce numerous related documents, including "existing documents reflecting settlement payments to the RRA Trustee," "any releases related to the settlement agreement," "an accounting of any associated expenses, along with supporting documentation," *id.* at 3; *see* D.E.943:23, and the Trustee's demand letter, D.E.636.

TD complains, however, that the district court did not allow *enough* discovery. But the court has "broad discretion" in determining discovery's precise scope, which requires balancing concrete costs to the parties against speculative benefits of uncovering additional probative evidence, *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976)—particularly where allowing broader discovery would serve (as here) "only to further delay the trial and expend unnecessary resources," D.E.943:23-24. In any event, TD cannot obtain a new trial on this ground "'unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence.'" *Lipphardt*, 267 F.3d at 1186

(citation omitted). TD identifies *no* abuse of the district court's discretion, much less one that skewed the verdict against the great weight of the evidence.

As the court recognized, Florida law allowed Coquina to recover any damages proximately caused by TD's illegal actions. D.E.570:2. It thus correctly reasoned that "*if* [Coquina] succeed[ed] on its fraud claims"—which would require Coquina to establish *inter alia* that TD proximately caused Coquina's damages—Coquina could recover amounts clawed back under the Settlement as a component of those damages. *Id.* (emphasis added). The court therefore reasonably concluded that even *broader* Settlement-related discovery was unnecessary because the amount of the Settlement aligned with Rothstein's payments to Coquina and the Trustee's demand—and that it would be "incredible" to construe the Settlement's terms in context as doing "anything other than … resolv[ing] the Trustee's demand for money Rothstein paid to Coquina on the fraudulent investments." D.E.943:23.

b. The District Court Properly Excluded The Demand Letter.

TD sought to introduce at trial, alongside the Settlement, the Trustee's demand letter to Coquina, which described the Trustee's claims to avoid the transfers Rothstein made to Coquina under bankruptcy law and the bogus claims for usury. The district court rejected TD's request, which TD claims hindered its ability to attack the Settlement's reasonableness. That is incorrect.

The letter was properly excluded under Federal Rule of Evidence 408 because, as the court found, it was plainly an "offer of compromise." D.E.943:31. Indeed, the statements TD claims were most important—those describing the Trustee's specific claims—were doubly barred: Rule 408 independently requires excluding "statement[s] made during compromise negotiations about the claim[s]" at issue, Fed. R. Evid. 408(a)(2), so long as the statements "'were intended to be part of the negotiations toward compromise,'" *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 642 (11th Cir. 1990) (citation omitted). The letter stated explicitly that it was "prepared for settlement purposes" and intended "'[t]o encourage a speedy and effective resolution of this matter prior to litigation.'" D.E.943:31; Ex.D-947.

Contrary to TD's contention (at 45), *Westchester Specialty Insurance Services, Inc. v. U.S. Fire Insurance Co.*, 119 F.3d 1505 (11th Cir. 1997), does not justify (much less require) the demand letter's admission here. *Westchester Specialty* allowed admission of "settlement agreements" *themselves* to resolve a "dispute about the meaning of the settlement agreements' terms." *Id.* at 1512. The Court did not suggest that parties' confidential correspondence *in negotiating a settlement* would also be fair game. Unlike the proponent of the settlement agreements in *Westchester Specialty*, moreover, TD did not offer the demand letter solely to show how the settlement was allocated to particular claims, but primarily

to attack the reasonableness of the Settlement amount itself. Admitting the demand letter would have invited the jury to consider it precisely for the "impermissible purpose of proving the invalidity of a claim or its amount." *Id.* At minimum, the district court, whose conclusions under Rule 408 merit "considerable deference," *Blu-J*, 916 F.2d at 642, did not abuse its discretion in excluding the letter given this risk.

Moreover, the district court independently excluded the letter under Rule 403, finding it would be more prejudicial than probative. D.E.943:31. That was correct, and certainly not a "clear abuse" of the court's "'broad discretion.'" *United States v. Palmer*, 809 F.2d 1504, 1505 (11th Cir. 1987) (citation omitted). Beyond the danger that the jury would consider the letter for an improper purpose, admitting it created the risk of "confus[ing] and mislead[ing] the jury about the nature of the claims in this case." D.E.943:31. The jury already had to sort through massive amounts of evidence concerning the claims that *were* relevant. *Id.* Adding to the mix claims for usury by the Ponzi-scheme architect's estate against its own victims—claims the Trustee never filed, which "may not have been even remotely viable or meritorious," and largely provided only an alternative basis to reclaim the same repayments—risked making the jury's task unmanageable. *Id.*

As the district court concluded, that prejudice dwarfed the minimal probative value the letter could add. The jury already knew of the Trustee's claims to recoup

Rothstein's repayments, which accounted for most or all of the Settlement. D.E.943:31. And it also knew that the Trustee asserted "other claims" beyond avoidable transfers. Br. 45; Ex.P-896.

c. The District Court Instructed The Jury To Award Only Reasonable Damages.

TD finally argues that the district court took the question of the Settlement's reasonableness away from the jury entirely. Br. 47. The record refutes that claim. The court explicitly directed the jury to award only "reasonable" damages: "In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and *reasonable* compensation for all of the Plaintiff's damages, no more and no less." D.E.745:23 (emphasis added). That instruction *required* the jury to assess the reasonableness of every category of damages Coquina claimed, including the Settlement.

TD's gripe is really that the court did not give the particular instruction TD preferred, reminding the jury to assess reasonableness regarding the Settlement specifically. But the court's decision to give only the more general instruction fell well within its "wide discretion as to the style and wording employed." *Gowski*, 682 F.3d at 1310. TD cites no authority requiring a more specific instruction.

B. TD Failed To Show That The Jury Awarded A Double Recovery.

TD next argues that Coquina's recovery should be halved, or a new trial ordered, because the jury improperly awarded duplicative damages. TD waived this argument below and cannot raise it on appeal. In any event, it is meritless.[9]

1. TD Waived Any Double-Recovery Argument.

TD's double-recovery argument rests on its claim that the verdict form was defective. The form sought separate compensatory damages awards on Coquina's fraud and aiding-and-abetting claims, which TD claims invited the jury to award duplicative damages. Br. 48-50. But a party that does not object to a "jury verdict form *prior* to jury deliberations" "waive[s]" its objection. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999); *accord Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992). If TD believed the verdict form was defective because it invited duplicative recoveries, TD had to object *on that ground* before the jury began deliberating.

It did not. Coquina repeatedly proposed a verdict form including separate compensatory-damages and punitive-damages amounts for each claim. *See* D.E.707-2:7-8, 15; D.E.708-1:3-4; D.E.714-2:4-5, 9. In response, TD did not argue that separate *compensatory*-damages awards were problematic because they

[9] As TD conceded below (9/25/2012 Tr. 68) and reiterates on appeal (Br. 50), any new trial ordered based on this alleged error would be limited to damages. *See Aronowitz v. Health-Chem. Corp.*, 513 F.3d 1229, 1242 (11th Cir. 2008); *Overseas Private Inv. Corp. v. Metro. Dade Cnty.*, 47 F.3d 1111, 1116 (11th Cir. 1995).

might invite the jury to award multiple damages for the same injury. It objected on various other grounds, including that multiple *punitive*-damages awards would be improper under punitive-damages law, and for that reason proposed a form with a single interrogatory. *See* D.E.707-2:9-10, 16-17; D.E.714-3:6-11; D.E.736:2; D.E.738:2-3. But TD's objections—particularly regarding punitive damages, which by definition do not compensate for injuries—had nothing to do with allegedly duplicative compensatory damages.

Likewise, when the court ruled on TD's objections in open court, explaining why it chose separate damages interrogatories, TD asked the court to reconsider only regarding *punitive* damages, claiming that "there can only be one finding of punitive damages"; it did not assert that separate *compensatory* awards for Coquina's two claims created a risk that Coquina would recover twice for the same injury. 1/17/2012 Tr. 4-5. Only *after* the jury's deliberations were well underway, in proposing an answer to a jury question, did TD raise a concern about double recovery. By then, it was too late.

2. TD Cannot Demonstrate That The Jury's Damages Award Was Duplicative.

Even if TD preserved its double-recovery argument, it provides no basis to overturn the damages verdict. A jury may not award multiple damages for the same harm. But that abstract principle avails TD nothing because it has not proved

that the damages *were* duplicative—let alone that the district court abused its discretion in upholding the verdict.

TD's burden is a heavy one. In addition to the deference due to the district court, TD also must overcome the "powerful" "policy of deferring to a jury verdict," *Gentile v. Cnty. of Suffolk*, 926 F.2d 142, 154 (2d Cir. 1991), which embodies deeply rooted principles of respect for the jury's weighing of the evidence and (as the court recognized, D.E.943:36) the presumption that juries follow the court's instructions. To overturn a damages verdict as duplicative, a defendant thus must *actually demonstrate* that the jury *in fact* awarded more than one recovery for an injury. *See Gentile*, 926 F.2d at 154; *Johnson v. Howard*, 24 F. App'x 480, 485 (6th Cir. 2001). Unless the court can rule out "the possibility" that the jury acted lawfully, even a "'persuasive' explanation of the jury's damages award indicat[ing] an award contrary to law" is insufficient. *Telecor Commc'ns, Inc. v. Sw. Bell. Tel. Co.*, 305 F.3d 1124, 1143 (10th Cir. 2002) (citation omitted). Speculation is not enough. But that is all TD offers.

a. None of the typical grounds on which courts find damages duplicative exists here. Double recovery cannot be inferred on the theory that the aggregate damages award exceeds Coquina's total proven injury because the aggregate compensatory "damages award does not exceed the outer limits of the evidence set forth at trial." D.E.943:36; *cf. Minotty v. Baudo*, 42 So. 3d 824, 833-34 (Fla. Dist.

Ct. App. 2010). Nor did Coquina suffer a unitary, indivisible harm, such that any damages awarded necessarily overlapped. *Cf. Bender v. City of New York*, 78 F.3d 787, 793-94 (2d Cir. 1996) (false-arrest claims against two defendants stemming from a single period of confinement at least partly duplicative). It was harmed instead in a series of distinct fraudulently induced transactions (ranging from $600,000 to $15 million) over a five-month span. Ex.P-807D.

The only "evidence" TD offers to support its duplicative-damages claim is that the awards on each count were the same. Br. 51-52. But that does not prove that the damages were duplicative: Juries *may* apportion a plaintiff's total damages among multiple counts; "defendants" thus "do not demonstrate that a jury's award is duplicative merely by noting that it allocated the damages under two different causes of action"—even if the jury allocates identical amounts to two claims. *See Gentile*, 926 F.2d at 153-54 (upholding verdict where jury apparently "divided their award for each plaintiff into two equal parts" because it was not "certai[n]" that the jury awarded double damages); *Johnson*, 24 F. App'x at 485-86 (same).

Here it is not merely *possible* that the jury intended to award both of the separate damages amounts it entered on the verdict form; it also makes vastly more sense than TD's contrary conjecture. Coquina invested more than $37 million with Rothstein, and "asked for, at a minimum, $32 million in compensatory damages to make it whole," based on the Settlement's terms. D.E.943:36; 1/17/2012 Tr. 93-

94. The jury did exactly that, awarding $16 million on each count, totaling $32 million. D.E.943:36; D.E.748.

b. Moreover, the court here properly instructed the jury to award on each count only the damages proximately caused by the conduct challenged in that count. D.E.745:13, 15; *see Gentile*, 926 F.2d at 154. And in response to a jury question, the court—at TD's suggestion, 1/18/2012 Tr. 5-6—reiterated that proximate-cause instruction. D.E.749:3. It further directed the jury to "consider the evidence as to each count separately." *Id.* Since the jury is presumed to have obeyed these instructions, *see Gowski*, 682 F.3d at 1315, the verdict reflects that the jury appropriately considered the claims separately and found that $16 million of Coquina's damages stemmed from TD's own fraud and the remainder from TD's aiding and abetting.

That allocation aligns with the record. TD itself insisted below, and the court agreed, that the damages for Coquina's *fraud* claim were confined to losses occurring on or after August 17, 2009 because (TD claims) TD had no direct contact with Coquina before then. D.E.943:10 n.5. Even assuming that is true, the jury could have found that only TD's aiding and abetting caused Coquina's losses before August 17, and apportioned those losses to the aiding-and-abetting claim, allocating the remainder between both of Coquina's theories. *See id.* at 10 n.5, 12 n.7.

The district court's conclusion that the damages were not duplicative thus makes perfect sense. TD's account, in contrast, requires assuming that the jury *flouted* the court's instructions and inexplicably cut Coquina's damages in half. The district court's explanation is by far the more plausible.

c. Unable to carry its burden of proving that the damages award was duplicative, TD also seeks a new trial because the verdict form was "confusing." Br. 50. But that is simply an attempt to sidestep its burden. TD cannot escape its obligation to demonstrate that the jury *actually* awarded a double recovery merely by citing circumstances that *might* have led a jury astray. *See Gentile*, 926 F.2d at 154; *Telecor*, 305 F.3d at 1143; *Johnson*, 24 F. App'x at 485. In any event, TD fails to demonstrate how or why the verdict form was fatally unclear. Read in the context of the court's original and supplemental instructions, the jury had ample guidance: It was told to determine the damages proximately caused by the unlawful conduct at issue in each count.

TD's only authority for its confusing-verdict-form claim is *Overseas Private Investment Corp.*, 47 F.3d 1111. But that case, which *reversed* an order reducing a jury verdict, lends TD no support. There the district court, concerned that the "jury disobeyed instructions not to aggregate or apportion damages," discarded the jury's damages awards for two of the plaintiffs' three claims and entered judgment awarding damages only for the third. *Id.* at 1116. This Court reversed, holding

that the jury found liability on all three counts, that the findings were supported by the evidence, and that "the district court abused its discretion in disregarding the jury verdicts as to the" first two claims. *Id.*

The Court did conclude that the "jury instructions and verdict forms were confusing and unclear, resulting in confusing damage awards," warranting a new trial on damages. 47 F.3d at 1116. But its opinion does not disclose what aspect of the instructions, verdict form, or verdict was vexing to the jury. One thing is clear: The problem was *not* the absence of an instruction prohibiting multiple recoveries, which TD now demands; the district court there *did* give the jury that instruction. *See Overseas Private Inv. Corp. v. Metro. Dade Cnty.*, 826 F. Supp. 1564, 1582 n.30 (S.D. Fla. 1993) ("the plaintiff is entitled to one recovery"). Whatever caused the confusion that concerned this Court, TD cannot contend that *Overseas Private Investments* requires a retrial on damages because it cannot show that the same problem was present here.

IV. THE DISTRICT COURT PROPERLY SANCTIONED TD FOR ITS EXTENSIVE LITIGATION MISCONDUCT.

TD's deliberate and repeated discovery misconduct, thoroughly investigated by the district court, ultimately failed in preventing the jury from holding TD accountable for its misdeeds. Instead of accepting responsibility for its pervasive misconduct—as its former counsel did, 05/18/2012 Tr. 104-05—TD seeks to overturn the district court's findings and hold that TD's efforts to obstruct the

truth-seeking process merit no censure. Br. 52-63. That request should be swiftly rejected. TD's misconduct below and cavalier attitude toward its obligations to the court bespeak brazen disregard for judicial authority that the district court properly refused to tolerate. Overturning the court's decision, reached only after a painstaking, months-long effort to provide TD every possible procedural protection, would perversely encourage similar abuses by future litigants.

A. TD's Attacks On The Willfulness Finding Fail.

1. TD's Attacks On The Willfulness Finding Are Irrelevant Because It Was Not Necessary For The Sanctions Imposed.

TD's brief makes no effort to deny (much less refute) the *acts* giving rise to the sanctions—including withholding key documents until after trial and submitting false sworn declarations that documents did not exist—and instead devotes all of the extra space this Court granted (and then some) to an issue that is ultimately academic: whether its misconduct was *willful*. Br. 53-61. Even if TD could prove (and it cannot) that the district court clearly erred in finding TD acted willfully, and that TD's lapses were *merely* reckless or grossly negligent, that would not matter because the sanctions imposed *did not require* a willfulness finding.

The district court sanctioned TD under Rule 37, not under its inherent authority. D.E.911:28. And "a finding of willfulness or bad faith failure to comply" is *not* a necessary predicate for Rule 37 sanctions unless "the court

imposes the most severe sanction—default or dismissal." *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1049 (11th Cir. 1994). "A court may impose lesser sanctions *without* a showing of willfulness or bad faith on the part of the disobedient party." *Id.* (emphasis added).

Although the district court had ample basis to strike TD's pleadings based on its findings, it elected not to do so. Instead, it deemed two factual issues established and ordered TD (and Greenberg) to pay Coquina's attorney's fees from the sanctions proceedings. D.E.911:28-29. Consequently, even *without* the court's willfulness finding, the sanctions it imposed would have been appropriate. TD's attack on the willfulness finding should be rejected for that reason alone.

2. The District Court's Willfulness Finding Was Not Clearly Erroneous.

TD's challenge to the district court's willfulness finding fails in any event because the bank cannot demonstrate that the court clearly erred. Because even the most brazen litigants rarely admit that they violated the rules willfully or in bad faith, willfulness typically must be inferred from their conduct. *See Byrne v. Nezhat*, 261 F.3d 1075, 1123 (11th Cir. 2001), *abrogated on other grounds*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008). Withholding critical evidence without explanation (especially repeatedly), or attempting to cover it up, is powerful proof of an improper motive. *Malautea v.*

Suzuki Motor Co., 987 F.2d 1536, 1540-41, 1543 (11th Cir. 1993). Lying to the court is a dead giveaway. TD did all of the above.

a. TD Deceived The District Court And Coquina Regarding The SIP.

The SIP is a glaring example that TD willfully flouted the rules. That document was plainly responsive to Coquina's repeated discovery requests, *see*, *e.g.*, D.E.95 Ex.A, but TD withheld it—despite motions and orders to compel that clearly encompassed it, *see*, *e.g.*, D.E.95; D.E.133. Even when a TD employee revealed the SIP's existence during an emergency mid-trial deposition—held to remedy *another* TD discovery violation—TD still suppressed it. And later during the trial, when Coquina again asserted that the bank was holding back, TD had two employees, including its Senior Vice-President of Global AML Enhanced Due Diligence, Vincent Auletta, falsely swear that the SIP did not exist.

As TD disclosed three months after the verdict, however, the document existed all along. Auletta—also a former FBI agent and TD's Rule 30(b)(6) designee, 05/17/2012 Tr. 213; D.E.727 Ex.C; D.E.911:17—had the document in his hands from the beginning. The document was in a shared drive for the unit Auletta oversaw. D.E.911:25. Even more significantly, it was sitting *in Auletta's own email inbox* since August 2009; this supposedly nonexistent document evidently was sent to him at his request while he was helping to revise it, and he instructed his assistant to forward it to outside counsel in April 2011. *See*

05/17/2012 Tr. 219-25, 227; 05/18/2012 Tr. 46 & Auletta Ex.4, Auletta Ex.5, Auletta Ex.6. Yet in January 2012, Auletta "unequivocally" denied the SIP's existence under oath. D.E.911:14; *see* D.E.727 Ex.C.

When TD first apprised the court that the SIP was real, TD's then-outside counsel disavowed Auletta's earlier false statements. But at the sanctions hearing, TD changed course and attempted to defend his earlier statements. *See*, *e.g.*, 05/18/2012 Tr. 24. When confronted with his deception, Auletta piled on *more* false explanations, which the court charitably dismissed as "disingenuou[s]." D.E.911:27 n.13. Auletta posited, for instance, that the SIP was merely a "guideline," not a policy—a characterization another TD employee refuted. *Id.* Auletta also claimed that he previously had confused the SIP with another document—a spreadsheet entitled "Standard Investigative Tools," which listed various *resources* for investigating suspicious activity. 05/18/2012 Tr. 26. But that excuse fell apart because his own descriptions of the Tools spreadsheet contradicted each other: Auletta's declaration averred that the Tools spreadsheet "is not a procedure, policy or protocol," D.E.727 Ex.C, yet in open court he described it as exactly that, 05/18/2012 Tr. 29.

TD's claim that its SIP-related misconduct constitutes only a failure to conduct a proper search gives understatement a bad name. Either Auletta lied outright—by denying the SIP's existence despite knowing it was real—or he

misled the court and Coquina by swearing that the SIP did not exist when he had no idea and had not conducted the most basic inquiry. The district court correctly saw through Auletta's and TD's deceit.

b. TD Willfully Prevented Coquina From Obtaining The True CDD.

The district court's finding that TD willfully failed to rectify its production of the grossly distorted CDD (D.E.911:24) is equally well-founded. The authentic document that TD could and should have produced, D.E.911:23, began with a bright red, all-capital-letters banner stating that the Rothstein account was "HIGH RISK," D.E.791 Ex.2. Had the true document been turned over, it would have refuted the "underlying beam of the Bank's defense that this was not high risk, [and] that the Bank did everything it was supposed to do." 05/17/2012 Tr. 39. In the distorted version Coquina received, however, the "HIGH RISK" banner was "blacked out," and embedded data indicating when bank employees reviewed and revised the CDD was omitted. D.E.911:6-7, 24; *see* Ex.P-912.

TD admittedly did not produce the authentic version. Indeed, it successfully resisted Coquina's earlier request to produce electronic evidence including the CDD in its native format—which Coquina sought precisely out of concern that otherwise the documents could be distorted, 07/12/2011 Tr. 8-9—based on TD's false representation to the court that "no native format exist[ed]" for such documents. *See* D.E.170; 07/12/2011 Tr. 23; *cf.* D.E.911:23. Instead, in TD's own

account, the bank sidestepped its usual discovery protocol and printed a black-and-white hard copy that it then mailed to outside counsel, who scanned the printout and sent it to Coquina. Br. 54.

TD does not deny any of this, arguing instead that *it* bears no blame because Greenberg, not TD, handled document production. Br. 54-55. Setting aside the impropriety of shifting its obligations to outside counsel, *but see infra* Part IV.A.2.d, TD's response misses the point. Whoever bears responsibility for *initially* producing the degraded document to Coquina, TD has no good-faith explanation for *failing to correct* that egregious error once it came to light at trial. D.E.911:24. Some "fifteen in-house lawyers or [TD] representatives … sat through trial." *Id.* at 24. Yet not one said a word.

TD cannot plead ignorance. As the district court explained, the differences between the true document and what the jury saw were "glaring." D.E.911:9. The distortions would have been even more obvious to TD lawyers and employees familiar with the bank's records. The district court, therefore, properly refused to credit TD's excuse that none of the bank's attorneys or employees who attended trial or saw the distorted CDD "had any idea what the critical documents in this case were supposed to look like." D.E.911:24 (explanation "defies credulity").

Indeed, the record shows that at least one TD employee *did* recognize the alterations. Ms. Pinkus, the same TD employee who provided the document to

Greenberg—and whom the district court concluded should have caught the problem *then*, 05/17/2012 Tr. 94 ("She is not three [years old]")—noticed the distortions during her deposition in another case. D.E.911:9-10. Her cryptic references to them then, which indicated only that "the top line is also blacked out" and "the risk status is black," 05/18/2012 Pinkus Ex.3, did not disclose the distortions' full significance, helping TD to continue hiding the ball. But her statements undoubtedly alerted in-house counsel to the problem—and, if not, she should have raised it internally. Instead, TD swept the problem under the rug.[10]

Moreover, even one *not* familiar with the bank's record-keeping system "should have immediately realized" from the appearance of the distorted CDD that it existed originally in electronic form and that some information had been lost, and inquired further. D.E.911:23. The *best* the bank can show is that it was "willful[ly] blin[d]." *Id.* at 25. But willful blindness is still willful.

[10] TD is wrong to suggest (at 55) that Pinkus's references to the distortions during this deposition somehow help its cause. Only TD knew what the distorted CDD concealed. Moreover, when asked directly at the same deposition whether TD designated RRA's account high-risk, Pinkus said only that she could not tell *based on the document in front of her*, even though she knew what the document *should* have reflected. 05/17/2012 Tr. 61-62. TD can hardly complain that Coquina, whose counsel was not present, should have done more based on Pinkus's deposition testimony.

c. TD's Pattern Of Misconduct Bolsters The District Court's Finding Of Willfulness.

Any doubt that TD deliberately defaulted on its duties of candor and to provide complete and accurate discovery is erased by the bank's abysmal history throughout this litigation. A litigant's prior abusive practices are undoubtedly relevant in evaluating whether later infractions were intentional. *See*, *e.g.*, *Aztec Steel Co. v. Fla. Steel Co.*, 691 F.2d 480, 481 (11th Cir. 1982) (per curiam); *see also Malautea*, 987 F.2d at 1539-40, 1543. A party's single, isolated failure to comply with discovery obligations might plausibly reflect an honest mistake. But where a violation is just the latest in a long series, common sense forecloses an innocent explanation. A hunter grazed once by a companion's bullet might charitably accept it as an accident; but when a string of bullets has just barely missed, he can reasonably infer his companion has it in for him. *See* 1 John Henry Wigmore, *A Treatise on the System of Trials at Common Law* § 302 (1904).

TD fought discovery tooth and nail, resisting Coquina's requests at every turn. The case was "litigated to the extreme," and the district court lacked words "to describe … difficulty throughout this trial … related to issues of documents and discovery," which arose "almost daily." 05/17/2012 Tr. 33, 142-43. Among other abuses, TD withheld critical evidence from the outset, producing two weeks *after* trial began (and months after the discovery cutoff) 150 pages of highly relevant documents—including emails bearing directly on its knowledge of

Rothstein's fraud—for which the district court sanctioned TD and ordered emergency discovery. *See* D.E.660. Its Rule 30(b)(6) witness, Auletta, lied during his deposition in this case (and later in another) by asserting that no alerts for RRA accounts existed in TD's monitoring system for the relevant period, when in fact dozens did—yet the bank produced them only on the eve of trial. *See* 05/18/2012 Tr. 18-22 & Auletta Ex.B.[11] And while the bank denies that its withholding of the emails between Gillen and Spinosa was willful, it does not dispute the district court's finding that the documents should have been but were not turned over. Br. 58-60; D.E.911:21-22, 27-28.

"[J]ustice may be blind," but "it is not stupid." *State v. Altrui*, 188 Conn. 161, 173, 448 A.2d 837, 844 (Conn. 1982). Given TD's long history of misconduct, "[t]he *mind* of justice, not merely its eyes, would have to be blind to attribute" TD's latest misdeeds to "mere fortuity." *Id.* (emphasis added). The district court, which lived through the trial and witnessed TD's actions firsthand, saw through TD's excuses.

d. TD Cannot Shift The Blame To Its Outside Counsel.

The common thread in TD's defenses is its attempt to lay the blame at Greenberg's feet. That argument fails, first and foremost, because it is not true. At

[11] Auletta's attempt to explain away his false testimony—that when he testified at his deposition, he was reporting only what others had told him—contradicts his own testimony and correspondence, *see* D.E.883 Ex.3, 05/18/2012 Tr. 18-22, Auletta Ex.C, and even at face value evinces bad faith.

least eleven in-house TD lawyers were involved in the case, according to TD's privilege logs, and more than a hundred other employees played some part. *See supra* at 12. Tellingly, when called to explain its in-house counsel's role at the sanctions hearing, TD tendered only a high-ranking in-house lawyer hired in the same month the trial in this case *ended*, and who knew nothing about the case. 06/12/2012 Tr. 76.

Moreover, Greenberg assuredly cannot bear the blame for Auletta's false sworn statement that the SIP was a fantasy, when it was sitting in his inbox and on a shared drive he should have searched. Nor is the firm responsible for TD's "willful blindness" to the "glaring" distortions in its own document, the CDD. D.E.911:9, 25. Even if Greenberg's negligence helped start that particular fire, TD at minimum stood silently by and watched it burn.

TD, in fact, actively set up its outside counsel to fail by "compartmentaliz[ing] its groups of attorneys and segregat[ing] information from the trial attorneys in this case." D.E.911:26. That strategy of maintaining separate "information silos" (06/12/2012 Tr. 17) worked exactly as planned. As the district court found, "[n]o one outside attorney was aware of the existence of all the discoverable or relevant materials," whereas TD's in-house counsel "had all the information." D.E.911:26. The bank never informed Greenberg, for example, about an investigation of its fraud-monitoring systems that "went to the heart of

this litigation," thus effectively taking the decision whether to produce related evidence "out of Greenberg Traurig's hands." *Id.* It was willful—and at minimum reckless—to entrust fulfillment of the bank's duties to the court to outside lawyers whom TD kept in the dark.[12]

TD denies that its in-house lawyers had the whole picture, and bristles at the suggestion that they *should*. Br. 55-56 & n.17. But it is TD's claim that litigants may completely abdicate their responsibilities by enlisting outside counsel—not the district court's ruling holding TD to account—that is deeply disconcerting. All litigants have certain non-delegable duties, including to comply with court discovery orders; that is why the federal rules expressly provide for sanctions on *parties* as well as their lawyers. *See*, *e.g.*, Fed. R. Civ. P. 16, 37.

TD offers no authority for the astonishing proposition that those duties disappear simply because a party retains outside counsel. Nor does it make sense. Outside counsel cannot possibly learn everything about a multi-billion-dollar business's activities, personnel, practices, and records, let alone ensure that the client fulfills its obligations to the court and opposing parties, without assistance and supervision from the client itself. A litigant can choose not to provide that

[12] TD misunderstands the significance of the district court's finding concerning the bank's failure to produce the expert report related to this investigation. As the district court explained, it considered that non-production not as a freestanding violation meriting sanctions, but as reflecting "an overall pattern of bad faith or willful conduct." D.E.911:26 n.12.

oversight, or even (like TD) to thwart outside counsel's efforts by keeping them uninformed. But in doing so, it knowingly assumes the risk that it will default on its duties, and plausible deniability will not be a defense.

It does not follow, contrary to *amicus*'s alarmist claims (ACC Br. 7-16), that every in-house lawyer must know everything about every case. Nor did the district court here dictate how TD or any other company must organize its internal legal staff. But inside attorneys who *are* charged with supervising outside counsel must *actually supervise*. And the client ultimately must ensure that *someone* does so. Either TD's in-house counsel were well aware that evidence the bank was required to produce was being withheld (and that false sworn statements about that evidence tendered to the court), or at best TD intentionally turned a blind eye. Either way, the bank's acts were willful.

B. The District Court Did Not Abuse Its Discretion In Tailoring The Sanction To Fit TD's Egregious Misconduct.

TD alternatively claims that, even accepting the district court's willfulness finding, the sanctions imposed were not adequately tailored to TD's abuses. Br. 61-63. But the bank fails to demonstrate that the district court abused its "broad discretion" in selecting a sanction. *Malautea*, 987 F.2d at 1542, 1544.

Rule 37 gave the district court a wide berth to "fashion appropriate sanctions for violation of discovery orders." *Malautea*, 987 F.2d at 1542. The sanction must be "'just'" and comply with "'general due process restrictions.'" *Id.* (citation

omitted). But TD cannot complain that it received inadequate process. As TD itself emphasizes, the district court afforded ample procedural protections. *See* TD's Mot. to Exceed Length Limitation at 2-3 (Nov. 2, 2012). It held three full days of evidentiary hearings, allowing both sides to present live witnesses and other evidence, and accepted lengthy supplemental briefs. D.E.911:1.

The sanction the court selected was well tailored to TD's misconduct. Because the court found that TD's violations were willful, it could have entered default or struck TD's pleadings altogether. *See Malautea*, 987 F.2d at 1542, 1544; Fed. R. Civ. P. 37(b)(2)(A). Instead, it chose a narrower approach. TD was seeking, through its post-trial motions and this (already-filed) appeal, to overturn the verdict based on the distorted trial record that its own misconduct created. To minimize the danger that TD would profit from its discovery violations, the court made two factual findings related to the withheld and altered documents—effectively precluding TD from contesting facts for which Coquina would have had even more evidence but for TD's misconduct. The CDD related directly to TD's knowledge of Rothstein's scheme; it declares in a bright red, all-caps banner that TD knew Rothstein's firm was "HIGH RISK," which a jury properly would have considered in evaluating whether TD employees knew what Rothstein was doing. The withheld Gillen emails also would have shed light on what top TD officials knew and when. D.E.911:27-28. And both the CDD and SIP bear on "the

underlying beam of the Bank's defense" that it acted reasonably to prevent fraud. 05/17/2012 Tr. 39. Deeming established TD's knowledge of the fraud and the unreasonableness of its monitoring systems thus was a "direct response to the harm" Coquina suffered. *Barnes v. Dalton*, 158 F.3d 1212, 1215 (11th Cir. 1998).

As the court acknowledged, it is impossible know precisely what effect the suppressed evidence would have had. D.E.911:24-25. But that uncertainty is a problem of TD's making. The bank hardly should benefit from a more lenient sanction because its misdeeds came to light months *after* trial ended.

Indeed, the timing of the revelations of TD's concealment left the district court with little choice. It could not delay trial and order necessary additional discovery (and payment of Coquina's associated expenses), as it could have done had TD come clean sooner. The court also could not ignore TD's misconduct. Sanctions "must never be hollow gestures; their bite must be real," *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002), since they serve not only to punish wrongdoers and protect injured parties, but also to deter future abuse, *see Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781 (1976) (per curiam). The specific sanctions the court imposed were essential to prevent further prejudice to Coquina. D.E.911:28.

The court could take added comfort from the fact that, even *without* the evidence TD withheld, the jury necessarily found both facts that the court deemed established. TD thus was not precluded from litigating Coquina's claims or the bank's defenses; it had done so already but lost. The district court's sanctions simply prevented TD from benefiting further from its misconduct. The court's careful, measured exercise of discretion should not be disturbed.

V. COQUINA SHOULD HAVE BEEN PERMITTED TO AMEND ITS RICO CLAIMS.

Coquina asks the Court to revisit only one aspect of the district court's handling of the litigation: its denial of Coquina's first (and only) request for leave to amend its complaint concerning its RICO claims, to plead an open-ended pattern of racketeering activity and supplement its factual allegations showing that TD conducted or participated in the scheme. In fairness to the district court, it decided that issue long before the full extent of TD's abusive tactics came to light. Yet even based on the evidence before the court when the motion was denied, amendment was amply justified. At minimum, the district court's order should be vacated so that the court can consider in the first instance whether to allow Coquina to amend.

A. Coquina Had Good Cause To Amend Its Complaint.

The federal rules strongly favor permitting amendments of pleadings, especially where it advances the interests of justice. *See* Fed. R. Civ. P. 15(a);

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). That policy is "strongest where the motion challenged is the first motion to amend." *Thompson v. N.Y. Life. Ins. Co.*, 644 F.2d 439, 444 (5th Cir. May 4, 1981). Even at trial or after judgment, the rules not only allow, but indeed encourage, amendments to conform the pleadings to the evidence that a party has accumulated and presented. *See* Fed. R. Civ. P. 15(b)(1)-(2); *cf. Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc) ("[d]elay alone" insufficient to deny leave to amend, even "after a trial on the merits"). Because the deadline for amendments in the district court's scheduling order had passed when Coquina moved to amend, *see* D.E.42, Coquina had to show good cause, *see* Fed. R. Civ. P. 16(b)(4); *Oravec v. Sunny Isles Luxury Ventures, LC*, 527 F.3d 1218, 1231 (11th Cir. 2008). It readily satisfied that standard.

As the district court explained in denying leave, it had previously granted summary judgment on Coquina's RICO claims—three business days before trial was scheduled to begin—because it concluded that Coquina had not presented evidence that TD benefited from the fraud scheme, such that Spinosa's and other TD employees' acts could be imputed to the bank, and that the closed-ended pattern of racketeering activity that Coquina pleaded was too short. D.E.567:2. The court did not dispute that Coquina's allegations in its proposed amended complaint (D.E.562 Ex.C) would have remedied both supposed deficiencies. But it

concluded that Coquina had not shown why it did not amend its complaint immediately after discovery closed and before the dispositive-motions deadline. *See* D.E.567:2.

As Coquina explained in seeking leave, however, it had uncovered new evidence supporting its claims only after the discovery and dispositive-motion deadlines. D.E.562. TD's efforts to frustrate discovery—including producing voluminous evidence just before or even after the discovery cutoff—had significantly slowed Coquina's ability to explore TD's involvement in the fraud. *See id.* at 3-5. TD's earlier obstruction, of course, was just the beginning; it was still withholding large amounts of relevant information that it would reveal only later—on the *eve* of trial, D.E.599, weeks *into* trial, D.E.660, and even months *after* trial, D.E.911. The new information Coquina had unearthed bore directly on its RICO claims. Coquina's expert discovered, for example, that TD was able to derive substantial benefits from its involvement in the fraud, collecting interest and fees in connection with the millions of dollars Rothstein laundered through the bank, and evidence revealed that Rothstein referred wealthy new clients to TD in exchange for Spinosa's involvement in defrauding Coquina. D.E.562:4-5.

Coquina had additional good cause for not seeking leave sooner to plead an open-ended (instead of closed-ended) pattern of racketeering activity. In January 2011—before the discovery and dispositive-motions deadlines—the court denied

TD's motion to dismiss that claim, concluding that the closed-ended pattern Coquina alleged *was* sufficient. D.E.87:8-9. The court reasoned that the relevant pattern spanned at least four years (from 2005 to 2009) and involved hundreds of other investors. *Id.* Nine months later, however—after discovery had closed, and with trial scheduled to begin within days—the court reversed course and *rejected* the same closed-ended theory, explaining that only the five-month period of Coquina's *own* direct interaction with Rothstein and TD in 2009 was relevant. D.E.547:21-23. That ruling understandably caught Coquina by surprise. It should have been permitted to replead its claims given the district court's revised conclusion.

B. TD Bank Would Not Be Unduly Prejudiced By The Amendment.

The district court also concluded—before learning the full extent of TD's discovery misconduct—that allowing Coquina to amend its complaint would "unduly prejudice" TD. D.E.567:2. That conclusion was incorrect then, and it certainly is untrue today.

The district court did not identify how TD would be unduly prejudiced by allowing Coquina to pursue RICO claims that TD's own foot-dragging during discovery had frustrated. D.E.567:2. TD, moreover, was not caught off-guard by the open-ended pattern Coquina sought to allege. Its summary-judgment motion (filed in May 2011) *addressed* the open-ended theory, arguing that it could not

succeed based on the record. D.E.225:12-14. Coquina's opposition directly answered and refuted that argument, demonstrating that even based on the limited information Coquina had then uncovered, the facts established an open-ended pattern. D.E.227:13-15. If TD, which was well aware of Coquina's open-ended theory, suffered prejudice at all, it certainly was not *undue*.

In any event, any claim of prejudice TD might have had in October 2011 has since disappeared. Having withheld key evidence from Coquina for years, including evidence relevant to Coquina's RICO claims, TD is in no position to claim unfair surprise. Now that it has finally seen fit to produce evidence that Coquina first requested more than two years ago, D.E.95 Ex.A, TD should be willing to let trial proceed on Coquina's claims.

CONCLUSION

For these reasons, 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.

DATED: May 3, 2013

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)(B), as extended by this Court's order of January 4, 2013, because this brief contains 18,000 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

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

DATED: May 3, 2013

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ADDENDUM:
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Constitution, art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Constitution, amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. § 547. Preferences

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by

which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,225[1]

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

---

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

11 U.S.C. § 548. Fraudulent Transfers And Obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

11 U.S.C. § 550. Liability Of Transferee Of Avoided Transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section[1] (a)(2) of this section from--

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes--

[1] So in original. Probably should be "subsection".

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 1109. Right To Be Heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

18 U.S.C. § 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in

section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs

[1] So in original.

or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last

of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection

of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil Remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) 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. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965. Venue And Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which

such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Fed. R. Civ. P. 15. Amended And Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be

supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. P. 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 17. Plaintiff And Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

Fed. R. Civ. P. 37. Failure To Make Disclosures Or To Cooperate In Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the

failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Fed. R. Evid. 403. Excluding Relevant Evidence For Prejudice, Confusion, Waste Of Time, Or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 408. Compromise Offers And Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

CERTIFICATE OF SERVICE

I hereby certify that today, May 3, 2013, I electronically filed the foregoing Brief for Appellee/Cross-Appellant Coquina Investments using the Court's ECF system. I further certify that I caused two true and correct copies of the foregoing Brief for Appellee/Cross-Appellant Coquina Investments to be served this same day, May 3, 2013, by personal service via hand-delivery on the following counsel for Defendant-Appellant/Cross-Appellee TD Bank, N.A.:

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