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

RESPONSE AND REPLY BRIEF
OF DEFENDANT-APPELLANT TD BANK, N.A.

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendant-Appellant TD Bank, N.A. certifies that, to the best of counsel's knowledge, the Certificate of Interested Persons contained in the Amended Brief of Defendant-Appellant TD Bank, N.A. is complete.

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendant-Appellant TD Bank, N.A. makes the following statement as to corporate ownership:

TD Bank, N.A. is a wholly owned indirect subsidiary of The Toronto-Dominion Bank, a publicly traded company in Canada and the United States (NYSE: TD). TD Bank, N.A. is a wholly owned subsidiary of TD Bank US Holding Company, which is, in turn, a wholly owned subsidiary of TD US P&C Holdings, ULC. TD US P&C Holdings, ULC is a wholly owned subsidiary of the Toronto-Dominion Bank.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Coquina's improbable theory at trial—which it reiterates in the first paragraph of its brief—was that TD knowingly participated in the Ponzi scheme perpetrated by Scott Rothstein. At Coquina's urging, the district court erroneously: (i) enabled that theory (by a panoply of errors relating to the "testimony" of Frank Spinosa); (ii) disabled TD's "too-good-to-be-true" defense (by admitting what Coquina now concedes to be the hearsay Exculpation Recital); (iii) augmented Coquina's damages (by awarding settlement payments *as a matter of law*, and inviting the jury to return double damages); and (iv) accepted Coquina's invitation to insulate these manifest errors from appellate review by imposing baseless discovery sanctions. Coquina's opposition brief, despite its heft, is conspicuously silent about nearly all of these errors.

I. It is passing strange to refer to "Coquina" at all, since "Coquina" was little more than a bank account through which 31 individual investors funneled their individual investments and received their individual returns. "Coquina" suffered no losses, nor could it. As such, Coquina lacked Article III standing to sue—and the "Coquina" brief does nothing to show otherwise.

II. Before trial, the district court held that the Fifth Amendment invocations of Frank Spinosa—Coquina's star witness—could not be held against TD. And for good reason: TD had fired Spinosa, and he since has refused to cooperate with TD. D.E. 548. At trial, though, the court inexplicably reversed course. Spinosa took the Fifth 193 times before the jury, and Coquina used him like a ventriloquist, asking him loaded questions and "proving" its points through him. Coquina scarcely mentions the district court's flip-flop, much less attempts to defend it. The district court's handling of Spinosa's testimony is the very opposite of measured discretion.

But it gets worse. Although Coquina never mentions it, the cornerstone of TD's defense was that Rothstein's "investments" were too good to be true, and that the Coquina investors knew it. The Exculpation Recital—which Coquina at long last concedes to be hearsay—totally disabled that defense. And while Coquina downplays this evidence as "passing hearsay," Red Br. 37, and its reliance on that evidence a mere "isolated remark," *id.* at 38, it was anything but.

III. Coquina also omits to mention the flawed ruling on settlement damages that it persuaded the district court to adopt. For Coquina to recover from TD its settlement payment to the bankruptcy trustee, it had to convince the jury that the settlement was reasonable. To escape that burden, Coquina insisted that it was entitled to the settlement damages *as a matter of law*—and the district court agreed. Now, however, Coquina retreats to ground that it thinks more defensible, claiming that the jury blessed the settlement damages after all. But the record proves otherwise. Nor does Coquina explain how the settlement damages were non-speculative, when its actual liability to the RRA estate turned out to be *zero*. And Coquina barely addresses the district court's erroneous supplemental instructions that invited the jury to award duplicative damages.

IV. Not surprisingly, Coquina seeks to drown out the merits issues with the district court's sanctions ruling. Ever since the verdict, Coquina has sought sanctions to shield the trial court's errors. It even urged the district court to "strike [TD's] notice of appeal" to keep TD from "tak[ing] every little nitpicky, niggling thing to the court of appeals." 5/17 Tr. 22, 23. But the sanctions ruling lacks both a factual and a legal basis, most conspicuously because TD provided every single one of the disputed documents to its outside counsel for the purpose of production in this case. Even so, the district court found TD's conduct to be "willful" while its outside counsel's non-production was merely "negligent" (and thus unworthy of serious sanction).

V. Finally, Coquina cannot now save its RICO claims by amending its complaint. RICO just does not fit this case: The "criminal" acts that Coquina could allege have a fixed end point, and Coquina's claims overlap with securities fraud. Thus, any amendment would be futile. Furthermore, it would prejudice TD and disrupt judicial efficiency to let Coquina amend its complaint after it lost on summary judgment.

ARGUMENT

I. COQUINA IS A MERE PASS-THROUGH THAT SUFFERED NO INJURY AND THUS LACKS STANDING

This lawsuit involves the claims of 31 individual investors, all of whom, as one investor put it, "ma[d]e their own decisions whether they invest[ed] or not." 12/2 Tr. 18. The individual investors also bore the costs of Rothstein's nonpayments and, so far as the record shows, the bankruptcy trustee's settlement demands. None of these investors acted on behalf of a larger group (much less the partnership called "Coquina"). Accordingly, the law required each investor to prove his own case, including that he knew about and relied on TD's alleged misrepresentations.

But only three investors—not coincidentally, the only three who claim even to have spoken with a TD employee[1]—appeared at trial. Based on *their* purported reliance, the jury awarded damages to cover the losses of all 31 investors. Why? Because the investors sued as "Coquina Investments," the paper entity that served essentially as the investors' bank account. Under the Coquina umbrella, the three investors claimed to speak for their 28 absent confederates.

This workaround is impermissible because Coquina suffered no injury and thus lacked Article III standing. The investors themselves acknowledged as much

[1] No Coquina investor was privy to a so-called "investor show" (see 12/1 Tr. 111-12), and thus Coquina's elaborate treatment of that evidence (Br. 1, 8) is beside the point.

when they signed letters—which are mentioned nowhere in Coquina's brief—stating that they, not Coquina, "incurred losses" resulting from investments made "through Coquina Investments." Ex. D-946. Coquina demurs that it is a partnership *capable of* suffering injury, that its actual structure and flow of funds is irrelevant, and that, in any event, TD has forfeited this standing argument. Each contention lacks merit.

A. Coquina first contends (Br. 23-24) that it is an entity capable of suffering injury and suing in its own name. Perhaps so, but this misses the point. It doesn't matter whether Coquina is a Texas partnership, an LLC, or a human being. What matters is that Coquina's sole function here was to bundle up the investors' money and forward it to Rothstein, then distribute any cash that Rothstein returned. Damson clip 8. True, there was paperwork in Coquina's name; but that merely confirms that Coquina was a "matter of convenience." See 11/28 Tr. 38. It was easier for the investors to execute one set of documents and one wire transfer than it would have been to do their own individual paperwork.

The investors, not Coquina, paid the price when the Ponzi scheme collapsed. Coquina had no stake in the outcome of the lawsuit. It was the investors' money; it stayed in Coquina's account just long enough to effect the necessary transfer. 12/2 Tr. 19-20, 30. Coquina was thus nothing more than an investment manager or an escrow agent—entities that lack standing to recover their clients' funds. *W.R. Huff*

Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 107 (2d Cir. 2008); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848 (9th Cir. 2001) (en banc).[2]

Similarly, the investors, not Coquina, paid the settlement price to the bankruptcy trustee of Rothstein's defunct firm. TD sought discovery that would reveal whether Coquina's payments to the trustee, like its payments to Rothstein, merely repackaged the investors' money. D.E. 557. Coquina—which bears the burden to prove standing—successfully opposed that request (and is thus charged with any uncertainty in the record). D.E. 570. Even so, the record shows that Coquina had no assets of its own with which to pay the trustee. D.E. 574-1 at 14, 16. Moreover, the trustee released the investors, not only Coquina, from any further claims. Ex. P-896. "[B]oilerplate" or not, see Red Br. 25, the investors reaped the benefit of the settlement. All of this indicates that the investors paid the trustee through Coquina in exchange for a release.[3]

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[2] Coquina struggles to evade *Huff* and like cases on the ground that the investment managers there did not allege their own injuries. But those cases were on motions to dismiss; this case went to trial. The failure of those plaintiffs to *allege* injury thus is tantamount to Coquina's failure to *prove* injury. *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 427 & n.9 (5th Cir. 2004), vacated on other grounds, 544 U.S. 1058, 125 S. Ct. 2511 (2005).

[3] That pure pass-through entities like Coquina lack standing does not mean that subsidiaries like TD would lack standing. See Red Br. 24-25. Quite the contrary: A corporation's shareholders (its owners) generally *lack* standing; the

B. Coquina insists, however, that *it* made the actual investments, and *its* name was on the transaction documents. Red Br. 23-24. But that is equally true of brokers, investment managers, and other pass-through entities that do not have standing to sue for their clients' losses. Suppose Investor Smith uses a broker, who—at Smith's direction—invests his money with Rothstein, Inc., which turns out to be a Ponzi scheme. The broker would be a real entity—just like Coquina; correspondence would doubtless go back and forth from the broker—just as it did from Coquina; the funds would first be sent to the broker—just like Coquina. But the *broker* could not sue for Smith's losses; only Smith could do that.

This is exactly what happened here. Coquina, the partnership, made no investment decisions. When Rothstein offered an "investment," each investor made the decision whether or not to buy in. 11/28 Tr. 47 ("I made my own decisions and managed my own investments. I did not make decisions for anyone other than myself."); 12/2 Tr. 18. And each did so on the basis of due diligence that he or she had personally performed. 11/14 Tr. 187-88 (investor "didn't rely on anybody else, other than the documents and Mr. Rothstein and" Rothstein's associate); Damson clip 31 ("I was meeting on behalf of Barrie Damson."). The investors also put up the money. Coquina was just a tool to facilitate this process. It suffered no injury of its own, nor could it.

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corporation itself is the proper plaintiff. See *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008).

Indeed, most of the investors were not even Coquina partners. They are not listed on the partnership agreement, which expressly provides that new partners may be added only in writing. Ex. D-104. Damson said outright that he was not a Coquina partner. Damson clip 5. And, though Klein's tax form said that he was a Coquina partner, he disavowed that statement as "inadvertent[]." 11/28 Tr. 42. This lack of a partnership stake underscores that Damson and Klein, like most of the other investors, dealt with Coquina at arm's length. The relationship was like that of an investment manager or an escrow agent to its clients.

Coquina regards these facts as "irrelevant." Red Br. 28. Not so. The decisions, like the money, came from outside of the Coquina partnership. Coquina did nothing more than appear on the back-end paperwork. The investors, not Coquina, were injured and were the only parties who *could* have been injured.

C. Nor has TD forfeited this argument. See *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1169 (11th Cir. 2006) (holding that Article III standing is jurisdictional and cannot be forfeited). Standing is a jurisdictional requirement, and "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986) (quotation marks omitted).

Coquina's discussion of third-party standing and Fed. R. Civ. P. 17 is a red herring. Those doctrines arise when the plaintiff has been injured but the claim properly belongs to someone else. *E.g.*, *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (plaintiff lost job due to action against employer; proper plaintiff was employer); *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992) (value of plaintiff's shares was diminished; proper plaintiff was corporation). Here, by contrast, the point is that Coquina has not been injured at all.

D. Lastly, Coquina is wrong that, had it moved to substitute the individual investors for Coquina, "[a]ll that would change is the caption." Red Br. 30 n.7. For one thing, the district court would have lacked the power even to consider such a motion. Because Coquina lacked Article III standing when it filed its complaint, there was no "case" or "controversy," and courts cannot grant motions in cases over which they lack jurisdiction. See *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002). The substitution rule on which Coquina relies, Fed. R. Civ. P. 17(a)(3), applies only if the original plaintiff had standing.

Moreover, permitting Coquina to sue—instead of the individual investors—was highly prejudicial to TD. Were the investors parties, TD would have been entitled to full discovery that would show how little most of the investors had to do with TD. None of the Coquina investors alleged any communication with TD before August 17, 2009, by which point they had invested $13.7 million with

Rothstein. And, to repeat, even after that date, only three of the 31 investors claimed to have spoken with any TD employee. Moreover, this is just the beginning of showing reliance—in addition, each investor would need to prove that he or she acted on what TD said, rather than relying, single-mindedly, on Rothstein's promised return. Unable to muster this proof, the investors sued as they had invested, through a mere conduit. But conduits do not suffer injury, and Coquina therefore lacked Article III standing. The action should be dismissed.

II. THE DISTRICT COURT'S EVIDENTIARY AND INSTRUCTIONAL ERRORS REQUIRE A NEW TRIAL[4]

A. The District Court Repeatedly Mishandled the "Critical" Testimony of Frank Spinosa

As plaintiff correctly observed below, Frank Spinosa was "the singular critical witness in [Coquina's] case." 11/10 Tr. 12. Coquina called him as its first witness, intoned through summation that "Frank is the bank," 1/17 Tr. 38, 40, and ended with Spinosa's picture on the screen before the jury, *id.* at 180-81. Spinosa's

[4] Coquina claims that TD must overcome a double-barreled standard of review. It asserts that we must show that the district court abused its discretion when it admitted evidence and that it also abused its discretion when it stated that any error was harmless. Red Br. 30-31, 36, 48. But our abuse-of-discretion burden begins and ends with the former showing. The latter standard applies only to new-trial motions "based on the weight of the evidence." *Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC*, 684 F.3d 1211, 1231 (11th Cir. 2012); see also *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). Here, the problems are errors of law, and "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996).

"testimony" was pivotal—whenever Coquina had a gap in its case to fill, it counted on Spinosa's invocations of the Fifth Amendment. These invocations allowed Coquina to argue that TD knew about Rothstein's fraud, see 1/17 Tr. 87, that TD's alleged misrepresentations were intentional, *id.* at 79-80, and that TD provided substantial assistance to Rothstein's scheme, *id.* at 86-87. Spinosa's role thus touched every disputed element of this case.

The district court committed three serious—and independently reversible—errors that enabled Coquina to turn Spinosa's nonanswers into the linchpin of its case. Coquina offers no persuasive response on any of them.

1. The District Court Abused Its Discretion by Allowing Spinosa To "Testify" at Trial

As we contended in our opening brief—and as Coquina does not dispute—"courts require a careful, fact-specific inquiry before permitting adverse inferences against a party based on the Fifth Amendment assertion of a nonparty witness." Blue Br. 28-29.[5] The goal is to determine whether an adverse inference from a particular invocation of the Fifth Amendment would be "trustworthy under all of the circumstances." *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997). Here, the district court *made* such a fact-specific inquiry, and correctly concluded,

[5] We have *never* contended, as Coquina inexplicably states (Red Br. 31-32), that there is a bright-line rule against nonparty witnesses invoking the Fifth Amendment. Our point has always been that it was error to permit *this particular* nonparty witness—Spinosa—to invoke the Fifth Amendment in front of the jury.

before trial, that Spinosa's "testimony" was *inadmissible* because it was *untrustworthy*. D.E. 548 at 3. Applying the *LiButti* factors, the district court explained that TD had fired Spinosa, *id.* at 2, that Spinosa had refused to cooperate with TD's internal investigation, *ibid.*, and that Spinosa had "little, if any, loyalty to TD Bank," *id.* at 3. In short, Spinosa lacked the "bond" by "friendship or business" that would result in "loyalty" to TD. See *LiButti*, 107 F.3d at 123.

The district court then reversed field. Without making a single new (and contrary) finding—there was none to make—the court permitted Spinosa to testify at trial so that adverse inferences could be drawn against TD. Understandably, Coquina does not identify any new fact that justified the district court's volte-face. Its only retort is to embrace the district court's post-verdict insistence that it had excluded only Spinosa's *deposition* testimony, but not his *trial* testimony. Red Br. 32. But Coquina offers no reason why an inference would be trustworthy in one context but not in the other. If anything, live testimony is worse, as "[t]he jury may think it high courtroom drama of probative significance when a witness 'takes the Fifth.'" *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970). For its part, the district court declared only that it had "reconsider[ed]" its ruling and decided that an adverse inference "comported with the *Li[B]utti* factors." D.E. 943 at 16 n.8, 17. The record, though, is devoid of any sign of this "reconsideration"—nowhere does the district court even attempt to explain why Spinosa's deposition testimony was not "trustworthy" but his trial testimony somehow was. That is the very definition of an abuse of discretion—when "neither the district court's decision nor the record provide sufficient explanation to enable meaningful appellate review." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012) (per curiam).

Implicitly conceding that the district court's turnabout was not an exercise of discretion at all, Coquina offers the explanation that it *wishes* the district court had offered. Red Br. 33-34. This effort, too, fails. Coquina raises only the same contentions that the district court considered *and rejected*—mainly, that TD paid for Spinosa's legal fees. As the district court explained, "Spinosa refused to cooperate in TD Bank's internal investigation *because his attorney advised him not to do so.*" D.E. 548 at 2 (emphasis added). Spinosa and his attorney were not mere pawns of TD. In addition, Coquina's hollow claim that "Spinosa's and TD's interests were closely aligned," Red Br. 33, ignores the law. The question is "whether the non-party witness is pragmatically a noncaptioned party in interest." *LiButti*, 107 F.3d at 123. Here, Spinosa had nothing to lose if TD lost (and every *personal* reason to invoke the Fifth).

2. The District Court Abused Its Discretion by Allowing Coquina To Ask Spinosa Questions for Which There Was No Independent Corroboration

Once Spinosa was on the stand, he was assured to invoke the Fifth Amendment across the board. Accordingly, the district court's role was to police *counsel's questions*, not *Spinosa's answers*. Yet the district court allowed counsel to elicit "testimony" that Spinosa had taken a bribe, among other things—without requiring counsel to produce an iota of corroborating evidence. This, too, was reversible error, and Coquina conspicuously omits any mention of this issue.

Even outside the context of Fifth Amendment invocations, district courts must, "[t]o the extent practicable," "conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Fed. R. Evid. 103(d). This is all the more true when a witness invokes the Fifth, and the substance of the testimony therefore comes not from the witness's answers but from counsel's questions. Without reasonable safeguards, counsel could smuggle into their questions all manner of otherwise-inadmissible evidence. To protect against that risk, courts permit an adverse inference from a witness's silence *only* "when independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000).

This case illustrates why we have this rule. The district court let counsel ask Spinosa such things as:

- whether he had taken a bribe, 11/10 Tr. 29-30;
- whether he permitted Rothstein to sign his signature, *id.* at 107; and
- whether he had assured Rothstein that another TD employee was a "player" to be trusted, *id.* at 30.

But the jury never heard a whiff of corroborating evidence. All it ever received were the uncorroborated insinuations built into Coquina counsel's questions, coupled with the predictable invocations by Spinosa. The district court should have demanded an offer of proof before the questioning, or, after the questions were asked, granted a mistrial. See D.E. 629. It did neither.

Coquina asserts that there is no way "the district court should have pre-screened Coquina's questions." Red Br. 34. But courts have heard this claim before—and rejected it: "[A] case-by-case analysis with a balancing test which weighs the need for the information being sought (and consequently its admissibility at trial) against the afforded constitutional protections is exactly what the law requires from the district court." *Glanzer*, 232 F.3d at 1267.

3. The District Court Abused Its Discretion by Instructing the Jury That It Could Conclude Almost Anything from Spinosa's Testimony

Compounding these errors, the district court singled out Spinosa's invocations for plaintiff-friendly treatment in its jury instructions. Two witnesses—Spinosa and Stephen Caputi—invoked the Fifth Amendment at trial. There was no reason to treat their invocations differently, and neither side urged the court to do so. See D.E. 714. But the district court "want[ed] to make clear that the liability of Spinosa is to be treated differently," so it gave one instruction for him and another for Caputi. 1/13 Tr. 176. "[W]hatever the applicable standard of review, the aim is always to ensure that . . . the law treats like alike." *SECSYS*, *LLC v. Vigil*, 666 F.3d 678, 687 (10th Cir. 2012). By treating like things differently, the district court abused its discretion.

For Caputi, the district court tightly cabined the jury's discretion. It limited any adverse inference to "the witness's refusal to answer a particular question," D.E. 745 at 19, so that the specific "answer would have been adverse," *id.* at 20, and it required "independent, corroborating evidence for the inference," *ibid*. That is exactly what the law required; adverse inferences, like the Fifth Amendment itself, operate on a "question-by-question" basis, and must be independently corroborated. *Glanzer*, 232 F.3d at 1265. By contrast, the district court invited the jury to "consider" Spinosa's invocations as it reached *any* conclusion, D.E. 745 at 19—save for TD's ultimate liability, as to which it needed only some "other evidence." *Ibid.* And, it bears repeating, the district court *intended* this disparate treatment, believing—mistakenly—that Spinosa's invocations should be more harmful to TD than Caputi's were.

Any sensible juror would have noted this difference. Indeed, the law *presumes* that juries follow the district court's instructions, down to the last nuance.

See *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707 (1987). "Reading the instructions as a whole," D.E. 943 at 19, the court allowed as to Spinosa what it forbade as to Caputi.

Coquina does not mention, much less defend, the Spinosa/Caputi contrast. Instead, it relies on the instruction that Spinosa's silence, standing alone, could not suffice to hold TD *liable*. Red Br. 34-36. But this limitation did not fix the error; it merely meant that Coquina must prove *some* element of its case with *some* evidence other than Spinosa. Spinosa remained fair game for any other inference that Coquina wanted the jury to draw. And, sure enough, Coquina pointed to Spinosa's Fifth Amendment invocations no fewer than 24 times in summation, counting on them to plug any hole in its case. See Blue Br. 26, 34. Whether the jury could infer TD's ultimate liability or merely most of the facts leading to it, the problem was the same—inference after inference untethered to questions or facts. Coquina built its case on these errors, warranting a new trial.

B. The District Court Admitted a Concededly Hearsay Statement Whose Sole Function Was To Disable TD's Core Defense

TD had one affirmative defense: that the Coquina investors knew all along that Rothstein was running a scam but hoped (and expected) that they would reap the promised rewards before the scheme imploded. The Coquina investors denied this allegation; to "prove" their innocence, they inserted the otherwise-gratuitous Exculpation Recital into their settlement with the bankruptcy trustee. This Recital said that the investors denied having "any knowledge of the Rothstein Ponzi scheme," and that "the Trustee has no knowledge to the contrary nor any indication of Coquina's knowledge of or complicity in or with the Rothstein Ponzi scheme." Ex. P-896.

Coquina now concedes that the Exculpation Recital was hearsay. Red Br. 37. It insists, however, that the admission was harmless.[6] But that just isn't so. Far from being a "passing" statement, *ibid.*, the Recital is the largest paragraph on the front page of the settlement agreement. See Ex. P-896. Plus, Coquina made sure that the Recital was not lost on the jury. Coquina vouched for the trustee as "impartial, objective, [and] experienced," 12/9 Tr. 12, to shore up his approval of the settlement, including the Recital. When Coquina's counsel mentioned TD's affirmative defense in closing, his sole rejoinder was the Exculpation Recital. 1/17 Tr. 180. Not only that; the Recital was the last exhibit in summation, the climax of the presentation. In short, Coquina did everything in its power to shine a light on the Recital—its significance could not have been lost on the jury.

The Exculpation Recital was hearsay, and its sole purpose was to vitiate TD's main defense. Bizarrely, this was the district court's rationale for *admitting*

[6] Coquina also misdirects the eye, contending (Br. 36-37) that TD sought to exclude the *entire* settlement agreement, parts of which were obviously relevant. In fact, TD sought to "have redacted" only the Recital. 11/14 Tr. 185; accord 12/8 Tr. 139. At Coquina's urging, the district court insisted that the bathwater come in with the baby.

it: "I recall at one specific sidebar asking the bank, 'Is that going to be part and parcel of your defense,' and Counsel for the bank said yes, and that's why I allowed it." 1/17 Tr. 188. Admitting hearsay precisely because the truth of the matter asserted contradicts the defendant's main defense is an abuse of discretion.

III. THE DISTRICT COURT'S AWARD OF DAMAGES IS ERRONEOUS

A. Coquina's Recovery of Damages Related to Its Settlement Agreement Is Unsustainable

At Coquina's urging, D.E. 714-1 at 52, 1/13 Tr. 191, the district court held that Coquina could recover its settlement payments to the bankruptcy trustee *as a matter of law*, D.E. 570 at 2, 1/13 Tr. 188, 193. This fundamental error—which Coquina does not even acknowledge, much less defend—tainted every aspect of the district court's treatment of these "settlement damages." Because of this basic misapprehension of law, the district court truncated pretrial discovery, precluded otherwise-admissible evidence, and then took the issue away from the jury entirely.

Recognizing the frailty of the district court's holdings, Coquina makes the surprising argument—never advanced below (or suggested by the district court)—that TD bore the burden to prove that the settlement was *un*reasonable. But even were that correct (it isn't), this novel argument could not save Coquina. To understand the outrageousness of the settlement damages awarded here, one need look no further than the fact that Coquina's *actual* tab to the RRA trustee will be *zero*.

Only by virtue of the district court's numerous errors could nothing be transformed into tens of millions of dollars.

1. Coquina Had the Burden To Persuade the Jury That It Was Entitled To Recover the Settlement Damages

It is the plaintiff's burden to prove its damages, not—*contra* Coquina's assertion—the defendant's burden to disprove them. See *Taylor Rental Corp. v. J.I. Case Co.*, 749 F.2d 1526, 1530 (11th Cir. 1985) (per curiam). This elementary rule applies with equal force where, as here, a plaintiff seeks to recover moneys it expended to settle with a third party. In this context, the plaintiff may "only recover so much of the settlement as *it* proved was reasonable in amount and a consequence of [the defendant's] breach." *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 761 (11th Cir. 1987) (emphasis added) (footnote and citations omitted).

Nor is this rule confined, as Coquina suggests, to the indemnity context. Any time a plaintiff (here, Coquina) settles a claim with a third party (here, the trustee), then turns around and sues the defendant (here, TD) to recoup its settlement, the plaintiff must show that it is entitled to those damages. Coquina's "harm exists *only* because of the settlement it entered to compromise liability," Red Br. 41—but for the trustee's demand, Coquina would have kept its money. And Coquina "believes the defendant [TD] should bear" this loss, *id.* at 41-42—which is why it sought settlement damages from TD.

For the first time on appeal, Coquina seeks to unyoke itself from this established principle. According to Coquina, TD is "in effect" saying that plaintiff should have "mitigated[] its damages" by settling for less money (or no money) with the trustee. Red Br. 39. And because mitigation is an affirmative defense—on which TD, not Coquina, therefore had the burden of proof—Coquina is off the hook for any errors committed (at its own urging) by the district court.

It is scarcely surprising that Coquina's trial counsel never made that argument below—it is unfounded. We are *not* contending, and never have, that Coquina failed to mitigate its settlement damages. We are, instead, contending that Coquina never proved its entitlement to the settlement damages in the first place. Because Coquina persuaded the district court that the bankruptcy court's approval of the trustee settlement was dispositive, plaintiff was never required to prove that a single dollar it paid to the trustee was attributable to TD's conduct, or that the total amount it paid was reasonable. Those are classic burdens a civil plaintiff must bear, and they have nothing to do with mitigation. Only *after* a plaintiff has shown its entitlement to particular damages may the burden pass to the defendant to show that the plaintiff could have mitigated its losses by pursuing some other course of conduct.

Indeed, mitigation was not even an issue at trial. Coquina fails to mention that the district court *struck* TD's mitigation defense on summary judgment. D.E.

547 at 28-29. Having not pleaded or tried mitigation with respect to settlement damages, it could not have been TD's burden to prove it. See *Juvenile Diabetes Research Found. v. Rievman*, 370 So. 2d 33, 37 (Fla. 3d DCA 1979). And, because mitigation was a dead issue, neither party even asked for, much less received, a jury instruction on that affirmative defense. See D.E. 714. Consequently, the district court—without a whiff of opposition—believed (correctly) that Coquina bore the burden of proof. D.E. 943 at 12-13.

To elude that burden, however, Coquina argued that its entitlement to the settlement damages "is not a jury question" because the bankruptcy court had approved the settlement. 1/13 Tr. 191. And the district court inexplicably agreed: "Upon review of the settlement documents provided to the bankruptcy court and the relevant legal authorities, this Court is convinced that, if it succeeds on its fraud claims, Coquina may recover the amount it paid in connection with the RRA Trustee settlement and associated expenses." D.E. 570 at 2. That is, if Coquina prevailed on liability, then it would automatically get its settlement damages. There was no middle step to determine whether the settlement was reasonable or whether TD was responsible, no matter whose burden it was.

Guided by this mistaken premise, the district court declined to require the jury to decide whether the settlement damages were reasonable. TD requested an instruction asking the jury to determine whether the settlement was reasonable and whether the settlement payments were caused by TD's conduct. D.E. 714 at 39. But Coquina balked, maintaining that the reasonableness of the settlement "is not a jury question and it has already been ruled on as a matter of law." D.E. 714-1 at 52. And, for that reason, the district court rejected the instruction: "You're saying it's a question of fact for the jury." "I am not giving the instruction." 1/13 Tr. 188, 193. This refusal was reversible error, as TD's instruction correctly stated the law and dealt with an issue before the jury, and the absence of the instruction harmed TD. *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir. 2003). The district court, like Coquina, viewed this as a question of law, not as a question of fact on which Coquina bore the burden of proof.

Coquina now admits that the jury *did* need to find that the settlement was reasonable—but insists that it actually did so. Red Br. 52.[7] To the contrary, the district court never even uttered "settlement" in its instructions to the jury. D.E. 745. Its one mention of "reasonable," nestled in the hackneyed phrase "full, just and reasonable," *id.* at 23, hardly compelled the jury to consider the factors that it should have. See *GAB*, 809 F.2d at 761-62 & n.10. That is especially true in this case, where the six-page special verdict form required the jury to lay out each

[7] Despite this, Coquina continues to suggest that the bankruptcy court's approval of the settlement was all that mattered. Red Br. 11-12, 43. For the reasons explained above, that is incorrect.

finding that it made. See D.E. 748. The district court deliberately refrained from putting the issue to the jury, and the jury did not resolve it.

2. Because the District Court Believed That the Reasonableness of the Settlement Was Not a Jury Question, It Refused the Evidence That Would Have Helped the Jury Decide That Issue

To discharge its burden to prove that settlement damages were reasonable, Coquina was required to prove that the payments it made were (a) attributable to TD and (b) paid by Coquina (rather than by the individual investors). Both issues were in play. On the one hand, there was reason to believe that Coquina settled claims that were *not* attributable to TD's conduct. Among others, the trustee threatened fraudulent transfer and usury claims, (see Ex. D-947), which turned on Coquina's receipt of outsize returns, and not on TD's conduct.[8] There is no basis for sticking TD with the bill on these claims—and Coquina does not disagree. But the second issue was also in dispute at trial: Who really *paid* the trustee settlement—Coquina or the individual investors? There was reason to conclude that the investors footed the settlement: Coquina itself made no investments, and it had no assets at the time of settlement. See *supra* at 6. Moreover, the settlement released

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[8] Under Florida law, it is a felony to provide loans at rates of more than 45 percent. Fla. Stat. § 687.071(3). Coquina's "loans" to Rothstein's firm received rates of 93.8 to 600 percent. Likewise, under the bankruptcy code, it is a fraudulent transfer to receive assets without paying reasonably equivalent value. 11 U.S.C. § 548(a)(1). Coquina did not pay reasonably equivalent value for its returns.

the individual investors. Thus, it is far from clear that Coquina, itself, could recover the settlement damages. To conclude that the settlement was reasonable, the jury had to sort out both of these fact-intensive questions.

With two rulings, however, the district court kept the jury completely in the dark—and it did so precisely because it believed, at Coquina's urging, that the reasonableness of the settlement was not a jury question at all, but was instead resolved, once and for all, by the bankruptcy court.

First, the district court barred TD from taking any discovery of consequence regarding the settlement.[9] Among other things, TD sought to learn the source of the settlement payments, in order to identify which investors were behind the settlement. D.E. 557 at 2. TD also sought to depose a Coquina representative who could explain why Coquina chose to settle with the trustee. *Ibid.* Neither the settlement documents nor the demand letter contained this information, without which the settlement was a black box. But the district court substituted its own beliefs for the actual information, deeming it "incredible" that the settlement served any function other than the one that Coquina suggested. D.E. 943 at 23.

Coquina insists that the district court allowed plenty of discovery, so that its refusal to provide more was not error. But the discovery the district court permit-

[9] This denial of discovery would be even more disturbing if Coquina were right that TD bore the burden on this issue. For this would mean that TD was barred from discovery on its own affirmative defense.

ted was entirely peripheral: making Coquina's expert available for deposition, producing "any existing documents reflecting settlement payments to the RRA Trustee, including transfer printouts and copies of checks," and producing "any releases related to the settlement agreement, and an accounting of any associated expenses, along with supporting documentation, such as itemized invoices." D.E. 570 at 2-3; see also D.E. 943 at 12. All this information revealed was the nuts and bolts of how Coquina paid the trustee. It shed no light on whether the agreement to make those payments in the first place was reasonable.[10]

Second, the district court kept the trustee's demand letter and draft complaint from the jury. 11/14 Tr. 184; D.E. 943 at 30-31. As a result, the jury had no way to know what was being settled—and, therefore, whether TD should be on the hook for it. In particular, the jury had no idea that the trustee had threatened two claims arising from Coquina's own conduct, fraudulent transfer and usury, for which he sought $31.1 million and $33.1 million, respectively. Ex. D-947. (Coquina admits that the trustee would have been entitled to a "premium" on the usury claim. Red Br. 9 n.2.) These amounts dwarf the $28.1 million liability for prefer-

[10] Coquina contends that affording more discovery would have delayed the trial. It omits to mention that it moved to recover its settlement damages only the week before trial was scheduled to begin, months after discovery had closed. D.E. 42, 545, 559. Coquina's own foot-dragging does not entitle it to a get-out-of-discovery-free card.

ential transfers. Had the jury known this, we submit that it would not have held TD liable for the *entire* amount of settlement damages that Coquina sought.

Neither of the district court's two rationalizations for precluding this holds water. Fed. R. Evid. 408 does not compel the demand letter's exclusion. The application of Rule 408 turns on the purpose for which evidence is admitted. See Fed. R. Evid. 408(b). "[R]esolving a factual dispute about the meaning of [a] settlement agreement['s] terms" is a permissible purpose. *Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505, 1512 (11th Cir. 1997). That was the purpose of the demand letter here. The settlement agreement specified that it encompassed "avoidable transfers and other claims," without spelling out what those other claims were. Ex. P-896. The demand letter provided the answer.

Nor does Fed. R. Evid. 403 compel the demand letter's exclusion. The district court observed that the claims in the demand letter differed from the claims in this case. D.E. 943 at 31. But that is the whole point: The jury needed to know that the trustee had advanced claims—and perhaps *settled* claims—*that were not chargeable to TD*. It may well be, as Coquina insists, that there were "massive amounts of evidence concerning the claims that *were* relevant." Red Br. 51. But what there was *no* evidence of—because the district court agreed to keep it out—are the claims *unrelated* to TD's conduct. Without that basic information, the jury had no basis for deciding whether the settlement was reasonable for purposes of holding TD liable.

3. The Evidence That the Jury *Did* Have Shows That the Settlement Was Unreasonable

Even crippled by these evidentiary rulings, the record shows that the settlement was unreasonable. That is true for two independent reasons, neither of which Coquina refutes: first, the settlement agreement made clear that Coquina was bargaining with TD's money, and thus the settlement amount is inherently unreasonable; second, the trustee stood to repay up to 100 percent of what Coquina paid him, and this basic uncertainty made the settlement damages speculative as a matter of law.

a. Coquina promised the trustee a lump sum, plus a share of what it might recover from TD—in essence, cash plus a lottery ticket. Coquina's ticket happened to win; its lawsuit against TD paid off. But it does not follow that the amount of the winnings that it agreed to hand over to the trustee is a reasonable value of the damage allegedly inflicted by TD. To the contrary, the true "value" of the settlement is the amount of Coquina's own money—not TD's—that it would have agreed to hand over to the Trustee and that the Trustee would have accepted. Because TD, not Coquina, would pay on the lottery ticket, Coquina had a "lack of incentive to limit any recovery," which "eliminates the likelihood of reasonableness." *Trustees of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 900 (3d Cir. 1987).

Coquina responds that it owned its claim against TD (the lottery ticket); thus, it was bargaining with its own assets, not TD's. Red Br. 46-47. But the settlement was structured to manufacture damages that would not otherwise exist. Had Coquina settled only for a lump sum of $12.5 million, its claimed settlement damages would have been $12.5 million. By settling as it did, however, Coquina gave the trustee a cut of whatever Coquina recovered. Ex. P-896. Thus, to recover the $12.5 million lump sum, Coquina had to ask the jury for about $25 million in settlement damages—the rest went to the trustee. See 1/17 Tr. 92-93. In short, Coquina did not promise the trustee a share of something to which it was entitled; it promised the trustee TD's money that *it would not otherwise recover*.

b. Even worse, the trustee agreed to repay Coquina up to 100 percent of the amount that Coquina paid the trustee under the settlement. See Ex. P-896. This wrinkle made the settlement unreasonable for two further reasons.

First, when the jury rendered its verdict, it was impossible to know how large the trustee's refund would be, which rendered the settlement damages utterly speculative. The trustee could refund zero percent, or he could refund 100 percent, or anywhere in between. It all would depend on how much money the RRA bankruptcy estate could return to creditors. See Ex. P-896. At the time of trial, as

Coquina's own expert put it, "[n]obody" could know how much that would be. 12/9 Tr. 37. Thus, Coquina failed to prove its damages with "reasonable certainty," as this Court and Florida law require. See *Aldon Indus., Inc. v. Don Myers & Assocs., Inc.*, 517 F.2d 188, 191 (5th Cir. 1975).

Second, we now know that the trustee is poised to refund Coquina 100 percent—which means that TD will have paid Coquina millions of dollars for damages *that Coquina never incurred*. (At the time of TD's opening brief, the projection was at least 80 percent. Blue Br. 42. Since, it has increased to 100 percent.[11]) This will happen because Coquina told the jury that it needed money from TD so that Coquina could pay the trustee, and the jury awarded that money. Now that the RRA bankruptcy is coming to a close, though, the trustee plans to give that money back to Coquina. Yet Coquina has no plans to give that money back to its original source—TD. At the end of the day, therefore, Coquina will have taken this money from TD, and the trustee will have nothing, all because of a deal that Coquina made with the trustee.

Coquina's sole response to this looming inequity is to deny that it will happen: "[T]o the extent Coquina is made whole [in this case], it will not obtain duplicative relief in the bankruptcy case." Red Br. 46. That is what it told the jury,

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[11] See page 8 of the May 8, 2013, Disclosure Statement (ECF No. 4391) and section 3.4 of the May 8, 2013, Plan of Liquidation (ECF No. 4392), *In re Rothstein Rosenfeldt Adler P.A.*, No. 09-34791-RBR (Bankr. S.D. Fla.).

too: "[W]e will step out of the line over there at the bankruptcy court. There will be no double dipping." 1/17 Tr. 94. Trouble is, Coquina has not stepped out of line. Despite its victory in this case, Coquina has continued to prosecute its allowed claim in the bankruptcy court. See Response of Coquina Investments (ECF No. 4468), May 20, 2013, *In re Rothstein Rosenfeldt Adler P.A.*, No. 09-34791-RBR (Bankr. S.D. Fla.). The threat of "double dipping" remains real. In any event, a decision to *forgo* payment in bankruptcy does not make the settlement damages any more legitimate. An injury Coquina *chooses* to suffer is no injury at all.

Finally, eliminating the award of settlement damages has implications for the amount of punitive damages in this case. The jury awarded $35 million in punitive damages on top of $32 million in compensatory damages, a ratio of about one to one. Without the settlement damages, however, Coquina's compensatory damages are confined to its $6.7 million in actual loss. Leaving the punitive award intact would defy both the jury's intended one-to-one award and due process limits on punitive damages. See Blue Br. 43. Coquina is silent on this issue.

In short, the district court awarded Coquina millions of dollars in damages based on a settlement agreement that no jury could conclude was reasonable. This Court should reduce Coquina's compensatory and punitive damages accordingly. At minimum, it should order a new trial on damages.

B. The District Court's Instructions and Verdict Form Invited a Duplicative Recovery

The district court got the damages wrong in a second way: It let Coquina ask for separate damages verdicts for its two tort claims that covered the same injury. It then compounded matters by failing to answer the jury's questions properly.

To start with, TD *did* object to the improper verdict form; Coquina's argument to the contrary (Br. 53-54) is fiction, plain and simple. TD objected that Coquina's proposed verdict form "improperly asks the jury to award damages—both *compensatory and punitive* damages—as to each of [Coquina's] claims." D.E. 736 at 2 (emphasis added). And again: "[T]he current verdict form, which asks for two awards of damage[s] and two awards of punitive damages, . . . is inconsistent with Florida law." D.E. 738 at 3. There is no way to read these objections as limited to punitive damages, as Coquina urges.

Coquina fails on the merits as well. It proceeds from the mistaken notion that its fraud claim and its aiding-and-abetting claim alleged distinct injuries. The injuries were separable, Coquina insists, because there was a series of transactions with Rothstein. But Coquina's counsel told the district court that the factual bases for both of its claims were the same. 1/13 Tr. 108-09. And Coquina's own expert dismissed the idea that most of Coquina's damages could be isolated to this or that transaction. 12/9 Tr. 44. Even were this possible, Coquina did not suffer $16 million of damages before August 17, 2009, and an equal amount thereafter. See Red Br. 57. Only after that date did Coquina make its largest ($15 million) "investment," and only after that date did Rothstein's scheme begin to fall apart. See Ex. D-497; 11/14 Tr. 91-93. Furthermore, Coquina never mentioned this August 17 distinction to the jury.

Coquina's fallback position—that, where there are multiple counts seeking recovery for the same injury, "[j]uries *may* apportion a plaintiff's total damages among multiple counts," Red Br. 56—fares no better. Florida law forbids the jury from "tak[ing] it upon itself to apportion damages . . . between the claims." *Minotty v. Baudo*, 42 So. 3d 824, 834 (Fla. 4th DCA 2010) (quotation marks omitted).

And Coquina does not even try to grapple with the district court's mishandling of the jury's questions. Rather than cautioning the jury against duplicative damages, as TD urged, the court told the jury to "render a separate verdict as to each count." D.E. 749 at 3. But "separate" verdicts, when the counts involve the same injury, would be duplicative verdicts. See Blue Br. 51. This instructional error, independent of the faulty verdict form, compels reversal. See *Bollenbach v. United States*, 326 U.S. 607, 66 S. Ct. 402 (1946).

IV. THE DISTRICT COURT'S SANCTIONS ARE BASED ON A FLAWED PREMISE AND VIOLATE DUE PROCESS

With the cards stacked in its favor by virtue of these trial rulings, Coquina had no problem securing a jury verdict. But it did not stop there. It then sought to insulate that verdict from effective appellate review, by moving to strike TD's notice of appeal, its pleadings, and its objections. See, *e.g.*, D.E. 883 at 3-4; Coquina Sealed Mem., June 18, 2012, at 20. And, while Coquina initially sought sanctions against TD's outside counsel, D.E. 791 at 6, it dropped that campaign altogether, focusing solely on TD. See 5/17 Tr. 26. In short, it started using sanctions motions not to advance justice but to elude it, by avoiding this Court's review.

The district court's sanctions order—the fruit of Coquina's shift in tactics—should be vacated for two independent reasons. First, the district court predicated its sanctions on its finding that TD—but not outside counsel—willfully violated its orders. Apart from lacking factual foundation, this aspect of the court's ruling threatens the basic, long-established division of labor between client and counsel. Second, the sanctions imposed by the court bear no relationship to the underlying discovery issues. They therefore violate due process.[12]

A. TD Did Not Willfully Violate the District Court's Discovery Orders

TD turned over thousands of documents to outside counsel for review and production. The sanctions ruling is predicated on three of those documents, which TD provided to outside counsel but which counsel thereafter failed to produce or

[12] Because these unwarranted sanctions present ongoing, highly prejudicial implications for TD, we ask the Court to reach the issue and vacate the sanctions even if it reverses the judgment below on other grounds.

produced in a different format. This is a far cry from the willful discovery misconduct that courts have required to impose serious Rule 37 sanctions on litigants, as opposed to their counsel. TD did not, for example, flee the country to avoid depositions or hide documents in an attic, see *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1517, 1520 (11th Cir. 1986) (per curiam), or hide false answers behind an implausible reading of an interrogatory, see *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1540 (11th Cir. 1993). Nor did TD burn evidence and claim that it was routine, which the Fifth Circuit held was *not* willful misconduct. *Pressey v. Patterson*, 898 F.2d 1018, 1021-22 (5th Cir. 1990). Indeed, TD and its counsel ultimately produced the documents at issue. It defies any sensible definition of "willful" to conclude—as the district court did—that TD flouted discovery orders during trial, then turned the documents over after it lost. Indeed, neither the district court nor Coquina ever explains how such a conclusion could possibly be squared with the undisputed fact that TD *gave these documents in native form to outside counsel precisely for production to Coquina*.

Coquina offers no effective rebuttal. It first tries to duck the issue, claiming that the sanctions can be upheld even if finding of willfulness is not. It then cherry-picks a few facts (relating to only two of the documents), ignores many other pertinent facts, and condemns TD for stating the obvious—that there is no way that outside counsel was merely negligent, while TD was willful.

1. But for the Unwarranted Finding of Willfulness, the District Court Would Not Have Sanctioned TD as It Did

Coquina first asserts (Br. 60-61) that the district court's finding that TD acted willfully is irrelevant to the sanctions it imposed. Not so. Two aspects of the court's opinion show that its willfulness finding was the *sine qua non* of its sanctions against TD.

First, the language of the district court's opinion reveals that, but for the willfulness finding, the court would not have imposed the sanctions that it did. At the outset of its "conclusions" section, it stated that TD acted willfully, then spent several pages attempting to explain why. D.E. 911 at 23-28. Then it transitioned from the willfulness finding to the sanctions imposed: "Having determined that TD Bank's discovery violations were willful . . . , I must determine what is the appropriate sanction in this case." *Id.* at 28. In other words, far from being disconnected conclusions, as Coquina would have it, the sanction flowed directly from the willfulness finding. Vacating the determination of willfulness therefore requires vacating the sanctions built upon it.

Second, the district court's willfulness finding explains its disparate treatment of TD and its outside counsel. The court concluded that outside counsel acted "negligently" and that TD acted "willfully." D.E. 911 at 23. The sanctions followed this asymmetry—outside counsel had merely to pay a portion of Coquina's fees; TD had to pay those fees, but also shouldered the "deemed facts" that its systems were unreasonable and that it knew about Rothstein's fraud. *Id.* at 28. And, lest there be any doubt about its reasons, the district court declined to further sanction outside counsel precisely *because* it found that counsel did not "act[] willfully or in bad faith." *Id.* at 29.

Accordingly, if this Court agrees that the willfulness finding is unwarranted, it should vacate the sanctions as well. As we next explain, Coquina's defense of the willfulness finding is all heat, but no light.

2. TD Provided the Color CDD Form and Pointed Out the Issues with the Black-and-White Version That Outside Counsel Produced

Coquina devotes the bulk of its willfulness argument to the "customer due diligence" (CDD) form. Coquina acknowledges that it received—and used extensively at trial—a black-and-white version of the CDD that conveyed all of the information that the color version did. Among other things, the produced version explicitly labeled Rothstein's account "high risk."

What is more, the district court found, and Coquina does not deny, that TD provided the color CDD to its outside counsel and to its document-production vendor. D.E. 911 at 7-8. TD had every right to expect that its lawyers and vendors would produce the document, as necessary, to Coquina. Indeed, the color CDD came to light because outside counsel *did* produce the document in a related case. The black-and-white CDD was created only because outside counsel—for reasons best known to them—requested it in hard copy, from a nonlawyer, circumventing TD's in-house legal team. 5/17 Tr. 49-50. TD thus hardly "sidestepped its usual discovery protocol." See Red Br. 65.

Beyond that, the TD employee who actually used the CDD in her daily activities (Sara Pinkus) pointed out in her deposition—before Coquina's trial—that "the top line is . . . blacked out." D.E. 911 at 9. Although Coquina characterizes these remarks as somehow "hiding the ball" (Red Br. 66), it is not apparent how pointing out an issue with a document constitutes "hiding the ball." At the very least, we don't see why the employee's remarks would have "alerted in-house counsel to the problem," *ibid.*, any more than they alerted Coquina to the problem.

In the face of these manifest indicators of good faith, Coquina and the district court claim that the real problem is that TD in-house counsel did not try to fix the exhibit when it was used at trial. D.E. 911 at 24-25; Red Br. 65. There are at least three problems with this assertion. First, there is no evidence about who was actually in the courtroom when the CDD was used, much less what he or she knew. The district court purported to make "credibility determinations" on this issue, D.E. 911 at 24, but there was no identified person (much less a *testifying* person) whose credibility was in issue. Second, no one has yet explained how the district court could find that "approximately fifteen in-house lawyers or [TD] representatives," *ibid.*, sat through trial. So far as the record shows, that is simply not true. Third, the issue was one color and two words on one form. TD is a large institution with many forms; it is hardly "willfully blind" because every employee has not memorized every aspect of every form. The employee at the deposition spotted the issue because she, unlike in-house counsel, actually dealt with the CDD on a regular basis. TD's alleged silence—even if anyone who knew about the form was in the courtroom—amounts to nothing.

Finally, Coquina does not even attempt to grapple with the fact that the absence of the color CDD caused it no harm. The black-and-white CDD that Coquina used at trial did indicate "High Risk," and Coquina made its point to the jury based on just that. 1/17 Tr. 60. That it wanted the words in a different font and color hardly justifies a finding of willfulness or a sanction.

3. Vincent Auletta Helped TD Provide the SIP to Outside Counsel (for the Second Time)

Like the color CDD, TD provided the SIP to outside counsel *twice*—first through the document-production vendor and then on a separate request from outside counsel. D.E. 911 at 15. (Outside counsel subsequently discharged the partner who had received the SIP and printed it out but did not produce it. D.E. 825 at 2 n.1.) TD's due diligence staff were *not* aware of the document, however, because it is not one that these employees had occasion to use. 5/17 Tr. 217-18; 5/18 Tr. 48-49. Thus, they did not know that the document was among the many sent to outside counsel. Nonetheless, when Coquina asked for the document, TD staff searched every part of their systems where they might expect such a document to be. 5/17 Tr. 180-83, 191-94.

Tellingly, Coquina ignores all of this. Instead, it devotes its entire discussion of the SIP to statements by TD employee Vincent Auletta, a 29-year veteran of the FBI. 5/17 Tr. 213. But Auletta, like the other due diligence staff, believed that the only relevant "protocol" document was the "Standard Investigative Tools" document. 5/17 Tr. 215-16, 218. There is nothing intentionally false about his declaration that, "[t]o my knowledge, there is not a document titled 'Standard Investigative Protocol' which was utilized by the AML or EDDO Departments in 2008 and 2009." D.E. 727-3 ¶ 4. Despite what he thought he knew, Auletta requested that an experienced member of his staff search for the document. 5/17 Tr. 224, 227. She did so—and emailed the SIP to outside counsel, *id.* at 225-26, who thereupon failed to produce it. That is no way to willfully hide a document. To the contrary: That is how clients work with their outside counsel to comply with discovery obligations.

4. The Absence of Willfulness on Multiple Occasions Does Not Add Up to a "Pattern" of Willfulness

Unable to seriously contend that TD willfully withheld *any* document, Coquina would have the Court find TD's willfulness everywhere and nowhere. In particular, it contends that TD had committed previous discovery violations, and thus the post-verdict events were appropriately found to be willful. That is not so.

To begin with, Coquina's premise—that the district court could and even *should* punish TD more harshly because of previous discovery disputes—is fundamentally flawed. As Coquina concedes, the district court had already sanctioned TD for pre-trial discovery issues. Red Br. 68. To predicate post-trial sanctions on the same conduct is to "double count" the "sanctioned conduct," which courts have condemned as "unfair." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). It is an "improper purpose" to "punish[]" TD "for its already sanctioned deficiencies in responding to . . . discovery." *S. Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1243 n.4 (11th Cir. 2009). By its own admission, this was the district court's purpose here. D.E. 911 at 22-23.

Furthermore, if there is any "pattern" here, it is the pattern of what TD got *right*. As *amicus* Association of Corporate Counsel (ACC) points out, TD "produced tens of thousands of documents to Coquina, and internally reviewed many more." ACC Br. 16. At the time, TD was fresh off the heels of a merger with Commerce Bank and defending against claims from other Rothstein investors. These complications did not prevent TD and its counsel from producing a closet's worth of documents—including many that Coquina requested about TD's anti-money-laundering procedures, which are irrelevant to the claims in this case. See *Lawrence v. Bank of America, N.A.*, 455 F. App'x 904, 907 (11th Cir. 2012) (per curiam). To borrow Coquina's analogy, see Red Br. 67, TD was not shooting its companion; it was shooting a lot of deer.

To the extent that Coquina lumps the consultant's report and the Gillen emails in with its Rorschach-test "pattern," it fails. TD provided the Gillen emails to outside counsel, which noted them on a privilege log, where they went unchallenged. See Blue Br. 58-60. And Coquina admits that the fact that TD saw no need to provide the consultant's report to counsel—no one says that it should have been produced to Coquina—is not a "violation meriting sanctions." Red Br. 70 n.12.

5. The District Court Sanctioned TD for Alleged Errors Uniquely Within the Province of Outside Counsel

The mistakes for which the district court sanctioned TD were lawyer mistakes, not client mistakes. Yet the court held that the lawyer was merely negligent, while the client was willful. This holding is unfathomable and, if left standing, would threaten any sensible allocation of responsibility between client and counsel.

For starters, it bears repeating (and Coquina does not dispute) that TD provided to outside counsel *every document* that is now at issue. It provided the color CDD and the SIP in native format through its normal production mechanism. The black-and-white CDD arose only because outside counsel directly contacted a TD employee—circumventing in-house counsel—who was not a lawyer and was not versed in document production. D.E. 911 at 8-9. And, in addition to normal production, TD emailed the SIP to outside counsel. *Id.* at 15. Outside counsel marked the Gillen emails as privileged. *Id.* at 21-22. And neither the district court nor Coquina maintains that the consultant's report should have been produced.

With that, TD fulfilled its primary responsibility regarding these documents. As *amicus* ACC explains: "If there is any common pattern to the role that in-house counsel play during litigation, it is to ensure that documents are preserved, to implement a program of document recovery and transmission to outside counsel, and to assist outside counsel as necessary." ACC Br. 10-11. In a case like this, involving a defendant the size of TD, this is no small feat. And TD accomplished it.

The district court would have clients go so far beyond these tasks as to duplicate nearly everything that their lawyers do. Under the district court's approach, clients would need to know what every exhibit at trial looks like, D.E. 911 at 24, to "participate in preparing witnesses for deposition or trial," *id.* at 25, and to "review[] documents prior to production," *id.* at 26. Not only that; the sanctions ruling brands clients' every shortcoming as willful misconduct. This is not a requirement to "supervise" outside counsel, Red Br. 71; it is a requirement to hold their hand. It is "simply not the case" that "inside counsel should and do double-check trial counsel's every move in the courtroom." ACC Br. 12. By requiring exactly that, the district court would upend a settled plank of the profession—that clients may rely on outside counsel to handle legal issues.

The district court's ruling likewise compels organizations to duplicate efforts within their walls. The court chided TD for "compartmentaliz[ing] its groups of attorneys," D.E. 911 at 26, so that not every litigator would know what every corporate attorney was doing. But the district court took no testimony about the structure of TD's legal department, and thus the court's conclusion is dubious at best. Even assuming that it is accurate, however, a proper division of labor makes it more likely, not less, that clients will be responsive to the court.

What makes all of this especially perverse is the district court's finding that outside counsel was merely negligent. On the one hand were the outside lawyers who were specifically tasked with producing and reviewing documents and who possessed the documents in question. On the other hand were the in-house lawyers who hired outside counsel to do that job and who afforded them unfettered access to and provided them with the correct documents. To call the former negligent and the latter willful is to get it backward, particularly when there was no testimony that in-house counsel had better knowledge about the documents than outside counsel did. It is "impermissible" for a court to sanction a party based on its counsel's errors; courts should "avoid a sanction that penalizes the parties for the offenses of their counsel." *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). Yet the district court did so here.

Ironically, Coquina trumpets the fact that outside counsel "apologize[d]" that "mistakes were made." 5/18 Tr. 105; see Red Br. 59. But that is the point—if anyone is to blame, it is not TD. The district court turned counsel's failure to produce documents *that TD had provided* into willful misconduct on TD's part. It could do so only by requiring TD, the client, to chaperone its outside counsel through every document production and every decision in this complex case. Such dangerous precedent should not stand.

B. The District Court Violated Due Process by Imposing Sanctions That Were Not "Specifically Related" to the Discovery Claims

Apart from its baseless finding of willfulness, the district court erred by imposing sanctions detached from the underlying discovery disputes. As the Supreme Court has explained, there are two due-process "limit[s]" on a district court's "discretion" in imposing sanctions under Rule 37: The sanctions "must be 'just'" and "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 2107 (1982). Applying the latter rule, this Court has vacated sanctions that had "no apparent relationship with the discovery abuse." *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1152 (11th Cir. 2006).

The district court's sanctions, like those in *Serra Chevrolet*, are not tailored to the discovery claims and so must be vacated. Coquina sought the documents at issue—principally, the SIP and the CDD—to show that TD did too little to sleuth out Rothstein's scheme. 5/17 Tr. 10-12; D.E. 883 at 7. Put another way, these documents were offered to prove that TD did *not* know of Rothstein's scam but should have. The CDD, for example, is only an account-opening document, and the Gillen emails postdate the fraud. There is simply no "specific[]" relationship between these discrete documents and the district court's finding that *all* of TD's "monitoring and alert systems were unreasonable." D.E. 911 at 28 (quotation marks omitted). And the other "deemed fact" sanction—that TD knew about Rothstein's fraud—is still further astray. Again, Coquina's point with these documents was that TD *failed* to discover the fraud, not that it did. Not only is there "absolutely no nexus" between the discovery issue and the sanction, *Serra Chevrolet*, 446 F.3d at 1152; there is an anti-nexus between them.

What is more, the district court's rationale for its sanctions is worse than silence. In *Serra Chevrolet*, this Court vacated an award of sanctions in part because "the district court failed to state any reasons" for it. *Ibid.* Here, the district court did offer a telling rationale: "This sanction will prevent further prejudice to Coquina in an eventual appeal on that issue." D.E. 911 at 28. In other words, the district court chose its sanctions not because they were related to the documents but because it believed that the sanctions would help Coquina on appeal.

Coquina responds by misdirecting attention from the real issue. It begins, for example, by noting that the district court "held three full days of evidentiary hearings" and "accepted lengthy supplemental briefs." Red Br. 72. So what? No matter how much evidence a district court takes, it runs afoul of due process if it imposes sanctions not "specifically related" to the discovery issues. *Ins. Corp. of Ireland*, 456 U.S. at 707, 102 S. Ct. at 2107. That is what the district court did here. Similarly irrelevant is Coquina's protest that sanctions must have "bite," Red Br. 73, and that the district court could have imposed even more onerous sanctions, *id.* at 72. The district court had an array of options that would have both punished TD and been related to the documents at issue. The problem is that it opted for a sanction unrelated to the documents at issue.

Because the district court's sanctions were untethered to the alleged wrong, they "violated the due process rights" of TD. *Serra Chevrolet*, 446 F.3d at 1153. They therefore should be vacated.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED COQUINA LEAVE TO AMEND ITS COMPLAINT AFTER SUMMARY JUDGMENT

In addition to its state-law claims, Coquina initially brought claims under the RICO Act, 18 U.S.C. § 1961 et seq., in search of treble damages. The district court entered summary judgment against Coquina on its RICO claims. D.E. 547. Coquina then sought leave to amend its complaint, D.E. 562, which the district court denied, D.E. 567. Coquina cross-appeals this denial, but its argument is insubstantial.

A. Leave To Amend Would Have Been Futile

The district court properly denied leave to amend because "the amendment would be futile." D.E. 567 at 2. Coquina does not even try to refute this conclusion, nor could it. This futility alone justifies the district court's decision to deny leave to amend.

"Leave to amend a complaint is futile when the complaint as amended would still . . . be immediately subject to summary judgment for the defendant." *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam). Coquina's amendments would have been futile for two independently sufficient reasons: Coquina could not establish the "continuity" requirement of RICO, and the Private Securities Litigation Reform Act (PSLRA) would bar its RICO claim.

1. Continuity is a necessary element of a RICO claim. By its terms, RICO applies only if the plaintiff establishes a "pattern of racketeering activity." 18 U.S.C. § 1962(c). The Supreme Court has explained that, to establish this pattern, the plaintiff must show that the defendant's acts "amount to or pose a

threat of *continued* criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900 (1989) (emphasis added).

The requisite "continuity" is "both a closed- and open-ended concept." *Id.* at 241, 109 S. Ct. at 2902. To establish closed-ended continuity, a plaintiff must "prov[e] a series of related [criminal acts] extending over a substantial period of time." *Id.* at 242, 109 S. Ct. at 2902. It is not enough to prove criminal conduct "extending over a few weeks or months." *Ibid.* Open-ended continuity, by contrast, exists only when the alleged criminal acts "themselves involve a distinct threat of long-term racketeering activity" or "are part of an ongoing entity's regular way of doing business." *Ibid.*

Coquina is unable to plead closed-ended continuity. "The overwhelming weight of case authority suggests that nine months is not an adequately substantial period of time" to allege closed-ended continuity. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1267 (11th Cir. 2004). Moreover, the time period that counts is "the time during which RICO predicate activity occurred, not the time during which the underlying scheme operated or the underlying dispute took place." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). Here, this means that the relevant period is that during which TD allegedly defrauded *Coquina*, not during which TD allegedly cooperated with Rothstein in general. Coquina investors first heard of Rothstein's scheme in March 2009, and the scheme collapsed in October 2009. This period is far too short to establish closed-ended continuity. See D.E. 547 at 22-23. Perhaps for this reason, Coquina appears to have dropped its closed-ended theory on appeal. See Red Br. 76.

Nor can Coquina plead open-ended continuity. To do so, it would need to show that the alleged Rothstein/TD enterprise "threatened repetition in the future." *Jackson*, 372 F.3d at 1267. But this was a Ponzi scheme, and, by definition, Ponzi schemes collapse. This case is the perfect example: Rothstein's scheme ended not because someone exposed it but because he couldn't find new investors to pay off the old investors. It is enough that a criminal investigation renders it "virtually certain that [the defendants] will *not* engage in similar conduct in the future." *Id.* at 1268-69. So it is more than enough that Rothstein sowed the seeds of his own destruction. Similarly, Coquina could not allege that the Ponzi scheme was a "regular way of doing business." See *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. at 2902. For "the very nature of the lender fraud was such that Defendants could not continue the fraud beyond a limited period of time." *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 550 (4th Cir. 2001); accord *Thompson v. Paasche*, 950 F.2d 306, 311 (6th Cir. 1991).

Like many efforts to turn garden-variety fraud into RICO, Coquina's RICO theory founders on this requirement. Courts have "caution[ed] against finding continuity too easily" in this context, as "[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and spread over a period of at least several months." *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000) (quotation marks omitted). It is impossible for Coquina to plead continuity; leave to amend would be futile. *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 409 & n.2 (8th Cir. 1999).

2. The PSLRA also renders Coquina's proposed amendment futile.[13] The "RICO Amendment" of the PSLRA provides: "[N]o 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 [RICO]." 18 U.S.C. § 1964(c). Because Coquina could have brought this case under the banner of securities fraud, it cannot seek to invoke RICO.[14] Indeed, district courts confronting identical claims by other Rothstein investors have so held. See *Platinum Partners Value Arbitrage Fund, L.P. v. TD Bank, N.A.*, No. 11-61835-civ, ECF No. 82, at 4-10 (S.D. Fla. Aug. 8, 2012); *Adams v. Rothstein*, No. 11-61688-civ, 2012 WL 1605098, at *3-*6 (S.D. Fla. May 8, 2012).

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[13] This Court "may affirm for any reason supported by the record, even if not relied upon by the district court." *United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008) (per curiam) (quotation marks omitted).

[14] The RICO Amendment does not apply if the defendant has been criminally convicted. 18 U.S.C. § 1964(c). That *Rothstein* has been convicted does not nullify the RICO Amendment as it applies to *TD*. *Powers v. Wells Fargo Bank NA*, 439 F.3d 1043, 1046 (9th Cir. 2006).

The RICO Amendment applies where—as here—*any* plaintiff *could* have prosecuted the case as a securities fraud case. It does not matter that Coquina has not, in fact, styled its claim as such. Though alleged misconduct "may well constitute wire, mail or bank fraud," it falls within the RICO Amendment so long as it "was also undertaken in connection with the purchase of a security." *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999) (applying RICO Amendment to Ponzi scheme allegations). Nor does it matter if only the Government, as opposed to private parties like Coquina, could have alleged securities fraud here. *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277, 280 (2d Cir. 2011) (noting agreement among courts of appeals).

The "broad definition of 'security,'" *SEC v. Edwards*, 540 U.S. 389, 393, 124 S. Ct. 892, 896 (2004), encompasses the sham "settlements" that Coquina bought. Under this definition—intended "to encompass virtually any instrument that might be sold as an investment," *ibid.* (quotation marks omitted)—an investment is a "security" if "'the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.'" *Ibid.* (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 1104 (1946)).

That was the case here. Investments in "settlements" qualify as securities. See *SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 742-44 (11th Cir. 2005). And that is true whether the settlements are real or not. See *SEC v. Unique Fin. Concepts*, *Inc.*, 196 F.3d 1195, 1200-01 (11th Cir. 1999). As in a similar scheme to which the Fifth Circuit applied the RICO Amendment, Coquina allegedly was "unaware" that the settlements "had little or no true economic substance." *Affco Investments 2001, LLC v. Proskauer Rose*, *LLP*, 625 F.3d 185, 191 (5th Cir. 2010). Coquina's investors "thus portrayed themselves as passive investors who depended—both in reality and according to their investment contracts—upon the efforts of others for their profits." *Ibid.*

This case likewise satisfies the "in the purchase or sale" requirement. By banning securities fraud as a predicate offense, the PSLRA imported the "*in connection with* the purchase or sale" requirement of the securities laws. *Bald Eagle*, 189 F.3d at 330 (quotation marks omitted). This requirement, like the definition of "security," has been given a "broad construction." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, 126 S. Ct. 1503, 1513 (2006). It applies whenever the alleged fraud "coincide[s] with the sales" of the securities. *SEC v. Zandford*, 535 U.S. 813, 820, 122 S. Ct. 1899, 1904 (2002). While Coquina does not allege that TD bought or sold any securities, it does allege that TD's misconduct coincided with Rothstein's sales. Thus, TD's alleged wrongdoing would be "actionable as fraud in the purchase or sale of securities"—and barred by the RICO Amendment. See *Bald Eagle*, 189 F.3d at 330 ("[C]onduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.”).

B. Leave To Amend Would Have Prejudiced TD and Hampered the Judicial Process

In the alternative, the district court denied leave to amend because “allowing Coquina to amend its Complaint at this late stage of litigation”—*after summary judgment*—“would unduly prejudice TD Bank.” D.E. 567 at 2. This rationale offers yet another independent basis for affirming the district court’s ruling.

Coquina admits that, because it sought leave to amend after the deadline had passed (by eight months, see D.E. 87), it must have “good cause.” Fed. R. Civ. P. 16(b)(4); see *Smith v. Sch. Bd.*, 487 F.3d 1361, 1366 (11th Cir. 2007) (per curiam). But it has none. The discovery that it received from TD after the deadline did nothing to bolster its RICO claim. In particular, it discovered no new fact—as there is none—that would permit it to establish continuity under RICO. Thus, its warmed-over complaints about TD’s alleged “efforts to frustrate discovery,” Red Br. 76, are misplaced at best.

Coquina’s efforts to find good cause in the district court’s change of mind, Red Br. 76-77, are just as mistaken. For the reasons explained above, the district court’s initial determination that Coquina had pleaded continuity was erroneous. An error by the court does not vest a right in Coquina. See *Fogel v. Gordon &*

Glickson, P.C., 393 F.3d 727, 731 (7th Cir. 2004) ("[W]hen a rule is unambiguous a litigant is not permitted to rely on erroneous advice, even by a court.").

More importantly, allowing Coquina to amend its complaint at this stage would invite litigants to play whack-a-mole with summary judgment. This Court repeatedly has held that district courts have the discretion to deny leave to amend after discovery has closed and the dispositive-motion deadline has passed. *E.g.*, *S. Grouts & Mortars*, 575 F.3d at 1242; *Carruthers v. BSA Adver., Inc.*, 357 F.3d 1213, 1218 (11th Cir. 2004) (per curiam); *Lowe's Home Centers, Inc. v. Olin Corp.*, 313 F.3d 1307, 1315 (11th Cir. 2002). Granting leave so that a party can try to salvage its loss on summary judgment is far worse. This would enable parties to keep trying until they win, which would "seriously hinder[] judicial economy and result[] in prejudice" to their opponents. *Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 623 (11th Cir. 1983).[15] In the absence of the most compelling cause, the Court should not permit summary-judgment losers to amend their complaints.

[15] "This argument calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 702, 101 S. Ct. 1309, 1332 (1981) (Rehnquist, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the case dismissed for want of Article III standing. In the alternative, the judgment should be reversed and a new trial ordered on all issues or, at a minimum, on damages (other than the settlement payments, for which there was insufficient evidence as a matter of law). In any event, the sanctions order should be reversed. The district court's denial of leave to amend the complaint should be affirmed.

Dated: July 18, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 28.1(e)(2)(A). This brief contains 13,861 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that, on July 18, 2013, I caused the original and six copies of the Response and Reply Brief for Defendant-Appellant/Cross-Appellee TD Bank, N.A. ("Appellant's Response/Reply Brief") to be filed by dispatching to the clerk of court by commercial carrier for overnight delivery. In addition, I certify that, on July 18, 2013, I caused a true and correct copy of Appellant's Response/Reply Brief to be served by commercial carrier for overnight delivery on counsel for Plaintiff-Appellee/Cross-Appellant Coquina Investments:

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