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

AMENDED BRIEF OF DEFENDANT-APPELLANT TD BANK, N.A.

Marcos Daniel Jiménez
MCDERMOTT WILL & EMERY LLP
333 Avenue of the Americas
Suite 4500
Miami, FL 33131
Telephone: (305) 358-3500
Facsimile: (305) 347-6500

Lawrence S. Robbins
Donald J. Russell (*pro hac vice*)
Mark T. Stancil
Joshua S. Bolian
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Counsel for TD Bank, N.A.

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. submits this list, which includes the judges in the trial court and all attorneys, persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of this matter:

1. Bandstra, Hon. Ted E., Magistrate Judge
2. Berger Singerman LLP
3. Berger Singerman, P.A.
4. Bolian, Joshua S., Counsel for Defendant-Appellant
5. Bond, Jonathan C., Counsel for Plaintiff-Appellee
6. BRBJ, Ltd.
7. Cech Samole, Brigid F., Counsel for Defendant-Appellant
8. Constance, Bethany
9. Constance, Mark S.
10. Cooke, Hon. Marcia G., District Judge
11. Coquina Investments, Plaintiff-Appellee
12. Covington, Peter J., Counsel for Defendant-Appellant
13. Damson, Barrie
14. Damson, Joan

15. Damson, N. Blair
16. Damson, Sarah B.
17. Dyer, Christina
18. Dyer, M. Aldo
19. Estrada, Miguel A., Counsel for Plaintiff-Appellee
20. Evans, Donna M., Counsel for Defendant-Appellant
21. Evans, Jason D., Counsel for Defendant-Appellant
22. Garno, Danielle N., Counsel for Defendant-Appellant
23. George S. Hawn Properties
24. Gibson, Dunn & Crutcher LLP
25. GN Ventures, Ltd.
26. Goldstein, Glenn E., Counsel for Defendant-Appellant
27. Greenberg Traurig, LLP
28. Greenberg Traurig, P.A.
29. Greer, James H.
30. GSH 1987 Trust
31. Hawn, Christina H.
32. Hawn, George S.
33. Hewitt, Scott
34. Hutchinson, Wen, Counsel for Defendant-Appellant

35. Jennifer Hawn Caldwell 2004 Trust

36. Jiménez, Marcos Daniel, Counsel for Defendant-Appellant

37. Jones, Al

38. Kearney, Dorothy

39. Kearney, William R.

40. Keeney, Vicky

41. Kinghorn, Mark W., Counsel for Defendant-Appellant

42. Klein, Jenna K.

43. Klein, Melvyn N.

44. Lazarus, Bruce

45. Lazarus, Laura

46. Mandel & Mandel LLP

47. Mandel, David Scott, Counsel for Plaintiff-Appellee

48. Mandel, Nina Stillman, Counsel for Plaintiff-Appellee

49. Martin, Scott P., Counsel for Plaintiff-Appellee

50. McDermott Will & Emery LLP

51. McGuireWoods LLP

52. Noriega, Camellia, Counsel for Plaintiff-Appellee

53. Peterson, Jim L.

54. Pumariega, Audrey, Counsel for Defendant-Appellant

55. Rabin, Samuel Joseph, Jr., Esq.

56. Robbins, Lawrence S., Counsel for Defendant-Appellant

57. Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP

58. Ross, Ian M., Counsel for Defendant-Appellant

59. Rothstein, Rosenfeldt & Adler, P.A.

60. Rothstein, Scott W.

61. Russell, Donald J., Counsel for Defendant-Appellant

62. Savitz, Jason Brent, Counsel for Plaintiff-Appellee

63. Scherker, Elliot H., Counsel for Defendant-Appellant

64. Schnapp, Mark Paul, Counsel for Defendant-Appellant

65. Singerman, Paul Steven, Esq.

66. Skolnick, Holly Robin, Counsel for Defendant-Appellant

67. Spinosa, Frank

68. Stancil, Mark T., Counsel for Defendant-Appellant

69. Stettin, Herbert, The Honorable

70. Strayman, Jacqueline Klein

71. TD Bank, N.A., Defendant-Appellant

72. TD Bank US Holding Company

73. TD US P&C Holdings, ULC

74. The Toronto-Dominion Bank

75. Wallace, Ben B.

76. Wallace, Patricia H.

77. Welch, Stephanie

78. White, Kathleen M.

79. Woodrum, Teresa

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.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant TD Bank, N.A. respectfully requests oral argument. The Court's decisional process would benefit from the opportunity for the Court to discuss the case with counsel.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – CONTINUED

Page

TABLE OF CONTENTS – CONTINUED

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – CONTINUED

Page

TABLE OF AUTHORITIES – CONTINUED

Page

TABLE OF AUTHORITIES – CONTINUED

Page

TABLE OF AUTHORITIES – CONTINUED

Page

TABLE OF AUTHORITIES – CONTINUED

Page

PRELIMINARY STATEMENT

Attorney Scott Rothstein is a crook. From 2005 until he fled to Morocco in October 2009, Rothstein operated a Ponzi scheme, promising astronomical overnight profits from investments in "structured settlements" of lawsuits initiated by his clients. The settlements were fictitious. The clients were fictitious. The defendants were fictitious. And the overnight profits were simply too good to be true.

But, for the 31 investors whose claims are at issue in this appeal, Rothstein's get-rich-quick scheme was irresistible. They invested with Rothstein through a conduit called "Coquina Investments." Each investor decided whether to participate in a particular "investment," and Coquina then aggregated the investors' money on the front end and returned "profits" to them on the back end.

Eventually, Rothstein's scheme collapsed. With little hope of recovering from Rothstein, the investors, acting in Coquina's name, sued the bank where Rothstein maintained accounts, TD Bank, N.A. ("TD"). They alleged that Frank Spinosa, a vice president in TD's Broward County operations, knowingly participated in Rothstein's scam. TD denied that allegation. It also contended that the investors, many of whom were highly sophisticated in financial matters, knew that Rothstein's pie-in-the-sky promises were too good to be true but thought they could profit before the fraud imploded.

The lawsuit was fatally flawed from the get-go:

- "Coquina" lacked Article III standing to sue for the investors' losses because it served as a mere pass-through for the individual investors' funds.
- Despite a pretrial finding that inferences from Spinosa's "testimony" would be untrustworthy, Coquina was permitted to call him at trial and elicit 193 Fifth Amendment invocations in response to heavily loaded (and often uncorroborated) "questions."
- Coquina was permitted to introduce a hearsay recital in a settlement agreement it had negotiated with the trustee of Rothstein's bankrupt law firm, which Coquina used as "evidence" that Coquina lacked knowledge of Rothstein's scheme (the district court never even ruled on TD's hearsay objection).
- The district court permitted Coquina to recover the settlement payments that it made to the bankruptcy trustee, while denying TD's request for discovery to determine whether those payments were reasonable. The court then refused to instruct the jury that it should even consider that question.
- The district court invited, and then approved, the award of duplicative damages.
- Finally, the district court imposed discovery sanctions against TD that were both groundless and excessive.

For all of these reasons, the judgment below should be reversed.

STATEMENT OF JURISDICTION

The district court asserted jurisdiction under 28 U.S.C. § 1332(a)(1); as explained below, the district court lacked jurisdiction because Coquina lacked Article III standing. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Coquina – a pass-through entity that merely aggregated the investments of the 31 investors and disbursed their "profits" – had Article III standing to commence this lawsuit.

2. With respect to liability:

   A. Whether multiple errors regarding the "testimony" of Frank Spinosa require a new trial.

   B. Whether the admission of a hearsay recital in Coquina's settlement agreement with the trustee for Rothstein's bankrupt law firm ("Settlement Agreement") requires a new trial.

3. With respect to damages:

   A. Whether multiple errors regarding the award of payments made under the Settlement Agreement require either dismissal of the settlement payments as damages or a new trial on damages.

   B. Whether the district court authorized, and then approved, duplicative damages.

4. Whether the district court imposed factually baseless and legally excessive sanctions for alleged discovery violations.

STATEMENT OF THE CASE

Plaintiff-Appellee Coquina Investments sued Scott Rothstein (who did not defend) and Defendant-Appellant TD Bank, N.A. ("TD" or "the Bank"). Following entry of partial summary judgment for TD (D.E. 547), two common-law claims – misrepresentation and aiding and abetting – were tried. The jury found TD liable, awarding identical damages ($16 million compensatory and $17.5 million punitive) on each count. The district court entered a final judgment for $67 million (D.E. 754), sanctioned TD for certain discovery violations (D.E. 911), and denied TD's post-trial motions (D.E. 943).

STATEMENT OF FACTS[1]

1. *Rothstein's scam.* In 2009, Scott Rothstein, then a prominent South Florida lawyer, purported to represent whistleblowers and victims of sexual harassment. According to Rothstein, the wrongdoers in those cases agreed to pay enormous sums to avoid litigation. To ensure confidentiality, they supposedly entered into "structured settlements" in which they paid large amounts to Rothstein's law firm, Rothstein Rosenfeldt Adler ("RRA"), but required RRA to release the money over time, with the proviso that the victims would forfeit the deferred payments if confidentiality was breached. Some victims, Rothstein claimed, desperately wanted *immediate* payment and would forgo a large portion

[1] Some of the facts are contained in argument sections to which they pertain.

of the settlement to get it. On that pretext, Rothstein asked wealthy investors to finance the immediate payment to a victim of a *fraction* of the settlement, in exchange for receiving the *entire* settlement in very quick installments. 11/14 Tr. 99-102. The wrongdoers, the victims, and the claims were fictitious.

Rothstein needed seed money to start his Ponzi scheme and ever-larger amounts to expand it. As in all such schemes, Rothstein needed to reward handsomely those who supplied the necessary funds. Enter the "Coquina" investors.

In early 2009, Mel Klein, a wealthy lawyer/investor, learned that Rothstein was offering these structured-settlement investments. Klein contacted his friends Barrie Damson (another attorney/investor) and George Hawn (a Texas banker/investor). Hawn, in turn, brought one of his employees, Kathleen White (a C.P.A.), into the discussions. See 11/14 Tr. 8-15. Klein, Hawn, and Damson each put in $200,000, with the understanding that each would receive $300,000 – a whopping 50% return – in only four months. *Id*. at 45.

The investors funneled their investments through a longstanding Hawn family partnership, Coquina Investments. *Id*. at 40. Coquina was a mere paper entity. Each participant sent funds to Coquina, which aggregated and forwarded the funds to an RRA account at TD. The process was reversed when Rothstein rewarded his investors. 12/2 Tr. 19-20. As Damson explained, the Coquina partnership merely "acted as a conduit." Video clip 57. Thus, each individual investor decided whether and how much to invest. 11/28 Tr. 47 (Klein: "I made my own decisions and managed my own investments. I did not make decisions for anyone other than myself."); 12/2 Tr. 18-19 (White affirming that "each individual investor makes his or her own decision"). Likewise, the profits (and later, the losses) were allocated to the individual investors in proportion to their initial investments. 11/28 Tr. 48 (Klein: "[T]he investments I participated in were my own."); Damson video clip 34 (losses were "individual losses for me"). Although Hawn and White were Coquina partners, Klein, Damson, and the vast majority of investors who eventually participated were not. Damson video clip 147 ("I wasn't any partner of Coquina . . . . I just was an investor."); 11/28 Tr. 40.

Within four months, Klein, Hawn, and Damson received $900,000 on their investment of $600,000. They wanted more, and brought in other investors for subsequent deals; ultimately, at least 31 investors used Coquina as a conduit for Rothstein investments. Ex. D-946. Collectively, they put up $3.3 million in June, $5.8 million in July, and $4 million on August 11, 2009. All of these transactions occurred before any Coquina investor had *any* communications with TD. 11/14 Tr. 235-36; Damson video clip 94, 95.[2]

[2] Coquina was nevertheless permitted to offer evidence of so-called "investor shows" staged by Rothstein and his confederates at TD's premises to deceive *other*

2. *The investors' only interactions with TD.* In mid-August 2009, Damson told Klein about a $15 million Rothstein investment promising a $22 million return within three months. 11/14 Tr. 50. Rothstein sent White a purported account statement showing $22 million in the RRA "1614 account." Klein wanted confirmation of that balance from TD (*id.* at 51-52), so Rothstein emailed White a copy of a one-page letter from Rothstein to Frank Spinosa, a regional vice president of TD Bank. 12/1 Tr. 206. Although the letter (which Coquina called a "lock letter") said nothing about the balance in the account, it did instruct Spinosa that funds in the account "shall only be distributed upon my [Rothstein's] instructions and shall only be distributed to Coquina Investments." Ex. P-531. Spinosa had signed the letter to signify his agreement.

On August 17, according to Klein, Spinosa confirmed that he had signed the letter and that the account contained $22 million. 11/14 Tr. 85-86. The investors then sent $15 million to Rothstein, via Coquina. After similar representations by Spinosa in September, the investors put in $5 million more, for a promised return of $10 million within two months. Ex. D-458. Klein, Damson, and White were the only investors who communicated with TD, and they communicated only with Spinosa. Damson video clip 108, 109, 110; 12/2 Tr. 10-12.

---

investors in Rothstein's scheme. *E.g.*, 11/29 Tr. 110-19. Significantly, none of the Coquina investors witnessed a single one of these episodes. 12/2 Tr. 10-13.

The fraud collapsed at the end of October 2009. Rothstein fled to Morocco, where he held a bank account to which he had wired $16 million. He pleaded guilty and is now serving a 50-year prison sentence in the United States.

3. *The defense case.* TD vigorously disputed that any of its employees, Spinosa included, knew of Rothstein's scheme. Significantly, it was undisputed that Rothstein and his accomplices had gone to elaborate lengths to falsify bank records and impersonate bank officials – steps that would have been unnecessary if Spinosa or other Bank employees were actually Rothstein confederates. For example, RRA employees created phony bank statements and a counterfeit TD website to show investors that RRA accounts had large balances. See 12/12 Tr. 12-53, 55-71. Rothstein also modified genuine TD letters and emails to mimic TD originals. 1/11 Tr. 65-77; 1/12 Tr. 8-13. Another Rothstein accomplice posed as a TD employee and gave phony account statements to investors. See 12/12 Tr. 73-94.

Indeed, TD contended, it was the Coquina investors, not the Bank, who had every reason to smell a rat. The very nature of the Rothstein "investments" was absurd – promises of annualized returns of 93.8% to 600% with no risk (because the settlement payments supposedly were already in RRA's hands). Equally preposterous was the notion that Rothstein had a seemingly endless series of "clients" who needed money so desperately that they would accept enormous discounts off already-deposited sums, simply to get paid three months early. Or that an equally endless Conga line of defendants would settle on these bizarre terms. And, as Rothstein's scheme progressed, the telltale signs of fraud multiplied before the investors' eyes. See, *e.g.*, 12/5 Tr. 56-57 (Rothstein confederate "verified" to the investors that $27.3 million had been wired to a Coquina account, but later wrote that only $22 million had been wired); *id.* at 65 (same confederate "verified" an assignment of settlement payments to Coquina that was executed *before* Coquina even agreed to invest).

The Coquina investors were not rubes. White was a C.P.A. Klein had studied at the London School of Economics and Columbia Law School, and had worked as a business consultant at McKinsey & Co. Hawn founded the leading independent bank in Texas. Damson was a former Governor of the American Stock Exchange. (Damson called Rothstein "Rothschild," and Rothstein called him "Rocky" (short for Rockefeller), because they anticipated becoming "rich, richer." Damson video clip 74.) *These* investors, TD contended, were not taken in by a transparently implausible scam promising risk-free returns of 93.8% to 600%. Rather, they hoped to celebrate alongside Rothstein: As Rothstein exclaimed to Damson upon completing a transaction: "Yipppppppie kai yay, Barrie, one down, billions to go." Damson video clip 75.

4. *Coquina's settlement with the RRA bankruptcy trustee*. Just before trial, Coquina settled with the trustee for Rothstein's bankrupt law firm. The settlement provided that the trustee would receive an immediate payment of $12.5 million plus a large contingent portion – up to $18.6 million – of Coquina's recovery from TD in this case. In exchange, the trustee released all claims against Coquina and the individual investors, including claims arising from their own misconduct – while simultaneously granting Coquina an "allowed" claim in the bankruptcy to recover its settlement payments. And the trustee agreed to include a gratuitous recital in the settlement agreement asserting that Coquina had no knowledge of or complicity in Rothstein's fraud – contrary to the trustee's draft complaint, in which he had accused Coquina of, among other things, usury and receiving fraudulent transfers from Rothstein. Ex. P-896 (settlement agreement and recital); D-947 (trustee demand).[3]

Over TD's hearsay objection, the district court permitted Coquina to introduce the recital for its truth, to rebut TD's "too-good-to-be-true" defense. 11/14 Tr. 185-186; 12/8 Tr. 138-149; 1/17 Tr. 180. The district court also permitted Coquina to seek damages to compensate for its settlement payments to the trustee. The district court denied TD's request, however, for discovery concerning how much of the settlement was due to Coquina's (rather than TD's)

[3] As explained below (*infra* pp. 44-46), the district court erroneously refused to admit the trustee's demand into evidence.

misconduct; how much was due to claims against the individual investors (rather than claims against Coquina); whether the settlement would be funded by Coquina (rather than by the individual investors); and whether the settlement amount was reasonable. D.E. 570 at 3. At trial, the district court then excluded evidence on those subjects and took those issues from the jury, ruling that Coquina was entitled to recover its settlement payments as a matter of law. 11/14 Tr. 184; 1/13 Tr. 188.

5. *The verdict and aftermath.* The jury returned identical awards on each count: $16 million in compensatory damages and $17.5 million in punitive damages.[4]

After the verdict, TD realized that documents it had produced in another Rothstein-related case had not been produced to Coquina. TD promptly produced the documents to Coquina and notified the court. D.E. 791, 825, 895. Coquina

[4] We urge the panel to review the trial transcript closely to obtain a flavor of the proceedings. Time and again, plaintiff's counsel asked the kinds of questions, and made the kinds of jury arguments, one usually sees only on *Law and Order* reruns. See, *e.g.*, 1/17 Tr. 72 (summation) ("[T]he next Scott Rothstein is out there somewhere or maybe worse yet, some drug lord or terrorist, and I'll bet they are running . . . not walking, but running to open their accounts at TD Bank right now."); *id.* at 95 ("Sure, the FBI prosecutes money laundering and terrorists, . . . [but] the FBI isn't ever going to know about it unless the bank picks up the phone."); 11/29 Tr. 50 (asking Spinosa's former secretary if she was aware that Spinosa had invoked the Fifth Amendment at trial); 1/10 Tr. 130 (asking defense expert whether it "matter[ed]" to him that Spinosa "took cash from Scott Rothstein . . . for his assistance in the money laundering scheme" – a wholly uncorroborated accusation); *id.* at 135 (suggesting to defense expert that TD employees who reviewed "alerts" were told by Spinosa not to pursue them – also entirely uncorroborated); 1/12 Tr. 56 (asking defense computer expert whether he "consider[ed] that TD Bank . . . purposefully deceive[d] investors").

moved for sanctions. The district court found that TD's now-former outside counsel – the lawyers who were directly responsible for the oversight – were *negligent*, but, against all evidence, that TD had acted *willfully*. D.E. 911 at 24. As a sanction, the court deemed two facts established – that TD Bank's monitoring and alert systems were unreasonable and that TD Bank had "actual knowledge of Rothstein's fraud." *Id*. at 28. The district court subsequently denied TD's post-trial motions. D.E. 943.

STANDARD OF REVIEW

The Court reviews standing issues *de novo*. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264 (11th Cir. 2011).

Evidentiary rulings are reviewed for abuse of discretion, but underlying errors of law are reviewed *de novo*. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 556 (11th Cir. 1998).

The Court reviews the correctness of jury instructions *de novo*. *Fid. Interior Constr., Inc. v. Se. Carpenters Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, 675 F.3d 1250, 1259 (11th Cir. 2012). The refusal to give a requested instruction is reversible if "(1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party."

Bogle v. McClure, 332 F.3d 1347, 1356 (11th Cir. 2003) (quotation marks omitted).

Discovery rulings are reviewed for abuse of discretion, but underlying legal determinations are reviewed *de novo*. *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

This Court "review[s] a district court's determination regarding duplicative damages for clear error." *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1200 n.17 (11th Cir. 2009).

Finally, review of discovery sanctions is for abuse of discretion and for a determination that the findings of the trial court are fully supported by the record. *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1146-47 (11th Cir. 2006). The Court reviews *de novo* arguments that sanctions violated due process. *Id.* at 1147.

SUMMARY OF ARGUMENT

I. The only plaintiff in this case – Coquina – lacks Article III standing.

A. Every plaintiff in federal court must prove the existence of an actual injury, but the undisputed evidence showed that no injury in fact could possibly have fallen upon Coquina. Coquina merely collected and passed through to Rothstein every dollar collected from the individual investors – each of whom made his or her own decision whether to invest – and passed every dollar of "gain" or "loss" right back to those same individuals. And, as far as this record shows, the investors again used Coquina as a conduit when settling their liability with the RRA trustee. Merely aggregating or facilitating others' investments does not confer standing. And while the investors are understandably eager to hide behind Coquina (their individual claims against TD would otherwise fall apart), the law does not permit them to do so.

B. The investors' attempt on the eve of trial to authorize Coquina to sue on their behalf only confirms Coquina's lack of standing. It was also too late (because standing is determined at the time the complaint is filed) and too little (because the authorizations failed to confer legal title to their claims).

II. On the merits, this trial was fundamentally flawed, and the judgment of liability cannot stand.

A. The district court should not have allowed Coquina's counsel to conduct a three-hour "examination" of Spinosa consisting of 193 highly loaded questions, in response to which Spinosa repeatedly took the Fifth. The district court had correctly *excluded* Spinosa's deposition invocations, finding that Spinosa's and TD's interests were too antagonistic to support an adverse inference against TD. But the district court inexplicably reversed course shortly before trial and permitted Coquina to give the very same performance live before the jury. And we do mean inexplicably – one will search the record in vain for *any* reason offered by the district court as to why Spinosa's "testimony" suddenly became reliable. Compounding that error, the district court permitted Coquina's counsel to ask a slew of "questions" for which he lacked necessary corroboration. Finally, the district court improperly instructed the jury that it could infer any fact, including TD's ultimate *liability*, from Spinosa's non-answers.

B. The district court erroneously allowed Coquina to introduce rank hearsay contained in its settlement agreement with the RRA trustee. The Exculpation Recital stated that the trustee had no reason to suspect that Coquina had knowledge of Rothstein's wrongdoing. This Recital was excludable hearsay, but the district court never even ruled on the hearsay objection. Coquina thereafter paraded the Recital before the jury, effectively disabling TD's core defense.

III. The $67 million damages award was legally defective on multiple grounds.

A. The investors claimed out-of-pocket losses to Rothstein of only $6.7 million, but they also sought to recover their nearly $25 million settlement with the RRA trustee. Settlement damages may be recovered only if they are reasonable and non-speculative. Here, that required Coquina to prove that these settlement payments were actually attributable to *TD's* misconduct (not to *Coquina's or the investors'* conduct), and that the *amount* was a reasonable approximation of Coquina's liability. Coquina did not even attempt such a showing, and thus the settlement payments cannot be recovered. At a minimum, a new trial on damages is required: The district court improperly denied TD discovery on the reasonableness of the settlement payments, and then took the entire issue away from the jury, holding (incorrectly) that the reasonableness of the settlement payments was a question of law dispositively resolved by the bankruptcy court.

B. Even though Coquina did not (and could not) distinguish the fraud losses from the aiding-and-abetting losses, the court's verdict form required the jury to award separate damages verdicts. After asking several questions about damages during deliberations – to which the court's answers were insufficient – the jury awarded identical damages on both counts. That is a classic double recovery.

IV. The district court grounded its sanctions on its determination that TD *willfully* violated discovery orders. But that determination is utterly unsupported by the record. Moreover, the court's "deemed facts" were untethered from the underlying discovery disputes, and thus violate due process.

ARGUMENT

I. COQUINA LACKED STANDING TO BRING THIS ACTION, AND THE LAWSUIT SHOULD THEREFORE BE DISMISSED

When the 31 Coquina investors decided to sue TD for their Rothstein losses, they faced a fundamental problem: Florida law required that each investor prove individual reliance on an alleged misrepresentation by TD, but only three of them had had any direct contact with TD. What is more, the three who did interact with TD insisted that they were *not* acting on behalf of all 31 investors and that each investor had acted independently. Their solution to this insurmountable problem of proof? Claim that *Coquina* had actually suffered the losses and name *Coquina* as the sole plaintiff.

But federal standing law requires that a plaintiff suffer an "injury *in fact*," not an "injury *in theory*." So far as this record shows, Coquina would not, could not, and did not receive a dime's worth of gain or loss from the Rothstein "investments." Rather, the 31 individual investors – 26 of whom were not even Coquina partners – used Coquina as a conduit for their individual investments. The investors decided individually whether to invest, and *their* money – not the partnership's money – was lost.

On the eve of trial, the investors tried to fix the problem, by signing letters authorizing Coquina to sue on their behalf. That act only confirmed that the injury rested with the individuals, not Coquina. In any event, it is black-letter law that standing is determined when the complaint is filed, so a *post hoc* authorization could have no effect. Moreover, the purported authorizations failed to transfer legal title to the investors' claims, as standing principles require.

A. Coquina Lacked Standing Because Only The Investors Could Claim To Have Suffered Actual Injury

Coquina failed to prove that it suffered an "injury in fact," which is the "irreducible constitutional minimum" to invoke the judicial power of the federal courts. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1279 (11th Cir. 2008).

1. Coquina sought redress for alleged economic losses – a "wallet injury." See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619, 127 S. Ct. 2553, 2574 (2007) (Scalia, J., concurring in the judgment). The trouble is, at no point was *Coquina's* wallet injured. The uncontested evidence shows that the investors decided individually whether to invest, invested their own funds, earned their own profits, and suffered their own losses. Coquina was just a conduit used – by Klein's admission – solely "as a matter of convenience." 11/28 Tr. 38; see also *id.* at 47; 12/2 Tr. 18; Damson video clip 8. All told, the investors lost $6.7 million, Rothstein gained $6.7 million, and Coquina came out even. Coquina suffered no injury "in a personal and individual way." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (quotation marks omitted).

The $12.5 million in settlement payments to the RRA trustee are no different. Coquina sent those payments to the trustee (just as it sent investment funds to Rothstein), but it presented no evidence to show whether it settled solely because of its own potential liability, or because of the potential liability of the individual investors.[5] Nor did Coquina show where it got the money to pay the settlement – including whether, as with the investments, the individual investors contributed their respective shares. D.E. 557 at 7-8; D.E. 570 at 2-3. Indeed, Coquina successfully opposed TD's request for discovery on those questions. In the end, Coquina's efforts to hide those facts avail it nothing. It was Coquina's burden to prove standing, not TD's burden to disprove it. See *Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011). Coquina did not carry that burden.

Nor is there any evidence that Coquina or its partners faced liability to the other investors. See *Via Mat Int'l S. Am. Ltd. v. United States,* 446 F.3d 1258, 1263 (11th Cir. 2006). To the contrary, the investors agreed to "pay[] the bills" *for Coquina* in this lawsuit. Damson video clip 103. Coquina utterly failed to prove that it sustained a real "wallet injury" not actually suffered by the individual investors.

2. This was not an arrangement in which the partners' losses and the partnership's losses were one and the same. See *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1232-33 (11th Cir. 1999). Most of the investors were not partners, and most of the partners were not investors. All told, 31 people or entities invested with Rothstein via Coquina. Ex. D-946. Only *five* –Hawn, White, and three others

[5] Coquina claimed that it faced liability on preferential transfer claims, but an entity that is merely a conduit through which a debtor transfers funds to others is not liable under bankruptcy law. See *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1199-1200 (11th Cir. 1988).

– were actually partners in Coquina. See Ex. D-104. The other 13 Coquina partners evidently played no role in the Rothstein investments.

Nor did Coquina function as a partnership in any relevant sense. White conceded that Coquina was "not a partnership where there is a managing partner who makes a decision on behalf of all of the partners as to whether or not to invest." 12/2 Tr. 18. Quite the opposite. The three investors who testified made clear that each investor made an individual decision to invest. 11/28 Tr. 47; 12/2 Tr. 18; Damson video clip 8. Even when the investors gathered information, they did so on their own behalf, not the partnership's. *E.g.*, Damson video clip 31.

Entities that merely facilitate or manage the investments of others lack standing to recover their clients' money. Investment managers are mere pass-throughs – the "clients, not [the investment manager], have suffered financial losses as a result of [the investment's] collapse." *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 104 (2d Cir. 2008) (denying standing). Like an investment manager, Coquina kept the records, but "any losses are only attributable to [its] customers." *Indemnified Capital Invs., SA v. R.J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1409 (7th Cir. 1993) (denying standing and citing, *inter alia*, *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 985 (11th Cir. 1990)). If anything, Coquina was *less than* an investment manager; an investment manager typically has "discretionary authority to make investment decisions for its clients."

W.R. Huff, 549 F.3d at 103. Coquina had no such power. In that sense, Coquina functioned more like an escrow agent, keeping records and executing transactions at the direction of the individual investors. Escrow agents lack standing to assert injuries suffered by those who use their services. See, *e.g.*, *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848 (9th Cir. 2001) (en banc).

3. The district court rejected TD's standing challenge, but only by relying on mistaken premises:

- The district court characterized Klein, White, and Damson as "Coquina partners." D.E. 943 at 2; see also *id.* at 6. False. Only White was a Coquina partner; Klein and Damson specifically disavowed owning a partnership interest in Coquina. 11/28 Tr. 39-40; Damson video clip 5.

- The district court stated that "Hawn, Damson, and Klein made the decision to invest on behalf of the partnership." D.E. 943 at 6. False. White, Damson, and Klein *all* testified that each individual investor decided whether to participate in each investment – no one made a decision "on behalf of the partnership." 12/2 Tr. 18; accord 11/28 Tr. 47; Damson video clip 8.

- The district court said that "certain partners conducted the due diligence on behalf of the partnership, not themselves individually," and that "[t]hey met with Rothstein and Spinosa on behalf of the partner[sh]ip, not themselves individually." D.E. 943 at 7. False. Damson was asked this question directly ("Q. But you were meeting on behalf of Coquina, correct?") and specifically denied it ("A. I was meeting on behalf of Barrie Damson."). Damson video clip 31. White insisted that other investors conducted and acted on their own individual due diligence and that her research was for the Hawn family's benefit, not Coquina's. 12/2 Tr. 110; 12/5 Tr. 45. Damson and White never claimed responsibility for any other investor's due diligence. 11/14 Tr. 188.

- The district court observed that "the RRA Trustee made a demand upon Coquina, not the individual investors" and that "Coquina, not the individual

> investors, eventually entered into a settlement agreement with the RRA Trustee." D.E. 943 at 7. Mistaken again. The settlement agreement explicitly released Coquina's "partners, managing partners, investors," and every other individual associated with it for "all claims, defenses, and counterclaims" related to the RRA estate. Ex. P-896 at 6-7. And Coquina was effectively judgment-proof against the trustee's multi-million-dollar demands – at least until the individual investors presumably sent Coquina funds to pay the trustee. See D.E. 574-1 at 14, 16.

Tellingly, the district court did not cite a single transcript page in support of these fundamental assumptions, nor did it cite a single case.

4. The investors' decision to sue as "Coquina," and not as individuals, was a strategic ploy, not just a technical oversight. Had they sued in their own right, most of the investors could not have proved that their losses were caused by a TD misrepresentation. For one thing, TD made no statements *at all* to most of the investors; TD communicated with only Klein, Damson, and White. The remaining 28 investors would have been hard-pressed to blame TD for their losses.

Reliance would have been the next insurmountable hurdle. Florida law requires an individualized showing of reliance, even if each person received the same misrepresentation. *BDO Seidman, LLP v. Banco Espirito Santo Int'l*, 38 So. 3d 874, 882 (Fla. 3d DCA 2010). White, Damson, and Klein – the only investors who testified at trial – did not, and could not, testify as to the reliance of the remaining 28 investors. Indeed, White, Damson, and Klein expressly *denied* acting on behalf of all Coquina investors. Damson video clip 31; 11/14 Tr. 188; 12/5 Tr. 44, 45, 124. And, because none of the investors had any contact with TD before the mid-August investment, none could have relied on a TD misrepresentation when they invested a combined $13.7 million with Rothstein *before* the first communication with TD. Damson video clip 106, 107. Moreover, even if every scrap of information received from TD *after* that date had been disseminated to every individual investor – an utterly implausible assumption on this record – each investor would *still* have had to show his own reliance: "What one purchaser may rely upon in entering into a contract may not be material to another purchaser." *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984).

The 31 investors attempted to circumvent these problems by calling themselves "Coquina" and pretending that "Coquina" suffered losses. That way, a tiny subset of the 31 – Klein, Damson, and White – could testify as "Coquina" and purport to cover *everyone's* burden of proof. Standing law rejects such efforts to cloak individual claims with the mantle of an association. See *Warth v. Seldin*, 422 U.S. 490, 515-16, 95 S. Ct. 2197, 2214 (1975) (denying standing because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof").[6]

[6] Even in federal securities cases, it is generally recognized that class certification is impossible when individualized proof of reliance is required. *E.g.*, *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-83 (5th Cir. 1973) (barring securities class action because basis for reliance varied across putative class). To alleviate that concern, the Supreme Court has recognized a

B. Coquina's "Assignments Of Collection Rights" Were Untimely And Failed To Confer Legal Title

Coquina attempted to massage its standing problem just before trial. Each investor assigned "collection rights" to Coquina. Ex. D-946. That maneuver fails for two reasons.

First, standing is determined as of the time the complaint is filed. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); accord *Abraxis Biosci., Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010) (dismissing suit because assignment of patent occurred after plaintiff filed complaint). For this reason alone, Coquina cannot rely on the purported assignments.

Second, the letters did not "manifest an intention to make the assignee the *owner* of [the] claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) (emphasis added) (quotation marks omitted) (rejecting an attempted assignment for this reason). Instead, the letters merely assigned collection rights to Coquina and granted a power of attorney. Ex. D-946. As the

---

rebuttable presumption of reliance based on a fraud-on-the-market theory in certain cases involving publicly traded securities. See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 242, 108 S. Ct. 978, 989 (1988). But the fraud-on-the-market presumption is unavailable here, and what happened in this case – relieving the investors of Florida law's requirement of individualized proof of reliance by pretending that reliance by Coquina would suffice – is worse than what courts have uniformly recognized would be unacceptable if securities class actions were certified despite the need for individualized proof of reliance.

letters state plainly, the investors authorized Coquina to pursue "my rights" and represent "my interests." Ex. D-946. But a transfer of *ownership* is necessary – an "assignment" that does not "confer[] a *property right*" does not confer Article III standing. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289, 128 S. Ct. 2531, 2544 (2008) (emphasis added); see also *W.R. Huff*, 549 F.3d at 107-09.

Standing doctrine exists precisely to bar uninjured parties like Coquina from suing when someone else has suffered an injury. This Court should reverse the district court's judgment in its entirety.

II. A NEW TRIAL IS WARRANTED BASED ON EVIDENTIARY AND INSTRUCTIONAL ERRORS

A. Multiple Errors Relating To The "Testimony" Of Frank Spinosa Require A New Trial

Coquina called Frank Spinosa as its first witness. The jury heard his testimony for nearly three hours – or, more accurately, heard the "testimony" of Coquina's trial counsel, in the form of questions that Spinosa refused to answer. Coquina posed 193 questions to elicit "evidence" – in the form of Spinosa's nonanswers – including questions about allegations for which Coquina could not produce a shred of evidence.

This was a textbook example of "lawyer abuse" that courts have repeatedly decried. *E.g.*, *LiButti v. United States*, 107 F.3d 110, 122 (2d Cir. 1997). When a witness invokes the Fifth, the witness's "testimony" consists of "questions by which the examining attorney effectively testifies for the invoking witness." *Ibid*. In these circumstances, "the adversary is effectively denied the right of cross-examination since the witness cannot even be made to explain why the privilege has been invoked, much less to contradict the intended inference." *Brink's, Inc. v. City of New York*, 717 F.2d 700, 716 (2d Cir. 1983) (Winter, J., dissenting). And there is a grave danger that the Fifth Amendment assertion

> will have a disproportionate impact on [the jury's] deliberations. The jury may think it high courtroom drama of probative significance when a witness "takes the Fifth." In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.

Bowles v. United States, 439 F.2d 536, 541-42 (D.C. Cir. 1970).

Coquina exploited its opportunity to the fullest. Coquina pointed to Spinosa's testimony no fewer than 24 times in its summation, reminding the jury that it could and should infer TD's liability from his silence. 1/17 Tr. 38, 39, 46, 48, 49, 51, 79, 80, 85, 87, 89, 96. Coquina did not exaggerate when it described Spinosa as "the singular critical witness in our case." 11/10 Tr. 12.

The district court erred when it permitted Coquina to conduct this display before the jury; compounded its error by permitting Coquina to ask about uncorroborated allegations; and topped it off by improperly instructing the jury on the kinds of inferences it could draw from Spinosa's refusal to answer questions. These errors warrant a new trial.

1. The District Court Erred By Permitting Coquina To Question Spinosa At All

TD moved before trial to exclude Spinosa's deposition testimony "and to further exclude *any and all testimony, evidence, or other references* to any invocations of the Fifth Amendment by Spinosa." D.E. 215 at 1 (emphasis added).[7] The district court granted the motion, finding as fact that any inference against TD based on Spinosa's refusal to testify "would not be trustworthy, and should be excluded under Rule 403." D.E. 548 at 3. The district court found, specifically, that Spinosa had been fired by TD; had refused to cooperate in TD's internal investigation; "did not have a close relationship" with TD; had "little, if any, loyalty to TD" – and that TD, although paying Spinosa's legal fees, was unable to "exert any control of its former employee," whose interests "may not be compatible with those of the bank." *Id*. at 2-3.

Moments before trial, however, the district court turned on a dime. Without concluding that its previous untrustworthiness finding was erroneous (it wasn't), or that new and contrary facts had emerged (there weren't any), the court permitted Coquina to call Spinosa to "testify" and invited the jury to draw inferences against

[7] TD also requested a stay of the litigation pending completion of the criminal investigation of Spinosa, pointing out that Spinosa was prepared to cooperate after the government completed its investigation and that his testimony was crucial to the defense. D.E. 210. Coquina opposed the motion, arguing, "That [TD] cannot present its best defense without Spinosa's help is simply not good enough." D.E. 238 at 12. The district court denied the stay. D.E. 327.

TD from his inevitable Fifth Amendment invocations. 11/8 Tr. 9; 11/10 Tr. 4. The court stated that its previous ruling covered only Spinosa's *deposition* testimony, and had no bearing on his *courtroom* testimony. 11/8 Tr. 9.[8]

That ruling simply makes no sense. True, juries sometimes are permitted in civil cases to draw adverse inferences *against a party* who invokes the Fifth Amendment, on the premise that "failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (quotation marks omitted). But that premise is attenuated when a *nonparty* witness takes the Fifth, and the proponent seeks an adverse inference against his party-opponent. A nonparty may well be indifferent to the outcome of the litigation, and might even be hostile to the party against whom an adverse inference might be drawn. A nonparty might take the Fifth even if – perhaps *because* – the witness's truthful answer to the question would exonerate the party.

Recognizing the crucial distinction between parties and nonparties, courts require a careful, fact-specific inquiry before permitting adverse inferences against

[8] Nine months later, the district judge wrote that she had "reconsider[ed]" her prior finding of untrustworthiness. D.E. 943 at 16 n.8. The trial transcript says otherwise. When the judge permitted Coquina to call Spinosa at trial, she *reaffirmed* her prior findings, explaining that "I chose to have him live, because of *the unreliability of the deposition testimony*." 11/8 Tr. 10 (emphasis added). And the court never articulated *any* findings – either contemporaneously or after the fact – to support a conclusion that inferences against TD from Spinosa's testimony were trustworthy.

a party based on the Fifth Amendment assertion of a nonparty witness. "[T]he overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *LiButti*, 107 F.3d at 124. Courts ask, for example, whether the witness is controlled by a party, has loyalty to a party, or is, practically speaking, a noncaptioned party that shares the same interest in the outcome of the litigation. *Id*. at 123. If not, there is no reason to assume that it would be "natural under the circumstances" for the witness "to object to the assertion in question" (*Baxter*, 425 U.S. at 319), and therefore no reason to believe that the witness's silence would support a *trustworthy* adverse inference against the party.

Here, the district court correctly found before trial that inferences against TD from Spinosa's testimony would be *untrustworthy*. The court's subsequent ruling – that the jury should hear Spinosa's *trial* "testimony," even though the same "testimony" in a deposition could yield only untrustworthy inferences – is baffling. Each of the findings that rendered unreliable any adverse inferences from Spinosa's *deposition* testimony applied equally to his *trial* testimony. If anything, an invocation at trial presented a much *greater* likelihood of unfair prejudice to TD.[9] The district court should never have permitted Coquina to call Spinosa at all.

[9] In a post-trial ruling, the district court stated that TD suffered no prejudice because it "had the opportunity to cross-examine Spinosa." D.E. 943 at 18. But cross-examination would only have elicited *additional* Fifth Amendment

2. The District Court Erred By Permitting Coquina To Ask Questions That Lacked Any Evidentiary Foundation, And By Permitting The Jury To Draw Adverse Inferences From Them

The district court compounded its error by permitting Coquina's counsel to ask Spinosa to confirm or deny allegations that were unsupported by *any* evidence. Before Spinosa testified, TD repeatedly warned that Coquina would engage in such tactics, citing numerous examples from Spinosa's deposition. D.E. 215 at 9-10; D.E. 619 at 4-5; 11/10 Tr. 10, 17. The district court should have insisted that Coquina identify evidence corroborating its allegations *before* making those allegations (in the form of questions to Spinosa) in the jury's presence. See Fed. R. Evid. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."). Instead, the district court brushed aside TD's warnings: "[A]ny experienced Counsel should know . . . that he is not allowed to ask any question for which he does not have a good faith basis, based upon the evidence that he knows he has in this case." 11/10 Tr. 17.

But then, over TD's objections, the district court permitted Coquina to ask:

- "Mr. Spinosa, did Scott Rothstein give you a manila envelope filled with $50,000 cash . . . at the Bova Restaurant on Las Olas Boulevard in or around August of 2009?" 11/10 Tr. 29.

---

invocations, and the court had already told the jury that any such invocations could be used *against* TD (only). Under these circumstances, cross-examining Spinosa would have compounded the prejudice to TD.

- "[D]id Scott Rothstein approach you, in 2009, to make sure that the Weston branch manager, Rosanne Caretsky, was a, quote, 'player', who could be trusted in connection with his fraud scheme?" *Id*. at 30.

- "Did you tell Scott Rothstein that she was a player?" *Ibid.*

- "Mr. Spinosa, did you tell Scott Rothstein that he had your permission to sign your name when you were unavailable?" *Id*. at 107.

Coquina never produced a shred of evidence to support these allegations.[10] Without such independent corroboration, the district court should not have allowed Coquina to ask any of these questions (or, at the very least, should have sustained TD's objections and instructed the jury to disregard them). "[L]ower courts interpreting *Baxter* [*v. Palmigiana*] have been uniform in suggesting that the key to the *Baxter* holding is that such adverse inference[s] can only be drawn 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) (citing cases); accord, *e.g.*, *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995); *Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924 (7th Cir. 1983).

An important corollary of this rule is that any adverse inference must be supported by independent evidence concerning the *particular* fact at issue in the

[10] In fact, the only "corroboration" for these questions were extra-record statements made to Coquina's counsel by the RRA trustee in communications that Judge James I. Cohn found to be in violation of his order. See D.E. 761-1 at 10-13.

specific question the witness refused to answer. See *Glanzer*, 232 F.3d at 1266 & n.2. That rule makes eminent sense because, standing alone, a Fifth Amendment assertion has virtually no probative value. In Coquina's telling, Spinosa took the Fifth because he was Rothstein's accomplice in defrauding the Coquina investors. But perhaps he took the Fifth for some other reason, including that he was wrongly suspected of wrongdoing. Without corroborating evidence, any particular inference would be speculative and impermissible. Yet that is what the district court authorized.

3. The District Court's Instructions Invited The Jury To Draw Impermissible Inferences From Spinosa's Testimony

The jury instructions delivered the *coup de grâce*. Over repeated defense objections, D.E. 539 at 174-76; D.E. 714-1 at 39-41; 1/13 Tr. 166-73, the district court instructed the jury regarding Spinosa:

> Under the law, whenever a past TD Bank employee refuses to answer questions, you may infer, but do not need to find that the answers would have been adverse to TD Bank's interests. 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. However, in conjunction with other evidence that was presented, you may consider a TD Bank employee's assertion of the Fifth Amendment privilege in determining TD Bank's liability in this case.

D.E. 745 at 19. This instruction embodied two errors.

First, the instruction permitted the jury to draw *any* adverse inference and make *any* finding against TD from *any* question that Spinosa refused to answer –

including any finding up to and including "*finding TD Bank liable*." It did *not* limit permissible inferences to the specific fact at issue in a particular question.

Second, the Spinosa instruction permitted adverse inferences as to facts for which there was no independent corroborating evidence. The only limitation was that Spinosa's testimony "alone" was an insufficient basis for finding liability; the jury had to credit *some* "other evidence" – no matter what it was and no matter how slight – supporting some element of liability. The instruction failed to require corroborating evidence specifically attributable to *each* adverse inference from Spinosa's testimony.

In both of these crucial respects, the Spinosa instruction deviated sharply from the instruction the court gave concerning Stephen Caputi, a Rothstein associate who also took the Fifth. With respect to Caputi's testimony (only), the district court admonished the jury that it could draw an adverse inference only with respect to a particular question and, even then, only if "there is *independent, corroborating evidence for the inference*." D.E. 745 at 20 (emphasis added). Indeed, the district court explicitly intended to highlight supposed differences between Spinosa and Caputi by providing these two different instructions. As the court put it, "I want to make clear that the liability [*sic*] of Spinosa is to be treated differently than some other witness, which is why I broke it apart." 1/13 Tr. 176. That distinction was improper.

TD objected vigorously and repeatedly to all of these infirmities, but to no avail. D.E. 714-1 at 39-41; 1/13 Tr. 166-73. And Coquina's closing argument took full advantage. At every opportunity, Coquina pointed to Spinosa's testimony as proof of TD's liability:

- Coquina explained that its fraud claim required proof of one or more misrepresentations or omissions. "Mr. Spinosa actually makes this pretty easy for us." 1/17 Tr. 78.

- The fraud claim required proof that TD knew that its representation was false. "I asked him [Spinosa], 'Did you know, at the time, that there was only $100 in the account?' He said, 'I take the Fifth.' And you know what inference you can draw from that." *Id*. at 79.

- "I asked him this question: 'Your statements on the telephone to Coquina on August 17, 2009 were designed and intended to mislead Coquina, were they not?' What did he say; 'I take the Fifth.'" *Id*. at 79-80.

- "[W]e have to prove that TD Bank had knowledge of the Rothstein fraud . . . 'From in or about 2008, did you agree to participate . . . in the Rothstein Ponzi scheme?' 'I take the Fifth.'" *Id*. at 87.

- "[W]e have to prove that TD Bank provided substantial assistance to Rothstein. . . . 'Did you agree to help Rothstein by using key bank employees and facilities to . . . lend credibility to Rothstein's fraud scheme?' 'I take the Fifth.'" *Id*. at 86-87.

Spinosa took the Fifth; Coquina took advantage; and TD took the fall.

B. The District Court Improperly Admitted Hearsay To Refute TD's Too-Good-To-Be-True Defense

TD's central defense was that Klein, Damson, and White – sophisticated investors who, unlike TD, actually heard Rothstein's cockamamie promises – knew that Rothstein's "investments" were too good to be true, but hoped to profit before the scheme unraveled. To counter that defense, Coquina obtained the following self-serving recital in its settlement agreement with the RRA bankruptcy trustee (Ex. P-896):

> [A]s a material inducement to entering into this Settlement, Coquina and its counsel have represented to the Trustee and his counsel that neither Coquina, nor its partners . . . [or] investors . . . had any knowledge of the Rothstein Ponzi scheme . . . and that, as of the date of this Settlement Agreement, 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.

This "Exculpation Recital" was rank hearsay, but the district court admitted it over TD's objections. 11/14 Tr. 185-86; 12/8 Tr. 138-49. The Recital bore the imprimatur of the bankruptcy court, which approved the settlement agreement as a whole. 12/9 Tr. 20. Coquina then vouched for the credibility of the bankruptcy trustee who exculpated Coquina of any "knowledge" or "complicity," eliciting from its expert that bankruptcy trustees are "impartial, objective, [and] experienced," and are appointed by the "United States Office of the Trustee." *Id.* at 12.

And then came summations. After TD argued that the Coquina investors knew that the "investments" were too good to be true, Coquina invoked the Exculpation Recital – and only the Exculpation Recital – in its rebuttal argument. "You will see," Coquina's counsel intoned, that "the settlement agreement that was *entered into with the trustee* and *approved by the bankruptcy court* says that the trustee has no knowledge or any indication of Coquina's knowledge of or complicity in or with the Rothstein Ponzi scheme." 1/17 Tr. 180 (emphasis added). Hardly a minute later, counsel sat down. If any exhibit followed the jury to its deliberations, this was it.

Inexplicably, the district court never addressed TD's hearsay objection. Instead, the court ruled only that the Exculpation Recital was *relevant*. 12/8 Tr. 148-149; 1/17 Tr. 188; see also D.E. 943 at 24-27.[11] No doubt it was – the Recital directly contradicted TD's central defense. The court's rationale only confirms that the Exculpation Recital was admitted precisely for its truth. The improper admission of this highly prejudicial hearsay, alone, requires reversal of the judgment of liability.

III. AT A MINIMUM, THE DAMAGES AWARD SHOULD BE VACATED

Even if the judgment of liability could stand, the damages award must be vacated because of multiple errors concerning Coquina's recovery of settlement

[11] In response to TD's hearsay objection, Coquina invoked the "public records" exception in Fed. R. Evid. 803(8). But bankruptcy trustees do not hold a "public office," *ibid.*; they have fiduciary duties to *private* parties. Moreover, the "circumstances" here "indicate a lack of trustworthiness." *Ibid.* The Recital was the product of *negotiations* between Coquina and the trustee, and the trustee secured a cut of any recovery Coquina might obtain from TD. By proffering a statement exonerating the Coquina investors, the trustee enhanced his own chances of obtaining an additional $18.6 million.

payments to the RRA bankruptcy trustee, and because the district court erroneously authorized, and then upheld, a double recovery.

A. Multiple Errors Tainted Coquina's Recovery Of Payments Under The Settlement Agreement

Coquina's initial quantification of damages was straightforward: The investors sent $37.7 million to Rothstein, received approximately $31.1 million in return, and therefore sought compensatory damages for the difference – approximately $6.6 million. See Ex. P-553 at 22. But two weeks before trial, Coquina quadrupled its demand, insisting that TD should reimburse Coquina for the settlement payments it made to the RRA bankruptcy trustee. Under that settlement, Coquina agreed to pay the trustee $12.5 million immediately; to pay 75% of the first $8 million of Coquina's recovery from TD in this case; and to pay 25% of any recovery in excess of $8 million, up to a maximum payment of $31,126,666.65. The settlement also provided that Coquina would have an "allowed general unsecured claim" in the bankruptcy case for all of its settlement payments; some (or all) of those payments thus will be sent back to Coquina when the assets of the bankruptcy estate are distributed to its creditors. Ex. P-896 ¶ 3.

As we show below, Coquina failed to prove its entitlement to these settlement payments, and the damages award should therefore be reduced by that amount. At a minimum, a new trial on damages is warranted.

1. Coquina Failed To Prove That It Was Entitled To Recover The Settlement Payments From TD

To recover its settlement payments from TD, Coquina was required to prove that the settlement was reasonable, *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 761 n.10 (11th Cir. 1987), and non-speculative, *Aldon Indus., Inc. v. Don Myers & Assocs., Inc.*, 517 F.2d 188, 191 (5th Cir. 1975); *Ctr. Chem. Co. v. Avril, Inc.*, 392 F.2d 289, 290 (5th Cir. 1968). In both respects, Coquina failed to adduce sufficient evidence.

The reasonableness of the settlement payments turned on two related questions.

a. First, what portion of the settlement payments arose from claims for which TD could properly be held liable, and what portion arose from claims for which TD was not liable? The Settlement Agreement did not merely secure the release of claims against Coquina; it also secured the release of claims *against the individual investors*. Ex. P-896 ¶ 4. The individual investors were not parties in this case; *Coquina* had no right to recover *from TD* payments made to settle claims against the non-party investors.[12]

[12] The individual investors were the transferees who faced liability for receiving preferential and fraudulent transfers from Rothstein; Coquina was merely a conduit and, as such, would not have been liable. See *In re Chase & Sanborn Corp.*, 848 F.2d at 1199-200.

Moreover, the settlement expressly released *all* claims the trustee could have asserted against Coquina, including claims arising *from Coquina's own conduct*. And the trustee had, in fact, threatened two such claims. The trustee sent a "demand letter" to Coquina, accompanied by a draft complaint, asserting that Coquina's "investments" with Rothstein were usurious, and that Coquina was liable for $33.1 million because of its usury violations. Ex. D-947 at 3. In addition, the trustee threatened to bring fraudulent transfer claims against Coquina, under 11 U.S.C. §§ 548 and 550, which likewise rested on *Coquina*'s conduct. According to the trustee's demand, Coquina faced a $31.1 million fraudulent transfer liability. Ex. D-947 at 2.

Coquina had the burden to prove what portion of the settlement, if any, was attributable to TD's conduct. As this Court dispositively explained in *In re Prudential of Florida Leasing, Inc.*, 478 F.3d 1291 (11th Cir. 2007), "[w]hen the amount for which a cause of action has been settled is unclear because the settlement involved multiple injuries, claims, and parties . . . an equitable valuation of that cause of action as a percentage of the total settlement amount" is required. *Id*. at 1302. And this Court specifically cautioned that the court in the second litigation should not merely accept the allocation suggested by the parties to the settlement. Any such allocation by the settling parties would be "self-serving"; "[b]ecause of the lack of truly adverse interests . . . the [settling] parties' allocation is virtually meaningless" and "may be inherently prejudicial to the interest of the non-settling parties." *Id*. at 1301.

Coquina never even attempted to bear this burden of proof. It offered no evidence allocating the settlement payments among causes of action. It offered no evidence purporting to show how much of the payments went to discharge *Coquina's* potential liability and how much discharged the *investors'* liability. Coquina simply asked to recover every dollar it settled for. *Prudential of Florida* does not tolerate that kind of blunderbuss "proof."

b. But it gets worse. Because Coquina sought recovery of payments pursuant to a voluntary settlement, rather than a litigated judgment, Coquina was required to demonstrate that the *amount* of the settlement was reasonable. To prove reasonableness, "expert testimony and other evidence relating to the strength of [the settled] claim [is] not only relevant, but absolutely essential." *GAB Bus. Servs.*, 809 F.2d at 761-62. The fact-finder must consider, among other things, "(1) the probability of success in the [settled] litigation; (2) the difficulties to be encountered in collection; and (3) the complexity, expense, inconvenience, and delay involved in the litigation." *Prudential of Fla.*, 478 F.3d at 1302 (quotation marks omitted). A defendant who is asked to bear the cost of the settlement "cannot be compelled to accept [the settling party's] evaluation of these critical factors." *GAB Bus. Servs.*, 809 F.2d at 760.

Here, again, Coquina failed to produce sufficient evidence. Indeed, what little evidence there was showed that the amount of the settlement was *un*reasonable – and prejudicial to TD. The settlement provided the trustee with assured payments of $12.5 million, plus up to $18.6 million more that was contingent on Coquina's recovery from TD in this case. In other words, Coquina agreed that the trustee could get an extra $18.6 million *if someone else* – TD – paid the extra amount. This two-tiered settlement structure presented an obvious danger. Coquina had little incentive to bargain for a reasonable limit on settlement payments that would ultimately be charged back to TD. Not surprisingly, courts have deemed two-tiered settlements to be "inherently unreasonable" because the settling party's "lack of incentive to limit any recovery for which it cannot be liable eliminates the likelihood of reasonableness." *Trustees of Univ. of Penn. v. Lexington Ins. Co.*, 815 F.2d 890, 900 (3d Cir. 1987).[13]

[13] Coquina capitalized on the two-tiered settlement in summation. Counsel told the jury that, after accounting for its out-of-pocket losses from the Rothstein fraud, plus its $12.5 million settlement payment to the trustee, "right now, as we sit here today, we are in the hole $20.5 million." 1/17 Tr. 92. But Coquina explained that the settlement agreement was structured so that the trustee would receive a percentage of any recovery Coquina obtained from TD; to assure that Coquina recovered its $20.5 million loss, the jury would have to award damages greater than that amount. "So if it is your intention, ladies and gentlemen, to compensate Coquina for out-of-pocket losses to bring us back to even, the actual number is 32,759,970. . . . [T]hat's what makes Coquina whole, and the trustee will get another 12.5 million dollars." *Id.* at 93. Coquina argued, in other words, that TD should be required to pay (a) damages sufficient to fully compensate Coquina for

But it gets worse yet. The Settlement Agreement provided that Coquina would have "an allowed general unsecured claim in the Bankruptcy Case for the amounts paid pursuant to this Settlement." Ex. P-896 ¶ 3. In other words, the estate would refund at least some of the payments from Coquina – perhaps *all* of them. This refund would necessarily offset Coquina's claimed damages dollar for dollar. But as Coquina's own expert testified, it was impossible at the time to know how much the estate would be able to refund. "I can't give you a number." 12/9 Tr. 23. "Nobody knows." *Id*. at 37. If that is not unreasonably speculative, what is?

Moreover, Coquina assumed that this refund would be zero – in essence, counting the settlement *payment* from Coquina to the estate as damages, but not accounting at all for the promised *repayment* from the estate to Coquina. Thus, every dollar that Coquina recovers on its allowed claim is an additional dollar more than the injury that Coquina claims to have suffered. But Coquina's assumption of a zero refund is almost surely off by a mile. On August 21, 2012, the bankruptcy trustee estimated that the RRA estate would likely recover at least $168 million for distribution to unsecured creditors holding $200 million in claims – an estimated distribution greater than 80%. 8/21 Tr. 30, *In re Rothstein Rosenfeldt Adler, P.A.*, Case No. 09-34791-RBR (Bankr. S.D. Fla.). So Coquina stands to collect at least

its losses, plus (b) $12.5 million (in addition to the initial settlement payment of $12.5 million) that would go to the trustee, for the benefit of the RRA estate.

$10 million back from the Trustee, even as it defends its recovery of those same dollars from TD!

What is more, the jury awarded punitive damages on top of compensatory damages that were not actually sustained. Suppose Coquina stands to recover even 80% of its payments to the trustee when the bankruptcy plan is confirmed – *i.e.*, the net payment to the bankruptcy estate is $6.2 million, not $31.1 million. Even accounting for Coquina's claimed $6.7 million in out-of-pocket and investment losses, that brings compensatory damages to $12.9 million. Yet the damages award includes punitive damages of $35 million – a nearly 3:1 ratio to the actual compensatory damages award. Such an award is unconstitutional. See *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 490 (6th Cir. 2007); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004). It is also not what the jury – which awarded a 1:1 ratio – concluded was justified.

The absence of any evidence on this issue requires reduction of the damages award, to exclude any portion attributable to the settlement.[14]

[14] The district court denied TD's Rule 50 motion without even addressing this issue. D.E. 943 at 13-14.

2. At A Minimum, A New Trial On Damages Is Warranted Because The District Court Disabled TD From Challenging The Reasonableness Of The Settlement Payments, And Then Took The Question Away From The Jury Altogether

a. *The preclusion of discovery.* TD's efforts to challenge the reasonableness of the settlement payments were hobbled from the outset. TD requested discovery, pointing out that "[i]t is Plaintiff's burden to prove that the settlement was reasonable and that the damages were caused by TD Bank's conduct." D.E. 557 at 4. The district court said no. In the court's view, "the settlement documents provided to the bankruptcy court" sufficed to resolve any question of reasonableness. D.E. 570 at 2.

With respect, that ruling is indefensible. The settlement documents manifestly did *not* purport to answer either of the two reasonableness questions. And, even if they had, TD was entitled to probe further. Self-serving assertions by the settling parties are "virtually meaningless" (*Prudential of Fla.*, 478 F.2d at 1301), especially when, as in this case, the settlement is "fraught with the danger of self-dealing and should be scrutinized with extra care." *Trustees of Univ. of Penn.*, 815 F.2d at 902. And the law is clear that the critical questions are *factual* questions, on which parties are entitled to discovery and, ultimately, findings by the jury. *GAB Bus. Servs.*, 809 F.2d at 760-62.

b. *The preclusion of evidence.* In an effort to show that at least some of the settlement payments went to discharge liabilities that were not caused by TD, the defense sought to introduce the trustee's demand letter to Coquina. TD argued that these demands demonstrated that Coquina faced potential usury and fraudulent transfer claims that could not be laid at TD's doorstep. The district court excluded the demand letter on two grounds, both mistaken.

First, the court held that the settlement agreement alone was sufficient to show exactly what claims were being settled. 11/14 Tr. 184. Not so. The settlement agreement did not spell out "exactly" what claims were settled; it merely stated that the trustee had threatened to challenge "avoidable transfers *and other claims*" – with no further specification – and provided a blanket release for "all" claims against Coquina and the investors. Ex. P-896 (emphasis added). The trustee's demand letter would have apprised the jury that Coquina faced potential claims for usury and fraudulent transfers that were attributable to the investors, not TD. See D.E. 947.

Second, the district court believed that the demand letter was inadmissible under Fed. R. Evid. 408. See D.E. 943 at 31. Wrong again. *Westchester Specialty Insurance Services, Inc. v. U.S. Fire Insurance Co.*, 119 F.3d 1505 (11th Cir. 1997), squarely holds that, when the calculation of damages depends on "what portion of the settlements [of other disputes] was properly allocable" to the plaintiff's claims, evidence concerning the prior settlement is admissible to prove the proper allocation. *Id.* at 1512; accord *Central Soya Co. v. Epstein Fisheries,* *Inc.*, 676 F.2d 939, 944 (7th Cir. 1982) ("Where the settlement negotiations . . . explain and are a part of another dispute they must often be admitted if the trier is to understand the case." (quotation marks omitted)). That is exactly the situation here.

The exclusion was highly prejudicial, since there is every reason to believe that Coquina paid to settle claims that could not possibly be attributed to TD. The settlement obligated Coquina to pay up to $31.1 million to the trustee – an amount $3 million greater than the *maximum* liability for preferential transfers under the trustee's own calculations, as set forth in the demand letter.[15]

c. *Taking the case from the jury altogether*. But that's not all. Recognizing that the reasonableness of the settlement payments was a question of fact for the jury, TD requested the following jury instruction:

> [Y]ou can only award the settlement payment damages if, based on the preponderance of the evidence, you find that (i) Plaintiff's decision to settle, and the amount of its settlement, was reasonable, and (ii) the settlement payments were caused by TD Bank's conduct.

D.E. 714 at 39. Coquina objected to the proposed instruction. Pointing to the bankruptcy court's approval of the settlement, Coquina asserted that its entitlement to recover the settlement payments "is not a jury question." 1/13 Tr. 191-92; D.E.

---

[15] Preferential transfer claims may be asserted only as to transfers within 90 days of the debtor's bankruptcy filing. See 11 U.S.C. § 547. The investors received only $28.1 million from Rothstein during this 90-day period. Ex. D-947 at 2.

714-1 at 52. The district court agreed. "You're saying it's a question of fact for the jury," she told TD's counsel. 1/13 Tr. 188. "Your objection is noted for the record. I am not giving the instruction." *Id*. at 193.

That decision, too, was reversible error. Coquina was entitled to recover settlement payments only if those payments, like any other damages, were "the natural, proximate, probable or direct consequence of the [tortious] act . . . ." *Nichols v. State Farm Mut.*, 851 So. 2d 742, 752 (Fla. 5th DCA 2003) (quotation marks omitted). And Coquina likewise was required to prove the *extent* of its injury – here, that the settlement amount was reasonable in light of *Coquina's* (not someone else's) potential liability, arising from TD's conduct. *Cf. Benchwarmers, Inc. v. Gorin*, 689 So. 2d 1197, 1198 (Fla. 4th DCA 1997) (limiting recovery by settling tortfeasor to subsequent tortfeasor's share of injury). These are factual questions that should have been decided by the jury.

The bankruptcy court's approval of the settlement has no bearing on those questions. That court's sole task was to ensure that Coquina did not pay too little, not to prevent Coquina from paying too much. See *In re Martin*, 490 F.3d 1272, 1275 (11th Cir. 2007) (settlement must not fall below the "lowest point in the range of reasonableness"). The approval process serves only to protect "the paramount interest of the creditors" of RRA – not third parties like TD. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990) (quotation marks omitted). Moreover, the bankruptcy court evaluated the settlement as a whole. The settlement resolved potential litigation involving "multiple claims and parties," but there was no reason for the bankruptcy court to attempt an "up front allocation" of the total value of the settlement among the disparate claims and parties. *Prudential of Fla.*, 478 F.3d at 1302. Indeed, even if the bankruptcy court *had* asked and answered these questions, its (hypothetical) findings would not have been admissible. See, *e.g.*, *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287 (11th Cir. 2001) (judicial findings are inadmissible hearsay); *Trustees of Univ. of Penn.*, 815 F.2d at 903-06 (judicial findings inadmissible as evidence that a settlement was reasonable).

The jury should have been asked to decide whether the settlement was reasonable, and whether (and to what extent) it was caused by TD's conduct. The damages award must be set aside because of the district court's erroneous ruling that Coquina was entitled to recover the settlement payments as a matter of law.

B. The District Court Erroneously Invited A Duplicative Recovery

The damages award should be vacated for an independent reason: Coquina pleaded and argued one injury under two causes of action, but the district court required the jury to enter two "separate" damages verdicts. The court's verdict form and supplemental instructions all but assured that the jury's award was impermissibly duplicative.

From complaint to summation, Coquina advanced a single nucleus of facts to show a single, undifferentiated injury under two separate causes of action: fraud and aiding and abetting fraud. While the investors' direct losses stemmed from different "investments" with Rothstein, Coquina never argued that some investment losses (much less losses in a certain amount) came from fraud and other losses from aiding and abetting. And Coquina's own expert told the jury that the lion's share of the damages – those attributable to the bankruptcy settlement – could not be divided in this way. 12/9 Tr. 44. Discussing damages in closing argument, Coquina's counsel did not even mention the two causes of action. 1/17 Tr. 90-94. Indeed, in successfully defending its preferred instruction on aiding and abetting, Coquina told the district court that the same allegedly false statements that gave rise to the fraud claim also established "substantial assistance" for purposes of aiding and abetting. 1/13 Tr. 108-09.

When a plaintiff pleads more than one cause of action to recover for overlapping injuries, a proper verdict form lists separate *liability* verdicts and a combined *damages* verdict, or at least includes an instruction against duplicative damages. See *Tompkins v. Cyr*, 202 F.3d 770, 785 (5th Cir. 2000); *Bender v. City of New York*, 78 F.3d 787, 794-95 (2d Cir. 1996). TD requested a proper verdict form, D.E. 736 at 2-3; D.E. 738 at 2-3, and the district court initially agreed, 1/13 Tr. 213. But just before reading its charge to the jury, the court did an about-face.

1/17 Tr. 4. The new verdict form directed the jury to put down two separate damages awards – one for fraud and one for aiding and abetting. See D.E. 748. Combined with the overlapping proof, this "confusing and unclear" form created a "serious risk" of duplicative damages. That alone requires a new trial on damages. *Overseas Private Inv. Corp. v. Metro. Dade County*, 47 F.3d 1111, 1116 (11th Cir. 1995).

But there is more. The jury was understandably befuddled – and it said so. During its deliberations, the jury asked two questions:

> (1) There are two separate counts that ask for compensatory damages, should they be the same amount or different? (2) If we made a decision in Count I does that [a]ffect the decision (compensatory) in Count II?

D.E. 749 at 2. Having heard about only a single injury, the jury had no idea what to do with the two compensatory damage blanks.

"When a jury makes explicit its difficulties," as the jury plainly did here, "a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405 (1946). Indeed, "a trial judge must be acutely sensitive to the probability that the jurors will listen to [the] additional instructions with particular interest and will rely even more heavily on such instructions than on any single portion of the original charge." *United States v. Carter*, 491 F.2d 625, 633 (5th Cir. 1974).

TD proposed a straightforward – and correct – answer to the jury's questions: "[A]s to damages, the Plaintiff may not recover damages twice for the same underlying conduct." 1/18 Tr. 8. But Coquina opposed any such instruction, assuring the district court that, in the event duplicative damages were awarded, they could be eliminated following post-trial motions. In Coquina's view, "[t]he [c]ourt" – not the jury – "is responsible for handling double recovery." *Id.* at 14.

The court agreed with Coquina. Repeating the same, obviously insufficient instruction it had given earlier, the court told the jury: "Please consider the evidence as to each count separately as you deliberate and reach a verdict. You should render a separate verdict as to each count. Consider all of the instructions as a whole, but review pages 13 & 15 as to damages." D.E. 749 at 3. This instruction was useless. Telling the jury to "render a separate verdict as to each count" simply restated the very instructions that prompted the jury's confusion in the first place. If the torts overlapped, and the jury awarded full damages under one theory, it had to *reduce* its damages under the other theory to the extent of the overlap. See *Bender*, 78 F.3d at 794. To call the verdicts "separate" was to invite a double recovery. This failure to answer the jury's questions likewise requires reversal. *Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1288 (11th Cir. 1998).

Not surprisingly, the jury awarded the same damages on each count: $16 million in compensatory damages and $17.5 million in punitive damages. D.E.

748. An award of "the same measure of damages applied to both theories of recovery" is the quintessential duplicative award. *Laufen, Inc. v. Andrew*, 83 So. 3d 898, 899 (Fla. 5th DCA 2012) (per curiam); see also *St. Luke's Cataract & Laser Inst.*, 573 F.3d at 1203 ("It is clear that no duplicating recovery of damages for the same injury may be had." (quotation marks omitted)). At best, it is impossible to know what the jury meant. When bungled instructions and verdict forms "result[] in confusing damage awards," the remedy is reversal. *Overseas Private Inv. Corp.*, 47 F.3d at 1116.

IV. THE DISTRICT COURT'S SANCTIONS SHOULD BE VACATED[16]

While TD's post-trial motions were pending, TD was engaged in pretrial discovery with other Rothstein investors who had sued the Bank. See *Emess Capital, LLC v. Rothstein*, No. 10-cv-60882 (S.D. Fla.). During that process, TD identified documents that would have been responsive in this case, produced them to Coquina, and notified the district court. D.E. 791, 825, 895.

Coquina reacted with a "barrage of filings" accusing TD of discovery misconduct, D.E. 911 at 2, and seeking sanctions designed expressly to insulate the district court's rulings from effective appellate review. D.E. 883 at 31-34. Following a series of hearings, the district court held under Fed. R. Civ. P. 37 that

[16] TD respectfully requests that the Court resolve this issue even if it vacates the district court's judgment on other grounds. The district court's sanctions, and its baseless criticism of TD in-house counsel, have collateral consequences even if the judgment is otherwise reversed.

TD had acted willfully in failing to rectify its now-former outside counsel's oversights. D.E. 911 at 24. As a sanction, the court deemed two facts established – "that TD Bank's monitoring and alert systems were unreasonable and that TD Bank had actual knowledge of Rothstein's fraud." *Id.* at 28.

That order is erroneous in two fundamental respects. First, it rests on the conclusion – flatly contradicted by the record – that TD *willfully* violated its discovery obligations. D.E. 911 at 23, 29. See *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1365 (11th Cir. 2008) (rejecting finding of willfulness). Second, the two deemed facts, imposed as sanctions, lack the requisite close connection to the underlying discovery violations, and therefore violate due process. See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 2107 (1982).

A. The District Court's Conclusion That TD Acted Willfully Is Baseless

The record is utterly devoid of evidence to sustain the district court's finding that TD willfully disregarded discovery obligations – that is, that TD "conscious[ly] and intentional[ly] fail[ed] to comply" with court orders. *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995). Because the district court's foundational premise is erroneous, this Court should vacate the sanctions built upon it. See *Marshall v. Segona*, 621 F.2d 763, 766 (5th Cir. 1980).

1. TD Did Not Willfully Withhold The CDD File

The district court's own findings on the production of TD's "Customer Due Diligence" file on Rothstein's law firm belie its willfulness finding. As the court explained, TD maintained this file in an electronic database. When displayed on a computer, the file's headings were red, the corporate color of TD's predecessor bank. D.E. 911 at 7, 24. The top heading indicated that RRA was "high risk," TD's default risk level for all law firms. *Id.* at 6, 7 n.1. *TD produced the database in its native form to its trial counsel* (*id.* at 7), *who "reviewed the documents . . . in html format in color, and selected relevant documents for production," id.* at 8 (emphasis added).

But, for some reason, TD's outside counsel then asked a TD employee for a paper version of the file. *Ibid.* Printed to a black-and-white printer, the red headings became dark gray, with black text inside. *Id.* at 9. TD's outside counsel photocopied the file, then scanned it into a computer. *Id.* at 10. When outside counsel produced *that* version of the document to Coquina, the words "high risk" in the heading were obscured, *id.* at 9 – although those words were readily apparent elsewhere in the document and plainly known to Coquina, which emphasized this point to the jury. 1/17 Tr. 60.

To whatever extent Coquina was hampered by outside counsel's production faux pas, it was scarcely *TD's* fault; and even outside counsel, according to Judge

Cooke, acted only negligently. D.E. 911 at 23. TD's employees never concealed the electronic version, which was made available early on to TD's document vendor and outside counsel. Indeed, when the TD employee who first printed the paper version was deposed in another case (*before* the Coquina trial concluded), she reported that the paper copy did not look like the electronic version. *Id.* at 9-10. Coquina's counsel used this very deposition at trial. Coquina was thus fully aware of any discrepancy before trial – precisely because of TD's employee.

To find *willfulness* by TD, the court therefore had to look beyond the actual record. First, without citing any testimony, Judge Cooke stated that "fifteen in-house lawyers or [TD] representatives" sat through the trial. D.E. 911 at 24. There was no such evidence, much less evidence that a particular TD in-house lawyer or representative was present *when the black-and-white CDD was introduced* and would have had reason to recognize the absence of a red banner. Second, Judge Cooke assumed that these 15 people – whoever they might have been – knew that the top heading of the CDD should have read "high risk" against a red background. *Ibid.* There was no such evidence. Finally, the court invoked unspecified "credibility determinations," suggesting that TD representatives or in-house counsel had actually testified about these issues. *Ibid.* They had not.[17] A "finding

[17] The court also opined that in-house counsel must recognize flaws in documents introduced at trial; must personally participate with outside counsel in

of fact is clearly erroneous if it is without substantial evidence to support it . . . ." *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971). Here, there is no evidence at all.

2. TD Did Not Willfully Withhold The SIP Document

Likewise, the district court's findings concerning the so-called "standard investigative protocol" document refute any suggestion of willful misconduct by TD. Far from willfully withholding the document, TD indisputably *furnished* it to outside counsel before trial and brought it to the court's attention as soon as TD recognized that it had not been produced.

To the knowledge of TD employees examined at trial, there was no single document entitled "Standard Investigative Protocol" – rather, that term referred loosely to a set of procedures. The single document that, in the view of the employees, best encompassed those procedures was entitled "Standard Investigative Tools," and counsel unquestionably produced that document to Coquina. 5/17 Tr. 165, 174-75, 215-16. As the district court itself found, before the verdict in this case, TD genuinely believed that there was no separate document entitled "Standard Investigative Protocol." D.E. 911 at 16.

After trial, however, TD realized that a document entitled "Standard Investigative Protocol" was stored on a TD server and was among the documents

"adequately reviewing documents"; and that their failure to do so is willful misconduct. D.E. 911 at 24-26. This view is as dangerous as it is wrong.

that TD had previously sent to outside counsel for review. 5/17 Tr. 191-92, 228. TD's counsel promptly produced the document to Coquina and notified the court. D.E. 825. In the district court's view, TD had not previously conducted a sufficiently thorough search for the document. D.E. 911 at 25. Even if that were true – and the undisputed possession of the document by outside counsel belies that assertion – by no means does it show willfulness. Indeed, the district court itself agreed that TD's employees genuinely believed that the "Protocol" document *did not exist*. D.E. 911 at 16. A party cannot willfully conceal a document that it believes not to exist – particularly when the party had already given the document to its outside counsel.

3. TD Did Not Willfully Withhold The Consultant's Report

The district court's reliance on TD's nondisclosure of a consultant's report likewise fails. Rule 37 – the basis for the district court's authority here – requires violation of a discovery order. *United States v. Certain Real Prop. Located at Route 1, Bryant, Ala.*, 126 F.3d 1314, 1317 (11th Cir. 1997). But as the district court itself recognized, there was no discovery order requiring TD to produce the report to Coquina. D.E. 911 at 26 n.12. That alone undermines the court's reliance on this non-disclosure to punish TD.

Moreover, the consultant's report could not have been the subject of a discovery order because it did not yet *exist* when discovery closed. *Id.* at 19 &

n.10. The report is thus entirely beyond the ambit of Rule 37, which governs only discovery. Even apart from these problems, the document was *not* generated in the ordinary course of business and is privileged, as TD has explained in its filings under seal and the district court did not dispute. See D.E. 911 at 18-19; TD Sealed Mem., May 16, 2012, at 4-10.

The court nonetheless concluded that TD had willfully withheld the report from its outside counsel. D.E. 911 at 27. Neither the court nor Coquina even cited a rule (much less authority under Rule 37) obliging parties to share every single privileged, non-ordinary course document – particularly those created for other purposes *after* the events in question – with their counsel. Of course, parties must ensure that their witnesses do not lie; but the court did not find – nor could it – that ignorance of the report actually resulted in false testimony by TD's expert. See *id.* at 20, 26.[18]

4. TD Did Not Willfully Withhold The Gillen Emails

Finally, the district court held that TD willfully withheld two email exchanges between Spinosa and Kevin Gillen (President of TD's Florida operations) that occurred after Rothstein's scheme unraveled. See D.E. 909 Ex. 1.

[18] Tellingly, the district court made no finding that, even if produced, the consultant's report could have been used to impeach the expert. Indeed, a December 2010 Audit Report, which *was* produced and addressed the reasonableness of TD's systems, was not used to cross-examine the expert. See 12/8 Tr. 40-42.

Here again, the willfulness finding is untenable. For starters, it is undisputed that TD had provided these documents to its outside counsel for review; outside counsel marked them privileged. See *id.* Ex. 2 at 2-3, 33 (privilege log listing emails). Yet, the district court did not find that outside counsel acted willfully. Moreover, the court itself recognized that TD enjoyed "an arguable claim of privilege" as to one of the two threads. D.E. 911 at 22. That much is undeniable – the email concerned TD's internal investigation and copied a TD attorney. See D.E. 905 at 5-6.

More generally, it is wrong to surmise that TD would have *deliberately* withheld documents of such modest consequence. One of the email exchanges reflects Gillen's acknowledgment that Spinosa had signed Rothstein's "lock letters," but TD never contested Spinosa's signature. D.E. 895-1 at 1. The other email shows that Gillen received copies of the "lock letters" themselves as email attachments; in the court's view, this email could have helped impeach Gillen's testimony that it was not until several days later that he first saw the letters. D.E. 909 Ex. 1 at 1, 4; D.E. 911 at 28. But this email scarcely "contradicts" Gillen's testimony. See D.E. 911 at 28. To begin with, there is no evidence that Gillen opened the attachments – which is not surprising, as his mother had just been diagnosed with pancreatic cancer and given two months to live. 11/15 Tr. 121. And, even if Gillen had opened the attachments, that fact would have permitted only the most anemic sort of impeachment. After all, Gillen acknowledged at trial that Spinosa had *read* the letters to him in a phone call that occurred before the email was sent, so confronting him with the email would only have confirmed what Gillen had already conceded. *Id.* at 121, 165. This Court has never held that an omission so trifling was willful, so as to merit severe sanctions.

5. TD Did Not Act Willfully, Period

The district court strained to award Coquina the harsh sanctions it sought, despite the dearth of evidence for Coquina's accusations. D.E. 911 at 22. But even this handful of errors – taken together – cannot sustain the grave charge of willfulness. "[I]n law as in mathematics zero plus zero equals zero." *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001).

Moreover, the district court did not even attempt to square its willfulness determination with the *undisputed* facts that flatly contradict a supposed "pattern" of willful misconduct:

- TD provided the CDD in original, unaltered format to its outside counsel;
- TD produced the CDD in its native format in another Rothstein-related case, in which Coquina's counsel also represented the plaintiffs;
- TD provided the SIP document to its outside counsel in an e-mail, and the document was not produced simply because outside counsel did not open the attachment;
- The consultant's report did not even *exist* until after the close of discovery and was privileged; and

- TD provided the Gillen emails to its outside counsel, who identified them as privileged.

Before concluding that the errors made here were *willful*, the district court should have considered evidence to the contrary. Because the willfulness determination was error, the sanctions based upon it must fall as well.

B. The District Court's Sanctions Are Not "Specifically Related" To The Discovery Issues And Thus Violate Due Process

The district court sanctioned TD by deeming two facts established: first, that TD's "monitoring and alert systems were unreasonable"; and second, that TD "had actual knowledge of Rothstein's fraud." D.E. 911 at 28. Even if the willfulness determination is upheld, both deemed facts exceed the district court's sanctioning authority.

Due process requires that *any* sanction under Rule 37 be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland*, 456 U.S. at 707, 102 S. Ct. at 2107. In *Serra Chevrolet,* 446 F.3d 1137, for example, this Court vacated a discovery sanction striking GM's affirmative defenses. As the Court explained, there was "'absolutely no nexus'" between the sanction and the underlying misconduct. *Id.* at 1152; see also *Harris v. City of Phila.*, 47 F.3d 1311, 1329-31 (3d Cir. 1995).

Here, as in *Serra Chevrolet,* there is no nexus – and certainly no "specific" nexus, *Ins. Corp. of Ireland*, 456 U.S. at 707, 102 S. Ct. at 2107 – between the documents at issue and the deemed facts. First, the sanction directing that TD's "monitoring and alert systems were unreasonable" is wildly out of proportion to the disputed documents. The district court might reasonably have ordered that RRA was known to be a "high risk" account, for example, or that TD possessed (but did not always follow) one particular investigative protocol. But it requires a massive – and, we respectfully submit, entirely untenable – leap to conclude that *everything* TD does to monitor accounts is "unreasonable." Moreover, the "reasonableness" of TD's monitoring systems was legally *irrelevant* to Coquina's claims at trial. Coquina was required to prove that TD *knew* that Rothstein was committing fraud, not that TD *should have* detected his wrongdoing. The sanction was not only disproportionate; it did not even directly relate to the issues properly in dispute at trial.

The "actual knowledge" sanction is even more out of whack. Each of the three main documents concerned TD's *failure* to detect Rothstein's fraud.[19] The CDD file indicates that the RRA account was "high risk" for enhanced due diligence purposes; the SIP document sets forth procedures for TD's anti-money laundering (AML) investigators to follow; and the consultant's report pertains to TD's AML systems. The subject of these documents is whether TD *failed* to

[19] The Gillen emails are related to TD's knowledge of the fraud only insofar as they *disprove* it. Gillen, TD's Florida President, referred to Spinosa's statement about Rothstein as a "bizzar[e] story" and stated that he had "no clue why" Spinosa had provided the "lock letters." D.E. 909 Ex. 1 at 7.

detect Rothstein's fraud. That is a different question altogether from the subject of the sanction – whether TD had actual knowledge of the Ponzi scheme. See *Lawrence v. Bank of America, N.A.*, 455 F. App'x 904, 907 (11th Cir. 2012).

Not surprisingly, Coquina used these documents (or substantially similar versions) at trial to show negligence – not actual knowledge. For example, in closing argument, Coquina used the CDD file to argue that TD should have reviewed the RRA accounts more closely. 1/17 Tr. 60. It mentioned the SIP document in the same discussion. *Id.* at 65. Even when Coquina moved for sanctions – after the four documents had been produced – it did not contend that the documents showed TD's actual knowledge of the fraud. D.E. 883 at 29; Coquina Sealed Mem., June 18, 2012, at 5.

In short, neither sanction is "specifically related" to the underlying discovery violation, as due process requires. Hence, even if the district court's willfulness finding stands, its deemed fact sanctions should be vacated.

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). The sanctions order should be reversed.

Dated: November 26, 2012

Respectfully submitted,

By: [signature]

Lawrence S. Robbins
Donald J. Russell (*pro hac vice*)
Mark T. Stancil
Joshua S. Bolian
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Counsel for TD Bank, N.A.

Marcos Daniel Jiménez
MCDERMOTT WILL & EMERY LLP
333 Avenue of the Americas
Suite 4500
Miami, FL 33131
Telephone: (305) 358-3500
Facsimile: (305) 347-6500

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), as extended by this Court's order of November 21, 2012. This brief contains 15,473 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.

Dated: November 26, 2012

Donald J. Russell
Counsel for TD Bank, N.A.

CERTIFICATE OF SERVICE

I certify that on November 26, 2012, I caused the original and six copies of the Brief for Defendant-Appellant/Cross-Appellee TD Bank, N.A. ("Appellant's Brief") to be filed by dispatching to the clerk of court by commercial carrier for overnight delivery. In addition, I certify that on November 26, 2012, I caused a true and correct copy of Appellant's Brief to be served via personal service, through hand delivery, on counsel for Plaintiff-Appellee/Cross-Appellant Coquina Investments:

Miguel A. Estrada
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
mestrada@gibsondunn.com

By: Donald J. Russell
Donald J. Russell