No. 15-10638

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COQUINA INVESTMENTS,

Plaintiff-Appellee,

v.

TD BANK, N.A.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANT-APPELLANT TD BANK, N.A.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendant-Appellant TD Bank, N.A. 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:

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2. Bandstra, Hon. Ted E., Magistrate Judge
3. Berger Singerman LLP
4. Berger Singerman, P.A.
5. Bolian, Joshua S., Counsel for Defendant-Appellant
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7. BRBJ, Ltd.
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73. Strayman, Jacqueline Klein

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

75. TD Bank US Holding Company

76. TD US P&C Holdings, ULC

77. The Toronto-Dominion Bank

78. Wallace, Ben B.

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80. Welch, Stephanie

81. White, Kathleen M.

82. 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. This case involves an intricate set of transactions, contracts, and judgments, with respect to which counsel may be able to assist the Court.

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INTRODUCTION

Plaintiff-Appellee Coquina Investments ("Coquina") sued Defendant-Appellant TD Bank, N.A. ("TD") to recover amounts that Coquina was required to pay a third party under a settlement agreement. The settlement agreement provided, however, that Coquina was entitled to a full refund from the third party in certain circumstances. Coquina won its lawsuit against TD. It then became clear that the refund-triggering circumstances had come to pass, so TD filed a motion under Federal Rule of Civil Procedure 60(b) to reduce the judgment accordingly—damages refunded are not damages at all.

Coquina proposed to "solve" this problem by simply forgoing the refund to which it was legally entitled. The district court agreed, assuming that Coquina was *required* to refuse those payments without examining the legal documents proving the contrary. The questions presented by this case are: (1) whether a plaintiff may suffer legally cognizable "damages" by refusing its legal right to a refund from a third party; and (2) whether a punitive-damages award based on that inflated compensatory-damages award must likewise be reduced.

Coquina's motivation for refusing the refund is transparent. If Coquina may recover the amounts at issue as "damages" from TD, then it can keep the even larger punitive award built on those damages. So, Coquina's forfeiture of its

refund is no act of kindness. It is profit maximization, plain and simple—at TD's expense.

But it gets worse. The circumstances triggering Coquina's right to a refund were driven by events in a related bankruptcy case. More particularly, the refund was due to Coquina if there was enough money in the bankruptcy estate to fund it, and the bankruptcy court confirmed a plan under which Coquina would receive the full refund. The key reason that there was enough money in the estate? TD had separately made a very large contribution to the estate ($72 million). So, in a series of events befitting Alice in Wonderland, TD *paid* the estate enough to fund a dollar-for-dollar refund to Coquina, only to have Coquina *refuse* to accept that refund so that it could preserve its enhanced damages verdict against TD.

This Court should conduct the analysis that the district court failed to conduct, recognize Coquina's return of the money as the voluntary, self-interested act that it is, and reverse.

JURISDICTION

The district court had jurisdiction over this diversity action under 28 U.S.C. § 1332(a)(1). On February 18, 2015, it denied TD's motion for partial relief from judgment under Federal Rule of Civil Procedure 60(b), "dispos[ing] of all issues raised in the motion." *See Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d

823, 829 (11th Cir. 2010). That same day, TD filed a notice of appeal. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291. *Thomas*, 594 F.3d at 829.

ISSUES PRESENTED

1. Whether the district court erred when it declined to reduce the damages award based on an assumption, contrary to the relevant legal documents, that Coquina faced an obligation to pay certain money to the Trustee.

2. If so, whether punitive damages must be reduced accordingly to respect the ratio the jury awarded, or at least to respect the Florida statutory cap on punitive damages.

STATEMENT

Coquina agreed to pay certain amounts to a bankruptcy Trustee under a settlement. It then sued TD for those amounts, and won—with punitive damages to boot. But there was a catch: Under certain conditions, the settlement required the Trustee to *refund* the amounts Coquina paid. After Coquina won its case against TD, those conditions occurred. Coquina, however, has *refused* the Trustee's refund. This tactic prompted the district court to preserve Coquina's judgment against TD. As we explain below, Coquina's refusal is voluntary—Coquina is legally entitled to the refund—and the judgment against TD, including the punitive damages, must be reduced to the extent of the refund.

A. Proceedings In The District Court

This appeal concerns the second of two proceedings in the district court. In the first proceeding, Coquina sued TD for fraud. *Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1304 (11th Cir. 2014) ("*Coquina I*"). As part of its damages, Coquina sought to recover money it owed under a settlement agreement with a bankruptcy Trustee. *Id.* at 1307 n.4. A jury found for Coquina, awarding it $32 million in compensatory damages, plus $35 million in punitive damages. *Id.* at 1306-07. After the trial, the district court sanctioned TD for various discovery-related issues. *Id.* at 1307-08. TD appealed the jury's verdict and the sanctions, and this Court affirmed. *Id.* at 1304.

This second proceeding commenced while TD's first appeal was pending. The bankruptcy court confirmed that the Trustee would refund every dollar that Coquina paid under the settlement. Bankr. Dkt. 4517:39.[1] TD thus moved the district court, under Federal Rule of Civil Procedure 60(b), to reduce Coquina's judgment by the amount of the refund. D.C. Dkt. 959.[2] Coquina cross-moved to execute on the bond that TD had posted for the first appeal. D.C. Dkt. 972. The district court denied TD's motion and granted Coquina's cross-motion. D.C. Dkt.

[1] "Bankr. Dkt. *X*:*Y*" refers to page *Y* of document *X* on the docket of the related bankruptcy case, *In re Rothstein Rosenfeldt Adler, P.A.*, No. 09-34791 (Bankr. S.D. Fla.).

[2] "D.C. Dkt. *X*:*Y*" refers to page *Y* of document *X* on the district-court docket in this case, *Coquina Investments v. Rothstein*, No. 10-cv-60786 (S.D. Fla.).

991. Purporting to fix the problem that TD had raised, the district court—*at Coquina's urging*—ordered Coquina to return the funds it had received from the Trustee. *Id.*

B. Statement Of Facts

1. Coquina Enters Into The First Settlement With The Bankruptcy Trustee

Coquina invested in a Ponzi scheme and lost millions of dollars. *Coquina I*, 760 F.3d at 1304-05. The Ponzi scheme was orchestrated by Scott Rothstein, the former lead partner of the law firm Rothstein Rosenfeldt Adler (RRA). *Id.* Rothstein used accounts at TD to carry out his scheme. *Id.* at 1305. After the scheme collapsed in 2009, Rothstein pleaded guilty to criminal charges, and RRA went bankrupt. *United States v. Rothstein*, No. 09-cr-60331 (S.D. Fla.); Bankr. Dkt. 1. Thereafter, Coquina filed this suit against TD and Rothstein, alleging that TD had participated in Rothstein's fraud. *Coquina I*, 760 F.3d at 1306. Rothstein defaulted, being in prison, leaving TD as the sole active defendant. *Id.* at 1306 n.3.

This appeal is not about the money that Rothstein took from Coquina through his Ponzi scheme. It is, instead, about a settlement between Coquina and the Trustee of Rothstein's bankrupt law firm, RRA. One week before Coquina filed its action against TD, the Trustee sent Coquina a letter demanding that Coquina pay $31 million into RRA's bankruptcy estate. Trial Ex. D-947. The letter stated that the Trustee was entitled to claw back the "investment returns" that

Rothstein had paid Coquina, *see* 11 U.S.C. §§ 547, 548, 550, and it accused Coquina of violating usury laws. But the potential liability was not a one-way street: Coquina likewise had potential claims against the estate based on RRA's role in the Ponzi scheme.

The settlement between Coquina and the RRA Trustee resolved these potential claims. Bankr. Dkt. 2112 Ex. A (the "First Settlement"). It provided for two payments from Coquina to the Trustee. First, it required Coquina to pay the Trustee $12.5 million in cash. First Settlement 1. Second, it required Coquina, should it recover from TD in this case, to pay the Trustee a portion of the recovery based on a formula. First Settlement 1-2. In return, the First Settlement provided that the Trustee might refund some, or even all, of those payments to Coquina. Specifically, it provided that "Coquina shall hold an allowed general unsecured claim in the Bankruptcy Case for the amounts paid pursuant to this Settlement." First Settlement 2. The First Settlement's provisions were the alpha and the omega of the obligations between Coquina and the Trustee: "The Parties agree that the provisions of this Settlement provide the *sole entitlement* to payment by each of the Parties to the other pursuant to the matters at issue regarding the Settlement." First Settlement 4 (emphasis added).

2. The Jury Compensates Coquina For Its First Settlement Damages, Notwithstanding The Potential Refund Of Those Damages

In its action against TD, Coquina sought to recover *both* the money it had lost in the Ponzi scheme *and* all of its First-Settlement-related losses. In particular, it asked the jury to award it three main categories of damages, which add up to $32 million:

- The money it had actually lost in the Ponzi scheme, plus prejudgment interest, which together were about $7.4 million (D.C. Dkt. 821:92);
- The $12.5 million it had already paid to the Trustee under the First Settlement (D.C. Dkt. 821:92); and
- The amount that it would owe the Trustee under the recovery-contingent formula set forth in the First Settlement, which Coquina calculated to be $12.1 million (D.C. Dkt. 821:94).

This appeal concerns the bottom two categories of damages, which (together) this brief will call the "First Settlement Damages."

Coquina's damages demand assumed that the Trustee would not ultimately refund any of the First Settlement Damages—in other words, that Coquina's bankruptcy claim, provided in the First Settlement, would prove worthless. At the time of trial, the Trustee had not finished collecting money for the bankruptcy estate, and a bankruptcy plan had not been confirmed. Consequently, as Coquina's expert

testified, "[n]obody kn[ew]" how much the bankruptcy claim would be worth—and, thus, how large Coquina's refund would be. D.C. Dkt. 812:37; *accord id.* at 23. Coquina justified its zero-refund assumption by asserting that its bankruptcy claim probably would be worth "only pennies on the dollar." D.C. Dkt. 821:90.

Because the amount of the refund was uncertain, TD argued that Coquina's First Settlement Damages were too speculative to be recovered. "[A] plaintiff cannot recover for losses that are speculative or uncertain." *Coquina I*, 760 F.3d at 1318. It would violate this rule, TD contended, to allow Coquina to recover its First Settlement Damages, because nobody knew how much of those damages would be refunded. D.C. Dkt. 808:131-47; D.C. Dkt. 760:26-28. The district court rejected this argument. D.C. Dkt. 943:11-14.

At the end of trial, the jury found for Coquina and awarded it nearly all of the damages it sought, including the First Settlement Damages—$32 million. D.C. Dkt. 748. It also awarded Coquina $35 million in punitive damages. *Id.* TD posted a supersedeas bond for the full judgment, plus interest. D.C. Dkt. 769. Then, after post-trial proceedings (D.C. Dkt. 911, 943), TD appealed to this Court. On appeal, TD reiterated its argument that the First Settlement Damages were impermissibly speculative at the time of trial. *See Coquina I*, 760 F.3d at 1318.

3. The Bankruptcy Plan Is Confirmed, Entitling Coquina To A Full Refund Of Its First Settlement Damages

While the appeal was pending in this Court, the amount of Coquina's refund from the Trustee became clear: *Every dollar* of its First Settlement Damages would be refunded by the estate. The bankruptcy court confirmed a plan projecting that the Trustee would pay "the Full Amount" of claims held by creditors like Coquina. Bankr. Dkt. 4517:39 ("Plan"); *see also* Bankr. Dkt. 4516:9 (disclosure statement indicating that holders of claims like Coquina's would receive 100% of their claim amount); Bankr. Dkt. 5063 (order confirming Plan).[3] The Trustee was able to pay these claims in full largely because TD had separately contributed $72 million to the RRA estate to facilitate confirmation of the Plan. Plan 25, 53.

The Trustee swiftly complied with the Plan's edict to refund Coquina in full. The Trustee could refund only what Coquina had paid, and, when the Plan was confirmed, Coquina had paid $12.5 million. First Settlement 1; *see supra* at 7. Less than a month after the Plan was confirmed, the Trustee made an "interim distribution," refunding Coquina about $9 million of the $12.5 million it had paid. Bankr. Dkt. 5146 Ex. A at 6. Subsequently, the Trustee made final distributions to

[3] Coquina's claim is a "Class 3" claim. Bankr. Dkt. 5146 Ex. A at 6. When the bankruptcy court confirmed the Plan, a new Trustee (the Liquidating Trustee) was substituted for the previous Trustee. Bankr. Dkt. 5063:32. As relevant here, the Liquidating Trustee "succeed[ed] to the rights of" the initial Trustee. Plan 39. Thus, for simplicity, this brief refers to the Trustee and the Liquidating Trustee interchangeably as the "Trustee."

other holders of claims like Coquina's, paying their claims in full. Bankr. Dkt. 5847. The Trustee made no final distribution on Coquina's $12.5 million claim—that is, the Trustee did not refund Coquina the remaining $3.5 million or so—presumably because this dispute was pending.

The Trustee was likewise obligated to refund in full the amount that Coquina would owe the Trustee once Coquina recovered from TD in this case. In addition to the $12.5 million that Coquina paid the Trustee before trial in this case, Coquina predicted it would owe another $12.1 million to the Trustee when it collected on its judgment against TD. First Settlement 1-2; *see supra* at 7. Because TD had posted a supersedeas bond for its appeal, however, Coquina had yet to recover from TD when the Plan became effective. *See* Fed. R. Civ. P. 62(d). But, if Coquina paid the $12.1 million to the Trustee under the First Settlement, then it would receive a new claim for every dollar of that amount. First Settlement 2. And the Trustee would be obligated to refund that amount in full, just as with Coquina's original $12.5 million claim. Plan 39.

All told, therefore, Coquina was poised to receive a refund of all $24.6 million of its First Settlement Damages. The Trustee refunded about $9 million of that amount shortly after the Plan was confirmed. The rest of the refund would come when this dispute was resolved and when Coquina recovered from TD in this case.

4. Due To The Full Refund, TD Moves The District Court To Eliminate Coquina's First Settlement Damages, And This Court Declines To Enter The Fray

After the bankruptcy court confirmed the Plan—but while TD's first appeal to this Court remained pending—TD moved the district court under Rule 60(b) to eliminate the First Settlement Damages from Coquina's award. D.C. Dkt. 959. TD argued that, because Coquina was guaranteed a full refund in the bankruptcy proceedings, the First-Settlement-related part of the "judgment ha[d] been satisfied." *See* Fed. R. Civ. P. 60(b)(5).[4] Coquina urged the district court to defer ruling on the motion until this Court resolved the pending appeal, to which TD did not object. D.C. Dkt. 960:7-9, 961:8; *see* Fed. R. Civ. P. 62.1(a)(1). Accordingly, the district court deferred ruling on the motion. D.C. Dkt. 962.

At the same time, TD brought these developments in the bankruptcy and district courts to the attention of this Court. TD Response & Reply Br. 30, *Coquina I*, No. 12-11161 (11th Cir. July 18, 2013) ("*Coquina I* Reply Br."); TD 28(j) Ltr., *Coquina I*, No. 12-11161 (11th Cir. Jan. 29, 2014) ("*Coquina I* Ltr."). "[W]hen the jury rendered its verdict," TD explained, "it was impossible to know how large the trustee's refund would be." *Coquina I* Reply Br. 29. TD therefore asserted that the jury's award was speculative at that time. "[W]e *now* know," TD explained, "that the trustee is poised to refund Coquina 100 percent." *Id.* at 30

[4] In the alternative, TD argued that fundamental fairness required that the judgment be reduced. *See* Fed. R. Civ. P. 60(b)(6).

(emphasis added). Thus, whether or not the award was speculative when rendered, TD faced the threat of "pa[ying] Coquina millions of dollars for damages that Coquina never incurred." *Id.* (emphasis omitted).

When this Court ruled on the first appeal, it expressly declined to address any issues raised by the Trustee's refund. "[P]ost-trial developments," the Court noted, "suggest that" the Trustee had refunded or would refund Coquina's First Settlement Damages. *Coquina I*, 760 F.3d at 1318. The Court then observed that TD had filed a Rule 60(b) motion in the district court "raising the issue of whether the damage award should be reduced in light of these post-trial developments." *Id.* at 1318-19. "[T]he Rule 60(b) proceeding," the Court therefore held, "is the proper vehicle for resolving this and related issues." *Id.* at 1319. The Court affirmed the judgment in other respects, thus rejecting TD's speculative-damages argument and leaving Coquina's damages award intact. *Id.* at 1304, 1318.

5. Denying TD's Motion, The District Court Allows Coquina To Recover Its First Settlement Damages

After this Court issued its mandate in *Coquina I*, the parties returned to the district court to resolve TD's Rule 60(b) motion. There, Coquina contended that it would never effectively *receive* a full refund of its First Settlement Damages. As for the $9 million refund that the Trustee had already paid, Coquina requested that the court order it to *return* that money to the bankruptcy estate. D.C. Dkt. 971:12-13. For that argument, Coquina relied on a letter from the Trustee, which in turn

relied on "collateral source recovery" provisions in the Plan. *See* D.C. Dkt. 967-1 (Trustee's letter); *infra* section I.A (describing these provisions). As for the rest of the refund, which the Trustee had yet to pay (*see supra* at 9-10), Coquina insisted that this part of the refund was purely hypothetical. D.C. Dkt. 971:13. Were this part ever paid, Coquina said, TD "should take its gripe to the bankruptcy court." D.C. Dkt. 984:36.

The district court denied TD's Rule 60(b) motion, largely echoing Coquina's arguments. As for the $9 million that the Trustee had refunded Coquina, the court ordered Coquina to return that money to the bankruptcy estate, relying on the Trustee's letter. D.C. Dkt. 991:2. And, as for the rest, the district court believed that "the bankruptcy judge will have jurisdiction" over refund amounts that the Trustee has yet to pay. D.C. Dkt. 984:44. The court "would find it difficult to believe" that the bankruptcy court would permit Coquina to recover the same sum twice—from the Trustee as a refund, and from TD as damages. *Id.* at 47. The court's order thus purported to prevent an excess recovery by Coquina—but by requiring Coquina to give the excess to the Trustee, not by reducing Coquina's judgment against TD in recognition of the fact that the First Settlement Damages had proved illusory since Coquina stood to collect a dollar-for-dollar refund on those amounts.

In addition to opposing TD's Rule 60(b) motion, Coquina cross-moved to execute on the supersedeas bond that TD had posted to take the appeal in *Coquina I*. D.C. Dkt. 972. The district court granted Coquina's cross-motion when it denied TD's Rule 60(b) motion. D.C. Dkt. 991. TD moved to stay execution, but the district court denied that motion. D.C. Dkt. 984:47-48. TD promptly appealed the district court's ruling and moved this Court to stay execution, but the Court denied that motion. TD therefore paid the judgment, and Coquina complied with the order it had itself instigated—it returned to the Trustee the roughly $9 million refund that the Trustee had paid Coquina. D.C. Dkt. 993-1.

6. Coquina Enters Into The Second Settlement With The Bankruptcy Trustee

TD's payment of the judgment triggered Coquina's remaining obligation under the First Settlement: to pay the Trustee a portion of the judgment, which Coquina had calculated to be about $12.1 million. First Settlement 1-2; *see supra* at 7. However, when Coquina made this payment, it would receive a corresponding bankruptcy claim under the express terms of the First Settlement. First Settlement 2. And the Plan would therefore require the Trustee to refund Coquina's payment in full, because Coquina's claim was worth 100 cents on the dollar in the bankruptcy. Plan 39. The Plan and the First Settlement had set up a round trip. Nonetheless, on February 24, 2015, the Trustee sent Coquina a letter demanding that Coquina make the payment.

To resolve unspecified "complications" with this situation, *see* Coquina Response to Motion for Extension of Time at 7 (Mar. 23, 2015), Coquina and the Trustee entered into a new settlement. Bankr. Dkt. 5888 (the "Second Settlement"). In this Second Settlement, Coquina agreed to pay the Trustee the full $12.1 million—and Coquina *waived* its claim to receive a refund of that amount. Second Settlement 2.[5] (Hedging its bets, however, Coquina negotiated permission to seek to recover those waived amounts from the Trustee should this Court rule for TD in this appeal. *Id.*)

On March 11, the bankruptcy court held a hearing on the joint motion by Coquina and the Trustee to approve the Second Settlement. Bankr. Dkt. 5884. In advance of that hearing, TD filed a statement. Bankr. Dkt. 5886. TD's statement called on Coquina and the Trustee to explain certain aspects of the Second Settlement and "reserve[d] all of [TD's] rights regarding" the Second Settlement. *Id.* at 1-2. The bankruptcy court ultimately granted the joint motion, giving effect to the Second Statement's provisions. Bankr. Dkt. 5888.

* * *

At present, therefore, TD has paid Coquina all $24.6 million of the First Settlement Damages, and Coquina has paid that full amount over to the Trustee.

[5] In addition, the Trustee has asserted that he is entitled to recover about $6.4 million more from Coquina. The Second Settlement requires Coquina to deposit this amount into escrow, subject to further litigation. Second Settlement 3.

There are three components of Coquina's payment to the Trustee. First, Coquina paid the Trustee about $9 million before trial in this case, the Trustee refunded that amount through the "interim distribution," and Coquina returned that refund per the district court's order (which Coquina solicited). Second, Coquina paid the Trustee about $3.5 million more before trial in this case, and Coquina has not demanded that the Trustee refund that amount to it, despite the mandate of the Plan. And, third, Coquina paid the Trustee about $12.1 million under the Second Settlement and has relinquished its claim to that amount.

C. Standard of Review

This Court "review[s] the district court's denial of relief under Rule 60(b) for an abuse of discretion, bearing in mind that '[a]n error of law constitutes an abuse of discretion.'" *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 (11th Cir. 2008) (citation omitted) (quoting *Wexler v. Lepore*, 385 F.3d 1336, 1338 (11th Cir. 2004) (per curiam)).

SUMMARY OF ARGUMENT

I. Coquina's decision to cede its refund of the First Settlement Damages was purely voluntary. The Court should therefore eliminate the First Settlement Damages from Coquina's award in this case.

A. Whether Coquina's decision was voluntary turns on interpretation of two governing documents. There is no fair reading of those documents that *requires* Coquina to give up the Trustee's refund.

B. Because Coquina voluntarily incurred its losses, it may not recover those losses from TD. That choice broke any chain of causation that might have linked TD to the losses.

C. The district court abused its discretion when it ruled for Coquina because it merely assumed—without consulting the governing documents—that Coquina could not keep the refund. It likewise erred when it attempted to eliminate a windfall recovery by ordering Coquina to give the excess to a third party (the Trustee), rather than reducing the award against TD.

II. Because the Court must reduce Coquina's compensatory damages, it must also reduce Coquina's punitive damages.

A. The jury expressly rejected Coquina's request for punitive damages, which were more than four times its compensatory-damages request. Instead, the jury awarded Coquina scarcely more than a one-to-one ratio. Reducing the compensatory damages here, without also reducing the punitive damages, would give Coquina what the jury refused to give it—punitive damages more than four times compensatory damages. The Court should therefore reduce the punitive damages in proportion to the reduction in compensatory damages.

B. The jury's intent aside, an applicable Florida statute caps punitive damages at a ratio of three to one. The Court thus must reduce punitive damages to no more than this ratio.

C. This Court has already rejected Coquina's argument that the policy rationale for punitive damages prevents a reduction in punitive damages here.

III. Coquina has argued that this Court's prior holding in this case forecloses the relief that TD now seeks. But this Court specifically left open the question presented here. The post-trial developments that form the premise of this appeal—namely, the Trustee's 100% refund—had not even happened when TD filed its first appeal.

ARGUMENT

I. COQUINA'S CHOICE TO GIVE THE REFUND BACK TO THE TRUSTEE CANNOT CREATE DAMAGES

In a desperate bid to preserve its punitive damages, Coquina has thrown overboard its right to a refund of the First Settlement Damages. It eagerly acquiesced in the Trustee's request for return of the $9 million or so already refunded, and, in the Second Settlement, it expressly waived its right to a further refund.

But Coquina is not *required* to cede its refund under the governing documents, the First Settlement and the Plan. Coquina's surrender of the First Settlement Damages thus was voluntary. For that reason, the First Settlement Damages cannot constitute damages for which TD is liable. The district court abused its

discretion when it assumed that Coquina must give the refund back, even ordering Coquina to do so in a misguided effort to prevent a windfall. This Court should do what other courts have done (and what logic requires) when the plaintiff gets a refund of amounts it claimed as damages: reduce the plaintiff's award against the defendant.

A. Coquina's Surrender Of The Refund To The Trustee Is Purely Voluntary

Coquina's argument that its choice was anything other than voluntary rests on a tortured reading of the governing documents—the First Settlement and the Plan. Those documents mandate that the First Settlement Damages go through three steps: (i) Coquina recovers damages from TD;[6] (ii) Coquina forwards those damages to the Trustee; and (iii) because the Trustee proved able to pay Coquina's claim in full, the Trustee refunds those amounts to Coquina. So, when all is said and done, Coquina keeps the money. Coquina's argument here assumes a fourth required step as well: (iv) Coquina returns or refuses the refunded amounts. But this fourth step—without which Coquina's argument must fail—is found nowhere in the First Settlement and the Plan.

Coquina never articulated to the district court exactly why it had to surrender its refund to the Trustee, other than the fact that the Trustee demanded payment.

[6] Part of the First Settlement Damages, $12.5 million, is not contingent on recovery from TD. First Settlement 1.

The governing documents do not require Coquina to return any payments to the Trustee. The "collateral source recovery" provisions of the Plan dictate the circumstances in which a creditor who has received a distribution from the bankruptcy estate must give that money back. *See* Plan 72-74. They are triggered by the receipt of a "collateral source recovery," defined (with certain exceptions) to include any money TD pays in connection with Rothstein's Ponzi scheme. Plan 72. If the collateral source recovery is larger than the distribution that the creditor had received from the bankruptcy estate, then the creditor must return its whole distribution. Plan 73-74. Thus, if these provisions applied to Coquina, then Coquina's recovery from TD in this case arguably would require Coquina to give back its refund from the Trustee.

But the collateral-source-recovery provisions do not apply to Coquina. That conclusion flows from a plain reading of the First Settlement and the Plan. Both documents are interpreted like run-of-the-mill contracts. *In re FFS Data, Inc.*, 776 F.3d 1299, 1304 (11th Cir. 2015) ("The Court follows principles of contract interpretation to interpret" a bankruptcy plan.); *In re Managed Care*, 756 F.3d 1222, 1232 (11th Cir. 2014) ("The law is clear that [p]rinciples governing general contract law apply to interpret settlement agreements." (quotation marks omitted)). "[T]he plain meaning of a contract's language governs its interpretation," and "[a]n interpretation giving reasonable meaning to all provisions of a contract is preferred

to one which leaves a part useless or inexplicable." *FFS Data*, 776 F.3d at 1304 (quotation marks omitted); *accord City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (requiring that interpretation "give effect to all portions" of a contract).[7]

Reading the First Settlement and the Plan together, it is impossible for the collateral-source-recovery provisions to apply to Coquina. Begin with the Plan. The Plan itself expressly carves Coquina out of the collateral-source-recovery provisions that apply to other creditors: "Collateral Source Recoveries received by [Coquina] shall be calculated and treated exclusively in accordance with the [First Settlement, and Coquina] shall receive Distributions . . . as, and to the extent, provided in the [First Settlement] and this Plan, to the extent not inconsistent with the [First Settlement]." Plan 41.

In other words, Coquina is only subject to the provisions in the Plan regarding collateral source recoveries (like its recovery from TD) if those provisions are consistent with the First Settlement. They are not. The First Settlement expressly provides how payments will flow between Coquina and the Trustee. First, Coquina will pay $12.5 million to the Trustee and get a dollar-for-dollar bankruptcy claim in return. Second, if Coquina recovers from TD, it will pay another amount

[7] Where, as here, state law provides the cause of action, state law governs the extent of damages. *E.g.*, *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1316 (11th Cir. 2007).

to the Trustee and, again, get a dollar-for-dollar bankruptcy claim in return.[8] Third, the Trustee will pay Coquina's bankruptcy claims in the same way it pays the claims of other, similarly situated creditors.

The First Settlement speaks directly to this point: The Trustee and Coquina "agree[d] that the provisions of [the First Settlement] provide the *sole entitlement* to payment by each of the Parties to the other pursuant to the matters at issue regarding the [First] Settlement." First Settlement 4 (emphasis added). Thus, anything in the Plan to the contrary (like the collateral-source-recovery provisions that might otherwise require Coquina to repay the refund to the Trustee) is inconsistent with the First Settlement and, therefore, inapplicable to Coquina. Because the First Settlement does not obligate Coquina to return any refund to the Trustee, no such obligation exists. The money was Coquina's to keep.[9]

The very existence of the Second Settlement belies any argument that Coquina was obligated to relinquish its refund. Were it true that the First Settlement Damages ultimately belonged to the Trustee, there would have been no need for the Second Settlement. But Coquina nonetheless entered into the Second Settlement, surrendering $12.1 million to the Trustee and "*expressly waiv[ing]* any claim

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[8] These two obligations are the *only* payment obligations placed on Coquina by the First Settlement.

[9] For these reasons, the district court's reliance on the Trustee's letter to Coquina, *see* D.C. Dkt. 967-1, was misplaced.

against" the Trustee to seek a refund. Second Settlement 2 (emphasis added). That Coquina had to waive the right expressly shows beyond doubt that it had the right in the first place—and elected to let it go.

Coquina's efforts to give up the refund money are completely voluntary. The governing documents did not require Coquina to give the refund back. In its effort to show the district court that it would not receive a windfall—calculated to protect its larger punitive damages—Coquina might as well have burned the money. The Trustee was merely a convenient recipient.[10]

B. Damages That Coquina Suffered Voluntarily Are Not Damages At All

A voluntary decision by the plaintiff—here, Coquina's voluntary decision to refuse the Trustee's refund—cannot create tort damages. It is elementary that, "[u]nder Florida law, to prove fraud, a plaintiff must establish that the *defendant* . . . actually caus[ed]" harm to the plaintiff. *Rand v. Nat'l Fin. Ins. Co.*, 304 F.3d 1049, 1052 (11th Cir. 2002) (per curiam) (emphasis added) (quotation marks omitted). The *plaintiff* cannot cause harm to itself, then seek to recover from the defendant. The plaintiff's decision to give money away "supersedes the prior wrong as the proximate cause of the injury by breaking the sequence between the

[10] Indeed, it is telling that the Second Settlement allows Coquina to seek the refund from the Trustee in the event TD succeeds in the current appeal. Coquina was willing to waive the refunds, but only so long as it got a better deal by recovering the full award from TD.

prior wrong and the injury." *See Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105, 1116 (Fla. 2005).

For this reason, the "losses" Coquina has suffered by ceding money to the Trustee cannot constitute damages recoverable from TD. Were Coquina obligated to pay those monies to the Trustee, then Coquina might be able to hold TD liable. But it was not. The decision to give the money back was Coquina's alone. And that decision severs any chain of causation that might have linked TD to Coquina's loss. Coquina's refusal to take and keep the Trustee's refund caused Coquina's harm. TD cannot be held accountable for Coquina's choices. Accordingly, the Court should eliminate the First Settlement Damages from Coquina's damages award.

C. The District Court Abused Its Discretion When It Assumed Away The Problem

The district court failed to rule *at all* on the main issue on appeal. It believed that its sole objective was to prevent Coquina from receiving a windfall recovery. To achieve this objective, it assumed that Coquina was obligated to relinquish its refund of the First Settlement Damages (and, on that premise, ordered Coquina to return the portion of the refund it had received). But this "solution" is uninformed and unprecedented—uninformed because it is a sheer assumption, and unprecedented because the way to fix a windfall is to eliminate it from the judgment. The district court therefore abused its discretion.

District courts must find facts, not make assumptions—but the district court here did the opposite. As to the roughly $9 million that the Trustee had already refunded Coquina, the district court assumed that Coquina could not keep that money. It accepted the Trustee's demand at face value: "[I]t appears as if there's an actual demand from the trustee that [Coquina] return that money." D.C. Dkt. 984:42. And, as to the rest of the First Settlement Damages, the court assumed that Coquina could not keep whatever refund it ultimately received. "I cannot imagine a diligent trustee who . . . would allow" Coquina to retain those damages. *Id.* at 46; *accord id.* at 42, 44, 47.

The district court's resort to assumptions was reversible error. "[T]he district court's inference" that the Trustee must be right—even about claims that the Trustee had not yet made—"without the aid of a shred of . . . evidence[,] was an exercise in sheer speculation. Accordingly, the district court abused its discretion." *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267-68 (11th Cir. 2009).

Moreover, the district court erred as a matter of law when it purported to eliminate Coquina's windfall by requiring Coquina to pay the excess to the Trustee. If a plaintiff "ha[s] received a recovery . . . for damages which [it] ha[s] subsequently been reimbursed for," then the court must undo that recovery. *Sharff, Wittmer & Kurtz, P.A. v. Messana*, 581 So. 2d 906, 907 (Fla. 3d DCA 1991) (per curiam). When a refund leaves a plaintiff "totally undamaged"—as the Trustee's

refund left Coquina here—the correct remedy is to reduce the plaintiff's damages award accordingly. *Delant Constr. Co. v. Doral Enters. Joint Venture*, 13 So. 3d 1097, 1098 (Fla. 3d DCA 2009). TD is aware of no precedent for eliminating a windfall by requiring the plaintiff to give the excess to someone else. By requiring Coquina to give the First Settlement Damages to the Trustee, the district court abused its discretion.[11]

II. BECAUSE COQUINA'S COMPENSATORY DAMAGES CANNOT STAND, ITS PUNITIVE DAMAGES MUST BE REDUCED ACCORDINGLY

Because "a reduction in compensatory damages is appropriate," the Court should also order "a proportionate reduction of punitive damages." *See Coquina I*, 760 F.3d at 1319. The reasons are plain. First, a proportionate reduction would honor the jury's intent that the punitive damages be scarcely larger than the compensatory damages. Second, even if a fully proportionate reduction is unwarranted, Florida law caps punitive damages at a ratio of 3:1. Coquina insists that the punitive damages must stand no matter what, but this Court's holding to the contrary—permitting a reduction in punitive damages—belies that argument. *Id.*[12]

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[11] If, however, this Court does not reverse the ruling of the district court, Coquina should not be permitted to receive or retain a refund of any amounts it paid (or pays) to the Trustee because such refund would be a windfall.

[12] Because Coquina's punitive damages are excessive as a matter of law, the Court may order a reduction in punitive damages. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999).

A. Reducing The Punitive Damages In Proportion To The Compensatory Damages Would Honor The Jury's Manifest Intent

The jury believed that TD's conduct warranted punitive damages only slightly larger in amount than Coquina's compensatory damages. In summation, Coquina's counsel asked the jury to award punitive damages of $140 million—more than four times the compensatory damages Coquina sought. D.C. Dkt. 821:93, 97. But the jury refused. Instead, it awarded Coquina $35 million in punitive damages, scarcely more than its compensatory award of $32 million. D.C. Dkt. 748.

To eliminate Coquina's First Settlement Damages from its compensatory award, but leave the punitive award intact, would be to undo the jury's work. Shorn of the First Settlement Damages, Coquina's compensatory damages would be about $7.4 million. *Supra* at 7. Punitive damages of $35 million—the amount Coquina wants to keep—are more than four times $7.4 million. That ratio is precisely what the jury rejected when it awarded Coquina $35 million in punitive damages, despite Coquina's request for more. The Court should not impose a punitive-damages award that the jury rejected.

Courts have embraced proportionate reductions of punitive damages where, as here, the jury plainly used a ratio to calculate punitive damages. In *Ogilvie v. Fotomat Corp.*, for example, the jury had awarded punitive damages of four times the compensatory damages on each count. 641 F.2d 581, 586 (8th Cir. 1981). The trial court then reduced the compensatory damages but left the punitive damages

alone. The Eighth Circuit reversed: "[W]hen the jury clearly assesses punitive damages as a multiple of actual damages, the court, by proportionally reducing punitive damages, will more likely effect the original judgment of the jury." *Id.* at 587. Numerous courts have followed suit. *E.g.*, *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1047 (5th Cir. 1984) ("Having determined that a remittitur of actual damages is required in this case, we find that a proportionate reduction of punitive damages is required."); *Searcy v. R.J. Reynolds Tobacco Co.*, No. 09-cv-13723, 2013 WL 5421957, at *7 (M.D. Fla. Sept. 12, 2013) ("[T]his Court will maintain the ratio determined by the jury and reduce the punitive damages award in accordance with the remitted amount of compensatory damages."); *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 107 (W. Va. 2014) ("[W]e applied the nearly 7:1 ratio, which was calculated based upon the jury's actual award of compensatory and punitive damages, to calculate a new punitive damages amount based upon the compensatory damages remaining.").

This Court should order a proportionate reduction in punitive damages for the same reason that the Eighth Circuit did so in *Ogilvie*. As in *Ogilvie*, the jury awarded damages in the same ratio for all counts in the case: $16 million compensatory and $17.5 million punitive for each of the two counts (fraud, and aiding and abetting fraud). D.C. Dkt. 748. Reducing the compensatory damages, without reducing the punitive damages, would upset that ratio.

B. Even If A Proportionate Reduction In Punitive Damages Is Unwarranted, Florida Law Caps The Punitive Damages Available To Coquina

Whether or not the jury's manifest intent compels a reduction in the punitive damages, Florida law sets a statutory cap on punitive damages: "Three times the amount of compensatory damages." Fla. Stat. § 768.73(1)(a)(1). Coquina's punitive-damage award of $35 million is well over *four* times the proper amount of compensatory damages, which is about $7.4 million. Accordingly, the Court should reduce Coquina's punitive damages to no more than three times its compensatory damages.

This case does not fall within the only conceivably applicable exception to this simple statutory cap. The three-to-one cap would not apply had the jury "determine[d]" that TD "had a *specific intent to harm*" Coquina. Fla. Stat. § 768.73(1)(c) (emphasis added). This specific-intent limitation is a strict one. An intent to undertake an action that ultimately proves to be harmful does not suffice. *Myers v. Cent. Florida Invs., Inc.*, 592 F.3d 1201, 1217 (11th Cir. 2010) (holding that battery does not fall within the exception). That is all the jury found here: that TD "intended to induce Coquina to rely" on its representations, and that this reliance ultimately damaged Coquina. D.C. Dkt. 748:2. The jury instructions, which the Court may consider (*Myers*, 592 F.3d at 1217), go no further than that. *See*

D.C. Dkt. 745:11-12. Florida's statutory cap therefore applies, and Coquina's punitive damages may not exceed three times its compensatory damages.

C. Coquina's Policy Argument Cannot Overcome This Court's Holding In This Very Case

In the district court, Coquina barely addressed either of these arguments for reducing punitive damages. Instead, it argued that policy considerations bar a reduction of punitive damages in this case. *E.g.*, D.C. Dkt. 971:14 ("Punitive damages . . . are designed to punish and deter wrongful conduct."). The "wrongfulness" of TD's conduct, said Coquina, is unaffected by the Trustee's refund of the First Settlement Damages.

Coquina's policy argument fails, first and foremost, because this Court already has held that a reduction in punitive damages might well be appropriate here. When the Court invited the district court to consider TD's Rule 60(b) motion, it added: "If the district court determines that a reduction in compensatory damages is appropriate, the court should also consider whether a proportionate reduction of punitive damages is required." *Coquina I*, 760 F.3d at 1319. This holding squarely refutes Coquina's argument. Coquina contends that a reduction in compensatory damages based on post-verdict developments can *never* require a reduction in punitive damages. But this Court expressly contemplated that it could.

Besides, Coquina's policy argument proves too much. In *every case* involving punitive damages, the jury places a dollar figure on the wrongfulness of the defendant's conduct. Under Coquina's logic, courts could not reduce that dollar figure, because courts cannot change how wrongful the defendant's conduct was. Yet, as discussed above, courts often *do* reduce the dollar figure, for "the amount of exemplary damages should be reasonably proportioned to the actual damages found." *Hansen*, 734 F.2d at 1047 (quotation marks omitted). Hence, Coquina's policy argument does nothing to prevent a reduction in the punitive damages here.

III. THIS COURT DID NOT, IN ITS PRIOR HOLDING, DISPOSE OF THE ISSUE NOW ON APPEAL

In its effort to save its punitive damages, Coquina has argued that this Court has already resolved the issues TD now raises. To the contrary, however, this Court expressly declined to do so. Indeed, the Court *could not* have ruled on the effects of the Plan and the Trustee's resulting obligation to refund the First Settlement Damages—the Plan was confirmed *after* the district court issued the orders that TD previously appealed.

In *Coquina I*, this Court expressly declined to resolve the issues in this appeal. It "note[d]" that "post-trial developments suggest" that the Trustee had refunded, or shortly would refund, all of Coquina's First Settlement Damages. 760 F.3d at 1318. It further observed that TD had filed a Rule 60(b) motion "raising the issue of whether the damage award should be reduced in light of these post-

trial developments." *Id.* at 1318-19. But the Court declined to address those new developments. Instead, it held that "the Rule 60(b) proceeding is the proper vehicle for resolving this and related issues." *Id.* at 1319. This appeal—which presents the question whether post-trial developments require a reduction of the damages award—arises from that Rule 60(b) proceeding. It is that simple.

Despite this, Coquina claims that *Coquina I* disposes of this appeal. It claims that TD's "central argument" now at issue is that "the compensatory damages the jury awarded based on the bankruptcy settlement were 'speculative' and 'nonexistent.'" D.C. Dkt. 971:11. But, Coquina says, this Court has already rejected TD's contention that the First Settlement Damages were speculative. *Coquina I*, 760 F.3d at 1318. Thus, Coquina concludes that TD cannot argue that the Trustee's refund prevents recovery of the First Settlement Damages.[13]

Coquina's argument conflates two things that, as this Court has recognized, are completely distinct: trial and post-trial. TD previously argued that, "*at the time of trial*," there was a "*possibility*" that the Trustee would refund Coquina's damages. *Coquina I*, 760 F.3d at 1318 (emphasis added). This *possibility*, TD contended,

[13] Coquina contends that the only issue this Court declined to resolve "is the issue of whether or not there is a double recovery." D.C. Dkt. 984:32. But a double recovery was just one "possibility" presented by the Trustee's refund. *Coquina I*, 760 F.3d at 1318. This Court expressly directed the district court to consider "whether the damage award should be reduced in light of" the refund, along with all "related issues." *Id.* at 1318, 1319. In any event, a plaintiff cannot avoid a double recovery by *choosing* to give the excess to a recipient it favors.

rendered the damages speculative, and this Court rejected that argument. *Id.* But "*post-trial* developments" showed that the Trustee "*has* returned"—not *might* return—money to Coquina. *Id.* (emphasis added). What had been a possibility at trial became an actuality post-trial. This Court has ruled on the former but expressly declined to rule on the latter. And the *only* argument in this appeal is that the *post-trial* developments require a reduction of Coquina's damages.[14]

In *Coquina I*, this Court expressly deferred for another day the argument that post-trial developments warrant a reduction on Coquina's judgment against TD. That day is today.

CONCLUSION

For the foregoing reasons, the Court should (i) reverse the district court's order insofar as it denies TD's Rule 60(b) motion; (ii) vacate that order insofar as it requires Coquina to pay any funds to the bankruptcy estate; and (iii) order Coquina

[14] Unable to avoid the simple distinction this Court has drawn, Coquina asserts that *TD* has conflated trial with post-trial. *E.g.*, D.C. Dkt. 971:11, D.C. Dkt. 978:4-7. In particular, Coquina relies on a previous letter to this Court, in which TD stated that the post-trial developments are "related to TD's argument[] . . . that the damages related to Coquina's bankruptcy settlement were speculative." *Coquina I* Ltr. 1. But the fact "that two inquiries are related does not mean that they are the same." *Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1102 (9th Cir. 2010). And TD was right: The post-trial developments are, in fact, related to the speculative-damages argument. The point of that argument was that there was a *risk* that the Trustee would refund Coquina's damages. The post-trial developments showed only that TD's concerns were founded—the risk became *reality*. *Coquina I* concerned the risk; this case concerns the reality.

to return to TD the amounts to which it was not entitled but that it has recovered from TD, with appropriate interest.

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 7,910 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: March 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2015, I caused a true and correct copy of the foregoing Brief for Defendant-Appellant TD Bank, N.A., to be filed with the Court by CM/ECF. All parties that have appeared are Filing Users and are served electronically by the Notice of Docket Activity generated by CM/ECF.

I further certify that, on March 31, 2015, I caused a true and correct copy of the foregoing Brief for Defendant-Appellant TD Bank, N.A., to be served via personal service, through hand delivery, on the following counsel for Plaintiff-Appellee Coquina Investments:

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