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

REPLY 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. certifies that, to the best of counsel's knowledge, the Certificate of Interested Persons contained in the Brief for Defendant-Appellant TD Bank, N.A. is complete.

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

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

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INTRODUCTION

TD has made one (and only one) compensatory-damages argument in this appeal: that "Coquina's decision to cede its refund of the First Settlement Damages was purely voluntary," so that TD cannot be liable for those damages. TD Br. 16.[1] But Coquina does not tackle that argument head on. Instead, it engages in misdirection, devoting vast swaths of its brief to completely different arguments. Specifically, Coquina protests that this Court's prior decision forecloses TD from making either a "speculative damages" or a "double recovery" argument. But, as Coquina eventually acknowledges, TD does not actually make either of those arguments here.

Once Coquina, after forty-one pages of briefing, finally reaches the argument that TD *does* make—that Coquina's losses were voluntary—it again tries to duck the issue, asserting that TD forfeited that argument. But TD repeatedly argued below that Coquina was not required to return the refund of the First Settlement Damages—and that Coquina's decision to do so anyway cannot serve as the basis of damages against TD. TD squarely preserved the issue for appeal.

The question before this Court, then, is simply whether the Bankruptcy Plan *required* Coquina to return the refund of the First Settlement Damages. And the plain language of the Plan, which Coquina fails to grapple with, definitively an-

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[1] Capitalized terms are defined in TD's opening brief.

swers that question: The Plan provides that the terms of the First Settlement control, and the First Settlement entitles Coquina to keep the refund. Coquina simply *chose* to give the money back in order to preserve its inflated punitive damages award.

Because Coquina's losses were voluntary, this Court should order a reduction in compensatory damages. And, because the jury awarded punitive damages as a multiple of the compensatory damages, this Court should also order a proportionate reduction of the punitive damages.

ARGUMENT

I. BECAUSE COQUINA VOLUNTARILY INCURRED ITS LOSSES, IT MAY NOT RECOVER THOSE LOSSES FROM TD

A. TD's Argument That Coquina's Damages Were Voluntary Is Properly Before This Court

1. Coquina's lead argument is that "this Court has already rejected" the claim "that Coquina's settlement-based damages are 'speculative.'" Coquina Br. 27 (capitalization altered). We agree. As Coquina goes to great pains to rehash (at 27-32), TD did argue in the prior appeal that Coquina's damages were speculative at the time of trial. And this Court rejected that argument.

But that is not the argument TD makes in this appeal. TD's argument is that Coquina's post-judgment decision to return about $9 million of its refund to the Trustee—and to abandon its claim to any further refund—was a voluntary deci-

sion. For that reason, the First Settlement Damages cannot constitute damages recoverable from TD. And, as TD explained in its opening brief (at 31-33), this Court's prior opinion did nothing to foreclose that argument.

Indeed, Coquina concedes as much. After devoting six pages to explaining why this Court's prior opinion forecloses a "speculative damages" argument, Coquina admits that "[n]o one disputes that this Court left open for the district court to consider in the first instance TD's distinct argument that 'post-trial developments' might warrant awarding TD a credit in paying the judgment." Coquina Br. 32 (quoting *Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1318 (11th Cir. 2014) (*Coquina I*)) (emphasis omitted). As Coquina further acknowledges, "[t]hat argument *was properly before the district court*." *Id.* (emphasis added).

That is exactly the argument TD makes here: that "post-trial developments"—the Trustee's obligation to refund Coquina 100% of the First Settlement Damages, and Coquina's decision to give up that refund—require a reduction in the damages award. Coquina might *disagree* with that argument. But there is no doubt that, as Coquina itself acknowledges, TD's argument based on post-trial developments was "properly before the district court" (Coquina Br. 32)—and properly before this Court on appeal.

2. Having finally conceded that this Court's prior opinion does not foreclose TD's argument, Coquina takes another tack. It contends that TD's claim is

that "a reduction of compensatory damages is necessary to avoid a double recovery," Coquina Br. 32 (capitalization altered), and it protests that no double recovery has occurred here: Coquina returned to the Trustee the part of the refund it had received, and has disclaimed the rest. *Id.* at 32-41.

Once again, however, Coquina takes aim at the wrong target. TD is not advancing a "double recovery" argument. Rather, TD contends that Coquina *voluntarily* gave up its refund, and thus it cannot recover its losses from TD. That argument does not depend on any "double recovery." To the contrary, it relies on the fact that Coquina *did* decline the refund, and thus has *not* recovered twice. Ultimately, as with its "speculative damages" point, Coquina concedes that its "double damages" point is misplaced. Coquina Br. 48.[2]

3. As Coquina is eventually constrained to acknowledge, TD's actual argument is that "any payment Coquina made was purely voluntary, and thus not properly part of Coquina's damages." Coquina Br. 41 (citing TD Br. 18-24). Coquina nevertheless contends that this Court should not consider that argument, because TD failed to preserve it for appeal. *Id.* at 42-44.

[2] Coquina also protests (at 37-38) that Florida law prevents intentional tortfeasors from seeking contribution. But TD does not argue that the Trustee should contribute to Coquina's damages. TD's argument is that Coquina has not suffered compensable damages because its "losses" were purely voluntary.

Not so. TD argued in the district court, just as it argues here, that the Plan did not require Coquina to return the refund of the First Settlement Damages—and that Coquina's decision to do so was therefore voluntary. For example, in its Rule 60(b) briefing (filed before the Trustee sought repayment of the $9 million refund), TD argued that, "if Coquina repaid the bankruptcy estate and declined additional distributions, that still could not legitimize its settlement damages," because "*[d]eclining offsetting payments to which one is entitled is not the same thing as suffering actual damages*." D.C. Dkt. 961:5 n.2 (emphasis added).[3]

Then, after the Trustee asked Coquina to return its refund, Coquina declared that "it will not dispute the trustee's demand, but will promptly return" the money. D.C. Dkt. 971:12. In response, TD challenged Trustee's authority to demand a refund, and again explained that "Coquina may choose to comply with the trustee's demand, but *a volunteer payment cannot create damages that have already been extinguished*." D.C. Dkt. 977:6 n.2 (emphasis added).

[3] The parties filed in the district court several post-judgment motions, including TD's Rule 60(b) motion (filed before this Court issued its decision in the prior appeal) seeking a reduction of the judgment, D.C. Dkt. 959; TD's motion (filed after this Court issued its prior decision) seeking a stay of execution on the judgment pending the district court's resolution of the Rule 60(b) motion, D.C. Dkt. 969; and Coquina's Rule 65.1 motion (also filed after this Court's decision) for enforcement of TD's supersedeas bond, D.C. Dkt. 972. The motions address overlapping issues, and the district court heard arguments on all three motions in a single hearing on February 11, 2015. D.C. Dkt. 984.

Finally, at the hearing in the district court, TD's counsel stated that "our point" is that "under the plan, the trustee doesn't have any right to demand that Coquina repay" the First Settlement Damages. D.C. Dkt. 984:23. Counsel continued: "If Coquina chooses to give that back, that's Coquina's choice, but Coquina can't recreate damages that have already been satisfied by voluntarily paying $9.1 million over to the trustee when the trustee has no right to demand that in the first place." *Id.* at 23-24. The reason why Coquina was not obliged to pay back the refund, TD further explained, was that the Plan "did not take the place of the bankruptcy settlement." *Id.* at 15.[4]

Coquina's quarrel therefore seems to be that, even though TD argued below (i) that the Plan does nothing to alter the First Settlement, which entitled Coquina to a refund of the Settlement Damages, (ii) that Coquina's decision to return the refund to the Trustee was therefore voluntary, and (iii) that Coquina's voluntary decision cannot cause damages, TD nevertheless failed to preserve these arguments for appeal because TD failed to *quote*, chapter and verse, the specific subsection of the Plan that entitled Coquina to keep the refund.

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[4] Responding to a hypothetical posed by the district court, TD's counsel stated that "we would have to ask the bankruptcy trustee." D.C. Dkt. 984:15. Coquina repeatedly tries to spin this as uncertainty about whether Coquina's payments were voluntary. *E.g.*, Coquina Br. 4, 42-44. It was no such thing. Counsel was clear that Coquina "[a]bsolutely" was entitled to its refund "regardless of what happens here," and that "[t]he trustee cannot demand that Coquina return the distribution." D.C. Dkt. 984:16.

That waiver theory finds no support in this Court's precedents. "Although new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal." *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 1532 (1992)). Here, TD is not even making a new argument, much less raising a new issue. TD expressly argued below that Coquina's decision to return the Trustee's refund was voluntary. It therefore squarely preserved the issue.[5]

B. Coquina's Surrender Of The Refund Was Voluntary And Therefore Requires A Reduction Of The Damages Award

At last, the merits. Coquina does not dispute—nor can it (*see* TD Br. 23-24)—that voluntarily incurred losses cannot create tort damages. The only question, then, is whether Coquina's damages were, in fact, voluntary. Coquina insists that its decision to forgo the refund of the First Settlement Damages was not volun-

[5] *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164 (11th Cir. 2004), is not to the contrary. *See* Coquina Br. 43. Although the Court there held that an argument was forfeited, it made clear that "it is not our position that [the defendant] waived its argument because it did not *sufficiently* raise it below; rather, the considerations discussed above, taken together, cause us to conclude that [the defendant] did not previously raise the issue *at all*." *Id.* at 1170. Here, Coquina is at most arguing that TD did not "*sufficiently*" (*id.*) raise the issue below because TD failed to explain exactly "*how* the 2011 settlement overrode the bankruptcy plan." Coquina Br. 43 (emphasis added). But, because TD argued below that the Plan did not require Coquina to return the refund, Coquina cannot plausibly contend that TD failed to "raise the issue *at all*." *See Four Seasons*, 377 F.3d at 1170.

tary because the Plan's collateral-source-recovery provisions require holders of claims against the bankruptcy estate to "repay bankruptcy distributions they receive if and to the extent they recover from a collateral source." Coquina Br. 45.

As TD explained in its opening brief (at 20-23), however, the Plan expressly carves Coquina out of the collateral-source-recovery provisions of the Plan to the extent that those provisions are inconsistent with the First Settlement. Section 3.4(b) of the Plan provides that "Collateral Source Recoveries received by [Coquina] shall be calculated and treated *exclusively in accordance with the Coquina Settlement Agreement* . . . [and Coquina] shall receive Distributions . . . as, and to the extent, provided in the Coquina Settlement Agreement and this Plan, to the extent not inconsistent with the Coquina Settlement Agreement." Plan 41 (emphasis added). The First Settlement, in turn, provides Coquina an allowed bankruptcy claim on account of any amounts paid to the Trustee—and makes clear that its provisions "provide the *sole entitlement to payment* by each of the Parties." First Settlement 4 (emphasis added). Thus, far from relieving the estate of its obligations under the First Settlement, the Plan—which incorporates the First Settlement by reference—*requires* the Trustee to pay out Coquina's claims as set forth in the First Settlement.

Coquina disagrees. According to Coquina, the First Settlement gave Coquina a "claim," but the *scope* of that claim was left to be determined by the Plan.

And the Plan, Coquina says, provides that *all* recoveries from collateral sources vitiate the claim-holder's right to a distribution. Coquina Br. 45. In other words, Coquina's bankruptcy claim—its "sole entitlement to payment" under the First Settlement—is no claim at all.

Under Coquina's theory, then, the First Settlement Agreement cannot require anything *other* than what the Plan's general collateral-source-recovery provisions require. If that is the case, however, Section 3.4's carve-out for Coquina—which states that Coquina's distributions should be "treated exclusively in accordance with the Coquina Settlement Agreement" (Plan 41)—serves no purpose at all. The Plan might as well have omitted the carve-out altogether. Coquina's interpretation of the Plan would be inconsistent with the First Settlement and could not be enforced under the express terms of the Plan and the First Settlement.

"It is a venerable principle of contract law that the provisions of a contract should be construed so as to give every provision meaning." *Florida Polk County v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 (11th Cir. 1999); *see Jameson v. Mut. Life Ins. Co. of New York*, 415 F.2d 1017, 1020 (5th Cir. 1969) ("An interpretation which gives a reasonable meaning to all provisions is preferable to one which leaves a portion of the [agreement] useless, inexplicable or creates surplusage."). This Court should reject Coquina's interpretation, which would render Section 3.4's carve-out for Coquina mere surplusage.

Read in its entirety, the Plan gave Coquina the right to recover 100% of the First Settlement Damages from the Trustee. Coquina refused that right in order to preserve its punitive damages from TD, which it would not recover had it recovered from the Trustee as contemplated by the First Settlement. That refusal—a voluntary act—breaks the chain of causation. Coquina's losses were of its own making, and therefore do not constitute damages recoverable from TD.

II. BECAUSE THE FIRST SETTLEMENT DAMAGES ARE NOT RECOVERABLE FROM TD, THE PUNITIVE DAMAGES SHOULD BE REDUCED ACCORDINGLY

A. "[W]hen the jury clearly assesses punitive damages as a multiple of actual damages, the court, by proportionately reducing punitive damages, will more likely effect the original judgment of the jury." *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981). As TD explained in its opening brief (at 27-28), the jury in this case plainly assessed punitive damages as a multiple of Coquina's compensatory damages. Because a reduction in compensatory damages is required for the reasons stated above, this Court should order a proportionate reduction of punitive damages.

Coquina does not dispute that the jury awarded punitive damages as a multiple of compensatory damages. It contends, however, that a proportionate reduction in punitive damages is permissible "*only if* the court determines that the compensatory award was erroneous and invalid in the first place." Coquina Br. 51 (citing

Peer v. Lewis, 2009 WL 323104, at *4 (11th Cir. Feb. 10, 2009) (per curiam)). And here, Coquina says, the reduction in compensatory damages would be the result of post-judgment developments (namely, Coquina's voluntarily induced damages)—not a finding that the jury's compensatory damages award was erroneous *ab initio*.

The cases Coquina cites, however, lend no support to that arbitrary rule. In *Peer*, for example, this Court affirmed a reduction of punitive damages where the district court had stricken certain compensatory damages as invalid. 2009 WL 323104, at *4. But this Court did not say—in *Peer* or in any other case Coquina cites—that such a reduction is permissible *only* where compensatory damages were invalid in the first instance.

To the contrary, when this Court addressed TD's Rule 60(b) motion, it stated that, "[i]f 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. Coquina protests that *Coquina I* merely "reserv[ed]" the question whether a reduction in punitive damages is appropriate here—but did not "resol[ve]" the issue. Coquina Br. 54 (emphasis omitted). To be sure, this Court did not hold that the district court *must* reduce the punitive damages in this case. But the Court plainly contemplated the possibility of such a reduction. Coquina's absolute rule—that post-trial develop-

ments can *never* justify a reduction in punitive damages—therefore runs counter to this Court's holding that post-trial developments in this very case may well warrant a reduction of the punitive damages.

In support of its sweeping rule, Coquina also contends that the sole purpose of punitive damages is to "punish the tortfeasor." Coquina Br. 49 (quotation marks omitted). Thus, according to Coquina, the consequential damages *actually* recovered by Coquina are irrelevant; all that matters, Coquina says, is the jury's *initial* damages award. But, again, Coquina overstates its case. This Court has made clear that punitive damages should be "proportionate to the amount of harm to the [plaintiff] and to the general damages *recovered*." *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (emphasis added) (quotation marks omitted). As explained above, Coquina should "recover[]" less here because its losses were purely voluntary. Accordingly, this Court should follow the Eighth Circuit's decision in *Ogilvie* and order a reduction in punitive damages so that the ratio of punitive to compensatory damages is in line with the jury's judgment.

B. Even if this Court does not reduce the punitive damages to give effect to the jury's judgment, it still should order a reduction to comply with Florida's three-to-one cap on punitive damages. Fla. Stat. § 768.73(1)(a)(1); *see* TD Br. 29. Coquina protests that the statutory cap on punitive damages does not apply here, because the jury determined that TD "'had a specific intent to harm'" Coquina.

Coquina Br. 56 (quoting Fla. Stat. § 768.73(1)(c)). In support, Coquina cites the jury's finding that there was "'intentional misconduct'" against Coquina by a TD employee. Coquina Br. 56 (quoting D.C. Dkt. 748:3).

But a finding of "intentional misconduct" is simply the prerequisite for imposing punitive damages at all. Fla. Stat. § 768.72(2) ("A defendant may be held liable for punitive damages only if the trier of fact . . . finds that the defendant was personally guilty of intentional misconduct or gross negligence."). Indeed, the verdict form in this case expressly instructed the jury that it could not award punitive damages unless it determined there was "intentional misconduct against Coquina by at least one TD Bank employee." D.C. Dkt. 748:3; *see Myers v. Cent. Florida Invs., Inc.*, 592 F.3d 1201, 1215, 1217 (11th Cir. 2010) (holding that there was intentional misconduct warranting punitive damages but that the exception to the statutory cap did not apply because the jury made no express finding of specific intent to harm).

By definition, then, the exception to Florida's punitive-damages cap requires more than just a determination that the defendant engaged in "intentional misconduct against" the plaintiff. The jury must *also* have determined that the defendant had the specific intent to harm the plaintiff. As TD explained in its opening brief (at 29), the jury made no such determination here. Florida's statutory cap therefore

limits Coquina's punitive damages to no more than three times its compensatory damages.

CONCLUSION

The Court should reverse the district court's order insofar as it denies TD's Rule 60(b) motion; vacate that order insofar as it requires Coquina to pay any funds to the bankruptcy estate; and order Coquina to return to TD the amounts to which it was not entitled but that it has recovered from TD, with appropriate interest.

Dated: May 14, 2015

Respectfully submitted,

By: /s/ Lawrence S. Robbins

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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)(ii) because this brief contains 3,254 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: May 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2015, I caused a true and correct copy of the foregoing Reply 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.

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