IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLOR
FOURTH DISTRICT

TD BANK, N.A.,

Petitioner,

v.

RAZORBACK FUNDING, LLC; D3 CAPITAL CLUB, LLC; BFMC INVESTMENT, LLC; LINDA VON ALLMEN, as Trustee of the VON
(caption continued on inside cover)

Case No.:

On Petition for Writ of Prohibition or Writ of Certiorari to the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County

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PETITION FOR WRIT OF PROHIBITION OR WRIT OF CERTIORARI

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Respondents.

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PETITION FOR WRIT OF PROHIBITION OR WRIT OF CERTIORARI

Petitioner, TD Bank, N.A. ("TD"), by and through its undersigned counsel, respectfully petitions this Court for a writ of prohibition (or, in the alternative, for a writ of certiorari) precluding the Honorable Jeffrey E. Streitfeld of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, from proceeding on a motion over which that court lacks jurisdiction and from conducting what constitute criminal contempt proceedings in violation of due process and the Florida Rules of Criminal Procedure.

PRELIMINARY STATEMENT

This case comes to this Court even though the plaintiffs—a group of funds and sophisticated private investors—settled it more than a year and a half ago. In their heavily lawyered settlement agreement, Plaintiffs released defendant TD from "any, and all manner of, claims . . . known or unknown . . . arising from or relating to" the case. And, as Plaintiffs concede, this agreement remains in effect—a federal court has entered an order barring rescission, and Plaintiffs have steadfastly refused to return the $170 million that TD paid in consideration for the settlement.

Plaintiffs nevertheless are seeking to prosecute—and to profit from—a motion accusing TD of discovery misconduct in the very case they settled. Their

allegations are false,[1] but that is not the issue here. Rather, the issues are whether the circuit court judge presiding over these allegations (i) has jurisdiction to award Plaintiffs further relief in spite of the settlement, and (ii) may proceed with what is quite plainly a criminal contempt proceeding against TD without abiding by the strictures of criminal procedure.

In the orders challenged by this petition, the circuit court has not followed criminal procedure. But it has not exactly followed civil procedure, either. The order the circuit court issued on October 17, 2013, states that the court has "wrestled" with the issue (indeed, it has reversed course a few times). But it nonetheless orders the parties to *present evidence* to the circuit court before the court determines whether it should proceed at all. (An order issued on December 2, 2013, confirmed this intention.) In other words, the circuit court has ordered the parties to proceed on the merits of the dispute before it decides whether or how it may proceed. Such orders urgently require the guidance of this Court. The circuit court cannot subject TD to an unlawful procedure in the name of determining whether or how such a procedure should go forward.

Because the circuit court's orders were issued without jurisdiction due to the settlement and will inflict irreparable injury on TD in the form of an illegal proce-

[1] *See* TD Motion for Reconsideration, A-298-301.

dure, this Court should grant TD's petition for a writ of prohibition (or, in the alternative, for a writ of certiorari) and quash the orders. And this Court should remand with instructions that the circuit court must deny Plaintiffs' motion, which seeks only relief that is barred as a matter of law, and then (should the circuit court proceed at all) move forward only in accordance with Florida Rule of Criminal Procedure 3.840 and the due process protections required in criminal cases.

JURISDICTION

A. Writ Of Prohibition

This Court has jurisdiction to issue a writ of prohibition pursuant to Article V, section 4(b)(3) of the Florida Constitution. *See* Fla. R. App. P. 9.030(b)(3). "Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992). In addition, a writ of prohibition is proper when a criminal defendant's "fundamental constitutional right . . . will be violated if the trial court proceeds." *Alvarez v. City of Plantation*, 824 So. 2d 339, 340 (Fla. 4th DCA 2002). Specifically, prohibition lies to prevent denials of due process. *Wargo v. Wargo*, 669 So. 2d 1123, 1125 (Fla. 4th DCA 1996).

The circuit court's orders satisfy these criteria. When it dismissed this case pursuant to the settlement agreement, the circuit court reserved jurisdiction only to

enforce the settlement. Any proceedings on Plaintiffs' motion—which seeks relief barred by the settlement—are therefore beyond the circuit court's jurisdiction, and the motion must be rejected. *Olen Props. Corp. v. Wren*, 109 So. 3d 263, 265 (Fla. 4th DCA 2013). Should the circuit court decide to proceed under its inherent authority (*i.e.*, not under Plaintiffs' ill-founded motion) and consider imposing punitive sanctions, it must afford TD the protections of criminal procedure. "[I]mposition of criminal contempt sanctions requires" the protections of constitutional due process and Florida Rule of Criminal Procedure 3.840. *Parisi v. Broward County*, 769 So. 2d 359, 364-65 (Fla. 2000). The circuit court's orders comply with neither.

B. Writ Of Certiorari

In the alternative, TD seeks a writ of certiorari with respect to the circuit court's December 2, 2013, order (A-327[2]) denying TD's motion for dismissal of Plaintiffs' amended motion. This Court has jurisdiction to issue a writ of certiorari pursuant to Article V, section 4(b)(3) of the Florida Constitution. *See* Fla. R. App. P. 9.030(b)(2)(A). A petitioner seeking certiorari review of a nonfinal order "must demonstrate: (1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a 'depart[ure] from the

[2] "A-" refers to pages in the Appendix filed herewith.

essential requirements of the law.'" *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 721 (Fla. 2012) (citation omitted). By denying TD's motion to dismiss Plaintiffs' motion, the circuit court has initiated proceedings that are necessarily punitive, but has not afforded the procedures required by the Florida Rules of Criminal Procedure and the U.S. Constitution. For that reason, the circuit court's order satisfies both criteria for certiorari jurisdiction.

First, the prosecution of punitive contempt sanctions but using ordinary civil procedure will irreparably harm TD. The classic use of certiorari review is to correct an "illegality of procedure." *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983) (quotation marks omitted); *accord Basnet v. City of Jacksonville*, 18 Fla. 523, 527 (1882). And it is difficult to imagine an "illegality of procedure" that is more irreparably harmful than the deprivation of a litigant's constitutional rights during trial-court proceedings. *See Belair v. Drew*, 770 So. 2d 1164, 1166-67 (Fla. 2000). By the same token, it is well established that punitive contempt proceedings held without the protections of Florida Rule of Criminal Procedure 3.840 warrant certiorari. *Kelley v. Rice*, 800 So. 2d 247, 251 (Fla. 2d DCA 2001); *Fredericks v. Sturgis*, 598 So. 2d 94, 96 (Fla. 5th DCA 1992).

Second, the circuit court has authorized a punitive contempt proceeding to go forward without the protections of criminal procedure, which departs from basic legal precepts. Whether a sanction is civil or criminal in nature turns on "an

examination of the character of the relief itself." *Int'l Union v. Bagwell*, 512 U.S. 821, 828 (1994) (quotation marks omitted). Because of the release in the settlement agreement—which unequivocally extinguishes any claim Plaintiffs could possibly have related to this matter—the only relief available in this case is punitive, or criminal, in nature. And the imposition of such relief requires the protections of constitutional due process and Florida Rule of Criminal Procedure 3.840. *Parisi*, 769 So. 2d at 364-65. The circuit court's order, again, complies with neither.

STATEMENT OF FACTS

A. The Case And The Settlement

This case arises out of a vast Ponzi scheme masterminded by disgraced ex-lawyer Scott Rothstein. Until the scheme's collapse in fall 2009, Rothstein and his accomplices at his now-defunct law firm peddled over one billion dollars of non-existent structured settlements. In the end, Rothstein pleaded guilty to all five counts in his federal indictment and is serving a fifty-year prison sentence. A-11 (*Coquina* summary judgment order). The Chief Operating Officer of his former firm is serving ten years.

Rothstein maintained accounts at TD, but, to further his charade, he had to falsify bank records. He and his accomplices made fake TD account statements. A-3. They forged TD signatures. A-3. They built a fake TD website, which

Rothstein showed to potential investors in his office. A-3-4. They even went to TD branches and posed as TD employees. A-4-5. All of this served Rothstein's nefarious purpose: to make it look like his accounts at TD held large sums, which they did not, and to make it appear that the bank was his knowing confederate, which it was not.

When the scheme collapsed, Plaintiffs—wealthy investors and investment firms—sued TD. They alleged that, because of the activity in Rothstein's accounts, TD must have known about and facilitated Rothstein's scheme. After extensive discovery, mediation, and trial preparation, Plaintiffs settled with TD on April 5, 2012, for $170 million. A-32-83. The circuit court thereupon dismissed the case with prejudice, retaining jurisdiction only to enforce the settlement agreement. A-84-85.

As relevant here, the key provision in the settlement agreement is its release. Plaintiffs agreed to release TD from any other claims related to the case, as follows:

> PLAINTIFFS, their members, managers, stockholders, . . . (collectively, the "RAZORBACK RELEASORS"), hereby remise, release, acquit, satisfy, and forever discharge TD BANK, its members, managers, stockholders, . . . , or entities affiliated with them (collectively, the "TD BANK RELEASEES"), of and from *any, and all manner of, claims*, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, and demands whatsoever, in law or in equity, *known or unknown, matured or unmatured, fixed*

> *or contingent, actual or potential (including costs, expenses, legal fees, and interest which may be or have been incurred in connection with such claims)*, which the RAZORBACK RELEASORS ever had, now has, or which the RAZORBACK RELEASORS hereafter can, shall or may have, against any of the TD BANK RELEASEES, *for, upon or by reason of any matter, cause or thing whatsoever, arising from or relating to all claims asserted in the ACTION from the beginning of the world to the day of these presents*. This release, however, shall not include any rights or remedies contained in or arising from any of the obligations of TD BANK and the RAZORBACK PLAINTIFFS set forth in this AGREEMENT.

A-38-40 (emphases added) (the "Release"). Boiled down, the Release bars any claim that Plaintiffs could assert against TD related in any way whatsoever to the underlying case, save for enforcement of the settlement agreement.

B. The Post-Settlement Accusations

Months after the settlement, on September 20, 2012, Plaintiffs accused TD of violating a court order (which required TD to certify that it had produced all responsive documents) and sought "sanctions." A-116-120. By "sanctions," Plaintiffs meant all the money they could have collected (and then some) if they had not settled the case for $170 million. In particular, Plaintiffs demanded all of the compensatory damages claimed in their complaint with interest, a trial on punitive damages (with an instruction that TD knew about Rothstein's scam), and related attorneys' fees. A-118. Despite these audacious demands, Plaintiffs refused to return any of the settlement money. Plaintiffs' request, in effect, would have the court undo their end—but not TD's end—of the settlement bargain.

In substance, Plaintiffs' motion parroted the accusations of a different group of Rothstein investors represented by different lawyers in a different court. *See Coquina Invs. v. Rothstein*, No. 10-cv-60786 (S.D. Fla.). In the *Coquina* case, the plaintiff group charged that TD had altered an exhibit and failed to produce an internal procedure document, two emails, and an internal report. *See* A-86-115. The *Coquina* court found that TD had turned over the documents, unaltered, to outside counsel for production (except the internal report, which, it held, TD was not obligated to produce). A-92-93, A-100, A-106-107, A-111 n.12. And it failed to identify any particular act by any TD representative that constituted willful misconduct. Nonetheless, the court held that TD had willfully neglected its discovery obligations—and that its outside counsel's errors were merely negligent. That holding, we submit, is demonstrably wrong, and the U.S. Court of Appeals for the Eleventh Circuit is reviewing it.

Plaintiffs here argue that TD altered or withheld the same documents in this case, seeking to capitalize on the *Coquina* holding before it gets reversed. The timing of the filings illustrates as much. On March 26, 2012, the *Coquina* plaintiff group (which, unlike Plaintiffs here, has never settled with and released TD) filed its first motion for sanctions. On April 5—that is to say, *after* that accusation in *Coquina* had already become public—Plaintiffs in this case finalized their settlement with TD. On August 3, the federal court granted the *Coquina* group's

motions in part. With that ruling in hand, on September 20, Plaintiffs here filed their first motion for sanctions in spite of the Release.

C. The Dispute About The Relief Sought And The Appropriate Procedure

Plaintiffs have filed two motions for sanctions. In their first motion, filed on September 20, 2012, Plaintiffs sought the smorgasbord of relief just described, including all of the compensatory damages claimed in their complaint with interest and a trial on punitive damages (with an instruction that TD knew about Rothstein's scam). In addition, Plaintiffs sought attorneys' fees—not just those incurred in bringing the motion, but also all of their other fees in this case, even though they had already been paid some $50 million (*see* A-34-35). At a hearing on November 1, 2012, the circuit court denied that motion. A-178. The court explained that "if it relates to discovery in [the *Razorback*] case it's concluded within the release" and that "the release embodies [Plaintiffs'] compensatory claims." A-152, A-161. But it authorized Plaintiffs to amend their motion and to seek different relief. A-178.

Plaintiffs then filed a second sanctions motion. That motion, which is at issue in this petition, was filed on December 10, 2012; in it, Plaintiffs continued to seek the attorneys' fees they have incurred as a result of TD's alleged misconduct. A-190. Those fees, they claimed, "*includ[e]* those incurred in bringing this Motion" (*id.*; emphasis added)—hinting that Plaintiffs *still* seek fees for their work

on the underlying case as well, for which they have already been paid handsomely. A-34-35. They asserted that awarding these fees would be "well within [the circuit court's] inherent power to sanction." A-191.

The circuit court has held two hearings and entered two orders on Plaintiffs' second motion, and its conclusions have changed over time. At the first hearing, held on March 22, 2013, the circuit court recognized that the "number one issue" is "what monetary sanctions [Plaintiffs] might be seeking and who would be the recipient of those sanctions." A-226. But it stated that it must take discovery before resolving that issue: "[U]ntil such time as the evidence is ultimately offered, it's difficult to determine what relief, if any, should be granted." A-232. And it added that *civil* procedure would govern the discovery process, though it reserved the option to change to criminal procedure later on. A-240-241. After this hearing, however, the circuit court issued no order embodying its statements. Meanwhile, on July 17, 2013, as part of a global settlement of Rothstein-related litigation, the U.S. Bankruptcy Court for the Southern District of Florida entered an order "prohibit[ing] any party to the TD-Razorback Settlement Agreement from seeking to rescind in whole or in part the TD-Razorback Settlement Agreement."[3]

[3] *In re Rothstein Rosenfeldt & Adler P.A.*, Case No. 09-34791-BKC-RBR (Bankr. S.D. Fla.), Order Confirming Second Amended Joint Plan of Liquidation at 25 (Dkt. No. 5063) (July 17, 2013) (footnote omitted).

At the second hearing, held *sua sponte* on August 2, 2013, the circuit court reached a different conclusion. In the court's words, it had "reconsidered" the "decision in March," such that "I'm not going to proceed further on this matter." A-258. Because Plaintiffs refused to rescind the settlement, it explained, any sanctions would be "strictly to punish," which "makes it criminal." A-269. And, because the proceedings would be criminal in nature, the court "would have to enter an order that found based upon the filings that [Plaintiffs] have stated a cause of action for indirect criminal contempt and the matter [would] be reassigned by the clerk to the criminal division, and that a prosecutor [would] be appointed by the Court." A-276.[4] The court, however, offered Plaintiffs "an opportunity to persuade me where that thinking is off the mark" (A-262), and it again did not deny Plaintiffs' motion.

On October 17, 2013, without any further briefing or hearings, the circuit court entered an order professing indecision. After stating that it had "continue[d] to wrestle" with the case, the court "concluded" that it could not, as things stood, "make a reasoned decision on whether to proceed, and if so the jurisdictional basis and the nature of the remedy to consider." A-289. But it nonetheless ordered

[4] The court added: "I can tell you, because I had to explore that, I had a very brief conversation with [Seventeenth Circuit State Attorney Michael J.] Satz and the expression of his face was one I had never seen before." A-276.

further proceedings. It directed Plaintiffs to submit an "offer of proof" consisting of "prior recorded testimony, documents previously discovered, and related forms of evidence, none of which shall be limited to the subject action." A-289. The order did not state that the proceedings would be criminal in nature, nor did it establish any of the protections of criminal procedure.

Shortly thereafter, on October 28, TD moved the circuit court to dismiss Plaintiffs' motion outright or, at the least, to reconsider its order and apply criminal procedures. A-291-304. On December 2, after Plaintiffs submitted a memorandum in opposition and TD submitted a reply, the circuit court denied TD's motion without explanation. A-327-328. In the same order, it directed Plaintiffs to submit, by January 2, the "offer of proof" called for in the October 17 order. A-327. TD then has thirty days to file a response.

NATURE OF RELIEF SOUGHT

TD respectfully requests that the Court quash the circuit court's orders of October 17, 2013, and December 2, 2013, and remand with instructions to deny Plaintiffs' motion with prejudice and to conduct any further proceedings (if at all) in accord with due process and criminal procedure. Specifically, the Court should instruct that, should the circuit court wish to proceed under its inherent authority, it must (i) do so on a suitable order to show cause, and (ii) if it appoints a special

prosecutor to assist with the matter, it must appoint a truly independent, non-self-interested party such as the State Attorney.

SUMMARY OF ARGUMENT

I. The Release precludes the award of any sanction that would flow to or directly benefit Plaintiffs or their counsel.

A. The circuit court dismissed the underlying case with prejudice per the terms of the settlement, which includes the Release. Thus, the Release continues to govern this case because, per the bankruptcy court's order, Plaintiffs may not seek to rescind it, and because Plaintiffs have declined to return TD to the status quo.

B. The expansive terms of the Release bar Plaintiffs from seeking any further remedies related to this case, including sanctions based on alleged misconduct purportedly unknown to them when they signed the settlement. While Plaintiffs do not dispute that the settlement remains in force (and they have retained the $170 million they accepted in payment), Plaintiffs contend that the Release does not preclude their motion. Their arguments fail as a matter of basic contract interpretation.

C. The Release expressly forbids any and all claims—known and unknown—and explicitly precludes an award of attorneys' fees to Plaintiffs.

D. The circuit court retains inherent authority to control the proceedings before it. Thus, the circuit court retains the authority to punish TD for any alleged

misconduct—but only provided that any monetary sanctions flow to the court, not to Plaintiffs.

II. Plaintiffs' amended motion must be denied, as it seeks only relief barred by the Release, and the circuit court thus lacks jurisdiction to consider it.

III. If the circuit court is to proceed further on Plaintiffs' allegations under its inherent authority, it must abide by the precepts of criminal procedure and due process.

A. Remedies that flow to the court, rather than redressing a wrong done to a party, are criminal in nature. These remedies include attorneys' fees payable to the court rather than to opposing counsel.

B. Because any further proceeding would involve remedies that are criminal in nature, it must follow the mandates of criminal procedure.

1. In particular, both Florida Rule of Criminal Procedure 3.840 and the Due Process Clause of the U.S. Constitution require that TD be provided formal notice of the charges against it in an order to show cause.

2. In addition, the circuit court should appoint disinterested counsel, such as the State Attorney, as special prosecutor. What is more, Florida law prohibits the award of attorneys' fees to any counsel acting as prosecutor—whether to Plaintiffs' counsel or anyone else.

ARGUMENT

I. PLAINTIFFS HAVE RELEASED THEIR RIGHTS TO ANY CIVIL REMEDY

With the Release, Plaintiffs have surrendered any right they had to profit from any claim against TD, including a claim for attorneys' fees. Therefore, the only remedies available are punitive remedies.

A. The Release Applies To These Sanctions Proceedings

The circuit court dismissed this case with prejudice pursuant to the settlement agreement, which includes the Release. A-84-85. The Release, therefore, is no ordinary contract; it has the force of a judicial order in this case. *See Miller v. Preefer*, 1 So. 3d 1278, 1282 (Fla. 4th DCA 2009).

Plaintiffs appear to have conceded that the Release continues to govern these proceedings. A-311-316. And they must so concede, for two independently sufficient reasons. First, as noted above, the U.S. Bankruptcy Court for the Southern District of Florida has entered an order prohibiting Plaintiffs here from seeking to rescind the settlement "in whole or in part." *See* note 3, *supra*. Second, even without the bankruptcy order, Plaintiffs could rescind the settlement only by returning TD to the status quo ante. *Bane v. Bane*, 775 So. 2d 938, 941 (Fla. 2000). Here, that means returning the $170 million that TD paid in consideration, which Plaintiffs concededly have refused to do. It is therefore beyond dispute that Plaintiffs may not now exercise any right that they surrendered in the Release.

B. The Release Forecloses Recovery Of Any Compensatory Remedy

Because Plaintiffs cannot avoid the Release, they are categorically barred from receiving any kind of compensatory remedy. Plaintiffs released TD from "any, and all manner of, claims, action and actions, . . . known or unknown, . . . actual or potential . . . arising from or relating to all claims asserted in the ACTION from the beginning of the world to the day of these presents." A-39-40.

Under any plausible reading, this Release bars the sanctions claim that Plaintiffs seek to assert. Their sanctions claim is a "claim" whose existence allegedly was "unknown" to them at the time of settlement. It is "relat[ed] to" the claims that Plaintiffs asserted in the underlying action because it arose from discovery in that action. The sanctions claim accrued before "the day of these presents" because TD's alleged misconduct took place before the settlement. A release this broad encompasses any recovery on Plaintiffs' sanctions claim. *See AXA Equitable Life Ins. Co. v. Gelpi*, 12 So. 3d 783, 785-86 (Fla. 3d DCA 2009) (reviewing application of similarly broad releases).

Plaintiffs have suggested that two aspects of the settlement agreement dilute the language of the Release, but Plaintiffs are demonstrably wrong.[5] First, Plain-

[5] In addition, Plaintiffs have suggested that the Release may be set aside because it was procured by fraud. But rescission has now been barred by the bankruptcy court, and, even if that were not the case, rescission would require Plaintiffs

tiffs have contended that a "whereas" clause in the settlement agreement limits the Release to claims "relating to the alleged Ponzi Scheme in the ACTION." A-33. But "whereas" clauses are merely prefatory; they do not limit or modify operative clauses. *N. Trust Co. v. King*, 6 So. 2d 539, 540 (Fla. 1942); *Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty.*, 105 So. 3d 646, 648 (Fla. 5th DCA 2013). Moreover, the "whereas" clause declares the parties' intent to resolve all claims "[1] arising from or relating to all claims asserted or that could have been asserted in the ACTION, and [2] all other disputes, asserted or unasserted, which do or may exist between them arising from any facts known or unknown relating to the alleged Ponzi Scheme in the ACTION." A-33. Plaintiffs emphasize the second item, which contains the reference to the Ponzi scheme, but ignore the first, which does not.[6]

Plaintiffs' second interpretive contention likewise fails. They have asserted that their sanctions claim did not exist before "the day of these presents" because they did not know about TD's alleged misconduct when they signed the Release.

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to return TD to the status quo (starting with the return of $170 million), which they have failed to do. *See* section I.A, *supra*.

[6] Indeed, even the second item is broad enough to cover Plaintiffs' claim. A request for sanctions arising from alleged discovery violations during a lawsuit about a Ponzi scheme can easily be said to "relate" to the alleged Ponzi scheme. But the Court need not resolve that issue to conclude that the Release plainly forecloses any further compensation to Plaintiffs.

This contention, however, would nullify the language "known *or unknown*" earlier in the Release—"all provisions of a contract must be given effect." *Felder v. Hull*, 953 So. 2d 621, 622 (Fla. 4th DCA 2007). Moreover, the statute-of-limitations clock on settlement-related fraud claims begins to run no later than when the settlement agreement is signed. *See Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1162-63 (Fla. 1996); *Lefler v. Lefler*, 776 So. 2d 319, 322-24 (Fla. 4th DCA 2001). It simply is not the case that Plaintiffs' sanctions claim came into existence only once they learned of the alleged facts to support it.[7] Were that true, settlements would never be final as long as parties could assert new facts, and "[t]he goal of most settlement proposals is finality." *Carey-All Transp., Inc. v. Newby*, 989 So. 2d 1201, 1206 (Fla. 2d DCA 2008).

C. The Bar On Civil Remedies Includes Any Attorneys' Fees Payable To Plaintiffs' Counsel

Plaintiffs apparently contend that their sanctions claim ceases to be a "claim" under the Release if the remedy is attorneys' fees payable to Plaintiffs' counsel. *See* A-227 ("Certainly, Your Honor, we have attorneys fees if we prevail."); A-206 ("Attorneys' fees sanctions based on inherent powers are not 'compensatory,' though the fees awarded as the sanction inures to the benefit of the

[7] In any event, Plaintiffs have long known of these allegations. *See supra* at 9-10.

victim of the inequitable conduct."). Hence, they have argued that, even if they are not entitled to additional damages, they are entitled to attorneys' fees.

The trouble with Plaintiffs' theory is, yet again, the Release. Plaintiffs released TD not only from further claims for damages but also from any claim for "costs, expenses, legal fees, and interest." A-39. There is no basis in the Release for distinguishing a claim for fees from a claim for damages or some other kind of relief that benefits Plaintiffs.

Moreover, the Release applies regardless of the basis for Plaintiffs' claim for fees. It makes no difference, for instance, that courts have the inherent authority to award attorneys' fees as a sanction. *See Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002); *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998). In cases like *Moakley* and *Bitterman*, there was no release that barred the recovery of fees. Whether a claim for fees arises under the court's inherent authority or some other basis, it is still a claim for fees—and, therefore, it is still barred by the Release.

D. The Release Does Not Limit The Court's Inherent Authority To Impose Punitive Sanctions—But The Release *Does* Foreclose Plaintiffs' Right To Benefit From Any Such Sanctions

In a release, the parties may bargain away only what they have; they cannot change a court's authority to police the proceedings before it. A court's authority to enforce its orders is "essential to the execution, maintenance, and integrity of the judiciary"; even the legislature cannot take it away. *Walker v. Bentley*, 678 So. 2d

1265, 1267 (Fla. 1996). Thus, if a party alleges that its opponent has violated a court order (as Plaintiffs allege here; *see* A-195), the court retains the authority to investigate the allegation and to punish the offender. *See In re E.I. DuPont de Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 367-68 (11th Cir. 1996).

Parties to a release *may*, however, waive any claim to *benefit* from sanctions that the court imposes on their opponent. The Release here operates in precisely this way. Consistent with the Release, the circuit court has the inherent authority to sanction TD under appropriate circumstances. But the Release bars *Plaintiffs* from claiming any part of that sanction for themselves. Thus, the court may make a monetary sanction payable to the court rather than to Plaintiffs' counsel. In particular, should the court sanction TD by requiring it to pay attorneys' fees, those fees must be paid to the court because of the Release. *See Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 818 (7th Cir. 1992) ("[S]ettling a case on the merits moots an appeal of sanctions arising out of the case, unless the sanctions have been made payable to the court."); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1199-1200 (11th Cir. 1985).

II. BECAUSE PLAINTIFFS' MOTION SEEKS ONLY CIVIL RELIEF BARRED BY THE RELEASE, THE CIRCUIT COURT LACKS JURISDICTION TO DO ANYTHING BUT DENY THE MOTION

The first consequence of the Release's bar on any further relief to Plaintiffs or their counsel is that Plaintiffs' motion must be denied. The reason is this: Any

motion seeking only relief barred by a release must (as a jurisdictional matter) be denied; Plaintiffs' motion seeks only relief barred by the Release; therefore, Plaintiffs' motion must (as a jurisdictional matter) be denied.

To start with, motions that seek relief that the movant has bargained away in a settlement must be denied. *See In re Guardianship of Sapp*, 868 So. 2d 687, 691 (Fla. 2d DCA 2004) (requiring denial of motion "[b]ecause we agree that the settlement agreement barred the award of additional fees and costs"). In particular, where—as here—"a court incorporates a settlement agreement into a final judgment," then the court's continuing jurisdiction over the case "is circumscribed by the terms of that agreement." *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003). Hence, courts have no jurisdiction to entertain motions seeking relief that a settlement agreement has barred. *Olen Props.*, 109 So. 3d at 265-66.

This rule applies directly to Plaintiffs' motion. That motion, by its terms, seeks an award of "the attorneys' fees and costs [Plaintiffs] have incurred as a result of [TD's alleged] misconduct." A-191; *accord* A-190, A-314. But, as discussed above, the Release bars Plaintiffs and their counsel from receiving any additional relief in this case, including fees and costs. The Release therefore encompasses all of the relief Plaintiffs have sought—indeed, any relief that Plaintiffs *could* seek for themselves—in their motion. And the Release is merged into the circuit court's order: The court "ratified and approved" the settlement, dis-

missed Plaintiffs' claims with prejudice, and retained jurisdiction only to enforce the settlement. A-84-85.

It follows that this Court must direct the circuit court to deny Plaintiffs' motion. The relief Plaintiffs seek is barred as a matter of law, and the circuit court lacks jurisdiction to proceed on Plaintiffs' motion.

III. IF THE CIRCUIT COURT NONETHELESS ELECTS TO CONDUCT FURTHER PROCEEDINGS, IT MUST DO SO IN ACCORD WITH CRIMINAL PROCEDURE AND DUE PROCESS

The second consequence of the Release is that if the circuit court chooses to conduct further proceedings in this matter—pursuant to its inherent power, and not by virtue of Plaintiffs' jurisdictionally barred motion—it must do so in accord with due process and Florida Rule of Criminal Procedure 3.840. Courts do have such inherent power to "deal with the alleged misconduct of an attorney." *State ex rel. Sheiner v. Giblin*, 73 So. 2d 851 (Fla. 1954). But the Release bars *Plaintiffs* from reaping the benefits of any such proceedings. *See* section I.D, *supra*. That is an important limitation: It means that the proceedings must observe the rules of criminal procedure and due process. In particular, the court must provide TD formal notice, and any appointed prosecutor must lack an interest in the outcome. Failure to provide these protections would violate a "fundamental constitutional right" (*Alvarez*, 824 So. 2d at 340 (prohibition)) and constitute an "illegality of procedure" (*Combs*, 436 So. 2d at 95 (quotation marks omitted) (certiorari)).

A. Because Punitive Remedies Are The Only Remedies Available, Any Sanction Would Amount To A Criminal Sanction

Because the Release bars any claim for relief payable to Plaintiffs or their counsel, any sanction the court may impose on TD would be criminal in nature. "Contempt sanctions are broadly categorized as criminal or civil." *Parisi*, 769 So. 2d at 363. Criminal and civil sanctions serve different ends. Whereas *criminal* sanctions "are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court," *civil* sanctions are "remedial, and for the benefit of the complainant." *Id.* at 364 (quotation marks omitted). Sanctions payable to the court, rather than to the movant, are almost always criminal.[8] The identity of the recipient matters because a sanction that "in no way benefits the adverse party" is, by that fact, "plainly a criminal contempt sanction." *State Dep't of Highway Safety & Motor Vehicles v. Berg*, 45 So. 3d 573, 574 (Fla. 4th DCA 2010).

For these reasons, it is beside the point whether sanctions payable to the court are called "attorneys' fees" or a "fine"—they would be criminal sanctions. Courts have recognized that payment of attorneys' fees to the court constitutes a criminal sanction. *See DuPont*, 99 F.3d at 368; *Wingate v. Celebrity Cruises, Ltd.*,

[8] The exception is sanctions payable to the court to coerce compliance with a court order, such as a fine for each day of noncompliance. *See Berlow v. Berlow*, 21 So. 3d 81, 83-84 (Fla. 3d DCA 2009). Such sanctions are civil, not criminal, but that exception clearly has no application here.

79 So. 3d 180, 183, 185 (Fla. 3d DCA 2012). "The [U.S.] Supreme Court has provided few 'straightforward rules' for distinguishing between civil and criminal contempts, but it has held that '[i]f the relief provided is a fine, it is remedial [and thus civil in nature] when it is paid to the complainant, and punitive when it is paid to the court.'" *DuPont*, 99 F.3d at 368-69 (alterations in original) (citations omitted).

Here, Plaintiffs have signed away any ability to gain from sanctions imposed on TD. Any sanction would be levied by the court, for its own benefit, to punish TD for allegedly failing to comply with its order. For that reason, the sanction would be criminal in nature.

B. Criminal Contempt Proceedings Require Procedural Protections That The Circuit Court Has Not Provided

The difference between criminal and civil contempt is critical because it determines the procedures that the court must follow. "The distinction between civil and criminal will determine both the quantum of proof required for conviction as well as the procedural due process to be afforded the alleged contemnor." *Levey v. D'Angelo*, 819 So. 2d 864, 867 (Fla. 4th DCA 2002). Criminal sanctions may be imposed only if the alleged contemnor has "been afforded the protections that the Constitution requires of . . . criminal proceedings." *Int'l Union*, 512 U.S. at 826. And, in Florida, "[i]ndirect criminal contempt proceedings require strict adherence

to Florida Rule of Criminal Procedure 3.840." *Levey*, 819 So. 2d at 869.[9] "Failure to strictly follow the dictates of Rule 3.840" in such proceedings "constitutes fundamental, reversible error." *Graham v. Fla. Dep't of Children & Families*, 970 So. 2d 438, 441-42 (Fla. 4th DCA 2007).

Thus, if the circuit court is to proceed at all, it must afford TD the procedural safeguards of the U.S. Constitution and of Florida Rule of Criminal Procedure 3.840. In particular, it must initiate the proceedings with proper notice, and any prosecutor it appoints must have no interest (monetary or otherwise) in the outcome.

1. The Circuit Court Must Provide TD Formal Notice And The Opportunity To Answer

Any proceedings that result in criminal contempt sanctions must begin with formal notice. On its own motion or on an affidavit, the trial court must issue an order to show cause "stating the essential facts constituting the criminal contempt charged." Fla. R. Crim. P. 3.840(a). This requirement echoes the mandate of due process under the U.S. Constitution, which requires that defendants be apprised of the criminal nature of the proceedings. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 297-98 (1947). The federal rule implementing this require-

[9] This case would involve indirect contempt, rather than direct contempt, because the alleged misconduct took place outside of the presence of the judge. *See Gidden v. State*, 613 So. 2d 457, 460 (Fla. 1993).

ment, like the Florida rule, requires notice "in an order to show cause, or in an arrest order." Fed. R. Crim. P. 42(a)(1). These procedures ensure that only a judge (not a plaintiff) may initiate a criminal contempt proceeding.

The proceedings now pending in the circuit court miss this mark—and thereby deprive TD of due process—for two independent reasons. First, the circuit court appears to be proceeding on Plaintiffs' motion, not on its own show-cause order. *See* A-289. But an unsworn motion by a civil litigant cannot be the basis for a criminal contempt proceeding. *Proctor v. State*, 764 So. 2d 752, 753 (Fla. 2d DCA 2000). Such a proceeding is invalid if "[n]o show cause order was issued by the trial judge" and "no affidavit or sworn testimony accompanied the motion or notice of hearing." *De Castro v. De Castro*, 957 So. 2d 1258, 1260 (Fla. 3d DCA 2007). To proceed, the circuit court must deny Plaintiffs' motion and enter an order to show cause.

Second, the circuit court has not provided TD notice that it faces sanctions that are criminal in nature. To the contrary—and perversely—the court has expressly reserved the question of whether a "criminal contempt proceeding [should] be initiated" until *after* it considers evidence. A-289. This, too, renders the proceedings invalid. The failure to "put [TD] on notice that [it is] potentially facing criminal penalties," as due process and Rule 3.840 require, constitutes "fundamental error" and "requires reversal." *De Castro*, 957 So. 2d at 1260, 1261.

2. If The Circuit Court Appoints A Prosecutor, The Prosecutor Must Be Disinterested

If the circuit court appoints any counsel to assist it in prosecuting a criminal contempt (and it need not, *see* Fla. R. Crim. P. 3.840(d)), that counsel must be sufficiently neutral. That is because a criminal contempt proceeding—"brought in the name of the public"—is "instituted solely and simply to vindicate the authority of the court." *Demetree v. State ex rel. Marsh*, 89 So. 2d 498, 501 (Fla. 1956). Given this weighty responsibility, it would be most appropriate to appoint the State Attorney to prosecute criminal contempt. *See* A-261 (circuit court recognizing that the State Attorney would be a suitable prosecutor). If that is not feasible, the court may appoint only a disinterested attorney, not an interested partisan.

The bare minimum requirement is that an appointed prosecutor may have no financial stake in the outcome. "[T]he award of attorney's fees for prosecution of criminal contempt charges improperly skews the decision making process and is without authority." *Dowis v. State*, 578 So. 2d 860, 861 (Fla. 5th DCA 1991) (per curiam). Although counsel may be paid to assist the court, that payment "should be considered prior to the appointment." *Routh v. Routh*, 565 So. 2d 709, 710 (Fla. 5th DCA 1990). Courts long have recognized that permitting prosecutors to seek a bounty for their success is against public policy. *E.g.*, *Baca v. Padilla*, 190 P. 730, 732 (N.M. 1920) ("To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the

accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.").

In addition, the U.S. Supreme Court has held that attorneys appointed to prosecute a criminal contempt must be as disinterested as a public prosecutor would be. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) ("A private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution."). That is because "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Id.*

Although the Supreme Court's rule in *Young* binds only federal courts, *see id.* at 809, it has every reason to apply here. Because of the Release, the sole interest at stake is the public interest in integrity before the law. And, because the alleged misdeeds here were out of public view, "prosecution" of this charge is more like a criminal investigation than like an ordinary motion. This case, therefore, is altogether unlike *Gordon v. State*, 960 So. 2d 31 (Fla. 4th DCA 2007), in which a split panel held that the *Young* rule does not apply in the family-law context. In that context—which, as the circuit court recognized, is "an entirely different ball game" (A-158)—there is a private interest at stake, and contempts are

not hidden. *Gordon*, 960 So. 2d at 38-39. In addition, the legislature had spelled out a separate remedy in that context that is not applicable here. *Id.* at 38. Other jurisdictions have adopted *Young* outside of family law, *see In re Jackson*, 51 A.3d 529, 540 (D.C. 2012); *Rogowicz v. O'Connell*, 786 A.2d 841, 843 (N.H. 2001), and this Court should do the same.

Allowing Plaintiffs' counsel to serve as special prosecutor here—much less allowing them to recover fees should they succeed—would contravene all of these rules. Because they were personally involved in the events at issue, Plaintiffs' counsel would need both to prosecute the case and to testify as fact witnesses. That alone is problematic. *Shargaa v. State*, 102 So. 2d 809, 813 (Fla. 1958) ("[T]he practice of acting as prosecutor and witness is not to be approved and should be indulged in only under exceptional circumstances."). What is more, as TD's longstanding opponents, Plaintiffs' counsel have the incentive to use the tools of the prosecutor to vex and embarrass TD (with undue discovery, for example).[10] And that is impermissible even where *Young* does not apply. *See Gordon v. State*,

[10] A neutral prosecutor, by contrast, would cast a broader net in investigating these allegations. In particular, he or she would be more willing to probe the role of the party most directly responsible for the alleged discovery errors—TD's former trial counsel. *See supra* at 9. Plaintiffs have strategically elected to pursue sanctions against TD alone, notwithstanding the self-evident importance of the decisions made and the actions taken (or not taken) by TD's former counsel. Absent the involvement of former counsel in any further proceedings, important questions about what happened and why could go unanswered.

967 So. 2d 357, 358 (Fla. 4th DCA 2007) (inviting trial courts to remove special prosecutors who "misuse[] the appointment for injustice and oppression").

In sum, the Court should direct the circuit court that any special prosecutor it appoints to assist it must be sufficiently disinterested. At minimum, no appointed counsel may prosecute the contempt for an award of fees. And, furthering policies of prosecutorial independence, appointment of the State Attorney is the proper course.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of prohibition (or, in the alternative, for a writ of certiorari), quash the circuit court's orders of October 17, 2013, and December 2, 2013, and remand with instructions for the circuit court to deny Plaintiffs' motion with prejudice and to proceed (if at all) under proper procedures.

Dated: December 20, 2013

Respectfully submitted,

By: /s/ Marcos Daniel Jiménez

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of December, 2013, a true and correct copy of the foregoing Petition for Writ of Prohibition or Writ of Certiorari was furnished in the manner indicated to all parties listed in the service list below.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Prohibition or Writ of Certiorari complies with the typeface requirements of Fla. R. App. P. 9.100(*l*) because it has been prepared in 14-point Times New Roman font.

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